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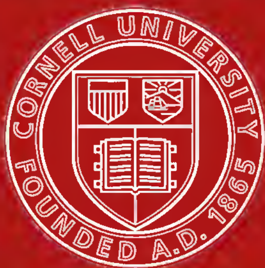

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ANNUAL DIGEST

OF

NEW YORK DECISIONS

COMPRISING

ALL THE CASES

REPORTED IN THE OFFICIAL AND STANDARD SERIES OF REPORTS DURING THE YEAR

1881

TOGETHER WITH

A Table of Cases Affirmed, Applied, Approved, Commented On, Compared,
Changed by Statute, Denied, Disapproved, Distinguished, Doubted,
Explained, Followed, Limited, Modified, Not Followed,
Opposed, Overruled, Questioned, Reconciled,
Reversed, or Otherwise Criticised
by Subsequent Decisions.

VOLUME I.,

BEING SUPPLEMENTAL TO VOLUME II. OF THE

NEW YORK REFERENCE DIGEST.

BY

STEWART RAPALJE.

JERSEY CITY:

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PREFACE.

The rapid accumulation of decisions, and consequent frequent issue of volumes of official and standard reports, not only furnishes a sufficient reason for the publication of an *annual* digest of New York cases, but, in the compiler's judgment, and that of many practitioners whom he has consulted, renders such a book, if properly prepared, an absolute necessity.

As this work is designed to be one of permanent value, it is intended to exclude from it, as far as possible, duplicate reports or extracts from the same case. For this reason the cases briefly reported in the Weekly Digest and those published in the Daily Register, which, if of any value, subsequently appear in nearly every instance in one or the other of the series of official or standard reports, are excluded until they so appear, thus avoiding much confusion and the heavily padding of one volume with a repetition of a large amount of matter which, taken from an inferior source, has already appeared in its predecessor.

That this book will be found to be acceptable to the profession, is the earnest hope of the editor, and the very flattering reception accorded to volume two of the *Reference Digest* (which covered the briefest period of time ever before deemed sufficient to afford materials for a digest of New York decisions) encourages him to believe that it will.

STEWART RAPALJE.

NEW YORK, March 20th, 1882.

REPORTS EMBRACED.

Abbott's New Cases	Vols.	8,* 9.
Howard's Practice Reports	"	59,* 60, 61.
Hun's Supreme Court Reports	"	21,* 22, 23, 24.
New York Reports	"	79,* 80, 81, 82, 83, 84.
Civil Procedure Reports	Vol.	1.†
Redfield's Surrogate Reports	"	4.
Superior Court Reports	"	46.

Total, 18 volumes.

*A few cases contained in the 8th Abbott, 59th Howard, 21st Hun and 79th New York, which could not be included in Volume II. of the New York Reference Digest, owing to the advanced stage of the preparation of that work when these volumes were issued, are also digested in this volume, in order to preserve the continuity of the work.

†The first four numbers, or parts, pp. 1-336, only.

ANNUAL

NEW YORK DIGEST.

A.

ABANDONMENT.

DIVORCE; HUSBAND AND WIFE; INSURANCE.

ABATEMENT AND REVIVAL.

I. GROUNDS OF ABATEMENT; AND HOW PLEADED.
II. REVIVAL. CONTINUANCE.

I. GROUNDS OF ABATEMENT; AND HOW PLEADED.

1. Death of party plaintiff. The death of the plaintiff (a widow suing to recover a gross sum in lieu of dower), after the oral announcement of the decision of the court in her favor, does not abate the action nor alter the rights of the parties; and the court will, in such case, order findings to be signed and judgment entered *nunc pro tunc*.—*Supreme Ct.*, (*3d Dept. Sp. T.*,) *Jan.*, 1880. Fulton *v.* Fulton, 8 Abb. N. Cas. 210.

2. — of party defendant. An action by a father to recover the damages occasioned by the seduction of his daughter, is an action on the case in tort, and is abated by the death of the defendant, and cannot be revived against his executors or administrators.—*Supreme Ct.*, (*3d Dept.*,) *Nov.*, 1880. Holliday *v.* Parker, 23 Hun 71.

3. That under the Revised Statutes and Code of Civil Procedure an action of replevin does not abate upon the death of a sole defendant, see Roberts *v.* Marsen, 23 Hun 486.

4. Necessity of answer or demurrer. The defence of the pendency of another action must be taken by answer or demurrer; if not so taken, it will be deemed to have been waived. —*Supreme Ct.*, (*4th Dept.*,) *June*, 1880. Remington *v.* Walker, 21 Hun 322.

5. Form and requisites of answer. An answer admitting a certain sum to be due by defendant, but alleging as a reason for non-payment, that a third party has attached the indebtedness in an action against plaintiff, that said action "has since been pending" and that the defendant has never been released from its obligations by reason of such levy, is insufficient, and does not constitute a bar to the recovery of the amount, on motion, under Code of Civ. Pro., § 511. The answer should state that said attachment and levy are still in force.—*Superior Ct.*, *Feb.*, 1880. Marsh *v.* West, &c., Manuf. Co., 46 Superior 8.

6. Proof of matter in abatement. Where the answer sets up as a defence a final settlement and adjustment of the plaintiff's claims in a proceeding had in another court, proof of a proceeding then pending in that court is inadmissible. Remington *v.* Walker, *supra*.

7. Waiver of matter in abatement. When, after the death of a sole defendant in an action of replevin, his administrator has, by an order entered upon the written stipulation of the parties, been substituted in his place, and the parties have thereafter voluntarily appeared before the court and proceeded with the trial, it is too late for the plaintiff to apply for leave to discontinue the action on the ground that it abated by the death of the defendant.—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1881. Roberts *v.* Marsen, 23 Hun 486.

II. REVIVAL. CONTINUANCE.

8. Interpreting the statutes. Code of Civ. Pro., § 1736, continuing an action of replevin, notwithstanding the death of either party, in favor of or against his executors or administrators, applies only to actions in which the sole defendant was living on September 1st, 1880, and is not retroactive.—*Superior Ct.*, (*Sp. T.*,) *Feb.*, 1881. Burnham *v.* Brennan, 60 How. Pr. 310.

9. *It seems* that the effect of the provision of the Code of Civil Procedure (§ 757, as amended by Laws of 1879, ch. 542,). requiring the court, on motion, to revive an action "in case of the death of a sole plaintiff or a sole defendant," where "the cause of action survives or continues," is to take away the discretion which the court previously had, either to grant

leave or to put the party to his bill of revivor, and requires that the relief shall be granted on motion, making the motion a complete substitute for the bill.—*Ct. of App., Nov.*, 1880. Coit *v.* Campbell, 82 N. Y. 509.

10. But the provision does not compel the granting of the motion in all cases; it simply requires that, where the party has the right to a revivor or continuance, the relief shall be granted on motion. *Ib.*

11. This right is to be determined according to the settled rules of equity, so far as established by precedent. *Ib.*

12. It is a rule of equity thus established, that the discretion of the court to refuse to revive a suit on the ground of delay, is to be guided by the statute of limitations applicable to the subject matter of the suit. *Ib.*

13. What causes of action survive. In an action against a plumber, for negligently and improperly making repairs in plaintiff's house, so as to allow gas to escape from the sewer into the house, and to seriously injure the health of plaintiff and his family, the complaint further alleged that, in addition to the said injuries, the plaintiff's five children were sickened and poisoned by the said gases; that three of them died, after a protracted illness, and that the plaintiff was put to great trouble and expense to provide necessary care, nursing and medical treatment, both for himself and his said children. The defendant having died after issue joined, plaintiff moved to have the action revived against his executrix, and for leave to serve a supplemental complaint. *Held*, that in so far as the action was brought to recover damages for the injuries occasioned to plaintiff's person, it abated by the death of defendant, but that in so far as it was brought to recover for the damages and expenses occasioned by the sickness of his children, it survived, and should be revived against the defendant's executrix. *Supreme Ct.*, (1*st Dept.*,) *May*, 1881. Scott *v.* Brown, 24 Hun 620.

14. Who is the successor in interest. The "successor in interest" referred to in section 757 of the Code of Civil Procedure, in relation to the survival of a cause of action, is one who succeeds to the subject matter of the action, the property, rights or interests which were the subject of the action, as distinguished from ordinary money demands which continue against the personal representative of the deceased.—*Supreme Ct.*, (1*st Dept. Sp. T.*,) *May*, 1881. Green *v.* Martine, 1 Civ. Pro. 129.

15. Continuing in case of death of party plaintiff. This action was commenced by one M. to recover certain real property, together with damages for the withholding thereof. After the joinder of issue herein, M. died, leaving a will, by which he devised one-third of his property to his wife, the plaintiff, and the other two-thirds to his minor children. Thereafter, an order was made reviving and continuing the action in the name of the plaintiff, individually, and as guardian in socage of the children, in the place and stead of the original plaintiff. In an amended answer served by the defendants, no specific objection to the right of the plaintiff, as guardian in socage for her children, to have the action so revived and continued, was taken.

Held, 1. That as no appeal had been taken from the order so reviving and continuing the action, the case stood as though the action had been originally commenced by the plaintiff, to recover in her own right the part of the premises devised to her, and as the guardian in socage of her children, the part devised to them, and that such an action was clearly maintainable.

2. That the court had, under 3 Rev. Stat. (6th ed.,) 575, and Code of Civ. Pro., § 757, power to so revive and continue the action.—*Supreme Ct.* (3*d Dept.*,) *Sept.*, 1880. More *v.* Deyoe, 22 Hun 208.

16. — of party defendant. Where all of several defendants but one have died, and the right of action has survived against him, he is a sole defendant within the meaning of Code of Civ. Pro., § 757, as amended by Laws of 1879, ch. 542; and upon his death, the action may be revived against his representatives. Coit *v.* Campbell, *supra.*

17. It is, however, only to the case of a *sole* defendant that said provision applies, and the action can be continued under it only against the representatives or successors in interest of such sole defendant. *Ib.*

18. Where an action which sought an accounting and recovery of a balance due was revived against the executors of the testator; and, after such revivor, the plaintiff moved to bring in the devisees and heirs-at-law, and to revive and continue the said action against them, on the ground that the personalty would not be sufficient to satisfy the judgment, if recovered—*Held*, that as the action did not seek to charge the testator's real estate, it was completely revived when the personal representatives of the testator were made parties, and that the devisees and heirs-at-law should not be made parties to the action.—*Supreme Ct.*, (1*st Dept. Sp. T.*,) *May*, 1881. Green *v.* Martine, 1 Civ. Pro. 129.

19. — of party defendant, sued in Marine Court. While, under the Code of Procedure (§§ 58, 46, 47 of Code of 1848; §§ 65, 53 and 54, Code of 1849,) an action could not be brought in the Marine Court of the city of New York against an executor or administrator as such, yet, where after the court had acquired jurisdiction of an action, the defendant died, the action did not abate, but could be continued against his personal representatives.—*Ct. of App., Sept.*, 1880. People, ex rel. Egan, *v.* Justices of Marine Court, 81 N. Y. 500; S. C. 8 Abb. N. Cas. 377; 59 How. Pr. 413; *reversing* 18 Hun 333.

20. This rule is not changed by the Code of Civil Procedure, as, while a similar prohibition is contained therein (§ 316, subd. 3,) the provisions for continuing actions (§§ 755, 756, 757) are made applicable to the Marine Court, (Laws of 1876, ch. 449, § 5, as amended by Laws of 1877, ch. 318, § 5,) and the law stands as it did under the former code. *Ib.*

21. Time for applying to revive. Under Code of Civ. Pro., § 757, as amended in 1879, providing that "in case of the death of a sole plaintiff or defendant, if the cause of action survives or continues, the court must, upon a motion, allow or compel the action to be continued, by or against his representative or successor in interest," it is the duty of the court to continue the action, if it survives or continues, without regard to whether or not the applicant has been guilty of laches in making the mo-

tion.—*Supreme Ct.*, (*1st Dept.*,) *May*, 1880. Greene *v.* Martine, 21 Hun 136.

22. **Effect of revival.** The revival of an action does not necessarily carry with it the whole of the prior right of action.—*Ct. of App.*, *Jan.*, 1881. Cregin *v.* Brooklyn Crosstown R. R. Co., 83 N. Y. 595; *reversing* 19 Hun 341.

23. Where a right of action for damages which can survive involves, mingled with, but separable from such damages, other damages of a character that die with the party, the revival of the action does not draw the latter with it and permit a recovery therefor. *Ib.*

24. Upon the death of the plaintiff, in an action by a husband for a wrongful injury to the person of his wife, the right to damages for loss of the wife's services and the expenses necessarily incurred by reason of the injury, survive to his personal representatives, as they are a pecuniary loss diminishing his estate; but the right of action for the loss of the society of his wife, and the comforts of that society, dies with him. Upon revival of the action, therefore, only the damages that so survive are recoverable. *Ib.*

For decisions upon the abatement of a *Legacy*, see LEGACIES; of a *Nuisance*, see NUISANCE; of a *Tax*, see TAXES, V.; as to *Pleas in Abatement*, see also PLEADING.

ABORTION.

CRIMINAL LAW, 4.

ABSENT AND ABSCONDING DEBTORS.

ATTACHMENT.

ACCESSORIES AND ACCOMPLICES.

CRIMINAL LAW, 2; WITNESSES, III.

ACCORD AND SATISFACTION.

DEBTOR AND CREDITOR, III.

ACCOUNTING.

1. **By personal representatives.** The provisions of the Revised Statutes, in reference to the accounting of administrators, were not repealed by the act of 1865, (Laws of 1865, ch. 733,) providing for the accounting of an executor or administrator who has been removed, on the application of his successor.—*Ct. of App.*, *Sept.*, 1880. Gerould *v.* Wilson, 81 N. Y. 573.

2. The rendering of an account to a surrogate by an executor or administrator, and the settlement of the acconut, after it has been rendered, are separate and distinct proceedings. *Sup. Ct.*, (*4th Dept.*,) *June*, 1880.—Remington *v.* Walker, 21 Hun 322.

3. What are proper charges and credits on the final accounting of an executor or administrator, see Matter of Boyd, 4 Redf. 154; Matter of Nichols, Id. 288; Wright *v.* Wright, Id. 345; Underhill *v.* Newberger, Id. 499.

4. As to granting allowances to counsel on the final accounting of an executor, see Osborne *v.* McAlpin, 4 Redf. 1.

5. **Procedure in action for an accounting.** When, in an action for an accounting in equity, the court will allow damages for a failure of defendant to perform the contract to be recovered on, see Bonn *v.* Steiger, 21 Hun 219.

6. **Appeal—effect of revereal.** When an action is brought for an accounting, and judgment is rendered dismissing the complaint on the ground that there has been an accounting by the defendant, which is binding and conclusive on the plaintiff, and adjudging that defendant recover for the amount found due him on such accounting, the effect of a reversal of such judgment is, that upon these facts appearing upon the trial, the plaintiff was entitled to an accounting, and to the payment of such sum as on such accounting he might be found entitled to.—*Superior Ct.*, *Feb.*, 1880. Rust *v.* Hauselt, 46 Superior 23.

As to accounting by *Personal representatives, partners, trustees, guardians*, &c., see also EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; PARTNERSHIP; TRUSTS.

ACCOUNTS.

1. **Accounts stated.** To maintain an action upon an account stated, it must appear that the account has been balanced and rendered, with an assent on the part of the defendant either express or fairly implied, to the balance.—*Ct. of App.*, *June*, 1880. Volkening *v.* De Graaf, 81 N. Y. 268.

2. Where, in such an action, plaintiff failed to show any assent, express or implied, on the part of defendants, that they were indebted to plaintiff in the balance claimed, and no amendment of the pleadings was asked—*Held*, that a dismissal of the complaint was proper, although there might have been some evidence of indebtedness. *Ib.*

ACCUMULATION.

DEVISE; LEGACIES; WILLS.

ACKNOWLEDGMENT.

Of *Deeds*, see DEEDS; of *Mortgages*, see MORTGAGES; by *Married Women*, see HUSBAND AND WIFE.

Of *Debt*, to remove bar of statute of limitations, see LIMITATIONS OF ACTIONS, V.

ACQUITTAL.

Effect of former, see JUDGMENT, III.
When proper, see TRIAL, VIII.

ACTION.

1. **Local and transitory actions.** Actions are local when their cause is in its nature local, and transitory when the transactions on which they are founded might have taken place anywhere. The distinction in no way depends on the character of the action as being one of common law or equitable jurisdiction.—*Superior Ct., Dec.*, 1880. Atlantic, &c., Telegraph Co., *v.* Baltimore, &c., R. R. Co., 46 Superior 377.

2. When the court, acting on the person, compels a thing to be done, (which could be done anywhere), though the doing of the thing might produce effects and results in a state, &c., other than that in which the court had jurisdiction, or though the inquiry as to whether the doing of the thing should be compelled or not, involves a question as to the title to lands situated in another jurisdiction, the solution of which may even constitute the essential point on which the case depends, the action is not local. *Ib.*

3. So also where the court, acting on the person, enjoins the doing of certain acts in the state in which it has jurisdiction, although such injunction may prevent the doing of certain acts in another state (which could not be directly enjoined against by it), which would otherwise have taken place as resulting from the act enjoined against, the action is not local. *Ib.*

4. **Statutory actions.** Where a new right is given by statute, and a specific relief prescribed for its violation, the remedy is confined to that given by the statute —*Ct. of App., April*, 1880. Jessup *v.* Carnegie, 80 N. Y. 441.

5. **What causes of action may not be joined.** Causes of action for conversion and wrongful detention of personal property, and for an accounting, cannot be joined in the same complaint.—*Supreme Ct., (1st Dept. Sp. T.,) June,* 1881. Thompson *v.* St. Nicholas Nat. Bank, 61 How. Pr. 163.

Nor can causes of action for false imprisonment and malicious prosecution.—*Com. Pleas, (Gen. T.,) June,* 1881. Nebenzahl *v.* Townsend, 61 How. Pr. 353.

6. A cause of action for malicious trespass by the original defendants in the erection and continuance of brick stacks, and another for the removal of such stacks and for an injunction against their maintenance and continuance, cannot be joined as against the successors in interest of the original defendants, who are made parties by a supplemental complaint reviving the action.—*Supreme Ct., (Sp. T.,) March* 1881. Equitable Life Assurance Soc. *v.* Schermerhorn, 60 How. Pr. 477.

The two causes of action do not affect all the parties to the action, as required by Code of Civ. Pro., § 484, as the new parties cannot be charged in tort. *Ib.*

7. **What actions are founded in contract.** The fact that there are allegations of fraudulent representations in a pleading does not necessarily fix the character of the action as one *ex delicto.*—*Ct. of App., Dec.*, 1880. Sparman *v.* Keim, 83 N. Y. 245.

8. Plaintiff's complaint alleged in substance that he was an infant; that induced by false and exaggerated representations of the defendant as to the profitable nature of his business, to wit, "that it would yield large profits," he was induced to become a partner, and invested $1000 therein; that becoming satisfied of the falsity of the representations, he demanded his money back, which was refused, and he asked judgment for the amount. The only representation proved on the trial was "that it was a good paying business." The plaintiff was nonsuited on the trial, on the ground that the cause of action stated in the complaint was in tort. *Held*, error; that the allegations of the complaint made a good cause of action on contract, as the agreement of partnership was one an infant could avoid, and having done so, plaintiff was entitled to recover back his money, less what he had received from the partnership. *Ib.*

9. **Election between causes of action.** When a complaint contains two causes of action, resting upon substantially the same facts, in one of which the defendant is sought to be made liable in one character, and in the other in another character, a case is presented where a motion made at the trial, to compel an election, should be granted.—*Superior Ct., Feb.,* 1880. Roberts *v.* Leslie, 46 Superior 76.

10. **Election once made, final.** Where, in the pleadings and upon the trial, the plaintiff avers a cause of action *ex delicto*, he cannot, in an appellate court, abandon that claim and have a reversal of judgment, because if he had asked for a judgment *ex contractu* it might properly have been rendered.—*Ct. of App., Dec.*, 1880. Lockwood *v.* Quackenbush, 83 N. Y. 607. S. P., People *v.* Dennison, 84 Id. 272.

11. **Appearance; what amounts to.** What is such an appearance by the defendant in an action brought by the attorney-general to wind up an insolvent insurance company, as will cure irregularities, on motion for the appointment of a receiver, see People *v.* Globe Mutual Life Ins. Co., 60 How. Pr. 82.

12. **When appearance will not cure want of process.** An attachment which has become invalid by reason of the failure of the plaintiff to serve the summons, either personally or by publication, within thirty days from the time it was issued, is not revived and rendered valid by the subsequent appearance of the defendant in the action.—*Supreme Ct., (1st Dept.,) Sept.*, 1880. Blossom *v.* Estes, 22 Hun 472.

For rules of *Evidence, Pleading* and *Practice*, in actions generally, see those titles, and the titles of the various causes of action.

For decisions particularly applicable to any distinct form or cause of action, see its title; also, the titles of the domestic and legal relations.

As to *Special Proceedings*, see that title, and the references there given.

ADMINISTRATORS.

EXECUTORS AND ADMINISTRATORS.

ADMISSIONS.

When admissible, and their *Effect as evidence*, see EVIDENCE, III. Effect of, in *Pleading*, see PLEADING, VI. When raise equitable *Estoppel*, see ESTOPPEL, IV.

Of *Agent*, to bind principal, see INSURANCE, VI.; PRINCIPAL AND AGENT, III.

ADULTERY.

As ground for *Divorce*, see DIVORCE, II.

ADVANCEMENT.

1. **Interpreting the statutes.** Under the provision of the statute of distribution in reference to advancements (2 Rev. Stat. 97, § 76,) the descendants of a child of an intestate, who died before him, are entitled, on the final distribution of his estate, when it consists exclusively of personal property, to the benefit of advancements made by him in his life time to his other children, and such advancements are to be taken into consideration in determining the distributive shares —*Ct. of App., Dec.*, 1879, Beebe *v.* Estabrook, 79 N. Y. 246.

2. The word "children," as used in said provision, includes all the descendants of the intestate entitled to share in his estate. *Ib.*

3. The provisions of said statute and of the statute of descents on the subject of advancements (1 Rev. Stat. 752, § 23,) are to be taken and construed together, as the two statutes are *in pari materia.* *Ib.*

4. **Evidence to prove an advancement.** Entries in the books of account of the testator, directing certain sums to be deducted from a child's portion as bequeathed to him by the will, are not, *per se*, evidence of advances. Evidence *aliunde* the books, which, in connection with them would prove the fact of an advancement, must be produced. *N. Y. Surr. Ct., Nov.*, 1878. Benjamin *v.* Dimmick, 4 Redf. 7. See also Lawrence *v.* Lawrence, Id. 278.

ADVERSE POSSESSION.

I. GENERAL PRINCIPLES.
II. UNDER THE STATUTE OF LIMITATIONS.

I. GENERAL PRINCIPLES.

1. **General nature of the title.** Adverse possession necessarily implies that a title has been completely acquired through one or another of the methods of transferring title recognized by law, and which, if relied on by a warrantor, who had not gained title by adverse possession, would inure to the benefit of the covenantee. But where title by adverse possession is relied on, the policy of the law forbids an examination of any particular claim, from its conclusive presumptions that there has been some unquestionable claim.—*Superior Ct., June*, 1880. Sherman *v.* Kane, 46 Superior 310.

2. **Who may acquire title, and against whom.** Adverse possession can commence and run in favor of a grantor, as to either the whole or a part of the granted premises. This, though he has never given the grantee possession. But the evidence to establish this should show a clear, unequivocal and notorious disclaimer of the grantee's title. *Ib.*

3. A corporation has power to acquire title by adverse possession in protection of an undoubted power to hold the lands in question. *Ib.*

4. A warranty deed does not estop the grantor from beginning an adverse possession, and acquiring thereby a title which will not accrue to the benefit of the grantee. This is the rule equally when possession is not given, and when it has been given and there has been a re-entry. *Ib.*

5. **What adverse possession will defeat a deed.** A person claiming land under a defective conveyance, having entered into actual possession of a part, claiming the whole, may have constructive possession of the residue. This is so, however, only when the part not actually possessed is for use with, or subservient to, that so possessed; it must have some necessary connection therewith.—*Ct. of App., Dec.*, 1879. Thompson *v.* Burhans, 79 N. Y. 93; *reversing* 15 Hun 580.

6. **What will not.** A mere payment of taxes and assessments upon land, by one claiming title thereto, will not preclude the true owner from asserting his title, such payment being made without his knowledge.—*Superior Ct., June*, 1880. Stevens *v.* Mayor, &c., of New York, 46 Superior 274.

II. UNDER THE STATUTE OF LIMITATIONS.

7. **What lapse of time will confer title.** By the amendment of Code of Pro., § 88, in 1870 (Laws of 1870, ch. 741, § 5,) striking out married women from the list of persons against whom the statute of limitations does not run, a married woman, as to the time of commencing actions, was placed upon the same footing as other persons, and thereafter she was bound to commence her action within the time specified after the cause of action accrued, although it had accrued prior to the amendment. Therefore in an action of ejectment brought by a married woman, an adverse possession of twenty years is a good defence.—*Ct. of App., Dec.*, 1880. Clarke *v.* Gibbons, 83 N. Y. 107.

8. The owner of a tract of land, for the purpose of selling the same, caused it to be surveyed and divided into lots, streets and alleys, and made and filed a map thereof, from which he sold lots to various persons. The streets and alleys were laid out and dedicated for the use and enjoyment of the purchasers of the lots and their grantees, but were never accepted by the public as such. *Held*, that where the purchaser of one of the said lots had erected a building extending to the centre of an alley upon which his lot was bounded, and had there maintained it for over twenty years, the right of the purchaser of one of the other lots to maintain an action to have the building removed as an obstruction of the alley, was barred by the statute

of limitations.—*Supreme Ct., (2d Dept.,) Feb.*, 1881. Corwin *v.* Corwin, 24 Hun 147.

9. Plaintiffs having title to land bounded by the waters of a bay at ordinary high-water mark, made an allotment, under which defendant claimed, bounded westerly by "the cliff." At the time of the allotment there was a strip of land between the cliff and high-water mark. In an action of ejectment to recover this strip, defendant claimed by adverse possession. It appeared that fences on the sides of defendant's premises, extending across the strip in question to or near low-water mark, had been maintained by him and his grantors for more than twenty years, those portions across the beach being taken away in winter to prevent their being carried away by the ice and tides; there was no fence along the cliff, the land on that side being open to the sea. *Held*, that the evidence was sufficient to authorize the submission to the jury of the question as to whether there was a substantial inclosure within the meaning of the statute.—*Ct. of App., March*, 1881. Trustees, &c., of East Hampton *v.* Kirk, 84 N. Y. 215.

10. Gathering sea-weed. The fact that defendant and his predecessors in title had gathered sea-weed from the premises, while not alone evidence of adverse possession, was such evidence taken in connection with the fact that they claimed to prevent other freeholders of the town from gathering, and that they did so under claim of exclusive right as owners, which claim was known to plaintiffs. *Ib.*

11. It appeared that R., a former owner of defendant's land, brought an action for trespass against one who had gathered sea-weed upon the beach. R. discontinued the action under an agreement with the town and agreed not to sue again. *Held*, that this did not entitle plaintiffs to a charge to the jury that R. thereby relinquished his adverse possession; that it was at most evidence bearing upon that question for the consideration of the jury. *Ib.*

AFFIDAVITS.

1. Before whom the oath may be taken. Under a statute prescribing that a bill must be verified in a specified manner—to be audited—but not naming the officer who shall administer the oath, it may be taken before a commissioner of deeds, although the statute confers upon certain of the auditing officers the power to administer the oath.—*Alb. Oyer & T., Feb.*, 1881. People *v.* O'Reilly,* 9 Abb. N. Cas. 77.

2. Requisites and sufficiency. Where a paper, purporting to be an affidavit taken in a judicial proceeding, indicates the proceeding in which it is made, has a proper venue, is subscribed by the deponent, and has a *jurat* in the usual form, signed by an officer having due authority to administer an oath, the omission of the name of the deponent in the body of the instrument is not, as a general rule, a fatal defect, and the paper is effectual as an affidavit. —*Ct. of App., April*, 1880. People, ex rel. Kenyon, *v.* Sutherland, 81 N. Y. 1.

*Reversed in Court of Appeals, but not on this point, October, 1881. See 3 *Crim. Law Mag.* 85.

3. The test of the legal sufficiency of the paper is, would an indictment for perjury lie against the person who signed and swore to it, if it was willfully false? An officer may receive and give credence to any paper upon which an indictment for perjury would lie and be maintained. *Ib.*

4. *It seems*, however, that where the affidavit, to be effectual, must be made by one having and acting in a certain character, or personal capacity, the paper should state the name of the deponent, and that he has that character or capacity. *Ib.*

5. Necessity of affidavit of merits. An affidavit of merits is still necessary upon motions by defendant before answer. Such an affidavit must be made by the *party*, except upon an application for further time to plead.—*Supreme Ct., (1st Dept. Sp. T.,) Nov.*, 1878. Bingham *v.* Bingham, 1 Civ. Pro. 166.

6. Sufficiency of affidavit of merits. An affidavit of merits in which the defendant states that "he has a good and valid defence to the whole of the plaintiff's claim as set forth in said complaint, upon the merits thereof," is defective and insufficient. It should state that the defendant "has a good and substantial defence on the merits in this cause."—*Supreme Ct., (4th Dept.,) Jan.*, 1881. State Bank of Syracuse *v.* Gill, 23 Hun 406.

7. An affidavit is also defective which fails to state that the counsel, whose advice is sworn to, is the counsel of the defendant in the action in which the affidavit is made. *Ib.*

8. Stating facts on information and belief. Facts stated upon information and belief are evidence where the sources of his information are given by the affiant, and also sufficient excuse for not obtaining the affidavits of the informants.—*Marine Ct., Sept.*, 1880. Wentzler *v.* Ross, 59 How. Pr. 397.

For decisions as to the form and sufficiency of the affidavits used on *motions* and in applications for the various *provisional remedies*, see MOTIONS AND ORDERS; also ARREST; ATTACHMENT; CERTIORARI; CONTEMPT; DEPOSITIONS; DISCOVERY; EXECUTION, V.; INJUNCTION; LANDLORD AND TENANT, IV.; NEW TRIAL; PROCESS; TRIAL, II., III.

As to their admissibility in *evidence*, see EVIDENCE, IV.

AGENCY.

PRINCIPAL AND AGENT.

AGREEMENTS.

CONTRACTS.

ALBANY.

For cases interpreting the city charter, or otherwise limited in their application to the municipality of Albany, see MUNICIPAL CORPORATIONS, V.

ALIENS.

1. **Devises to aliens.** Under the provision of the act of 1845, to enable resident aliens to hold and convey real estate, (Laws of 1845, ch. 115, § 1,) which provides that a resident alien to whom any real estate had been or should thereafter be devised, might, on filing the deposition of intention to become a citizen, etc., prescribed by 1 Rev. Stat. 720, § 15, hold the real estate the same as if he was a citizen at the time of the devise, a resident alien devisee of a citizen takes, upon acceptance of the devise, a conditional title, absolute as against the heirs of the testator, but defeasible by the state until he complies with the conditions as to aliens.—*Ct. of App., June,* 1880. Hall *v.* Hall, 81 N. Y. 130, 137.

2. The provision, therefore, of the statute of wills, (2 Rev. Stat. 57, § 4,) declaring a devise to one who, at the time of the death of the testator, is an alien, to be void, was modified by the said act in this respect. *Ib.*

3. The said act of 1845 is not retrospective solely; it applies to aliens who have become residents of this state subsequent to its passage. *Ib.*

4. **Inheriting by aliens.** The words "resident alien," in the provision of the act of 1845, § 4, above mentioned, which enables those answering the description of heirs of a deceased alien resident to take, whether they are citizens or aliens, do not include or designate a naturalized citizen.—*Ct. of App., Feb.,* 1880. Luhrs *v.* Eimer, 80 N. Y. 171.

5. The incapacity, therefore, of alien heirs of a naturalized citizen, who died intestate, to take lands of which he died seized, was not removed by that statute. *Ib.*

6. So, also, the alien children of a deceased brother or sister of the intestate, who was an alien, are not within the provisions of the statute (1 Rev. Stat. 754, § 22,) which saves a person "capable of inheriting," from being barred of the inheritance by reason of the alienage of any ancestor. Alienism is an impediment to taking lands by descent only when it comes between the stock of descent and the person claiming to take; if some of the persons who answer the description of heirs are incapable of taking by reason of alienage, they are disregarded, and the whole title vests in those heirs competent to take, provided they are not compelled to trace the inheritance through an alien. *Ib.*

As to *Naturalization* and rights of *Citizenship*, see CITIZENS.

ALIMONY.

DIVORCE, IV.

ALTERATION OF INSTRUMENTS.

Of married woman's note. In an action brought upon a joint and several promissory note made by a husband and wife, and indorsed by the payee and others, one of the indorsers set up as a defence that the note was, after the making and indorsement thereof, materially altered, without his knowledge or consent, by the insertion in the body thereof of the following words, "and the said Ellen A. Brown makes this note a charge upon her separate estate." *Held,* that the facts so alleged constituted a good defence to the action.—*Supreme Ct., (2d Dept.,) Dec.,* 1880. Reeves *v.* Pierson, 23 Hun 185.

As to *Filling blanks* in bills of exchange or promissory notes, see those titles.

As to the alteration of *Papers in suits,* by amendment, see AMENDMENT.

AMBIGUITIES.

Parol evidence to explain, see EVIDENCE, II.

AMENDMENT.

[Embraces amendments in *Actions* and *Suits,* only. For amendments in *Special proceedings,* see the titles of the several special proceedings; and for amendments on *Appeal* or *Error,* see those titles, respectively.]

1. **Amending the summons.** A failure to name in the summons the county in which the plaintiff desires the trial to be held, is not such a defect as requires the court to set aside its service absolutely; the court may in a proper case deny a motion to set aside the service of such a summons on condition that a proper summons shall, within five days after the entry of the order, be served upon the defendant.—*Supreme Ct., (1st Dept.,) May,* 1881. Wallace *v.* Dimmick, 24 Hun 635.

2. **Amending the complaint, generally.** In actions *ex contractu,* to authorize recovery for more than is claimed in the complaint, an amendment of it is requisite.—*Ct. of App., June,* 1880. Van Gelder *v.* Van Gelder, 81 N. Y. 128.

3. **—at the trial.** Where a complaint states a cause of action *ex delicto* it is not competent at the trial to convert it into one *ex contractu.*—*Ct. of App., June,* 1880. Neudecker *v.* Kohlberg, 81 N. Y. 296, 302.

4. **— after trial.** Upon the trial, plaintiff moved to amend his complaint to include interest on the demand, and the referee reserved his decision, no objection being made to his so doing. *Held,* that an allowance of the amendment, made in the findings of the referee, was in time.—*Superior Ct., Dec.,* 1880. Bean *v.* Edge, 46 Superior 455.

5. Where plaintiff fails to prove the cause of action set up in his complaint, and the objection is raised upon the trial, and no amendment of the pleading is asked for or ordered, a judgment in plaintiff's favor, upon a cause of action entirely separate and distinct from that alleged, cannot be sustained on appeal. In such case the pleadings cannot, after the trial, be conformed to the proof. It is no answer to the objection that defendant was probably not misled.—*Ct. of App., March,* 1881. Southwick *v.* First Nat. Bank of Memphis, 84 N. Y. 420; *reversing* 20 Hun 349.

6. Where the complaint sets forth a promissory note not purporting to be made by defendants, and various circumstances by reason

of which it is sought to charge defendants with the payment of the note, but does not allege a promise by defendants, or either of them, to pay it, the trial court has no power to allow an amendment of the complaint by inserting an allegation of a promise to pay; consequently, the General Term can neither deem it to have been made, nor make it itself, so as to make the verdict *secundum allegata.—Superior Ct., Dec.,* 1880. Storrs *v.* Flint, 46 Superior 498.

7. Amending the answer. The defendant cannot avail himself of the defence of the statute of limitations, unless he has set it up in his answer. His failure so to plead it, is not a defect in matter of form which should be corrected by the court upon the trial.—*Supreme Ct., (4th Dept.,) April,* 1881. Dezengremel *v.* Dezengremel, 24 Hun 457.

8. As to the effect of a stipulation not to amend the answer, upon the power of the trial-judge to grant amendments on the trial, see Hennequin *v.* Clews, 46 Superior 331.

9. Amending the judgment-roll. The court must, where necessary, direct amendments to be made both in the process and pleadings in an action, by correcting a mistake in the name of a party, or adding or striking out such name, either upon the trial, or before or after judgment. In every stage of the action the court is also required to disregard any error or defect in the proceedings not affecting any substantial right of the adverse party. Sections 721, 723. Therefore, where the judgment-roll does not contain proof of service of the notice of application for judgment and for the trial of the action, and such service was in fact made, the judgment-roll may properly be amended by supplying the omission.—*Supreme Ct., (1st Dept.,) March,* 1881. Weil *v.* Martin, 1 Civ. Pro. 133.

For further decisions as to *Amended* and *Supplemental pleadings,* see PLEADING, VIII.

As to amendments in *Justices' courts,* see JUSTICE OF THE PEACE.

As to bringing in *New parties* by amendment, see PARTIES.

For the power of a *Referee* to allow amendments, see REFERENCE.

ANIMALS.

1. Liability of owner for trespasses by them. The term "running at large," as used in Laws of 1862, ch. 459, § 1, as amended by Laws of 1867, ch. 814, implies permission or assent, or at least some fault or neglect on the part of the owner of the animals.—*Supreme Ct., (2d Dept.,) May,* 1880. Coles *v.* Burns, 21 Hun 246.

2. Where animals escape from their owner's premises, after due precautions to secure them have been taken, and without any default or neglect on his part, and he thereafter makes immediate and suitable efforts to secure and recover them, they cannot be said to be "running at large," within the meaning of the said act. *Ib.*

3. Proceedings to enforce the liability. In order to give a justice of the peace jurisdiction of an application to sell animals, seized, under the act above mentioned, while trespassing upon the lands of the applicant, the complaint must allege that the animals escaped upon the land from the highway. *Ib.*

4. It is improper to allow the complaint to be amended by the insertion of this allegation after the defendant has answered, and the case has been called for trial. *Ib.*

As to the liability of a railroad company, for *Killing stock* on the track, see RAILROAD COMPANIES, IV.

ANNUAL REPORT.

For decisions as to the duty of *Trustees of manufacturing companies* to file annual reports, and their *Individual liability* for failure to do so, see MANUFACTURING COMPANIES, II.

ANSWER.

In *Abatement,* see ABATEMENT, 4, 5.

In *Bar,* see PLEADING; and the titles of the various causes of action.

APPEAL.

[Embraces, for the most part, appeals in *actions* only. For appeals in special proceedings, the titles of the several special proceedings should also be consulted. For the general course of proceedings to obtain a review in *criminal cases,* see CERTIORARI; ERROR; also, the titles of particular offences.]

I. GENERAL PRINCIPLES.
1. *When an appeal will lie.*
2. *Nature and exercise of appellate jurisdiction.*
3. *Procedure on appeal.*

II. APPEAL TO THE GENERAL TERM.
1. *When an appeal will lie.*
2. *Procedure.*

III. APPEAL TO THE COURT OF APPEALS.
1. *When an appeal will lie.*
2. *Procedure.*

IV. APPEALS FROM MARINE COURT TO COURT OF COMMON PLEAS, IN NEW YORK CITY.

V. APPEALS FROM COUNTY COURTS TO SUPREME COURT.

VI. APPEALS FROM SURROGATES' COURTS.

VII. ENFORCEMENT OF APPEAL BONDS.

I. GENERAL PRINCIPLES.

1. *When an appeal will lie.*

1. The right to appeal, and how waived. The defendant appealed from an order referring the issues in the action for trial, and thereafter applied for leave to serve an

amended answer, which was granted upon condition that the order of reference stand, and that the issues made by the amended answer be tried thereunder. Thereupon, defendant duly entered an order in compliance with said conditions, served an amended answer, and proceeded with the reference. *Held*, that he thereby waived his right of appeal from the order of reference.—*Superior Ct., April*, 1880. Egbert *v.* O'Connor, 46 Superior 194.

2. What matters are discretionary, and therefore not reviewable. When an order denying a motion to exonerate bail is in discretion, and so not reviewable, see Mills *v.* Hildreth, 81 N. Y. 91.

3. Where evidence upon the cross-examination of a witness is offered for the purpose of discrediting him, the rejection thereof for that purpose is in the discretion of the court, and so is not error.—*Ct. of App., Nov.*, 1880. Canaday *v.* Krum, 83 N. Y. 67.

4. An order of reference of a claim held by the receiver of an insolvent corporation directed the discontinuance of an action which had previously been brought by the receiver, without costs. *Held*, that it was in the discretion of the court whether or not to allow costs to the defendant.—*Ct. of App., June*, 1880. Matter of Crosby *v.* Day, 81 N. Y. 242, 245.

5. In this state there is no fixed rule, applicable to all cases, determining whether or not a mortgagee in possession is, upon an application by the mortgagor to redeem, entitled to commissions upon the amount received and expended by him. The decision of this question rests in the discretion of the court or referee trying the action, and when it is not unreasonably exercised the appellate court will not interfere therewith.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. Green *v.* Lamb, 24 Hun 87.

6. Where, upon the hearing of a motion to set aside an execution because issued for the first time more than five years after the entry of the judgment, it appears that the facts are such as would have required the court to have granted leave to issue it, if an application therefor had been formally made, it is not an abuse of judicial discretion for the court to refuse to set it aside.—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Frean *v.* Garrett, 24 Hun 161.

2. *Nature and exercise of appellate jurisdiction.*

7. What errors are ground for reversal, generally. On the trial of an action the plaintiff is entitled to go to the jury on any theory consistent with the pleadings which his evidence will justify; before he can be limited to any certain theory, on appeal, it must appear in the case as settled that he has thus limited himself on the trial. Where, therefore, upon the trial the judge stated to the jury, that plaintiff had thus limited herself, but her counsel disputed this and claimed that she had not, and it did not appear in the case that she had assented to any such limit—*Held*, that it was error for the court to take from the consideration of the jury another theory presented and supported by the evidence.—*Ct. of App., June*, 1880. Hazewell *v.* Coursen, 81 N. Y. 630.

8. Under the provision of Code of Civ. Pro., § 993, which provides that a refusal to make any finding whatever upon a question of fact, on a trial by the court or a referee, where a request was seasonably made, is a ruling upon a question of law, a refusal of a request to find a fact, on the ground that the fact is immaterial, presents a question of law, and if the fact be material the ruling is error, although the fact be not conclusively proved, and the evidence as to it is conflicting.—*Ct. of App., Nov.*, 1880. James *v.* Cowing, 82 N. Y. 449; *reversing* 17 Hun 256.

9. Admission of improper evidence. The fact that one issue existed in the case, which might have been decided in favor of the successful party, does not justify the appellate court in disregarding errors in the admission of testimony bearing upon a different issue, and holding that the evidence so admitted was harmless.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. Ayres *v.* Water Comm'rs of Binghamton, 22 Hun 297.

10. Exclusion of proper evidence. In an action to recover damages for an injury sustained by plaintiff in falling over a water-gate projecting from the sidewalk in one of the streets of defendant, a witness for the plaintiff having testified that he knew of the existence of the water-gate at the place where plaintiff fell, for some year and a half before the accident, was asked, "Did you ever know of anybody falling over there before?" Upon defendant's objecting that the evidence was immaterial and irrelevant, the court excluded it. *Held*, error.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. Burns *v.* City of Schenectady, 24 Hun 10.

11. Plaintiff recovered a judgment for an amount alleged to be due to him for his salary as attendant for the Fourth District Court of the city of New York from January 1st, 1877, to June 1st, 1877. He offered evidence tending to show that he had been appointed to the office of janitor by the justice of the said court, on the 15th day of March, 1870, who acted in accordance with a resolution of the common council, approved by the mayor on that day. Upon the trial defendant offered to prove that on December 28th, 1876, the resolution conferring such authority upon the justice was repealed. *Held*, that the court erred in excluding the evidence.—*Supreme Ct.*, (*1st Dept.*,) *Jan.*, 1881. Hartman *v.* Mayor, &c., of New York, 23 Hun 586.

12. Erroneous refusal to charge. In an action brought by a client against her attorney, to recover moneys alleged to be wrongfully detained by him, the main fact at issue was whether a certain sum of money was paid by her to the attorney in satisfaction of his charges for services, &c., or whether the said sum was delivered to him upon the understanding that part thereof was to be received in full satisfaction of his said charges, and the remainder to be used in settling certain claims which were (as alleged by the client) falsely stated by said attorney to exist. *Held*, error to refuse to charge that the jury might consider the value of the attorney's services and the disbursements incurred by him for said client, as having a bearing upon the probabilities of the case.—*Superior Ct., April*, 1880. Robbins *v.* Pultzs, 46 Superior 184.

13. What errors may be disregarded, generally. The fact that a party declines to comply with a notice to produce, does not make the subsequent admission of a paper offered by such party, substantially differing in its terms from the one called for, although

bearing on the same subject matter, error calling for a reversal.—*Superior Ct., Feb.*, 1880. Scott *v.* Sandford, 46 Superior 544.

14. When facts appearing on the trial, tending to establish a cause of action not set up in the complaint, will not authorize a reversal of the judgment for defendant, see Roe *v.* Barker, 82 N. Y. 432.

15. **Errors not objected to below.** An objection which, if taken, might have been obviated at the trial, cannot be urged for the first time on appeal.—*Com. Pleas, (Gen. T.,) March*, 1881. Sacia *v.* Decker, 1 Civ. Pro. 47.

16. The point that in an action on a lost note, the bond required by statute was not given, cannot be raised for the first time on appeal; it must be presented by exception.—*Ct. of App., March*, 1881. Fordham *v.* Hendrickson, 84 N. Y. 654.

17. Where a defendant moves for a non-suit, or rests his defence upon propositions of law and does not request to go to the jury, and his motion is denied, or the law held adversely to him, he is estopped from raising the point upon appeal that there were questions of fact which should have been passed upon by the jury.—*Ct. of App., Nov.*, 1880. Ormes *v.* Dauchy, 82 N. Y. 443; *affirming* 45 Superior 85. S. P., Graham *v.* O'Hern, 24 Hun 221.

18. For instances of the application of the rule that an objection cannot ordinarily be taken in the first instance on appeal, see Burns *v.* City of Schenectady, 24 Hun 10; Duckworth *v.* Roach, 81 N. Y. 49.

19.—**or which might have been cured below.** *It seems* that where, upon the trial of an action, either civil or criminal, the court corrects, or offers to correct, an erroneous ruling, and the party against whom it was made refuses to consent to the correction or to avail himself of the offer, an exception to the ruling will not be available on appeal, provided the appellate court can see that the acceptance of the offer would have relieved the party from any actual or possible injury in consequence of the erroneous ruling.—*Ct. of App., April*, 1880. Cox *v.* People, 80 N. Y. 500, 511.

20. **What errors are not cured.** Where the court erroneously charges the jury, as a matter of law, that a certain material fact is as contended by plaintiff, such error is not cured by a subsequent charge, made upon request of defendant's counsel, to the effect that the burden of proof is on plaintiff to show the said fact as claimed by him, and that on the evidence in the case it is a question for the jury whether it is so or not, and if they believe such to be the fact, they will find, &c.,—the original charge in that regard not having been withdrawn.—*Superior Ct., June*, 1880. Canfield *v.* Baltimore, &c., R. R. Co., 46 Superior 238.

21. **Harmless, or non-prejudicial errors.** The ruling of a judge on the trial admitting secondary evidence will not be reversed on appeal, unless it very clearly appears that an error has been committed which has prejudiced the party complaining thereof.—*Supreme Ct., (1st Dept.,) Nov.*, 1880. Naugatuck Cutlery Co. *v.* Babcock, 22 Hun 481.

22. A chance expression of opinion as to the credibility of a material witness, made by the judge in his charge, and which he subsequently qualified by a statement to the effect that the jury are not bound thereby, does not necessarily furnish good ground for exception.—*Superior Ct., Dec.*, 1880. Hoffman *v.* New York Central, &c., R. R. Co., 46 Superior 526.

23. **Presumptions on appeal.** Defendants' counsel presented to the court thirteen written requests to charge. The court, after remarking that there were certain requests to charge which it would read, then read nine of the requests. The court did not state in terms as to whether it gave them to the jury as the law, nor did it refuse in terms to charge the four requests not read. *Held*, that the inference was that the court intended to charge in accordance with the requests read, and declined to charge the residue.—*Ct. of App., Sept.*, 1880. Hynes *v.* McDermott, 82 N. Y. 41; *affirming* 7 Daly 513.

3. *Procedure on appeal.*

24. **The security.** An undertaking and notice of appeal describing the judgment appealed from as a judgment entered March 11th, when, in fact, it was entered March 12th, may be disregarded and execution issued; the respondent is not required to move to set aside the undertaking in such a case.—*Com. Pleas., (Sp. T.,) May*, 1881. Dinkel *v.* Wehle, 61 How. Pr. 159.

25. As to the power of the court to amend an undertaking on appeal, on motion of one of the sureties thereto, see O'Sullivan *v.* Connors, 22 Hun 137.

26. **Bringing up the record—motion for new trial below.** Where, in an action brought to foreclose a mortgage, issues of fact are framed and, in pursuance of an order to that effect, tried by a jury, a motion for a new trial on the case and exceptions, founded upon irregularities committed on the trial by the jury, must be made before the entry of judgment in the action, otherwise the findings of the jury will be deemed to have been acquiesced in, and questions of fact involved therein cannot be reviewed on an appeal from the judgment.—*Supreme Ct., (3d Dept.,) Nov.*, 1880. Chapin *v.* Thompson, 23 Hun 12.

27. As to how questions of fact may be brought up for review, and when an entry on the clerk's minutes will be deemed an order denying a motion for a new trial, see Dart *v.* Gillies, 46 Superior 560.

28. **The hearing. What questions are before the court.** Where a defendant does not accept an allegation of fact in the complaint, but gives evidence upon the trial in conflict with it, plaintiff is not precluded on appeal from claiming the fact to be as the evidence establishes it.—*Ct. of App., Dec.*, 1879. Cowing *v.* Altman, 79 N. Y. 167.

So, also, where the case is tried without reference to the pleadings, and no exception is taken raising the question that plaintiff is precluded thereby from showing the actual transaction, the question cannot be raised upon appeal. *Ib.*

29. **Reviewing the evidence.** When a defect in the plaintiff's case is supplied by testimony on the part of the defendant, the former is entitled to the benefit thereof on appeal in support of a denial of a motion to nonsuit.—*Ct. of App., Nov.*, 1880. Painton *v.* Northern Central R'y Co., 83 N. Y. 7.

30. **Receiving new evidence on ap-**

peal. Where, upon the trial of an action brought by one claiming to have been appointed an attendant upon the Marine Court, under a particular act, to recover the salary attached to such office, his attention is specifically called to the fact that he has failed to prove an appointment thereunder, he cannot, upon the hearing of an appeal taken by the defendant, from a judgment rendered against it, introduce documentary evidence to prove that in fact he was appointed thereunder.—*Supreme Ct.*, (1*st Dept.*,) *May*, 1880. Moser *v.* Mayor, &c., of New York, 21 Hun 163.

31. An omission in proof of a matter of record may be supplied on appeal to sustain a judgment, where the record cannot be answered or changed.—*Ct. of App.*, *March*, 1881. Dunford *v.* Weaver, 84 N. Y. 445; *affirming* 21 Hun 349.

32. **Discontinuance of appeal.** An order discontinuing an appeal, entered by consent, should not be vacated on an *ex parte* application.—*Supreme Ct.*, (1*st Dept.*,) *June*, 1880. People *v.* Central Crosstown R. R. Co., 21 Hun 476.

33. **Rendering final judgment on reversal.** To justify an appellate court in rendering final judgment against the respondent upon reversal of a judgment, it is not sufficient that it is improbable that the defeated party can succeed upon a new trial; it must appear that he certainly cannot.—*Ct. of App.*, *Feb.*, 1880. Guernsey *v.* Miller, 80 N. Y. 181.

II. Appeal to the General Term.

1. *When an appeal will lie.*

34. **From interlocutory judgment.** After an appeal from a final judgment entered upon an interlocutory one (no appeal having previously been taken from the interlocutory judgment), had been dismissed, an appeal was taken from the interlocutory judgment. On motion this appeal was dismissed.—*Superior Ct.* Cameron *v.* Equitable Life Assurance Soc., 46 Superior 84.

35. **What orders are appealable, generally.** An order denying a motion to compel the acceptance of a pleading is appealable.—*Supreme Ct.*, (1*st Dept.*,) *Dec.*, 1880. Pattison *v.* O'Connor, 23 Hun 307; S. C., 60 How. Pr. 141.

36. An order denying an application to vacate an attachment founded only upon the papers upon which the warrant was granted, is appealable to the General Term.—*Com. Pleas*, (*Gen. T*,) *Jan.*, 1881. Achelis *v.* Kalman, 60 How. Pr. 491.

On such appeal the General Term must exercise the same supervision over the motion that the judge to whom it was originally made could have done. It must consider as to whether there is sufficient in the papers to justify the issuing of the attachment, not whether there was jurisdiction. *Ib.*

37. As to when an appeal should be taken from the original order, and not from a subsequent one amending it, and when a party, not restrained by an injunction order, may appeal therefrom, see Landers *v.* Fisher, 24 Hun 648.

38. **What are not.** No appeal lies from an order refusing to confirm the report of a referee appointed by an interlocutory judgment to take proof of certain facts and report the same to the court before which an action is being tried, to enable it to make and render a final judgment therein, when such refusal is based upon the insufficiency of the report, and is accompanied by an order requiring the referee to furnish more specific facts.—*Supreme Ct.*, (2*d Dept.*,) *Dec.*, 1880. Kent *v.* Quicksilver Mining Co., 23 Hun 199.

39. An order allowing an open commission to issue, as authorized by sections 893 and 894 of the Code of Civil Procedure, is not appealable to the General Term.—*Supreme Ct.*, (1*st Dept.*,) *April*, 1881. Jemison *v.* Citizens' Savings Bank, 24 Hun 350.

40. **Orders on motions for judgment.** An order denying a motion for judgment for an amount admitted by the answer, sufficiently involves the merits of the action, and affects a substantial right, to be appealable to the General Term.—*Superior Ct.*, *Feb.*, 1880. Marsh *v.* West, &c., Manuf. Co., 46 Superior 8.

41. **Orders on motions for new trial.** Under section 999 of the Code of Civil Procedure, a party may move for a new trial, on the ground that the verdict is contrary to law, and upon an appeal from an order denying such a motion, the whole case is before the appellate court, upon the law as well as the facts.—*Supreme Ct.*, (2*d Dept.*,) *Dec.*, 1880. Tate *v.* McCormick 23 Hun 218.

2. *Procedure.*

42. **Who may appeal.** Under Code of Civ. Pro., § 1247, a referee, appointed to sell real estate in pursuance of a judgment, may appeal from an order fixing his fees and compensation for the services so rendered by him.—*Supreme Ct.*, (4*th Dept.*,) *Jan.*, 1881. Hobart *v.* Hobart, 23 Hun 484.

43. **Limiting time to appeal.** Service of a copy of an order, before entry, not addressed to any one, and without written notice of entry, is not sufficient to limit the time for appeal.—*Ct. of App.*, *Sept.*, 1880. Sheridan *v.* Andrews, 81 N. Y. 650.

44. **Taking an appeal—security.** For matters of practice, relative to perfecting an appeal and extending the time to give an undertaking, when the time allowed by law has expired, see Wheeler *v.* Millar, 59 How. Pr. 396.

45. **Stay of proceedings.** An interlocutory judgment was entered in this action adjudging a deed given by the plaintiff to the defendant to have been procured by fraudulent misrepresentations and undue influence, and directing that it be given up and canceled, and also providing for a reference to take and state an account of the rents received from the premises and the payments made on account thereof. An appeal having been taken from the interlocutory judgment, an application was made for a stay of all further proceedings during the pendency thereof. *Held*, that the stay should have been granted.—*Supreme Ct.*, (1*st Dept.*,) *March*, 1881. Coleman *v.* Phelps, 24 Hun 320; S. C., 1 Civ. Pro. 9.

46. The object of the legislature in providing for such an appeal was to avoid unnecessary litigation and expense, which would not be effected if the proceedings demanded by the

interlocutory decree were carried on and subsequently rendered futile by a reversal of the main judgment on which the interlocutory decree was based. *Ib.*

47. On appeal from an order refusing a stay of proceedings until the determination of a motion, a stay should not be granted.—*Supreme Ct.*, (*1st Dept.*,) *June*, 1881. People *v.* Manhattan R R. Co., 9 Abb. N. Cas. 448.

48. **Time to make and serve the "case."** Under the provision of the Code of Procedure, in reference to making a case for the purposes of review, in an action tried by the court or a referee (§ 268), the ten days allowed for that purpose did not begin to run until the entry of judgment, and notice thereof; the alternative stated therein, "or within such time as may be prescribed by the rules of the court," meant such further time as might be prescribed.—*Ct. of App.*, *Feb.*, 1880. French *v.* Powers, 80 N. Y. 146.

49. A service, therefore, of a copy of a referee's report, and notice of filing, did not operate to limit the time to serve a case or exceptions. The rule of the Supreme Court, (rule 34 of 1858, rule 47 of 1871 and 1874, and rule 32 of 1877), requiring a case to be served within ten days after written notice of the decision or report, was in conflict with the code, and consequently inoperative. *Ib.*

50. The practice, in this respect, was not changed by the provision of the Code of Civ. Pro., § 994, providing that exceptions, taken after trial, may be taken "at any time before the expiration of ten days after service * * * of a copy of the decision of the court, or report of the referee, and a written notice of the entry of judgment thereupon." *Ib.*

51. While under this provision, exceptions may be taken at any time after trial, they are not required to be taken until ten days after notice of judgment; and although no provision is made as to time for serving the case, as the case is required to contain the exceptions, (Code, § 997,) it need not, and cannot be served until after the exceptions are framed, and the party cannot be put in default for not serving a case containing them, before the expiration of the time allowed for framing them. *Ib.*

52. The exceptions referred to in said provision are not simply those taken on the trial. *Ib.*

53. *It seems*, that where a report of a referee, and notice of filing thereof, were served prior to the going into effect of the Code of Civil Procedure, (September 1st, 1877,) but no judgment had been entered, that even if the practice had been changed by the said code, and the rule validated, the notice would not have become operative to limit the time for making a case to ten days after the code went into effect; as the notice when served did not operate to limit the time, the new provision could not retroact to give it that effect, and a new notice should have been served. *Ib.*

54. **Discontinuing an appeal.** An appeal is not discontinued as to the respondent, by the service of a notice of withdrawal, accompanied by a tender of costs to date; the order of the court is necessary to accomplish this. The respondent, in such case, may obtain an order that the appeal be declared abandoned; or he may proceed under general rule 41, and rule 4 of this court, if no printed case has been served, and after the appeal has been placed on the calendar, move for a dismissal thereof.—*Superior Ct.*, *April*, 1880. Weinman *v.* Dilger, 46 Superior 101.

55. **Reviewing the evidence, or the facts.** Facts can only be reviewed on appeal from an order denying a motion for a new trial; the statement in the case, of a motion to set aside the verdict, is not equivalent to an order. —*Supreme Ct.*, (*2d Dept.*,) *Dec.*, 1880. Ehrman *v.* Rothschild, 23 Hun 273.

56. **Allowing amendments.** In an action upon a contract the General Term has power, on appeal from a judgment for plaintiff, to amend the complaint so as to make it conform to the terms of the contract as proved upon the trial. Code of Civ. Pro., § 723.—*Ct. of App.*, *Dec.*, 1880. Harris *v.* Tumbridge, 83 N. Y. 92.

57. Upon the trial of this action the complaint was dismissed and a verdict directed in favor of defendant; and a motion for a new trial, made upon the judge's minutes, was denied. Plaintiff appealed from the order denying the motion for a new trial, but not from the judgment. Thereafter, and after the time to appeal from the judgment had expired, upon discovering that the questions he sought to review could not be considered upon the appeal from the order, he applied for leave to amend his notice of appeal by inserting therein a notice of an appeal from the judgment as well as from the order. *Held*, that, as the time to appeal from the judgment had expired, the court had no power to grant the application.—*Supreme Ct.*, (*1st Dept.*,) *May*, 1881. Lavelle *v.* Skelly, 24 Hun 642.

58. On a re-argument at General Term, the court cannot allow the appellant to amend his case, and hear the re-argument on such amended case.—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Wright *v.* Terry, 24 Hun 228.

59. **Disregarding errors not objected to below.** Judgment by default was recovered by plaintiff's intestate, in his lifetime, against the defendant L., and assigned to S. Subsequently the default was opened, and upon the death of plaintiff's intestate an order was made reviving the action and directing S. to be made a party defendant. The trial then proceeded by consent before a referee previously appointed, and judgment was given in favor of S. against his co-defendant L. *Held*, that the trial having proceeded without objection until the merits of the controversy were determined, no question of irregularity could be heard on appeal, as such questions should be raised by motion, and defendant's claim to a right of trial by jury not having been made before or at the trial, could not be listened to on appeal.—*Superior Ct.*, (*Gen. T.*,) *Jan.*, 1881. Derham *v.* Lee, 60 How. Pr. 334.

60. **Effect of the appellate judgment.** When the General Term, on appeal from a judgment, is bound by a decision of the same General Term on an appeal from an order in the same action, see Rogers *v.* Syracuse, &c., R. R. Co., 21 Hun 44.

61. **Rendering judgment which should have been rendered below.** Upon an appeal from an order denying a motion to open a default, the General Term may, on reversal, direct the entry of such order opening the default as the Special Term should

have granted.—*Superior Ct., Nov.*, 1880. Knauer *v.* Globe Mut. Life Ins. Co., 46 Superior 370.

62. Entry of order of affirmance. Where, after argument, and pending decision of an appeal taken by a purchaser at the partition sale, from an order requiring him to complete his purchase, one of the respondents, a plaintiff in partition, died, and the order was affirmed—*Held*, that the order of affirmance might be entered *nunc pro tunc*, as of the day of argument. —*Ct. of App., March*, 1881. Bergen *v.* Wyckoff, 84 N. Y. 659; 1 Civ. Pro. 1.

63. Compelling filing of judgment-roll. When judgment of affirmance is rendered by the General Term, it is the duty of the respondent to prepare and file a proper judgment-roll, based upon the said decision, and the appellant has a right to insist upon the performance of that duty. This is so though the appellant has failed to file the printed case and exceptions as settled under rule 35, the point not having been raised at the argument of the appeal, and the proposed case, proposed amendments and settlement of the judge having been filed.—*Superior Ct., May*, 1880, Knapp *v.* Roche, 46 Superior 200.

64. Upon appeal from judgment in this action the General Term affirmed it, provided plaintiff would stipulate to deduct therefrom a specified sum; plaintiff filed the required stipulation, also the decision of the General Term, signed by one of the judges. *Held*, that this was not an entry of judgment within the meaning of the provisions of the Code of Civil Procedure in reference thereto (§§ 1236, 1354).—*Ct. of App., Oct.*, 1880. Knapp *v.* Roche, 82 N. Y. 366; *affirming* 46 Superior 200.

65. The memorandum handed down by a General Term of its decision of an appeal is not a judgment, but simply an authority to enter one. *Ib.*

66. Upon the filing of such decision a formal judgment should be prepared and entered in the judgment-book, attested by the signature of the clerk; and, to constitute a judgment-roll, a copy thereof should be annexed to the papers upon which the appeal was heard. Therefore—*Held*, that, as the duty of preparing such judgment-roll is imposed upon "the attorney for the party at whose instance the final judgment is entered" (Code of Civ. Pro., § 1238,) an order was properly granted directing the plaintiff to enter judgment and file a judgment-roll, and for that purpose authorizing him to file a printed copy of the case on appeal. *Ib.*

67. Effect of the appeal while pending. It is within the discretion of the court, and is a proper exercise thereof, to deny as prematurely made, a motion to charge the person beneficially interested in the recovery in an action (2 Rev. Stat. 619) with the payment of a judgment for costs entered therein, when an appeal from said judgment is pending at the time said motion is made, though no security upon appeal has been filed, and no stay of proceedings granted. The denial of the motion upon said grounds may be deemed equivalent to a stay.—*Superior Ct.* Slauson *v.* Watkins, 46 Superior 172.

III. Appeal to the Court of Appeals.

1. *When an appeal will lie.*

68. Jurisdiction as dependent upon the amount in controversy. The question as to whether this court has jurisdiction on appeal from a judgment, or from an order granting or refusing a new trial, is to be determined by the amount in controversy in the General Term.—*Ct. of App., April*, 1880. Davidson *v.* Alfaro, 80 N. Y. 660.

69. In the provision of the Code of Civil Procedure limiting appeals to this court (§ 191, subd. 3,) the amount demanded in the complaint is made controlling only in actions not founded on contract, because in actions *ex contractu* the facts alleged in the complaint may show that plaintiff, if successful, would not in law be entitled to so large a recovery; the distinction is not based upon the theory that in the latter class of actions plaintiff may recover more than he demands in his complaint.—*Ct. of App., June*, 1880. Van Gelder *v.* Van Gelder, 81 N. Y. 128.

70. Instances. In an action for money had and received plaintiff asked judgment for $400 with interest from the day prior to that on which the action was commenced. The judgment was for defendant. On appeal to this court plaintiff claimed the facts proven entitled him to interest from 1869. *Held*, that the judgment was not reviewable in this court, as the amount in controversy was less than $500; that to authorize a recovery for a larger sum than that claimed, an amendment of the complaint would have been required, and no such amendment was made or applied for. *Ib.*

71. This action was brought to recover a balance of $639, alleged to have been found and agreed to be due plaintiff on a settlement and account stated between him and defendant on May 1st, 1876, and for labor of plaintiff and son between that day and December 9th, 1876. Defendant, in his answer, after denying many of the allegations of the complaint and alleging payments, expressly admitted an indebtedness of $230.89 "over and above all payments, offsets and counter-claims." During the trial defendant asked to amend his answer by alleging therein a counter-claim for $700. This application was denied, on the ground that the facts offered to be proved would not constitute a counter-claim. *Held*, that the amount in controversy was less than $500, and the case was not appealable to this court; that if the counter-claim had been alleged in the answer and put in issue by a reply, the amount in controversy would have been sufficient to allow an appeal, but as the counter-claim was not so alleged, it was not in controversy; that it mattered not that the referee placed his refusal to allow the amendment upon an erroneous view of the law; if an error was committed, such error could be reviewed only like any other error committed on the trial, and the amount in controversy would have to be determined by the pleadings as they actually were.—*Ct. of App., April*, 1880. Wiley *v.* Brigham, 81 N. Y. 13.

72. What orders are appealable, generally. An order of the Supreme Court punishing an attorney for professional misconduct, not committed in the presence of the court, but based upon evidence, is reviewable upon the facts in this court.—*Ct. of App., Sept.*, 1880. Matter of Eldridge, 82 N. Y. 161.

73. An order of General Term, reversing an order of Special Term, vacating an assessment, without ordering a rehearing, is a final order

appealable to this court.—*Ct. of App., Sept.*, 1880. Matter of N. Y. Prot. Epis. Pub. School, 82 N. Y. 606.

74. An order vacating an attachment because of failure to serve or publish the summons within the statutory time, as it involves simply a question of jurisdiction, is reviewable here.—*Ct. of App., March,* 1881. Blossom *v.* Estes, 84 N. Y. 614.

75. What are not appealable. An appeal from an order of General Term affirming a judgment, is premature and unauthorized; judgment should first be entered and the appeal taken from the judgment.—*Ct. of App., Feb.*, 1880. Kilmer *v.* Bradley, 80 N. Y. 630.

76. An order of reference, to take proof as to charges made by creditors against an assignee for the benefit of creditors, is not reviewable here, as it is an order, not final, made in a special proceeding. Code of Civ. Pro., § 190, subd. 3. —*Ct. of App., Sept.*, 1880. Matter of Friedman, 82 N. Y. 609.

77. Where an ordea of Special Term, vacating an assessment for a local improvement, is reversed by the General Term, on the ground that the assessment should be reduced, not vacated, and the case is remitted to the Special Term, that the assessment may be modified in conformity with the principles laid down by the General Term, the order of General Term is not a final order; and so is not reviewable here.—*Ct of App., Dec.*, 1879. Matter of Auchmuty, 79 N. Y. 622.

78. Upon appeal from a judgment of Special Term, dismissing plaintiff's complaint, the General Term reversed the judgment, directed that an "interlocutory judgment be entered upon the facts found by the court; that a referee be appointed to take and state the accounts of the respective parties, and that, upon the filing and confirmation of his report, a further and final judgment should be entered by the Special Term for the final disposition of the entire controversy between the parties." Plaintiff appealed to this court from the order, and the order of Special Term entered in pursuance thereof; he gave no stipulation for judgment absolute in case of affirmance. *Held,* that the order of General Term was not a "final judgment" within the first subdivision of section 198 of the Code of Civil Procedure; nor was it an order which, in effect, determined the action and prevented a final judgment, or an order made upon or deciding an interlocutory application, or an order deciding a question of practice within the second subdivision of said section; that as there was no stipulation, it was unnecessary to determine whether the order could be regarded as an order granting a new trial. Appeal therefore dismissed.—*Ct. of App., April,* 1880. Jones *v.* Jones, 81 N. Y. 35.

79. The following orders have been held not to be appealable to the Court of Appeals:

An order annexing an improper question to a commission; it affects no substantial right, as the party may raise the objection on trial.—*Ct. of App., Dec.*, 1879. Uline *v.* New York Central, &c., R. R. Co., 79 N. Y. 175.

An order granting an order of arrest; where the papers stated facts to give jurisdiction.—*Ct. of App,, March,* 1881. King *v.* Arnold, 84 N. Y. 668.

An order refusing leave to withdraw a demurrer and plea, after judgment overruling the demurrer without leave to plead to the merits, or with leave not availed of.—*Ct. of App., June,* 1880. Fisher *v.* Gould, 81 N. Y. 228, 232.

An order of General Term refusing to open a default.—*Ct. of App., Dec.*, 1880. Stevens *v.* Glover, 83 N. Y. 611.

An order of the Supreme Court confirming the report of commissioners of estimate and assessment in proceedings to open streets in New York City.—*Ct. of App., June,* 1881. Matter of One Hundred and Thirty-eighth and other streets, 61 How. Pr. 284.

80. Orders granting or refusing a new trial. An order granting a new trial, in an action tried by jury, where the facts were before the General Term, is not appealable.—*Ct. of App., June,* 1880. Whitson *v.* David, 81 N. Y. 645.

81. An order of the General Term granting a new trial in proceedings for the determination of claims against an estate, is not appealable to this court; it is not a final order, and in a special proceeding no appeal to this court is authorized except from a final order. Code of Civ. Pro., § 190.—*Ct. of App., June,* 1880. Roe *v.* Boyle, 81 N. Y. 305.

82. Orders in proceedings for contempt. An order punishing for contempt, in violating an injunction, can only be reviewed, upon the merits or for alleged legal error, on appeal from the order.—*Ct. of App., Jan.*, 1880. Watrous *v.* Kearney, 79 N. Y. 496.

It is within the discretion of the court whether to open or vacate the order on motion, and the exercise of this discretion cannot be reviewed here. *Ib.*

83. Orders in relation to costs. Where an order of General Term, reversing an order of Special Term, as to the disposition of surplus moneys in a foreclosure suit, and sending the case back to the referee, imposes costs absolutely, in this respect it is a final decision, and an appeal to this court can be taken. *It seems* that in the absence of such a provision as to costs, the order is not appealable.—*Ct. of App., Dec.*, 1879. Bergen *v.* Carman, 79 N. Y. 146; Compare Van Gelder *v.* Van Gelder, 84 N. Y. 658.

84. Reviewing discretionary action, generally. The Supreme Court has discretionary power to grant or withhold a common law *certiorari,* and the exercise of this discretion cannot be reviewed here.—*Ct. of App., Nov.*, 1880. People, ex rel. Waldman, *v.* Police Commissioners of New York, 82 N. Y 506.

85. The provision of the Code of Civil Procedure regulating appeals to this court in such cases (§ 190, subds. 2, 3,) does not differ in meaning from that of the Code of Procedure. *Ib.*

86. An application to exonerate a sheriff as official bail, made after the time for answering in an action to charge him as such has expired, is in the discretion of the court below. The exercise of this discretion by a Special Term of the Supreme Court may be reviewed by the General Term, but the determination of the latter court is not reviewable here.—*Ct. of App., Nov.*, 1880. Douglass *v.* Haberstro, 82 N. Y. 572.

87. An order of a Special Term denying a motion to set aside a referee's report and the judgment thereon, and to vacate the order of reference because of irregularity in the proceedings before the referee, is not reviewable here; it is a matter addressed to the discretion of that

court.—*Ct. of App., Feb.,* 1880. Comins *v.* Hetfield, 80 N. Y. 261.

88. Where an order in supplementary proceedings made in the district where the venue was laid and roll filed, appoints a referee and directs all further proceedings to be before a justice of the district where defendant resides, such justice has power to change referees, and the exercise of this power is discretionary and not reviewable here.—*Ct. of App., Jan.,* 1881. Pardee *v.* Tilton, 83 N. Y. 623.

89. —in respect to arrests. An order of arrest is a provisional remedy which the court may grant or refuse in a proper case within its discretion, and the exercise of this discretion is not reviewable here. No appeal lies, therefore, to this court, from an order vacating an order of arrest, when upon any view of the facts the decision can be upheld. Unless the contrary appears in the order, it must be assumed that it was made in the exercise of such discretion.—*Ct. of App., Nov.,* 1880. Clarke *v.* Lowrie, 82 N. Y. 580. S. P., Matter of Townsend, 81 N. Y. 644.

90. —in respect to the pleadings. An appeal lies to the General Term from an order of the Special Term, directing judgment for plaintiff on account of the frivolousness of defendant's answer, before the entry of judgment in pursuance thereof.—*Ct. of App., Nov.,* 1880. Elwood *v.* Roof, 82 N. Y. 428.

91. But an order of General Term reversing the Special Term order is not appealable to this court; it is in the discretion of the court below whether to pass upon the sufficiency of the answer, on motion, or to put the plaintiff to a regular demurrer. *Ib.*

92. —in respect to examination of witnesses. After a party has been permitted to examine a witness at length in reference to a transaction, it is in the discretion of the court to exclude further examination upon the subject, and its decision is not reviewable here.—*Ct. of App., Dec.,* 1879. Cowing *v.* Altman, 79 N. Y. 167. And see Agate *v.* Morrison, 84 N. Y. 672.

93. —in respect to orders made after judgment. The Supreme Court has power to open defaults and to vacate judgments, and a judgment entered upon demurrer may be relieved against as well as any other.—*Ct. of App., June,* 1880. Vanderbilt *v.* Schreyer, 81 N. Y. 646.

94. Whether the power shall be exercised in a case is a question in the discretion of that court, with the exercise of which this court will not ordinarily interfere; and while this power must not be exercised arbitrarily, so as to deprive a party of a valuable right, where facts exist showing that the ends of justice may require its exercise, the determination of the General Term is not reviewable here. *Ib.*

95. This action was commenced in 1866 to foreclose a mortgage executed by defendant G.; C. was made co-defendant upon the ground that he had guaranteed payment of the mortgage, and judgment was demanded in the complaint against both defendants for any deficiency. C. died on January 9th, 1870, and in June of that year judgment was entered *nunc pro tunc* as of January 6th, charging G. only with any deficiency. In November, 1877, there was a sale under the judgment and a large deficiency. Plaintiff died in December, 1878; in December, 1879, his executor moved that the judgment be amended *nunc pro tunc* so as to provide that C. should be liable for any deficiency. The motion was granted by the Special Term, but on appeal to the General Term the order was reversed. *Held,* that conceding the Special Term had power to make the order, it was not bound to exercise it, but it was a matter of discretion; that the exercise of this discretion was reviewable by the General Term but not by this court; also, that the denial of the relief, under the circumstances, was no abuse of its discretion by the General Term.—*Ct. of App., Nov.,* 1880. Grant *v.* Griswold, 82 N. Y. 569.

96. —in respect to compelling entry of judgment. The Supreme Court may, in its discretion, instead of compelling the successful party in an action to enter a formal judgment, direct that unless judgment is so entered within a time specified, the defeated party may enter it; and the exercise of this discretion is not reviewable here.—*Ct. of App., March,* 1881. Wilson *v.* Simpson, 84 N. Y. 674.

97. —in special proceedings. Under the provision of the State Constitution (art. III, § 18,) prohibiting the construction of a street railroad without the consent of a specified portion of adjacent property-owners, or in lieu thereof a determination of commissioners appointed by the General Term of the Supreme Court, that such railroad ought to be constructed and a confirmation thereof by the court, the determination of commissioners is inoperative until so confirmed. The General Term has not a mere formal function; and, while the proceeding before it is in the nature of an appeal, it has original jurisdiction so far that it has the power, and it is its duty to review the whole case and to pass upon the sufficiency of the facts to warrant the determination, and it is within the discretion of said court whether or not to confirm the commissioners' report. The exercise of this discretion is not reviewable here.—*Ct. of App., Sept.,* 1880. Matter of Kings Co. Elevated R'y Co., 82 N. Y. 95.

98. *It seems* that where an order of General Term in such proceedings refusing to confirm the report of commissioners does not state whether it was made upon questions of law or fact, it is to be presumed that the court examined and passed upon the questions of fact as well as those of law. *Ib.*

99. It is competent for a person against whom supplementary proceedings for the collection of a tax have been instituted, *ex parte,* under the statute of 1867, (Laws of 1867, ch. 361,) to move for a dissolution of the order for his appearance and examination on the ground that it was improvidently granted. Where, upon such motion, the question as to whether the person proceeded against was a resident of the county was in dispute, and the evidence in relation thereto was conflicting—*Held,* that the question was not reviewable here. (Code of Civ. Pro., § 1337.)—*Ct. of App., March,* 1881. Bassett *v.* Wheeler, 84 N. Y. 466.

2. *Procedure.*

100. Necessity of exceptions. This court can only review judgments and grant new trials for errors of law; and such errors must be pointed out by exceptions taken at a proper time. Where, therefore, it is alleged that a

verdict is perverse, excessive in amount, and contrary to the law and the evidence, the judgment entered thereon cannot be reviewed here without an exception. This rule has not been changed by the provision of the Code of Civ. Pro., § 999, in reference to the granting of a new trial by the judge presiding at the trial. For such errors, *it seems* the General Term has power to grant a new trial in its discretion, although no exceptions were taken on the trial.—*Ct. of App., Jan.*, 1880. Standard Oil Co. *v.* Amazon Ins. Co., 79 N. Y. 506.

101. Effect cannot be given by this court to a stipulation requiring or consenting to the review on appeal of rulings made by a trial court, to which no exceptions appear in the case.—*Ct. of App., Jan.*, 1881. Briggs *v.* Waldron, 83 N. Y. 582.

102. The case. *It seems* that where, on appeal to this court, cases are served which are defective in not containing the notice of appeal and the judgment and opinion of the General Term, it is not correct practice for respondent's attorney to return the case, and, upon failure to serve others, to enter order dismissing appeal.—*Ct. of App., March,* 1881. Bliss *v.* Hoggson, 84 N. Y. 667.

That the proper practice in such case is to move, upon notice, to have the cases corrected, or that corrected copies be served, and, in default of such correction, that appeal be dismissed, see *Ib.*

103. The calendar—preferred causes. Notwithstanding the provision of Code of Civ. Pro., § 791, giving preferences among civil causes, a party claiming a preference in this court must comply with the directions of rule 20; *i. e.*, he must state such claim in his notice of argument, and the grounds of the preference, etc.—*Ct. of App., Jan.*, 1881. Taylor *v.* Wing, 83 N. Y. 527; S. C., 1 Civ. Pro. 43.

104. An action for an accounting and partition and other relief, is not entitled to a preference because the construction of a will is incidentally involved therein.—*Ct. of App., Feb.*, 1881. Peyser *v.* Wendt, 84 N. Y. 642.

105. To give a cause a preference under the Code of Civ. Pro., § 791, subd. 5, as "an action for the construction of or adjudication upon a will," it must be expressly brought for that purpose. *Ib.*

106. What questions are before the court. When, during the pendency of an appeal to this court, from an order denying a motion to change the place of trial in the action, the plaintiff moves the cause for trial and takes judgment in the county wherein the venue is laid, this court has no jurisdiction to entertain a motion to set aside the judgment; it has only jurisdiction of so much as is brought up by appeal from the order. *It seems* that the motion should be made in the Supreme Court.—*Ct. of App., Dec.*, 1880. Veeder *v.* Baker, 83 N. Y. 163.

107. When opinion of General Term may be examined. While on appeal from an order which expresses the grounds upon which it was put, but the expression is coupled with phrases which create a doubt, the opinion of the court may be referred to, where no ground appears in the order, it cannot be qualified in its operation and effect by reference to the opinion. —*Ct. of App., June*, 1880. Fisher *v.* Gould, 81 N. Y. 228, 230.

108. Where an order, denying an application for an order of arrest or commitment, does not show that it was not made upon the merits, it will be so presumed, and the order is not reviewable here. The opinion below cannot be looked into, unless the language of the order is ambiguous and needs aid for an understanding of the ground on which it went.—*Ct. of App., June*, 1880. Matter of Townsend, 81 N. Y. 644; *Nov.*, 1880, Clark *v.* Lourie, 82 N. Y. 580.

109. The order of Special Term was "in all respects affirmed" by the General Term. *Held*, that this court could only look to the order to ascertain the ground upon which the court below proceeded.—*Ct. of App., Feb.*, 1881. Direct U. S. Cable Co. *v.* Dominion Teleg. Co., 84 N. Y. 153; *reversing* 22 Hun 568.

110. Review of questions of fact. On appeal to this court from a judgment entered on a decision of the court or the report of a referee, no fact can be considered for the purpose of reversing a judgment unless it is either stated in the findings, or was requested to be found on uncontroverted evidence.—*Ct. of App., Sept.*, 1880. Thomson *v.* Bank of British North America, 82 N. Y. 1.

111. Under Code of Civ. Pro., § 1338, where an order of General Term, reversing a judgment entered upon the report of a referee, does not state that it was made on questions of fact, it will be deemed to have been made on questions of law only.—*Ct. of App., Jan.*, 1880. Weyer *v.* Beach, 79 N. Y. 409.

112. An order of General Term, reversing a judgment, entered upon a decision of the court, stated that the reversal was "upon the law and the facts." *Held*, that it sufficiently appeared that the reversal was "upon a question of fact," within the meaning of the provision of the Code of Civ. Pro., § 1338, authorizing a review of such a question by this court.—*Ct. of App., June*, 1880. Van Wyck *v.* Watters, 81 N. Y. 352.

113. Extent of review of referred causes. To sustain an exception to the refusal of a referee, to find facts as requested, it is incumbent upon the party to show that the material facts, so requested to be found, were established by uncontroverted evidence, and that if found they would have affected the result,—*Ct. of App., Jan.*, 1880. Stewart *v.* Morss, 79 N. Y. 629.

114. No question can be raised in this court, upon a matter of fact, in a case tried by a referee, as to which no facts were found by the referee, or requested to be found. *Ib.*

115. In an action upon a promissory note, where the defence was usury, *i. e.*, that the note was executed by defendant for the accommodation of the payee, and was transferred by him at a usurious rate of interest—there was no finding, or request to find, that the note was accommodation paper, upon which question the evidence was conflicting; but the referee found that it was duly made and delivered to the payee, and by him duly indorsed to plaintiff before maturity; to these findings there were no exceptions. *Held*, that this court had no right, for the purpose of reversing the judgment, to find that the note was not business paper; that, *prima facie*, the note was given for value, and the burden was upon defendant to prove the defect alleged. —*Ct. of App., June*, 1880. Bayliss *v.* Cockroft, 81 N. Y. 363, 367

116. Where, upon the trial of an action to compel the cancellation of a deed alleged to have been forged, the issue of forgery was tried by all the parties upon the theory that it depended upon the question whether the signature to the deed was the genuine signature of the apparent grantor, and the referee found it was not executed by him and was not his deed—*Held*, that it could not be claimed upon appeal that the grantor may have acknowledged the deed and so bound himself thereby; that the finding, interpreted with reference to the issue made, was equivalent to a finding that the deed was neither executed nor acknowledged by the grantor; and that the finding was conclusive here.—*Ct. of App.*, *Sept.*, 1880. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474.

117. What errors are ground for reversal. The denial to the party who holds the affirmative of the issue, of the right to open and close upon the trial, is ground for reversal in the Court of Appeals—*Ct. of App.*, *April*, 1881. Murray *v.* New York Life Ins. Co., 9 Abb. N. Cas. 309.

118. What are not. The refusal of a trial court, to whom a case is submitted for determination, to find, upon a question of law involved, as requested by the defeated party, is not error requiring a reversal of the judgment here, although the request might well have been granted, if this court arrives at the same final conclusion as to the right of recovery.—*Ct. of App.*, *Nov.*, 1880. Loeb *v.* Hellman, 83 N. Y. 601.

119. Effect of failure to object in court below. Where, in an action upon an oral contract, the statute of frauds is not pleaded, and there is no objection to proof of the contract by oral testimony, or exception to any finding or conclusion which presents any question under that statute, no such question can be considered on appeal to this court.—*Ct. of App.*, *Sept.*, 1880. Bommer *v.* American Spiral, &c., Manuf. Co., 81 N. Y. 468.

120. Where the statute of limitations is set up as a defence, but no point is made in respect to it on the trial, and no exception taken, raising any question under it, no such question can be considered here. *Ib.*

121. It was objected that no competent order was made for the issuing of an attachment in the action; this objection was not raised at Special Term. Upon the attachment was an indorsement signed by the clerk of the court stating that it was issued by special order of the court. *Held*, that the presumption was that such an order had been made; but in any event, as the objection was not raised below, it was not available here.—*Ct. of App.*, *Feb.*, 1880. Park *v.* Park, 80 N. Y. 156.

122. It is too late for a defendant to claim for the first time, on appeal to this court, that his answer contains a counter-claim which is admitted by not being replied to. It should be insisted upon and the attention of the court or referee called to it on trial, and if not allowed an exception should be taken.—*Ct. of App.*, *Feb.*, 1881. Muldoon *v.* Blackwell, 84 N. Y. 646.

123. It was claimed on appeal, in an action of ejectment, that a judgment for the entire *mesne* profits had been taken against two of the defendants without proof of possession by them, or either of them, of the entire premises. *Held*, that as it did not appear by the record that the point was brought to the attention of the trial court it was not available here.—*Ct. of App.*, *Sept.*, 1880. Hynes *v.* McDermott, 82 N. Y. 41.

124. Waiver of objection. Judgment having been entered against defendant, upon an order overruling his demurrer to the complaint, he appealed to the General Term. He subsequently moved at General Term for leave to discontinue his appeal, to withdraw his demurrer and to answer, which motion was, by consent of counsel on both sides, there heard. *Held*, that upon appeal from an order granting the application, the objection could not be raised that the motion to withdraw the demurrer and answer could not properly be made at General Term.—*Ct. of App.*, *June*, 1880. Vanderbilt *v.* Schreyer, 81 N. Y. 646.

125. Allowing amendments. A General Term of the Supreme Court has power to amend its record, after an appeal to this court, by inserting in an order of reversal that its decision was made upon questions of fact.—*Ct. of App.*, *Feb.*, 1880. Guernsey *v.* Miller, 80 N. Y. 181.

126. The pleadings in an action will not be amended on appeal to this court for the purpose of reversing a judgment. *Ct. of App.*, June, 1881. Volkening *v.* De Graaf, 81 N. Y. 268, 272.

127. The decision of the General Term herein was filed nearly two years, and the appeal to this court was taken more than one year ago. The respondents' counsel requested, in case the court reached a conclusion different from that of the General Term, that it would suspend its decision, to give opportunity to apply to that court for an order showing that the reversal was upon the facts as well as the law. It did not appear that the reversal was upon the facts. *Held*, that the request could not be granted; that it would not be proper to allow a new decision to be made by the court below to defeat the appeal; and that if the reversal was upon the facts, the respondents should have taken proceedings before the argument and submission of the case to procure an amendment of the order of General Term.—*Ct. of App.*, *Oct.*, 1880. Hamlin *v* Sears, 82 N. Y. 327.

128. When an affirmance is proper. The caption of an order for the service of summons by publication was "At a Special Term of the Supreme Court, * * * held at chambers;" and there was a direction to enter it. It did not appear that it was entered as a court order; it was in fact made by the judge whose name appeared in the caption, out of court, in his private chambers; it was signed with his initials and those of his office; and in the body thereof it purported to be made by the judge. The General Term held that the caption and the direction to enter were not conclusive, and that the order was good as a chamber order of the judge. *Held*, that as the question was purely one of form, this court would not differ with the court below on so technical a point of practice. Order, therefore, affirmed.—*Ct. of App.*, *April*, 1880. Phinney *v.* Broschell, 80 N. Y. 544; *affirming* 19 Hun 116.

129. Rendering judgment absolute on affirmance. Under the provisions of the Code of Civ. Pro., §§ 191,194, requiring a party, on appeal from an order granting a new trial, to stipulate for judgment against him in

case of affirmance, and directing this court, in such case, to render judgment absolute upon the right of the appellants; also authorizing such proceedings in the court below upon the *remittitur* as are necessary to render the judgment effectual, the judgment must be absolute against the appellant upon the whole matter and right in controversy in the action.—*Ct. of App., March,* 1880. Hiscock *v.* Harris, 80 N. Y. 403.

130. Where, therefore, an order, reversing a judgment in favor of plaintiff and granting a new trial, is affirmed on appeal to this court, and judgment absolute ordered, in an action wherein the answer sets up a counter-claim, defendant is entitled to such judgment upon the *remittitur* as the facts alleged by him in his answer entitle him to. *Ib.*

131. When a reversal is proper. While if, in proceedings under the New York city charter of 1873, (§ 28), by the head of a department to remove a subordinate, there is any evidence from which an inference of incapacity or unfitness can be drawn, this court will not reverse his decision; there must be some evidence to justify a removal, and where there is none the removal is not "for cause," and the order may be reversed here.—*Ct. of App., Oct.,* 1880. People, ex rel. Campbell, *v.* Campbell, 82 N. Y. 247.

132. Re-argument. The omission of the appellant to present a point appearing in the case upon the argument of a cause in this court is not, as a general rule, a ground for re-argument; the ordinary rule that an exception not raised on argument is to be deemed abandoned will govern.—*Ct. of App., June,* 1880. Rogers *v.* Laytin, 81 N. Y. 642.

133. Dismissal of appeal. For the purposes of a motion to dismiss, an appeal is to be regarded as pending where notice of appeal was duly served and undertaking given, and the appellant has not abandoned the appeal.—*Ct. of App., Dec.,* 1880. Stevens *v.* Glover, 83 N. Y. 611.

134. The Court of Appeals will not decide mere abstract questions from the determination of which no practical result can follow. Where, therefore, on appeal from an order denying an application for a *mandamus* to compel the common council of a city to appoint certain officers, it appeared that the official term over which the controversy arose had already expired—*Held,* that the appeal should be dismissed.—*Ct. of App., Nov,* 1880. People, ex rel. Geer, *v.* Common Council of Troy, 82 N. Y. 575.

135. Where no undertaking is given on appeal, and no return filed and no steps taken in this court, there is no appeal, and a motion to dismiss cannot be granted.—*Ct. of App., Sept.,* 1880. Benedict, &c., Manuf. Co. *v.* Thayer, 82 N. Y. 610.

136. This action was brought to recover back two items of moneys alleged to have been extorted from plaintiff without consideration and wrongfully; the defences were a denial of the wrongful acts charged and averments that one of the items was paid for services rendered by a bank of which defendant was president, and that the payment was to said bank and not to defendant; as to the other item that it was a charitable donation to a church of which defendant was treasurer, and that both were paid voluntarily; evidence was given on the trial supporting the defence as to both items. Upon appeal from an order of General Term reversing a judgment in favor of plaintiff entered on the verdict of a jury and granting a new trial—*Held,* that, assuming the payments were made without consideration, and though voluntarily made could be recovered back (as to which *quære*), yet if the defendant was not guilty of the wrongs charged, and as to one of the items simply acted as agent of his bank in receiving the money, and the payment was in fact to the bank and went to its use (which facts it was conceded by appellant's counsel were to be assumed in favor of respondent), defendant was not personally liable for that item, but the action should have been against the bank; that at least as to so much of the recovery it was erroneous, and being wrong in part a new trial was proper. Appeal, therefore, dismissed.—*Ct. of App., Sept.,* 1880. Amer. Nat. Bank *v.* Wheelock, 82 N. Y. 118.

137. Effect of the appellate judgment. As to the power of the court of original jurisdiction to modify a judgment of the Special and General Term, after affirmance by the Court of Appeals, see Sheridan *v.* Andrews, 80 N. Y. 648.

138. The remittitur, and its effect. This court does not lose jurisdiction of a cause brought here upon appeal until the *remittitur* has been filed in the court below, and that court has taken some action thereon.—*Ct. of App., Dec.,* 1879. Smith *v.* Village of Nelliston, 79 N. Y. 638.

139. Restitution on reversal. Where, under an adverse judgment in an action in the nature of a *quo warranto,* the defendant who was in the possession of the office, having a certificate of election from the duly constituted board of canvassers, was removed from the office—*Held,* that upon reversal of the judgment here, the court had power and it was proper to compel restitution of the rights lost by means of the erroneous judgment (Code of Civ. Pro., § 1323); also, that the court could not look into the case to see which way the merits inclined as between the two contestants; the defendant having the adjudication in his favor required by the statutes, and by virtue of it having held and exercised the office, this is conclusive until the certificate has been corrected or shown to be false by judicial determination. (1 Rev. Stat., 118, § 17.)—*Ct. of App., Feb.,* 1880. People, ex rel. Dailey, *v.* Livingston, 80 N. Y. 66.

IV. Appeals from Marine Court to Court of Common Pleas, in New York City.

140. Notice of appeal—stipulation. The provision of the act of 1874, in reference to the Marine Court of the city of New York, (Laws of 1874, ch. 545, § 9,) which requires that a notice of appeal, from an order of the General Term of said Marine Court to the Court of Common Pleas, reversing a judgment and granting a new trial, shall "contain an assent, on the part of the appellant, that if the order be affirmed, judgment absolute shall be entered against him," etc., was not repealed or abrogated by the provision of the act of 1875, (Laws of 1875, ch. 477,) in reference to said Marine Court, which regulates appeals from the General Term thereof.—*Ct. of App., Dec.,* 1879. Gordon *v.* Hartman, 79 N. Y. 221.

141. Judgment absolute on affirmance. Where the Common Pleas affirms the order appealed from, and gives judgment absolute on the stipulation against the appellant, the judgment is final; and no appeal therefrom lies to the Court of Appeals. *Ib.*

142. Where upon such an appeal it appears that there was a controverted question of fact involved to go to the jury, judgment absolute must be given against the defendant.—*Com. Pleas.*, (*Gen. T.*,) *April*, 1881. Webber *v.* Truax, 61 How. Pr. 34.

V. Appeals from County Courts to Supreme Court.

143. From judgment on report of referee. A judgment on a report of a referee in an action commenced in a justice's court and re-tried in a County Court, may be reviewed at General Term of the Supreme Court, without a motion for a new trial first made in the County Court.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. Cook *v.* Darrow, 22 Hun 306.

144. What orders are appealable. An order of the County Court, setting aside a sale made by an assignee for creditors, on a motion, is appealable to the General Term.—*Supreme Ct.*, (*3d Dept.*,) *Nov.*, 1880. Matter of Rider, 24 Hun 91.

145. What are not. No appeal lies to the General Term from an order of the County Court denying a motion for a new trial, made in an action originally commenced in a justice's court. The appeal should be taken from the judgment entered in the County Court.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. Perry *v.* Round Lake Camp Meeting Association, 22 Hun 293.

146. The provision of the Code of Civ. Pro., § 1342, in reference to appeals to the Supreme Court from orders of a County Court, confines the appellate jurisdiction to orders in actions originating in the County Court. Therefore—*Held*, that an order of a County Court dismissing an appeal from a judgment of a justice of the peace, was not appealable to the Supreme Court.—*Ct. of App.*, *Jan.*, 1880. Andrews *v.* Long, 79 N.Y. 573. S. P., Fish *v.* Thrasher, 21 Hun 15; Roberts *v.* Marson, Id. 363.

147. Effect of the appeal while pending. On a motion to set aside a county judge's order appointing a receiver in supplementary proceedings, it appeared that an appeal had been taken to the General Term, which appeal was still pending. *Held*, that such appeal must be deemed to be a waiver of such irregularities, if any there were, as were not brought up by it for review, and as to all such alleged irregularities and improper acts of the county judge as were covered by the appeal, they would be considered when the appeal should be heard at General Term. All action proper to be taken at Special Term, either to vacate it or correct it, should be taken before the bringing of the appeal from it to the General Term.—*Supreme Ct.*, (*Saratoga Sp. T.*,) *Aug.*, 1880. Tinkey *v.* Langdon, 60 How. Pr. 180.

VI. Appeals from Surrogates' Courts.

148. When an appeal will lie. The proper remedy for erroneous allowance of counsel fees by a surrogate on final accounting of executors, is by appeal, not by motion to open the decree and vacate the allowance.—*Ct. of App.*, *April*, 1880. Marsh *v.* Avery, 81 N. Y. 29.

149. When it will not lie. A surrogate has power, in proceedings to prove a contested will, after the testimony has been closed and the case submitted, to grant an order, on motion opening the case, to allow a witness to correct his testimony. The granting of the motion is in the discretion of the surrogate, and is not reviewable here.—*Ct. of App.*, *June*, 1880. Martinhoff *v.* Martinhoff, 81 N. Y. 641.

150. Procedure on reversal. Upon reversal on appeal on the law to the General Term, from the decree of the surrogate of New York county establishing a lost or destroyed will, it is proper to remit the proceedings to the surrogate, and costs should be awarded against respondent.—*Ct. of App.*, *Feb.*, 1881. Sheridan *v.* Houghton, 84 N. Y. 643.

151. The probate of a codicil to a will was contested, both on the ground of want of due execution, and of undue influence. There was evidence tending to sustain the latter ground. The surrogate refused to admit it to probate upon the first ground without passing upon the latter. The General Term, upon appeal, reversed the decree of the surrogate, and directed him to admit the codicil to probate. *Held*, error; that the case should have been remitted to the surrogate to be heard upon the question of undue influence.—*Ct. of App.*, *March*, 1881. Dack *v.* Dack, 84 N. Y. 663; *modifying* 19 Hun 630.

VII. Enforcement of Appeal Bonds.

152. Justification. Sureties to an undertaking on appeal to the General Term are not released from their liability by their failure to justify after being excepted to, and it is competent for the respondent to waive the justification of the sureties after he has excepted to their sufficiency; as the justification is a matter relating to his protection, and not that of the appellant.—*Superior Ct.*, (*Gen. T.*,) *May*, 1881. Manning *v.* Gould, 1 Civ. Pro. 216.

153. It may be said that the sureties are, in law, liable upon the proper execution and delivery of the undertaking, and that all else in regard to the undertaking is matter of practice. *Ib.*

154. Liability of the sureties. Where, upon an appeal to the Court of Appeals from an order granting a new trial, the court affirms the order, and renders a judgment absolute in favor of the respondents, in pursuance of section 194 of the Code of Civil Procedure, the sureties upon the undertaking, given by the appellants, are liable for all the costs in the action, and not simply for those incurred by the appeal to the Court of Appeals.—*Supreme Ct.*, (*1st Dept.*,) *Nov.*, 1880. Burdette *v.* Lowe, 22 Hun 588.

155. Upon an appeal from a judgment against defendant W., in an action for the recovery of possession of real property, he gave an undertaking to stay proceedings, in the form prescribed by the Code of Pro., § 338, containing among other things this provision that "during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon." The judgment appealed from was affirmed by the General

Term. W. appealed to this court, giving the requisite undertaking with new sureties. While this appeal was pending, W., who remained in possession, committed waste. In an action on the undertaking given on appeal to the General Term—*Held*, that the surety was liable for the waste so committed; that his liability was not limited to waste committed pending the appeal to the Supreme Court.—*Ct. of App., Dec.*, 1880. Church *v.* Simmons, 83 N. Y. 261; *reversing* 19 Hun 220.

156. *It seems* that if, after judgment of affirmance, the defendant had continued in possession by permission of the plaintiff under an agreement constituting the relation of landlord and tenant, the obligation of the surety would not extend to subsequent acts of the tenant. *Ib.*

157. *It seems*, also, that after such judgment the surety would have been entitled to call upon the plaintiff to execute the judgment and relieve him from liability; and unreasonable delay in proceeding after such notice would discharge the sureties from liability as to subsequent acts. *Ib.*

158. *It seems*, also, that the sureties in the first undertaking would be entitled to resort, for their indemnity, to the undertaking on the second appeal. *Ib.*

159. **—of surviving surety.** Where, upon an appeal to the General Term, the appellant, in order to stay proceedings during the pendency thereof, gave a joint undertaking with two sureties, one of whom thereafter became insolvent and died—*Held*, that upon the affirmance of the judgment appealed from, the surviving surety was liable to the plaintiff for the amount secured by the undertaking.—*Supreme Ct., (3d Dept.,) Sept.*, 1880. Comins *v.* Pottle, 22 Hun 287.

160. **What change of parties will not discharge surety.** Where, subsequent to the giving of an undertaking on appeal to the General Term the appellant died, and the action was revived against his administratrix and the judgment affirmed on appeal—*Held*, that under section 815 of the Code of Civil Procedure the undertaking was not affected by such change of parties, and that the sureties were liable. Manning *v.* Gould, *supra*.

As to *taking exceptions, framing the bill, the hearing, &c.*, see EXCEPTIONS.

For *other methods* of review, see CERTIORARI; ERROR; NEW TRIAL.

As to *costs* on appeal, see COSTS, II.

As to appeals from *Justices' courts*, see JUSTICE OF THE PEACE.

APPEARANCE.

ACTION, 11, 12.

APPLICATION OF PAYMENTS.

DEBTOR AND CREDITOR, II.

ARBITRATION AND AWARD.

I. THE SUBMISSION; AND PROCEEDINGS THEREUNDER.
II. THE AWARD; AND HOW ENFORCED.
III. IMPEACHMENT OF THE AWARD.

I. THE SUBMISSION; AND PROCEEDINGS THEREUNDER.

1. **Who may make a submission.** That the board of supervisors has power to submit to arbitration the validity and reasonableness of a claim made against the county, see People, ex rel. Benedict, *v.* Supervisors of Oneida Co., 24 Hun 413.

2. As to the power of executors to submit to arbitration differences arising between them and devisees or legatees, and the propriety of submitting such questions to the counsel for the estate as arbiter, see Whitney *v.* Phœnix, 4 Redf. 180.

3. **Construing the submission.** A submission by the parties hereto to arbitrators, in the usual form, contained this clause: "The arbitration shall be conducted and decided upon the principle of fair and honorable dealing between man and man." *Held*, that this did not justify a decision of the arbitrators that the submission limited them to passing upon the statements of the parties only.—*Ct. of App., Sept.*, 1880. Halstead *v.* Seaman, 82 N. Y. 27.

4. **Swearing the arbitrators.** As to what amounts to a waiver of the failure of an arbitrator to be sworn, see Kelsey *v.* Darrow, 22 Hun 125.

II. THE AWARD; AND HOW ENFORCED.

III. IMPEACHMENT OF THE AWARD.

5. **In general.** The general rule that the decisions of arbitrators are not reviewable on the mere ground that they are erroneous, applies only to their decisions on matters submitted to them. Halstead *v.* Seaman, *supra*.

6. The construction by arbitrators of the submission to them is not conclusive; it is for the court to determine whether they have exceeded their powers or refused to exercise them. *Ib.*

7. In an action to recover an item allowed plaintiffs by an award, the defendants in their answer alleged, among other things, that the arbitrators exceeded their jurisdiction, that the award was void upon its face, and that it was corruptly and fraudulently made, by the procurement of the plaintiffs, and therefore void; also, that it was invalid for other reasons stated. The relief demanded was that the award be adjudged void, that the same be vacated and set aside, and the submission be declared to be revoked, and that the complaint be dismissed. Plaintiffs replied, denying the facts stated in the counter-claim. Plaintiffs obtained judgment sustaining the award, and for the sum claimed; this was reversed by the General Term, and new trial granted. The order of General Term was affirmed here, and judgment absolute or-

dered for defendants. Judgment of affirmance was entered on the *remittitur*, which also contained a clause adjudging the contract of submission to arbitrators, and the award to be void, and setting aside the same, and adjudging all acts and proceedings under and in pursuance of the submission and award to be void. On motion to strike out said clause—*Held*, that the judgment entered was too broad; that there were no allegations in the pleadings showing the contract of submission to arbitration to be void; and there was no authority for adjudging the proceedings and acts done under the submission and award to be void; but that defendants were entitled to have the award adjudged void, and all subsequent proceedings depending solely upon it, leaving the submission to stand. —*Ct. of App., March,* 1880. Hiscock *v.* Harris, 80 N. Y. 403.

8. —for misconduct of arbitrators. The refusal of an arbitrator to hear testimony which is pertinent and material, is sufficient misconduct to authorize the setting aside of his award, although he may think he has sufficient other evidence. Halstead *v.* Seaman, *supra.*

9. The statements presented by the parties were conflicting; plaintiff insisted upon calling witnesses in his behalf to disprove defendant's statements, and named two witnesses whom he offered to produce. A majority of the arbitrators refused him permission and refused to receive any evidence other than the statements, basing their refusal upon the ground that under the submission their powers were limited to the statements. *Held*, that it was not necessary for plaintiff, in order to preserve his rights, to produce or name his witnesses, or to state what facts he intended to prove by them; and that the refusal was misconduct which vitiated the award. *Ib.*

As to the appointment, powers and duties of *Referees*, see Reference, and titles there referred to.

As to *Referring claims against decedents' estates*, see Executors and Administrators, III.

ARRAY.

As to *Challenging jurors*, collectively or individually, see Trial, IV., VIII.

ARREST.

I. In Civil Actions.

1. *Under the Stilwell act.*
2. *Under the codes.*
   - (*a*) The right to an arrest.
   - (*b*) Obtaining and service of the order.
   - (*c*) Motion to vacate.

II. In Criminal Cases.

I. In Civil Actions.

1. *Under the Stilwell act.*

1. What will justify the issue of a warrant. To justify an arrest under the non-imprisonment act of 1831, on the ground of an unjust refusal to apply property in satisfaction of a judgment, a specific demand and refusal must be shown; the mere statement of an unjust refusal is insufficient, especially when the charge is made on information and belief.—*Supreme Ct.,* (*Gen. T.,*) *Feb.,* 1880. Matter of Townsend *v.* Nebenzahl, 8 Abb. N. Cas. 427.

2. *Under the codes.*

(*a*) The right to an arrest.

2. In general. The liberty of a citizen is of quite as much importance as the preservation or security of property, and the provisions of the code, in relation to obtaining orders of arrest, should be strictly construed.—*Supreme Ct.,* (1*st Dept. Sp. T.,*) *April,* 1881. Southern, &c., Nav., &c., Co., *v.* Sherwin, 1 Civ. Pro. 44.

3. The issuing of an order of arrest is not a matter of course, and it is the duty of a plaintiff who invokes the aid of the court in obtaining such an order, to see that he has complied with all the requirements of law applicable thereto. *Ib.*

4. When a party who has elected to take judgment as for goods sold cannot sustain an order of arrest for conversion, see Fields *v.* Bland, 81 N. Y. 239.

5. In action on foreign judgment. A plaintiff suing upon a foreign judgment (in this case, a judgment of a Circuit Court of the United States sitting in another state,) is entitled, under Code of Civ. Pro, § 552, to an order of arrest, if the original cause of action was of such a nature as would have authorized an arrest under the provisions of the code.—*Ct. of App., July,* 1881. Baxter *v.* Drake, 1 Civ. Pro. 225; S. C., 61 How. Pr. 365; *affirming* 22 Hun 565.

6. Where the complaint in an action upon a foreign judgment was confined wholly to the allegations of recovery of such judgment, &c., but it appeared by affidavits on which an order of arrest was granted, that the original cause of action was a conversion of property—*Held*, that the original cause of action and the right to an order of arrest were not merged by the recovery of the foreign judgment, and that an order of arrest might be granted upon affidavits showing the original existence of a proper ground for arrest. *Ib.*

7. Grounds: Disposal of property with intent, &c. In an action brought upon a promissory note, an order for the arrest of the defendant may be granted where it is shown that he has, subsequently to the making of the note, disposed of his property with intent to defraud his creditors, although such fraudulent acts are not set forth in the complaint.—*Supreme Ct.,* (1*st Dept.,*) *May,* 1881. Duncan *v.* Guest, 24 Hun 639.

8. Second arrest not favored. Plaintiff commenced an action and obtained an order of arrest on the ground of fraudulent representations made by defendant, which order was vacated upon the ground that the alleged fraudulent representations did not apply to the whole

cause of action. On motion by plaintiff for leave to discontinue the action. *Held*, that as plaintiff's object was to commence a new action and obtain a second order of arrest, leave to discontinue should not be granted.—*Com. Pleas*, (*Sp. T.*,) *Jan.*, 1881. Livermore *v.* Berdell, 60 How. Pr. 308.

(*b*) Obtaining and service of the order.

9. Power to grant it. So much of section 551 of the Code of Civil Procedure as provides that, in a case specified in subdivision 4 of section 550, an order of arrest can only be granted by the court, is not applicable to the first judicial district, and in the said district such an order may be made, by a judge out of court, at any time.—*Supreme Ct.*, (*1st Dept.*,) *June*, 1880. Boucicault *v.* Boucicault, 21 Hun 431.

10. What must be alleged in the complaint. To authorize the granting of an order of arrest, under Code of Civ. Pro., § 549, subd. 4, as amended in 1879, the complaint must allege the debt which is the fundation of the cause of action therein set forth, to be fraudulent or to have been fraudulently contracted, and must limit the application for the order to such cause of action.—*Supreme Ct.*, (*1st Dept.*,) *June*, 1880. Easton *v.* Cassidy, 21 Hun 459; Compare, King *v.* Arnold, 84 N. Y. 668.

11. The order. It is no objection to an order of arrest, granted under the Code of Civ. Pro., § 550, subd. 4, that it prescribes the form of the undertaking to be taken by the sheriff, if such form corresponds with that required by subdivision 1 of section 575 of said code. Boucicault *v.* Boucicault, *supra.*

12. Undertaking to procure discharge. If an unauthorized security is designedly taken by a public officer from a person under arrest, as a ground of his discharge, it is void as having been taken *colore officii*, although the officer may not have designed to violate the law.—*Ct. of App., Feb.*, 1880. Cook *v.* Freudenthal, 80 N. Y. 202.

13. Defendant H., having been arrested upon an order of arrest issued in an action to recover the possession of personal property, was discharged from arrest upon giving to the sheriff an undertaking, in and by which the sureties undertook that H. should "at all times render himself amenable to the process of the court, * * * and for the payment to the plaintiffs of such sum as may, for any cause, be recovered against the defendant," instead of an undertaking for the delivery of the property to the plaintiff, if delivery be adjudged, etc., as prescribed by Code of Pro., §§ 187, 211. In an action upon the undertaking — *Held*, that the final clause therein, *i. e.*, as to payment, was to be construed in connection with the provision of said code (§ 277), directing the form of judgment in such an action; and that, as so construed, it was not an absolute undertaking to pay the value of the property, but only to pay on condition that no delivery can be had; but that the undertaking was void as having been taken *colore officii*, within the meaning of the statute (2 Rev. Stat., 286 § 59,) for the reason that it bound the sureties for the amenability of H. to process, an obligation which could not be required from H. as a condition of his relief. *Ib.*

14. It was claimed that this provision in the undertaking should be rejected as surplusage, for the reason that an execution against the body could not issue on the judgment in the action, and so that no liability cuuld arise under the clause in question.

Held, 1. That this ground was untenable, as an execution against the body could have been issued (Code, § 288,) after a return unsatisfied of an execution against the property of H.

2. That in the absence of any evidence as to the circumstances under which the undertaking was given, it was to be assumed that the sheriff designedly took the undertaking in the form in which it was given.

3. That the undertaking could not be treated as an agreement between the parties to the replevin suit, and so enforceable by plaintiffs; that, although taken by the sheriff for the benefit of the plaintiffs, it was also for his own protection, and in taking it he acted, not as the private agent of the plaintiffs, but as agent of the law. *Ib.*

15. The doctrine of ratification by the plaintiff in an action, of an unauthorized act of the sheriff, has no application to the case of a security taken by him in the assumed exercise of his official authority and duty, from one under arrest, containing conditions not embraced in the statutes. *Ib.*

16. Where the sheriff, after an arrest had been made, under an order which specified, as prescribed by the Code of Procedure, § 183, the sum for which defendant should be held to bail, and after declining to accept a bond executed by one instead of by two or more sufficient bail as prescribed by said code, § 187, did agree, at defendant's solicitation, to take to plaintiff's at torneys an undertaking executed by one in double the amount specified in the order, and if it should be approved and accepted by them, that defendant should be discharged, the latter agreeing that if they should decline to accept he would, on being notified, give a new undertaking, as prescribed by the code, and in the meanwhile should remain in the custody of his bail, and where said attorneys accepted the undertaking so executed—*Held*, that the undertaking, when thus accepted, might be regarded as an agreement made between the parties to the action, and not as an undertaking taken by the sheriff under claim or in the exercise of official authority; and that so considered it became operative and binding, though not as a statutory obligation.—*Ct. of App., March*, 1881. Toles *v.* Adee, 84 N. Y. 222. *Consult* BAIL, I.

17. Extinguishment of order by execution against the body. Where judgment in an action has been perfected against the defendant and he has been charged in execution, a provisional order of arrest issued thereon is extinguished, and is thereafter of no force or validity; it is not revived by a reversal of the judgment. Therefore—*Held*, that upon such reversal the relators, who were held in confinement under the execution, could not be held under the order of arrest, but were entitled to their discharge.—*Ct. of App., April*, 1880. People, ex rel. Roberts, *v.* Bowe, 81 N. Y. 43; S. C., 8 Abb. N. Cas. 234.

(*c*) Motion to vacate.

18. The proper place to move. Code of Civ. Pro., § 568, authorizing a motion to va-

cate an order of arrest, founded upon proof by affidavit on the part of the defendant, to be made "to the court, or, if the order was granted by a judge out of court, to any judge of the court upon notice," is not in conflict with, nor does it abrogate the provisions of section 769 of the said code, which requires all motions, upon notice, in an action in the Supreme Court, to be made within the judicial district in which the action is triable, or in a county adjoining it, except that when it is triable in the first judicial district, the motion must be made therein.—*Supreme Ct.*, (1*st Dept.*,) *Nov.*, 1880, Sutton *v.* Sabey, 22 Hun 557.

19. A motion under Code of Civ. Pro., § 572, to discharge a defendant held in actual custody under an order of arrest, on the ground that the plaintiff has neglected to enter judgment in the action within one month after it was in his power so to do, need not be made in the judicial district or in the county adjoining the judicial district in which the action is triable, but may be made to a judge of the court in which the action was commenced, within the county where the defendant is held in custody.—*Supreme Ct.*, (2*d Dept.*,) *Sept.*, 1880. Sumner *v.* Osborn, 22 Hun. 13.

The right of the defendant to a discharge depends upon the fact of his being held in actual custody, and not upon the fact that the plaintiff or his attorney knew that he had been surrendered by his bail, and was so held. *Ib.*

20. Evidence on the hearing. When the facts on which an order of arrest is granted are not extrinsic to the cause of action, but the nature of the action alone furnishes the authority for granting it, it should not be vacated upon evidence tending to disprove the existence of the cause of action; the merits of the controversy should not be determined upon affidavits, but should be allowed to await the trial of the action.—*Supreme Ct.*, (2*d Dept.*,) *Sept.*, 1880. Peck *v.* Lombard, 22 Hun 63.

21. Opposing the motion. The plaintiff cannot defeat the motion to vacate or modify, by objecting that it has been held under consideration more than twenty days, in violation of Code of Civ. Pro., § 719, as amended in 1879, which requires such motion to be decided within twenty days. An order referring such a motion to a referee, though made after the lapse of more than twenty days, is not void, nor to be set aside, on plaintiff's motion, on that ground.—*Buff. Superior Ct.*, (*Sp. T.*,) *Dec.*, 1879. Stafford *v.* Ambs, 8 Abb. N. Cas. 237.

22. Amending the complaint on the motion. Where an order of arrest was granted upon a complaint which failed to set forth a cause of action, and an application on behalf of the defendant to vacate the order was founded on the papers upon which it was granted, and the plaintiff served upon the attorneys for the defendant an amended complaint, and moved, with a view of sustaining the order, that the original complaint be declared amended *nunc pro tunc*, as of the date of its service upon defendant—

Held, 1. That the motion to so amend the complaint should not be granted for the purpose of upholding the order of arrest.

2. That as the motion to vacate the order was made upon the plaintiff's own papers, to permit him to introduce an amended complaint would be to allow him to refer to papers other than those on which the order was granted, and would be in violation of section 568.—*Supreme Ct.*, (1*st Dept. Sp. T.*,) *April*, 1881. Southern, &c., Nav., &c., Co. *v.* Sherwin, 1 Civ. Pro. 44.

23. When the motion should be granted. An order of arrest was issued in an action to recover damages for wrongfully and maliciously cutting down and carrying away certain telegraph poles, with the wires and insulators attached thereto, which were located in a highway in the State of New Jersey, and formed part of a continuous telegraph line in operation in that state. On motion to vacate the order of arrest—*Held*, that the order was not properly granted; that as the poles were affixed to the soil they were part of the realty, and the cutting down of the same was a trespass, the damages for which could only be recovered in an action *quare clausum fregit;* that the cutting down and removal charged was one continuous transaction, constituting but one cause of action, which could not be divided, and was local; also, that the objection as to jurisdiction could be taken on such a motion; as, if the order of arrest was granted without authority, defendant was entitled to have it vacated, and was not bound to raise the question by answer or demurrer.—*Ct. of App.*, *March*, 1880. American Union Teleg. Co. *v.* Middleton, 80 N. Y. 408.

24. It appeared, by the affidavits, that defendant cut the poles in a highway, and carried them to the ditches and side fences of the road, and left them. *Held*, that conceding the poles and wires could have been made the subject of a conversion after they had been severed, no such conversion actually took place; also, that as the order of arrest was granted for the cutting, as well as the conversion, even if such conversion took place, the order should be vacated, for the reason that the right of arrest is not applicable to all the causes of action. *Ib.*

25. An order of arrest was granted on affidavits showing that certain personal property belonging to plaintiff had been intrusted to defendant S., upon her agreement that she and the other defendant would sell it for the plaintiff and account to him for the proceeds, instead of which they had secreted and taken it away. On motion to vacate the order it appeared that after the property had gone into the possession of S.. plaintiff accepted from her a confession of judgment; the statement upon which it was entered declared that the property was "sold and delivered" to her, and that for its value see was indebted to plaintiff. After the facts alleged to show conversion were known to plaintiff he issued an excution upon said judgment and collected a part thereof. Plaintiff in opposition alleged that the judgment was taken as security merely. *Held*, that the judgment was conclusive against plaintiff upon this question; that by accepting and enforcing it by execution he must be deemed to have made his election to treat the property as that of S. under a sale from him, and that he could not now change his ground; and that, therefore, a refusal to vacate the order was error. —*Ct. of App.*, *June*, 1880. Fields *v.* Bland, 81 N. Y. 239.

26. This action was brought to recover moneys alleged to have been fraudulently embezzled and misappropriated by defendant while acting as a book-keeper for plaintiff.

Upon a motion to vacate an order of arrest granted herein, the court below found that a portion of the sum sought to be recovered had probably been fraudulently appropriated by defendant, and that the residue had been obtained and used by him, with the plaintiff's knowledge and consent, and held that, inasmuch as the demand, upon which an order of arrest could have been properly granted, had been united with one upon which it could not be granted, that the order should be vacated. *Held*, that the order was properly vacated.—*Supreme Ct.*, (1*st Dept*,) *June*, 1880. Easton *v.* Cassidy, 21 Hun 459.

27. What defects in an affidavit for an order of arrest will warrant a setting aside of the order and a denial of the application to amend, see Jones *v.* Platt, 60 How. Pr. 73.

28. Requiring stipulation not to sue for false imprisonment. The court, in granting a discharge from arrest when the arrest was made upon an execution issued without authority of law, has no power to impose a condition that the party thus discharged from an unlawful arrest shall not bring an action to recover his damages for such unlawful imprisonment. The irresistible effect of such a rule would be to compel a party to surrender one right to obtain another right to which he was entitled absolutely.—*Supreme Ct.*, (*Chamb.*,) *Nov.*, 1880. Mayer *v.* Rothschild, 59 How. Pr. 510.

29. The rule that where an arrest is made on process void for want of jurisdiction, a condition not to sue for false imprisonment cannot be lawfully imposed on a motion to vacate the process, applied. Matter of Faulkner *v.* Morey, 22 Hun 379.

II. In Criminal Cases.

30. Arrest without warrant. A police officer or other known conservator of the peace, may lawfully interpose to prevent a breach of the peace, and so long as there remains any danger of it the duty of interference continues. He has the right to remonstrate against noise and disturbance in the street, and if an assault upon him be attempted for so doing, he may arrest the offender.—*Superior Ct.*, *April*, 1880. McIntyre *v.* Raduns, 46 Superior 123.

31. What constitutes a breach of the peace, also the general rights and duties of police officers in making arrests, considered by the court. *Ib.*

32. A police officer is not authorized without process, to arrest a person as a common prostitute, on the ground that she is a disorderly person, unless the offence was committed in his presence.—*Supreme Ct.*, (3*d Dept.*,) *Sept.*, 1880. People, ex rel. Kingsley, *v.* Pratt, 22 Hun 300.

33. A city ordinance providing that "policemen shall have power * * * to arrest * * * all vagrants, common prostitutes, drunkards and other disorderly persons found in the city," must be construed as a power to arrest such offenders in the manner required by the general common and statutory law of the state, and not as giving additional power to such officers, not warranted by and not in harmony with such general law. *Ib.*

As to *putting in bail*, see Bail.

As to *execution against the person*, see Execution, II.

ARSON.

1. Averment of ownership of building. The indictment charged the prisoner as accessory to the crime of arson in the first degree; it charged that the fire was set by the principals in the night-time, and burned the dwelling-house of K., in which he then was. It appeared that the building was a five-story tenement-house, having a common entrance in front and in the rear. The front entrance opened into a hall-way, used in common, and the apartments in the several floors opened into a common hall. The prisoner, with his wife, occupied three rooms; K., with his family, occupied three adjoining rooms; there was no direct communication between the rooms of K. and those occupied by the prisoner; the fire was set in the prisoner's rooms and burned portions of them. *Held*, that the indictment was well drawn; that the building was a dwelling-house, and was the dwelling-house of K. within the meaning of the statute defining arson in the first degree. (2 Rev. Stat. 657, § 9.)—*Ct. of App.*, *March*, 1880. Levy *v.* People, 80 N. Y. 327.

2. Evidence. The reception of testimony that the prisoner indicted as an accessory, conferred with the principals after the fire—*Held*, not error, in view of the fact that the prisoner afterwards denied that he knew them at all. *Ib.*

ASSAULT.

1. Assault with intent to kill—indictment. A count in an indictment for assault and battery with intent to kill, instead of alleging that the intent was "to kill," alleged that it was "to commit murder." *Held*, good.—*Ct. of App.*, *Oct.*, 1880. Pontius *v.* People, 82 N. Y. 339.

2. Evidence for the people. Upon trial of such an indictment, the prosecution gave in evidence certain notes purporting to have been made or indorsed by H., the complainant, also a book of account; these, the witness producing them testified, came lawfully into his possession, at the prisoner's house, and in his presence. Testimony was then given by H. and others, showing that the signatures of H. to the notes were forged. *Held*, that the evidence was properly received, as showing motive, although it tended to prove the commission of another crime. *Ib.*

3. The prosecution gave evidence of declarations of the prisoner, made two days before the alleged assault, while he was examining a note signed by H., tending to show an intimate acquaintance on his part with the signature of H. *Held*, competent. *Ib.*

4. The account-book received in evidence contained the handwriting of the prisoner. *Held*, that it was proper to permit the jury to examine the entries in said book, and to compare them with the alleged forged notes. *Ib.*

5. The prisoner was examined at length in his own behalf, asserting the genuineness of the notes, and that they were made in payment of moneys loaned by him to H.

Held, 1. That it was competent to inquire on cross-examination as to the sources from whence

the prisoner procured the money to make the loans.

2. That it was competent for the prosecution to prove any facts tending to show the improbability of the prisoner's statement, *i. e.*, his pecuniary necessities, the borrowing of money by himself, at or about the time of the alleged loans, the non-payment of small debts when due, after frequent requests, etc. *Ib.*

ASSESSMENTS.

CORPORATIONS; EMINENT DOMAIN; INSURANCE; MUNICIPAL CORPORATIONS; NEW YORK CITY; TAXES.

ASSIGNMENT.

[Consult, also, ASSIGNMENTS FOR BENEFIT OF CREDITORS; FRAUDULENT CONVEYANCES; SALES; VENDOR AND PURCHASER.]

I. WHAT MAY BE ASSIGNED, AND HOW.
II. CONSTRUCTION AND VALIDITY.
III. RIGHTS AND LIABILITIES OF THE ASSIGNEE.

I. WHAT MAY BE ASSIGNED, AND HOW.

1. What is assignable, generally.—A cause of action against a sheriff for his failure to return an execution against property within the time required by law, and for making a false return, is assignable and the assignee may bring an action thereon in his own name.—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Jackson *v.* Daggett, 24 Hun 204.

2. The act of congress (U. S. Stat. of 1874, ch. 459, § 18) prohibiting liens, assignments, sales and transfers of an "Alabama Claim," for services in collecting, does not affect an agreement to pay for such services.—*Ct. of App.*, *April*, 1880. Lawson *v.* Bachman, 81 N. Y. 616.

3. Oral assignment. An assignment of an account may be made by oral agreement, without writing, or any written statement of the claim assigned; and, if founded on a valid consideration, vests in the assignee a right to proceed in his own name for the collection of the debt. So, also, an oral assignment, for a valid consideration, of a portion of a debt is valid.—*Ct. of App.*, *Jan.*, 1881. Risley *v.* Phenix Bank of New York, 83 N. Y. 318, 328.

4. Where, concurrently with the giving of a check for a portion of the amount standing to the credit of the drawer upon the books of defendant, there was an oral agreement between the drawer and payee, by which the former, for a valuable consideration, agreed to assign so much of the indebtedness of the bank to him as was represented by the check, and the check was given to enable the payee to collect and receive the portion of the debt assigned—*Held*, that the check was not the contract between the parties, and so did not render oral evidence of the agreement inadmissible; and that the parol assignment was sufficient to vest in the plaintiff a title to the portion of the debt assigned. *Ib.*

II. CONSTRUCTION AND VALIDITY.

5. In general. Defendant, S., assigned to plaintiff a certificate of stock in a manufacturing corporation "as security for the payment of any demands" plaintiff "may from time to time have or hold against" E. S. was the wife of E., who, at the time the assignment was executed, was largely indebted to the plaintiff, and was on the verge of actual insolvency. In an action to foreclose plaintiff's lien upon the stock pledged—*Held*, that the assignment, by its terms, included and secured all demands had and held by plaintiff against E. after its execution, as well as those existing at that time; and that the circumstances disclosed this to have been the intent of the parties; also that the assignment was a continuing security; and that an extension of time, by renewals in the ordinary course of business, granted by plaintiff to E. for payment of any of the debts, did not discharge the lien upon the stock.—*Ct. of App.*, *Jan.*, 1881. Merchants' Nat. Bank *v.* Hall, 83 N. Y. 338.

6. Assignment under foreign law. An assignment by virtue of or under a foreign law does not operate upon a debt, or rights of action as against a person in this state.—*Ct. of App.*, *March*, 1881. Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367; *affirming* 21 Hun 166.

7. What will be deemed an equitable assignment. Where, for a valuable consideration received from the payee, an order is drawn upon a third person, payable out of a particular fund then due or to become due from him to the drawer, the delivery of the order to the payee operates as an assignment *pro tanto* of the fund; the drawee is bound, after notice thereof, to apply the fund, as it accrues, to the payment of the order, and the payee may by action compel such application.—*Ct. of App.*, *Sept.*, 1880. Brill *v.* Tuttle, 81 N. Y. 454.

8. An order drawn by one upon a fund due him from the city of New York, operates as an equitable assignment of the sum therein named, and the drawee is the real party in interest as to the city, although the contract under which the fund was earned provided that none of the moneys payable thereunder should be assigned without the assent of the commissioners of public works, which consent was not obtained; and though after the order was presented, and before payment thereof, the drawee forbade the city to pay it.—*Superior Ct.*, *Dec.*, 1880. Gray *v.* Mayor, &c., of New York City, 46 Superior 494.

III. RIGHTS AND LIABILITIES OF THE ASSIGNEE.

9. Assignee's right to sue. The assignment of personal property after a cause of action for conversion thereof has accrued, gives the assignee a right of action.—*Ct. of App.*, *April*, 1880. McKeage *v.* Hanover Fire Ins. Co., 81 N. Y. 38.

As to the mode of assigning or transferring any *particular instrument*, see the title of the writing in question.

As to *Assigning errors*, see APPEAL; ERROR.
Assignment of *Dower*, see DOWER.

ASSIGNMENTS FOR BENEFIT OF CREDITORS.

I. VALIDITY, INTERPRETATION AND EFFECT.
II. RIGHTS, POWERS AND LIABILITIES OF THE ASSIGNEE.

I. VALIDITY, INTERPRETATION AND EFFECT.

1. Execution—acknowledgment—assent of assignee. An assignment of the property of a debtor, in trust for creditors, executed in the name of the debtor and duly acknowledged by an attorney duly constituted for that purpose, is valid under the act of 1860, (Laws of 1860, ch. 340,) and effectual to vest in the assignee the title to the assigned property. —*Ct. of App., Nov.,* 1880. Lowenstein *v.* Flauraud, 82 N. Y. 494.

2. Since the passage of Laws of 1877, ch. 466, a general assignment for the benefit of creditors must, in order to vest the property in the assignee, be in a writing duly acknowledged by the assignor, must have thereon the assent of the assignee, duly subscribed and acknowledged by him, and must have been duly recorded.—*Supreme Ct.,* (*3d Dept.,*) *Jan.,* 1881. Rennie *v.* Bean, 24 Hun 123.

3. An assignment recorded without the assent of the assignee to act, having been duly subscribed and acknowledged by him thereon, although he may have orally agreed to act, is void as against creditors claiming under attachments against the property of the assignor *Ib.*

4. Validity of preferential assignment. A preferential assignment cannot be treated as a fraudulent disposition of the debtor's property, merely because, shortly before its execution, he purchased goods upon a credit which had not expired at the time of the assignment, for which goods he had no reasonable hope of being able to pay.—*Supreme Ct.,* (*1st Dept.,*) *Nov.,* 1880. Talcott *v.* Rosenthal, 22 Hun 573.

5. Intent to hinder creditors. Where it appears either upon the face of an assignment, or by proof *aliunde*, that it was made with intent to hinder or delay creditors, it affords no protection to the assignee against a sheriff who seeks to enforce, by execution, a judgment against the assignor.—*Ct. of App., March,* 1881. McConnell *v.* Sherwood, 84 N. Y. 522; 61 How. Pr. 67; *affirming* 19 Hun 519.

6. The insertion in an assignment of the partnership effects of an insolvent firm, of a provision directing the payment of individual debts out of partnership property, is such evidence of fraudulent intent as to avoid the assignment.—*Com. Pleas,* (*Gen. T.,*) *May,* 1881. Schile *v.* Healy, 61 How. Pr. 73.

7. Provision as to compromising debts. The assignment, after describing the property assigned, declared the conveyance to be in trust: *First*, to sell and dispose of the assignor's personal property and estate, and "collect the notes, accounts and choses in action," taking a part of the whole when the assignee "shall deem it expedient to do so;" *second*, to distribute and pay of the proceeds to all the creditors of the assignor for all debts and liabilities which he may be owing, or, if insufficient for that purpose, "in proportion to their respective demands." It further declared that the assignee "may have the right to compromise with" those creditors if, in his opinion, "it would be advantageous" to them and to the assignor.

Held, 1. That the first provision does not taint the assignment.

2. That to the clause permitting the assignee to compromise with the creditors must be applied the rule which regards every assignment operating to delay creditors, for any reason not distinctly calculated to promote their interests, as contrary to the statute of frauds, and therefore void.

3. That the assignment was void upon its face. McConnell *v.* Sherwood, *supra.*

8. An assignment for the benefit of creditors contained a clause empowering the assignee to collect the "choses in action with the right to compound for the said choses in action, taking a part for the whole, when he shall deem it expedient." In an action by the assignee to recover assigned property levied upon by defendant, as sheriff, by virtue of executions against the assignor.

Held, 1. That the clause was to be construed as simply authorizing the assignee to compromise such claims as in a sound discretion the interests of the trust required; that as so construed, the clause was not in conflict with the provision of the act of 1877, in relation to such assignments, (Laws of 1877, § 23, ch. 466,) which permits the County Court to authorize an assignee to compromise any claim or debt belonging to the estate; and that it did not invalidate the assignment.

2. That evidence of the declarations of the assignor, made after the assignment, acceptance and delivery of possession under it, were properly excluded.—*Ct. of App., March,* 1881. Coyne *v.* Weaver, 84 N. Y. 386.

II. RIGHTS, POWERS AND LIABILITIES OF THE ASSIGNEE.

9. The bond. A conveyance of property made by a general assignee for the benefit of creditors, before he has filed the bond required by Laws of 1860, ch. 348, § 3, is a nullity, and may be questioned and set aside, not only by the creditors of the assignor, but by the successors of the assignee.—*Supreme Ct.,* (*3d Dept.,*) *Sept.,* 1880. Woodworth *v.* Seymour, 22 Hun 245.

10. What will pass by the assignment. Section 1 of the act of congress of 1853 (10 U. S. Stat. at L. 170,) prohibiting the transfer or assignment of any claim against the United States, or any share thereof or interest therein, whether absolute or conditional, before the allowance of such claim, or the ascertainment of its amount and the issuing of a warrant for its payment, and declaring every assignment in contravention of such restraint absolutely null and void, does not prevent the assignment to an assignee for the benefit of creditors, under the laws of New York, of a claim made by the assignors against the United States to recover income taxes paid under protest, which claim is, after the making of the assignment, decided upon and allowed in favor of the assignors.—*Supreme Ct.,* (*1st Dept.,*) *March,* 1881. Stanford *v.* Lockwood, 24 Hun 291.

11. Notwithstanding a levy under an execution upon his personal property, the judgment

debtor remains owner, and can convey title, subject to the lien created by the execution. An assignee for the benefit of creditors of the debtor, acquires a title subject to such lien, good against all persons until the assignment is impeached for fraud.—*Ct. of App., Nov.,* 1879. Mumper *v* Rushmore, 79 N. Y. 19; *affirming* 14 Hun 591.

12. Where the property is in the possession of the sheriff at the time of the assignment, the transaction is not within the provision of the statute of frauds (2 Rev. Stat. 136, § 5,) which requires an immediate delivery of goods sold; that applies only to a sale of goods in the vendor's possession or under his control. *Ib.*

13. **Powers as respects management of estate, generally.** Under an assignment for the benefit of creditors the assignee is merely the representative of the debtor, and must be governed by the express terms of his trust.—*Ct. of App., June,* 1880. Matter of Lewis, 81 N. Y. 421.

14. **Payment of debts, taxes, &c.** L. executed his bond and mortgage to secure an indebtedness; the mortgage contained a provision that upon failure to pay interest and taxes accruing the whole mortgage debt should, at the option of the mortgagees, become due. Such default having occurred, the mortgagees commenced foreclosure and a receiver was appointed, who took possession of the mortgaged premises. Prior to the commencement of the foreclosure suit, L. executed an assignment for the benefit of creditors; the assignment contained no provision giving preference, or in relation to taxes, save as they were included in the general and unpreferred debts. The mortgagees, upon petition setting forth these facts, and alleging that L. had failed to pay the taxes, and that the lands were insufficient security, moved for an order requiring the assignee to pay the taxes in arrear.

Held, 1. That the application was properly denied; that the authority of the assignee and the control of the court over him was limited by the terms of the assignment, and he could only be compelled to perform the trust therein defined; that, therefore, the court had no power to direct him to pay a debt of the assignor or to give it a preference in violation of the assignment.

2. That the assignee could not be compelled to pay the taxes which accrued after the assignment. *Ib.*

The distinction between such a case and that of the distribution of a decedent's or bankrupt's estate pointed out. *Ib.*

15. **Sales by assignee.** A County Court has no power to set aside, on motion, a sale made by an assignee for the benefit of creditors, on the ground that the price paid was insufficient, and that a better one can be obtained.—*Supreme Ct.,* (*3d Dept.,*) *Nov.,* 1880. Matter of Rider, 23 Hun 91.

16. **Power to compel him to account.** When, after a debtor has made a general assignment for the benefit of his creditors, he is declared a bankrupt in involuntary proceedings instituted against him in a United States District Court, the mere fact that a composition with his creditors is thereafter made, as provided in the bankrupt act, does not relieve the assignee acting under the general assignment, from accounting to the creditors for the property received by him, unless the creditors have in some way relinquished their right to such an accounting, or the District Court has ordered the assignee to return the property to the bankrupt.—*Supreme Ct.,* (*4th Dept.,*) *April,* 1881. Matter of Allen, 24 Hun 408. And see Matter of Strauss, 61 How. Pr. 243.

17. Where an assignee for benefit of creditors has received assets, it is no defence to an action for an accounting, brought against him by the creditors, to allege that, since the execution of said assignment, the assignor has been discharged in bankruptcy from the debts thereby secured, under proceedings instituted after the assignment. The beneficiaries under the trust created by the assignment, *i. e.,* the creditors, have a vested interest in the assigned property, and its proceeds, to the extent of their respective claims.—*Superior Ct., June,* 1880. Smith *v.* Tighe, 46 Superior 270.

18. **Charges against him on accounting.** That, upon the accounting of an assignee, the County Court may charge him with any loss occasioned by his wrong-doing in making a sale at an inadequate price, see Matter of Rider, 23 Hun 91.

19. **Proof of claims. Distribution.** Where partners make an assignment of their individual and copartnership estate, and the individual estate of one of them is more than sufficient to pay his individual debts, the individual creditor has the right to claim his debt and the damages, by way of interest, which he has sustained by reason of non-payment at maturity, up to the time of the distribution.—*Com. Pleas,* (*Gen. T.,*) *May,* 1881. Matter of Shipman, 61 How. Pr. 515.

20. **Compensation of assignee.** Upon a composition under the general assignment act, (Laws of 1877, ch. 466 p. 543,) the creditors agreed to take the notes of the assignors for a percentage of their respective claims, and, after payment of the expenses, all the property assigned, or the proceeds of it, was restored to the assignors. *Held,* that the five per cent. commission upon the value of the estate allowed by law to the assignee should be estimated upon the aggregate amount of the composition, with the expenses incurred and paid out by the assignee added.—*Com. Pleas,* (*Sp. T.,*) *May,* 1881. Matter of Hulbert, 61 How. Pr. 98; S. C., 9 Abb. N. Cas. 132.

21. **—of assignee's attorney.** In allowing compensation to the attorney of the assignee the court will not go beyond the $2000 allowed in the cases provided by sections 3252 and 3253 of the Code of Civil Procedure, unless the nature of the attorney's services is specifically detailed, in order that their value may clearly appear. *Ib.*

As to assignments directed by the court in proceedings under the *Insolvent laws,* see INSOLVENCY.

As to the effect of the late *Bankrupt law* upon assignments for creditors, see BANKRUPTCY.

ASSOCIATIONS.

SOCIETIES AND ASSOCIATIONS.

ASSUMPSIT.

CONTRACTS; MISTAKE; MONEY RECEIVED; SALES; SERVICES.

ATTACHMENT.

I. WHEN AN ATTACHMENT WILL LIE.
II. OBTAINING AND SERVING THE WARRANT, AND ITS EFFECT.
III. MOTION TO VACATE, OR DISSOLVE.
IV. REMEDIES FOR WRONGFUL ATTACHMENT.

I. WHEN AN ATTACHMENT WILL LIE.

1. **What property is subject to attachment.** Judgment debts and moneys collected on execution by and in the hands of a sheriff, are liable to attachment under process issued in an action against the judgment creditor.—*Ct. of App., Dec.*, 1880. Wehle *v.* Conner, 83 N. Y. 231.

2. The right so to attach is not affected by the fact that the judgment debtor is also the attaching creditor. *Ib.*

3. Plaintiff offered to prove that there was a conspiracy between the attachment creditors, the judgment debtors and the sheriff, to issue the attachment "for the purpose of preventing the collection of plaintiff's judgment." *Held,* that the offer was properly excluded; that the fact that there was a conspiracy to do what the law authorizes did not affect the legality of the act. *Ib.*

4. It was claimed that as two of the judgments were for costs they were not affected by the attachments, because of the precedence of the attorney's lien. *Held,* that until the lien was asserted by the attorney, who alone was entitled to and could claim it, the judgments were the property of the plaintiff; and that they were to be so considered here, as there was no offer to prove that the attorney had given notice of his claim or had attempted to enforce it. *Ib.*

5. It was claimed that plaintiff was entitled to a judgment for the surplus of her judgments over the amounts claimed in the attachments. *Held,* untenable; that as the sheriff was required to keep so much of the property as would satisfy the attachment demands, with costs and expenses, (Code of Pro., § 232; Code of Civ. Pro., § 641,) he had a right to exercise a reasonable discretion as to the amount so to be retained. *Ib.*

6. **What is not.** Wages due to a debtor for services rendered within a period not exceeding the sixty days prior to the levy of an attachment, which are necessary for the support of his family, are not the subject of levy under such attachment.—*Supreme Ct., (2d Dept.,) Feb.*, 1881. McCullough *v.* Carragan, 24 Hun 157.

7. Choses in action in the hands of an assignee for the benefit of creditors cannot be levied upon under an attachment issued in an action brought against the assignor by one of his creditors, even though the assignment was made to defraud the assignor's creditors.—*Supreme Ct., (1st Dept.,) March,* 1881. Smith *v.* Longmire, 24 Hun 257.

8. **Attachments against national banks.** In an action against a national bank organized in another state, an attachment may be issued against the property of the defendant in this state.—*Ct. of App., June,* 1880. Robinson *v.* Nat. Bank of Newberne, 81 N. Y. 385, 392.

9. The provision of the national banking act (U. S. Rev. Stat., § 5242,) prohibiting the issuing of an attachment, injunction or execution against such an association or its property before final judgment, applies only to an association which has become insolvent or to one about to become so, as specified in the preceding part of the section. *Ib.*

10. **Fraudulent assignment.** Where the party made an assignment in October, the goods being bought in August, and there being preferences to creditors whom he owed, the court cannot assume from that fact in favor of an attachment, that there was a fraudulent disposition of his property.—*Com. Pleas (Gen. T.,) Jan.*, 1881. Achelis *v.* Kalman, 60 How. Pr. 491.

II. OBTAINING AND SERVING THE WARRANT, AND ITS EFFECT.

11. **Form and sufficiency of the affidavit.** It matters not what a person believes or disbelieves, the applicant for an attachment under subdivision 2 of section 636 of the Code of Civil Procedure, must show by proof of facts known to the witnesses who testify to them, that the belief in the intent to defraud by a disposition of the property is well founded. In other words, the intent so to defraud must be a fair and logical sequence from facts proved.—*Supreme Ct., (Ulster Sp. T.,) Sept.*, 1880. Ellison *v.* Bernstein, 60 How. Pr. 145.

12. It is not enough that a witness is willing to testify to a fact positively; he will not be allowed so to testify, when it is plain that he can have no actual knowledge on the subject. The sources of information must be given, so that the tribunal called upon to act can see that the facts sought to be proved are established by legitimate testimony. *Ib.*

13. The facts (even if true) that the defendant was insolvent when he made the purchases, that he bought more goods than he needed, and that he failed to disclose his insolvency, in the absence of an false statements, are not sufficient to show an intent to defraud. *Ib.*

14. Nor is it any evidence of such intent, that defendant refused to secure plaintiffs; so long as the law allows preferences to creditors by a failing debtor, it cannot be proof of intent to defraud, that defendant intends to do what the law permits. *Ib.*

15. The failure to state, in an affidavit, for an attachment, that plaintiff is entitled to recover the sum specified therein, over and above all counter-claims known to him, as required by Code of Civ. Pro., § 636, renders the attachment void *ab initio.*—*Supreme Ct., (1st Dept.,) May,* 1880. Donnell *v.* Williams, 21 Hun 216. S. P. Trow's Printing, &c., Co. *v.* Hart, 60 How. Pr. 190.

16. The failure to allege, in the affidavit for an attachment, in the language of section 3169, subdivision 5, that defendant is an adult, is not

material. The law will presume that he is an adult.—*Marine Ct., Sept.,* 1880. Wentzler *v.* Ross, 59 How. Pr. 397.

17. Defendants had in store for plaintiff a quantity of coffee, to be held for it, but with liberty to sell, and to pay to plaintiff, out of the proceeds, the amount due to it upon bills of exchange which it had discounted on the security of the property. The defendants sold the coffee, using the proceeds, which were more than sufficient to pay the drafts, in their business, thus appropriating them to their own use. On motion to vacate an attachment granted on affidavits showing these facts—*Held,* that the attachment could not be sustained, because it had not been shown that the defendants either assigned, disposed of, or secreted, or were about to assign, dispose of, or secrete their property, with the intent to defraud their creditors.—*Supreme Ct.,* (1st *Dept. Sp. T.,*) *Dec.,* 1880. German Bank of London *v.* Dash, 60 How. Pr. 124.

18. The provision as to attachments differs in this respect from that providing for the making of an order of arrest; so that a debtor is liable to arrest, but not to seizure of his property by attachment, when he may have disposed of plaintiff's property or that of any other person with intent to defraud its owner. *Ib.*

19. **Second attachment.** A plaintiff after having obtained one attachment and order of publication, may abandon them and take out a new attachment and order, provided this is not done for the purpose of vexation.—*Ct. of App., April,* 1880. Mojarrietta *v.* Saenz, 80 N. Y. 547.

20. It does not affect the jurisdiction of the court in granting the second attachment, that the same affidavit was used which was used in obtaining the first. *Ib.*

21. *It seems* that it is proper thus to use the affidavit a second time, but if not it is a mere matter of practice, a departure from which by the court does not deprive it of jurisdiction. *Ib.*

22. **Upon whom service may be made.** An attorney for the successful party in an action by whom a judgment was procured is not an "individual holding such property" within the meaning of the provision of the Code of Procedure, § 235, authorizing the execution of an attachment by service of a copy. Therefore—*Held,* where a judgment in favor of an attachment debtor was attempted to be attached by service of a copy of the warrant upon one of the attorneys for said debtor, in the action wherein said judgment was rendered, that the attachment was not properly executed; and that a purchaser at sheriff's sale under execution and order of the court in the attachment suit acquired no title.—*Ct. of App., Feb.,* 1881. Matter of Flandrow, 84 N. Y. 1; *affirming* 20 Hun 36.

23. *It seems,* also, that the omission upon the second application to comply with the rule 25, requiring that the affidavit upon an *ex parte* application shall state whether a previous application has been made, does not affect the jurisdiction; it is a mere irregularity, and if not regarded by the court below will not be regarded here. *Ib.*

24. **The levy; and its effect.** The complaint alleged that plaintiff and defendant W. were copartners, and that the firm had become insolvent; that the other defendants had, by collusion with defendant W., commenced actions against the firm in the Marine Court of the city of New York, in which attachments had been issued, under which property of the firm had been seized; that such attachments were void, for the reason that the firm had a place of business in the city of New York, though both of the members thereof resided in Kings county. The relief sought was the dissolution of the firm, the appointing of a receiver the vacating of the attachment, and also that the said defendants might be restrained from further prosecuting their actions in the Marine Court. *Held,* that as to the attaching creditor, the complaint did not state facts sufficient to constitute a cause of action, and that it should be dismissed.—*Supreme Ct.,* (2d *Dept.,*) *Sept.,* 1880. Fielding *v.* Lucas, 22 Hun 22; S. C., 60 How. Pr. 134.

25. **When formal levy is unnecessary.** Where property of an attachment debtor is already in the hands of the sheriff to whom the attachment is issued, no formal levy or notice is necessary to subject it to the lien of the attachment.—*Ct. of App., Dec.,* 1880. Wehle *v.* Conner, 83 N. Y. 231.

26. **Undertaking to discharge attachment—liability of sureties.** In an action upon an undertaking given to secure the release of property belonging to a firm, from an attachment issued in an action commenced against two of the partners, the surety cannot set up as a defence that the summons and complaint in the original action were, after the giving of the undertaking and before the entry of the judgment, amended, by consent, by the addition of the name of a third partner.—*Supreme Ct,* (2d *Dept.,*) *Feb.,* 1881. Christal *v.* Kelly, 24 Hun 155.

27. In an action upon an undertaking, given to discharge an attachment, conditioned to pay any judgment recovered by the attachment creditor, it appeared that the attachment debtor, within four months after the issuing of the attachment, filed his petition and was thereupon adjudicated a bankrupt and made an assignment; he then applied to the bankruptcy court to stay proceedings in the action in which the attachment was issued; this was denied, and judgment was recovered. *Held,* that the proceeding in bankruptcy was no defence, as there was at the time no attachment lien or attachment in force upon which the proceeding could operate; and that neither the letter nor the policy of the bankrupt act was infringed by holding the defendants liable.—*Ct. of App, Sept.,* 1880. McCombs *v.* Allen, 82 N. Y. 114; *affirming* 18 Hun 190.

III. Motion to Vacate, or Dissolve.

28. **Who may move.** The right of third persons to move, under section 682 of the Code of Civil Procedure, to vacate a warrant of attachment, is not confined to those who have acquired liens or interests by proceedings *in invitum;* and a person who has acquired an interest by voluntary transfer, will be permitted to stand in the defendant's place in respect of the right to question the validity of the attachment.—*Ct. of App., June,* 1881. Trow's Printing, &c., Co. *v.* Hart, 1 Civ. Pro. 240; *affirming* 60 How. Pr. 190.

Such motion may be made by a person who has acquired an interest in part only of the attached property; in which case, the relief will be limited to vacating the attachment as to such part, and the plaintiff cannot complain that the attachment has not been set aside *in toto*. *Ib.*

29. Right to move a second time. The rule prohibiting the splitting up a single demand and bringing separate actions at law, has no application to proceedings to vacate an attachment.—*Ct. of App., Dec.*, 1880. Steuben Co. Bank *v.* Alberger, 83 N. Y. 274.

30. The facts, therefore, that a party has made a prior motion to vacate an attachment upon the ground that it is an obstruction to the enforcement of a judgment and execution, and was defeated thereon, does not preclude a second motion to vacate the attachment as far as it affects real estate, on the ground that it is a cloud upon an alleged title thereto of the moving party; and this although the party might have proceeded on the first motion upon this ground also. *Ib.*

31. Counter affidavits. Where the moving affidavit did not contradict any fact stated in the papers on which the attachment was granted, and did not bear upon the merits, but was confined to showing the right of the third person to move, and excusing his delay—*Held*, that the plaintiff was not entitled to read affidavits in support of the attachment other than those on which it was issued.—*Ct. of App., June*, 1881. Trow's Printing, &c., Co. *v.* Hart, 1 Civ. Pro. 240; *affirming* 60 How. Pr. 190.

32. Vacating under "thirty-day clause" (§ 638.) Where, in an action brought against a firm consisting of two members, an attachment is issued, and thereafter one of the partners is personally served with the summons, but the other is not, nor are proceedings to serve him therewith by publication commenced within the thirty days required by the statute, the attachment ceases to be a lien upon the firm property.—*Supreme Ct.*, (1*st Dept.*,) *May*, 1880. Donnell *v.* Williams, 21 Hun 216.

33. A request on the part of a defendant, against whom an attachment has been issued, to suspend legal proceedings, does not excuse a failure to serve the summons or to commence publication within the time prescribed by Code of Civ. Pro., § 638, and does not operate as an estoppel precluding the defendant from setting up want of publication or service.—*Ct. of App., April*, 1880. Mojarrieta *v.* Saenz, 80 N. Y. 547.

34. As to whether the lapse of the thirty days prescribed ousts the court of jurisdiction and abates the action, or merely avoids the attachment, *quære*. *Ib.* Compare Blossom *v.* Estes, 84 N. Y. 614; *affirming* 22 Hun 472.

35. An attachment was issued May 13th, 1879, an order for service of summons by publication was obtained, but publication was not commenced within the thirty days prescribed; within that time one of the defendants, whose goods had been levied on, telegraphed and wrote to plaintiffs to suspend proceedings. On June 12th, 1879, a second attachment was granted, plaintiff using for that purpose the same summons and complaint and the same affidavit upon which the first warrant was granted, but giving a new undertaking; a new order of publication also was obtained, and publication was commenced within thirty days after the second attachment was granted. The first warrant was before the judge when he granted the second. Motion was made to vacate the attachments; the notice did not specify a failure to comply with said rule as an objection to the second attachment. *Held*, that the first attachment was properly vacated, but that the second attachment was properly granted; that plaintiffs had thirty days thereafter within which to commence publication of summons; and as the publication was commenced within that time, the motion as to the second attachment should have been denied. *Ib.*

36. When the motion will be denied. The plaintiffs, in an action against two copartners, obtained a warrant of attachment against the property of one of them only, and another firm of subsequent attaching creditors, in another action against the same defendants, applied for and obtained a Special Term order vacating such first-mentioned attachment, because it appeared, on the argument of the motion to vacate, that the warrant was issued against the property of one defendant only, on the ground that he had absconded, and that the firm against whom the action was brought was insolvent and unable to pay its debts in full. *Held*, the attachment should not have been discharged merely because no lien on the firm property had been thereby acquired, but plaintiffs should have been allowed to retain their attachment for whatever it was worth.—*Supreme Ct.*, (1*st Dept.*,) *May*, 1881. Buckingham *v.* Sweezey, 61 How. Pr. 266.

37. Where the plaintiff, on a warrant of attachment, levied upon certain shares of stock in a manufacturing corporation belonging to the defendant, and received the certificate of defendant's interest required to be given by Code of Civ. Pro., § 650, and subsequently entered up judgment against the defendant, and obtained an order under section 651 to examine the manager of said corporation in relation to such certificate of interest—*Held*, denying a motion to vacate the order, that the attachment was not superseded by judgment; and that by the omission of the word "execution" from section 650, it was not intended to make a radical change in regard to such examinations.—*Supreme Ct.*, (1*st Dept. Sp. T.*,) *June*, 1881. Smoot *v.* Heim, 1 Civ. Pro. 208.

IV. Remedies for Wrongful Attachment.

38. When malice must be shown. Where an attachment regularly granted upon competent evidence is vacated upon appeal, for error alone, and not upon the ground of irregularity or want of jurisdiction, in the absence of proof of malice upon the part of the party obtaining the process, action will not lie against him for conversion of goods taken thereunder. —*Superior Ct., Dec.*, 1880. Day *v.* Bach, 46 Superior 460.

ATTEMPTS.

To commit crime, generally, see Criminal Law; and the titles of the graver offences.

ATTESTATION.

DEEDS; MORTGAGES; WILLS.

ATTORNEY AND CLIENT.

I. THE VOCATION.
II. THE RELATION WITH THE CLIENT.
III. COMPENSATION OF ATTORNEYS.
IV. PRIVILEGED COMMUNICATIONS.

I. THE VOCATION.

1. **Liability for fees and costs.** Defendants, acting as the attorneys for one H. and others, recovered a judgment in an action brought against a railroad company, and issued an execution thereon to the plaintiff (the sheriff,) under which he levied upon certain personal property of the railroad, sufficient in amount, with the real estate owned by it, to satisfy the execution. Thereafter, and before the property had been sold, the sheriff received a letter from the plaintiffs in the execution, stating that the difficulty between the railroad and their firm had been satisfactorily settled, and that "the judgment and all of our claims against them have been paid and satisfied in full; so, of course, you will proceed no further in the sale of the railroad company as advertised." In fact the judgment had not been paid, but had been assigned to one C., who agreed to pay the sheriff's fees. C. having failed to pay the fees, the sheriff brought this action against the defendants, to recover them. *Held,* that he was entitled to recover.—*Supreme Ct.,* (*3d Dept.,*) *Nov.,* 1880. Van Kirk *v.* Sedgwick, 23 Hun 37.

2. **—for stenographer's fees.** In the absence of a special agreement imposing a personal liability, an attorney for one of the parties to an action cannot be held personally responsible for the services of a stenographer therein. —*Ct. of App., June,* 1880. Bonynge *v.* Field, 81 N. Y. 159; *affirming* 44 Superior 581.

3. **Disbarring attorneys.** In proceedings to disbar an attorney, he can only be convicted on evidence good at common law, delivered, if he chooses, in his presence, by witnesses subject to cross-examination. Therefore—*Held,* that the granting of an order in such proceedings, against the objection of the attorney, directing that a commission issue to examine a witness without the state, was error; and that the order was not validated by the insertion in it of a provision reserving "until the final hearing of the matter" the question as to the "right to issue the commission, and the legality of the evidence taken thereunder."—*Ct. of App., Dec.,* 1880. Matter of an Attorney, 83 N. Y. 164.

4. **Punishing them for contempt.** Where, upon the return of an order requiring an attorney to show cause why he should not be punished, as for a contempt, because of his failure to pay over to his client moneys collected for him, a reference is ordered, the court may, upon the coming in of the report, appoint a day for the hearing thereon, and direct that an attachment issue against the attorney, returnable upon the day of the hearing, for the purpose of securing his presence thereon. The court may direct the hearing to be had within a shorter period than that prescribed by General Rule No. 30.—*Superior Ct.,* (*1st Dept.,*) *March,* 1881. Matter of Steinert, 24 Hun. 246.

5. The fact that the attorney has evaded the service of the attachment and other papers, and neglected to appear on the return-day, will not authorize the court to refuse to entertain a motion made by his counsel to set aside the order directing the attachment to issue, on the ground of alleged irregularities in the proceedings. *Ib.*

6. **—for professional misconduct.** The distinction between the case of the punishment of an attorney for misconduct not committed in the presence of the court, and proceedings for a contempt occurring in the presence of the court, and where the facts are certified by the court, pointed out.—*Ct. of App., Sept.,* 1880. Matter of Eldridge, 82 N. Y. 161.

7. Where the alleged misconduct is denied, the affidavits and papers upon which the proceedings were instituted are not evidence upon the issues, but simply perform the office of pleadings or statements of the charges relied upon. Affidavits are sufficient to originate the proceedings, but upon the trial of the issues the common law rules of evidence must be observed. *Ib.*

8. In proceedings for the probate of a will, E., an attorney who appeared as proctor for a contestant, introduced in evidence the deposition of a witness taken on commission; the answers were very full and minute in details, tending to show undue influence; in proceedings to punish E. for alleged professional misconduct in procuring such testimony, it appeared that he prepared and caused to be written out all the answers to be given by the witness to the interrogatories and cross-interrogatories; that he was present when the testimony was taken, and himself read to the commissioner the answers he had prepared to the interrogatories, and left with the witness the answers so prepared to the cross-interrogatories which the latter read to the commissioner; that E. paid money to the witness both before and after the taking of the testimony, and he afterward wrote to the witness suggesting a destruction of their correspondence and asking for a return of the memoranda so used at the taking of the deposition. *Held,* that practically the examination was merely an affidavit drawn by E., and in its true character not admissible before the surrogate; that the procuring its reception by disguising it in the form of a deposition was a fraud upon the surrogate; and that, therefore, without regard to the truth or falsity of the answers so given, E. was properly convicted of professional misconduct. *Ib.*

II. THE RELATION WITH THE CLIENT.

9. **The attorney's authority, generally.** An attorney's authority extends not only to the perfecting and enforcement of a judgment, but also to its defence against all attempts to interfere with it. He should therefore be served with notice when it is sought to set aside a judgment or other proceeding in which he has participated.—*N. Y. Surr. Ct., Nov.,* 1878. Matter of McCunn, 4 Redf. 15.

10. As to the power of the court to compel an attorney to deal justly with his client, and

to appoint a referee to take proof of the facts, see Matter of Kuhne *v.* Daily, 23 Hun 282.

11. Power to bind his client. Defendants obtained judgment against W. and issued execution thereon to plaintiff as marshal, who levied upon personal property to about double the amount of the execution. This property was claimed by D. & H. Defendants gave a bond of indemnity, a printed form being used; it contained a written recital of the levy and the claim of D. & H., and a printed condition to save plaintiff harmless from levying and selling under his execution "any personal property which he or they shall or may judge to belong to the judgment debtor." A portion of the property levied on, which was not in fact the property of W., was taken from plaintiff's possession by some person unknown; upon his reporting the eloignment to the defendants they notified him that they should hold him responsible for the levy. Plaintiff thereafter, without the authority, knowledge or consent of defendants, levied upon and sold other property, the proceeds of which he paid to defendants, who received it without any knowledge of such new levy. An action was brought by S. against plaintiff for such levy and sale, and judgment recovered against him. In an action upon the bond—

Held, 1. That it was intended simply to furnish indemnity for the levies already made; that its terms did not enlarge plaintiff's authority, and the subsequent unlawful levy and sale was made entirely at his risk, and that defendants were not liable.

2. That the receipt by the defendants of the proceeds of the sale in ignorance of the facts was not a ratification; and that they were not affected by knowledge upon the part of their attorney, as he had no authority to bind them by directing a trespass or by ratifying one when committed.—*Ct. of App., Jan.*, 1881. Clark *v.* Woodruff, 83 N. Y. 518; *affirming* 18 Hun 417.

12. Substitution of attorneys. While the attorney has a lien upon the papers in the suit, which cannot be divested without payment, he has none upon the client, and cannot prevent him from employing another attorney to represent him.—*Marine Ct.*, (*Sp. T.*,) *Feb.*, 1881. Prentiss *v.* Livingston, 60 How. Pr. 380.

13. But if the client desires the papers in the possession of his attorney, he must first discharge his lien. If this relief is not insisted upon, the order for substitution must provide that the taxable costs in the action to the present time (if collected upon a favorable termination of the action) be paid to the present attorney of the defendants, to whom they equitably belong. *Ib.*

III. Compensation of Attorneys.

14. The lien and how enforced. The amendment of 1879, to Code of Civ. Pro., § 66, gives to the attorney of record, from the commencement of an action or the service of an answer containing a counter-claim, a lien upon his client's cause of action or counter-claim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof, in whosoever hands they may come, and cannot be affected by any settlement between the parties before or after the judgment.—*Superior Ct.*, (*Sp. T.*,) *July*, 1880. McCabe *v.* Fogg, 60 How. Pr. 488.

15. But no new remedy is provided for the enforcement of the lien, and, in order to make it available in the case of a settlement before judgment, the attorney, while he need no longer prove fraud or collusion, must still go on with the litigation until judgment, which is to be perfected for costs only. *Ib.*

16. While the defendants were, as attorneys for one L., prosecuting an action brought by him upon a promissory note, L. assigned his interest therein to the plaintiff's testator. The only consideration for the assignment, which was drawn by one of the defendants, was a preexisting debt due from L. to the assignee. *Held*, that the defendants had a lien upon the proceeds of the judgment recovered in the action, not only for their services rendered therein, but also for their general account for professional services rendered to the assignor, and that the rights of the assignee were subject thereto.—*Supreme Ct.*, (*4th Dept.*,) *April*, 1880. Schwartz *v.* Schwartz, 21 Hun 33.

17. Special agreements for compensation. As to when an agreement that an attorney shall be compensated out of the fund recovered creates an equitable lien, and the priority of such lien over that of an attachment issued under a judgment recovered against the client, see Williams *v.* Ingersoll, 23 Hun 284.

18. Effect of settlements between the parties. Where a defendant in an action has in good faith settled the same with the plaintiff without knowledge or notice of any lien of the plaintiff's attorney for costs, and has been fully released and discharged from the cause of action and the costs thereof, the plaintiff's attorney cannot continue the action for the purpose of enforcing his alleged lien, without having first obtained an order of the court allowing him so to do.—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Goddard *v.* Trenbath, 24 Hun 182.

19. August 30th, 1878, the plaintiffs herein recovered a judgment against one Smith, upon which an execution was issued on September 2d, 1878. On August 16th, 1879, the sheriff having failed to return the execution, the plaintiffs brought this action against him to recover damages because of his failure so to do. Thereafter, and on August 28th, 1879, for the purpose of defeating the lien of the plaintiff's attorney for his costs, included in the said judgment, and also his costs in this action, the plaintiffs settled with Smith and the sheriff, and the execution was returned by the latter satisfied. *Held*, that the plaintiffs' attorney was entitled to continue this action, and to recover a judgment for the costs of the former action, and also for the costs of this one.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. Wilber *v.* Baker, 24 Hun 24.

20. And when set aside. A settlement of an action, in fraud of an attorney's rights, can only be vacated on his application made in his own name, not by an application in the name of one of the parties; as to them it is conclusive.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Murray *v.* Jibson, 22 Hun 386.

21. When an attorney must have given notice of the assignment of a part of the recovery to him in order to justify his moving to set aside

a settlement entered into between the parties, see Jenkins *v.* Adams, 22 Hun 600.

22. What may be an offset to the lien. That under Code of Civ. Pro., § 66, as amended in 1879, the attorney for a defendant, in whose favor a judgment for costs has been entered upon the dismissal of the complaint, acquires a lien thereon for his compensation, which is superior to the right of the plaintiff to set off a prior judgment in his favor, whether he seek to enforce such right upon a motion or by an action, see Ennis *v.* Curry, 22 Hun 584; S. C., 61 How. Pr. 1.

23. As to how far the right of lien of an attorney for costs will stand in the way of a set-off of a judgment, sought in an equitable action, see Davidson *v.* Alfaro, 80 N. Y. 660.

24. Action for services—time to sue. The statute of limitations does not begin to run against an attorney's claim for services, until the termination of the action, and is not affected by an intermediate assignment of the cause of action.—*Supreme Ct., (3d Dept.,) Nov.,* 1880. Gustine *v.* Stoddard, 23 Hun 99.

IV. Privileged Communications.

25. What communications are privileged. Every communication which a client makes to his legal adviser, for the purpose of professional aid or advice, is protected.—*Ct. of App., March,* 1880. Bacon *v.* Frisbie, 80 N. Y. 394.

26. Although an attorney, when called as a witness as to communications made to him, disclaims that he was acting in a professional capacity, that is a matter for the court to determine from the facts appearing. *Ib.*

27. It is not essential to bring the case within the statutory prohibition that a fee was paid at the time of the communication, or that a suit was pending or contemplated; if the communication was in the course of any professional employment, related to the subject matter thereof, and may be supposed to have been drawn out in consequence of the relation of the parties to each other, it is entitled to protection as a privileged communication. *Ib.*

28. The rule of exclusion applies to every attempt to give the communication in evidence without the assent of the person making it; and so, includes a case where the evidence is sought to be given without such consent, against a third person. *Ib.*

29. *It seems* that when such a communication is sought to be proved in an action to which the person making it is not a party, an objection thereto, by the party against whom it is offered, will lie, on the ground of public policy. *Ib.* Compare Root *v.* Wright, 84 N. Y. 72, *reversing* 21 Hun 344.

AUCTION.

1. Liabilities of an auctioneer. Where the mortgagor in a chattel mortgage causes the goods to be sold at auction before the mortgage becomes due, in parcels, to various purchasers, and delivers them, not subject to the mortgage, but in hostility to it, the auctioneer who makes the sale is liable in damages to the mortgagee; and the plaintiff, in an action for such damages, need not show that the mortgagor was wholly irresponsible.—*Brooklyn City Ct., (Gen. T.,) Dec.,* 1880. Moloughney *v.* Hegeman, 9 Abb. N. Cas. 403.

2. His fees and commissions. The plaintiff, who had given to one A. a chattel mortgage, as security for a promissory note, payable on demand, subsequently entered into a written agreement with him, by which it was provided that the note and mortgage should be deemed due, without any demand being made, and that the property should be placed in the hands of the defendant, an auctioneer, who should sell the same and pay from the proceeds thereof, after deducting the expenses incurred, and his commission at five per cent., the amount due to A., and turn over the balance to the plaintiff. *Held,* that though the defendant was not a party to the contract, yet it furnished the authority under which he sold the property and gave him the right to retain commissions at the rate of five per cent., and relieved him from the penalty imposed upon auctioneers who charge commissions in excess of the statutory rate.—*Supreme Ct., (2d Dept.,) Sept.,* 1880. Carpenter *v.* Le Count, 22 Hun 106.

3. After enough of the property had been sold to pay the amount due to A. and the expenses of the sale, the plaintiff directed the auctioneer to stop the sale, leaving unsold about $600 worth of property. *Held,* that the defendant was entitled to a reasonable compensation for his labor in including this unsold property in the catalogue which he had made for the sale. *Ib.*

AUTREFOIS ACQUIT.

Judgment, III.

AVERAGE.

Insurance, IV.

AWARD.

Arbitration and Award, 5-9.

B.

BAGGAGE.

Liability for *Loss of*, see RAILROAD COMPANIES, IV

BAIL.

1. **Validity of the bond or undertaking.** *It seems* public policy requires that officers armed with bailable process for the arrest of defendants, should, in taking securities for their enlargement, be held to a strict compliance with statutory requirements.—*Ct. of App., March,* 1881. Toles *v.* Adee, 84 N. Y. 222.

2. *It seems* also that the fact, that, under our practice, bail taken by a sheriff on discharging a defendant from arrest, stands in some sense both as bail to the sheriff and bail to the action, does not affect the application of the statute making void obligations taken *colore officii* in any other case or manner as provided by law (2 Rev. Stat. 286, § 59,) when the undertaking contains conditions not prescribed by law; nor is it in the power of the plaintiff afterwards to adopt the act of the sheriff and thereby avoid the effect of the illegality. *Ib.*

3. *It seems* also that the validity of the security is not dependent upon the question whether it was voluntarily given or was extorted by actual duress and oppression. *Ib.*

4. **Liability of sheriff as bail. Re-arrest.** The provision of the Code of Pro., § 201, making the sheriff liable as bail for a party arrested in a civil action "if bail be not given or justified," must be construed as meaning, if bail be not given, or do not justify as provided by the law and practice of the proceedings towards justification, provided in the foregoing sections; consequently, if the plaintiff's attorney consent to a postponement of the justification of the defendant's sureties, though for an indefinite time, the sheriff is not liable as bail, and has no right to rearrest the defendant until an actual default has been made by the sureties, and no mere lapse of time will give him this right. In case of such re-arrest, before default, proof of notice by the sheriff to the defendant that he would expect the undertaking to be approved of at once by the judge, on justification, or by the plaintiff's attorney, affords no defence to an action for false imprisonment, nor does ignorance of the existence of the stipulation postponing justification constitute a defence.—*Superior Ct., April,* 1880. Arteaga *v.* O'Conner, 46 Superior 91.

5. **Exoneration of bail.** Under Code of Pro., § 191, exoneration of bail by the legal discharge of the principal from the obligation to render himself amenable to process within twenty days after the commencement of an action against them, was a matter of right, but after that time it was a matter in the discretion of the court. Therefore—*Held,* that an order denying a motion on the part of bail, made more than twenty days after the commencement of a suit upon the bail-bond, was not reviewable here; it not appearing that the order was made upon any ground concerning which the court was not called upon to exercise its discretion.—*Ct. of App., June,* 1880. Mills *v.* Hildreth, 80 N. Y. 91.

6. Bail are sureties with the rights and remedies of sureties in other cases. The neglect of a creditor, upon request of a surety, to proceed against the principal discharges the surety, if thereby the debt has been lost. Toles *v.* Adee, *supra.*

7. **Surrender of principal.** When the sheriff has become liable as bail, by reason of the failure of the original sureties to justify, he may exonerate himself by surrendering the principal to the jail before the expiration of the time to answer, or within such time thereafter as the court may deem just to prescribe.—*Supreme Ct.,* (*4th Dept.,*) *June,* 1880. Douglass *v.* Haberstro, 21 Hun 320.

8. But to entitle the sheriff to an order, allowing him to surrender the principal, after the time to answer has expired, he must show a substantial and sufficient excuse for permitting the defendant in the execution to be at large. *Ib.*

9. It appeared that the action in which the order of arrest was issued was decided in favor of plaintiff and decision filed in the clerk's office in July, 1868. In September, 1868, the defendant's attorneys served written notice on plaintiff's attorneys to tax costs and enter judgment, but no action was taken until April, 1874, when judgment was entered, and after return of a property execution unsatisfied, body execution was issued and returned by the sheriff not found. The defendant has, since 1868, resided out of the state. He returned to the state in 1869 and in 1871, remaining on each occasion several weeks. During his visit in 1871 the executors of the surety in the undertaking made search for it at the clerk's office, but it had not then been filed. They then called upon plaintiff's attorney and informed him that the defendant was here and would remain a month, and that they had searched for the undertaking so as to make a surrender; they requested him to enter judgment, issue execution and enforce it, so that the estate might be discharged from liability, they offering to stipulate the costs to prevent delay. This he declined to do. *Held,* that as the undertaking was only enforceable upon the theory that it was an agreement good at common law and not requiring the aid of the statute, the testator stood as surety merely; that he was the jailor of his principal, and the statutory provisions authorizing bail to surrender their principal did not apply; that laches was a good defence to the action; and that the evidence required the submission of that question to the jury. Toles *v.* Adee, *supra.*

BAILMENT.

1. **Liability of bailee, generally.** When, in an action to recover the value of goods, lost through the negligence of the bailee, their purchase price may be proved on the question of damages, see Jones *v.* Morgan, 24 Hun 372.

2. Conversion by bailee—rights of purchaser. The rule that upon the wrongful conversion of securities by a pledgee, a purchaser can only hold them to the extent of his actual advances, applied; and when the pledgee may sue for their recovery, determined. Gould *v.* Farmers' Loan, &c., Co., 23 Hun 322.

3. Rights of pledgee. Sale of thing pledged. Where bonds of a railroad company are taken from a director in pledge for a precedent debt, the pledgee takes no better title than his pledgor, and they are subject in his hands to any defect in the title of the latter. —*Ct. of App., March,* 1881. Duncomb *v.* New York, &c., R. R. Co., 84 N. Y. 190.

4. A pledgee of certain of the bonds claimed that the pledge had been foreclosed by sale at auction, and that through such sale he became the owner; the terms of the sale, or whether before sale there was a demand of payment or notice to redeem, did not appear. *Held,* that as no right to sell was shown, the holder of the bonds must still be treated as pledgee. *Ib.*

5. Personal property specifically pledged for a particular loan cannot, in the absence of a special agreement, be held by the pledgee for any other advance. Nor can it be so held, although the pledgees are bankers; the general lien which bankers hold on property deposited with them for a balance due on general account cannot be invoked.—*Ct. of App., Jan.,* 1881. Duncan *v.* Brennan, 83 N. Y. 487.

6. When a pledgee of stock as collateral to a loan may sell it without notice to the pledgor, see Wallace *v.* Berdell, 24 Hun 379.

7. A pledgee may waive his lien and sell the property under an execution.—*Supreme Ct.,* (1*st Dept.,*) *Jan.,* 1881. Sickles *v.* Richardson, 23 Hun 559.

As to what constitutes a *Conversion* of property bailed, see TROVER.

As to the *Measure of Damages* in actions against bailees, see DAMAGES.

For further rules applicable to distinct *Species* of bailees, see BANKS; CARRIERS; EXPRESS COMPANIES; RAILROAD COMPANIES; WAREHOUSEMEN.

BANKRUPTCY.

1. Right of assignee to intervene in suit against bankrupt. This action was brought for dissolution of the copartnership between plaintiffs and defendant, and for an accounting; also for damages for inducing plaintiffs by false representations to enter into said copartnership. Upon the issue of fraud a verdict was rendered for plaintiffs, and the referee before whom the accounting was had, reported that the amount thereof should be paid out of the individual interest of the defendant in the partnership assets which had been collected and paid into court. Prior to the confirmation of the referee's report, the defendant was adjudged a bankrupt, and two years after entry of final judgment upon the report and payments to plaintiffs thereunder, defendant's assignee petitioned that the judgment be set aside, and that he be substituted in place of defendant and be allowed to come in and defend. It appeared that plaintiffs were ignorant of the proceedings in bankruptcy till after entry of final judgment and payment of the funds thereunder. *Held,* that the prayer of the petitioner was properly denied; that the relief asked for must be sought in an independent action.—*Superior Ct., Nov.,* 1880. Keck *v.* Werder, 46 Superior 339.

2. Suit by creditors on assignee's refusal to sue. Upon the refusal of an assignee in bankruptcy to bring an action to set aside fraudulent transfers of property made by the bankrupt, the general creditors of the latter may bring an action for that purpose in a State Court, in behalf of themselves and all other creditors who are willing to come in and contribute, making the assignee in bankruptcy a party defendant thereto, and praying for a judgment for a sum named "for the benefit of the creditors of said bankrupts to be administered in due course of proceedings in bankruptcy."—*Supreme Ct.,* (3*d Dept.,*) *Jan.,* 1881. Bates *v.* Bradley, 24 Hun 84.

3. The discharge: what claims are barred. The liability of a factor for money collected for his principal is discharged by his discharge in bankruptcy.—*Supreme Ct.,* (1*st Dept.,*) *June,* 1880. Falkland *v.* St. Nicholas Nat. Bank, 21 Hun 450. But see to the contrary, Hardenbrook *v.* Colson, 61 How. Pr. 426; 24 Hun 475.

4. What are not. In an action by a receiver of a savings bank against its trustees, for negligence, a discharge in bankruptcy is no defence.—*Ct. of App., Sept.,* 1880. Hun *v.* Cary, 82 N. Y. 65.

5. Two of the defendants, after the commencement of the action, filed petitions for their discharge in bankruptcy, and were discharged before judgment. *Held,* that such a discharge was not a defence to the action, as the claim, being for unliquidated damages occasioned by a tort, was not provable in bankruptcy, and therefore not discharged. *Ib.*

6. The firm of R. Bros., ship brokers, having become embarrassed in business, caused the moneys thereafter received by them in their business as agents for others, to be deposited with defendant in the name of their bookkeeper, plaintiff's intestate, in order to protect such funds from being attached by their creditors and that they might be paid over to the parties entitled thereto. *Held,* that the discharge of R. Bros. in bankruptcy did not affect the rights of the parties for whose benefit these deposits were made; that such discharge, while it might destroy the claims against them, did not deprive those for whom the funds were deposited of their right thereto.—*Ct. of App., Feb.,* 1881. Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145; *reversing* 21 Hun 450.

7. When the discharge in bankruptcy of an attachment debtor is no defence in an action on the undertaking given to discharge the attachment, see McCombs *v.* Allen, 82 N. Y. 114.

8. Cancellation of judgments after discharge. Plaintiff having incurred certain liabilities for defendant's benefit, the latter executed a bill of sale and chattel mortgage of certain personal property to him to secure him against loss therefrom. Thereafter, defendant having failed to pay the indebtedness for which plaintiff was liable, plaintiff brought this action to recover the possession of the property covered by the bill of sale and mortgage. The

sheriff having been unable to find the whole of the property, plaintiff procured an order of arrest, under Code of Pro., § 179, upon the ground that defendant had concealed, removed or disposed of the property with the intent that it should not be found or seized by the sheriff. Plaintiff thereafter recovered a judgment and collected a portion thereof under an execution issued thereon, but never obtained the possession of that portion of the property in respect to which the order of arrest was made. Upon a motion made by defendant, under Code of Civ. Pro., § 1268, to have the judgment canceled on the ground of his subsequent discharge in bankruptcy—*Held*, that the debt upon which the judgment was recovered was not created "by the fraud" of the defendant within the meaning of that term, as used in Rev. Stat., § 5117, exempting debts so created from the effect of a discharge in bankruptcy, and that the motion should be granted.—*Supreme Ct.*, (*1st Dept.*,) *March*, 1881. Bergen *v.* Patterson, 24 Hun 250.

9. New promise. When a debtor has promised to pay a debt from which he has been discharged by proceedings in bankruptcy, an action will lie upon the original debt, and need not be brought upon the new promise.—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Graham *v.* O'Hern, 24 Hun 221.

10. Effect of discharge under composition. A discharge in bankruptcy, under a composition, does not release the bankrupt from debts fraudulently contracted; no reply need be served to an answer setting up the defence of such a discharge; the fraud may be proved though the action be on notes given for the original debt.—*Supreme Ct.*, (*1st Dept.*,) *May*, 1880. Argall *v.* Jacobs, 21 Hun 114.

11. A debt due from a factor for goods sold by him on commission, is a debt created in a fiduciary character within the meaning of the bankrupt act, and is not discharged by a composition made by the debtor in accordance with the provisions of the said act.—*Supreme Ct.*, (*4th Dept.*,) *April*, 1881. Hardenbrook *v.* Collson, 24 Hun 475; S. C., 61 How. Pr. 426.

12. The right of a creditor to an accounting by the assignee for creditors cannot be divested by the mere fact of a composition in bankruptcy, unless that right was in some way relinquished by the creditors, or shall be divested by the order of the court in bankruptcy; as when a composition has been made and accepted, and the terms of the composition have been complied with, the bankruptcy court will order the property in the hands of the assignee in bankruptcy to be surrendered to the bankrupt. If a composition under the bankrupt law has been duly ratified, it confines the creditor to his security and discharges the debtor from liability. But the creditor can pursue any collateral remedies for the collection of his debt.—*Supreme Ct.*, (*4th Dept.*,) *April*, 1881. Matter of Strauss, 61 How. Pr. 243.

13. Prohibited and fraudulent transfers. *It seems* that under the bankrupt act as amended in 1874 (U. S. Rev. Stat., § 5128,) an assignee in bankruptcy, in order to set aside an assignment of property made by the bankrupt to a creditor, must establish not only that the person claiming under the assignment received it with "reasonable cause to believe" the assignor "insolvent," but that he received it "knowing that such assignment was made in fraud of the provisions of the act." The "reasonable cause to believe" the insolvency may rest upon conjecture, but the knowledge of the fraud must be established as a fact.—*Ct. of App.*, *Feb.*, 1880. Guernsey *v.* Miller, 80 N. Y. 181.

14. This action was brought by the plaintiff, as the assignee in bankruptcy of an insolvent banking association, organized under the general act of 1838, ch. 260, to recover the sum of $400, paid to the defendant's testator, a stockholder of the bank, as a dividend upon his stock, on the ground that at the time it was paid the bank was insolvent. It was conceded that, at the time the dividend was paid, neither the testator nor the officers of the bank knew that it was insolvent, unless they were chargeable in law with such knowledge by reason of their respective positions as a stockholder therein and as officers thereof. *Held*, that the action could not be maintained.—*Supreme Ct.*, (*4th Dept.*,) *June*, 1880. McLean *v.* Eastman, 21 Hun 312.

For decisions under the *Insolvent laws* of the state, now revived by the repeal of the bankrupt law, see INSOLVENCY.

As to *Assignments for benefit of creditors*, see that title.

BANKS AND BANKING.

I. ORGANIZATION AND MANAGEMENT.
II. RIGHTS AND LIABILITIES OF STOCKHOLDERS.
III. POWERS AND DEALINGS OF BANKS.
IV. OFFICERS; THEIR POWERS, DUTIES AND LIABILITIES.
V. DISSOLUTION, RECEIVER, &c.
VI. SAVINGS BANKS.

I. ORGANIZATION AND MANAGEMENT.

1. Statutory restriction on banking. The term "individual banker," in the provision of the act of 1875, relating to savings banks (Laws of 1875, ch. 371, § 49,) which declares it "not to be lawful for any bank, banking association or *individual banker* to advertise or put forth a sign as a savings bank," applies only to one who has availed himself of the banking statutes of this state, and has become empowered to do banking thereunder; it does not apply to a private banker, who exercises in his business no more than the rights and privileges common to all.—*Ct. of App.*, *Feb.*, 1880. People *v.* Doty, 80 N. Y. 225.

2. Defendant and one W. were engaged in conducting a banking business in a building owned by defendant. They were not organized as bankers. Nor was either of them authorized to do banking business under the banking laws of the state. They did business under the name of "The Farmers' Bank of Batavia." Defendant caused to be placed in plain sight, on the outside of the building, the words, "L. Doty's Savings Bank." In an action to recover penalties, under said act of 1875, for putting "forth a sign as a savings bank"—*Held*, that defendant was not an "individual banker," within the meaning of said act, and that, therefore, the action was not maintainable. *Ib.*

II. Rights and Liabilities of Stockholders.

3. Stockholder's right to sue. This action was brought by the stockholder of a national bank, against the bank, a receiver thereof, appointed by the comptroller of the currency, and its directors, the complaint charging the directors with misconduct and neglect in discharging the duties of their office, to the damage and injury of the bank; it also alleged that the plaintiff had demanded of the receiver that he should bring an action against the directors for the said causes, and that he had refused to do so. *Held*, that, as under U. S. Rev. Stat., § 5234, a direction from the comptroller is required to authorize a receiver to bring an action, the complaint was defective in not alleging a demand upon the comptroller for, and a refusal by him of a direction requiring the receiver to bring the said action.—*Supreme Ct.*, (*2d Dept.*,) *Dec.*, 1880. Brinckerhoff *v.* Bostwick, 23 Hun 237.

4. *It seems* that an improper refusal on the part of the comptroller of the currency to prosecute or direct the receiver to prosecute such an action, would authorize the stockholders to sue in their own behalf in a State Court, making the corporation or its representative a party defendant to the action. *Ib.*

III. Powers and Dealings of Banks.

5. Power to make contracts. That a national bank has no power to loan its credit and become an accommodation indorser of a promissory note, see Nat. Bank of Gloversville *v.* Wells, 79 N. Y. 498.

6. Receiving deposits, and obligation to repay. The firm of R. Bros., ship brokers, having become embarrassed in business, caused the moneys thereafter received by them in their business as agents for others, to be deposited with defendant in the name of their book-keeper, plaintiff's intestate, in order to protect such funds from being attached by their creditors and that they might be paid over to the parties entitled thereto. Defendant having discounted a note for said firm, when it became due charged it to said account and refused to pay over the amount so deducted, to plaintiff. In an action to recover the amount so retained—

Held, 1. That defendant was not entitled to set off the amount of the notes against the deposits, as the deposits were not the property of R. Bros., but were deposited and held in trust for the benefit of those for whom the moneys were received.

2. That it was immaterial that none of the parties entitled to the deposits had made claim therefor, as they could enforce their claims against the plaintiff.

3. That it was immaterial that defendant was not notified that said intestate so held the funds in trust; that the deposits being in his name he was under no obligation to give notice that others had an interest therein.

4. That the discharge of R. Bros. in bankruptcy did not affect the rights of the parties for whose benefit these deposits were made; that such discharge, while it might destroy the claims against them, did not deprive those for whom the funds were deposited of their right thereto.—*Ct. of App., Feb.*, 1881. Falkland *v.* St. Nicholas Nat. Bank, 84 N. Y. 145; *reversing* 21 Hun 450.

7. When, in the case of a deposit by the supervisor of a town with a bank, of the money to pay town bonds, the bank will not be held to act as the agent of one by whom bonds have been deposited with it for safe keeping, see People, ex rel. Hustis, *v.* Green, 23 Hun 280.

8. Special deposits: power to receive them. The power to receive special deposits is incidental to the business of banking. The enumeration of banking powers in the national banking act is not significant of an intention to place any special restrictions upon national banks as distinguished from state banks. The enumeration is of the general, not the incidental powers. National banks, therefore, have power to receive special deposits gratuitously or otherwise; and when received gratuitously, they are liable for their loss by gross negligence. When a national bank has habitually received such deposits, this liability attaches to a deposit received in the usual way. —*Ct. of App., Feb.*, 1880. Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 89, 97.

9. Liability for their loss. In an action to recover damages for a special deposit alleged to have been lost through defendant's gross negligence, it appeared that plaintiff delivered to defendant's teller, at its bank, for safe keeping, a package containing certain bonds. Defendant had been accustomed to receive, for that purpose, packages supposed to contain securities and valuables. Some of these were left by its directors. The cashier of the bank had the control and management of its affairs. It did not appear that the president took any part in its management, or that the directors held any meetings. The teller sometimes acted as cashier in his absence. Some time before the deposit, the cashier said something to the teller as to their not taking any more packages for safe keeping. The teller testified that this was not a positive instruction, but merely an opinion, and that he did, after that, receive packages. He also testified that he told plaintiff when the deposit was made, that it would be at his own risk; this was contradicted by plaintiff. The teller also testified that the cashier sometimes told persons depositing packages that they would be at their own risk, and on other occasions packages were received without such notice. The package so left by plaintiff was kept in defendant's bank for about two years before its loss, being occasionally taken out by him to cut off coupons, and then returned. *Held*, that the evidence justified the submission to the jury of the question of the authority of the teller, and whether the deposit was with the bank; and, this having been found, that defendant was bound to return the bonds when demanded, or to show some sufficient ground for not doing so. *Ib.*

10. There was no direct explanation of the manner of the loss, but the evidence tended to show that the bonds were stolen in the daytime, when the bank was open. They were kept in a safe, so placed as to be accessible to any person entering the bank from the street, while those in the bank were so placed that at times the safe was not in their view, and sometimes the door of the safe was left open.

Held, 1. That the evidence authorized a finding that the bonds were stolen by some one

coming in from the street; and that leaving the property thus exposed was gross negligence.

2. That the fact that property of the bank was stolen from the same place, at the same time, was not conclusive against the charge of gross negligence. *Ib.*

11. As to whether, assuming the receipt of special deposits to have been beyond the legal power conferred upon defendant, yet having in fact received plaintiff's property into its custody, it could set up its own want of corporate power as a defence, *quære.* *Ib.*

12. **Checks.** A check is a bill of exchange within the statute (1 Rev. Stat. 768, § 6,) declaring that no person shall be charged as acceptor of a bill of exchange unless his acceptance is in writing. A verbal promise by a bank, therefore, to pay a check does not create a cause of action thereon.—*Ct. of App., Jan.,* 1881. Risley *v.* Phenix Bank of New York, 83 N. Y. 318, 324.

13. **Forged checks.** When forged checks have been paid by a bank, charged in the depositor's account, and returned to him, he owes no duty to the bank to so conduct an examination of these vouchers that it will necessarily lead to a discovery of the fraud; at most, all that is required of the depositor is ordinary care, and if this is exercised by him or his agent, the bank cannot justly complain, although the forgeries are not discovered until too late to enable it to retrieve its position or make reclamation from the forger.—*Ct. of App., March,* 1881. Frank *v.* Chemical Nat. Bank, 84 N. Y. 209; *affirming* 45 Superior 452.

14. Where, therefore, checks forged by plaintiffs' confidential clerk, who filled out their checks and had charge of their bank account, were paid by defendant, charged to plaintiffs in their pass-book, the book balanced and the checks, including those forged, returned to the clerk, who assisted one of the plaintiffs in examining the account, which examination was made whenever the pass-book was written up and vouchers returned, and the clerk, by abstracting the forged vouchers and by false balances and readings, prevented the forgeries from being discovered—*Held,* that plaintiffs were not estopped from questioning the accuracy of the account; and that defendant was liable for the balance, deducting the forged checks. *Ib.*

15. When an action is maintainable against a bank by the drawer of a check to recover the amount paid thereon, when it has been lost or fraudulently obtained from the payee and his indorsement forged, see Thomson *v.* Bank of British North America, 82 N. Y. 1.

16. **Discounts of commercial paper.** The purchase of a promissory note for a sum less than its face is a discount thereof within the meaning of the provision of the banking act of this state, (Laws of 1838, ch. 260, § 18,) which authorizes associations organized under it to discount bills, notes, etc. Plaintiff was organized under said act. The note in question was purchased by it at a greater discount than lawful interest. *Held,* that this did not invalidate its title; that if any penalty was incurred thereby (as to which *quære*), it was only the penalty prescribed by the act (see amendment, Laws of 1870, ch. 193); that this was not available as a defence as it was not set up in the answer.—*Ct. of App., Oct.,* 1880. Atlantic State Bank *v.* Savery, 82 N. Y. 291; *affirming* 18 Hun 36.

17. The L. & I. Co. by its charter (Laws of 1871, ch. 730, § 5,) is authorized to "advance moneys * * * upon any property, real or personal." It discounted a note secured by pledge of the bonds of a railroad corporation. *Held,* that conceding the discount was in violation of the provision of the statute against unauthorized banking, and so the note was void, the loan and its security were valid and could be enforced.—*Ct. of App., March,* 1881. Duncomb *v.* New York, &c., R. R. Co., 84 N. Y. 190.

18. **Collections—liability of collecting bank.** Plaintiff deposited with defendant, for collection, a note to which there was no indorser save the maker, payable at the bank of Lowville, of which bank the maker was a customer. Defendant sent the note by mail to that bank, which was an ordinary method of transacting such business. The note reached said bank the day it fell due; upon the next day it sent its draft on New York in payment, and on the same day failed. The maker had not quite sufficient on deposit to pay the note; the deficit was made up after the failure. Defendant received the draft the next day, which was Saturday, after business hours; it forwarded it on Monday morning, in the usual course of business, to the clearing-house in New York, and it was returned "not good." Defendant immediately gave plaintiff notice of non-payment. In an action to recover the amount of the note, because of alleged negligence—*Held,* that plaintiff was properly non-suited; that as there was no evidence that the maker was insolvent, it did not appear that plaintiff sustained any damage; that the receipt of the draft was not a payment, and did not discharge him from liability. That by sending the note to the bank of Lowville by mail, defendant did not constitute that bank its agent to receive payment, but simply presented the draft through the mail for payment; that no relation was created between defendant and said bank by presentment in this manner different from what would have existed had the note been sent through any other agency; that if presented by a sub-agent the latter would have been justified in accepting a draft for the amount; also, that there was no negligence in forwarding the draft.—*Ct. of App., Feb.,* 1880. Indig *v.* Nat. City Bank of Brooklyn, 80 N. Y. 100.

19. A check deposited by plaintiffs with defendant for collection was sent by defendant to a bank which was its collecting agent, the latter bank charging the check to the drawer's account, and crediting defendant with the amount, in pursuance of an arrangement made between the two banks, the check being returned to the drawer, a third party, as a voucher, and the collecting bank then failed and passed into the hands of a receiver. *Held,* that such charging and crediting constituted a payment of the check to defendant, rendering it liable for the amount of the check to plaintiff.—*Com. Pleas, (Gen. T.,) April,* 1881. Briggs *v.* Central Nat. Bank, 61 How. Pr. 250.

20. The Crawford County National Bank of Pennsylvania being indebted to the plaintiff, drew a draft upon its correspondents in New York city to the order of the plaintiff, and delivered it to him. The defendant to whom it

was sent for collection took the drawee's check in payment thereof, but did not present the check for payment or certification until the next day after receiving it, when payment thereof was refused, the drawee having failed in the meantime. Thereafter the draft was duly protested and notice thereof given to the drawer. The drawer of the draft had at the time moneys in the hands of the drawee, and the check would have been paid if presented on the day it was drawn. Upon the trial of this action, brought by the plaintiff to recover the damages occasioned by the negligence of the defendant in failing to collect the draft—

Held, 1. That if the delivery of the draft to the plaintiff by the drawer was to be considered as a payment of the indebtedness, the failure of the creditor to collect the same from the drawee, who then had funds of the drawer in his hands, released the drawer from all liability for the debt.

2. That if it was delivered to the plaintiff to collect the same, as the agent of the drawer, then the plaintiff was responsible for the acts of its sub-agent, the defendant, and was liable to the drawer for the negligence of the defendant in failing to collect it.

3. That in either event the plaintiff was entitled to recover as damages the face of the draft, with interest.—*Supreme Ct.*, (1*st Dept.*,) *March*, 1881. First Nat. Bank *v.* Fourth Nat. Bank, 24 Hun 241.

21. Jurisdiction of suits against national banks. The provision of the national banking act (U. S. Rev. Stat., § 5798,) authorizing suits against the banking associations organized under it, to be brought in the court of the county or city of the state in which the association is located, does not have the effect to deprive other courts of jurisdiction; it is permissive, not mandatory, and therefore does not limit the general rule permitting civil cases arising under the laws of the United States to be prosecuted and determined in the State Courts, where no exclusive jurisdiction has been vested in the Federal Courts, or the State Courts have not been prohibited from entertaining jurisdiction.—*Ct. of App.*, *June*, 1880. Robinson *v.* Nat. Bank of Newberne, 81 N. Y. 385, 391.

IV. Officers; their Powers, Duties and Liabilities.

22. The President. This action was brought by a national bank and one of its stockholders, against two of its directors, to recover the damages occasioned by the president thereof having, in violation of his duty, lent the money of the bank, without security, and by his having borrowed, taken away and appropriated its money to his own use. The complaint alleged that the defendants knew of those acts and might have prevented them, but negligently permitted and allowed, and aided, countenanced and assisted the president to do them, and concealed the facts from the plaintiff and other stockholders. *Held*, that the president was not a necessary party to the action.—*Supreme Ct.*, (3*d Dept.*,) *Sept.*, 1880. Smith *v.* Rathbun, 22 Hun 150.

23. The defendants demurred, on the ground that two causes of action were improperly joined, viz., one for negligence and the other for malfeasance. *Held*, that the demurrer was properly overruled, as the complaint stated but one cause of action; that it would be impracticable in this case to clearly distinguish between those acts of the defendant which merely permitted and those which aided the president in his wrong-doing. *Ib.*

24. In an action brought by an assignee in bankruptcy against a bank to recover a payment made to it, as having been made with intent to give a preference, and received by the bank with knowledge of the debtor's insolvency, the bank is chargeable with knowledge of all facts in regard to the debtor's intention and solvency which its president has acquired while acting in the capacity of president in its behalf.—*Supreme Ct.*, (4*th Dept.*,) *Jan.*, 1880. Getman *v.* Second Nat. Bank of Oswego, 23 Hun 498.

25. What evidence is sufficient to establish such knowledge on the part of the president, considered. *Ib.*

26. Receiving teller's bond. In an acaction upon a bond given by A, as bookkeeper of a bank, conditioned that he should faithfully discharge the duties of that position, "and the duties of any other trust or employment," relating to the business of plaintiff, which might be assigned to him or which he should undertake to perform, it appeared that A was subsequently appointed receiving teller of the bank, and afterwards was found to be a defaulter, which defalcation occurred long after he was appointed teller—*Held*, that the bond in question should not be held to cover this default.—*Supreme Ct.*, (2*d Dept.*,) *May*, 1881. Nat. Mechanics' Banking Assoc. *v.* Conklin, 61 How. Pr. 76; S. C., 24 Hun 496.

V. Dissolution, Receiver, &c

27. Effect of dissolution in foreign state. In an action on a draft drawn upon bankers in New York, by a Louisiana bank, in favor of the plaintiff, a resident of Lousiana, it appeared that the draft was presented for payment in New York and payment refused; that a few days before, the charter of the Louisiana bank had been forfeited and commissioners in liquidation duly appointed; that such commissioners were soon after made parties to the action; and that the assets of the bank in Louisiana had been transferred to them.

Held, 1. That the draft being drawn upon residents of this state, and payment thereof having been here refused by them, the cause of action arose in this state.

2. That the fact that prior to the commencement of this action the charter of the bank had, by the decree of the court in Louisiana, been forfeited, and its corporate existence thereby terminated, did not affect the right of a creditor of the bank to proceed against it, in this state, as to property situated therein.

3. That the fact that the plaintiff was domiciled within and subject to the laws of the State of Louisiana, did not prevent it from maintaining this action here.—*Supreme Ct.*, (1*st Dept.*,) *May*, 1880. Hibernian Nat. Bank *v.* Mechanics,' &c., Bank of New Orleans, 21 Hun 166; *affirmed*, 84 N. Y. 367.

VI. Savings Banks.

28. Interpretation of charter provisions. Under its charter (Laws of 1868, ch. 816,) the People's Safe Deposit and Savings In-

stitution had power to loan its capital and funds, but was restricted in its investments to such securities as are specified in its charter (§ 11); this did not include commercial paper. Therefore—*Held*, that as the discounting of commercial paper is prohibited by statute (1 Rev. Stat., 712, §§ 3, 6,) to any corporation not authorized by law so to do, and as paper so discounted is declared void, that a promissory note discounted by said corporation was void; but that the illegal action of its directors in thus investing its funds did not work a forfeiture of the money loaned, and that this might be recovered, although the security was void.—*Ct. of App., Jan.*, 1880. Pratt *v.* Short, 79 N. Y. 437.

29. Powers and liabilities of the trustees. The relation between a savings bank and its trustees or directors is that of principal and agent, and that between the trustees and depositors is similar to that of trustee and *cestui que trust*. If such trustees transcend the limits placed upon their power in the charter of the bank and cause damage to the bank or its depositors, they are liable. They are also bound to exercise care and prudence in the execution of their trust, in the same degree that men of common prudence ordinarily exercise in their own affairs.—*Ct. of App., Sept.*, 1880. Hun *v.* Cary, 82 N. Y. 65.

30. Defendant T. was one of the trustees of a savings bank. To make up a deficiency in the assets of the bank, caused by a loss upon a loan made by it, he executed a mortgage to H., who assigned it to the bank. In an action to foreclose the mortgage—*Held*, that T. in executing it did not thereby become a surety or obligor for moneys loaned by the bank, within the meaning of the provision of the act of 1875, in relation to savings banks (Laws of 1875, ch. 37, § 121,) which prohibits a trustee from becoming such surety or obligor; and so, that the mortgage was not invalid as violative of that provision.—*Ct of App., Nov.*, 1879. Best *v.* Thiel, 79 N. Y. 15.

31. The claim was made that the trustees of the bank were personally liable for the deficiency. The superintendent of the banking department informed them that they were so liable, and that this liability would be enforced unless they made up the deficiency, and upon his requirement the mortgage was executed. T. set up want of consideration as a defence. *Held*, untenable. 1st. The seal was presumptive evidence of a consideration, which presumption was not clearly overcome. 2d. T. was estopped from denying the legal validity of the mortgage, as it was with his knowledge and assent reported to the bank department and represented to the depositors of the bank as a portion of its assets, and upon the strength thereof and other similar securities, the bank was permitted to continue its business. *Ib.*

32. Liability for moneys deposited in trust. S. deposited with defendant, a savings bank, a certain sum of money, receiving a pass-book, which stated that the account was with her, "in trust for Christopher Boone," plaintiff's intestate. S. received the pass-book and drew out one year's interest. After her death defendant paid the amount to her administrator, upon production of his letters of administration and of the pass-book. In an action to recover the deposit—*Held*, that, in the absence of any notice from the beneficiary, the payment was good and effectual to discharge the defendant; that the deposit constituted S. trustee and transferred the title to the fund from her individually to her as such trustee; that, upon the death of S., her rights as trustee to demand and receive the fund devolved upon her administrator, and upon his demand defendant was bound to pay it over; it had no right to inquire into the nature of the trust, and owed no duty to the beneficiary until the latter by notice, by forbidding payment or by demanding it himself, created such right and duty.—*Ct. of App., Feb.*, 1881. Boone *v.* Citizens' Savings Bank, 84 N. Y. 83; S. C., 9 Abb. N. Cas. 146; *reversing*, 21 Hun 235.

BASTARDY.

For any decisions as to the legal status and rights of illegitimate children, see DESCENT.

BENEVOLENT SOCIETIES.

SOCIETIES AND ASSOCIATIONS.

BEQUESTS.

As to the *Interpretation* and *Validity* of bequests, generally, see LEGACIES; WILLS.

As to bequests in *Lieu of dower*, see DOWER.

As to *Payment of bequests*, see EXECUTORS AND ADMINISTRATORS, III.; LEGACIES, III.

BIGAMY.

Competency of wife of accused to testify. Under Laws of 1876, ch. 182, § 2, a wife cannot, though willing so to do, be allowed to testify against her husband upon his trial for bigamy.—*Supreme Ct., (2d Dept.,) May*, 1881. People *v.* Houghton, 24 Hun 501.

As to what constitutes a *Valid marriage*, see HUSBAND AND WIFE, I.

As to the *Prohibition* of future marriage of person divorced for his own adultery, see DIVORCE, II.

BILLS.

Of *Exceptions*, see APPEAL; ERROR; EXCEPTIONS.

Of *Exchange*, see BILLS OF EXCHANGE.

Of *Lading*, see BILLS OF LADING.

Of *Particulars*, see BILLS OF PARTICULARS.

Of *Revivor*, see ABATEMENT, II.

BILLS OF EXCHANGE.

[Consult, also, PROMISSORY NOTES.]

1. Necessity of acceptance. Where a draft is drawn generally, to be paid by the drawee in the first instance on the credit of the drawer, the designation by the drawer of a particular fund out of which the drawee may sub-

sequently be reimbursed, does not convert the draft into an assignment of the fund, and the payee can have no action thereon against the drawee, unless he duly accepts.—*Ct of App., Sept.*, 1880. Brill *v.* Tuttle, 81 N. Y. 454.

2. Promise to accept. The rule that where a conditional promise to accept a draft is made, performance of the condition on the part of the plaintiff must be shown in order to entitle him to recover for defendant's failure to accept, applied. Commercial Bank of Keokuk *v.* Pfeiffer, 22 Hun 327.

3. Refusal to accept—retention of bill. The "refusal" spoken of in the provision of the statute in reference to bills of exchange (1 Rev. Stat. 769, § 11,) which declares that one upon whom a bill is drawn and delivered for acceptance, who destroys or refuses to re-deliver it, shall be deemed to have accepted it, is an affirmative act, or is made up of conduct tantamount to one; it is also a willful or wrongful act.—*Ct. of App., Jan.*, 1880. Mattison *v.* Moulton, 79 N. Y. 627.

4. The mere retention, without a demand for a return, or a dissent to the retention, and with the permission of the owner, is not a refusal within the meaning of the statute. Where, therefore, it appeared that the drawee promised to pay the amount by the time or upon a contingency named, and that the payee, relying upon this, permitted the bill to remain in the hands of the former, and no demand or request for its return, and a denial or evasion thereof was proved—*Held*, that the drawee was not chargeable as acceptor of the bill, that the promise to pay was void under the statute of frauds (2 Rev. Stat. 135, § 2,) as it was an oral promise to answer for the debt of another. *Ib.*

5. Rights of purchaser of accommodation paper. There is no implied warranty or representation on the part of the vendor of a bill, valid in the hands of an indorsee, that it was drawn against funds, or that it was not accommodation paper.—*Ct. of App., June,* 1880. People's Bank *v.* Bogart, 81 N. Y. 101.

6. A vendor of a bill purchased by him from and known by him to have been drawn for the accommodation of the acceptor, and as a means of borrowing money by the latter, is not bound, in the absence of any inquiry on the part of the vendee, and where the means of information are open to the latter, to disclose at the time of the sale the circumstances under which the paper was made. The rule of *caveat emptor* applies in such a case. *Ib.*

7. Non-negotiable orders. A. & Co. being engaged in repairing a house for defendant, for a valuable consideration, executed and delivered to plaintiffs the following instrument, directed to defendant: "Pay B. & R. three hundred dollars, and charge same to our account, for labor and materials performed and furnished in the repairs and alterations of the house in which you reside, in the village of M." In an action upon the instrument, it appeared that the work was nearly done when the instrument was executed; the testimony was conflicting as to the amount then due. Previous to its delivery to plaintiffs, one of them, with the drawer, called upon defendant and requested him to accept an order for the $300, or give plaintiffs a note or some security therefor, which he declined to do, and immediately thereupon the order in question was given, which defendant refused to pay or recognize. *Held*, that the order did not necessarily require a construction that it was a request to advance the sum specified; that the direction therein, in connection with the surrounding circumstances, indicated the intent to have been simply to direct payment of such sums as were or might become due to the drawers on the account for repairs, up to the amount specified; that thus construed, the order was an assignment of so much of the fund; and that a voluntary payment by defendant to the drawers, after notice of plaintiffs' rights, was in his own wrong, and was no defence.—*Ct. of App., Sept.*, 1880. Brill *v.* Tuttle, 81 N. Y. 454.

8. Law of place. The authorities as to the *lex loci* controlling bills of exchange, collated and discussed.—*Ct. of App., March,* 1881. Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367; *affirming* 21 Hun 166.

9. Demand and notice. An indorser has one day after the receipt of notice in which to serve notice on a prior indorser. Higgins *v.* Barrowcliffe, 46 Superior 540.

10. As to the liability of an indorser who has not received notice of presentment and non-payment, and how it may be revived, see Van Dyck *v.* Jones, 46 Superior 538.

11. Pleading and evidence. In March, 1873, T., of the firm of S., T. & Co., doing business at Memphis, drew his draft upon that firm, payable to the order of J. M. N. & Son, a Boston firm. The draft was accepted by the drawees, payable at Memphis in forty days. The holder sent the draft to Memphis for collection. Before it fell due the drawees notified the payees that they would not be able to meet it, and requested permission to draw for the amount. Permission was granted by telegram to draw at sight to pay said draft. S., T. & Co. thereupon drew upon J. N. M. & Son a sight draft for the amount. This draft was discounted by defendant, and with the assent of the drawers the proceeds were placed to their credit, their account with defendant being at that time overdrawn to more than the amount. J. N. M. & Son accepted the new draft on presentation, and subsequently paid it. S., T. & Co. drew a check on defendant to pay the old draft which it refused to honor, and refused to pay said draft when presented. S., T. & Co. soon after became insolvent. In an action to recover the amount of the new draft it was not alleged, nor was it proved, that a demand or offer to return the draft was first made, or that defendant had any knowledge of the telegram, or the purpose for which J. N. M. & Son authorized the drawing of the new draft. The court directed a verdict for plaintiff. *Held*, error; that neither a cause of action for a conversion of the draft, nor one to recover back moneys paid by mistake, was established.—*Ct. of App., March,* 1881. Southwick *v.* First Nat. Bank of Memphis, 84 N. Y. 420; *reversing* 20 Hun 349.

12. The complaint alleged that defendant was notified of the purpose for which the new draft was authorized to be drawn; that it received it, agreeing to collect and apply the proceeds for that purpose, but that it refused so to do. *Held*, that the court erred in denying a motion for a nonsuit, as plaintiff failed to prove the cause of action alleged in the complaint. *Ib.*

BILLS OF LADING.

1. How construed, generally. In case of variance between bills of lading, the terms of the one given to the shipper control.—*Supreme Ct.*, (*2d Dept.*,) *Dec.*, 1880. Ontario Bank *v.* Hanlon, 23 Hun 283.

And the printed portions are controlled by the written parts.—*Supreme Ct.*, (*1st Dept.*,) *May*, 1881. Miller *v.* Hannibal, &c., R. R. Co., 24 Hun 607.

2. How far conclusive. When the carrier is estopped by the recitals in the bill of lading from denying the receipt of the articles specified in it, see *Ib.*

3. Particular provisions and exceptions. A bill of lading which provides that live stock will only be taken at the owner's risk of injury during the loading thereof, unless specially agreed to the contrary, does not exempt the carrier from liability for injuries sustained by a horse while being put upon the car, if the injury be occasioned by the negligence of the carrier in furnishing unsafe and insufficient accommodations for receiving it.—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Potter *v.* Sharp, 24 Hun 179.

4. The bill of lading under which the goods were shipped provided that the defendant would "not be responsible for goods while at any station awaiting delivery, * * * nor for decay of perishable articles, nor for damages arising from heat or cold, or where occasioned by providential causes or by fire, * * * nor for delays from unavoidable causes." In an action by the plaintiffs to recover damages for the injuries sustained by the heating of the hams—*Held*, that the damages were caused by the negligence of the defendant in failing to deliver the hams and give the customary notice of their arrival to the consignees; and that the bill of lading did not relieve the defendant from liability for damages occasioned by his own negligence.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. McKinney *v.* Jewett, 24 Hun 19.

5. Plaintiff shipped, on board one of defendant's steamships, a quantity of gold coin, receiving a bill of lading, which contained a clause exempting defendant from liability for any loss, etc., resulting from the following causes, among others: "Theft on land or afloat," "barratry of master or mariners." A portion of the money was stolen *en route*. In an action to recover for the loss, the evidence tended to show that the theft was perpetrated by the purser. The court charged, in substance, that if the gold was lost by the theft of the purser the defendant was liable. *Held*, error; that in such case defendant was exempted from liability by the clause against barratry; that if the purser could not be considered a mariner, so that the clause against barratry did not apply to him, then the case was within the exemption as to theft.—*Ct. of App.*, *Feb.*, 1880. Spinnetti *v.* Atlas Steamship Co., 80 N. Y. 71.

6. Effect of delivery of the bill to pass title to goods. Plaintiffs made advances to N. on pledge of the bill of lading of a cargo of corn, of which N. was general owner, and which was consigned to him at B. Upon arrival of the corn, plaintiffs consented that N. might designate the elevator in which it should be stored; this he did, and upon receiving from the master of the vessel the elevator receipt, instead of procuring a warehouse receipt in the names of plaintiffs, and delivering it to them, as according to usage it was his duty to do, he obtained such receipt in his own name. The plaintiffs knew that according to the usual course of dealing, the master would deliver the elevator receipt to the consignee on payment of freight, and that on such receipt a warehouse receipt would be issued to the consignee, or in the name of whom he should direct. They expected N. to pay the freight, and intended him to receive the elevator receipt. The corn arrived November 8th; plaintiffs paid no attention to its possession until November 18th, when they demanded repayment of their loan. Meanwhile N. had shipped the corn to New York by canal, and on the faith of the canal boat bills of lading obtained advances from defendants.

Held, 1, that conceding plaintiffs' claim could not be enforced as against defendants, as to which *quære*, yet it remained good as against N. or his creditors, and defendants would be entitled to protection against such claim only to the extent of their advances, and so far only as a lien on the corn or its proceeds was necessary to secure such advances.

2. And, it appearing that defendants had in their hands other funds belonging to N. upon which they had a lien for, and had the right to apply them to, the payment of these advances, and which, after notice of plaintiffs' claim they paid over to another on the order of N, that plaintiffs were entitled to demand, and upon refusal to pay, to maintain an action to recover the corn or its proceeds.

3. That plaintiffs' right to have such other funds applied to cancel defendants' lien was superior to the title thereto of an assignee in bankruptcy of N., or to that of any person to whom N. might have assigned the same.—*Ct. of App.*, *Jan.*, 1881. Hazard *v.* Fiske, 83 N. Y. 287; *affirming* 18 Hun 277.

BILLS OF PARTICULARS.

1. Power to order a bill. The provision of the Code of Civil Procedure, allowing the court to direct a bill of particulars of the claim of either party, (§ 531,) confers a broad judicial discretion, and is declaratory of the practice which existed anterior to the adoption of the Code.—*Supreme Ct.*, (*3d Dept.*,) *April*, 1880. Butler *v.* Mann, 9 Abb. N. Cas. 49.

2. The power thus conferred should be prudently employed, with the view to enable parties to prepare their pleadings and evidence for the trial of the real issues involved, and not to impose unnecessary labor on any party. *Ib.*

3. The power of the Supreme Court to order bills of particulars extends to all descriptions of actions, and it may be exercised as well in behalf of the plaintiff as of the defendant.—*Ct. of App.*, *March*, 1881. Dwight *v.* Germania Life Ins. Co., 84 N. Y. 493; *dismissing appeal from* 22 Hun 167.

4. The word "claim" in the provision of the Code of Civ. Pro., § 531, providing that the court may "in any case direct a bill of the particulars of the *claim* of either party to be delivered to the adverse party," includes not merely a ground or cause of action upon which some affirmative relief is asked, but also, in case

of a defendant, whatever is set up by him, based upon facts alleged as the reason why judgment should not go against him. *Ib.*

5. The said provision does not take away the power the court previously had of affixing a disability to disobedience of an order directing a bill of particulars. *Ib.*

6. **In what cases granted.** A broker who is the agent of his client is, and ought to be, required to show fully and specifically each item of the account which he charges against his client. Each of the parties to such an account is entitled to know and to have presented to him, when a demand is made for a loss, supposed or real, the items which make up such loss, and to be given an opportunity not only to inspect and ascertain the correctness of the same, but to controvert such items whenever it becomes necessary.—*Supreme Ct.*, (1st *Dept.*,) *Oct.*, 1880. Miller, *v* Kent 60 How. Pr. 388, 394; S. C., 24 Hun 657.

7. When plaintiff should be required to furnish a bill of particulars as to assets of a savings bank, alleged to have been misappropriated by a director, the defendant, see Friedberg *v.* Bates, 24 Hun 375.

8. **Instances.** Plaintiff having sued defendant, an attorney, for the conversion of a certain draft and the moneys collected thereon, claiming title thereto by assignment from one D., defendant in his answer alleged that the draft was received by him under an agreement with D., by which he was to collect the sum due thereon, and credit D. with the net amount collected, on account of moneys which he alleged were due him from D. for professional services and otherwise, and on account of divers contracts, &c., assumed by him for D. In another subdivision of his answer, he further alleged that said agreement, having been carried out, D. had executed and delivered to him a general release, of and from all claims. *Held*, that plaintiff was entitled to a bill of particulars of defendant's first defence, notwithstanding the fact that another of the defences relied on was a general release.—*Superior Ct.*, *Nov.*, 1880. Diossy *v.* Rust, 46 Superior 374.

9. In an action upon a policy of life insurance certain breaches of warranty in answering untruly questions in an application were set up as a defence, to wit, that the insured stated that he had made no other application for insurance which had been refused, whereas he had made such applications to companies unknown to defendant; also that he had not had bronchitis or spitting of blood, when in fact he had had both prior to the application; also that he had other insurance on his life in addition to those specified by him. The court, on motion for a bill of particulars, directed defendant to deliver to plaintiff's attorney a statement of the particular times and places at which it expected to prove that the insured had bronchitis and spitting of blood, also stating what other insurance in addition to those specified the defendant expects or intends to prove the insured had, specifying the name of the company and the date and amount of the policy; also stating what applications for insurance were made which had not led to an assurance, specifying name of company, time when application was made, and date of application. The order also provided that defendant should be precluded from giving evidence on the trial of matter not specified in such bill of particulars. The General Term modified the order so as to allow defendant to give in evidence general admissions and declarations of the insured without regard to the bill of particulars. *Held*, that the court had power to grant such an order; and that the granting of it in this case was not such an abuse of discretion as to authorize a review of it in this court. Dwight *v.* Germania Life Ins. Co., *supra.*

10. The affidavits upon which the motion was made stated that plaintiffs did not know to what instances the said averments of the answer referred, but did not state that they did not know of some instances of the kind referred to. It was claimed that these allegations were not sufficient to authorize the court to entertain the motion. *Held*, untenable; that the affidavits made a case for the exercise of the discretion of the court. *Ib.*

11. **When refused.** Where sureties, sued on an official bond, applied for particulars of the moneys received by the principal, and for which it was alleged he had failed to account—*Held*, that in absence of anything to indicate that defendants could not, equally with plaintiff, ascertain the facts from the principal, the application should be denied. Butler *v.* Mann, *supra.*

12. The object of this provision is to enable a party reasonably to protect himself against surprise, not to impede the prosecution of an action, or unnecessarily to increase its expense. *Ib.*

13. **Sufficiency of the bill.** In an action of slander the complaint alleged that on or about the 4th, 5th or 6th days of August, 1880, &c., defendant at the town of W. and elsewhere, &c., and at divers other times and places, and in the presence and hearing of divers persons, spoke of and concerning the plaintiff, &c. Upon application of defendant an order was made directing plaintiff to deliver to defendant a bill of particulars specifying the times when and the places where the slanderous words alleged were spoken. A bill was served, which, after specifying a few times and places, stated that said defendant "did, as plaintiff is informed and believes, at other places and dates and times, in the town of W., in said county of O., during the month of August, 1880, speak of and concerning said plaintiff, the slanderous and defamatory words in the complaint mentioned and set out, but at what particular place or places or dates, said plaintiff is now absolutely unable to state or set out more particularly and definitely." Defendant applied for a further bill, which should comply literally with the order of the court, and also give the names of the persons in whose presence the words were spoken. *Held*, that plaintiff should be compelled to strike out the above clause or state the particular times and places, but should not be compelled to give the *names* of the *persons* in whose *presence* the words were spoken.—*Supreme Ct.*, (*Oneida Sp. T.*,) *Jan.*, 1881. Jones *v.* Platt, 60 How Pr. 277.

14. When a bill of particulars is sufficiently definite and specific, see People *v.* Cox, 23 Hun 269.

BOARDS.

CORPORATIONS; COUNTIES; MUNICIPAL CORPORATIONS, IV.; NEW YORK CITY, III.; OFFICERS.

BONDS.

I. FORM, CONSTRUCTION AND VALIDITY.
II. ACTIONS ON BONDS.

I. FORM, CONSTRUCTION AND VALIDITY.

1. How construed, generally. Bonds taken by an officer in the course of official duty, to and for the benefit of another, are not open to the objections to bonds taken by an officer, to and for himself, which must more closely follow the statutory requirement; in the former case the substance is looked for more than the form, although it be a surety that is to be held.—*Ct. of App., Sept.,* 1880. Gerould *v.* Wilson, 81 N. Y. 573.

2. Where a bond of indemnity given to an officer can reasonably be construed otherwise, a construction will not be given to it which will make the obligors liable for trespasses which they did not direct or authorize.—*Ct. of App., Jan.,* 1881. Clark *v.* Woodruff, 83 N. Y. 518; *affirming* 18 Hun 417.

3. Validity. Bonds issued in pursuance of a statute for and in the name of a town, to defray the expenses of a local improvement, are not necessarily invalid because of illegality of the provisions in the act for the levying of an assessment to pay the bonds.—*Ct. of App., Dec.,* 1880. Horn *v.* Town of New Lots, 83 N. Y. 100.

4. Negotiable bonds—rights of holders. Where a trustee of a mortgage, given by a railroad company to secure the payment of bonds issued by it, upon the application of persons claiming to own a majority of the said bonds, allowed the applicants to institute proceedings in its name to foreclose the mortgage, and to carry on the proceedings to final judgment and sell the property thereunder, the trustee paying no attention to the said proceedings, but leaving them wholly subject to the control and direction of such persons—*Held,* that the trustee was liable to a holder of one of the said bonds for the damages sustained by him, by reason of its neglect to faithfully perform and discharge the duties imposed upon it by the acceptance of the trust.—*Supreme Ct.,* (1*st Dept.,*) *March,* 1881. Merrill *v.* Farmers' Loan and Trust Co., 24 Hun 297.

5. As to the rights of parties holding bonds of a railroad corporation on foreclosure of the mortgage securing the bonds, see Duncomb *v.* New York, &c., R. R. Co., 84 N. Y. 90.

II. ACTIONS ON BONDS.

6. Who may sue. The plaintiff and defendant having executed a joint and several bond, payment of which was secured by a mortgage upon real estate owned by them, the plaintiff paid the whole of certain interest falling due upon the bond, and thereafter brought this action against the defendant to recover one-half of the amount so paid. *Held,* that he should be considered as the equitable assignee of the claim of the obligees in the bond against the defendant to the extent of one-half of the payment so made, and should be allowed to maintain the action, subject to the right of the defendant to interpose any defence which he might have set up had the action been brought directly upon the bond by the obligees thereof.—*Supreme Ct.,* (1*st Dept.,*) *March,* 1881. McCready *v.* Van Antwerp, 24 Hun 322.

7. In an action upon a bond given by the defendants as sureties for one H., conditioned that the latter should faithfully perform his duties as agent of a life insurance company, and pay all indebtedness to the plaintiff, it appeared that in an action previously brought by the plaintiff against H., he had caused him to be arrested under an order granted therein, and had subsequently released him from such arrest, upon his confessing a judgment for the amount due to the plaintiffs. *Held,* that his so doing did not prevent his maintaining this action upon the bond.—*Supreme Ct.,* (4*th Dept.,*) *Oct.,* 1880. Emery *v.* Baltz, 22 Hun 434.

8. Actions on forged bonds. In an action to recover moneys paid for a forged bond, alleged to have been sold by defendants to plaintiffs, the defence was that the bond was sold by W., the owner, and was simply delivered by defendants, who held it, as security for a loan. A witness for defendants having testified to the transactions within his knowledge, was asked whether the defendants' firm ever sold the bond to plaintiffs; this was objected to and excluded. *Held,* no error, as it called upon the witness to place a construction upon the facts, which was for the jury to do.—*Ct. of App., Feb.,* 1880. Nicolay *v.* Unger, 80 N. Y. 54.

9. W., as a witness for defendants, testified that he sold the bond in question, and four others of the same description, to plaintiffs, and upon cross-examination that he was owner of the bonds. Plaintiffs produced, and were permitted to give in evidence, a memorandum, in the handwriting of W., showing that four of the bonds belonged to another person, also a check given for the purchase money, which was made payable to that person. *Held,* no error. *Ib.*

10. Defendants' counsel requested the court to charge that, if defendants received the proceeds of the sale of the bond from the plaintiffs, and applied them in payment of a loan, for which they held it as collateral, they were entitled to a verdict. The court so charged, adding, however, this proviso—if the owner of the bond sold it, or plaintiffs knew or had reason to believe that W. was the owner, or that defendants were acting for others in selling; the proviso was excepted to. *Held,* no error; that the proposition contained in the request to charge was untenable. *Ib.* 59.

As to bonds on *Appeal or Error,* see those titles.

As to the security required on granting either of the *Provisional remedies,* see their titles, chiefly ARREST; ATTACHMENT; INJUNCTION; MANDAMUS; RECEIVERS; REPLEVIN.

As to *Official bonds,* see OFFICERS; and the titles of various officers there referred to.

As to town and city bonds *In aid of railroads,* see MUNICIPAL CORPORATIONS, III.

BOUNDARIES.

1. **How proved—practical location and acquiescence.** When there has been a practical location of the dividing line between the lands of adjoining owners and a long acquiescence therein, the line so established will not be disturbed.—*Ct. of App., Nov.,* 1880. Avery *v.* Empire Woolen Co., 82 N. Y. 582.

2. Where there is no agreement between the parties as to the boundary line, although a division line has been actually in existence, and the parties have severally occupied accordingly, yet, if such existence and occupation have been for less than twenty years, the fact of their acquiescence in the line as *a boundary line* must be found, to establish it as a boundary line by practical location.—*Superior Ct., June,* 1880. Stevens *v.* Mayor, &c., of New York 46 Superior 274.

3. A line cannot be practically located by an intention in the minds of parties to locate it in a certain place, when, in fact, they locate it somewhere else. *Ib.*

4. **Lands bounded by the sea.** Plaintiffs having title to land bounded by the waters of a bay at ordinary high-water mark, made an allotment, under which defendant claimed, bounded westerly by "the cliff." At the time of the allotment there was a strip of land between the cliff and high-water mark. In an action of ejectment—*Held,* that this strip was not embraced in the allotment; but that the boundary by the cliff was not a shifting one so as to entitle plaintiffs to make reprisals out of the allotted lands for land lost by the advance of the sea; and that, as between them and the grantees, the site of the cliff at the time of the allotment continued to be the western boundary, and if the strip then intervening between it and high-water mark and a portion of the cliff had subsequently been worn away by the action of the sea, so that the present high-water mark was within the boundaries of the allotted land, plaintiffs had no title.—*Ct. of App., March,* 1881. Trustees, &c., of East Hampton *v.* Kirk, 84 N. Y. 215.

BRIDGES.

1. **Power of town to contract for building bridges.** Where a highway bridge in the town of G. was carried away by a flood, shortly prior to the town meeting of 1873—*Held,* that the commissioners of highways of the town, with the consent of the board of town auditors, were authorized to enter into a contract for the rebuilding of the bridge, under the provisions of the act providing for "the speedy construction and repair of roads and bridges," etc., (Laws of 1858, ch. 103, § 1, as amended by Laws of 1865, ch. 442,) which authorizes the commissioners of highways of a town, with such consent, where a bridge has been damaged or destroyed after a town meeting, to cause the same to be immediately repaired or rebuilt; and, also, that the commissioners were authorized to contract to pay for the bridge upon the completion thereof, although they had no money in their hands for that purpose.—*Ct. of App., Dec.,* 1879. Boots *v.* Washburn, 79 N. Y. 207.

2. In an action upon such a contract, it appeared that the consent of the board of town auditors to the rebuilding of the bridge was given at its regular annual meeting, when all the members of the board were present; it did not appear whether the consent was in writing or not. *Held,* that, if requisite, it would be assumed that a record of the consent was properly made. *Ib.*

3. There were three commissioners of highways of the town, all of whom united in the determination to re-build the bridge, and in the application to the board of auditors; also, in the agreement upon the plan, and that the work should be by contract, the letting to be advertised. At the time the contract was let and entered into, one of the commissioners was absent, he not having received actual notice in time to attend; his name was signed to the contract by one of the other commissioners, who previously, by his consent, had signed his name to the advertisement; he afterwards, with knowledge of the facts, acted with the other commissioners in reference to the bridge, without any objection, and never questioned the validity of the contract. *Held,* that the contract was to be treated as the valid contract of the three commissioners. *Ib.*

4. **Respective liabilities of adjoining towns.** For a failure to keep in repair a bridge over a stream dividing adjoining towns, as required by Laws of 1841, ch. 225, as amended by Laws of 1857, ch. 383, the commissioners of highways of the said towns are jointly and not severally liable.—*Supreme Ct., (2d Dept.,) May,* 1880. Theall *v.* City of Yonkers, 21 Hun 265.

Consult, also, Highways; Plank Road Companies; Turnpike Companies.

BROKERS.

Principal and Agent, IV.

BROOKLYN.

1. **Municipal elections.** The provisions of the act of 1872, "to regulate elections in the city of Brooklyn" (Laws of 1872, ch. 575, §§ 12, 13,) providing for preserving the ballots, are germane to the subject expressed in the title; their incorporation in the act, therefore, does not render it violative of the provision of the state constitution, declaring that no private or local bill shall embrace more than one subject, and that shall be expressed in the title. (Art. III, § 16.)—*Ct. of App., Dec.,* 1879. People, ex rel. Dailey *v.* Livingston, 79 N. Y. 279.

2. The provision of said act (§ 13) requiring the board of canvassers to deposit the ballot-boxes in the department of police, does not require the canvassers personally to carry the boxes to the police department, nor does it require the boxes to be deposited at police headquarters; a delivery of the boxes by the canvassers to police officers assigned for that purpose, and a deposit of said boxes by such officers in the precinct station-houses, is a substantial compliance with the provision. *Ib.*

3. The provision requiring, that after the canvass is completed, and the ballots returned to the boxes, said boxes shall be "securely sealed up by the canvassers," contemplates that the boxes shall be so sealed that they cannot be opened without breaking the sealing. *Ib.*

4. Where the inspectors sealed the apertures to the boxes, through which the ballots were inserted, and the canvassers did not remove these seals, but delivered the boxes to the police department without further sealing—*Held*, that this was not a compliance with the act; but that this provision was directory only, and where it is proved satisfactorily that the boxes had been kept "undisturbed and inviolate," the omission of the canvassers to seal up the boxes, as contemplated, does not render the ballots inadmissible as evidence. *Ib.*

5. The burden of proof, however, is upon a party producing the ballot-boxes to show to the satisfaction of a jury that they have been kept undisturbed and inviolate; it is not sufficient that a mere probability of security is proved; the fact must be shown with a reasonable degree of certainty. *Ib.*

6. The use of the ballots so preserved, as evidence, is not limited to cases of city officers merely; they are admissible as well in cases of other officers voted for in the city. *Ib.*

7. **Assessments for local improvements.** In proceedings to reduce assessments, the whole amount of any deduction should be made from the part remaining unpaid. (Laws of 1875, ch. 633, § 30.)—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Matter of Rust, 24 Hun 229.

8. **Railroads.** As to the right of the Long Island Railroad Company to use steam power upon Atlantic avenue, see People *v.* Long Island R. R. Co., 60 How. Pr. 395.

9. **Elevated railroads.** The county of Kings cannot maintain an action to restrain the construction of an elevated railroad over the Ocean Parkway to the highway known as the Concourse, as the fee of the land used in constructing the Parkway is not in the county, but remains in the former owners.—*N. Y. Supreme Ct.*, (*2d Dept.*,) *Dec.*, 1880. Supervisors of Kings Co. *v.* Sea View R'y Co., 23 Hun 180.

BUFFALO.

1. **Act concerning sea-wall on Lake Erie, constitutional.** The act entitled "An act authorizing the common council of the city of Buffalo to lay out a public ground for the purpose of maintaining and protecting a sea-wall or breakwater along the shore or margin of Lake Erie" (Laws of 1864, ch. 547,) authorized the taking of a fee in lands required for the purpose specified; and under proceedings for that purpose taken as prescribed by the act which gave to the city all the interest authorized by the act, it acquired an absolute fee.—*Ct. of App.*, *Dec.*, 1879. Sweet *v.* Buffalo, &c., R'y Co., 79 N. Y. 293.

2. The fact that the particular purpose for which the land was to be taken is expressed in the title and in the act, does not qualify the estate taken; the purpose so declared simply regulates and defines the use for which the land shall be held. *Ib.*

3. The act does not conflict with the provision of the state constitution (art. III., § 16,) declaring that a private or local act shall include but one subject, which shall be expressed in its title. *Ib.*

4. **Act concerning repairs of "Hamburgh turnpike," constitutional.** The act entitled "An act to legalize certain proceedings of the common council of the city of Buffalo" (Laws of 1875, ch. 2,) which ratifies and confirms the proceedings of the common council in the matter of the repairs of the "Hamburgh turnpike," is not violative of the provision of the state constitution declaring it to be the duty of the legislature to restrict the power of assessment in cities so as to prevent abuse in assessments, as the provision is not a limitation upon the legislature, and the power of assessment created by the act is not a power exercised by the city, but by the legislature.—*Ct. of App*, *Sept.*, 1880. Tifft *v.* City of Buffalo, 82 N. Y. 206.

5. The legislature has power thus to adopt and legalize the acts of a municipality, invalid, because of irregularity merely in the mode of procedure, when there was municipal jurisdiction of the subject matter. *Ib.*

6. Said act is not repugnant to the constitutional provision (art. III., § 16,) declaring that no private or local bill shall embrace more than one subject, and that shall be expressed in the title. *Ib.*

Nor is it in contravention of the provision of the constitution (art. III., § 18) prohibiting the legislature from passing a private or local bill for the laying out, opening, altering, etc., of a highway, as it does not originate the work, but simply cures defective proceedings. *Ib.*

7. The turnpike in question formerly belonged to the B. & H. T. Co., which, by its charter, had power to purchase, hold and convey real estate necessary for its use; the lands used were conveyed to said corporation in fee for the uses and purposes of a road; the deed, aside from specifying this purpose, contained no limitation or condition. After the said corporation ceased to keep up the road, and was dissolved, the city assumed the care of it as one of its streets, and it has, since it was laid out by that company, always been used as a highway. *Held*, that the lands did not revert to the original owners upon dissolution of the corporation; and that, assuming the provision of the act of 1838 (Laws of 1838, ch. 262, § 1,) declaring that when a turnpike corporation shall be dissolved and the road discontinued, it shall become a public highway, did not apply so long as any rights of the company remained to be affected, and yet it was a legislative declaration of the effect of a discontinuance; and so when the corporation ceased to exist, and its franchise went back to the state that had given it, the public interest in the road remained. *Ib.*

8. Although an appropriation or conveyance of lands be for a public use, and it be so expressed in the law authorizing the appropriation, or in the deed, this does not prevent the passage of the absolute title, so as to cut off all right of *reverter* to the former owner or the grantor. *Ib.*

9. The said act of 1875, although by its terms simply ratifying and confirming what had been done by the common council, made the steps taken the proper ones to produce a valid

local assessment for the expenditures in repairing said road, and validated the assessment made therefor. *Ib.*

10. Municipal taxes. The provision of the charter of 1870 (Laws of 1870, ch. 519, § 22,) declaring that goods and chattels upon lands for which taxes are assessed shall be deemed to belong to the person to whom the lands are assessed, does not apply to property belonging to another person in no way liable for the tax, which is transiently upon lands assessed, but in the possession of the owner for his own purposes; and the collector cannot lawfully, by virtue of his warrant, take such property, for the purpose of satisfying the tax.—*Ct. of App., March*, 1880. Lake Shore, &c., Ry. Co. *v.* Roach, 80 N. Y. 339.

11. Where such property is so taken, an action by the owner to recover the possession thereof, may be maintained against the collector. *Ib.*

12. The property, in such case, cannot properly be said to be taken for a tax within the meaning of the provision of the Code of Pro., § 207, requiring an affidavit for the claim and delivery of property to show that the property has not been taken for a tax, or of the provision of the Revised Statutes (2 Rev. Stat. 522, § 4,) which provides that "no replevin shall lie for any property taken by virtue of any warrant for the collection of any tax," etc. *Ib.*

13. *It seems* that where property belonging to A, upon lands assessed to B, has been properly levied upon by the collector, under said provision of the charter, it cannot be shown against him that B did not own or occupy the lands; there being nothing upon the face of the papers to notify the collector of the alleged illegality, it is his duty to execute his warrant, and he will be protected in doing so. *Ib.*

14. Mechanics' lien law. Under the local mechanics' lien law (Laws of 1844, ch. 305; Laws of 1871, ch. 872,) the notice must contain the facts required in a complaint, and the lien ceases unless the judgment is entered within a year, and the court cannot extend the time.—*Supreme Ct.,* (*4th Dept.,*) *Jan.,* 1881. Dart *v.* Fitch, 23 Hun 361.

BUILDING CONTRACTS.

CONTRACTS, 39-45.

BURDEN OF PROOF.

EVIDENCE, I.

BURGLARY.

1. Jurisdiction. The provision (2 Rev. Stat. 727, § 50,) declaring that "a person committing a burglary and larceny in one county and carrying the stolen property into another county, may be indicted, tried and convicted for the burglary in the latter county, as if the crime had been there committed," is within the legislative power and is valid.—*Ct. of App., Sept.,* 1880. Mack *v.* People, 82 N. Y. 235.

2. The offender may be indicted and tried in the Court of General Sessions of the county where he is found with the fruits of his crime. *Ib.*

BURIAL.

1. Right to select place of burial. The question as to the right to select the place of burial of deceased must be solved upon equitable grounds. While there is property in the burial lot, in the monuments, in the ornaments and decorations of the deceased or his grave, there is none in the remains themselves.—*Supreme Ct.,* (*Schenectady Sp. T.,*) *Sept.,* 1880. Snyder *v.* Snyder, 60 How. Pr. 368.

2. Since the common law cannot protect or bestow them as property or afford an adequate remedy in cases which sometimes occur, equity will be invoked to grant such protection and give such remedies as seem to be required by the circumstances, and are in consonance with the feelings of mankind. *Ib.*

3. The person having charge of the remains holds them as a sacred trust for the benefit of all who may, from family ties or friendship, have an interest in them; in case of a contention the court should assume an equitable jurisdiction over the subject, somewhat in analogy to the care and custody of infants, and make such a disposition as should seem to be best and right under all the circumstances. *Ib.*

4. In a contention between the widow of the deceased (his second wife) and his only son and heir (the child of his first marriage,) as to the disposition of his remains—*Held*, under all the circumstances of the case, that the claim of the son was to be preferred. *Ib.*

5. Rights of applicant for cemetery lot. Where a party applies for a burial lot at the cemetery of a distinctively Roman Catholic church, it is with the tacit understanding that he is either a Roman Catholic, and as such eligible to burial therein, or that he applies in behalf of those who are in communion with that church.—*Supreme Ct.,* (*1st Dept.,*) *May,* 1880. People, ex rel. Coppers, *v.* Trustees of St. Patrick's Cathedral, 21 Hun 184; *reversing* 7 Abb. N. Cas. 121; 58 How. Pr. 55.

6. *Quære,* as to whether the superintendent of the cemetery could, under his ordinary powers, agree with the applicant that the latter should have the right to use the lot, without regard to the rules and usages of the church to which the cemetery association was attached. *Ib.*

BY-LAWS.

CORPORATIONS, IV.; MUNICIPAL CORPORATIONS, II.; NEW YORK CITY, I.

C

CALENDAR.

Preference on, see APPEAL, 103-105; TRIAL, III.

CANALS.

Liability of *Carrier* by, see CARRIERS, 4, 5.

CARRIERS.

1. **Liability for loss or damage, generally.** Where a common carrier performs his contract to transport and deliver goods, a payment of the freight or a submission to judgment therefor does not preclude the owner of the goods from recovering damages for injuries thereto while *en route;* he may pay the freight and sue for the damages, or set up his damages by way of counter-claim in an action to recover the freight, or he may bring a cross-action.—*Ct. of App., Dec.,* 1880. Schwinger *v.* Raymond, 83 N. Y. 192.

2. **Liability of carrier by sea.** Under the English statutes in relation to compulsory pilotage in the port of Liverpool, an owner of a vessel is not relieved from liability for damage to freight unless a pilot was in charge under the act, and was actually and necessarily engaged in the discharge of his duty. Where, therefore, a vessel had left its dock at Liverpool in charge of a pilot and anchored in the river Mersey, to finish loading and to receive coal for a voyage to New York, and while at anchor an accident occurred causing the loss—*Held,* that the owner was not excused from liability by said statutes.—*Ct. of App., Jan.,* 1880. Guiterman *v.* Liverpool, &c., Steamship Co., 83 N. Y. 358.

3. The goods damaged were sold at public auction. *Held,* that evidence of the prices brought was competent as tending to show value, and upon the question of damages. *Ib.*

4. **—by canal.** Where a carrier by canal neglects to protect his cargo, or to furnish means by which it may be done, according to his contract, and the cargo, in, consequence is injured by frequent rains, this does not constitute a marine disaster, and he is liable for the damages. Schwinger *v.* Raymond, *supra.*

5. **Carriage of goods on deck.** A shipper, by consenting that his goods may be carried on deck, does not thereby assume the risk of loss or injury to them. *Ib.*

6. **Duty as to time of transportation.** As to what is an excuse for not forwarding the goods by the first conveyance, see Fowler *v.* Liverpool, &c., Steamship Co., 23 Hun 196.

7. **Duty to deliver—effect of law of place.** Plaintiffs contracted in New York with the N. & N. Y. T. Co. for the transportation of certain goods by that company from said city to Boston, and the delivery thereof to plaintiffs, who were the consignees. The goods were received by defendants, who were connecting carriers over the latter part of the route, and were residents of Massachusetts. Upon arrival of the goods at Boston they were called for, but a delivery refused until the next day, as it was not convenient to deliver at the time. They were unloaded the same afternoon and placed in defendants' warehouse, but too late for delivery; and during the night the warehouse, with the goods, was destroyed by fire. In an action to recover the loss—*Held,* that defendants were liable; and this, although under the decisions of the courts of Massachusetts, the operators of a railroad, as matter of law, cease to be common carriers and become warehousemen, when the duty of transportation is completed and goods are deposited in a warehouse awaiting the orders of the owner or consignee. —*Ct. of App., Nov.,* 1880. Faulkner *v.* Hart, 82 N. Y. 413; *reversing* 44 Superior 471.

As to the interpretation, validity and effect of *Bills of lading,* see that title.

As to the *Measure of damages,* in actions to enforce the carrier's liability, see DAMAGES.

For further decisions illustrating the law of common carriers, see RAILROAD COMPANIES; SHIPPING.

CASE.

As to making and serving a *Case on appeal,* see APPEAL, 48-53; 102, 103.

CASES AFFIRMED, REVERSED, &c.

See TABLE OF CASES CRITICISED, *infra.*

CATTLE.

Right of *Property* in, see ANIMALS; offence of *Cruelty* to, see CRIMINAL LAW; damages for *Killing on railroad track,* see RAILROAD COMPANIES, IV.

CAUSE OF ACTION.

For decisions as to any particular cause of action, see its *Title,* or that of the *Remedy* by which it is enforced.

For causes of action against *Officers, Corporations, Trustees, &c.,* see those titles.

For rights of action arising out of the various *Personal and Legal relations,* see such titles as ACCOUNTING; ATTORNEY AND CLIENT; DEBTOR AND CREDITOR; DIVORCE; DOWER; EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; HUSBAND AND WIFE; INFANTS; LANDLORD AND TENANT; MASTER AND SERVANT; PARENT AND CHILD; PARTNERSHIP; PRINCIPAL AND AGENT; PRINCIPAL AND SURETY; VENDOR AND PURCHASER.

CAVEAT EMPTOR.

EXECUTION, I.; SALES, III.; VENDOR AND PURCHASER, I.

CERTIFICATE.

Of *Acknowledgment*, see DEEDS, 4, 5.
Of *Stock*, see CORPORATIONS, II.
As to the admissibility and effect of *Official certificates* and *Certified copies* of written instruments, as evidence, see EVIDENCE, IV.

CERTIORARI.

I. IN CIVIL ACTIONS, GENERALLY.
II. IN CRIMINAL CASES.

I. IN CIVIL ACTIONS, GENERALLY.

1. When the writ will not lie. Where a subordinate tribunal had jurisdiction, and there was evidence legitimately tending to support its decision, and no rule of law was violated, the decision cannot be reviewed upon a common law *certiorari.—Ct. of App., Oct.*, 1880. People, ex rel. Hart, *v.* Fire Comm'rs of New York, 82 N. Y. 358.

2. The decision of a board of excise denying an application, made in pursuance of Laws of 1873, ch. 549, § 4, to have a license revoked on the ground that the licensee has violated the provisions of the act, is not reviewable upon a *certiorari*, when the board has not exceeded its jurisdiction or proceeded otherwise than in accordance with law.—*Supreme Ct.*, (2*d Dept.*,) *Feb.*, 1881. People, ex rel. Funke, *v.* Board of Excise, 24 Hun 195.

3. Time to apply for the writ. Unreasonable delay in applying for the writ of *certiorari* is a good ground for quashing it after hearing on a return thereto.—*Ct. of App., Nov.*, 1880. People, ex rel. Waldman, *v.* Police Comm'rs of New York, 82 N. Y. 506.

4. Prior to the adoption of sections 2125 and 2126 of the Code of Civil Procedure there was no statute nor rule of law prescribing any fixed period within which a writ of *certiorari* must be applied for, but the decision of that question was left to the discretion of the court to which the application was made.—*Supreme Ct.*, (1*st Dept.*,) *Nov.*, 1880. People, ex rel. Smith, *v.* Cooper, 22 Hun 515.

5. On April 5th, 1879, the defendant, the mayor of New York, certified to the governor that he had removed the relator from his office of police commissioner. From that time until January 27th, 1880, when the case of People *v.* Nichols was decided by the Court of Appeals, the right of the relator to review such removal by a writ of *certiorari* was in dispute. On February 2d, 1880, the relator applied for and obtained a writ of *certiorari. Held*, that the court below properly held that he was guilty of no laches which would authorize a denial of the writ. *Ib.*

6. On September 8th, 1879, the relator applied for a writ of *certiorari* to review the proceedings by which he was removed from his position as a member of the police force of the city of New York, which proceedings were completed and terminated on December 24th, 1878. *Held*, that in the absence of any excuse for his omission to sooner apply for the writ, his application was properly dismissed, because it was not made with reasonable diligence.—*Supreme Ct.*, (1*st Dept.*,) *March*, 1881. People, ex rel. Stevens, *v.* Police Comm'rs of New York, 24 Hun 284.

7. What errors are ground for reversal. Under section 2140 of the code, the scope of a review upon *certiorari* has been enlarged; and a judgment may be reversed, if there be such a preponderance of proof against the existence of the facts found against the relator as would, had the facts been found by a jury, call for a reversal of the verdict, as against the weight of evidence.—*Supreme Ct.*, (2*d Dept.*,) *April*, 1881. People, ex rel. Fitzsimmons *v.* Jourdan, 1 Civ. Pro. 328.

8. Costs. Costs of appeal in proceedings by common law *certiorari* are not allowable, whether the proceedings come here upon appeal from a judgment, or from an order superseding the writ.—*Ct. of App., Dec.*, 1879. Smith *v.* Village of Nelliston, 79 N. Y. 638.

II. IN CRIMINAL CASES.

9. What is reviewable. Writs of error and of *certiorari* will issue from the Supreme Court to review a trial and conviction had in the City Court of Brooklyn, upon an indictment found in the Court of Sessions and transferred to the City Court for trial.—*Supreme Ct.*, (2*d Dept.*,) *Sept.*, 1880. People, ex rel. Flaherty *v.* Neilson, 22 Hun 1.

10. What may not be reviewed. A decision overruling a demurrer interposed to an indictment and directing that judgment be given for the people, unless the accused plead over, cannot be reviewed upon a *certiorari* before a judgment has been entered on the decision. The court cannot review the decision before entry of judgment, even though the counsel for both of the parties agree that it may so review it.—*Supreme Ct.*, (3*d Dept.*,) *Sept.*, 1880. People *v.* Beman, 22 Hun 283.

11. The return. As to the requisites of the return by the magistrate, as respects the making and filing of the certificate of conviction, the necessity that the evidence appear in the record, &c., see cases of Lynch & Burns, 9 Abb. N. Cas. 69.

12. What errors are ground for reversal. During the trial of the plaintiff in error upon an indictment charging him with a conspiracy to defraud the city, the judge called one of the jurors and the counsel for the prosecution and the defence into a room, and, after showing to the juror an anonymous letter, which stated that the juror had been in the habit of playing cards with the sons of the plaintiff in error, asked him if he knew who wrote it, to which the juror replied that he did not. The judge then said that it was "very embarrassing and unpleasant, and, toward a juror, monstrously unjust and a serious imputation." The plaintiff in error was not present, and the judge said, when the counsel for the

plaintiff in error attempted to speak, that "he did not expect counsel to make any observations." There was no proof that the facts stated in the letter were true, nor was the juror asked if they were true. *Held*, that the conviction should he reversed, as the tendency of this action by the judge was to dominate the juror's free will and terrify him into a verdict for the people. People, ex rel. Flaherty, *v.* Neilson, *supra.*

CESTUI QUE TRUST.

TRUSTS, III.

CHAMPERTY.

ADVERSE POSSESSION; ATTORNEY AND CLIENT; DEEDS.

CHARGE.

As to *Instructions to the jury*, see TRIAL, VI., VIII.; and the titles of the various causes of action, civil and criminal.

As to *Charging legacies upon land*, see DEVISE; LEGACIES, II.; WILLS, V.

CHARTER.

CORPORATIONS, I.; and the titles of the various corporate bodies.

CHATTEL MORTGAGES.

I. WHAT MAY BE MORTGAGED, AND WHAT DEBTS SECURED.

II. RIGHTS OF THE PARTIES.

III. RIGHTS OF CREDITORS, AND PURCHASERS IN GOOD FAITH.

I. WHAT MAY BE MORTGAGED, AND WHAT DEBTS SECURED.

1. General nature of the instrument. As to what instrument need not be recorded as a chattel mortgage, because evidencing a conditional sale rather than a mortgage, see Nash *v.* Weaver, 23 Hun 513.

2. Validity, form, &c. On October 17th, 1877, one Smith executed and delivered to plaintiff a chattel mortgage, which was, on March 11th, 1878, filed in the proper office. On March 11th, 1879, Smith, with the concurrence and under the direction of plaintiff, made upon the mortgage the following statement, viz.: "Smithtown, March 11th, 1879. This chattel mortgage is hereby renewed for one year from this date. As witness my hand and seal. Caleb T. Smith. [L. S.] Sworn to before me this 11th day of March, 1879. Jacob B. Conklin, Notary Public." *Held*, that the effect of this act was to create a new mortgage, valid as against Smith and his creditors.—*Supreme Ct.*, (*2d Dept.*,) *Sept.*, 1880. Smith *v.* Cooper, 22 Hun 11.

3. A chattel mortgage given by a vendee to his vendor, upon the goods purchased, is not rendered invalid, as a matter of law, by reason of an oral agreement, entered into at the time of its execution, by which the vendee agrees to manufacture the goods purchased into other articles and sell the same, and when such articles are sold to pay to the mortgagee the cash received upon cash sales, and assign to him the accounts for sales made on credit; the cash and accounts so received being applied, when so paid or assigned, in payment of the debt secured by the mortgage.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Caring *v.* Richmond, 22 Hun 369.

4. Necessity of actual possession by mortgagee. To satisfy the provision of the statute (Laws of 1833, ch. 279, as amended by Laws of 1873, ch. 501,) declaring every chattel mortgage not accompanied by immediate delivery and "followed by an actual and continued change of possession" of the mortgaged property to be void unless the mortgage is filed, and that a mortgage so filed shall cease to be valid as against creditors after one year, unless a copy be filed, &c., a constructive or legal change of possession is insufficient; the possession by the mortgagee must be actual, open and public.—*Ct. of App.*, *March*, 1881. Steele *v.* Benham, 84 N. Y. 634; *reversing* 21 Hun 411.

5. S., who was carrying on a manufacturing business on premises owned by him, executed to H. a mortgage on certain of his personal property used in the business. The mortgage was duly filed. S. remained in possession and continued to carry on the business. The mortgage was not refiled as required by the statute. In an action to recover for the alleged taking and conversion of the mortgaged property which had been levied upon by defendant under an execution against S., the testimony on the part of the plaintiff, who is the wife of S., was to the effect that the mortgage, soon after its execution, was for a valuable consideration assigned to her; that the business and property were *formally* turned over to her, she giving to S. a power of attorney, authorizing him to carry it on for her and agreeing to pay him a stipulated sum for his services; that she went to the shop once or twice and gave some directions, but took no personal charge of the business, and S. continued to carry on the business, having personal charge of and apparent actual possession of the property as before. *Held*, that there was no such possession in the plaintiff as the statute requires; and that, therefore, the mortgage not having been refiled, ceased to be valid at the end of the year, and the property was lawfully levied upon by defendant; and this, although at the time of the levy the payday named in the mortgage had passed. *Ib.*

II. RIGHTS OF THE PARTIES.

6. Rights of mortgagee after de-

fault. If the mortgagee in a chattel mortgage takes possession of the mortgaged property, after a forfeiture of the conditions of the mortgage, it is a satisfaction of the mortgage debt, providing the value of the property is sufficient; but if, upon a *fair sale* of the property, less than the amount of the debt be realized, the mortgagee may sue for the balance.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Mott *v.* Havana Nat. Bank, 22 Hun 354, 357.

III. Rights of Creditors, and Purchasers in Good Faith.

7. Protection of bona fide purchasers from mortgagor. B. executed to plaintiff a chattel mortgage upon a span of horses; both parties were then residents of this state, and the horses were in the state. B. subsequently took the horses to Canada, where they were sold by a regular trader dealing in horses, the purchaser buying in good faith, without knowledge of plaintiff's claim. Under the laws of Canada property cannot be reclaimed, from one so purchasing, without refunding to him the price paid. Defendant, a resident of this state, bought the horses in Canada from such purchaser; they were left in Canada. Upon refusal of defendant to deliver them up on demand, this action, for their conversion, was brought. *Held,* that plaintiff was entitled to recover.—*Ct. of App., June,* 1880. Edgerly *v.* Bush, 81 N. Y. 199; *reversing* 16 Hun 80.

8. April 22d, 1878, one M., a member of the firm of Y. & M., executed in his own name and gave to defendant a chattel mortgage upon personal property of the firm, and upon all the lumber and stock it should thereafter acquire. Y. ratified the act of M. in giving the mortgage. About August 1st, defendant, claiming under the mortgage, which had never been filed, took possession of the property described in it, and of certain other property subsequently acquired by the firm, and sold the same as therein provided, on August 12th. On August 9th, Y. & M. executed to plaintiffs a bill of sale of part of the property covered by the mortgage, in part payment of a pre-existing debt. In an action by plaintiffs to recover the value of the property sold by the defendant—

Held, 1. That as the plaintiffs were not judgment creditors of the firm, they could not attack the validity of the mortgage, because it had not been filed.

2. That as the property was in the actual possession of the defendant when the bill of sale was executed, and the plaintiffs took it in payment of a pre-existing debt, they were not *bona fide* purchasers, and had no greater rights, as against the defendant, than their grantor had.

3. That as between the firm and the defendant, the court would sustain the mortgage and protect the defendant in the possession of the property, whether it had been acquired by the firm before or after the execution of the mortgage.—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1881. Kennedy *v.* Nat. Union Bank of Watertown, 23 Hun 494.

As to mortgages of *Land*, see Mortgages.

CHATTELS.

Bailment; Execution; Sales; Trover.

CHEATS.

False Pretences.

CHECKS.

1. Liability of drawer. Neither the fact that a check was dishonored when transferred, or that presentment for payment has been delayed, discharges the drawer. If dishonored, any defence thereto against the payee will be available against his transferee: but no presumption arises that over-due or dishonored paper is invalid. If loss results to the drawer by delay in presentment, that is matter of defence.—*Ct. of App., Dec.,* 1879. Cowing *v.* Altman, 79 N. Y. 167.

2. The drawer of a check undertakes that the drawee will be found at the place where he is described to be, and that the sum specified will there be paid to the holder when the check is presented; and if not so paid and he is notified, he becomes absolutely bound to pay the amount at the place named. The rights of the parties, therefore, are to be governed by the laws of the place of payment.—*Ct. of App., March,* 1881. Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367; *affirming* 21 Hun 166.

3. Exchange of checks—rights of holder. Where two persons have exchanged checks, upon the agreement that each will keep his account good to meet his check at maturity, the fact that one person has failed to keep his account good constitutes no defence to the other when sued upon his check by a *bona fide* holder thereof.—*Supreme Ct.*, (*1st Dept.*,) *March,* 1881. Frazier *v.* Trow's Printing, &c., Co., 24 Hun 281.

4. Date. The fact that a check bears a date subsequent to that on which it was made and issued does not render it invalid. *Ib.*

For decisions upon the liability of the *Bank* upon which a check is drawn, see Banks and Banking, 12-15.

CHILD.

As to *Personal* and *Property rights* of children, see Infants.

As to *Illegitimate children,* see Descent.

For some decisions respecting *Cruelty to children,* see Criminal Law, 6-9.

CIRCUMSTANTIAL EVIDENCE.

Evidence, I.

CITIES.

For decisions of a local character, affecting some *Particular city, village or town* only, see BROOKLYN; BUFFALO; MUNICIPAL CORPORATIONS, V.

CITIZENS.

1. **Wives of citizens are citizens.** Where an alien female intermarries with a citizen, by virtue of the marriage she becomes a citizen and capable of taking and holding lands in this state by purchase or descent. (10 U. S. Stat. at L., 604; 1 Rev. Stat. 719, § 8.)—*Ct. of App., Feb.*, 1881. Luhrs *v.* Eimer, 80 N. Y. 171.

2. **Naturalization proceedings.** The court cannot issue a certificate of naturalization *nunc pro tunc*, when no record has been made of the steps taken antecedent to the issuing of the certificate. It will not be presumed that things have been done in respect to the naturalization of persons, which do not appear of record.—*Superior Ct.*, (*Sp. T.*,) *Jan.*, 1880. Matter of Desty, 8 Abb. N. Cas. 250.

3. **Proof of citizenship.** Where a person asking to be registered as a voter claims to be a citizen by virtue of the naturalization of his parents, the best evidence of the naturalization of the parent would be the original certificate of naturalization, or a duplicate thereof, when it can be obtained. But a party may, in the matter of proving his citizenship, resort to secondary evidence when primary evidence cannot be obtained.—*Supreme Ct.*, (*1st Dept. Sp. T.*,) *Oct.*, 1880. People, ex rel. O'Donnell, *v.* McNulty, 59 How. Pr. 500; S. C., 9 Abb. N. Cas. 468.

As to the rights and disabilities of *Aliens*, see that title.

CIVIL RIGHTS.

As to the right to *Trial by jury*, see TRIAL, I., VIII.; right not to be *Twice put in jeopardy*, see JUDGMENT, III.; right to *Vote*, see ELECTIONS.

CLAIM AND DELIVERY.

REPLEVIN.

CLERKS.

NEW YORK CITY, III.

CLOUD ON TITLE

1. **Irregular or unlawful assessments.** To authorize the interposition of the court to remove the lien of an assessment as a cloud upon title, it must appear that the record or proceedings are not void upon their face, and that the claimant under it would not, by the proof which he would be obliged to produce in event of an attempt to enforce his claim, develop the defects rendering it invalid.—*Ct. of App., June*, 1880. Dederer *v.* Voorhies, 81 N. Y. 153, 156.

2. An action cannot be maintained to set aside an assessment, as a cloud on title, on the ground that the act under which the assessment was laid, is unconstitutional. If the act is unconstitutional, the assessment is void upon its face, and so is not a cloud on plaintiff's title.—*Ct. of App., Feb.*, 1880. Wells *v.* City of Buffalo, 80 N. Y. 253.

3. **Forged deeds.** An action is maintainable for the cancellation, as a cloud on title, of a forged deed which, upon the strength of a false certificate of acknowledgment, made by an officer duly authorized, has been put upon record.—*Ct. of App., Sept.*, 1880. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474.

4. As to whether the allegation of forgery simply would be a sufficient ground for invoking the jurisdiction of a court of equity, see *Ib.* 482.

5. Where the law raises a presumption of the validity of a conveyance, and its invalidity can only be shown by extrinsic proof, an action to compel its surrender and cancellation as a cloud on title is maintainable. *Ib.* 483.

CODICILS.

WILLS, V.

COHOES.

MUNICIPAL CORPORATIONS, 50, 51.

COLLATERAL SECURITY.

BAILMENT, 2-7.

COLLECTOR.

As to collectors as *Agents*, generally, see PRINCIPAL AND AGENT.

As to the *Collection of taxes*, and the powers and liabilities of the collector and his sureties, see TAXES, III. Of *Assessments*, see MUNICIPAL CORPORATIONS, II.; NEW YORK CITY, II.

As to collection of moneys due to *Decedents' estates*, see EXECUTORS AND ADMINISTRATORS, III.

COLLISION.

SHIPPING, 8.

COMMISSION.

To take *Depositions*, see DEPOSITIONS. Of various *Officers* and *Agents*, as compensation for their services, see OFFICERS; PRINCIPAL AND AGENT; and the titles of the various distinct classes of officers.

COMMON CARRIERS.

CARRIERS.

COMMON PLEAS.

As to *Appeals to*, from the Marine Court of the City of New York, see APPEAL, IV.

COMMON SCHOOLS.

SCHOOLS.

COMPENSATION.

EMINENT DOMAIN; HIGHWAYS; MUNICIPAL CORPORATIONS, II.; NEW YORK CITY, II.; RAILROAD COMPANIES, II

COMPLAINT.

AMENDMENT, 2-6; PLEADING; and the titles of the various forms and causes of action.

COMPROMISE.

As to the *Attorney's authority* to compromise a pending litigation, see ATTORNEY AND CLIENT, II.

As to the *Power of a partner* to compromise debts of the firm, see PARTNERSHIP, II.

Effect of an *Account stated*, see ACCOUNTS, 1, 2.

What is an *Accord and satisfaction*, see DEBTOR AND CREDITOR, III.

CONCEALMENT.

ATTACHMENT, II.; INSURANCE, II., III., IV.; LIMITATIONS OF ACTIONS, IV.

CONDITIONS.

BONDS; CONTRACTS; DEEDS; INSURANCE; SALES.

CONFESSION.

Of *Crime*, see EVIDENCE, III.
Of *Judgment*, see JUDGMENT, VIII.

CONFLICTING CLAIMS TO REAL PROPERTY.

EJECTMENT.

CONSOLIDATION OF ACTIONS.

ACTION, 5-7.

CONSPIRACY.

1. **Civil action for—pleading.** Plaintiff's complaint alleged, in substance, that a copartnership existed between himself and defendant K., which was doing a prosperous business, that defendants entered into a conspiracy to break up this business, in pursuance of which the other defendants commenced an action against K., in which he offered judgment; the offer was accepted and judgment entered, which was enforced by a levy on K.'s interest in the partnership property. Whereas, at the time of the entry of the judgment, K. was not indebted to his co-defendant in any sum whatever, but "the supposed debt was acknowledged * * * in pursuance of said conspiracy." Defendants answered, putting in issue the allegations as to the conspiracy, and alleging that the judgment was for an actual indebtedness. On the trial it appeared that an indebtedness for the full amount of the judgment existed, but, as the evidence tended to show, the debt was not due at the time judgment was rendered. Defendants moved for a dismissal of the complaint, on the ground that the allegations thereof had not been proved. No request to amend the complaint was made. *Held*, that a denial of the motion was error; that aside from the question of pleading, and conceding that the debt was not due when judgment was rendered, it did not establish the cause of action; that it was in the power of the debtor and his right to waive the running of the credit and permit the debt to be treated as due and payable; and that with whatever motive it was done, this did not aid the plaintiff, or give to him a right of action.—*Ct. of App., June*, 1880. Neudecker *v.* Kohlberg, 81 N. Y. 296.

2. **Evidence—damages.** Evidence was given on the trial, tending to show that prior to the formation of the partnership between plaintiff and K, and as an inducement to the former to enter into it, the other defendants agreed to and did loan a sum of money to K. for two years, which he put into the firm as his share of the capital. The judgment obtained against K. was for the money so loaned. It appeared that the business had resulted in a loss, and that in an action brought by plaintiff a receiver had been appointed. *Held*, that if the action had been brought upon the agreement, plaintiff would, in no view, have been entitled to more than nominal damages. *Ib.*

CONSTABLES.

For decisions illustrating the nature of the office, and the duties and liabilities attendant upon it, see EXECUTION; SHERIFFS.

CONSTITUTIONAL LAW.

[The following titles should be consulted for matters intentionally omitted here: BANKRUPTCY; BANKS; CITIZENS; CORPORATIONS; COUNTIES; COURTS; ELECTIONS; EMINENT DOMAIN; JUDGMENT; LIQUOR-SELLING; SHIPPING; STATUTES; TAXES.]

1. **Right of trial by jury.** The provisions of the code, (2706–2714,) are not unconstitutional, because they do not provide for a trial by jury; and the legislature has power to confer upon the surrogate any summary authority in respect to estates within his jurisdiction, which courts of equity could have used before the adoption of the constitution; and especially is this so, when the power conferred simply relates to the possession of the personal effects of the decedent.—*Supreme Ct.*, (*1st Dept.*,) *March*, 1881. Matter of Curry, 1 Civ. Pro. 319.

2. **Regulation of commerce.** Defendant was organized as a corporation under the statutes of several states, to operate a continuous line of road running through those states, which had previously been operated by consolidated corporations. It was claimed that those statutes, so far as they authorized the consolidation in adjoining states, were repugnant to the provision of the U. S. Constitution (art. I, § 8, subd. 3,) conferring on congress the power to regulate commerce with foreign nations, and among the several states. *Held*, untenable; that in the absence of any legislation by congress upon the subject, the power so to legislate existed in the states.—*Ct. of App.*, *March*, 1881. Boardman *v.* Lake Shore, &c., R'y Co., 84 N. Y. 157.

3. Laws of 1875, ch. 604, prohibiting the deposit of carrion, offal or dead animals in the rivers and bays therein mentioned, or its transportation through the same, except subject to the restrictions therein prescribed, is in the nature of a police regulation, and is not unconstitutional as encroaching upon the powers of congress to regulate commerce.—*Supreme Ct.*, (*1st Dept.*,) *Jan.*, 1881. Mayor, &c., of New York, *v.* Furgueson, 23 Hun 594.

4. **Inhibition against taking private property.** Property, as used in the constitutional inhibition against taking private property, embraces the free use, enjoyment and disposal of all one's acquisitions, without control or direction. Therefore—*Held*, that the polluting the air of one's dwelling with noisome smells, which render the enjoyment of life and property uncomfortable, is a taking of property within such inhibition; and this, although the smell be not unwholesome.—*Superior Ct.*, *April*, 1880. Caro *v.* Metropolitan, &c., R. R. Co., 46 Superior 138.

5. **Infringement of vested rights.** When, as against the owners of the land taken, the right to operate a railroad has been acquired, the mode of such use, whether by steam or otherwise, is a matter within legislative control, and in regulating such use, no right of property is infringed upon, to which the provisions of the federal and state constitutions are applicable.—*Supreme Ct.*, (*Sp. T.*,) *June*, 1880. People *v.* Long Island R. R. Co., 60 How. Pr. 395.

6. **Impairing obligation of contracts.** Laws of 1880, ch. 59, requires the mayor and clerk of the city of Yonkers, after the Manhattan Savings Institution has published a notice, and executed and delivered to the city a bond of indemnity as therein prescribed, to execute and deliver to the said institution duplicates of certain negotiable bonds made by the city, which had belonged to and been stolen from the said institution. It also declares that after the publication of the said notice and the delivery of the said duplicate bonds, the city shall be relieved and discharged from all liability upon the original bonds, and gives to *bona fide* holders of such bonds a right of action upon the bond of indemnity executed by the Manhattan Savings Institution.

Held, 1. That the act, in so far as it exempted the city from liability on account of the bonds issued by it, impaired the obligation of a contract, and was unconstitutional and void.

2. That as the protection and enforcement of the rights of individual citizens growing out of past transactions, belonged to the judicial and not to the legislative department of the government, the act was also void as being an exercise of a power not granted to the legislature.—*Supreme Ct.*, (*2d Dept.*,) *May*, 1881. People, ex rel. Manhattan Savings Inst., *v.* Otis, 24 Hun 519.

7. Municipal and private corporations, as regards the power of the legislature to compel their action for private purposes against their consent, stand on the same footing as individuals. *Ib.*

8. **Private or local bills—subject not expressed in title.** The act of 1866 (Laws of 1866, ch. 347,) is not violative of the constitutional provision declaring that "no private or local bill * * * shall embrace more than one subject, and that shall be expressed in the title." The act embraces but one subject, the supplying of the village of Middletown with water, which is expressed in the title; the words "and private" therein are surplusage.—*Ct. of App.*, *Sept.*, 1880. Matter of Village of Middletown, 82 N. Y. 196.

9. Laws of 1874, ch. 604, entitled "An act to provide for the surveying, laying out and monumenting of certain portions of the city and county of New York, and to provide means therefor," is not unconstitutional for the reason that being a local act the subject of opening streets is not expressed in its title.—*Supreme Ct.*, (*Sp. T.*,) *Nov.*, 1880. Matter of One Hundred and Thirty-eighth Street, 60 How. Pr. 290.

10. Laws of 1858, ch. 17, § 6, and section 6 of title 5 of chapter 330 of 1873, being the charter of the village of Deposit, which village is situated partly in the county of Delaware and partly in the county of Broome, provides that "all notices or other publications required by law to be published in the county of Delaware, and all notices or other publications required by law to be published in the county of Broome, may be published in any newspaper printed in said village, and shall be regarded, and shall have the same effect, as if the same were published in the counties of Delaware and Broome, or either of them." *Held*, that this provision

was not a violation of section 16 of article 3 of the constitution, declaring that no private or local bill shall embrace more than one subject, which shall be expressed in its title, and that the act was constitutional and valid.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. More *v.* Deyoe, 22 Hun 208. And see Matter of Upson, 24 Hun 650.

11. Retrospective laws. It is not an unlawful exercise of the legislative power of retrospective legislation to take away defences based upon mere informalities; a party has no vested right in such a defence, where it does not affect his substantial equities.—*Ct. of App.*, *Sept.*, 1880. Tifft *v.* City of Buffalo, 82 N. Y. 206.

12. Cruel and unusual punishments. When the general law has in plain words declared what shall be the maximum of punishment for a particular crime all over its jurisdiction, and has thus proclaimed the adequacy and sufficiency of the penalty thereby imposed for the offence, a special statute, which excepts from the operation of the general law a small portion of the state, and gives to a local magistrate within such excepted district power to inflict double that punishment for the same crime, when committed therein, cannot be upheld, and must be declared void, because it authorizes the infliction of a cruel and unusual punishment.—*Supreme Ct.*, (*Alb. Sp. T.*,) *June*, 1881. Matter of Bayard, 61 How. Pr. 294.

CONSTRUCTIVE DELIVERY.

SALES, II.

CONSTRUCTIVE NOTICE.

DEEDS, II.; MORTGAGES, IV.; NOTICE.

CONTEMPT OF COURT.

1. What contempts are punishable, generally. In proceedings under the provision of the Code of Civ. Pro., § 14, to punish as a contempt an act of misconduct or neglect of duty, in a civil action pending, it must be made to appear that the act or omission complained of is one "by which a right or remedy of a party * * * may be defeated, impaired, impeded or prejudiced;" and this must be adjudged to authorize the infliction of the punishment.—*Ct. of App.*, *June*, 1880. Fischer *v.* Raab, 81 N. Y. 235.

2. What are not punishable. A party cannot be adjudged guilty of a contempt, and confined in a jail as a punishment therefor, for any disobedience of a judgment or order, where, by law, an execution can be issued for the purpose of enforcing the judgment or order which has been disobeyed.—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1881. Baker *v.* Baker, 23 Hun 356.

3. To punish as for a contempt for refusing to deliver property to a receiver, an order requiring such delivery is a necessary perequisite. A simple demand of possession is not sufficient.—*Supreme Ct.*, (*Saratoga Sp. T.*,) *Aug.*, 1880. Tinkey *v.* Langdon, 60 How. Pr. 180.

4. Instances. Upon hearing of cross-motions, one to dissolve and the other to continue a temporary injunction, a contest having arisen as to the facts, the court ordered a reference, the order providing that the party against whom the referee found the disputed facts should pay the expenses of the reference, the motions to stand over until the coming in of the report. The referee determined the contested facts in favor of defendants and caused notice to be served upon plaintiff stating that his report was ready, the purport thereof and the amount of his fees. Plaintiff not having paid the fees, the court, on proof of the fact and on motion of defendants' attorney, granted an order requiring plaintiff to pay within three days or show cause why he should not be committed for contempt for disobeying the order; and on return of the order and proof of non-payment, an order directing that plaintiff be committed for contempt was granted. *Held*, error, as there were no facts showing or adjudication holding that the alleged misconduct defeated, impaired, impeded or prejudiced any right or remedy of the defendants. Fischer *v.* Raah, *supra*.

5. Where the order appointing a receiver directed the debtor to assign and convey his lands and real estate, but contained no directions to the debtor to surrender its possession—*Held*, that he could not be held in contempt for omitting or refusing to do what had not been commanded or required of him. Tinkey *v.* Langdon, *supra*.

6. Violations of injunctions. Defendant commenced an action in the Marine Court of New York city against plaintiff to recover a deposit, which was also claimed by another party. In that action costs of appeal from an order had been awarded defendant. Plaintiff thereupon commenced this action for an interpleader, and procured a temporary injunction restraining defendant, her attorneys, etc., from further prosecuting or carrying on the former action, or from taking any steps to recover said deposit. Defendants' attorney thereafter issued a precept for the collection of the costs. In proceedings to punish said attorney for contempt—*Held*, that the injunction did not prohibit the collection of the costs, and that the attorney was justified in issuing the precept.—*Ct. of App.*, *March*, 1880. German Savings Bank *v.* Habel, 80 N. Y. 273.

7. Contempts in supplementary proceedings. To authorize the court to punish a party for contempt in proceedings supplementary to execution in refusing to pay over money or property in pursuance of its order, it must appear that the specific property or sum of money was, at the time of the service of the order for his examination, in his possession or under his control.—*Supreme Ct.*, (*1st Dept.*,) *Nov.*, 1880. Tinker *v.* Crooks, 22 Hun 579.

8. Preliminary proceedings to bring a party into contempt. Upon the appearance of a debtor before a judge, in pursuance of an order for his examination in proceedings supplementary to execution, he admitted that he had in his possession money and property sufficient to satisfy the judgment, and requested a postponement to enable him to apply the same upon the judgment. The judge thereupon made an order reciting the facts, and granting

him until a day named to pay the judgment with interest, and the costs, and providing in default thereof that he be adjudged guilty of a willful contempt; it further ordered and directed that, in that case, he pay to the sheriff a fine of $384, and be imprisoned until the payment thereof, and that a commitment issue to carry this judgment into effect. *Held*, that defendant could only be convicted of contempt upon the return of an attachment or an order to show cause, and that the court could not thus summarily declare the consequences of a disobedience to its order. *Ib.*

9. Order to show cause, and how served. An order had been granted, requiring an executrix to "personally appear" on a day specified, and "return an inventory according to law," and in default thereof, that she then show cause why an attachment should not issue. On the return day she appeared by attorney, and opposed, on the ground that by the terms of a written waiver given to the executor by the assignor of the moving party, she was included and therefore not required to obey the order.

Held 1. That in the absence of proof of personal service of the order, she was not a party to the proceeding so far as to warrant the issuing of an attachment.

2. That the order requiring the executrix to "personally appear" implied that it should be personally served on her, as an appearance by attorney only would not be a sufficient compliance with it, (§ 2528,) and that an attachment could not be founded on the executrix's disobedience of such an order without proof of such personal service.—*Kings Co. Surr. Ct., March*, 1881. Estate of Barnes, 1 Civ. Pro. 59.

10. Appearance by attorney. Where a party has been brought into court on attachment, in proceedings to punish for contempt, he may be represented by attorney in the subsequent proceedings.—*Ct. of App., Jan.*, 1880. Watrous *v.* Kearney, 79 N. Y. 496.

11. An order punishing defendants for contempt was granted by default. On motion to vacate the order, it was alleged, in the moving papers, that the attorneys who appeared for the defendants in the proceedings had no authority. The attorney who appeared on return of the attachment, made affidavit that he was authorized; the defendants were also personally present; the same attorney appeared before the referee to whom it was referred to take proofs. Notice of motion for final order was served on, and service admitted by, attorneys who had appeared for defendants in the action, and who had also admitted service of the referee's report. *Held*, that as the attorneys thus undertook to represent defendants, the mere allegation of want of authority so to do did not invalidate the order. *Ib.*

12. What may be shown in defence. After the defendant has appeared and been examined in proceedings supplementary to execution, without objection, he is not in a position to justify himself when proceeded against for contempt in violating the order restraining him from disposing of his property, by allegations of informalities in the affidavit upon which the proceedings were based, nor to claim that the jurisdiction to which he has submitted, is avoided by such informalities; *a fortiori*, this is so when the defendant is an officer of the court. —*Superior Ct., Feb.*, 1880. Lehmaier *v.* Griswold, 46 Superior 11.

13. The fine. In proceedings to punish a defendant for contempt, for violating an injunction restraining him from collecting the rents of certain premises during the pendency of an action brought to foreclose a mortgage thereon, the court can only impose such a fine as shall be sufficient to indemnify the party aggrieved for his actual loss and injury, and to satisfy his costs and expenses in the proceedings.—*Supreme Ct.*, (*1st Dept.*,) *Dec.*, 1880. Dejonge *v.* Brenneman, 23 Hun 332.

14. The amount of the loss and injury must be established by the same proof as would be required in an action at law, to recover the damages sustained. *Ib.*

15. Setting aside the proceedings. On the return of an order to show cause, an order was made by a county judge, declaring a judgment debtor in contempt. The order having been duly served on the debtor, but without his presence and without the appearance of any one in his behalf—*Held*, that it being taken against the debtor by default, it was competent for him to move to set it aside for irregularity. The moving party was bound to make a case for the granting of the order on the merits, at least, the same as if the debtor had appeared and objected to the proceeding; and if he failed to make his case the debtor might and should move to set the order aside rather than to appeal.—*Supreme Ct.*, (*Saratoga Sp. T.*,) *Aug.*, 1880. Tinkey *v.* Langdon, 60 How. Pr. 180.

16. Review of proceedings on certiorari. Upon the return of an order requiring the relator to show cause why he should not be attached for a criminal contempt, in forcibly and willfully resisting the lawful order and process of the court, such proceedings were had that the court adjudged him to have been guilty of the said contempt and ordered that he be imprisoned in the county jail for thirty days and pay a fine of $250. *Held*, that for the purpose of reviewing these proceedings upon a *certiorari*, they must be deemed to have been terminated by the entry of the final order convicting the relator of the contempt, and sentencing him to pay the fine and be imprisoned, and that it was error to quash the writ on the ground that the proceedings were not terminated, because no warrant of commitment had yet been issued.—*Supreme Ct.*, (*1st Dept.*,) *Sept.*, 1880. People, ex rel. Gilmore, *v.* Donahue, 22 Hun 470.

CONTINGENT REMAINDERS.

DEVISE; WILLS.

CONTINUANCE.

ABATEMENT AND REVIVAL, II.; TRIAL, III., VIII.

CONTRACTS.

I. General Principles.
II. Consideration.
III. Requirements of the Statute of Frauds.
IV. Interpretation and Effect. Conditions.
V. Validity.
VI. Performance. Breach.
VII. Modification.
VIII. Rescission.
IX. Law of Place.
X. Actions for Breach of Contract.

I. General Principles.

II. Consideration.

1. **What consideration is sufficient, generally.** It is not essential to the existence of a consideration for a promise that mutuality of obligation should exist between the parties at the time of the making of the promise. —*Ct. of App., Nov.,* 1880. Marie *v.* Garrison, 83 N. Y. 14; *reversing* 45 Superior 158.

2. Where a proposition is made by one party accompanied by a promise, a voluntary performance by another to whom the proposition was made of the requirements in consideration of the promise, constitutes a consideration which will uphold the promise, and make it binding. *Ib.*

3. **Mutual promises.** Plaintiff having brought an action against defendants, upon a doubtful claim for a large amount, it was verbally agreed between the parties that the defendants should pay to the plaintiff $150, in consideration of his agreeing to discontinue and settle the suit. The plaintiff thereafter tendered his consent to the discontinuance of the suit, together with a release, but the defendants failed to pay the $150 as agreed. The release and discontinuance were never accepted, nor were they left with the defendants or their attorney. Plaintiff then brought this action to recover the $150, averring mutual promises, with fulfillment on his part and a breach on the part of defendants.

Held, 1. That the agreement to settle the pending suit, being entirely unexecuted, was not binding upon the plaintiff, and would have been no bar to the original suit, unless executed by the acceptance of the $150.

2. That there was, therefore, no consideration for the defendants' promise to pay the $150.

3. That the action could not be maintained. —*Supreme Ct.,* (1*st Dept.,*) *May,* 1880. Panzerbeiter *v.* Waydell, 21 Hun 161.

4. **Promise for benefit of third person.** Where two persons, for a consideration sufficient as between themselves, covenant to do some act, which, if done, would incidentally result in the benefit of a mere stranger, he has not a right to enforce the covenant, although one of the contracting parties might enforce it as against the other.—*Ct. of App., Feb.,* 1880.—Lake Ontario Shore R. R. Co. *v.* Curtiss, 80 N. Y. 219.

5. **Forbearance.** As to when an agreement to extend a loan, without specifying the time, constitutes a sufficient consideration to support a new promise, see Mut. Life Ins. Co. *v* Smith, 23 Hun 535.

6. **Offers of rewards.** Where an advertisement is published offering a reward for information in respect to or for a return of lost property, an acceptance of it by any person who is able to give the information asked, or to return the property, creates a valid contract; and on compliance with its terms an action is maintainable to recover the reward offered.—*Ct. of App., Nov.,* 1880. Pierson *v.* Morch, 82 N. Y. 503.

III. Requirements of the Statute of Frauds.

7. **Contracts not to be performed within a year.** In 1855 plaintiff and defendant entered into an oral agreement, by which the former conveyed to the latter (a railroad company) certain lands, and a right of way over other real property, and the latter agreed to lay a separate track to the adjoining lands of plaintiff, and to bring the cattle and stock, which might come to it from the west, to said plaintiff's lands, to be there fed and cared for. Plaintiff conveyed the land and right of way to defendant, but the latter shortly thereafter repudiated the agreement, and failed and refused to bring the cattle to plaintiff's yard. In this action, brought by plaintiff in 1857, to recover the damages occasioned to him thereby—*Held,* that as the parol agreement was void, because it was not to be performed within one year, plaintiff could not recover the damages occasioned by the breach thereof.—*Supreme Ct.,* (4*th Dept.,*) *Oct.,* 1880. Day *v.* New York Central R. R. Co., 22 Hun 412.

8. But, as the defendant had repudiated the agreement after a partial performance thereof, the plaintiff was entitled to recover the value of the land and right of way conveyed, after deducting therefrom the value of the partial performance of the agreement by the defendant, viz., the profits made by him from the business brought to him by the defendant. *Ib.*

9. In determining the amount of the profits realized by him, the amount expended by him in the construction of the cattle yards and sheds, and the rental value of the land covered by them, were properly submitted to the jury, for their consideration. *Ib.*

10. As the value of the land and the right of way were not fixed by the agreement, and as they could not be ascertained by reference to any public market, or computed by reference to any well-ascertained mode, the damages were unliquidated, and it was error to allow interest from the time of the commencement of the action, upon the value as determined by the jury. *Ib.*

11. October 17th, 1874, plaintiff agreed to sell to one W. certain lands for the sum of $764, to be paid in annual installments of $50 each, with interest on all sums remaining unpaid. In November, 1874, W., in pursuance of an agreement made with one B., assigned the said contract to him, and executed and delivered to him a bond and mortgage for $900 upon certain other real estate then conveyed by B. to W. B. verbally agreed to pay plaintiff the amounts

to fall due upon his contract with W., and thereafter entered into possession of the land contracted to be sold by plaintiff and made two payments to him. In this action, brought against the administrators of B. to enforce his agreement to pay the amounts to become due under this contract—*Held*, that as most of the payments fell due more than one year after the time when B. assumed the payment thereof, his agreement was void under the statute of frauds, as being an oral agreement not not to be performed within one year.—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1881. Kellogg *v.* Clark, 23 Hun 393.

12. Contracts for sale of land. A parol agreement to pay a larger sum, for a deed of land which purports to convey the land for $1, is valid.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. Tuthill *v.* Roberts, 22 Hun 304.

13. — for exchange of land. Defendant and H. negotiated for the exchange of certain real estate; the terms were agreed upon verbally by them; defendant was to pay a sum agreed upon as the difference in the values of the lands to be exchanged; he gave to H. a check for $500, as a payment, receiving therefor a receipt signed by H. In an action upon the check, parol evidence was given as to the contents of the receipt, it having been lost, which was to the effect that it stated that the check was received on account of the exchange of said lands, specifying them, and then stated the terms, *i. e.*, the price of each piece of property, the amount of mortgages to be executed, etc.; it did not appear that the terms of credit were specified. Defendant thereafter refused to enter into a written contract, as was agreed, and stopped payment of the check. *Held*, that the burden was upon defendant to show a failure of consideration; that as it did not appear that the terms of credit were not in the receipt, as every presumption was in favor of the validity of the check, this was to be presumed; that the receipt, taken in connection with the check, contained the material elements of a contract, sufficient and valid under the statute of frauds, and enforceable in equity against H.; and that, therefore, there was a good consideration for the check.—*Ct. of App.*, *April*, 1880. Raubitschek *v.* Blank, 80 N. Y. 478.

14. Effect of performance to take the case out of the statute. The parties hereto entered into an agreement whereby plaintiff was to purchase certain real estate of defendant, and in part payment thereof convey to him a stock of goods in a store and the unexpired term of a lease thereof made to plaintiff, defendant agreeing, orally, to pay the rent thereafter to fall due thereon to the lessors. The agreement was fully performed by plaintiff, who thereafter brought this action to recover the rent which defendant had failed and refused to pay.

Held, 1. That the agreement was not one of indemnity merely, and that the plaintiff was not required to prove actual damage to maintain his action.

2. That the agreement having been fully performed by the plaintiff, and the defendant having taken possession of the goods and store, the defence that the agreement was void under the statute of frauds could not be interposed.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. Smart *v.* Smart, 24 Hun 127.

IV. Interpretation and Effect. Conditions.

15. General principles of construction. Where two different constructions to an instrument are possible, one of which will uphold, the other render it void, the former is to be chosen.—*Ct. of App.*, *March*, 1881. Coyne *v.* Weaver, 84 N. Y. 386.

16. Written and printed words. In the interpretation of a contract of which a portion is printed and a portion written, greater weight will be given to the written than to the printed words, where they are in conflict and tend to different results.—*Ct. of App.*, *Jan.*, 1881. Clark *v.* Woodruff, 83 N. Y. 518; *affirming* 18 Hun 417.

17. What may be implied or presumed. From the words of an express covenant, an additional or correlative covenant may be implied, if the language used shows that such covenant was intended; but such implication cannot be permitted where it is apparent from the contract that the parties had the subject in mind, and either one has withheld a promise in regard to it.—*Ct. of App.*, *Dec.*, 1879. Bruce *v.* Fulton Nat. Bank, 79 N. Y. 154; *affirming* 16 Hun 615.

18. A term cannot be implied or imported into a valid contract because of a fraud, for the purpose of rendering the agreement void.—*Ct. of App.*, *June*, 1880. Guggenheimer *v.* Geiszler, 81 N. Y. 293.

19. The rule that where there is an express contract the law will not imply one, is only applicable to those cases in which the express contract and that implied by law relate to the same subject matter, and where the provisions of the express contract are intended to control and supersede those which would otherwise be raised by implication.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Commercial Bank of Keokuk *v.* Pfeiffer, 22 Hun 327.

20. Conditions precedent. In the purchase of an agent's interest in an agency for a term of years, provided the principal's consent, if necessary, should be obtained, a condition precedent to recovery of the purchase money is that there should be a valid, subsisting contract, whereby the vendor is constituted agent for the term.—*Superior Ct.*, *Feb.*, 1880. Felton *v.* McClave, 46 Superior 53.

21. Where, from the terms of a contract for the construction of a dam, it appears that the parties have agreed upon and adopted the decision of an engineer, therein named, as a final and conclusive arbitrament of all disputes and litigations that should arise in respect to the kinds or quantity of the several parcels or kinds of work to be done, and have by express stipulation made the certificate of the engineer a condition precedent to the right of the contractor to demand and recover, and to the liability of the other party to pay the compensation therein provided, such certificate is, in the absence of fraud or bad faith, final and conclusive, and it cannot be attacked or impeached on the ground that the engineer erred in deciding the questions submitted to him.—*Supreme Ct.*, (*1st Dept.*,) *May*, 1880. Whiteman *v.* Mayor, &c., of New York, 21 Hun 117.

22. Instances of the interpretation of contracts containing peculiar and unusual pro-

visions, or complicated circumstances affecting the rights of the parties, but not involving in their construction any new or important principles of law. Harris *v.* Kasson, 79 N. Y. 381; Jones *v.* Kent, 80 Id. 585; S. C., 8 Abb. N. Cas. 300; Burr *v.* Amer. Spiral, &c., Co., 81 N. Y. 175; S. C. 8 Abb. N. Cas. 403; James *v.* Burchell, 82 N. Y. 108; *affirming* 7 Daly 531; Hart *v.* Taylor, 82 N. Y. 373; Callmeyer *v.* Mayor, &c., of New York, 83 N. Y. 116; Budd *v.* Thurber, 61 How. Pr. 206; Still *v.* Holbrook, 23 Hun 517; Wheeler *v.* Spencer, 24 Id. 29; Matter of Upson, Id. 650; Eccles *v.* Darragh, 46 Superior 186.

V. Validity.

23. What agreements are valid, generally. A contract made pursuant to a statute which prescribes its terms, is valid only to the extent of the law.—*Supreme Ct., (Alb. Sp. T.,) June,* 1880. People *v.* Long Island R. R. Co., 9 Abb. N. Cas. 181.

24. H. claimed title to a mortgage executed by B. to F. under a trust deed executed by the latter. F. brought suit against H. to set aside the trust deed, in which action a receiver was appointed of the trust property, with authority to collect and satisfy the mortgage. While the order appointing the receiver was in force, one J. F. H., without authority from or request by B., paid to the receiver the amount of said mortgage, receiving the mortgage and a satisfaction-piece thereof, and the receiver paid over the amount to F. H. thereafter commenced an action to foreclose the mortgage, making B., the mortgagor, and T., who held a junior mortgage on the premises, defendants. B. answered, alleging payment and satisfaction of the mortgage. B. and T., thereupon, entered into a contract with J. F. H., by which the latter agreed to furnish the papers and evidence to sustain the defence; in consideration thereof, and if the defence should be successful, B. and T. agreed to pay one-half the amount of the mortgage. J. F. H. performed the contract on his part and the action of H. was defeated. In an action upon the contract—*Held,* that plaintiff was entitled to recover, that no corrupt intention appeared upon the face of the contract, and under the circumstances disclosed, there was no ground for supposing that it was entered into for the purpose of perverting justice by procuring false testimony in support of the defence in the foreclosure suit.—*Ct. of App., March,* 1881. Wellington *v.* Kelly, 84 N. Y. 543.

25. As to the validity of a contract to pay for services for collecting an "Alabama claim," and what is sufficient performance to authorize a recovery of the stipulated compensation, see Lawson *v.* Bachman, 81 N. Y. 616.

26. Stock speculation contracts. Plaintiff purchased, through the agency of defendant, a stock option or privilege known as a "straddle," which secured to her the right to demand of the seller, at a price stated, a certain number of shares of a specified stock, or to require him to take said stock at the same price, within sixty days. Plaintiff was induced to make the purchase by printed circulars issued by defendant, explaining the nature of a "stradle," offering to purchase one of his selection upon payment of a specified sum, and guaranteeing that fluctuations in the stock during the pendency of the contract would amount to eight per cent., and in case it did not, agreeing to refund the amount paid, less commissions. Plaintiff authorized defendant, as her agent, to exercise the option. On the next day after the purchase defendant sold the stock "short," which resulted in a loss. Defendant claimed on appeal that this was a gambling transaction, and as such prohibited by statute. No such defence was set up in the answer. *Held,* that the contract was not of necessity a wager contract; that this was for defendant to prove; and that the fact that it might have been so did not dispense with the necessity of proving that it was.—*Ct. of App., Dec.,* 1880. Harris *v.* Tumbridge, 83 N. Y. 92.

27. Contracts respecting lotteries. The law will not presume a contract illegal, or against public policy, and so void, when it is capable of a construction which will make it lawful and valid.—*Ct. of App., Nov.,* 1880. Ormes *v.* Dauchy, 82 N. Y. 443; *affirming* 45 Superior 85.

28. A contract made in this state to advertise a lottery in other states, in the absence of proof that such advertisement is in violation of the laws of those other states, will not be held illegal. *Ib.*

29. Defendants contracted with plaintiff's firm that if the latter would procure for them the advertising work of a Virginia corporation, to be done in various newspapers throughout the country, that they would pay said firm ten per cent. on the moneys received by them. A list of 1,130 newspapers was produced, 200 of which were published in this state, and the contract, as testified to by one of the defendants, was for a publication in the entire list. Through the efforts of said firm, defendants procured a contract for the advertising. In an action to recover the stipulated percentage, the defence was that the contract was for the publication of lottery advertisements, and so was illegal. The contract between defendants and the Virginia corporation was not produced by them. No evidence was given of a publication in any newspaper in this state, and the monthly bills rendered by defendants for the publication were much less than what was stated to be the charge for all the papers in the list. There was no proof that the contract was in violation of the laws of Virginia, or that the laws of any other state were violated. *Held,* that it was a question of fact for the jury whether the contract with the corporation embraced any newspaper published in this state; that, as it appeared defendants had control of the contract and did not produce it, every intendment was against them; that a contract to advertise in other states was not shown to be illegal; and that, therefore, a refusal to dismiss the complaint was not error. *Ib.*

30. Contracts to drive race-horses. It is not unlawful to trot horses for purses, prizes or premiums at any place where, by statute, it is authorized, or to contract to drive a horse in a trotting race at such place.—*Ct. of App., Sept.,* 1880. Harris *v.* White, 81 N. Y. 532.

31. As there are special statutes, and a general statute, authorizing the formation of associations having a right to offer premiums or rewards for such contests, a party seeking to avoid a contract to pay for services in driving a horse

in trotting races, as coming within the prohibitions of the statute, must aver and prove that the services were contracted to be rendered at a place, and in trotting for prizes or rewards not within the exception of the statute. *Ib.*

32. Plaintiffs entered into a contract with defendant, whereby plaintiff E. L. H. was to drive the horses of defendant during the trotting season of 1875, at such times and places as defendant might desire, in races or contests of speed for purses, prizes or premiums. Defendant's horses had at that time been entered for races at various places, all of them but one out of this state. The contract was entered into with these places in contemplation, and such others as defendant should designate. By the laws of this state races for purses and prizes were authorized at the places so in contemplation in this state. E. L. H. drove defendant's horses at places designated by him in this and other states. In an action to recover the contract price for the services of E. L. H., it appeared that races were authorized under the statutes of the state for purses or prizes at most of the places in this state where defendant's horses were driven, and it did not appear that they were not so authorized at the others. *Held,* that the contract did not stipulate for a driving for a bet, wager or stakes within the prohibition of said statute, and so was not illegal. *Ib.*

33. Defendant gave evidence of the dealings of the parties in reference to the same horses prior to the contract, to the effect that they connived with the owners or drivers of other horses that there should not in fact be a contest, but that a horse agreed upon should be allowed to come in ahead, and that they bore the expenses of the horses and shared in the winnings, and bought pools and divided the avails. *Held,* that as there was no statutory disapprobation of such feigned races, and as the evidence authorized an inference that these former practices were to be abandoned, and that plaintiffs should be compensated for their services by the payment of a definite sum, a finding that the contract did not contemplate a driving for a bet, wager or stakes, and was not in violation of any statute of this state, was justified. *Ib.*

34. Testimony was given to the effect that defendent made similar secret arrangements with the owners of other horses during the season of 1875, and that plaintiff drove by the order of defendant, so as to make it sure to those in the plot which horse would win. *Held,* that this was not riding or driving for a bet, wager or stakes; and, while fraudulent and wrongful, was not statutory wrong-doing. *Ib.*

35. Testimony was also given tending to show that after such secret arrangement had been made, defendant and E. L. H. bought pools and gained thereby. *Held,* that it was not so conclusive that this was in contemplation of the parties as to make it plain that a finding that it was not was erroneous. *Ib.*

36. It appeared that defendant paid entrance fees for his horses. *Held,* that this was not a staking of so much of his money on the result, as the entrance fee did not specifically make up the purse or premium trotted for. *Ib.*

37. Contracts contrary to public policy. The plaintiff having left her husband, the defendant, and brought an action against him to procure a divorce on the ground of his adultery, in which *prima facie* evidence of his guilt had been given, agreed with him to discontinue the action, without costs to either party, and to return to and live with him on condition that he should give his note for $1000 to her father for her benefit. The note was given, the suit discontinued, and the wife returned to and lived with her husband for several years. In an action brought by her upon the note after she had again separated from her husband:

Held, 1. That the note was founded upon a good consideration, and was not void as being against public policy.

2. That the note having been assigned to the wife, she could bring an action at law upon it, and that, even if she could not maintain an action at law, equitable relief might be afforded to her under a complaint stating the facts.—*Supreme Ct.* (*4th Dept.*) *April,* 1881. Adams *v.* Adams, 24 Hun 401.

38. Promise induced by threats. Plaintiff being indebted to the defendant in the sum of $71, for two notes, which had been forged by plaintiff and transferred to defendant, it was agreed that a wagon belonging to plaintiff, and then in possession of defendant, should be exposed for sale at public auction, and that plaintiff should not forbid the sale, and defendant agreed, in consideration thereof, to surrender the notes. The wagon was accordingly sold, and purchased by defendant, who surrendered the notes to plaintiff, by whom they were destroyed. At the time of the making of the agreement plaintiff was not in custody, nor was he threatened with an illegal arrest. *Held,* that an action by plaintiff to recover the value of the wagon, on the ground that the agreement was procured by threats, and was made to compromise a felony, could not be maintained.—*Supreme Ct.,* (*3d Dept.,*) *November,* 1880. Kissock *v.* House, 23 Hun 35.

VI. Performance. Breach.

39. Obligation to perform or show waiver. A literal performance of a building contract, in every detail, is not a condition precedent to the right of the contractor to require payment.—*Ct. of App*, *June,* 1880. Heckmann *v.* Pinkney, 81 N. Y. 211, 214.

40. By the terms of a contract between defendants P. and G., the latter agreed to make certain repairs and alterations upon the premises of the former, the work to be completed in two months. G. leased certain other premises of P., and it was agreed that the rent falling due before the completion of the contract was to be credited upon the contract price. In an action by a sub-contractor to foreclose a mechanics' lien it appeared that the contract was not performed within the time, but the referee found that it was substantially performed before the commencement of the action, and that defendant had waived performance as to the items wherein there was not perfect performance. *Held,* that the failure to perform was no defence. *Ib.*

41. The referee allowed defendant the rent falling due up to the time of the commencement of the action. *Held,* no error; that for the purpose of the action the contract must be treated as then performed. *Ib.*

42. What is a sufficient performance. Where a contractor has in good faith intended to comply with a building contract, and

has substantially so done, although there may be slight defects caused by inadvertence or unintentional omission, which are susceptible of remedy without difficulty, so that an allowance out of the contract price will give to the other party a full indemnity, he may recover the contract price, less the damages on account of such defects.—*Ct. of App*, *March*, 1880. Woodward *v.* Fuller, 80 N. Y. 312.

43. To justify a recovery, however, the defects must not run through the whole work, or be so essential as that the object to have a specified amount of work done in a particular manner, is not accomplished. *Ib.*

44. Where, therefore, plaintiff undertook in good faith the performance of a contract for altering a dwelling-house, and performed it substantially, but through his own inadvertence and that of his workman, and through want of skill and judgment on their part, some of the specifications were not fully performed, *i. e*, the roof and chimneys were not well supported, folding-doors were not well hung, and the casings thereto well fitted, tar-paper and clapboards, in a few instances, not well put on, and one door and casing not fitted so that the door would shut—*Held*, that as it appeared that all of the defects could be easily remedied, and they did not pervade the whole work; also that they were not so essential as to defeat the object of the parties, plaintiff was entitled to recover the contract price, less the damages. *Ib.*

45. Plaintiff also contracted separately to build a piazza, which contract he performed, and he did extra work. *Held*, that in any view plaintiff was entitled to recover for the piazza and the extra work; that money paid upon the principal contract could not, nor could the damages be set off or applied thereon. *Ib.*

46. What is a sufficient performance of a contract on plaintiff's part to entitle him to damages for non-performance on defendant's part, determined in a case depending upon peculiar and unusual circumstances. Barnes *v.* Brown, 80 N. Y. 527.

47. What is not sufficient. In case of a contract where one party is to build a wall at the joint expense of both, and certain other things are to be done at the expense of the other, when the party who was not required so to do, built a wall, but not the one called for by the contract, he cannot call on the other for contribution, nor do these facts relieve him from his obligation to pay for the other things which were to be done at his expense.—*Superior Ct., Feb.*, 1880. Scott *v.* Sanford, 46 Superior 544.

48. Defendant and one O'D. entered into a contract for the purchase by the former, and sale by the latter, of certain premises. Defendant agreed to pay a portion of the purchase price by the assignment of a mortgage which he covenanted should be a valid and subsisting first lien; the property covered by it to be of the value of $4000. O'D. conveyed the premises and defendant assigned the mortgage; the assignment contained a guaranty that the mortgage was a valid and subsisting lien, but contained no covenant as to the value of the mortgaged premises or as to the priority of the lien. *Held*, that the acceptance of the assignment was not a satisfaction or extinguishment of the covenant as to value in the agreement; and that an action was maintainable for a breach thereof.—*Ct. of App., Nov.*, 1880. Smith *v.* Holbrook, 82 N. Y. 562.

49. What will excuse non-performance—inability to perform. To excuse non-performance of an express condition in a contract, it must appear that performance could not, by any means, have been accomplished.—*Ct. of App., Nov*, 1880. Wheeler *v.* Connecticut Mut. Life Ins. Co., 82 N. Y. 543; *reversing* 16 Hun 317.

50. Waiver of strict performance. Plaintiffs contracted orally to sell and deliver to defendants at a price named six hundred and ninety-nine boxes of glass, the whole to be delivered together at one and the same time. Prior to the delivery of any portion, defendants wrote to plaintiffs to forward them at once a small portion described. Plaintiffs delivered three hundred and sixty-five boxes, which defendants accepted, received and used without any notice to plaintiffs that they insisted upon a delivery of the remainder, or any reserve of the condition of full delivery. Some days after the delivery, defendants wrote plaintiffs that they wanted the order completed in a reasonable time. Subsequently, there was a correspondence between the parties growing out of a misunderstanding as to its terms. Plaintiffs then wrote, offering to complete the contract, which defendants declined, on the ground that the time for performance had expired. Defendants at no time claimed that they were not liable to pay for the boxes delivered, but claimed to be allowed damages for the non-delivery. *Held*, that the facts justified a finding of a waiver of the condition of complete performance before they should become liable to pay for the part delivered; and that while defendants had a right to recoup damages for failure to deliver as agreed, yet not having claimed it in their answer they could not prevent a recovery for the glass actually delivered—*Ct. of App., June*, 1881. Avery *v.* Willson, 81 N. Y. 341.

51. The parties to this action entered into a contract, by which plaintiff agreed to build for defendants a grain elevator of a certain capacity, for a sum specified. The contract provided that if, after a trial of the elevator, "there proves to be any deficiency in the working of any of its parts, such parts shall be removed and replaced with new and acceptable work" by plaintiff; it also provided for a retention by defendants of twenty-five per cent. of the contract price until the whole work was completed and accepted. Plaintiff built the elevator, defendants took possession, and thereafter continued to operate it; they also paid the contract price in full. The elevator was not of the stipulated capacity, and defendants, without notifying plaintiff of the deficiency, expended money in improving the elevator, raising it to a capacity beyond that stipulated for in the contract. In an action upon another contract, defendant set up the sums so expended as a counter-claim, and they were allowed by the referee. *Held*, error; that while plaintiff was bound to remedy any defects, in order that he might do so, defendants were obligated to give him notice; that they could not, when defects were discovered, remedy them at the expense of plaintiff and in his absence, without notice or an opportunity on his part to do so.—*Ct. of App., Sept.*, 1880. Mansfield *v.* Beard, 82 N. Y. 60.

VII. MODIFICATION.

VIII. RESCISSION.

52. Restoration of the consideration. The rule that one seeking to rescind a contract, for fraud, must restore what he received under it, applied to the facts of the particular case.—*Supreme Ct.*, (*4th Dept.*,) *June*, 1880. Gould *v.* Cayuga, &c., Nat. Bank of Auburn, 21 Hun 293.

IX. LAW OF PLACE.

53. Effect of, on loans. A party residing in one state who goes into another state and there makes an agreement with a citizen of that state for a loan, lawful by its laws, but usurious under the laws of the borrower's state, cannot render his obligation void by making it payable in his own state. Nor does the fact that the obligation is executed in the latter state, and sent to the lender by mail, require that it should be governed by the usury laws of the state where it was signed.—*Ct. of App.*, *Sept.*, 1880. Wayne Co. Savings Bank *v.* Low, 81 N. Y. 566; S. C., 8 Abb. N. Cas. 390.

54. — on guaranties. In October, 1872, the N. S. S. C., a corporation organized under the laws of this state, and having its principal place of business in Rome, Oneida county, executed at that place bonds, to the amount of $150,000, payable January 1st, 1878, at a bank in New York city, secured by a mortgage upon real estate owned by it at Sandusky, Ohio, payment of the bonds being also secured by a joint guaranty thereof, executed in this state by one W. and others. Thereafter, the bonds were, in pursuance of a previous arrangement to that effect, sent to Sandusky, and there sold to citizens of that place. In 1874, W. made a general assignment of all his property for the benefit of his creditors, and thereafter, and in 1876, died. Upon an application to compel a distribution of the funds in the hands of the assignee, the holders of the bonds, payment of which had been so guaranteed by W., claimed to be entitled to share therein.

Held, 1. That as the guaranty, though executed in this state, was to be delivered and become operative, and had its inception in Ohio, its construction and the liability of the parties thereto, were to be governed by the laws of that state.

2. That as a statute of that state provided that when one or more persons indebted upon a joint contract shall die, his estate shall be liable, as though the contract had been joint and several, the estate of W. was liable for the amount of the bonds so guaranteed by him.—*Supreme Ct.*, (*2d Dept.*,) *Dec.*, 1880. Richardson *v.* Draper, 23 Hun 188.

X. ACTIONS FOR BREACH OF CONTRACT.

55. The right of action, and who may sue. Defendant and others signed the following instrument: "We, the undersigned, citizens of Unionville and vicinity, pledge ourselves to subscribe for and take stock in and for the construction of the Lake Ontario Shore railroad to the amount set opposite our names respectively, on condition said road be located and built through or north of the village of Unionville, in Parma." In an action thereon—*Held*, that it was not a subscription to plaintiff's capital stock; that it was in no sense a party to the agreement, and could not maintain an action thereon.—*Ct. of App.*, *Feb.*, 1880. Lake Ontario Shore R. R. Co. *v.* Curtiss, 80 N. Y. 219.

56. *It seems* that an action by a party to the instrument could not be maintained in the absence of evidence that the contract was entered into for his beoefit, and not until after the condition stated therein had been performed; also, that any recovery would be, not for the amount of the promised subscription, but only for the damages which such party had sustained. *Ib.*

57. It appeared that plaintiff's road and property of every kind, with its rights and franchises, were sold under a mortgage, that a new company was organized, which became the owner thereof, and that the road was thereafter built by the new company; plaintiff did not offer to furnish defendant with stock in the new road. *Held*, that these facts did not aid the plaintiff; that plaintiff, although not formally dissolved, had in fact ceased to exist for any practical purpose; that its certificate of stock, if now issued, would not represent the road, or anything else of value, and so that defendant would receive no consideration for his subscription, if made, or for his money, if paid. *Ib.*

58. Plaintiff contracted to convey to H. certain premises for $1350; $300 was paid down and the balance was agreed to be paid in annual installments. H. assigned his contract to defendants in payment of two notes, the latter agreeing to pay enough in addition to make the purchase price $300, H., however, reserving the right to redeem. In an action brought to recover installments due and unpaid on the contract, H., as a witness for plaintiff, testified that defendants were to pay up the contract. *Held*, that the evidence failed to show an express agreement on the part of defendants to pay the balance due plaintiff; that the most that could be claimed was that defendants agreed to make advances for H., to be repaid when he redeemed; that there was, therefore, no assumption of the debt, so as to make it the debt of defendants, at least no promise intended for the benefit of plaintiff; and that, therefore, plaintiff was not entitled to recover.—*Ct. of App.*, *Nov.*, 1880. Roe *v.* Barker, 82 N. Y. 431; *affirming* 17 Hun 204.

59. After installments had become due, defendants requested plaintiff to give further time, which he did, in consideration of an oral promise to pay the debt. *Held*, that this did not authorize the reversal of the judgment, as no such cause of action was set forth in the complaint, and as the promise was void under the statute of frauds; and that, conceding it was supported by a sufficient consideration in the agreement for forbearance, it was not thereby made valid. *Ib.*

60. Matters of defence. Failure of defendant to set up non-performance of a contract, as a defence does not preclude him from a counter-claim for damages.—*Ct. of App.*, *Jan.*, 1881. Taylor *v.* Mayor, &c., of New York, 83 N. Y. 625.

61. *It seems* that in an action against a third party, whose title depends upon a contract

claimed by plaintiff to have been rescinded, defendant cannot set up a want of tender by plaintiff, to the other party to the contract, of a return of what plaintiff received.—*Ct. of App.*, *March*, 1881. Town of Springport *v.* Teutonia Savings Bank, 84 N. Y. 403.

62. Evidence. Plaintiff contracted to build certain railroad bridges and trestle-work for defendant's firm, which had a contract with the railroad company for building the road. The bridges, etc., were to be built to the satisfaction of B., the superintendent of the road. In an action to recover for work, etc., in building a bridge and trestle-work under the contract, in which the defence was that the work was not done according to contract—*Held*, that testimony was competent on the part of plaintiff to the effect that the bridge and trestle-work had been and were in use by the company, and that no objection thereto was ever made by defendants or by B.—*Ct. of App.*, *Feb.*, 1880. Comins *v.* Hetfield, 80 N. Y. 261.

63. Damages recoverable. Plaintiff and defendants McC. entered into a contract, by which the former agreed to convey to the latter seven lots, they giving back their bond and a mortgage on each lot for the purchase money. The vendees agreed to erect a dwelling upon each lot, plaintiff making to them certain advances as the work progressed, to be repaid out of the proceeds of mortgages upon the lots. After the papers were executed, and the work of building commenced, the vendees negotiated a loan of defendant G., secured by mortgages upon four of the lots, and an agreement was made between all the parties, to the effect, among other things, that a certain portion of the moneys loaned should be deposited in a trust company "as collateral security for the completion of the dwelling-houses," and that said mortgages should have the priority over plaintiff's mortgages on said lots. The vendees failed to perform their agreement, and after the expiration of the time fixed for performance, abandoned the premises; whereupon plaintiff went on and completed the buildings. In an action to reach the trust funds—*Held*, that plaintiff's damages were the difference between the value of the premises as they were when abandoned by the vendees, and what their value would have been, had the buildings then been completed according to the contract; and that he was entitled to have out of the trust fund the amount of the damages so estimated. —*Ct. of App.*, *Jan.*, 1881. Kidd *v.* McCormick, 83 N. Y. 391.

64. Plaintiff, before bringing this action, foreclosed his mortgages, bidding in the premises and obtaining judgments for deficiencies. *Held*, that neither the taking possession and completing the buildings, nor the foreclosures, worked a rescission of the contract on the part of plaintiff; also, that a reservation of said contract in the foreclosure judgments was not necessary, and that plaintiff was entitled to recover for expenditures made after the foreclosure sales in completing the buildings. *Ib.*

For decisions respecting the various contracts by which title to or possession of *Property is transferred*, see BAILMENT; CHATTEL MORTGAGES; DEEDS; MORTGAGES; SALES; VENDOR AND PURCHASER.

As to the power of any particular officer to contract in his *Official character*, see OFFICERS; and the titles of the various kinds of officers.

As to *Contracts with the state*, see STATE, II.

For the *Agent's power to bind the principal* by contract, see PRINCIPAL AND AGENT, III.

As to *Contracts by corporations*, see CORPORATIONS, IV.; MUNICIPAL CORPORATIONS, II., III.

As to when a court of equity will *Enforce* the performance of a contract, see SPECIFIC PERFORMANCE.

In what cases equity will *Cancel* or *Reform* the contract, see EQUITY, II.

As to contracts between *Husband and wife*, or between *Wife and third person*, see HUSBAND AND WIFE, V., VII.

For the effect upon a contract of the *Infancy of the party* to it, see INFANTS.

As to the contracting powers of *Guardians*, *Personal representatives*, and *Trustees*, see EXECUTORS AND ADMINISTRATORS; GUARDIAN AND WARD; TRUSTS.

For rules of *Pleading* and *Evidence*, generally, see those titles.

CONTRIBUTION.

Between *Sureties*, see PRINCIPAL AND SURETY; in *General average*, see INSURANCE, IV.

CONTRIBUTIVE NEGLIGENCE.

NEGLIGENCE, II.; RAILROAD COMPANIES, IV.

CONVERSION.

As to *Equitable conversion* of land into personalty, see WILLS, V.

As to what constitutes a *Tortious conversion* of chattels, see TROVER.

CONVEYANCES.

DEEDS; MORTGAGES; WILLS.

CORPORATIONS.

I. HOW CREATED; INCORPORATION; ORGANIZATION; CHARTERS.
II. CORPORATE STOCK.
III. RIGHTS AND LIABILITIES OF STOCKHOLDERS.
1. *In general.*
2. *Subscriptions for stock.*
3. *Individual liability.*
IV. CORPORATE POWERS.
V. CORPORATE LIABILITIES.
VI. OFFICERS AND AGENTS.
VII. DISSOLUTION, RECEIVER, &c.
VIII. FOREIGN CORPORATIONS.

I. How Created; Incorporation; Organization; Charters.

1. **Organization.** Plaintiff alleged that in January, 1873, he assigned to defendant his interest in an invention, for which a patent had been applied for, in consideration of defendant's agreement to pay a royalty upon all of the patented articles manufactured, that the patent was issued to defendant, and it has manufactured under it. Defendant alleged that it was not organized as a corporation until after the making of the alleged agreement, and proved that a certificate of incorporation was filed after that time. It appeared, however, that when the agreement was made, business was being done by the same parties as those now conducting defendant's business, and in the same corporate name, and that they contracted with plaintiff in the corporate name; that the patent was issued to defendant, after the alleged organization, and that for a time thereafter defendant paid to plaintiff the royalty agreed upon. *Held,* that it was immaterial whether the organization proved was the first corporate organization or simply a reorganization; that the corporation had, by availing itself of, and acting under, the agreement after such organization, adopted and ratified it and was bound by its provisions.—*Ct. of App., Sept.,* 1880. Bommer *v.* American Spiral, &c., Manuf. Co., 81 N. Y. 468.

2. **Reorganization.** A railroad was sold upon foreclosure of a mortgage subject to a certain "plan and arrangement" of reorganization, provided for in the judgment, entitling the stockholders, on the payment of a specified sum, to exchange their stock for that of the new company, before the expiration of such time as might be lawfully limited by the parties to the "plan and arrangement." It did not appear that those parties ever fixed any time. *Held,* that, as the plan undertook to regulate the time, the statute of limitations did not apply, and that the new organization had no power to limit the time.—*Supreme Ct.,* (1*st Dept.,*) *Feb.,* 1881. Vatable *v.* New York, &c., R. R. Co., 9 Abb. N. Cas. 271.

II. Corporate Stock.

3. **General nature of stock—stock certificates.** The capital stock of a corporation is to be distinguished from the certificates issued by it called "stock certificates," which are simply the written evidence of the stockholder's right to participate in the surplus profits.—*Superior Ct.,* (*Sp. T.,*) *June,* 1881. Williams *v.* Western Union Teleg. Co., 9 Abb. N. Cas. 437; S. C., 61 How. Pr. 216.

4. The capital stock, *i. e.,* the corporate property, is not withdrawn or reduced by the issuing of stock certificates. *Ib.*

5. **Issuing.** Capital stock can only be created by an agreement founded upon a good legal consideration, and when issued without any subscription made or consideration paid or agreed to be paid, has no foundation to rest upon; it does not exist, and has not the characteristics of property.—*Superior Ct.,* (*Chamb.,*) *May,* 1881. Hatch *v.* Western Union Teleg. Co., 9 Abb. N. Cas. 430. Compare Williams *v.* Same, Id. 437.

6. Accumulated earnings upon which no dividend has been declared, being already assets of the corporation, furnish no consideration for the issuing of stock to be divided among the stockholders. *Ib.*

7. The issuing of stock to the stockholders without any consideration, is forbidden by statute, and is *ultra vires* and void, and incapable of ratification by the stockholders. *Ib.*

8. Upon the division of surplus earnings each individual shareholder has a right to take his portion in money, and cannot be forced to take it in the form of additional capital. *Ib.*

9. **Disposal of additional stock on increase of capital.** The officers of a corporation act as trustees in disposing of its capital stock, and are bound to act not only as specifically directed by statute, but under the general obligations of trustees.—*Superior Ct.,* (*Chamb,*) *March,* 1881. Williams *v.* Western Union Teleg. Co., 9 Abb. N. Cas. 419.

10. Upon an increase of capital, the directors, in disposing of the increased stock, are to be deemed trustees for those holding shares of the original stock, and it is their duty so to dispose of them that as much value as possible shall be returned to the corporation for its business purposes. *Ib.*

11. **Transfers, and rights of transferee.** The owner of certain preferred shares of stock in a mining company, after having sold the same and delivered the certificates thereof to one person, assigned to another all his right, title and interest in and to the interest due upon the shares of stock which he had previously owned. By the terms of the certificates the company agreed to pay interest upon them annually out of its net earnings, at the rate of seven per cent. per annum for each year, provided so much had been earned in the year preceding. It did not appear that any separation of this interest from the other funds of the company had ever taken place, or that any of the earnings had been in any form appropriated or assigned to the payment of this interest. *Held,* that the right to recover the interest was merely an incident to the shares themselves, and depended upon the title thereto, and that the assignee of the said interest could not sue to recover the same and compel the company to account therefor.—*Supreme Ct.,* (1*st Dept.,*) *April,* 1881. Manning *v.* Quicksilver Mining Co., 24 Hun 360.

12. **Determining conflicting claims to stock.** Under what circumstances an action is not maintainable at the instance of a corporation to determine conflicting claims to its stock, see Buffalo Grape Sugar Co. *v.* Alberger, 22 Hun 349.

13. **Dividends.** Where preferred guaranteed stock is issued by a railroad company, the holders, although they are not entitled to dividends when no profits are earned, yet they are first entitled to be paid the amount of dividends specified and guaranteed, including all arrears, before the holders of common stock are entitled to anything.—*Ct. of App., March,* 1881. Boardman *v.* Lake Shore, &c., R'y Co., 84 N. Y. 157.

14. A shareholder in a corporation is not entitled to any of the property or profits until a division has been made or a dividend declared. *Ib.*

15. When a dividend is declared it belongs to the owners of the stock at the time, but until such declaration, the profits form part of the assets; and an assignment by a stockholder of his

shares carries with it his proportionate share of the assets, including all undeclared dividends. *Ib.*

16. While, as a general rule, the officers of a corporation are the sole judges as to the propriety of declaring dividends, and the courts will not interfere with a proper exercise of their discretion where the right to a dividend is clear and fixed by contract, and requires the directors to take action before the right can be asserted by an action at law, a court of equity will interpose to compel such action, and, when necessary, to restrain, by injunction, any action adverse to such right. *Ib.* And see Williams *v.* Western Union Teleg. Co., 9 Abb. N. Cas. 419.

III. Rights and Liabilities of Stockholders.

1. *In general.*

17. Rights as towards the corporation. A general understanding between the subscribers to stock as to the purpose or object of the company, cannot limit the powers of the latter as embodied in the certificate of incorporation.—*Supreme Ct.*, (*Sp. T.*,) *Feb.*, 1881. Hatch *v.* Amer. Union Teleg. Co., 9 Abb. N. Cas. 223.

18. — as towards each other. Where a stockholder receives from a corporation dividends, declared and admitted by it to be due to him on shares of the corporate stock, an action is not maintainable against him in the first instance, at the suit of one claiming to be entitled to share in the dividends, but whose rights had been ignored by the corporation, to recover as for moneys had and received, the proportion of the dividends so received, which plaintiff would have been entitled to had his shares participated.—*Ct. of App.*, *Nov.*, 1880. Peckham *v.* Van Wagenen, 83 N. Y. 40; *affirming* 45 Superior 328.

19. *It seems* that the remedy of one thus wrongfully excluded from the rights of a stockholder is against the company. *Ib.*

20. He cannot follow the assets of the company in the hands of parties to whom it has paid them, until, at least, he has established his rights as a creditor of the company and has exhausted his legal remedies against it. *Ib.*

21. Stockholder's remedy against the corporation. Where a large majority of the stockholders favor the corporate action, the court will not interfere by injunction at the instance of a holder of a comparatively small number of shares, unless in a clear case.—*Supreme Ct.*, (*Sp. T.*,) *May*, 1878. Benedict *v.* Western Union Teleg. Co., 9 Abb. N. Cas. 214.

22. Plaintiff's complaint alleged in substance that the railroad and franchises of the T., W. & W. R. R. Co., of which he was a stockholder, were sold under a decree of foreclosure and were bid off by a committee of the holders of the bonds secured by the mortgage; that a portion of the stockholders disputed the validity of the sale, and a litigation arose, which resulted in an arrangement under which said stockholders withdrew all opposition and were accorded by the purchasers of the road the right to take stock in a new company to be organized, upon certain terms specified, among others, that the option so to do must be exercised within thirty days, otherwise all rights should be forfeited; that in pursuance of this arrangement defendant, the W. R. Co., was organized and is operating the road, and possesses the rights and property of the old company, and has issued stock under the agreement; that plaintiff had no knowledge or notice of the agreement until after the expiration of the thirty days; that when notified he tendered performance on his part, and demanded his proportionate share of the new stock, which was refused. The other defendants were the purchasing committee who were authorized to carry out the said agreement. Plaintiff asked damages for the refusal. *Held*, that a demurrer to the complaint was properly sustained; that if the foreclosure sale was valid, all of plaintiff's legal rights were cut off; if invalid, his right to attack it was not affected or impaired by the agreement, unless he elected to come in and ratify it, in which case he was bound to adopt it as such and could not vary its terms.—*Ct. of App.*, *Sept.*, 1880. Thornton *v.* Wabash R'y Co., 81 N. Y. 462.

23. *It seems* that if the property and franchises of the old company had become vested in the new corporation without the intervention of legal proceedings cutting off the rights of the old stockholders, there would have been a foundation for plaintiff's claim. *Ib.*

24. — or its officers. When a stockholder, upon its insolvency, has been compelled to contribute to the debts of the corporation, he may maintain an action on behalf of himself and others to recover from the directors the losses, resulting in such insolvency, which were caused by their negligence and misconduct, provided the corporation or its receiver refuses to bring such action.—*Supreme Ct.*, (*1st Dept.*,) *April*, 1881. Nelson *v.* Burrows, 9 Abb. N. Cas. 280.

2. *Subscriptions for Stock.*

25. Validity of the contract. Part payment. Defendant subscribed for stock of plaintiff and gave his check for ten per cent. of the amount of the subscription. Before the check was presented for payment, defendant countermanded it. In an action to recover the amount of defendant's subscription—*Held*, that no binding subscription was made, because of defendant's failure to make the cash payment of ten per cent. required by the statute before the subscription itself could be received by the commissioners; and what was done was entirely ineffectual.—*Supreme Ct.*, (*1st Dept*,) *July*, 1881. Excelsior Grain Binding Co. *v.* Stayner, 61 How. Pr. 456; *affirming* 58 Id. 273.

26. What may be taken in payment. In the absence of statutory restriction, a corporation has power to receive payment for its stock otherwise than in money.—*Superior Ct.*, (*Sp. T.*,) *June*, 1881. Williams *v.* Western Union Teleg. Co., 9 Abb. N. Cas. 437.

27. What will discharge the liability for subscriptions. Defendant, V. B., being the president and a director of the H. A. R. R. Co., as such president entered into a contract with C., by which the latter agreed o build and equip a portion of the road, for a certain sum in stock of the company, and for a certain sum in its bonds. Immediately after

ward, and in accordance with a previous arrangement, the contract was assigned by C. to V. B., who, with others associated with him, performed the contract at an expense less than the par of the stock and bonds agreed to be paid therefor, which they received. In an action by plaintiff, among other things, to recover of V. B., as the amount unpaid upon the stock, a proportionate share of the difference between the par value of the stock so transferred and the cost of performance, it appeared that the contract was entered into and assignment made, in good faith, after full deliberation and consultation, with the knowledge and assent of all the directors and the stockholders of the company, as the only means to insure the construction of the road, and that the amount expended exceeded the actual value of the stock and bonds delivered in payment. *Held,* that the stock so transferred was to be considered as fully paid-up stock, and that the action was not maintainable.—*Ct. of App., Nov.,* 1880. Van Cott *v.* Van Brunt, 82 N. Y. 535.

28. What will not. When a subscription to the capital stock of a railroad company, made before its incorporation, is valid, and when a subscriber is not released by its failure to complete the road, or by its sale on foreclosure, see Buffalo, &c., Railroad Co. *v.* Clark, 22 Hun 359.

29. Where, by the charter of a corporation, the right is reserved to the legislature to alter or repeal it, a subscriber to its capital stock is not discharged from his subscription by a subsequent amendment to the charter, but will be regarded as having consented to the change.—*Ct. of App., Jan.,* 1880. Union Hotel Co. *v.* Hersee, 79 N. Y. 454; *reversing* 15 Hun 371.

30. Instances. By plaintiff's charter (Laws of 1871, ch. 432,) it was provided that the franchises thereby granted should become null and void, unless it should begin the construction of a hotel within two years after the passage of the act; it was also made "subject to the liabilities and restrictions contained in certain provisions of the Revised Statutes," among others to the provision (1 Rev. Stat 600, § 8,) declaring that the charter of every corporation thereafter "granted by the legislature shall be subject to alteration, suspension or repeal, in the discretion of the legislature." Defendant subscribed for fifty shares of the capital stock. Subsequently, but before the expiration of the two years, the charter was amended (Laws of 1873, ch. 123,) by extending the time for beginning the construction of the hotel five years. The work of construction was not commenced within the two years, and, soon after, defendant gave notice to plaintiff that he withdrew his subscription. In an action upon the subscription—*Held,* that the said provision of the Revised Statutes was to be considered as incorporated in the charter, and as part of defendant's contract; and that the subscription was not defeated by the amendment. *Ib.*

31. Defendant's subscription was made on the condition that "the sum of $200,000 be subscribed by the citizens of Buffalo." The requisite amount was subscribed; some of the subscriptions were in firm names written by one partner; one was in the name of a corporation; it appeared that this was made by authority of the directors of the corporation, and with the assent of all the stockholders. Upon these subscriptions payments were made in compliance with calls made upon the subscribers. *Held,* that the evidence established *prima facie* the validity of these subscriptions; that, in any event, the payment upon each was a ratification thereof. *Ib.*

32. One of the subscribers had, at the time of his subscription, his domicile in Batavia, but boarded in Buffalo, was engaged in business and spent nearly all of his time there. *Held,* that he was a citizen of Buffalo within the meaning of the subscription papers. *Ib.*

33. Another subscription was in the name of "B. & S. M. Spencer." B. Spencer, who signed, was a resident of Buffalo. *Held,* that the subscription was within the terms of the contract; and this, although there was no such firm, or B. signed without authority, as in either event he would be liable as upon his individual subscription. *Ib.*

34. Defendant signed a printed paper whereby he agreed to take one share of the capital stock of a railroad company thereafter to be organized, the route of which was described in the paper. Other printed papers, *fac similes* of the one signed by defendant, were signed by other persons, all of which papers were thereafter delivered to the persons proposed in them as directors, with the intention that they should be used in organizing the company. Thereafter the persons having the said papers in charge cut from all of them, except one, the signatures attached thereto, pasted such signatures upon the remaining paper, and filed it, with the requisite affidavit annexed thereto, in the office of the secretary of state, for the purpose of organizing the corporation. In an action brought by the corporation to recover the unpaid balance of defendant's subscription—

Held, 1. That as the defendant's liability was in no way changed or affected by the mutilation of the paper signed by him, and as the paper was not mutilated by the corporation or by any person for whose acts it was responsible (the directors in what they did having acted as agents of the subscribers,) the defendant was not released from his liability upon the agreement.

2. That the defendant was estopped from claiming that the corporation was not duly organized and had no existence, and that, for that reason, the action could not be maintained.—*Supreme Ct., (4th Dept.,) April,* 1881. Sodus Bay, &c., R. R. Co. *v.* Hamlin, 24 Hun 390.

3. *Individual liability.*

35. Liability of former holder where transfer is not made on books. In this action, brought by a receiver of the Bankers' and Brokers' Association, incorporated under Laws of 1867, ch. 474, § 2, to recover a portion of the amount unpaid upon the shares of stock, against one in whose name certain shares of stock stood on the books of the company, it appeared that the defendant had prior thereto sold and delivered the certificate of stock to another person, who had thereafter drawn the dividends upon the stock, but had not had it transferred to his name on the books of the association. *Held,* that the liability of the defendant continued until the transfer was made on the books of the company, and that the plaintiff was en-

titled to recover. *Supreme Ct.*, (1*st Dept.*,) *Dec.*, 1880. Cutting *v.* Damerel, 23 Hun 339.

36. Rules of evidence. In an action against a stockholder of a railroad corporation by a creditor thereof, under the provision of the general railroad act making each stockholder liable for the debts of the corporation to the amount unpaid on his stock, the record of a judgment against the corporation is competent evidence of plaintiff's *status* as a creditor and of the amount due him.—*Ct. of App.*, *Jan.*, 1881. Stephens *v.* Fox, 83 N. Y. 313; *affirming* 17 Hun 435.

37. The effect of said provision is not to impose any penalty or original liability upon the stockholder, but simply to confer upon the creditor of the corporation a right to pursue, for the satisfaction of his claim, the indebtedness of the stockholder to the corporation for his unpaid subscription. The creditor claims through the corporation, and if he shows that he is a creditor, by evidence binding and conclusive against it, the evidence is competent against the stockholder. *Ib.*

38. In an action to charge a holder of stock issued for property purchased by the company, on the ground of a fraudulent over-valuation thereof, when evidence of an offer for part of it, made to and refused by the company, is admissible, see Thurber *v.* Thompson, 21 Hun 472.

IV. Corporate Powers.

39. Power to contract. Unless restrained by law, every corporation has the incidental power to make any contract necessary to advance the objects for which it was created. —*Ct. of App.*, *Feb.*, 1880. Legrand *v.* Manhattan Mercantile Assoc., 80 N. Y. 638.

40. Construction of corporate contracts. Any contract which a corporation may make, abridging its powers, should be construed, if possible, in accordance with the public interests.—*Supreme Ct.*, (*Alb. Sp. T.*) *June*, 1880. People *v.* Long Island R. R. Co., 9 Abb. N. Cas. 181.

41. Power to acquire property. The purchase by a corporation of property paid for with capital issued for that purpose, will not be set aside upon a stockholder's application, on the ground of the inadequacy of the value of the property purchased, unless it is so great as to authorize a finding of fraud.—*Superior Ct.*, (*Sp. T.*,) *June*, 1881. Williams *v.* Western Union Teleg. Co., 9 Abb. N. Cas. 437; S. C., 61 How. Pr. 216.

42. Powers respecting the capital stock. The capital stock of a corporation mentioned in its charter is not *per se* a limitation of the amount of property, either real or personal, which it may own. It may divide its profits among the stockholders at such times and to such amounts as the directors may deem expedient. Instead of dividing the profits, they may, in their discretion, permit the surplus of property to accumulate beyond their original capital, as the interest of the corporation shall appear to dictate; and the corporation has, in the manner provided by law, a right to increase the number of certificates which represent the interest its stockholders have in its corporate fund. Such transaction is neither in law nor in fact a watering of the stock of a corporation. *Ib.*

43. The doctrine of ultra vires. Public policy demands that corporations should be kept strictly within their chartered limits, and every contract which exceeds those limits, is illegal and void.—*Superior Ct.*, (*Chamb.*,) *May*, 1881. Hatch *v.* Western Union Teleg. Co., 9 Abb. N. Cas. 430.

44. An objection that an act is *ultra vires*, rests upon an absence of statutory power, and not upon a wrong use of it. Williams *v.* Western Union Teleg. Co., *supra*.

V. Corporate Liabilities.

45. Upon contracts by officers and agents. One who deals with the officers or agents of a corporation is bound to know their powers and the extent of their authority; the corporation is only bound by their acts and contracts which are within the scope of their authority.—*Ct. of App.*, *Jan.*, 1881. Alexander *v.* Cauldwell, 83 N. Y. 480.

46. It cannot be presumed that the agent of a corporation had authority to transact business which the corporation itself was not by its charter authorized to engage in. *Ib.*

47. For wrongful acts of officers and agents. A corporation is liable for its wrongful acts and omissions, and for the acts of its agents while engaged in the business of their agency, to the same extent and under the same circumstances as natural persons.—*Ct. of App.*, *Feb.*, 1880. Fishkill Savings Inst. Nat. *v*, Bank of Fishkill, 80 N. Y. 162.

48. One B. was in March, 1874, cashier of defendant, the National Bank of Fishkill, and its managing officer and general agent; he was also plaintiff's treasurer. He took certain bonds belonging to plaintiff which, in the name and as cashier and managing officer of said defendant, he pledged with various parties as securities for loans. In January, 1876, B. repossessed himself of the bonds, and returned them to plaintiff, but on the thirty-first of that month again took them, and in the same manner pledged them with W. and McM., a banking firm, as security for advances made and to be made to defendant; the bonds were subsequently sold pursuant to the conditions of the pledge and the proceeds credited to said defendant. In an action for conversion of the bonds—*Held*, that said defendant was liable; that ignorance on the part of its directors was not a defence, as, if ignorant, it was because they omitted the performance of official duty; that although B. had no authority to take the bonds, when he pledged them he represented the bank, and his knowledge was notice to it. *Ib.*

49. When affected by knowledge of officer. Knowledge acquired by a director, not as an officer of the corporation or while engaged in its business, but in an individual capacity, will not operate to its prejudice.—*Ct. of App.*, *Oct.*, 1880. Atlantic State Bank *v.* Savery, 82 N. Y. 291; *affirming* 18 Hun 36.

50. Liabilities of members of quasi corporations. The duties and liabilities of members of *quasi* corporations, such as school trustees and other similar bodies, discussed. Donovan *v.* McAlpin, 46 Superior 111.

VI. Officers and Agents.

51. The president. When the president

of a railroad corporation, who has taken an assignment of and has performed a contract for building the road, receiving stock in payment, is not liable to an action at the suit of creditors of the road, see Van Cott *v.* Van Brunt, 82 N. Y. 535.

52. The director of a corporation occupies a fiduciary position, and so is within the rule disenabling one entrusted with powers to be exercised for the benefit of others, from dealing in his own behalf in respect to matters involving the trust.—*Ct. of App., March,* 1881. Duncomb *v.* New York, &c., R. R. Co., 84 N. Y. 190; *reversing* 22 Hun 133.

53. The right of the corporation, or those claiming through it, to avoid any such dealings does not depend upon the question whether the director was acting fraudulently or in good faith. *Ib.*

54. But an act of a director, claimed to be in hostility to this rule, in the absence of bad faith on his part, cannot be avoided without a restoration to him of what the corporation received. *Ib.*

55. Where a director receives the property of the corporation as collateral security for a debt honestly due him, or a liability justly incurred, the rule has no application, as the payment of the debt or the discharge of the obligation is an essential prerequisite of an avoidance of the transaction; and this is so whether the pledge be taken for a present or a precedent debt. *Ib.*

56. The director of a railroad corporation cannot purchase its bonds below par except on peril of avoidance by the courts upon application of the corporation. But as he may be the lawful holder of such bonds, knowledge upon the part of a purchaser from him, for value and in good faith, of bonds so bought, that he is a director, does not put such purchaser upon inquiry, or charge him with constructive notice of the defect in the title. *Ib.*

57. Where, however, bonds are taken from a director in pledge for a precedent debt, the pledgee takes no better title than his pledgor, and they are subject in his hands to any defect in the title of the latter. *Ib.*

58. Suspension and removal. Compelling officers to account. Proceedings by a director against the other officers of the corporation for an accounting, will not prevent an action by the attorney-general for a suspension or removal of the officers, and for an accounting against the director who brought the first action, and others who were not included in the accounting asked for therein.—*Supreme Ct., (Brooklyn Sp. T.,) Dec.,* 1880. Keeler *v.* Brooklyn Elevated R. R., 9 Abb. N. Cas. 166.

VII. Dissolution, Receiver, &c.

59. Grounds of forfeiture, or dissolution. A corporation cannot be said to have committed an act of bankruptcy or insolvency, or to have neglected or refused to pay and discharge its obligations, because its demand notes remain outstanding and unpaid, until payment has been demanded.—*Ct. of App., April,* 1880. Denike *v.* New York, &c., Lime, &c., Co., 80 N. Y. 599, 607.

60. Power to enforce forfeiture. A forfeiture of the franchises of a corporation, unless there be special provision by statute, can only be enforced by the sovereign power to which the corporation owes its life, in some proceeding instituted in behalf of the sovereignty. *Ib.* 605.

61. The lien of the creditors of an insolvent corporation upon its assets in the hands of its stockholders, or of other persons, is a purely equitable one, and can only be enforced in an equitable proceeding.—*Supreme Ct., (4th Dept.,) June,* 1880. McLean *v.* Eastman, 21 Hun 312.

62. Who may sue for dissolution. A stockholder has no right, by the inherent powers of a court of equity, to bring suit to wind up the business of a corporation.—*Supreme St., (Chamb.,) Jan.,* 1881. Bliven *v.* Peru Steel, &c., Co., 60 How. Pr. 280; S. C., 9 Abb. N. Cas. 205.

63. If a stockholder may proceed under 2 Rev. Stat. 463, § 38, which provides for dissolution when the corporation has been insolvent for a year, or has neglected or refused for a year the payment of its debts, or has suspended its business for a year, the plaintiff has not made out such a case. It is only a *judgment* creditor who can apply for sequestration under 2 Rev. Stat. 463, § 36. A creditor whose claim has not been prosecuted to judgment cannot so proceed. *Ib.*

64. A consent or acquiescence by the trustees of a corporation to a judgment not authorized by the statute, cannot be substituted for the methods so prescribed. *Ib.*

65. A creditor at large of a corporation cannot maintain an action to have it dissolved, on the ground of insolvency, and to compel its trustees, directors and officers to make good the losses which it has sustained by reason of their negligence and mismanagement.—*Supreme Ct., (2d Dept.,) Dec.,* 1880. Cole *v.* Knickerbocker Life Ins. Co., 23 Hun 255.

66. Duty of attorney-general to sue. Under Code of Civ. Pro., §§ 1781, 1782, the attorney-general is empowered to bring an action against the trustees and other officers of a corporation for misconduct, and under § 1808, he *must* bring the action, "if, in his opinion, the public interests require that an action should be brought." By § 1810 the court has power to appoint a receiver in such an action. Therefore, where the president of a railroad company made a contract with himself for the construction of a railway; obtained all the securities, stock and bonds under the pretence of paying the nominal contractor; and as chief engineer, made to himself as contractor, certificates of work done, and then as president paid himself many hundred thousand dollars in advance of what the nominal contractor was entitled to receive under the contract for construction—*Held,* that ample cause was shown for the appointment of a receiver, and that the command of the statute to the attorney-general that he "must bring an action," became imperative.—*Supreme Ct., (Ulster Sp. T.,) Nov.,* 1880. People *v.* Bruff, 60 How. Pr. 1, 5; S. C., 9 Abb. N. Cas. 153.

67. Effect of dissolution. A lease to a corporation is not terminated by its dissolution, and its covenant to pay rent does not thereupon cease to be obligatory. Its assets, upon its dissolution, become a fund for the payment of its debts, including those to mature as well as accrued indebtedness, and all open and subsisting engagements entered into by the

corporation.—*Ct. of App., Oct.,* 1880. People *v.* Nat. Trust Co. of New York, 82 N. Y. 283.

68. A receiver of the dissolved corporation is authorized to retain out of its assets sufficient to cancel and discharge such open and subsisting engagements. 2 Rev. Stat. 470, § 74, *et seq.* Until, therefore, the lessor has, by some act on his part, released or discharged the covenant to pay rent, he is entitled to payment thereof, as it accrues, from the receiver. *Ib.*

69. The defendant leased certain premises for five years from May 1st, 1876. In December, 1877, B. was, by order of the Supreme Court, on application of stockholders, appointed receiver of defendant; he occupied the premises until February 1st, 1879, when he removed therefrom and abandoned possession; he paid rent up to that time. In April, 1879, by judgment in this action, the corporation was dissolved. B. was continued as receiver, with the powers and duties conferred and imposed by statute. On petition of lessors that said receiver be required to pay the rent which accrued May 1st, 1879, it appeared that he had paid all admitted debts, and had deposited a sum sufficient to pay all disputed claims, including the amount of the rent accrued and to accrue on the petitioner's lease; also, that after the payment of all debts, there was a large surplus to be distributed among stockholders. *Held,* that the petitioners were entitled to the relief sought; and that an order denying the prayer of the petition was erroneous. *Ib.*

70. Receiver's right to sue. Where, after the return, unsatisfied, of an execution issued upon a judgment recovered against a corporation, the judgment creditor commences an action against it, in equity, for the appointment of a receiver, and procures therein a final judgment appointing a receiver, such receiver may, under Laws of 1860, ch. 403, commence separate actions against each of the stockholders thereof to recover any sum remaining due upon his shares of stock, and he is not bound to bring one action and make all the creditors and stockholders parties thereto.—*Supreme Ct.,* (1*st Dept.,*) *Nov.,* 1880. Van Wagenen *v.* Clark, 22 Hun 497.

71. Reference of controversies with receiver. The court has power to order a compulsory reference of any controversy between the receiver of an insolvent corporation and a debtor, in respect to the debt. (2 Rev. Stat. 469, §§ 68, 73; Id. 45, §§ 19, 20, 21.) The jurisdiction of the court to make the order does not depend upon the nature of the defence to the claim. Such an order is therefore proper, although fraud is alleged. The fact that the receiver has commenced an action at law to recover the debt, does not conclude him from afterward applying for a reference.—*Ct. of App., June,* 1880. Matter of Crosby *v.* Day, 81 N. Y. 242.

VIII. Foreign Corporations.

72. Individual liability of stockholders. To enforce the liability of a stockholder in a foreign corporation organized under an act providing that judgment and execution must first be had against the company, such judgment must be obtained and execution issued in the state where the corporation was created.—*Supreme Ct.,* (1*st Dept.,*) *Feb.,* 1881. Viele *v.* Wells, 9 Abb. N. Case. 277.

73. Under a foreign act of incorporation, providing that the individual liability of the incorporators should be determined by liquidators appointed by the company in case of winding up, and enforced by a specified foreign tribunal, such liquidators may sue in the courts of this state upon the order or decree of the foreign tribunal, as upon a judgment.—*Supreme Ct.,* (1*st Dept.,*) *April,* 1881. Anderson *v.* Haddon, 9 Abb. N. Cas. 289.

74. Suits by foreign corporations. Two corporations organized under the laws of Great Britain entered into an agreement, which provided, in case of difference, for arbitrators to be appointed and to act in this state, having the powers given to arbitrators under the English common law procedure, their award to be made a rule of the Queen's Bench. In an action brought by one of said corporations against the other, and arbitrators appointed under the agreement, to restrain the prosecution of the arbitration, the Special Term denied plaintiff's motion for a preliminary injunction, on the ground as stated in the order "that the court has no jurisdiction in this action." *Held,* error; as the plaintiff, although a foreign corporation, could invoke the jurisdiction of the courts, and the individual defendants were residents of the state.—*Ct. of App., Feb.,* 1881. Direct U. S. Cable Co. *v.* Dominion Teleg. Co., 84 N. Y. 153; *reversing* 22 Hun 568.

75. — against them. A foreign corporation sued in this state cannot avail itself of the statute of limitations; and this, although it has, for the time specified in the statute, before the commencement of the action, continuously operated a railroad in this state, and has property and officers therein.—*Ct. of App., March,* 1881. Boardman *v.* Lake Shore, &c., R'y Co., 84 N. Y. 157.

76. Service of process on, within the state. In this action brought by the plaintiff against the defendant, a foreign corporation, to recover for goods sold and delivered to it, the summons was served upon the defendant's president in the city of New York, while he was passing through the state, with his family, on his way to a watering-place in another state. *Held,* that this was a good service of the summons, under section 1780 of the Code of Civil Procedure, although the president was not in the state upon any business of the corporation or in any official capacity.—*Supreme Ct.,* (1*st Dept.,*) *March,* 1881. Pope *v.* Terre Haute Car, &c., Co., 24 Hun 238; S. C., 60 How. Pr. 419. See, also, Ervin *v.* Oregon Steam Nav. Co., 22 Hun 598.

77. — without the state. An attachment is not necessary to confer jurisdiction upon the court to grant an order for personal service, without the state, upon a foreign corporation.—*Supreme Ct.,* (1*st Dept. Sp. T.,*) *June,* 1881. Wood *v.* St. Louis Bolt and Iron Co., 1 Civ. Pro. 220.

78. Effect of liqidation in foreign state. The plainiff, a national bank organized and having a place of business in New Orleans, purchased, for value, of defendant, the M. & T. Bank, a Louisiana corporation, a draft drawn on bankers in the city of New York for $10,000, payable to plaintiff's order; the draft was duly presented to the payees at New York, and pay-

ment refused; it was duly protested and notice given to the drawer. An action was thereupon commenced in the Supreme Court and an attachment issued, which was served on said bankers, who had funds of the M. & T. Bank in their hands. *Held*, that under and within the meaning of the provision of the Code of Civ. Pro., § 427, providing that an action against a foreign corporation may be brought in the Supreme Court by a plaintiff not a resident of this state, "where the cause of action shall have arisen in this state," plaintiff was to be regarded as a non-resident; that the cause of action arose in this state; and that, therefore, the court had jurisdiction of the action.—*Ct. of App., March*, 1881. Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367; *affirming* 21 Hun 166.

79. After the delivery of the draft to plaintiff, the M. & T. Bank was placed in liquidation under the laws of Louisiana, and commissioners were appointed to take possession of and administer its assets; they were made defendants, and claimed title to the attached property. *Held*, that neither the law nor the adjudication under which said commissioners were appointed could have any operation here to defeat or affect the lien of plaintiff's attachment. *Ib.*

For decisions relating to *Particular corporations* and *Classes of corporations*, see BANKS AND BANKING; INSURANCE, VI.; JOINT STOCK COMPANIES; MANUFACTURING COMPANIES; MUNICIPAL CORPORATIONS; NEW YORK CITY; PLANK ROAD COMPANIES; RAILROAD COMPANIES; RELIGIOUS SOCIETIES; SOCIETIES AND ASSOCIATIONS; TELEGRAPH COMPANIES; TURNPIKE COMPANIES.

CORROBORATION.

Of *Witnesses*, see WITNESSES, III.

COSTS.

I. IN ORIGINAL CIVIL SUITS.
II. ON APPEAL OR ERROR.
III. SECURITY FOR COSTS.
IV. ALLOWANCE IN ADDITION TO COSTS.
V. TAXATION AND COLLECTION.

I. IN ORIGINAL CIVIL SUITS.

1. **Discretionary powers of the court.** In an action brought by a judgment creditor to set aside, as fraudulent, a conveyance of land made by the debtor, the costs are in the discretion of the court.—*Supreme Ct.*, (*3d Dept.*,) *Nov.*, 1880. Black *v.* O'Brien, 23 Hun 82.

2. The rule that, in equitable actions, costs are in the discretion of the court, was not altered or affected by the adoption of the Code of Civil Procedure. *Ib.*

3. **Costs in suits in forma pauperis.** Leave to sue as a poor person, under the code, does not deprive the court of power to impose costs against such person as a condition upon which a judgment by default will be opened.—*Marine Ct.*, (*Sp. T.*,) *June*, 1881. Elwin *v.* Routh, 1 Civ. Pro. 131.

4. **Plaintiff's costs on recovery of less than $50.** To entitle a plaintiff, who recovers less than $50, in an action brought in a County Court, to costs, on the ground that a justice's court had not jurisdiction over the action, because it involved accounts exceeding in amount $400, he must prove not only that the sum of the accounts claimed exceeded $400, but that the sum of the accounts actually proved upon the trial was in excess thereof.—*Supreme Ct.*, (*2d Dept.*,) *Mdy*, 1880. Tompkins *v.* Greene, 21 Hun 257.

5. **— where question of title to land arises.** In an action of trespass upon lands the complaint alleged title and possession in plaintiff, both of which allegations were specifically put in issue by the answer. Plaintiff claimed damages for injuries to the freehold by the deposit of earth and rubbish thereon, as well as for the entry. Plaintiff recovered less than $50. *Held*, that as to entitle plaintiff to recover for the injury to the freehold it was necessary to allege and prove his title, the question of title arose upon the pleadings, and that consequently a certificate that it arose on trial was unnecessary to entitle plaintiff to costs.—*Ct. of App., June*, 1880. Kelly *v.* New York, &c., R. R. Co., 81 N. Y. 233.

6. **Costs where there are several defendants who appear separately.** Where, in an action brought against several defendants, each appears by a separate attorney and interposes a separate defence, and all succeed in their defences, each of them is, under section 305 of the code, entitled to a separate bill of costs, unless the severance be made in bad faith and for the purpose of increasing the costs.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. Williams *v.* Cassady, 22 Hun 180; S. C., 59 How. Pr. 490. S. P., Royce *v.* Jones, 23 Hun 452.

What facts will show that the severance of the action was in bad faith, so that but one bill of costs should be allowed to the defendants, see Williams *v.* Cassady, *supra.*

7. Where an application is made by defendants who have successfully interposed separate defences, to have separate bills of costs taxed, under section 305 of the code, the clerk has no power to refuse to allow them so to do, on the ground that the separate defences were unnecessarily and collusively interposed. The remedy of the party aggrieved is to apply to the court by a motion, for the relief sought. *Ib.*

8. As to the right of several defendants answering separately to tax separate bills of costs, and the effect of an error in the *remittitur* from the Court of Appeals in using the word "respondent" in the award of costs instead of "respondents," in such a case, see Sheridan *v.* Andrews, 80 N. Y. 648.

9. **Costs on demurrer.** Costs may be allowed on the decision of a demurrer, though an issue of fact is left to be determined upon a

trial.—*Supreme Ct.*, (*Herkimer Sp. T.*,) *Jan.*, 1881. Adams *v.* Ward, 60 How. Pr. 288.

10. For drawing the demurrer, serving it and noticing the argument, plaintiff is entitled to the costs before and after notice of trial, as well as $20 for a trial of an issue of law. *Ib.*

11. But where the case is one requiring no application to the court for judgment upon the complaint if no answer had been served, plaintiff is only entitled to $15 for costs before notice of trial. *Ib.*

12. When each party is entitled to costs. Where the complaint sets up several distinct causes of action, on which defendant joins separate and distinct issues, and plaintiff succeeds as to one cause of action and defendant as to another, each party is entitled to a bill of costs, and defendant is entitled to have his judgment set off against plaintiff's.—*City Ct. of Brooklyn*, (*Sp. T.*,) *Jan.*, 1881. Hudson *v.* Guttenberg, 9 Abb. N. Cas. 415.

13. Costs of ex parte motion. Costs cannot be allowed upon the granting of an *ex parte* order requiring the defendant to file his answer.—*Supreme Ct.*, (1*st Dept.*,) *July*, 1880. Edlefson *v.* Duryee, 21 Hun 607.

14. Costs on severance of action. As to the right of the plaintiff to have separate bills of costs taxed on severance of the action, and his right to have an extra allowance against each defendant (Code of Civ. Pro., § 3231,) see Abbott *v.* Johnstown, &c., Horse R. Co., 24 Hun 135.

II. On Appeal or Error.

15 In general. Costs, as used in the judgment of the Court of Appeals when ordering judgment absolute for plaintiff, carries to the plaintiff the general costs of the action from the beginning to the end, except such as, subsequent to the decision of the Court of Appeals, are specially adjudged to the defendant.—*Superior Ct.*, *Aug.*, 1880. Rust *v.* Hauselt, 46 Superior 38.

16. In this case the costs which were specially adjudged to the defendant (which were less than the general costs in the action which were awarded plaintiff), were offset against the general costs, and judgment ordered for the plaintiff for the excess. *Ib.*

17. When the party finally succeeding is entitled to the costs of an unsuccessful appeal taken by him, see Donovan *v.* Vandemark, 22 Hun 307.

18. As to the right of the Special Term to make any allowance of costs on the appeal to the General Term, see Matter of N. Y. Prot. Epis. Pub. School, 24 Hun 367.

19. On affirmance. On an appeal to the Supreme Court from the decree of a surrogate removing an executor and guardian, it is proper that infant respondents should appear by a different attorney from the one who appears for adults, and tax separate bill of costs, on affirmance.—*Supreme Ct.*, (*Troy Sp. T.*,) *March*, 1880. Savage *v.* Gould, 60 How. Pr. 255.

20. Where, in an equity action, the defendants answered separately and a judgment in their favor was affirmed in this court with costs "to the respondents"—*Held*, that this authorized but one bill of costs.—*Ct. of App.*, *March*, 1881. Van Gelder *v.* Van Gelder, 84 N. Y. 658.

21. On reversal. Upon an appeal from an order of a General Term reversing, with $10 costs and disbursements, an order of the Special Term vacating an assessment, the Court of Appeals reversed the order of the General Term, with costs. Upon the filing of the *remittitur*, an order was made at Special Term directing that the petitioners recover their costs of the appeal taken from the Special to the General Term. *Held*, that the petitioner was only entitled to recover for the costs of the appeal to the General Term the sum of $10 and his disbursements.—*Supreme Ct.*, (1*st Dept.*,) *April*, 1881. Matter of N. Y. Prot. Epis. Pub. School, 24 Hun 367.

22. On reversal with "costs to abide the event." Where an order is made by this court on appeal from a judgment, reversing the judgment with costs to abide the event, and without other limitation, the respondent, if finally successful in the action, is entitled to tax the costs of the appeal.—*Ct. of App.*, *March*, 1881. First Nat. Bank of Meadville *v.* Fourth Nat. Bank of New York, 84 N. Y. 469; S. C., 60 How. Pr. 436; *reversing* 22 Hun 563.

23. Where, on appeal by the defendants to the General Term, the judgment recovered by the plaintiff was reversed and a new trial granted, the order of reversal reading, "that a new trial be and the same is hereby directed to be had herein, costs of this appeal to abide the event"—*Held*, that such direction as to costs meant that the costs of appeal should be taxed in favor of the party ultimately successful.—*Supreme Ct.*, (1*st Dept. Sp. T.*,) *Oct.*, 1881. Comly *v.* Mayor, &c., of New York, 1 Civ. Pro. 306.

24. When a judgment recovered by the plaintiff is affirmed at the General Term, but reversed by the Court of Appeals (by which latter court a re-argument is ordered at General Term), "with costs of the appeal to this court [the Court of Appeals] to abide the event of the action," and thereafter the judgment is, upon a re-argument had at the General Term, again affirmed, the plaintiff cannot include in his bill of costs, the costs of the first appeal to the General Term.—*Supreme Ct.*, (2*d Dept.*,) *Feb.*, 1881. Bigler *v.* Pinkney, 24 Hun 224.

25. On appeal from courts not of record. On appeal from a judgment of a District Court, the appellant on reversal, is entitled to $30 costs, besides costs of the court below.—*Com. Pleas*, (*Sp. T.*,) *May*, 1881. Clark *v.* Carroll, 61 How. Pr. 47.

26. Code of Civ. Pro., §§ 3060, 3067, providing for costs on appeal from judgments of justices of the peace, apply to appeals from the District Courts. *Ib.*

27. Where the defendant carried an appeal from the judgment of a justice's court to the General Term of the Supreme Court, and the judgment was there affirmed, the entry of the decision being simply "judgment affirmed," without any direction as to costs—*Held*, that the plaintiff was not entitled, of course, to costs upon appeal, and that the costs, being in the discretion of the court, and not having been awarded to the plaintiff, they could not be taxed.—*Supreme Ct*, (*Monroe Sp. T.*,) *March*, 1881. Combs *v.* Combs, 1 Civ. Pro. 298.

28. Code of Civ. Pro., § 3228, should be construed as though subdivision 13 of section 3447

was incorporated therein; and the costs allowed by section 3228 apply only to actions in certain of the courts of record. *Ib.*

29. Section 3238 regulates the recovery of costs on appeal from a final judgment, and subdivision 1 prescribes the only cases in which costs upon such appeal are a matter of right, and those cases are the actions specified in section 3228. As section 3228 has reference to actions in certain courts of record only; and, as by subdivision 2 of section 3238, in every other case upon appeal from a final judgment, the costs are in the discretion of the court, it follows that on an appeal from a justice's judgment to the General Term of the Supreme Court, the costs are in the discretion of the court, and cannot be taxed unless awarded. *Ib.*

III. Security for Costs.

30. **Interpreting the statute.** The Code of Civil Procedure is not applicable to an order requiring a non-resident to file security for costs, made before its passage. Wiley *v.* Arnoux, 46 Superior 575.

31. The distinction between sections 3268 and 3271 is, that under the former section the defendant may require security for costs as a matter of absolute right, and that under the latter section it rests in the discretion of the court. This absolute right to require security may be lots by laches.—*Common Pleas, (Sp. T.,) Feb.,* 1881. Healy *v.* Twenty-third Street R'y Co., 1 Civ. Pro. 15.

32. **In what cases security may be required.** A plaintiff suing executors will, under Code of Civ. Pro., § 3271, be required to give security for costs where it is made to appear by affidavit that he is pecuniarily irresponsible, although the action is concededly brought in good faith.—*Supreme Ct., (Sp. T.,) Feb.,* 1881. Murphy *v.* Travers, 60 How. Pr. 301.

33. A plaintiff suing as a trustee of an express trust will be required to file security for costs when one of the beneficiaries is a non-resident of the state, and the other is an infant whose guardian *ad litem* has not filed such security.—*Supreme Ct., (4th Dept. Sp. T.,) March,* 1881. Fish *v.* Wing, 1 Civ. Pro. 231.

34. The former rule under Code of Pro., § 317, requiring proof of bad management or bad faith before such trustee will be required to file security, has not been retained in the present revision. The defendant, in such case, ought not to be deprived of the right to require security, by an assignment to a beggar. *Ib.*

35. Who is deemed a non-resident, so as to be required to file security for costs, see Norton *v.* Bennett, 22 Hun 604.

36. **When it cannot be.** A guardian *ad litem* is responsible for costs under the Code of Civil Procedure, but he is not required to file security therefor.—*Superior Ct., June,* 1880. Steinberg *v.* Manhattan R'y Co., 46 Superior 216.

37. When a plaintiff, pending an appeal taken by the defendant from a judgment recovered against him, removes from the state, he cannot, while the judgment stands unreversed, be compelled to file security for costs.—*Supreme Ct., (4th Dept.,) April,* 1881. Flint *v.* Van Deusen, 24 Hun 440.

38. In an action, brought since September 1st, 1880, in the Superior Court of the City of New York, defendant cannot demand security for costs upon the ground of plaintiff's non-residence, when the latter resides in this state.—*Superior Ct., Nov.,* 1880. Lewis *v.* Farrell, 46 Superior 358. S. P., Wiley *v.* Arnoux, 60 How. Pr. 137.

39. When defendant's laches in making the motion is ground for its denial, see Lewis *v.* Farrell, *supra.*

40. Where it appeared that the plaintiff of record, a resident, was prosecuting an action for the benefit of a non-resident, on a judgment recovered against the defendant in the State of Illinois, and which had been assigned to the plaintiff of record by an assignment absolute on its face—*Held,* that the plaintiff of record could not be compelled to file security for costs.—*Supreme Ct., (1st Dept.,) Jan.,* 1881. Horton *v.* Shepard, 1 Civ. Pro. 26.

41. That the plaintiff of record is not the real party in interest, is an issue to be raised by the pleadings, and disposed of at the trial. *Ib.*

42. The defendant moved to substitute, as plaintiff in the action, the real party in interest. *Held,* not to be the proper subject of a motion. *Ib.*

43. **Sufficiency of the bond.** While an instrument, not containing any penalty, cannot be regarded as complying with the statute providing for the giving of a bond, as security for costs, yet a party may waive a strict compliance with the statute and accept and enforce a promise in an entirely different form.—*Supreme Ct., (Orleans Cir.,) Oct.,* 1880. Warner *v.* Ross, 9 Abb. N. Cas. 385.

44. **Liability of surety.** To render one liable as surety on a bond given as security for costs, it is sufficient if it appears therefrom that he intended to undertake absolutely and without condition to pay the costs. On such promise he is liable for the whole amount of the costs, although it exceeds $250, the sum for which a statutory bond could be required. *Ib.*

45. **Waiver of right to proceed upon the bond.** The plaintiff in an action, being a non-resident, was required by an order, made on the application of the defendant, to file a bond as security for the costs of the action, and pay $10 costs of the motion, within ten days. Within that time the plaintiff filed the bond, but neglected to pay the costs. Thereafter, on the defendant's application, the complaint was dismissed, and a judgment for the costs entered in his favor. In an action brought by him against the sureties to the said bond, to recover the costs of the action—*Held,* that by procuring a dismissal of the complaint, the defendant, in legal effect, refused to accept the bond, and that the same never went into effect or became operative.—*Supreme Ct., (1st Dept.,) June,* 1880. Remington *v.* Westermann, 21 Hun 440.

IV. Allowance in Addition to Costs.

46. **Power of the court to grant extra allowance.** An application for an additional allowance can only be made to the justice before whom the trial was had.—*Supreme Ct., (1st Dept.,) May,* 1881. Hun *v.* Salter, 24 Hun 640.

47. An action to restrain the recognition of a claim to an office, is not one in which, under

the code, the court has power to grant an extra allowance.—*Superior Ct.*, (*Gen. T.,*) *June*, 1881. Voorhis *v.* French, 61 How. Pr. 161.

48. When it should be refused. Where the Court of Appeals reverses a judgment of the General Term in favor of the defendant on his demurrer to the complaint, and orders judgment for the plaintiff on the demurrer, with leave to the defendant to answer, on payment of costs, within a certain time, an extra allowance cannot be granted within that time, so that the same shall become a part of the costs to be paid as a condition precedent to answering.—*Superior Ct.* McDonald *v.* Mallory, 46 Superior 58.

49. Where counsel have appeared and presented claims, in behalf of their clients, against funds in the hands of a receiver of an insolvent life insurance company, and the claims have been rejected, and the orders rejecting them have been reviewed and affirmed, upon appeals taken therefrom to the General Term and Court of Appeals, and neither of the courts has ordered that costs of the proceedings or of the appeals should be paid to such claimants, the Special Term should not grant an application made to it by the counsel for the unsuccessful claimants for an order granting them allowances in the nature of costs.—*Supreme Ct.*, (1*st Dept.,*) *Jan.*, 1881. People *v.* Security Life Ins., &c., Co., 23 Hun 596.

50. The will of R. gave to plaintiffs certain legacies, payable after the debts of the testator had been discharged. Plaintiffs brought this action for an accounting by certain of the defendants, as executors and trustees under said will, and for a payment of the amount found due, out of the property in their hands; or, if this proved insufficient, out of the real estate in the hands of the other defendants, "so far as the same might be applicable." The referee found that the testator was insolvent, that the real estate in question was sold to pay debts, and the complaint was dismissed. Defendants appeared by different attorneys, and an extra allowance of costs was made to each. *Held*, error; that the facts furnished no basis on which an extra allowance could be computed under the provision of the Code of Civil Procedure in reference thereto (§ 309,) as there was no "recovery," or "claim" for the payment of any fixed sum, and "the subject matter involved" was plaintiffs' interest when ascertained, which proved to be nothing.—*Ct. of App., Dec.*, 1880. Weaver *v.* Ely, 83 N. Y. 89.

51. How the allowance should be computed. In an action to compel the defendant to lower the height of a dam and to recover the damages already occasioned thereby, any extra allowance which may be granted in the action must be computed upon the amount of the damages allowed, and not upon the value of the plaintiff's property.—*Supreme Ct.*, (2*d Dept.,*) *Feb.*, 1881. Rothery *v.* New York Rubber Co., 24 Hun 172.

52. In an action brought by a judgment creditor to set aside a conveyance of land made by the defendant, on the ground that it was made with intent to hinder, delay and defraud his creditors, in which action the plaintiff succeeds, an extra allowance granted by the court must be based upon the amount due to the plaintiff upon his judgment, and not upon the value of the land.—*Supreme Ct.*, (3*d Dept.,*) *May*, 1881. Potter *v.* Farrington, 24 Hun 551.

53. Instances. Where plaintiff alleged that defendant, the Western Union Telegraph Company, had no legal right to certain property purchased by it from the American Union Telegraph Company, the value of which was found by the court, and such defendant claimed that it was the legal owner thereof, and the court sustained the claim of defendant—*Held*, that the defendant's title to this property was affected by the judgment, and that the value of such property was the value of the "subject matter involved," as that expression is used in Code of Civ. Pro., § 3253, and the basis on which to compute an extra allowance.—*Superior Ct.*, (*Sp. T.,*) *July*, 1881. Hatch *v.* Western Union Teleg. Co., 1 Civ. Pro. 194; Williams *v.* Same, 61 How. Pr. 305.

V. Taxation and Collection.

54. Adjustment by clerk. Upon a dismissal of an appeal from a County Court to the Supreme Court, the costs must be adjusted by the clerk, upon notice, in the usual way, and they cannot be taxed by a judge of the court, under section 311 of the code.—*Supreme Ct.*, (2*d Dept.,*) *Sept.*, 1880. Andrews *v* Long, 22 Hun 24.

55. Costs, in excess of the amounts allowed by law, cannot be taxed by the agreement of the attorneys for the parties to the action.—*Supreme Ct.*, (2*d Dept.,*) *Dec.*, 1880. O'Keefe *v.* Shipherd, 23 Hun 171.

56. Referee's fees paid by defendant upon taking up the referee's report, made upon a reference ordered in and by the order, ordering pursuant to the judgment of the Court of Appeals, judgment absolute for plaintiff against the defendant, with costs, cannot be taxed by defendant as a disbursement.—*Superior Ct.*, (*Sp. T.,*) *Aug.*, 1880. Rust *v.* Hauselt, 46 Superior 38.

57. Witness fees. Under the provisions of Code of Civ. Pro., § 3251, a party is entitled to tax ten dollars for *each* witness examined before trial.—*Supreme Ct.*, (*Sp. T.,*) *Feb.*, 1881. Marston *v.* Hebert, 60 How. Pr. 490.

58. Disbursements. In an action to compel the reduction in height of defendant's dam and for damages, the plaintiff cannot be allowed to include in his bill of costs the amount paid to a surveyor for making a survey and plans to be used upon the trial.—*Supreme Ct.*, (2*d Dept.,*) *Feb.*, 1881. Rothery *v.* New York Rubber Co., 24 Hun 172.

59. Setting aside adjustment; readjustment. Affidavits to oppose a taxation of costs must be presented to the clerk at the time of taxation.—*Supreme Ct.*, (1*st Dept. Sp. T.,*) *Oct.*, 1881. Comly *v.* Mayor, &c., of New York, 1 Civ. Pro. 306.

60. To obtain a review by the court of the clerk's taxation of costs, the matter must be brought on by motion for a new taxation, and not by appeal from the taxation of the clerk; and the motion should be heard upon the bill of costs with the items objected to, the exceptions, the rulings of the clerk, and the affidavits presented to the clerk in opposition to his taxation. *Ib.*

61. Collection—party beneficially interested. Where the owner of a claim assigns the same to a third party, upon considera-

tion that the assignee shall begin and prosecute an action thereon, at his own expense, and when the said claim is collected pay to the assignor one-half of the amount received over and above all costs, the assignor is beneficially interested in the recovery under 2 Rev. Stat. 619, § 44, and is liable for the costs of the action so brought. This, though he did not retain or appoint an attorney, or furnish funds for the prosecution of said action, or in any way interfere therewith, or direct the progress thereof.—*Superior Ct., Nov.*, 1880. Merceron *v.* Fowler, 46 Superior 351.

62. Enforcing payment. Costs awarded upon sustaining a demurrer interposed by the plaintiff, to parts of an answer, are not interlocutory, but final costs, and the plaintiff cannot recover nor assign them until judgment is rendered upon the issues in the action generally.—*Supreme Ct.,* (1*st Dept.,*) *Nov.,* 1880. Armstrong *v.* Cummings, 22 Hun 570.

63. Staying proceedings for non-payment. This action was noticed for trial by both parties for the February Term, 1878. In June, 1878, a motion made by the defendant was denied, with $10 costs, which have never been paid. In February, 1879, the action was reached upon the calendar, and on the plaintiff's failing to appear, a judgment by default was taken by the defendant. *Held,* that the failure of the defendant to pay the costs awarded against him, operated, under Code of Civ. Pro., § 779, to stay all proceedings on his part; that he had no power to move for a dismissal of the complaint, and that the judgment should be set aside as entirely unauthorized.—*Supreme Ct.,* (1*st Dept.,*) *Jan.,* 1881. Brown *v.* Griswold, 23 Hun 618.

As to costs in *Special proceedings,* see that title, and the titles of the various special proceedings.

As to costs in actions by or against personal representatives, see EXECUTORS AND ADMINISTRATORS, IV.

As to the *Attorney's lien* for costs, see ATTORNEY AND CLIENT, III

CO-TENANTS.

TENANTS IN COMMON.

COUNSELOR.

ATTORNEY AND CLIENT.

COUNTER-CLAIM.

SET-OFF.

COUNTIES.

1. Powers of board of supervisors. Under the provision contained in Laws of 1874, ch. 323, that in all proceedings before the governor for the removal of any county officer upon charges preferred against him, all the costs and expenses thereof shall be a county charge upon such county, and shall be audited and allowed by the board of supervisors thereof, the board of supervisors has power, when a claim is presented to it thereunder, to examine the items thereof and determine whether or not such costs and expenses were reasonable, and whether or not they were necessarily and properly incurred; and as to these matters the court will not control the discretion of the board by a writ of *mandamus.—Supreme Ct.,* (4*th Dept.,*) *April,* 1881. People, ex rel. Benedict, *v.* Supervisors, 24 Hun 413.

2. N. Y. Laws of 1875, ch. 482, passed in pursuance of section 23 of article III., of the constitution, authorizing the legislature to confer further powers of local legislation upon boards of supervisors, did not authorize the board of supervisors of Cattaraugus county to alter the salary of the surrogate of that county, as established by Laws of 1872, ch. 767, as amended by Laws of 1877, ch. 401.—*Supreme Ct.,* (4*th Dept.,*) *Oct.,* 1880. Spring *v.* Wait, 22 Hun 441.

3. As to the limits of the power of a board of supervisors to authorize an inquiry into town matters, compel attendance of witnesses by attachment, &c., see Matter of Faulkner *v.* Morey, 22 Hun 379.

4. The county clerk. A county clerk is only liable for negligence in making a search, to the person for whom it is made.—*Supreme Ct.,* (3*d Dept.,*) *Nov.,* 1880. Day *v.* Reynolds, 23 Hun 131.

5. The county treasurer. A joint action will not lie against three successive county treasurers to recover damages for misinvestment and mismanagement of trust funds. They are not co-trustees. Each is a trustee successively, and has no control over the other, and is liable for his own acts only. There could be no contribution between them.—*Supreme Ct.,* (*Sp. T.,*) *April,* 1879. Firth *v.* Roe, 60 How. Pr. 432.

6. Set-off in action by county. It is not inherent in the nature or the authority of a county that it cannot be sued and be subjected to legal process; the exemption must be by statute.—*Ct. of App., Sept.,* 1880. Taylor *v.* Mayor, &c., of New York, 82 N. Y. 10.

7. Where, therefore, a county seeks to recover a debt by judicial process, a demand against it, upon which the defendant might not maintain an action by reason of a statute requiring an audit before suit brought, may be allowed as a set-off. *Ib.*

COUNTY COURT.

COURTS, 14-16.

COURT OF APPEALS.

APPEAL, III.

COURTS.

I. General Principles.
II. Courts of General Civil Jurisdiction.
III. Surrogates' Courts.
IV. Courts of Criminal Jurisdiction.

I. General Principles.

1. **What will disqualify a judge.** A justice of the Supreme Court who has confirmed the report of a referee in a reference, under the statute, of disputed claims against an estate, is disqualified by the state constitution (art. VI., § 8,) from sitting at General Term in review of his decision.—*Ct. of App., March,* 1881. Duryea *v.* Traphagen, 84 N. Y. 652.

2. **Rules of court.** The provision (Code of Civ. Pro., § 17,) authorizing a convention of the General Term justices and the chief judges of the Superior Court to establish rules of practice, does not empower said convention to alter, modify or annul any rule of practice established by the code, but simply to make such other rules as shall be deemed necessary and as are in harmony with the provisions of the code.—*Ct. of App., March,* 1881. Gormerly *v.* McGlynn, 84 N. Y. 284.

3. The provision of said code (§ 1023) fixing and determining the practice as to findings by the court or a referee, and providing that requests to find shall be made and the proposed findings passed upon before the final decision or report, is inconsistent with that portion of rule 32 as it stood prior to the last amendment (adopted December 17th, 1880; went into effect March 1st, 1881,) which authorized findings of fact upon settlement of the case, and rendered so much of said rule inoperative. *Ib.*

4. The old rule of the Court of Chancery (180) providing for the investment of funds paid into court, where no direction as to it is contained in the decree, is still in force, modified only by the rule of the Supreme Court (Rule 82, of 1871 and 1874; Rule 73, of 1877,) prescribing the place of deposit of the funds while on deposit.—*Ct. of App., June,* 1880. Chesterman *v.* Eyland, 81 N. Y. 398.

5. **Concurrent jurisdiction of federal and state courts—suits against national banks.** Although state courts have concurrent jurisdiction with the federal courts in actions by and against national banks, in an action in a state court, the practice and pleadings prescribed by the legislature of the state in regard to a counter-claim or recoupment cannot be resorted to, so as to defeat the object and intention of a federal enactment.—*Ct. of App., April,* 1880. Nat. Bank of Auburn *v.* Lewis, 81 N. Y. 15.

6. The provision of U. S. Rev. Stat., § 914, providing that the practice, pleadings, forms and modes of proceedings, in civil causes, in the Circuit and District Courts, shall conform, as near as may be, to those existing at the time in the courts of record of the state, has no application in such case; it cannot annul or operate to prevent the application and enforcement of a statutory provision of a penal character. *Ib.*

7. **Following decisions of courts of sister state.** The construction put upon the statutes of another state by its courts are controlling in the tribunals of this state.—*Ct. of App., Feb.,* 1881. Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48; Faulkner *v.* Hart, 82 Id. 413; Viele *v.* Wells, 9 Abb. N. Cas. 277.

8. The decisions of the court of one state upon a question of commercial law are not obligatory upon the courts of other states; and when such decisions are in conflict with the principles of the common law concurred in by the courts of this state, they will not control even as to contracts made here but to be performed in the state where such decisions were made.—*Ct. of App., Nov.,* 1880. Faulkner *v.* Hart, 82 N. Y. 413; *reversing* 44 Superior 471.

9. **— of federal courts.** Where a question arises under a federal law and respects a corporation created by its authority, the rulings of the federal courts must be followed.—*Ct. of App., March,* 1881. Duncomb *v.* New York, &c., R. R. Co., 84 N. Y. 190.

II. Courts of General Civil Jurisdiction.

10. **The Supreme Court.** The Supreme Court has jurisdiction over an action *ex contractu* brought by a citizen of the state against a national bank located in another state.—*Ct. of App., June,* 1880. Robinson *v.* Nat. Bank of Newberne, 81 N. Y. 385.

11. Under the provisions of Code of Civ. Pro., § 2434, the Supreme Court, First Department, has jurisdiction in proceedings supplementary to execution.—*Supreme Ct.,* (1*st Dept.,*) *May,* 1881. Baldwin *v.* Perry, 1 Civ. Pro. 118; *reversing* Id. 32; and *overruling* Id. 33 *n.*

12. The plenary jurisdiction of the Supreme Court over trustees may be invoked by an executor where the surrogate is disqualified; and in such case the Supreme Court has power to set aside his decrees for want of jurisdiction.—*Supreme Ct.,* (2*d Dept. Sp. T.,*) *Dec.,* 1879. Wigand *v.* Dejonge, 8 Abb. N. Cas. 260.

13. As to the power of the Supreme Court justices to appoint attendants, (Laws of 1872, ch. 438,) see Blunt *v.* Mayor, &c., of New York, 60 How. Pr. 482.

14. **The County Courts** have jurisdiction of an action for assault and battery where the amount demanded is $2000. The statute (Laws of 1880, ch. 480,) conferring jurisdiction upon these courts, where the defendants reside in the county in which the action is brought, when the relief demanded is the recovery of a sum of money not exceeding $3000, is constitutional. —*Chemung Co. Ct.* Sweet *v.* Flannagan, 61 How. Pr. 327.

15. A county judge may grant an order to show cause why an injunction should not issue in an action in the Supreme Court.—*Supreme Ct.,* (4*th Dept.,*) *Jan.,* 1881. Babcock *v.* Clark, 23 Hun 391.

16. While a county judge has power, under Code of Pro., § 298, to appoint a receiver in supplementary proceedings, yet it is doubtful whether he is authorized by law to order a conveyance by the debtor of his property to the receiver, or to direct its delivery and possession to him.—*Supreme Ct.,* (*Saratoga Sp. T.,*) *Aug.,* 1880. Tinkey *v.* Langdon, 60 How. Pr. 180.

III. Surrogates' Courts.

17. **Jurisdiction and powers, gen-**

erally. A surrogate may direct the collectors of an estate to dispose of horses and carriages, in order to reduce expenses. Matter of Cogswell, 4 Redf. 241.

18. His power to control the conduct of personal representatives does not extend to property which they had no right to take possession of in their representative capacity. Calyer *v.* Calyer, 4 Redf. 305.

19. As to his power to complete unfinished business of his predecessor, see Matter of Martinhoff, 4 Redf. 286.

20. **Power to construe a will.** A surrogate should not construe a will of real property, on the probate; otherwise as to a will of personal property.—*N. Y. Surr. Ct., Aug.,* 1880. Marx *v.* McGlynn, 4 Redf. 455. Compare Leggett *v.* Leggett, 24 Hun 333.

21. **Power to determine claims against estates.** In proceedings to sell the lands of a decedent to pay the debts and claims against the decedent, and to make distribution among the creditors, the surrogate has jurisdiction to hear proofs and decide upon a claim disputed by the executor.—*Supreme Ct.,* (*3d Dept. Sp. T.,*) *April,* 1881. People, ex rel. Adams, *v.* Westbrook, 61 How. Pr. 138, 140.

22. The surrogate has not jurisdiction to decide the question between a creditor of the deceased on the one side and the representative of the deceased on the other. *Ib.* 141.

23. It is entirely plain from the provisions of the Code of Civ. Pro. §§ 2755, 2756, 2758, 2761, 2788, upon this subject, that the surrogate is the proper if not the ultimate tribunal for the determination of the claims of creditors, whether disputed or not, upon the real estate of the decedent sold under the order of the surrogate for the payment of debts, and its proceeds. *Ib.* 142.

24. Where an application is made for the payment of a judgment against the intestate, the surrogate has power to inquire whether any such judgment in fact exists.—*N. Y. Surr. Ct., Oct.,* 1879. Archer *v.* Furniss, 4 Redf. 88.

Or whether it was fraudulently obtained or not. Freeman *v.* Nelson, Id. 374.

25. He cannot direct the payment of claims created by the executor, but only those created by or existing against the deceased. Bulkley *v.* Staats, 4 Redf. 524.

26. **Power to pass executors' accounts.** The act of a surrogate in passsng the accounts of an executor is a judicial one, even when no objections are made to the account. In passing such account the surrogate exercises that power over trusts which was formerly exercised by the Court of Chancery; and where infants are interested, he should investigate and take charge of their interests as their ultimate guardian.—*Supreme Ct.,* (*2d Dept. Sp. T.,*) *Dec.,* 1879. Wigand *v.* Dejonge, 8 Abb. N. Cas. 260.

27. Under the provision of the act of 1867, (Laws of 1767, ch. 782, § 8,) in relation to Surrogates' Courts, authorizing a surrogate, when an executor or administrator has been compelled to account, to charge him personally with the costs of the proceeding, a surrogate has power to charge an administrator personally with fees of an auditor appointed in such proceeding to examine his accounts.—*Ct. of App., March,* 1881. Dunford *v.* Weaver, 84 N. Y. 445; *affirming* 21 Hun 349.

28. **Power to compel obedience by personal representative.** Where a surrogate has made a decree for the payment of money by an administrator, he may enforce the performance of it by attachment. 2 Rev. Stat. 221, § 6, subd. 4. *Ib.*

29. It is not needed that the process to attach should recite all the facts and proceedings necessary to confer jurisdiction; it is sufficient if on its face it appears to have been issued in a proceeding in which the surrogate had jurisdiction, states in substance the cause for arrest, and specifies the act or duty to be performed. *Ib.*

30. Where an attachment against an administrator directed the collection of interest on the decretal sum named in it—*Held,* that, conceding the surrogate had no power to direct the collection of interest, such direction in the attachment did not vitiate it *in toto.* *Ib.*

31. **Power to remove testamentary trustees.** Laws of 1871, ch. 482, empower a surrogate to remove a testamentary trustee in whom title to real estate is vested by the terms of the will.—*N. Y. Surr. Ct., Feb.,* 1880. Clapp *v.* Brown, 4 Redf. 200; Savage *v.* Gould, 60 How. Pr. 234.

32. **Power to grant costs and allowances.** Upon an application made by the appellant, for the admission to probate of the will of her husband, by which he had given all his estate to her, and appointed her sole executrix, his brothers and sisters appeared and filed objections. The proctors for the contestants, after having cross-examined the witnesses by whom the due execution and publication of the will was proved, withdrew their objections, and the will was thereupon admitted to probate. Subsequently, the counsel for the contestants made an affidavit setting forth various matters, consisting chiefly of statements made to them by their clients, many of which were scandalous in their character, and alleged that, after an examination of the witnesses, they had induced their clients to withdraw from the contest, in the interest of equity and of the public morals. Upon this affidavit they applied for an allowance in lieu of costs, which was granted by the surrogate.

Held, 1. That the surrogate had no power to award either costs or allowances in lieu thereof, as the case was not one "of a contest" within the meaning of 2 Rev. Stat. 223, § 10, authorizing costs to be awarded in such cases.

2. That even if the surrogate did have power to make an allowance, it was not a proper exercise of his discretion to grant one in this case.

3. That, as the allowance was directed to be paid to the proctors, they were properly made parties to the appeal taken by the executrix.—*Supreme Ct.,* (*1st Dept.,*) *Dec.,* 1880. Peck *v.* Peck, 23 Hun 313.

33. **Power to open decrees.** Although a surrogate has power to open a decree, even after the time to appeal therefrom has passed, in order to correct a palpable error therein, such power should only be exercised when the moving party shows fraud, deception or excusable negligence in regard to the error sought to be corrected.—*Supreme Ct.,* (*3d Dept.,*) *Jan.,* 1881. Matter of Dey Ermand, 24 Hun 1.

34. The fact that the moving parties, who were represented by counsel before the surrogate, were ignorant of the law at the time of the entry of the decree, and only discovered

their mistake after the expiration of the time to appeal therefrom, furnishes no ground for the opening of the decree. *Ib.*

35. When a proper case presents itself for the exercise of the power, the surrogate should not set aside or open the whole decree, but only so much thereof as relates to the alleged error. *Ib.*

36. The surrogate's power to open a decree made by him should be cautiously exercised, and not simply for the purpose of reviewing his decision; his discretion in respect thereto is reviewable on appeal.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Story *v.* Dayton, 22 Hun 450.

37. When disqualified. Under what circumstances a surrogate is disqualified, by reason of having acted as attorney and counselor before his election as surrogate, for the executor, whose accounts subsequently came before him as surrogate, see Wigand *v.* Dejonge, 8 Abb. N. Cas. 260.

IV. Courts of Criminal Jurisdiction.

38. Courts of Sessions. The provision of the act of 1879, extending the jurisdiction of Courts of Special Sessions, (Laws of 1879, ch. 390,) which gives to said courts exclusive jurisdiction, in the first instance, to hear and determine, among other things, "charges for assault and battery, not alleged to have been committed riotously," did not oust Courts of Sessions of jurisdiction to try pending indictments for that offence; it applies only to charges made subsequent to the passage of the act.—*Ct. of App.*, *Jan.*, 1880. Ryan *v.* People, 79 N. Y. 593.

39. Courts of Special Sessions. The provision of the state constitution, (art. VI., § 26) declaring that "Courts of Special Sessions shall have such jurisdiction of offences of the grade of misdemeanors as may be prescribed by law," is not limited to offences of the grade specified, created by statute after the adoption of that provision; it includes as well all such offences existing by statute at that time, including petit larceny.—*Ct. of App.*, *Dec.*, 1880. People, ex rel. Comaford, *v.* Dutcher, 83 N. Y. 240; *reversing* 20 Hun 241.

40. The said provision was also intended to confer authority upon said courts as they were then or might thereafter be constituted by statute, and without regard to the question whether or not they were authorized to summon and impanel a common law jury. *Ib.*

41. The provision, therefore, of the act of 1879, (Laws of 1879, ch. 390,) giving to Courts of Special Sessions, except in the cities of New York and Albany, exclusive jurisdiction to hear and determine in the first instance "charges for petit larceny not charged as a second offence," is constitutional and valid, and said courts can alone now try the offences specified. *Ib.**

For further decisions upon the *Jurisdiction of courts*, see Jurisdiction.

As to the principles governing the exercise of *Equitable jurisdiction*, see Equity, and the titles there referred to.

As to courts of *Appellate jurisdiction*, see Appeal; Certiorari; Error; New Trial.

COVENANTS.

1. Implied covenants. The surrender of an existing right by the owner raises no implied covenant against a future re-acquirement of such right.—*Supreme Ct.*, (*Alb. Sp. T.*,) *June*, 1880. People *v.* Long Island R. R. Co., 9 Abb. N. Cas. 181.

2. Where land is granted bounded upon a street or highway, there is an implied covenant that there is such a way, and that so far as the grantor is concerned it shall be continued, and that the grantee, his heirs and assigns, shall have the benefit of it.—*Supreme Ct.*, (*Sp. T.*,) *Jan.*, 1881. Matter of Sixty-seventh Street, 60 How. Pr. 264.

3. Joint and several covenants. That where a covenant is, by its language, capable of being construed either as joint or several as regards the covenantees, it will be construed as several if, as between themselves, their rights are such, see Warner *v.* Ross, 9 Abb. N. Cas. 385.

4. Covenant of indemnity. The distinction between a covenant to secure against liability and one to indemnify against damages by reason of non-performance of some specified act, pointed out.—*Ct. of App.*, *Nov.*, 1880. Nat. Bank of Newburgh *v.* Bigler, 83 N. Y. 51.

5. Covenant to stand seized. A covenant to stand seized was not abolished by the Revised Statutes.—*Supreme Ct.*, (*4th Dept.*,) *April*, 1881. Eysaman *v.* Eysaman, 24 Hun 430.

6. What is a breach of covenant. A covenant in a deed against the use of premises as a "tenement-house" is not violated by their use for a family hotel or apartment house. —*Supreme Ct.*, (*Sp. T.*) Musgrave *v.* Sherwood, 23 Hun 674 *n.*

7. Who may sue for breach. On November 2d, 1871, defendants, by a deed containing covenants against incumbrances, and of warranty and seizin, conveyed certain premises to one W., who conveyed them to one R., who conveyed them to plaintiff, by deeds all of which contained covenants against incumbrances. This action was brought by plaintiff to recover the amount she had been compelled to pay to redeem the land from sales for taxes and assessments, which were liens upon it at the time of its conveyance by the defendants. *Held*, that the plaintiff was the real party in interest, and that to avoid circuity and multiplicity of actions, she was entitled to maintain the present one.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Andrews *v.* Appel, 22 Hun 429.

8. Evidence, damages, &c. When a judgment recovered against the grantee is conclusive evidence of a breach of a covenant for quiet enjoyment, as against the grantor; the measure of damages on partial eviction; and when the grantee may sue for a breach of the covenant, after having sold the land, see Adams *v.* Conover, 22 Hun 424.

As to the interpretation of sealed instruments, generally, see Deeds, III.; Leases; Mortgages, II.

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* This would seem to overrule Ryan *v.* People, *supra*.

COVERTURE.

As to the *Disabilities* of coverture, and the *Rights of married women*, generally, see HUSBAND AND WIFE, IV., V.

For the effect of coverture to suspend the running of the *Statute of limitations*, see ADVERSE POSSESSION, II.; LIMITATION OF ACTIONS, IV.

CREDITOR'S SUIT.

1. **How far the legal remedy must be exhausted.** To entitle a creditor to the aid of a court of equity in reaching assets, there must be a judgment, an execution issued thereon and a return thereof unsatisfied.—*Ct. of App., June*, 1880. Adee *v.* Bigler, 81 N. Y. 349.

2. The fact that the debtor is an insolvent corporation and has conveyed its property in contravention of the statute, does not authorize a resort to equity until the remedy at law has been thus exhausted. *Ib.*

3. Nor can an equitable action be upheld on the ground that the appointment of a receiver is necessary to preserve the property from misappropriation and waste pending the litigation. *Ib.*

4. The provision of the Code of Civil Procedure in relation to receivers (§ 713) has not changed the practice in this respect or established any new rule authorizing an equitable action before a judgment is obtained. *Ib.*

5. Plaintiff having recovered a judgment against the defendant, B., in the District Court of the United States for the southern district of New York, and having had an execution issued thereon to the United States marshal, returned unsatisfied, brought this action to have certain voluntary conveyances of real estate made by the said B., set aside as fraudulent and void as against him. *Held*, that as plaintiff had not exhausted his remedy at law by the recovery of a judgment against the defendant in one of the courts of this state, and the return unsatisfied of an execution issued upon it, the action could not be maintained.—*Supreme Ct.*, (1*st Dept.*,) *Jan.*, 1881. Davis *v.* Bruns, 23 Hun 649.

6 **The complaint.** In an action brought by a judgment creditor, against one to whom the debtor had conveyed a portion of his real estate, to procure a judgment setting aside the conveyance as fraudulent and void, declaring the judgment a lien upon the premises conveyed, and appointing a receiver to sell the same, the complaint must allege that an execution has been issued upon the judgment and returned unsatisfied in whole or in part. It is not sufficient to allege the death of the judgment debtor, and that from the time of the entry of the judgment until his death he was wholly insolvent, and had neither real nor personal property from which any part of the judgment could be collected.—*Supreme Ct.*, (3*d Dept.*,) *Nov.*, 1880. Adsit *v.* Sanford, 23 Hun 45.

7. As to when an execution upon the judgment is unnecessary to enable the judgment creditor to file a creditor's bill, see Royer Wheel Co. *v.* Fielding, 61 How. Pr. 437.

8. **Matters of defence.** Where, in an action brought by a receiver appointed in proceedings supplementary to execution, to set aside a conveyance as fraudulent as against the creditors of the grantor, it appears that the fraudulent grantee has, at the request of the fraudulent grantor, given mortgages upon the property to secure debts of the grantor, existing at the time of the conveyance, to creditors who were ignorant of his pecuniary condition and ability, and of his intent in making the conveyance, the rights of such mortgagees are superior to those of the creditors bringing the action, and cannot be affected thereby.—*Supreme Ct.*, (3*d Dept.*,) *Nov.*, 1880. Murphy *v.* Moore, 23 Hun 95.

For the rules of *Equity pleading*, generally, see PLEADING.

As to the remedy introduced by the code as a substitute for the creditor's bill, by an examination of the debtor in *Supplementary proceedings*, see EXECUTION, V.

CRIMINAL LAW.

[Comprises elementary rules of criminal law applicable generally; also decisions relating to some particular offences which are of minor importance or of infrequent occurrence. These are arranged alphabetically, by the recognized name of the offence. For decisions relating to *Indictments*, *Evidence*, and competency of *Witnesses* in criminal cases, and *Trial* of such cases, see INDICTMENT; EVIDENCE; WITNESSES; TRIAL. Decisions respecting offences of common occurrence, and hence more frequently subjects of judicial investigation, are treated under the title of the offence in question.]

I. GENERAL PRINCIPLES OF CRIMINAL LAW.

II. DECISIONS RELATING TO PARTICULAR OFFENCES.

I. GENERAL PRINCIPLES OF CRIMINAL LAW.

1. **Who is a principal offender.** To constitute one a principal in a felony, he must be present at its commission; his presence, however, may be constructive, and this is established when it is shown that he acted with another in the pursuance of a common design and was so situated as to be able to give aid to his associates with a view to insure the success of the common purpose.—*Ct. of App., Jan.*, 1881. McCarney *v.* People, 83 N. Y. 408.

2. **Conviction of principal as evidence against accessory.** Upon the trial of an accessory before the fact, the record of conviction of the principal is sufficient proof *prima facie* of that fact, and that he was properly convicted; but it is not conclusive proof of his guilt as against the alleged accessory, and the latter may controvert the propriety of the conviction. The people are entitled to rebut his proofs thereon and to give evidence *aliunde* of the commission of the principal crime.—*Ct. of App., March*, 1880. Levy *v.* People, 80 N. Y. 327.

3. **Marital coercion.** A husband and wife may be jointly indicted and convicted of a crime, where it appears that they were both guilty of the offence charged, and it is shown that there was no coercion, as in such case the wife acts in her own capacity, as one able to commit crime, and of her own accord and in-

tent, the same as if she were an unmarried woman.—*Ct. of App., Sept.*, 1880. Goldstein *v.* People, 82 N. Y. 231.

II. Decisions Relating to Particular Offences.

4. Abortion. An indictment under the statute providing for the punishment of any person who "shall administer to any *pregnant woman*" any medicine, etc., to cause a miscarriage, is sufficient, where, instead of using the words "pregnant woman," it charges the offence to have been committed upon "a woman with child."—*Ct. of App., Jan.*, 1881. Eckhardt *v.* People, 83 N. Y. 462; *affirming* 22 Hun 525.

5. Common prostitutes. A complaint before a police magistrate to the effect that the complainant had heard and believed a person to be a common prostitute, without stating the source of his information, or the grounds of his belief, will not justify the magistrate in proceeding with the trial of the person upon such charge.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. People, ex rel. Kingsley, *v.* Pratt, 22 Hun 300.

6. Cruelty to children. Plaintiff in error was indicted under the provisions of the act "to prevent and punish wrongs to children" (Laws of 1876, ch. 122, ¿ 4,) which declares it to be a misdemeanor for one "having the care or custody of any child" to cause or permit the child's life to be endangered or health to be injured, etc. The charge was that the accused willfully neglected to provide the child named, of whom he had the care and custody, with proper and sufficient food, clothing and medicine; thus causing his health to be injured. It appeared on trial that the accused was the secretary of a benevolent institution, having a board of trustees and subject to visitation of the Supreme Court and the State Board of Charities and Corrections. He was, however, in actual charge, provided for the household, and was the director of all its internal affairs, and had the actual care and custody of its inmates. *Held*, that he had the care and custody of the child within the meaning of the statute.—*Ct. of App., Jan.*, 1881. Cowley *v.* People, 83 N. Y. 464; *affirming* 21 Hun 415; S. C., 8 Abb. N. Cas. 1.

7. The court declined to charge that the prisoner had no right to receive and distribute the revenue provided by the legislature for said institution. It did not appear that the ability to supply more and different food or other needful things depended upon that revenue, but it appeared that he had other means in his power to use. *Held*, no error. *Ib.*

8. The court charged that if the prisoner took the child into his care and custody the law imposed upon him the duty of giving him food, clothing, care and medical attendance reasonably necessary and proper to keep his life from danger and his health from injury. Also, that if he did not have the means to provide what was needful for the child, it was his duty to apply to the public authorities for aid; and that if the prisoner neglected so to do and life was endangered or health injured, he was guilty. *Held*, no error. *Ib.*

9. One who, with no natural or legal duty, voluntarily seeks and assumes the care and custody of a child, is amenable to the statute if he fails to perform the duty required, to the injury of the child. It is not requisite to aver or prove that he had means of support; he must either perform his duty or surrender such care and custody. *Ib.*

10. Disorderly houses. It is not an essential element of the offence of keeping a disorderly house that the public should be disturbed by noise; the keeping of a common bawdy or gambling-house constitutes the house so kept a disorderly house.—*Ct. of App., Jan.*, 1881. King *v.* People, 83 N. Y. 587.

11. When the house of a person is the resort of prostitutes, plying their vocation, with his knowledge, this constitutes a bawdy-house. *Ib.*

12. Upon the trial of an indictment for keeping a disorderly and common bawdy and gambling-house, after the court had charged that if the defendant kept a gambling-house, where gamblers resorted to play for money, and did so play to the knowledge of defendant, he was guilty, defendant's counsel asked the court to charge that the playing of cards in defendant's house did not, of itself, make it a gambling-house. The court, in reply, said, "Except that it is the gambling for money that makes it a disorderly house." *Held*, no error; that the court had properly defined the offence of keeping a gambling-house, and its remark clearly referred to a house of that character. *Ib.*

13. Disturbing religious meetings. Laws of 1834, ch. 78, providing that one arrested for disturbing a religious meeting may demand to be tried by a jury to consist of the same number of jurors, to be summoned in the same manner as is provided for the summoning of jurors before Courts of Special Sessions, is valid; and the fact that the jury before which the trial is to be had is to consist of six instead of twelve jurors, does not render the act unconstitutional, as in violation of ¿ 2 of art. I. of the constitution, providing that "the trial by jury, in all cases in which it has heretofore been used, shall remain inviolate forever."—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1881. People, ex rel. Eckler, *v.* Clark, 23 Hun 374.

14. The plaintiff in error was tried upon an indictment charging that on the 1st day of June, 1879, at the town of M., in the county of O., and the State of New York, he, in the Church of the Immaculate Conception, during the celebration of divine service, "unlawfully, unjustly and irreverently did disturb and hinder one James O'Reilly, then and there being the minister and pastor officiating in the said church, and then and there being in the discharge of his sacred functions and in the performance of divine service." *Held*, that the offence charged therein was indictable at common law, and that the provisions of the Revised Statutes (1 Rev. Stat. 674, ¿ 64,) prohibiting the disturbance of religious meetings, were not inconsistent with nor did they take away the common law remedy by indictment.—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1881. People *v.* Crowley, 23 Hun 412.

15. Pool-selling. *It seems* that the policy of the statute of 1877 (Laws of 1877, ch. 178,) prohibiting the selling of pools, is against the buying as well as the selling of pools.—*Ct. of App., Sept.*, 1880. Harris *v.* White, 81 N. Y. 532.

16. Vagrancy. Children found picking rags in the streets of the city of New York may be committed to the Catholic Protectory under Laws of 1877, ch. 428, without notice to parents or guardians.—*Supreme Ct.*, (*2d Dept. Sp. T.*,)

Aug., 1881. People, ex rel. Lopardo, *v.* Catholic Protectory, 61 How. Pr. 445.

As to proceedings against a *Husband as a disorderly person*, for refusal to support his wife, see HUSBAND AND WIFE, III.

CRUELTY.

CRIMINAL LAW, 6-9; DIVORCE, III.

CURTESY.

1. Necessary seizin in wife. The rule that the wife must be seized in fact, to give the husband rights as a tenant by the curtesy, applied. Gibbs *v.* Esty, 22 Hun 266.

2. Rights of tenant by curtesy. In 1856 one L., a married woman, died, seized of certain real estate, leaving a husband and three children, all of whom have since died intestate and without issue. Petitioner was the widow of one of the said children, her husband having died in 1879, leaving his father his only heir-at-law. On an application by petitioner to have dower admeasured to her in the said land—

Held, 1. That on the death of L., her husband took an estate for life in the said property, as a tenant by the curtesy, and that his possession thereof could not be disturbed by the heirs of his wife, or by the widow of any of them.

2. That the fact that the father was the sole heir-at-law of the petitioner's husband, did not give her the right to have dower admeasured to her, as her right thereto was defeated by the death of her husband before the termination of the life estate of the father, and before any estate or interest in possession had vested in him.—*Supreme Ct.*, (*4th Dept.*,) *June*, 1880. Leach *v.* Leach, 21 Hun 381.

As to the respective rights of the *Husband or wife*, in respect to property owned by the other, or jointly, see HUSBAND AND WIFE, VI. As to the wife's *Right of dower*, see DOWER.

CUSTOM: USAGE.

When proof of custom will control a contract. A custom or usage in a business will not bind the parties to a contract unless it appears they had knowledge of its existence, or that it was so general that they must be presumed to have contracted with reference to it.—*Ct. of App.*, *Dec.*, 1880. Harris *v.* Tumbridge, 83 N. Y. 92.

D.

DAMAGES.

I. GENERAL PRINCIPLES.
II. MEASURE OF DAMAGES.
1. *In actions on contract.*
2. *In actions for wrongs*

I. GENERAL PRINCIPLES.

1. When loss of profits is recoverable. In an action to recover damages for tearing down a party wall, as it is not based upon negligence, contributory negligence is not a defence. Loss of profits, consequent upon such a trespass, are properly allowed as an item of damages, provided they are such as might naturally be expected to follow from the wrongful act, and are certain, both in their nature, and in respect to their cause.—*Ct. of App.*, *April*, 1880. Schile *v.* Brokhaus, 80 N. Y. 614, 619.

2. Where a business has been partially interrupted, because of the trespass, it is competent to prove, upon the question of damages, the amount of business previously done, and how much less the business was during the months when the injury occurred than during the corresponding months of the previous year, and the profits upon the business; and where the evidence is sufficient to show that the falling off of business was in consequence of the wrongful acts of the defendant, the loss of profits thus established is a proper item of damages. *Ib.*

II. MEASURE OF DAMAGES.

1. *In actions on contract.*

3. Actions against carriers. In an action at law against a common carrier for a wrongful refusal to receive and transport property, the party aggrieved is entitled to recover, as damages, the difference between the value of the property at the place where it was tendered to the company, and its value at the place to which it was to be taken, less the expenses of transportation.—*Supreme Ct.*, (*1st Dept.*,) *Nov.*, 1880. People, ex rel. Ohlen, *v.* New York, Lake Erie, &c., R. R. Co., 22 Hun 533.

4. Actions for breach of covenants. For a breach of a covenant against incumbrances, only the amount actually paid to relieve the premises therefrom, can be recovered, and in no event can the recovery exceed the amount of the consideration for which the deed was given.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Andrews *v.* Appel, 22 Hun 429.

5. Actions on contracts for services. In an action for wrongful discharge from employment, damages are recoverable up to the time of the trial.—*Com. Pleas*, *Jan.*, 1881. Everson *v.* Powers, 60 How. Pr. 166.

2. *In actions for wrongs.*

6. In general. Where a plaintiff has been damnified by a wrong-doer, he must see to it that his loss is not swollen by any act of omission, or of commission on his part, but he is not called upon to do an act which will not affect his own damages, though it would be of service to the wrong-doer.—*Com. Pleas, Nov.,* 1880. Van Shaick *v.* Sigel, 60 How. Pr. 122, 124.

7. Fraudulent representations. When a false representation is made on the sale of a security, the remedy of the purchaser is not limited to a recovery simply of the money advanced, if he would have received a benefit beyond that had the fact been as represented.—*Ct. of App., April,* 1880. Grissler *v.* Powers, 81 N. Y. 57, 61.

8. Libel. The rule as to damages in actions for libel, stated by the court, and a verdict of $1375.03—*Held,* not excessive, as actual damages to plaintiff in her business as midwife, from a libelous writing in regard to her said business, printed and published in a newspaper in New York city, where a retraction of the charges made was published in the same newspaper two days thereafter, no evidence of damage being before the jury. In such case, the question of malice, in its bearing upon the right to exemplary damages, should not be taken from the jury.—*Superior Ct., April,* 1880. Meyer *v.* Press Publishing Co., 46 Superior 127.

9. Negligence. In an action to recover damages for personal injuries alleged to have been caused by defendant's negligence, after plaintiff had given evidence of loss of wages as an item of damages, he was asked on cross-examination if he was not paid his wages by his employer during the time he was sick; this was objected to and excluded. *Held,* error; that defendant was entitled to show that plaintiff did not suffer such loss.—*Ct. of App., March,* 1880. Drinkwater *v.* Dinsmore, 80 N. Y. 390; *reversing* 16 Hun 250.

10. Trespass. The trespass complained of was the cutting and removing of timber. *Held,* that evidence was properly received as to the value of the farm with the timber, and its value after it was cut; and that this difference furnished a proper measure of damages.—*Ct. of App., Oct.,* 1880. Argotsinger *v.* Vines, 82 N. Y. 308.

11. Trover. In an action for the conversion of personal property, the right of the plaintiff to recover the full value of the property is not affected by proof of an unaccepted tender of the property made by the defendant after the conversion, and before the commencement of the action.—*Supreme Ct., (2d Dept.,) Sept.,* 1880. Carpenter *v.* Manhattan Life Ins. Co., 22 Hun 47.

12. When the amount of damages, in trover, may depend upon the intent of the wrong-doer, and when the question of intent should be submitted to the jury, see Andrews *v.* New Jersey Steamboat Co, 23 Hun 545.

13. As to the proper measure of damages in an action for conversion of stock pledged with stock broker for advances, see Gruman *v.* Smith, 81 N. Y. 25.

As to obtaining a new trial on the ground of *Excessive* or *Inadequate* damages, see NEW TRIAL, I.

As to the amount of damages recoverable in actions upon *Insurance policies,* see INSURANCE, V.

As to the measure of a land-owner's compensation for *Land taken for public use,* see EMINENT DOMAIN, 8-14.

As to damages in civil actions for *Causing death,* see HOMICIDE, II.

DAMS.

RIPARIAN RIGHTS; WATERCOURSES.

DEATH.

Death of a party as *Ground of abatement,* see ABATEMENT, 1-3.

Proof of, in actions on policies of *Life insurance,* see INSURANCE, V.

When *Presumed,* from long absence, &c., see EVIDENCE, 17.

As to the statutory *Civil action for causing death,* see HOMICIDE, II.

DEBTOR AND CREDITOR.

I. THE RELATION, GENERALLY CONSIDERED.
II. PAYMENT AND DISCHARGE OF DEBTS.
III. ACCORD AND SATISFACTION, COMPROMISES, EXTENSIONS, &C.
IV. COLLATERAL SECURITIES.
V. COMPOSITION DEEDS.

I. THE RELATION, GENERALLY CONSIDERED.

1. Rights and duties of the debtor. A loan was made by R to L, at his request, upon promissory notes of third parties. Before they matured they were surrendered by R. to W., and in place of them R. took from W. a chattel mortgage on his property (which he afterwards foreclosed), and a policy of insurance on his life, in addition to a previous policy on his (W.'s) life, held by him, R. The loan was originally procured by W., acting as the agent of L., who, it was claimed, as such agent, indorsed the notes of R.; but at the time of the surrender of the notes, W.'s agency and his authority, whatever it may have previously been, had come to an end. The surrendered notes never came to defendant's hands. *Held,* that L. was discharged from liability, whether he be regarded as a loanee or as an indorser.—*Supreme Ct., Feb.,* 1880. Roberts *v.* Leslie, 46 Superior 76.

2. R., held three notes made by one Williams to the order of L., per Henry White. Henry White had been in the employ of L., and it was claimed that he had authority from L. to indorse these notes. After White had been discharged by L., R. came with these notes to L., who denied his liability. The matter was compromised by a renewal of the notes;

two of the renewal notes L. indorsed unconditionally; the third he indorsed without recourse. When this third note came due it was not protested, but was taken up by Williams, he giving, in lieu of it, his note to the order of R. at three months. *Held*, L. was not liable upon, or by reason of, said third note. *Ib.*

3. **Rights and remedies of the creditor.** *It seems* that one of several original debtors may so contract with the others for their assumption and payment of the common debt, as to acquire the rights of surety, upon notice of the new arrangement being given to the creditor.—*Ct. of App., Dec.*, 1880. Palmer *v.* Purdy, 83 N. Y. 144.

4. Such notice, however, must be definite and distinct, and so given as to fully and fairly apprise the creditor of the changed attitude of the debtor claiming the rights of a surety. *Ib.*

5. **— of foreign creditor.** A foreign creditor rightfully in a court of this state, pursuing a remedy given by the statutes of the state, may enforce that remedy to the same extent, in the same manner and with the same priority of lien as a citizen.—*Ct. of App., March*, 1881. Hibernia Nat. Bank *v.* Lacombe, 84 N. Y. 367; *affirming* 21 Hun 166.

II. Payment and Discharge of Debts.

6. **In general.** As to whether payment of a debt by a stranger is a satisfaction, see Wellington *v.* Kelly, 84 N. Y. 543.

7. **Taking a check in payment.** Where a debtor pays his debt by a check to the order of his creditor or of one nominated by the latter, and the check is lost by or fraudulently obtained from the creditor, and is paid to the finder or fraudulent holder on a forged indorsement of the payee, the debtor is not discharged, and may be again called upon to pay his debt; at least unless the check was taken in absolute payment and extinguishment thereof.—*Ct. of App., Sept.*, 1880. Thomson *v.* Bank of British North America, 82 N. Y. 1.

8. **Application of payments: by the debtor.** Where a debtor creates or appropriates a fund for the payment of a particular debt or lien, the duty of the holder of the fund is not performed by applying it to the payment of another debt; the debtor has the right to determine as to the application, and to have the application, when made, carried out.—*Ct. of App., June*, 1880. Bennett *v.* Austin, 81 N. Y. 308, 332.

9. Although a debtor may, when making a payment, apply it as he pleases, even upon an outlawed debt, yet the creditor cannot compel its application to such debt by expressing his wishes to the debtor, unless the latter assent thereto expressly, or by not objecting to the positive statement of the creditor as to the application he intends to make thereof.—*Supreme Ct.*, (*3d Dept.*) *Sept.*, 1880. Sitterly *v.* Gregg, 22 Hun 258.

10. **— by the creditor.** *It seems* that the right of a debtor making a payment to direct upon which one of several distinct liabilities or demands held by his creditor, it shall be applied, must be excercised at the time of payment; if he makes a payment without directing at the time as to its appropriation, the money becomes absolutely the property of the creditor, and he may apply it as he chooses.—*Ct. of App., Nov.*, 1880. Nat. Bank of Newburgh *v.* Bigler, 83 N. Y. 51.

11. So, where the debtor assigns property as collateral security generally, without dictating upon what demand its proceeds shall be applied, he cannot bind the creditor by any subsequent direction, but the latter may apply such proceeds to any of the demands held by him which are due at the time the money is received. *Ib.*

12. **— by the court.** Where money is collected by a creditor by the sale of collaterals placed in his hands to secure several distinct items of indebtedness, under such circumstances that neither he nor the debtor possesses the right to determine as to the application, the power devolves upon the court, and it will apply the money upon equitable principles.—*Ct. of App., Dec.*, 1880. Jones *v.* Benedict, 83 N. Y. 79; *affirming* 17 Hun 128.

III. Accord and Satisfaction, Compromises, Extensions, &c.

13. **What amounts to an accord and satisfaction.** When, in an action brought upon a claim against a village, the plaintiff, as a part of his case, proves a payment under a resolution of a board of village trustees to the effect that the sum so paid shall be in full settlement of the whole claim, and the circumstances under which it was accepted, the defendant may rely upon these facts as constituting an accord and satisfaction, though it has not pleaded them in its answer as such.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. Looby *v.* Village of West Troy, 24 Hun 78.

14. **Effect of compromises and settlements.** A policy of insurance upon the life of B., plaintiff's intestate, was taken out and delivered to defendant as collateral security for two promissory notes against B. & Co., amounting to $4678.48. These notes, the court found, were subsequently compromised and settled, defendant receiving from one W. $925 in full satisfaction, and surrendering the notes, which were delivered to B. & Co., who destroyed them. W. testified that he purchased the notes of defendant, paying his own money, and afterward delivered them to B., on receiving the amount paid and his expenses. B. paid the first premium on the policy; defendant paid those accruing thereafter. In an action for an accounting, etc.—*Held*, that defendant was bound by the settlement, and plaintiff was entitled to the proceeds of the policy, less the premiums paid and interest.—*Ct. of App., Feb.*, 1880. Babcock *v.* Bonnell, 80 N. Y. 244.

IV. Collateral Securities.

V. Composition Deeds.

15. **Effect of duress, or fraud.** The doctrine that where a debtor himself, or a near relative, out of compassion for him, pays money exacted by a creditor as a condition of his signing a composition, he may be regarded as having paid under duress, and is not equally criminal

with the creditor, and so that he may recover it back, if sound (as to which *quære*), cannot be invoked in favor of one remotely related by marriage to the debtor; it can only be asserted in favor of the debtor himself, and the wife, husband or near relative of the blood of the debtor. —*Ct. of App., Nov.*, 1880. Solinger *v.* Earle, 82 N. Y. 393; S. C., 60 How. Pr. 116; *affirming* 45 Superior 80.

16. Plaintiff, who was a brother-in-law of N., of the firm of N. & Co., to induce the defendants, who were creditors of that firm, to unite with the other creditors in a composition of its debts, secretly agreed to and did give them his promissory note for a portion of their debt beyond the amount to be paid by the composition agreement. Defendants transferred the note before due to a *bona fide* holder, and plaintiff was compelled to pay. *Held*, that the agreement was a fraud upon the other creditors; that it was not divested of its fraudulent character by the fact that it was made, not by the debtor, but by a third person; and that an action was not maintainable to recover back the amount so paid. *Ib.*

For decisions as to the effect of a *Legacy* to a creditor, or a debtor, to extinguish an indebtedness existing between the testator and the legatee, see LEGACIES.

As to what debts carry *Interest*, see INTEREST.

As to the effect of *Usury*, and the right to set it up as a defence, see USURY.

DECEIT.

FALSE PRETENCES· FRAUD.

DECLARATIONS.

As to the admissibility and effect of declarations and admissions, *As evidence*, see EVIDENCE, III.

As to *Dying declarations*, see EVIDENCE, 60; HOMICIDE, I.

As to *Declarations of trust*, see TRUSTS, I.

DECREE.

JUDGMENT.

DEDICATION.

1. **Power of executors to dedicate land of testator.** Executors acting under a testamentary power or trust to sell real estate may lawfully dedicate to public use that portion of the testator's land situate within the lines of a proposed street, as incidental to the sale of the land in lots or otherwise on each side of said street.—*Supreme Ct.*, (*Sp. T.*,) *Jan.*, 1881. Matter of Sixty-seventh Street, 60 How. Pr. 264.

2. The power to divide and lay out such land in lots and streets is a necessary incident to a testamentary power to sell and dispose of it to the best advantage. *Ib.*

3. **What amounts to a dedication of a street.** An owner of a tract of land in the city of New York, by conveying a portion thereof bounded upon a street, dedicates the street not only to the next intersecting avenue, but as far as the same extends through or is laid out over his land. *Ib.*

DEEDS.

I. COMMON LAW REQUIREMENTS.
II. ACKNOWLEDGMENT. RECORDING.
III. HOW CONSTRUED. VALIDITY.

I. COMMON LAW REQUIREMENTS.

1. **What will operate as an absolute deed.** B. and wife, by a deed dated December 5th, acknowledged December 8th and recorded December 12th, 1837, conveyed to one R. plaintiffs' intestate, certain vacant lots in the city of New York. R., by an agreement dated December 6th, and recorded October 9th, 1838, for and in consideration of $1, agreed to give B. the right of pre-emption of the said lands, and that if B., his executors, administrators or assigns, should, within three years, pay to him the consideration named in the deed, with interest thereon at seven per cent. and all taxes and assessments paid by him, he would reconvey the premises to B., his heirs or assigns, free and clear from all incumbrances. On September 8th, 1838, B. assigned his interest in the contract to one L., who was thereafter declared a bankrupt, and upon a sale of his estate, by his assignee, his interest in the premises was on November 27th, 1872, purchased by defendant. In an action by R. to recover damages for a trespass upon the said lands committed by the defendant—

Held, 1. That the deed to R. was not to be treated as a mortgage, but as an absolute conveyance, and that the title to the lots was thereby vested in him.

2. That the lots being vacant and unoccupied, the possession followed the title, and that R. was entitled to maintain an action for trespass.—*Supreme Ct.*, (1*st Dept.*,) *Jan.*, 1881. Randall *v.* Sanders, 23 Hun 611.

2. **Execution in fictitious name.** Where a person, with intent to convey title, executes a conveyance of property in a name not his own, he is bound by the name he thus adopts, which will be considered as his name *pro hac vice*, and the conveyance is effectual to vest title in the grantee.—*Ct. of App., Dec.*, 1880. David *v.* Williamsburgh City Fire Ins. Co., 83 N. Y. 265.

3. **Proof of delivery, and when presumed.** This action was brought to foreclose a mortgage upon certain premises which were, in 1861, conveyed by the mortgagor to the defendant subject to the mortgage now in suit and other mortgages, amounting in all to $7000, which the grantee (the defendant) assumed to pay as so much of the consideration ($10,000) expressed in the deed. The plaintiff sought to charge the defendant with any deficiency that might arise upon the sale. Upon the trial the

plaintiff offered in evidence a certified copy of the record of the deed, which was, upon the defendant's objection, excluded, upon the ground that there was no evidence of its delivery. *Held*, that this was error; that in the absence of any evidence to the contrary, the fact that the instrument was found upon the record duly acknowledged or attested, was *prima facie* evidence of its delivery.—*Supreme Ct.*, (*1st Dept.*,) *March*, 1881. Lawrence *v.* Farley, 24 Hun 293; S. C., 9 Abb. N. Cas. 371.

II. ACKNOWLEDGMENT. RECORDING.

4. **Necessity of acknowledgment.** Under 1 Rev. Stat. 738, § 137, a deed not acknowledged or attested by at least one witness, previous to its delivery, does not take effect, as against a subsequent purchaser or incumbrancer, until so acknowledged; and such a purchaser or incumbrancer may attack the deed, without showing that he purchased in good faith and without notice of it.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Chamberlain *v.* Spargur, 22 Hun 437.

5. **Power to take an acknowledgment.** An officer is not disqualified from taking an acknowledgment of a deed from his father to his wife, by reason of his relationship to the parties.—*Ct. of App.*, *Sept.*, 1880. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474, 483.

III. HOW CONSTRUED. VALIDITY.

6. **The consideration clause.** A deed acknowledging the payment of the purchase money is *prima facie* evidence that the grantee was a purchaser in good faith, for a valuable consideration, within the recording act.—*Ct. of App*, *Nov.*, 1880. Lacustrine Fertilizer Co. *v.* Lake Guano, &c., Co., 82 N. Y. 476; *affirming* 19 Hun 47.

7. **The habendum clause.** The rule that the *habendum* clause of a deed when repugnant to the grant, is void, applied to the facts of the particular case.—*Supreme Ct.*, (*4th Dept.*,) *April*, 1881. Kenney *v.* Wallace, 24 Hun 478.

8. **What deeds are void because premises conveyed are held adversely.** To avoid a deed for champerty under the statute (1 Rev. Stat., 739, § 147,) actual, not constructive, adverse possession in another, is required.—*Ct. of App.*, *Jan.*, 1880. Dawley *v.* Brown, 79 N. Y. 390.

9. It must also appear that at the time of the delivery of the deed the lands were in the actual possession of a person claiming "under a title adverse to the grantor." It is not enough that he claims title; he must claim under some specific title, which must be disclosed, so that the court may see that it is adverse to that of the grantor in the deed assailed. *Ib.*

10. **Description of premises conveyed.** By bounding land conveyed by the side of a street or highway, the land in the highway is excluded by force of the description so used, and does not pass to the grantee.—*Supreme Ct.*, (*Sp. T.*,) *Jan.*, 1881. Matter of Sixty-seventh Street, 60 How. Pr. 264.

11. **Courses and distances must yield to landmarks and monuments.** When fixed and visible monuments will not control measurements, see Smyth *v.* McCool, 22 Hun 595.

12. **What will pass as appurtenant.** Where the owner of an entire estate conveys a portion thereof, the purchaser takes the same with all the incidents and appurtenances which appear at the time of the sale to belong to it, as between it and the portion retained.—*Ct. of App.*, *Sept.*, 1880. Simmons *v.* Cloonan, 81 N. Y. 557.

13. It is not essential to the application of this rule that at the time of sale the apparent incidents should be in actual use by the vendor, in connection with the portion conveyed; knowledge on his part of their existence is sufficient, and this may be shown otherwise than by actual use. *Ib.*

14. The incidents which pass as appurtenances must be open and visible, and when so, knowledge will be inferred. *Ib.*

15. The appurtenances which pass in such case are not limited to those absolutely necessary to the enjoyment of the property conveyed; it is sufficient if full enjoyment of the property cannot be had without them. *Ib.*

16. **Reservations.** A clause reserving to the grantors the right of controlling the lands and all the benefits thereof, cannot operate as a reservation in favor of one who is not a party to the deed.—*Supreme Ct.*, (*4th Dept.*,) *April*, 1881. Eysaman *v.* Eysaman, 24 Hun 430.

As to the power of equity to *Cancel*, *Reform*, or *Set aside* a deed, see CLOUD ON TITLE; CREDITOR'S SUIT; EQUITY.

As to *Composition deeds*, see DEBTOR AND CREDITOR, V.

As to deeds to *Married women*, or between husband and wife, see HUSBAND AND WIFE, VI., VII.

As to the admissibility and effect of a deed as a *Means of evidence*, and how far it is open to *Explanation by parol*, see EVIDENCE, II., IV.

As to the doctrine of *Estoppel by deed*, see ESTOPPEL, III.

When a deed absolute in form will be deemed to be a *Mortgage*, see MORTGAGES, I.

As to deeds creating *Trusts*, see TRUSTS, I.

DEFAMATION.

LIBEL; SLANDER.

DEFINITIONS.

1. **Account stated.** An account balanced and rendered, with an assent to the balance, express or implied, so that the demand is essentially the same as if a promissory note had been given for the balance.—*Ct. of App.*, *June*, 1880. Volkening *v.* De Graaf, 81 N. Y. 268, 270.

2. **All my property,** as used in a devise contained in a will, in a previous provision of which one-third of all testator's property had been devised to the testator's widow.—*Held*, to mean all my *remaining* property.—*Ct. of App.*, *June*, 1880. Roseboom *v.* Roseboom, 81 N. Y. 356, 358.

3. Barratry includes every species of fraud committed by any one standing in the place of master or mariner.—*Ct. of App., Feb.,* 1880. Spinnetti *v.* Atlas Steamship Co., 80 N. Y. 71, 81.

4. Bet or stakes. The words "bet or stakes" in the provision of the statute against racing (1 Rev. Stat. 672, § 55,) which prohibits all contests of speed of animals "for any bet or stakes; * * * or any reward * * * excepting such as are by special laws for that purpose expressly allowed," do not include contests of speed for "purses, prizes, or premiums," as those terms are now commonly understood.—*Ct. of App., Sept.,* 1880. Harris *v.* White, 81 N. Y. 532.

5. Bet or wager. By a "bet or wager" each party contributes money or some valuable thing termed the stake, getting a chance to gain a portion of that put in by the others and taking a chance to lose that contributed by himself. While a "purse, prize or premium" is ordinarily some valuable thing offered for a contest, into the strife for which the person offering it does not enter. *Ib.*

6. Capital stock. The words "capital stock," as used in 2 Rev. Stat. (6th ed.) 398, mean the property and franchises of the company, and the statute itself means that no corporation shall divide among its shareholders any portion of "the property and franchises of the company."—*Superior Ct., (Sp. T.,) June,* 1881. Williams *v.* Western Union Teleg. Co., 61 How. Pr. 216.

7. Charges, as used in the provision of the act of 1879, extending the jurisdiction of Courts of Special Sessions (Laws of 1879, ch. 390,) which gives to said courts exclusive jurisdiction, in the first instance, to hear and determine, among other things, "charges for assault and battery, not alleged to have been committed riotously," implies an original complaint, made in the first instance, preliminary to a formal trial for a crime; it does not include indictments.—*Ct. of App., Jan.,* 1880. Ryan *v.* People, 79 N. Y. 593.

8. Children, as used under the provision of the statute of distribution in reference to advancements (2 Rev. Stat. 97, § 76,) includes all the descendants of the intestate entitled to share in his estate.—*Ct. of App., Dec.,* 1879. Beebe *v.* Estabrook, 79 N. Y. 246.

9. As used in a will—who are not included, see Van Voorhis *v.* Brintnall, 23 Hun 260, 263.

10. Counter-claim. An affirmation of a cause of action against the plaintiff, in the nature of a cross-action, and upon which the defendant may have an affirmative judgment against the plaintiff.—*U. S. Circ. Ct., (So. Dist.,) Nov.,* 1880. Clarkson *v.* Manson, 60 How. Pr. 45, 48.

11. Due process of law. What constitutes "due process of law" stated, and a trial by jury held not to be, in all cases, an essential element of such process.—*Supreme Ct., (1st Dept.,) March,* 1881. Matter of Curry, 1 Civ. Pro. 319.

12. External means, as used in a life policy in reference to the death of the insured, are exterior, visible and apparent means or causes—in this case the mistaking poison for water and drinking it. Its action on the system of the insured was internal, though external as well as internal in its effect.—*Supreme Ct., (3d Dept.,) Sept.,* 1880. Hill *v.* Hartford Accident Ins. Co., 22 Hun 187, 191.

13. Floating debt, as used in Laws of 1875, ch. 517, providing for the "settlement of the floating debt of the village of Saratoga Springs," etc., defined.—*Supreme Ct., (3d Dept.,) Nov.,* 1880. Cooke *v.* Village of Saratoga Springs, 23 Hun 55, 59.

14. Gaming. Illegal gaming implies gain and loss between the parties by betting, such as would excite a spirit of cupidity.—*Ct. of App., Sept.,* 1880. Harris *v.* White, 81 N. Y. 532, 539.

15. Honorary, as used in connection with a public office, means without profit, fee or reward, and in consideration of the honor conferred by holding a position of responsibility and trust.—*Ct. of App., June,* 1880. Haswell *v.* Mayor, &c., of New York, 81 N. Y. 255, 258.

16. Ill conduct. The adultery of the wife is "ill conduct" within the meaning of those terms as used in 2 Rev. Stat. 147, § 53, authorizing the defendant, in an action for a separation, to prove ill conduct on the part of the complainant.—*Supreme Ct., (3d Dept.,) Nov.,* 1880. Doe *v.* Roe, 23 Hun 19.

17. Illegitimate, as used in the statute of descents in this state, means a child begotten and born out of wedlock.—*Supreme Ct., (2d Dept.,) Feb.,* 1881. Bollermann *v.* Blake, 24 Hun 187.

18. Implied contract. One which reason and justice dictate, and which the law therefore presumes that every man undertakes to perform. In implied contracts the law implies from the antecedent acts of persons, and from general usage and custom, what the obligations of such persons are to be; whereas, if an express contract is made, the parties themselves thereby assume to define what their obligations are to be.—*Supreme Ct., (4th Dept.,) Oct.,* 1880. Commercial Bank of Keokuk *v.* Pfeiffer, 22 Hun 327, 335.

19. Improvidence, as used in 3 Rev. Stat. (6th ed.) 73, § 3, subd. 5, authorizing the removal of an executor for "improvidence," means habits of mind and conduct which become a part of the man, and render him unfit for the trust.—*N. Y. Surr. Ct., Feb.,* 1880. Freeman *v.* Kellogg, 4 Redf. 218,

20. Individual banker, as used in the provision of the act of 1875, relating to savings banks, (Laws of 1875, ch. 371, § 49,) which declares it "not to be lawful for any bank, banking association or *individual banker* to advertise or put forth a sign as a savings bank," applies only to one who has availed himself of the banking statutes of this state, and has become empowered to do banking thereunder; it does not apply to a private banker, who exercises in his business no more than the rights and privileges common to all.—*Ct. of App., Feb.,* 1880. People *v.* Doty, 80 N. Y. 225, 228.

21. The various banking acts expressive of the legislative intent in the use of the term "individual banker," collated. *Ib.*

22. *It seems,* that the proper phrase to designate a banker doing business without having acquired the privileges conferred by the provisions of the statute, is "private banker," not "individual banker." *Ib.*

23. Internal means, as used respecting the cause of death of one whose life is insured, are causes occurring and operating within the

body of the insured, and effecting death by unapparent and invisible means and causes. Such risks are not assumed under an accident policy. —*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. Hill *v.* Hartford Accident Ins. Co., 22 Hun 187, 191.

24. Involved, as used in section 3253 of the Code of Civil Procedure, relating to allowances in addition to costs, means "affected."—*Superior Ct.*, (*Sp. T.*,) *July*, 1881. Hatch *v.* Western Union Teleg. Co., 1 Civ. Pro. 194; Williams *v.* Same, 61 How. Pr. 305.

25. Judge of the court. The phrase "judge of the court" is used in the sections of Title XII., relative to supplementary proceedings, in its general sense, and without regard to the question whether the judge's title is technically that of "justice" or "judge."—*Supreme Ct.*, (*1st Dept.*,) *May*, 1881. Baldwin *v.* Perry, 1 Civ. Pro. 118.

26. Labor, as used in the Michigan statute, rendering stockholders in a manufacturing corporation "liable for all labor performed for such company," does not, either by the Michigan law or by that of New York, include services rendered by the secretary, although he also acted as book-keeper.—*Supreme Ct.*, (*1st Dept.*,) *Feb.*, 1881. Viele *v.* Wells, 9 Abb. N. Cas. 277.

27. Laying out. The words "laying out," in the title of an act of the legislature, include the opening of streets.—*Supreme Ct.*, (*1st Dept.*,) *April*, 1881. Matter of Dept. of Public Works, 24 Hun 378. And see, also, Matter of One Hundred and Thirty-eighth Street, 60 How. Pr. 290, 293.

28. Mariners includes a purser permanently attached to a vessel; and a theft or embezzlement by him is included in the term "barratry."—*Ct. of App.*, *Feb.*, 1880. Spinetti *v.* Atlas Steamship Co., 80 N. Y. 71, 80.

29. My personal estate. When the words "my personal estate," in a married woman's note, will be held binding, the same as if she had used the words "my separate estate," see First Nat. Bank of Saugerties *v.* Hurlbut, 22 Hun 310.

30. Next of kin. Although a widow is not entitled to a share in the estate of her deceased husband as one of his next of kin, yet she is included in that term as used in sections 9 and 10 of 2 Revised Statutes 114, authorizing an action to be brought "by any legatee, or by any of the next of kin entitled to share in the distribution of the estate," against the executor or administrator thereof, to recover his legacy or distributive share.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. Betsinger *v.* Chapman, 24 Hun 15. See, also, Snyder *v.* Snyder, 60 How. Pr. 368, 370.

31. Obligation, as used in Laws of 1879, ch. 538, reducing the rate of interest to six per cent., and excepting from its operation "obligations" made before its passage, is broad enough to cover all cases in which, either by contract or by operation of law, interest was attached to an existing liability. The general sense of the word "obligation" is "a duty," and Lord Coke defines it to be "a tie which binds us to pay or do something agreeably to the laws and customs of the country." (Inst. 3, 14.) In a narrower sense it means a bond or deed under seal. But it is obviously used in the statute regulating interest, in its broadest sense, with intent to cover every liability to which interest attaches.—*Supreme Ct.*, (*1st Dept.*, *Jan.*, 1881. Erwin *v.* Neversink Steamboat Co., 23 Hun 578, 580.

32. Perils of the sea. When the word "perils" in a marine policy will be construed as synonymous with risks, see Providence, &c., Steamship Co. *v.* Phœnix Ins. Co., 22 Hun 517, 522.

33. Pregnant woman, as used in 3 Rev. Stat. (6th ed.) 932, § 11, is synonymous with "a woman with child," and the use of the latter term instead of the former, in an indictment under said section is sufficient.—*Supreme Ct.*, (*1st Dept.*,) *Nov.*, 1880. Eckhardt *v.* People, 22 Hun 525.

34. Private nuisance. Anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another. Any unwarrantable, unreasonable or unlawful use by a person of his own property, real or personal, to the injury of another.—*Ct. of App.*, *April*, 1880. Heeg *v.* Licht, 80 N. Y. 579, 582.

35. Purse, prize or premium. A purse, prize or premium is ordinarily some valuable thing, offered by a person for the doing of something by others, into the strife for which he does not enter. He has not a chance of gaining the thing offered; and if he abide by his offer, that he must lose it and give it over to some of those contending for it, is reasonably certain.—*Ct. of App.*, *Sept.*, 1880. Harris *v.* White, 81 N. Y. 532, 539.

36. Reciprocal demands, as used in the provision of the Code of Pro., § 95 specifying when a cause of action "upon a mutual, open and current account, where there have been reciprocal demands between the parties," shall be deemed to have accrued, means no more than "mutual accounts," as used in the former statutes.—*Ct. of App.*, *Nov.*, 1879. Green *v.* Disbrow, 79 N. Y. 1, 8.

37. Refusal. The "refusal" spoken of in the provision of the statute in reference to bills of exchange, (1 Rev. Stat. 769, § 11,) which declares that one upon whom a bill is drawn and delivered for acceptance, who destroys or refuses to return it, shall be deemed to have accepted it, is an affirmative act, or is made up of conduct tantamount to one; it is also a willful or wrongful act.—*Ct. of App.*, *Jan.*, 1880. Matteson *v.* Moulton, 79 N. Y. 627.

38. Resident alien, as used in the provision of the act of 1845, "to enable resident aliens to take and hold real estate" (Laws of 1845, ch. 115, § 4,) which enables those answering the description of heirs of a deceased alien resident to take, whether they are citizens or aliens, does not include or designate a naturalized citizen —*Ct. of App.*, *Feb.*, 1880. Luhrs *v.* Eimer, 80 N. Y. 171, 177.

39. Special deposits includes money, securities and other valuables delivered to banks, to be specifically kept and redelivered; it is not confined to securities held by the banks as collateral to loans.—*Ct. of App.*, *Feb.*, 1880. Pattison *v.* Syracuse Nat. Bank, 80 N. Y. 82, 96.

40. Straddle, as used in respect to stock speculations, defined. Harris *v.* Tumbridge, 83 N. Y. 92, 95.

41. Theft—thieves. The difference in the views of the courts of England from those of the courts of this state, as to the meaning of the words "theft" and "thieves" in policies of insurance, pointed out.—*Ct. of App.*, *Feb.*, 1880. Spinnetti *v.* Atlas Steamship Co., 80 N. Y. 71.

42. To arrive. These words in a contract of sale import a condition that if the goods do not arrive the vendors shall not be bound by the contract.—*Supreme Ct., (2d Dept.,) Dec.,* 1880. Dike *v.* Reitlinger, 23 Hun. 241, 242.

43. Unsatisfied—unexecuted. What constitutes the return of an execution "unsatisfied or unexecuted," as those terms are used in section 1377 of the Code of Civil Procedure, stated.—*Supreme Ct., (2d Dept.,) Feb.,* 1881. Frean *v.* Garrett, 24 Hun 161.

44. Vacant and unoccupied, as used in a condition in a fire policy.—*Held,* to mean not only that the house should have no occupying tenant, but an unfurnished as well as untenanted house.—*Ct. of App., June,* 1880. Herrman *v.* Merchants' Ins. Co., 81 N. Y. 184, 188.

45. Whole sum, as used in the statute fixing the percentage of the fees of an assignee for creditors, defined.—*Com. Pleas., (Sp. T.,) May,* 1881. Matter of Hulbert, 61 How. Pr. 98, 99.

DELIVERY.

DEEDS, 3; SALES, II.

DEMAND.

As to the *Necessity* of a demand before suit, see BILLS OF EXCHANGE, 9, 10; PROMISSORY NOTES, TROVER.

DEMURRER.

How *Interposed,* and *When proper,* see PLEADING, III.

DEPOSIT.

As to *Moneys deposited in bank,* see BANKS, 6-11.

DEPOSITIONS.

I. DE BENE ESSE, AND ON COMMISSION.
II. EXAMINATION OF PARTIES BEFORE TRIAL.

I. DE BENE ESSE, AND ON COMMISSION.

1. Power to award a commission. The power of the court to award a commission without the consent of parties, to take the testimony of a witness out of the state, depends entirely on statute, and can only be exercised in the cases therein specified—*Ct. of App., Dec.,* 1880. Matter of an Attorney, 83 N. Y. 164.

2. The provisions of the Code of Civil Procedure in reference to taking depositions out of the state (§ 887, *et seq.,*) relate to actions only. *Ib.*

3. When a commission may issue. When a commission to take testimony may issue in an action of interpleader, and when the order should not direct that the testimony may be used on the trial of all issues that may arise, see Kemp *v.* Dickinson, 22 Hun 593.

4. A commission may be issued to take the testimony of one committed to a lunatic asylum in another state, on the ground of insanity, but, upon the trial of the action the return thereto must be first submitted to the presiding justice, who shall determine, on an examination of the answers therein contained, and of such witnesses having knowledge of the subject as may be produced before him, whether or not the mental condition of the witness is such as to render his testimony admissible in evidence.—*Supreme Ct., (1st Dept.,) Dec.,* 1880. Hand *v.* Burrows, 23 Hun 330.

5. Settling the interrogatories. *It seems,* that while a judge, in settling interrogatories to be annexed to a commission to take testimony, is required to allow "any question pertinent to the issue" (Code of Civ. Pro., § 892,) he has authority to disallow questions not pertinent, and hence to determine whether a question is pertinent or not. The power to exclude questions, however, should be sparingly exercised.—*Ct. of App., Dec.,* 1879. Uline *v.* New York Central, &c., R. R. Co., 79 N. Y. 175.

6. The judge in such case has not the discretion which the court has on trial as to the extent to which he will permit a cross-examination, for the purpose of merely testing the credit of the witness, and upon matters collateral to the main issue; he must insert all pertinent questions. *Ib.*

7. The decision of the judge in settling the interrogatories is an order (Code, § 767); if it disallows a pertinent question, it affects a substantial right, and is therefore appealable. (Code, §§ 1347, 1348.) *Ib.*

8. In an action to recover damages for injuries alleged to have resulted from defendant's negligence, a release was set up as a defence; this the plaintiff claimed was a forgery. A commission was issued on behalf of defendant, to take the testimony of the person who plaintiff alleged forged the release, as to the alleged settlement. Plaintiff, after a cross-interrogatory calling for the salary paid to the witness, proposed others, asking the amount of the witness' expenses per annum, whether he left the place by day or night, by whom he was accompanied, and where he stopped; also, as to the amount of the debts he left unpaid; whether before he left he purchased an India shawl, and at what price, and whether he borrowed money of certain persons specified. These cross-interrogatories were disallowed. *Held,* error. *Ib.*

9. Annexing exhibits to the commission. Upon the taking of a deposition in another state, letters which are merely identified before the commissioner are not to be considered as "produced and proved" within Code of Civ. Pro., § 901, as exhibits, and such letters need not be annexed to the commission.—*Supreme Ct., (1st. Dept.,) Nov.,* 1880. Kelley *v.* Weber, 9 Abb. N. Cas. 62.

10. Such an identification will not render the letters admissible at the trial, without evidence of genuineness by witnesses; but the fact

that such letters have not been annexed to the deposition, is not a sufficient ground for the suppression of the commission. *Ib.*

II. Examination of Parties Before Trial.

11. Discretionary powers of the court. Where the affidavit, presented upon an application for an order for the examination of of a party before trial, contains all the facts which the Code of Civil Procedure and the general rules require to be stated therein, it is imperative upon the judge to grant the order.—*Supreme Ct., (2d Dept.,) Feb.,* 1881. Sweeney *v.* Sturgis, 24 Hun 162. See, also, Harrold *v.* New York Elevated R. R. Co. 21 Hun 268.

12. In what cases the order should be granted. In an action to set aside a general assignment for the benefit of creditors on the ground of fraud, the defendant may, on a proper showing, he examined before trial at the instance of the plaintiff.—*Supreme Ct., (1st Dept.,) Jan.,* 1881. Tenney *v.* Mautner, 1 Civ. Pro. 64. But compare to the contrary, Russ *v.* Campbell, Id. 41.

13. Such examination may be had where the moving affidavits conform to the provisions of the code, and the rules laid down by the decisions of this court and the Court of Appeals, in relation to the necessity of satisfying the court that the desired examination is something more than a mere fishing expedition, and is sought to establish facts important to the issues and necessarily within the knowledge of the parties to be examined. While the court will carefully protect parties from an abuse of its power to direct such examination, it will see that the objects and spirit of the code are not defeated by a rigid adherence to technical rules. Tenney *v.* Mautner, *supra.*

14. When it should be refused. An order for the examination of a party before trial, is not properly granted, to enable the plaintiff to procure material with which to frame an amended complaint, where it appears that, so far as the form of the complaint is concerned, it is not necessary to the prosecution of the plaintiff's rights, that it should be made more definite and certain; and where the form of complaint will entitle him to all the relief which his proven cause of action would call for. In such case, the moving papers show no facts or circumstances as to the materiality or necessity for the examination, and do not conform to rule 83 of the General Rules of Practice.—*Superior Ct., (Gen. T.,) May,* 1881. Williams *v.* Western Union Teleg. Co., 1 Civ. Pro. 294.

15. Who may apply for an order. A party to the action cannot have an order for his own examination, in his own behalf, before trial, merely on the ground specified in Code of Civ. Pro. ch. 872, § 5, that he is about to depart from the state, or so sick, &c., that he will not be able to attend trial. He must show the materiality of and necessity for such examination.—*Superior Ct., (Sp. T.,) Nov.,* 1880. Preston *v.* Hencken, 9 Abb. N. Cas. 68.

16. What affidavits are sufficient. It was a settled rule that the complainant in a bill of discovery must show a good cause of action or a good defence. This is still an indispensable requisite of an application for the examination of an adversary.—*Com. Pleas., (Sp. T.,) Dec.,* 1880. McCoon *v.* White, 60 How. Pr. 149.

17. While there is no reason for introducing the unwarranted and unwarrantable rule that a party who seeks to examine his adversary before trial must swear that he intends to introduce the examination as evidence on the trial, it is eminently proper to adhere to the equity practice which required the party seeking a discovery to state that he expected to prove by the examination the facts which he alleges to lie peculiarly within the knowledge of the person whom he seeks to examine. *Ib.* Compare Cornell *v.* Fryer, 9 Abb. N. Cas. 52.

18. On an application for such examination, the moving papers should disclose an intention to use the deposition at the trial.—*Supreme Ct., (1st Dept., Chamb.,) April,* 1881. Russ *v.* Campbell, 1 Civ. Pro. 41.

19. Where the party whose examination is desired is a corporation, the moving affidavits must state the name of the officer or director of such corporation whose testimony is necessary and material. Williams *v.* Western Union Teleg. Co., *supra.*

20. Instances. This action was brought by plaintiff, an employee of the "Eagle Mill," to recover damages for injuries alleged to have been occasioned by the negligence of defendant, who was alleged to be its proprietor; this latter allegation being denied by the answer. After issue joined, plaintiff applied for an order directing defendant to appear and be examined, upon an affidavit stating the facts above mentioned, and that the testimony of defendant was material and necessary to enable her to prove her cause of action, and stating that she desired to prove what interest defendant had in said Eagle Mill, and to ascertain whether said mill was a corporation or a copartnership. *Held,* that the affidavit was sufficient and that the order should have been granted.—*Supreme Ct., (2d Dept.,) Feb.,* 1881. Sweeney *v.* Sturgis, 24 Hun 162.

21. In this action, brought by plaintiff to recover the price of two hundred and sixty-six bales of rags sold to defendant, the latter, before answering, made an affidavit stating that the defence was that the sale was fraudulent and void, and that the goods were not what they were falsely and fraudulently represented to be; that in opening some of the bales they were found to contain about one-quarter in weight of substances other than rags, which were of no pecuniary value; that a return of the goods was thereupon tendered to, and refused by, plaintiff; that plaintiff had thereafter attached the said goods, and that the same were then in the possession of the sheriff, and that defendant was, therefore, unable to inspect or examine them; that he desired to examine plaintiff, to prove the contents of the bales not yet opened, and to prove the fraudulent and deceitful packing and arrangement thereof, and to prove plaintiff's knowledge of, and connection with, such frauds. *Held,* that an order for the examination of plaintiff was properly granted; and that if, upon the examination, any questions were put to plaintiff, the answers to which would tend to criminate or degrade him, or to subject him to a penalty or forfeiture, he could then claim his privilege. —*Supreme Ct., (1st Dept.,) Nov.,* 1880. Sprague *v.* Butterworth, 22 Hun 502.

22. What are insufficient. To authorize the granting of an order for the examination of a party before trial, the affidavit must specify

the facts and circumstances showing the testimony of the party to be material and necessary. It is not sufficient to allege that the testimony is material and necessary for the party making the application, and the prosecution of the action, and that the applicant cannot safely proceed to trial without examining him.—*Supreme Ct.*, (*2d Dept.*,) *Dec.*, 1880. Crooke *v.* Corbin, 23 Hun 176. Compare Shaw *v.* Van Rensselaer, 60 How. Pr. 143.

23. Upon an application for an order to compel the defendant to appear and be examined before the trial, the existence of a cause of action is not established by allegations in the affidavit, stating simply that the "action is brought to recover damages for certain breaches, on the part of defendant, of a contract in writing."—*Supreme Ct.*, (*2d Dept.*,) *Sept.*, 1880. Hale *v.* Rogers, 22 Hun 19.

24. Although the affidavit may be made by the attorney, the materiality of the testimony of the witness must be alleged upon his own knowledge; or if it be made upon information, the sources thereof must be given. *Ib.*

25. In an action on a promissory note, where defendant seeks to examine plaintiff before answer, an affidavit which does not state that defendant expects to prove that the note in suit was not, either before or at the time of its maturity, in the hands of one who could have collected it from defendant, and that it came after its maturity into the hands of defendant, is defective. McCoon *v.* White, *supra.*

26. The affidavit is also defective if admitting everything it alleges, it does not show that defendant has a defence to the action. *Ib.*

27. Compelling production of books and papers. On the examination of a party before trial, the court has no power to compel a discovery of books and papers; but if he is unable to testify to the facts on such examination without refreshing his memory from such books and papers, they may be produced, but for such purpose only.—*Marine Ct.*, (*Sp. T.*,) *Feb.*, 1881. Black *v.* Curry, 1 Civ. Pro. 193. See, also, Parsons *v.* Belden, 9 Abb. N. Cas. 54.

28. Privilege to refuse to answer. Under the provisions of the Code of Civil Procedure, relating to the examination of parties before trial, so far as the questions put to the witness are relevant to the issues to be tried, the party examined must answer them.—*Supreme Ct.*, (*2d Dept.*,) *May*, 1880. Harrold *v.* New York Elevated R. R. Co., 21 Hun 268.

29. Examination of party before suit brought. Since the amendment of 1879 to Code of Civ. Pro., § 872, subd. 6, it is requisite and necessary, in an affidavit for the examination of witnesses where no action is pending, to state what the circumstances are which render it necessary for the protection of the applicant's rights that the witnesses' testimony should be perpetuated.—*Com. Pleas*, (*Sp. T.*,) *Dec.*, 1880. Matter of Ketchum, 60 How. Pr. 154.

30. The meaning of the amendment is to require the applicant to show that he is in danger of losing the evidence of his right before it could be judicially investigated. To prove that such danger exists it is incumbent on the complainant to allege that he has an interest, present or contingent, in the property, and that the defendant has, or claims to have, an interest. He is further bound to show that he is in danger of losing his witnesses by sickness, age, death or departure from the jurisdiction, or that his case rests upon the evidence of only one witness. Where he could at once bring a suit, he is bound to show that it has been commenced. If no action is pending, he is obliged to explain why he is not able to maintain an action, the ordinary reasons being that the right of action belonged to the adverse party, or that the adverse party had raised some impediment (an injunction, for example,) to an immediate trial in a court of law. *Ib.*

As to the examination of witnesses *On the trial* of an action, see WITNESSES, IV.

As to compelling production of *Books and papers*, see DISCOVERY.

DESCENT.

1. Descent through alien ancestor. The common law principle that the descent between brothers, or a brother and sister, is immediate and is not impeded by the alienage of the father, was not changed by the statute of 1786, (Laws of 1786, ch. 12, § 4,) which changed the order of descent by enabling the father of a decedent to inherit in default of lineal heirs.—*Ct. of App.*, *Feb.*, 1880. Luhrs *v.* Eimer, 80 N. Y. 171.

2. J., a naturalized citizen, died in 1866 intestate, and seized of certain real estate. He left him surviving his widow, his father, the defendant B., who was his sister, and the wife of a citizen, and two alien children of a deceased sister, who was an alien. The widow died in 1870. B., in 1873, by judgment in an action of ejectment, wherein she founded her claim upon her title by descent, recovered possession of the premises. She contracted to sell the same to plaintiff, in 1877. Upon submission of the controversy as to her title under section 1279 of the Code of Civil Procedure—*Held*, that the title to the premises vested in B. upon the death of her brother, that the act of 1874 (Laws of 1874, ch. 261,) amending the provision of the act of 1845, by inserting after the words "resident alien," the words "or any naturalized or native citizen," could not operate to divest her estate thus acquired, and that, therefore, she could give a good title and was entitled to a performance of the contract. *Ib.*

3. To alien heirs, under provisions of treaty. B. died May 18th, 1866, leaving as his heirs-at-law two brothers and a sister, all non-resident aliens. In 1845 a convention was made between the United States of America and the Grand Duchy of Hesse "for the mutual abolition of the *droit d'aubaine* and taxes on emigrants." By article I. thereof, every kind of *droit d'aubaine* was abolished, and article II. provided that where a citizen of either country would be entitled to inherit real estate, were he not disqualified by alienage, he should be allowed a term of two years to sell the same and withdraw the proceeds thereof without molestation. In April, 1868, the legislature, by chapter 433 of 1868, released all the estate and interest of the State of New York in the real estate in question to the heirs-at-law of B. In November, 1868, the alien heirs-at-law conveyed the land to the defendant.

Held, 1. That under the convention made in 1845, the real estate vested upon Bollermann's death in his alien heirs-at-law, subject to be divested upon their failure to sell the same within the two years.

2. That the passage of the act of 1868 removed this condition and vested the estate absolutely in them.—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Bollermann *v.* Blake, 24 Hun 187.

4. Descent to after-born child, not mentioned in will. On September 5th, 1862, one S., being married, but having no children, made a will, by which he authorized his executor to sell all his property, both real and personal, and pay the proceeds thereof to his widow. On April 17th, 1864, the plaintiff, the testator's only child, was born, and about a month thereafter S. died, leaving his will unaltered, his child not being in any way mentioned therein, and not being provided for by any settlement. On December 1st, 1865, the executor named in the will sold certain real estate, of which S. died seized, to the defendant for the sum of $3200, $2200 thereof being paid in cash, and the residue by discharging a mortgage upon the premises. In this action, brought by plaintiff to recover the said land, subject to the dower of her mother—

Held, 1. That the plaintiff not being provided for by or mentioned in the will, succeeded, under 2 Rev. Stat. 65, § 49, to the same portion of her father's real and personal estate as would have descended or been distributed to her if her father had died intestate.

2. That she was not confined to suing the devisee or legatee to recover the proceeds arising upon the sale made by the executor, but could bring an action against the grantee and recover the land itself.—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Smith *v.* Robertson, 24 Hun 210.

5. Illegitimate children. Children born out of wedlock cannot, by being legitimated by the law of another country, acquire the right to hold real estate in this state. Bollermann *v.* Blake, *supra.*

As to the distribution of the *Personal property* of a decedent, see DISTRIBUTION.

DEVISE.

1. What words will pass a fee. A testator, by his will, devised and bequeathed the one-third part of all the rest, residue and remainder of his estate to his nephew, "Edward B. Coe, and the heirs of his body forever, and in case of his death without issue then living," he devised and bequeathed the said portion to other devisees therein named. *Held*, that Edward B. Coe took a fee in the testator's real estate, which passed to one purchasing at a sale had under the foreclosure of a mortgage given by him thereon.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*. 1880. Coe *v.* De Witt, 22 Hun 428.

2. A testator, by a will made and proved in 1823, gave and bequeathed "unto my daughter, Penelope Slater, at the decease of widow Penelope Merritt, all my right and title of the land and buildings thereon now in possession of the said widow Penelope Merritt, it being the equal undivided one-half of said property, together with the appurtenances thereunto belonging." *Held*, that the devisee took a fee and not simply a life estate in the premises.—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Merritt *v.* Abendroth, 24 Hun 218.

3. What property will pass. A testatrix died seized of certain real estate, having acquired title to a portion thereof by a conveyance made to her, and to the remainder thereof by inheritance. Her will contained, among others, the following clause: "I give, bequeath and devise to my granddaughter, Ella Lyman, all my personal property of every description that I may have and be the owner of, at the time of my death, and all the real estate that I may have title thereto, by deed, lease, or any interest therein." *Held*, that all her real estate, both that acquired by the conveyance and that acquired by inheritance, passed to the devisee under the said clause.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. Lyman *v.* Lyman, 22 Hun 261.

4. Ademption. Where a testatrix, after making a will, devising certain specific parcels of real estate, then owned by her, to her executors, upon certain trusts therein declared, and for the payment of certain legacies, sells a portion of the said real estate, and converts the proceeds thereof into personal property, such acts amount to a partial ademption of the devise, and the court has no power to substitute the personal property for the real estate devised for the payment of the legacies.—*Supreme Ct.*, (*2d Dept.*,) *Dec.*, 1880. Philson *v.* Moore, 23 Hun 152.

As to devises in *Lieu of dower*, see DOWER, 3.

As to the powers and duties of *Personal representatives* in respect to lands devised, see EXECUTORS AND ADMINISTRATORS, III.

DIRECTORS.

CORPORATIONS, 52-58; RAILROAD COMPANIES, III.

DISABILITY.

Of *Aliens*, see ALIENS. Of *Infants*, see INFANTS. Of *Insane persons*, see INSANE PERSONS. Of *Married women*, see HUSBAND AND WIFE, IV.

As to the effect of the disability to *Suspend the running* of the statute of limitations, see LIMITATIONS OF ACTIONS, IV.

DISBURSEMENTS.

COSTS, 58.

DISCHARGE.

BANKRUPTCY; EXECUTION; HABEAS CORPUS; IMPRISONMENT; INSOLVENCY.

DISCONTINUANCE.

Of *Actions*, generally, see PRACTICE. Of *Appeal*, see APPEAL, 32, 54.

DISCOUNTS.

BANKS AND BANKING, 16, 17.

DISCOVERY AND INSPECTION.

1. **Power of the court to order production of books and papers.** The court, in granting a discovery of books, papers, &c., is not limited to applications made for the purpose of framing a pleading, but has power to direct such discovery, after issue joined, to enable the applicant to prepare for trial.—*Supreme Ct.*, (1st *Dept.*,) *Jan.*, 1881. Babbitt *v.* Crampton, 1 Civ. Pro. 169.

2. The provisions of sections 803, 804, and 805 of the code are sufficiently broad to allow such an investigation, and if they were not, the equity jurisdiction possessed by this court would be sufficient in itself to accomplish that purpose. *Ib.*

3. Such examination will facilitate the trial of the action, and that is an important circumstance to be considered by the court in the exercise of its discretion to grant or refuse the application. *Ib.*

4. **When the application should be granted.** The complaint set forth that defendant, while employed as the plaintiff's confidential manager, clerk, and cashier, with full charge of his financial affairs, appropriated large sums of money by means of false entries and accounts. *Held*, that defendant was entitled to a discovery of these accounts, &c., in order to be able to disprove the allegations at the trial; such examination to be confined to the transactions covered by the pleadings. *Ib.*

5. **Compelling production by foreign corporation.** An order for the inspection of the books and papers of a foreign corporation should not require it to produce books, kept and in constant use in its office in a distant state, before a referee in this state, but should direct it to produce and deliver to the plaintiff sworn copies of so much of their contents as relates to the subject matter mentioned in the order, within a reasonable time, to be designated by the order.—*Supreme Ct.*, (1st *Dept.*,) *Nov.*, 1880. Ervin *v.* Oregon R'y and Nav. Co., 22 Hun 566.

As to the remedy by *Supplementary proceedings*, see EXECUTION, V.

As to the *Examination of a party before trial*, see DEPOSITIONS, II.

DISMISSAL.

APPEAL, 133-136; TRIAL, V.

DISORDERLY HOUSES.

CRIMINAL LAW, 10-12.

DISPOSSESSION.

LANDLORD AND TENANT, IV.

DISSOLUTION.

CORPORATIONS, VII.; INSURANCE, VI.; and the titles of the various distinct corporate bodies.

DISTRIBUTION.

1. **When persons of the half blood may take.** A testator directed the payment of a part of his estate, with its accumulations, to a granddaughter at her majority, and in case of her death before that time, without issue, "to her then living brother and sisters and the issue of any deceased brother or sister." She died unmarried before attaining her majority, leaving, her surviving, two sisters and a brother of the whole blood, and two sisters of the half blood. *Held*, that the two sisters of the half blood were entitled to a distributive share.—*Supreme Ct.*, (1st *Dept.*,) *Sp. T.*, *April*, 1881. Wood *v.* Mitchell, 61 How. Pr. 48.

2. The testator devised real estate to his wife for life, directing that upon her death it should be sold and the proceeds distributed among his three children or their legal representatives. *Held*, that the interest vested in each of them as personal estate, and the share of a daughter who died before and that of a son who died after the widow, passed to their next of kin, so that, although the testator had no intention that the children of the half blood should receive any portion of his estate, they should be included in the distribution.—*Supreme Ct.*, (*Sp. T.*,) *Jan.*, 1881. Freeman *v.* Smith, 60 How. Pr. 311.

3. **Distribution among collaterals.** The statute of distributions (2 Rev. Stat. 96, § 75, subds. 5, 11,) provides for no representation among collaterals, except in the case of children of brothers and sisters of the intestate; if there are none of these, the nearest of kin, in equal degree, take the whole.—*Ct. of App.*, *Nov.*, 1879. Adee *v.* Campbell, 79 N. Y. 52; *affirming* 14 Hun 551.

4. M. died intestate, leaving no descendant, parent, brother, sister, descendant of any brother or sister, uncle, or aunt, but leaving first cousins, and the children of deceased first cousins. *Held*, that the first cousins were entitled to the personal estate, to the exclusion of said children. *Ib.*

As to what are *Assets*, and the powers and duties of *Personal representatives*, in making distribution, see EXECUTORS AND ADMINISTRATORS, II., III.

DIVIDENDS.

CORPORATIONS, 13-16.

DIVORCE.

I. SUIT TO ANNUL MARRIAGE CONTRACT.
II. ABSOLUTE DIVORCE.
III. LIMITED DIVORCE.
IV. ALIMONY; AND CUSTODY OF CHILDREN.

I. SUIT TO ANNUL MARRIAGE CONTRACT.

1. **Marriage by unsuccessful party, after divorce.** A marriage contracted in another state, between a man forbidden by a decree of divorce granted in this state to marry again during the lifetime of his former divorced wife, and a woman cognizant of the former marriage and divorce, during the lifetime of the former spouse, and for the purpose of evading the prohibition in the decree of divorce, the parties intending to return, and in fact soon, thereafter returning to this state, in which before such marriage they were both domiciled, will not be annulled on the application of the wife. She is *in pari delicto* and can have no relief.—*Supreme Ct.*, (1st *Dept. Sp. T.*,) *Sept.*, 1880. Kerrison *v.* Kerrison, 60 How. Pr. 51; S., C. 8 Abb. N. Cas. 444.

II. ABSOLUTE DIVORCE.

2. **When an arrest will be granted.** In an action brought by a wife against her husband, to procure an absolute divorce on the ground of adultery, an order for his arrest may be granted under Code of Civ. Pro., § 550, subd. 4.—*Supreme Ct.*, (1st *Dept.*,) *June*, 1880. Boucicault *v.* Boucicault, 21 Hun 431.

3. **Parties—rights of alleged paramour.** Where, in an action brought by a wife to procure an absolute divorce from her husband, on account of his adultery, the complaint alleges that the adultery was committed with a woman named therein, such woman cannot, upon the failure of the defendant to appear and answer, be made a party to the action and be allowed to answer and defend the same upon the merits.—*Supreme Ct.*, (1st *Dept.*,) *July*, 1880. Clay *v.* Clay, 21 Hun 609.

4. The court will, however, require notice to be given to her counsel of all proceedings to take testimony in the action, and will allow her to be present and cross-examine the witnesses produced, to be herself sworn as a witness and give her testimony, and to have summoned and examined such witnesses as she may desire. *Ib.*

5. **Pleading.** The facts required to be alleged in the complaint, viz., that the alleged adultery was committed without plaintiff's consent, connivance, privity or procurement; that five years have not elapsed since its discovery; and non-cohabitation thereafter, are to be considered, where the complaint is verified, a matter of affirmative defence, which defendant, in view of the disability of the statute, is bound to controvert and disprove.—*Supreme Ct.*, (1st *Dept. Sp. T.*,) *May*, 1881. Farace *v.* Farace, 61 How. Pr. 61.

6. **Evidence of adultery.** Evidence of mere association and frequent interviews between a man and woman, in the absence of criminating circumstances, cannot be attributed to an improper purpose, and will not sustain a charge of adultery.—*Ct. of App.*, *Sept.*, 1880. Conger *v.* Conger, 82 N. Y. 603.

7. **Judgment on referee's report.** Upon the hearing of a motion for leave to enter judgment upon the report of a referee, appointed to hear and determine the issues in an action for divorce, on the ground of adultery, the court cannot set aside the report, on the ground that the evidence is insufficient to sustain the findings and direct a judgment to be entered in favor of the party against whom the referee awarded a judgment.—*Supreme Ct.*, (2*d Dept.*,) *Dec.*, 1880. Schroeter *v.* Schroeter, 23 Hun 230.

8. The legislature, by requiring by Code of Civ. Pro., § 1229, that the judgment in matrimonial actions, where a reference of the issues has been ordered, must be rendered by the court, did not intend to authorize the court to examine the evidence, and to render such judgment as it should justify, but only required the approval of the court as a safeguard against irregularity, fraud or collusion. *Ib.*

9. **Prohibition of marriage of guilty party.** A person from whom a former wife obtained a decree of divorce in this state, in which decree he was forbidden to marry again during her lifetime, went to another state for the purpose of evading the law, and there, the first wife being still alive, contracted a second marriage, and immediately thereafter returned to this state. *Held*, that although it be true that such marriage is to be judged by the *lex loci contractus*, the preliminary question of the capability of the party to contract a second marriage is presented when such party appeals to a tribunal of this state, and that capability is to be determined by the law, not of Pennsylvania but of New York; and as by the laws of the latter state he was absolutely forbidden to contract it, such second marriage was void.*—*Superior Ct.*, (*Gen. T.*,) *Jan.*, 1881. Thorp *v.* Thorp, 60 How. Pr. 295.

10. **Petition for leave to marry again.** The right of a defendant in a divorce suit, the judgment in which prohibited him from marrying again, to make application under Laws of 1879, § 49, for a modification of such judgment, is saved by the repealing act of 1880; and Code of Civ. Pro., § 1761, containing the disqualification upon remarriage never became operative law, except as modified by said repealing act. —*Com. Pleas*, (*Sp. T.*,) *Jan.*, 1880. Peck *v.* Peck, 60 How. Pr. 206; S. C., 8 Abb. N. Cas. 400. And see Greene's Case, 8 Abb. N. Cas. 450.

III. LIMITED DIVORCE.

11. **What constitutes cruel and inhuman treatment.** In an action for a limited divorce on the ground of cruel and inhuman treatment, it is unnecessary, to sustain the charge that there should be personal violence. —*Superior Ct.*, (*Gen. T.*,) *Dec.*, 1880. Kennedy *v.* Kennedy, 60 How. Pr. 151.

12. Threats and menace from which danger to health or life may be apprehended is sufficient, though the cause of apprehension should not only be weighty but such as clearly showing

* Overruled in Van Voorhis *v.* Brintnall, 13 *Week. Dig.* 246.

that the duties and obligations of the marriage state cannot be discharged. *Ib.*

13. Charges of infidelity, made maliciously without probable cause, are also sufficient to sustain the action. *Ib.*

14. The complaint—joinder of causes of action. *Quære,* as to whether or not, under the present practice, a cause of action for a divorce, on the ground of adultery, can be united with one for a limited divorce, on the ground of cruel treatment.—*Supreme Ct*, (*3d Dept.,*) *Nov.*, 1880. Doe *v.* Roe, 23 Hun 19.

15. Matters of defence—adultery of plaintiff. Upon the trial of this action, brought by the plaintiff to procure a limited divorce from the defendant on account of his cruel treatment of her, it appeared that for some time previous to December 10th, 1877, she had been in the habit of having illicit intercourse with one P., having visited him at his market for that purpose, and having sent to him by the hands of her daughter, a girl about eleven years old, notes asking for interviews and expressing her love and her desire to be with him. On December 10th the daughter handed one of these notes to the defendant, and informed him that she had previously carried similar notes to P. The cruel acts complained of took place on that and the following day, and on or about the 24th, 27th and 29th of that month, and were caused by the discovery of the plaintiff's adultery. On April 16th the plaintiff went away from the defendant, and has since been living apart from him in another city. *Held,* that the plaintiff was not entitled to maintain the action nor to have any allowance made to her for her support. *Ib.*

IV. Alimony; and Custody of Children.

16. When alimony pendente lite will be granted. To authorize the allowance of alimony *pendente lite,* in an action for divorce, the existence of the marital relation must be either admitted or there must be proof thereof satisfactory to the court; the *onus* is upon the applicant to establish this fact with a reasonable degree of certainty.—*Ct. of App, Jan.*, 1880. Collins *v.* Collins, 80 N. Y. 1.

17. Where, at the time of the alleged marriage, the applicant believed herself competent to marry, but in fact was under a disability rendering the marriage void, which disability subsequently ceased, proof of cohabitation, thereafter, without any new marriage contract, and in reliance simply on the validity of the original marriage, is not satisfactory proof of a valid marriage for the purposes of such application. *Ib.*

18. Where, at the time an action for divorce is instituted, the parties are living separate and apart, in pursuance of articles of separation, and suitable provision has been made by the husband for the separate maintenance of the wife, alimony *pendente lite* should not, as a general rule, be allowed. *Ib.*

19. Such provision, however, does not prejudice an application on the part of the wife to be provided with means to prosecute the action; this will be granted if she is otherwise entitled, and has not sufficient means of her own. *Ib.*

20. When the wife has sufficient means of her own, temporary alimony is not allowable; this is not a matter of discretion, but a settled principle of equity. *Ib.* See, also, McQuien *v.* McQuien, 61 How. Pr. 280.

21. Counsel fees. It appeared that, six months prior to the commencement of the action, the parties entered into articles of separation, under and in pursuance of which defendant paid to plaintiff $5000, and transferred to trustees certain real estate for her use, which she agreed to accept in full satisfaction for her support and maintenance and all right of dower and alimony. The provision thus made was found to be a suitable and proper one, considering defendant's circumstances. The case had been pending for more than ten years, without any attempt on the part of either party to bring it to trial. *Held,* that plaintiff was entitled to an allowance for the expenses of the litigation, notwithstanding the said articles, if she was the wife of defendant, and he had given her cause to seek a divorce, and was destitute of means of her own, but was not entitled to any allowance for alimony; that looking at the application as it stood at the time it was first made (which was soon after the commencement of the suit,) it should have been denied both for alimony and allowance; but as defendant had permitted the controversy to continue without taking measures to bring the cause to trial, an allowance for counsel fees was proper. Collins *v.* Collins, *supra.*

22. Power of court to require security. Where the final decree in an action for divorce directs the payment of a certain sum as alimony, but makes no provision in regard to security therefor, an order directing the defendant to pay the alimony, and further providing "that he give security for the future payment of said $600, and in default thereof that an attachment issue punishing defendant for contempt," is not proper and should be reversed.—*Superior Ct., June,* 1880. Gane *v.* Gane, 46 Superior 218.

23. Enforcing payment by proceedings for contempt. Where a defendant, in an action brought against him by his wife, for a limited divorce, fails to comply with the terms of an order requiring him to pay a certain sum of money to her attorney to meet the expenses of the suit, he is guilty of a contempt for which the court may issue a precept committing him to jail.—*Supreme Ct.,* (*4th Dept.,*) *June,* 1880. Strobridge *v.* Strobridge, 21 Hun 288.

24. Upon the return of an order, requiring the defendant to show cause why he should not be committed for failing to comply with the terms of such an order, he cannot show, in opposition to the motion, that his pecuniary circumstances are such as to render him unable to pay the moneys thereby required to be paid. *Ib.*

25. An application, under 2 Rev. Stat. 538, § 20, for relief, on the ground of the applicant's inability to comply with the requirements of the order, must be made to the court, upon notice to the adverse party. *Semble,* that the remedy afforded by the said section was intended for those only who are actually imprisoned. *Ib.* See, also, Isaacs *v.* Isaacs, 61 How. Pr. 369.

26. Instances. Upon the return of an attachment against defendant for an alleged contempt in disobeying the provision contained in a judgment of divorce herein, which required him to pay alimony and to give security for the

payment thereof, and upon motion to vacate the attachment, the court adjudged him to be in contempt, and ordered him to pay a fine, to give security in a specified amount for future alimony, and to stand committed until compliance with the order—*Held*, that the whole matter was before the court, and it had jurisdiction to grant such relief.—*Ct. of App., Feb.*, 1880. Park *v.* Park, 80 N. Y. 156.

27. The attachment was issued upon proof of service of a copy of the judgment, with demand of payment of the alimony in arrear, with the costs, and the giving security as required by the judgment, and proof of defendant's failure to comply therewith. *Held*, that the papers served were sufficient to authorize the issuing of the writ (Code of Civ. Pro., § 14); that the judgment contained all that was necessary to advise defendant of the nature of the claim made against him. *Ib.*

28. Defendant claimed that the attachment should have been vacated, because based on his refusal to pay costs. *Held*, untenable, as it was issued for "disobedience to the lawful mandate of a court" (Code of Civ. Pro., § 14, subd. 3); and that the provision of the statute of 1847 (Laws of 1847, ch. 390, § 2,) prohibiting imprisonment for contempt in not paying costs, had no application. *Ib.*

29. **Striking out answer for non-payment.** The court has power, when and while a defendant in an equity action is in contempt for disobeying its order, to refuse to hear him. Where, therefore, the defendant in an action of divorce was in contempt because of disobedience of an order of the court directing the payment of alimony—*Held*, that an order directing defendant's answer be stricken out unless he obey the previous order within five days; also an order striking out the answer upon his failure to obey, and directing a reference to take proof of the facts stated in the complaint, was proper.—*Ct. of App., Oct.*, 1880. Walker *v.* Walker, 82 N. Y. 260; S. C., 8 Abb. N. Cas. 436; *affirming* 20 Hun 400.

DOCUMENTARY EVIDENCE.

EVIDENCE, IV.

DOMICILE.

1. **Of child, effect of on power to appoint guardian.** On application for the appointment of a guardian for two infants, it appeared that the legal domicile of their father was in Rhode Island. One of them was, at the time of the application, in that state, and the other had been, a few days prior to that time, secretly taken, without the knowledge of her father or her relatives, from Rhode Island, and brought into this state for the purpose of bringing her within the jurisdiction of the court, and in aid of the proceedings. Neither of the infants had any property in this state. The Special Term appointed a guardian residing in this state; the General Term, on appeal, reversed the order, and appointed a resident of Rhode Island as guardian. *Held*, that both appointments were erroneous; that the legal domicile of the infants was in Rhode Island, as the domicile of the father was the domicile of his infant children; and that the Supreme Court had no jurisdiction.—*Ct. of App., Sept.*, 1880. Matter of Hubbard, 82 N. Y. 90.

2. **Change of domicile.** For facts held insufficient to show the change of domicile by a testator, so as to deprive the surrogate of the county of his original domicile of jurisdiction to probate his will, see Matter of Stover, 4 Redf. 82. And see, also, Von Hoffman *v.* Ward, 4 Redf. 244.

DOWER.

1. **General nature of the inchoate right.** Before her dower has been assigned to her, a widow has no assignable estate or interest in the lands of her deceased husband, nor has she any estate or interest therein which will pass to a receiver (appointed in proceedings supplementary to an execution, issued upon a judgment recovered against her) by a conveyance made by her to him in pursuance of an order of the court by which the receiver was appointed.—*Supreme Ct., (2d Dept.,) Sept.*, 1880. Payne *v.* Decker, 22 Hun 28.

2. **Dower in equity of redemption.** A wife who executes a mortgage jointly with her husband is nevertheless entitled to dower in the equity of redemption of which her husband is seized, notwithstanding the mortgage, which right is not affected in equity unless she is made a party to the foreclosure.—*Supreme Ct., (1st Dept.,) Nov.*, 1880. Ross *v.* Boardman, 22 Hun 527, 529.

3. **Testamentary provisions in lieu of dower.** A widow who elects to take pecuniary or other provisions in lieu of dower, takes the same for a consideration and is in by purchase; hence, her legacy does not abate even for the payment of debts, until the abatement of all general legacies.—*N. Y. Surr. Ct., Dec.*, 1880. Matter of Dolan, 4 Redf. 511.

4. **Assignment of dower.** The rule that dower may be assigned to the widow by parol agreement, followed by her occupation, in which case her entry defeats the seizin of the heirs, applied. Gibbs *v.* Esty, 22 Hun 266.

5. **Computing the amount; charges, &c.** As to the computation of the amount of a widow's dower in lands subject to mortgage; the amount she must pay to redeem; and when her dower should be charged on lands in the inverse order of their alienation, see Raynor *v.* Raynor, 21 Hun 36.

As to the *Estate of the husband* in wife's lands, after her death, see CURTESY.

DRAFTS.

BILLS OF EXCHANGE.

DURESS.

Effect of, on composition deed, see DEBTOR AND CREDITOR, 15, 16.

DYING DECLARATIONS.

EVIDENCE, 60.

E.

EASEMENTS.

I. General Principles.
II. Particular Kinds of Easements.

I. General Principles.

1. Easement by prescription. *It seems* that to constitute an easement by prescription, it is not essential that the user should have been with the actual knowledge of the owner of the servient tenement. Where the user has been, for the requisite time, open, notorious, visible, uninterrupted, undisputed and under claim of right adverse to such owner, he is charged with notice and his acquiescence is implied; the law presumes a grant from him, and such presumption is conclusive.—*Ct. of App., Oct.*, 1880. Ward *v.* Warren, 82 N. Y. 265; *affirming* 15 Hun 600.

2. What conveyance will create an easement. H., being the owner of certain lands in the city of New York, executed conveyances and mortgages of various parcels, referring therein to certain streets and avenues which had not then been laid out by legal authority, and the parcels conveyed and mortgaged were described as bounded by said streets and avenues. *Held*, that the conveyances, although not amounting to a dedication to the public of the land embraced in the specified streets and avenues, or constituting them public highways, created an easement in the grantees, which, as between them and him, entitled them to have the land left open as streets, for the benefit of their lots.—*Ct. of App., Sept.*, 1880. Matter of Eleventh Ave., 81 N. Y. 436, 447.

3. In subsequent proceedings to open said streets and avenues, the commissioners appointed to award compensation for the land to be taken, in the first place awarded nominal compensation only, they treating the land as having been dedicated to public use. The court refused to confirm their report, and sent it back to be corrected by awarding just compensation. *Held*, that this was not an adjudication that no easement had been parted with by the owner, but the only right adjudicated upon was that of the city; and it was not, therefore, a bar to a claim of such an easement by the owner of one of the lots so conveyed. *Ib.*

4. Rights of grantee of easement. A servitude is not an estate in lands within the meaning of section 137 of 1 Rev. Stat. 738, providing that every grant in fee, or of a freehold estate, not acknowledged or attested, shall not take effect as against a purchaser or incumbrancer until so acknowledged.—*Supreme Ct.*, (*3d Dept.*,) *May*, 1881. Nellis *v.* Munson, 24 Hun 575.

5. Right of one who has exercised an easement to enforce, against a purchaser of the servient tenement, with notice, specific performance of a defective grant of the easement, considered. *Ib.*

6. Where lands are taken subject to a covenant made between a former owner thereof and the owner of adjacent property, which covenant forbids the use of the premises for "any kind of manufactory, trade, or business whatsoever," a change in the character of the neighborhood *e. g.*, such as that produced by the erection of an elevated railway, which impairs the use of the premises in question for the purposes contemplated by the covenant, but does not affect the remainder of the property bound thereby, does not modify or impair the obligation imposed by the covenant upon the owner of said premises.—*Superior Ct., June*, 1880. Trustees of Columbia College *v.* Thacher, 46 Superior 305.

II. Particular Kinds of Easements.

7. Party-walls. An old wall from long user, in the absence of evidence, may be deemed a party-wall, presumptively, either from an agreement to that effect, or from its being built upon the line of the two lots for that purpose by the respective owners.—*Ct. of App., April*, 1880. Schile *v.* Brokhaus, 80 N. Y. 614, 618.

8. *It seems* that where a party-wall has become so dilapidated as to be unsafe, the owner of one building has the right to replace it, and in so doing is not liable in damages. *Ib.*

9. *It seems*, also, that where a party-wall is interfered with for the benefit of one owner, as by raising it, such owner is absolutely liable as insurer for any loss or damage occasioned to his neighbor thereby. *Ib.*

10. Where one of two adjoining proprietors, in disregard of the rights of his neighbor, tears down a party-wall, or a portion thereof, claiming that it stands entirely upon his own land, and intending to erect a new wall for himself, without giving his neighbor any benefit from it as a party-wall, it is a trespass, and the trespasser is liable for the damages resulting. *Ib.*

11. A party-wall may be increased in height by either party interested therein, provided it can be done without detriment to the strength of the wall, or to the building of the adjoining owner.—*Supreme Ct.*, (*Sp. T.*,) Musgrave *v.* Sherwood, 23 Hun 674 *n.*

12. Private ways. Plaintiff claimed a right of way, by prescription, over defendant's premises in the city of T. The way led from a public street; it had been paved, kept in order, and used uninterruptedly, for more than twenty years by the owners of the dominant tenement, who also maintained and used a gate for entry thereto from the street. The way was not used by the owners or occupants of the servient tenement. The defendants had owned the latter, as tenents in common, since 1846, two of them living in the city all of the time, and the other most of the time. They did not occupy the premises, but had personal charge of them, letting them on short leases, keeping them in repair, and collecting the rents. In an action to restrain defendants from closing up and obstructing the way, after proof of the foregoing facts, the defendants, as witnesses, denied any

knowledge of the user; one of them was blind. *Held*, that the facts authorized a finding of knowledge.—*Ct. of App., Oct.,* 1880. Ward *v.* Warren, 82 N. Y. 265.

13. The judgment gave the plaintiff the possession and right "to use and enjoy the way, the same as he has been accustomed to do." *Held*, proper. *Ib.*

EJECTMENT: CONFLICTING CLAIMS TO REAL PROPERTY.

1. **When ejectment will be.** Under what showing a plaintiff will not be estopped from bringing ejectment, either by reason of long delay in asserting his title, or by the fact that the defendant had, relying upon the validity of his title, expended large sums of money in improving the property, see McCullouch *v.* Wellington, 21 Hun 5.

2. **Parties defendant.** In an action to recover real property, those who claim to be the owners thereof are properly joined as defendants with the tenants who are in possession under them.—*Supreme Ct.,* (*3d Dept.,*) *Sept.,* 1880. More *v* Deyoe, 22 Hun 208.

3. **What title or possession will support the action.** In an action of ejectment plaintiff claimed under a void deed from the state comptroller, executed in 1836, purporting to convey, with other lands, the northwest quarter of a certain township containing six thousand three hundred acres. Defendant unlawfully entered into posssession of two thousand acres of the north part of the said quarter. Plaintiff gave evidence to the following effect. He had paid the taxes on the land, claiming title thereto, and caused the same to be surveyed. About 1852 he caused some lots to be surveyed in the northwest corner of said quarter, lot one containing nine hundred and fifty acres. In 1856 one R., under an arrangement with plaintiff, cut from this lot a quantity of logs, paying plaintiff therefor. In 1864 plaintiff hearing that defendants intended to enter upon the land, arranged with R. to go upon it, cut some logs, and build a shanty, for the purpose of thus gaining possession. R. that winter went upon said lot 1, cut logs and built a shanty without a roof, cutting over less than a quarter of an acre, and remaining thereon about three weeks; in the summer of 1865 R. put a roof on the shanty, and built a barn. In the winter of 1865–1866, after the commencement of the action, R. went upon the said lot under plaintiff, cut roads and cut a large quantity of logs. *Held*, that plaintiff did not show such possession as entitled him to recover for anything more, at most, than the small piece of cleared land upon which was the shanty and barn.—*Ct. of App., Dec.,* 1879. Thompson *v.* Burhans, 79 N. Y. 93; *reversing* 15 Hun 580.

4. It is sufficient to maintain an action of ejectment against the lessee claiming under a void lease, that the plaintiff was in actual possession at the time of entry under the lease; and if in such an action the lessor be allowed to interpose an answer, it cannot defend if the relation of landlord and tenant is not shown to exist between it and the defendant.—*Superior Ct., Dec.,* 1880. Carleton *v.* Darcy, 46 Superior 484.

5. **Demand and notice to quit.** When the relation of landlord and tenant does not exist between the parties, and the only issue between them is as to the title, no demand or notice to quit need be made or given before commencing an action of ejectment.—*Supreme Ct.,* (*4th Dept.,*) *April,* 1881. Eysaman *v.* Eysaman, 24 Hun 430.

6. **What may be shown in defence.** Where both the plaintiff and defendant in an action of ejectment claim under quit-claim deeds given by a common grantor, the defendant may show that such grantor had no title, and that nothing passed by either of the deeds executed by him.—*Supreme Ct.,* (*4th Dept.,*) *Oct.,* 1880. Henry *v.* Reichert, 22 Hun 394.

7. In an action of ejectment the plaintiff must recover upon the strength of his own title, and the defendant need not show title in himself until some right to disturb his possession has been shown by the plaintiff. *Ib.*

8. **Evidence.** In an action of ejectment brought against persons claiming title to the land in question, and tenants in possession under them, the plaintiff gave evidence tending to show that the annual use of the premises was worth $500, the taxes to be paid by the lessee. The defendants then put in evidence the lease given to their tenant, by which a rent of $525 was reserved; the lessee agreeing to pay the school and road taxes, and the lessors the town, county, and state taxes. They then offered to prove that the actual receipts of the rents and profits from the farm, after paying the taxes and expenses, amounted to only $325 a year. *Held*, that the evidence so offered by the defendants bore upon the question as to the value of the use and occupation of the premises, and that the court erred in rejecting it. More *v.* Deyoe, *supra.*

9. This action was brought by plaintiff, as the devisee of H., deceased, to recover the possession of a lot formerly belonging to said H. The defence was, that defendant had, prior to the death of said H., entered into the possession of the lot under an oral agreement with him, which provided that the lot should belong to her, if she should thenceforth support and maintain one M. H., a sister of defendant and of said H., and that on the faith of the said agreement she did provide for and maintain the said M. H., and made permanent and valuable improvements upon the property. Upon the trial, defendant offered to prove that, after entering into possession of the premises, relying upon the said agreement, she made substantial and permanent improvements thereon. *Held*, that the evidence was admissible, and that the court erred in excluding it.—*Supreme Ct.,* (*3d Dept.,*) *Nov.,* 1880. Dana *v.* Wright, 23 Hun 29.

10. In this action, brought to recover a triangular strip of land, it appeared that the plaintiff had in 1856 contracted, by a sealed instrument, to convey about twenty-five acres of land (including the strip in question), part of a larger tract of fifty acres, to one S., who agreed to pay a mortgage covering the whole fifty acres, as a part of the purchase money. Thereafter, the mortgage was conveyed to S.'s wife, who foreclosed it by advertisement, and bought in a part of the fifty acres for the full amount due; the part so purchased being substantially that covered by the contract, except that it was claimed that the description did not include the strip in question. Upon the trial, evidence was

received, against the plaintiff's objection and exception, to show that S. made the contract as the agent for, and in behalf of his wife, who thereafter entered into possession of the premises with him, and that the amount due upon the contract had been fully paid to the plaintiff. *Held*, that the evidence was properly admitted.—*Supreme Ct.*, (*3d Dept.*,) *May*, 1881. Carley *v.* Potts, 24 Hun 571.

11. **Compensation for improvements.** *It seems* that one who has put improvements upon the lands of another is at the best only allowed to thereby mitigate the damages by offsetting them to the extent of the rents and profits claimed. To do this he must be a *bona fide* occupant; he cannot be allowed them if he has acted with knowledge of the owner's right.—*Ct. of App.*, *Jan.*, 1881. Wood *v.* Wood, 83 N. Y. 575; *affirming* 18 Hun 350.

For rules relative to the *Title* to real property, and the rights and liabilities of the owner in respect to its use, see REAL PROPERTY.

As to *New trials* in ejectment, see NEW TRIAL, I.

ELECTION.

Of *Officers*, see ELECTIONS; MUNICIPAL CORPORATIONS, IV.

As to the election between different *Forms* or *Causes of action*, see ACTION, 9, 10.

As to election between *Dower* and *Testamentary provision*, see DOWER, 3.

ELECTIONS.

1. **Receiving and rejecting ballots.** Where one who attempts to vote has been naturalized by a court of competent jurisdiction, his right to citizenship cannot be questioned by election officers.—*Supreme Ct.*, (*1st Dept.*,) *Oct.*, 1880. People, ex rel. Christern, *v.* Walsh, 9 Abb. N. Cas. 465.

2. Where a statute prohibits those voting at an election to vote for more than two of three officers to be elected, ballots cast in pursuance of the act are not invalidated by its unconstitutionality; the fact that the electors exercised in part only their privilege or duty of voting, does not affect the votes actually given.—*Ct. of App.*, *Feb.*, 1880. People, ex rel. Watkins, *v.* Perley, 80 N. Y. 624.

3. **Illegal inducements to vote.** The defendant, a candidate for a county office, during the whole canvass, down to the day of election, published and circulated throughout the county a promise addressed to the electors to this effect: "That if elected to the office of county judge, I will pledge myself to take only $1200 a year for my services; that I will pay out of my own pocket the coal necessary to heat my law office; that I will pay for all stationery and letter-heads, and will see that persons needing blanks pay for them themselves, and if a member of assembly can be elected who will have the law amended reducing the salary to $1200, I will guarantee to waive all constitutional objections and never question its validity." *Held*, sufficient to invalidate defendant's right to the office.—*Supreme Ct.*, (*Sullivan Cir.*,) *Dec.*, 1880. People, ex rel. Bush, *v.* Thornton, 60 How. Pr. 457.

4. The promises and pledges of defendant were made to the tax-payers and electors generally, and were of a character, within the fair spirit and meaning of the acts, impliedly prohibited by article XII. of the state constitution. *Ib.*

5. It is not necessary that there should be evidence from any witness who voted at the election for defendant, that he did so in consequence of such pledges and promises. The illegal promises to induce votes having been affirmatively shown to have been made to every elector, more particularly to every tax-paying elector, the *onus* of showing the numbers of votes that were influenced thereby, should devolve upon the defendant, and it should devolve upon him to show the number of votes uninfluenced by such promises he did actually receive. *Ib.*

6. An offer of a bribe is criminal, and this is so whether the offer is accepted or not. It disfranchises the party making the offer as well as the party influenced thereby. *Ib.*

EMBEZZLEMENT.

For offences *analogous* to embezzlement, see FALSE PRETENCES; LARCENY.

EMINENT DOMAIN.

[Consult, also, MUNICIPAL CORPORATIONS; RAILROAD COMPANIES.]

1. **Constitutionality of statutes.** The act of 1866, (Laws of 1866, ch. 347,) entitled "An act to supply the village of Middletown with water for public and private purposes," and the amendatory act of 1879, (Laws of 1879, ch. 85,) are not unconstitutional as authorizing the taking of private property for private use; the acts simply contemplate a public use.—*Ct. of App.*, *Sept.*, 1880. Matter of Village of Middletown, 82 N. Y. 196.

2. The provision of the act (section 3 as amended in 1879,) empowering the commissioners appointed under it to appraise the compensation, also to fix and limit the maximum of water to be taken, &c., is not repugnant to the constitution; there is no constitutional prohibition, express or implied, against conferring additional powers upon commissioners appointed to appraise the compensation for property taken for public use. *Ib.*

3. The said act is not unconstitutional because of failure to provide for giving notice to landowners or parties interested, of the application for the appointment of commissioners; it is sufficient that it provides for notice of hearing. *Ib.*

4. Where, in such case, opportunity to appear and be heard is secured, it is within the power of the legislature to determine the form, time and manner of notice. *Ib.*

5. **What estate or interest may be taken.** It is within the power of the legislature, in authorizing land to be condemned for a public use which may be permanent, to determine

what estate therein shall be taken, and to authorize the taking of a fee or any less estate, in its discretion.—*Ct. of App., Dec.*, 1879. Sweet *v.* Buffalo, &c., R'y Co., 79 N. Y. 293.

6. A fee may be taken, although the public use for which the land is to be taken is special and not of necessity permanent or perpetual. *Ib.*

7. Where a statute authorizes the taking of a fee it cannot be held invalid, or that an easement only was acquired thereunder, on the ground that an easement only was required to accomplish the purpose in view. *Ib.*

8. **The right to compensation.** The constitutional provisions in regard to taking private property for public use without compensation, do not apply to the taking of public rights and public property.—*Supreme Ct., (Alb. Sp. T.,) June*, 1880. People *v.* Long Island R. R. Co., 9 Abb. N. Cas. 181.

9. **Computing the compensation.** When land is taken for a railroad, the damages to be paid by the company are to be determined by the detriment occasioned to the owner, and not by the value of the land to the company.—*Supreme Ct., (3d Dept.,) Sept.*, 1880. Matter of Boston, &c., R'y Co., 22 Hun 176.

10. It is not essential under the act above mentioned (¶ 1) that the damages of all parties interested should be assessed in one proceeding. Therefore—*Held*, that it was not a valid objection to proceedings under the act, for the appointment of commissioners; that there were owners whose rights would be affected by a diversion of the water, to whom no notice of the application had been given. Matter of Village of Middletown, *supra.*

11. The provision of said act (§ 4), providing that on appeal from the award of commissioners, the court may increase or diminish the compensation, is violative of the constitutional provision (art. I, § 7,) declaring that the compensation for property taken for public use shall be ascertained by a jury or by commissioners. But this unconstitutional provision did not invalidate the remainder of the act; as, with it stricken out, the remainder was complete in itself and capable of being executed. *Ib.*

12. Under the provision of said act (§ 3), making it a condition precedent to an application for the appointment of commissioners, that the trustees, after effort made by them for that purpose, had failed to agree with any owner or occupant upon the amount of the damages, all that was requisite was that negotiations should proceed far enough to indicate that an agreement was impossible; an effort to agree was all that was required; and where an owner put a price upon his property ten times above its value, it was equivalent to a refusal to come to an agreement. *Ib.*

13. An effort and failure to agree preceding the passage of the amendatory act of 1879 was sufficient. *Ib.*

14. **Conclusiveness of commissioners' report.** Where the report of commissioners appointed to appraise the damages resulting to the owners of land, by reason of its being taken for railroad purposes, has been set aside by the General Term, on the ground that they erred in only awarding nominal damaget to the owners, and a new set of commissioners has been appointed who have made their report, by which nominal damages only are awarded to the owners, the court will not, in the absence of fraud, corruption, misconduct or misapprehension, set aside the last report and appoint a new set of commissioners.—*Supreme Ct., (2d Dept.,) Feb.*, 1881. Matter of Prospect Park, &c., R. R. Co., 24 Hun 199.

ENTRY.

As to *Right of a landlord to re-enter*, see LANDLORD AND TENANT, I.

As to entry of *Judgments and Decrees*, see JUDGMENT, II.

EQUITABLE CONVERSION.

WILLS, V.

EQUITY.

I. THE JURISDICTION, GENERALLY; AND HOW EXERCISED.

II. JURISDICTION IN PARTICULAR CASES.

I. THE JURISDICTION GENERALLY; AND HOW EXERCISED.

1. **What matters are within the jurisdiction, generally.** When fraud will vitiate assessment proceedings, and when equity will relieve against conveyances under them, see Dederer *v.* Voorhies, 81 N. Y. 153.

2. **What are not.** Equity will not interpose to perfect a defective gift or voluntary settlement made without consideration, nor can it convert an imperfect gift into a declaration of trust merely on account of that imperfection. —*Ct. of App., April*, 1880. Young *v.* Young, 80 N. Y. 422.

3. **— because plaintiff has a remedy at law.** Plaintiffs, to discharge an attachment, executed an undertaking conditioned to pay the plaintiffs in the attachment suit the amount of any recovery therein. Subsequently, by stipulation of the parties in that action, the summons and proceedings were amended by bringing in another as defendant; the answer was thereafter withdrawn and judgment taken as by default. An action was brought upon the undertaking. This action was thereupon brought to stay proceedings in said action, to vacate the judgment and attachment and to cancel the undertaking, the complaint alleging fraud and collusion and that the claim in the attachment suit was fictitious. The trial court found the facts in favor of defendants and dismissed the complaint. It was claimed upon appeal that by the amendment bringing in a new party, plaintiffs' undertaking was discharged. *Held*, that if plaintiffs' claim has any merit (as to which, *quære*) it was available to plaintiffs in the action on the undertaking, and furnished no ground for the interposition of a court of equity.—*Ct. of App., April*, 1880. Kelly *v.* Christal, 81 N. Y. 619.

4. When trespass instead of an application for equitable relief is the proper remedy, where one has entered upon and dug a channel upon the lands of another, see Avery *v.* Empire Woolen Co., 82 N. Y. 582.

5. Feigned issues. When an issue of fact in an equitable action should be tried by a jury, Brady *v.* Cochran, 23 Hun 274.

6. New trial of feigned issues. Where feigned issues in an action are tried by a jury, and the judge presiding at the trial neither entertains a motion for a new trial nor directs exceptions taken at the trial to be heard at the General Term, a motion for a new trial can only be made under the Code of Civ. Pro., (§ 1003,) at the Special Term, where the motion for final judgment is made, and before such judgment.—*Ct. of App., March,* 1880. Chapin *v.* Thompson, 80 N. Y. 275.

7. The provision of said code (§ 1005) providing for a motion for a new trial after judgment, has reference to a new trial of the action itself, not to a new trial upon the feigned issues which may have been awarded therein. *Ib.*

II. JURISDICTION IN PARTICULAR CASES.

8. Cancellation of instruments, generally. The purchaser of lands on sale under execution, after the expiration of a year from the day of sale without redemption, acquires an equitable title, which entitles him to maintain an action for the cancellation of instruments which, within the definition of courts of equity, are clouds on title.—*Ct. of App., Sept.,* 1880. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474.

9. An action to procure the cancellation of a written instrument cannot be maintained, unless some special circumstance exists establishing the necessity of a resort to equity, to prevent an injury which might be irreparable, and which equity alone is competent to avert; it is not sufficient that a defence exists as against the instrument, or that evidence may be lost.—*Ct. of App., Dec.,* 1879. Globe Mut. Life Ins. Co. *v.* Reals, 79 N. Y. 202.

10. The circumstance that a security has become or is invalid and cannot be enforced, either at law or equity, does not entitle a party to come into a court of equity to have it decreed to be surrendered or extinguished without paying the amount equitably due thereon.—*Ct. of App., June,* 1880. Tuthill *v.* Morris, 81 N. Y. 94.

11. — of deed. In an action by plaintiff as purchaser of certain real estate on sale under execution, against defendant P., to have a deed to defendant A. canceled as forged, and to have certain other conveyances and mortgages canceled as fraudulent, it appeared that a portion of the lands was sold on execution on a judgment against defendant A. The purchasers, after the time for redemption had expired, assigned the certificate of sale to A., who received the sheriff's deed. Said judgment was prior to that recovered by plaintiffs against P., but his cause of action accrued and the action was commenced before the incurring of the obligation upon which the prior judgment was rendered. *Held,* that plaintiff was not precluded from alleging the invalidity of the title of A.; that his rights were paramount to those acquired by her under the sale and sheriff's deed.—*Ct. of App., Sept.,* 1880. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474.

12. — of mortgage. In February, 1870, one S. and others filed in the insurance department, a declaration for the organization of the "Peabody Insurance Company," with the certificate of the attorney-general annexed. S. subscribed for seventy shares of the stock, and gave therefor three mortgages upon real estate owned by him, which were subsequently assigned by the company to the superintendent of the insurance department, accompanied by a certificate signed by S., to the effect that there was due and to become due thereon the principal sum, with interest, and that there was no legal or equitable defence thereto. The Peabody company being unable to raise the amount required by law to authorize it to commence business, consolidated with the Farmers' and Mechanics' company, all the stockholders consenting thereto; one of the plaintiffs, the administrator of S., signing the consent for the stock held by him. Thereafter the mortgages were assigned by the superintendent of the insurance department to the Farmers' and Mechanics' company, and thereafter, by various mesne conveyances, they came into the hands of the defendant. In a action by the plaintiffs, the heirs of S., to hav the mortgages canceled on the ground of th failure of the consideration upon which the were given—*Held,* that they were founded upo a valuable consideration, and that there ha been no failure thereof.—*Supreme Ct.,* (*2d Dept. Dec.,* 1880. Schenck *v.* O'Neill, 23 Hun 209.

13. — of insurance policy. In an actic to procure the cancellation of a policy of life i surance, the complaint alleged that the polic was obtained by fraud and conspiracy betwee plaintiff's agent and the insured; that the pr mium was not paid in cash, as required by th policy, but by the note of the insured, and w delivered to the latter when he was sick, c which sickness the insured died. The complai also averred that plaintiff feared the holder c the policy would commence an action thereo and by collusion with said agent obtain an ap pearance on its behalf, and from failure answer, or to duly defend the action, obtain judgment without plaintiff's knowledge, th preventing plaintiff from presenting its defenc or that defendants would delay bringing an a tion until the evidence of fraud and conspirac was lost. The referee found that there was r fraud; the other facts were found substantiall as alleged in the complaint. *Held,* that the con plaint was properly dismissed. Globe Mu Life Ins. Co. *v.* Reals, *supra.*

For further decisions as to the *Jurisdiction* c and *Procedure* in, courts of equity, see ACCOUN ING; CLOUD ON TITLE; CREDITOR'S SUI DISCOVERY; FRAUD; FRAUDULENT CONVE ANCES; INJUNCTION; INTERPLEADER; R CEIVERS; SPECIFIC PERFORMANCE; TRUSTS

EQUITY OF REDEMPTION.

MORTGAGES, VII.

ERROR.

1. **Stay of judgment.** While, in capital cases, a stay of judgment, pending error, should be granted, where the exceptions are not clearly frivolous, yet in cases not capital it should not be granted, unless, in the opinion of the judge to whom the application is made, there is reasonable ground to believe that error has been committed.—*Alb. Oyer & T., Feb.*, 1881. People *v.* O'Reilly, 9 Abb. N. Cas. 77.

2. The mere possibility of a reversal on a technical ground should not, in such cases, suspend the punishment, when the prisoner's moral guilt is clear. *Ib.*

3. **What is brought up for review.** The office of the writ of error in a criminal action is to bring up exceptions taken on the trial; it does not bring up for review questions presented upon a motion in arrest of judgment, as they form no part of the proceedings on trial.—*Ct. of App., Oct.*, 1880. Pontius *v.* People, 82 N. Y. 339; *affirming* 21 Hun 382.

4. **What errors are ground for reversal.** During the trial of the plaintiff in error upon an indictment, charging him with a conspiracy to defraud the city, the judge called one of the jurors and the counsel for the prosecution and the defence into a room, and after showing to the juror an anonymous letter, which stated that the juror had been in the habit of playing cards with the sons of the plaintiff in error, asked him if he knew who wrote it, to which the juror replied that he did not. The judge then said that it was "very embarrassing and unpleasant, and, toward a juror, monstrously unjust, and a serious imputation." The plaintiff in error was not present, and the judge said, when the counsel for the plaintiff in error attempted to speak, that "he did not expect counsel to make any observations." There was no proof that the facts stated in the letter were true, nor was the juror asked if they were true. *Held*, that the conviction should he reversed, as the tendency of this action, by the judge, was to dominate the juror's free will, and terrify him into a verdict for the people.—*Supreme Ct.*, (*2d Dept.*,) *Sept.*, 1880. People, ex rel. Flaherty, *v.* Neilson, 22 Hun 1.

5. **What errors will be disregarded.** Where an indictment contains several counts, some of which are good, the fact that some of the counts are bad does not make a conviction erroneous where the verdict is general.—*Ct. of App., Jan.*, 1881. Hope *v.* People, 83 N. Y. 418.

6. **Harmless or non-prejudicial errors.** Mere irregularities in the drawing of grand and petit jurors do not furnish a ground for reversing a conviction, unless it appears that they operated to the injury or prejudice of the prisoner.—*Ct. of App., April*, 1880. Cox *v.* People, 80 N. Y. 500, 512.

7. **Review of discretionary action.** Where a cross-examination relates to matters pertinent to the issue, or which tend to discredit a witness, this court cannot interfere, save where there has been an abuse of discretion.—*Ct. of App., Jan.*, 1881. People, ex rel. Phelps, *v.* Oyer and Terminer, 83 N. Y. 436.

8. **Instances.** Where, upon the trial of alleged accessories, after the record of conviction of the principals had been given in evidence on the part of the prosecution, testimony was received under objection and exception, tending to show the commission of the crime by the principals—*Held*, that the question was simply as to the order of proof, which was in the discretion of the trial court.—*Ct. of App., March*, 1880. Levy *v.* People, 80 N. Y. 327.

9. The case against the prisoner was made up of circumstances, among them the acts of the principals, so proved, the character of which gave ground for inference of the prisoner's knowledge. *Held*, that in the reception of such testimony the court did not exceed a wise discretion. *Ib.*

10. A telegram was offered in evidence on the part of the people; the district attorney stated he expected to show that the prisoner was once employed where he would have had knowledge of the meaning of certain marks upon it, and that if he did not, by further testimony, connect the prisoner with it, he "would consent that the message be stricken out." The prisoner's counsel objected that he was not then connected with it, and to the taking of it, "on the promise to strike it out." The objection was overruled. *Held*, no error, that it was a mere question as to the order of proof and within the discretion of the court.—*Ct. of App., Jan.*, 1881. McCarney *v.* People, 83 N. Y. 408.

11. The omission of the court, on its own motion, to strike out this evidence upon failure of the prosecution to connect the prisoner with it was not error; it was for the prisoner to ask to have the evidence, if he so desired, stricken out, or to request the court to charge the jury to disregard it, and his omission to do so was a waiver of his right. *Ib.*

12. A witness for the prisoner was shown, on cross-examination, a copy of a telegram, and was asked if he received it. This was objected to, as having nothing to do with the trial and as immaterial. The objection was overruled. The telegram was not read or offered in evidence. *Held*, no error. *Ib.*

13. **Ordering new trial by court below.** As to whether a case is to be considered here as *res nova* under the provision of the act to enlarge the jurisdiction of the Courts of Sessions of the city and county of New York (Laws of 1855, ch. 337, § 3, as amended by Laws of 1858, ch. 330,) which authorizes this court in cases coming from the General Sessions to "order a new trial, if it shall be satisfied that the verdict against the prisoner was against the weight of evidence," &c., *quære.* Levy *v.* People, *supra.*

As to *Taking exceptions*, *Framing* the bill, the *Hearing*, &c., see, also, EXCEPTIONS.

For *Other methods* of review in criminal cases, see CERTIORARI; NEW TRIAL.

ESCAPE.

As to the powers and duties of officers in respect to *Arrests*, and *Custody* of persons arrested, see ARREST; EXECUTION, II.; IMPRISONMENT; PUNISHMENT; SHERIFFS.

ESCHEAT.

As to the *Disabilities of Aliens* to hold land, see ALIENS.

ESTATES.

Remainders. As to whether a remainder in a chattel may be created and given, by the donor's carving out a life estate for himself, and transferring the remainder without any intervention of a trustee, *quære.—Ct. of App., April,* 1880. Young *v.* Young, 80 N. Y. 422.

As to the *Separate estate* of a married woman, see HUSBAND AND WIFE, V.

As to *Trust estates;* and the rights of the *cestui que trust,* see TRUSTS, III.

ESTOPPEL.

I. GENERAL PRINCIPLES.
II. ESTOPPEL BY RECORD.
III. ESTOPPEL BY DEED.
IV. ESTOPPEL IN PAIS.

I. GENERAL PRINCIPLES.

1. **Estoppels in respect to corporations.** A party who has assumed to contract with a *de facto* corporation by its corporate name, cannot afterwards, in an action brought by it upon such contract, deny its legal existence.—*Supreme Ct., (4th Dept.,) Oct.,* 1880. Commercial Bank of Keokuk *v.* Pfeiffer, 22 Hun 327.

2. An interested party who contests the validity of a bequest to a voluntary unincorporated society, is not estopped from denying its incorporation by the fact that the testator, in his lifetime, had dealt with the association, and had conveyed land to it for a valuable consideration. —*Monroe Co. Surr. Ct., July,* 1880. Lutheran Reform Church *v.* Moak, 4 Redf. 513.

II. ESTOPPEL BY RECORD.

3. **What will raise an estoppel, generally.** When a party accepts the tests of the measure of damages insisted upon by the opposite party and makes proof in accordance therewith, the latter cannot insist that it is not the true measure.—*Ct. of App., Jan ,* 1881. Taylor *v.* Mayor, &c., of New York, 83 N. Y. 625.

4. **Estoppel by recitals in affidavits.** B. executed to N., without consideration, a bond and mortgage for $20,000, which defendant P. purchased for $16,000, upon the faith of an affidavit made by B. to the effect that the consideration expressed was the true consideration; B. afterward sold the mortgaged premises subject to the mortgage, which the purchaser assumed, and defendants sold and assigned the securities for their face. Plaintiffs, as judgment creditors of B., brought this action to reach the excess of the proceeds of sale, over the amount paid by P. for the securities, on the theory that the excess was held under an implied trust for B., and that P. was bound to account to him therefor. No question of usury was raised. *Held,* that the action was not maintainable; that B. was estopped by the statements in his affidavit from denying their truth; and that the effect of the estoppel was not limited to the mere purpose of protecting P. to the extent of the money advanced by him.—*Ct. of App., April,* 1880. Grissler *v.* Powers, 81 N. Y. 57.

5. **— by stipulations.** A stipulation that copies of letters might be produced with affidavit of mailing with the same effect as originals, and that the party would not controvert the contents of letters thus proved, does not preclude the party from showing that the letters were not received.—*Ct. of App., Dec.,* 1880. Lockwood *v.* Quackenbush, 83 N. Y. 607.

III. ESTOPPEL BY DEED.

6. **When a mortgage will operate as an estoppel.** When a mortgagor cannot set up the invalidity of a mortgage, as against one whom he has induced to purchase it, see Barnett *v.* Zacharias, 24 Hun 304; Schenck *v.* O'Neill, 23 Id. 209.

7. When a mortgagor is estopped from enforcing an agreement upon which the mortgage was given, as against an assignee thereof; and when one for whose benefit the mortgage was given is also estopped, see First Nat. Bank of Corry *v.* Siles, 22 Hun 339.

8. When one who has assumed the payment of a mortgage is estopped from disputing the amount due thereon, see Root *v.* Wright, 21 Hun 344.

9. **When it will not so operate.** The assignor of a mortgage is not estopped, by a guaranty of payment, from setting up the invalidity of the mortgage, where the assignee had knowledge of the facts which are relied upon to render it void.—*Buff. Superior Ct., Dec.,* 1879. Fellows *v.* Wallace, 8 Abb. N. Cas. 351.

10. Where, after giving a mortgage to secure a usurious loan, the mortgagor subsequently executes to the mortgagee, who still holds the mortgage, a general assignment of all his property in trust to pay his debts, and in an inventory of his property and debts, subsequently made thereunder, recognizes the mortgage as a valid lien, and the debt it was given to secure as a valid debt, he is not thereby estopped from setting up the defence of usury in an action brought to foreclose the mortgage, by the mortgagee or his assignee, where there is no proof that the latter took the assignment on the faith of such recognition.—*Supreme Ct., (3d Dept.,) Nov.,* 1880. Chapin *v.* Thompson, 23 Hun 12

IV. ESTOPPEL IN PAIS.

11. **How created, generally.** When a mistake which is not calculated to mislead will not work an estoppel, although it does affect the conduct of a party to his injury, see Howe Machine Co. *v.* Farrington, 82 N. Y. 121.

12. **How far the facts out of which the estoppel arises must be relied upon, or acted on.** Conduct of one party is an estoppel upon him only when it induces action in another, which cannot be withdrawn from without loss.—*Ct. of App., Sept.,* 1880. Waring *v.* Somborn, 82 N. Y. 604.

13. Before a party can be estopped by his statement from asserting the truth, it must ap-

pear that the one claiming the estoppel has acted or rested upon such statements, and that he will suffer loss if they are not conclusively held to be true.—*Ct. of App., Oct.,* 1880. Winegar *v.* Fowler, 82 N. Y. 315.

14. Plaintiff owned certain furniture, which he had let to B., and which was in a house occupied by her, and in her use and possession; she was indebted to defendant F., and to secure him gave him a mortgage on the furniture, representing that it belonged to her. Thereafter B., in the presence of plaintiff, asked F. for permission to remove the furniture. After the removal, F. asked plaintiff how the furniture fared in the removal, to which plaintiff replied, "Your furniture is all right," and at other conversations spoke of the furniture as B.'s, and when the mortgage was referred to, spoke of F.'s claims as all right, saying nothing of his ownership. F., after notice of plaintiff's title, took the furniture by virtue of his mortgage. In an action to recover possession—*Held,* that plaintiff was not estopped from claiming title, as it did not appear that F. parted with any value, gave up any right, or in any way altered his position, or acted in reliance upon anything said by plaintiff. *Ib.*

15. Agreements, written and oral. When a debtor who has agreed that certain articles shall be sold under an execution against him as personal property, is estopped from afterwards claiming that such articles were in fact a part of the realty, see Bennett *v.* Bagley, 22 Hun 408.

16. In an action of ejectment, plaintiff claimed under a sheriff's deed on sale on execution against T., who then owned the legal title. Summary proceedings were instituted to remove T. and defendant, which resulted in an adjudication in favor of the judgment creditor, and a warrant of removal was issued. T. thereupon took a lease of the premises, and defendant executed a contract, whereby he agreed not to take any advantage of the possession of T. under the lease, until the proceedings were reversed. The judgment creditor, in consequence, refrained from executing his warrant. *Held,* that while occupying this position the defendant, as well as T., was estopped from denying plaintiff's title.—*Ct. of App., Jan.,* 1880. Territt *v.* Cowenhoven, 79 N. Y. 400.

17. False representations. As a general rule, an estoppel, created by a false representation acted upon, is commensurate with the thing represented, and operates to put the party entitled to the benefit of the estoppel in the same position as if the thing represented was true.—*Ct. of App., April.,* 1880. Grissler *v.* Powers, 81 N. Y. 57, 61.

18. Silence. To sustain an estoppel because of omission to speak, there must be both the specific opportunity and the apparent duty to speak; the party maintaining silence must have known that some one was relying thereon, and was either acting or about to act as he would not have done had the truth been told.—*Ct. of App., Sept.,* 1880. Viele *v.* Judson, 82 N. Y. 32; *reversing* 15 Hun 328.

19. Where one has wrongfully taken the property of another and sold it, not as agent, but on his own account, mere silence upon the part of the owner does not confirm the sale; the confirmation must rest upon some consideration upholding it, or upon an estoppel. The owner, upon discovery of the wrong, is not required to make immediate efforts to regain his property, and silence, short of the time prescribed by the statute of limitations, will not bar his claim.—*Ct. of App., Oct.,* 1880. Hamlin *v.* Sears, 82 N. Y. 327.

As to the effect of a *Judgment in a prior action* as an estoppel, see JUDGMENT, III.

EVICTION.

EJECTMENT; LANDLORD AND TENANT; TENANTS IN COMMON; VENDOR AND PURCHASER.

EVIDENCE.

I. THE NECESSITY AND SUFFICIENCY OF EVIDENCE.

1. *General principles.*
2. *Judicial notice.*
3. *Presumptions.*
4. *Best and secondary evidence.*
5. *Hearsay evidence.*
6. *Res gestæ.*
7. *Burden of proof.*

II. PAROL EVIDENCE TO AFFECT WRITTEN INSTRUMENTS.

III. ADMISSIONS, DECLARATIONS, AND CONFESSIONS.

1. *In civil actions.*
2. *In criminal cases.*

IV DOCUMENTARY EVIDENCE.

1. *In general.*
2. *Judgments, records, and judicial proceedings.*
3. *Statutes, public documents, and official certificates.*
4. *Other documentary evidence.*

I. THE NECESSITY AND SUFFICIENCY OF EVIDENCE.

1. *General principles.*

1. Admissibility, generally. In an action against attorneys, to recover for the services of a stenographer, plaintiff offered to show that at the time of an interview between defendants and the stenographer, after the services were performed, in reference to the bill, defendants' client had escaped from prison and that the newspapers contained the announcement of his escape. The evidence was objected to and excluded. *Held,* no error.—*Ct. of App., June,* 1880. Bonynge *v.* Field, 81 N. Y. 159, 163.

2. Plaintiff offered to prove previous dealings of the stenographer with defendants when services were performed on like retainers, bills furnished to defendants, and payments made by them. *Held,* that the testimony was properly rejected. *Ib.*

3. As to the admissibility of evidence to prove the value of a chattel, see Armitage *v.* Mace, 46 Superior 550.

4. **Evidence which appeals to the senses.** In an action for injuries to the person, caused by negligence of defendant, it is not error to allow the plaintiff to exhibit to the jury the injured limb, *e g.*, an arm which has been crushed by machinery.—*Superior Ct., Nov.,* 1880. Jordan *v.* Bowen, 46 Superior 355.

5. **Photographs.** On the trial of the manager of a charitable institution for cruelty to a child, the prosecution offered in evidence photographs of the child, one taken before he went to the institution, and others taken about two weeks after he was taken away. It was proved that said photographs were accurate pictures as the child appeared at the times they were taken; also, that the child improved in condition after he was taken from the prisoner's custody and before the last photographs were taken. These were received under a general objection. *Held,* no error.—*Ct. of App., Jan.,* 1881. Cowley *v.* People, 83 N. Y. 464; *affirming* 21 Hun 415.

6. Photographic pictures, when shown to be correct resemblances of the person or thing represented, are competent as evidence. *Ib.*

2. *Judicial notice.*

7. **Of what the courts will take judicial notice.** The courts will take judicial notice of the general course of business in a community, including the universal practice of banks.—*Ct. of App., Jan.,* 1881. Merchants' Nat. Bank *v.* Hall, 83 N. Y. 338.

8. *It seems* that the court will take judicial notice of the nature of the business and the office of mercantile agencies.—*Ct. of App., Nov.,* 1880. Eaton, Cole, &c., Co. *v.* Avery, 83 N. Y. 31; *affirming* 18 Hun 44.

9. **What matters will not be judicially noticed.** The courts of this state will not take judicial notice of any laws of another state not according to the common law. Therefore—*Held,* that as it was not illegal at common law to make a bet or wager on the result of a horse-race, an agreement to drive a horse in a contest of speed for a wager or stakes, or for a purse, prize or premium in another state, was not *prima facie* illegal or against the policy of this state.—*Ct. of App., Sept.,* 1880. Harris *v.* White, 81 N. Y. 534.

10. The courts will not take judicial notice of the street numbers of dwelling-houses. People, ex rel. Gilmore *v.* Callahan, 23 Hun 581.

Nor of the values of foreign coins. Sanabria *v.* People, 24 Hun 270.

3. *Presumptions.*

11. **In favor of lawfulness of corporate acts.** In the absence of evidence to the contrary, a corporation, in increasing its stock, will be presumed to have acted in conformity with its corporate powers and its articles of association.—*Superior Ct., (Sp. T.,) June,* 1881. Williams *v.* Western Union Teleg. Co., 9 Abb. N. Cas. 437.

12. **As to laws of other states and countries.** In the absence of proof it will not be presumed that the law of marriage of another country is different from that of this state.—*Ct. of App., Sept.,* 1880. Hynes *v.* McDermott, 82 N. Y. 41; *affirming* 7 Daly 513.

13. As to whether the courts of a state, in the absence of proof and allegations to the contrary, are required to presume that the statute laws of another state are like those of their own state, *quære.*—*Ct. of App., Sept.,* 1880. Harris *v.* White, 81 N. Y. 532, 544.

Such a presumption will not be made of a statute imposing a penalty or forfeiture. *Ib.*

14. **As to jurisdiction of foreign courts.** In an action upon a judgment of a District Court of California, it appeared by the judgment-record that the defendant brought an action in that court and recovered a judgment, which was reversed by the Supreme Court and remitted to the District Court, with directions to allow a counter-claim; in pursuance of which direction, the judgment in question was rendered. It was objected that the record contained no notice of appeal, and so showed no jurisdiction in the Supreme Court. *Held,* untenable; that the Supreme Court having, under the constitution of California, general appellate jurisdiction of judgments of the District Courts, and having entertained and acted upon the appeal, jurisdiction by proper notice was to be presumed; also that the attorneys for the plaintiff in that action appeared in the appellate court.—*Ct. of App., March,* 1880 Pacific Pneumatic Gas Co. *v.* Wheelock, 80 N. Y. 278.

15. **As to national character of vessel.** One of the requests declined was that the presumption is, as the vessel sailed from an English port, she was an English vessel. *Held,* that the court properly refused so to charge. Hynes *v.* McDermott, *supra.*

16. **With respect to intent.** A person furnishing information to a mercantile agency as to his means and pecuniary responsibility, is to be presumed to have done so to enable the agency to communicate the information to persons interested, for their guidance in giving credit to him.—*Ct. of App., Nov.,* 1880. Eaton, Cole, &c., Co. *v.* Avery, 83 N. Y. 31.

17. **Relative to death.** As to the presumption of death arising from absence, unheard of, for seven years, see Keller *v.* Stuck, 4 Redf. 294.

18. **As to delivery of forged instrument.** In respect to a forged instrument there is no presumption of delivery at its date or at any particular time.—*Ct. of App., Sept.,* 1880. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 424.

4. *Best and secondary evidence.*

19. **Sufficiency of notice to produce best evidence.** When the pleadings give notice to a party to be prepared to produce a writing, if necessary to contradict the evidence of the opposite party, secondary evidence of the contents of the writing may be given by the latter without further notice.—*Ct. of App., April,* 1880. Lawson *v.* Bachman, 81 N. Y. 616.

20. **Effect of refusal or failure to produce.** The fact that a party declines to comply with a notice to produce, does not make the subsequent admission of a paper offered by such party, substantially differing in its terms from the one called for, although bearing on the same subject matter, error calling for a reversal. —*Superior Ct., Feb.,* 1880. Scott *v.* Sanford, 46 Superior 544.

21. The plaintiff notified the defendants to produce a letter written to them. Upon the trial the defendants offered to prove that they had delivered it to their assignee in bankruptcy, but did not show who he was, or where he resided, nor that they had made any effort to produce it, or even that they had notified the plaintiff that they had parted with it. *Held*, that it was proper to allow the plaintiff to give parol evidence of the contents of the letter.—*Supreme Ct., (1st Dept.,) Nov.*, 1880. Naugatuck Cutlery Co. *v.* Babcock 22 Hun 481.

5. *Hearsay evidence.*

22. What evidence is hearsay, and inadmissible. A letter from a person other than the accused, stating that the writer had committed the crime in question, is inadmissible as being hearsay. And verbal declarations of another person to the same effect are also inadmissible, where they amount to a mere narrative of past events, and are therefore not admissible as *res gestæ*.—*Supreme Ct., (4th Dept.,) Jan.*, 1881. Greenfield *v.* People, 23 Hun 454.

23. Upon the trial of an action on a life policy, a brother of the deceased was called by the plaintiff, and testified that he himself was subject to attacks of disease, during which he remained unconscious for half an hour, or thereabouts. He was then asked whether he knew from the statements of others what he did while thus unconscious. *Held*, that the evidence was inadmissible, as being merely hearsay.—*Supreme Ct., (3d Dept.,) Sept.*, 1880. Hagadorn *v.* Connecticut Mut. Life Ins. Co., 22 Hun 249.

6. *Res gestæ.*

24. In civil cases. As to what statements made by an agent of the party sought to be charged are admissible as a part of the *res gestæ*, see McGraw *v.* Tatham, 84 N. Y. 677.

25. What statements of a party are admissible as part of the *res gestæ*, see Sickles *v.* Richardson, 23 Hun 559.

26. In criminal cases. As to what declarations are inadmissible as a part of the *res gestæ*, on a trial for murder, see People *v.* Greenfield, 23 Hun 454. 467.

7. *Burden of proof.*

27. In action against carrier. In an action against a common carrier for loss of goods, alleged to have occurred by the negligence of the carrier, the burden of proof as to the delivery of the goods is on the plaintiff.—*Superior Ct., June*, 1880. Canfield *v.* Baltimore, &c., R. R. Co., 46 Superior 238.

28. — on insurance policy. In an action on an insurance policy, the answer admitted the issuing, but alleged, as a breach of the conditions of the policy, that the insured died in consequence of a violation of the laws of the state. *Held*, that the burden of proof was upon the defendant.—*Ct. of App., April*, 1881. Murray *v.* New York Life Ins. Co., 9 Abb. N. Cas. 309.

29. — between master and servant. An employer is bound to exercise due care and diligence in furnishing for the use of his employees fit and safe implements and machinery, but is not a guarantor of their safety; and in an action by an employee for alleged neglect to perform this duty, the *onus* is upon the plaintiff to show negligence.—*Ct. of App., Nov.*, 1880. Painton *v.* Northern Central R'y Co., 83 N. Y. 7.

30. — principal and agent. Where an agent or trustee has mingled his principal's property with his own, the burden of proof is on him, his creditors, and their representatives, to distinguish his own from the trust property.—*Ct. of App.*, 1880. Hooley *v.* Gieve, 9 Abb. N. Cas. 8.

II. Parol Evidence to affect Written Instruments.

31. Limits and exceptions to the rule excluding it. Parol proof of the relationship existing between the grantor and the grantee may be properly admitted to show that the requisite consideration existed to support the deed.—*Supreme Ct., (4th Dept.,) April*, 1881. Eysaman *v.* Eysaman, 24 Hun 430.

32. In an action by plaintiffs, as assignees of common carriers of the freight on a cargo of staves, shipped by defendants from T. to N. Y., plaintiffs, for the expressed purpose of proving ownership of the cause of action, offered in evidence the bill of lading, executed about six years before the trial, indorsed by the carrier to a bank as security for plaintiffs' accceptance and payment of an accompanying draft; also, with an indorsement thereon, signed by the bank and directed to plaintiffs, as follows: "Upon your acceptance of the draft, the bill of lading is placed in your custody to collect and apply the first proceeds in payment of the draft." This evidence was rejected. Plaintiffs also offered to prove by parol an acceptance which was rejected. *Held*, error; that the presumption from the possession of the draft was that plaintiffs bad complied with the condition precedent, *i. e.*, the acceptance of the draft; that, although plaintiffs could not be charged as acceptors without showing a written acceptance, yet, as defendants were not parties to the draft, or privies, and the fact of acceptance was collateral to the issues herein, it might be proved by parol.—*Ct. of App., Nov.*, 1880. Sprague *v.* Hosmer, 82 N. Y. 466.

33. Showing surrounding circumstances as proof of intent. Where a particular fund to accrue *in futuro* is designated in the instrument, and the language thereof is ambiguous, evidence of the surrounding circumstances may be resorted to for the purpose of determining whether the intention was that the payment should only be made out of the designated fund, or whether the direction to pay was intended to be absolute, and the fund was mentioned only as a means of reimbursement.—*Ct. of App., Sept.*, 1880. Brill *v.* Tuttle, 81 N. Y. 454.

34. Showing an independent or collateral agreement. The rule prohibiting the reception of parol evidence, varying or modifying a written agreement, does not apply to a collateral undertaking. Such fact is always open to inquiry, and may be proved by parol.—*Herkimer Co. Ct., April*, 1881. Lanphire *v.* Slaughter, 61 How. Pr. 36. See, also, Bates *v.* First Nat. Bank of Brockport, 23 Hun 420; Duparquet v. Knubel, 24 Id. 653.

35. Defendant D. executed to plaintiff an assignment under seal of a bond and mortgage, which contained a guaranty of payment of the

amount secured, in case of the failure of the mortgagors to pay. In an action to foreclose the mortgage, D. was sought to be charged with any deficiency. He alleged and offered to prove that at the time of the execution of the assignment, plaintiff, in consideration of being permitted to retain $300 out of the purchase money, and of the assignment to him of a policy of insurance upon a building on the premises, agreed by parol to keep the building insured until the mortgage became due, that she did not do this, and that the building was destroyed by fire. The evidence was objected to and excluded. *Held*, error; (1) that the rule excluding parol evidence varying or modifying written instruments did not apply, as the agreement sought to be proved was an independent collateral engagement upon a new consideration, which, if established, would not qualify or change the guaranty, but simply gave a right of action available as a counter-claim; (2) that the fact that the breach of this parol agreement was not in terms set up, as a counter-claim was not available here, as the facts were alleged, and no objection to the proof offered was made, upon the ground that the pleading was defective.—*Ct. of App.*, *June*, 1880. Van Brunt *v.* Day, 81 N. Y. 251; S. C., 8 Abb. N. Cas. 336.

36. Application of the rule to mortgages. Under the rule that oral evidence is admissible to show usury in a written security, a grantee of mortgaged premises may show the negotiations pursuant to which the mortgage was made, and the acts and declarations of the parties, made at the time of its execution, as part of the *res gestæ*.—*Buff. Superior Ct.*, *Dec.*, 1879. Fellows *v.* Wallace, 8 Abb. N. Cas. 351.

37. —to negotiable instruments. In this action, brought against the maker and accommodation indorsers of a promissory note, dated January 28th, 1879, and payable one day after date, the indorsers were allowed, against the plaintiff's objection and exception, to prove that they indorsed the note under a verbal agreement with the plaintiff, to whom the note was to be delivered, that they should have until the first of the following June to pay it. *Held*, that the evidence was directly inconsistent with, and affected the terms of the note, and that the court erred in admitting it.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. Willse *v.* Whitaker, 22 Hun 242.

38. As to the admissibility of parol evidence to vary the terms of an indorsement of negotiable paper, see Higgins *v.* Barrowcliffe, 46 Superior 540.

39. —to wills. It is entirely proper to resort to extrinsic proof to explain a latent ambiguity as to the subject of the devise, and to make clear the intention of the testatrix.—*Supreme Ct.*, (*Sp. T.*,) *Dec.*, 1880. Peters *v.* Porter, 60 How. Pr. 422. See, also, Gallup *v.* Wright, 61 How. Pr. 286.

40. In an action to recover for services rendered to defendants' testator by the wife of plaintiff, who was the adopted daughter of the testator, the defence was that the services were rendered under an agreement that they were to be compensated for by gifts to plaintiff and wife from the testator in his lifetime, and by legacies in his will; after providing for the payment of debts, a legacy was given to the wife by the will, and one to her daughter, but of less amount than the debt. Defendants offered to prove declarations of the testator, made at the time and to the person who drew the will, that he had made such an agreement, and that said legacies were intended as a payment for the services. *Held*, that the evidence was properly excluded, that a legacy implies a bounty, not a payment, and to permit extrinsic evidence of the declarations of the testator thus to change the import of the donative words would be to contradict by oral evidence the legal effect of the instrument, and would violate the policy of the statute of wills; that the legal presumption that a legacy from a debtor to a creditor of a sum as great or greater than the amount of the debt was intended as a satisfaction did not apply; first, as the legacies are given "after payment of debts;" second, they were of less amount than the debt; third, the debt was unliquidated; fourth, the legacies are not given to the creditor, but to third persons.—*Ct. of App.*, *Sept.*, 1880. Reynolds *v.* Robinson, 82 N. Y. 103.

41. Parol evidence of the intention of a testator is not admissible to fortify a legal presumption raised against the apparent intention, or to create a presumption contrary to the apparent intention where no such presumption is raised by law. *Ib.*

III. Admissions, Declarations and Confessions.

1. *In civil actions.*

42. Declarations of persons having joint interest. One joint debtor cannot bind another by his statements or admissions, unless he is the agent or in some way the representative of the other, and authorized to speak for him; the mere fact of joint liability does not give the authority.—*Ct. of App.*, *June*, 1880. Wallis *v.* Randall, 81 N. Y. 164, 170.

43. —of husband or wife. As to the admissibility of admissions of the husband respecting purchases made with the wife's money, see Lucky *v.* Odell, 46 Superior 547.

44. —of parties to negotiable instruments. Upon the cross-examination of the payee of the note sued on, who was called by plaintiff to prove that the note was an accommodation one, evidence was received under objection and exception that he had negotiated other notes of the defendant, which he stated at the time to be business paper. *Held*, no error; also, that evidence of the transfer of other similar notes, to which were attached written declarations of defendant that they were business paper, was competent.—*Ct. of App.*, *June*, 1880. Bayliss *v.* Cockcroft, 81 N. Y. 363.

45. After the receipt in evidence of written certificates signed by defendant and the payee, attached to other similar paper, to the effect that they were business paper, plaintiff was allowed to prove, under objection and exception, statements of the payee when transferring the paper to the same effect as the certificates. *Held*, that if erroneous, the error could have done no harm, as it was but a repetition, in a feebler way, of the declarations furnished by defendant to the payee, to be used by him. *Ib.*

46. —of personal representatives. The declarations of a sole administrator or executor, made, when not acting in the discharge of his duties, to third parties having no interest in or connection with a claim belonging to the

estate, are not evidence against him in an action brought by him in his representative capacity upon such claim.—*Ct. of App., Jan.,* 1880. Church *v.* Howard, 79 N. Y. 415.

47. In an action by an administrator, upon a promissory note, signed by H. as surety, the defence was that the note had been altered without defendant's consent. A witness called for the defence was asked to state a conversation between her and plaintiff, after the death of the intestate, in relation to the note. This was objected to on the ground that the declarations of the administrator were not evidence against the payee of the note. The objection was overruled, and the witness answered, in substance, that plaintiff stated he erased a clause in the note, at the request of the deceased. Plaintiff was not, at the time of the conversation, doing any business in connection with the estate, and the witness had no connection with or interest in the note. *Held,* error; and that the objection was sufficient to present the point as to the competency of such admissions. *Ib.*

48. **— of principal or agent.** The declarations and admissions of an agent are not admissible as against his principal, unless they were connected with or made in regard to a transaction then (at the time of the making of such declarations and admissions) being conducted by him for his principal.—*Supreme Ct., (3d Dept.,) Nov.,* 1880. Johnston *v.* Thompson, 23 Hun 90.

49. **— of testator.** The declarations of a testator cannot be resorted to to contradict or explain the intentions expressed in his will.—*Ct. of App., Jan.,* 1881. Williams *v.* Freeman, 83 N. Y. 561.

50. **Admissions and declarations respecting title to, or possession of real property.** While oral admissions constitute a dangerous species of evidence, still, when clearly and unmistakably established, they become most satisfactory. While ownership of property in a person is presumed to continue until a change of title shall be proven, such a change may be established as well by an admission by the owner, as by a contract. An admission or declaration, having reference to a precedent condition of things, is also an admission of an intervening fact, essential to the truth of such admission. — *Westchester Co. Surr. Ct., March,* 1879. Wright *v.* Wright, 4 Redf. 345.

51. When declarations of a party, hostile to, but made before his acquiring his interests in the property, are admissible, stated.—*Supreme Ct (3d Dept.,) Nov.,* 1880. Dana *v.* Wright, 23 Hun 29.

52. **Instances.** In an action to recover the purchase price of land, plaintiff offered in evidence a letter written to him by P., who made the purchase in question jointly with defendant, and who was named as defendant, but was not served with process, written several years after the contract in question, and containing statements tending to sustain plaintiff's claim. This was objected to and excluded, the court holding that it could only be used for the purpose of contradicting and discrediting P. as a witness. *Held,* no error; that defendant could not be affected by such declarations of P., as they were not partners, and P. was in no sense agent of defendant.—*Ct. of App., June,* 1880. Wallis *v.* Randall, 81 N. Y. 164, 170.

53. In an action, brought by plaintiff, as the widow and the grantee of the heirs-at-law of one H., to recover a lot of land owned by him, defendant claimed that he had removed from New Jersey, and come to live upon the lot, and had improved and paid the taxes upon it, under a parol promise of the said H. to convey the lot to him if he would do so. Upon the trial defendant was allowed, against plaintiff's objection and exception, to prove declarations made by H. to the effect that he was going to give the lot to the defendant, and others to the effect that he had done so. *Held,* that as the plaintiff was in privity with the party making the declarations, they were properly admitted against her.—*Supreme Ct., (4th Dept.,) Oct.,* 1880. Rose *v.* Adams, 22 Hun 389.

54. Subsequently plaintiff gave evidence of declarations made by defendant to the effect that he had agreed, by parol, to buy the lot of H. for $1100, and that he had paid part, but not all, of the purchase price. Thereafter defendant was allowed, against plaintiff's objection and exception, to prove declarations of H. to the effect that he had borrowed money of defendant or was owing money to him. *Held,* that there was no identity of interest between plaintiff and H., the deceased, as to the personal estate, and that the declarations of the latter that he, H., was owing money to the defendant were improperly admitted, being immaterial, and mere hearsay. *Ib.*

55. **— of personal property.** The title of the assignee of a non-negotiable promissory note cannot be affected by declarations of the assignor, made after the assignment.—*Ct. of App., June,* 1880. Van Gelder *v.* Van Gelder, 81 N. Y. 625.

56. Plaintiffs, who were bankers, loaned to B. Bros. & H. $10,000, upon the specific pledge of a quantity of whiskey; this loan was paid in full. Prior and subsequent to this loan, plaintiffs made other advances to said firm to a large amount. The whiskey was levied on by B., defendant's testator, then sheriff, under attachments against M. On the trial of an action to recover possession of the whiskey, defendants offered to prove admissions of one of the firm of B. Bros. & H., to the effect that the whiskey was the property of M.; this evidence was excluded. *Held,* error, that plaintiffs had no lien or claim upon the property, but B. Bros. & H. were entitled thereto, and the admissions were competent as against them.—*Ct. of App., Jan.,* 1881. Duncan *v.* Brennan, 83 N. Y. 487.

57. **Effect of admissions as evidence.** The effect of the admissions of a party as evidence is not destroyed by proof, if otherwise uncontradicted, contrary to the admissions, but they raise a question of fact for a jury.—*Ct. of App., Oct.,* 1880. Greenwood *v.* Schumacker, 82 N. Y. 614.

2. *In criminal cases.*

58. **Confessions.** Where the confession of a prisoner to an officer is voluntarily made, evidence thereof cannot be rejected, because of the fact that the officer held the prisoner in custody at the time upon an invalid process, or without any process or lawful right.—*Ct. of App., April,* 1880. Balbo *v.* People, 80 N. Y. 484. S. P., Cox *v.* People, Id. 500, 515.

59. The prisoner was charged with killing his wife; the murder was committed in the city of New York; the prisoner, on the night of the

murder, left that city and went to Wheeling, W. Va., where he was arrested, without a warrant, by police officers who had followed him. While on the way to, and before reaching this state, he made a confession to one of the officers having him in charge, to the effect that he killed his wife. It was shown that no promises were held out, or threats used to induce the confession. *Held*, that it was properly received in evidence; that conceding the fact that the prisoner was at the time under illegal arrest, this did not render it inadmissible. Balbo *v.* People, *supra.*

60. Dying declarations have no weight as testimony in civil cases unless made under oath, whereas in murder trials the words spoken by the victim before expiring, carry conviction with them.—*Supreme Ct., (Monroe Sp. T.,) May,* 1881. Waldele *v.* New York Central, &c., R. R. Co., 61 How. Pr. 350.

IV. Documentary Evidence.

1. *In general.*

61. Preliminary proofs. Where plaintiff's books of account have been used in evidence by both parties for several days, and an expert has, by stipulation, made summaries of the entries therein, which were regarded as evidence for the defendant, it is too late for the defendant to object to the admission of said books, on the ground that the proper preliminary proof to justify their reception, as original evidence, has not been given.—*Superior Ct., Dec.,* 1880. Whitman *v.* Horton, 46 Superior 531.

62. Books of account in which the bookkeeper has made the entries upon information from other persons or from other books, cannot be admitted in evidence merely upon his testimony as to their general accuracy. *Ib.*

63. Ancient instruments. Upon the trial of an action of ejectment, two leases were produced on behalf of the plaintiff, one dated in 1808 and the other in 1815. A witness, called by the plaintiff, gave evidence tending to show that the witnesses to the leases were dead; that, from an inspection of many early leases of the same character, he had become familiar with their signatures and thought them to be genuine; that the lessor was dead; that he had seen him write, and believed his signature to be genuine. An objection to the admission of the leases, made by the defendant, on the ground that there was no proof of their execution or delivery, was overruled. *Held*, error; that there was no such proof of possession under, or as to the custody of the leases, as to authorize their admission in evidence as ancient records.—*Supreme Ct., (3d Dept.,) Jan.,* 1881. Martin *v.* Rector, 24 Hun 27.

2. *Judgments, records and judicial proceedings.*

64. Pleadings. In an action to recover damages for an alleged conspiracyto break up the business of a firm, by means of a levy on the interest of one partner on execution on a judgment confessed by him, defendants proved that prior to the levy under the execution the property of the firm had been seized under an attachment, and the attachment was given in evidence. Plaintiff was allowed, under objection and exception, to give in evidence the answer in the attachment suit. *Held*, error.—*Ct. of App., June,* 1880. Neudecker *v.* Kohlberg, 81 N. Y. 296, 304.

65. Orders, and papers in suits. In an action against legatees under the provision of 2 Rev. Stat. 451, § 26, authorizing actions by the creditors of a deceased person to recover the value of assets received by his legatees, the complaint alleged a liability of B., the testator, for breach of a warranty against incumbrances contained in a deed. To establish the liability plaintiff offered in evidence the papers and an interlocutory order in an action brought by him against B. in his lifetime. The order was made upon a trial at Special Term on the report of a referee who had been directed to take proof of the facts, to take the accounts, and to report with his opinion. The opinion was that plaintiff was entitled to the relief demanded and to a judgment for a specified sum. The order confirmed the report in part, and after stating the principles which should govern the accounting, directed that it be referred back to report what amount, if any, under those principles, should be awarded to plaintiff. The order concluded thus: "Enter the preceding order as of 15th March, 1869, without prejudice to either party." Before further steps were taken in that action B. died. *Held*, that the order was not conclusive as to the liability of B., nor was it competent as evidence herein.—*Ct. of App., Nov.,* 1880. Webb *v.* Buckelew, 82 N. Y. 555.

66. Testimony given on former trial. The trial of an action is concluded when the case is closed and submitted to the jury; and section 992—providing that for the purpose of article III. of title 1 of chapter 10, a trial by a jury is regarded as continuing until the verdict is rendered—is an expression of legislative construction that for all other purposes the trial is closed when the case is submitted.—*Com. Pleas, (Gen. T.,) June,* 1881. Lawson *v.* Jones, 1 Civ. Pro. 247.

67. Accordingly, where, on the former trial, the jury disagreed; and at a second trial, the plaintiff sought, under section 830 of the code, to read his testimony relating to personal transactioos with the original defendant, since deceased, and it was objected that, as the jury had disagreed, there had been no former trial—*Held*, that notwithstanding the disagreement of the jury, there had been a trial within the provisions of section 830. *Ib.*

68. A party who has been examined in the first trial, and who is rendered incompetent by the death of his adversary before the second trial, may have his testimony, given in such former trial, read at any subsequent trial; and the statute does not require that the testimony of the deceased party should be first offered in evidence. *Ib.*

69. Such testimony of the surviving party may be read in evidence by the stenographer who took it down at the former trial, from his notes, and it need not be in the form of a deposition reduced to writing and subscribed by the party. *Ib.* *Consult* Witnesses, II.

70. —on examination before trial. In an action to recover damages resulting from alleged fraudulent representations made by defendant to plaintiff, each party was, upon the application of his adversary, examined as a witness before the trial. Before the trial the defendant died, and the action was continued against his executors. *Held*, that upon the trial,

plaintiff was entitled to introduce in evidence his own examination, taken at the instance of the defendant, and that the same was not rendered inadmissible by Code of Civ. Pro., § 829.—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Rice *v.* Motley, 24 Hun 143.

71. **Records** kept at the police station and hospital, showing injuries received by plaintiff from an accident, are not admissible in evidence against him in an action for such injuries, it not appearing that the entries therein were made by persons having knowledge of the facts, or from statements of the plaintiff.—*Superior Ct.*, *Dec.*, 1880. Hoffman *v.* New York Central, &c., R. R. Co, 46 Superior 526.

72. Where a certificate of the sale of real estate by a sheriff has been duly filed and recorded by the proper county clerk, as required by Laws of 1857, ch. 60, such record or a certified copy thereof is evidence of the facts therein contained in all courts and places the same as if the original record were produced, even though the original certificate was not acknowledged by the sheriff, and though no copy thereof was filed in the office of the register of the said county, in those counties in which such an office exists.—*Supreme Ct.*, (*1st Dept.*,) *May*, 1880. Clute *v.* Emmerich, 21 Hun 122.

3. *Statutes, public documents and official certificates.*

73. **Statutes.** To prove the constitution of California, plaintiff produced a book purporting to be the statutes of that state, published by the state printer. A member of the bar of California testified that the person named was the state printer; that the volume was the received official publication of the statutes and the constitution; that it was recognized by the bar, and was the only record the court had. *Held*, that the book was sufficiently proved to authorize its reception as evidence.—*Ct. of App.*, *March*, 1880. Pacific Pneumatic Gas Co. *v.* Wheelock, 80 N. Y. 278.

74. **Municipal ordinances.** Upon the trial of an action for negligence the plaintiff was allowed, against the defendant's objection and exception, to introduce in evidence an ordinance of the city, making it unlawful for a team to stand in the street without a person in charge or without being secured to a tying-post. *Held*, no error.—*Supreme Ct.*, (*2d Dept.*,) *Dec.*, 1880. Knupfle *v.* Knickerbocker Ice Co., 23 Hun 159.

75. **Certified copies of public records.** Under the provisions of the act of 1876, (ch. 299,) to enable the records of the signal service department to be received in evidence, where the officer in charge produces a book containing a copy of the record, attested by his signature, and he verifies its correctness as a witness, this is a sufficient certification "under oath" to authorize the reception of the copy as evidence.—*Ct. of App.*, *April*, 1880. Schile *v.* Brokhahus, 80 N. Y. 614.

4. *Other documentary evidence.*

76. **Entries in corporate books.** When entries in books of a corporation are competent against the officers, see First Nat. Bank of Whitehall *v.* Tisdale, 84 N. Y. 655.

77. **Maps.** For the purpose of proving title in the state to a bridge over the Erie canal, the state map, showing the lines of the state lands, was introduced. *Held*, that this was sufficient *prima facie* to show title in the state. (Laws of 1837, ch. 451, § 5.)—*Ct. of App.*, *April*, 1880. Carpenter *v.* City of Cohoes, 81 N. Y. 21, 25.

For rules of evidence particularly applicable to the several distinct *Causes of action, and remedies* having recognized names, see their titles; also the titles of the various legal instruments.

As to *Putting in evidence* on the trial, see TRIAL, V., VIII.

As to the granting of new trials, for *Error in receiving, rejecting, or disregarding* evidence, or for *Newly-discovered evidence*, see NEW TRIAL, I.

For rules governing the *Examination of witnesses*, see WITNESSES, IV.

EXAMINATION OF PARTY BEFORE TRIAL.

DEPOSITIONS, II.

EXCEPTIONS.

1. **Grounds of exception.** The mere proof of the execution of a paper which is not received in evidence furnishes no ground for an exception.—*Ct. of App.*, *Sept.*, 1880. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474.

2. **How exceptions should be taken.** The attention of the court must be called to the precise point intended by an exception, otherwise it will not avail.—*Ct. of App.*, *April*, 1880. Schile *v.* Brokhahus, 80 N. Y. 614.

3. An exception to the overruling of an objection to evidence, where the objection was made after the evidence has been received, is not available.—*Ct. of App.*, *Oct.*, 1880. Pontius *v.* People, 82 N. Y. 339; *affirming* 21 Hun 328.

4. It is not essential, in an exception to a portion of a charge, to repeat the language excepted to, although this is strictly the more accurate practice; it is sufficient if the portion objected to is pointed out with such accuracy that there can be no misapprehension as to the application of the exception.—*Ct. of App.*, *Dec.*, 1879. People, ex rel. Dailey, *v.* Livingston, 79 N. Y. 279.

5. **Instances.** After the motion to dismiss the complaint was denied, defendants not having requested that any question of fact should be submitted to the jury, the court directed a verdict for plaintiff. *Held*, that an exception to this direction was not available; that defendants should have asked to go to the jury upon the facts if they desired it.—*Ct. of App.*, *Nov.*, 1880 Ormes *v.* Dauchy, 82 N. Y. 443; *affirming* 45 Superior 85.

6. At the close of the charge of the court on the trial, defendant's counsel excepted to the court's "statement to the jury of the evidence or the supposed evidence connected with the accident," on the ground that it was "stated too strongly." *Held*, that the exception was not sufficient to bring up any question for review.—*Ct. of App.*, *Jan.*, 1881. Minick *v.* City of Troy, 83 N. Y. 514; *affirming* 19 Hun 253.

7. There was no controverted question of fact. The court took a verdict for the plaintiff, reserved the case for further consideration and then rendered judgment for defendant. This was done without objection; there was an exception to the judgment, but none to the mode in which it was reached. *Held*, that there was no exception bringing the error, if any, to the notice of this court.—*Ct. of App., March*, 1881. Develin *v.* Cooper, 84 N. Y. 410.

8. **General exception.** Where an action for injury to the person has been brought by a minor, who becomes of age before the trial, a general exception to the proposition in the judge's charge, that the plaintiff, if entitled to recover, is entitled to compensation for the time during which he has been unable to labor, presents no grounds for reversal.—*Superior Ct., Nov.*, 1880. Jordan *v.* Bowen, 46 Superior 355.

9. **Ordering exceptions to be heard in the first instance at General Term.** It is not an irregularity for the trial judge at the same time that he denies defendant's motion for a new trial on the minutes, to order the exceptions to be heard in the first instance at General Term, there being but one motion, viz., for a new trial.—*Superior Ct., Nov.*, 1880. Garner *v.* Mangam, 46 Superior 365.

For further decisions respecting the *necessity, sufficiency* and *manner of taking* exceptions, see APPEAL, 100, 101; TRIAL, V.

EXCISE.

LIQUOR-SELLING.

EXECUTION.

I. EXECUTIONS AGAINST PROPERTY.
II. EXECUTIONS AGAINST THE PERSON.
III. PAYMENT. SATISFACTION. DISCHARGE.
IV. RELIEF AGAINST EXECUTIONS.
V. PROCEEDINGS SUPPLEMENTARY TO EXECUTION.

I. EXECUTIONS AGAINST PROPERTY.

1. **Leave to issue** execution on a judgment should be granted at any time within twenty years after the docketing of the judgment, where uncontradicted proof shows that it has not been paid.—*Oneida Co. Ct., Jan.*, 1881. Kincaid *v.* Richardson, 9 Abb. N. Cas. 315.

2. The doctrine of the reluctance of courts to enforce stale demands, is merged in the statute of limitation, which now furnishes the rule by which courts act. *Ib.*

3. As to the powers and duties of the surrogate with regard to granting leave to issue execution on a judgment against an executor or administrator; the necessity of an accounting prior to such issue, and of an order of the surrogate that the execution issue; and the requisites of the petition for leave to issue execution, see Melcher *v.* Fisk, 4 Redf. 22; Keyser *v.* Kelly, Id. 157; Matter of Nichols, Id. 288; Freeman *v.* Nelson, Id. 374; Glacius *v.* Fogel, Id. 516.

4. **What property may be reached.** A seat in the New York Stock Exchange is property that may be applied toward satisfaction of a judgment against its owner.—*Com. Pleas, March*, 1881. Grocers' Bank *v.* Murphy, 60 How. Pr. 426.

5. Bonds of a corporation cannot be levied upon until they have been delivered.—*Supreme Ct., (1st Dept.,) Jan.*, 1881. Sickles *v.* Richardson, 23 Hun 559.

6. **Effect of the levy.** The rights acquired by the plaintiff by the levy of an execution are subject to be divested by any subsequent act of the court in setting aside the judgment or execution.—*Supreme Ct., (3d Dept.,) Jan.*, 1881. May *v.* Cooper, 24 Hun 7.

7. **Validity of the sale, and who may contest it.** As to who may not raise the objection that an execution sale of personal property was made in bulk instead of in parcels, see Bennett *v.* Bagley, 22 Hun 408.

8. **The sheriff's deed.** That the sheriff's deed is presumptive evidence that the sheriff had performed his duty in giving the notices required by law, see Clute *v* Emmerich, 21 Hun 122.

9. **Rights of the purchaser.** Where the purchaser of land at execution sale attempts to gain possession of the premises sold by instituting summary proceedings against persons in possession other than the judgment debtor, the case is a proper one for a writ of prohibition.—*Supreme Ct., (1st Dept.,) Nov.*, 1880. People, ex rel. Higgins, *v.* McAdam, 60 How. Pr. 139.

10. Where a debtor has made a fraudulent conveyance of his real estate, a subsequent judgment creditor may proceed to sell under his execution, and the purchaser has the right to impeach the conveyance upon a reference as to surplus moneys in foreclosure; he is not bound to bring ejectment, or an action to set aside the conveyance.—*Ct. of App., Dec.*, 1879. Bergen *v.* Carman, 79 N. Y. 146.

11. A purchaser of lands sold on execution may waive any defect in an attempted redemption; and an acceptance of the money tendered for that purpose is such waiver, and a subrogation of the person paying it to his right to a deed.—*Ct. of App., Sept.*, 1880. Matter of Eleventh Avenue, 81 N. Y. 436, 452.

12. **Redemption.** A purchaser of lands at a sheriff's sale, under execution, whether he be the judgment creditor or a stranger, is legally entitled to his deed at the end of the fifteen months, unless a valid redemption has been made; he cannot be deprived of the benefit of his purchase, against his will, by the mere deposit with the sheriff of the amount of his bid, by a person not entitled to redeem. *Ib.*

13. An assignee of a judgment creditor on applying to redeem premises of the debtor, which had been sold under a prior judgment, presented to the sheriff what purported to be a certified copy of the docket, except that neither the name of the clerk nor his official title appeared in it, nor was it signed by him, or any one in his behalf, although the official seal was impressed upon it. *Held*, that it was not a certified copy of the docket, and was insufficient to enable the assignee to redeem from the prior sale.—*Supreme Ct., (3d Dept.,) May*, 1881. Brackett *v.* Miller, 24 Hun 560.

II. EXECUTION AGAINST THE PERSON.

14. **In what actions issued.** The rule that an execution against the person follows the judgment applies solely to those cases where

the right to issue an execution against the person results from the nature of the action, and follows from the fact of a judgment having been obtained, and does not depend upon any previous proceeding in the action—to cases where the gist of the action is a tort, and where, if judgment is recovered, an execution against the person may be issued as a matter of course.—*Com. Pleas, (Sp. T.,) Aug.*, 1881. Whitman *v.* James, 1 Civ. Pro. 235.

15. In an action to recover damages for a conversion of personal property, the costs exceeded the verdict recovered by plaintiff, and a judgment for such excess was entered in favor of defendant. *Held*, that as the judgment was recovered in an action for a tort, plaintiff could be imprisoned under an execution against his person, issued thereon.—*Supreme Ct., (2d Dept.,) May*, 1880. Philbrook *v.* Kellogg, 21 Hun 238.

16. Necessity of previous arrest on mesne process. Under the Code of Procedure a warrant must have been issued in the first instance in every case, to authorize an execution against the person. As section 16 of the old code is still unrepealed and operative, the only change made by the Code of Civil Procedure being that every action must be begun by summons, and the substitution of orders of arrest for warrants of arrest, it would *seem* that the practice would be the same under the law as it now stands.—*Com. Pleas, (Gen. T.,) May*, 1881. Glacius *v.* Moldtz, 61 How. Pr. 62.

17. Where, in an action on contract, an order of arrest was granted against one of the two defendants, upon facts extrinsic to the cause of action set forth in the complaint, and the order of arrest was executed against such defendant, and remained unvacated, and judgment subsequently recovered against both defendants, and execution issued against the property of both and returned unsatisfied, and execution against the person of that defendant against whom the order of arrest had been granted was then issued—*Held*, that such execution against the person was valid, notwithstanding the order of arrest was against only one of the defendants, the grounds of arrest being extrinsic to the cause of action, and such execution being governed by subdivision 2 of section 1487. Whitman *v.* James, *supra.*

18. Where the right to issue an execution against the person depends upon the nature of the action, the execution must run against all the defendants; but it is otherwise where the right to arrest depends upon extrinsic facts, in which case all the defendants are not necessarily liable to arrest. *Ib.*

19. Time within which to issue. The defendant in this action, having been arrested and given bail, his sureties neglected to justify, of which fact the sheriff had notice, but owing to some understanding between one of his deputies and the defendant, never lodged the defendant in jail, but suffered him to go where he pleased. *Held*, that the defendant was not "in actual custody" within the meaning of Code of Civ. Pro., § 572, authorizing one in actual custody, by virtue of an order of arrest in an action, to apply for a *supersedeas* if the plaintiff fails to issue an execution against his person within one month after it is within his power so to do.—*Supreme Ct., (1st. Dept.,) Nov.*, 1880. Watt *v.* Healy, 22 Hun 491.

20. Setting aside the execution—stipulation not to sue. The plaintiff, having been arrested by virtue of an execution against his person, issued upon a judgment for costs recovered by the defendant herein, moved for and obtained, at Special Term, an order setting the execution aside unconditionally, which order was, upon appeal, reversed by the General Term, but affirmed by the Court of Appeals. After the granting of the order by the Special Term, the plaintiff commenced, and is still prosecuting, an action against the defendant for false imprisonment. After the affirmance of the order of the Special Term by the Court of Appeals, the defendant moved to have it so modified as to make the relief thereby granted conditional upon the plaintiff stipulating not to bring an action for false imprisonment, or to continue the action already brought therefor. *Held*, that the motion was properly denied.—*Supreme Ct., (1st Dept.,) Nov.*, 1880. Catlin *v.* Adirondack Co., 22 Hun 493.

21. The defendant also moved to have the costs awarded to the plaintiff by the Special Term and Court of Appeals, set off against the costs awarded to it and included in the final judgment in the action in which the execution had issued. *Held*, that the motion should have been granted, particularly as the plaintiff was shown to be insolvent. *Ib.*

22. Voluntary discharge—sheriff's poundage. The defendant in this action having been arrested by the sheriff under an execution against his person, issued upon a judgment recovered against him, the plaintiff served upon the sheriff the following notice: "You are hereby authorized and requested to release and discharge from imprisonment the defendant, Albert Falk, in the above-entitled action, upon his paying and satisfying all your legal fees, charges and expenses, under and upon the orders of arrest and execution herein under which the defendant Albert Falk is now in your custody." *Held*, that the sheriff was entitled to his poundage upon the execution, and that the defendant was not entitled to be released from custody until he had paid the same.—*Supreme Ct., (1st Dept.,) March*, 1881. Ryle *v.* Falk, 24 Hun 255; S. C., 60 How. Pr. 516.

III. Payment. Satisfaction. Discharge.

IV. Relief against Executions.

23. Motion to vacate. June 15th, 1860, the plaintiff's attorney issued an execution upon a judgment recovered on that day against the defendant, which was on August 5th, 1860, returned unsatisfied. On April 16th, 1877, the same attorney, without any application to the court, issued a second execution upon the judgment, indorsed by him as the plaintiff's attorney, under which certain premises belonging to the defendant were, on June 8th, 1877, sold, and thereafter, and in September, 1878, conveyed to the purchasers. The plaintiff died in February, 1870, and letters of administration were duly issued upon his estate. Prior to his death he had assigned the judgment to his attorney as security for certain costs owing to him. Upon an application, made by persons who had purchased the premises from the defendant shortly before the issuing of the second execution, to

vacate and set it aside, together with all the proceedings had thereunder—

Held, 1. That the execution was irregularly issued, and that the application should be granted.

2. That the question as to whether or not the conveyance to the applicants was made with the intent to defraud the creditors of the judgment debtor could not be determined upon this application.—*Supreme Ct.*, (*1st Dept.*,) *March*, 1881. Duryee *v.* Botsford, 24 Hun 317.

V. Proceedings Supplementary to Execution.

24. Jurisdiction. The Supreme Court is not deprived of jurisdiction in cases of supplementary proceedings by Code of Civ. Pro., § 2434.—*Supreme Ct.*, (*1st Dept.*,) *July*, 1881. Baldwin *v.* Perry, 61 How. Pr. 289.

25. In an order to examine a non-resident of the county upon supplementary proceedings, in an action in the Marine Court of the city of New York, it must appear that the defendant has, within the city, an office for the regular transaction of business in person, as contradistinguished from cases where he transacts the same through agents.—*Marine Ct.*, (*Sp. T.*,) *Sept.*, 1880. Brown *v.* Gump, 59 How. Pr. 507.

26. Upon what judgment proceedings may be taken. Under Code of Pro., § 292, supplementary proceedings cannot be instituted where a transcript of a justice's judgment for less than $25, exclusive of costs, has been filed, and an execution issued thereon has been returned unsatisfied.*—*Supreme Ct.*, (*2d Dept.*,) *Sept.*, 1880. Wolf *v.* Jordan, 22 Hun 108.

27. Code of Civ. Pro., § 2458, providing that proceedings supplementary to execution cannot be instituted upon a judgment recovered for costs only, does not apply to a case where such a judgment was recovered, and an execution issued thereon was returned unsatisfied prior to September 1st, 1880.—*Supreme Ct.*, (*1st Dept.*,) *April*, 1881. Bean *v.* Tonnelle, 24 Hun 353; S. C., 1 Civ. Pro. 33.

28. Necessity of exhausting remedy by execution. Where, upon the examination of a judgment debtor in supplementary proceedings, it appears that he has an estate in land, as a tenant by the curtesy, and it is not shown that an execution has been issued and returned upon the judgment since he acquired the said estate, a receiver to sell the same should not be appointed, but the creditor should issue an execution upon his judgment and sell the debtor's estate thereunder.—*Supreme Ct.*, (*2d Dept.*,) *May*, 1880. Bunn *v.* Daly, 24 Hun 526.

29. Second examination. Upon an application to vacate an order made herein, on February 13th, 1880, directing the defendant to appear and be examined in proceedings supplementary to execution, it was shown that the defendant had already been examined herein, in pursuance of an order made on June 17th, 1872, and that such examination had been completed, and a receiver appointed. The affidavit upon which the second order was granted made no reference to the previous application. *Held*, that the order was properly set aside for that reason.—*Supreme Ct.*, (*1st Dept.*,) *May*, 1880. Grocers' Bank *v.* Bayand, 21 Hun 203.

Quære, as to whether a second application to examine a judgment debtor may be made *ex parte*, or whether notice thereof must be given. *Ib.*

30. The failure of the applicant to show, as required by General Rule No. 25, that no previous application for the order has been made is an irregularity which authorizes but does not compel the court to refuse to grant the order or to vacate it after it has been granted. Bean *v.* Tonelle, *supra*.

31. Appointment of receiver—notice. A defendant who has appeared before a referee and been examined, in pursuance of an order made in proceedings supplementary to execution, is entitled to a written notice of an application for the appointment of a receiver; a verbal notice that such an application will be made, given at the close of the examination, is not sufficient.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. Ashley *v.* Turner, 22 Hun 226.

32. In a proceeding for the examination of a third party, a receiver cannot be appointed without notice to the judgment debtor.—*Com. Pleas, Dec.*, 1880. Morgan *v.* Von Kohnstamm, 60 How. Pr. 161.

33. There was no authority under the former code for the appointment of a receiver in a proceeding for the examination of a third party, alleged to have property of, or to be indebted to the judgment debtor. A receiver could be appointed only in a proceeding instituted for the examination of a judgment debtor. *Ib.*

34. By the provisions of Code of Civ. Pro., § 2464, a receiver cannot be appointed before an order or warrant to be examined, is served upon the judgment debtor, without ten days' notice to the judgment debtor, unless he cannot, after due diligence, be found in the state. *Ib.*

35. Rights and powers of receiver. A receiver in supplementary proceedings may employ on his behalf the attorney of the party for whose benefit the proceedings are instituted.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Baker *v.* Van Epps, 60 How. Pr. 79.

36. His right to sue. A receiver in proceedings supplementary to execution, to whom the judgment debtor has conveyed his interest in real property, cannot, as such, maintain an action for partition thereof.—*Superior Ct.*, *June*, 1880. Miller *v.* Levy, 46 Superior 207.

37. Discharge of receiver—claims for expenses. The payment of a judgment by the debtor, after the appointment of a receiver in supplementary proceedings, does not, *ipso facto*, discharge the receiver. The receiver may have a claim for expenses incurred in the exercise of his authority, which may be required to be paid before the property held by him can be taken out of his possession.—*Supreme Ct.*, (*Sp. T.*,) *Dec.*, 1880. Crook *v.* Findley, 60 How. Pr. 375.

38. Costs in supplementary proceedings. A motion was made by the plaintiff for costs and disbursements of supplementary proceedings, and to have the same paid from certain funds in the hands of the receiver therein, and to have the costs which had been granted by an order denying a motion made therein paid out of said fund. *Held*, that a justice of the Supreme Court, First Department, had jurisdiction to grant the motion.—*Supreme Ct.*, (*1st*

* Under Code of Civ. Pro., § 2458, the judgment must, in all cases, be for a sum not less than $25, exclusive of costs.

Dept.,) May, 1881. Baldwin *v.* Perry, 1 Civ. Pro. 118.

As to the necessity of issuing an execution to give the *Right to maintain a creditor's suit,* see CREDITOR'S SUIT, 1-5.

As to executions on *Justices' judgments,* see JUSTICE OF THE PEACE.

As to *Sheriffs' fees* on execution, and the officers' liability for failure to collect, or for a false return, see SHERIFFS.

EXECUTORS AND ADMINISTRATORS.

I. APPOINTMENT AND REMOVAL.

II. ASSETS, INVENTORY, &c.

III. RIGHTS, POWERS, DUTIES AND LIABILITIES.

1. *Care and management of the estate.*
2. *Payment of debts, legacies, &c. Distribution.*
3. *Sale of lands for payment of debts.*
4. *Accounting.*
5. *Compensation.*

IV. SUITS.

1. *Actions by executors or administrators.*
2. *Actions against executors or administrators.*
3. *Proceedings to enforce administration bonds.*

V. PUBLIC ADMINISTRATORS. FOREIGN REPRESENTATIVES.

I. APPOINTMENT AND REMOVAL.

1. **Testamentary appointment.** Where it is apparent from the terms of a will, that the testator intended to invest his wife with the character of executrix thereof, though she is not expressly so named therein, she cannot, until letters of administration with the will annexed have been issued to her by the surrogate, transfer or sell any of the assets of the estate, unless such transfer or sale be necessary for the preservation of the estate, or to enable her to pay the funeral expenses.—*Supreme Ct.,* (*4th Dept.,*) *Oct.,* 1880. Humbert *v.* Wurster, 22 Hun 405.

2. This is so, although by the terms of the will the wife is given "full power and control to lease or sell" the real or personal property. *Ib.*

3. As to what is a sufficient testamentary appointment of an executor, see Matter of Blancan, 4 Redf. 151.

4. **When security will be required from an executor.** The fact that an executor, although a citizen of the United States, is not a resident of the state, does not go to his competency. It is, however, a legal objection, which may be set forth under Code of Civ. Pro., § 2636; but, if such objection is not raised, it will not be considered, and letters testamentary will be granted to such an executor without his giving a bond.—*Kings Co. Surr. Ct., Oct.,* 1881. Estate of Demarest, 1 Civ. Pro. 302.

5. Under what circumstances executors, who are pecuniarily irresponsible, may be compelled to give security, and how the right may be waived, see Freeman *v.* Kellogg, 4 Redf. 218.

6. **Instances.** Where, after the admission of a will to probate, application for letters testamentary was made by an executor who, although a citizen of the United States, was a non-resident of the state, and had no office for the transaction of business within the state, and the will contained no provision dispensing with security,—*Held,* that, in the absence of objections, such executor was entitled to letters testamentary without giving security. Estate of Demarest, *supra.*

7. The defendant resides upon a large farm, owned by him, in Nebraska, and is one of the senators of that state; he employs an overseer upon the farm, and is absent therefrom a considerable portion of the year, spending the period of such absences at Middletown, in this state, where he lived before going west. He has no place of business at Middletown, but has a desk in the office of his attorney, and one containing papers at the hotel there, and is a director of a national bank at that place. His visits to Middletown are periodical and irregular; and to go from his farm in Nebraska to that place requires about three days. *Held,* that the defendant did not have "his usual place of business within this state," within the meaning of chapter 657 of 1873, authorizing letters testamentary to be issued to a non-resident executor, without requiring security to be given by him, if he has his usual place of business within this state.—*Supreme Ct.,* (*2d Dept.,*) *Sept.,* 1880. Van Wyck *v.* Van Wyck, 22 Hun 9.

8. **Priority of right to letters of administration.** The provision, (3 Rev. Stat., (6th ed.) 78, § 32,) giving unmarried women a preference over married women to letters of administration, has been repealed, (Laws of 1867, ch. 782, § 2,) and upon an application by a married woman for letters of administration, it is no longer necessary to serve a citation on an unmarried sister of the applicant, as one having a prior right to administer.—*N. Y. Surr. Ct., Nov.,* 1880. West *v.* Mapes, 4 Redf. 496.

9. **Right to letters with will annexed.** Where, upon application for letters of administration with the will annexed, it appears that there are no assets, or the presumption arises from lapse of time that there are no assets of the testator in existence which can be identified and reached by the administrator, and there is no claim in respect to them which can be enforced, and no other reason appears, the granting of letters cannot be claimed as a matter of right, and the application may be properly refused.—*Ct. of App., Jan.,* 1881. Van Giessen *v.* Bridgford, 83 N. Y. 348; *affirming* 18 Hun 80.

10. **The administrator's bond.** Where an administrator with the will annexed is called upon to give further security, the only material inquiries are whether the bond is in the amount required by law, and whether the securities are sufficient; and it is, therefore, immaterial that some of the legatees may be satisfied with insufficient security.—*Kings Co. Surr. Ct., July,* 1881. Estate of Weeks, 1 Civ. Pro. 164.

11. By the requirements of the code, an administrator with the will annexed must give full security, and any person interested in the estate has the right to insist that the bond given by such administrator shall not only be suffi-

cient to secure the separate interest of such person, but be in the full amount required by law, and with sufficient sureties. *Ib.*

12. There is no provision for reducing the amount of the bond with the consent of any of the legatees. The application of the maxim *expressio unius est exclusio alterius* to Code of Civ. Pro., § 2595, forbids the taking of modified security on any other terms than those prescribed in that section. *Ib.*

13. **Validity and conclusiveness of letters of administration.** Where the surrogate had jurisdiction to grant new letters after the removal of an administrator, they cannot be attacked in an action on the bond of the removed administrator for an irregularity; the letters are conclusive as to the authority of the person to whom they are granted, until revoked or set aside.—*Ct. of App., Feb.,* 1880. Kelly *v.* West, 80 N. Y. 139.

14. A failure to cite the widow of the deceased is an irregularity, for which the letters might be revoked, but does nnt render them absolutely void. *Ib.*

15. *It seems* that the letters would not be void for fraud in not mentioning the name of the widow in the petition for letters. *Ib.*

16. **Application for ancillary letters testamentary.** That a testator resided without the state at the time of executing his will is, under Code of Civ. Pro., § 2695, a fact to be proved; and, where the only evidence to prove such fact was an allegation, on information and belief, contained in the petition for ancillary letters testamentary—*Held,* that such allegation was insufficient to establish the fact.—*Kings Co. Surr. Ct., Sept.,* 1881. Estate of Thompson, 1 Civ. Pro. 264.

17. An application for ancillary letters testamentary must be made upon an exemplified copy of the will, and not upon the original will. *Ib.*

18. Where the letters testamentary were issued in a foreign country, the copy of such letters to accompany the petition must be authenticated in the manner provided by section 952. *Ib.*

19. A power of attorney from the foreign executor to wind up the business formerly carried on by the testator, and, generally, to settle his affairs, is not such an instrument as is required by section 2697, in order to authorize the petitioner to receive ancillary letters, it not expressly conferring upon him such authority; and it, also, not being proved or acknowledged and certified in like manner as a deed to be recorded. *Ib.*

20. Under section 2698, on such applications, the full names and the residences of each creditor or person claiming to be a creditor, residing within the state, must be given; and not the names of the firms of which they are members, nor merely the initials of their Christian names. *Ib.*

21. In an application for ancillary letters testamentary, the facts conferring jurisdiction should be stated directly, and not be left to inference; and the petition should be verified. The affidavit as to the residence of the testator should be sworn to before a person authorized to take acknowledgments of deeds; and, if made without this state, certified as required by section 844. Before such letters can be issued, it must appear that the will has been admitted to probate, within the proper jurisdiction, by a competent court.—*Kings Co. Surr. Ct., Sept.,* 1881. Estate of Winnington, 1 Civ. Pro. 267.

22. **Renunciation.** As to the renunciation of trusteeship by an executor, see Green *v.* Green, 4 Redf. 357.

23. **Removal.** When a person has been appointed one of the executors of a will, and also one of the trustees thereunder, he may, upon proper cause being shown, be removed from his office as trustee, and still be left to exercise his functions as executor.—*Supreme Ct., (2d Dept.,) Sept.,* 1880. Deraismes *v.* Dunham, 22 Hun 86.

II. Assets, Inventory, &c.

24. **What are assets.** Real estate devised to the testator's widow during life or widowhood, and, on her death or re-marriage, directed to be sold, does not constitute assets in the hands of the executor. He has no control over such real estate until the death or re-marriage of the widow.—*N. Y. Surr. Ct., March,* 1880. James *v.* Beesly, 4 Redf. 236.

25. **Articles set apart to the widow.** The statute authorizing the setting apart of sheep and swine to the widow, only applies where the deceased has such an ownership and possession of them at the time of the making of the inventory, as will permit of their delivery to the widow; when he has but a half-interest therein, they cannot be delivered to her, nor can any allowance be made therefor.—*Supreme Ct., (3d Dept.,) Jan.,* 1881. Baucus *v.* Stover, 24 Hun 109.

26. **The inventory, and waiver of right thereto.** The statutory provisions as to the making and filing of an inventory may be waived by the parties in interest.—*Kings Co. Surr. Ct., March,* 1881. Estate of Barnes, 1 Civ. Pro. 59.

27. Where a legatee has waived his right to compel an inventory with official appraisement, his assignee is estopped from insisting that the executor be required to return such an inventory, notwithstanding the provision of section 2514, subd. 11, that such assignee is "a person interested" in the estate within the purview of section 2715, allowing a person having such interest to require the return of an inventory. *Ib.*

28. As to the necessity of, and sufficiency of the inventory, and when its filing cannot be compelled, see Matter of Robbins, 4 Redf. 144.

29. **Further inventory.** Where, upon an application to compel the administrator to file a further inventory, he denies the existence of further assets, the application must be refused.—*N. Y. Surr. Ct., Oct.,* 1880. Matter of McIntyre, 4 Redf. 489.

III. Rights, Powers, Duties and Liabilities.

1. *Care and management of the estate.*

30. **In general.** Where a contest has arisen as to the validity of a will, and an appeal has been taken from a decree of the surrogate, admitting the will to probate, but rejecting the codicils thereto, pending which the funds of the estate have, by the consent of the parties, been deposited with him, the Supreme Court has no power to make an order directing the surrogate to pay over to the executors, or their counsel, a

specified sum of money to be used and expended by them in the prosecution of the suits relating to the estate.—*Supreme Ct.*, (2*d Dept.*,) *Sept.*, 1880. Swenarton *v.* Hancock, 22 Hun 43.

31. When an executor is personally liable upon an agreement made in regard to the estate; and when his promise to pay is valid, though not in writing, see Hall *v.* Richardson, 22 Hun 444.

32. **Care and management of personal property.** An executor is not a guarantor of the safety of securities in his charge belonging to the estate; he is bound simply to exercise such prudence and diligence in the care and management of the estate as men of discretion and intelligence in general employ in their own like affairs.—*Ct of App., March*, 1881. McCabe *v.* Fowler, 84 N. Y. 314.

33. N., in his lifetime, left certain United States bonds in the hands of O. for safe keeping, who was at the time responsible, of good character, and considered entirely trustworthy. N. died in 1865, leaving a will by which his widow was appointed executrix, and W., defendant's testator, executor. The latter qualified; the former did not until after the death of W. The bonds were converted into other bonds, which remained in the custody of O. until W. died in 1871. W. also left securities of his own in the hands of O. After the death of W., the widow of N. qualified as executrix, but no letters testamentary were issued to her. Her attorney took charge of the estate; no call was made upon O. to deliver up the bonds; after his death, which occurred in 1875, it appeared that in 1874 he hypothecated the bonds as collateral for a loan made to a firm of which he was a member; said firm, including O., were insolvent. In an action to charge the estate of W. with the amount of the bonds so lost to the estate of N.—*Held*, that there was no negligence or want of care and vigilance on the part of W., such as would authorize a recovery. *Ib.*

34. **Collecting assets.** The surrogate's power, under 3 Rev. Stat., (6th ed.,) 95, § 35, to authorize executors and administrators to compromise debts and claims due the estate, is not limited to demands against insolvent debtors only. Such authority may be granted where there is doubt as to the liability of the debtor.—*N. Y. Surr. Ct., March*, 1880. Shepard *v.* Saltus, 4 Redf. 232.

35. **The duties of a collector** are limited to the powers enumerated in the statutes. His powers relate to the preservation, and not to the administration, of the estate. The powers of a receiver of real estate, appointed under Laws of 1870, ch. 359, § 13, are, like those of a collector, confined to the preservation of the estate; he cannot be authorized to administer the estate.—*N. Y. Surr. Ct., Oct.*, 1880. Riegelman *v.* Riegelman, 4 Redf. 492.

36. **Recovery of assets of decedent wrongfully withheld.** The provisions of sections 2706–2714 of the code in relation to discovery and delivery of personal property belonging to the estate of a decedent, are not unconstitutional.—*Supreme Ct.*, (1*st Dept.*,) *March*, 1881. Matter of Curry, 1 Civ. Pro. 319.

37. These provisions of the code are confined to a determination of the question of possession, and not of title, and delivery to the representative of the decedent can be decreed, only after it clearly appears that possession is wrongfully withheld. It was not the intent of the statute to go further than to recover property clearly belonging to the estate of the decedent from a person not lawfully entitled to withhold it. *Ib.*

38. **Loans.** An executor must exercise due diligence in the making of loans, to protect himself from personal liability for losses; and the taking second mortgages and reliance upon the judgment of others is not such diligence. When mortgages so improperly taken are foreclosed and bought in by him for the estate, the executor is liable for costs, taxes, &c.—*Supreme Ct.*, (3*d Dept.*,) *Jan.*, 1880. Savage *v.* Gould, 60 How. Pr. 216.

39. **Investments.** The fact that the testator, at the time of his death, was possessed of shares of stock of a corporation, does not authorize his executors, upon an increase of the corporate stock, to subscribe for additional shares thereof, under a special privilege given to the stockholders.—*Kings Co. Surr. Ct., Dec.*, 1880. Lacey *v.* Davis, 4 Redf. 402.

40. *It seems* that, as a general rule, investments by executors or testamentary trustees of the funds in their hands, which take those funds beyond the jurisdiction of the court, will not be sustained, and the trustee who so invests does so at the peril of being held responsible for the safety of the investments.—*Ct. of App., March*, 1881. Ormiston *v.* Olcott, 84 N. Y. 339.

41. This rule, however, is not so rigid as to admit of no possible exceptions, although the case must be very rare and the circumstances very unusual and peculiar to make it an exception. *Ib.*

42. This rule relates only to voluntary investments by the trustee, and does not govern a case where, by act of the testator, a foreign investment has been made, or where, without the fault of the trustee, the assets have been transmuted into a debt which can only be secured and saved by taking a foreign security. *Ib.*

43. Where, therefore, the assets of an estate had all passed into the possession of one of two executors and trustees, and, upon his death, the surviving executor found that the deceased had mingled the assets with his own, and had partly converted them to his own use, and partly lost them by unsafe investments, and, as the best possible arrangement to secure the fund, the survivor took from the estate of the deceased a bond secured by mortgage on real estate in Ohio, which was guaranteed by the widow, who was sole legatee and at that time solvent, and also took further collaterals for greater safety, the securities being at the time perfectly good—*Held*, that it was the right and the duty of the survivor to accept the securities; and that he could not be made personally liable for so doing. *Ib.*

44. **Sales of personal property.** Where executors are directed, by the will, to convert the residuary estate into money, they are still clothed with a reasonable discretion as to the proper time for the sale of the decedent's irregular securities, which they are bound, however, to exercise in good faith. There is no fixed period within which the executors may exercise their discretion, but the reasonableness of any

delay must be determined by the circumstances of each case.—*N. Y. Surr. Ct.*, 1880. Weston *v.* Ward, 4 Redf. 415.

45. Where executors, clothed with a discretion as to the time when the decedent's securities shall be sold, forbear to sell in the exercise of an honest judgment, and loss results to the estate, they are not liable for this error of judgment. *Ib.*

46. Executors and administrators are not required to sell non-perishable personal property unless the will so provides, or it be necessary to enable them to pay debts and legacies; and they should not, upon their final accounting, be charged with interest upon the value of articles so retained by them.—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1881. Greeno *v.* Greeno, 23 Hun 478.

47. Where assets are sold for less than the inventoried price, the burden of proving the discrepancy, and that the decrease is without his fault, rests upon the representative. His verified account, setting forth the amount received on the sale, is not, if objected to, *prima facie* evidence in his favor.—*N. Y. Surr. Ct.*, *Jan.*, 1881. Underhill *v.* Newburger, 4 Redf. 499.

48. Liability for losses, neglect, &c. When executors may be held liable for debts which they have neglected to collect, see Leggett *v.* Leggett, 24 Hun 333.

49. Rights of one of several executors. One of several executors has no authority to borrow money without the assent of the others, and such assent is not to be assumed from the fact that the loan was for the benefit of the estate.—*Ct. of App.*, *Dec.*, 1880. Bryan *v.* Stewart, 83 N. Y. 270.

50. In an action to recover for moneys alleged to have been loaned to the defendants, it appeared that defendants were executors of an estate, certain lots belonging to which were advertised for sale. Plaintiff's transactions were with defendant F., alone, and it did not appear that the other defendants gave any directions in regard to the loans, or ever promised to pay them. The referee found that the business relating to such sale was, with the assent of defendants, conducted by F., who disbursed large sums on account of the expenses of sale; that plaintiff advanced to him, for the purpose of defraying expenses, the sums mentioned in the complaint; and, as matter of law, said referee found that said advances were for the benefit and at the request of all the defendants, and that they were liable. *Held*, that the conclusions of law were not authorized by the findings of fact; that from the facts that F. conducted the business, and that plaintiff advanced moneys to defray expenses, it did not follow as a necessary or logical result that defendants reaped any benefit therefrom, or requested plaintiff to make the advances. *Ib.*

51. Liability for acts of co-executor. The rule that each of several co-executors is only liable for his own acts, and cannot be made responsible for the negligence or waste of another, unless he in some manner aided or concurred therein, applies as well where the executors are also trustees. Ormiston *v.* Olcott, *supra*.

52. Two executors, having, in pursuance of a power of sale contained in a will, executed a contract for the sale of certain real estate, the purchaser made a payment thereon, by laying the money upon a table in the presence of both of the executors, one of whom picked up the money and put it in his pocket, and the other of whom signed a receipt, in his name alone, which was indorsed upon the back of the contract. The executor who took up the money was insolvent and known to his co-executor to be so. *Held*, that the executor so signing the receipt was liable for the amount so received by his co-executor.—*Supreme Ct.*, (*3d Dept.*,) *Nov.*, 1880. Croft *v.* Williams, 23 Hun 102.

53. Although, when all of the executors join in the execution of a power of sale conferred by a will, each is, as a general rule, only liable for the application of so much of the money received therefrom as actually comes into his possession or under his control, yet where one executor, knowing that his co-executor is in embarrassed circumstances and insolvent, allows the avails of such a sale to go into his hands, he is guilty of such negligence and want of care as to render him liable for the amount so received. *Ib.*

54. What evidence that money came into the possession of an executor is sufficient to charge him therewith, considered. *Ib.*

55. Executors who were ordered by the surrogate to have certain securities of the estate registered in their joint names, repeatedly requested their co-executor to have them so registered, but on his failure to do so, neglected to enforce, by legal proceedings, observance of the order, or to bring the matter to the notice of the surrogate. *Held*, that they were liable for their co-executor's misappropriation of the securities.—*Kings Co. Surr. Ct.*, *Oct.*, 1880. Matter of McDonald, 4 Redf. 321.

56. Devastavit. As to what amounts to a devastavit, and the liabilities of an executor therefor, see Whitney *v.* Phœnix, 4 Redf. 180; Rorke *v.* M'Conville, Id. 291; Matter of Macdonald, Id. 321.

2. *Payment of debts, legacies, &c. Distribution.*

57. General Principles. An executor who pays legacies and debts in full, before ascertaining the whole amount of the claims of creditors, does so at his peril.—*Westchester Co. Surr. Ct.*, *Jan.*, 1881. Glacius *v.* Fogel, 4 Redf. 516.

58. An administrator with the will annexed, is not authorized to pay the expenses of lunacy proceedings instituted against the widow and sole legatee of the decedent.—*N. Y. Surr. Ct.*, *Jan.*, 1881. Underhill *v.* Newburger, 4 Redf. 499.

59. Marshalling assets. The failure of the holder of a note, who has fixed the indorser by a regular demand and notice, to pursue the maker with diligence, will not discharge the estate of the indorser from liability on the note. If, in such a case, the indorser's estate is insolvent, the ordinary rule as to marshalling assets, respecting creditors who have two or more funds to resort to, does not apply.—*N. Y. Surr. Ct.*, *Oct.*, 1879. White *v.* Gardner, 4 Redf. 71.

60. Where there is a gift of the income of a fund, the taxes imposed thereon and expenses of the trust must be paid out of the income; but in the case of an annuity, no deduction can

be made, but all taxes and expenses must be paid out of the estate.—*N. Y. Surr. Ct., Dec.,* 1879. Stubbs *v.* Stubbs, 4 Redf. 170.

61. What claims should be allowed. Where it appears that a daughter, residing with her mother, has, during her life-time, promised to pay board, and that other members of the family were charged for and paid board, a claim against the estate of the daughter for unpaid board should be allowed.—*N. Y. Surr. Ct., May,* 1880. Valentine *v.* Valentine, 4 Redf. 265.

62. Preferred claims. A judgment for deficiency against the representatives is not a preferred claim under 3 Rev. Stat. 95, (6th ed.) § 37. That section applies only to judgments against the deceased, personally.—*N. Y. Surr. Ct., March,* 1880. James *v.* Beesly, 4 Redf. 236.

63. Rights of representative who is himself a creditor of the estate. An administrator's claim against the estate, if objected to, must be proved to be allowed by the surrogate, under 3 Rev. Stat., 96, (6th ed.) § 43. The administrator's affidavit, verifying his claim, does not amount to "proof" of the same. The existence of the debt must be established by legal evidence.—*N. Y. Surr. Ct., Jan.,* 1881. Underhill *v.* Newburger, 4 Redf. 499.

64. The surrogate has power under 3 Rev. Stat. 96 (6th ed.,) § 44, to pass upon the claim of a personal representative against the estate, either in proceedings taken to establish the claim, or upon final accounting of the representative, although such claim is contested by the next-of-kin. Such a claim, being disputed on the final accounting, it is not analagous to a claim disputed under the statute, by the representatives of the estate.—*N. Y. Surr. Ct., April,* 1880. Barras *v.* Barras, 4 Redf. 263.

65. As to the allowance of a claim by an administratrix against the estate, for nursing the deceased, (her brother,) see Keller *v.* Stuck, 4 Redf. 294. Compare Wood *v.* Rusco, Id. 380.

66. Publication of notice to creditors. The provisions of the Revised Statutes (2 Rev. Stat. 88, §§ 34, *et seq.,*) in reference to publication by executors and administrators of notice to those having claims against the deceased, to exhibit them, and the provision (§ 38) limiting the time for commencing suits upon claims disputed or rejected, include claims which are contingent, as well as those where the liability is certain and fixed.—*Ct. of App., Dec.,* 1879. Cornes *v.* Wilkin, 79 N. Y. 129; *affirming* 14 Hun 428.

67. Plaintiff and B., defendant's testator, were co-sureties upon an undertaking given on appeal; the judgment appealed from was affirmed July 5th, 1873; an action was commenced against plaintiff August 28th, 1873; judgment was perfected therein against him September 17th, 1873, which he paid Nov. 11th, 1873. Defendant obtained an order for the publication of notice to creditors September 13th, 1873, and such notice was on that day published. Plaintiff served upon defendant a claim for contribution, April 15th, 1874, which was immediately rejected. This action upon such claim was commenced November 27th, 1876.

Held, 1. That the six months' limitation, prescribed in said statute, applied to the claim; that the fact that the first publication of notice was prior to the establishment of plaintiff's liability was immaterial; and that the action was barred.

2. That an omission of a middle letter in the name of the testator, in the notice published, was immaterial; and that this was so, although there was a person living of the same name as that published, as the law recognizes but one Christian name, and as it did not mislead. *Ib.*

68. Reference of disputed claims. Disqualification of referee. While the appointment of a referee as a judge of the court pending the reference of a claim to him as referee disqualifies him, yet the case may be referred back to him after his term of office as judge has expired.—*Supreme Ct., (4th Dept.,) April,* 1880. Countryman *v.* Norton, 21 Hun 17.

69. Appeal from judgment on referee's report. A party who appears and unsuccessfully opposes a motion for the confirmation of the report of a referee, appointed in pursuance of the statute to pass upon a claim against the estate of a deceased person, may appeal from the judgment entered thereon without first moving at a Special Term for a new trial upon a case and exceptions.—*Supreme Ct., (4th Dept.,) Jan.,* 1881. Kellogg *v.* Clark, 23 Hun 393.

70. New trial of referred claims. Where a judgment has been entered upon an order confirming the report of a referee, to whom disputed claims against an estate have been referred in pursuance of sections 36 and 37 of 2 Rev. Stat. 88, the court may, upon a motion made upon a case prepared and settled as required by the Code of Civil Procedure, set aside the judgment and grant a new trial.—*Supreme Ct., (2d Dept.,) Dec.,* 1880. Young *v.* Cuddy, 23 Hun 249.

71. Remedy of creditor where estate is insolvent. The proper proceeding by a creditor to obtain payment of a proportional part of his debt, where the estate is insolvent, is to compel a judicial settlement of the account of the executor or administrator, as the case may be; all the parties interested will then be before the court, and will be bound by the proceedings taken to ascertain the proportional share of the surplus, which will be directed by the decree to be paid to each.—*Kings Co. Surr. Ct., Oct.,* 1880. McKeown *v.* Fagan, 4 Redf. 320.

72. Payment of legacies—distribution. Pending a contest over the probate of a will, the surrogate cannot, under 3 Rev. Stat. (6th ed.,) § 98, upon petition of a legatee or distributee, order payment of a portion of such legacy or share necessary for petitioner's support. Until the validity of the will is established, the petitioner is not entitled to any legacy or distributive share.—*N. Y. Surr. Ct., Oct.,* 1880. Riegelman *v.* Riegelman, 4 Redf 492.

73. Payment of legacies or other claims will not be ordered while the judicial settlement of an account is pending, without some very good reason therefor.—*Kings Co. Surr. Ct., June,* 1881. In re Harris, 1 Civ. Pro. 162.

3. *Sale of lands for payment of debts.*

74. Time within which to apply for the order. Upon an application by a creditor of one deceased, for an order directing land devised to be sold to pay the decedent's debts, judgment creditors of the devisee may set up

the statute of limitations as a defence, though the devisee himself does not appear or oppose the application.—*Supreme Ct., (2d Dept.,) Dec.,* 1880. Raynor *v.* Gordon, 23 Hun 264.

75. Such proceedings cannot be maintained when an action on the original debt would not then lie. The fact that a judgment was recovered against the executor, who was also the devisee, before an action on the debt was barred by the statute, will not enable the creditor of the decedent to maintain the proceedings. *Ib.*

76. November 30th, 1872, one C. died, intestate, leaving him surviving a daughter, his only child and heir-at-law, to whom certain real estate of which he was seized, descended, and of which she took possession. Thereafter, and on April 29th, 1876, she mortgaged a part of the real estate to one B., who thereafter assigned the mortgage to the defendant Chapman, who, on January 20th, 1880, commenced a statutory foreclosure thereof. On December 30th, 1879, letters of administration upon the estate of C. were, for the first time, issued to the plaintiff, as a creditor; the intestate having been indebted to him upon certain notes, the interest upon which had up to that time been paid by the daughter. On April 6th, 1880, the plaintiff instituted proceedings to have the land mortgaged, leased or sold, for the payment of the intestate's debts, and on April 21st, brought this action to have the defendant restrained from proceeding with the foreclosure of his mortgage. *Held*, that the action could not be maintained.—*Supreme Ct.,* (*3d Dept.,*) *Nov.,* 1880. Fonda *v.* Chapman, 23 Hun 119.

77. Laws of 1869, ch. 845, as amended by Laws of 1873, ch. 211, providing that no real estate, the title to which shall have passed out of any heir or devisee, by conveyance or otherwise, to a purchaser in good faith and for value, should be sold unless letters have been applied for within four years from the death, nor unless an application for a sale has been made within three years after the granting of letters, applies to and protects one taking a mortgage upon the real estate, within the times therein specified, provided the said time has elapsed before proceedings to sell the land for debts have been commenced. *Ib.*

78. As to what lapse of time will bar a creditor's application to sell lands of a decedent to pay his debts, see Mead *v.* Jenkins, 4 Redf. 369.

79. The petition. As to the requisites and sufficiency of a creditor's petition for the sale of the lands of a decedent to pay his debts, see Mead *v.* Sherwood, 4 Redf. 352.

80. Order to show cause. Where, in proceedings by administrators for the sale of real estate to pay debts, the order of the surrogate directing persons interested in the estate to show cause, etc., is made returnable in less time than is required by statute (2 Rev. Stat. 101, § 5,) *i. e.*, six weeks from the time of making the order, it shows a want of jurisdiction fatal to its validity, and all proceedings founded thereon are void. The rights of infant defendants in such proceedings cannot be waived by failure to make the objection.—*Ct. of App., June,* 1880. Stilwell *v.* Swarthout, 81 N. Y. 109.

81. Appointment of guardian for infant heirs. Where, in such proceedings, an order was made appointing a guardian for infants, but it did not appear that he consented to or did act, or that he had notice of his appointment; but on the contrary it appeared that he acted as counsel for the claimant in the proceedings—*Held*, that even if his appearance for the infants would have constituted a waiver, his consent at least was essential. *Ib.* 114.

82. Report of sale. An omission on the part of the administrators to make a report of sale to the surrogate, and to obtain an order confirming the report prior to a conveyance to the purchaser at the sale, is also a fatal defect. *Ib.*

83. These defects are not cured by the provisions of the act "for the protection of purchasers of real estate upon sales made by order of surrogate." (Laws of 1857, ch. 82, § 3, as amended by Laws of 1869, ch. 260.) *Ib.*

84. Disposition of proceeds of sale. Where such proceedings are legal, and the sale under them valid, the fund realized is under the control and within the exclusive jurisdiction of the surrogate; to reach it, proceedings may be instituted before that officer to compel a report of the administrators, the distribution of the fund and the payment of any lawful demand. *Ib.*

85. An action, therefore, cannot be maintained to reach the fund in the hands of the administrators. *Ib.*

86. After a sale had been made by order of the surrogate in such proceedings, which were void because of the defects above specified, the administrators procured certain mortgages to be foreclosed, and title was then obtained in favor of the purchaser under the surrogate's order. The fund remaining after payment of the mortgages was paid over to the administrators. In an action brought to reach such fund and to compel its application to alleged demands against the estate, to which the administrators and the heirs-at-law were made parties—

Held, 1. That the administrator could not be held liable, as the fund represented real estate and belonged to the heirs-at-law, subject to the widow's right of dower, and was held by the administrators, not in that capacity, but as trustees for said owners; that the action could not be sustained as one against the heirs, to compel them to pay plaintiff's debt from the surplus, as they can only be made liable in the manner prescribed by the statute (2 Rev. Stat. 109, § 53,) and not unless it be made to appear that the deceased left no personal assets out of which the debt can be collected, or that the personal assets have been disposed of and appropriated toward its payment.

2. That plaintiffs were not entitled to specific relief on the ground that the action is *in rem* for equitable relief, as the remedy of the plaintiff's had not been exhausted at law. *Ib.*

4. *Accounting.*

87. Who may require an accounting. As to the accounting by an executrix of an executor, the requisites of the petition therefor, and her power (in her capacity as legatee of the executor's testator) to cite herself to account, see Popham *v.* Spencer, 4 Redf. 399.

88. Who may be called to account. A removed administrator, as long as he is liable for assets that have come into his hands, is amenable to process from the surrogate calling

him to an account.—*Ct. of App., Sept.,* 1880. Gerould *v.* Wilson, 81 N. Y. 573. S. P., Dunford *v.* Weaver, 21 Hun 349.

89. Time to file the account. It is not necessary for an executor to file his account at or before the issuing of a citation to the parties in interest. It is sufficient if such filing be had on or before the return day, or the day to which the hearing upon the return of the citation is adjourned.—*Kings Co. Surr. Ct., June,* 1881. In re Harris, 1 Civ. Pro. 162.

90. Filing objections — default — opening default. The proctor for the contestant on an accounting by executors in this court was engaged, on the day upon which a citation thereon was returnable, in the trial of a cause in a district court in the upper part of New York city. He had previously sent a written request to the proctor for the executors for an adjournment, and for additional time within which to file objections to the account. This was refused by letter, which did not reach the hands of the contestant's proctor until after the cause was called on the surrogate's calendar and his default taken. *Held,* sufficient to open the default without costs. *Ib.*

91. What are proper charges against the representative.—Commissions allowed to a trustee out of trust funds by mortgagees, or to his attorney, when the trustee is to share therein, remain the funds of the estate and are to be accounted for as such.—*Supreme Ct., (3d Dept.,) Jan.,* 1880. Savage *v.* Gould, 60 How. Pr. 217.

92. That some service was rendered by the attorney will not alter this rule when the amount is manifestly excessive as compensation, and the burden is upon the executor to establish such value. *Ib.*

93. Although under section 14 of 3 Rev. Stat. (6th ed.) 91, an executor must include a debt due from him to his testator in the inventory, and is, upon the final accounting, *prima facie* to be held liable therefor as for so much money in his hands at the time the debt became due, yet the presumption of solvency created by the statute may be rebutted, and the executor may show an honest inability to pay the debt continuing during the whole period of his executorship.—*Supreme Ct., (3d Dept.,) Jan.,* 1881. Baucus *v.* Stover, 24 Hun 109.

94. A decree refusing to charge the executor with the amount of his debt as for so much money in his hands, does not prevent his being required to render a further account should he thereafter become able to pay the debt, nor does it prevent a proceeding being instituted in equity against him to enforce the payment of the claim and the due application of the avails thereof when collected. As the executor holds the position of a trustee as regards the debt, he could not avail himself of the statute of limitations as a defence. *Ib.*

95. What credits should be allowed him, generally. Money lent by one executor to a co-executor, in reliance upon a statement of the latter that he intends to apply it to pay debts of the estate, is not a charge against the estate, and cannot be allowed to the executor so advancing the same on the passage of his accounts, unless it be shown by him that it was in fact, actually, so applied.—*Supreme Ct., (3d Dept.,) Nov.,* 1880. Croft *v.* Williams, 23 Hun 102.

96. An executor who fails to pay taxes when due, being in funds, cannot claim the interest or penalty imposed because of his failure to pay such taxes when due.—*N. Y. Surr. Ct., Dec.,* 1879. Stubbs *v.* Stubbs, 4 Redf. 170.

97. An administrator cannot be allowed a charge for preparing his accounts, in the absence of proof that it was necessary for him to employ an accountant.—*N. Y. Surr. Ct., Jan.,* 1881. Underhill *v.* Newberger, 4 Redf. 499.

98. As to the powers and duties on an executor in respect to the payment of assessments, and what payments will be allowed to him on his accounting, see Hone *v.* Lockman, 4 Redf. 61.

99. —for funeral expenses, headstones, &c. An executor, under a discretionary direction in the will, contracted for a monument to be placed over the testator's grave to cost $1455. The value of the personal estate was $11,096. *Held,* the cost of the monument was excessive, and only $700 should be allowed to the executor therefor, upon his accounting.—*N. Y. Surr. Ct., April,* 1879. Estate of Luckey, 4 Redf. 95. Compare as to purchase of burial lot, Valentine *v.* Valentine, Id. 265.

100. As to the allowance, upon his accounting, to an administrator, of moneys paid by him for funeral expenses, and for costs and disbursements of legal proceedings instituted by him for the collection of claims due to the estate, see Matter of Miller, 4 Redf. 302; Estate of Valentine, 9 Abb. N. Cas. 313.

101. —for costs, counsel-fees, &c. As to the effect of the going into effect of the Code of Civil Procedure, on granting costs in an action to compel a final accounting begun before September 1st, 1880, but not settled by decree until after that date, see Matter of Mace, 4 Redf. 325.

102. As to allowances to counsel on an accounting by an executor, see Osborne *v.* McAlpin, 4 Redf. 1.

103. When he will be charged with interest. An executor who deposits the funds of the estate to his individual bank account, mingles them with his own, and employs them in his own business, is chargeable with compound interest, notwithstanding there is proof that he had good reasons to keep the funds of the estate uninvested.—*N. Y. Surr. Ct., Nov.,* 1878. Berwick *v.* Halsey, 4 Redf. 18.

104. A collector who deposits trust funds in his individual name is liable to be charged with the highest rate of lawful interest for the time such deposit continues.—*N. Y. Surr. Ct., Nov.,* 1879. Matter of Mairs, 4 Redf. 160.

105. In what cases a personal representative is chargable with compound interest on his accounting, see Freeman *v.* Freeman, 4 Redf. 211; Lacey *v.* Davis, Id. 402.

106. Review of accounting by appeal. The proper remedy for erroneous allowance of counsel fees by surrogate on final accounting of executors is by appeal, not by motion to open decree and vacate allowance.—*Ct. of App., April,* 1880. Marsh *v.* Avery, 81 N. Y. 29.

5. *Compensation.*

107. Commissions, and how computed. Where, under a power in the will authorizing a sale for the purpose of a division of the proceeds, an executor sells real estate sub-

ject to mortgages existing thereon at the time of the testator's death, or sells the real estate free from the incumbrance, paying off such incumbrance from the proceeds of sale, he is only entitled to commissions upon the amounts actually received for the equity of redemption, and cannot charge them also upon the amount of the mortgages on the property sold.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. Baucus *v.* Stover, 24 Hun 109.

108. The right to commissions on final accounting, the amount chargeable, when double commissions are allowable, and effect of neglect of duty on the right to commissions, see Ward *v.* Ford, 4 Redf. 34; Matter of Leggatt, Id. 148; Whitney *v.* Phœnix, Id. 180; Freeman *v.* Freeman, Id. 211.

IV. Suits.

1. *Actions by executors or administrators.*

109. The right to sue in the representative capacity. Under Laws of 1858, ch. 314, an administrator may bring an action to set aside, as fraudulent as against creditors, a conveyance made by his intestate, when it appears that there are creditors whose debts were in existence at the time of the making of the conveyance, and that there is no personal property wherewith to satisfy their claims.—*Supreme Ct.*, (*4th Dept.*,) *April*, 1881. Barton *v.* Hosner, 24 Hun 467.

110. Where, in such an action, it appears that the property has passed from the hands of the fraudulent grantee or transferee to a *bona fide* purchaser, it seems that a recovery may be had against such fraudulent grantee or transferee for the damages sustained by the estate. *Ib.*

111. Letters of administration granted by a surrogate in this state, where the intestate died leaving assets in his county, are conclusive as to his authority to bring an action for causing the intestate's death.—*Ct. of App.*, *Feb.*, 1881. Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48.

112. Action was brought by plaintiff, as administrator, to recover certain moneys deposited in a savings bank in the name of defendant as trustee for plaintiff's intestate.—

Held, 1. That an order of the surrogate, under Laws of 1870, ch. 394, deciding that said administrator, by virtue of his office as such, was entitled to the custody of the bank-book, was not an adjudication of his title to the funds represented thereby.

2. That the surrogate had no jurisdiction to try such a claim, and that the defect was not waived by the appearance of the parties.—*Superior Ct.*, *June*, 1880. Westervelt *v.* Westervelt, 46 Superior, 298.

113. As to the right of an executor to sue his co-executor in equity for an accounting, see Price *v.* Brown, 60 How. Pr. 511; Neilly *v.* Neilly, 23 Hun 651.

114. —or individually. Where a promissory note indorsed in blank by a testator, and deposited in a bank for collection, comes, after his death, into the possession of his executor, the executor may maintain an action thereon in his own name, or may rely upon it as a defence by way of set-off to an action brought against him in his individual capacity to enforce a claim for which he is individually liable.—*Supreme Ct.*, (*1st Dept.*,) *March*, 1881. Barlow *v.* Myers, 24 Hun 286.

2. *Actions against executors or administrators.*

115. Liability to be sued as such. A creditor may sue an administrator to recover the amount of bonds of the intestate, the payment of which is secured by mortgages upon real estate; and the fact that the plaintiff is the owner and holder of mortgages upon lands situated in New Jersey, given as collateral security to the bonds, is no defence to the suit. The provisions of 1 Rev. Stat. 749, § 4, is no bar to such action.—*Supreme Ct.*, (*1st Dept. Circ.*,) *Nov.*, 1880. Thompson *v.* Sullivan, 60 How. Pr. 71.

116. —as individuals. An action against an executor in his representative capacity does not bar one against him individually.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Hall *v.* Richardson, 22 Hun 444.

117. Statutory limitation of suits. The extension of one year given by the last clause of Code of Civ. Pro., § 403, is not applicable to a case where the letters were not issued until after the claim was barred.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. Chapman *v.* Fonda, 24 Hun 130.

118. The complaint. Where an action is brought upon an instrument executed by a person as executor and trustee under a last will and testament, an allegation that such person, as executor of such last will and testament, executed the instrument, is sufficient, though where one sues as executor the rule is different, in which case he must aver his appointment and title as such, in particular. Or where the action is brought to recover a debt due to or from a testator, an allegation is necessary showing the appointment of the executor, or administrator, as such, with all necessary details to make that act apparent.—*Supreme Ct.*, (*1st Dept.*,) *July*, 1881. Kingsland *v.* Stokes, 61 How Pr. 494; *affirming* 51 Id. 1.

119. Enforcement of judgment—contempt. An executor against whom a judgment has been obtained, ordering him to pay over moneys of the estate to a legatee, cannot be arrested for contempt in refusing to pay over the moneys, when the performance of the judgment can be enforced by execution.—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1881. Baker *v.* Baker, 23 Hun 356.

120. Costs. The court, upon adjudging that a fund in the hands of an administrator-defendant, which he claims belongs to his decedent, in fact belongs to the plaintiff, and that neither the administrator nor his decedent has any interest therein, cannot *direct* the payment of the defendant's costs out of such fund.—*Superior Ct.*, *Feb.*, 1880. Sheehan *v.* Huerstel, 46 Superior 64.

121. Costs awarded to the plaintiff in an action against an executor will be presumed, in the absence of a contrary showing, to be payable out of the estate, and not by the defendant personally.—*N. Y. Surr. Ct.*, *Nov.*, 1878. Berwick *v.* Halsey, 4 Redf. 18.

3. *Proceedings to enforce administration bonds.*

122. Sufficiency of the bond. Letters of administration having been issued to defendant B., by the surrogate of Steuben county, he gave a bond, with the other defendants as sureties, conditioned that he would faithfully execute the duties of the bond, and "obey all the orders of the surrogate of the county of Ontario

* * * or of any other officer or court having jurisdiction in the premises." In an action upon the bond—*Held*, that the mistake in naming the surrogate of Ontario did not vitiate the instrument; that, leaving out that clause, enough remained to meet the requirements of the statute (2 Rev. Stat. 77, § 42,) and to hold the obligors.—*Ct. of App*, *Sept.*, 1880. Gerould *v.* Wilson, 81 N. Y. 573.

123. Liability of the sureties. The sureties upon the bond of an administrator are privies to proceedings against their principal, and where he is, without fraud or collusion, concluded, they are concluded also. *Ib.*

124. The letters were, upon application of a surety, revoked in 1864. No other administrator was appointed. In 1876, B. was required to account. B. appeared and rendered his account, and he was ordered to pay to plaintiff, as next of kin, a certain sum, as her distributive share of the estate. It appeared that the moneys he was thus ordered to pay over had come into his hands officially, before the revocation of the letters. *Held*, that the surrogate had jurisdiction and power to decree distribution, and that his decree was conclusive as to the sureties. *Ib.* S. P., Kelly *v.* West, 80 N. Y. 139.

125. Subrogation of surety. A surety for an administrator, who has so administered the estate as probably to render the surety liable on his bond, has no such equitable lien or right as to enable him to prevent the payment of a legacy to the executrix of his principal. Such a surety has no claim against his principal's property, until he has paid pursuant to his bond, and has recovered judgment against his principal.—*N. Y. Surr. Ct.*, *July*, 1879. Brown *v.* Kerrigan, 4 Redf. 146.

126. Matters of defence in action on bond. Where an administrator is removed by order of a surrogate having jurisdiction of the estate, and of the administrator, the order of removal cannot be assailed in an action brought by administrators, appointed in place of the one removed, upon his official bond, because of irregularity in the proceedings for removal, assented to by him; the order is valid as to him, and if so is valid as to all others, including his sureties.—*Ct. of App.*, *Feb.*, 1880. Kelly *v.* West, 80 N. Y. 139.

127. In such an action where an objection to the order of removal, of want of jurisdiction, is taken, where the order was granted by the surrogate of the county of New York, the provision of the act of 1870 in relation to said surrogate, (Laws of 1870, ch. 359, § 1,) which provides that the objection of want of jurisdiction shall not be taken to his orders, except by appeal, or in a proceeding before the surrogate, to vacate or modify it, may be invoked to sustain the order. *Ib.*

V. Foreign Representatives.

128. Right of action of foreign executor. The rule that assets pass to the administrator appointed in the state where they are situated, and that a foreign executor cannot sue to recover them, applied to the facts of the particular case.—*Supreme Ct.*, (2*d Dept.*,) *Sept.*, 1880. Holyoke *v.* Union Mutual Life Ins. Co., 22 Hun 75.

As to the rights of *Heirs* and *Distributees*, see Descent; Distribution.

Of *Devisees* and *Legatees*, see Devise; Legacies.

EXEMPTION.

Attachment; Execution; Taxes.

EXHIBITS.

Evidence, IV.

EXONERATION.

Of *Bail*, see Bail, 5-9; of *Guarantor*, see Guaranty, IV.; of *Surety*, see Principal and Surety, III.

EXPERTS.

Witnesses, V.

EX POST FACTO LAWS.

Statutes, I.

EXTRADITION.

1. Between the states—what offences embraced. The provision of the federal constitution, (art. IV., § 2,) requiring the surrender, on demand of the executive authority of a state, of fugitives from justice, "charged with treason, felony or other crimes," who are found in another state, and the provision of the U. S. statutes giving practical effect thereto, (U S. Rev. Stat. 5278,) embrace every criminal offence and every act forbidden and made punishable by the law of the state where the act was committed.—*Ct. of App.*, *March*, 1881. People, ex rel. Jourdan, *v.* Donohue, 84 N. Y. 438.

2. The governor's warrant. Where the papers upon which a warrant of extradition is issued are withheld by the executive, the warrant itself can only be looked to for the evidence that the essential conditions of its issue have been complied with, and it is sufficient if it recites what he law requires. *Ib.*

3. Both at common law and under the statutes of Connecticut, "theft" is recognized as a crime and as synonymous with "larceny." Where, therefore, to a writ of *habeas corpus*, a warrant of extradition issued by the governor of this state was alone returned, which recited a representation by the governor of Connecticut, that the prisoner stood "charged with the crime of theft" committed in said state, that said governor has demanded his arrest and extradition, that the demand was accompanied by affidavits, etc., whereby the prisoner "is charged with said

crime, and with having fled from the said state," and that such papers were certified by said governor to be duly authenticated—*Held,* that the warrant fully complied with the statute and sufficiently established the conditions necessary to its issue; that it was not necessary to state therein the facts constituting the alleged crime. *Ib.*

F.

FACTOR.

PRINCIPAL AND AGENT, IV.

FALSE IMPRISONMENT.

1. **When the action will lie.** The plaintiff, who had entered one of the defendant's cars at Forty-second street, New York city, was, while attempting to pass out of the station at Rector street, stopped by the gateman, who demanded his ticket. Upon being told by the plaintiff that he had purchased a ticket but had lost it, the gateman detained him and finally sent for a policeman, who arrested him on the charge of disorderly conduct and refusing to pay his fare, and took him to the station-house, where he was detained over night. On the next morning he was examined before a police justice and discharged. The defendant had instructed its gatemen to compel passengers to produce their tickets on leaving its stations. In an action brought by the plaintiff to recover damages for the false imprisonment—

Held, 1. That the detention of the plaintiff at the station, and his subsequent arrest on the complaint of the gateman, were illegal.

2. That the defendant was liable for the acts of the gateman.

3. That the plaintiff was entitled to recover.—*Supreme Ct.,* (*2d Dept.,*) *May,* 1881. Lynch *v.* Metropolitan Elevated R'y Co., 24 Hun 506.

2. **When it will not.** The rule that the complaint should be dismissed, when the process under which the plaintiff was arrested was regular, and the arrest under it lawful, applied. Nebenzahl *v.* Townsend, 61 How. Pr. 353.

3. **Time to sue.** As to when the cause of action for false imprisonment is complete, and what delay to sue is fatal under the two-year statute of limitations, see Dusenbury *v.* Keiley, 61 How. Pr. 408.

As to *Malicious prosecution,* see that title.

FALSE PRETENCES.

1. **What constitutes the offence.** It is not necessary that words should be spoken or written to create a false representation; a mute or silent act may convey the falsehood, and if it does, it constitutes the offence.—*Ct. of App., Jan.,* 1881. People, ex rel. Phelps, *v.* Oyer and Terminer, 83 N. Y. 436.

2. **Sufficiency of the indictment.** In an indictment under the statute for obtaining a accused with obtaining the signature of the signature to a written instrument under false pretences, it is not essential to set forth all the details of the fraud; it is sufficient to specify particularly the pretences, to aver their falsity and the fraudulent intent, and to show how they were effectual in accomplishing the fraud. *Ib.*

3. If the false pretence averred and proved is capable of defrauding, it is sufficient, and this must be determined by the circumstances of each particular case. *Ib.*

4. Such an indictment may be based upon a false claim of indebtedness against a municipal corporation; and if it appear that the claim was presented under such circumstances and in such manner as was calculated to deceive the municipal officer whose duty it was to act thereon, and that his signature was thus procured, a conviction will be sustained. *Ib.*

5. The question in such case whether the false pretence was calculated to deceive and was capable of defrauding, is one for the jury. *Ib.*

6. In an indictment, therefore, charging the mayor of the city of New York to a warrant drawn on its chamberlain by false pretences, to wit, by means of a false and fraudulent bill, set forth in the indictment, represented by the accused to be a just and true account, and that the city was justly indebted to the person in whose name the account was presented against the city—*Held,* that it was not necessary to set forth how the fraudulent account operated to deceive through the action of the intermediate agents of the corporation; that the manner in which the false representation reached the mayor was matter of detail belonging properly to the evidence on trial. *Ib.*

7. **Evidence for the people.** Upon the trial the mayor testified that he had no distinct recollection of what occurred at the time he signed the warrant, and knew that he signed it simply because his name was affixed to it; it appeared that the bill in question was delivered to him; he was then allowed to testify to the routine of business in his office. *Held,* no error. *Ib.*

8. It appeared from this evidence that while the mayor did not read or examine each voucher which accompanied the warrants presented to him to sign, he required their presence and was induced to sign by the presence of the bill and by the approval thereof by the proper officers. *Held,* that this authorized the submission of the question to the jury as to whether the presence of the bill was one of the inducements to the signature; that its bare presence, although neither examined nor read by the mayor, was a false pretence. *Ib.*

9. Where, upon the trial of an indictment for obtaining goods on credit, by means of false representations on the part of the prisoner as to his responsibility, the representations charged their falsity, and the knowledge of the accused

that they were false, is established, the allegation that they were made with intent to defraud may be supported by proof of dealings of the prisoner with parties other than the complainant, such as purchases made upon the faith of similar representations, which tend to show a fraudulent scheme to obtain property by devices similar to those practiced upon him, provided the dealings are sufficiently connected in point of time and character to authorize an inference that the purchase from the complainant was made in pursuance of the same general purpose.—*Ct. of App., March*, 1880. Mayer *v.* People, 80 N. Y. 364.

10. So, also, similar representations made by the prisoner to creditors, from whom goods had been previously purchased by him, although no goods were obtained by means of the representations, may be proved, when evidence has been given tending to show that he was at the time making fraudulent disposition of the goods purchased. *Ib.*

11. Such testimony is relevant, not as bearing upon the question whether the prisoner made the representations charged, but as tending to show a motive in pursuance of the general fraudulent scheme, to quiet the creditors and retain control of the goods, so as to continue the fraudulent disposition of them. *Ib.*

12. **The pretence must have influenced the person defrauded.** To justify a conviction upon the trial of an indictment for obtaining property or the signature to a written instrument by false pretences, it must appear by the evidence that the parting with the property or the signing of the instrument was by reason of some of the pretences laid in the indictment, or that they materially influenced the action of the prosecutor.—*Ct. of App.* Therasson *v.* People, 82 N. Y. 238.

13. It is not necessary, however, that this should be established by direct proof; it may be inferred from other facts tending legitimately to show it. *Ib.*

14. Upon the trial of an indictment for obtaining the signature of Z. to the discharge of a mortgage by false pretences, Z. was examined as a witness for the prosecution, but was not asked the direct question as to whether she was influenced or induced to sign by the representations proved. The prisoner's counsel asked the court to charge in substance that although the jury might find the false pretences to have been made, and the necessary fraudulent intent, yet the jury had no right to consider these questions or the evidence as to them, in determining the question whether the pretences exerted a material influence over the mind of Z.; the court refused so to charge. *Held*, error; that while the falsity of the alleged pretence and the fraudulent intent of the prisoner were both necessary elements of the crime, the question whether the prosecutrix was influenced by the representations was a distinct one, having no necessary connection with the others, and proof of these others reflected no light upon it. *Ib.*

Nor was the exception to the refusal to charge abandoned by a claim on the part of the said counsel that in the absence of testimony by Z., that she was influenced by the representations, the fact could not be found from the other evidence. *Ib.* Compare People, ex rel. Phelps, *v.* Oyer and Terminer, *supra.*

FALSE REPRESENTATIONS.

FRAUD, 2-4; INSURANCE, II., III, IV.; VENDOR AND PURCHASER, I.

FALSE RETURN.

SHERIFFS, II.

FEES.

ATTORNEY AND CLIENT, 14-24; AUCTION, 2, 3; COSTS, 56-58; SHERIFFS, I.; WITNESSES, I.

FEIGNED ISSUES.

EQUITY, 5-7.

FERRIES.

1. **Right to maintain ferry—public and private ferry.** Any person owning land on both sides of a river may, without legislative authority, and even in defiance of legislative prohibition, maintain a ferry or bridge for his own use, providing he does not interfere with the public easement. Such owner, however, cannot, without legislative authority, maintain a bridge or ferry for public use.—*Ct. of App., Dec.*, 1880. Chenango Bridge Co. *v.* Paige, 83 N. Y. 178.

2. **Liability of ferry company for injuries to passengers.** While a ferry company is bound to use the strictest diligence in providing suitable and safe accommodation for landing passengers from its boats, it is not bound to so provide against any possibility of danger that they can meet with no casualty.—*Ct. of App., March*, 1881. Loftus *v.* Union Ferry Co., 84 N. Y. 455; *affirming* 22 Hun 33.

3. Defendant landed passengers from its ferry boats by means of a float or bridge, between each side of which and the adjoining pier was a space of from eight to twelve inches, left for the movement of the bridge under the action of the tide and the impact of the boats on entering the slip. On each side was a guard, with a sill along the outer line of the passage-way rising six or eight inches from the floor of the bridge, which was spanned by an arched rail, at the centre about three feet above the sill, supported by stanchions in the sill about six feet apart. Between the sill and this rail was another rail twenty or twenty-two inches above and parallel with the sill. Plaintiff's intestate, a child six years old, while leaving one of defendant's boats, in passing over this bridge, fell through one of the openings in the guard into the water and was drowned. In an action to recover damages it appeared that the bridge had been constructed five or six years before the accident and was similar to bridges at other ferries of the defendant, over which millions of people passed annually and no simi-

lar accident had previously happened. *Held*, that defendant was not chargeable with any actionable negligence; and that a verdict for plaintiff was properly set aside. *Ib.*

FIERI FACIAS.

EXECUTION, I.

FILING.

CHATTEL MORTGAGES, 4, 5; JUDGMENT, II.

FINDINGS.

By *Referee*, see REFERENCE; by *Judge*, on trial without a jury, see TRIAL, VII.

FIRE.

Insurance against, see INSURANCE, II.; liability for *Negligence*, in respect to spread of, see RAILROAD COMPANIES, IV.

FISHERIES.

Rights of owner of oyster bed. Although the right of fishing in the navigable waters of the state is common to all of its citizens, yet where one has staked out a bed, where no oysters are then growing, planted oysters therein, and taken measures to save and protect the young oysters, or "spat," such oysters and their offspring belong to him, and he may maintain an action against one who takes them away and converts them to his own use.—*Supreme Ct., (2d Dept.,) Sept.*, 1880. McCarty *v.* Holman, 22 Hun 53.

FIXTURES.

1. **What are, as between vendor and purchaser.** Soil removed from the land of one person and placed on the land of another, with his consent, and without an intention on the part of the former to reclaim it, or any agreement authorizing him to remove it, becomes a part of the land of the latter.—*Ct. of Ap., Nov.*, 1880. Lacustrine Fertilizer Co. *v.* Lake Guano, &c., Co., 82 N. Y. 476; *affirming* 19 Hun 47.

2. The owner of land cannot, as a general rule, by agreement between himself and another, make that which is a part of the realty, personal property, as against a subsequent purchaser of the land for value without notice, there having been no actual severance when the subsequent grant was made. *Ib.*

3. The doctrine of constructive severance cannot be applied to defeat the rights of such subsequent purchasers, under the recording acts. *Ib.*

4. **Instances.** In excavating a channel through the farm of T., to turn the waters of a river for canal purposes, a deposit of marl was struck, which was excavated and deposited on the banks of the cut, where it remained for over twelve years, when T. sold and conveyed his farm to S. The deed contained an exception of the said beds or deposits of marl, and an agreement that the marl might remain on the land for ten years and that the grantor might, at any time within that period, "remove a part or the whole of said marl." *Held*, that when the conveyance was made, the marl was a part of the soil of the farm of T., and this without regard to the question whether or not the state, before cutting the channel, had acquired title to the land through which it was excavated; that the exception in the deed was of an interest in the land, terminable on the expiration of the ten years, and if the right of removal was not exercised within that period, the grantee held, relieved of the burden of the exception, and as absolute owner. *Ib.*

5. T., by instrument under seal, conveyed the beds of marl to B. with covenant of warranty and without limitation as to time of removal. Thereafter, T. re-acquired title to the farm. The conveyance to B. was not recorded.

Held, 1. That the marl did not become personalty by force of the conveyance; that it was void as against a subsequent grantee of the farm, who purchased after the expiration of the ten years, in good faith, for a valuable consideration without knowledge; that the exception in the deed was not constructive notice, as the right reserved to T. had expired, and even if the ten years had not elapsed when T. re-purchased, the right, save for the grant to B., was merged in the fee then acquired.

2. That a purchaser from said grantee stood in the place of the latter and was entitled to the protection of the recording act, although he purchased with notice of the interest of B. *Ib.*

6. **What are not.** Gas fixtures, which are simply screwed on to the gas pipes of a building, and can be detached by unscrewing them, and mirrors which are not set into the walls, but are put up after the completion of the building, being supported by hooks or other supports driven in or attached to the walls, and which can readily be detached from these supports without interfering with or injuring the walls, form no part of the realty; they are simply chattels, not appertaining to the building; and so, do not pass by deed or under a mortgage of the premises.—*Ct. of App., April*, 1880. McKeage *v.* Hanover Fire Insur. Co., 81 N. Y. 38.

7. In respect to such articles, the mere declaration of the owner that he intends them to go with the house does not make them realty. *Ib.*

8. Where, however, such chattels are specially bargained for and purchased by a purchaser of the premises, they pass by delivery, although not mentioned in the deed, and no bill of sale of them is given. *Ib.*

9. **Instances.** M., who had purchased and had been put into possession of certain premises, with the gas fixtures and mirrors, executed a mortgage on the premises to defendant. No mention of said chattels was made in the mortgage. When he applied for the loan, to secure which the mortgage was given, he

stated that the house included gas fixtures, mirrors, etc., and that they were to go with it. The premises were afterward sold and conveyed to S., who sold and conveyed to W., the deeds stating the conveyance to be subject to the mortgage; no mention was made of said chattels. The grantees went into possession; while so in possession W. executed a bill of sale of said chattels to McK., to whom he had also contracted to sell the house. McK went into possession, and subsequently paid most of the purchase price. In an action for the alleged conversion of said chattels, by plaintiff, who claimed as assignee of McK. against defendant, who had taken possession under foreclosure sale—

Held, 1. That the possession of W., at the time he executed the bill of sale, was *prima facie* evidence of his title; that the representations and statements made by N. when negotiating the loan did not change the character of the property, and could not affect subsequent purchasers for value having no notice of them, although as between defendant and N., the former might have an equitable lien.

2. That the fact that McK. was present at the foreclosure sale and failed to give notice of his claim, did not estop him from asserting it; that the property offered for sale being simply the house and lot, and no announcement having been made that the chattels in question were included, there was no occasion for protest. *Ib.*

10. The assignment from McK. to plaintiff was after the cause of action for the conversion had accrued. The assignment transferred the title of McK. to the property as well as the cause of action. *Held,* that plaintiff could maintain the action; also, that the consideration of the assignment was not material so long as it was valid as between the parties to it. *Ib.*

FORBEARANCE.

GUARANTY, 11; PRINCIPAL AND SURETY, III.

FORCIBLE ENTRY AND DETAINER.

1. **What questions are before the court.** In proceedings for forcible entry and detainer, under Code of Civ. Pro., ch. 17, title 2, the main question for determination is whether the party charged entered by force, upon one having previously a peaceable possession, under claim of right, and whether the person whose possession was invaded has been held out by force.—*Marine Ct., (Sp. T.,) March,* 1881. Kelly *v.* Sheehy, 60 How. Pr. 439.

2. These provisions do not cast upon the magistrate the burden of examining and determining conflicting titles to real estate. *Ib.*

FORECLOSURE.

MECHANICS' LIEN, II.; MORTGAGES, VI.

FOREIGN CORPORATIONS.

CORPORATIONS, VIII.; INSURANCE, VI.

FOREIGN EXECUTORS.

EXECUTORS AND ADMINISTRATORS, 120.

FORGERY.

Sufficiency of indictment. The plaintiff in error was convicted of forgery in the third degree in attempting to forge an instrument purporting to be a pecuniary obligation of the empire of Brazil. The instrument, which was set forth in the indictment in the Portuguese language, with an English translation, states that "the national treasury will pay to bearer this quantity of *twenty mil-reis,* value received."

Held, 1. That as the mil-reis was not money of this country, and as the court could not take judicial notice that it was a coin at all, it did not appear that the instrument involved any pecuniary demand or obligation upon the part of the empire of Brazil, and that the indictment was insufficient.

2. That the objection might be taken after verdict and judgment thereon.—*Supreme Ct., (1st Dept.,) March,* 1881. Sanabria *v.* People, 24 Hun 270.

FORMER ADJUDICATION.

JUDGMENT, III.

FRANCHISE.

CORPORATIONS, I.; and the titles of the various corporate bodies.

FRAUD.

Comprises only general principles as to what acts or representations are, or are not fraudulent, and the remedies at the command of the person wronged or deceived. The following titles should be consulted for the decisions on the effect of fraud or deceit upon the matters and questions there treated: ASSIGNMENTS; BILLS OF EXCHANGE; CHATTEL MORTGAGES; CONTRACTS; DEEDS; MORTGAGES; PROMISSORY NOTES; SALES; VENDOR AND PURCHASER; WILLS.

The circumstances which will render a conveyance fraudulent as against the grantor's creditors, are treated under FRAUDULENT CONVEYANCES.

I. WHAT AMOUNTS TO FRAUD OR DECEIT.
II. REMEDIES FOR FRAUD.

I. What Amounts to Fraud or Deceit.

1. Constructive fraud. The fact that there is difference in the special information of the parties on the subject, will not constitute an element tending to establish constructive fraud, unless there are relations of confidence between the parties or their agents.—*Superior Ct., June,* 1880. Stevens *v* Mayor, &c., of New York, 46 Superior 274.

2. False representations. When a statement is made by a party who assumes or intends to convey the impression that he has actual knowledge of its truth, though conscious that he has no such knowledge, and when he knows that the inquirer relies and is about to act upon his statement, a jury may be justified in finding, on proof of the falsity of the statement, and of the injury sustained by the party relying thereon, that the party making the same intended to deceive and defraud the inquirer.—*Supreme Ct.,* (1st *Dept.,*) *Jan.,* 1881. Meyer *v.* Amidon, 23 Hun 553. Compare Fenn *v.* Curtis, Id. 384; Bradner *v.* Strang, Id. 445.

3. Where the party making such statement testifies that he simply undertook to repeat what had been told him, while the party to whom it was made testifies that the statement was positive and made as being within the personal knowledge of the party making it—*Held,* that the question should be submitted to the jury. Meyer *v.* Amidon, *supra.*

4. False statements believed to be true. The plaintiff purchased of the defendant a mortgage, relying upon a statement made by the latter, that it was a first mortgage, and that the property covered by it was worth $15,000. In fact, it was a second mortgage, and worthless. The defendant made the statement in good faith, believing it to be true. He did not intend, and refused to guarantee the payment of the mortgage. In an action brought by the plaintiff to recover the amount paid by her on the purchase of the mortgage—*Held,* that she was not entitled to recover.—*Supreme Ct.,* (2d *Dept.,*) *Dec.,* 1880. Van Vliet *v.* McLean, 23 Hun 206.

5. Concealment, or suppression of facts. D., S. & Co., a banking and commission firm, accepted drafts drawn upon the firm by B., a clerk in their employ, which were purchased by defendants, who were note-brokers. B. had no funds on deposit, and said firm was not indebted to him. Defendants knew that the drafts were not drawn against funds, but were issued by D., S. & Co., as a means of borrowing money. Plaintiff had no such knowledge. Defendants had been accustomed for several years to purchase similar acceptances and to sell them in the market. Plaintiff had purchased large amounts of them from defendants and other brokers. In pursuance of their custom, defendants immediately after said purchase sent a written notice to plaintiff that they had for sale acceptances of D., S. & Co., stating the price paid, and for what they would sell. Plaintiff purchased a portion of the paper. Defendant made no express representation of any kind as to the paper, and no inquiry was made by plaintiff as to its origin, character or consideration. D., S. & Co. failed a few days after; up to the day of such failure that firm had enjoyed the highest financial credit and standing, and it did not appear that defendants had any knowledge or information that it was in embarrassed circumstances. *Held,* that an action to recover back the moneys paid for the acceptances on the ground of fraud on the part of defendants, in concealing their knowledge of the origin and consideration of the paper, was not maintainable.—*Ct. of App., June,* 1880. People's Bank *v.* Bogart, 81 N. Y. 101.

6. Plaintiffs, on the 6th of November, 1868, wrote to S., of the firm of S. & Co., of which firm defendant was a member, stating that they understood S. & Co. had "a lien," etc., on the mills of the U. S. W. Co.; that said company was offering to buy of them on credit, and inquiring as to its "ability to pay." Defendant answered under date of November 7th, 1868, stating that said company consigned all its goods to them, for which they had a ready sale, sometimes on orders largely ahead of the production; that so far as they could judge, it had made money; that they could only form an opinion as to its management from the period they had been in connection with it; that it had nothing to conceal, and would no doubt fairly answer all plaintiffs' inquiries. In an action to recover damages for alleged fraudulent representations and concealments, it appeared that S. & Co., at the time the answer was written, had a chattel mortgage for $300,000 on the personal property of said company, which was on record; also, a mortgage on its real estate. Nothing was said of this, and defendant testified that the omission was because the mortgage was on record, and, therefore, was intentional. He did not admit, however, that it was with any wrong intent. *Held,* that the evidence did not warrant a finding of a fraudulent suppression; that from the terms of the letter of inquiry, defendant might reasonably assume that the object was not to elicit information as to the "lien," etc., of the existence of which plaintiffs were aware.—*Ct. of App., Sept.,* 1880. Babcock *v.* Libbey, 82 N. Y. 144; *affirming* 17 Hun 131.

II. Remedies for Fraud.

7. Who may sue for deceit. Where a member of a firm makes to a mercantile agency statements known by him to be false, as to the capital invested in the firm business, with the intent that the statements shall be communicated to persons interested in ascertaining the pecuniary responsibility of the firm, designing thus to procure credits and to defraud such persons; and such statements are communicated to one who in reliance thereon sells goods to the firm upon credit, an action for deceit is maintainable at the suit of the vendor, against the partner making such false representations.—*Ct. of App., Nov.,* 1880. Eaton, Cole, &c., Co. *v.* Avery, 83 N. Y. 31; *affirming* 18 Hun 44.

8. No recovery ex contractu, on failure to prove fraud. Where an action is brought to recover back moneys alleged to have been fraudulently obtained under color of a contract with the state, by means of fraudulent pretences and vouchers, and by collusion with state officers, on failure to prove fraud a recovery *ex contractu* cannot be had.—*Ct. of App., April,* 1880. People *v.* Denison, 80 N. Y. 656.

9. Power of equity to grant relief. A common law action, for deceit, based on actual fraud, in which the allegations of fraud go to the very foundation of the action, and are not simply attached as incident to the cause of action, cannot be sustained as an equitable action,

brought to charge defendant as trustee for plaintiff, on the ground of constructive fraud.—*Superior Ct., June,* 1880. Stevens *v.* Mayor, &c., of New York, 46 Superior 274.

As to fraud in *Sales of chattels,* see SALES; in *Sales of land,* see VENDOR AND PURCHASER.

FRAUDULENT CONVEYANCES.

1. **Effect of possession remaining in grantor.** Although the continued possession of the demised premises by an assignee of a lease, after he has assigned the same, may be evidence of fraud, and tend to show that the assignment was merely colorable or fictitious, yet that fact standing alone is not sufficient to establish the invalidity of the assignment, or render such assignee liable for rent thereafter accruing.—*Supreme Ct.,* (*2d Dept.,*) *Dec.,* 1880. Tate *v.* McCormick, 23 Hun 218.

2. **Effect of reservations or trusts in grantor's favor.** The statute (2 Rev. Stat. 135, § 1,) has no application to real and actual alienation, upon valuable consideration and positive and real purposes, although incidental benefits are reserved to the grantor. Its object is to render simply ineffectual, clearly nominal transfers of personal estate, when the entire use and control are, by declaration of trust, in or out of this instrument, left in him who makes the transfer. The statute only avoids conveyances which are wholly to the use of the grantor.—*Supreme Ct.,* (*4th Dept.,*) *April,* 1881. Shoemaker *v.* Hastings, 61 How. Pr. 79.

3. **Conveyances between parent and child.** M., being insolvent, conveyed to his son F., who was then a man of no means, his farm, which was worth from $10,000 to $11,000. F. was then twenty-six or twenty-seven years old; after he became of age he continued working on the farm under no express agreement, except for a year previous to the conveyance, when he worked it on shares. The farm was conveyed subject to a mortgage of $4000. F., to secure a portion of the purchase money, gave back a mortgage of $3500, and $1500 was agreed upon and allowed for the services of F., after he became of age, and for his share of the proceeds of the farm for the last year, which M. had received. F. also gave to M. a note for $500, and executed a written agreement, by which, for an expressed consideration of love and affection, and of $100, he agreed to support M., and to pay him $500 on demand, in case he should think it the duty of F. so to do. By another writing, executed about six weeks thereafter, M. conveyed to F. all his farming utensils and farm property in consideration of $1200, for which F. gave his notes. In an action by judgment creditors of M. to set aside the deed as fraudulent—*Held,* that the facts authorized a finding that in and by the transaction the parties intended to hinder, delay and defraud the creditors of M.; and so, that the deed was void.—*Ct. of App., Dec.,* 1879. Stearns *v.* Gage, 79 N. Y. 102.

4. **—to wife on purchase by husband.** A husband is authorized to make a suitable provision for his wife, and if made without any fraudulent intent or purpose, it will be sustained. Where, therefore, a husband, who is entirely solvent, openly purchases property and causes the same to be conveyed to his wife, retaining sufficient property in his own hands for the purposes of his business and abundant means to pay all his existing debts, and the circumstances show that neither insolvency nor inability to meet his obligations could reasonably have been within his contemplation, and that no new or more hazardous business was in contemplation, the transaction cannot be held fraudulent and void as against subsequent creditors. —*Ct. of App., Sept.,* 1880. Carr *v.* Breese, 81 N. Y. 584.

5. Where a husband having property worth from $21,000 to $22,000, and owing debts to the amount of $2800, and doing a prosperous business, purchased and caused to be conveyed to his wife premises costing $16,300, of which sum $10,600 was paid by him by mortgage on his real estate, and the balance secured by a mortgage on the premises—

Held, 1. That the settlement was not unsuitable or disproportionate to the husband's means.

2. That the fact that one who had given the husband credit previous to such settlement, knowing that he owned the real estate so mortgaged to pay part of the purchase money, was not informed when subsequent credit was given, of the purchase for the wife, was not evidence of fraudulent intent. *Ib.*

For the effect of fraudulent acts or representations *As between the parties* to the conveyance, see VENDOR AND PURCHASER, I.

As to the remedy by *Creditor's suit,* see that title.

FREIGHT.

CARRIERS; INSURANCE, IV.; SHIPPING, II.

FUGITIVES FROM JUSTICE.

EXTRADITION.

FUNERAL EXPENSES.

EXECUTORS AND ADMINISTRATORS, 92, 93.

G.

GAS-LIGHT COMPANIES.

1. **The liability of a stockholder** of a corporation organized under the act authorizing the incorporation of gas-light companies (Laws of 1848, ch. 37,) to the creditors of the company imposed by said act (§ 10), until the whole capital stock has been paid in and certificate thereof filed, is not limited to the original incorporators, but applies as well to those becoming stockholders after the incorporation.—*Ct. of App.*, *Jan.*, 1881. Briggs *v.* Waldron, 83 N. Y. 582.

2. *It seems* that the complaint in an action brought by a creditor against a stockholder, under that act, is defective when it omits to state that the capital stock had not been paid in and certificate filed at the time the debt was incurred. *Ib.*

3. *It seems*, also, that the certificate of the clerk of the proper county as to the non-filing of the certificate is defective where it omits to state that diligent search for it has been made in his office, as required by section 921 of the Code of Civil Procedure. *Ib.*

For decisions relative to *Manufacturing corporations*, generally, see MANUFACTURING COMPANIES.

GENERAL AVERAGE.

INSURANCE, IV.

GENERAL ISSUE.

PLEADING; and the titles of the various causes of action.

GENERAL TERM.

As to *what is appealable to*, and the *Jurisdiction and Procedure* of the General Term, see APPEAL, II.

GIFT

1. **Necessity of delivery.** To establish a valid gift, a delivery of the subject of the gift to the donee, or to some person for him, so as to divest the possession and title of the donor, must be shown.—*Ct. of App.*, *April*, 1880. Young *v.* Young, 80 N. Y. 422, 430.

2. To make a valid gift *in præsenti* of an instrument securing the payment of money, reserving to the donor the accruing interest during life, without a written transfer or declaration of trust, there must be an absolute delivery of the security to the donee, vesting the entire legal title and possession in him, on his undertaking to account to the donor for the interest. *Ib.*

3. If the donor retains the instrument under his own control, though merely for the purpose of collecting the interest, there is an absence of the complete delivery essential to the validity of a gift. *Ib.* 431.

4. So, also, such a gift cannot be made by creating a joint possession of donor and donee, even if it be with the intention that each shall have an interest. *Ib.*

5. **Evidence; and when question for jury.** As to what facts must be proved to establish a valid gift, and when the question should be left to the jury, see Armitage *v.* Mace, 46 Superior 550.

As to gifts in *Fraud of creditors*, see FRAUDULENT CONVEYANCES.

As to gifts by *Will*, see DEVISE; LEGACIES; WILLS. By way of *Advancement*, see ADVANCEMENT.

GRAND JURY.

INDICTMENT, I.

GRAND LARCENY.

LARCENY.

GUARANTY.

I. GENERAL PRINCIPLES.
II. REQUIREMENTS OF THE STATUTE OF FRAUDS.
III. CONSTRUCTION AND OPERATION.
IV. ACTIONS ON GUARANTIES.

I. GENERAL PRINCIPLES.

1. **What amounts to a guaranty.** To induce plaintiff, a ship-builder, to build a schooner for defendant and others, and to receive a one-sixteenth interest therein in payment for his services, defendant covenanted and agreed with plaintiff that the said one-sixteenth part of the schooner should pay to him "a dividend to the amount of not less than twenty-five per cent. per annum, and as much more as said schooner shall pay over twenty-five per cent. on her cost, clear of her bills," unless some serious accident should occur. *Held*, that the agreement amounted to a guaranty on the part of defendant that the earnings of the schooner in each year should amount to twenty-five per cent. of her cost, and that the covenant to pay the same to plaintiff was subject to the implied warranty that he should continue to own his share in the schooner, and that defendant's liability thereunder ceased upon plaintiff's parting therewith. —*Supreme Ct.*, (*2d Dept.*,) *May*, 1880. Bishop *v.* Alcott, 21 Hun 255.

II. REQUIREMENTS OF THE STATUTE OF FRAUDS.

2. What promises are not within the statute. Where the holder of a promissory note, ostensibly acting for himself, sells the same for a valuable consideration, and, upon the sale, promises orally that the note is good and will be paid at maturity, the promise is not within the statute of frauds, and the promisor is liable thereon in case of non-payment.—*Ct. of App., Feb.*, 1880. Milks *v.* Rich, 80 N. Y. 269.

3. The promise may be regarded, not as one to answer for the default of the maker, but as one to pay the purchaser for the money had, in case the maker does not. *Ib.*

III. CONSTRUCTION AND OPERATION.

4. Guaranty of payment. One who guarantees the payment of a bond and mortgage, guarantees the payment not only of the principal, but also of the interest that may accrue on the mortgage debt.—*Westc. Surr. Ct., Feb.*, 1881. Hurd *v.* Callahan, 9 Abb. N. Cas. 374.

5. The firm of B. Bros., distillers, at Evansville, Indiana, were accustomed, to the defendants' knowledge, to consign their products to one F. in New York and draw upon him as occasion required. December 29th, 1874, defendants wrote from New York to B. Bros. a letter saying "any drafts you may draw on F., of our city, we guarantee to be paid at maturity." Thereafter B. Bros. drew a draft on F. and presented the same, together with the defendants' letter, to plaintiff, which discounted the draft, and forwarded it to New York, where it was dishonored. In an action brought against the defendants—

Held, 1. That the letter operated as a special promise to B. Bros. to pay the amount of any drafts drawn by them upon F., which he refused to pay.

2. That the discounting of the draft by the plaintiff, upon the delivery to it of the letter, rendered the plaintiff an equitable assignee of the promise contained in the letter, and that, having an interest in the subject matter, the plaintiff could maintain the action to the same extent as its assignors could have done.—*Supreme Ct.*, (*1st Dept.*,) *May*, 1881. Evansville Nat. Bank *v.* Kauffmann, 24 Hun 612.

6. When a letter is to be considered as a general agreement to guarantee all drafts to be drawn against a certain person, enforceable by the holders thereof, discussed and the authorities collated. *Ib.*

7. Guaranty of collection. This action was brought to foreclose a mortgage given by one D. to the defendant, S., and by him assigned to plaintiff. The complaint alleged that the defendant, S., by his assignment, "guaranteed the payment of the principal sum of said bond and mortgage, together with the interest thereon, from May 5th, 1874," and prayed for a judgment against him for any deficiency that might arise on the sale. The clause in the assignment was as follows: "I hereby guarantee the payment of said bond and mortgage for five thousand dollars, and interest from May 5th, 1874, by due course of foreclosure and sale."

Held, 1. That the guaranty was one of collection and not of payment.

2. That no cause of action arose thereon against S. until the mortgaged premises had been sold and the amount of the deficiency arising on such sale determined.

3. That the complaint should be dismissed as to S.—*Supreme Ct.*, (*1st Dept.*,) *June*, 1880. Vanderbilt *v.* Schreyer, 21 Hun 537.

8. Continuing guaranty. January 10th, 1877, the defendants executed an instrument whereby they agreed with the plaintiff's assignors that one P., who had purchased or was about to purchase coal of said assignors, should and would pay them such prices therefor at such time or times as might be agreed upon between them and P., for all coal that might be delivered to him up to the 1st day of January, 1878; and in default of his so doing the defendants agreed to pay for the same, provided the amount so in default should not at any time exceed the sum of $1000.

Held, 1. That the guaranty was a continuing one.

2. That the proviso that the amount in default should not at any time exceed $1000 was a limitation upon the defendants' liability, and not upon the amount of coal to be furnished, and that the fact that the indebtedness due from P. for coal exceeded at times that sum, did not relieve the defendants from liability upon the contract.—*Supreme Ct.*, (*4th Dept.*,) *April*, 1881. Pratt *v.* Matthews, 24 Hun 386.

IV. ACTIONS ON GUARANTIES.

9. What may be shown in defence, generally. In October, 1874, one W., who was engaged in business in Buffalo as a pork-packer, presented to plaintiff, in the presence of defendant, a paper signed by the latter, which, after reciting that W. desired to increase his facilities for obtaining money from plaintiff, and proposed to pledge property in his possession to secure such loans and advances, provided as follows: "I do hereby promise and guarantee to said bank all such pledges of property, warehouse receipts, and other vouchers that may from time to time be given by said W. as collateral security to said bank for advances, discounts and loans of money, and promise on my part, that the property so transferred and set over to said bank shall not be misapplied or diverted to any other purpose while such loans or advances remain unpaid to said bank, and if any default or misappropriation of the property so pledged shall be made, I do promise and agree to make good to said bank any deficiency, and fully satisfy the stipulations contained in any such receipts or other vouchers therefor, without requiring any notice to me of the several loans and discounts that may be made by said bank to said W."

Held, 1. That the defendant was, by the terms of the said instrument, not only bound to make good to the plaintiff any loss or deficiency caused by the misapplication or diversion by W. of property pledged to the plaintiff, but that he also undertook that W. actually had in his possession the property which he professed to pledge, and that he could not defend an action brought against him upon the said agreement by showing that the property, for the value of which he was sought to be held, was not in ex-

istence at the time the receipts therefor were given to the plaintiff, or that the property described therein was worth much less than the receipts called for.

2. That the fact that the notes, to secure the payment of which the receipts had been given, had been renewed by plaintiff, and that the receipts had been taken from the old notes and attached to the new ones, did not affect the defendant's liability upon his guaranty.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Farmers', &c., Nat. Bank *v.* Lang, 22 Hun 372.

10. **The concealment** which will avoid a guaranty must be a fraudulent one; if not fraudulent in fact or in law, the defence is not made out.—*Ct. of App.*, *Sept.*, 1880. Howe Machine Co. *v.* Farrington, 82 N. Y. 121; *affirming* 16 Hun 591.

11. **Neglect to proceed against principal.** The mere neglect of the owner of a mortgage to proceed against the mortgagor will not discharge the guarantor of its payment, even though the value of the land has so depreciated as to be inadequate to pay the amount due.—*Westc. Co. Surr. Ct.*, *Feb.*, 1881. Hurd *v.* Callahan, 9 Abb. N. Cas. 374.

12. **Amount recoverable.** While in proceedings to sell the real estate of a deceased guarantor of a mortgage, the costs of foreclosure cannot be treated as a part of the debt, yet as they are incidental to the endeavor to collect the debt out of the mortgaged premises, the amount to be credited on the debt is the proceeds realized on the foreclosure after deducting the costs. *Ib.*

For the effect of the statute of frauds upon guaranties *In common with other contracts*, see CONTRACTS, III.; also, SALES, I.; VENDOR AND PURCHASER, I.

As to the nature and enforcement of the *Liability of a surety*, generally, see BONDS, II.; EXECUTORS AND ADMINISTRATORS, 114-119; PRINCIPAL AND SURETY, II.

GUARDIAN AD LITEM.

1. **Necessity of service of summons on infant before appointment.** A guardian *ad litem* can only be regularly appointed for an infant defendant in foreclosure after service of summons personally or by the substituted mode of service prescribed. An appearance, therefore, by one appointed guardian *ad litem* for an infant defendant who has not been served with summons is not a voluntary appearance of the defendant within the meaning of the provision of the code, (§ 424,) which provides that such an appearance shall be equivalent to personal service of the summons.—*Ct. of App.*, *March*, 1881. Ingersoll *v.* Mangam, 84 N. Y. 622; S. C., 61 How Pr. 149; *affirming* 24 Hun 202.

2. In an action to foreclose a mortgage, one of the defendants, who owned an interest in the mortgaged premises, was an infant under the age of fourteen; he resided with his mother in New Jersey. The summons was not served upon him, either personally or by publication, but was personally served upon his mother, in this state, who, after such service, upon her own application, was by order appointed a guardian *ad litem*, with authority to appear and defend in behalf of the infant, and she appeared and put in a general answer. Upon application to compel a purchaser at the sale under the judgment to complete his purchase—*Held*, that the court had no jurisdiction over the infant defendant to appoint a guardian *ad litem*, as said defendant had not been brought in, and the action had not been commenced as against him (Code, § 416); that an appearance by the guardian was not an appearance by the infant; that the judgment, therefore, was not binding upon him, the sale under it did not convey a good title, and the motion was properly denied. *Ib.*

3. **When it need not be.** Under the provisions of the Code of Procedure in reference to the appointment of guardians *ad litem* for infant parties to civil actions, the plaintiff in an action for partition could apply for and was entitled to an order appointing a guardian for a non-resident infant defendant, without a previous service of the summons upon or previous notice to said defendant. (§ 116, subd. 2.) —*Ct. of App.*, *Dec.*, 1880. Gotendorf *v.* Goldschmidt, 83 N. Y. 110.

4. Upon the petition of the plaintiff in a partition suit an order was made, as prescribed by said provision, appointing D. as guardian *ad litem* for certain non-resident infant defendants, unless they, or some one in their behalf, should, within a time specified, after service upon them of a copy of the order, procure a guardian to be appointed, and directing service upon the infants and their father. Service was made as directed, and at the expiration of the time limited, no steps having been taken by or on behalf of the infants, D. was appointed such guardian, and duly qualified. The summons was served upon him, and the infants appeared by him and answered. *Held*, that this was sufficient, both under said provision of the code and under the provisions of the Revised Statutes in reference to proceedings in partition (2 Rev. Stat. 317, § 3,) which are made applicable to actions for partition under the code (§ 448); and, it appearing that the court had jurisdiction of the subject matter, that a sale in pursuance of a judgment in the action gave a valid title as against said infant defendants. *Ib.*

5. **Rights of the guardian.** A guardian *ad litem*, appointed for an infant judgment creditor, who was made a defendant in foreclosure, had no notice of his appointment until after final judgment. *Held*, that he should then, on promptly applying, be allowed to answer, especially where the priority of the lien of his judgment was in dispute.—*Supreme Ct.*, (*Sp. T.*,) *Jan.*, 1878. Farmers' Loan, &c., Co. *v.* Erie R'y Co., 9 Abb. N. Cas. 264.

6. That an offer to amend the judgment, so as not to prejudice his right to collect the infant's judgment out of property not held under plaintiff's mortgage, should not be allowed to defeat the application, see *Ib.*

7. The application will be denied, however, if plaintiff consents to strike out the infant's name as a party to the proceedings. *Ib.*

As to the appointment, powers, and duties of *Special guardians* to sell lands of infants, see INFANTS, 6-13.

GUARDIAN AND WARD.

I. Appointment; and Nature of the Trust.
II. Powers and Duties of the Guardian.
III. Accounting; and Liability of Sureties.

I. Appointment; and Nature of the Trust.

1. **Appointment by Supreme Court.** The Supreme Court has no jurisdiction to appoint a guardian for an infant where the infant is not within the jurisdiction, or domiciled there, and has no property therein.—*Ct. of App., Sept.*, 1880. Matter of Hubbard, 82 N. Y. 90.

2. *It seems* that if an infant is a resident within the jurisdiction, although not domiciled and having no property there, the court has power to appoint a guardian; so, also, property gives jurisdiction to appoint a guardian thereof, although the infant is out of the jurisdiction and a resident abroad. The bringing of an infant, however, into this state by stratagem, for the purpose of giving jurisdiction, will not avail. *Ib.*

3. **— by surrogate.** As to the powers and discretion of the surrogate, with respect to the appointment of guardians, and to notify relatives of the infant of an application for letters of guardianship, see Matter of Feely, 4 Redf. 306.

4. **Testamentary appointment.** Laws of 1862, ch. 172, § 6, declaring that no man should create any testamentary guardian for his child unless the mother, if living, should in writing signify her assent thereto, was repealed by chapter 32 of 1871, authorizing every father to dispose, by deed or will duly executed, of the custody and tuition of any living child, or one likely to be born, during its minority or for any less time, to any person or persons in possession or remainder.—*Supreme Ct.*, (*1st Dept.*,) *April*, 1881. Fitzgerald *v.* Fitzgerald, 24 Hun 370; S. C., 61 How. Pr. 59.

5. **Who should be appointed.** One Marcellin died, leaving him surviving a daughter, about nine years old, a second wife, and a paternal uncle and aunt. A day or two before his death, he handed to his wife a paper, upon which he had written "Keep the children. Be a good Catholic, live a good Catholic, and die a good Catholic, and pray, pray for me when I am dead." Neither the father, the daughter, nor the stepmother had any property. The aunt had some property, and desired to be appointed guardian of the child. *Held*, that the surrogate rightly appointed the stepmother its guardian.—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Matter of De Marcellin, 24 Hun 207; S. C. 4 Redf. 299.

6. **The bond — when not required.** Where a foreign trust company is appointed guardian of infants, *it seems* that no bond will be required, if the statutes of the state in which such trust company is incorporated dispense with a bond in similar cases, making the property and capital of the company liable in case of default.—*N. Y. Surr. Ct., Aug.*, 1879. Matter of Cordova, 4 Redf. 66.

II. Powers and Duties of the Guardian.

7. **Of guardians in socage.** A wife whose husband had died, leaving children of whom she is guardian in socage, may purchase, on foreclosure, lands held and mortgaged by her deceased husband. Lucky *v.* Odell, 46 Superior 547.

III. Accounting, and Liability of Sureties.

8. **Allowances to guardian.** For matters of practice upon the accounting of a guardian, who is also the parent of the ward, and when, in such case, allowances for the ward's support and maintenance may be made, see Voessing *v.* Voessing, 4 Redf. 360.

9. **Release by ward.** Where the guardian had a settlement with the ward after he attained his majority, and assigned a mortgage to him for the amount found due, and the ward gave a receipt acknowledging the assignment of the mortgage "as equivalent" to the amount found due—*Held*, that upon the accounting of the guardian, the surrogate had no jurisdiction to try the question of the validity of the settlement, and that the receipt was conclusive upon the question of the acceptance of the mortgage by the ward in satisfaction of the amount due him, and could not be contradicted by parol evidence.—*Kings Co. Surr. Ct., April*, 1880. Downing *v.* Smith, 4 Redf. 310.

10. **Right to proceed upon the bond.** An accounting by a guardian is not a prerequisite to an action against the sureties upon his bond, in those cases in which the extent of his liability has been otherwise as definitely determined as it could be by an accounting.—*Supreme Ct.*, (*4th Dept.*,) *June*, 1880. Girvin *v.* Hickman, 21 Hun 316.

11. Where a guardian wrongfully converts the money of the ward to his own use, no demand is necessary before bringing an action against the sureties upon his bond. *Ib.*

12. **Subrogation of surety.** As to the surety's right to be subrogated to the position of the ward, on payment upon the guardian's default, of the amount decreed to be paid to the ward, see Rapp *v.* Masten, 4 Redf. 76.

H.

HABEAS CORPUS.

1. When the proper remedy. Where a party is illegally arrested under an execution, while returning from attendance at a court, the proper remedy is by a motion and not by a writ of *habeas corpus;* a party must be in actual custody to authorize such a writ to issue.—*Supreme Ct.*, (1st *Dept.*,) *May*, 1880. Matter of Lampert, 21 Hun 154.

2. Use of the writ to obtain custody of children. Where, in a contest between parents for the custody of two children, aged five and six years, there is no objection to the mother personally, it is for the welfare of the children, considering their tender years, that they be left with her. And, in such a case, an inquiry as to the father's ill-treatment of the mother is pertinent, as bearing upon his right to take the children from her. — *Supreme Ct.*, (*Chamb.*,) *Jan.*, 1881. Matter of Pray, 60 How. Pr. 194.

As to imprisonment on *Civil process*, see EXECUTION, II.; IMPRISONMENT. On *Criminal commitment*, see TRIAL, VIII.

HABITUAL DRUNKARDS.

1. Disability to contract. An habitual drunkard is not incompetent to execute a deed; he is simply incompetent upon proof that at the time his understanding was clouded, or his reason dethroned by actual intoxication, or upon proof of general unsoundness of mind.—*Ct. of App.*, *June*, 1880. Van Wyck *v.* Brasher, 81 N. Y. 260.

2. Accounting by committee. The committee of an habitual drunkard, on proving their accounts, claimed to be allowed the sum of $30 per month, allowed by them to the inebriate for spending money. The court refused to allow more than $75 a year for that purpose. *Held*, no error; that it would have been proper to refuse to allow any sum for that purpose.—*Supreme Ct.*, (1*st Dept.*,) *Jan.*, 1881. Stephens *v.* Marshall, 23 Hun 641.

3. When the committee fail to file the inventories required by law, and do not, on the commencement of the accounting, disclose all the property they received, they may be properly charged with one-half of the expenses of the accounting. *Ib.*

HANDWRITING.

EVIDENCE, IV.; WITNESSES, V.

HAZARDOUS AND EXTRA-HAZARDOUS.

INSURANCE, II.

HIGHWAYS.

1. Right of action of highway commissioner. As to when he should be nonsuited for failing to prove his official character, and as to his right to bring an action to set aside a fraudulent conveyance made by one against whom he has recovered a judgment, see Albro *v.* Rood, 24 Hun 72.

2. Liability on contracts. The complaint in action upon a bridge contract set forth the contract for building the bridge, in which the defendants were described as highway commissioners, and that they signed it as such; they were not described in the summons and complaint as commissioners, and judgment was asked against them personally. *Held*, that plaintiff was properly nonsuited, because defendants were not sued officially as commissioners; that under the statute providing for actions upon such contracts (2 Rev. Stat. 473, § 92) it was necessary to specify "in the process, pleadings and proceedings their name of office;" that the statutory requirement was not merely formal, but matter of substance, to the end that the amount collected might be allowed in the official account of the commissioners (2 Rev. Stat. 476, § 108); also as it affected the place of trial.—*Ct. of App.*, *Dec.*, 1879. Boots *v.* Washburn, 79 N. Y. 207.

3. — for failure to repair highway. To relieve the commissioners of highways of a town from personal liability to one who has been injured by their neglect to repair a defect known by them to exist in the highway, it is not sufficient to show that they had no funds on hand wherewith to cause the necessary repairs to be made, but it must also be shown that they had sought through the proper channels to procure the said funds; and their failure so to apply therefor will render them liable for the damages sustained by reason of such defect.—*Supreme Ct.*, (4*th Dept.*,) *April*, 1881. Warren *v.* Clement, 24 Hun 472.

4. Proceedings for opening new roads. A court of equity cannot entertain an action to restrain commissioners of highways from continuing proceedings instituted under the provisions of the statutes, to open a highway, on account of any irregularities occurring in their proceedings, unless it be shown that the assistance of the court is necessary to protect the complainant against irreparable damage and injury.—*Supreme Ct.*, (2*d Dept.*,) *Feb.*, 1881. Prospect Park, &c., R. R. Co. *v.* Williamson, 24 Hun 216.

5. Highway assessments; validity, &c. The provision of the act of 1871 (Laws of 1871, ch. 670, § 12,) authorizing the making of a road in the county of Rockland, which empowers the commissioners to sell lands assessed for unpaid assessments, "in the same

manner as the comptroller of the state is authorized to sell lands for the non-payment of assessments for taxes," does not make applicable to sales under said act the provision of the statute (Laws of 1855, ch. 427, § 65, as amended by Laws of 1860, ch. 209,) which declares all conveyances by the comptroller upon such sales by him to be presumptive evidence of regularity. Therefore—*Held*, that as there was no provision of said act of 1871 making an assessment under it when completed *prima facie* evidence of itself of regularity, and as one claiming under an assessment sale would be required to show the proceedings, and would thus develop any defects invalidating them, an action could not be maintained to set aside the assessment as a cloud on title because of any such defects.—*Ct. of App., June,* 1880. Dederer *v.* Voorhies, 81 N. Y. 153.

6. In such an action it was alleged that a commissioner was appointed who was not a freeholder, and it was claimed that for this defect the suit was maintainable, as it would not appear upon the face of the proceedings. *Held*, that the court, by the appointment of the commissioner, adjudged that he was a freeholder, and that this was final unless corrected by a direct proceeding for that purpose. *Ib.* 158.

7. The complaint alleged various fraudulent acts and practices upon the part of the commissioners not appearing in the records, and material false and fraudulent statements in their reports. The complaint was demurred to. *Held*, that the demurrer was improperly sustained; that the frauds alleged would vitiate the proceedings; and that equity would relieve against the conveyance under them; that the act of 1874, (Laws of 1874, ch. 395,) confirming the assessment and declaring it in all respects regular, did not apply to or cover fraud. *Ib.*

8. Action to remove obstructions from highways. As to the damages recoverable in an action to remove obstructions from a highway, and what evidence is not admissible to mitigate them, see Van Brunt *v.* Ahearn, 23 Hun 288.

For rules relative to *Plank roads* and *Turnpikes*, see PLANK ROAD COMPANIES; TURNPIKE COMPANIES.

HOLDING OVER.

LANDLORD AND TENANT, IV.

HOMICIDE.

I. THE CRIMINAL OFFENCE; AND HOW PROSECUTED.

II. THE CIVIL ACTION FOR CAUSING DEATH.

I. THE CRIMINAL OFFENCE; AND HOW PROSECUTED.

1. What killing is murder in the first degree. Some of the counts of the indictment charged that, while engaged in the commission of the crime of grand larceny, the prisoner assaulted the deceased, and "in some way and manner, and by the use of some means and instruments to the jury unknown," killed her. *Held*, that a conviction under these counts was proper, where the evidence showed, and the jury found, that the deceased died from fright, superinduced by the violence of the prisoner; that it was not necessary to show that the actual personal violence was the sole and immediate cause of the death, nor was it necessary to allege in the indictment, that the death was by fright occasioned by the acts of violence.—*Ct. of App., April,* 1880. Cox *v.* People, 80 N. Y. 500, 515.

2. After the jury had been charged, that if they believed that the deceased died from fright and not from any violence of the prisoner, they might acquit, his counsel requested the court to charge, "that the possibility of death by natural causes must be excluded, by the circumstances of murder in the first degree." The court refused to charge other than it had charged. *Held*, no error; that the possibility of death from any cause other than the act of the prisoner would not require an acquittal, if the evidence satisfied them, beyond a reasonable doubt, that such act did cause the death, or produced the fright which caused it. *Ib.* 516.

3. Form and requisites of indictment. Under the provisions of the statute (Laws of 1876, ch. 333,) which declares the killing of a human being, "when perpetrated by one engaged in the commission of a felony," to be murder in the first degree, an intent to kill is not a necessary ingredient of the crime; the killing, if done by the accused while engaged in the commission of a felony, constitutes the offence, although casual and unintentional. *Ib.* 514.

4. It is not necessary, therefore, to aver an intent to kill, in an indictment charging the killing to have been done while the accused was engaged in the commission of a felony. *Ib.*

5. An indictment is good in form which describes the offence in the language of said provision. *Ib.*

6. *It seems* that the technical words "malice aforethought," essential in an indictment for murder at common law, are not necessary in an indictment framed under either of the specifications contained in said act of 1876. *Ib.*

7. The specification in the act of 1876 (Laws of 1876, ch. 333,) of the cases which shall be deemed murder in the first degree, does not necessarily require a change in the form of an indictment; and a conviction under a common law indictment, of murder in the first degree, is proper where the offence proved is brought within either of the statutory definitions. *Ib.*

8. Evidence for the prosecution. Upon a trial for wife murder, evidence as to the conduct and bearing of the prisoner on the day of the murder, tending to show an indifference on his part as to the death of his wife, is admissible for the purpose of showing how the prisoner demeaned himself when the imputation of this crime was fresh upon him, and also to rebut the legal presumption that the affection existing between husband and wife will deter either one of them from wantonly doing an injury to the other.—*Supreme Ct., (4th Dept.,) Jan.,* 1881. People *v.* Greenfield, 23 Hun 454, 464.

9. As to the competency of evidence on a

trial for murder, as showing motive, and as connecting the prisoner with the crime; also when evidence is properly excluded as leading and as hearsay, see Reinhart *v.* People, 82 N. Y. 607.

10. Evidence in defence — confessions of third persons. Upon a trial for murder, declarations or admissions of persons other than the prisoner (in this case letters,) that they had killed the deceased, are not competent evidence in his favor. People *v.* Greenfield, *supra.*

11. Violent character of deceased. N. and one O'C. having had an altercation in a beer saloon, the latter struck N. and shoved him out of the saloon, and subsequently followed him some two hundred and fifty feet to the corner of a street, and again struck him. N. then ran home, calling for his knife, and stating that he would kill or fix O'C. Having procured a carving knife, he returned to the corner, where he and O'C. instantly came together, and the latter was cut through the heart with the knife. Upon the trial of N. for murder, he testified that upon his return he was attacked by O'C., and used the knife in self-defence. He then offered to show specific acts of violence committed by the deceased upon other occasions upon other people, and also to show the character of the deceased to be bad, from general reputation for violence. *Held,* that the court properly excluded the evidence tending to prove specific acts of violence upon other occasions, but erred in excluding that which tended to show that the general character of the deceased for violence was bad.—*Supreme Ct.,* (*3d Dept.,*) *Nov.,* 1880. Nichols *v.* People, 23 Hun 165.

12. Instructions to the jury. Upon the trial of an indictment for murder, where the evidence was conflicting, the court charged, "that the jury, if they believed the evidence offered in behalf of the people to be true, would be justified in finding the prisoner guilty of murder in the second degree." *Held,* error; that the existence of the intent to kill, which is the necessary ingredient of that crime, was a question to be determined by the jury from all the facts and circumstances; and from the charge as given, nothing being said concerning their duty in this respect, it might well have been understood by the jury as involving an opinion of the court upon this as well as the other elements of the crime; and that it was likely to mislead and prejudice, as it virtually excluded from inquiry the question as to how far the testimony on the part of the prosecution was modified or neutralized by that produced by the defendant, or what inference should be drawn from any of it.—*Ct. of App., June,* 1880. McKenna *v.* People, 81 N. Y. 360.

13. The verdict was manslaughter in the third degree, not "murder in the second degree." *Held,* that this did not conclusively establish that the objectionable charge could have done no harm, as it could not be said that the jury were not influenced by it. *Ib.*

14. Upon the trial of the plaintiff in error, for murder, he was sworn and testified in his own behalf. Thereafter the court, after commenting on the right of one accused of crime to testify in his own behalf, and on the right of the jury to accept that part of such testimony which they believed to be true, and to reject that which they believed to be false, said, "when a party in a civil action deliberately swears false to one material part of his testimony, and the jury are satisfied that he has so sworn falsely, intentionally false, they are not only at liberty to reject it, but it is sometimes the duty of the jury to reject the whole. The maxim is, *falsus in uno falsus in omnibus.*" *Held,* that there was no error in the charge, as it properly left the decision of the question as to whether or not the whole testimony should be disregarded, to the judgment of the jury, to be formed upon the whole case. — *Supreme Ct.,* (*3d Dept.,*) *Nov.,* 1880. People *v.* Moett, 23 Hun 60.

15. *Semble,* that if the court had omitted the word "sometimes," and if the charge could be considered to apply to the present case, and not solely to civil actions, it would have been erroneous, as making an absolute rule of law out of that which is only a wise maxim, to be applied discreetly by the jury, according to their judgment in each case. *Ib.*

II. Civil Action for Causing Death.

16. The right to sue. An action is maintainable in this state by the personal representatives of one whose death resulted from an injury received in another state through the negligence of the defendant, where it appears that the laws of that state are similar to those of this state, giving to the personal representatives a right of action in such cases; it is not essential that the statutes should be precisely the same.—*Ct. of App., Feb.,* 1881. Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48.

17. *It seems,* however, that the existence of such statutes in the other state must be proved; it cannot be presumed. *Ib.*

18. An administrator appointed in this state may maintain the action without showing that letters of administration have been taken out in the state where the death occurred. *Ib.*

19. Time within which to sue. An action under Laws of 1847, ch. 450, as amended by Laws of 1849, ch. 256, and Laws of 1870, ch. 78, to recover damages for the death of a person occasioned by the defendant's negligence, must be brought within two years from the time of the death.—*Supreme Ct.,* (*2d Dept.,*) *May,* 1881. Bonnell *v.* Jewett, 24 Hun 524.

20. Evidence—declarations of deceased. Admissions of the deceased as to the manner in which the accident occurred are competent evidence against his representative in an action brought for causing the death of the deceased.—*Superior Ct., Dec.,* 1880. Lax *v.* Forty-second St., &c., R. R. Co., 46 Superior 448. To the contrary, Waldele *v.* New York Central, &c., R. R. Co., 61 How. Pr. 350.

21. In an action for causing death, evidence on the part of the defendant, that the life of the deceased was insured is incompetent.—*Ct. of App., Nov.,* 1879. Kellogg *v.* New York Central, &c., R. R. Co., 79 N. Y. 72.

22. Amount of recovery—right to recover. In an action brought by a father, as the administrator of his deceased child, a healthy boy of about six years of ago, to recover damages occasioned by his having been killed through the defendant's negligence, the absence of proof of any special pecuniary damage resulting from his death will not justify the court in nonsuiting the plaintiff, or in directing the jury to find a verdict for nominal

damages only.—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1881. Gorham *v.* New York Central, &c., R. R. Co., 23 Hun 449.

23. This action was brought to recover damages for the negligent killing of the plaintiff's intestate. The plaintiff, his mother, was aged, blind and helpless, and largely dependent upon her son's earnings for her support. The son, an engineer, was industrious and faithful in his professional duties and in providing and caring for the plaintiff. The case has been tried three times. The first verdict was for $1500, the second for $100 (set aside on the ground of the inadequacy of the damages) and the third for $5000. *Held*, that the last verdict would not be set aside as excessive.—*Supreme Ct.*, (*1st Dept.*,) *Jan.*, 1881. Erwin *v.* Neversink Steamboat Co., 23 Hun 573.

HORSE RAILROADS.

Railroad Companies, V.

HUSBAND AND WIFE.

[See, also, Curtesy; Divorce; Dower.]

I. Marriage; and Agreements, and Promises in Relation to Marriage.
II. Rights and Powers of the Husband.
III. Liabilities of the Husband.
IV. Rights and Disabilities of the Wife.
V. Separate Estate of the Wife.
VI. Effect of the Relation on the Tenure and Transfer of Land.
VII. Contracts and Dealings between them.
VIII. Actions by or Against Husband and Wife.

I. Marriage; and Agreements, and Promises in Relation to Marriage.

1. Validity of marriage after divorce, but before entry of decree. Where the marriage of plaintiff with her present husband took place at eleven o'clock on the morning of April 29th, 1880, and the decree of divorce from her former husband was, in strictness and in fact, actually granted, entered and perfected at or about two o'clock in the afternoon of the same day—*Held*, that plaintiff's marriage with her present husband was valid and binding, having been entered into in good faith, both parties supposing and believing she was actually divorced. The decree for that purpose would be considered as granted at the opening of the court on that day, as the court will not divide a day or examine critically the precise hour in which any act in court is done, except in cases of necessity, for the purpose of guarding against injustice or where important rights are concerned.—*Supreme Ct.*, *Aug.*, 1881. Merriam *v.* Wolcott, 61 How. Pr. 377.

2. Presumption as to foreign marriage laws. In an action of ejectment where plaintiffs claimed as the widow and children of H., who died intestate, and where the validity of the marriage was in question, sufficient facts were proved to establish a valid marriage under the law of this state, part occurring in England, part on board a vessel crossing the channel from an English to a French port, and part in France. It was conceded that sufficient was not shown to constitute a valid marriage under the law of England. There was no proof as to the nationality of the vessel, or of the law of France in reference to marriage. *Held*, that conceding a vessel at sea has with it the law of marriage of the nation whose flag it flies, it was not to be presumed that the nationality of the vessel in which the parties crossed the channel was that of a country whose law of marriage was proved to be different from our own, nor was it to be presumed that the law of France on this subject was different, and that, therefore, a finding that there was a valid marriage was justified.—*Ct. of App.*, *Sept.*, 1880. Hynes *v.* McDermott, 82 N. Y. 41; *affirming* 7 Daly 513.

3. As to whether, where acts are proved which would constitute a valid marriage if done in this state, but not in the country where they took place, they will establish a relation which will be upheld as a valid marriage in this state, *quære*. *Ib.*

II. Rights and Powers of the Husband.

4. Right to dividends on wife's stock—law of place. Where a married woman is the owner of stock of a bank located in a state other than that in which she and her husband are domiciled, the effect of payment, by the bank to her husband, of dividends declared upon her shares of stock, is to be determined by the law of the place where the bank is located, not by the law of the owner's domicile.—*Ct. of App.*, *March*, 1881. Graham *v.* First Nat. Bank of Norfolk, 84 N. Y. 393; *affirming* 20 Hun 326.

5. E., a married woman domiciled with her husband in Maryland, was the owner of certain shares of stock of a Virginia bank; in the latter state the rule of the common law as to the relations of husband and wife prevails. The husband was cashier of two Maryland banks, in both of which he was largely interested, and of which he was the controlling agent; with these banks the Virginia bank had accounts kept in the name of the husband as cashier; by his direction, or with his assent, various dividends declared upon said shares of stock were paid to said banks or credited in their accounts, and allowed them on settlement. In an action by assignees of the wife to recover the dividends—*Held*, that the evidence justified a finding of payment of the dividends to the husband; and that such payment was good as against the wife or her assignees and discharged defendant's liability. *Ib.*

III. Liabilities of the Husband.

6. For necessaries furnished to wife. While, at common law, a husband, whose wife leaves him while insane, would be liable to any one who supplied her with necessaries, or maintained her, yet an action on such common law liability cannot be maintained by a superintend-

ent of the poor.—*Supreme Ct.*, (*2d Dept. Circ.*,) *Aug.*, 1881. Goodale *v.* Brocknor, 61 How. Pr. 451.

7. Compelling husband to support wife. In proceedings to compel a husband to provide for the support of his wife, whom he had threatened to abandon, the woman testified that she had been married to him for eight years; that during that time he had lived with her, introduced her to his relatives and acquaintances, and recognized her as his wife. Upon cross-examination she testified she was not married by any person, but that the defendant had always acknowledged her as his wife, and that they had always lived together as husband and wife. *Held*, that the evidence was sufficient to establish a marriage in fact, and that the wife was a competent witness to prove the fact of marriage. —*Supreme Ct.*, (*1st Dept.*,) *March*, 1881. People, ex rel. Commissioners, *v.* Bartholf, 24 Hun 272.

IV. Rights and Disabilities of the Wife.

8. In respect to policy in her favor on her husband's life. A policy of insurance payable to the wife upon the death of her husband, or upon a certain date, should he then be living, is not assignable by the wife. A guaranty by the wife of the "sufficiency and validity of the assignment" does not give validity thereto; nor does the assignee acquire any interest in the policy by subsequent payment of premiums in good faith. His rights are limited to the recovery of the amount as paid by him.—*Superior Ct.*, *April*, 1880. De Jonge *v.* Goldsmith, 46 Superior 131.

The presumption that such a policy was issued for the purposes declared in the act of 1840, is not destroyed by proof of a former assignment by the wife for the husband's benefit. Whether such evidence is admissible for that purpose, *quære*. *Ib.*

9. Disability to contract. The complaint alleged that defendants executed a bond to the plaintiff, guaranteeing the payment of all indebtedness that might be incurred by one W. to plaintiff, and that in said bond defendant F. expressly charged her separate estate with the payment. The complaint then set out breaches of the bond and demanded judgment. F. answered "that at the time of the making of said bond she was, and still is, a married woman, and has had no separate estate and has carried on no separate trade or business." *Held*, that the complaint should be dismissed as to F.; that if she had no separate estate at the time of the execution of the bond, she was not competent to enter into the contract contained in the bond.—*Supreme Ct.*, (*Cir.*,) *Feb.*, 1881. Wilson Sewing Machine Co. *v.* Fuller, 60 How. Pr. 480.

10. A married woman cannot give herself a legal capacity to contract by falsely representing that she has such capacity. *Ib.*

11. Liability for necessaries. When a married woman purchases provisions upon her own credit, and takes the title thereto, she is liable for the price thereof, though she have no other separate property, and her liability therefor is not affected by the use to which the property may be applied.—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Crisfield *v.* Banks, 24 Hun 159.

12. Liability for husband's acts on ground of agency. The plaintiff having received from the administrator of her father's estate two checks for $500 each, payable to her order, delivered the same, indorsed in blank, to her husband, with directions to deposit the same to her credit with the defendant, the First National Bank of Brockport. The husband deposited the checks in the bank to the plaintiff's credit and received a pass-book from the defendant, in which the amounts were credited to her. In an action by the plaintiff to recover the amounts so deposited, the defendant offered to prove that at the time the deposits were made it was orally agreed between the husband and the teller of the bank that they should be credited to the plaintiff upon the condition that the same should be withdrawn upon checks made by the plaintiff, or by the husband in her name, and that the amounts so deposited had been subsequently withdrawn by checks made by the husband in the name of the wife. *Held*, that in the absence of evidence tending to show an authority in the husband to act as the agent of his wife, or any ratification by her of his acts, the evidence was inadmissible and was properly excluded.—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1881. Bates *v.* First Nat. Bank of Brockport, 23 Hun 420.

13. What is sufficient evidence of ratification by a married woman, of the delivery of her deed by her husband as her agent, see Chamberlain *v.* Woodward, 22 Hun 440.

V. Separate Estate of the Wife.

14. Recovery of wife's property from husband's estate. It appeared from the husband's own memoranda that he received his wife's separate property, and invested and reinvested it, depositing the securities, together with his own, in the joint names of himself and wife. He subsequently converted the securities to his own use, and upon his death the wife presented a claim for the amount against his estate. *Held*, that in the absence of any direct evidence as to the nature of the agreement under which the husband received the securities, these facts would warrant the presumption that the husband held the securities for safe keeping, and that the statute of limitations did not begin to run until a demand and refusal, or until after the conversion of the securities.—*Kings Co. Surr. Ct.*, *April*, 1880. Brooks *v.* Brooks, 4 Redf. 313.

15. Charging the separate estate, generally. While it is true that the duty of burying the dead body of his wife rests upon her husband, yet the wife may, by her will, charge her separate estate with the expenses of her funeral, and where she does so, such expenses cannot be charged to the husband.—*Supreme Ct.*, (*1st Dept. Sp. T.*,) *July*, 1880. Jackson *v.* Westerfield, 61 How. Pr. 399.

16. The plaintiff's intestate having during her lifetime presented a claim against the defendants as the administrators of her husband's estate, based upon a promissory note for $500, given by him to her, it was, on being disputed by the defendants, referred, in accordance with the statute. On the trial it was shown that after the giving of the note, one Mary Murphy, who was a niece of the wife, and was sick and feeble, was taken into the family under an agreement that she should do as much work as she was able to do, and that the wife, who had a separate estate, should pay to her husband one-half of her board, after deducting therefrom what she should

earn. *Held*, that although the claim for the board of Mary Murphy could not be enforced against the wife, as she had not charged her separate estate with the payment thereof, yet, as it appeared that no payment of either principal or interest, nor any demand therefor had been made during the husband's lifetime, and as no charge as to such board had been made by him in any of his books or papers, it was to be inferred, after the death of both of the parties, that the board was, by mutual consent, applied upon the note, and that the referee should have treated the amount found to be due therefor, as a payment upon it.—*Supreme Ct.*, (*2d Dept.*,) *Sept.*, 1880. Murphy *v.* Carpenter, 22 Hun 15.

17. *Semble*, that a married woman should be deemed to have benefited her separate estate by the performance of every contract she makes, and should be able to enforce it, and be liable to have it enforced against her, simply because she had made it the same as if she were unmarried. *Ib.*

18. **Promissory notes.** The defendant's husband and others being indebted to the plaintiffs for goods previously sold and delivered, the defendant, to procure an extension of the time of payment, joined with her husband in making, in Virginia, four promissory notes payable at future periods in Pennsylvania. The notes did not expressly charge defendant's separate estate with their payment, and by the laws of Pennsylvania and of this state she was not liable upon them, although by the laws of Virginia contracts so executed are held to be a charge upon the separate estate of a married woman. The defendant at the time possessed no separate estate except two policies of insurance issued upon the life of her husband, by companies incorporated under the laws of this state, which were payable to her. At the time of the making of the notes, the defendant's husband, in her presence, informed the person who took them of the existence of the policies. Thereafter her husband died. In an action upon the notes—

Held, 1. That the question whether the giving of the notes under the circumstances of the case operated to charge, with their payment, the amount due to the defendant upon the policies, was to be determined by the laws of this state, as the companies issuing the policies existed under its laws.

2. That if the policies were within the protection of the acts authorizing married women to insure the lives of their husbands (ch. 187 of 1858, as amended by ch. 656 of 1866,) no charge was created, as the mode of assigning the wife's interest, prescribed by ch. 821 of 1873, had not been complied with.

3. That if they were not within the protection of the said acts, then, as the premiums were probably paid by the husband, the policies belonged to him and could only be reached by proceedings instituted against his personal representatives.—*Supreme Ct.*, (*1st Dept.*,) *April*, 1881. Bloomingdale *v.* Lisberger, 24 Hun 355.

19. **Mortgages.** The defendant, J. K. Merritt, owning a piece of land, upon which was a mortgage for $1500, and his wife, owning, as her separate estate, another piece upon which was a mortgage for $2200, joined in executing a mortgage upon the two pieces, to secure the payment of their joint bond for $4000, the amount procured thereby being applied to the payment of the two mortgages. In an action brought to foreclose the mortgage—*Held*, that as part of the money went for the benefit of her separate estate, a personal judgment for any deficiency that might arise on the sale was properly rendered against her.—*Supreme Ct.*, (*2d Dept.*,) *Dec.*, 1880. Jones *v.* Merritt, 23 Hun 184.

20. **Simple contracts, purchases, &c.** This action was brought to recover the price of meat sold by the plaintiff to the defendant, who lived with her family, consisting of her husband and ten children, and conducted the household affairs. The husband supported the family, and the wife carried on no separate trade or business, but was possessed of a separate estate liable to be charged with her debts. The plaintiff having refused to give further credit to the husband, said to the defendant that "if they wanted to run a bill he should charge it to her," to which the defendant replied, "you will not get cheated out of it, if you do; I will see you paid."

Held, 1. That the defendant was not liable for the price of the meat, as the evidence failed to show an intent to charge her separate estate with the payment thereof.

2. That she could not be held liable, under section 1 of chapter 90 of 1860, as having purchased the meat as her husband's agent, for the support of herself and family, as the evidence showed that the sale was made to her and not to him.—*Supreme Ct.*, (*3d Dept.*,) *Nov.*, 1880. Salmon *v.* McEnany, 23 Hun 87.

21. **Contracts for services.** The father of the defendant, a married woman, gave to his executors one-fourth of his property in trust, to pay the income thereof to her during her life, with power to her to dispose of the principal by her last will and testament, and in case she failed so to dispose of it, then he gave the same to her children. Upon the settlement of the accounts of the executor before the surrogate, the defendant employed the plaintiff, an attorney, to appear and protect her interests, which he did. In this action, brought by him to recover the value of the services so rendered—*Held*, that as the defendant had no estate in the property held by her trustees, but only a right to enforce the performance of the trust in equity, the contract was not for the benefit of her separate estate, and that she was not liable for the services rendered thereunder.—*Supreme Ct.*, (*2d Dept.*,) *Dec.*, 1880. Embree *v.* Franklin, 23 Hun 203.

VI. Effect of the Relation on the Tenure and Transfer of Land.

22. **Conveyances to wife.** In 1844 certain premises were conveyed to plaintiff, a married woman, for life, as and for her own separate estate, free from the control of her husband, her husband covenanting for a consideration expressed that she should hold the premises to her separate and own sole use, free from any claim or interference from him. In an action to recover possession of the premises, brought against the husband and his tenant—

Held, 1. That under the law as it existed when the deed was executed, plaintiff could, in equity, enjoy the property separate from her husband; that a trustee was not required to be named in the instrument, as in case of such

omission the law created the husband a trustee for the wife; that the effect of the acts in relation to married women (ch. 200 of 1848; ch. 375 of 1849; ch. 90 of 1860; ch. 172 of 1862) was to change her equitable right to hold a separate estate into a legal estate, to give her the right of control and management the same as if she were *feme sole;* that there was no occasion for her to resort to the Supreme Court, under the act of 1849 (§ 2,) for the resignation and surrender of the trustee and a conveyance to her; and that as, by the said acts, she was given the power to sue and be sued, she could maintain the action.

2. That as it appeared that the husband had not acquired possession by the consent of the plaintiff, he was not entitled to notice to quit.

3. That the fact that the defendant had put valuable improvements upon the land was no defence to the action.—*Ct. of App., Jan.,* 1881. Wood *v.* Wood, 83 N. Y. 575; *affirming* 18 Hun 350.

23. —to husband, on consideration furnished by wife. As to the rights of a wife whose husband purchases land with her money, in his own name, under an agreement with her that title should be taken in their joint names, see Lucky *v.* Odell, 46 Superior 547.

24. —by wife, on husband's consent. Under the provision of the act of 1860, in reference to married women, (Laws of 1860, ch. 90, § 3,) declaring that no conveyance of real estate, by a married woman, "shall be valid without the consent, in writing, of her husband," it was not required that such consent should be a part of or concurrent with the execution of the conveyance, or that it should be given before the delivery thereof; where given thereafter, it validated the conveyance; at least, if given before any attempt, upon the part of the wife, to avoid the conveyance.—*Ct. of App. Dec.,* 1879. Wing *v.* Schramm, 79 N.Y. 619.

VII. CONTRACTS AND DEALINGS BETWEEN THEM.

VIII. ACTIONS BY OR AGAINST HUSBAND AND WIFE.

25. When husband should be sued alone. An action by a household servant for her wages, is properly brought against the husband alone, although it is alleged in the complaint that the employment was by him and his wife.—*City Ct. of Brooklyn,* (*Gen. T.,*) *Jan.,* 1880. Condon *v.* Callahan, 9 Abb. N. Cas. 407.

26. When wife may be sued alone. In an action against a married woman for her personal tort, it is not necessary, under section 450 of the code, to join her husband as a defendant, and he is not a proper party to such an action. The reason of the rule in regard to the joinder of the husband with the wife in an action for the tort of the wife, stated and explained, and the rule itself held no longer to exist.—*Supreme Ct.,* (*Livingston Circ.,*) *May,* 1881. Fitzgerald *v.* Quann, 1 Civ. Pro. 273.

As to *Dissolution of the marriage contract,* see DIVORCE.

HYPOTHECATION.

BAILMENT, 3-7.

I.

ILLEGALITY.

CONTRACTS, 26-38; DEEDS, 8, 9; MORTGAGES, II.; SALES, I.

IMPEACHMENT.

Of *Consideration of Contracts,* see CONTRACTS, II.; of *Witnesses,* see WITNESSES, III.

IMPRISONMENT.

[Includes only imprisonment on civil process. Imprisonment as a punishment for crime, is treated under PUNISHMENT. Such titles, also, as ARREST, BAIL, EXECUTION, INSOLVENCY and RECOGNIZANCE should be consulted for a full view of this subject.]

1. The petition for discharge. A petition for the discharge of an imprisoned debtor sufficiently sets forth the cause of his imprisonment, if it allege that he is confined in the county jail, by virtue of an execution against his person, issued in a civil action brought by a plaintiff therein named.—*Supreme Ct.,* (*2d Dept.,*) *Dec.,* 1880. Matter of Chappell, 23 Hun 179.

2. The proof required to be made at the time of presenting the petition, and before granting the discharge (2 Rev. Stat. 35, § 2,) that the debtor resides, or is imprisoned, in the county in which the officer to whom the application is made resides, may be made by the verified petition alone.—*Ct. of App., March,* 1881. Develin *v.* Cooper, 84 N. Y. 410.

3. The petition, which was verified to be "true in all respects," began thus: "The petition of Frederick Maxwell, of Southhold, in the county of Suffolk, * * * respectfully showeth," etc. The petition recited that Maxwell was in custody of the sheriff of Suffolk county on execution, and had given bail for the jail liberties. *Held,* that the first statement was not sufficient to make proof of residence in the county; but that being out of jail on the liberties was, in the judgment of the law, being in prison; and the last recital, therefore, was, in effect, an averment of imprisonment in the county, and so gave jurisdiction of the person of the debtor. *Ib.*

4. Affidavit to be indorsed on petition. Section 5 of 2 Rev. Stat. 32, relating to the discharge of imprisoned debtors from arrest, and providing that "at the time of presenting such petition the following affidavit shall be indorsed thereon, and shall be sworn to by the applicant," does not require the affidavit to be indorsed and sworn to in the presence of the court at that time, but only that at the time of its presentation the petition shall have upon it, sworn to by the applicant, the required affidavit. The fact that the affidavit is annexed to, instead of being indorsed upon the petition, is immaterial.—*Supreme Ct.*, (*3d Dept.*,) *May*, 1881. Richmond *v.* Praim, 24 Hun 578.

5. Effect of order to protect sheriff. Where an order of discharge exempting a debtor from imprisonment for any prior debt, purporting to be issued under the article of the Revised Statutes in relation to the exoneration of insolvent debtors from imprisonment (2 Rev. Stat. 28, § 1, *et seq.*,) contains recitals of all the facts needed to give jurisdiction to the officer granting it, the order alone will protect a sheriff acting under it, in the absence of proof of knowledge, on his part, of any defects in the proceedings.—*Ct. of App.*, *March*, 1881. Develin *v.* Cooper, 84 N. Y. 410.

6. If the order omits a recital of any necessary fact the sheriff will be protected if he can show *aliunde* the existence of the fact. *Ib.*

7. The said article includes a debtor who has been charged in execution. *Ib.*

8. In an action against a sheriff for an escape, wherein he justified under a discharge granted by the county judge of the county of Suffolk, which contained a recital that "Frederick Maxwell, the debtor, of the town of Southold, in the county of Suffolk, did present a petition"—*Held*, that the recital was sufficient proof of the place of residence, and that proof thereof was made to the officer granting it. *Ib.*

9. Discharge of one of several copartners. While each partner is liable to arrest for the frauds committed by the others, even though he may have been entirely ignorant of such frauds, yet, upon application by one partner to be discharged from imprisonment, personal participation in the fraud by the applicant is required to be proved in order to justify the court in denying such discharge. A judgment that the firm of which the petitioner is a member has been guilty of a fraudulent disposition of its property, does not necessarily preclude his discharge as one of the partners.—*Com. Pleas*, *Feb.*, 1881. Matter of Benson, 60 How. Pr. 314.

IMPROVEMENTS.

LANDLORD AND TENANT, II.; MORTGAGES, III.

INCAPACITY.

To make *contract*, see HUSBAND AND WIFE, 9-11; INFANTS; INSANE PERSONS, 1, 2.

INCORPORATION.

CORPORATIONS, I.; and the titles of the various distinct corporate bodies.

INCUMBRANCES.

Covenant against, see COVENANTS, 7; VENDOR AND PURCHASER, I.

INDICTMENT.

[Consult, also, the titles of the various crimes, such as ARSON; BURGLARY; EMBEZZLEMENT; FALSE PRETENCES; FORGERY; HOMICIDE; LARCENY; PERJURY; RAPE, &c.; also, CRIMINAL LAW, II.]

I. THE FINDING.
II. FORM AND CONTENTS.
III. PLEA. MOTION TO QUASH.

I. THE FINDING.

1. The proper county. The act of 1877 (Laws of 1877, ch. 167,) in relation to criminal offences committed on railroads, providing that for any crime or offence committed within this state * * * "in respect to any portion of the lading or freight of any railroad train or car," an indictment may be found and tried in any county through which the train or car shall have passed in the course of that trip, includes the offence of receiving with guilty knowledge goods stolen from a railroad train, and an indictment therefor may be found and tried in any county through which the train passed.—*Ct. of App.*, *March*, 1881. People *v.* Dowling, 84 N. Y. 478.

II. FORM AND CONTENTS.

2. Charging the offence, generally. When an indictment contains several counts, some good and some void for duplicity, a general verdict may be sustained upon the valid counts.—*Ct. of App.*, *Oct.*, 1880. Pontius *v.* People, 82 N. Y. 339; *affirming* 21 Hun 382.

3. A count of an indictment setting forth the substance of the offence, with the circumstances necessary to render it intelligible and to inform the accused of the allegations against him, is sufficient. *Ib.*

4. Following the words of the statute. It is not essential, in an indictment for a statutory offence, to employ the precise words of the statute; it is sufficient to state all the facts constituting the offence, so as to bring the accused precisely within the statutory provisions. —*Ct. of App.*, *Jan.*, 1881. Eckhardt *v.* People, 83 N. Y. 462; *affirming* 22 Hun 525.

III. PLEA. MOTION TO QUASH.

5. Plea. The sufficiency of the evidence upon which a grand jury finds an indictment is not a question which can be raised by plea to the indictment. It is not a proper plea, there-

fore, to an indictment, that the grand jury received incompetent and irrelevant evidence, to wit, the *ex parte* affidavits taken before the committing magistrate.—*Ct. of App., Jan.*, 1881. Hope *v.* People, 83 N. Y. 418.

6. *It seems* that allegations that a grand jury received and considered such affidavits would not be sufficient to sustain a motion to quash the indictment, in the absence of averments or proof that the affidavits were the only evidence, or that some fact material to the case of the prosecution was established thereby, or that the witnesses by whom the affidavits were made were not also personally examined, or that the indictment was not based upon sufficient competent evidence. *Ib.*

7. **Motion to quash.** If an indictment be improperly and irregularly found, the defendant may, before plea, move upon affidavit to quash it for such irregularity.—*N. Y. Oyer and T., Oct.*, 1880. People *v.* Briggs, 60 How. Pr. 17

8. Where the defendant in an indictment moves to quash the indictment for irregularity, a grand juror may be examined and testify to facts showing the irregularity, if it does not arise out of misconduct by the grand jury. *Ib.*

9. The moving affidavit may allege the facts constituting the alleged irregularity upon information and belief, if they should be within the knowledge of the district attorney; and if so alleged they may be sufficient to call upon him to dispute them if not correctly set forth in the moving affidavit. *Ib.*

10. If an indictment be found or based wholly, or in part, upon evidence clearly incompetent and illegal, it will be quashed and the defendant remanded, that his case may be passed upon by another grand jury upon competent and proper evidence. *Ib.*

As to indictments for any *Particular offence*, see its title; also, CRIMINAL LAW, II.

INDIVIDUAL LIABILITY.

Of *Officers and stockholders* in corporations, see CORPORATIONS, 35-38; MANUFACTURING COMPANIES, II., III.

INDORSEMENT.

Of *Commercial paper*, see BILLS OF EXCHANGE; PROMISSORY NOTES.
Of *Bill of lading*, see BILLS OF LADING.

INFANTS.

1. **Power of court over infant's property.** In what manner shares of infants in proceeds of partition sale, paid over to the chamberlain of New York city, should be invested, see Chesterman *v.* Eyland, 81 N. Y. 398.

2. **Petition for sale of infant's lands.** Under the provisions of the Revised Statutes in relation to the sale of the real estate of infants, (2 Rev. Stat. 194, § 170, *et seq.*,) it is not essential that the infaut should join in the petition for such sale; it may be made by the next friend or guardian alone.—*Ct. of App., Jan.*, 1880. Cole *v.* Gourley, 79 N. Y. 527.

3. The rule of the Court of Chancery, (rule 158,) requiring an infant to join when he is over fourteen years of age, was a mere regulation of practice, which the court had power to waive, and did not affect the jurisdiction or invalidate a sale under the proceedings. *Ib.*

4. So, also, said court had power to dispense with the provision of said rule, requiring corroborating affidavits; and with that requiring the petition to be by the general guardian of the infant, or to show that he has none. *Ib.*

5. Where a petition shows that the application was made for and on behalf of the infants, by one entitled to represent them, as provided in said statute, and is in conformity with its requirements, this is sufficient. *Ib.*

6. **The guardian's bond—liability of sureties.** On September 18th, 1867, the plaintiff being then an infant about six years old, and being seized of certain real estate, her mother signed and verified a petition asking for leave to sell the same, and proposing the name of F. as a special guardian, and S. and another, as sureties for him. On February 4th, 1868, the proposed special guardian and his sureties signed and acknowledged a bond conditioned that the former "should faithfully perform the trust reposed in him as the guardian of" the infant. On February 21st the petition and bond were presented to the court, by which the bond was approved and the usual order, appointing F. a guardian, was made. The estate was sold and the proceeds of sale were paid to F. as special guardian. In an action upon the bond, against the sureties thereon—

Held, 1. That although a bond of the character of the one in question should be executed after, and not before, the granting of the order appointing the guardian, yet it was not necessarily void because signed and acknowledged previously thereto.

2. That the delivery of the bond in question appeared by its approval and filing to have occurred after the application had been granted, and that the bond then took effect and became valid.—*Supreme Ct.,* (*3d Dept.,*) *Sept.*, 1880. Center *v.* Finch, 22 Hun 146.

7. Upon the trial of this action it appeared that, upon a petition alleging that the guardian had received and converted to his own use certain moneys of the infant, an order was made requiring him to make a full report of his proceedings and render an account of the funds which he had received, and to show cause why he should not be required to pay into court the moneys found to be in his hands. The petition and order having been personally served on the guardian, and he having failed to appear on the return day thereof, an order was made requiring him to pay into court the amonnt alleged to be due in the petition. He having failed to comply therewith, this action was, in pursuance of an order of the court, brought upon his bond. *Held*, that a non-suit, ordered on the ground that there had been no accounting by the guardian before the commencement of the action, was erroneous, and that the judgment entered on such order should be reversed. *Ib.*

8. **The deed to the purchaser.** An order of the Court of Chancery in such proceedings adjudged that the special guardian who

signed the petition should execute a sufficient conveyance of the interest of the infants; a deed was executed by him in his own name as special guardian; the names of the infants appeared in the deed. *Held*, that the deed was in proper form; that it was not necessary to have it executed in the name of the infants. Cole *v.* Gourley, *supra*.

9. **Order to mortgage—duties of guardian—procedure.** Where an order is made requiring the special guardian of an infant to mortgage its real estate and apply the proceeds thereof to the payment of certain specified debts, he cannot, after having received the money, refuse to pay one of the said debts, on the ground that the infant is not liable therefor.—*Supreme Ct., (3d Dept.,) Sept.*, 1880. Matter of Lampman, 22 Hun 239.

10. When such special guardian renders an account of his proceedings, and procures an order confirming his report, without notice to the debtor whose claim he has knowingly refused and neglected to pay, such order furnishes no protection to him, and the same will, on the application of the creditor, be vacated, and the guardian will be directed to pay to such creditor his proportionate share of the proceeds of the mortgage. *Ib.*

11. In such a case the guardian should be required to pay interest on the amount which the creditor was entitled to receive, from the date of the order confirming his report. *Ib.*

12. An order directing the real estate of an infant to be mortgaged for the payment of its debts should contain a statement of the objects to which the avails thereof are to be applied, and should not refer to any other paper for a specification of such objects. *Ib.*

13. The report of the referee in such proceedings should also specify such objects, and should not refer to the evidence for a statement thereof. *Ib.*

14. **Right of infant to sue.** On January 2d, 1873, the defendant, who had been and was then acting as attorney for the plaintiff's mother, who was the administratrix of her deceased husband, and the general guardian of his children, gave to her a receipt stating that there was due to her, as guardian of her children, the sum of $1500, and as next of kin of two deceased children, $1000, "payable according to a decree of the surrogate of the county of New York, interest to be paid on the money," semi-annually. The decree directed the shares to be paid to the general guardian of the infants. The plaintiff's mother died in 1876. On July 19th, 1877, K. was appointed general guardian, and on October 15th, 1877, guardian *ad litem* for the plaintiff. *Held*, that the plaintiff could, by his guardian *ad litem*, maintain an action against the defendant to recover his share of the fund received by the latter from the plaintiff's mother.—*Supreme Ct., (2d Dept.,) Sept.*, 1880. Segelken *v.* Meyer, 22 Hun 6.

15. **Service of process on infants.** Under the Code of Civil Procedure, (§ 426,) to constitute a personal service of a summons upon a defendant who is an infant under the age of fourteen, there must be a delivery of a copy of the summons, within the state, both to the infant and to his father, mother, guardian or other person specified; service on the infant alone, or upon one of the persons specified, is not sufficient.—*Ct. of App., March,* 1881. Ingersoll *v.* Mangan, 84 N. Y. 622.

INFRINGEMENT.

CONTEMPT; INJUNCTION; TRADEMARKS.

INJUNCTION.

I. GENERAL PRINCIPLES.
II. USE OF THE WRIT IN PARTICULAR CASES.
III. GRANTING AND DISSOLVING.
IV. DAMAGES ON DISSOLUTION. REMEDY ON BOND OR UNDERTAKING.

I. GENERAL PRINCIPLES.

1. **When the writ will be granted, generally.** Where one puts improvements and erections on the land of another under a joint arrangement, one of the details of which is, that the one on whose land the improvements and erections are placed, may, at his option, terminate the joint agreement and become the sole owner and possessor of the improvements and erections, upon compensation therefor, and it appears that the owner of the land is about to take possession and exclusive control without making compensation, and it also appears that the taking of such possession and exclusive control without making compensation at the same time would produce irreparable injury to the other party, a case is presented for the equitable relief of injunction to be exercised by the court having jurisdiction of the subject matter. —*Superior Ct., Dec.*, 1880. Atlantic, &c., Teleg. Co. *v.* Baltimore, &c., R. R. Co., 46 Superior 377.

2. The complaint alleged that in pursuance of a conspiracy between the defendants, two of them had, by fraudulent representations, procured from the plaintiff, in Belgium, $17,000, and transmitted the same by the mail in registered letters, addressed to the other defendants in Brooklyn and New York; that these letters, with their contents, were at the post-office in Brooklyn and New York, and that the defendants, who were irresponsible, had made demands upon the postmasters therefor. *Held*, that an injunction, restraining the defendants from demanding or receiving any of the said registered letters, was properly granted.—*Supreme Ct., (2d Dept.,) Dec.*, 1880. Zellenkoff *v.* Collins, 23 Hun 156.

3. **When it will be refused.** Plaintiff moved for an injunction against defendants, who are members of a trades union, to restrain them from interfering with the business of plaintiff, or intermeddling with any person in his employ, or any one with whom plaintiff is negotiating to enter into such employment. The facts showed a combination of defendants and an enticement by them of laborers from plaintiff's shops, and others wh were about to enter the employ of plaintiff, by means of arguments, persuasion and personal appeals, accompanied by payment of

traveling expenses to other localities. *Held,* that an injunction should not be granted for such a cause.—*Supreme Ct.,* (*Monroe Sp. T.,*) *Nov.,* 1880. Johnston Harvester Co. *v.* Meinhardt, 60 How. Pr. 168; S. C., 9 Abb. N. Cas. 393.

4. There being no sufficient evidence of violence, force, intimidation or coercion on the part of defendants against plaintiff's laborers, the position that a confederation of persons to entice away workmen or servants from the plaintiff's employ is an unlawful act, and may be restrained by injunction, is untenable. *Ib.*

5. While it is the duty of courts and of peace officers to see to it that such controversy shall not result in breaches of the peace, or in such acts as may tend to breaches of the peace, and to hold alike the employer and the employed to the payment of damages for any violation of contract, and to responsibility for any acts which immediately and in a legal sense affect the rights of either, yet the court cannot go beyond preventing breaches of the peace. *Ib.*

6. Staying proceedings. During the pendancy of an action to remove the trustees under a railroad mortgage made to secure bondholders, defendants cannot, by bringing an action in another department against the prosecuting bondholders, on the theory that plaintiffs are improperly resisting a scheme assented to by a large majority of the bondholders, and which is for the best interest of all, obtain an injunction perpetually staying the action for their removal. —*Supreme Ct.,* (*Sp. T.,*) *March,* 1878. Farmers' Loan, &c., Co. *v.* McHenry, 9 Abb. N. Cas. 235.

This rule will be applied even where the trustees seek, in the action brought by them, to perform such duties connected with the trust as they are charged in the bondholders' action with having neglected. *Ib.*

7. Where two foreign corporations, created under statutes of Great Britain, have entered into an agreement, which provides that certain matters shall be submitted to arbitrators, to be appointed and to act in New York, and that all questions as to the regularity or validity of the proceedings shall be determined by the English Court of Queen's Bench, the Supreme Court will not restrain either party from proceeding before such arbitrators, because the other party alleges that the said arbitrators were not properly and legally appointed.—*Supreme Ct.,* (*1st Dept.,*) *Nov.,* 1880. Direct U. S. Cable Co. *v.* Dominion Teleg. Co., 22 Hun 568.

8. When an order in one action restraining the prosecution of another action is improper, see Wood *v.* Swift, 81 N. Y. 31.

II. Use of the Writ in Particular Cases.

9. Alienation or removal of property. In an action to recover damages for false representations made by the defendants, except H., by reason of which plaintiffs parted with a large amount of goods, judgment was asked against the defendants, other than H., for the amount so lost, and the suit was against H. to restrain him from parting with, or disposing of, goods assigned to him, pending the action—*Held,* that under a proper construction of Code of Civ. Pro., § 604, subd. 2, an injunction should not be granted.—*Supreme Ct.,* (*1st Dept. Chamb.,*) *Nov.,* 1880. Jerome Co. *v.* Loeb, 59 How. Pr. 508.

10. Municipal corporations. In 1869 one W. leased certain premises belonging to the county of Schenectady from the board of supervisors thereof, and erected thereon certain buildings upon the agreement that he was to be entitled to remove the same at any time during the continuance of the lease. In April, 1880, the plaintiff, who had acquired the rights of W. in the lease and buildings, brought this action to restrain the board from entering upon the said premises or taking any steps to remove him therefrom, on the ground that by a resolution passed in December, 1879, his lease had been renewed for one year from May 1st, 1880, upon his paying therefor the sum of fifty dollars, and that he had paid the said sum to the county treasurer. The defendants denied the passage of the resolution and the payment of the rent. *Held,* that as the plaintiff, relying upon the alleged passage of the resolution and the payment of the rent, had, in good faith, allowed the buildings to remain upon the premises, it would not be equitable to allow the defendant to take the buildings from him, even though the resolution had not in fact been passed or the rent paid; and that as no relief in this respect could be granted, if summary proceedings to recover possession of the premises were instituted, the plaintiff should be allowed to maintain this action.—*Supreme Ct.,* (*3d Dept.,*) *Jan.,* 1881. Landon *v.* Supervisors of Schenectady Co., 24 Hun 75.

11. Nuisances. When a party has wrongfully erected a dam to such a height as to set the water back upon another's mill, the court may relieve the injured party by granting an injunction restraining the continuance of the nuisance, or by ordering the dam to be lowered to such a height as will abate it.—*Supreme Ct.,* (*2d Dept.,*) *Feb.,* 1881. Rothery *v.* New York Rubber Co., 24 Hun 172.

12. When an act under which a corporation is organized authorizes the taking by such corporation of private property for public use, and provides for the making by such corporation of compensation for the property taken by it, and is therefore constitutional, yet where the taking consists in the daily and continuous interference with a naked incorporeal right incident to tangible property, to the diminution of its free enjoyment, *e. g.,* the polluting the air of one's dwelling with noisome smells, which, although not unwholesome, yet render the enjoyment of life and property uncomfortable—and no compensation is made for such interference, and the corporation's want of ability to make reparation is proved or admitted, an injunction may go against the doing or suffering to be done that which causes such interference.—*Superior Ct., April,* 1880. Caro *v.* Metropolitan Elevated R'y Co., 46 Superior 138.

13. A legislative authority to construct an elevated railroad and to operate it by atmospheric power, compressed air or other power, does not authorize it to pollute the air of abutting dwelling-houses with noisome smells or noxious gas, which greatly diminishes the enjoyment of the occupation of such houses. Such authority neither directly nor by implication authorizes the infliction of such a grievance. The infliction of such grievance does not appear to be necessary or incident to the exercise of the corporate authority and power. *Ib.*

14. As to when a city may be restrained from

discharging sewage upon private property, see Beach *v.* City of Elmira, 22 Hun 158.

15. Railroads. The fee of the Parkway leading to, and the road adjoining the Concourse, constructed by the park commissioners of the city of Brooklyn, under ch. 583 of 1874, as amended by ch. 489 of 1875, was not vested, by the said acts, in the county of Kings, but remained in the former owners, and the county of Kings cannot maintain an action to restrain the construction of an elevated railroad across it, on the ground of its ownership of the fee therein, or on the ground that the railroad will frighten teams and diminish the value of the adjoining lots, which are to be assessed to reimburse the county for the moneys borrowed by it by the issue of bonds, for the purpose of paying the cost of the improvements made under the said acts.—*Supreme Ct., (2d Dept.,) Dec.,* 1880. Supervisors *v.* Sea View R'y Co., 23 Hun 180.

16. When a preliminary injunction against a railroad, forbidding the issuing of bonds or the payment of principal or interest on the same, or the issuing of stock certificates, should be continued, see Cornell *v.* Utica, &c., R. R. Co., 61 How. Pr. 184.

17. Summary proceedings to dispossess tenant. This action was brought to restrain the enforcement of an order made in summary proceedings by one of the justices of a District Court of the city of New York dispossessing the plaintiff and directing him to be removed from certain premises held by him under a lease. The action was based upon the refusal by the justice to appoint a guardian *ad litem* in such proceedings for the defendant, who alleged in his answer that he was an infant.

Held, 1. That the action could not be maintained, and that the remedy of the plaintiff, if any, was by an appeal under section 2260 of the Code of Civil Procedure.

2. That this was not a case in which, under section 2265 of the Code of Civil Procedure, an injunction should be granted to stay the execution of final judgment in an action of ejectment.—*Supreme Ct., (1st Dept.,) May,* 1881. Jessurun *v.* Mackie, 24 Hun 624; S. C., 61 How. Pr. 261.

18. Trademarks. To entitle a party to restrain another from continuing the unlawful use of his trademark, it is not essential to show an actual intent to defraud. Nor is it essential that the party shall first establish a legal right to the trademark in an action at law.—*Ct. of App., Nov.,* 1880. Hier *v.* Abrahams, 82 N. Y. 519.

19. It is sufficient to justify the interference by injunction of a court of equity, to show that there is a fraudulent intention on the part of the defendants to palm off their goods as those of the plaintiff, and that such intention is being carried into execution.—*Supreme Ct., (1st Dept.,) Jan.,* 1881. Enoch Morgan's Sons' Co. *v.* Troxell, 23 Hun 632.

20. In determining whether buyers are likely to be deceived by the defendants, the character of the article sold, the use to which it is to be applied, the kind of people by whom and the manner in which it is bought, are all to be considered. *Ib.*

21. The plaintiff had for many years sold a polishing soap, put up in cakes, wrapped in paper, coated with tin-foil, and having around the edge of each cake a blue paper band, with gilt letters printed thereon. On each cake was stamped the words, "Enoch Morgan's Sons' Sapolio." Thereafter the defendants prepared and sold a soap which they put up in cakes, wrapped in tin-foil, and having a blue paper band around them, similar to those used by the plaintiff, upon which were stamped the words, "Troxell's Pride of the Kitchen Soap." It appeared that the defendants sold and delivered the soap so put up, to grocers, with the intent that it should be, and the same was, in many cases, sold as "Sapolio." *Held,* that the defendants should be enjoined from so preparing and selling the said soap. *Ib.*

22. Trespasses. *It seems* that it is not essential under the code in case of a disputed title to land, that the title be determined by legal action before the court will interfere by injunction to restrain alleged trespasses by one of the parties.—*Ct. of App., Nov.,* 1880. Lacustrine Fertilizer Co. *v.* Lake Guano, &c., Co., 82 N. Y. 476; *affirming* 19 Hun 47.

III. Granting and Dissolving.

23. Jurisdiction and powers of the court. An action was brought by a domestic corporation against two defendants—one a domestic corporation and one a foreign corporation, having an office and agency and doing business in this state—for an accounting by the foreign corporation, under a contract alleged to exist between it and the plaintiff; to restrain it from an alleged unlawful interference with certain rights claimed by the plaintiff under the alleged contract, which interference consisted in part of threatened acts, which could only be done in another state, and in part of a combination with the other defendant, undertaken to be consummated in this state, with the view of ousting the plaintiff from its claimed rights and vesting them in such other corporation, and of acts done here, directing, or which would result in, the doing of the threatened acts in the other state.

Held, 1. That the courts of this state had no jurisdiction to restrain the doing of the acts threatened to be done in the other state; nor, if they have been done, to compel the undoing of them and restoration of things to their former condition.

2. That the courts of this state have jurisdiction over the action so far as to compel an accounting, and to restrain the doing of the acts threatened to be done in this state.—*Superior Ct., Dec.,* 1880. Atlantic, &c., Teleg. Co. *v.* Baltimore, &c., R. R. Co., 46 Superior 377.

24. The bond or undertaking. The insolvency of one of the sureties to an undertaking given by the plaintiff upon procuring an injunction, furnishes no ground for the granting of an order staying generally all proceedings on the part of the plaintiff in the action; the order should direct that the injunction be dissolved, unless the plaintiff file a new undertaking, within a specified period.—*Supreme Ct., (1st Dept.,) Nov.,* 1880. Randall *v.* Carpenter, 22 Hun 571.

25. Grounds for dissolving. This action was brought by plaintiff to restrain the defendant, the commissioner of public works of the city of New York, from taking down and removing, as a public nuisance, a building erected by plaintiff, partly upon land belonging

to her and partly upon a portion of the street in front thereof. Upon a trial, had before the court, without a jury, the complaint was dismissed, with costs. Thereafter, upon plaintiff's application, an order was made restraining defendant from interfering with plaintiff's building, pending an appeal taken by her from the judgment rendered against her. *Held*, that it was error to grant the order, and that the same should be reversed.—*Supreme Ct.*, (1*st Dept.*,) *Nov.*, 1880. Emmons *v.* Campbell, 22 Hun 582.

26. Effect of entry of judgment to dissolve injunction. The entry of a final judgment in an action does not, unless it be so expressly declared therein, dissolve a temporary injunction theretofore granted in the action, where the defendant has appealed from the judgment and given an undertaking to stay all proceedings during the pendency of such appeal. —*Supreme Ct.*, (1*st Dept.*,) *May*, 1881. Gardner *v.* Gardner, 24 Hun 627.

27. The motion to vacate. Under Code of Civ. Pro., § 626, the application to the Supreme Court to vacate an injunction should be *ex parte*, and wholly based upon the papers upon which the order was granted. The code does not contemplate a hearing of both parties on an application under that section.—*Supreme Ct.*, (1*st Dept.*,) *May*, 1880. Coffin *v.* Prospect Park, &c., R. R. Co., 61 How. Pr. 105.

28. The complaint and the affidavit upon which the injunction order was made were verified by the Belgian consul in New York, and all of the allegations thereof were upon information and belief. Upon the hearing of a motion to vacate the injunction, which was made upon the original papers only, the plaintiff was allowed to read depositions taken in Belgium, they being the sources from which the consul had derived his information and formed his belief as to the facts set forth in the complaint and affidavit. *Held*, no error.—*Supreme Ct.*, (2*d Dept.*,) *Dec.*, 1880. Zellenkoff *v.* Collins, 23 Hun 156.

29. — to continue. Where the injunction order was merely preliminary to an order to show cause why the injunction should not be continued, which order is still pending before the Special Term, the order of the General Term should not interfere to prevent its hearing. On such hearing the parties may present additional facts affecting the right to the injunction and its continuance.—Coffin *v.* Prospect Park, &c., R. R. Co., *supra*.

30. Punishment for violating the order. That the injunction is too broad, and restrains the doing of acts which the court has no jurisdiction to restrain, as well as acts over which the court has jurisdiction, is no excuse for the violation of the injunction by the doing of the acts over which there is jurisdiction.—*Superior Ct.*, *Dec.*, 1880. Atlantic, &c., Teleg. Co. *v.* Baltimore, &c., R. R. Co., 46 Superior 377.

IV. Damages on Dissolution. Remedy on Bond or Undertaking.

31. The right to damages. Damages cannot be assessed upon undertakings given on granting an injunction until a final decision that plaintiff was not entitled thereto, as until then there is no breach of the condition.—*Ct. of App.*, *Oct.*, 1880. Johnson *v.* Elwood, 82 N. Y. 362.

32. When reference to ascertain damages is proper. Such a reference can only be had when there has been a final determination that plaintiff was not entitled to the injunction, or something equivalent to such a determination.—*Supreme Ct.*, (4*th Dept. Sp. T.*,) *May*, 1881. Neugent *v.* Swan, 61 How. Pr. 40.

33. The fact that the injunction was dissolved on motion, pending the action, is not enough, as that may have been done for various reasons in no way affecting the merits, and yet the court might, at the final hearing, decide that the defendant ought to be enjoined. *Ib.*

34. In an action to restrain defendant from entering upon certain lands and cutting timber, etc., a temporary injunction was granted; this was dissolved by stipulation on the termination of another suit determining the title to the land. After this, defendant died; on motion of his administratrix an order was granted requiring plaintiff to elect whether or not he would continue the action against her, and subsequently, upon her motion, the action was discontinued and judgment entered accordingly.

Held, 1. That an order of reference to ascertain damages by reason of the injunction was improperly granted; that as the action abated upon the death of the defendant, and the cause of action did not survive, the court had no authority to direct a discontinuance.

2. That there was no breach of the condition of the undertaking, which provided for the payment of damages in case the court should finally decide that plaintiff was not entitled to the injunction, as there had been no such decision.—*Ct. of App.*, *Oct.*, 1880. Johnson *v.* Elwood, 82 N. Y. 364; *reversing* 15 Hun 14.

35. Amount recoverable—costs, expenses, &c. On the hearing of an unsuccessful application to dissolve a temporary injunction granted in this action, the defendants' counsel confined his objections to alleged defects in the plaintiff's papers, and did not use affidavits relating to the merits of the action, which he had previously prepared. Upon the trial of the action the complaint was dismissed. Upon a reference ordered to ascertain the damages sustained by reason of the injunction—*Held*, that the sureties to the undertaking were not liable for the costs and expenses of the unsuccessful application to dissolve the injunction.—*Supreme Ct.*, (1*st Dept.*,) *Nov.*, 1880. Langdon *v.* Gray, 22 Hun 511.

36. In this action, brought to restrain the defendant from interfering with a boom across a certain river, the plaintiffs procured an order temporarily restraining him from so doing, and requiring him to show cause why the injunction should not be continued until the entry of final judgment in the action. Upon the return day an order was made, after a partial hearing upon the merits, providing that if the plaintiffs should, if required by the defendant, give an undertaking for a larger sum, the injunction should be continued until the final determination of the action. The order also authorized the defendant to give notice of a further hearing upon the order to show cause before another judge. Increased security was given, but no further hearing was had, and upon the trial a judgment was rendered in favor of the defendant. *Held*, that the trial was necessary to enable the defendant to get rid of the injunction, and that he was entitled to recover the fees of his

counsel thereon as a part of the damages secured by the undertaking.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. Newton *v.* Russell, 24 Hun 40.

As to injunctions in *Supplementary proceedings*, see EXECUTION, V.

As to the jurisdiction and procedure in *Courts of equity, generally*, see EQUITY.

INJURY.

To the *Person*, see ASSAULT; MUNICIPAL CORPORATIONS, III.; NEGLIGENCE; RAILROAD COMPANIES, IV., V.

To *Property*, see TRESPASS; TROVER.

To *Reputation*, see LIBEL; SLANDER.

To *Vessels*, by collision, see SHIPPING.

As to the right of action for *Injuries causing death*, see HOMICIDE, II.

INSANE PERSONS.

I. DISABILITIES OF INSANE PERSONS.

II. THE INQUISITION. APPOINTMENT OF COMMITTEE, &C.

I. DISABILITIES OF INSANE PERSONS.

1. Liability on contracts. Where a party seeks to sustain a contract made with a lunatic, on the ground that it was made in good faith, for the benefit of the lunatic and without knowledge of his incapacity, and that it has been so far performed that said party cannot be placed *in statu quo*, these facts must be alleged and proved.—*Ct. of App., March*, 1881. Riggs *v.* American Tract Soc., 84 N. Y. 330; *reversing* 19 Hun 481.

2. —for money loaned. *It seems*, that an obligation entered into by an insane person to repay money loaned, of which he had the benefit, is valid where the lender acted in good faith, without fraud or unfairness, and without knowledge of the insanity or notice or information calling for inquiry; and an action is maintainable thereon.—*Ct. of App., Jan.*, 1880. Mutual Life Ins. Co. *v.* Hunt, 79 N. Y. 541; *affirming* 14 Hun 169.

The fact that the borrower was subsequently, upon inquisition taken, declared to be insane, does not affect the right to recover. *Ib.*

II. THE INQUISITION. APPOINTMENT OF COMMITTEE, &C.

3. Application for the commission. The failure to notify one of the heirs of the lunatic of the application is, at most, only an irregularity, as he has no absolute right to notice, and the irregularity will be deemed waived by him, unless he takes advantage of it immediately upon learning of the proceeding. He cannot wait until after the inquisition has been found before raising his objection of want of notice, without clearly showing some injury therefrom.—*Supreme Ct.*, (*Saratoga Sp. T.*,) *March*, 1881. Matter of Rogers, 9 Abb. N. Cas. 141.

4. Rule 25, of the Supreme Court, requiring an *ex parte* application for an order, to state whether any prior application has been made, does not apply to an order by which a special proceeding is instituted. *Ib.*

5. The omission to comply with the rule is an irregularity which must be taken advantage of on the first opportunity; if a party has delayed raising the objection until much labor and expense have been incurred, and taken the chances of a result favorable to his wishes, he cannot avail himself of such objection. *Ib.*

6. The finding. It is unnecessary to use the word "lunatic" in a finding under an inquisition of lunacy; a finding that the alleged lunatic "at the time of taking the inquisition is of unsound mind, and mentally incapable of governing himself or his affairs, and that he has been in the same state since" a given date, is sufficient. *Ib.*

7. A person of unsound mind who is mentally incapable of governing himself and his affairs, comes within the definition of lunacy, as laid down in the code, (§ 3343). *Ib.*

8. Application to set aside inquisition. An application to set aside an inqnisition is addressed very much to the discretion of the court, and brings the case before it on the merits. *Ib.*

9. An inquisition will not be set aside for a mere irregularity, when there is no doubt as to the lunacy of the party concerned. *Ib.*

10. Action against committee—defences. Where, in an action brought against the committee of a lunatic to recover for necessaries furnished to one claiming to be his wife, it appears that a marriage was duly solemnized between the lunatic and the woman, which was followed by cohabitation continuing down to the time of the appointment of the committee, when the woman was obliged to leave and live apart from him, the committee cannot set np as a defence that the marriage was void because the husband was at the time of its solemnization and ever since had been a lunatic, without lucid intervals.—*Supreme Ct.*, (*4th Dept.*,) *April*, 1880. Stuckey *v.* Mathes, 24 Hun 461.

INSOLVENCY.

1. Notice to creditors, service, &c. An affidavit presented in proceedings under the two-third act, as proof of service of the order reqniring creditors to show cause why an assignment of the insolvent's estate should not be made, and he be discharged, as prescribed by the act of 1847, (Laws of 1847, ch. 366, § 2,) averred that deponent "served a printed notice, of which the following is a copy." It was objected that no notice followed the affidavit; in the printed appeal book a notice did follow the affidavit, and one preceded it. *Held*, that it did not appear that the affidavit was defective in this particular.—*Ct. of App., April*, 1880. People, ex rel. Kenyon, *v.* Sutherland, 81 N. Y. 1.

2. Service of notice by mail. The affidavit averred that the printed notice was served "on each of the following named persons, on the days and in the manner next herein specified;" then followed a list of names, under a column

headed "names of creditors," and in another column, on the same line with each name the statement of the residence, save, in one instance, where the word "unknown" was written. Following the list was this averment: "By depositing, 1860, April 9th, in the post-office in the city of Brooklyn, a letter envelope directed to each of the foregoing creditors, at the place of residence hereinbefore designated, and in each envelope was a printed notice, of which the following is a true copy, and on each envelope so directed was placed a post office stamp to pay the legal postage of each letter." *Held*, that the averments were sufficient to show service by mail upon each of the creditors named. *Ib.*

3. The residence of most of the creditors was stated in the affidavit as New York city. No number or street was named. *Held*, that this did not show such a disregard of the law as to vitiate the proceedings; that the requirement to give notice was dependent upon the place of residence being known to the insolvent; that service by letter could be no more perfect, as to the address, than the knowledge of the insolvent, and it could not be said that he did not serve the notices to the best of his knowledge, nor could it be said that the proof was not such as the officer might legally be satisfied with. *Ib.*

4. **List of creditors.** The name of one of the creditors was Charles Storrs. This name, so spelled, did not appear in the list of creditors, but "Charles Stores" appeared, who was designated as assignee of a firm. *Held*, that it was a case of *idem sonans*, and was a sufficient designation of the creditor. *Ib.*

5. **What creditors may sign the petition.** It appeared that two-thirds of the creditors, claiming to represent more than two-thirds of the debts, signed the petition; the liability of the insolvent as to a portion of these debts was as indorser. It appeared that the paper indorsed had been protested for nonpayment, and the insolvent had thus become liable. *Held*, that on this account, and as the effect of the notice of discharge was to exonerate the insolvent from all liability incurred by indorsement, these debts were properly included. *Ib.*

6. **The discharge; its validity, effect, &c.** The provision of the statute (2 Rev. Stat. 23, § 35, subd. 7,) declaring a discharge of an insolvent from his debts void "if he shall be guilty of any fraud whatever contrary to the true intent" of the article, refers to a fraud perpetrated in the proceedings to obtatn the discharge, not to a fraud in the creating of the debt.—*Ct. of App., March*, 1881. Develin *v.* Cooper, 84 N. Y. 410.

7. In this action, brought by the plaintiff upon several promissory notes, given for money loaned and beer sold to the defendant, the defendant, S., was arrested in pursuance of an order granted on the ground that the plaintiffs were induced to loan the money and sell the beer by means of false and fraudulent representations made by him; and a motion subsequently made by him to have the order vacated was denied. After the judgment was recovered herein, S. procured a discharge from his debts from the Court of Common Pleas under the two-thirds act. In the schedule accompanying the petition he stated the cause and consideration of the debt to the plaintiff, as follows, viz.: "Notes and open account for money loaned and interest thereon." *Held*, that the true cause and consideration of the indebtedness was sufficiently set forth to confer jurisdiction over the proceedings upon the Court of Common Pleas, and that upon producing his discharge he was entitled to an order perpetually staying all proceedings under the judgment herein, and ordering the same to be marked "satisfied by the defendant's discharge in insolvency proceedings."—*Supreme Ct.*, (*1st Dept.*,) *Jan.*, 1881. Schaeffer *v.* Soule, 23 Hun 583.

INSPECTION.

As to *Inspection of books and papers*, see Discovery and Inspection.

As to the powers and duties of *Inspectors of election*, see Elections, 1, 2.

INSTRUCTIONS.

Of *Principal*, to agent, see Principal and Agent, II.; of *Court*, to jury, see Trial, VI., VIII.; and the titles of the various forms and causes of action, and criminal offences.

INSURANCE.

I. General Principles.
II. Fire Insurance.
III. Life Insurance.
IV. Marine Insurance.
V. Actions on Insurance Policies.
VI. Insurance Companies.
VII. The Insurance Department.

I. General Principles.

1. **Agreement for insurance.** When a verbal agreement to issue a policy of insurance will be enforced after the destruction of the property before a policy has been issued, see Van Loan *v.* Farmers' Mut. Fire Ins. Co., 24 Hun 132.

2. **Interpretation of policy.** Words in a policy of insurance must be taken in their ordinary sense, as commonly used and understood; and if the sense in which they were used is uncertain, as they are found in a contract prepared and executed by the insurer, they should be construed most favorably to the insured.—*Ct. of App., June*, 1880. Herrman *v.* Merchants' Ins. Co., 81 N. Y. 184, 188.

3. **Conditions, and breach thereof.** The policy contained a condition forfeiting all claims under it in case of "any fraud or attempt at fraud, or any misrepresentatio in proofs of loss, or examination, or any false swearing." *Held*, that a mere mistaken ex-

pression of opinion or innocent misstatement did not work a forfeiture under this provision; but that the misstatement must be false and fraudulent.—*Ct. of App., June,* 1880. Titus *v.* Glens Falls Ins. Co., 81 N. Y. 410, 420; S. C., 8 Abb. N. Cas. 315.

4. A policy of insurance issued by defendant provided that "this insurance (the risk not being changed) may be continued for such further time as shall be agreed on, provided the premium therefor is paid and indorsed on this policy, or a receipt given for the same, and it shall be considered as continued under the original representations, and for the original amounts and divisions, unless otherwise specified in writing; but in case there shall have been any change in the risk, either within itself or by neighboring buildings, not made known to the company by the assured, at the time of renewal, this policy and renewal shall be void." In an action to recover for a loss occurring after a renewal of the policy—*Held,* that if there had been any change in the risk, increasing the hazard, after the first insurance and before the renewal was delivered, whether known or not to the plaintiff, and it was not made known to the defendant at the time of the renewal, the policy and the renewal thereof was void, and no recovery could be had thereon. —*Supreme Ct.,* (1*st Dept.,*) *June,* 1880. Brueck *v.* Phœnix Ins. Co., 21 Hun 542.

5. **Waiver of breach of condition.** Where there has been a breach of a condition in a policy of insurance, the insurer may waive the forfeiture, either by express language to that effect or by acts from which an intention to waive may be inferred, or from which a waiver follows as a legal result. Titus *v.* Glens Falls Ins. Co., *supra.*

6. If, in any negotiation or transaction with the insured, after knowledge on the part of the insurance company of forfeiture, it recognizes the continued validity of the policy, or does acts based thereon, or requires the insured, by virtue of the policy, to do some act or incur some trouble or expense, the forfeiture is, as matter of law, waived. *Ib.*

7. Such a waiver need not be based upon any new agreement, or upon an estoppel. *Ib.*

8. **— of proofs of loss.** A condition in a policy of fire insurance requiring the filing of proofs of loss, being for the benefit of the company, it may waive a forfeiture resulting from a failure to comply therewith; and if it waives the condition, it cannot afterwards recall the waiver and insist upon the forfeiture.—*Ct. of App., Feb.,* 1880. Brink *v.* Hanover Fire Ins. Co., 80 N. Y. 108.

9. Such companies may refuse to pay a loss without specifying any ground, and when sued may insist upon any available ground; but if they plant themselves upon a specified defence and so notify the assured, they should not be permitted to retract after he has acted upon their position as announced, and incurred expenses in consequence of it. *Ib.*

10. If a company intends to avail itself of the objection that proofs were not filed in time, it should refuse to receive them on that ground, or at least promptly notify the assured of its determination, otherwise the objection will be regarded as waived. *Ib.*

11. **— of defects in proofs of loss.** Where no objection was made to the form or sufficiency of the proofs furnished or to the particularity of their details, and none were suggested at the trial which could not have been readily obviated to the extent of the duty to furnish created by the policy, if it had been suggested that greater minuteness of details was desired; and the company acted on the proofs furnished, and employed an adjuster to adjust the amount of damages, and the adjuster acted with the knowledge and co-operation of the assured, and concluded that the loss exceeded the whole sum insured by all the policies insuring the property; a defence that the proofs of loss were defective is not tenable —*Superior Ct., Feb.,* 1880. Smith *v.* Exchange Fire Ins. Co., 46 Superior 543.

12. Proof of loss having been received and retained by defendant without objection—*Held,* that defendant could not object that the proofs were not sufficiently full. Titus *v.* Glens Falls Ins. Co., *supra.*

II. Fire Insurance.

13. **The policy, and how construed.** Defendant's policy contained a provision that the insured should, "if required, submit to an examination * * * under oath." *Held,* that M. was only bound to answer such questions as had a material bearing upon the risk; and, having submitted to such examination, that his refusal to answer questions having no such bearing was not a violation of the provision. *Ib.*

14. The policy in suit contained a clause as to liens, as follows: "In case of assignment, before or after loss, whether of the whole policy or of any interest in it, or of any sale, transfer or change of title in the property insured by this company, or of any undivided interest therein, or the entry of a foreclosure of a mortgage, or the creation of any lien, or the levy of an execution or attachment, or possession by another of the subject insured, without the consent of this company indorsed hereon, this insurance shall immediately cease." Various judgments were recovered against A., to whom the policy was issued, and under one the premises on which the insured dwelling was located were sold by the sheriff to S., the plaintiff. Four days after such purchase the defendant, by its general agent, and by an indorsement made upon the policy, consented to the assignment thereof by A. to S.

Held, 1. That the consent to a transfer was a renewal of the policy, if it had become void by the sale or recovery of the judgments,

2. That the recovery of the judgments against A. did not vitiate the policy. He did not, by his own voluntary act, encumber the property, and he must have created the liens to make the policy void. *Supreme Ct.,* (*Ulster Cir.,*) *Jan.,* 1879. Steen *v.* Niagara Fire Ins. Co., 61 How. Pr. 144, 147.

15. **Condition against sale, or transfer of interest in property insured.** After the delivery of the policy, the plaintiff, without the written consent of the company, gave a chattel mortgage upon four cows, which were covered by it. The policy provided that "if the said property shall be sold or conveyed, or if the interest of the parties therein be changed in any manner, whether by act of the parties or by operation of law, or if the prop-

erty shall become encumbered by mortgage, judgment or otherwise, * * * then and in every such case the policy shall be null and void until the written consent of the company at the home office is obtained." *Held,* that as to the cows, the policy was avoided by the mortgage given upon them.—*Supreme Ct., (4th Dept.,) April,* 1880. Dacey *v.* Agricultural Ins. Co., 20 Hun 83.

16. Condition as to disclosure of interest of insured. Defendant issued to O., its general agent, an open or underwriters' policy of insurance, which contained a condition that if the interest of the insured be other than the entire and sole ownership, it must be so represented to the company, and so expressed in the written part of the policy, otherwise it would be void. O. issued to B. & Co. two certificates of insurance, which were indorsed upon the policy, upon wheat in their elevator; in one, loss, if any, payable to whom it may concern; in the other, loss payable to R. Previous to obtaining the insurance R. had discounted drafts, drawn by B. & Co. upon him, receiving as security warehouse receipts of specified quantities of wheat in said elevator. After a loss B. & Co. assigned the certificates to R. In an action thereon defendant set up, as a defence, a breach of said condition. The case on appeal did not contain the evidence, but simply stated that certain facts were proved. There was no suggestion therein as to whether or not any representations were made by B. & Co. as to the nature of their interest, no request to find, and no findings upon that subject; the only exceptions were to the findings as made. The court by whom the cause was tried, found that all the conditions of the policy had been duly kept and performed. The General Term reversed the judgment, on the ground that there was a breach of this condition. *Held,* error; that it did not appear from the bill of exceptions, that this question was litigated upon the trial, and there was no exception enabling the court to consider it on appeal; that the burden of proving a breach of the condition was upon defendant; that if B. & Co., when the insurance was procured, informed O. of the nature of their interest, and he omitted to describe it in the policy, defendant would be deemed to have waived the condition, and it could not be assumed that this was not done.—*Ct. of App., Dec.,* 1879. Richmond *v.* Niagara Fire Ins. Co., 79 N. Y. 230.

17. It was claimed by defendant that B. & Co. had, prior to the insurance, issued warehouse receipts, covering a larger quantity of wheat than there was at the time of the insurance in the elevator, and that they had therefore no insurable interest. No fraud was claimed, and it appeared that the whole insurance was less than the value of the wheat in the elevator. The case stated that it was proved that B. & Co. were the owners of the wheat, and it was so found. *Held,* that assuming B. & Co. had parted with the title to the wheat by force of warehouse receipts, before the receipts to R. were executed, they occupied at least the position of warehousemen, and so had an insurable interest; but that the finding of ownership could not be questioned here. *Ib.*

18. Condition against incumbrances. A condition in a policy of fire insurance, forfeiting it in case the property insured becomes incumbered in any way without the consent of the company written on the policy, refers to incumbrances created by the act of the insured; it does not apply to incumbrances by judgment or otherwise *in invitum* by operation of law.—*Ct. of App., Jan.,* 1880. Baley *v.* Homestead Fire Ins. Co., 80 N. Y. 21.

19. Where, therefore, after the issuing of such a policy, a mechanics' lien was filed against the property insured, and there was no claim that it was filed by the procurement of the assured—*Held,* that it was not such an incumbrance as was contemplated by the condition, and did not avoid the policy.—*Ct. of App., Nov.,* 1880. Green *v.* Homestead Fire Ins. Co., 82 N. Y. 517; *affirming* 17 Hun 467.

20. Condition against foreclosure of mortgage. The policy contained a condition declaring it void, in case foreclosure proceedings were commenced against the insured property. Plaintiff commenced a foreclosure of his mortgage, obtained judgment, and the property was advertised for sale a few days before the fire. *Held,* that the condition was applicable to plaintiff's mortgage, and that the foreclosure proceedings forfeited the policy. But—*Held,* that as defendant, after the fire and after it had notice of the proceedings, had required the insured to appear and be examined, and as it had the right to make such examination only by virtue of the policy, this was a recognition of its validity, and was a waiver of the forfeiture.—*Ct. of App., June,* 1880. Titus *v.* Glens Falls Ins. Co., 81 N. Y. 410, 417.

21. Condition respecting use of hazardous articles. Plaintiff made application to defendant's agent for an insurance upon his stock, etc.; the agent inspected the premises, was informed that kerosene oil was used for lighting, and saw the means provided for that purpose. A policy was issued containing a condition that it should be void if "refined coal or earth oils are kept for sale, stored or used on the premises, without written consent." In an action upon the policy—*Held,* that it was not avoided by the use of kerosene, without written consent; that it could not be supposed, without imputing bad faith to defendant, that the use of kerosene for lighting was intended to be prohibited, as it would have rendered the policy void from the beginning; but that the inference was that its use was contemplated; also that defendant might be held to have waived the condition, and to be estopped from setting up a forfeiture for breach thereof.—*Ct. of App., June,* 1880. Bennett *v.* North British, &c., Ins. Co., 81 N. Y. 273.

22. Condition requiring premises to be occupied. Where a policy of fire insurance contains a condition avoiding it in case the buildings become "vacant and unoccupied," to avoid the policy the buildings must not only be unoccupied but vacant.—*Ct. of App, June,* 1880. Herrman *v.* Merchants' Ins. Co., 81 N. Y. 184, 188.

23. A dwelling-house furnished throughout, from which the owner has removed for a season, intending to return and resume possession, is not vacant. *Ib.*

24. Instances. Where, therefore, defendant issued a policy, containing that condition, upon plaintiff's summer residence, from which he removed in November, leaving it furnished and in charge of a person living near, intending to return again the following spring—*Held,* that

the house was not vacant within the meaning of the policy; and so, that there was no breach of the condition. *Ib.*

25. The policy contained a provision that, "if the premises hereby insured shall become vacant or unoccupied, or, if the property insured being a mill or manufactory, shall cease to be operated and so remain for a period of more than fifteen days, without notice to the company and consent indorsed thereon, in every such case the policy shall be void." *Held*, that the words, "and so remain for a period of more than fifteen days," applied to a case where a house became vacant or unoccupied, as well as to one where a mill or manufactory ceased to be operated.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. Miaghan *v.* Hartford Fire Ins. Co., 24 Hun 58.

26. The policy contained a clause which declared, after the enumeration of several other matters: "Or if the premises, at the time of insuring, or during the life of this policy, be vacant, unoccupied, or not in use, whether by the removal of the owner or occupant, or for any cause, without this company's consent is indorsed hereon, this insurance shall be void, and of no effect." On the application of the insured, the general agents of the defendant wrote in the body of the policy, so as to make a part and portion of the contract, this clause: "The dwelling being unoccupied for a short time, but being in charge of a trusty person living near by, shall be no prejudice to this policy."

Held, 1. That the clear effect of the insertion of such a clause in the body of the policy was to modify the contract as originally made; and the clause making it void for non-occupancy must be read in connection with the amendment, and so reading it the policy was not vitiated; for the premises were only temporarily vacant at the time of the fire, and were then "in charge of a trusty person living near by."

2. That a declaration of the defendant, by its general agents, when informed of the last vacation of the premises, that the contingency was provided for, would waive the forfeiture, if any existed.—*Supreme Ct.*, (*Ulster Cir.*,) *Jan.*, 1879. Steen *v.* Niagara Fire Ins. Co., 61 How. Pr. 144, 147.

27. Defendant's agent, at the time the application was made, was informed that the house was then unoccupied and vacant. *Held*, that a condition in the policy requiring notice of and a special agreement indorsed on the policy in case the building became vacant and unoccupied, was waived.—*Ct. of App., Dec.*, 1880. Woodruff *v.* Imperial Fire Ins. Co., 83 N. Y. 133.

28. Within a few days after the policy was issued the house was in fact occupied as a dwelling. Subsequently there was a change of tenants; it did not appear but that the new tenants went in as soon as the old went out. No loss then occurred. *Held*, that the change was not a breach of said condition. *Ib.*

29. The building was destroyed by fire April 3d, 1875. It was rented and occupied up to April 1st. The tenant had permission "to keep his things" there after that time, and as a witness for defendant he testified, "my occupancy ceased when my things were burned up;" he also testified that he occupied as tenant, the barn and carriage-house, which were also insured by the policy, and continued so to do after the fire. Another witness, who went to the house to see about repairs the day before the fire, testified that he saw articles of furniture in one of the rooms, and others were locked. *Held*, that the evidence justified the submission of the question as to whether the house was "vacant and unoccupied," to the jury. *Ib.*

30. As to whether a "vacancy" under the terms of such a policy must be a vacancy of the entire premises, or whether each building insured stands by itself under the condition, *quære*. *Ib.*

31. **Condition against acts increasing the risk.** The policy contained a condition avoiding it in case of an increase of risk "internally or externally," unless proper notice thereof in writing was given. Upon the trial of an action upon the policy, defendant offered to show that the risk was increased by non-occupancy; this was excluded. *Held*, no error; that as the policy contained express conditions as to vacancy and occupancy, and as to the mode in which and purposes for which the house was to be used, it was not to be presumed that the general condition was intended for any of the cases thus specially provided for; and so, that if the risk was thus increased the condition was not violated. Herrman *v.* Merchants' Ins. Co., *supra.*

32. **Condition against further or other insurance.** The policy contained a provision avoiding it, in case the assured had at the time of insurance, or thereafter made, other insurance without the consent of the company written thereon. There was, at the time other insurance, which was not consented to in writing. It appeared that the other insurances were effected through O., the company's general agent, and were known to him to be in existence when the insurance in question was made. *Held*, that, under the circumstances, the issuing of the insurance by O., without noting a written consent to the other insurance, was a waiver of the provision, binding upon the defendant.—*Ct. of App., Dec.*, 1879. Richmond *v.* Niagara Fire Ins. Co., 79 N. Y. 231.

33. **Warranties.** In an application for a policy of fire insurance upon a building, under the heading of "survey," and following several questions as to the materials of which the building was constructed and its condition, was the question: "For what purpose used; state fully?" The answer was: "Dwelling." *Held*, that this was not a warranty that at the time of the application the building was in use as a dwelling; that the question simply called for what the building was designed or fitted for; and that the fact that the building at that time was unoccupied did not establish a breach of warranty.—*Ct. of App., Dec.*, 1880. Woodruff *v.* Imperial Fire Ins. Co., 83 N. Y. 133.

34. The plaintiff applied for a policy of insurance against fire, upon certain buildings and certain articles of personal property therein. The buildings were situated upon land conveyed, by deed, to her husband, after her marriage, and which he had devised to her by his will. The application contained the following question, viz.: "What is your title to or interest in the property?" An agent of the company, who filled in the application, wrote opposite to this the word "deed." The policy provided that all statements contained in the application should be deemed warranties. Upon the trial of this action, brought to recover upon the policy, the company claimed that the answer was false, and

that the policy was thereby avoided. *Held*, that there was no breach of warranty, because—(1) The word "deed" was not an answer to the question. (2) That as the plaintiff had an inchoate right of dower in the premises during the life of her husband, which became perfected by his death, and as such interest, and all her husband's interest, were acquired by deed, it might be said, in a general sense, that the plaintiff's title or interest was by "deed."—*Supreme Ct*, (*4th Dept*.,) *April*, 1880. Dacey *v*. Agricultural Ins. Co., 20 Hun 83.

35. Representations. Defendant issued a policy of fire insurance to M., loss payable to plaintiff, as mortgagee. It was provided in the policy that it should be void if all the liens on the property insured were not expressed thereon; the representations in the application were also made warranties. In answer to a question if there were any incumbrances, and for what amount, M. answered, "Yes, $2500." Plaintiff's mortgage was for that amount; all the interest due at the time the application was made had been paid, but a little over two months' interest had not been paid. In an action upon the policy—*Held*, that the representation was substantially correct.—*Ct. of App*, *June*, 1881. Titus *v*. Glens Falls Ins. Co., 81 N. Y. 410, 414; S. C., 8 Abb. N. Cas. 315.

36. The application stated that the insurance on a dwelling-house and wood-house was to be $400, and that it was worth $600; that the insurance on a barn was to be $250, and that it was worth $400. The application contained the following question: "What is the value of the land and building?" Opposite to it was written "$3000." The agent who filled in the application certified that he had examined the risk, and recommended its acceptance. Upon the trial it was shown that the dwelling-house and barn were of the value stated, but that the building and land were worth but $1500 at the time the policy was issued.

Held, 1. That the policy was not thereby avoided, and that the statement of the assured as to the value of the land was to be taken as a mere statement of opinion, an error in which could not affect the company, as it was the building, not the land, which was to be insured.

2. That, in any event, the company was estopped from setting up the forfeiture, as its agent was present at the time, and examined the premises, and it was to be presumed that he had as much knowledge as to the value of the land as had the plaintiff. Dacey *v*. Agricultural Ins. Co., *supra*.

37. Hazardous and extra-hazardous articles. In the absence of proof the court cannot hold that kerosene oil is a "burning fluid or chemical oil," as these words are used in a policy of insurance, forbidding their use in the insured premises.—*Supreme Ct*., (*3d Dept*.,) *May*, 1881. Mark *v*. Nat. Fire Ins. Co., 24 Hun 565.

38. Provisions for renewal. The policy contained a provision for its renewal; at its expiration it was renewed for another year; the certificate of renewal contained the words, "provided, always, that the original policy is in full force." At the time the policy was issued, there was a small judgment docketed against M., which was a lien, but which was not noticed in the application or in the policy, and was unknown to defendant. This judgment was paid before the renewal. *Held*, that assuming this lien avoided the original policy, yet it did not prevent the renewal from taking effect, as then no cause of forfeiture existed. Titus *v*. Glens Falls Ins. Co., *supra*.

39. Before the renewal certificate was issued, plaintiff, without the knowledge of M., procured insurance in another company, upon the same property, loss payable to him as mortgagee. This insurance was not mentioned in the policy issued by defendant, or in the renewal certificate, and was not known to defendant until after the loss. Defendant's policy contained a clause avoiding it in case the assured then had, or should thereafter procure, other insurance without the consent of defendant written on the policy. *Held*, that there was no breach of said condition, and this although M.'s mortgage contained a clause, that he should keep the mortgaged buildings insured, and assign the policy, and in case of default authorizing plaintiff to procure insurance; as M. was not in default, and plaintiff in procuring the insurance acted for himself, and not in any sense as agent for M. *Ib*. 415.

40. M., after the loss, made the formal proof required to procure payment of the insurance so obtained by plaintiff. *Held*, that there was no ratification by M. of such insurance so as to make the act of procuring it his act. *Ib*.

41. Preliminary proofs. Defendant issued to plaintiffs a policy of fire insurance upon merchandise in a store in L., North Carolina. The policy contained a condition requiring proofs of loss to be filed as soon as possible after a fire. The property was destroyed by fire November 23d. Immediately thereafter an agent from defendant's North Carolina agency went to L. to make investigations, and subsequently one went from New York. These investigations extended until some time in December, and required the presence of the insured. Their books and papers were nearly all destroyed, and they were obliged in preparing the proofs to obtain from New York and elsewhere duplicates of bills of purchases, and to make a detailed inventory of all the items of the stock, which was large, with their value, and a like inventory of the property saved. A considerable portion of the goods were purchased for cash, in small parcels, and plaintiffs were unable to procure bills in many cases. Charges of fraud in burning the store, and as to the quantity and value of the goods destroyed were made against them. The papers were finished by one of the plaintiffs January 7th, and transmitted to the other at Washington to verify. After examination he returned them to his partner in North Carolina for further examination and explanation, and this was repeated. They were finally completed and forwarded to New York to plaintiff's attorney to be filed, February 7th. There was evidence to the effect that on that day defendant's general agent, on being advised by the plaintiff in Washington that the proofs had been sent on, stated that he would not be able to take them up for examination until the latter part of the week after, and consented that they might be recalled to enable plaintiffs to examine them together. This was done and they were returned and filed February 16th. In an action upon the policy—*Held*, that the facts authorized a finding that reasonable diligence was ex-

ercised in furnishing proofs; and that this was all the policy required.—*Ct. of App., Feb.,* 1880. Brink *v.* Hanover Fire Ins. Co., 80 N. Y. 108.

42. Defendant received the proofs without objection, retained them, examined plaintiffs in respect to them, and then decided not to pay, upon the ground of fraud, and so declared to plaintiffs. *Held,* that from the failure of the defendant to raise the question of forfeiture it was to be presumed it did not then suppose any forfeiture had taken place; and that this was proper to be considered by the jury upon that question; also, that defendant was estopped from claiming a forfeiture. *Ib.*

43. Provision in policy for arbitration as to amount of loss. A policy of insurance provided, among other things, that if any difference should arise touching any loss or damage, the matter should, at the written request of either party, be submitted to impartial arbitrators, whose award in writing, should be binding on the parties as to the amount of such loss or damage, but should not decide the liability of the company, and that no suit should be sustainable until after an award should have been obtained in the manner provided, nor unless it was commenced within twelve months after the loss should occur. *Held,* as neither the number of arbitrators nor the manner of their appointment was specified, and as there was no way provided whereby their appointment could be procured nor their award obtained within the time limited for the bringing of the action; as in case no differences should arise as to the amount of loss (but only as to the liability of the company) no arbitration could be had, and consequently no suit be sustained; that the clause could not be treated as a condition precedent, compliance with which was essential to the bringing of the action, but as merely an independent covenant, collateral to the agreement to pay.—*Supreme Ct.,* (3*d Dept.,*) *May,* 1881. Mark *v.* Nat. Fire Ins. Co., 24 Hun 565.

III. Life Insurance.

44. The application. In the application for the policy, in answer to the question as to the occupation of the deceased, the answer was, "soda-water maker." In the "medical examiner's certificate," which was required to be and was signed by the applicant, and contained what purported to be transcripts of his answers to the medical examiner, in answer to a question as to the effect of the occupation upon the risk, the answer was, "is out of doors most of the time, selling soda-water; in my opinion, healthy occupation." It appeared that the insured made and sold soda-water. *Held,* that the answers were to be taken together, and stated the facts correctly.—*Ct. of App., March,* 1880. Grattan *v.* Metropolitan Life Ins. Co., 80 N. Y. 281.

45. The medical examiner was required by his instructions from defendant to give the answers to the questions in the certificate in his own handwriting, and not to allow any person to dictate any portion of them. In answer to a question calling for the family history "of the applicant," he stated correctly the cause of the death of a sister. At the time the insured signed his name to the certificate, the answer had not been written in by the examiner; he subsequently filled in the cause of death as "not known to applicant."

Held, 1. That the examiner was the agent of defendant for the purpose of reporting the answers; that it, not the insured, was responsible for his mistake in making the entry; and that the mistake did not release defendant from its obligation.

2. That it was competent to prove by parol the actual transaction in reply to defendant's claim of breach of warranty and fraud; and this without reforming the contract or asking for equitable relief. *Ib.*

46. Provisions respecting residence, travel, &c. On October 1st, 1868, defendant issued an endowment policy on the life of T., which contained a condition declaring it void in case the insured should "travel upon the seas," without the written consent of the company previously obtained. Upon the back of the policy was also a stipulation to the effect that if, after three or more annual premiums had been paid, the policy should cease "in consequence of the non-payment of premiums," the company would, upon its surrender, issue a new policy for the full value acquired under the old one. The annual premiums were paid up to, and including, the one due October 1st, 1875. In September, 1875, T., without obtaining the consent of the company, and without its previous knowledge or subsequent assent, went to Spain. Plaintiffs, in August, 1877, offered to surrender the policy and demanded a paid-up policy for eight-tenths of its amount, which was refused. In an action to enforce specific performance of such stipulation—

Held, 1. That the policy and all rights under it were forfeited by the violation of said condition; and that even if a court of equity would, in any case, relieve against such a forfeiture, it was not authorized to do so here, as it was not incurred by accident, ignorance, mistake, or any overpowering necessity.

2. That the stipulation did not constitute a separate and independent contract, but was to be taken in connection with the provision in the body of the policy, all constituting but one contract.

3. That the premiums paid were forfeited, although it was not so expressly provided in the policy.—*Ct. of App., Jan.,* 1881. Douglas *v.* Knickerbocker Life Ins. Co., 83 N. Y. 492; *affirming* 45 Superior 313.

47. In reference to certain other conditions, some of which were conditions subsequent, it was expressly stated in the policy that in case of their violation, the premiums should be forfeited. *Held,* that the absence of this express provision, in reference to the condition in question, did not justify an inference that such a forfeiture was not intended; also, that the fact that as to certain other conditions it was expressly stated that its violation would work a forfeiture, "without notice" did not raise a presumption that the forfeiture here would not follow without notice, it appearing that there was an apparent purpose for the insertion of the express stipulation. *Ib.*

48. When the last premium was paid, in October, 1875, defendant gave a receipt, using a printed blank in general use by the company,

which stated, in substance, that the policy was thereby continued in force for one year, subject to a condition forfeiting it in case any obligation given for premiums should not be paid when due. *Held*, that this receipt did not have the effect to relieve from the forfeiture and continue the policy in force for the year, but only continued it so far as depended upon the payment of premiums. *Ib.*

49. On the back of the policy was printed a statement that permits would be granted by the company "on reasonable terms" for persons insured "to make voyages to any foreign country." It was claimed by plaintiff that a forfeiture of the policy was not caused by a failure to obtain such a permit before the forbidden travel, but that the trial court should have ascertained what a reasonable charge would have been for the permit and have allowed it to defendant. *Held*, untenable; that the defendant could not only make a reasonable charge for a permit, but could impose other conditions; and the terms were so far in its discretion that unless it unreasonably refused a permit the court could not interfere; and as no permit was asked for, and the company was thus deprived of the opportunity to fix terms, there was nothing for a court of equity to act upon. *Ib.*

50. Payment of premiums. Where a policy of life insurance contains a clause forfeiting it in case of non-payment of any premium when due, the insanity of the insured is not an excuse for non-payment, and does not effect a waiver of the forfeiture; as it is not necessarily an obstacle to the performance of the condition; payment may be made as well by any other person.—*Ct. of App., Nov.,* 1880. Wheeler *v.* Connecticut Mut. Life Ins. Co., 82 N. Y. 543; *reversing* 16 Hun 317.

51. Defendant issued a policy of insurance, dated October 12th, 1872, on the life of M., which contained a condition to the effect that if a note, other than the regular premium note, should be given for a portion of the premium, and if said note should not be paid "strictly in accordance with the provisions thereof" the policy would immediately become void; also, that no agent of the company, except its president or secretary, could waive or alter "any condition of the policy or of any such note." The insured, aside from the regular premium note, which was for $234, gave a note for $176, for a portion of the premium, payable six months from date, which stated for what it was given, and that the policy would immediately become void if the note was not paid at maturity. The policy was procured by M. through one R., who was agent for several insurance companies other than defendant. When he had a larger amount of proposed insurance than he could place in his own companies he had occasionally applied to defendant, through its general agents, in New York, delivering to them the application and receiving the policy and receipts for premiums. R. collected the annual premiums on such policies, and accounted to said general agents. The policy in question was obtained in this manner. R. wrote on the margin of the application his name, adding thereto "general agent." It was not claimed that he was general agent of the defendant, or that M. understood him to be so. At the time the two notes were given by M., he delivered to R. another note for $640, payable to the order of R., with collaterals, which note R. procured to be discounted; he delivered to defendant the two premium notes, but retained the proceeds of the other note. No further payment of premium was made. M. died October 26th, 1873. In an action on the policy—*Held*, that R. was not the agent of defendant, and in taking the third note did not act for it; but that he merely occupied as to it the position of an insurance broker; that the delivery of said third note did not operate as a payment; and, the six months' note not having been paid when it was due, that the policy was forfeited.—*Ct. of App., Feb.,* 1880. How *v.* Union Mut. Life Ins. Co., 80 N. Y. 32.

52. The policy acknowledged receipts of the payment of the first premium. Soon after its delivery M. assigned it to plaintiff, who was his housekeeper, in consideration of her services, defendant consenting to the assignment, "subject to all the provisions and conditions of the policy." *Held*, that defendant was not estopped from denying the payment; that the acknowledgment was not that payment was made in cash, and the conditions showed that payments might and were contemplated to be made partly in notes; and, therefore, that plaintiff had no right to rest in the belief that the first premium was paid in cash; also, that by the assignment plaintiff simply took the place of M. as owner of the policy, and took it subject to all its conditions. *Ib.*

53. There was no communication between plaintiff and defendant in reference to the policy until October 9th, 1873, when plaintiff took the policy to defendant's agent at Philadelphia, and requested him to have it changed, so that she could pay the annual premiums quarterly instead of annually, and at Philadelphia instead of New York. Said agent forwarded the policy to defendant's main office at Boston, but did not hear from it until about November 1st. Between October 9th and 26th, plaintiff called at the office of the agent several times to pay the premium falling due October 12th. The agent informed her he was not authorized to receive the money, but would send for renewal receipts, and that she would not be prejudiced by the delay. She said nothing, and the agent knew nothing, about the non-payment of the six months' note. About November 1st, defendant replied to the agent's letter, advising him as to said note and the forfeiture, of which he informed plaintiff the next time he saw her. Neither the agent nor defendant knew of the sickness of M. until after his death. *Held*, that there was no waiver of the previous forfeiture by the delay in answering the agent's letter; that, at most, it could only excuse the prompt payment of the second annual premium. *Ib.*

54. Paid-up policies. A policy of life insurance contained a clause to the effect that if, after the payment of two or more annual premiums, it should cease and determine because of default in payment of subsequent premiums, the company would grant a paid-up policy for such amount as the then present value of the policy would purchase, provided the policy should be transmitted and application for the paid-up policy made within one year after de-

fault. In an action upon the policy the complaint alleged in substance that after three annual premiums were paid, default was made, the insurer died, and within a year after the default the owner of the policy transmitted it to the company with proof of loss, but said company refused to grant a paid-up policy. *Held*, that the complaint made out a cause of action, and that a demurrer thereto was properly overruled; that the right to a paid-up policy was not determined by the death of the assured, and upon refusal to issue it a liability was created for the amount for which it should have been issued. Wheeler *v.* Connecticut Mut. Life Ins. Co., *supra*.

55. Death; and proof thereof. By the terms of a policy of life insurance, issued by defendant, the amount of insurance was to be paid "in sixty days after receipt and acceptance of proofs of death of the insured." In an action upon the policy, it appeared that defendant had blanks for such proofs, and that it was its custom, upon the death of a person insured, to send these blanks to his representative, or for his use to the local agent; that immediately after the death of the insured plaintiff applied to the local agent for blanks, who wrote to defendant, informing it of the death, and of the application, and requesting it to furnish the blanks. A similar application was also made by plaintiff. Defendant declined, on the ground that the policy was null and void, and that it refused to recognize any claim thereunder, and it also directed its agent not to give the usual certificate. *Held*, that the proofs called for must, in view of defendant's custom, be held to relate to proofs according to its instructions, and upon blanks to be furnished by it, and that its refusal to furnish them was a waiver of the requirement.—*Ct. of App., March*, 1880. Grattan *v.* Metropolitan Life Ins. Co., 80 N. Y. 281.

56. The defendant issued a policy of insurance upon the life of one John A. Hill, in the sum of $2000, to be paid to the plaintiff, his wife, upon proof that the insured "shall have sustained bodily injuries effected through external, violent and accidental means within the intent and meaning of this contract, and the conditions hereto annexed, and such injuries alone shall have occasioned death. * * * Provided always, that this insurance shall not extend * * * to any death or disability which may have been caused wholly or in part * * * by the taking of poison * * or by suicide, felonious or otherwise, sane or insane." In the course of his business, Hill, who was a physician and surgeon, mixed some poison with water in a goblet, and thereafter, mistaking the mixture for pure water, and without any intention of taking his life, drank it, and subsequently died from its effects. In an action brought by the plaintiff upon the policy—

Held, 1. That the death was not "effected through external, violent and accidental means," as those terms were used in the policy.

2. That the proviso, excepting from the insurance a death caused "by the taking of poison," was not limited to cases of intentional self-poisoning, but included all cases in which the death was so caused.—*Supreme Ct., (3d Dept.,) Sept.*, 1880. Hill *v.* Hartford Accident Ins. Co., 22 Hun 187.

IV. Marine Insurance.

57. Interpretation of the policy. For an instance of the construction of a marine policy, and a of policy of re-insurance, see St. Nicholas Ins. Co. *v.* Merchants' Mut. Fire, &c., Ins. Co., 83 N. Y. 604.

58. A clause in a marine policy, providing that the insurer is "not liable for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel," comprises leakage from sea perils insured against, as well as ordinary leakage, from whatever receptacle it may occur. Such a clause is not to be deemed an exception from general liability, and where part of the loss was from leakage, the insured must prove the amount and cause thereof, to enable him to recover.—*Superior Ct., Dec.*, 1880. Borland *v.* Mercantile Mut. Ins. Co., 46 Superior 433.

59. Carriage of goods on deck. A policy of marine insurance containing a provision that the company should not be liable, unless by special agreement indorsed thereon, for damage to goods on deck, construed; and the effect of the approval of an agent of the company as to the manner of lading, determined.—*Superior Ct., April*, 1880. Allen *v.* St. Louis Ins. Co., 46 Superior 175.

60. Implied warranty of seaworthiness. The mere fact of effecting the insurance, independently of the particular terms used, impliedly warrants that the vessel at the commencement of the voyage is seaworthy.—*Superior Ct., Feb.*, 1880. Rogers *v.* Sun Mut. Ins. Co., 46 Superior 65.

61. The warranty of seaworthiness implies that the material of which the vessel is made, its construction, the qualifications of the captain, the number and description of the crew, the tackle, sails and rigging, stores, equipment and outfit generally, are such as to render it in every respect fit for, and able to encounter, with safety, the ordinary perils of the proposed voyage or service. It extends to qualities and defects of the vessel unknown, and that could not have been known, no less than to those known, to the assured. *Ib.*

62. This warranty is a condition precedent to the policy attaching, and the burden is on the assured to prove seaworthiness, whether the loss or injury proceeded from a want of it in any particular or not. *Ib.*

63. Measures taken by the assurer, such as having a survey made to satisfy himself as to the seaworthiness of the vessel, will not of themselves so operate as to amount to a waiver of the warranty of seaworthiness. *Ib.*

64. The facts that the vessel had been built for sound and inland navigation, that the assurer knew such facts, and that by the policy she was described as "The Steamboat Novelty," do not, as matter of law, restrict the implied warranty of general seaworthiness to a limited warranty of seaworthiness for sound and inland navigation. *Ib.*

65. Evidence as to seaworthiness—presumption. In an action upon a marine policy, insuring the cargo of a vessel, the insured, in the first instance, need only give general testimony as to the seaworthiness of the vessel, but at the close of the case, the fact of

seaworthiness must affirmatively appear in those particulars as to which an attack has been made.—*Superior Ct., Dec.*, 1880. Borland *v.* Mercantile Mut. Ins. Co., 46 Superior 433.

66. Where it appears that the cargo was so laden upon the deck as to be likely to interfere with the movements of the crew in navigating the vessel, there is a presumption of unseaworthiness, which, if not overcome, (by showing affirmatively that the deck cargo was not likely to interfere with the due management of the vessel,) will prevent the insured from recovering, though such lading be an act of barratry by the master, and the policy contain a clause insuring against the master's barratry; seaworthiness must exist as a condition precedent to the policy attaching. *Ib.*

67. Under Laws of 1857, ch. 242, a foreign vessel which leaves the port of New York without a licensed pilot is presumed to be unseaworthy, and the presumption is not answered by proof that she was safely navigated out of port. *Ib.*

68. Breach of warranty — waiver. Defendant issued a policy of insurance to plaintiff upon his canal-boat, which policy contained a warranty that the boat would be "securely moored in a safe place satisfactory to defendant from December 10th to April 1st, * * * with privilege to lighter in New York harbor during the winter." The boat was laid up during the period specified at a place outside of said harbor. No notice of the laying up was given save to S., an insurance broker, not in defendant's employ, who solicited applications for insurance by it, forwarded them when obtained, and, if accepted, policies were issued, sent to S., who delivered them to the applicants, and received commissions thereon. While so laid up the boat was destroyed by fire. In an action upon the policy—*Held*, that notice to S. was not notice to defendant; and that there was a breach of the warranty avoiding the policy; also, that the privilege to lighter did not dispense with the warranty or justify the omission to give notice.—*Ct. of App., Dec.*, 1880. Devens *v.* Mechanics', &c., Ins. Co., 83 N. Y. 168.

69. Plaintiff served the proofs of loss upon the general manager of defendant and asked him if they were all right; he answered that they were, and, upon being asked what was due on the policy, answered, "we considered not anything, and that it was the carelessness of the captain of the boat." *Held*, that this was not a waiver of the breach, nor did it estop defendant from claiming it. *Ib.*

70. An insurance company is not deprived of the defence of breach of warranty, because, when a claim is first presented, while denying its liability, it omits to disclose the ground of defence or states another ground than that upon which it finally relies; there must be, in addition, evidence justifying a finding that, with full knowledge of the facts, there was an intention to abandon or not to insist upon such defence, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury. *Ib.*

71. The policy provided that the acts of the insurer in saving and preserving the property insured should not be considered as affirming or denying any liability under it. Defendant, when informed of the fire, directed the captain of the boat to store the articles saved. *Held*, that this was not a waiver of the breach. *Ib.*

72. Necessity of abandonment. Where the cargo of a vessel is insured, "free from particular average," it is not necessary that there shall be an actual, total, physical loss of the thing insured; it is enough if there be a constructive total loss, *i. e.*, such a destruction of all value as amounts, in consideration of law, to a total loss to the owner. But in such case there must be an abandonment of the goods by the insured, to enable him to recover as for a total loss; and notice of such abandonment must be given, while the whole is in peril, and in a reasonable time; and if the insurers do not accept the abandonment, the owners must hold the property in behalf and for the interest of the insurer. If they hold and use or treat the property as their own, it will amount to a waiver of their abandonment.—*Superior Ct., April*, 1880. Chadsey *v.* Guion, 46 Superior 118.

73. Contribution in general average. When the underwriter must contribute to the expense of getting off a stranded vessel, and how his proportion of the expense is determined, see Providence, &c., Steamship Co., *v.* Phœnix Ins. Co., 22 Hun 517.

V. Actions on Insurance Policies.

74. The right of action. Under the provision of the Code of Procedure, (§ 427,) authorizing the bringing of an action against a foreign corporation by "a resident of this state for any cause of action"—*Held*, that an action was properly brought in this state by an executor, a resident therein, upon a policy of insurance issued by a Connecticut corporation upon the life of the testator, who resided and died in that state, the will having been admitted to probate in that state, and afterward, upon production to the surrogate of an authenticated copy, having been admitted to probate in this state.—*Ct. of App., Feb.*, 1881. Palmer *v.* Phœnix Mut. Life Ins. Co., 84 N. Y. 63.

75. Limitations of time to sue. A policy of fire insurance contained the following clause: "No suit or action of any kind against this company for the recovery of any claim upon, under or by virtue of this policy, shall be sustainable in any court of law or chancery, unless such suit or action shall be commenced within the term of twelve months next after the loss or damage shall occur." Proofs of loss were required to be furnished in sixty days from the happening thereof. The fire occurred January 11th, 1876, and the suit was not commenced till March 3d, 1877. *Held*, that a recovery was not barred by the clause in the policy; that the words "after the loss shall occur," referred to the time when the loss should become a fixed demand, and not to the time of the actual destruction.—*Supreme Ct., (Ulster Cir.,) Jan.*, 1879. Steen *v.* Niagara Fire Ins. Co., 61 How. Pr. 144.

76. Matters of defence. January 28th, 1870, the defendant issued to the plaintiff a policy insuring the life of plaintiff's brother, in the sum of $5000. In 1871 the company commenced an action to have the said policy canceled and declared void, on the ground that it was procured by false and fraudulent statements made by the present plaintiff in his application therefor. The complaint therein did not ques-

tion the plaintiff's insurable interest in the life of his brother, and no issue in regard thereto was made in the action, but the answer and the judgment, subsequently entered therein in favor of the then defendant, the present plaintiff, recited that he was interested in his brother's life by reason of a debt owing from the latter to him. In this action, brought by the plaintiff, upon the policy, after his brother's death, the defendant alleged in its answer that his brother was not indebted to the plaintiff at the time of the issuing of the policy or at any time thereafter, and that the plaintiff had no insurable interest in his brother's life, and also set up several false and fraudulent representations contained in the application for the policy and certain breaches of warranty, as defences to the action. *Held*, that the judgment rendered against it in the former action did not prevent the defendant from proving the defences of a want of insurable interest and of breaches of warranty set up in its answer to this action.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Ferguson *v.* Massachusetts Mut. Life Ins. Co., 22 Hun 320.

77. The complaint—amending complaint. All that need be alleged in the complaint in an action on a policy of life insurance, is the contract, the death of the assured and the failure to pay as agreed. An allegation that the death of assured was not caused by the breach of any of the conditions in the policy is unnecessary, and need not be proved.—*Ct. of App.*, *April*, 1881. Murray *v.* New York Ins. Co., 9 Abb. N. Cas. 309.

78. In the original verified complaint and in the proofs of loss the plaintiff stated his loss at $800. Upon the trial he was allowed, against the defendant's objection and exception, to amend his complaint so as to demand the amount named in the policy, viz., $2000. *Held*, no error.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. Miaghan *v.* Hartford Fire Ins. Co., 24 Hun 58.

79. Evidence. Where the husband, as the agent of his wife, and in her name, obtains a policy of insurance upon his life, warranting the truth of his statement in the application that he is of correct and temperate habits, and making the same a part of the policy, a statement of the wife in a verified petition thereafter made by her in an action for separation, that ever since their marriage he had been addicted to the excessive use of intoxicating liquors, is admissible in evidence against her, in an action on the said policy, and if said admission is not explained or contradicted, a verdict for defendant should be directed.—*Superior Ct.*, *Dec.*, 1880. Furniss *v.* Mut. Life Ins. Co., 46 Superior 467.

80. What answer to questions in an application will constitute a declaration of correct and temperate habits, and what is sufficient evidence of such habits in deceased, as against an admission such as the above, considered. *Ib.*

81. In an action upon a policy of fire insurance, it appeared that when the issuing of the policy was reported to defendant by its agent, it at once notified him to cancel the policy, unless the "average clause" was inserted; this notice did not reach the agent until after the fire. On the trial, defendant's counsel asked one of its witnesses whether "an average clause in a policy is favorable or unfavorable to an insurance company." This was objected to and excluded. *Held*, no error.—*Ct. of App.*, *Jan.*, 1880. Standard Oil Co. *v.* Amazon Ins. Co., 79 N. Y. 506.

82. The plaintiff was, against the defendant's objection and exception, allowed to testify that he did not read the policy when it was delivered to him. *Held*, no error; that it tended to show that he relied on the agent's acts. Miaghan *v.* Hartford Fire Ins. Co., *supra*.

83. For the purpose of showing the falsity of representations of the insured as to the cause of death of his mother, defendant called a physician, who testified that he attended her in her last illness. It did not appear that he ever visited or saw her at any other time or in any other than a professional capacity. The witness was then asked if he knew or was able to state the cause of her death; if he observed the symptoms she exhibited in her sickness; if the symptoms were such as might have been discovered by observation and physical examination, without the aid of any specific statement from the patient, or without their being confidentially disclosed by her, or any friend or attendant, or through any private examination; and also if the statement of the insurer as to the cause of death was true. *Held*, that the questions, so far as material, were properly excluded.—*Ct. of App.*, *March*, 1880. Grattan *v.* Metropolitan Life Ins. Co., 80 N. Y. 281.

84. Questions for the jury. This action was brought upon a policy issued by the defendant, insuring the plaintiff's barn, house, and the personal property, wearing apparel, &c., therein, against loss by fire. It contained a clause providing "that any fraud or attempt at fraud, on the part of the assured, shall cause a forfeiture of all claims under this policy." Upon the trial it was shown that there was included in the proofs of loss a sealskin sacque, valued at $75, given by some person other than the plaintiff, to his unmarried daughter Mary, who was twenty-seven years old, but who had always resided with and been provided for by him. There was evidence to show that the agent of the defendant, the insurance company, with knowledge of the facts, had directed the daughter to appraise the sacque, and that it had thereafter been included in the proofs of loss.

Held, 1. That it was for the jury to say whether or not the plaintiff inserted the sacque in the proofs of loss, with a willful intent to defraud the defendant, and that a verdict in the plaintiff's favor would not be disturbed.

2. That neither the fact that the plaintiff stated in his proofs of loss that the damage to the building amounted to $1017.64, while it had been estimated by the appraisers at $694, nor the fact that he had stated to the agent that the building was worth from $3500 to $4000, while it was, in fact, worth less than that amount, was conclusive evidence of an attempt to defraud the defendant, and that the question whether they were or not, was properly left to the jury.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Dolan *v.* Ætna Ins. Co., 22 Hun 396.

85. Instructions. In an action upon a policy of fire insurance, upon real and personal property, the defence was that, at the time of the insurance and of the loss, the property did not belong to plaintiff. Defendant's evidence was to the effect that H., who was then the owner, conveyed the property in form to M., a fictitious person, and then in the name of M. he conveyed it to plaintiff. The court charged the jury, in substance, that if they believed there was no such person as M., or that he never exe-

cuted the conveyance, they must find for defendant. *Held,* error; that, as it was to be assumed the conveyances were executed by H. with the intention of vesting title in plaintiff, to whom they were delivered, and who the proof tended to show took and held possession of the property, although the conveyance to M., there being no such person, was invalid, yet the conveyance in the name of M. to plaintiff was valid as against H., and the plaintiff showed sufficient title to maintain her action.—*Ct. of App., Dec.,* 1880. David *v.* Williamsburgh City Fire Ins. Co., 83 N. Y. 265.

86. Amount of recovery. Where different articles of property are separately described in a policy, and insured for specific sums, the damages allowed for the destruction of any article cannot exceed the amount for which it was insured.—*Supreme Ct., (4th Dept.,) April;* 1880. Dacey *v.* Agricultural Ins. Co., 20 Hun 83.

VI. Insurance Companies.

87. Rights of stockholders. Plaintiffs, as policy-holders of the defendant corporation, sued to call the directors to account for various alleged breaches of trust, whereby the company's assets were claimed to be wasted and wrongfully misappropriated, and they asked for a receiver and an accounting. *Held,* (sustaining demurrer to complaint,) (1) That no trust was created or existed between plaintiffs and the defendant corporation and its directors. (2) That plaintiffs' alleged claim being thus reduced to mere creditors of the corporation, which was solvent and able to meet all its obligations, they could only obtain relief as judgment creditors, and that the complaint was demurrable.—*Supreme Ct., (1st Dept. Sp. T.,) July,* 1881. Bewley *v.* Equitable Life Assur. Soc., 61 How. Pr. 344.

88. Agents; and their authority to bind the company. A broker who effects insurance under no employment by the insurers, but for a commission paid by them upon the premiums received, for such risks as he procures to be offered and they choose to accept, is not an agent in such a sense that they will be bound by notice to him after policies are issued.—*Ct. of App., Dec.,* 1880. Devens *v.* Mechanics', &c., Ins. Co., 83 N. Y. 168.

89. When bound by agent's knowledge. A policy of insurance upon a boat was issued to "G. M., Superintendent." The boat was owned in different shares by five persons, of whom M. was one. He had been superintendent, and managed the boat for many years. The agent of the company knew that M was not the sole owner of the boat when he issued the policy. *Held,* that the policy was not avoided by the clause reciting that if the interest of the assured was other than the entire unincumbered interest, it must be so represented, or the policy would be void.—*Supreme Ct., (3d Dept.,) May,* 1881. Mark *v.* Nat. Fire Ins. Co., 24 Hun 565.

90. In this action, brought by the plaintiff upon a policy of insurance against fire, issued by the defendant, the latter set up as a defence a breach of a condition, avoiding it in case the interest of the insured was not truly stated and described in the policy. Upon the trial it appeared that the policy in question was issued to the plaintiff by the general agent of the company in renewal and continuance of one previously issued by the defendant, and which had been assigned to the plaintiff, and that at the time of such assignment the said general agent, with full knowledge and information of the plaintiff's title to and interest in the property, had by an indorsement upon the policy made the loss payable to the plaintiff as his interest might appear. At the expiration of the first policy, the agent having called on the plaintiff and been informed that he wished it to be continued, issued the one in suit, which was not examined by the plaintiff when delivered to him.

Held, 1. That the knowledge of the agent, acquired while acting for the company in reference to the insurance of the same property, was the knowledge of the company.

2. That the fact that such knowledge was acquired by the agent prior to the time when he issued the policy in question was immaterial.

3. That the company was estopped from insisting upon the breach of the said condition as a defence to the action.—*Supreme Ct., (4th Dept.,) Jan.,* 1881. Broadhead *v.* Lycoming Fire Ins. Co., 23 Hun 397. S. P., Miaghan *v.* Hartford Fire Ins. Co., 24 Hun 58.

91. Power of agent to waive conditions as to payment of premiums. The policy acknowledged receipt of the first premium, and contained a condition avoiding it in case of non-payment of the annual premiums on or before the date they fell due. There was also a notice indorsed upon the policy to the effect that no receipts for premiums should be valid unless signed by the president or secretary, and that no agent had anthority to alter a policy or to receive any premium after it became due "without special permission from the officers of the company." S., who was general agent of defendant for the State of Rhode Island, took the application for the policy in question in Connecticut. He took notes for the first premium, which contained a condition avoiding the policy if the amount was not paid when due; he forwarded the application to defendant, received the policy and delivered it to the insured. The first note was not paid when due, and the insured wrote to S., expressing inability to pay and asking to be relieved from liability. S. thereafter made a new agreement, taking new notes with longer time to run, the notes containing the same condition, printed forms furnished the agent by the company being used. S. informed the defendant of this arrangement, and forwarded to it two of the notes; it made no objection, received the money on the first note falling due, which was paid at maturity, and retained the others until after the death of the insured. The second note not being paid at maturity, S. wrote to the insured, using paper with a printed heading furnished by the company, in which he was styled its general agent, asking for payment of the note by a day named, and this not having been complied with, again wrote, asking the insured to send the amount "by return of mail or by express." On the day this letter reached the insured he inclosed the amount in bank bills in a letter addressed to S., at his place of residence, which he mailed in time for a mail leaving the same day, although not the first mail after the receipt of the letter. The letter, with its contents, never was received by S. In an action upon the policy—*Held,* that the condition and notice had no reference to the

first premium, but only to subsequent ones, and so placed no restrictions upon the power of S. as to the notes taken by him, and in the absence of any notice of a limitation upon his authority as general agent, the insured had a right to suppose he could extend the time and prescribe the mode of payment, and that payment in the mode prescribed was binding upon the defendant; that the direction in the letter of S., to send by return mail, did not require the answer to be sent by the first return mail; that the insured was entitled to a reasonable time for compliance before he could be put in default; and that the letter with money was mailed in time.—*Ct. of App., Feb.*, 1881. Palmer *v.* Phœnix Mut. Life Ins. Co., 84 N. Y. 63.

92. **Duty of attorney-general to sue for dissolution of insolvent company.** As to the duties of the attorney-general under Code of Pro, § 430, in respect to bringing suits to wind up insolvent insurance companies, see People *v.* Globe Mut. Life Ins. Co., 60 How. Pr. 82.

93. **The actuary's report.** As to the power of the court to appoint a receiver of an insolvent insurance company, and over the report of the actuary upon the condition of the company, and matters of practice on motion to confirm the actuary's report, see People *v.* Globe Mut. Life Ins. Co., 60 How. Pr. 57.

94. **Powers and duties of receiver, generally.** A receiver of an insolvent life insurance company may, at any time, apply to the court for instructions in regard to any matter touching the fund placed in his custody. Especially is this so where the fund, through his error, is in danger of being unfairly distributed. —*Ct. of App., Dec.*, 1879. People, ex rel. Attorney General *v.* Security Life Ins., &c., Co., 79 N. Y. 267.

95. The receiver owes a like duty to all claimants upon the fund, and it is his duty, as far as possible, to see that each has an equal opportunity to enforce his claim. *Ib.*

96. **Right of receiver to possession of assets.** Where a receiver has been appointed of a registered policy life insurance company, pursuant to the act of 1869, (Laws of 1869, ch. 902, § 7,) and the superintendent of the insurance department has sold the securities deposited with him to secure such policies, as prescribed by said act (§ 8), the receiver is entitled to have the proceeds immediately paid over to him. The superintendent has no right to retain the fund until the receiver is ready to distribute it.—*Ct. of App., Feb.*, 1880. Matter of Attorney-General *v.* North America Life Ins. Co., 80 N. Y. 152; *affirming* 18 Hun 470.

97. The state is simply custodian of the securities, and when converted under the provisions of the act, the receiver becomes the rightful custodian of the proceeds. *Ib.*

98. *It seems* that the bond given by the receiver as required by said act (§ 7) covers a misappropriation by him of such proceeds; but if otherwise, this will not affect the explicit language of the act requiring the payment to him. *Ib.*

99. **Notice to creditors.** A receiver of such a company obtained an order as prescribed by statute, (2 Rev. Stat. 467, § 56,) for publication of notice to creditors, requiring them to exhibit their claims within a time specified. Before the expiration of the time the receiver addressed a circular to policy-holders, to the effect that policies in force on the books of the company would be allowed without subjecting their holders to further proof. Misled by such circulars the holders of such policies did not make proof of their claims. These were objected to by other creditors, and were rejected by the referee to whom it was referred to take proof as to distribution of the assets. Whereupon, and before any dividend had been made, the receiver applied for and obtained an order giving two months' further time within which such claims could be presented and established before the referee. *Held*, that the receiver was authorized in making the application; that the court had power, in its discretion, to grant it; and that the exercise of this discretion was not reviewable here. People, ex rel. Attorney-General, *v.* Security Life Ins. Co., *supra.*

100. The power and discretion of the court in reference to publication of notice in such cases, may be exercised to the same extent as in other proceedings or actions, save that the notice must be for "not less than six months" (§ 56); and the power of the court is not exhausted by making an order. *Ib.*

101. **Proof of claims.** The receiver of an insolvent life insurance company, appointed under the insurance act of 1869, (Laws of 1869, ch. 902, § 7,) may file exceptions to the report of a referee appointed to take proof of claims. —*Ct. of App., Sept.*, 1880. Attorney-General *v.* Nor. Amer. Life Ins. Co., 82 N. Y. 172.

102. A receiver of said N. A. L. Ins. Co. was appointed March 8th, 1877. Upon application of the attorney-general under the act of 1853, (Laws of 1853, ch. 463,) an order was granted January 16th, 1877, dissolving the corporation and continuing the receiver. The referee, in computing the value of the claims, took the date of March 8th, 1877, and computation was made up to that time. *Held*, no error. *Ib.*

103. At the time of the appointment of a receiver of an insolvent life insurance company, certain policies were running upon which premiums had been paid to some time subsequent to that date; the receiver gave notice that he would receive no more premiums; the persons insured died after the times to which premiums had been paid; the referee allowed the claims on these policies. *Held*, no error; that further payments of premiums were excused by the failure of the company, as well as by the express notice of the receiver; also, that the claimants were entitled each to be allowed the present value of the policy at the time of the dissolution of the company and the appointment of the receiver.—*Ct. of App., Oct.*, 1880. Attorney-General *v.* Guardian Mut. Life Ins Co., 82 N. Y. 336.

104. **Computing value of annuity bonds.** The referee, in computing the values of annuity bonds, took as his basis the American Experience Table of Mortality, (see table annexed to Insurance Act, Laws of 1868, ch. 623, p. 1317,) and interest at four and one-half per cent., this being the table used by the company in selling annuities. The Special Term sustained an exception to this, holding the values should be computed according to he Northampton Table, with interest at six per cent. *Held*, that the rule adopted by the referee was correct,

and the holdings of the Special Term error. Attorney-General *v.* Nor. Amer. Life Ins. Co., 82 N. Y. 172.

105. The value of an annuity bond is such a sum as will purchase a similar bond in a solvent company for the remainder of the life. *Ib.*

106. The holder of an annuity bond died in November, 1878. The time for presenting claims to the receiver under the published notice expired May 20th, 1879. The claim under said policy was presented before that time, but after the death of the annuitant; the party presenting it contended that the bond should be valued as of the day when the receiver was appointed (March 8th, 1877.) *Held,* untenable; that, as when the claim was presented to the receiver it was possible to compute its precise value, this was all the claimant was entitled to. *Ib.*

107. — of unmatured life-policy. When, after a policy in an insolvent insurance company has been valued and placed upon the receiver's dividend list, the holder thereof dies, the court will not, upon the application of his executor, direct that the policy be re-valued as a death claim and order the receiver to pay dividends thereon upon the basis of the latter valuation.—*Supreme Ct.,* (1st *Dept.,*) *Jan.,* 1881. People *v.* Security Life Ins., &c., Co., 23 Hun 601.

108. Priority among claims. The holders of running registered policies are not entitled to payment, out of the securities deposited under the registration acts, in preference to death claimants under registered policies. Attorney-General *v.* Nor. Amer. Life Ins. Co., 82 N. Y. 172.

109. Where, in lieu of policies upon which notes have been given, paid-up policies had been issued, containing a provision that in case interest on the notes should not be paid as agreed, the policy should become void—*Held,* that the condition was not usurious; that where there had been default in payment of interest the policies were forfeited, and the referee was correct in rejecting the claim. *Ib.*

110. In lieu of certain registered policies surrendered, and in pursuance of provisions contained therein, unregistered paid-up policies had been issued; no fraud or mistake was shown. The referee decided that these paid-up policies were to be treated as if registered, and paid *pro rata* out of the fund deposited. *Held,* error; that the claimants, to entitle themselves to share in this fund, should have shown sufficient to authorize a reformation of their policies; also, that they had taken prompt measures on the receipt of their policies to notify the superintendent of the insurance department of their claims. *Ib.*

111. Two holders of registered policies, who were entitled by the terms thereof to paid-up policies in their stead, surrendered their policies, which were canceled, and unregistered paid-up policies were issued to them; one refused to accept and returned his policy, the other objected when his policy was tendered, but was induced to accept by the statement of the agent of the company that the record would show it to be registered, and that it would have the same force and effect as if registered. The Special Term held that these claimants were not entitled to share in the registered fund, but were entitled to a preference in the general fund for a dividend of the same amount given to the registered policies out of the special fund. Said policy-holders claimed a preference in the general fund for the full amount of their policies. *Held,* untenable. *Ib.*

112. As to whether the preference allowed by the Special Term was right, *quære.* *Ib.*

113. Holders of unregistered policies issued after January 1st, 1870, claimed that their policies must be considered as registered by virtue of the provision of said act of 1869, (§ 2,) declaring that any company electing to make special deposits shall do so in respect to all policies thereafter issued, etc. *Held,* untenable; that assuming the company was bound to register all of its policies, as these policies were not in fact registered, those accepting them could not claim the benefit of a fund not set apart for their security; but that the said provision was to be taken and construed with the provision (§ 11) authorizing the issuing of unregistered policies in certain cases. *Ib.*

VII. The Insurance Department.

114. Constitutionality of statutes relative to the department. The act of 1866, (Laws of 1866, ch. 576,) authorizing the N. A. L. Ins. Co. to deposit with the superintendent of the insurance department a fund for the security of the registered policy-holders, is not in conflict with the provision of the state constitution (art. VIII., § 1,) prohibiting the creation of corporations by special act, as it does not create, but regulates a corporation previously in existence.—*Ct. of App., Sept.,* 1880. Attorney-General *v.* Nor. Amer. Life Ins. Co., 82 N. Y. 172.

115. The said act of 1866, and the provisions of the act of 1869, and of the act of 1867, Laws of 1867, ch, 708,) making similar provision for a special fund for the security of registered policy-holders, are not violative of the constitutional provision (art. VII., § 9,) prohibiting the giving or loaning the credit of the state, "in aid of any individual, association or corporation," as the credit of the state is not given or loaned by said acts; it incurs no responsibility except as a depository. *Ib.*

116. The provisions of the said act of 1869, providing for arresting the business of a company, when its further prosecution will be injurious to the public interests, and for the appointment of a receiver, etc., are not repugnant to the provisions of the state and federal constitutions, prohibiting the depriving of a person of property without due process of law. *Ib.*

117. Nor do the said provisions in reference to registration, impair the obligation of contracts then existing between a company and its policy-holders. *Ib.*

118. Assignments of mortgages to the superintendent. Where the superintendent of the insurance department has accepted from an insurance company an assignment of a mortgage as a part of the deposit to be made with him, under the requirements of the insurance law, on the faith of a representation on the part of the mortgagor that there is no legal or equitable defence to the same, he can avail himself of the doctrine of estoppel prohibiting a debtor, upon the faith of whose statements an assignment of his obligation has

been accepted, from disputing such statements. —*Ct. of App., March,* 1881. Smyth *v.* Munroe, 84 N. Y. 354.

119. Defendant A. executed to an insurance company his bond for $40,000, secured by mortgage executed by him and by defendant J., his wife, upon lands owned by the latter. At the same time the mortgagors signed a written instrument in which they consented to the assignment of the mortgage to the superintendent of the insurance department, and stated that no portion of the mortgage debt had been paid and that there was "no offset to or legal or equitable defence to the same." The insurance company became insolvent and a receiver of its effects was appointed. In an action by the superintendent to foreclose the mortgage, wherein the defence of usury was interposed, it appeared that it was the custom of the insurance department to require such statements as a condition precedent to the acceptance of assignments of mortgages, and that the instrument was taken and deposited with the other papers in the office of the superintendent.

Held, 1. That it was to be presumed that the superintendent acted in accepting the assignment, and as an essential part of the transaction, upon the faith of the representations in said instrument; that, therefore, a finding to that effect was justified; and that defendants were estopped from availing themselves of said defence.

2. That in the absence of proof of fraud, or want of knowledge, it was a legal presumption that the parties executing said instrument did so with knowledge of its contents; and that this presumption was not affected by the fact that one of them was a married woman; also, that as against a person who had acted upon the faith of her representation she could not be exonerated therefrom by reason of her ignorance.

3. That knowledge on the part of the insurance company of the usury could not be attributed to and did not affect the superintendent.

4. That evidence was competent showing the custom of the department in such transactions. *Ib.* Compare Smyth *v.* Knickerbocker Life Ins. Co., 84 N. Y. 589.

120. Charges for examination of companies, and how audited. Laws of 1873, ch. 593, § 2, provides that "all charges for making examinations of any insurance company, and all charges against any company by any attorney or appraiser of this department, shall be presented in the form of an itemized bill, which shall first be approved by the said superintendent, and then audited by the comptroller, and shall be paid on his warrant, drawn in the usual manner, upon the state treasurer." *Held,* that under the said section the approval of a bill by the superintendent was not conclusive upon the comptroller, but that the latter had power to examine and pass upon and readjust a bill approved by the superintendent and presented to him for audit and payment, as prescribed in the said section. —*Supreme Ct., (3d Dept.,) May,* 1881. Matter of Murphy, 24 Hun 592.

For decisions regulating the organization and management of insurance companies, *In common with other corporations,* see CORPORATIONS.

INTENDMENTS.

APPEAL, 23; EVIDENCE, 11-18.

INTENT.

Evidence of, and when presumed, see EVIDENCE, 16.

Assaults with *Special intent,* see ASSAULT.

When a *Question for the jury,* see QUESTIONS OF LAW AND FACT.

Effect given to *Intent of testator,* in construing will, see WILLS, V.

INTEREST.

I. THE RIGHT TO INTEREST.
II. THE RATE; AND COMPUTATION.

I. THE RIGHT TO INTEREST.

1. On contracts, generally. Defendant contracted to pay to plaintiff $5000 "out of any moneys or property" received by him from the sale or license of certain patented inventions. Defendant assigned the patents, the assignment to take effect when the purchase price agreed upon ($25,000) was paid. The assignee did not pay, and defendant revoked the assignment. Defendant, with the owners of certain other patents, thereupon assigned their patents to H. in trust, he agreeing to grant licenses and sell royalties, and to divide the proceeds as soon as received, in certain specified proportions, between the assignors and himself, the amount due plaintiff, however, to be paid out of the first proceeds. In an action upon the contract with plaintiff—*Held,* that he was not entitled to interest from the time of the first or the second assignments, but only from the time moneys were received on sales or licenses. —*Ct. of App., Oct.,* 1880. Howard *v.* Johnston, 82 N. Y. 271.

2. Legacies. Where a legacy to an infant, as to whom the testator is *in loco parentis,* is made payable when the infant becomes of age, and such legatee has no other provision in the meantime, or any maintenance allotted by the will, the legacy carries interest from the time of the death of the testator.—*Ct. of App., Dec.,* 1879. Brown *v.* Knapp, 79 N. Y. 136.

3. It is not needed for the application of this rule that the testator should have been under a legal obligation at the time of his death to support the legatee; it is sufficient that he has voluntarily assumed such a relation, similar in some respects to that of parent, as that it may be presumed he did not intend to leave the legatee without support. *Ib.*

4. Plaintiff's father, who was the son of B., the testator, entered the military service of the United States in 1863. Before he entered the service B. said to him, that if he never returned his wife and son would always be cared for. After his departure B. took plaintiff and his mother to his (B.'s) house to live. Plaintiff's father died in the service; plaintiff and his

mother continued to live with B., being supported by him until his death; plaintiff was at that time about seven years old. By his will B. gave to plaintiff $3000, which he directed his executor to pay when plaintiff attained the age of twenty-one years. The residue of his "real and personal estate" B. gave to his son W., whom he appointed executor. W. qualified and took possession of the estate. Plaintiff had no property except that given him by the will. *Held*, that the evidence authorized a finding that the testator assumed the paternal care of plaintiff; that he was entitled to interest upon the legacy at the rate of six per cent. per annum from the death of the testator, during his minority; and that W. was personally liable therefor. *Ib.*

5. The will gave to a daughter of the testator $4000, to be invested by the executor "for her use, support and maintenance during her natural life," with directions that if the interest should prove insufficient, the executor should apply so much of the principal as should be necessary for her support. *Held*, that the presumption in favor of plaintiff, as to interest, was not overthrown by the language used in this bequest. *Ib.*

6. Orders for money. The plaintiff, having received an assignment of a non-interest bearing order, drawn upon the defendant's treasurer, presented it on September 3d, 1872, to the treasurer for payment, which was refused for want of funds. On August 26th, 1874, the order was again presented to the treasurer and paid by him, he then telling the plaintiff that he could not pay any interest thereon; that it was customary to have bills for over-due interest made out and presented to the common council, who issued orders therefor which he could pay. The order was then surrendered, the plaintiff stating that he would take the money, if he would not thereby release his claim for interest, but would not if he did thereby release his claim. The common council having refused to allow the claim for interest, this action was brought to recover the amount due. *Held*, that the plaintiff was not entitled to recover.—*Supreme Ct.*, (*3d Dept.*,) Nov., 1880. Middaugh *v.* City of Elmira, 23 Hun 79.

II. The Rate; and Computation.

7. When computable from commencement of action. In an action for labor done and materials furnished, it appeared that no time was fixed under the agreement with plaintiff when the job was to be completed, and that it was completed and accepted by defendant September 9th, 1874. *Held*, that the bringing of suit was a sufficient demand, and plaintiffs were entitled to interest from that time at least.—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1880. Case *v.* Osborn, 60 How. Pr. 187.

8. Effect of statutory change of rate. Upon a contract for the payment of a sum certain on which interest at seven per cent. was lawfully payable prior to January 1st, 1880, by the terms of the contract, the rate agreed upon continues as part of the unimpairable obligation of the contract until judgment, notwithstanding the change in the statute and though the contract matured before such change. —*Superior Ct.*, (*Sp. T.*,) *Nov.*, 1880. Assoc. for Relief of Aged, Indigent Females *v.* Eagleson, 60 How. Pr. 9.

9. When, at the time of an agreement for a loan, nothing is said as to the rate of interest, the law implies it to be that limited by statute; to increase or alter it, a special agreement is necessary, and where the defence of usury is interposed, the burden of showing that such an agreement was made is upon the defendant.—*Ct. of App.*, *June*, 1880. Guggenheimer *v.* Geiszler, 81 N. Y. 293.

10. On March 5th, 1880, the plaintiff recovered a judgment for $5000 against the defendant for the negligent killing of her intestate on May 12th, 1873. *Held*, that under chapter 78 of 1870 she was entitled to recover interest upon that amount from the time of the death to the time of the rendering of the verdict.—*Supreme Ct.*, (*1st Dept.*,) *Jan.*, 1881. Erwin *v.* Neversink Steamboat Co., 23 Hun 578.

11. The liability of defendant, for the damages occasioned by the negligent killing of the intestate, was an "obligation" within the meaning of that term as used in the exception contained in the act reducing the rate of interest on money to six per cent., (Laws of 1879, ch. 538,) which provided that nothing therein contained should "be so construed as to in any way affect any contract or obligation made before the passage of this act." *Ib.*

12. The interest should be computed at the rate of seven per cent. up to the time of the rendering of the verdict. *Ib.*

INTERPLEADER.

1. When proper. When a defendant, likely to be vexed by conflicting claims may have remedy by action of interpleader or by having other claimants brought in, see Dows *v.* Kidder, 84 N. Y. 121.

2. When the application should be refused. The provision of the Code of Civ. Pro., § 820, for interpleader by order, is a substitute for the old action of interpleader, and is governed by the same principles. It appeals to the equitable discretion of the court. Such an application ought not to be granted where it clearly appears on the face of the papers that the claim of the third party is frivolous and without validity.—*Superior Ct.*, (*Sp. T.*,) *Nov.*, 1880. Pustel *v.* Flannelly, 60 How. Pr. 67.

3. This action was brought by the plaintiff, as the assignee of one C., to recover certain money collected for the assignor from persons indebted to him and still held by the defendant for the assignor. The defendant, who had notice of the assignment, moved upon an affidavit stating that certain persons claim this money under judgments obtained against the assignor, to have them substituted as defendants in his place. *Held*, that an order of interpleader should not have been granted.—*Supreme Ct.*, (*2d Dept.*,) *May*, 1881. Delancy *v.* Murphy, 24 Hun 503.

INTERPRETATION.

Of *Contracts*, see Bills of Exchange;

CHATTEL MORTGAGES; CONTRACTS, IV.; DEEDS, III.; MORTGAGES, II.; SALES, I.; VENDOR AND PURCHASER, I.

Of *Corporate charters,* see CORPORATIONS; and the titles of the various distinct corporate bodies.

Of *Statutes,* and *Constitutional provisions,* see CONSTITUTIONAL LAW, I.; STATUTES, II.

Of *Wills,* see WILLS, V.

J.

JAIL LIMITS.

EXECUTION, II.; IMPRISONMENT.

JOINT DEBTORS.

Proceedings to bind, by judgment, when *Not originally summoned* see JUDGMENT, 1.

JOINT-STOCK COMPANIES.

1. The articles of association of an unincorporated joint-stock company bear the same relation to it that the charter bears to an incorporated company; they regulate the duties of the officers and the duties and obligations of the members among themselves.—*Ct. of App., Sept.,* 1880. Bray *v.* Farwell, 81 N. Y. 600.

2. Rights of shareholders—assessments. *Prima facie,* the shareholders of such a company are not bound to pay assessments upon their stock until the whole capital of the company has been subscribed for. *Ib.*

3. In the absence of a provision in the articles authorizing the company to proceed to business and to levy assessments upon a partial filling up of its capital and before the entire stock is taken up, it is necessary, in order to charge an individual subscriber for an assessment before the whole stock is taken, to show that he has waived his rights to insist upon that condition by his own acts. *Ib.*

4. By the articles of association of a joint-stock association its capital was fixed at $3,000,000, divided into thirty thousand shares. It was provided that the number of shares might be increased or diminished by resolution of the board of directors, and the shares were each made subject to assessments to pay liabilities, etc., which the shareholders agreed to pay. There was no provision authorizing the commencement of business until the whole capital stock was subscribed for and taken. About fifteen thousand shares were subscribed for, upon which only $50 per share was required to be paid, for which certificates for full-paid stock were issued. Business was commenced, and in a few months an assessment was made by the directors upon the stockholders of $40 per share to meet liabilities. In an action against defendant, who owned a number of shares, to recover the assessment thereon, it did not appear that defendant ever attended a meeting of the stockholders, or assented in any way to the commencement or prosecution of business before all the shares were taken, or that he knew before the assessment was made that they had not been taken. *Held,* that he was not bound by the acts of the directors and was not liable; also, that defendant, by dealing with his stock, did not incur the obligation sought to be enforced or preclude himself from making or contesting the assessment. *Ib.*

JOINT TENANTS.

TENANTS IN COMMON.

JUDGES.

COURTS, 1.

JUDGMENT: DECREE.

I. RULES RELATIVE TO PARTIES.

II. RENDITION AND ENTRY OF JUDGMENTS.

III. INTERPRETATION AND EFFECT. CONCLUSIVENESS.

1. *In general.*
2. *How far conclusive.*
3. *Collateral impeachment.*

IV. LIEN. PRIORITY.

V. SATISFACTION AND DISCHARGE.

VI. OPENING, AMENDING AND VACATING.

VII. ENFORCEMENT.

VIII. JUDGMENTS BY CONFESSION.

IX. JUDGMENTS OF COURTS OF OTHER STATES AND COUNTRIES, AND OF THE FEDERAL COURTS

I. RULES RELATIVE TO PARTIES.

1. Proceedings to bind joint debtors not originally summoned. In proceedings instituted under Code of Pro., § 375, to require one joint debtor, not originally summoned to answer the complaint, to show cause why he should not be bound by the judgment entered against his co-debtor, the fact that an action upon the original contract would then be barred by the statute of limitations constitutes no defence, provided that the statute had not run at the time the action was originally commenced against the defendant upon whom the summons

was served.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. Maples *v.* Mackey, 22 Hun 228.

II. Rendition and Entry of Judgments.

2. Formal requisites, generally. Notwithstanding the liberal rule of construction applied to pleadings under the code, the principle still remains that the judgment to be rendered by any court must be "*secundum allegata et probata.*"—*Ct. of App.*, *June*, 1880. Neudecker *v.* Kohlberg, 81 N. Y. 296, 301.

3. For a form of an interlocutory judgment entered on the report of a referee, see Hathaway *v.* Russell, 46 Superior 103 *n.*

4. Right to enter judgment on the pleadings. Prior to the amendment of Code of Civ. Pro, § 549, in 1879, the allegation that a debt was fraudulently contracted was not necessary for the maintenance of an action to recover the amount of the claim due. The right of arrest was a provisional remedy and was so treated. Therefore—*Held*, that where a complaint contains several causes of action on contract and also allegations of fraud (the defendant having been arrested under an order not vacated, made upon affidavits containing in substance such allegations,) and defendant having admitted the amount due, but denied the allegations of fraud, and demanded a trial of such issue, that plaintiff was entitled to have the court direct judgment in his favor.—*Supreme Ct.*, (1*st Dept.*,) *May*, 1881. Cohn *v.* Burtnett, 1 Civ. Pro. 211.

5. In an action to foreclose a mortgage, defendant W. set up in his answer a tender upon a day specified, which was after the commencement of the action, of a sum stated "in payment of the mortgage debt evidenced and secured by the bond and mortgage." The amount so alleged to have been tendered was more than the amount claimed in the complaint to be due and payable, with interest up to the time of the tender; there was no averment of tender of the costs or order for the tender of the debt without costs.

Held, 1. That by the pleadings, if the plaintiff and the court chose to take the averments of the answer as true, there was no issue of fact to be tried ; but that the tender alleged was insufficient, as plaintiff was entitled to costs; that plaintiff was therefore entitled to judgment; and that motion for judgment on the pleadings was properly granted.

2. That no findings of fact were required, as there was no trial of an issue of fact; and that an order for judgment was a sufficient decision in writing to meet the demands of section 1010 of the Code of Civil Procedure.— *Ct. of App.*, *Nov.*, 1880. Eaton *v.* Wells, 82 N. Y. 576.

6. Judgment on demurrer. Where a demurrer interposed to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, is sustained, and leave is given to the plaintiff to amend his complaint within twenty days, on payment of the costs, an interlocutory judgment to that effect must be entered before the time within which the plaintiff must amend his complaint will commence to run. Nor can a final judgment dismissing the complaint, with costs, be entered, until such an interlocutory judgment has been entered.—*Supreme Ct.*, (*2d Dept.*,) *Sept.*, 1880. Liegeois *v.* McCrackan, 22 Hun 69.

7. Where leave to enter the final judgment on the failure of the plaintiff to comply with the terms of the interlocutory judgment is not given by the decision, application for leave to enter it must be made as upon a motion. *Ib.*

8. —on findings by court or referee. Under Code of Civ. Pro., § 1023, and the other sections thereof touching the subject, a judge or referee cannot be required or permitted to make additional findings of fact or of law upon the settlement of the case, after his report or decision has been rendered. So far as Rule 32 conflicts with these sections it is inoperative.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. Palmer *v.* Phenix Ins. Co., 22 Hun 224.

9. Requisites of judgment-roll. What the judgment-roll should contain, and the right of a party to insist that the report of a referee (which owing to defects therein has been sent back to the referee and a new and amended report been made) shall be included in it, see Lyddy *v.* Chamberlain, 24 Hun 377.

10. Necessity of entry by clerk. There can be no judgment until the paper signed by the judge shall have been entered in the office of the clerk of the court. The court directs the clerk to enter; and when the clerk has followed the direction of the court, it then becomes the judgment of the court, and the adjustment of costs is in strictness a proceeding subsequent to the entry of judgment.—*Superior Ct.*, (*Sp. T.*,) *July*, 1881. Hatch *v.* Western Union Teleg. Co., 1 Civ. Pro. 194.

11. What is a sufficient docketing. A judgment by default in ejectment is not conclusive against persons claiming under the defendant, unless it has been for three years *docketed* in the office of the clerk of the court in which it was rendered. (2 Rev. Stat. 309, § 38.)—*Ct. of App.*, *June*, 1880. Sheridan *v.* Linden, 81 N. Y. 182.

12. The "judgment book" required to be kept by every clerk of a court of record (Code of Pro., § 279; Code of Civ. Pro., § 1236,) is a separate and distinct book from the "docket book," also required to be kept (2 Rev. Stat. 360, § 13; Code of Pro., § 282; Code of Civ. Pro., § 1245); and an entry of such a judgment in the "judgment book" is not sufficient; unless entered in the "docket book" it is not docketed within the meaning of the statute. *Ib.*

13. Vacating the docket. In an action for an accounting, brought by the executors of a deceased partner against the surviving partner of a firm, a judgment was rendered directing defendant to pay over to a receiver a specified sum, and to turn over to him the partnership assets remaining, out of which the receiver was directed to pay plaintiffs a sum stated, and to divide the residue; thereupon a judgment was docketed in favor of plaintiffs against defendant, for the amount the latter was required to pay; on motion to vacate the docket in this particular—*Held*, that it was not authorized by the judgment, and was properly vacated ; that the docket, if any was authorized, should have been in favor of the receiver; that it was not sufficient that it appeared plaintiffs would be entitled to as large or a larger sum when the judgment is fully carried out; there was no personal money judgment between the parties, the money required to be paid the receiver was partnership money, and the demand of plaintiffs was to be paid by the receiver from firm

assets.—*Ct of App., Jan.,* 1880. Geery *v.* Geery, 79 N. Y. 565.

III. Interpretation and Effect. Conclusiveness.

1. *In general.*

14. Judgment of no force unless court had jurisdiction. Where a court, authorized by statute to entertain jurisdiction in a particular case only, undertakes to exercise the power conferred in a case to which the statute has no application, it acquires no jurisdiction; its judgment is a nullity, and will be so treated when it comes in question, either directly or collaterally.—*Ct. of App., Jan.,* 1881. Risley *v.* Phenix Bank of New York, 83 N. Y. 318, 337.

2. *How far conclusive.*

15. In general. What constitutes *res adjudicata,* and how a party may avail himself thereof; also jurisdiction of surrogate, when must be shown and how, considered by the court.—*Superior Ct.* Westervelt *v.* Westervelt, 46 Superior 298.

16. What actions are barred. A judgment in an action brought to set aside a tax for an installment of an assessment because of alleged irregularities in the assessment is a bar to an action to recover a subsequent installment.—*Ct. of App., Jan.,* 1880. Guest *v.* City of Brooklyn, 79 N. Y. 624.

17. When parties to an action seeking to hold the estate of a deceased surety on a collector's bond for the amount of the collector's defalcation, will be estopped by the judgment entered in that action, from claiming, in a suit against the purchaser at a sale under such judgment, that the land sold was not liable to sale under said judgment, see Upham *v.* Paddock, 23 Hun 377.

18. Instances. On January 2d, 1878, the defendant, a collector of taxes, in pursuance of a warrant directing him to collect from one P. the sum of $19.30, levied upon a wagon and other property belonging to him, which was then upon a lot owned by P.'s wife, the plaintiff, upon which they then resided, and whereon the said P. had been accustomed for many years to keep this and other property. On January 19th, defendant, having satisfied the demand of the warrant by the sale of the property other than the wagon, returned it to plaintiff's lot, although she had on January 9th forbidden him to put it upon her premises. January 19th, plaintiff sued defendant in a justice's court for trespass in wrongfully entering upon her premises and leaving the wagon there, and recovered a judgment for six cents damages, and $6.60 costs. On January 22d, 24th, 26th, 29th, and February 4th, 1878, plaintiff, brought other actions against defendant, alleging that he had wrongfully left the wagon on her lot on January 19th, and refused to move it on the above-mentioned dates, although requested so to do by plaintiff, in each of which actions she recovered nominal damages and costs. *Held,* that the injury to plaintiff's rights was the direct result of a single act of defendant, in thus entering and leaving the wagon upon her premises, and that the judgment recovered in the first action was a satisfaction thereof, and a complete bar to the actions subsequently brought.—*Supreme Ct.,* (*3d Dept.,*) *Sept.,* 1880. Porter *v.* Cobb, 22 Hun 278.

19. July 25th, 1869, one C. executed to defendant, S., a lease of certain premises for the term of fifty years, upon which the said S. executed a mortgage to plaintiff, who thereafter foreclosed the same in an action to which S. was a party, and purchased the premises at a sale had on December 13th, 1879, under a decree entered on September 1st, 1877. In October, 1879, defendant, S., procured a deed of the premises from C., the lessor, for and in the name of his partner, the defendant, E. An application by plaintiff for a writ of assistance was opposed by defendant, on the ground that the original lease was void as being of agricultural lands and for a term of fifty years. *Held,* that S. and his partner, E., who acted in collusion with him, was estopped by the judgment of foreclosure from denying the validity of the lease.—*Supreme Ct.,* (*3d Dept.,*) *Nov.,* 1880. Witherbee *v.* Stower, 23 Hun 27.

20. The plaintiff's testator sold to defendant a bond and mortgage given to secure $1000, for $900, received $500 in cash, the balance being retained by defendant to secure the payment of unpaid taxes upon the mortgaged premises. Thereafter, in an action brought by defendant to foreclose the mortgage, plaintiff's testator answered, claiming to have a prior lien upon the proceeds of the sale, to the extent of the $400; the judgment therein directed that the sum of $600, and interest, should be first paid out of the proceeds to defendant, and then the sum of $400 to plaintiff's testator. Upon the sale the premises did not bring enough to pay the amount due to the defendant. In this action, brought by plaintiff to recover the balance alleged to be due upon the sale of the bond and mortgage—*Held,* that the judgment in the foreclosure suit finally settled the rights of all the parties thereto, and that this action could not be maintained.—*Supreme Ct.,* (*2d Dept.,*) *Dec.,* 1880. McWilliams *v.* Morrell, 23 Hun 162.

21. What are not. *It seems* that it is only a final judgment upon the merits which is competent as evidence, and conclusive in a subsequent action between the same parties or their privies. An interlocutory order is not such a judgment.—*Ct. of App., Nov.,* 1880. Webb *v.* Buckelew, 82 N. Y. 555.

22. The defendant, in an action in a court of record, is not bound to avail himself by way of counter-claim, of an independent cause of action, existing in his favor against plaintiff. The rule in this respect was not changed by the code.—*Ct. of App., April,* 1880. Brown *v.* Gallaudet, 80 N. Y. 413.

23. Instances. In an action brought by B. against G., among other things to recover sums of money to the amount of about $2000, alleged to have been collected by G. as agent of B., G. pleaded a former suit in bar. It appeared that G. had brought a former action against B., to recover money alleged to have been loaned to him, and expenses paid and incurred for his use. In the complaint therein it was alleged that B. had paid or advanced to G $2050, and judgment was asked for the balance, with interest. The answer, in that action, was simply a general denial. Judgment was rendered therein in favor of G. The referee, upon the trial of the second action, refused to find that plaintiff had received a credit in the former suit

for the amount claimed, and that fact was not established by the evidence. *Held*, that the former suit was not a bar; that B. was not bound in that action to set up his demand against G. for moneys collected, or to avail himself of the credit G. proposed to give him, but had the right to bring a cross action; that B. not having set up such demands by way of counter-claim, they were not necessarily involved in the former action; that if it had appeared that the amounts claimed had been in fact allowed to B., and judgment only rendered for the balance, this would have been a defence; but if nothing in fact was credited to B., and the verdict was for the whole amount the jury found owing to G., without reference to any offsets or credits, as the facts showed, the judgment did not extinguish B.'s demand. *Ib.*

24. Plaintiff, being the owner of a bond and mortgage, assigned them to C. as security for a debt. C. brought an action to foreclose the mortgage, claiming only the amount due him, and judgment was obtained therein, adjudging that C. had a lien for that amount, and directing the enforcement of such lien by a sale, etc. Plaintiff thereafter paid the amount due C., and then brought this action to foreclose the mortgage. *Held*, that the judgment in the prior action was not a bar; that after plaintiff had discharged the lien of C., the mortgage was restored to her as fully, and her relation to it was the same, as if there had been no assignment; that the rule that where an action is brought for part only of an entire demand, the verdict and judgment are a conclusive bar to a subsequent action, for another part of the demand, did not apply.—*Ct. of App., Sept.*, 1880. O'Dougherty *v.* Remington Paper Co., 81 N. Y. 496.

25. In an action brought by C. against one W., to recover the value of legal services rendered by the former, W. set up as a counter-claim that C. had retained possession of and refused to surrender up certain abstracts of title and searches belonging to him. Upon the trial, upon C.'s objecting to the counter-claim, on the ground that it was founded upon a tort, and did not grow out of the same transaction upon which their claim was founded, the court, with the consent of W., struck out the counter-claim, and thereafter a judgment was rendered in that action in favor of W. This action was brought by W. against C. to recover damages for the conversion of the said abstracts. *Held*, that the former judgment was not a bar to the maintenance of this action, and that he was properly allowed to recover as damages the cost of procuring other searches, similar to those so detained.—*Supreme Ct.*, (*2d Dept.*,) *Dec.*, 1880. Watson *v.* Cowdrey, 23 Hun 169.

26. In 1867 G., one of the subscribers to a fund for the purchase of oil lands, brought an action against D., the treasurer of the fund, to which all the other subscribers were made parties, in which he asked for a general accounting, and that the share of each party, including that of S., the assignor of the plaintiffs in the present action, should be ascertained and determined. In that action S. interposed no answer. Subsequently an order was made therein, allowing the complaint to be amended, and limiting the benefit of the action to plaintiff and those defendants who had answered therein. *Held*, that the judgment entered therein did not bar S. or his assignees from maintaining this action.—*Supreme Ct.*, (*1st Dept.*,) *Jan.*, 1881. Rodman *v.* Devlin, 23 Hun 590. And see, also, Woodworth *v.* Seymour, 22 Id. 245.

27. Conclusiveness of former judgment as respects matters not in issue in former suit. As a general rule a party alleging the estoppel of a former judgment must establish that the same fact sought to be litigated in the second suit was an issue in the former one. —*Ct. of App., Sept.*, 1880. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474.

28. One John Olcott, claiming to be in possession of a certain piece of land and to be a tenant of Adelaide Olcott, brought an action in a justice's court to recover damages for a trespass committed thereon by one M. M. alleged, and upon the trial offered to prove, that he had been in possession of the land for twenty years; but upon Olcott's objecting that it would bring the title to land in dispute, he withdrew this defence, and judgment was entered in Olcott's favor. Nothing was litigated before the justice but Olcott's actual occupation and the amount of damages sustained. Thereafter this action was brought by M. against John and Adelaide Olcott to recover the land.

Held, 1. That this action was not barred by the former judgment, as the question of title was not in any way involved or determined therein

2. That M. did not waive or in any way pre judice his rights by withdrawing his offer upon Olcott's objecting, instead of giving an undertaking and removing the action into another court.—*Supreme Ct.*, (*3d Dept.*,) *May*, 1881. Masten *v.* Olcott, 24 Hun 587; S. C., 60 How. Pr. 105.

29. —as respects matters in issue but not litigated. An estoppel by judgment in a former action arises when the same matter was at issue therein, and was either litigated by the parties and determined, or might have been litigated and a decision had upon it. —*Ct. of App., Jan.*, 1880. Smith *v.* Smith, 79 N. Y. 634.

30. It is not necessary that it shall appear by the record of the prior suit that the particular controversy sought to be precluded was then necessarily tried and determined; it is sufficient if there might have been judgment in the first action for the same cause alleged in the second. *Ib.*

31. Whether the matter might have been tried in the former action must appear from the record. If it does so appear, oral testimony is competent in the second action to show that it was litigated, passed upon and determined. *Ib.*

32. Conclusiveness of judgments by default. Plaintiff having been wrongfully discharged from defendant's employment, brought action to recover certain installments of her wages, being all that she would have been entitled to under the contract at the time the action was brought. The complaint was in form for wages, but it appeared upon the face thereof that no services were rendered after plaintiff's discharge. Judgment was taken by default, and was paid in full by defendant. *Held*, that the above recovery exhausted plaintiff's remedy for damages for breach of contract, and was a bar to a subsequent action therefor.—*Superior Ct., May*, 1880. Brodar *v.* Lord, 46 Superior 205.

33. —of foreign judgments. This action was brought against certain of the stockholders of the D. R. C. Co, a company purport-

ing to have been incorporated in the State of Iowa for the purpose of furnishing materials for building and equipping railroads. The defendants were sought to be charged with an indebtedness of the company on the ground that the proceedings for its incorporation were not in accordance with the provisions of the Iowa statute under which the incorporation was attempted, as the articles of incorporation were not filed in the office of the secretary of state, as prescribed (Rev. Code of Iowa, ch. 52; Laws of 1860, as amended by ch. 172, Laws of 1870, § 1152); and so, that no incorporation was effected, and the individual stockholders were personally liable. By said statute a failure to comply with its requirements makes the stockholders individually liable (§ 1166), save in case of railroad corporations, (§ 1338.) It appeared that in a similar action brought in the State of Iowa (First National Bank of Davenport *v.* Davies, 43 Iowa 424,) against one of the stockholders of the same company, it was held that the filing of the articles in said office was not essential to the validity of the incorporation, nor did the omission render the private property of the stockholders liable for the payment of its debts, as the company was a railroad corporation within the meaning of the statute. *Held*, that said decision was conclusive as to the construction to be placed on said statute, and the action was not maintainable; that the fact that the judges in that case differed in determining the questions presented was not material, and did not impair the force of the decision; it was sufficient if a majority of the court agreed in the interpretation of the statute in question. Also, that the fact that said decision was made after the commencement of this action did not render it less effective as an authority, there being no prior decision to the contrary, or different rule established in said state applicable to the case.—*Ct. of App., April*, 1880. Jessup *v.* Carnegie, 80 N. Y. 441.

34. — of judgments in ejectment. A judgment in ejectment is only conclusive, under the statute, (2 Rev. Stat. 235, § 36,) as to the title litigated and established in the action; it is not the recovery which constitutes an estoppel in a subsequent action, but the decision of the question which was in contestation between the parties. So, also, in case of a plea of a former suit pending in an action of ejectment, the point is whether the same title is sought to be litigated in both actions; if not, the former action is not a bar.—*Ct. of App., Jan.*, 1880. Dawley *v.* Brown, 79 N. Y. 390.

35. In an action of ejectment, plaintiff claimed under a devise from his father, a deed from himself to C., in March, 1857, and a reconveyance from C. on July 16th, 1869. It appeared that a former action was commenced by plaintiff, after his deed to C. and before the reconveyance, against defendant, one F., and others. What the original complaint was did not appear. The default of defendant and F. was entered therein July 6th, 1869, and by an *ex parte* order the summons and complaint were amended by striking out the names of all the defendants therein except the defendant here and F., and by making the complaint one in ejectment, for lands including the premises claimed in this action, and judgment was thereupon entered against defendant and F. for the recovery of the said lands. A writ of possession was issued, and on the same day plaintiff went with the sheriff upon the lands, to be put in possession, when defendant and two other persons in possession of part of the lands, attorned in writing to plaintiff, and the sheriff made return that he had delivered full possession to plaintiff, which return was filed July 14th. On July 26th, an order was made vacating and setting aside said judgment, and reinstating defendant and F. in possession. *Held*, that the deed from C. to plaintiff was not void under the statute aforesaid: 1st. As prior to its date plaintiff had been put in possession and defendant had attorned to him, which attornment was then in force; the subsequent vacation of the judgment did not relate back so as to make the deed void on the ground that defendant was then holding adversely. 2d. Because it did not appear that defendant claimed under any specific title adverse to that of C. *Ib.*

36. Defendant set up the pendency of the former action as a bar. *Held*, untenable, as at the time of bringing the former action the title was in C., and the subsequently-acquired title of plaintiff from C. could not avail him in that action, it was, therefore, necessary to bring a new action to recover upon that title; that although if the plaintiff had evidence which would sustain the first action, the same evidence might entitle him to recover in the second, the evidence upon which he relied in the second would not sustain the first. *Ib.*

37. Privies, as well as parties, estopped. An estoppel by a former action, effectual as between the parties, arises also in favor of or against those in privity with them. —*Ct. of App., Jan.*, 1880. Smith *v.* Smith, 79 N. Y. 634.

38. Doctrine of former adjudication as applied in criminal cases. Where, on the trial of an indictment containing different counts, there is a specific verdict of guilty on one count and the verdict is silent as to the other counts, it is equivalent to an acquittal on those couuts, and a judgment on the verdict is, as to them, a bar to further prosecution.—*Ct. of App., March*, 1881. People *v.* Dowling, 84 N. Y. 478.

39. Upon a reversal of the conviction the trial and conviction are not a bar to a new trial upon the count on which the verdict of guilty was rendered; but the reversal does not disturb the verdict of acquittal upon the other counts. *Ib.*

40. An indictment contained two counts, one charging burglary and larceny, the other the receiving of stolen goods with knowledge; there was no separate count for burglary or larceny. The prisoner's counsel, on trial, moved to strike out the count "for burglary" because of failure of proof; this was granted; he then moved to quash the count "for larceny," which was denied. The question of larceny was submitted to the jury without objection and the prisoner was convicted thereof. The conviction was reversed on writ of error and a *venire de novo* ordered. *Held*, that the effect of the decision upon the motion to strike out the count for burglary was simply to hold that the prisoner could not be convicted, on the evidence, of burglary, and to strike out so much of the count as charged that offence; that the

new trial must be had upon the same indictment; but that upon the new trial the prisoner could only be tried for larceny. *Ib.*

3. *Collateral impeachment.*

41. Right to impeach judgment for want of jurisdiction. The jurisdiction of *quasi* judicial officers to make a decision in any case is always open to inquiry, and the decision may be attacked collaterally for want of jurisdiction.—*Ct. of App., March,* 1881. Cagwin *v.* Town of Hancock, 84 N. Y. 532; *reversing* 22 Hun 201.

42. — for fraud. A judgment recovered by the vendor of a chattel on the contract of sale is not an affirmance of such sale, or a bar to his recovery of the chattel where fraud is subsequently discovered. There is no election of remedies until the vendor has knowledge of the fraud.—*Com. Pleas,* (*Gen. T.,*) *March,* 1881. Sacia *v.* Decker, 1 Civ. Pro. 47.

IV. Lien. Priority.

43. Lien of judgment against distributee of undistributed fund. As to the lien of a judgment against a distributee of funds derived from the sale of a decedent's land to pay his debts, upon his share in such fund in the hands of the surrogate, where such judgment was not docketed in the surrogate's county until the day of distribution; and the power of the county judge to restain the payment of such fund by the surrogate to such judgment debtor, see Davis *v.* Davis, 4 Redf. 355.

V. Satisfaction and Discharge.

44. Action to compel entry of satisfaction. Where a mortgage or a judgment, which has been paid, is continued as an apparent lien for inequitable purposes, as for defrauding creditors, an action is maintainable by a purchaser on execution sale of lands so apparently incumbered, to compel its satisfaction of record.—*Ct. of App., Sept.,* 1880. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474, 483.

VI. Opening, Amending and Vacating.

45. Opening. An application to open an inquest and serve a supplemental answer setting up a discharge in bankruptcy, will not be granted when it appears that the discharge was obtained pending the action, and that defendant made no motion to amend his answer (though the inquest was not taken till a year after the discharge), and that no motion to open the inquest was made till several years after judgment, no excuse for defendant's laches appearing.—*Superior Ct, June,* 1880. Henderson *v.* Savage, 46 Superior 221.

46. Amending. Where a clause is inserted in a judgment without authority, the remedy is by motion to correct the judgment, not by appeal.—*Ct. of App., Feb.,* 1881. Leonard *v.* Columbia Steam Nav. Co., 84 N. Y. 48.

47. Vacating. As to the power of a court to vacate its judgments, and when it may substitute the personal representatives of a deceased party in his place, see Underwood *v.* Sutcliffe, 21 Hun 357.

48. When no sufficient decision in writing is filed, as required by Code of Civ. Pro., § 1010, the remedy of the party is by motion for a new trial as prescribed by said section, not by motion to set aside the judgment.—*Ct. of App., Nov.,* 1880. Eaton *v.* Wells, 82 N. Y. 576.

VII. Enforcement.

49. By action on the judgment—who may sue. This action was brought upon a judgment obtained in the State of Mississippi; the judgment-roll showed that the judgment was recovered upon a policy issued by defendant to the firm of W. R. G. & Co. That action was brought by the members of the firm, as stated in the declaration, for the use and benefit of the plaintiff herein, and this was stated in the judgment. It appeared that the rule of the common law, that choses in action are not assignable, and that actions thereon when assigned must be brought in the name of the assignor, prevails in said state, and that the laws of said state authorized, in case of assignment, a statement such as was contained in the declaration. *Held,* that the judgment-roll furnished presumptive evidence that the plaintiff was the owner of the judgment; that the plaintiff in such an action is merely a nominal party having no interest in or right to control it; nor is he a trustee in any rightful sense under the code, and so plaintiff alone could sue upon the judgment.—*Ct. of App., March,* 1881. Greene *v.* Republic Fire Ins. Co., 84 N. Y. 572.

50. It appeared that said firm was indebted to plaintiff and that there was an understanding between them that he should have the benefit of the policy; that after the loss, in pursuance of such understanding, the policy was sent to him by the firm to collect and apply the proceeds upon his claim, together with an order upon defendant, expressing a consideration, requesting it to pay the amount to plaintiff, and stating that his receipt would be a full discharge. *Held,* that the order was virtually an assignment transferring the policy; also that the understanding and delivery of the policy in pursuance of it operated as a valid transfer. *Ib.*

51. Requisites of the complaint. In an action by a judgment creditor of a deceased person to secure payment of the judgment from real estate which descended to the heirs-at-law, it is sufficient to allege and prove that the personal assets of the deceased were not sufficient to pay and discharge the debt, and it is not necessary to show the inability of the creditor to collect the same, by proceedings at law or before the surrogate, from the personal representatives, next of kin or legatees of the deceased. —*Supreme Ct.,* (1*st Dept.,*) *March,* 1881. Blossom *v.* Hatfield, 24 Hun 275.

52. Defences. As to what evidence is admissible to establish the defence that the plaintiff is not the owner of the judgment sued on, see Brown *v.* Decker, 21 Hun 199.

53. Enforcement of surrogate's decrees. Code of Civ. Pro., § 2555, regulating the proceedings to be taken to enforce a decree of a Surrogate's Court, does not apply to the enforcement of a decree rendered prior to September 1st, 1880.—*Kings Co. Surr. Ct., Oct.,* 1880. Underhill *v.* Nichols, 4 Redf. 318.

VIII. JUDGMENTS BY CONFESSION.

IX. JUDGMENTS OF COURTS OF OTHER STATES AND COUNTRIES, AND OF THE FEDERAL COURTS.

54. The general rule of comity. The law is well settled that courts of justice in one state will, out of comity, enforce the laws of another state or country when, by such enforcement, they will not violate their own laws or inflict injury upon some one of their own citizens.—*Supreme Ct.*, (*Jefferson Sp. T.*,) *Dec.*, 1880. Roblin *v.* Long, 60 How. Pr. 200.

55. Judgments of courts of sister state. The courts of this state recognize a foreign judgment as binding here when the record shows that the court rendering it had jurisdiction of the subject and of the person of the defendant, and give full credit to such judgment by refusing to retry the matters when once determined in an action where the foreign courts had acquired jurisdiction. But the judgment of the court of a sister state has no binding effect in this state, unless the court had jurisdiction of the subject matter and of the person of the party sought to be affected thereby, and the want of such jurisdiction renders the judgment a mere nullity.—*Supreme Ct.*, (1*st Dept. Sp. T.*,) *June*, 1880. Shepard *v.* Wright, 59 How. Pr. 512.

56. — of the federal courts. A judgment of the United States Circuit Court, though docketed in a county clerk's office, still remains a judgment of that court, and an action can be brought thereon without first obtaining leave from the court so to do, as is required by Code of Pro., § 71, when an action is to be brought upon a judgment recovered in a court of this state.—*Supreme Ct.*, (3*d Dept.*,) *Sept.*, 1880. Goodyear Dental Vulcanite Co. *v.* Frisselle, 22 Hun 174.

57. — of Canadian courts. The courts of this state having acquired jurisdiction of the person of a defendant, possess full power to enforce the judgment and decree of the chancery court of Canada, to the extent of compelling defendant to convey the lands mentioned in the complaint, though the same are situated in the province of Canada and without the jurisdiction of this court. Roblin *v.* Long, *supra.*

As to the admissibility and effect of a judgment as a *Means of evidence*, see EVIDENCE, IV.

JUDICIAL SALES.

[Consult, also, AUCTION; EXECUTION, I.; MORTGAGES, VI.]

1. Statute to be strictly followed. Statutory proceedings to divest title to real estate must be strictly pursued; and a substantial departure from the requirements of the statute renders the proceedings void.—*Ct. of App.*, *June*, 1880. Stilwell *v.* Swarthout, 81 N. Y. 109, 114.

2. Rights of purchasers. Where a mortgage or judgment which has been paid is continued as an apparent lien to defraud creditors, an action is maintainable by a purchaser on execution sale of lands so apparently incumbered, to compel its satisfaction of record. —*Ct. of App.*, *Sept.*, 1880. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474.

3. Setting aside the sale. The circumstances under which a court will not set aside a judicial sale, considered.—*Supreme Ct.*, (3*d Dept.*,) *Nov.*, 1880. Matter of Rider, 23 Hun 91.

JURIES.

For decisions relative to the right of *Trial by jury*, see TRIAL, I., VIII.

As to *Impaneling* the jury, *challenges*, &c., see TRIAL, IV., VIII.

When a *New trial* will be granted for *separation* or *misconduct* of the jury, see NEW TRIAL, I.

As to the *Grand jury*, see INDICTMENT, I.

JURISDICTION.

[Treats only of such general rules as are applicable to all courts in common.

For decisions on the jurisdiction of any particular court, see COURTS. Of *Appellate* courts, see APPEAL. Of courts of *Equity*, see EQUITY. Of *Justices' courts*, see JUSTICE OF THE PEACE.]

1. Jurisdiction as affected by state lines. Courts of one state or country have no jurisdiction over an action, the cause whereof is in its nature local in another state or country.—*Superior Ct.*, *Dec.*, 1880. Atlantic, &c., Teleg. Co. *v.* Baltimore, &c., R. R. Co., 46 Superior 377.

2. Of suit in which foreign minister is a party. Where a public minister is a member of a firm, the other members of which are not such, a state court will not obtain jurisdiction over an action against the firm upon a firm liability, by reason of non-service of the summons on such public minister, even though such non-service be intentional; and want of jurisdiction may be availed of in such a case by petition of the public minister for an order dismissing the complaint.—*Superior Ct.*, (*Gen. T.*,) *Feb.*, 1880. Matter of Tracy, 46 Superior 48.

3. Waiver of want of jurisdiction. The appearance of the parties before the trial judge, and the argument of a motion on the merits alone, are not acts which confer jurisdiction. If the question of jurisdiction is waived, it should appear by recitals in the order or in a stipulation to that effect.—*Superior Ct.*, *Feb.*, 1880. Newhall *v.* Appleton, 46 Superior 6.

JUSTICE OF THE PEACE.

I. JURISDICTION.

II. PROCEDURE.

III. APPEALS FROM JUSTICES' COURTS.

I. JURISDICTION.

1. Long and short summons. The defendant was created a corporation by Laws of

1868, ch. 617, its property and place of business being situated in the county of Saratoga; its shareholders and trustees reside in different counties of the state. Its business has been transacted in Saratoga county, except that its trustees have met in the counties of Albany and Rensselaer. In an action commenced against it by the plaintiff in the Albany justice's court, a long summons was served upon its secretary, who resided in Albany county. *Held*, that the defendant was a resident of Saratoga county, and that, being a non-resident of Albany county, the justice's court acquired no jurisdiction over it by the service of the summons.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. Perry *v.* Round Lake Camp Meeting Assoc., 22 Hun 293.

2. Discontinuance on plea of title. Litigating the question of possession of land is not trying the title, and it is an issue which can be properly tried and determined in a justice's court.—*Supreme Ct.*, (*Sullivan Co. Cir.*,) *Oct.*, 1880. Masten *v.* Olcott, 60 How. Pr. 105.

II. Procedure.

3. Adjournments. When, upon an application for an adjournment in a justice's court, the good faith of the applicant is involved, the granting or refusing of the adjournment rests in the sound discretion of the justice, and an appellate court will not interfere with the decision of the justice, unless an abuse of discretion be clearly shown.—*Supreme Ct.*, (*3d Dept.*,) *May*, 1881. Bush *v.* Weeks, 24 Hun 545.

4. Although it is not usual to require a party to state what he expects to prove by an absent witness on the first application for an adjournment, yet, when his conduct in applying for a second adjournment is such as to cast suspicion upon his good faith, and he refuses to state, either upon oath or otherwise, what he expects to prove by his absent witness, the justice may refuse to grant the adjournment, *Ib.*

5. Enforcement of judgment. A justice's judgment, after the filing of the transcript, is deemed and is enforceable as a judgment of the County Court, and leave to issue execution thereon may be granted by the County Court.—*Oneida Co. Ct.*, *Jan.*, 1881. Kincaid *v.* Richardson, 9 Abb. N. Cas. 315.

6. The filing of the transcript and the docketing of the judgment in the county clerk's office, is as much the rendering of a judgment as a filing of the judgment-roll upon default, and the consequent docketing. *Ib.*

7. Time within which to enforce by execution. After transcript filed, the judgment is governed by the same statute of limitations as a judgment of the County Court, and Code of Civ. Pro., § 376, prescribes the statute of limitations applicable after transcript filed; § 382, subd. 7, is confined to judgments of courts not of record, prior to the filing of transcripts. *Ib.*

8. As remedies not specified in a statute of limitations are not barred by it, Code of Civ. Pro., § 382, providing that actions shall not be brought on judgments of courts not of record, after six years, will not prevent the granting of leave to issue execution thereon after that time. *Ib.*

III. Appeals from Justices' Courts.

9. Effect of the appeal while pending. A justice's judgment ceases to act as an estoppel, or to be effectual as evidence between the parties, when an appeal for a new trial in the County Court has been perfected and is pending.—*Supreme Ct.*, (*Monroe Sp. T.*,) *April*, 1881. Burns *v.* Howard, 9 Abb. N. Cas. 321.

10. Otherwise, where the appeal is in the nature of a writ of error, for the purpose merely of having an affirmance, reversal, or modification. *Ib.*

11. What errors are ground for reversal. Although a judgment of a justice's court, for nominal damages only, will not, in some cases, be reversed by the County Court, though it be erroneous, yet this rule does not apply to an erroneous judgment in favor of one whose suit was both vexatious and groundless.—*Supreme Ct.*, (*4th Dept.*,) *April*, 1881. Countryman *v.* Lighthill, 24 Hun 405.

L.

LACHES.

Effect of, to *Bar suit*, see Limitations of Actions, II.

LANDLORD AND TENANT.

I. The Relation; how Constituted and Terminated.
II. Rights and Obligations arising out of the Relation.
III. Rent; and Remedies to Recover it.
IV. Recovery of Possession by Landlord.

I. The Relation; how Constituted and Terminated.

1. When the relation exists—rights of assignee of lessor. In summary proceedings, the tenant admitted that he was the tenant in possession, but denied that there had been any attornment between him and the relator. It appeared that the latter's claim to the possession of the premises rested upon a lease which was assigned to him by *mesne* conveyance, and that the tenant held possession under one of the assignors. The lease referred to in the assignment was not produced, and the court dismissed the proceedings on the ground that the relation of landlord and tenant did not exist. *Held*, error, because the tenant, having hired from one of the assignors of the lease, could not

controvert his landlord's title, and the relator, as assignee, succeeded to the rights of the latter, —*Supreme Ct.*, (1*st Dept.*,) *Jan.*, 1881. People, ex rel. Barnes, *v.* Angel. 61 How. Pr. 157.

II. Rights and Obligations Arising Out of the Relation.

2. Right of landlord to re-enter. B., who had leased a hotel in New Jersey of defendant's intestate, and who owned the furniture, leased the hotel and furniture for the unexpired term to E. for a sum specified in addition to the rent as it accrued under the lease to B. E. agreed to keep the furniture insured, and not to sell, remove, or permit the same to be removed; B. agreed that upon payment of the rent and performance of the covenants by E., he would, at the expiration of the term, sell and convey the furniture to E. In case of default on the part of E, B. was authorized to re-enter and take possession of, and to sell the furniture at auction, retaining out of the proceeds the amount of rent unpaid, paying over the surplus to E. B. subsequently transferred his interest in the lease to plaintiff, and assigned to him his interest in the furniture. Defendant's testator caused the furniture to be distrained for non-payment of rent, under the statute of New Jersey, which authorizes a landlord to seize for rent in arrears, within six months after the same becomes due, the goods of his tenant on the demised premises, but not those of any other person, although in the possession of the tenant. In an action for conversion of the furniture—*Held*, that the transaction between B. and E. as to said furniture was a conditional sale, the title remaining in B. until performance by E.; that no such interest was transferred to E., as rendered the property subject to be distrained for rent due from him; and that the transfer from B. vested the title in plaintiff, and upon default made by E, he had a right to take possession.—*Ct. of App.*, *March*, 1881. Bean *v.* Edge, 84 N. Y. 510.

3. Liability of landlord to third persons. Defendant was the owner of a house in the city of Brooklyn; between it and the adjoining house was a leader, which ran through defendant's stoop and emptied upon the sidewalk in front of his house. This leader had originally been used to carry off the water from both houses, but at the time of the accident only the water from the adjoining premises passed through it. On December 27th, 1876, water had run through the leader out upon the sidewalk, and there formed a mound of ice, upon which plaintiff, while passing along the sidewalk at between nine and ten o'clock in the evening, slipped and fell. In an action by her to recover damages for the injuries thus sustained—*Held*, that the leader running from defendant's house and discharging the water upon the sidewalk, under such circumstances, was a nuisance for which the owner of the house was liable, even though such house was, at the time of the accident, rented and in the possession of a tenant whose duty it was to remove the ice from the sidewalk.—*Supreme Ct.*, (2*d Dept.*,) *Sept.*, 1880. Wenzler *v.* McCotter, 22 Hun 60.

4. Rights of tenant—disputes between tenants. October 25th, 1878, plaintiff procured a lease of two stores in a block consisting of five, which was known as "Reynolds' Building," for the term of three years, the premises being described as "the stores known as Nos. 25 and 27 John street, in said city of Utica, including the basement and the first floor above said basement, and the second, third and fourth stories above said basement, with the appurtenances," etc. Each store was separated from the others by a brick wall extending from the basement to the roof, and in each was originally a stairway extending from the first floor to the attic. In December, 1878, the owner of the stores leased No. 29 to defendant, agreeing to take out the stairs in that store, cut a hole through the wall so as to communicate with the stairs in No. 27, and to give him the right to use the same. Thereafter defendant entered into possession of No. 29, and having leased from the plaintiff the third floor of Nos. 25 and 27 was allowed by him to use, without objection, the said stairs in No. 27. Upon the expiration of this lease, plaintiff, having refused to allow defendant to use the stairs, brought this action to restrain defendant from attempting to remove obstructions, placed by plaintiff thereon with the intention of closing the same. *Held*, that the stairs were included in the premises leased to the plaintiff, being covered by the general descriptive words in the lease contained; that his right to the use thereof was exclusive, and that the lessor could not thereafter confer upon the defendant any right to use the same.—*Supreme Ct.*, (4*th Dept.*,) *Jan.*, 1881. Vidvard *v.* Cushman, 23 Hun 434.

III. Rent; and Remedies to Recover it.

5. The right to rent. Plaintiff, by a written instrument, dated October 18th, 1872, leased to defendant twenty-five acres of land, upon which was a bed of iron ore, for the term of five years, and for such further time as he might require to mine all the ore therein, he agreeing to pay to plaintiff twenty cents for each ton removed, and to remove, at least, eight thousand tons a year; the agreement binding him to remove all ore where the vein was over fifteen inches in thickness, and leaving it optional with him to do so or not where the vein was of less thickness. In an action brought to recover the sum of $1600, claimed to be due for the year ending October 18th, 1877, it appeared that defendant had been in possession of the premises, and uncovered between one and two acres thereof, and that he had paid the sum of $1600 for each of the preceding years.

Held, 1. That as the instrument transferred to the defendant the use and occupation of the premises, at a fixed compensation to be paid annually, it was a lease.

2. That to justify a recovery by the plaintiff, it was not incumbent upon him to show, by express testimony, that there continued to be ore upon the premises during the year for which it was sought to recover rent.—*Supreme Ct.*, (4*th Dept.*,) *Oct.*, 1880. Gilmore *v.* Ontario Iron Co., 22 Hun 391.

6. The obligation to pay it Plaintiff leased certain premises to a firm. Two of the partners subsequently left the firm and the premises, the partners remaining having by valid contract assumed and agreed to pay the rent thereafter accruing. In an action brought against the original members of the firm to re-

cover such rent, it appeared that plaintiff was informed that the two partners were going out, and that the others were to remain and would pay the rent; but it did not appear that he was advised of any agreement by which those remaining were bound to pay the rent, or by which the legal relation of the retiring members of the firm to the common liability was changed. *Held*, that the evidence failed to establish the right of the retiring partners to be treated as sureties.—*Ct. of App., Dec.,* 1880. Palmer *v.* Purdy, 83 N. Y. 144.

7. S. & O., the defendants who continued the business, gave their notes to the plaintiff for rent in arrears. These were accepted by him upon the express stipulation that the liability of G. & P., the other defendants, should not thereby be released, and with the reservation of his rights and remedies against them. *Held*, that the arrangement was not such an extension as discharged G. & P., even if the rights of sureties were accorded to them. *Ib.*

IV. Recovery of Possession by Landlord.

8. **Jurisdiction.** A justice of one of the District Courts of the city of New York cannot entertain summary proceedings to remove a tenant, under the provisions of the Revised Statutes, when the premises which are the subject of the controversy are not situated within the district in and for which he was elected.—*Supreme Ct.,* (1*st Dept.,*) *Nov.,* 1880. People, ex rel. Hambrecht, *v.* Campbell, 22 Hun 574.

9. Section 1 of ch. 187 of 1877, prohibiting such justice from exercising such jurisdiction unless the premises are situated within his judicial district, was not repealed or abrogated by ch. 101 of 1879. The latter act only enlarged the jurisdiction of justices of the peace in such proceedings. *Ib.* S. P., People ex rel. Gilmore, *v.* Callahan, 23 Hun 581; S. C., 60 How. Pr. 373.

10. **Right to proceed for non-payment of rent.** The respondent demised certain premises to the relator, for the term of five years, from November 15th, 1870, by a written lease, and thereafter extended the said term to November 16th, 1877. After the latter date the relator continued to use and occupy the premises as before, until summary proceedings to remove it for the non-payment of rent were instituted, no rent having been paid since 1876.

Held, 1. That the entire period during which the relator held over was to be treated as an enlargement of the original term, and that the proceedings were properly instituted for the non-payment of the whole rent unpaid.

2. That the tenancy from year to year did not cease at the end of each year, so that a new term for the succeeding year began thereafter.

3. That the payment of all the rent falling due subsequent to the 15th of November next preceding the commencement of the summary proceedings, rent due prior to that time being still unpaid, was not sufficient to stay the proceedings.—*Supreme Ct.,* (2*d Dept.,*) *Sept.,* 1880. People, ex rel. Chrome Steel Co., *v.* Paulding, 22 Hun 91.

11. **—for subletting premises for policy shop.** Where a tenant knowingly sub-lets a portion of the demised premises for a policy-shop, his lease may be annulled by the landlord, and he may, under the statute in reference to illegal trades, be removed by summary proceedings, the same as if he were an overholding tenant; and after the forfeiture has once attached, it cannot be discharged by the tenant abating the nuisance.—*Marine Ct., Oct.,* 1880. Shaw *v.* McCarty, 50 How. Pr. 487.

12. **Who may institute proceedings as landlord.** Within the meaning of the provision of the statute in reference to summary proceedings to recover lands (2 Rev. Stat. 512, § 28, subd. 4, amended by Laws of 1879, ch. 101,) which authorizes the removal, as a tenant, of any person holding over and continuing in possession of real estate sold under execution against such person, after title under said sale has been perfected, any person in possession under the title which the purchaser has acquired is a tenant and may be removed. The statute is equally applicable to the judgment-debtor, and all who hold under him under pretence of title acquired from him, posterior to the judgment. Therefore—*Held*, that a person in possession under a lease executed by a receiver appointed in an action brought by executors, who held as such a leasehold interest in the premises, was a tenant within the meaning of the said provision; and that one who had purchased the interest of the executors upon sale under execution issued by order of the surrogate, upon a judgment against them as executors, recovered prior to the appointment of the receiver, the Supreme Court having given leave that the execution be levied and enforced upon property in the hands of the receiver or the executors, could maintain summary proceedings to remove such tenant; that under the order of the Supreme Court the receiver was in effect the person against whom the execution was issued.—*Ct. of App., March,* 1881. People, ex rel. Higgins, *v.* McAdam, 84 N. Y. 287; S. C., 60 How. Pr. 444; *reversing* 22 Hun 559; 60 How. Pr. 139; 59 Id. 442.

13. **Restraining proceedings by injunction.** When one in possession of land as tenant may restrain his lessor from taking proceedings to remove him, see Landon *v.* Supervisors of Schenectady Co., 24 Hun 75.

14. **Review of proceedings on certiorari.** When the return to a *certiorari*, issued to review summary proceedings, does not show whether or not the premises were situated within the district of the justice before whom the proceedings were had, the affidavit of the landlord being silent on that point, and the relator did not appear, but suffered judgment to be taken against him by default, the court at General Term will not take judicial notice of the fact that the premises, described in the affidavit only by street and street number, were not situated within his district, and reverse the proceedings for lack of jurisdiction.—*Supreme Ct.,* (1*st Dept.,*) *Jan.,* 1881. People, ex rel. Gilmore, *v.* Callahan, 23 Hun 581; S. C., 60 How. Pr. 373.

15. *Quære*, as to the rule where the entire street is embraced within the statutory boundaries of a district. *Ib.*

As to the validity and construction of the *Lease*, as an instrument, see Leases.

LARCENY.

1. **Indictment—describing the stolen property.** An indictment for stealing a satchel containing trade dollars, describing them as "sixty silver coins (of the kind usually known as dollars) of the value of one dollar each," is sufficient.—*Supreme Ct.*, (1st *Dept.*,) *June*, 1880. Miller *v.* People, 21 Hun 443.

2. **Evidence for the people.** An indictment for larceny averred that the stolen property was owned by "a body corporate," the name of which was given, "organized and existing under the laws of the State of New York." On the trial the people proved the due organization and existence of the corporation named under the laws of the United States. *Held*, that the averment of incorporation under the laws of the State of New York was surplusage that need not be proved; that all that was necessary to be averred and proved was that the owner was a corporation, having the name given to it in the indictment.—*Ct. of App., Jan.*, 1881. McCarney *v.* People, 83 N. Y. 408.

3. It did not appear that the prisoner was present at the warehouse from which the property was taken, or in its close vicinity, but there was proof upon the trial tending to show that he had part in planning the theft and in learning the situation of the premises and the ways of the keeper thereof. That the one who was in fact engaged in taking the property, sent the porter of the warehouse to the house of the keeper with a letter, and promised a reward, upon his calling, after the delivery of it, at a specified street and number, and that on reaching the street, while searching for the number, he met the prisoner and conversed with him about the keeper and his whereabouts. *Held*, that the testimony was sufficient to authorize the submission of the question of the prisoner's participation as principal in the theft to the jury. *Ib.*

4. The letter handed to the watchman, a decoy letter, was received in evidence. *Held*, no error. *Ib.*

5. **Evidence in defence.** Some of the stolen property was found in the prisoner's possession; he claimed that he purchased it, and offered to prove what was said as to the mode of obtaining the property at the time of the alleged purchase by the men of whom the alleged purchase was made. This was objected to and excluded. *Held*, error; that while not competent to prove that the alleged vendors came by the property in the mode asserted, it was relevant and competent upon the issue of guilty knowledge.—*Ct. of App., March*, 1881. People *v.* Dowling, 84 N. Y. 478.

6. The prosecution proved the finding at the house of the prisoner, other goods than those named in the indictment, and there was testimony tending to prove that those other goods had been stolen and received with guilty knowledge. The prisoner offered to show, by his own testimony, that he purchased a part of these goods at L., and that he asked the persons of whom he bought them to go and look at and identify them. This was objected to and rejected. *Held*, that if the proof given by the prosecution was competent, such testimony was erroneously rejected; that the prisoner had the right to meet the evidence against him by testimony tending to show that he came by the property honestly. *Ib.*

7. **Receiving stolen goods—instructions.** Upon the trial of an indictment for receiving stolen goods, with knowledge, the court charged "that the possession of stolen goods, immediately after the larceny, if under peculiar and suspicious circumstances, where there is evidence tending to show that some other person or persons stole the property, such possession not being satisfactorily explained, would warrant" a conviction. *Held*, no error.—*Ct. of App., Sept.*, 1880. Goldstein *v.* People, 82 N. Y. 231. See, also, Hentze *v.* People, Id. 611.

For decisions respecting offences *Analogous to larceny*, see BURGLARY; FALSE PRETENCES.

LAW OF PLACE.

For the effect of the law of place upon *Contracts*, generally, see CONTRACTS, 53, 54, and the titles of the various contracts.

Upon the *Marriage contract*, see HUSBAND AND WIFE, 2, 3.

For decisions upon the law of place in connection with the *Administration of decedents' estates*, see DESCENT; DEVISE; EXECUTORS AND ADMINISTRATORS; LEGACIES; WILLS.

For the effect of the law of place upon the rate of *Interest*, see INTEREST; USURY.

LEADING QUESTIONS.

WITNESSES, 46.

LEASES.

1. **Stipulation to pay taxes.** Although the acceptance of rent by a lessor is a waiver of a forfeiture theretofore incurred by the failure of the lessee to pay taxes assessed against the premises as required by the terms of the lease, yet the failure of the lessee to pay the taxes within a reasonable time after the reception of the rent occasions a new forfeiture, for which the lessor may re-enter.—*Supreme Ct.*, (1st *Dept.*,) *May*, 1881. Conger *v.* Duryee, 24 Hun 617.

2. **Covenant for renewal.** A lease under seal, drawn technically in form, and with obvious attention to details, contained various covenants, some binding the parties mutually, some the lessor only, others the lessee. It contained a covenant, on the part of the lessor, to the effect that if the lessee should pay the rents, and perform all the covenants on his part, that the lessee "shall and will at the end or expiration of the term," grant to the lessee a new lease for a further term specified, at a rent to be adjusted by appraisers, but not less than that for the first term. In an action to compel the lessee to accept a new lease—*Held*, that this was a covenant on the part of the lessor only, from which no covenant on the part of the lessee, to take a new lease, could be implied; and that it was optional with him whether or not to take a new lease.—*Ct. of App., Dec.*, 1879. Bruce *v.* Fulton Nat. Bank, 79 N. Y. 154.

3. An under-lease contained a covenant that

if the lessee again obtained a lease of the premises, the sub-lessee should have the benefit of it, so long as the rent charged the lessee remained the same, and if that was changed, the sub-lessee's rent should be correspondingly changed. The lessee, upon his reletting the premises, gave a new sub-lease for the term for which he had rented them, containing no covenant for a further renewal. *Held*, that the covenant was satisfied, and that the words "so long" applied only to the first new term created by the original landlord, and not to any subsequent ones.—*Supreme Ct.*, (*1st Dept.*,) *Nov.*, 1880. Banker *v.* Braker, 9 Abb. N. Cas. 411.

4. Covenant to pay mortgage on leasehold interest. Plaintiff and J. (to whose rights plaintiff subsequently succeeded) leased of R. certain premises for twenty-one years, from May 1st, 1855. R. covenanted that if the lessees erected a building, as specified, upon the demised premises, he would advance $20,000, to be secured by the lessees' bond, and a mortgage upon the leasehold interest; and at the termination of his lease he would, at his option, either pay the appraised value of the building or execute a new lease for a further term. The building was erected, and the money loaned and secured as covenanted. In May, 1858, the lessees executed to C., defendant's testator, a sub-lease of the premises for seventeen years and six months, from August 1st, 1858. C. covenanted "to assume, pay off, and discharge" said mortgage. In August, 1858, said lessees executed to C. another instrument, by which they agreed, upon his compliance with the covenants in said sub-lease, at the expiration of the term therein specified, "at and upon the application" of C., or assigns, to grant a renewal for the further term of eighty-five days, and to execute an assignment of the right of said lessees to a renewal of the original lease, or to a payment of the moneys awarded to them for the value of the buildings and improvements. C. assigned the sub-lease and agreement; the holder thereof made no application for a renewal, as authorized by the agreement; but, on the contrary, gave written notice that he would not avail himself of such right; and at the expiration of the term specified in the said sub-lease surrendered the premises. Plaintiff paid the mortgage, received from the lessors an agreed price for the improvements, and took a new lease. In an action on the covenant of C. to pay the mortgage—*Held*, that plaintiff was entitled to recover; that under said covenant a cause of action arose upon failure of C. to pay the mortgage when it became due and payable; that, conceding the sub-lease and subsequent agreement were to be taken and construed together, the covenant of C. in the former was not modified or affected by the latter; also, that, as neither C. nor his assigns availed themselves of the privileges of renewal, all their rights terminated at the expiration of the term specified in the sub-lease; the original lessees were at liberty to deal with the property as they chose, and their subsequent action furnished no defence.—*Ct. of App.*, *Dec.*, 1879. Hume *v.* Hendrickson, 79 N. Y. 117.

For other decisions illustrating rights and liabilities arising out of the *Relation of landlord and tenant*, not depending, strictly, upon the terms of the lease, see LANDLORD AND TENANT.

LEGACIES.

I. NATURE, INTERPRETATION, AND EFFECT. VALIDITY.
II. WHEN A CHARGE UPON LAND.
III. PAYMENT.
IV. INCIDENTAL RIGHTS AND LIABILITIES OF LEGATEE.

I. NATURE, INTERPRETATION, AND EFFECT. VALIDITY.

1. General and specific legacies. When legacies will be deemed general and not specific, see Osborne *v.* McAlpine, 4 Redf. 1.

2. Legacies to two or more, or to a class. Where several persons are named as legatees in the residue, primarily, and are appointed to take equal shares, so as to create a tenancy in common, the share of one pre-deceasing the testator will not pass to the survivors, but will go to the next of kin, as property undisposed of.—*N. Y. Surr. Ct.*, *April*, 1879. Meeker *v.* Meeker, 4 Redf. 29, 33. Compare Thompson *v.* Conway, 23 Hun 621.

3. F., at the time of making his will, had three children living; a daughter, Irene, had died leaving five children; another deceased daughter, Isabella, left a son. In his will he gave separate legacies to the three living children, and a legacy to "the children of Irene." His residuary estate he directed "to be divided equally between Anita, (a daughter,) the children of Irene, the son of Isabel, and Henry" (a son.) *Held*, that the residuary estate should be distributed *per stirpes*, not *per capita*, the "children of Irene," as a class, together receiving but one share.—*Ct. of App.*, *June*, 1880. Ferrer *v.* Pyne, 81 N. Y. 281; *affirming* 18 Hun 411.

4. Legacy with remainder over. Where the intent is to give an absolute, unconditional gift and power of disposition to the primary legatee, and the legacy over is of what remains unspent, or that which he dies possessed of, or has not sold or devised, such a remainder is void, as being inconsistent with the absolute estate or *jus disponendi* previously given by express terms, or necessary implication.—*N. Y. Surr. Ct.*, *May*, 1879. Cohen *v.* Cohen, 4 Redf. 48, 50.

5. A testator by his will bequeathed one-half of a certain sum of money to his "son John, in trust, to be invested for the benefit of his heirs, he having the use or interest of the same; also his widow, so long as she remains his widow; he dying without heirs of his own begotten," the principal of the same to revert to certain persons named in the will.

Held, 1. That the bequest was a general one to John for life, (and to his widow so long as she should remain his widow,) with remainder over as specified in the will.

2. That as no trustee for the fund was created by the will, the executrix should either retain and invest the same, or that security should be required of John in case it were delivered to him.

3. That even if John, who was a non-resident of the state, was to be deemed a testamentary trustee of the fund, the surrogate was author-

ized, by section 1 of chapter 482 of 1871, to require him to give security for its ultimate disposition in accordance with the direction of the will.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. Montfort *v.* Montfort, 24 Hun 120.

6. Annuities. A bequest of the interest of a particular sum will not be construed as giving an annuity, though the interest is payable annually, but simply as a gift of the income or interest of the particular amount.—*N. Y. Surr. Ct.*, *Dec.*, 1879. Stubbs *v.* Stubbs, 4 Redf. 170.

7. While a trust estate created by will, providing for accumulations for the benefit of adults as well as minors, is void, yet an annuity to the widow, provided for under such trust estate, also charged upon the real estate, survives the failure of the trust. But such annuity is subject to a proportional deduction in favor of an after-born child, who will take as if the father died intestate.—*Supreme Ct.*, (*Sp. T.*,) *Nov.*, 1880. McCormack *v.* McCormack, 60 How. Pr. 196.

8. Interpretation on question of validity. A testator by his will gave and bequeathed "to each and every grandchild (if any) that may be hereafter born within twenty years after my death, and before the final settlement of my estate, the sum of $1000, * * to be paid to each on their severally arriving at full age, or if granddaughters on their sooner being lawfully married." The testator left him surviving two sons, three daughters, and four grandchildren by a son who died after the testator. *Held*, that there was no unlawful suspension created by the will of the absolute ownership of the property; that the legacies to the grandchildren living at the testator's death vested immediately, and that as to those who might thereafter be born, the absolute ownership could not possibly be suspended beyond one life in being at the death of the testator, namely, that of the parent, who was a child of the testator.—*Supreme Ct.*, (*2d Dept.*,) *Dec.*, 1880. Smith *v.* Edwards, 23 Hun 223.

9. Validity of bequests to corporations. Where a devise is made to a charitable incorporation, authorized to take it, in trust for an association, then unincorporated, it is sufficient if the latter be incorporated before the money becomes payable, although it was an unincorporated voluntary association only, at the time of the testator's death.—*Supreme Ct.*, (*2d Dept.*,) *Dec.*, 1880. Philson *v.* Moore, 23 Hun 152.

10. When a bequest to a Pennsylvania corporation, in the will of a resident of this state, is void, see Kerr *v.* Dougherty, 79 N. Y. 327.

II. When a Charge upon Land.

11. What bequests are a charge upon land. Where a legacy is given, and is directed to be paid by the executor, who is a devisee of real estate, such estate is charged with the payment of the legacy; and the devisee, upon accepting the devise, becomes personally bound to pay the legacy; and this, although the land devised to him proves to be less in value than the amount of the legacy.—*Ct. of App.*, *Dec.*, 1879. Brown *v.* Knapp, 79 N. Y. 136.

12. A testator, by his will, provided as follows: "After all my lawful debts are paid and discharged, I give and bequeath to my wife, Deziah Hull, all my real and personal estate for her use and disposal during her life, to keep, use and dispose of as she may think proper. I also give and bequeath to her the sum of $1000, to be disposed of, after death or during her life, as she may please. The rest of my estate, after deducting the above-mentioned $1000, I give and bequeath as follows: * * * ." *Held*, that the legacy of $1000 given to the wife was a charge upon the real estate of the testator.—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Finch *v.* Hull, 24 Hun 226.

III. Payment.

13. Petition for payment in advance of distribution. As to the requisites or sufficiency of a petition to the surrogate by a legatee for an order directing the payment of her legacy, see Baylis *v.* Swartwout, 4 Redf. 395.

IV. Incidental Rights and Liabilities of Legatee.

14. Conditional legacy—forfeiture. In respect to conditions subsequent, there must be a capacity and opportunity and an option on the part of the legatee to perform the conditions before a forfeiture of the legacy is or can be incurred. A court of equity, at all times reluctant to enforce a forfeiture or a penalty, will not do so when the victim of it has acted in ignorance of the conditions upon which or with whose non-compliance such forfeiture was involved or dependent.—*Supreme Ct.*, *Aug.*, 1881. Merriam *v.* Wolcott, 61 How. Pr. 377.

15. Legatees who oppose the probate of a will do not thereby forfeit the legacies in their favor under the clause of the will declaring that any beneficiary who should make opposition or controversy in relation to its validity should thereby forfeit the bequest to him or her, where it is not apparent that the opposition to the probate was not interposed in good faith or that it was vexatious.—*Supreme Ct.*, (*1st Dept. Sp. T.*,) *July*, 1880. Jackson *v.* Westerfield, 61 How. Pr. 399.

16. Ademption Where a parent bequeathes a legacy to a child, and afterwards, in his lifetime, gives a portion or makes a gift to or a provision for the same child, even without expressing it to be in lieu of the legacy, if the gift or provision be certain and not merely contingent, if no other object be pointed out, and if it be *ejusdem generis*, then it will be deemed an ademption of the legacy *in toto*, if greater than or equal to, and *pro tanto* if less, than the provision by the will.—*N. Y. Surr. Ct.*, *Nov.*, 1878. Benjamin *v.* Dimmick, 4 Redf. 7, 9.

17. Actions for legacies. *It seems* that payment of a legacy directed to be paid by the executor, who is a devisee under the will, may be enforced by a suit in equity against the real estate, or by an action directly against the devisee upon the promise to pay implied by the acceptance of the devise; and an action to enforce the legal liability of the devisee and executor may be brought in this state, although the testator was a resident of, and said executor was appointed in another state.—*Ct. of App.*, *Dec.*, 1879. Brown *v.* Knapp, 79 N. Y. 136.

18. In such case, however, where action is brought to recover interest during the minority of the legatee, as the cause of action arose in

the other state, the rate of interest allowed by its laws should control. *Ib.*

For decisions relative to a *Will*, as a whole, and not limited to a particular devise or legacy contained in it, see WILLS.

LEGISLATION.

CONSTITUTIONAL LAW; STATUTES.

LETTERS.

Of *Credit*, see GUARANTY, III.
Upon *Decedents' estates*, see EXECUTORS AND ADMINISTRATORS, I.

LEVY.

ATTACHMENT, 24, 25; EXECUTION, 6; JUSTICE OF THE PEACE, 5-8; SHERIFF, 5; TAXES, 20-24.

LIBEL.

1. **What publication is libelous.** To accuse one holding a public office of an offence is not privileged, and if the charge be false the utterer is liable, however good his motives; and this, although the libel relate to an act of the officer in the discharge of his official duties. —*Ct. of App., June,* 1880. Hamilton *v.* Eno, 81 N. Y. 116, 126.

2. The official acts of the officer may be freely criticised, and the occasion will excuse everything but actual malice and evil purpose in the critic: but the occasion will not of itself excuse an attack upon the character and motives of the officer; to excuse this the critic must show the truth of what he has uttered. *Ib.*

3. Plaintiff, as assistant inspector of the board of health in the city of New York, made an official report, which was published in a public journal, in which he recommended highly a certain kind of street pavement, giving statistics. Defendant caused to be published a communication, to the effect that said statements in plaintiff's report were dictated by those interested in the pavement, and that plaintiff received a reward for their publication. In an action for libel—*Held,* that the occasion was such as made privileged any publication, however severe and sarcastic, questioning the statements as matters of fact, also the conclusions drawn therefrom and the reasoning of the report, but did not justify an attack upon the private character of the author; that defendant's publication was calculated to injure plaintiff's official and private reputation; and, in the absence of proof establishing the truth of the accusations therein, defendant was liable, however good may have been his motives. *Ib.*

4. **The complaint, and when demurable.** In an action brought against the proprietor of the New York Herald, to recover damages for a libel, alleged to have been published concerning the plaintiff, the complaint alleged that the plaintiff was engaged in carrying on business as a baker and restaurant-keeper, in the city of New York, and was not and never had been in any manner a co-partner, owner or agent in any business or calling, such as described in the libel, or in the production of milk, or distillery swill, so called, or distillery waste or grain, or ownership or care of cows, or keeping or feeding of cows; it then alleged that the defendant published concerning the plaintiff an article, which it set forth in full, which related to a swill milk establishment kept by Gaff, Fleischmann & Co., in Queens county. *Held,* that a demurrer interposed to the complaint, on the ground that it appeared therefrom that the libel was not published of or concerning the plaintiff, should be sustained.—*Supreme Ct.,* (*2d Dept.,*) *Dec.,* 1880. Fleischmann *v.* Bennett, 23 Hun 200.

5. **Evidence in mitigation.** The matter that will serve to mitigate damages in an action of libel must be connected with or bear upon the defamatory charge, *i. e.,* matter tending to prove the truth of the charge or to show that there was induced in the defendant a belief of its truth, or prior publications of the plaintiff of such a nature as to exasperate and to call forth bitterness in reply. Hamilton *v.* Eno, *supra.*

6. Upon the trial of an action for writing and publishing a libel concerning the plaintiff, the defendant, having testified as to certain statements made to him by the plaintiff, and as to his previous knowledge of his life and character was asked, with a view of showing that he wrote the article with good motives and in the belief that it was true, "Why did you write it?" *Held,* that the court erred in refusing to allow him to answer the question, as evidence that he acted in good faith was admissible, not in mitigation of the compensatory, but of the vindictive damages which a jury might award in such a case.—*Supreme Ct.,* (*3d Dept.,*) *Nov.,* 1880. Bennett *v.* Smith, 23 Hun 50.

7. **Instructions to the jury.** Defendant's counsel asked the court to charge, in an action for libel, that unless defendant was moved by actual malice it was not a case for punitive damages; and that the jury should give such damages only as they thought the plaintiff had really borne. The court refused so to charge, but in reply to the request stated to the jury that malice might be inferred from the falsehood of the charges. *Held,* that the request was too broad, as it sought to limit the jury to the actual damage; and that therefore the refusal to charge was not error. Hamilton *v.* Eno, *supra.*

8. The court was also requested to charge that the jury should take into consideration the circumstances attending the making and publication of plaintiff's report, its importance and subject, and the public effect of it, and weigh them in mitigation of damages. The request was refused. *Held,* no error; that these facts could not lessen the responsibility of defendant for having charged plaintiff in substance with having taken a bribe. *Ib.*

For decisions illustrating the above principles, but arising in actions for slander, see SLANDER.

LICENSE.

1. License to drain—necessity of writing. A right of drainage through the lands of another is an easement requiring for its enjoyment an interest in such lands which cannot be conferred by parol license; it can only be granted "by deed or conveyance in writing." (2 Rev. Stat. 134, § 6.)—*Ct. of App., Feb.,* 1881. Wiseman *v.* Lucksinger, 84 N. Y. 31.

2. The parol contract which equity will regard as equivalent to the grant required at common law or by the statute must be a complete and sufficient contract, founded not only on a valuable consideration, but with its terms defined by satisfactory proof, and accompanied by acts of part performance unequivocally referable to the supposed agreement. *Ib.*

3. Revocation. A mere license to drain is not made irrevocable by the fact that a valuable consideration was paid therefor. *Ib.*

4. The parties owned adjoining city lots, fronting upon a street in which there was no sewer. Defendant built an underground drain or sewer of plank from his house to a sewer in another street; he gave to plaintiff, for the consideration of $7, a writing stating that the money was received "for the right to drain through my premises," and plaintiff thereupon built a similar drain of plank connecting with defendant's drain. After the lapse of over twenty years, plaintiff took up his drain and replaced it with a drain of tile of greater capacity than defendant's, and also made changes in his privy vault, and thereafter the filth and foul water from his privy flowed back into defendant's cellar; thereupon defendant, on his own land, cut off the connection and refused to allow plaintiff to go upon his premises to open and repair the drain. In an action to restrain defendant from obstructing the sewer and for damages—*Held,* that the agreement indicated by the writing could not be inferred to be a permanent one, but it would be satisfied by regarding it as a temporary arrangement, and should be so construed; that the agreement so indicated was good as a license giving plaintiff immunity while acting under it, but giving no vested right to the use or enjoyment of the privilege, against the will of the grantor, and that, therefore, it was revocable at the pleasure of the latter. Also, that twenty years' user did not give plaintiff a prescriptive right to the easement, as the possession was by consent of defendant and there could be no adverse possession until defendant cut off plaintiff's drain. *Ib.*

As to licenses to sell *Intoxicating liquor,* see LIQUOR-SELLING.

As to the regulation and licensing of various *Trades* and *Employments,* in cities, see MUNICIPAL CORPORATIONS, II.

LIEN.

Of livery-stable keeper. As to the lien of a keeper of a livery stable on property committed to his charge, and how the same may be enforced, see Armitage *v.* Mace, 46 Superior 550.

As to the lien of an *Attachment,* or *Execution,* see ATTACHMENT, 24-27; EXECUTION, I. Of a *Judgment,* see JUDGMENT, IV. Of a *Mortgage,* see MORTGAGES, IV.

As to the lien of a *Pledgee,* see BAILMENT, 3-7. Of an *Attorney,* for costs, see ATTORNEY AND CLIENT, III. Of a *Vendor of land,* for the purchase money, see VENDOR AND PURCHASER.

As to *Mechanics' liens,* see that title.

As to liens upon *Vessels,* see SHIPPING, IV.

LIFE ESTATES.

LEGACIES, 4-6; WILLS, V.

LIFE INSURANCE.

INSURANCE, III.

LIMITATIONS OF ACTIONS.

I. GENERAL PRINCIPLES.
II. WHAT LAPSE OF TIME WILL CREATE A BAR.
III. WHEN THE STATUTE BEGINS TO RUN.
IV. DISABILITIES AND EXCEPTIONS.
V. ACKNOWLEDGMENT. NEW PROMISE. PART PAYMENT.

I. GENERAL PRINCIPLES.

1. Retrospective operation of the statute. A statute of limitations, unless it contains some provision saving prior contracts from its operation, applies to them as well as to those made after its passage.—*Ct. of App., June,* 1880. Acker *v.* Acker, 81 N. Y. 143.

2. Laws of 1876, ch. 431, amending Code of Pro., § 94, so as to limit to one year the time within which an action for an injury to the person must be brought, operated prospectively only, and did not affect causes of action existing at the time of its passage.—*Supreme Ct.,* (*4th Dept.,*) *April,* 1881. Carpenter *v.* Shimer, 24 Hun 464.

3. What will take a case out of the statute. May 1st, 1866, plaintiff leased a house of defendant, at the yearly rent of $68, and lived therein until May 1st, 1870. When the first quarter's rent came due the plaintiff told the defendant he wanted to pay the rent, but the latter said: "No; let that apply on what was laying there," referring to loans previously made by the plaintiff to him. No rent was ever paid by the plaintiff. On April 28th, 1876, he brought this action to recover the amount due upon the loans, claiming that the effect of the agreement was that the rent, as it fell due, was to be applied as a payment upon the loans, and that as the last rent fell due May 1st, 1870, the case was thereby taken out of the statute of limitations.

Held, 1. That the referee properly held that the agreement only related to the payment of the first quarter's rent, and that the action was barred by the statute.

2. That the case was not one of running or mutual accounts.—*Supreme Ct., (3d Dept.,) Nov.,* 1880. Bodell *v.* Gibson, 23 Hun 40.

4. *Quære,* as to whether the bar of the statute would have been removed even if such an agreement as the plaintiff claimed existed, had been proved. *Ib.*

5. **Waiver of the statute.** Defendant, an executor, in May, 1874, wrote to plaintiff's attorney, before suit commenced on a claim against his testator's estate, offering to submit the controversy under Code of Pro., § 372; said attorney wrote a letter in March, 1876, accepting the proposition, to which defendant made no reply. *Held,* that the offer was not a waiver of the statute of limitations respecting the commencement of actions upon rejected or disputed claims, (2 Rev. Stat. 88, § 38); that to constitute a waiver the offer should have been accepted within the six months, and this followed by an actual submission.—*Ct. of App., Dec.,* 1879. Cornes *v.* Wilkin, 79 N. Y. 129.

II. What Lapse of Time will Create a Bar.

6. **In general.** As to the application of the statute of limitations to claims by administrators against the estate, see Wood *v.* Rusco, 4 Redf. 380.

7. **Ten years.** An application to vacate an assessment in the city of New York is a special proceeding, and is barred by the statute of limitations, unless made within ten years from the confirmation thereof.—*Supreme Ct., (1st Dept.,) Jan.,* 1881. Matter of Striker, 23 Hun 647.

8. The right of one partner to recover a claim against the firm, is barred by the ten and not by the six years' statute.—*Supreme Ct., (4th Dept.,) Jan.,* 1881. Still *v.* Holbrook, 23 Hun 517.

9. On February 23d, 1865, the plaintiff's assignor, S. and others signed an agreement, by which they agreed to pay the amounts set opposite to their names, for the purchase of certain real estate, to D., the payments to be made to said D., the defendant's testator, in whose name the title of the property was to be taken, the property to be put into an association for its development, upon such terms as the subscribers might thereafter elect. On February 12th, 1875, this action was brought to compel the said D.'s executors to account for the moneys received and expended by him under the agreement. *Held,* that the plaintiffs had no right to bring an action at law upon the agreement, and that as their only remedy was in equity the ten and not the six years' statute of limitation was applicable to the claim.—*Supreme Ct., (1st Dept,) Jan.,* 1881. Rodman *v.* Devlin, 23 Hun 590.

10. **Six years.** An action against a stockholder in a manufacturing company to enforce the liability imposed where all the capital stock had not been paid in, is barred by the statute of limitations after the expiration of six years from the time the liability was incurred.—*Ct. of App., April,* 1880. Knox *v.* Baldwin, 80 N. Y. 610.

11. **Three years.** Under the provision of the Code of Pro., § 91, subd. 2, limiting the time for bringing an action to recover a penalty to three years, where an action is brought against a trustee of a manufacturing corporation, to charge him with a debt because of failure of the corporation to file an annual report, more than three years after January 20th of the year when the alleged failure occurred, the action is barred; as upon that day, if at all, the cause of action accrued. *Ib.*

12. A motion to compel a sheriff to pay over to defendant a surplus remaining in his hands after sale on execution, does not come under the one-year limitation prescribed by Code of Civ. Pro., § 385, but under the three-year limitation, as prescribed by § 383.—*Superior Ct., (Sp. T.,) Nov.,* 1880. Frankel *v.* Elias, 60 How. Pr. 74.

III. When the Statute begins to Run.

13. **Action for false imprisonment.** August 5th, 1876, the plaintiff having been adjudged guilty of a contempt, in proceedings supplementary to execution, was imprisoned upon an order of the county judge, fining him and committing him to jail; on August 10th he gave an appeal bond, and was released. On January 25th, 1877, the order of the county judge was reversed, and on January 9th, 1879, this action for false imprisonment was commenced. *Held,* that the right of action accrued upon his release, upon giving the appeal bond in August, 1876, and that the action was barred because not commenced within two years from that time —*Supreme Ct., (3d Dept.,) Jan.,* 1881. Van Ingen *v.* Snyder, 24 Hun 81.

14. **Suits against bailees.** Interest on securities left with a bailee for safe-keeping being payable as soon as collected, without demand, the statute of limitation as to such interest collected and not paid over runs from the time of the receipt of the interest by the bailee. —*Kings Co., Surr. Ct., April,* 1880. Brooks *v.* Brooks, 4 Redf. 313.

15. **Suits on notes and checks payable on demand.** As against the maker or as against one who has indorsed his name upon the back of a non-negotiable promissory note, payable on demand with interest, the statute of limitations begins to run from the time of the making and delivery of the note.—*Supreme Ct., (1st Dept.,) April,* 1881. McMullen *v.* Rafferty, 24 Hun 363.

16. Where the drawer of a check has no funds at the time in the bank to meet it, the check is due immediately without presentment and demand, and the statute of limitations begins to run from its date. Where, therefore, the holder of the check delays for six years to enforce his claim it is barred by the statute.—*Ct. of App., Nov.,* 1880. Brush *v.* Barrett, 82 N. Y. 400.

17. **Suit to enforce individual liability of stockholders.** The statute of limitations commences to run in favor of the stockholders from the time of the bringing of the action against the company, and not from the time of the return of an execution issued upon a judgment recovered against it.—*Supreme Ct., (2d Dept.,) Dec.,* 1880. Handy *v.* Draper, 23 Hun 256.

18. **Suits to enforce trusts, and for accounting.** This action, brought to have certain lands conveyed to defendant, declared to be held by him in trust, and for an accounting, was commenced in 1867. The lands were

conveyed to defendant in 1854; his mother, for whom he acted as agent, and with whose money he made the purchase, died in 1866. Defendant did not assume to own the property or deny her right thereto until after her death; and she had no knowledge that the deed had been taken in his name. *Held*, that, until the happening of one or the other of these events, the cause of action did not accrue; and that, therefore, the action was not barred by the statute of limitations.—*Ct. of App., April*, 1880. Reitz *v.* Reitz, 80 N. Y. 538; *reversing* 14 Hun 536.

19. When a demand is necessary to set the statute running. The lapse of six years is not a bar to an action to recover a deposit; the statute of limitations only begins to run from the time payment is refused.—*Ct. of App., Sept.,* 1880. Thomson *v.* Bank of British North America, 82 N. Y. 1, 8.

IV. Disabilities and Exceptions.

20. Removal of disability of coverture. The amendment of 1870, (Laws of 1870, ch. 741, ¶ 5,) to the provision of the Code of Pro., ¶ 101, excusing from bringing actions within the times limited because of certain disabilities, which struck out married women from the list of those disabled and removed the disability as to them, took away the extension of the time of limitation that theretofore had existed in their favor, and left the sections of the code (¶¶ 89, 90,) providing a period of limitation, operative upon them as well as others.—*Ct. of App., June,* 1880. Acker *v.* Acker, 81 N. Y. 143.

21. Plaintiff owned a bond and mortgage which became due and payable November 1st, 1857; she was then a married woman. Her husband died September 8th, 1866. She commenced this action to foreclose the mortgage December 10th, 1877.

Held, 1. That by force of said amendment plaintiff had but twenty years from the time the cause of action accrued in which to bring her action; and that, therefore, it was barred by the statute.

2. That the provision of the Code of Civ. Pro., ¶ 381, which saves from the application of its periods of limitation a case where a person was entitled, when it took effect, to commence an action, if such action be brought within two years of that time, did not relieve the plaintiff, as in such a case it is declared (¶ 414) that the provision of law then applicable should continue to be applicable, notwithstanding its repeal. *Ib.*

V. Acknowledgment. New Promise. Part Payment.

22. Part Payment. When the receipt by a mortgagee of a part of the money payable on a policy of insurance on the mortgagor's life, which policy is held by the mortgagee as collateral to the mortgage, will not be deemed such a payment on account of the mortgage debt as to revive or extend the right to foreclose the mortgage beyond the twenty years, see Acker *v.* Acker, *supra.*

For the effect of a new promise to take a debt out of the protection of a *Discharge in bankruptcy* or *Insolvency*, see Bankruptcy; Insolvency.

LIQUOR-SELLING.

1. What officers may sue for penalties. An action to recover the penalty incurred by a breach of the condition of an innkeeper's bond, required by Laws of 1857, ch. 628, ¶ 7, must be prosecuted by the officers named in ¶ 24 of the said act, and not by those named in ¶ 22 thereof.—*Supreme Ct., (3d Dept.,) Sept.,* 1880. People *v.* Groat, 22 Hun 164.

Such an action may be brought and prosecuted by the officers named in the said ¶ 24 in the name of the people as obligees of the bond. *Ib.*

2. In Westchester county an action for penalties is to be brought by the overseers of the poor, not by the excise board; or, in the city of Yonkers, by the commissioners of charities. —*Ct. of App., March,* 1877. Board of Excise of Westchester *v.* Curley, 9 Abb. N. Cas. 100.

3. Suit in name of overseer of poor —previous complaint to overseer. Where a person brings an action, in the name of an overseer of the poor, to recover a penalty for a violation of the provisions of the excise law, without having first made complaint to the said overseer of the alleged violation, accompanied with reasonable proof thereof, the action is unauthorized, and such person is personally liable to the defendant for the costs thereof.—*Supreme Ct., (3d Dept.,) Sept.,* 1880. Jobbitt *v.* Giles, 22 Hun 274.

4. To authorize a private person to bring such an action, the complaint made to the overseer of the poor should be so definite, and should be accompanied with such proof, as to satisfy the overseer that a penalty has been incurred, or to enable him to investigate and decide whether or not there has been a violation of the statute. *Ib.*

5. Defences in action for penalties. In an action to recover the penalty incurred by a breach of the condition of the bond required by Laws of 1857, ch. 628, ¶ 7, to be given by an applicant for an inn, tavern, or hotel license, it is no defence to show that the instrument executed and delivered by the applicant, and upon which the license was issued, had no seal. People *v.* Groat, *supra.*

LOANS.

Bailment, 3-7; Banks, 16, 17; Interest; Usury.

LOCAL IMPROVEMENTS.

Municipal Corporations, II.; New York City, II.

LOST INSTRUMENTS.

Secondary evidence in suits on, see Evidence, 19-21.

LUNATICS.

Insane Persons.

M.

MACHINERY.

When deemed a *Fixture*, and not removable, see FIXTURES.

Liability of master to servant, for *Defects in*, see MASTER AND SERVANT, 7, 8; RAILROAD COMPANIES, 45-48.

MAINTENANCE.

As to the duty of a *Husband, Parent* or *Guardian*, to support the *Wife, Child* or *Ward*, see HUSBAND AND WIFE; PARENT AND CHILD; GUARDIAN AND WARD.

As to allowances for maintenance in *Divorce cases*, see DIVORCE, IV.

MALICIOUS PROSECUTION.

[Consult, also, FALSE IMPRISONMENT.]

1. **When the action lies.** It appeared that the prosecution complained of was based upon an affidavit verified by defendant, K., which alleged in substance that two deeds, which conveyed to deponent property of the value of $6000, and which were not recorded, were "feloniously taken, stolen and carried away from the possession of the deponent," as she had probable cause to suspect, and did suspect, by plaintiff; that he, at the time mentioned, told deponent that her deeds were not in order; that she went and got them, when plaintiff took them from her against her will and consent, put them into his pocket, refused to give them up and took them away by force. The facts so alleged as to plaintiff's obtaining and retaining the deeds, and that he subsequently and fraudulently conveyed the premises to another, were proved on the trial. *Held*, that while the charge of larceny was made in the affidavit in technical terms, yet as the facts and circumstances on which it was based were stated, and as the evidence established the truth of these allegations of fact, whether the deeds were the subject of larceny, or whether the facts stated made out that crime or not, the action was not maintainable; that the affiant was responsible for those statements, not for the legal conclusion drawn therefrom.—*Ct. of App., June*, 1880. Thaule *v.* Krekeler, 81 N. Y. 428.

2. **The prosecution must have terminated in plaintiff's favor.** The complaint should be dismissed unless plaintiff avers and proves that the suit or prosecution was determined in his favor.—*Com. Pleas., (Gen. T.,) June*, 1881. Nebenzahl *v.* Townsend, 61 How. Pr. 353.

3. **Probable cause—burden of proof.** In an action for malicious prosecution it is for the plaintiff to establish affirmatively the want of a reasonable and probable cause for the prosecution, and that it was instituted with malice. Thaule *v.* Krekelen, *supra.*

4. Upon the trial of such an action it is for the court to determine, as a matter of law, assuming plaintiff's evidence to be true, whether plaintiff has established these propositions. *Ib.*

For decisions relative to *Other personal torts*, analogous to malicious prosecution, see FALSE IMPRISONMENT; LIBEL; SLANDER.

MANDAMUS.

I. GENERAL PRINCIPLES.
II. USE OF THE WRIT IN VARIOUS CASES.
III. PROCEDURE.

I. GENERAL PRINCIPLES.

1. **Rule that there must be no other remedy.** Where a railroad company wrongfully refuses to receive and transport goods, tendered to it by one who offers to comply with the terms established by it in reference thereto, the remedy of the party aggrieved is by an action at law, to recover the damages sustained thereby, and as the remedy afforded to him by such action is an appropriate and adequate one, a *mandamus* compelling the company to receive and transport such goods will not be granted.—*Supreme Ct., (1st Dept.,) Nov.*, 1880. People, ex rel. Ohlen, *v.* New York, Lake Erie, &c., R. R. Co., 22 Hun 533.

II. USE OF THE WRIT IN VARIOUS CASES.

2. **Controlling judicial action.** An alternative *mandamus* is the proper remedy to raise the question whether a judge improperly refused to enter an order embodying his decision denying a stay.—*Supreme Ct., (1st Dept.,) June*, 1881. People *v.* Manhattan R. R. Co., 9 Abb. N. Cas. 448.

3. **Mandamus to corporate officers.** A *mandamus* may issue to compel an officer of a benevolent association having charge of the books thereof, to permit an inspection thereof, although he has a lien upon the books for arrears of salary, upon condition of their being returned to him after such inspection.—*Supreme Ct., (1st Dept. Sp. T. & Ch.,) Oct.*, 1880. People, ex rel. Aaronson, *v.* Scheel, 8 Abb. N. Cas. 342.

4. A *mandamus* may issue to the officers of an hospital to correct a certificate of death of a patient, filed by them with the board of health. —*Supreme Ct., (1st Dept. Ch.,) June*, 1880. People, ex rel. Haase, *v.* German Hospital, 8 Abb. N. Cas. 332.

5. **—to municipal officers.** In April, 1879, one B., who had been engaged as a teacher in the public schools for more than twenty years, and as a teacher in the College of the City of New York for the previous eleven or twelve, died leaving a widow. Thereafter the board of trustees of the college, at a meeting duly held, adopted a resolution directing that B.'s salary be paid from the date of his death to the end of the

annual school year, September 1st, 1879, to his widow or legal representative. The auditor and comptroller having refused to audit the account or issue a warrant therefor, on the ground that the claim was a mere gratuity or gift and did not constitute a legal claim upon the public treasury—*Held*, that a *mandamus* should issue to compel them to audit and pay the claim.—*Supreme Ct.*, (1*st Dept.*,) *Jan.*, 1881. People, ex rel. Burnet, *v.* Jackson, 23 Hun 568; S. C., 60 How. Pr. 330.

III. Procedure.

6. Vacating previous writs of application for mandamus. As to the right of a respondent, when an application is made for a *mandamus*, to move to vacate prior orders allowing a *mandamus*, see People, ex rel. Vandervoort, *v.* Cooper, 24 Hun 337.

MANSLAUGHTER.

Homicide.

MANUFACTURING COMPANIES.

I. Organization and Corporate Powers.
II. Liabilities of Officers and Trustees.
III. Individual Liability of Stockholders.
IV. Dissolution, Receiver, &c.

I. Organization and Corporate Powers.

1. Purchases and mortgages of chattels. Defendant's assignors sold to the A. B. W. Company, a manufacturing corporation organized under the general act of, 1848, (Laws of 1848, ch. 40,) certain machinery on credit, the corporation giving its notes for the purchase price secured by chattel mortgages upon the machinery. Each mortgage provided that the mortgagees might demand possession at any time, and that until such demand the possession of the mortgagor should be "deemed the possession of an agent or servant, for the sole benefit and advantage of his principal," the mortgagees. The sale was prior to the amendment of said act, (Laws of 1871, ch. 481,) authorizing such corporations to mortgage their personal property on consent of stockholders. Defendant took possession of the property. Plaintiff claimed title thereto under a levy and sale on execution against the corporation.

Held, 1. That although the form of the security adopted was prohibited by the said act (§ 2), this did not destroy the equitable rights of the vendors to hold the property as against any one except *bona fide* purchasers, until the purchase-money was paid; that the transaction was in effect a sale upon condition of payment of the purchase price as specified, when the entire ownership was to be transferred, up to which time it was the intention that the vendors should hold the title and possession; and the corporation received the property *cum onere;* that the rights of the vendors were not dependent entirely upon the act of the corporations in creating a lien, but arose out of the transfer, and are secured by the rule protecting the equitable liens of vendors; and therefore, that as between the parties, defendant was entitled to the property.

2. That a mortgage upon said property given by said corporation to secure an antecedent debt was void.—*Ct. of App., March*, 1880. Coman *v.* Lakey, 80 N. Y. 345.

2. Mortgages of land — assent of stockholders. In an action brought by stockholders of a manufacturing corporation, among other things, to set aside a mortgage executed by it upon its land and property, the complaint alleged that the written assent of two-thirds of the stockholders was not first obtained and filed as required by the statute, (Laws of 1867, ch. 517,) as amended by (Laws of 1871, ch. 481,) and that it was not given for a valid debt of the company. These allegations were denied by the answer. The referee found that the mortgage was given and taken in good faith, and that the company received in cash the whole amount secured. Judgment of foreclosure had been obtained upon the mortgage. There was no proof and no finding, or request to find, as to the assent. *Held*, that it was to be presumed, in the absence of proof, that the required assent was obtained and filed; also, that it was for the plaintiff to prove that the mortgage was neither given to secure a debt of the company, nor that the money obtained was used to pay debts; that the judgment of foreclosure, unless impeached, was conclusive against the corporation and its stockholders as to the validity of the mortgage, and the burden of impeaching it was upon plaintiffs.—*Ct. of App., April*, 1880. Denike *v.* New York, &c., Lime and Cement Co., 80 N. Y. 599, 606.

II. Libailities of Officers and Trustees.

3. Sufficiency of the annual report. The statutory liability imposed upon the trustees of a manufacturing corporation by the manufacturing act of 1848 (Laws of 1848, ch. 40, § 12,) for a failure of the corporation to make and file an annual report as prescribed, does not attach if a report is made and filed, in terms complying with the statute, although some of the material representations therein are untrue. —*Ct. of App, Feb.*, 1880. Bonnell *v.* Griswold, 80 N. Y. 128.

4. Nor does such penalty attach when the stock of the corporation has been issued in payment for property as authorized by the amendatory act of 1853 (Laws of 1853, ch. 333, § 2), and this fact is not stated in the report as required by said act. *Ib.*

5. Who is liable as trustee—effect of resignation, &c. In an action under the general manufacturing act (§ 12,) against a trustee, to charge him with a debt of the corporation, because of its failure to make and file an annual report, the liability does not depend upon the fact that defendant was a trustee when the debt was incurred, but upon his having been a trustee when the default in filing the report occurred.—*Ct. of App., March*, 1880. Bruce *v.* Platt, 80 N. Y. 379.

6. Where, therefore, a trustee resigned after the incurring of the debt in question, but before

the default complained of—*Held*, that he was not liable; also, that it was not necessary for him to give notice to the public, or the plaintiffs or any persons other than his associates, of his intention to resign, or of his resignation. *Ib.*

7. Defendants, in February, 1874, were elected trustees of a manufacturing corporation for one year. Before the expiration of the year the corporation had become insolvent and discontinued its business. It did no business after January 15th, 1875. On that day the trustees passed a resolution that the corporation should cease to transact business and resigning their office, to take effect at the end of their term. Defendants did not act as trustees after that date. In an action under the manufacturing act (§ 12), to recover the amount of a debt due from the corporation because of a failure to file an annual report in January, 1876—*Held*, that defendants were not liable; that while, if they had continued to act as trustees after the expiration of their term, they would have been bound to make the report, they were not bound to hold over, and unless they chose to act, their offices became vacant at the end of the year.—*Ct. of App., April*, 1880. Van Amburgh *v.* Baker, 81 N. Y. 46.

8. **Effect of abandonment of organization, dissolution, &c.** Where it appeared that in December, 1874, the entire property of the corporation was sold under execution; that before January 1st, 1875, every person interested in it as a corporator had abandoned it; that it was carrying on no business, had no means of procuring money, and intended to do no further act in pursuance of the object of its incorporation—*Held*, that the statute did not require the filing of a report for the year 1875; that for every practical purpose the corporation might be deemed to have been dissolved; and so, that its obligation to file a report had ceased before the arrival of the time when the report was required. Bruce *v.* Platt, *supra.*

9. The authorities upon the question as to when, so far as the liability of trustees and stockholders of a corporation is concerned, it may be deemed to be dissolved, collated. *Ib.*

10. **Who may sue, and for what debts.** A judgment of record is a debt, "then existing," for which the trustees are liable, under section 12.—*Supreme Ct., (Sp. T.,) April*, 1880. Lewis *v.* Armstrong, 8 Abb. N. Cas. 385.

11. November 3d, 1877, a corporation, of which the defendant was the president and a trustee, drew its draft on a firm in New York, payable to its own order, four months after date, which draft was accepted by the drawee and thereafter sold to the plaintiff, by whom the same was at maturity presented for payment, and notice of its non-payment duly given to the company, against which the plaintiff thereafter recovered a judgment, upon which an execution was issued and returned wholly unsatisfied. The company having failed to file the report required by section 12 of chapter 40 of 1848, between the 1st and 20th days of January, 1878, or at any time thereafter, the plaintiff brought this action against the defendant to recover the amount due upon the draft. *Held*, that even if the contingent liability of the company upon the draft, prior to its maturity, was not such an indebtedness as would, under the said statute, be recoverable from the trustees, yet, as that liability became an absolute indebtedness upon due notice to the company of the non-payment of the draft by the acceptors, and as the report was then still unfiled, the statute imposed upon the defendant a liability therefor, which the plaintiff could enforce by an action.—*Supreme Ct., (1st Dept.,) Dec.*, 1880. First Nat. Bank of South Norwalk *v.* Fenton, 23 Hun 309.

12. **Who may not sue.** *It seems* that where a manufacturing corporation is indebted to a firm, one member of which is a trustee of the corporation, neither the members of the firm jointly, nor the other members to whom the trustee has transferred his interest, can maintain an action against another trustee under the provision of the manufacturing act, (§ 12), making the trustees liable for the debts of the corporation upon failure to file an annual report; nor can they hold him liable as stockholder under the provision of said act (§ 10), making stockholders individually liable for the debts of the corporation, until the whole amount of the stock is paid in and a certificate filed.—*Ct. of App., April*, 1880. Knox *v.* Baldwin, 80 N. Y. 610.

13. The creditor trustee being equally with the other trustees charged with the duty of seeing to it, that the annual report is made, also of calling in the capital stock and filing the certificate, and so being chargeable with the default, he cannot alone or in connection with his associates, nor can his assignees, pursue a remedy which, if enforced, would enable him to profit by his own wrong or negligence. *Ib.* S. P., Roach *v.* Duckworth, 61 How. Pr. 128.

14. **Time within which to sue.** An action under the manufacturing act, (Laws of 1848, ch. 40, § 12), against the trustees of a corporation organized under it, to recover a debt of the corporation because of its failure to file an annual report, need not be commenced within three years after the debt accrued against the corporation. It is immaterial when the debt arose; if it existed and might have been the subject of an action at the time of the alleged default in complying with the requirement of the statute, an action may be commenced at any time within three years thereafter.—*Ct. of App., April*, 1880. Duckworth *v.* Roach, 81 N. Y. 49.

15. Where, therefore, plaintiff loaned money to such a corporation in 1873, and the corporation omitted to file a report in January, 1875—*Held*, that an action against defendants, as trustees, commenced in March, 1877, was in time. *Ib.*

16. Upon appeal defendants claimed that no report was filed in January, 1874, and so that the action was barred. This was not alleged in the pleadings, and the fact nowhere appeared in the proceedings on trial. *Held*, untenable; that to present the point that the cause of action accrued in 1874, defendants should have shown on the trial the omission to file a report for that year. *Ib.*

17. Where the trustees fail, during three successive years, to file the annual report, the right of action is barred by the statute of limitations, and the continuance of the default does not create a new liability.—*Supreme Ct., (1st Dept.,) Feb.*, 1881. Cornell *v.* Roach, 9 Abb. N. Cas. 275.

18. Where a liability had been incurred by

the trustees of a manufacturing corporation for a failure to file a report within the first year of the organization of the corporation, but no action had been commenced thereon until the going into effect of the act of 1875 (ch. 510), amending the section imposing the liability—*Held*, that the creditor's right of action was lost; as the amendment repeals the original section, and requires no report until the corporation has been organized at least one year, and the saving clause relates only to actions then pending.—*Ct. of App.*, *April*, 1880. Knox *v.* Baldwin, 80 N. Y. 610.

19. Matters of defence. *It seems* that in an action to charge defendant as trustee of a manufacturing corporation, because of failure of the corporation to file an annual report, where it appears that the term of office of defendant expired before the contracting of the debt for which he is sought to be made liable, it is necessary for the plaintiff to prove that defendant held over and continued to act after the expiration of his term; this fact is not to be presumed.—*Ct. of App.*, *Nov.*, 1880. Philadelphia, &c., Coal and Iron Co., *v.* Hotchkiss, 82 N. Y. 471.

20. In such an action defendant offered to prove that after his term of office had expired, and before the debt to plaintiff was contracted by the corporation, he filed his petition in bankruptcy, including in his list of assets his stock in the corporation; that he was adjudged a bankrupt and assigned and delivered said stock to the assignee and received his discharge, and that after the filing of the petition he had no connection with the corporation. This offer was rejected. *Held*, error; that the bankruptcy proceedings were circumstances bearing upon and explaining the fact that defendant had ceased all connection with the corporation; and so that proof thereof was competent, and the offer was not too broad. *Ib.*

21. Liability for false report. *It seems* that where the requirement of Laws of 1853, ch. 333, § 2, in relation to the report, is not obeyed, the report made is false and subjects the persons making it to the penalty imposed by the original act (§ 15), for the making of a false report.—*Ct. of App.*, *Feb.*, 1880. Bonnell *v.* Griswold, 80 N. Y. 128.

22. A report made and filed by a manufacturing corporation, stated that the "capital stock had been paid up in full." *Held*, that this was equivalent to a statement that all the capital had been paid in, and so was a compliance with said provision of the act of 1848 (§ 12), that the report "shall state * * * the proportion actually paid in" of the capital. *Ib.*

23. The verification to the report was as follows. "Sworn to before me this 13th day of January, 1870, Charles W. Anderson, notary public, New York county." The report was signed by the president of the corporation and was actually verified by him before a proper officer. *Held*, that the verification was sufficient. *Ib* 139.

24. The corporation was adjudged a bankrupt in November, 1870, and on January 3d, 1871, its entire property passed into the hands of an assignee in bankruptcy. *Held*, that no report subsequent to that of January, 1870, was necessary. *Ib.*

See also as to the liability when a false report is filed, Brockway *v.* Ireland, 61 How. Pr. 372.

25. Place of trial of action based on false report—change of venue. As an action under the manufacturing act (§ 15), against an officer of a corporation organized under it, to recover a debt of the corporation, on the ground that such officer has signed a false report, is a penal action, it is local (Code of Civ. Pro., § 983), and must be tried in the county where the cause of action or some part thereof arose.—*Ct. of App.*, *Dec.*, 1880. Veeder *v.* Baker, 83 N. Y. 156.

26. As the cause of action is solely the false report, it arises in the county where said report was made and filed, and the venue should be laid in that county, although the debt against the company may have originated in another. *Ib.*

27. The right of the defendant in such an action to have the place of trial changed to the proper county, where the venue is laid in another, is an absolute one, and his motion to secure that right cannot be defeated by proof showing that the convenience of witnesses and the ends of justice would be promoted by retaining the place of trial as stated in the complaint. *Ib.*

28. *It seems* that the proper practice in such case is to order the change upon defendant's motion, and then, if plaintiff desires a change on the grounds upon which such change is authorized by the code (§ 987), he must make his motion. *Ib.*

III. Individual Liability of Stockholders.

29. Who is liable as a stockholder. In an action by a judgment creditor of a manufacturing corporation, to charge a stockholder thereof with the payment of the judgment because of a failure to pay in the amount due upon his stock, the fact that he was a stockholder is sufficiently shown by proving that he was one of the trustees named in, and that he signed the certificate of incorporation; that he subscribed for fifty shares of the stock, and subsequently acted as secretary of the company, even though it is not shown that he in fact actually received his certificate of stock.—*Supreme Ct.*, (*3d Dept.*,) *May*, 1881. Wheeler *v.* Miller, 24 Hun 541.

30. Necessity and sufficiency of previous proceedings against the company. To authorize a creditor of a corporation formed under Laws of 1848, ch. 40, to maintain an action against one who is then a stockholder thereof, to recover the amount unpaid upon his stock, as provided in §§ 10 and 24 of the said act, it is sufficient to show that an action has been brought against the company as therein provided, and it is not necessary to show that a judgment has been recovered against it, and that an execution issued thereon has been returned unsatisfied in whole or in part.—*Supreme Ct.*, (*2d Dept.*,) *Dec.*, 1880. Handy *v.* Draper, 23 Hun 256.

31. In such an action proof that the judgment was recovered against the company is not sufficient; it is incumbent upon the plaintiff to prove, by competent and satisfactory evidence,

the validity of his claim against the company. Wheeler *v.* Miller, *supra.*

32. Matters of defence. In such an action the defendant cannot dispute the validity of the judgment recovered against the company, or of the execution issued against it thereon, for mere irregularities. *Ib.*

IV. Dissolution, Receiver, &c.

33. Right of stockholders to sue for dissolution. A portion of the stockholders of a manufacturing corporation cannot maintain an action to dissolve it; nor have they, in the absence of proof of fraud, mismanagement or wrong-doing on the part of its directors, an absolute right to have a receiver of its property appointed; and this, although the corporation be utterly insolvent; it is at least discretionary with the court.—*Ct. of App., April,* 1880. Denike *v.* New York, &c., Lime and Cement Co., 80 N. Y. 599, 606.

34. *It seems* that a manufacturing corporation may temporarily lease its property to some person who will continue and carry on its business. If, however, such a lease is unlawful, it does not give a portion of the stockholders a standing in a court of equity to ask for a dissolution of the corporation. *Ib.*

35. Grounds for dissolution. Under the provisions of the statute, (1 Rev. Stat. 604, § 4; 2 Id. 463, § 38,) providing that a corporation shall be deemed or adjudged to be dissolved, when it shall have remained insolvent, or neglected or refused to pay its notes or evidences of debt, or suspended its business for one year, a corporation cannot be said to have committed an act of insolvency, or to have neglected or refused to pay its obligations, because its demand notes remain outstanding until payment has been demanded. *Ib.*

For rules applicable to manufacturing companies *In common with other* corporations, see Corporations; and the titles of the various corporate bodies.

MAPS.

Admissibility and effect of, *As evidence,* see Evidence, 77.

MARINE COURT OF CITY OF NEW YORK.

Appeal, 140-142.

MARINE INSURANCE.

Insurance, IV.

MARITIME LIENS.

Shipping, 7.

MARRIAGE.

Husband and Wife, I.

MASTER AND SERVANT.

1. The contract of hiring. In case of a contract of hiring for an undescribed period, although the contract may take effect immediately on its being made, yet, if the nature of the service to be performed under it is such that the performance of it regularly commences at a certain period of the year and ends at a certain period, no service being performed between the last-named period and the recurring first-named period in the next year (which circumstances are well known to both parties), the date of the commencement of the year for the running of the contract as one from year to year under the general rule will be the first-named period; the time intervening between the making of the contract and such first-named period forms no part of such year.—*Superior Ct., June,* 1880. Tyng *v.* Theological Seminary, &c., of Ohio, 46 Superior 250.

2. Discharge. A household servant, employed by the month, may be discharged at the expiration of any month.—*City Ct. of Brooklyn, (Gen. T.,) Jan.,* 1880. Condon *v.* Callahan, 9 Abb. N. Cas. 407.

3. Liability of master to third persons for servant's acts. Whether the wrongful act of the servant of a railroad company, not inconsistent with the nature of his employment, was done in pursuance of his employment and in the interest of his employers, or wickedly and maliciously out of his own spite, is always a question for the jury. When the jury find such act to have been done in pursuance of the servant's employment and to serve the interest of the employer, the employer is liable.—*Superior Ct., Dec.,* 1880. Hoffman *v.* New York Central, &c., R. R. Co., 46 Superior 526.

4. The above principles applied to a state of facts, showing the plaintiff, a lad eight years of age, being a trespasser on one of the defendant's trains, then moving at the rate of ten miles an hour, was kicked therefrom by one of the defendant's servants, thereby suffering severe injuries: the court holding that there was no distinction in the authorities between the commission of such an act by the conductor and by other servants of the company. *Ib.*

5. It was shown upon the trial that plaintiff was thrown from defendant's car by the conductor in charge thereof while it was in motion. The court charged that if the conductor "acted neither maliciously nor with the view to effect some purpose of his own, but within the general scope of his employment, while engaged in defendant's business, and with a view to the furtherance of that business and the defendant's interest, believing, upon the appearances before him, and upon which he had to exercise his judgment, that his duty to defendant required him to act, then the defendant is responsible for the manner in which he acted, in excess of his authority." *Held,* correct.—*Superior Ct., June,* 1880. Schultz *v.* Third Ave. R. R. Co., 46 Superior 211.

6. Liability of master to servant, generally. Upon the trial of this action, brought to recover damages for the death of the plaintiff's intestate, which was alleged to have been occasioned by the defendant's negligence, it appeared that the deceased, an employee of the defendant, while engaged in coupling cars, caught his foot in an open ditch or trench, and being unable to extricate it was run over and killed. The counsel for the defendant requested the court to charge that if this ditch had remained, while the deceased was there, in the condition in which it was at the time of the accident, and in plain sight and he knew of its existence, he took the risks incident to its existence, and that the plaintiff could not recover. *Held*, that the court should have charged as requested, and erred in qualifying it by charging that that was so if he understood fully all the dangers that might under any circumstances result to him from the existence of the ditch.—*Supreme Ct*, (*4th Dept.*,) *Jan.*, 1881. De Forest *v.* Jewett, 23 Hun 490.

7. —for defective machinery. A master is not absolutely bound to furnish his servant with safe machinery, nor does he guarantee that the machinery furnished is perfect. He is only required to use due care and diligence in the selection and use thereof. The degree of care required of him is to be measured by the circumstances of each case, and depends upon the kinds of machinery used, the risks incident to its use, and the hazards of the business in which it is used.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. Jones *v.* New York Central, &c., R. R. Co., 22 Hun 284.

8. Where a master furnishes defective machinery for use in the prosecution of his business, he is not excused by the negligence of a servant in using the machinery from liability to a co-servant for an injury which could not have happened had the machinery been suitable for the use to which it was applied.—*Ct. of App.*, *June*, 1880. Cone *v.* Delaware, &c., R. R. Co., 81 N. Y. 206.

9. —for negligence of fellow-servant. The liability of a master for an injury to an employee, occasioned by the negligence of another employee, does not depend on the grade or rank of the latter, but upon the character of the act in the performance of which the injury arises.—*Ct. of App.*, *Sept.*, 1880. Crispin *v.* Babbitt, 81 N. Y. 516.

10. If the act is one pertaining to the duty the master owes to his servants, he is responsible to them for the manner of its performance; but if the act is one pertaining only to the duty of an operative, the employee performing it, whatever his rank or title, is a mere servant, and the master is not liable to a fellow-servant for its improper performance. *Ib.*

11. Instances. McC., plaintiff's intestate, was employed in the yard of defendant, to assist the yardmaster, L.; he was hired by L. and was under his control and supervision. While McC. was engaged, by the direction of L., in attaching a damaged car standing on the track to another, L. negligently signaled to an engineer, whose train stood upon the track, to back the train, which he did, without signal or warning, and in consequence McC. was crushed between the cars, receiving injuries causing his death. In an action to recover damages—*Held*, that the yardmaster was to be deemed a fellow-servant with the deceased as to all acts done in the range of the common employment, except those done in the performance of some duty which defendant owed to its servants; that the act in question was not one of that character; and that, therefore, defendant was not liable.—*Ct. of App.*, *Feb.*, 1881. McCosker *v.* Long Island R. R. Co., 84 N. Y. 77.

12. The defendant, a railroad company, was accustomed, to the knowledge of its employees, to run upon its single track, extending from Syracuse to Rochester *via* Auburn, extra or wildcat trains, the movements of which and of the regular trains were regulated by telegraphic dispatches. By the printed rules with which employees were furnished, its telegraph operators and engineers were directed to comply strictly with the orders received by telegraph. The defendant's superintendent having decided, on August 22d, to send an extra freight train to Cayuga, telegraphed to its operator at that station to have train No. 50, of which the plaintiff's intestate was the engineer, held on its arrival at that station until further orders. The operator having received the message, and replied to defendant's superintendent, found the intestate, and, by mistake, told him to hold his train until the arrival of a regular train, known as No. 61, instead of telling him to hold it for orders. The intestate having left the station with his train after the arrival of No. 61, ran into the extra about a mile and a half from the depot, and was killed. In an action to recover the damages occasioned by his death, the court charged the jury that the telegraph operator and the deceased were not co-employees. *Held*, that this was error.—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1881. Dana *v.* New York Central, &c., R. R. Co., 23 Hun 473.

13. When the co-servant will be deemed the master's alter ego. An act or duty which a master is bound to perform for the safety and protection of his servant cannot be delegated so as to exonerate him from liability for an injury to the servant caused by an omission to perform it, or by its negligent performance; and this, whether the misfeasance or non-feasance is that of a superior or inferior officer, agent or servant, to whom the doing of the act or the performance of the duty has been committed. The act or omission is that of the master also, irrespective of the question whether it was or was not practicable for the master to act personally, or whether he did or did not do all that he personally could do to secure the safety of the servant.—*Ct. of App.*, *Feb.*, 1880. Fuller *v.* Jewett, 80 N. Y. 46, 52.

14. One H., who acted as the superintendent of the defendant, a gas company, caused a trench to be dug in a street to expose a gas-pipe therein, in order that it might be examined and repaired. The trench having, by mistake, been dug about two and a half feet south of the pipe, H., in order to avoid opening a new trench, ordered the men to undermine the earth north from the trench to the pipe, and to throw the dirt removed upon the top of the earth which covered the excavation over the pipe. The overhanging bank having fallen in and injured the plaintiff, an employee of the defendant, while he was engaged in examining the pipe, he brought this action to recover the damages occasioned thereby. *Held*,

that the questions whether or not H. was, as to the act in question, to be regarded as the *alter ego* of the company, and whether or not the evidence showed him to be an unskillful and improper person to be employed as a superintendent, should have been left to the jury, and that it was error to direct a non-suit.—*Supreme Ct.*, (*2d Dept.*,) *Sept.*, 1880. Devine *v.* Tarrytown, &c., Gas Light Co., 22 Hun 26.

15. When he will not be. In an action to recover damages alleged to have been occasioned by defendant's negligence, it appeared that plaintiff was a laborer employed in defendant's iron works, which, as plaintiff's evidence tended to show, were under the management and control of one B., defendant himself not living in the place where the works were located, and only occasionally visiting them. At the time of the accident, plaintiff was at work near an engine, when B. carelessly let on steam and plaintiff was injured. The court charged that although B., as agent or superintendent, represented and stood in the place of defendant, he did so only in respect to those duties which defendant had confided to him as such. Defendant's counsel then requested the further charge, that as to any other acts or duties performed by B., in and about defendant's works or business, he was not to be regarded as defendant's representative, but as a fellow-servant with plaintiff. This the court refused to charge, but left it as a question of fact to the jury. *Held*, error; that it was a question of law, and the court should have charged as requested.—*Ct. of App.*, *Sept.*, 1880. Crispin *v.* Babbitt, 81 N. Y. 516.

16. The court was also requested, and refused, to charge that in letting on the steam B. was not acting in defendant's place. *Held*, error. *Ib.*

For rules regulating the law of *Agency*, generally, see Principal and Agent.

For liability of *Railroad companies*, for injuries to servants in their employ, see Railroad Companies, 45-53.

MATERIAL-MEN.

Mechanics' Lien; Shipping, 7.

MAYOR.

Removal of *Officers* by, see New York City, 55, 56.

MEASURE OF DAMAGES.

Damages, II.

MECHANICS' LIEN.

I. The Lien; and Rights of the Parties, generally.

II. Proceedings to Foreclose.

I. The Lien; and Rights of the Parties, generally.

1. Interpreting the statutes. The act of 1875 (Laws of 1875, ch. 379,) gives to a sub-contractor a lien, and the words "liable to pay at the time," in the provision thereof, providing that the aggregate amount of liens "must not exceed the amount which the owner would be *otherwise liable to pay at the time* of the filing of the claim," etc., do not necessarily mean a liability which can then be enforced, but mean liability to pay by virtue of, and according to the terms of the contract, either presently or *in futuro*. The clause was intended to limit the owner's liability in the aggregate to the amount which he has contracted to pay, deducting payments made before the filing of the lien.—*Ct. of App.*, *June*, 1880. Heckmann *v.* Pinkney, 81 N. Y. 211, 216; *affirming* 8 Daly 466.

2. Repeal. The mechanics' lien law for the city of New York, of 1863, (Laws of 1863, ch. 500,) was repealed by the law of 1875, (Laws of 1875, ch. 379.) *Ib.*

3. Who may file a lien. The defendants leased certain lands and quarries to a cement company for the term of seven years, with privileges of renewal, the company agreeing to erect certain improvements thereon, which were to become the property of the lessors upon the termination of the lease. The plaintiff, in pursuance of a contract made with the company, erected the improvements upon the lands, the defendants assisting in locating the same and directing him as to the foundations thereof. The cement company having failed, the plaintiff filed a notice of lien under Laws of 1873, ch. 489. *Held*, that he thereby acquired a valid lien upon the land as against the defendants, the owners thereof.—*Supreme Ct.*, (*3d Dept.*,) *May*, 1881. Otis *v.* Dodd, 24 Hun 538.

4. Necessity of contract with owner. By a lease from the owners of certain premises in the county of Queens it was agreed in substance that, "as part of the consideration of the letting," the improvements built or to be built upon the premises by the lessee should revert to the lessors at the expiration of the term, and that the lessee would leave them upon the premises; also, that the lessee would insure for half the cost of the buildings built or to be built upon the premises, and in case of fire would devote the proceeds to the re-erection or restoration of the improvements destroyed; in case of default in any of the covenants, on the part of the lessee, the lessor had the right to re-enter. Plaintiff, under a contract with the lessee, erected a building upon the premises. The lessors lived near the premises, saw the building from time to time while plaintiff was engaged in its erection, and made no objection. In an action to foreclose a mechanics' lien—*Held*, that the lessee was permitted by the owners to erect the building within the meaning of the mechanics' lien law for said county (Laws of 1862, ch. 478, § 1); and that the said lien was valid and enforceable against the land.—*Ct. of App.*, *Dec.*, 1879. Burkitt *v.* Harper, 79 N. Y. 273.

5. The notice of lien filed did not allege that the owners permitted the lessee to build, but that they permitted the plaintiff to furnish

the work and material; it specified the amount of the claim, the person against whom it was made, and the name of the owner and the situation of the building, particularly describing the land; it also stated that the work and material were furnished pursuant to a contract with the lessee. *Held*, that the notice was sufficient; that it was not necessary to state therein the permission of the owner; this was simply a fact to be alleged in the complaint. *Ib.*

6. Effect of payments by owner. Under the provisions of the mechanics' lien law of 1862, for Kings and Queens counties, (Laws of 1862, ch. 478, § 1,) which directs the disallowing as against the lienors of any payment made by the owner " by collusion, for the purpose of avoiding the provisions of this act, or in advance of the terms of any contract," payments made in advance, although without fraud or collusion, cannot be allowed.—*Ct. of App., Jan.*, 1881. Post *v.* Campbell, 83 N. Y. 279.

7. The statute, however, was intended to protect the lienor against payments made to the contractor or other persons to the prejudice of the lienor, and where payments in advance were made to him on account of the work or materials for which he claims a lien, he will not be permitted to dispute the right of the owner to have them credited because they were made too soon. *Ib.*

8. Notice of lien. The plaintiff having furnished materials to one S., who had contracted to erect a building upon land in the city of Buffalo belonging to defendant, filed a notice of lien against the premises under Laws of 1844, ch. 305, § 1, as amended by Laws of 1871, ch. 872. The notice served by him, as required by § 6 of the act of 1844, in instituting proceedings to foreclose the lien, did not allege that there was anything due, or to become due, to S. on his contract with defendant, or that defendant was in any way indebted, or was to become indebted, to him thereon.

Held, 1. That the notice required by the act took the place of a complaint, and was subject to the rules governing pleadings in other actions.

2. That as it did not show that defendant was or would become indebted to S. under the contract, it did not state facts sufficient to constitute a cause of action and should have been dismissed.—*Supreme Ct., (4th Dept.,) Jan.*, 1881. Dart *v.* Fitch, 23 Hun 361.

9. Filing the notice: place of filing. The mechanics' lien law of 1844, (Laws of 1844, ch. 305,) for cities and certain villages named, was not repealed or affected by the act of 1858, (Laws of 1858, ch. 204,) extending to all the counties of the state except New York and Erie, the provisions of the lien law of 1854, (Laws of 1854, ch. 402.)—*Ct. of App., April*, 1880. Whipple *v.* Christian, 80 N. Y. 523; *affirming* 15 Hun 321.

10. Where, therefore, a material-man sought to acquire a lien in 1866, upon premises in Canandaigua, one of the villages specified in the act of 1844, but not in a county specified in the act of 1854, by filing his claim in the office of the town clerk of Canandaigua, as required in the act of 1854, instead of in the office of the clerk of the county of Ontario, in which said village is situated, as prescribed by the act of 1844—*Held*, that the notice was ineffectual; and that plaintiff acquired no lien. *Ib.*

11. — time of filing. *It seems* that under the Kings and Queens county act of 1862, a lienor is only entitled to the value of materials and work performed within three months next preceding the filing of the notice of lien. Post *v.* Campbell, *supra.*

12. In an action by a sub-contractor to enforce a lien under said act, plaintiffs claimed and were allowed, by the referee, $4350, and interest. The referee found that the value of the work performed by plaintiffs within three months preceding the filing of notice was $1077.17. The last installment on plaintiffs' contract was $3350, payable ten days after the completion of the work. *Held*, that, conceding the lien could be established as to the last installment by filing a notice within three months after the completion of the work, on the ground that it was not earned until such completion, this did not justify the including in the judgment work done previous to the three months and not embraced in that installment. *Ib.*

13. Duration and continuance of the lien. The notice was filed in the clerk's office on October 25th, 1877. On October 21st, 1878, the report of the referee in favor of the plaintiffs was filed, and on October 25th judgment in their favor was entered therein. On November 23d an order was made setting aside the judgment as prematurely entered, and directing that a judgment be entered *nunc pro tunc* as of October 26th, 1878.

Held, 1. That under Laws of 1871, ch. 872, § 6, the lien expired, unless judgment was entered within one year from the time of the filing of the notice.

2. That though the court had power to order its judgments to be entered *nunc pro tunc*, it could not thereby extend the time limited by the statute within which the lien must be prosecuted to judgment. Dart *v.* Fitch, *supra.*

14. Deposit of money to remove lien. The deposit of money with the county clerk to remove a mechanics' lien upon certain lands does not confer an absolute right upon the lienor to receive the money without first establishing his lien.—*Supreme Ct., (1st Dept.,) May*, 1881. People, ex rel. Flynn, *v.* Butler, 61 How. Pr. 274.

15. Where a sub-contractor files a lien, after his contractor has made an assignment for the benefit of creditors, he is entitled, in an action to foreclose the lien, to the money deposited by the assignee to discharge the lien, and is not obliged to share in the fund in the assignee's hands as an ordinary creditor.—*Com. Pleas, (Sp. T.,) July*, 1880. Murry *v.* Hutchinson, 8 Abb. N. Cas. 423.

II. Proceedings to Foreclose.

16. When a personal judgment is proper. Where, in a proceeding under the general lien law, (Laws of 1854, ch. 402, as amended by Laws of 1869, ch. 558, and Laws of 1873, ch. 489,) to foreclose an alleged mechanics' lien, it appears that no lien ever existed, a personal judgment cannot be rendered against the owner of the premises, upon an independent contract between him and the claimant. —*Ct of App., Jan.*, 1880. Weyer *v.* Beach, 79 N. Y. 409.

17. The proceeding, being statutory, can only

be resorted to in a case falling within the statute, *i. e.*, where a mechanics' lien exists. The power to render a personal judgment is merely incidental to the main purpose, and where it appears that no lien ever existed, the whole proceeding falls. *Ib.*

For decisions relative to the *Acquisition and enforcement of liens*, generally, see LIEN; and the titles there referred to.

MILITIA.

As to the exemption of members of the national guard from *Taxation*, see TAXES, 18, 19.

MILLS.

1. **Right of mill-owner to restrain diversion of water.** Plaintiff was the owner of a mill operated by water-power furnished by a creek. Defendant, who was a riparian owner above, under a claim of right, diverted the waters of the creek, conveying them by pipes to reservoirs whence its locomotives were supplied with water. The jury found, on sufficient evidence, that the water so diverted from the creek was sufficient "to perceptibly reduce the volume of water therein," and to "materially reduce or diminish the grinding power of plaintiff's mill," and that in consequence he had sustained damage to a substantial amount. *Held*, that plaintiff was entitled to maintain an action to recover the damages sustained, and restrain such diversion.—*Ct. of App., Jan.*, 1881. Garwood *v.* New York Central, &c., R. R. Co., 83 N. Y. 400; *affirming* 17 Hun 356.

2. **Sales and conveyances of mill property.** H. being the owner of premises upon which was a mill known as "The Old Mill," and a dam and reservoir, the water from which was conducted to the mill by a flume, conveyed "The Old Mill" to B., the deed granting the right to use the water of the reservoir for the benefit of the mill; with the condition, however, that in case the mill should not be kept in use the water-privileges and right of flowage should cease and revert to H. H. subsequently contracted to sell and convey to B. a portion of the lands lying between "The Old Mill" and the reservoir, upon which B. erected a new mill, taking the water from the reservoir for its use. B. subsequently assigned his contract back to H., and released the title acquired under it. H. thereupon, without reference to the contract, conveyed to S. the premises embraced therein, with appurtenances as to which nothing was said in the contract. The Old Mill was afterward destroyed by fire, and was not rebuilt. H. conveyed the lands upon which was the reservoir to defendant, C., who proceeded to fill up the reservoir and remove the flume. In an action to restrain the doing of this—*Held*, that as by the assignment of the contract to H. he became re-invested with the entire title, freed from the equities of the contract, the date of the deed to S. became the date of the sale, and the water-power then in use for the mill, and visibly incident and appurtenant thereto, passed by the deed; and that therefore the action was maintainable.—*Ct. of App., Sept.*, 1880. Simmons *v.* Cloonan, 81 N. Y. 557.

3. The assignment from B. to H. in terms authorized the latter to convey to S., and the conveyance was in pursuance of an arrangement between B. and S.; the consideration of the deed was about the contract price, with interest, unaffected by the improvements put on the land by B. *Held*, that all the facts justified a finding that the intent of the parties was, not simply to carry out the old contract, but that the sale should bear the date of the deed, and that the water-power should pass as appurtenant. *Ib.*

4. B. fitted the mill so erected by him with steam-power, to be used when the water supply was insufficient. *Held*, that this did not prevent the passing, under the deed to S., as appurtenant, of the right to use the water, as the water-power was necessary to the full enjoyment of the property. *Ib.*

For decisions on the law of *Riparian rights* and *Water-courses*, disconnected with the use of the water for mill purposes, see RIPARIAN RIGHTS; WATER-COURSES.

MINORS.

INFANTS.

MISCARRIAGE.

As to the carrier's liability for *Miscarriage of goods*, see CARRIERS; RAILROAD COMPANIES, IV.

As to the offence of *Producing an abortion*, see CRIMINAL LAW, 4.

MISJOINDER.

ACTION, 5, 6; PLEADING, I., II.

MISREPRESENTATIONS.

FRAUD, 2-6; SALES, III., IV.; VENDOR AND PURCHASER, 9-11.

MISTAKE.

The right to relief. To entitle a party to relief, on the ground of mistake, it must be a mistake as to some existing fact, not as to something to occur in the future; and it must be a mistake as to some fact bearing directly, not remotely, upon the act against which relief is sought.—*Ct. of App., March*, 1881. Southwick *v.* First Nat. Bank of Memphis, 84 N. Y. 420; *reversing* 20 Hun 349.

As to *Reformation of contracts*, and relief for mistake, *in equity*, generally, see EQUITY, II.

As to recovery back of *Money paid by mistake*, see MONEY RECEIVED, 5-7.

MONEY RECEIVED, (Action for.)

1. When the action lies, generally. An action for moneys had and received is maintainable against a town to recover moneys of another wrongfully taken by it and applied to its own use.—*Ct. of App., Dec.*, 1880. Horn *v.* Town of New Lots, 83 N. Y. 100.

2. Money received in good faith and in the course of business. One G., who was a member of the board of education, defendant herein, as attorney for it, received $3600.84 of its money, which he wrongfully appropriated to his own use; he subsequently procured from plaintiff, on a forged mortgage, $4129.34, which he deposited in a bank to his credit, and on the same day drew his check on said bank to defendant's order for the amount so appropriated, and delivered the same to defendant, who received it, without notice or knowledge of the fraud perpetrated upon plaintiff, and gave G. credit therefor; the check was paid and the money received thereon used by defendant. In an action to recover the amount so received by defendant from G.—*Held*, that defendant having received the money in good faith, and in the ordinary course of business, for a valuable consideration, was not liable.—*Ct. of App., Dec.*, 1879. Stephens *v.* Board of Education of Brooklyn, 79 N. Y. 183.

3. The possession of money vests the title in the holder, as to third persons dealing with him and receiving it in due course of business and in good faith, upon a consideration good as between the parties. *Ib.*

4. The doctrine that an antecedent debt is not such a consideration as will cut off the equities of third parties, in respect to negotiable securities obtained by fraud, has no application to money so obtained. *Ib.*

5. Payments made under mistake. The obligation of a party to refund money, voluntarily paid to him by mistake, can arise only after notification of the mistake, and demand of payment.—*Ct. of App., March*, 1881. Southwick *v.* First Nat. Bank of Memphis, 84 N. Y. 420; *reversing* 20 Hun 349.

6. Where a demand is necessary it is not excused by showing that defendant would not probably have complied if one had been made; and it matters not that defendant, on the trial, contests plaintiff's right to recover. *Ib.*

7. Where a bill of exchange is paid to one who holds it in good faith and for value, he cannot be called upon to account for the money paid, upon proof that in transactions between the drawer and drawee, of which he had no knowledge or means of knowledge, there has been some fraud or mistake to the injury of the drawee; and this, although the holder, not having parted with value at the time when he took the draft, could not have enforced it against the drawee, even after acceptance. This rule is based upon principles of public policy. *Ib.*

8. Payments induced by fraud. Plaintiff's complaint alleged in substance that defendant, at the request of S., loaded a vessel with petroleum, and by representations that it had put on board one hundred and ten barrels more than it had in fact, induced the master of the vessel to give to S. a bill of lading for that amount in excess of the actual amount loaded, and S. paid defendant therefor; that S. assigned the bill of lading, and the assignees on arrival compelled the master to pay for the deficiency. Plaintiff claimed as assignee of the master to recover the amount so paid. *Held*, that a demurrer to the complaint was properly overruled; that as the payment was compulsory, caused by the act of defendant, the law implied a promise on his part to repay it.—*Ct. of App., June*, 1880. Van Santen *v.* Standard Oil Co., 81 N. Y. 171.

9. As to whether, by the application of equitable principles, the master could be considered as having by his payment acquired the right to be subrogated in the place of S., and so entitled to enforce the cause of action which the latter had, *quære*. *Ib.*

10. Payments made to compound a crime. The law will not aid a party to recover back money paid for compounding a crime.—*Ct. of App., Feb.*, 1880. Collins *v.* Lane, 80 N. Y. 627.

11. Where a person has voluntarily, *i. e.*, without the coercion of force or threats, given his promissory note to compound a crime, and has been compelled to pay the same, it having been transferred to a *bona fide* holder for value before maturity, he cannot maintain an action against the one to whom the note was so given to recover back the moneys paid. As to whether one who aids in doing a criminal act can, under any circumstances, have an action to recover anything paid by him in furtherance thereof, *quære*.—*Ct. of App., Dec.*, 1880. Haynes *v.* Rudd, 83 N. Y. 251.

12. Payments of municipal assessments. An action is not maintainable to recover back an assessment voluntarily paid, which was irregular but has not been vacated, although an assessment on other lots in the same proceeding has been vacated.—*Ct. of App., Dec.*, 1879. Wilkes *v.* Mayor, &c., of New York, 79 N. Y. 621.

13. Where an assessment is not only unconstitutional and void, but has been so judicially declared and the invalidity is such that it must appear upon the proof necessary to be made to sustain proceedings under it, it is not essential to the maintenance of an action to recover back moneys collected under the assessment that it should first be judicially vacated.—*Ct. of App., Dec.*, 1880. Horn *v.* Town of New Lots, 83 N. Y. 100.

14. Payments of taxes—voluntary payments. The plaintiff having refused to pay a tax levied upon the amount of personal property for which he was assessed, on the ground that he did not reside in the town in which the assessment was made, proceedings were instituted before the county judge, in pursuance of ch. 361 of 1867, in which the judge made the usual order of reference in supplementary proceedings, and enjoined the plaintiff "from selling, assigning, incumbering, or in any manner interfering with his property until the further order of the court." Upon the coming in of the report an order was made directing the plaintiff to pay to the supervisor,

who had instituted the proceedings, the amount of the tax, with the costs of the proceedings. The plaintiff, having paid the amount as directed by the order, brought this action to recover the same from the assessors, on the ground that they had acted without jurisdiction in making the assessment. *Held,* that the payment was a voluntary one, and that the action could not be maintained.—*Supreme Ct.,* (*4th Dept.,*) *April,* 1881. Drake *v.* Shurtliff, 24 Hun 422.

MORTGAGES.

I. WHAT CONSTITUTES A MORTGAGE.

II. VALIDITY, INTERPRETATION AND EFFECT.

III. RIGHTS AND LIABILITIES OF THE PARTIES.
- 1. *As between themselves.*
- 2. *As towards grantee of mortgagor, who assumes the mortgage.*

IV. DECISIONS UNDER THE RECORDING ACTS. PRIORITY.

V. ASSIGNMENTS.

VI. FORECLOSURE.
- 1. *By advertisement; strict foreclosure, &c.*
- 2. *By suit.*

VII. REDEMPTION.

VIII. DISCHARGE OF THE LIEN BY PAYMENT.

I. WHAT CONSTITUTES A MORTGAGE.

1. Absolute deed, when a mortgage. The fact that the deed vests the legal title to the land in the grantee is not decisive on the question as to whether the conveyance is an equitable mortgage. In equity it may be a mortgage, although the defeasance be to some other than the grantor.—*Ct. of App., Nov.,* 1880. Pardee *v.* Treat, 82 N. Y. 385; *reversing* 18 Hun 298.

2. Where, therefore, a deed, absolute on its face, was executed by one G. to defendants, containing a covenant upon the part of the latter to pay certain liens, but which deed was intended simply as security for a debt of G. to defendants, and where, in accordance with the agreement of the parties, and as part of the same transaction, defendants executed a contract agreeing to convey to Mrs. G., on the payment by her of the amount of the liens and defendants' debt, which amount she agreed to pay at a time specified—*Held,* that an action by a lienor to recover of defendants the amount of his lien was not maintainable. *Ib.*

3. As to when a deed will be treated as a mortgage, and the right of action to have it so declared, see Bennett *v.* Austin, 81 N. Y. 308; Brumfield *v.* Boutall, 24 Hun 451.

II. VALIDITY, INTERPRETATION AND EFFECT.

4. Interpretation, generally. A mortgage was executed to M. and S., who were copartners, doing business under the firm name of M. & Co. It was expressed in the condition of the mortgage that it was intended among other things, "as a continuing security and indemnity" to the mortgagees "for and against all liabilities they then had incurred or might thereafter incur as indorsers, acceptors or sureties in any form," for J. B., one of the mortgagers, or the firm of J. B. & Co. *Held,* that the mortgage included not merely such liabilities as were incurred by the mortgagees jointly as copartners, but such as were incurred by either of them, separately and individually.—*Ct. of App., Nov.,* 1880. Nat. Bank of Newburgh *v.* Bigler, 83 N. Y. 51.

5. Consideration. In 1869, the plaintiff having caused the necessary papers to be prepared to commence an action to foreclose a mortgage given to it by the defendant S., the latter proposed, if the plaintiff would allow the loan to stand, to give a new mortgage to secure the payment of the sum secured to be paid by the first, together with a bond to be executed by additional parties. The plaintiff accepted this offer and the new bond and mortgage; discontinued the proceedings instituted for the foreclosure of the first mortgage, and took no further steps to collect it down to 1874, when this action was commenced to foreclose both mortgages, and to recover a judgment for any deficiency against the parties liable upon the bonds as collateral to which they were given. When the second bond and mortgage were given, no particular period of time was mentioned or agreed upon, for which the loan secured by the first mortgage was to be allowed to remain uncollected. *Held,* that the general agreement to allow the loan to remain for the time uncollected, followed by an actual forbearance of several years, furnished a sufficient consideration to support the second bond and mortgage as between the parties thereto, although no particular period for the forbearance was agreed upon.—*Supreme Ct.,* (*1st Dept.,*) *Jan.,* 1881. Mut. Life Ins. Co. *v.* Smith, 23 Hun 535.

6. Validity of mortgage to secure future advances. Defendant E. executed his bond and mortgage to secure the People's Safe Deposit and Savings Institution, for any indebtedness it had against the mortgagor, "upon or by reason of any promissory note, bill of exchange, overdraft, or otherwise." Subsequently said corporation loaned to the mortgagor various sums of money upon the discount of his notes, which expressed that the maker had deposited the bond and mortgage as collateral. In an action to foreclose the mortgage—*Held,* that the notes were void, as the corporation had no power, under its charter, to loan money on personal security (Laws of 1868, ch. 816,) and was prohibited by statute from discounting commercial paper (1 Rev. Stat. 712, §§ 3, 6); but that the corporation was authorized by its charter (§ 11) to invest in bonds and mortgages; that the fact that the loan was made by way of discount, and upon the security of the notes, as well as of the mortgage, did not vitiate the latter; and that it was a valid security for the loan and enforceable as such.—*Ct. of App., Jan.,* 1880. Pratt *v.* Eaton, 79 N. Y. 449.

III. RIGHTS AND LIABILITIES OF THE PARTIES.

1. *As between themselves.*

7. Mortgagee's right to proceeds

of insurance. December 1st, 1870, one A. executed to plaintiff a bond and mortgage for $2000, and covenanted thereby to keep the buildings insured for that sum and the policy assigned to plaintiff. A policy for that amount was procured, assigned to plaintiff and kept in force until November, 1874, when it was allowed to expire and a new policy for $3000 was procured by A., which was not assigned to plaintiff. March 6th, 1875, A. executed another bond and a mortgage covering the same premises for $1400 to his brother, the defendant E. Avery, and thereby covenanted to keep the premises insured for $3000, and the policy assigned to defendant, and the $3000 policy was made payable to him. The $3000 policy expired and a $2000 one issued in renewal thereof was thereafter made payable in case of loss to E. Avery, and was held by him at the time of the destruction of the premises by fire in October, 1877.

Held, 1. That by virtue of the covenant contained in his mortgage the plaintiff acquired an equitable lien upon the money due upon the policy, to the extent of his interest in the property; and that this was so although the policy had not been issued or made payable to him, but had been taken out by the mortgagor in his own name and contained no reference to the mortgagee.

2. That the record of the mortgage to the plaintiff was notice to the defendant of the covenant of the mortgagor to keep the premises insured for the plaintiff's benefit.

3. That the plaintiff was entitled to receive so much of the insurance money as might be necessary to satisfy any deficiency that might arise upon the sale of the premises under a decree of foreclosure.—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1880. Dunlop *v.* Avery, 23 Hun 509.

8. Mortgagee's right to rents and profits. The right of a mortgagee to the rents of land, without the interposition of the equity power of the court, before he has foreclosed the mortgage, depends upon the fact whether the possession is a lawful one, either by consent of the proper party, or by means of legal proceedings.—*Ct. of App.*, *June*, 1880. Bennett *v.* Austin, 81 N. Y. 308, 317.

9. Relative rights of mortgagee and purchaser from mortgagor. As to the rights of one taking a mortgage (given to secure an existing indebtedness) from one who has theretofore contracted to sell the land; how far the vendee will be protected in payments made to his vendor without notice of the mortgage; and as to payments, after notice of the prior mortgage, to an assignee of a mortgage given by the vendee, see Young *v.* Guy, 23 Hun 1.

2. *As towards grantee of mortgagor, who assumes the mortgage.*

10. What amounts to a covenant to pay the mortgage. An agreement by the grantee to pay the interest on the mortgage will not require him to accept a deed containing a clause assuming the payment of the mortgage.—*Supreme Ct.*, (*1st Dept.*,) *Jan.*, 1879. Manhattan Life Ins. Co. *v.* Crawford 9 Abb. N. Cas. 365.

11. The mortgagor of certain premises conveyed the same by a deed containing the following clause: "Which said mortgage the party hereto of the first part hereby assume and agree to pay as part of the consideration hereinbefore expressed." *Held*, that this was the covenant of the party of the second part.—*Superior Ct.*, *Jan.*, 1880. Fairchild *v.* Lynch, 46 Superior 1.

12. Effect of the covenant, generally. *It seems* that the mere fact that the purchaser of lands took subject to a mortgage does not render him liable, either legally or equitably, to indemnify his grantor against the mortgage.—*Ct. of App.*, *March*, 1881. Smith *v.* Truslow, 84 N. Y. 660.

13. *It seems*, however, the rule would be otherwise if the mortgage debt formed part of the consideration of the purchase and was to be paid by the purchaser, if he retained its amount. *Ib.*

14. The nature of covenants to pay mortgages, and what is sufficient to satisfy such covenants, considered. Fairchild *v.* Lynch, 46 Superior 1.

15. When the covenant is not binding. When, on the assumption of a mortgage by a grantee of land, the grantee receives the title only to transfer it to another, he is not liable under the clause in the deed assuming the mortgage.—*Supreme Ct.*, (*2d Dept.*,) *Sept.*, 1880. Deyerman *v.* Chamberlin, 22 Hun 110.

16. Where the grantee covenants to pay a certain mortgage, as part of the consideration of the deed, &c., and his grantor, who is also the mortgagor and obligor, thereafter purchases the said bond and mortgage, the grantee is not liable on his said covenant; this, though the bond and mortgage be subsequently transferred to third parties, and foreclosure proceedings instituted, in which the mortgagor is charged with and pays a deficiency. In such a case the mortgagor voluntarily extinguishes the personal liability on said mortgage before there is any breach of the covenant, there being no equitable reason why it should be kept alive.—*Superior Ct.*, *Jan.*, 1880. Fairchild *v.* Lynch, 46 Superior 1.

17. Who may enforce the covenant. A clause in a deed by which the grantee assumes and agrees to pay liens upon the premises can only be enforced by a lienor, when in equity the debt of the grantor secured by the lien becomes, by the agreement between them, the debt of the grantee. If in equity as well as law the grantor remains the principal debtor, the assumption clause is a contract between the parties to the deed alone, and the liability of the grantee for a breach of his obligation is to the grantor alone.—*Ct. of App.*, *Nov.*, 1880. Pardee *v.* Treat, 82 N. Y. 385; *reversing* 18 Hun 298.

18. A covenant in a deed, absolute on its face but intended simply as a mortgage, by which the grantee assumes and agrees to pay a prior mortgage, is in effect simply an agreement between the parties that the grantee will advance the amount of the prior lien upon security of the land, and gives no right of action against the grantee to the holder of the mortgage, as he is neither a party to the contract nor the one for whose benefit it was made.—*Ct. of App.*, *Feb.*, 1881. Root *v.* Wright, 84 N. Y. 72.

19. Liability of grantee for deficiency. Plaintiff sold to defendant W. certain premises, taking a mortgage thereon to secure a portion of the purchase money; subsequently, W. conveyed to defendants K. and H.,

undivided interests in said premises, the deed reciting that the parties thereto were jointly interested in the purchase from plaintiff, the title having, for convenience, been taken in the name of W. for the use and benefit of all in certain specified proportions, and that the grantees had assumed and agreed to pay their proportions of said mortgage. The conveyance was made subject to the mortgage, and the proportions thereof specified the grantees assumed and agreed to pay as part of the consideration. In an action to recover a deficiency arising on foreclosure of the mortgage—*Held*, that there was a sufficient consideration to sustain the covenant of the grantees; and that plaintiff, as mortgagee, could enforce the same.—*Ct. of App.*, *Dec.*, 1880. Hand *v.* Kennedy, 83 N. Y. 149; *affirming* 45 Superior 385.

20. Mortgagor's power to release grantee. One who purchases a part of mortgaged lands, and agrees with his grantor to assume and pay the whole mortgage, may discharge his land from the consequences of that assumption, by agreement made with his grantor while the latter is still the owner of the residue, and a grantee of the residue, after such discharge, cannot claim the benefit of the assumption. The grantee succeeds only to the equities of his grantor, existing at the time of the conveyance, and that without regard to any question of notice.—*Ct. of App., Jan.*, 1880. Judson *v.* Dada, 79 N. Y. 373.

21. Defendant A. being the owner of certain premises, subject to a mortgage then on record, sold and conveyed a portion thereof to D. and M., which, as stated in the deed, was "supposed to be eighty acres," the grantor covenanting that in case of a deficiency she would pay therefor at the rate of $30 per acre; the grantees, as the consideration for the conveyance, assumed and agreed to pay the whole mortgage; subsequently, it having been ascertained that there was a deficit in quantity of the land conveyed, A. executed to her said grantees a writing agreeing that she would save them harmless, to the amount of $273.32, the sum agreed to be paid for such deficit, from any claim under the mortgage. A. subsequently conveyed the residue of the premises to other parties, covenanting that the same was free and clear of all encumbrances. In an action to foreclose the mortgage—*Held*, that the grantees of such residue were entitled to no other or greater equities than those which A. had at the time she conveyed; that the residue was presumably chargeable in equity with the payment of $273.32 of the mortgage, and the portion so conveyed to D. and M. was chargeable with the balance; that the fact that the covenant of D. and M. to pay the mortgage was contained in a deed on record was immaterial; as were also the facts that the agreement of A. to re-assume the amount of the rebate for the deficiency, was not on record, and that the grantees of the residue had no notice thereof. *Ib.*

IV. Decisions under the Recording Acts. Priority.

22. Protection accorded to purchasers in good faith. To enable a subsequent purchaser to assail a prior unrecorded mortgage, under the recording act (1 Rev. Stat. 756, § 1,) it is incumbent upon him to show not only that he was a *bona fide* purchaser for value without notice, but that his conveyance was first recorded.—*Ct. of App., Nov.*, 1879. Westbrook *v.* Gleason, 79 N. Y. 23.

23. Where a junior mortgagee, with notice of a prior unrecorded mortgage, assigns his mortgage to a *bona fide* purchaser for value, who has no notice, the assignment is the "conveyance," within the meaning of said act (1 Rev. Stat. 762, §§ 37, 38,) and such assignee is entitled to preference, only in case he records his assignment before the first mortgage is recorded. *Ib.*

24. *It seems* that where, at the time of the execution of a mortgage, A., a third party, is in possession of the mortgaged premises, under an executory contract for the purchase thereof, and has made improvements thereon, and subsequently, and before the mortgage is recorded, A. takes a conveyance, in good faith, without knowledge of the mortgage, giving his bond and mortgage for the whole of the purchase price, and the deed and subsequent mortgage are recorded before the prior mortgage, the title of A. is superior to the prior mortgage; and a purchaser upon foreclosure of the mortgage so given by A. takes all his title, and so takes the premises freed from the lien of the prior mortgage. *Ib.*

25. In such case, for the purpose of determining the question of the lien of the prior mortgage, the legal title of A. will be considered as relating back to his equitable title, and is thus freed from the lien; but if by accepting a deed A. loses his equitable rights as vendee in possession under his contract, then he is protected by the recording act, as by parting with such right he becomes a purchaser for value, and is entitled on that ground to priority, although he paid no portion of the purchase-money. *Ib.*

26. Effect of recording as notice. That the recording of a mortgage is notice only to the extent of the amount then advanced, or agreed to be advanced, upon it; and when a second mortgage is entitled to priority over advances made upon a prior one after the recording of the second, see Ketcham *v.* Wood, 22 Hun 64.

27. Priority between mortgages. In an action to foreclose two mortgages, it appeared that there was a prior mortgage upon the premises, the beneficiary owner whereof, in pursuance of an agreement under which a fourth mortgage was executed and accepted, covenanted that said mortgage should have priority of lien over his mortgage, as if it had been previously executed and recorded. The lien of the first mortgage was subsequently discharged. *Held*, that the covenant did not give the fourth mortgage a priority of lien over plaintiff's mortgages; that the intent of the parties to the agreement under which the fourth mortgage was taken was, not to place that mortgage ahead of plaintiff's mortgages, or to give its owner an interest in the first mortgage, but simply that the liens prior to the fourth mortgage should only be the amount of plaintiff's mortgages; and that the agreement was fully satisfied by a discharge of the first mortgage.—*Ct. of App., March*, 1881. Taylor *v.* Wing, 84 N. Y. 471; *reversing* 23 Hun 233.

28. In an action for partition, plaintiff claimed title under a sale on foreclosure of two

mortgages, both executed April 1st, 1872. Two other mortgages were executed at the same time, all the mortgagees mutually agreeing that neither mortgage should have priority over either of the others, but that all should be equal liens. The mortgages under which plaintiff claimed were recorded in December, 1872; they were both assigned, the assignees taking for a valuable consideration and in good faith, and the assignments were recorded, one in January, 1874, the other in June, 1876. The other two mortgages were recorded, one in July, the other in August, 1877. *Held*, that the assignees of plaintiff's mortgages were subsequent purchasers, under the recording act, and upon recording their assignments acquired a preference over the other mortgages, and that, therefore, plaintiffs acquired a valid title under the foreclosure sale.—*Ct. of App., Dec.*, 1880. Decker *v.* Boice, 83 N. Y. 215.

V. Assignments.

29. The assignee's title, and how far subject to equities. An assignee in good faith and for a valuable consideration, of a recorded mortgage, gets no preference over a prior unrecorded deed or mortgage by reason of such record, when his assignor could not claim it by reason of notice or any other equity. —*Ct. of App., Dec.*, 1880. Decker *v.* Boice, 83 N. Y. 215.

30. Such assignee is, however, a purchaser, and his assignment is a conveyance under the recording act. (1 Rev. Stat. 756, §§ 37, 38.) If, therefore, the assignment is recorded before the recording of such prior deed or mortgage, he thereby obtains a preference; and an unrecorded conveyance is as to him void under said act. *Ib.*

31. Recording, and its effect. The record of an assignment of a mortgage is constructive notice to all persons of the rights of the assignee, as against any subsequent acts of the mortgagee affecting the mortgage; it protects as well against an unauthorized discharge as against a subsequent assignment by the mortgagee.—*Ct. of App., Sept.*, 1880. Viele *v.* Judson, 82 N. Y. 32; *reversing* 15 Hun 328.

32. It is not required, in order to make it the duty of a county clerk to record an assignment of a mortgage, that it should contain a statement of the place of record of the mortgage, or a description of the lands mortgaged; it is sufficient if it so identifies the mortgage that by examining the records the one referred to can be ascertained. *Ib.*

33. Noting assignment on record of the mortgage. It is not imposed by statute as a duty upon the county clerk to note an assignment upon the margin of the record of a mortgage, and his omission so to do does not affect the rights of the assignee. *Ib.*

34. Defendant D. executed to V. a mortgage for $1200, which the latter assigned to plaintiff; the assignment gave the date of the mortgage, the name of the mortgagor and mortgagee, and covenanted that there was due thereon $1200; the assignment was recorded, but the clerk did not minute on the margin of the record of the mortgage the fact of the assignment; there was no other mortgage of D. bearing the same date. V. thereafter, without authority, executed a discharge of the mortgage, which was recorded. L., a subsequent grantee of the premises, executed a mortgage thereon to H., both having actual knowledge at the time that such discharge was fraudulent; H. assigned said mortgage to defendant J., who, in an action to foreclose plaintiff's mortgage, claimed his to be the prior lien. *Held*, untenable; that the assignment to plaintiff was sufficient to identify the mortgage, and his rights under it were not affected by the fraudulent discharge, as against any one claiming a right under it; that J., by his assignment, gained no other or greater right than his assignor had at the date of the assignment, as against plaintiff's mortgage; and as H. had knowledge of plaintiff's rights, he took his mortgage subject thereto, and so transferred it. *Ib.*

35. The mortgage from L. to H. was made without consideration, for the accommodation of the former, and it had no inception until purchased by J. *Held*, that this did not change the position of J. or transform the character of his holding from that of assignee to that of mortgagee; also that plaintiff was not estopped from enforcing his mortgage, as against J. by the fact that after he had knowledge of the fraudulent discharge he took no steps within a reasonable time to correct the record. *Ib.*

VI. Foreclosure.

1. *By advertisement; strict foreclosure, &c.*

36. Foreclosure by advertisement. In an action brought in the Supreme Court to restrain the foreclosure by advertisement of a mortgage, a county judge may grant an order requiring the defendant to show cause before him why a temporary injunction should not be granted, and restrain him in the meantime from selling the premises at the time specified in the advertisement.—*Supreme Ct., (4th Dept.,) Jan.*, 1881. Babcock *v.* Clark, 23 Hun 391.

37. As to who is "a subsequent grantee" upon whom notice must be served, in foreclosure by advertisement (Laws of 1844, ch. 346,) see Raynor *v.* Raynor, 21 Hun 36.

38. Foreclosure of mortgages to loan commissioners. A sale under a mortgage, given pursuant to the act "authorizing a loan of certain moneys belonging to the United States," (Laws of 1837, ch. 150,) being a statutory proceeding, a failure to comply with the provisions of the statute renders the sale void. —*Ct. of App., Nov.*, 1879. Thompson *v.* Commissioners for Loaning, &c., 79 N. Y. 54.

39. The advertisement of sale must indicate who executed the mortgage, and to whom it was given. *Ib.*

40. Commissioners appointed under said act, in case of default in payment as specified therein, become seized as trustees only, subject to the possession and the right of the mortgagor to redeem, until a sale is made in conformity with the statute. *Ib.*

41. Where a published notice of sale under such a mortgage omitted the name of one of the mortgagors, and stated that the mortgage was given to "the commissioners of the United States deposit fund," instead of "the commissioners for loaning certain moneys of the United States," as stated in the mortgage, and as designated by the statute—*Held*, that the notice was defective and the sale illegal; and that the

mortgagors were thereafter entitled to redeem. *Ib.*

42. After such an illegal sale, a mortgagor served upon the commissioners a notice in writing, offering to pay the amount of the mortgage, principal and interest, and to redeem the premises; also stating therein that she desired an accounting of the rents and profits, possession having been taken by the purchaser. The commissioners made no answer. In an action to redeem—

Held, 1. That the omission to make tender was not fatal to the action, but that in any event it only affected the question of costs; that the plaintiff in such an action occupied the same position as any other mortgagor seeking to redeem; also, that plaintiff was entitled to an accounting from the purchaser, and his successors in interest and possession, for the rents and profits.

2. That such an action, with all the parties brought in, was the proper remedy in such case. *Ib.*

43. Plaintiff, at the time of the execution of the mortgage, was the owner in fee of one-third of the premises; she subsequently received a deed from her husband of the other two-thirds. *Held*, that defendants were not in a position to raise the question as to plaintiff's rights as grantee of her husband. *Ib.*

44. **Strict foreclosure.** In what cases an action for a strict foreclosure may be maintained, and when an accounting of the rents and profits received by the mortgagee should be ordered, see Ross *v.* Boardman, 22 Hun 527.

2. *By suit.*

45. **Jurisdiction.** Where, by mistake, the land intended to be covered by a mortgage is therein so vaguely and uncertainly described as to render it impossible to identify and locate it, an action to reform the mortgage by correcting the error in the description of the land, and to foreclose the mortgage as so reformed, can be brought in the Supreme Court, but cannot be brought in a County Court, the latter court not having jurisdiction of an action to reform a mortgage.—*Supreme Ct.*, (*3d Dept.*,) *May*, 1881. Avery *v.* Willis, 24 Hun 548.

46. **The right of action.** A., who purchased at a foreclosure sale, afterwards executed a mortgage upon the property so purchased, which mortgage was subsequently assigned to B. It being then first learned that at the time of the foreclosure C. had a junior mortgage on the premises, and that through mistake he had not been made a party to the action, A. took an assignment of the foreclosed bond and mortgage, and joined with B. in an action for a second foreclosure of the mortgage, C. being made defendant. *Held*, upon demurrer by C., that such second foreclosure could be maintained, and C.'s mortgage be shut off from being a first lien, the mortgage lien anterior to C.'s not being thereby increased.—*Supreme Ct.*, (*1st Dept. Sp. T.*,) *March*, 1881. Franklyn *v.* Hayward, 61 How. Pr. 43.

47. **Parties.** The mortgagor died seized of the mortgaged premises, and left by will a legacy to his daughter, C., not making it a charge upon the land. He left sufficient personal property to pay the legacies, and bequeathed the "remainder," including the real estate, to his sons.

Held, 1. That C. had no interest in the mortgaged premises, and was therefore not a necessary party to an action to foreclose the mortgage.

2. That the fact that the executors had wasted the personal property, and neglected to pay the legacy, could not charge the real estate with such payment.—*Supreme Ct.*, (*Sp. T.*,) *Oct.*, 1880. Hebron Soc. *v.* Schoen, 60 How. Pr. 185.

48. **Process, and how served.** As to the effect of failure to state the name of the wife of a defendant in the summons, see Weil *v.* Martin, 24 Hun 645.

49. Where an order to serve the summons by publication is obtained, leave to serve it personally, without the state, need not be given. *Ib.*

50. **The complaint.** When an amended complaint need not be served on parties appearing but in default, see *Ib.*

51. **Defence of payment.** Where, in an action to foreclose a mortgage, which by its terms was given to secure the payment of moneys as specified in the condition of a bond, the defence of payment is interposed, the non-production of the bond by the plaintiff is evidence of the discharge of the mortgage debt; and if unexplained is conclusive against plaintiff's right to recover.—*Ct. of App.*, *Nov.*, 1880. Bergen *v.* Urbahn, 83 N. Y. 49.

52. **Usury as a defence.** In an action to foreclose a mortgage for $2500, the defence was usury. The court found that the mortgage and accompanying bond were executed to one H., not as a security, but only for the purpose of being sold to plaintiff at a discount; that they were so sold and were usurious. Defendants' evidence was to the effect that F., the mortgagor, before the execution of the bond and mortgage, applied to plaintiff for a loan of $2500, that plaintiff directed him to go and make a mortgage to somebody else, that he could buy it of them, and would loan the money. No terms of loan were stated, and no property specified to be mortgaged. H. held judgments against F. to the amount of about $900. The bond and mortgage were executed to secure this indebtedness. H. also advanced thereon $320, and it was understood that the balance realized on the sale of the securities after paying the judgments and the money advanced was to be paid to F. They were offered to other parties before plaintiff purchased, and were sold to him at a discount. *Held*, that the evidence did not sustain the finding; that the defence of usury was not made out, but only, as to part of the sum secured, a failure or want of consideration; that the bond and mortgage were valid securities in the hands of H. for the amount of his judgments and the sum advanced by him, and to that extent, at least, plaintiff, standing in the place of H., could enforce them.—*Ct. of App.*, *Dec.*, 1879. Sickles *v.* Flanagan, 79 N. Y. 224.

53. G., being indebted to S. upon notes past due, amounting to $172.45, which were in the hands of R., an attorney, for collection, it was agreed that S. should loan to the former $1500. Nothing was said as to the rate of interest. G. was to pay the attorney's fees. The parties thereafter met at the office of R., and without any words or parley a bond and mortgage were executed and delivered by G. to S., as security for the loan. A statement showing the amount due on the notes, a receipted bill of R., as attor-

ney, made out to G., and a check for the balance of the $1500, after deducting these two items, were handed to G.; one item of R.'s bill was, "commission for obtaining loan, $150." There was no foundation for this charge, and it was intended for the benefit of S., and was never, in fact, paid to R., but retained by S. G. questioned the correctness of this charge. S. replied it was cheap enough and he could do no better. In an action to foreclose the mortgage—*Held*, that these facts did not sustain the defence of usury, as there was no agreement or intent on the part of G. to pay usury; that under the agreement for the loan, S. was entitled simply to lawful interest. G. was under no obligation to allow any of the loan to be retained to pay the $150, but was entitled to recover that amount. —*Ct. of App., June*, 1880. Guggenheimer *v.* Geiszler, 81 N. Y. 293.

54. *It seems* that G. might claim that the recovery should include only the amount actually received by him, and the attorney's fees allowed by him, deducting the item of $150. *Ib.*

55. Receiver of rents and profits. By the appointment of a receiver in a foreclosure suit, the plaintiff obtains an equitable lien only upon the unpaid rents; until such appointment, the owner of the equity of redemption has a right to receive the rents and cannot be compelled to account for them.—*Ct. of App., March*, 1881. Rider *v.* Bagley, 84 N. Y. 461.

56. *It seems* that, assuming the court has power, in a foreclosure suit, to compel the owner of the equity of redemption to pay the rents to the receiver after his appointment, the exercise of the power is in the discretion of the court, and so not reviewable here. *Ib.*

57. So, also, where fraud or contempt upon the Supreme Court is charged upon the owner, in receiving rents with knowledge of the pendency of an application for a receiver, it is for that court to deal with it, and its action in that respect is not subject to review by this court. *Ib.*

58. In an action to foreclose a mortgage upon a leasehold interest, plaintiff was, upon his own motion and by consent, appointed receiver of the rents and profits of the mortgaged premises, with power to keep the buildings insured and in repair, and "to pay the ground-rent and taxes." Subsequently M., the holder of prior mortgages, foreclosed, and upon sale the premises were bought in by M. for a sum less than his mortgages. Plaintiff, out of the rents collected by him as receiver, paid the ground-rent from the time of his appointment to the time of sale; also for some repairs, and to M. a sum for interest on his mortgages. Upon settlement of his accounts as receiver plaintiff was required to pay over the balance in his hands in payment of taxes. *Held*, error; that the appointment of plaintiff as receiver was for his benefit, not for the benefit of M., who might have applied for a receivership in his own suit, which would have superseded the rights of the plaintiff; that the terms of the order appointing plaintiff, as to the rents and taxes, were permissive, not mandatory; and plaintiff having, by diligence, acquired a specific lien upon the rents superior to the equities of M., was entitled to retain them to apply on his mortgage.—*Ct. of App., Nov.* 1880. Ranney *v.* Peyser, 83 N. Y. 1; *reversing* 20 Hun 11.

59. Restraining waste by mortgagor. In an action for the foreclosure of a mortgage, after judgment, and a sale in pursuance thereof, and while awaiting the confirmation of the court for the payment of the purchase money and the delivery of the deed, the court has authority, on the petition of the purchaser, to restrain the mortgagor from committing waste.—*Ct. of App., Jan.*, 1880. Mutual Life Ins. Co. *v.* Bigler, 79 N. Y. 568.

60. The petition of the purchaser in such a case showed that the mortgagor was threatening to remove certain machinery from a mill upon the premises, which machinery the petitioner claimed to be part of the realty. *Held*, that an order restraining the mortgagor from removing the machinery until the confirmation of the report of sale and the receipt of the deed by the purchaser, was proper; but that it was not necessary to adjudge the question as to whether the articles of machinery were fixtures passing with the land; that this was a question which should not be adjudged summarily on a motion. Leave therefore granted to either party to bring an action to determine that question. *Ib.*

61. Motion for judgment—affidavit of regularity. A motion was made by plaintiff in a foreclosure suit for judgment, based upon an affidavit of regularity under rule 63, all the parties being in default except an infant who had appeared and interposed an answer by his guardian *ad litem*, raising a material issue, namely, the amount unpaid on the mortgage held by the plaintiff. *Held*, that the motion, being based solely upon rule 63, must be denied.—*Supreme Ct.*, (*Sp. T.*,) *Sept.*, 1880. Jackson *v.* Reon, 60 How. Pr. 103.

62. Provision in judgment as to interest. It was stipulated in plaintiff's mortgages which were executed prior to the passage of the act (Laws of 1879, ch. 538,) reducing the rate of interest to six per cent., that the principal sum should bear interest at seven per cent. until paid. By the decision and judgment entered thereon, interest was directed to be paid on the amount found due, from the date of the decision, at the rate of seven per cent. *Held*, error; that after entry of judgment the mortgages were merged therein, and thereafter plaintiff was entitled to interest, not by virtue of the mortgages, but of the judgment; and so, that the interest should have been at the lawful rate.—*Ct. of App., March*, 1881. Taylor *v.* Wing, 84 N. Y. 471; *reversing* 23 Hun 233.

63. Notice of sale. A sale of real estate, under a decree of foreclosure, will not be set aside because the notice of sale was not published in all the editions of the paper issued on the days on which the notice was published.—*Supreme Ct.*, (*2d Dept.*,) *Sept.*, 1880. Everson *v.* Johnson, 22 Hun 115.

64. Validity of the sale. The word "must," in the last sentence of § 1678 of the Code of Civil Procedure, is directory merely; and whether, in foreclosure, a sale of two or more distinct buildings, &c., is proper or not, is to be determined by the circumstances of each case.—*Com. Pleas*, (*Sp. T.*,) *June* 1881. Wallace *v.* Feely, 1 Civ. Pro. 126; S. C., 61 How. Pr. 225.

65. Order of sale. As to the order of sale on foreclosure, where portions of the land covered by the mortgage in suit have been conveyed subsequent to the giving of the mortgage, see Zabriskie *v.* Salter, 80 N. Y. 555; Hopkins

v. Wolley, 81 N. Y. 77; Coles *v.* Appleby, 22 Hun 72.

66. Who may be purchaser. The usual provision in a decree of foreclosure, that any of the parties to the suit may purchase on the sale, will not permit one defendant to bid in premises belonging to another, and to hold them against the latter contrary to equity.—*Ct. of App., June,* 1880. Bennett *v.* Austin, 81 N. Y. 308, 337.

67. Compelling purchaser to take title. Where a purchaser at foreclosure sale sought to be relieved from his purchase on the ground that three distinct buildings situated on the same city lot, access to none of which was obtained through any of the others, were sold together instead of separately; and that the heirs of the mortgagor and owner of the equity of redemption, who had died since the sale, claimed an interest in the said premises by reason of the failure to sell separately. *Held,* that the purchaser should not be relieved on the ground that the buildings, &c., were sold together, it appearing that such was the most advantageous mode of sale; and, that as it appeared that the mortgagor and owner of the equity of redemption had notice of the proceedings and was chargeable with notice of the mode of sale and had not come in to object, he would be estopped from afterward objecting, and his heirs would be equally estopped by his acquiescence. Wallace *v.* Feely *supra.*

68. Setting aside the sale. When a sale had under a decree in foreclosure of a railroad mortgage will not be set aside, see Peck *v.* New Jersey, &c. R'y Co., 22 Hun 129.

69. Fees of referee to sell. The act (Laws of 1869, ch. 569, as amended by Laws of 1874, ch. 192,) in relation to fees of sheriffs and referees on foreclosure sales, in the city and county of New York, was not repealed by the amendment of 1876 to § 309 of the Code of Procedure, which limits the sum to be allowed for fees on such a sale. The amendment simply modified the act by fixing the maximum of fees, leaving the scale of charges, up to this limit, as fixed by said act.— *Ct. of App., March,* 1880. Schermerhorn *v.* Prouty, 80 N. Y. 317.

Nor were those enactments superseded by the Code of Civil Procedure.—*Com. Pleas,* (*Gen. T.,*) May, 1881. Lockwood *v.* Fox, 61 How. Pr. 522.

70. Determination of claims to surplus moneys. Upon a reference as to surplus moneys in such an action, the referee has authority to inquire as to the validity of conveyances or liens; and conveyances, as well as liens, may be attacked as fraudulent.—*Ct. of App., Dec.,* 1879. Bergan *v.* Carman, 79 N. Y. 146.

71. The rights of contesting parties as to surplus moneys, determined, in cases depending upon unusual and complicated questions of fact, but involving no new or important principles of law. Erie County Savings Bank *v.* Roop, 80 N. Y. 591; Rogers *v.* Ivers, 23 Hun 424.

72. Protection of prior liens. To this action—brought by plaintiff to foreclose a mortgage given by one C. S. Lester—Lucy C. Lester, his wife, C. S. Grant, and E. M. Harris were made parties defendants, the complaint containing the usual allegations that they held interests or liens which had accrued subsequently to the lien of the plaintiff's mortgage. Grant appeared, but did not answer. Lucy C. Lester and Harris appeared and answered, denying that their liens were subsequent to that of the mortgagee, and demanded and obtained a judgment declaring that the inchoate right of dower of Lucy C. Lester, and a mortgage held by her, and a judgment held by Harris, were prior and superior to the plaintiff's mortgage, and directing the premises to be sold subject to their said liens. Upon on appeal from an order denying a motion made by Grant to have the clause establishing the priority of the liens of Lester and Harris stricken from the judgment, and to have the sale set aside—

Held, 1. That it was not necessary for Lester or Harris to have answered, setting up the priority of their respective liens, as the entry of the usual judgment of foreclosure and a sale thereunder would not have cut them off if they were prior in fact.

2. That upon their serving answers, setting up the priority of their liens over that of the plaintiff, the court should have dismissed the complaint as to them, but should not have rendered a judgment establishing the priority and amount of their liens as against the defendant Grant.

3. That the order should be reversed.—*Supreme Ct.,* (*3d Dept.,*) *Nov.,* 1880. Payn *v.* Grant, 23 Hun 134.

73. *Quære,* as to whether the defendants Lester and Harris could, by serving their answer upon the defendant Grant, as provided by § 521 of the Code of Civil Procedure, have litigated and established the priority of their liens in this action. *Ib.*

74. Judgment for deficiency. The mortgage in suit, which contained no covenant to pay taxes, was executed by defendant D. in 1872. He sold the premises in 1873 to defendant G., who assumed the payment of the mortgage. In 1874, G. sold the property subject to the mortgage. The judgment of foreclosure permitted the purchaser to retain out of the purchase money the amount of all taxes and assessments which, at the time of the sale, were a lien on the premises, and $578 were deducted to discharge taxes due upon the premises. *Held,* that a motion by G. to deduct the $578 from the judgment against him for deficiency, came too late after sale under the decree; and that, at any rate, G. was liable for the deficiency after deducting such taxes from the purchaser's bid.—*Supreme Ct.,* (*Sp. T.,*) *Jan.,* 1881. Fleishauer *v.* Doellner, 60 How. Pr. 438; S. C., 9 Abb. N. Cas. 372.

75. In this action, brought by plaintiff to foreclose a mortgage given by defendant, the usual judgment of foreclosure and sale, and for any deficiency that might arise thereon, was entered on January 8th, 1879. On June 13th, 1879, the plaintiff obtained an order vacating the judgment, and allowing him to amend by bringing in an additional party. Thereafter, and before any further proceedings were taken, another action was commenced to foreclose a prior mortgage upon the same premises, and under a decree in the latter action they were sold for an amount only sufficient to pay the said first mortgage and the costs of its foreclosure. Thereupon the plaintiff moved to vacate the order setting aside the judgment, and for a direction that a judgment for a deficiency be entered against the defendant for the full amount due on the second mortgage and the bond to which it was collateral. *Held,* that the motion was properly

denied, and that the plaintiff's remedy, if any, was by an action at law upon the bond.—*Supreme Ct.*, (1*st Dept.*,) *Nov.*, 1880. Loeb *v.* Willis, 22 Hun. 508.

76. Subsequent suit to recover deficiency against persons not parties in foreclosure. A mortgagee who has recovered a deficiency judgment against the administrators of a deceased mortgagor, cannot maintain an action to have his judgment declared a lien upon surplus money arising upon the foreclosure of a mortgage upon other lands given by the deceased mortgagor to another mortgagee.—*Supreme Ct.*, (2*d Dept.*,) *May*, 1881. Fleiss *v.* Buckley, 24 Hun 514.

77. The only remedy of the holder of the deficiency judgment, except as against the personal property in the hands of the administrators, is by an action against the mortgagor's heirs or devisees, in which, if such heirs or devisees be insolvent, the court may direct their officer to hold the surplus moneys and apply them in satisfaction of the judgment. *Ib.* See, also, Fleiss *v.* Buckley, 22 Hun 551.

78. An action upon a guaranty of a mortgage is within the provision of the Revised Statutes (2 Rev. Stat. 191, §§ 153, 154,) prohibiting any proceedings unless authorized by the court, after bill filed to foreclose a mortgage, for the recovery of the debt secured by the mortgage; and in the absence of such authority the action is not maintainable.—*Ct. of App.*, *Feb.*, 1881. McKernan *v.* Robinson, 84 N. Y. 105; *affirming* 23 Hun 289.

79. Where, however, such an action has been commenced without previous authority, the court may, by subsequent order made *nunc pro tunc*, grant permission, and so remove the impediment to the maintenance of the action founded upon the statute. *Ib.*

VII. Redemption.

80. Right to redeem, generally. As security for advances made to the firm of B. & A., B. and wife and A. deeded to S. G. A. their interest in certain premises, upon which were two elevators; the wife of B. having a separate interest therein. Prior to this, the said firm had, in connection with the owners of other elevators, entered into an agreement with the W. E. Co., by which they nominally leased their elevators to that company for three years; they, however, retaining possession and operating the elevators, receiving a specified compensation for their services and expenses, and the profits being divided among the several owners. The said firm had also assigned their share in the profits to S. & Co., the holders of a prior mortgage, to be applied in liquidation of the debt secured by the mortgage, and also of prior incumbrances. S. G. A. had full notice of this arrangement when he took his deed; he, thereafter, by setting up the apparent title conferred upon him by his deed, and without the consent of B. & A. or of S. & Co., induced the W. E. Co. to substitute in place of said agreement a new one with him as owner of the elevators, of which he took possession, and he thereafter received and retained the dividends. S. & Co. thereupon foreclosed their mortgage, and by arrangement with them, S. G. A., after judgment, obtained control of the sale, and became the purchaser for the amount of the judgment. In an action to have the deed to S. G. A. declared a mortgage, and to redeem, etc.—*Held*, that defendant, as devisee of S. G. A., could not, in equity, avail herself of the title obtained on foreclosure sale to defeat plaintiff's equity of redemption; that B. and wife had the right to have the dividends set apart for the reduction of the mortgage of S. & Co. applied to that purpose; that when S. G. A. possessed himself in the manner specified of said dividends, he became *ex maleficio*, constructively, a trustee of the fund, and the law imposed upon him the duty to apply the dividends to the purpose for which they had been appropriated; and that, therefore, he could not take advantage of his violation of that duty by becoming purchaser in his own behalf, and the purchase did not cut off the right to redeem.—*Ct. of App.*, *June*, 1880. Bennett *v.* Austin, 81 N. Y. 308.

81. B., by not defending the foreclosure, was not concluded from contesting the title obtained under it, as he had no defence to the mortgage; nor was he affected so far as the question here is concerned, by the usual clause in the decree of foreclosure authorizing any party to the action to become a purchaser; and this although the facts as to the assignment of the dividends and the subsequent action of S. G. A. were set forth in the complaint as the foundation of a claim against the latter for the dividends. *Ib.*

82. S. G. A. was the owner, in his own right, of one-third of one of the elevators. *Held*, that this fact did not change the principle applicable to the case, but would merely reduce the amount which he was bound to apply upon the mortgage of S. & Co. *Ib.*

83. Right of junior mortgagee to redeem. The holder of a junior mortgage is entitled to be subrogated to the rights of the holder of the senior mortgage upon payment of the amount thereof, and may, upon tender of the amount, compel an assignment, although he does not occupy the position of a surety. This relief may be granted upon motion before judgment, in an action to foreclose the senior mortgage, in which the holder of the junior mortgage is a party defendant.—*Ct. of App.*, *Sept.*, 1880. Twombly *v.* Cassidy, 82 N. Y. 155, 158.

Upon such motion, the plaintiff cannot object that the defendants, other than the moving party, have not had notice. *Ib.*

An order made in such a case directed an assignment to the junior mortgagee, or to a person to be named by him. *Held*, no error. *Ib.*

84. Upon the motion, it was a question at issue, as to whether the junior mortgage was paid. *Held*, that the determination of the court below was conclusive upon the appeal. *Ib.*

85. The order directed the continuance of the action, without costs, as against plaintiff. *Held*, that this was in the discretion of the court, at least that plaintiff was not in a position to raise the question. *Ib.*

VIII. Discharge of the Lien by Payment.

86. Tender of the mortgage debt. To entitle a mortgagor to maintain an action to extinguish the lien of his mortgage because of a tender of the amount due and a refusal to accept, the tender must be kept good.—*Ct. of App.*, *June*, 1880. Tuthill *v.* Morris, 81 N. Y. 94, 100.

87. The rule that a party coming into a court of equity for affirmative relief must himself do equity, requires, in such case, that the mortgagor pay the debt secured by the mortgage, with costs, in any foreclosure proceedings, and the interest at least up to the time of the tender. *Ib.*

88. The most that can equitably be claimed by the mortgagor is relief from the payment of interest and costs, subsequent to the tender, and to entitle him to this he must keep the tender good from the time it was made. *Ib.*

89. To establish a tender and refusal, such as will discharge the lien of a mortgage, without the tender being kept good, the proof must be clear that the tender was fairly made and deliberately and intentionally refused by the owner of the mortgage or some one duly authorized by him, and that sufficient opportunity was afforded to ascertain the amount due; at least it should appear that a sum was absolutely and unconditionally tendered, sufficient to cover the whole amount due. *Ib.*

90. In an action to have two mortgages declared extinguished, and to restrain foreclosure, it appeared that defendant, being the owner of the mortgages, which were executed by plaintiff to secure certain notes, proceeded to foreclose by statutory proceedings; he employed S. to engage an auctioneer and to attend the sale on his behalf and see that it was properly conducted. S. was not the attorney in the proceeding, nor was he in any way connected with it, and his first and only connection with defendant or the foreclosure was in compliance with such request; he had no express authority to receive a tender. At the time and place advertised for sale S. attended and was presented with a summons, complaint and order of injunction in an action by plaintiff against defendant. S. declined to receive or to admit service thereof on behalf of defendant. The injunction order directed the sale to be upon the terms, among others, that ten per cent. of the bid be paid down. S. thereupon announced his determination to adjourn the sale. Plaintiff's attorney thereupon tendered to S. a package of greenbacks containing $6300, saying he wanted to pay the whole amount if S. would let him know what it was; he did not state the amount of the money. S., on being asked if he would not take the money, said he would not, as he was not authorized. He asked plaintiff's attorney what he wanted to pay for; the latter answered, the notes, interest and costs. S. stated he did not know the amount. The auctioneer thereupon, under the instructions of S., announced the adjournment of the sale for thirty days. The amount of principal and interest, as appeared by the notice of sale, was $6150 and upwards; the amount of costs did not appear. *Held*, that the evidence failed to show a sufficient tender. *Ib.*

As to mortgages of *Chattels*, see CHATTEL MORTGAGES.

MOTIONS AND ORDERS.

1. Time to move. It is within the discretion of the court, and is a proper exercise thereof, to deny, as prematurely made, a motion to charge the person beneficially interested in the recovery in an action (2 Rev. Stat. 609) with the payment of a judgment for costs entered therein, when an appeal from said judgment is pending at the time said motion is made, though no security upon appeal has been filed, and no stay of proceedings granted. The denial of the motion upon said ground may be deemed equivalent to a stay.—*Superior Ct., April,* 1880. Slanson *v.* Watkins, 46 Superior 172.

2. When motion may be made to judge out of court. Under Code of Civ. Pro., § 770, any application, except for a new trial upon the merits, which, elsewhere, must be made in court, may, in the first judicial district, be made at any time to a judge out of court.—*Supreme Ct.,* (1*st Dept.,*) *June,* 1880. Boucicault *v.* Boucicault, 21 Hun 431.

3. Order to show cause. Upon a motion to set aside an order for irregularity, the order to show cause must, under rule 37, specify the irregularity, even if it appear in the affidavit.—*Superior Ct., Nov.,* 1880. Garner *v.* Mangam, 46 Superior 365.

4. It is within the power of the court or a judge thereof to grant an order to show cause, returnable in more than eight days, where a greater period than that number of days intervened between the day of service and the day on which the motion was to be answered and was in fact heard. Such an order is merely the substitute for the ordinary notice of motion.—*Supreme Ct.,* (1*st Dept.,*) *Jan.,* 1881. Gross *v.* Clark, 1 Civ. Pro. 17.

5. Code of Civ. Pro., § 780, requiring that the moving affidavit disclose a reason for granting an order to show cause, does not apply to surrogate's courts.—*Kings Co. Surr. Ct., June,* 1881. In re Harris, 1 Civ. Pro. 162.

6. Renewal of motion. The doctrine that a motion once denied cannot be renewed as a matter of right and without leave of the court, except upon facts arising subsequent to the decision, does not apply to a case where the party proceeds in the second motion upon a distinct property interest and right from that involved in the first motion.—*Ct. of App., Dec.,* 1880. Steuben Co. Bank *v.* Alberger, 83 N. Y. 274.

7. Service of orders. Returning order. Where a copy of an order of the court has been served at the office of an attorney, he will not be justified in returning the same for any of the following reasons: 1. That the notice of entry fails to specify the county in which the order is entered. 2. That it does not recite the filing of a paper used upon the motion. 3. That it was not a certified copy. 4. That it was served upon a person in the office of the attorney, not in his employ, when he himself was in the office and easily accessible. Gross *v.* Clark, *supra.*

8. The attorney, at the time service of a copy of an order was made, did not appear to be in the room which was entered by the person employed to make the service, and he accordingly delivered it to the individual found in charge of the office.

Held, 1. That such service was regular.

2. That such service was not rendered ineffectual by reason of the circumstance that the

attorney himself was in an adjacent room at the time; and that if it had, the fact that the copy order soon thereafter came to the hands of the attorney, corrected any possible irregularity. *Ib.*

9. Service of a judge's order, in a case where it is not sought to bring a party into contempt for non-compliance therewith, is properly made by delivery of a copy to, or for, the person upon whom the service is to be made. The original need not be exhibited. *Ib.*

10. Their effect. Effect must be given to an order of the court according to its terms.—*Ct. of App., June,* 1880. Fisher *v.* Gould, 81 N. Y. 228.

MUNICIPAL CORPORATIONS.

I. INCORPORATION AND CHARTERS.
II. POWERS.
1. *In general.*
2. *Local improvements; and assessments therefor.*
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1. *In general.*
2. *Upon bonds in aid of railroads.*
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IV. MUNICIPAL OFFICERS.
V. DECISIONS OF A LOCAL CHARACTER, AFFECTING A PARTICULAR CITY OR VILLAGE ONLY.

I. INCORPORATION AND CHARTERS.

II. POWERS.

1. *In general.*

1. Municipal powers, generally. Public powers or trusts devolved by law upon the governing body of a municipal corporation, to be exercised by it when and in such manner as it shall judge best, cannot be delegated to others. But there is a distinction in this respect between acts *quasi* judicial or involving discretion, and those which are merely ministerial.—*Supreme Ct.,* (*4th Dept.,*) *Jan.,* 1881. Edwards *v.* City of Watertown, 61 How. Pr. 463.

2. Power to lease real estate. A municipal corporation or a county has the power to lease real estate when the use thereof is needed to carry out any of its acknowledged powers and purposes.—*Ct. of App., Dec.,* 1880. Davies *v.* Mayor, &c., of New York, 83 N. Y. 207, 210; *reversing* 45 Superior 373.

3. Where the common council of a city has decided to lease certain rooms for city purposes, it may confer upon a committee appointed by it the power to arrange the rooms and procure the necessary furniture therefor. It may appoint the recorder of the city one of the members of such committee, although he is not a member of the common council.—*Supreme Ct.,* (*4thDept.,*) *April,* 1881. Edwards *v.* City of Watertown, 24 Hun 426.

4. Ordinances. By a city charter the common council were authorized to enact ordinances "to regulate the erection, use and continuance of slaughter-houses."

Held, 1. That the common council had power to pass an ordinance prohibiting the slaughtering of animals within certain specified portions of the city; and that under an amendment to the charter making the violation of a city ordinance a misdemeanor, an indictment lay for the violation of such an ordinance.

2. That it was not necessary, either in the ordinance or in an indictment founded upon it, to allege the reasons for its enactment, or the exigency out of which it grew.—*Ct. of App., Oct.,* 1880. Cronin *v.* People, 82 N. Y. 318.

5. Regulation of streets and piers. A city, in its control over its streets and piers, cannot restrain an owner from using adjoining property.—*Supreme Ct.,* (*2d Dept.,*) *Dec.,* 1880. City of Brooklyn *v.* New York Ferry Co., 23 Hun 277.

2. *Local improvements; and assessments therefor.*

6. Grounds for vacating. Under Laws of 1874, ch. 313, in relation to vacating assessments for fraud or substantial error, an assessment will not be vacated for the omission of any officer to perform his duty.—*Supreme Ct.,* (*1st Dept.,*) *Sept.,* 1880. Matter of Pinckney, 22 Hun 474.

7. What errors or omissions in an assessment will not authorize the court to vacate it, see Matter of Dennis, 22 Hun 607.

8. Who may move to vacate. One who purchases the property assessed subject to the assessment, and agrees to pay the assessment, cannot apply to have it vacated.—*N. Y. Supreme Ct.,* (*1st Dept.,*) *Nov.,* 1880. Matter of Conley, 22 Hun 603.

9. Time to move. As a proceeding to vacate an assessment is a special proceeding, it is governed by the limitation prescribed by Code of Civ. Pro., §§ 388, 414, and a delay in moving, for a less time than there limited, is not fatal to the proceeding.—*Ct. of App., Sept.,* 1880. Matter of Manhattan Savings Inst., 82 N. Y. 142.

10. Evidence and burden of proof on application to vacate. The *onus* of establishing a substantial error in an assessment devolves upon the party making objection thereto, and must be proved by affirmative evidence. Accordingly—*Held,* that an objection that the entire cost of the work was assessed when no more than one-half thereof was assessable upon adjacent property under the act of 1865 (Laws of 1865, ch. 565, § 8,) could not be entertained in the absence of proof of what was the entire cost of the work; that it could not be presumed, in the absence of evidence to establish it, that more than one-half of the expense was assessed.—*Ct. of App., March,* 1881. Matter of Merriam, 84 N. Y. 596.

It seems that said act of 1865 has reference to the laying out of streets, not to the construction of sewers. *Ib.*

11. An objection that the assessment was illegal because made up and notice published by three of the assessors, not by the full board, is not tenable in the absence of proof that all four were not present or that the fourth did not have notice of the meeting, or that a vacancy, which,

had been occasioned by the death of one of the assessors, had been filled at the time of the assessment. *Ib.*

12. Proof that a member of the board of revision was absent does not sustain the objection that the assessment was not legally confirmed. *Ib.*

13. The affidavit of the assessors is not conclusive, but only *prima facie* evidence of the facts therein stated.—*Ct. of App., March,* 1881. Town of Springport *v.* Teutonia Savings Bank, 84 N. Y. 403.

14. **Reducing assessments.** Where, upon an application to vacate an assessment, the amount thereof is reduced, interest can only be charged upon the assessment, as so reduced, from the time that the amount thereof is ascertained by the order directing the reduction.—*Supreme Ct.,* (1*st Dept.,*) *May,* 1881. Matter of Miller, 24 Hun 637.

15. **Review of proceedings on certiorari.** No notice of the granting of a writ of *certiorari* to review an assessment of real or personal property, under chapter 269 of 1880, need be given if the court in its discretion sees fit to dispense with it.—*Supreme Ct.,* (3*d Dept.,*) *Jan.,* 1881. People, ex rel. Ulster, &c., R. R. Co., *v.* Smith, 24 Hun 66.

16. The supervisor of the town is not a necessary party to proceedings instituted under the said act to review an assessment. *Ib.*

17. The writ must require a return to be made thereto at a Special Term to be held within not less than ten days from the time of its allowance, but it is not necessary that the writ should be served ten days before the return day. *Ib.*

18. A writ issued upon the application of one assessed for real estate only, may require a return as to assessments of both real and personal property. *Ib.*

19. The return to a writ issued thereunder is not conclusive, but is open to contradiction, and the court may appoint a referee to take and report the evidence to be produced by the parties. *Ib.*

III. Liabilities.

1. *In general.*

20. **Contracts for city advertising.** Laws of 1869, ch. 831, providing "that for publishing any notice, order, citation, summons or other proceedings or advertisements required by law to be published, not more than seventy-five cents per folio for the first insertion and fifty cents for each subsequent insertion" shall be charged, refers principally, if not altogether, to publications in actions and the like, and has no application to the case of publishing proceedings of a city common council.—*Supreme Ct.,* (3*d Dept.,*) *Jan.,* 1881. McArthur *v.* City of Troy, 24 Hun 55.

21. **Effect of receiving part payment.** Where the owner of a disputed claim against a village, with knowledge of the fact that the board of trustees thereof has passed a resolution directing that a certain sum shall be paid thereon in full and complete settlement and satisfaction of his whole claim, receives the said sum from the chamberlain of the village and signs a receipt stating that the same was received as a full and complete settlement and satisfaction of his claim, his claim is discharged, and he cannot thereafter maintain an action against the village to recover the balance thereof. The fact that he stated at the time of receiving the money that he would not accept it in full payment is immaterial.—*Supreme Ct.,* (3*d Dept.,*) *Jan.,* 1881. Looby *v.* Village of West Troy, 24 Hun 78.

22. **When a city may be sued, generally.** Where a particular mode of discharging the obligations of a municipal corporation is provided by law, that mode must be pursued; but it is only when the corporation is put in default in omitting to discharge some duty imposed upon it by statute after the proper steps have been taken, that an action will lie against it, unless it has by some act of its own, outside of the original indebtedness, rendered itself liable.—*Ct. of App., Jan.,* 1881. Swift *v.* Mayor, &c., of New York, 83 N. Y. 528; *reversing* 17 Hun 518.

23. **Necessity of presentment of claims to preserve right to costs.** A plaintiff demanding judgment for a sum of money only, in an action against a municipal corporation, who fails to present his claim for payment to the chief fiscal officer of such corporation, before the commencement of the action, cannot, under Code of Civ. Pro., § 3245, be awarded costs, although he recover a verdict against the corporation; and it is no answer to this requirement of the code, that the chief fiscal officer is not authorized to adjust and pay the claim on presentation.—*Ct. of App., June,* 1881. Baine *v.* City of Rochester, 1 Civ. Pro. 269.

24. Where the plaintiff fails to so present his claim, and recovers the sum of $50 or more, the defendant does not, by reason of the plaintiff's not being entitled to costs, become entitled thereto; that the plaintiff is not entitled to costs under such circumstances is not a case specified in § 3228, and the defendant is, therefore, not entitled to costs under § 3229. *Ib.*

25. A plaintiff who recovers judgment against a municipal corporation for $50 or more, should not be subjected to the payment of costs, as a penalty for non-presentation of his claim, in addition to being deprived of the right to costs. *Ib.*

26. The certificate to entitle a party to costs, &c., provided for by § 3248, is of some fact appearing on the trial, and has no application to facts extrinsic to the action, and which have no connection with the issue. *Ib.*

27. The non-presentation of a claim against a municipal corporation to its chief fiscal officer, is not a defence to the action, and not a fact involved in the trial; and the certificate referred to in § 3248 is not required as to the fact of non-presentation. *Ib.*

2. *Upon bonds in aid of railroads.*

28. **Construction and operation of statutory provisions.** The P. C. & F. D. M. R. R. Co. was incorporated by the legislature of Missouri in 1860; by its charter the County Court of any county through which the road was located, and any city or town, were authorized to subscribe for stock, and to issue bonds to pay therefor; by another section (§ 7) a provision is made for taking a vote of the taxable inhabi-

tants of a strip of country on either side of the road, and if a majority vote in favor of a tax to pay for stock, it is made the duty of the court to levy and collect the tax. *Held*, that the charter gave no authority to the taxable inhabitants of a strip of country along the road to vote for the issue of bonds, or for an issue of bonds upon a vote in favor of subscribing for stock, but only authorized the levy and collection of a special tax to pay for stock.—*Ct. of App., Sept.*, 1880. Dodge *v.* County of Platte, 82 N. Y. 218; *reversing* 16 Hun 285.

29. Rights of bondholders—duty to inquire. There can be no *bona fide* holder of town bonds within the meaning of the law applicable to negotiable paper, as they can only be issued by virtue of special authority conferred by some statute, and are only binding upon the town when issued in the way pointed out by the statute.—*Ct. of App., March*, 1881. Cagwin *v.* Town of Hancock, 84 N. Y. 532; *reversing* 22 Hun 201.

30. All persons, therefore, taking such bonds are chargeable with knowledge of the statute under which they were issued, and must see to it that its provisions were complied with; and in the absence of some provision making the action of the officer or agents of the town binding and conclusive, the fact that the holder of such bonds purchased for value and in good faith, does not preclude the town from showing that they were illegally issued. *Ib.*

The decisions of the federal courts holding a contrary doctrine held not to be controlling. *Ib.*

31. Consent of tax-payers, and how disproved. Under the provisions of the act of 1866, (Laws of 1866, ch. 398, § 2,) authorizing certain towns to subscribe for the stock of the N. Y. & O. M. R. R. Co., and to issue bonds for moneys borrowed to pay therefor, provided the consent in writing of a majority of the tax-payers, owning more than one-half of the taxable property of the town shall first have been obtained, and provided that the fact that such majority has been obtained, "shall be proved by affidavit, in writing," of one of certain specified town officesr, and declaring that such affidavit "or a certified copy thereof shall be evidence of the facts therein contained," the affidavit is not conclusive but only *prima facie* evidence of the facts, and may be disputed. Accordingly—*Held*, in an action to recover the amount due upon certain interest coupons cut from bonds issued by railroad commissioners appointed for defendant under said act, and which had been purchased for value and in good faith, that defendant was not precluded by an affidavit of its assessor from showing that in fact the consent of a majority of the tax-payers of the town had not been obtained. *Ib.* See, also, Dodge *v.* County of Platte, 82 N. Y. 218.

32. Revocation of consent. In actions brought to restrain defendants from transferring, and to compel the cancellation of bonds issued by plaintiff under ch. 314, of 1869, authorizing it to subscribe for stock of the C. L. R. R. Co., it appeared that revocations of consents of tax-payers of the town, executed and acknowledged with the same formalities as the consents, were delivered to the assessors while they had the consents before them, and before they had acted upon them, and that the residue were insufficient to constitute the majority required by the statute; also, that the assessors disregarded the revocations and wrongfully made and filed the statutory affidavit.

Held, 1. That the omission to file the revocations did not render them ineffectual; that their delivery made them effectual and withdrew from the assessors the authority to make the affidavit.

2. That such omission did not estop the plaintiff; that, assuming the tax-payers, who signed consents and then revoked them, could be estopped by their acts or omissions, they could not estop the whole body of tax-payers.

3. That a tender before the commencement of the action, of the stock received for the bonds was not necessary; that defendants could not require a tender to themselves, as they were not received from them and they had no title thereto. If they had any right to them (as to which *quære*), all they could claim was an equitable right of subrogation on canceling their bonds; if the claim was that the stock should have been surrendered to the company or canceled, that was a matter between it and plaintiff, and the rights of the latter as against defendants did not depend upon the prior adjustment of the matter. —*Ct. of App., March*, 1881. Town of Springport *v.* Teutonia Savings Bank, 84 N. Y. 403.

3. *For wrongs; and herein of liability for defects in streets.*

33. Liability for unsafe condition of streets and sidewalks. The public are entitled to an unobstructed passage upon the streets, including the sidewalks of a city. A hole in a sidewalk, communicating with a coal vault beneath, is an obstruction.—*Ct. of App., April*, 1880. Clifford *v.* Dam, 81 N. Y. 52.

34. One driving along a public street has the right to assume that it is safe for travel, and is not bound to be on the look-out for danger as is one about to cross a railroad track; and one who digs a pit therein must so guard and protect it that no accident can happen, except by such extreme negligence on the part of a traveler as may almost be called willful.—*Supreme Ct.*, (*3d Dept.*,) *Nov.*, 1880. Childs *v.* Village of West Troy, 23 Hun 68.

35. A village is not bound to construct a sidewalk in each street, and it is not liable for the negligence of an individual in constructing one for his own use.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. Saulsbury *v.* Village of Ithaca, 24 Hun 12.

36. — for property destroyed by mob. A building in which plaintiff occupied a store caught fire; the fire not, however, having as yet reached his store, he remained in it, keeping the shutters and doors closed. A crowd, which had assembled to see the fire, having shown an inclination to break into the store, the chief engineer turned a stream of water upon them, whereupon he was struck with a brick, and went away to get a revolver. While he was gone, the crowd kicked the door and windows open, went into the store, broke the show cases therein, threw and left upon the floor a portion of the plaintiff's goods, and carried other portions of them away. In an action by plaintiff, brought under ch. 428, of 1855, against the city in which the building was situated, to recover the damages sustained by him—

Held, 1. That the fact that the original purpose for which the crowd had assembled, viz., to see the fire, was a lawful one, did not consti-

tute a defence, as they had subsequently united in unlawful conduct and wrongfully broken into the plaintiff's store.

2. That he was entitled to recover for the goods taken away by the mob as well as for those destroyed upon the premises.

3. That he was not, under the circumstances of the case, bound to notify the mayor or the sheriff of the threatened danger.—*Supreme Ct.*, (*3d Dept.*,) *May*, 1881. Solomon *v.* City of Kingston, 24 Hun 562.

IV. Municipal Officers.

37. Appointment. A municipal common council having once lawfully appointed a person to an office for a stated term, it cannot thereafter rescind the appointment and appoint another person to the same office during that term.—*Supreme Ct.*, (*3d Dept.*,) *July*, 1879. People, ex rel. Mosher, *v.* Stowell, 9 Abb. N. Cas. 456.

38. The duty of the mayor to attest an appointment made by the common council is ministerial only, and his omission to sign the appointment will not vitiate it, nor enable the common council to rescind it. *Ib.*

39. A resolution duly entered in the records of a municipal corporation is sufficient evidence of an appointment to office made by such resolution. *Ib.*

40. Oath of office. The city clerk is authorized by 2 Rev. Stat. 119, § 22, to administer the oath of office, notwithstanding a clause in the city charter requiring such oath to be taken before some officer authorized to take affidavits to be read in courts of justice. The latter clause is merely cumulative. *Ib.*

41. The oaths of city officers were taken by subscribing printed forms contained in a book of oaths kept as one of the city records. *Held*, that the omission of a venue did not invalidate the oaths so taken. *Ib.*

42. The words "when sworn in" and "before whom sworn," at the head of the respective columns in such book, under which the date and the name of the city clerk appeared—*Held*, to constitute a sufficient jurat. *Ib.*

43. Compensation. A municipal corporation, whose disbursing officer has once made payment of the compensation given by law to an office, to one actually in the office, discharging its duties, with color of title, and with his right thereto not determined against him by a competent tribunal, is protected from a second payment.—*Ct. of App.*, *Feb.*, 1880. McVeany *v.* Mayor, &c., of New York, 80 N. Y. 185.

44. The rule is the same whether the compensation is by fixed fees payable from the municipal treasury for the specific services rendered, or by an annual salary payable at recurring periods; so, also, it is immaterial whether the office is held by appointment or by election. *Ib.*

45. But when there has been such an adjudication, any amount of compensation for services rendered, not paid to the intruder in the office, is due and payable to the one adjudged to be the officer *de jure*, and may be recovered by the latter of the municipality. *Ib.*

46. So, also, where, after an adjudication against the one in office, and after notice thereof to the disbursing officer of the municipality, the intruder still continues to perform the duties of the office, the rendition of the services is in behalf of the one entitled to the office, the compensation accruing therefor belongs to him, and he may maintain an action against the municipality to recover the same, although the disbursing officer has paid it to the intruder. *Ib.*

47. *It seems* that where the compensation is by fees paid for each particular official act, not by the municipality, but by the individual for whose benefit the service is rendered, the corporation is not liable in any event. *Ib.*

48. No compensation is recoverable from a municipal corporation, by one of its officers, for the performance of a public service or of official duties, unless it is given by law. So—*Held*, where the engineer of the New York board of health was notified by the board that a resolution had been passed that no salary should be attached to his office after a day named, and he continued to act as engineer after that date.—*N. Y. Ct. of App.*, *June*, 1880. Haswell *v.* Mayor, &c., of New York, 81 N. Y. 255.

V. Decisions of a Local Character, affecting a Particular City or Village only.

49. Albany. By the city charter of 1870, (Laws of 1870, ch. 77,) the common council were authorized to enact ordinances "to regulate the erection, use and continuance of slaughter-houses."

Held, 1. That the common council had power to pass an ordinance prohibiting the slaughtering of animals within certain specified portions of the city; and that under the amendment to the charter of 1871, (Laws of 1871, ch. 536, § 1, title 15,) making a violation of a city ordinance a misdemeanor, an indictment lay for the violation of such an ordinance.

2. That such an ordinance is not void as being in restraint of trade.

3. That it was not necessary, either in the ordinance or in an indictment founded upon it, to allege the reasons for its enactment, or the exigency out of which it grew.—*Ct. of App.*, *Oct.*, 1880. Cronin *v.* People, 82 N. Y. 318; *affirming* 20 Hun 137.

50. Cohoes. An action for negligence is not maintainable against the city for omitting to keep in repair the approaches to a bridge over the Erie canal, on lands belonging to the state, although the bridge is used as a part of a public highway.—*Ct. of App.*, *April*, 1880. Carpenter *v.* City of Cohoes, 81 N. Y. 21.

51. The power which the city charter (Laws of 1876, ch. 440, as amended by Laws of 1880, ch. 456,) has attempted to confer upon its recorder cannot be upheld, it being subversive of the principles of our fundamental law; and also violative of an express constitutional provision.—*Supreme Ct.*, (*Albany Sp. T.*,) *June*, 1881. Matter of Bayard, 61 How. Pr. 294.

52. Huntington. The harbor of Northport lies within the limits of the town of Huntington, and under its charter the said town has the right to lease the lands under the waters of the said harbor, to be used for the purpose of planting and raising oysters.—*Supreme Ct.*, (*2d Dept.*,) *May*, 1881. Robins *v.* Ackerly, 24 Hun 499.

53. Kingston. The power conferred by the charter of the city (Laws of 1872, ch. 150,) upon the commissioners of the alms-house, to sue in their corporate name for all violations of the

excise laws committed in the city, was not affected or taken away by the amendment to Laws of 1857, ch. 628, § 22, by Laws of 1878, ch 109, § 1.—*Supreme Ct.*, (*3d Dept.*,) *Nov.*, 1880. Commissioners, &c., of Kingston, *v.* Osterhoudt, 23 Hun 66.

54. Poughkeepsie. Under the amended charter of the city, the purchasers at tax sales made thereunder are not required to serve notices thereof upon those holding mortgages upon the premises, unless the statement required by ch. 387 of 1840, as amended by ch. 266 of 1844, has been filed.—*Supreme Ct.*, *Sept.*, 1880. Dubois *v.* City of Poughkeepsie, 22 Hun 117.

55. Under the amended charter, the city has power to sell lands for unpaid state and county taxes, as well as for unpaid city taxes, and is entitled to collect interest at the rate of one per cent. per month upon all of the said taxes *Ib.*

56. Under Laws of 1874, ch. 497, § 8, providing that the city attorney shall, upon making a sale, have "such fee as the common council may fix," the common council may fix the attorneys' fees for all future sales in one resolution. *Ib.*

57. The charter provided that every tax should be a lien upon the real estate charged with the payment thereof for two years from the signing of the warrant for its collection. *Held*, that the sale must be made before the expiration of the two years, and that it was not enough that all the preliminary proceedings had been taken, and the advertisement commenced within that period, where the sale took place a few days after the expiration thereof. *Ib.*

58. Rhinebeck. The section of the village charter (Laws of 1867, ch. 360, § 25) in reference to laying out streets, etc., and assessing the expenses thereof, is not violative of the constitutional provision of the state (art. VIII., § 9,) requiring the legislature to restrict the power of taxation and assessment of municipal corporations.—*Ct. of App.*, *Oct.*, 1880. Matter of Livingston Street, 82 N. Y. 621.

59. The power given in said section to apply to the court for the appointment of a second set of commissioners without notice to the property-owners is not at variance with the constitutional provision (art. VI., § 1,) declaring that no person shall be deprived of property without due process of law. *Ib.*

60. The fact that said section gives power to the trustees to confirm or annul the report of commissioners, and makes their decision final and conclusive, is not fatal to the section or to proceedings under it; the legislature had authority to grant the power. *Ib.*

61. The trustees of the village have power to proceed under said section without the certificate of freeholders, such as is required by commissioners of highways of towns. The provisions of the charter are paramount to those of the statute governing the action of such commissioners. *Ib.*

62. The provisions of the charter were amended in 1870 (Laws of 1870, ch. 323,) so as to require the application of six freeholders before the trustees could take action to open a new street. The amendatory act was repealed in 1879. (Laws of 1879, ch. 452.) *Held*, that the original provisions were thereby restored and came again into force. *Ib.*

63. Where proceedings were taken under said section of the charter to open a street and commissioners were appointed to assess damages for the land taken—*Held*, that the proceedings were not affected by a subsequent act amending the village charter (Laws of 1880, ch. 324,) making the power of the trustees to institute such proceedings dependent upon the petition of twelve freeholders. *Ib.*

64. Rochester. Where, in pursuance of statutes (Laws of 1872, ch. 387 ; Laws of 1875, ch. 563,) imposing upon the city a system of water-works, "for the use of its inhabitants and the extinguishment of fires," lands were purchased and a reservoir constructed in the town of Rush—*Held*, that the work was to be regarded as executed for the public benefit, and the property, therefore, as held for public purposes ; and so, that in the absence of an express legislative declaration authorizing it, it was not subject to taxation, and that a tax imposed thereon in said town was illegal and void.—*Ct. of App.*, *March*, 1880. City of Rochester *v.* Town of Rush, 80 N. Y. 302 ; *reversing* 15 Hun 239.

65. Where, however, the said property was assessed by the town assessors, and the city paid the tax to the town collector, who paid it over to the county treasurer, by whom it was applied "in the same manner as other taxes assessed and collected in said town," *i. e.*, a portion paid to the authorities of the town, a portion to the proper state officers and the residue retained for county purposes—*Held*, that an action could not be maintained against the town to recover back the tax, or that portion thereof paid over to the town officers, as the town has no treasurer, and its officer to whom the money was paid do not represent it, their functions being prescribed by statute, and the money they received being expended in the performance of official duty. *Ib.*

66. *It seems*, however, that the city has a remedy in such case under the provision of the statute extending the powers of boards of supervisors (Laws of 1869, ch. 855, as amended by Laws of 1871, ch. 695, § 5,) which requires the board of supervisors of a county, upon the order of the county judge, to refund the amount of any tax illegally or improperly assessed. *Ib.*

67. Saratoga Springs. Laws of 1875, ch. 517, providing for the settlement of the floating debt of the village, after creating a board of auditors, declares "that their first duty shall be to thoroughly examine and investigate all claims and accounts against said village embraced in the floating debt thereof, and to audit and allow so much of the same as is just and equitable."

Held, 1. That by the term "floating debt" was meant only the unpaid legally-authorized obligations of the village, and that it did not include a claim for services rendered or supplies furnished in violation of § 61 of its charter (ch. 220 of 1866, as amended by ch. 760 of 1871,) which provides that no debt shall be incurred or created, nor any expenditure made until the money or tax for that specific object shall have been voted or raised.

2. That when the bills incurred for any specific object did not exceed the money voted and raised therefor, the rights of the owners of such bills were not affected by the wrongful diversion of the money to other purposes.—*Supreme Ct.*,

(*3d Dept.,*) *Nov.,* 1880. Cooke *v.* Village of Saratoga Springs, 23 Hun 55.

68. The act of 1875 provided that no suit should be brought against the village except upon audited bills. *Held,* that interest on the claims could only be allowed from the time of their audit. *Ib.*

69. Syracuse. The common council of the city passed an ordinance prohibiting the peddling or delivery of milk from any vehicle in the streets, etc., of the city, without a license, authorizing the mayor to grant licenses, and declaring the violation of said ordinance a misdemeanor.

Held, 1. That the ordinance was within the power conferred upon the common council by the charter of the city. (Laws of 1857, ch. 63, §§ 4, 6.)

2. That said ordinance was not in conflict with the privilege of selling milk to the inhabitants of said city granted to the O. C. M. Association by its charter (Laws of 1872, ch. 102); that the franchise was simply to sell as a corporate body, and gave no more right to the corporation in that regard than its members had as individuals; and that the corporation was affected by the lawful ordinances of the city the same as an individual.—*Ct. of App., Oct.,* 1880. People, ex rel. Larrabee, *v.* Mulholland, 82 N. Y. 324; *affirming* 18 Hun 548.

70. Troy. The city charter (Laws of 1872, ch. 129, § 10,) provides that no civil action shall be brought against the city for injuries to persons or property "unless it appears that the claim for which the action was brought was presented to the comptroller with an abstract of the facts out of which the cause of action arose, * * * and that the comptroller did not, within sixty days, audit the same." Plaintiff presented a petition, as required, setting forth the facts and claiming damages to the amount of $10,000 for injuries alleged to have been caused by the negligent omission of the city to keep one of its streets in repair. The claim not having been audited as prescribed, this action was brought. The complaint alleged, substantially, the same facts as the petition, and claimed $5000 damages. *Held,* that the word "claim," and the phrase "cause of action," related to the same thing; that although the amount of compensation was different, the claim presented in the petition and the cause of action set forth in the complaint were identical; and that there was a sufficient compliance with the provisions of the charter.—*Ct. of App., Jan.,* 1881. Minick *v.* City of Troy, 83 N. Y. 514; *affirming* 19 Hun 253.

71. The common council may fix the price to be paid for publication of its proceedings.—*Supreme Ct.,* (*3d Dept.,*) *Jan.,* 1881. MacArthur *v.* City of Troy, 24 Hun 55.

72. West Troy. Under the charter of the village (Laws of 1850, ch. 230, §§ 31, 32, 33,) the trustees thereof have no power to audit claims against the village, arising out of torts, and the claimant, to entitle him to recover costs therein, is not required by Laws of 1859, ch. 262, to present his claim to the chief fiscal officer of the village before bringing an action thereon.—*Supreme Ct.,* (*3d Dept.,*) *Nov.,* 1880. Childs *v.* Village of West Troy, 23 Hun 68.

For decisions of a local character applicable to the *City of New York,* see NEW YORK CITY.

MURDER.

HOMICIDE, I.

N.

NATIONAL BANKS.

BANKS AND BANKING.

NATURALIZATION.

CITIZENS, 2, 3.

NECESSARIES.

HUSAND AND WIFE, 6, 7, 11; PARENT AND CHILD, 1.

NE EXEAT.

Abolition of the writ. A *ne exeat* was issued herein in March, 1869. A motion was made in May, on the part of defendant, to vacate the writ and the order for its issue, or to reduce the amount of bail, and that a sum deposited with the sheriff be restored, and for general relief. The motion appears to have been founded on the merits; it did not appear in the notice of motion, or in any of the papers, that the ground of want of power was taken. The order made upon the motion simply directed a reduction of the bail and a return of the money deposited in excess of the amount fixed; no further disposition of the motion to vacate was made. An appeal was taken in January, 1879. On appeal to this court—*Held,* the presumption was that all that was presented to or passed upon by the Special Term was the right of defendant to relief upon the facts; that under the circumstances, as the question is not distinctly presented by the order appealed from, and as Code of Civ. Pro., § 548, has declared in terms that the writ is thereby abolished, thus rendering the question of no practical importance, so far at least as future cases are concerned, the court would not review the many decisions of

the Supreme Court, prior to the new code, holding the writ not abolished.—*Ct. of App., Feb.*, 1880. Collins *v.* Collins, 80 N. Y. 24.

NEGLIGENCE.

I. What Amounts to Negligence, and the Liability Therefor.

II. Contributory Negligence.

I. What Amounts to Negligence, and the Liability Therefor.

1. **Who is liable for negligence.** One O'D., having applied by his agent, W., to plaintiff, for a loan on bond and mortgage, was told to procure a proper search from the county clerk's office, and that if the property was clear he could have the money. W., acting for O'D., and at his expense, procured from the defendant, the county clerk, a search against the premises, from which was omitted a deed, then on record, by which O'D. had conveyed to another person the premises in question. The plaintiff, having made the loan in reliance upon the search, and being unable to collect the money on his bond and mortgage, brought this action against defendant to recover the said amount as damages for the negligence of defendant in omitting the deed from the search. *Held*, that defendant owed no duty to plaintiff, and was not liable to him for the damages occasioned by his omission of the deed from the search.—*Supreme Ct.*, (*3d Dept.*,) *Nov.*, 1880. Day *v.* Reynolds, 23 Hun 131.

2. **The complaint.** Although in an action to recover damages, alleged to have been caused by the defendant's negligence, the burden of proof is on the plaintiff to show upon the trial by competent proof that his negligence did not contribute in any degree to the injury complained of, yet it is not necessary for him to specifically allege these facts in the complaint. It is sufficient to aver therein that the injury and damage complained of was caused by the negligence of the defendant; the averment that the negligence of the defendant was the cause of the injury is equivalent to an averment that it was the sole cause.—*Supreme Ct.*, (*3d Dept.*,) *Nov.*, 1880. Urquhart *v.* City of Ogdensburg, 23 Hun 75.

3. **The burden of proving negligence.** *It seems* that in an action to recover damages for injuries occasioned by falling through a coal hole in a sidewalk, it is not necessary to prove negligence on the part of the defendant; nor, in the first instance, want of contributory negligence on the part of plaintiff. The action is not based upon negligence, but a wrongful act, and all that is necessary for plaintiff to prove to make out a cause of action is, the existence of the hole, defendant's responsibility therefor, and that in passing plaintiff fell into it. When permission is given by a municipal authority to thus interfere with a sidewalk, solely for private use and convenience, the person obtaining the permission must see to it that the street is restored to its original safety and usefulness.—*Ct. of App.*, *April*, 1880. Clifford *v.* Dam, 81 N. Y. 52.

4. **Evidence to prove negligence.** While, in an action for negligence, it is necessary for the plaintiff to show affirmatively that the negligence of the defendant was the sole cause of the injury complained of, it is not necessary that this be done by positive and direct evidence; proof of circumstances from which the inference may fairly be drawn is sufficient. —*Ct. of App.*, *Feb.*, 1880. Hart *v.* Hudson River Bridge Co., 80 N. Y. 622.

5. In an action to recover damages for alleged negligence, proof of the violation of a city ordinance does not establish negligence *per se;* it is competent evidence upon the question to be submitted to the jury, but not conclusive.—*Ct. of App., March*, 1881. Knupfle *v.* Knickerbocker Ice Co., 84 N. Y. 488; *reversing* 23 Hun 159.

6. **Instances.** Plaintiff, a brakeman in defendant's employ, was injured by the breaking of an eye-bolt connecting the chain with the rod of a brake. In an action to recover damages it appeared that the eye-bolt was defective in not having been properly welded. There was no evidence of notice of the defect to defendant, or any of its agents, nor was it shown that the defect could have been discovered by inspection; there was evidence that the maker of the bolt could have discovered the defect by bending it while hot and in other ways, but it did not appear whether the eye-bolt was made by the company or purchased; and no want of care, the exercise of which would have discovered the defect, was shown. *Held*, that the plaintiff failed to make out a case, so far as it rested upon the imperfection referred to.—*Ct. of App., Nov.*, 1880. Painton *v.* Northern Central R'y Co., 83 N. Y. 7.

7. There was evidence, however, that the eye-bolt was smaller than those used by defendant at the time of trial; that the breaking of the chains had formerly been of frequent occurrence. The eye-bolt in question and one of the larger eye-bolts adopted since the accident were produced, and submitted to the inspection of the jury. *Held*, that while the proof of negligence on the part of defendant was slight, sufficient was shown to justify the submission of the question to the jury. *Ib.*

8. Plaintiff's sleigh was upset by striking against a switch laid down by defendant in a street in the city of B., to connect its tracks with that of another road over which it ran its cars. The evidence tended to show that the switch was higher above the pavement than was necessary or reasonable; that defendant had put salt on its track, which had melted the snow and caused the slush to run down and cover the switch from sight. Accidents had frequently happened to other passing vehicles from the same cause. In an action to recover damages—*Held*, that the evidence justified the submission of the question of defendant's negligence to a jury.—*Ct. of App., Dec.*, 1880. Wooley *v.* Grand Street, &c., R. R. Co., 83 N. Y. 121.

9. The plaintiff, who was blind in one eye, while passing in the night-time over a bridge, which was not guarded by a railing, unexpectedly met a loaded team, in attempting to avoid which he stepped off the bridge and sustained injuries, to recover damages for which this action was brought against the commissioners of highways. Upon the trial before the court, without a jury, the plaintiff was allowed, against

the defendants' objection and exception, to show that after the accident the defendants had, in pursuance of a resolution adopted prior thereto, placed a railing upon the bridge, and this evidence was considered by the court as bearing upon the question of the defendants' negligence. *Held*, that the court erred in admitting the evidence.—*Supreme Ct., (3d Dept.,) Jan.*, 1881. Morrell *v.* Peck, 24 Hun 37.

10. How far proof of the subsequent erection of the rail was admissible for the purpose of proving funds in defendants' hands, and that they exercised control over the bridge; and its admissibility when considered in connection with the fact that the railing was put up in accordance with a resolution adopted prior to the accident, considered. *Ib.*

11. Exhibiting injured limb to jury. In an action for injuries to the person, caused by the negligence of defendant, it is not error to allow the plaintiff to exhibit to the jury the injured limb, *e. g.*, an arm which has been crushed by machinery.—*Superior Ct, Nov.*, 1880. Jordan *v.* Bowen, 46 Superior 355.

12. When the question is for the jury. Where, from the circumstances shown, inferences are to be drawn which are not certain and incontrovertible, and as to which persons might differ, it is for the jury to decide.—Hart *v.* Hudson River Bridge Co., *supra.*

13. Where there is a conflict of testimony as to whether the car upon a street railroad was stopped at the request of the deceased, and again negligently started while he was in the act of alighting, the case should go the jury, notwithstanding that it appears that the passenger was unnecessarily upon the front platform, and attempted to alight therefrom.—*Superior Ct., Dec.*, 1880. Lax *v.* Forty-second St., &c., R. R. Co., 46 Superior 448.

14. While plaintiff was driving his mare across the track of defendant's road at the intersection of two streets in the city of T., her foot caught between the planking and one of the rails and she was injured. Upon the trial of an action to recover damages, plaintiff's evidence was to the fact that there was over three and one-fourth inches between the plank and the rail, while two and one-quarter inches was all that was required for the passage of the flanges of the car wheels, and because of this the horse's hoof got into the open space and the toe-calk caught under the rail; that the plank was from one-fourth to three-eighths of an inch higher than the top of the rail; and that the crossing was constructed differently from others upon defendant's road and upon other railroads. Plaintiff was nonsuited, on the ground that there was no evidence of negligence on the part of defendant. *Held*, error; that the question of negligence was one of fact for the jury.—*Ct. of App., Jan.*, 1881. Payne *v.* Troy, &c., R. R. Co., 83 N. Y. 572.

15. Proper instructions to the jury. The evidence was to the effect that, as between the defendant and the other street railway, with whose tracks the switch made a connection, the defendant was to keep the switch and the abutting pavements in good condition. The court was asked to charge that if the switch was properly put down defendant was not chargeable; the request was refused, but the court charged that if the switch was skillfully put down and was in itself no obstruction, which a person could not, with ordinary care and prudence, avoid, the proposition would be correct. *Held*, no error; that although the switch was a proper one and well laid down, if it subsequently, from any cause, was raised to an undue height above the pavement, or the pavement had sunk unduly below it, it was defendant's duty to put it in good condition. Wooley *v.* Grand Street, &c., R. R. Co., *supra.*

16. After the court had charged, in substance, that the switch used was not in itself objectionable, but was only so if found by the jury to have been, at the time, too high to be compatible with defendant's right to a reasonable use of the street and to have been an obstruction, was asked by defendant's counsel to instruct the jury that defendant was not chargeable with negligence in putting down the switch he did, that the switch used was not an obstruction in law, if properly laid. The court replied it would leave that to the jury. *Held*, that the request and answer must be considered in view of what the court had already charged, and so considered was not error. *Ib.*

II. Contributory Negligence.

17. The care required. Although the degree of care and prudence required of one traveling upon a street wherein a street railway has been rightfully laid down, is greater than that required in traveling upon a street not so used, yet it may still be characterized as ordinary. Wooley *v.* Grand Street, &c., R. R. Co., *supra.*

18. What amounts to contributory negligence. A plaintiff's own negligence, or want of ordinary care or caution is not contributory, unless but for such negligence or want of ordinary care or caution, the collision resulting in injury to the plaintiff would not have happened.—*Supreme Ct., Dec.*, 1881. Healy *v.* Dry Dock, &c., R. R. Co., 46 Superior 473.

19. Where a defendant, after becoming aware of plaintiff's danger by observing the condition and peril of plaintiff, could, by the exercise of reasonable care and prudence, have avoided the collision, the negligence, &c., of plaintiff is not contributory; in such case, it cannot be said that the collision would not have happened but for the negligence, &c., of plaintiff. *Ib.*

20. The fact that one has placed himself in a place of danger can never be an excuse for another carelessly or recklessly injuring him. *Ib.*

21. Upon the trial of this action, brought by the plaintiff, an employee of the defendant, to recover damages for injuries sustained by reason of the premature explosion of a blast while he was engaged in charging the hole, it appeared that the defendant was, to the plaintiff's knowledge, guilty of negligence in three respects, viz., in using damp, unglazed powder, in drilling a square instead of a round hole, and in using an iron instead of a copper spoon for charging it. *Held*, that the mere fact that the plaintiff continued his work, with the knowledge of these facts, did not of itself establish contributory negligence as a matter of law on his part, but only authorized the submission of that question to the jury, and that the court erred in taking it

from them and non-suiting the plaintiff.—*Supreme Ct.*, (3*d Dept.*,) *Jan.*, 1881. McMahon *v.* Port Henry Iron Ore Co., 24 Hun 48.

22. What contributory negligence on the part of the plaintiff will bar his action, see Toomey *v.* Turner, 24 Hun 599.

23. —in cases where children are injured. An infant, to avoid the imputation of negligence, is bound only to exercise that degree of care which can reasonably be expected of one of its age.—*Ct. of App.*, *Jan.*, 1881. Byrne *v.* New York Central, &c., R. R. Co., 83 N. Y. 620.

24. The plaintiff's intestate, a bright boy of nine years of age, waited on the westerly side of the defendant's road, at a public crossing, until a long freight train, which was going in a southerly direction, had passed, and then immediately attempted to run across the track, without looking along it, to see whether another train was approaching; after having run about thirty or forty feet he was struck by the locomotive of a passenger train, going north, at a speed of about thirty or thirty-five miles an hour; there was a curve just south of the crossing, which hid the tracks beyond it, and only about twenty-five seconds elapsed from the time the locomotive passed it until it struck the boy. *Held*, that the court properly refused to non-suit the plaintiff on the ground that the deceased had been guilty of contributory negligence.—*Supreme Ct.*, (2*d Dept.*,) *Sept.*, 1880. Powell *v.* New York Central, &c., R. R. Co., 22 Hun 56.

25. The rules as to contributory negligence on the part of children, and the obligation as to care resting on persons having charge of a school, in regard to the safe condition of the premises, discussed and applied.—*Supreme Ct.*, (*Gen. T.*,) *May*, 1881. Miller *v.* McCloskey, 9 Abb. N. Cas. 303.

26. Contributory negligence of another than the plaintiff. This action was brought by the plaintiff, a married woman, to recover damages for injuries sustained by her by reason of her being thrown from a carriage driven by her husband in one of the streets of the city of Cohoes on a Sunday evening. The accident was alleged to have been occasioned by the negligence of the defendant in allowing a heap of earth to be thrown upon and left unguarded in the street.

Held, 1. That the court properly refused to non-suit the plaintiff on the ground that she met with the accident while violating the Sunday law, in traveling on that day for a purpose other than "charity or necessity."

2. That the court properly charged that the plaintiff was not responsible for any carelessness on the part of her husband in driving, unless she did some act encouraging it.—*Supreme Ct.*, (3*d Dept.*,) *Jan.*, 1881. Platz *v.* City of Cohoes, 24 Hun 101.

27. Plaintiff's testator was, by invitation of the driver, a stranger, riding in a wagon upon a highway crossed by defendant's road. A wheel of the wagon went into a hole in the road between the rails of defendant's track, and he was jolted from the wagon and killed. In an action to recover damages the court charged in substance that "carelessness upon the part of the driver, assuming he was a competent driver and a sober man, and there was no reason which the deceased could discover why he should not ride with him, would not defeat a recovery, unless the death was caused by his wrongful and willful act." Defendant's counsel requested a charge that "that if the driver's negligence was the proximate cause of the jar the plaintiff cannot recover." The court refused to alter its charge. *Held*, no error; that the charge in this respect was sufficient.—*Ct. of App.*, *March*, 1881. Masterson *v.* New York Central, &c., R. R. Co., 84 N. Y. 247.

28. Evidence as to contributory negligence. Where the testimony of single witnesses is susceptible of construction either for or against the existence of contributory negligence, the complaint should be dismissed. Desmond *v.* Rose, 46 Superior 569.

29. The rule that in an action for damages occasioned by negligence, the plaintiff must prove freedom from any negligence on his part contributing to the accident, applied to the facts of the particular case.—*Supreme Ct.*, (2*d Dept.*,) *Sept.*, 1880. Glendening *v.* Sharp, 22 Hun 78.

30. When a question for the jury. Plaintiff, while in the employ of defendant as locomotive engineer, was injured by the overturning of his engine, caused by the bad condition of defendant's road. In an action to recover damages, it appeared that plaintiff was running his engine, by express orders without cars attached, ahead of a passenger train; he knew that the road was somewhat out of repair, and that he incurred some danger, but it did not appear conclusively that he knew how badly it was out of repair, or that the danger was very great. Three or four passenger trains, besides freight trains, passed over the road daily each way; it did not appear that any accident had previously happened, caused by the bad condition of the road. Plaintiff and other engineers had frequently run their engines over the road with safety, in the same way plaintiff was running his at the time of the accident. Plaintiff was ordered by competent authority to so run his engine, and he had the assurance that the road would soon be put in repair. *Held*, that the evidence authorized the submission of the question of contributory negligence to the jury.—*Ct. of App.*, *Oct.*, 1880. Hawley *v.* Northern Central Railway Co., 82 N. Y. 370; *affirming* 17 Hun 115.

31. Plaintiff, who was riding in a sleigh, knew that there was a switch in the locality in which he was driving, but it did not appear that he had in mind its precise location; he was not thinking particularly of the switch at the moment of the accident; but, thinking the place was one dangerous to cross without care, was going slowly and using great caution when his sleigh was upset. *Held*, that he was not, as matter of law, chargeable with contributory negligence, but that the question was one for the jury.—*Ct. of App.*, *Dec.*, 1880. Wooley *v.* Grand Street, &c., R. R. Co., 83 N. Y. 121.

32. The defendants, wholesale dealers in stoves, occupied the upper stories of a building in New York city, for the storage of stoves, and received orders for and delivered them in the basement. An elevator, used by the defendants and other occupants of the building, ran from the upper story to the basement, and into a pit made in the floor thereof. The plaintiff, who had ordered some stoves in the morning, came in the afternoon to get them, and finding no one to attend to the matter in the basement, went to the elevator to call up to some one in the upper

story, and in so doing fell into the elevator pit and was injured. The basement was dark, and there were no guards around the pit. The plaintiff had been there before and knew where the elevator was situated, but did not know of the existence of the pit. When there before, he had found a guard around the place where the elevator descended. In an action by him to recover damages for the injuries so sustained —*Held*, that the question of the plaintiff's contributory negligence was properly left to the jury, and that a verdict in his favor would not be disturbed.—*Supreme Ct.*, (2d *Dept.*,) *Dec.*, 1880. Harris *v.* Perry, 23 Hun 244.

33. Instructions to the jury. Upon the question of contributory negligence the court charged: "It is not enough to prove facts from which either the conclusion of negligence or the absence of negligence may be with equal fairness drawn, but the burden is upon plaintiff to satisfy you that there was no contributory negligence on the part of the deceased." *Held*, no error.—*Ct. of App.*, *Feb.*, 1881. Hart *v.* Hudson River Bridge Co., 84 N. Y. 56.

34. The injury was caused by the wheel of the wagon in which plaintiff was riding running into a hole in the street. The court, after it had charged, in substance, that plaintiff could not recover if her negligence had in any manner contributed to the injury, and that she was responsible for the conduct of the driver, her son, was asked by defendant's counsel to charge that "if the hole was one which might have been seen by the plaintiff or her son and readily avoided by the ordinary exercise of their eyes, the failure to avoid it constituted negligence." The court replied that this was substantially correct, save the expression "might have been seen," as to which he charged, in substance, that if, in the use of ordinary care, the hole ought to have been discovered, plaintiff could not recover. *Held*, no error.—*Ct. of App.*, *Jan.*, 1881. Minick *v.* City of Troy, 83 N. Y. 514; *affirming* 19 Hun 253.

For decisions upon the *Liability of carriers*, for negligence, see CARRIERS; RAILROAD COMPANIES, IV.

As to negligence of *City and town authorities*, see MUNICIPAL CORPORATIONS, 33-36.

For the liability of *Master to servant*, for negligence of the former, or of fellow servant, see MASTER AND SERVANT, 6-16; RAILROAD COMPANIES, 45-53.

NEGOTIABLE INSTRUMENTS.

BILLS OF EXCHANGE; PROMISSORY NOTES.

NEW PROMISE.

BANKRUPTCY, 9; LIMITATIONS OF ACTIONS, V.

NEW TRIAL.

I. GROUNDS.

II. THE APPLICATION; AND HOW DISPOSED OF.

I. GROUNDS.

1. Misconduct of jurors. The constable having allowed the jurors, after they had retired, to come into the court-room, they, while there, found upon the floor and took back to the jury-room with them, a memorandum of the items of damages, made by the plaintiff's attorney and used by him in summing up. The court, upon the jury subsequently applying to it for instructions, discovered that they had this memorandum, and, upon ascertaining how they had obtained it, took it from them, remarking that they had no right to it and must give no heed to it. The damages, as found by the jury, agreed with the directions contained in the charge of the court, in regard thereto. *Held*, that a motion to set aside the verdict, based upon this irregularity, was properly denied.—*Supreme Ct.*, (4*th Dept.*,) *Oct.*, 1880. Dolan *v.* Ætna Ins. Co., 22 Hun 396, 403.

2. There is no presumption that individual jurors have compromised their opinions in arriving at the amount of their verdict in an action for libel where there is no evidence as to damages, from the mere fact that the verdict is for a certain number of dollars and three cents. —*Superior Ct.*, *April*, 1880. Meyer *v.* Press Publishing Co., 46 Superior 127.

3. Excessive damages. A verdict for $15,000—*Held* not excessive in an action against a railroad company for personal injuries, in view of the severity of plaintiff's injuries. Schultz *v.* Third Ave. R. R. Co., 46 Superior 211.

4. Upon the trial of this action brought to recover damages for personal injuries alleged to have been occasioned by the defendant's negligence, evidence was given tending to show that the plaintiff, a man about forty years old, in the full vigor of health, was suddenly injured by the shock of a collision which occurred upon the defendant's railroad; that besides many lesser injuries the accident produced a concussion of the spine, the result of which has been chronic inflammation of the membranes which envelop the spinal cord; that the disease was a progressive one; that it had already largely impaired his faculties, both mental and physical, and that it would probably progress until paralysis and premature death ensued. *Held*, that a verdict in the plaintiff's favor for $30,000 would not be set aside as excessive.—*Supreme Ct.*, (2d *Dept.*,) *Feb.*, 1881. Harrold *v.* New York Elevated R. R. Co., 24 Hun 184.

5. Inadequacy of damages is a sufficient ground for setting aside a verdict and granting a new trial. So—*Held*, where the plaintiff was seriously and permanently injured by the defendant's negligence, and a verdict for $400 appeared to be unjust and to have been a compromise verdict, and possibly influenced by an error in the judge's charge.—*Supreme Ct.*, (3*d Dept.*,) *May*, 1879. Platz *v.* City of Cohoes, 8 Abb. N. Cas. 392.

6. When granted in ejectment. The Code of Civil Procedure has not altered the practice in relation to new trials in actions of ejectment; an order may be made before judgment is perfected, that when the judgment is perfected, it be thereupon vacated, and a new trial ordered without further order of the court. —*Com. Pleas*, (*Sp. T.*,) *May*, 1881. Post *v.* Moran, 1 Civ. Pro. 222; S. C., 61 How. Pr. 122.

7. By the alteration of the provisions of law

in relation to granting orders for new trials in ejectment, as now found in § 1525, it was not the intention of the legislature to change the practice as to when such orders might be made, but to fix with greater certainty the exact date from which the absolute right to a new trial runs, and not to exclude the defeated party from the advantages of anticipating the entry of judgment—retaining possession of the disputed premises, and preventing the issuing of an execution to enforce the judgment. *Ib.*

8. It was not the intention of the codifiers to alter the former practice in relation to ejectment, by inserting the words "and the judgment-roll is filed," in the provisions of the code, and these words were inserted in §§ 1524 and 1526 as a substitute for the previous provisions as to "docketing" the judgment, and were inserted in § 1525 for the purpose of uniformity. *Ib.*

9. The statute authorizing the vacating of the judgment and a new trial in ejectment, applies to ejectment for non-payment of rent.—*Supreme Ct.*, (*Ulster Sp. T.*,) *June*, 1879. Reed *v.* Loucks, 61 How. Pr. 434.

II. The Application; and How Disposed of.

10 Jurisdiction — proper place to move. The Code of Civ. Pro., § 1002, requires that in a case not specified in the three preceding sections, the motion for a new trial must be heard and determined at Special Term, in the first instance. A motion on the ground of surprise and newly-discovered evidence, must, under the said section, be made at Special Term. The appearance of the parties before the trial judge, and the argument of the motion on the merits alone, are not acts which confer jurisdiction. If the question of jurisdiction is waived, it should appear by recitals in the order or in a stipulation to that effect.—*Superior Ct.*, *Feb.*, 1880. Newhall *v.* Appleton, 46 Superior 6.

11. The motion which Code of Civ. Pro., § 999 authorizes the trial judge to entertain upon his minutes, is one to set aside the verdict and grant a new trial; but, where the complaint is dismissed upon the plaintiff's own showing, there is no verdict, although a jury may have been impaneled to try the issue. The remedy of the plaintiff in such a case is either by motion at Special Term on a case to be made and settled, or by appeal to the General Term.—*Superior Ct.*, (*Trial T.*,) *Aug.*, 1881. Dusenbury *v.* Dusenbury, 1 Civ. Pro. 292; S. C., 61 How. Pr. 432.

12. Entry of order. As to what is a sufficient entry of an order granting a new trial, see Dart *v.* Gillies, 46 Superior 560.

13. Before whom new trial to be had. The reversal of a judgment entered upon the report of a referee and the granting of a new trial does not vacate the order of reference; and the new trial must be had before the same referee, unless otherwise specially provided.—*Ct. of App.*, *June*, 1880, Catlin *v.* Adirondack Co., 81 N. Y. 379.

As to *Other modes of review*, see Appeal; Certiorari; Error; Exceptions.

NEW YORK CITY.

I. Corporate Powers.
II. Local Improvements; and Assessments therefor.
III. Municipal Officers.
1. *In general.*
2. *Decisions relating to particular officers or boards.*
IV. Corporate Liabilities.
1. *Upon contracts.*
2. *For wrongs.*

I. Corporate Powers.

1. A lease of lands (the title to which the city of New York claims under Laws of 1839, ch. 246, and Laws of 1834, ch. 150,) purporting to be made by the "mayor, aldermen, &c., acting by the commissioners of the sinking fund," as lessor, and which is signed by the comptroller with his name and official title, is improperly executed and void.—*Superior Ct.*, *Dec.*, 1880. Carleton *v.* Darcy, 46 Superior 484.

2. Ordinances and resolutions. Under the provisions of the charter of 1870 (Laws of 1870, ch. 137, § 20,) declaring that no vote shall be taken in either board of the common council upon the passage of a resolution or ordinance contemplating a specific improvement, or laying a tax or assessment until after notice shall be published at least three days, each board, separate and independent of the other, must cause notice of the introduction of a resolution into its own body to be published for three days before final action thereon; a publication by one board will not suffice.—*Ct. of App.*, *Sept.*, 1880. Matter of De Pierris, 82 N. Y. 243.

3. Regulation of piers and wharves. N. Y. Laws of 1875, ch. 249, § 1, provides that it shall be lawful for the owner or lessee of a pier or bulkhead in the city of New York to erect and maintain sheds upon it, "provided they shall have obtained from the department of docks, in said city, a license or authority to erect or maintain the same, and subject to the conditions and restrictions contained in such license or authority." *Held*, that the license or authority required by the act must be in writing. —*Supreme Ct.*, (*1st Dept.*,) *Nov.*, 1880. People *v.* Macy, 22 Hun 577.

4. The right of the city to resume possession of piers leased, what is sufficient evidence of its having done so and the effect of a failure to give notice to a lessee, as required by the lease, determined.—*Supreme Ct.*, (*1st Dept.*,) *Jan.*, 1881. Christie *v.* Parker, 23 Hun 661.

5. Protection of harbor. In an action to recover a penalty for illegal dumping in the harbor, the intent of the defendant is a substantial fact and must be shown. (Laws of 1857, ch. 671, § 7, as amended by Laws of 1876, ch. 414.) —*Supreme Ct.*, (*1st Dept.*,) *Dec.*, 1880. Commr's. of Pilots *v.* Pidgeon, 23 Hun 346.

II. LOCAL IMPROVEMENTS; AND ASSESSMENTS THEREFOR.

6. Interpreting the statutes. The effect of the passage of Laws of 1871, ch. 574, § 5, upon irregular assessments for local improvements, determined.—*Supreme Ct.,* (*1st Dept.,*) *Dec.,* 1880. Matter of Metropolitan Gas Light Co., 23 Hun 327.

7. What is a taking of land. An award by commissioners for land not required for the street, but which is a part of a lot, a portion of which was required, and which the commissioners deemed it expedient to include in their estimate and assessment, and the acceptance of such award, operate as a conveyance of the land to, and vest the title in, the corporation of the city.—*Superior Ct., June,* 1880. Sherman *v.* Mayor, &c., of New York, 46 Superior 310.

8. What property may be assessed. Where a provision in an act incorporating a charitable institution in the city of New York exempted its real estate from taxation—*Held,* that such real estate was not thereby exempted from an assessment for a local improvement; that the assessment was not taxation within the meaning of the act.—*Ct. of App., Feb.,* 1881. Roosevelt Hospital *v.* Mayor, &c., of New York, 84 N. Y. 108.

9. Notice to land-owner. The power given by the city charter of 1870 (Laws of 1870, ch. 137,) to the department of public works, to order the construction of sewers, and to carry on the work, was not divested by the charter of 1873. (Laws of 1873, ch. 335.)—*Ct. of App., April,* 1880. Matter of De Peyster, 80 N. Y. 565; *affirming* 18 Hun 445.

10. An assessment for the expenses of constructing a sewer is not invalid, because of omission to give to the owner of lots assessed, a personal notice that an assessment is to be imposed. The legislature may prescribe what the notice shall be, and where provision has been made for notice, before the completion of the assessment, by publication for objections to be presented within a time specified, and this has been complied with it, is sufficient. *Ib.*

11. Consent of land-owner. The power conferred upon the commissioners of Central Park by the act of 1867 (Laws of 1867, ch. 697, § 1,) to change the grade of any of the streets within a district therein specified, was not subject to, or limited by, the provision of the act of 1852 (Laws of 1852, ch. 52, § 2,) prohibiting the common council from changing the grade of streets without the written consent of the owners of two-thirds, in lineal feet, of the adjoining lands. Therefore—*Held,* that an assessment for a change in the grade of a street, made by said commissioners under said act of 1867, was not invalidated because of failure to obtain such consent.—*Ct. of App., Jan.,* 1881. Matter of Walter, 83 N. Y. 538; *affirming,* 21 Hun 533.

12. Necessity of compensation to owner. The commissioner of public works run an underground drain through lots of the petitioners, which had already been thoroughly drained by means of ordinary sewers, for which an assessment had been duly paid. *Held,* that an assessment for such drain was properly vacated, the appropriation of petitioner's lots therefor without compensation being illegal.—*Supreme Ct.,* (*1st Dept.,*) *Oct.,* 1880. Matter of Church of the Holy Sepulchre, 61 How. Pr. 315.

13. Letting out the work—necessity of a contract. Under and by virtue of the provision of the charter of 1873, (Laws of 1873, ch. 335, § 91,) declaring that all contracts for work or supplies shall be made by the appropriate heads of departments, and that all work save as excepted "shall be done by contract," etc., the contract system provided for by the same section of the charter was made applicable to work thereafter inaugurated by the department of public works, including works ordered by that department in the exercise of powers transferred to it from the department of public parks and the commissioners of Central Park. —*Ct. of App., Sept.,* 1880. Matter of Robbins, 82 N. Y. 131; *reversing* 20 Hun 530.

14. The act of 1873, (Laws of 1873, ch. 528,) requiring the department of public works to establish, lay out, grade and improve the eastern boulevard, does not except the work so authorized to be done from said provisions of the charter; but, on the contrary, by declaring applicable to the improvement, all existing laws in relation to street improvements, expressly subjects it to that provision. Therefore—*Held,* that the doing of the work without a contract, made as prescribed by said chapter, was a substantial error, which invalidated an assessment therefor. *Ib.*

15. Prior to the passage of the city charter of 1873, (Laws of 1873, ch. 335,) under the provisions of the act of 1871, (Laws of 1871, ch. 226, § 1,) changing the grade of a portion of Ninth avenue, and directing the commissioner of public works to proceed forthwith in such manner as should be deemed necessary and proper to regulate and grade said avenue, according to the grade so fixed, certain maps were filed; one, of the streets intersecting Ninth avenue, the grade of which by said act of 1871 (§§ 2–4) the said commissioner was authorized to change so as to conform to the grade of Eighth avenue, on which map new grades of Ninth avenue appeared; another, a map or profile of the new grade of Ninth avenue. No work, however, had been done upon said avenue, in changing the grade, prior to the passage of the charter, and no contract had been made for such work.

Held, 1. That the work was not "in progress" within the meaning of the exception of such works in the provision of said charter, (§ 91), requiring contracts for work not therein otherwise provided for, to be founded on sealed proposals and let to the lowest bidder; and, the work having been done without a contract let as prescribed, that an assessment therefor was invalid.

2. That the work could not be considered "in progress" because other streets referred to in the act of 1871 had been actually graded or the work thereon was in progress when the charter went into effect.

3. That the power of the commissioner of public works, under said act of 1871, to do the work unrestricted by the contract system, was not preserved by the provision of said charter (§ 73) vesting in the department of public works created by the charter the powers and functions previously possessed by the depart-

ment of public parks or the department of public works.—*Ct. of App., Jan.*, 1880. Matter of Weil, 83 N. Y. 543.

16. Advertising for proposals—awarding the contract. The intent of the provision of the city charter of 1873, (Laws of 1873, ch. 335, § 91,) requiring contracts for works and supplies to be founded on sealed proposals and given to the lowest bidders, was to require a submission for competition of every important item of a contemplated work.—*Ct. of App., March*, 1881. Matter of Merriam, 84 N. Y. 596.

17. The published notice inviting bids for a local improvement in the city of New York contained a provision that the bidders should state in their proposals the price per cubic yard for rock excavations, and one-fourth the price bid would be allowed as the price for earth excavations; the notice contained the estimated quantities of work to be done. *Held*, that in the absence of allegations or proof that the provision was fraudulently inserted or that it in fact did any harm, this was not a violation of the provisions of the charter of 1870, (Laws of 1870, ch. 137, § 104,) requiring contracts for such work to be let to the lowest bidder.—*Ct. of App., Jan.*, 1881. Matter of Marsh, 83 N. Y. 431; *affirming* 21 Hun 582.

18. It appeared that the bid accepted, tested by the actual quantities as found in the prosecution of the work and as paid for, was the lowest. *Held*, that the error, if any, in not awarding the contract to the apparent lowest bidder was not a substantial one within the meaning of the statute of 1874, relating to the vacating of assessments (Laws of 1874, chs. 312, 313); and that one whose lands were assessed for the improvement was not aggrieved thereby; and, therefore, was not entitled to have the assessment vacated. *Ib.*

19. A bid a little lower than the one accepted, tested by the estimated quantities, was rejected because of failure to conform to this specification, the bid for earth excavation being slightly in excess of one-fourth of that paid for rock excavation. *Held*, that the commissioner of public works having authority to insert the specification could require a literal and exact compliance therewith, and could reject as informal all bids not so complying, and a letting to the lowest bidder who did so comply, was valid. *Ib.*

20. On December 12th, 1871, the commissioners of Central Park passed a resolution authorizing their treasurer to carry into execution, by contract or otherwise, the regulating, grading, surveying, paving and improving of a certain portion of One Hundred and Fifty-fifth street. Thereafter, and prior to June 17th, 1872, the proposal of one C. for the regulating and grading of the said street was accepted, and a formal contract was directed to be prepared. On that day, the department of public works assumed, under ch. 872 of 1872, exclusive control over the said work, and thereafter, and on July 12, the commissioner of public works awarded the contract to C., deeming it his duty to do so, because his bid had already been accepted by the commissioners of the Central Park. On an application to vacate an assessment laid to cover the cost of the improvement, on the ground that the commissioners of Central Park had no authority to delegate to their treasurer the discretion confided to them by the legislature—*Held*, 1. That whether or not their action in so delegating their power to their treasurer was unauthorized, need not be considered, as the contract was in fact made, not by him, but by the commissioner of public works.

2. That the fact that the latter entered into the contract because he believed that C. was entitled to it by virtue of the previous action of the commissioners, was immaterial, as the validity of his act was in no way dependent upon his intentions or belief.—*Supreme Ct.*, (1*st Dept.*,) *June*, 1880. Matter of Fuller, 21 Hun 497.

21. Sufficiency and validity of the contract. In the advertisement for proposals for constructing a sewer a price was fixed to be allowed for rock excavation, and the price so fixed was included in the contract, thus withdrawing the item from competition. *Held*, that this was not a compliance with the provision of the statute requiring the work to be let by contract, after advertisement, to the lowest bidder; and that the contract and an assessment for the work was illegal and void.—*Ct., of App., Sept.*, 1880. Matter of Manhattan Savings Inst., 82 N. Y. 142.

22. The advertisement and the contract required the purchase by the contractor from the city of sewer and culvert pipe at specified prices; said pipe had been purchased by the city under contract let at a public bidding and was furnished by the city at the contract price. *Held*, that this provision was proper and lawful. Matter of Merriam, *supra*.

23. By the contract the right was reserved to the commissioner of public works to increase or diminish the gross length of the sewers, culverts and drains, the number of basins or piles or the amount of foundation plank, or any other item. *Held*, that in the absence of proof of fraud, this did not impair the validity of the contract. *Ib.*

24. The valuation. In an action to vacate an assessment on property of a charitable institution imposed in 1873, it appeared that the land had been assessed for the purposes of taxation in 1866, at which time it belonged to plaintiff. *Held*, that this was a sufficient basis for an assessment within the provision of the act of 1840 (Laws of 1840, ch. 326, § 7,) prohibiting an assessment for a local improvement exceeding half the value of the property as valued by the general tax assessing officers.—*Ct. of App., Feb.*, 1881. Roosevelt Hospital *v.* Mayor, &c., of New York, 84 N. Y. 108.

25. An assessment for paving and grading a street was made prior to January, 1876. A strip of land one hundred feet wide, marked on the map annexed to the assessment as avenue B, crossing the street in question at right angles, was omitted from the assessment. Said avenue was closed by statute in 1875. (Laws of 1875, ch. 49.) The said strip, prior to the assessment, was not designated on the tax map of the city and no valuation thereof appeared upon the tax assessment-rolls. It was divided between the adjoining lots and assessed upon the tax-roll for 1876, which assessment was made prior to January 1st, but did not become effectual until May 1st of that year. (Laws of 1859, ch. 302, § 8.) In proceedings to vacate the assessment—*Held*, that as there was no lawful valuation of said strip of land when the board of assessors acted, they had no power to

make such valuation or to assess it; that they were under no legal obligation to suspend their proceedings until the new assessment-roll became operative; and that, therefore, the omission of said strip of land did not invalidate the assessment.—*Ct. of App., Oct.*, 1880. Matter of Churchill, 82 N. Y. 288.

26. Necessity of appearing and objecting before the commissioners. Objections and affidavits in opposition to the report of the commissioners of estimate and assessment, which were not presented to them within the time or in the manner required by the statute, cannot be received upon a motion to confirm their report, where no sufficient excuse is alleged for the omission.—*Supreme Ct.*, (*Sp. T.*,) *Nov.*, 1880. Matter of One Hundred and Thirty-eighth Street, 60 How. Pr. 290.

27. The report of the commissioners will be regarded with the same or even greater consideration than the verdict of a jury on the question of the value of the property taken or amount assessed, and unless some wrong principle has been adopted in estimating awards granted or assessments imposed, the report will be confirmed. *Ib.*

28. Upon the coming in of such report the court will examine the testimony submitted to the commissioners as to the value of property to be taken for the street, and if it appears that the amounts awarded are greatly in excess of the real value of the property, the report will not be confirmed.—*Supreme Ct.*, (*Sp. T.*,) *Jan.*, 1881. Matter of Sixty-seventh Street, 60 How. Pr. 264.

29. Damages to land-owners—rights of rival claimants. When an award has been made for damages to premises by reason of a change of grade of a street, and the right of the party named in the award is disputed, it is the duty of the city to pay the amount of the award to the city chamberlain, to be disposed of as the Superior Court shall direct. (Laws of 1867, ch. 697, § 3; Laws of 1852, ch. 52, §§ 3, 4.)—*Ct. of App., Nov.*, 1880. Hatch *v.* Mayor, &c., of New York, 82 N. Y. 436; *reversing* 45 Superior 599.

30. The city, after knowledge that there is a dispute as to the title to the award, cannot pay to the person named therein, or by his direction or assent, and use a payment thus made as a defence against the true owner of the award. *Ib.*

31. Where, therefore, an award was made to B., to which plaintiff was entitled, and the city, after knowledge that the title of B. was disputed, paid part to the city chamberlain and the residue, with the assent of B., in satisfaction of certain local assessments upon the premises—*Held*, that for the portion paid to the city chamberlain defendant was not liable, but that an action was maintainable to recover the residue; and that the payments so made with the assent of B. did not constitute a defence. *Ib.*

32. The assessments so paid were imposed upon the premises for local improvements. It did not appear against whom they were assessed, or that the premises were not of sufficient value for the assessments to be realized therefrom, or that the person, if any, against whom they were assessed was not liable and able to pay. *Held*, that the city was not entitled to a stoppage of the money applied by it to the payment of the assessments. *Ib.*

33. Where, in proceedings to acquire lands for a street, an award is made of the full value of the lands to "unknown owners," and it appears by the commissioners' report that the award was intended for the benefit of all parties interested, the owner of the fee is not entitled to the whole award, where a perpetual easement in the land is vested in another person, but the latter is entitled to the value of his easement.—*Ct. of App., Sept.*, 1880. Matter of Eleventh Ave., 81 N. Y. 436.

34. Review of assessments, generally. Where the sidewalks of a street have once been paved, this does not make the pavement of the carriageway where no pavement has ever been laid, a "repavement," within the meaning of the act of 1875 (Laws of 1874, ch. 476,) providing a uniform system for the repavement of streets in the city of New York.—*Ct. of App., June*, 1880. Matter of Grube, 81 N.Y. 139.

35. The fact, therefore, that the sidewalks of a street have been paved and the expense assessed upon the property-owners, does not invalidate an assessment upon the property-owners for paving the street. *Ib.*

36. The common council, by ordinance, directed a street to be graded, and that the expense be assessed on the property benefited. On motion to vacate the assessment, the ordinance was claimed to be void because it purported to direct a tax regardless of the question whether the benefit equaled the expenditure. *Held*, untenable; that in the absence of any allegation or proof to the contrary, it was to be assumed that the legislative judgment was that the benefit would be as great as the cost.—*Ct. of App., June*, 1880. Matter of Roberts, 81 N. Y. 62.

37. The report of the board of assessors recited that they were directed by the ordinance "to make a just and equitable assessment of the expense" among the owners, etc., "in proportion to the advantage which each shall be deemed to acquire;" it then declared that the board had "made a just and equitable assessment thereof," following which was the assessment list. The assessment was claimed to be void because the assessors did not state in terms in their report that they had assessed those benefited, and in proportion to benefit. *Held*, untenable; that in the absence of an allegation that the assessors had varied from the legal rule, and in a proceeding to vacate the asesssment, it could not be held void because of the absence from the report of a mere form of words. *Ib.*

38. The assessment in question was for the construction of a sewer. It appeared that a general plan of sewerage for the district had been adopted and a map had been filed as prescribed by the act of 1865 (Laws of 1865, ch. 381, § 2), upon which map the sewer in question did not appear. *Held*, that this alone did not vitiate the assessment; that when the needs of a district or any part of it, after a plan had been so adopted, required another sewer, the construction of it was authorized by the provision of said act (§ 4) permitting "such subsequent modifications as may become necessary in consequence of alterations made in the grade of any street or avenue, or part thereof, in said district *or otherwise*;" that to invalidate the assessment it must be shown, either that the sewer did not accord in its characteristics with the general plan, or that there had been no general plan devised, mapped and filed.—*Ct. of App., Feb.*, 1881. Roosevelt Hospital *v.* Mayor, &c. of New York, 84 N. Y. 108.

39. Powers and duties of board of

revision and correction. The corporation of the city has power to grade a street at its own expense, and after the work is done to assess the costs and charges upon the lands benefited, and to collect the same, as in the case of an estimate and assessment before the work is begun. Where such an improvement is thus ordered to be done by the common council, it is not required that there should be an estimate and assessment until the work is done. The board of assessors having, therefore, authority to make an assessment in such case, the board of revision and correction has authority to confirm an estimate and assessment made by the former board. *Ib.*

40. It is not necessary that there should be any action of the common council confirming the estimate and assessment to give it validity; the confirmation must be by that particular member of the corporate body having the lawful power to revise and correct or confirm. The authority to act is in the municipality and is to be exercised through the subordinate body to whom it is delegated. *Ib.*

41. When the common council passes an ordinance for the doing of such work it thereby ordains a tax. *Ib.*

42. The board of assessors and the board of revision and assessment do not tax, but only determine what amount thereof shall be paid by each person benefited. *Ib.*

43. The provision of the act of 1861 creating the board of revision and assessment (Laws of 1861, ch. 308,) which provides that if the said board does not finally act upon the report of the board of assessors within thirty days it shall be held confirmed, is separable from that providing for confirmation by said board of revision; and if the former provision is unconstitutional and void, it does not affect the latter. *Ib.*

44. Power of the court to vacate under Laws of 1874. Since the passage of Laws of 1874, ch. 312, § 2, no suit or action, in the nature of a bill in equity or otherwise, can be brought for the vacation of an assessment; the remedy of a party aggrieved by an illegal assessment is an application under Laws of 1858, ch. 338, as amended by the act of 1874.—*Supreme Ct.*, (*1st Dept.*,) *Nov.*, 1878. Heckman *v.* Mayor, &c., of New York, 22 Hun 590.

45. Who may move to vacate. One purchasing premises subject to an assessment thereon cannot apply to vacate it.—*Supreme Ct.*, (*1st Dept.*,) *Dec.*, 1880. Matter of Gantz, 23 Hun. 350.

46. When the application will be denied. An omission to award damages as prescribed by the act of 1852 (Laws of 1852, ch. 52, § 3,) for injuries sustained by reason of a change of the grade of a street in the city of New York, is not a "substantial error" in an assessment for the work, within the meaning of the act (Laws of 1858, ch 338, as amended by Laws of 1874, ch. 312,) authorizing the vacating of assessments for such errors.—*Ct. of App.*, *March*, 1881. Matter of Cruger, 84 N. Y. 619.

47. An objection that the assessors acted on an erroneous principle in making the assessment is not tenable; it is a matter of judgment on their part, and an error, if any, is not an error in the proceedings and is not a subjeet for review under the statute. So, also, an objection that the area of assessment for benefit was too small is untenable, as that matter is committed to the assessors and the board of revision, and the exercise of their discretion in this respect cannot be reviewed on such motion. *Ib.*

48. When an assessment will be vacated because an arbitrary price was fixed for a portion of the work to be done, see Matter of Manger, 23 Hun 658.

49. Reducing assessments. Where, in the advertisement for proposals for constructing a sewer, a price was fixed for rock excavation, which constituted a large portion of the work.

Held, 1. That this was a violation of the charter, and that an assessment for the work was so far void.

2. That such error furnished no ground for vacating the whole assessment; that a case was presented for a deduction of the objectionable item as authorized by the act of 1870. (Laws of 1870, ch. 383, § 27.)—*Ct. of App.*, *March*, 1881. Matter of Merriam, 84 N. Y. 596.

50. The provision of said act of 1870, allowing the modification of assessments by making such deductions was not repealed by the act of 1874 (Laws of 1874, ch. 312,) in relation to taxes and assessments. *Ib.*

51. Action to discharge lien of assessment. In an action to compel the defendant to discharge a lot belonging to plaintiff from the lien of certain assessments, and to discharge the same of record, it appeared that before plaintiff paid the purchase price for the lot, she ascertained, at the proper office, from the official records, that two assessments, laid in July and August, 1872, upon the lot, were marked upon the record of assessments as "paid by K. Bros., * * * March 7th, 1873." Plaintiff thereupon, after deducting certain assessments which appeared in the records unpaid, paid the balance of the purchase money and received a deed in November, 1873. These assessments were, in fact, paid at the time stated, by K. Bros., they supposing the lot was theirs, when, in fact, it was not; and the entry was then made by the official having charge of the record. In August, 1876, K. Bros. commenced an action against defendant, to recover back the moneys so paid, alleging they were paid through mistake. Plaintiff was not made a party, and had no notice or knowledge of the action. Defendant served an offer allowing judgment to be entered therein for the amount claimed; judgment was so entered to that effect; and also directing that the entries of payment be canceled, which was done.

Held, 1. That plaintiff was entitled to the relief sought; that the fact that the payment was entered as made by K. Bros. was not sufficient to put plaintiff upon inquiry or charge her with constructive notice of the error; nor was the fact that, in making and receiving the payment, the parties acted under a mistake, material so far as plaintiff was concerned.

2. That the provision of the act of 1853 in relation to the collection of arrears of taxes, &c., (Laws of 1853, ch. 579, § 16,) providing for the obtaining of receipts or certificates from the clerk of arrears showing payment of assessments, had no application, as it relates only to assessments which have been due twelve months and over, while the assessments in question were paid within nine months, after they were due, and while they were still in the collector's office. —*Ct. of App.*, *Jan.*, 1880. Curnen *v.* Mayor, &c., of New York, 79 N. Y. 511.

III. Municipal Officers.

1. *In general.*

52. Compensation. *It seems* that where the board of apportionment makes no appropriation for the pay of an attendant on a District Court, he cannot recover for services thereafter rendered.—*Supreme Ct.*, (1st *Dept.*,) *Jan.*, 1881. Hartman *v.* Mayor, &c., of New York, 23 Hun 586.

53. Plaintiff was appointed an attendant of the Supreme Court by the board of supervisors of the county of New York, under the provision of the Code of Pro., § 28, requiring the "supervisors of the several counties" to provide the courts appointed to be held therein, with * * * attendants, * * * suitable and sufficient for the transaction of their business." *Held*, that he was "in office" within the meaning of the provision of the act of 1870, (Laws of 1870, ch. 382, § 3,) in reference to said county, which prohibits the board of supervisors of said county from "increasing the salaries of those now in office, or their successors;" and that, therefore, an ordinance of said board increasing plaintiff's salary was illegal and void.—*Ct. of App.*, *Jan.*, 1881. Rowland *v.* Mayor, &c., of New York, 83 N. Y. 372.

54. The intention of said act was to extend the prohibition to all persons who, under any name, were the recipients of salaries from the city treasury. *Ib.*

55. Removal by mayor. Under the charter of 1873, (Laws of 1873, ch. 335, § 106,) the commissioners of accounts are removable at the pleasure of the mayor; the section of said charter (§ 25) providing that certain officers therein specified can only be removed for cause, after opportunity to be heard, and subject to the approval of the governor, has no application.—*Ct. of App.*, *Nov.*, 1880. People, ex rel. Westray, *v.* Mayor, &c., of New York, 82 N. Y. 491; *affirming* 16 Hun 509.

56. *It seems* that when a power of removal is thus expressly given by statute to be exercised at pleasure, the officer upon whom it is conferred is made the sole and exclusive judge as to the propriety of its exercise. *Ib.*

57. — by head of department. Laws of 1873, ch. 335, § 28, prohibiting the removal of a departmental clerk until he has been informed of the cause of his proposed removal, and an opportunity has been offered him for making an explanation, applies only to cases where the removal is to be made for cause *personal to the party*, or when it is sought arbitrarily and without adequate reason, to substitute another person in the place of one proposed to be removed. The provision does not apply where the removal is made in order to reduce expenses, in a case where the appropriation for running the department had been cut down by the board of apportionment.—*Supreme Ct.*, (1st *Dept. Sp. T.*,) *Aug.*, 1880. People, ex rel. Evans, *v.* Commissioners of Public Parks, 60 How. Pr. 130.

58. As to the power of removal of subordinate officers by heads of departments, and as to the responsibility of officers for negligence, see People, ex rel. Campbell, *v.* Campbell, 82 N. Y. 247.

2. *Decisions relating to particular officers or boards.*

59. Board of aldermen. The provision of the charter of 1873, (Laws of 1873, ch. 335, § 6,) making the board of aldermen "the judge of the election, returns and qualifications of its own members, subject, however, to the review of any court of competent jurisdiction," did not oust the courts of jurisdiction, or prevent them from originating an inquiry as to the right to that office.—*Ct. of App.*, *Feb.*, 1880. People, ex rel. Hatzel, *v.* Hall, 80 N. Y. 117.

60. The provision simply creates a cumulative jurisdiction, by the exercise of which the board is for the time constituted a legal body and its acts are made authoritative, leaving to courts of competent jurisdiction the right to inquire, in behalf of the people, into the right of any person who, by action of the board, holds a place in it. *Ib.*

61. The rule that where a new right or the means of acquiring it is conferred, and an adequate remedy for its invasion given by the same statute, parties injured are confined to the statutory redress, does not apply in such case, as against the people, as the right to inquire is not given by the charter, nor is a remedy given to the people by it. *Ib.*

62. The distinction between the occasions and the effect of the use of such provisions in a legislative enactment conferring power upon the councils of municipalities or other inferior tribunals, and their use in the constitution of the United States, (art. I., § 5, subd. 1,) and of this state, (art. III, § 10,) conferring power upon the houses of the legislature pointed out. *Ib.*

63. Inasmuch, however, as the said provision does give judicial power to the board of aldermen, where a person claiming to be a member of said board has instituted a proceeding before it, wherein it has been adjudged that he has not, and that, as against him, another has the right to the office, such an adjudication, until reversed, is conclusive as to him, and is a bar to an action brought by him to test his claim, although it is not a bar as against the people. *Ib.*

64. Plaintiff was elected and qualified as alderman in the city of New York in December, 1869. The term of office was then two years from January 1st, 1870. He served until the first Monday of June, 1870, when he was superseded by an alderman elected in May, under and by virtue of the charter of 1870. (Laws of 1870, ch. 137.) In an action to recover salary after he was so superseded—*Held*, that, as the office was not created or regulated by the constitution, the legislature had entire control over it, and could thus shorten the term; that plaintiff, after the term was so ended, was neither *de jure* nor *de facto* an incumbent of the office, and, therefore, was not entitled to recover.—*Ct. of App.*, *June*, 1880. Long *v.* Mayor, &c., of New York, 81 N. Y. 425.

65. Board of assistant aldermen. The power given to the board of assistant aldermen by the charter of 1873, (Laws of 1873, ch. 335, § 6,) to judge of the election of its own members, is not exclusive, but cumulative only; it does not oust the courts of jurisdiction.—*Ct. of App.*, *Feb.*, 1880. McVeany *v.* Mayor, &c., of New York, 80 N. Y. 185.

66. In an action brought to recover the sal-

ary of the office of assistant alderman for the year 1869, plaintiff put in evidence a judgment-roll in an action in the Supreme Court, in the nature of *quo warranto*, wherein he was relator, against one C., to test the title to the office. It was adjudged therein that C. had usurped and intruded into the office, that he be and was thereby ousted therefrom, and that plaintiff was entitled to the office for the year aforesaid. On June 18th, 1869, plaintiff gave notice of the judgment to the comptroller of the city. He also made demand of the board that it recognize him, and give him his seat, and was refused. C. had received the canvassers' certificate of election; he took the oath of office, discharged the duties of the office for the year, and received the salary.

Held, 1. That the judgment established for the purposes of this case that plaintiff was the officer *de jure;* that he was entitled to recover the salary accruing after notice of the judgment to the comptroller, but not that which became due and payable, and was paid to C. prior to such notice.

2. That the omission of plaintiff to apply for a *mandamus* requiring the board to allow him to take his seat, and to perform the duties of the office, was not a defence. *Ib.*

67. The board of assistant aldermen, after notice was given to it, made inquiry into the matter, and adjudged C. to be entitled to the contested seat. Plaintiff was not a party in person or by counsel to the inquiry. *Held*, that plaintiff was not precluded by their judgment; that such judgment did not countervail that of the Supreme Court, which, being the first and unreversed, was of the greater force, and bound the city and its disbursing officer. *Ib.*

68. As to whether, if plaintiff had appeared in the proceedings before the board simply to set up and insist upon the judgment in his favor, he would have been prejudiced by its decision, *quœre*. *Ib.*

69. Chamberlain. As to the liability of the chamberlain of the city of New York, in respect to the investment of the shares of infants, of the proceeds of sales of land in partition in which such infants are part owners, see Chesterman *v.* Eyland, 81 N. Y. 398.

70. Board of education. As to the liability in damages, of the board of education, to one who sustains injury by falling through the grating of a school building, see Donovan *v.* Board of Education, 46 Superior 565.

71. Board of fire commissioners. The relator was a member of the uniformed force of the fire department of the city of New York; he was charged in writing by the foreman of his company with having been at its truck-house at a time specified, "under the influence of liquor." He was notified of the charge, and appeared before the board of fire commissioners at a time appointed for examination, and pleaded guilty. Desiring to make an explanation, he was sworn, and testified that, on the morning of the occurrence, he had a chill and pain in his back, and, before eating breakfast, drank a glass of brandy, and was overcome thereby. The foreman testified that the relator came to quarters in the morning under the influence of liquor; that he was a hard drinker, as a general thing, and that witness had had occasion to reprimand him for his habits. The commissioners found him guilty, and sentenced him to be dismissed. *Held*, that under the provisions of the charter, (Laws of 1873, ch. 335, § 77; Laws of 1870, ch. 137, § 60,) in relation to the government and discipline of the fire department, the commissioners had jurisdiction, and a case was made out sufficient to authorize their decision, and the same was final and conclusive; that it was not necessary that rules should have been adopted and promulgated, prohibiting intoxication, before the commissioners could remove a member for that cause; that it was "conduct injurious to the public welfare," and "unbecoming an officer," within the meaning of said provisions of the charter.—*Ct. of App., Oct.*, 1880. People, ex rel. Hart, *v.* Fire Comm'rs of New York, 82 N. Y. 358.

72. *It seems* that the interests of the service require that in such cases a wide discretion be left to the commissioners, and their judgment should not be disturbed, save where there was an entire absence of evidence to sustain it. *Ib.*

73. The board of police commissioners has power to determine and regulate the compensation which shall be allowed to sick or disabled policemen, who are unable to perform their duties by reason of such disability, and the court will not interfere by *mandamus* to compel the board to pay a full salary to a policeman, to whom a smaller amount has been allowed, in pursuance of its rules, on the ground that he is unable to discharge the duties of his office.—*Supreme Ct.,* (*1st Dept.,*) *March*, 1881. People, ex rel. Ryan, *v.* French, 24 Hun 263.

74. On the trial of an officer by the board of police commissioners, the testimony may be taken before one, and afterwards submitted to and acted upon by all, and a change in the constitution of the board pending a trial does not invalidate a removal made by the new board.—*Supreme Ct.,* (*1st Dept.,*) *Dec.,* 1880. People, ex rel. Gilhooly, *v.* Police Comm'rs of New York, 23 Hun 351.

75. The relator, a policeman, having been convicted by the police board upon a charge of receiving money from keepers of a house of prostitution, as an inducement for allowing certain privileges, was dismissed from the force. *Held*, that under the law of 1873, giving the board power to dismiss any member of the force, on his conviction of a legal offence or neglect of duty, or any conduct injurious to the public welfare, or immoral conduct, or conduct unbecoming an officer, though the relator could have been convicted and punished for the offence, yet it was not necessary to await a conviction in a court of criminal jurisdiction before instituting the inquiry.—*Supreme Ct.,* (*Sp. T.,*) *Feb.*, 1881. People, ex rel. Murphy, *v.* French, 60 How. Pr. 377.

76. Boards of school trustees. The several boards of trustees of the common schools of the city of New York, for the respective wards thereof, are, under the statute, (Laws of 1873, ch. 112, § 6,) official bodies in the nature of corporations. The trustees cannot be held liable in an action against them personally, for the negligence of a workman employed by the board, upon the theory that the relation of master and servant exists between the trustees, personally, and the said workman; the board of trustees, as a corporate body, is, in such case, the master.—*Superior Ct., April,* 1880. Donovan *v.* McAlpin, 46 Superior 111.

77. Chief engineer of Croton aqueduct. The relator, C., was appointed "chief engineer of the Croton aqueduct," under the charter of 1873. (Laws of 1873, ch. 338.) By the action of the chief of the department of public works, and by his own assent, he also became, acted and described himself as engineer of that department, and was the only chief engineer therein.

Held, 1. That, conceding C. might lawfully have declined the added duties, yet, having assumed them, the commissioner of public works could rightfully hold him responsible for their proper performance.

2. That if, in the performance of the added duties, C. developed a want of skill or ability as engineer, or an inefficient and slack control, this was a sufficient ground for his removal from his office.

3. That C. was not responsible for the inefficiency or incapacity of assistants whom he did not, and had no power to appoint.—*Ct. of App., Oct.*, 1880. People, ex rel. Campbell, *v.* Campbell, 82 N. Y. 247.

78. In the course of a street improvement, of which the relator had supervisory charge as acting engineer of the department of public works, an arch was built. In the contract for the arch and roadway, provision was made for inspectors "to inspect the material to be furnished and the work done," to be appointed by the commissioner, and to report to him and to the superintendent of street improvements. Such an inspector was appointed. The arch fell in consequence of "bad workmanship and the use by the contractor of bad materials." C. had no knowledge of the imperfections until they were developed by the cracking and settling of the arch.

Held, 1. That as it was impossible for C. to watch personally all the different works of improvement in progress at the same time in the city, and as this duty was, in regard to the work in question, expressly assigned to inspectors over whom C. had no official control, he was not required to watch the material and work, or to detail an assistant for that purpose, and was not responsible for the negligence or misconduct of the inspectors.

2. That the fact that C. advised or instructed the inspectors, did not change his position. *Ib.*

79. Commissioner of public works. Under the charter of 1873, (Laws of 1873, ch. 335, § 71,) the commissioner of public works being charged with the care of the public buildings, has power to appoint janitors of the buildings in which the district civil courts are held; the common council cannot appoint, nor can it delegate to the justices of said court the power to appoint a janitor to take charge of any of the public buildings.—*Ct. of App., March*, 1881. Fagan *v.* Mayor, &c., of New York, 84 N. Y. 348.

80. Plaintiff was appointed by said commissioner, janitor of the building in which the sixth district civil court, in said city, held its sessions. Defendant, C., was appointed janitor by the justice of said court, under a resolution of the common council authorizing the justices of said courts to appoint janitors for their courts. The board of estimate and apportionment made an appropriation to pay the salary of one janitor of said court, with the condition, however, that no portion should be paid by the comptroller until the question was judicially determined in whom, by law, the appointment of janitors was placed; and that "the city is not to be burdened with the expense of two sets of janitors." *Held*, that the appointment of plaintiff was valid; that this was a proper case for impleading C., as an adverse claimant, with the city; that C. had no lawful appointment; that no distinction could be recognized between a janitor of the court and a janitor of the building in which the court is held, and but one janitor could legally serve; and that, therefore, plaintiff alone was entitled to payment out of the appropriation. *Ib.*

81. Engineer of board of health. On May 24th, 1871, the board of health passed a resolution that, on and after June 1st, "the office of engineer of this board be honorary, and that no salary be attached to that office, or paid to that officer, after that date." This resolution was communicated to plaintiff, who then held the office, and who had been in receipt of an annual salary. He wrote in reply, acknowledging receipt of the communication, expressing gratification at being retained "as honorary engineer," and stating it would afford him pleasure to discharge the duties of engineer whenever intrusted with them.

Held, 1. That an action to recover for services rendered after June 1st, 1871, was not maintainable; that the language employed in the resolution expressed a design that all pay should cease at that time, and, taken in connection with the letter, showed the understanding to be that any service rendered thereafter by plaintiff, was to be gratuitous.

2. That the fact that the board audited a claim for services rendered subsequent to June 1st, did not authorize a recovery for the amount of the audit; that it was without authority, as the resolution, so long as it remained in force, was binding; and that the audit did not operate as a rescission of the resolution, or create any new liability.—*Ct. of App., June*, 1880. Haswell *v.* Mayor, &c., of New York, 81 N. Y. 255.

82. Register of deeds. The register is liable for all errors, inaccuracies or mistakes made in a return, when the usual requisition has been made at his office for a certificate of search. And this, although the party, in making his requisition at the register's office, designated the clerk whom he desired should make the search. It is the duty of the register to make the search correct, and any failure in that respect is a neglect of duty.—*Com. Pleas, Nov.*, 1880. Van Shaick *v.* Sigel, 60 How. Pr. 122; *affirming* 58 How. Pr. 211.

83. The "Superintendent of Telegraph" is not the head of a bureau or a regular clerk, within the meaning of Laws of 1873, ch. 335, § 28, providing that "no regular clerk, or head of a bureau shall be removed until he has been informed of the cause of the proposed removal, and has been allowed an opportunity of making an explanation."—*Supreme Ct., (1st Dept.,) Dec.*, 1880. People, ex rel. Emerick, *v.* Fire Comm'rs of New York, 23 Hun 317.

84. The charter of 1873, (ch. 335,) took away the power conferred by ch. 446 of 1857, and ch. 137 of 1870, upon the common council and heads of departments to create new bureaus, and thereafter no new bureaus could be created except by an act of the legislature. *Ib.*

IV. Corporate Liabilities.

1. *Upon contracts.*

85. For rent of premises leased to the city. In May, 1872, in pursuance of a resolution of the board of supervisors of the county, directing it, a lease was executed by the mayor and plaintiff, by which the latter leased to the city certain rooms as chambers for the recorder, for one year; that officer occupied them until July, 1877, and delivered up the keys to plaintiff about May 1st, 1878. The rent was paid by the comptroller of the city at the rate named in the lease, up to November 1st, 1876. In December, 1876, under a resolution of the board of aldermen, other rooms were set apart for the recorder, but because they were unfit for occupancy he did not take possession of them until June or July, 1877. In May, 1877, plaintiff was notified by the comptroller that the city would not be held liable after May 1st of that year. In an action brought to recover rent accruing after November 1st, 1876—

Held, 1. That the recorder having been placed in possession under the lease by the board of supervisors, whose duty and power it was to procure him chambers, it was to be presumed that it acquiesced in his continuance in possession after the expiration of the lease; that the board, having the power originally to take the lease, had the power also, with the consent of the landlord, or without his dissent, to hold over after the term had expired; that by acquiescing in the action of the recorder the board exercised this power, and the lease was thus renewed from year to year, and that plaintiff was entitled to recover.

2. That such a renting did not fall within the phrase "work or supplies" for which there must be, under the city charter of 1873, (Laws of 1873, ch. 335, §§ 92, 112,) a letting by contract to the lowest bidder and certificate of necessity from the head of a department.

3. Conceding that upon the adoption of the resolution of December, 1876, by the board, the continuance in occupation by the recorder was no longer permitted, plaintiff was at least entitled to the rent for the balance of the rental year, *i. e.*, to May 1st, 1877.—*Ct. of App.*, *Dec.*, 1880. Davies *v.* Mayor, &c., of New York, 83 N. Y. 207; *reversing* 45 Superior 373.

86. Contracts for street paving. In pursuance of an invalid ordinance of the common council, the Croton aqueduct board advertised for proposals for paving a street. On October 15th, 1869, the proposals for the work were opened, plaintiff was announced to be the lowest bidder, and the contract was awarded to him. Plaintiff's proposal was accompanied by a bond with sureties, as required by the specifications. On December 18th, 1869, the common council, by resolution, rescinded the ordinance. Plaintiff thereafter demanded of the said board, that the contract should be executed, which was refused. In May, 1872, plaintiff presented the papers to the commissioners appointed under the act of 1872, (Laws of 1872, ch. 580,) who gave a certificate that there was no fraud in the award. In an action to recover damages—

Held, 1. That the award of the contract by the board was an approval of a sufficiency of the sureties and no other was needed; that the security mentioned in § 38 of the city charter of 1857, (Laws of 1857, ch. 446,) which is required to be approved by the comptroller, was that required of the contractor on entering into the formal contract after the award to him.

2. That the ordinance not having been legally passed, all subsequent proceedings were invalid and plaintiff acquired no rights under it; that, as previous to the passage of the act of 1872 the ordinance was annulled, there was nothing for the commissioners to act upon; and that, therefore, plaintiff was not entitled to recover.

3. That the resolution rescinding the ordinance was not required to be published, as it did not involve any of the matters mentioned in the provision of said charter (§ 38) in reference to publication.—*Ct. of App.*, *Dec.*, 1880. Baird *v.* Mayor, &c., of New York, 83 N. Y. 254.

87. *It seems* that had the ordinance, authorizing the work been valid, and the proceedings, prior to opening the bids, regular, plaintiff would have had a valid contract, for the breach of which he could have claimed damages (Laws of 1861, ch. 308,) and that, having such a contract, it could not be destroyed by the rescission of the ordinance. *Ib.*

88 *It seems*, also, that the quantities mentioned in the specifications were proper to be taken as, *prima facie*, the amount of work to be done; and that the prices specified in the proposal, less what the work could have been done for, furnished the proper measure of damages. *Ib.*

89. — for street cleaning. *It seems* that under the charter of 1873, (Laws of 1873, ch. 335,) although the power of incurring obligations for street cleaning is conferred upon the police department, yet as that department exercises the power simply as one of the executive branches and instrumentalities of the city government and on its behalf, the duty of providing means for their payment and of paying them resting upon the corporation, it could be treated as the debtor; and an action would be maintainable against it.—*Ct. of App.*, *Jan.*, 1881. Swift *v.* Mayor, &c., of New York, 83 N. Y. 528; *reversing* 17 Hun 518.

90. The police department, however, having been by the act supplementary to the charter, (Laws of 1873, ch. 755,) intrusted with the payment of its own expenditures through its own treasurer, an action would not lie in the first instance against the corporation for an indebtedness incurred by the street department. *Ib.*

91. The remedy of the creditor against the police department is by *mandamus*, not by action. *Ib.*

2. *For wrongs.*

92. Obstructions in Hudson river. The Hudson river, opposite the city, is not a highway of the city; and it is under no duty to remove obstructions therefrom, or to keep it safe for navigation.—*Ct. of App.*, *Feb.*, 1880. Seaman *v.* Mayor, &c., of New York, 80 N. Y. 239.

93. The lessee of one of the defendant's piers, on the Hudson river, drove spiles in front of it, which were fastened to the pier by bolts and chains; two of them became loose, and fell away from the pier, their upper ends projecting into the river; they were wholly submerged, except at low tide. Plaintiff's steam tug, in passing the pier, struck the spiles and was injured. It did not appear that the city officials

had any notice that the spiles had fallen away, or that they in any way obstructed the navigation of the river. *Held,* that an action to recover the damages was not maintainable against defendant; that as the city had nothing to do with placing the spiles, or in causing them to fall in the river, it owed no duty in regard to them; also, that even if it did owe any such duty, that duty could not arise until it had some notice. *Ib.*

For decisions affecting the city of New York in common with *Other municipal corporations,* see MUNICIPAL CORPORATIONS.

For decisions upon the jurisdiction and procedure in the various *Courts of justice* sitting in New York, see APPEAL, IV.; COURTS, II., III.

NEXT OF KIN.

DISTRIBUTION; EXECUTORS AND ADMINISTRATORS, III.

NON COMPOS MENTIS.

INSANE PERSONS; WILLS, VI.

NON-JOINDER.

PARTIES, 1, 2; PLEADING.

NON-SUIT.

TRIAL, 18, 19.

NOTES.

PROMISSORY NOTES

NOTICE.

As to *Notice of Appeal,* see APPEAL, 140; JUSTICE OF THE PEACE, II.

As to *Notice to quit,* see EJECTMENT, 5; LANDLORD AND TENANT, 9, 10.

As to effect of notice to an *Agent,* to bind his principal, see PRINCIPAL AND AGENT, III.

As to notices in proceedings under *Mechanics' lien laws,* see MECHANICS' LIEN, 8-12.

As to *Notice of motion,* see MOTIONS AND ORDERS, 3-5.

NUISANCE.

I. WHAT AMOUNTS TO A NUISANCE.

II. REMEDIES.

I. WHAT AMOUNTS TO A NUISANCE.

1. Storage of gunpowder. The keeping of gunpowder or other explosive materials in a place or under circumstances where it will be liable, in case of explosion, to injure the dwelling-houses or the persons of those residing in close proximity, may constitute a private nuisance, for which the person so keeping them is liable to respond in damages, in case of injury resulting therefrom, and that without regard entirely to the question whether he was chargeable with carelessness or negligence.—*Ct. of App., April,* 1880. Heeg *v.* Licht, 80 N. Y. 579; *reversing* 16 Hun 257.

2. The keeping of such materials does not, however, necessarily constitute a nuisance *per se;* that depends upon the locality, the quantity and the surrounding circumstances. *Ib.*

3. Defendant constructed a powder magazine on his premises, with the usual safeguards, in which he kept stored a quantity of powder. This, without any apparent cause, exploded, injuring plaintiff's house upon adjoining premises. On the trial of an action to recover damages, the court charged the jury that they must find for the defendant unless they found that he carelessly or negligently kept the gunpowder upon the premises. *Held,* error; that the fact that the explosion took place under the circumstances tended to establish that the magazine was liable to explode and cause damage to the property of persons residing in the vicinity, although guarded against with the greatest degree of care and vigilance, and so evinced its dangerous character; that this itself in some localities would render it a private nuisance; and that the question should have been left to the jury to determine whether, from the dangerous character of the magazine, its proximity to other buildings, &c., it was, in fact, such a nuisance. *Ib.*

4. Obstructions in streets. Where the owner of a lot fronting upon a street in a city erects a stoop and fence in front thereof, so as to reduce the space left for public travel upon the sidewalk from nineteen to eight feet, an owner of a lot fronting on the same street, and distant about one hundred feet from the obstruction so created, may maintain an action to have the same abated as a nuisance.—*Supreme Ct.,* (*2d Dept.,*) *Dec.,* 1880. Crooke *v.* Anderson, 23 Hun 266.

5. Overhanging branches of trees. The fact that the branches of a tree not poisonous or noxious in its nature overhang from five to fifteen feet the land of an adjoining owner, does not, *per se,* render such branches a nuisance, so as to authorize such adjoining owner to maintain an action for damages, in the absence of proof that real and sensible damages have resulted therefrom. — *Supreme Ct.,* (*4th Dept.,*) *April,* 1881. Countryman *v.* Lighthill, 24 Hun 405.

6. The adjoining owner may in such a case clip the overhanging branches, especially if the owner of the tree refuses to do so when requested. *Ib.*

II. REMEDIES.

7. Who may sue. Where an individual has been unlawfully deprived of his property,

the proper remedy is by an action in his own behalf. Where the people, by an express law, have conferred upon a railroad company the right to use steam upon a street in a city, they cannot claim in their own behalf that what they have authorized is a public nuisance.—*Supreme Ct.*, (*Alb. Sp. T.*,) *June*, 1880. People *v.* Long Island R. R. Co., 9 Abb. N. Cas. 181.

8. Where a railroad has been in operation for many years, a technical defect in the title to its road-bed can be taken advantage of, if at all, only by the true owners as individuals, and an action by the people to enjoin the road as a nuisance cannot, in such case, be sustained. *Ib.*

9. **Who is liable.** He who knowingly maintains a nuisance is as responsible therefor as he who created it.—*Ct. of App., Feb.*, 1880. Wasmer *v.* Delaware, &c., R. R. Co., 80 N. Y. 212.

10. A wrong motive in erecting a structure otherwise lawful does not make the structure itself unlawful or a nuisance. An unlawful use thereof may be complained of and restrained, but the structure cannot be destroyed.—*Ct. of App., Dec.*, 1880. Chenango Bridge Co. *v.* Paige, 83 N. Y. 178.

As to restraining the *Continuance* of nuisances, see INJUNCTION, 11-14.

O.

OATH.

Of *Officers*, see MUNICIPAL CORPORATIONS, 40-42, and the titles of the various officers.

As to taking *False oaths*, see PERJURY.

OBSTRUCTIONS.

HIGHWAYS, 8; MUNICIPAL CORPORATIONS, 33-35; NUISANCE, 4.

OFFICERS.

As to officers of *Corporations*, generally, see CORPORATIONS, VI.

As to *County*, *Town* and *Municipal officers*, see COUNTIES; MUNICIPAL CORPORATIONS, IV.; TOWNS.

As to *Compelling* or *Restraining official action*, see INJUNCTION, II.; MANDAMUS, II.

ORDERS.

MOTIONS AND ORDERS, 7-10.

ORDINANCES.

MUNICIPAL CORPORATIONS, 4; NEW YORK CITY, 2.

OYER AND TERMINER.

COURTS, IV.

P.

PARENT AND CHILD.

1. **Duty to support child.** It is the primary duty of a parent, whether father or mother, if of sufficient ability, to support his or her minor child. Where the parent of a minor is also guardian, the circumstances of the parent, as well as the amount of the ward's estate, may be taken into consideration in determining the liability of the former to support the latter.—*Westchester Co. Surr. Ct., March*, 1880. Voëssing *v.* Voëssing, 4 Redf. 360.

2. **Liability for torts or negligence of child.** A parent is not liable for the willful trespasses or negligence of an infant child.—*Com. Pleas*, (*Sp. T.*) *March*, 1881. Schlossberg *v.* Lahr, 60 How. Pr. 450.

As to the rights of *Infants*, generally, irrespective of the relation with the parent, see GUARDIAN AND WARD; INFANTS.

PARTIAL LOSS.

INSURANCE, IV.

PARTIES.

[Includes only *General rules* relative to parties in civil actions, at law or in equity. Such rules as are peculiar to any particular cause of action, remedy or defence, which is the subject of a separate title in the work, will be found under that title.]

1. **Who are not necessary parties.** In an action against trustees of a savings bank for negligence in discharge of their duties, all of the trustees need not be joined as defendants.—*Ct. of App., Sept.*, 1880. Hun *v.* Cary, 82 N. Y. 65.

2. In an action against joint tort-feasors, there is no defect of parties defendant, though others alleged to have been engaged in the scheme are

not joined, because these parties were joint tort-feasors with defendant, and severally, as well as jointly, liable to plaintiff; and it is, therefore, at his option to sue any one or all; and the fact that equitable relief is demanded does not affect the question as to parties.—*Supreme Ct.*, (1st *Dept. Sp. T.*,) *June*, 1881. Pierson *v.* McCurdy, 61 How. Pr. 134.

3. Bringing in new parties. Rights of parties newly brought in. After an action had been referred, the evidence taken and the case finally submitted to the referee for his decision on the merits, the court granted an order bringing in other parties as defendants, and directing that the cause remain and continue for trial before the referee the same as if the parties added had been parties from the beginning of the action, they to have the privilege, however, of cross-examining the witnesses produced and examined on the trial. It did not appear that the case was one which could have been referred without consent. *Held*, that conceding the court had power to bring in the new parties, the residue of the order was erroneous, as the court could not compel them to accept the referee or the evidence taken; that they had at least the right to be heard as to the appointment of a referee, and the right to be present when the witnesses were sworn and examined. —*Ct. of App., April*, 1880. Wood *v.* Swift, 81 N. Y. 31.

4. The action was to determine the title of conflicting claimants to a policy of life insurance; the insurance company was a party defendant; one of the parties so brought in had commenced a suit against said company; the order restrained the prosecution of said action. *Held*, error; that if for any reason he ought not to proceed, the company could have his proceedings stayed in that action. *Ib.*

5. Substitution of new plaintiff. After the commencement of this action, plaintiff assigned to R. and A. the claim upon which it was brought; thereafter plaintiff was adjudged a bankrupt and an assignee of his property appointed; judgment was subsequently recovered, and after it was perfected, plaintiff died intestate, leaving no property, real or personal. No administrator of his estate has been appointed. Upon notice to defendants' attorneys and to the widow and next of kin of the decedent, a motion was made on behalf of R. and A. that they be substituted as plaintiffs, which was granted; defendants appealed. On argument at General Term the respondents produced and filed a stipulation of the assignee in bankruptcy, waiving notice of motion and all objection to the order. *Held*, that the order was properly affirmed; that the court had a right to proceed without the appointment of an administrator of the original plaintiff; also that the stipulation was properly received and considered by the General Term. —*Ct. of App., Oct.*, 1880. Schell *v.* Devlin, 82 N. Y. 333.

PARTITION.

1. Jurisdiction of proceedings under the Revised Statutes. In proceedings for partition of lands by petition under the Revised Statutes, jurisdiction was acquired by the appointment of a guardian in the first instance, upon notice to the infant or his general guardian. —*Ct. of App., March*, 1881. Ingersoll *v.* Mangam, 1 Civ. Pro. 151.

2. When an action for partition will lie. When a widow is in possession of lands, whereof her husband died seized, claiming to be entitled thereto by virtue of a devise thereof to her contained in his last will and testament, one of his heirs-at-law may maintain an action against her and his co-heirs, under ch. 238 of 1853, to procure a judgment declaring the alleged devise to be invalid, and directing a partition to be made of the said lands.—*Supreme Ct.*, (4*th Dept.*,) *Jan.*, 1881. Wager *v.* Wager, 23 Hun 439; Ward *v.* Ward, Id. 431.

3. *Quære*, as to whether, in such a case, the widow could be required by the judgment to surrender possession of the premises, or whether the parties entitled thereto would be left to bring another action for their recovery. Wager *v.* Wager, *supra.*

4. The act cannot be held unconstitutional on the ground that it allows the question of title to be tried in an action for partition, as a party thereto may, if he so desire, have the issues arising therein settled and tried by a jury on making a timely demand therefor. Ward *v.* Ward, *supra.*

5. Who may maintain it. A *cestui que trust* cannot maintain an action for the partition of real estate, and a purchaser at a sale had under a judgment therein, cannot be made to complete his purchase, even though the trustees were made parties defendant, and allowed the judgment to be taken by default.—*Supreme Ct.*, (1*st Dept.*,) *Nov.*, 1880. Harris *v.* Larkins, 22 Hun 488.

6. Reference—trial by jury. Notwithstanding there are, in an action for partition, a large number of defendants and many separate appearances, and the case presents four distinct issues of fact, two of which affect distinct parts of the property, and the other two affect undivided shares in the whole of the remainder, and the case can therefore be better tried by reference than in any other way, yet, if any of the parties object to a reference, the case must go to a jury.—*Supreme Ct.*, (1*st Dept. Sp. T.*,) *July*, 1881. Cassedy *v.* Wallace, 61 How. Pr. 240.

7. But a compulsory reference may be ordered except as to the issues raised by claim of ownership of two pieces of the property, and the action may be severed so as to try separately, before a referee, the issues as to the remainder of the property, the title to which is not in dispute. *Ib.*

8. Receiver of rents and profits. The plaintiff, a receiver in proceedings supplementary to execution, to whom the judgment debtor had conveyed his interest in certain real estate devised by the will of his father to executors, in trust for specified purposes, commenced this action for partition of the premises in question, and was appointed receiver of the rents, &c., therein. It appeared that the said executors were wholly responsible; that they had duly accounted before the surrogate; that two years had elapsed since the commencement of this action and a hearing thereof had been had; and that increased expense would be caused by such additional administration of the trust estate. *Held*, that the order appointing plaintiff receiver should be reversed.—*Superior Ct., June*, 1880. Miller *v.* Levy, 46 Superior 207.

9. Where one of the parties in interest in a partition suit has in his possession a portion of the estate, and has been in the habit of collecting the rents, as he alleges, for the protection of the income from waste, a receiver should not be appointed upon an affidavit upon information and belief, that such party is of little or no responsibility.—*Supreme Ct.*, (1*st Dept.*,) *May*, 1881. Darcin *v.* Wells, 61 How. Pr. 259.

10. In this action, brought to obtain a partition of certain real estate, a receiver *pendente lite* was appointed, with direction to collect the rents and divide the net proceeds thereof between the plaintiff and the defendant. Thereafter one Man, having recovered a judgment against the defendant upon which an execution had been issued and returned unsatisfied, applied for an order, directing the receiver to pay the amount due on the judgment to him, from the defendant's share of the rents. *Held*, that the application was properly denied.—*Supreme Ct.*, (2*d Dept.*,) *Sept.*, 1880. Verplanck *v.* Verplanck, 22 Hun 104.

11. *Semble*, that the remedy of the judgment creditor was to come into the action and press it to a judgment, after which his claim might be paid from the proceeds of a sale of the premises, or if an actual partition was decreed the share set off to the judgment debtor might be sold. *Ib.*

12. **Judgment. Sale. Rights of purchaser.** M. died seized of certain premises, leaving a widow, four daughters and several grandchildren, the children of two of the daughters, him surviving. He left a will, by the first clause of which he gave his widow the use of all his real and personal estate during her life. By the second clause he gave the income arising from his estate to his four daughters, "to be divided between them share and share alike, during their and each of their respective natural life, remainder to their respective children," their heirs, &c. An action for the partition of said premises was brought by one of the daughters, the complaint in which alleged the second clause of the will to be void, and that the daughters took a fee, subject to the life estate of their mother. The judgment in said action directed a sale, taking no notice of the rights of unborn children. Three of the daughters were living at the time of sale. The purchaser at such sale having refused to complete his purchase, on motion to compel him so to do—*Held*, that said judgment did not bar the future contingent interests of such unborn issue; and that the purchaser could not be compelled to accept the defective title.—*Ct. of App.*, *March*, 1880. Monarque *v.* Monarque, 80 N. Y. 320; S. C., 8 Abb. N. Cas. 102; *reversing* 19 Hun 332.

13. A judgment and sale in partition only concludes contingent interests of persons not in being, when the judgment provides for and protects such interests, by substituting the fund derived from the sale of the land in place of it, and preserving the fund to the extent necessary to satisfy such interests. *Ib.*

14. Prior to the bringing of the partition suit an action was brought by one of the daughters to obtain a construction of the will, in which action the widow, the other daughters and the grandchildren of the testator were joined as defendants. The adult defendants did not answer; a general answer was put in by the guardian *ad litem* of the infants, and a judgment was taken, practically by consent, declaring the life estate in the widow valid and the subsequent devises void, and adjudging the fee, after the death of the widow, to vest in the daughters. This judgment was set up in the complaint in the partition suit. *Held*, that conceding said judgment was conclusive as to the rights of the parties thereto—as to which *quære*—it did not bind the contingent interests of such unborn issue. *Ib.*

15. *It seems* that the case was not a proper one for bringing an action for the construction of the will, as there was no trust or other element to justify invoking the jurisdiction of the court for that purpose. *Ib.*

16. **Investment of proceeds of sale.** When a bond and mortgage of an attorney of one of the parties in a partition suit was deposited in good faith by the referee to sell, as part of a fund directed to be deposited with and invested by the county treasurer, in trust, and the *cestuis que trust*, with full knowledge, have for years received the income, they cannot repudiate the investment and impose it upon the referee.—*Ct. of App.*, *Jan.* 1881. Wiggins *v.* Howward, 83 N. Y. 613; *affirming*, 22 Hun 126.

17. **Actual partition.** Where lands are assigned in partition, and are subsequently conveyed by the persons to whom assigned with warranty, they ratify and affirm the partition, and are estopped from questioning its validity.—*Ct. of App.*, *March*, 1881. Bergen *v.* Wyckoff, 1 Civ. Pro. 1.

PARTNERSHIP.

I. The Relation; and how Constituted.
II. Power of One Partner to Bind another, or the Firm.
III. Suits Between Partners. Accounting.
IV. Rights of Creditors.
V. Dissolution.

I. The Relation; and how Constituted.

1. **What constitutes a partnership.** As to what agreement will constitute a partnership as to third parties, see Curry *v.* Fowler, 46 Superior 195.

2. When a voluntary association is not a partnership, see Lafond *v.* Deems, 81 N. Y. 507.

3. **Effect of agreements to share profits and losses.** The participation in the profits of a business does not in all cases make the participant a partner as to third persons; to have that effect the participation must be in the profits *as such*, under circumstances which give him a proprietary right as principal trader in such profits before division.—*Ct. of App.*, *Sept.*, 1880. Burnett *v.* Snyder, 81 N. Y. 550.

4. A contract between one of two or more partners and a third person, with the knowledge and assent of the other partners, by which the third person is to share in the profits and losses, in the firm business, of the partner with whom he contracts, does not constitute such a participation in the profits as will make the third person a partner, or liable for the partnership debts. *Ib.*

5. **Rights of partners inter sese.** The fact that a lease of premises, used by a firm for copartnership purposes, is to one of the copartners, does not authorize him to take a renewal lease in his own name and for his own benefit; and a renewal will inure to the benefit of the firm.—*Ct. of App., March,* 1881. Mitchell *v.* Read, 84 N. Y. 556.

6. An unfiled chattel mortgage on property subsequently brought by the mortgagor into a firm of which he becomes a member, as his proportion of the capital, is not invalid as to the other partners by reason of its non-filing.—*Superior Ct., Feb.,* 1880. Rust *v.* Hansell, 46 Superior 22.

7. **Interpretation of partnership articles.** In an action for an accounting, brought by the executor of a deceased partner against the survivor, it appeared that the firm was insolvent. By the articles of copartnership it appeared that the deceased partner had contributed stock estimated to be of the value of $15,775.-48, and the other partner, stock estimated to be of the value of $3363.77. All profits were, by the terms of the copartnership agreement, to be equally divided, and "all losses happening to the said firm, whether from bad debts, depreciation of goods or any other cause or accident, and all expenses of the said business," were to be borne equally. *Held,* that the plaintiff was entitled to recover from the surviving partner one-half of the sum by which the estimated value of the stock contributed by his testator exceeded that of the stock contributed by the defendant.—*Supreme Ct.,* (*4th Dept.,*) *Jan.,* 1881. Jones *v.* Butler, 23 Hun 367.

8. **The firm name—using fictitious firm name.** The provisions of the act of 1833 (Laws of 1833, ch. 281,) in reference to transacting business under fictitious names, which prohibits a person from transacting business in the name of a partner not interested in the business, and which requires that where "& Co." is used it shall represent an actual partner, does not apply to or include the use of the real name of an actual partner, although such a partner is under a disability at the time.—*Ct. of App., Dec.,* 1880. Zimmerman *v.* Erhard, 83 N. Y. 74; S. C., 60 How. Pr. 163.

9. Where, therefore, a firm is composed of a husband and wife, the latter being represented by the "& Co." in the firm name, in the absence of any intention to impose upon the public by obtaining undue credit, and conceding that a married woman cannot be a partner of her husband, this is not a violation of the statute. *Ib.*

10. As to the rights of the successors in business of a dissolved partnership to the use of the old firm name, trade-marks and labels, see Hazard *v.* Caswell, 46 Superior, 559.

II. Power of One Partner to Bind Another, or the Firm.

11. **By making or indorsing negotiable paper.** The plaintiff, a bank, held a protested check drawn by one C., and indorsed for his accommodation by one V. The bank, knowing that V. was an accommodation indorser, having pressed him and C. for payment, the latter was induced to give his firm note to V., who indorsed it, and with it took up the protested check from the bank, paying to it a small balance due on the latter in cash. U., C.'s partner, knew nothing of the giving of the firm note, and never assented thereto. In an action upon the note,—*Held,* that the transaction itself was notice to the bank, and put it upon inquiry as to whether U. had assented to the giving of the firm note; and that, as he had not assented to it, he was not liable thereon.—*Supreme Ct.,* (*1st Dept.,*) *May,* 1880. Union National Bank of Rahway *v.* Underhill, 21 Hun 178.

12. The firm of C. F. P. & Co. made their promissory note payable to their order, and indorsed the same. L., one of the firm, and also a member of the firm of J. S.'s Sons, indorsed his own name and the name of the latter firm thereon, without their knowledge or consent, and delivered it to a firm to whom he was individually indebted, to be applied upon the debt, who transferred the note to plaintiff for value, before maturity, plaintiff having no notice of the circumstances attending the execution of the note. In an action against the members of the firm of J. S.'s Sons upon the indorsement—*Held,* that the defendants were liable.—*Ct. of App., Oct.,* 1880. Atlantic State Bank *v.* Savery, 82 N. Y. 291; *affirming* 18 Hun 36.

13. **By fraudulent representations.** As so the liability of one partner for the fraudulent representations of his copartner, and when his liability therefor is not affected by a discharge in bankruptcy, see Bradner *v.* Strang, 23 Hun 445.

14. **Ratification of partner's act.** Where one partner, without the knowledge or consent of his copartner, gives to H. his own notes, with the firm's name indorsed thereon by him, in payment of his individual debt, which is secured by a chattel mortgage made by him on his individual property, which property, subject to the mortgage, he had brought into the copartnership as his proportion of the capital, H. at the same time surrendering his chattel mortgage, and thereafter there is a transaction between the firm and H. as to some wire gauze, and thereafter the firm makes an assignment to H. for the benefit of creditors, and in the schedule of liabilities annexed thereto states its indebtedness to H. to be $3000, and upon the evidence it appeared that there could not be so large a claim in favor of H., except upon the basis that the firm acknowledged its liability on the said indorsement; and it also appeared that upon that basis the claim in favor of H. would be much larger, unless the firm had received a credit in respect of the wire gauze; and H. testified as follows: "Q. in Ex. 1," (being the schedule of indebtedness), "The firm's indebtedness to you is stated at $3000; state how that amount was arrived at? Ans. They owed me $6000, and after deducting the wire gauze, they agreed that the balance should be $3000; I accepted the assignment upon the schedule of liabilities handed me by Rancke & Rust, which included my debt of $3000"—*Held,* a ratification of the act of the partner who gave the firm indorsement for his individual debt, and an adoption by the firm of the original claim against the individual partner as a firm obligation.—*Superior Ct., Feb.,* 1880. Rust *v.* Hauselt, 46 Superior 22.

15. When one partner may ratify a chattel mortgage given by his copartner, see Kennedy *v.* Nat. Union Bank of Watertown, 23 Hun 494.

III. Suits between Partners. Accounting.

16. Suits to compel accounting. An accounting may be had for the purpose of adjusting the accounts of a copartnership, as between the partners, though the complaint fails to show whether there are outstanding claims due to or from the firm, or whether there is property owned by the firm.—*Superior Ct., April,* 1880. Keuhnemundt *v.* Haar, 46 Superior 188.

17. In an action for such an accounting, where the complaint shows that an assignment for the benefit of creditors has been made by the firm, the complaint will be held insufficient on demurrer. The cause of action for such sums as may have been withdrawn in excess by any of the partners, is in the firm, and passes as an asset by the assignment. *Ib.*

18. M., plaintiff's testator, and defendant were formerly partners carrying on a hotel, the leases for which expired at the time fixed for the termination of the partnership. Prior to that time the defendant, without the assent or knowledge of his partner, procured new leases in his own name for terms beginning at the termination of the partnership, which, upon discovery of the fact by M., he claimed to hold exclusively for his own benefit. This action was brought to have M.'s interest in the leases declared and adjudged. It appeared that during the pendency of the action, M. brought another action for a dissolution of the partnership and sale of its effects. The judgment therein directed, among other things, a sale of the furniture and fixtures belonging to the firm, leaving the question as to the disposition of the leases to be determined in this action. Sale was made accordingly, the property bid off by defendant, and M. received his proportion of the purchase price. Upon the final trial herein, which did not occur until after the expiration of the new leases of which defendant had had the benefit, plaintiff was allowed to prove, as a basis for computing damages, what the furniture, good-will and leases, if put up for sale together, would have brought, the partners each having a right to bid at the sale. *Held,* no error.—*Ct. of App., March,* 1881. Mitchell *v.* Read, 84 N. Y. 556.

19. Opening the accounting—allowances for uncompleted contracts. When a settlement of partnership accounts will be set aside because of the false and fraudulent statements of one partner, and what allowance should be made on such settlement for uncompleted contracts, see King *v.* Leighton, 22 Hun 419.

IV. Rights of Creditors.

20. Rights of creditors as to application of firm assets. The prior right of the creditors of a firm to its effects cannot be impaired by any consideration having reference to the interests of the individual partners; and anything which defeats this right and hinders or delays such creditors in enforcing payment of their demands against the firm from the firm's property, is a violation of the statute and a fraud upon such creditors.—*Com. Pleas,* (*Gen. T.,*) *May,* 1881. Schiele *v.* Healy, 61 How. Pr. 73.

V. Dissolution.

21. Notice of dissolution. A bank with which a firm has for several years kept an account, wherein the firm is credited with the amounts deposited by it, and charged with the amounts withdrawn, is a dealer with the firm, within the meaning of the rule requiring actual notice of the dissolution of a firm to be given to all persons who had previously been dealers with it.—*Supreme Ct.,* (*1st Dept.,*) *March,* 1881. Nat. Shoe and Leather Bank *v.* Herz, 24 Hun 260.

22. This is especially so where, on the dissolution of the firm, (Martin Herz & Co.,) Martin Herz retires, and, by agreement, his former partner carries on the business under the former firm name. *Ib.*

23. Powers of surviving partner. By articles of copartnership it was stipulated that in case of the death of one of the partners, the survivor should continue to carry on the business for the benefit of both parties, for a time specified after such death. *Held,* that the authority thus conferred, if valid and operative, (as to which *quære,*) did not authorize the survivor to bind the estate of the deceased by new accommodation indorsements, nor did it permit and make valid an indorsement of the firm executed by the survivor as a renewal of an indorsement made in the lifetime of the deceased, and with his assent.—*Ct. of App., Nov.,* 1880. Nat. Bank of Newburgh *v.* Bigler, 83 N. Y. 51.

24. After one member of a firm has been adjudged a bankrupt and has executed an assignment to his assignee, the solvent partner and such assignee must join in an action to collect a claim due to the firm.—*Supreme Ct.,* (*1st Dept.,*) *Nov.,* 1880. Browning *v.* Marvin, 22 Hun 547.

25. Liabilities of surviving partner. A surviving partner, standing also in the position of trustee of the deceased partner, who fails to set apart the share of such deceased partner, and wrongfully keeps such share in the business, is liable to the *cestuis que trust,* on demand, for its value, which is payable to them out of the firm assets which came into his hands, or from the proceeds of such assets.—*Ct. of App.,* 1880. Hooley *v.* Gieve, 9 Abb. N. Cas. 8.

26. Rights and powers of liquidating partner. Upon the dissolution of a partnership it is competent for the copartners to constitute one of their number a special agent for winding up its affairs; and when this has been done, third persons who, with notice of the arrangement, deal, in matters connected with the liquidation, with a partner other than the one thus authorized, are subject to the equitable rights of the other partners.—*Ct. of App., Nov.,* 1880. Hilton *v.* Vanderbilt, 82 N. Y. 592.

27. Upon the dissolution of the firm of U. & Co., V., one of the copartners, by agreement between them, assumed the payment of all the debts, and took charge of the liquidation and settlement of its affairs; U., the other partner, having nothing to do therewith. Of this arrangement plaintiffs, who were the factors of the firm, had notice, and they were directed by V. not to sell the goods of the firm in their hands at less than a specified price. Notwithstanding this, plaintiffs, without any notice to V., upon consultation with, and by the direction or advice of U., who had become their clerk, and who was

insolvent, sold the goods at a less price. In an action to recover an alleged balance for advances made by plaintiffs to the firm—*Held*, that the sale was made without lawful authority; that U. had parted with all right to control or direct as to sales. *Ib.*

28. **Power of one partner to bind firm after dissolution.** By the articles for the dissolution of a firm consisting of two partners the business was to be liquidated at the firm store, and both the partners were to assist and were authorized to sign in liquidation. Thereafter, one of the partners, without the knowledge or consent of the other, made out and sent to the plaintiff a statement of the account due to him from the firm. In an action upon this as an account stated—*Held*, that it was binding only upon the partner making it, and not upon his copartner.—*Supreme Ct.*, (*2d Dept.*,) *May*, 1881. Hart *v.* Woodruff, 24 Hun 510.

29. As to the liability of one partner for conversion of partnership assets after dissolution, see Flannagan *v.* Maddin, 81 N. Y. 623.

30. **Marshaling assets—rights of creditors.** The owner of a judgment against a surviving partner obtains thereby no lien upon a trust fund created by the deceased partner out of the partnership assets; and where such fund has been wrongfully permitted by its trustees, who were also partners, to remain in the business, the rights of a receiver, appointed at the instance of the *cestui que trust* of the fund, to the partnership assets, are prior to the judgment, if it was not obtained until after the appointment of the receiver.—*Ct. of App.*, 1880. Hooley *v.* Gieve, 9 Abb. N. Cas. 8.

31. **Rights of representatives of deceased partner.** The representatives of a deceased partner have a lien upon the whole of the assets of the firm, subject to the payment of the debts of the firm for the amount which may be found to be the deceased partner's share of the firm's assets. *Ib.* 26.

32. The surviving partner is entitled to the whole of the firm's assets for the purposes of liquidation, and he becomes a trustee for that purpose. *Ib.*

33. If the surviving partner continues the business of the firm and uses the assets of the old firm in such continuation, he commits a breach of trust, and misappropriates property upon which a lien has been impressed for the security of the representatives of the deceased partner. *Ib.*

34. If, by such continuation, the surviving partner has disposed of the assets and stock of the old firm and has invested the proceeds thereof in new stock, so that the identity of the old stock and assets are lost, and has mingled in such new stock property of his own, in such a manner that it cannot be separated, the court will impress the lien of the representatives of the deceased partner upon the whole of the new stock to indemnify the trust fund, except as against a *bona fide* purchaser or a party having acquired a specific lien by the levy of an execution or attachment. *Ib.*

35. Such a lien will be enforced to the exclusion of the individual creditors of the surviving partner, upon the ground that it would be more inequitable to appropriate any portion of the trust funds to the payment of the individual debts of the surviving partner, than that some portion of his individual property, which he had so mingled with the trust funds that its identity was lost, should be appropriated to the indemnification of the trust fund. *Ib.* 27.

PART PAYMENT.

Effect of, generally, see DEBTOR AND CREDITOR, III., V.; on *Statute of frauds*, see CONTRACTS, IV.; on *Statute of limitations*, see LIMITATIONS OF ACTIONS, V.

PARTY WALLS.

EASEMENTS, 7-11.

PASSENGERS.

RAILROAD COMPANIES, 28-32, 39-42.

PATENTS.

1. **Patentee's right to royalties from manufacturer.** *It seems*, that where a patent is apparently valid and in force, a party using it is liable for royalties agreed to be paid until the patent is rescinded or revoked, or until notice has been given to the opposite party that he will pay no more under the contract. Actual invalidity of the patent is alone no defence to an action to recover such royalties. But if the patent is annulled by proper legal proceedings and priority of invention, and a patent is awarded to another, no royalty is thereafter recoverable; and in such case no notice is necessary.—*Ct. of App., Nov.*, 1880. Marston *v.* Swett, 82 N. Y. 526.

2. Plaintiff and defendants, S. and M., were joint-owners of certain letters patent which they believed to be valid; an agreement was entered into between the parties to the effect that defendants should have the exclusive right to manufacture and sell the patented article in consideration of certain royalties which they agreed to pay plaintiff. In an action to recover royalties accruing under the contract from October 1st, 1869, to January 1st, 1872, defendants offered to prove that on December 8th, 1869, the patent office declared an interference between the patentee and one G. respecting the invention, and that on January 19th, 1871, a decision was made by that office declaring G. to be the first and original inventor, awarding priority to him, and directing the issue of a patent to him. This evidence was objected to and excluded. *Held*, error; and that had the facts so offered to be proved been established, plaintiff would not have been entitled to recover royalties accruing after the date of such decision. *Ib.*

For decisions respecting *Trade-marks*, see INJUNCTION, 18-21; TRADE-MARKS.

PAUPERS.

POOR.

PAYMENT.

[Consult, also, DEBTOR AND CREDITOR, 6-12.]

Taking a check in payment. In an action upon a promissory note for $2400, it appeared that the note was indorsed by defendant W. for the accommodation of the makers, of which fact plaintiff had notice. The note was delivered by the makers to plaintiff's cashier, who indorsed it, and at their request procured it to be discounted by another bank, plaintiff receiving a compensation for procuring the discount. On, or prior to, the day the note fell due, the makers delivered to plaintiff another note, being one of several indorsed by W., and delivered to the makers to take up the note in suit, and other notes previously indorsed by him; plaintiff's cashier was directed to apply the proceeds to take up the paper so indorsed. It did not appear that this direction was revoked. The proceeds were credited to the makers. It did not appear that plaintiff, at that time, held any paper so indorsed by W., save the note in suit, which it had taken up. A few days after, the makers drew a check on, and delivered it to, plaintiff for $2731.62, payable to "notes, etc., or bearer." No money was paid the drawers thereon, and it did not appear that the proceeds of the note had been drawn out. *Held*, that the plain inference from the transaction was that the check was given to pay the note in suit, and that it was paid thereby; and that, in the absence of any proof rebutting this presumption, a finding of non-payment was error.—*Ct. of App., Jan.*, 1880. Nat. Bank of Gloversville *v.* Wells, 79 N. Y. 498.

As to *Payment into court*, see TENDER.
As to *Application of payments*, see DEBTOR AND CREDITOR, 8-12.
As to payment of *Legacies* and *Debts of decedent*, see EXECUTORS AND ADMINISTRATORS, 57-73; LEGACIES, III.
For rules regulating the *Recovery back*, of money paid, see MONEY RECEIVED.

PENALTIES.

1. **For allowing cattle to run at large on highway.** This action, which was brought to recover the statutory penalties for allowing cattle to run at large upon the highway, was commenced by the service upon the defendant of a summons, issued by a justice of the peace, which required the defendant to appear before him, at his office, "to answer Smith Schoonmaker, in a civil action for penalty for letting cattle run at large on highway, to his damage of two hundred dollars or under." There was no indorsement upon the summons.

Held, 1. That § 7 of art. I, title 6, ch. 8, part 3 of the Revised Statutes, requiring a general reference to the statute giving the penalty, to be indorsed upon every process issued to compel the appearance of the defendant in an action brought to recover the same, was not repealed by the Code of Procedure.

2. That the statement of the object of the action contained in the body of the summons was not a sufficient compliance with the statute.—*Supreme Ct., (3d Dept.,) May*, 1881. Schoonmaker *v.* Brooks, 24 Hun 553.

2. In such an action the statute must be literally complied with, and the notice must be indorsed upon, and not embodied in the summons. *Ib.*

PENDENCY OF ANOTHER ACTION.

ABATEMENT, 4; PLEADING, II.

PERILS OF THE SEA.

INSURANCE, IV.

PERJURY.

1. **The oath—how to be administered.** As to what is a sufficient administering and taking of an oath to sustain a prosecution for perjury, see People *v.* O'Reilly, 61 How. Pr. 3; 9 Abb. N. Cas. 77. But see reversal of this case, 3 Crim. L. Mag. 85.

2. **Indictment for subornation.** Under the provisions of the Revised Statutes (2 Rev. Stat. 682, § 8,) declaring every person guilty of a felony "who shall, by the offer of any valuable consideration, attempt unlawfully and corruptly to procure any other to commit willful and corrupt perjury," it is not essential to the validity of an indictment for the offence that it should aver that the accused incited or solicited the other person to commit perjury. The statute declares in what the attempt prohibited shall consist—*i. e.*, the offer of a valuable consideration, and an averment of an offer of such a consideration for the purpose specified is sufficient.—*Ct. of App., June*, 1880. Stratton *v.* People, 81 N. Y. 629.

PERPETUITIES.

WILLS, 15-18.

PERSONAL INJURIES.

MUNICIPAL CORPORATIONS, 33-35; RAILROAD COMPANIES, 39-53.

PERSONAL PROPERTY.

1. **Seat in stock exchange is.** The seat of a member in the exchange is property in every proper sense of the term, and can be

sold, and is transferable as any other species of property having actual value as such.—*Superior Ct.*, (*Sp. T.*,) *May*, 1881. Sewell *v.* Ives, 61 How. Pr. 54.

2. Effect of law of place on title. As between citizens of this state, the title to personal property cannot be divested without the assent or intervention and against the will of the owner, by the removal of the property from the state by another, having no authority from the owner, and its sale in another country under different laws.—*Ct. of App.*, *June*, 1880. Edgerly *v.* Bush, 81 N. Y. 199.

PHYSICIANS AND SURGEONS.

1. Right to practice—necessity of license or diploma. Ch. 436 of 1874, declaring it to be a misdemeanor for any person to practice medicine or surgery who is not authorized to do so by a license or diploma from some chartered school, &c., does not apply to one who undertakes to cure diseases by manipulating the patient's body by rubbing, kneading and pressing it; and such person is entitled to recover a compensation agreed to be paid for such services, although he is not a graduate of a medical school and has no license permitting him to practice either medicine or surgery.—*Supreme Ct.*, (1*st Dept.*,) *May*, 1881. Smith *v.* Lane, 24 Hun 632.

2. Privilege of communications between physician and patient. The statute prohibiting a physician from disclosing any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to prescribe, (2 Rev. Stat. 406, § 73; Code of Civ. Pro., § 834,) includes information received through the sense of sight as well as that communicated through the ear. It needs not that an examination of a patient should be private to exclude information so derived; nor is it required that it should be shown, in the first instance, by formal proof, that the information was necessary to enable the physician to prescribe.—*Ct. of App.*, *March*, 1880. Grattan *v.* Metropolitan Life Ins. Co, 80 N. Y. 281.

3. The statute includes all knowledge acquired from the patient himself, from the statements of others surrounding him, and from observation of his appearance and symptoms. *Ib.*

4. The death of the patient does not remove the prohibition, and the physician cannot testify to the cause of death learned by him while attending the patient in a professional capacity. *Ib.* See, also, Same *v.* Same, 24 Hun 43.

As to competency of physicians as *Witnesses*, see Witnesses, 61, 73

PLACE OF TRIAL.

Trial, II.

PLANKROAD COMPANIES.

1. Extension of term of incorporation. In so far as ch. 611 of 1875, providing for the organization of business corporations, and authorizing them to extend their corporate existence, applied to plankroad companies, it was repealed by ch. 135 of 1876, and after the passage of the latter act such companies could only extend the term of their corporate existence by taking the proceedings therein provided for.—*Supreme Ct.*, (2*d Dept.*,) *Dec.*, 1880. People *v.* Newburgh, &c., Plank Road Co., 23 Hun 173.

2. Ch. 187 of 1880, amending ch. 611 of 1875, applied only to existing corporations, and not to such as had then ceased to exist. *Ib.*

PLEADING.

[Includes rules of pleading in civil actions at law or in equity, except such as are *peculiar to some particular cause of action, remedy, or defence*, which is the subject of a separate title in the work.]

I. Complaint.
II. Answer.
III. Demurrer.
IV. Reply.
V. Verification of Pleadings.
VI. The Issue. Effect of Admissions in Answer.
VII. Evidence under the Pleadings.
VIII. Amended and Supplemental Pleadings.
IX. Remedies for Errors and Defects.

I. Complaint.

1. Requisites, generally. Although it is only requisite that a complaint shall contain facts constituting a cause of action, and the court will give the relief to which those facts entitle the plaintiff, whether legal or equitable, and so the complaint may be framed with a double aspect, yet the plaintiff can have no relief that is not "consistent with the case made by his complaint and embraced within the issue." (Code of Pro., § 275; Code of Civ. Pro., § 1207.) The plaintiff, therefore, must establish the allegations, and if they warrant legal relief only, he cannot have equitable relief upon the evidence.—*Ct. of App.*, *March*, 1881. Stevens *v.* Mayor, &c., of New York, 84 N. Y. 296.

2. Statement of the cause of action. The evidence by which a cause of action is to be established upon the trial should not be pleaded, but only the facts which constitute the cause of action.—*Supreme Ct.*, (1*st Dept.*,) *June*, 1880. Badeau *v.* Niles, 9 Abb. N. Cas. 48.

3. A complaint, in an attorney's action for services, which sets out the original agreement for compensation, the performance of service under it, and that the fruits resulting from the services have been received by one whom the defendant, with the knowledge and consent of the plaintiff, has authorized to receive the same, and that neither such person nor defendant has paid to plaintiff the proportionate part of such fruits payable to him, states a good cause of action. Upon such a state of facts, the defendant had the power, and was bound to see that the person who received the money paid to the plaintiff his proportion thereof, or to demand it from such

person and pay it himself.—*Superior Ct., June*, 1880. Dickinson *v.* Devlin, 46 Superior 232.

4. As to the proper manner of alleging the making of false representations on the part of defendant, in a complaint, and when a failure to properly allege such representations, will be deemed to have been waived, see Furlong *v.* Gair, 46 Superior 232.

5. Instances. Plaintiff's complaint alleged in substance that there was a sum of money belonging to her in the official custody of the county clerk of K. county, the same being the surplus arising upon the foreclosure of a mortgage upon certain lands belonging to her in the town of N. L.; that an assessment for a local improvement had been in form laid upon said lands in pursuance of certain statutes which were unconstitutional and void and the assessment invalid; that a tax was levied upon the premises to pay such assessment and a warrant issued to the collector of said town, who, by virtue thereof, levied upon and took said money from the county clerk and paid it to the county treasurer to the credit of the town; that bonds of the town had been issued to provide for payment of the expenses of said improvement, which were valid obligations of the town, and the money so paid was applied to the payment of said bonds, and that said town had wrongfully taken and received said money, without the knowledge or consent of the plaintiff, and applied it to its own use, and had failed and neglected to pay over the same. *Held*, that the complaint set forth a good cause of action against the town, and that a demurrer thereto was improperly sustained.—*Ct. of App., Dec.*, 1880. Horn *v.* Town of New Lots, 83 N. Y. 100.

6. Plaintiff's complaint alleged in substance that prior to July, 1866, he was the owner of certain premises in the city of New York, part of an old street which had been closed and a new street opened, of which fact and of his title plaintiff was ignorant; that defendant sold said premises at public auction, and thereafter applied to the plaintiff for a release and conveyance of his title, at the time, "fraudulently and with intent to deceive," keeping concealed from him the facts, and falsely informing him that he had some slight claim, a mere equitable one of no value, and "that the plaintiff, misled, deceived and induced by such fraudulent concealment and such false and fraudulent statements and misrepresentations, which he believed to be true, executed and delivered such release without any consideration." That the premises so conveyed were worth $200,000, and judgment was demanded for that amount. The answer denied the allegations of fraud, and the referee found in favor of defendant. *Held*, that the action was one at law only, and plaintiff not having sustained the allegations of the complaint, a judgment for defendant was proper, although the case may have presented matters of equitable cognizance. Stevens *v.* Mayor, &c., of New York, *supra*.

7. Plaintiff's complaint alleged in substance that R., his intestate, being at the time of unsound mind, transferred to defendant various sums of money, under an agreement in writing, by which defendant agreed to pay to R. the interest on said money during his life, and after his death interest on the whole or a part thereof to his executor or administrator for the benefit of his widow, or directly to his widow and his sister for their benefit during their lives; that interest was paid by defendant up to the death of R., but not since; that the sister of R. died shortly after his death; that plaintiff, after his appointment as administrator, obtained from the widow her written consent that he might surrender the written agreement, which he offered to do, and demanded a return of the moneys, which defendant refused. On demurrer to the complaint—*Held*, that it stated a good cause of action; that the allegation as to unsoundness of mind was one of fact, and the contract was one that could be rescinded.—*Ct. of App., March*, 1881. Riggs *v.* American Tract Soc., 84 N. Y. 330; *reversing* 19 Hun 481.

II. Answer.

8. Facts, not conclusions of law, must be alleged. A defence that, upon the facts set forth in the complaint, plaintiff is not the real party in interest, and not the proper plaintiff, is bad on demurrer.—*Supreme Ct., (Delaware Sp. T.,) Sept.*, 1880. Gleason *v.* Youmans, 9 Abb. N. Cas. 107.

9. General and specific denials. Defendant may admit one or more special allegations of the complaint and interpose a general denial to the remainder, when the allegations of the complaint are so specified that there can be no mistake in ascertaining what is put in issue or in prosecuting the defendant for perjury if the verification is false.—*Supreme Ct., (Sp. T.,) June*, 1881. Haines *v.* Herrick, 9 Abb. N. Cas. 379.

10. Where the complaint is not generally denied, it is not sufficient for the defendant to deny such portions thereof as are not otherwise admitted or avoided, the code not having provided for such a mode of pleading. Accordingly, where the answer contained admissions and specific denials of various allegations of the complaint, and, with respect to others, added that the defendant "denies each and every allegation in said complaint contained, not hereinbefore admitted or avoided"—*Held*, that this last-mentioned form of denial was not authorized by § 500 of the code.—*Supreme Ct., (1st Dept.,) March*, 1881. Miller *v.* McCloskey, 1 Civ. Pro. 252; S. C., 9 Abb. N. Cas. 303.

11. Pleading defect of parties. An answer setting up a defect of parties plaintiff, must give the names of the necessary parties if they be known to the defendant.—*Supreme Ct., (4th Dept.,) April*, 1881. Maxwell *v.* Pratt, 24 Hun 448.

12. A general denial is a waiver of the objection that the promise sued upon is joint, and that plaintiff should have joined the other covenantees as parties.—*Supreme Ct., (Orleans Cir.,) Oct.*, 1880. Warner *v.* Ross, 9 Abb. N. Cas. 385.

13. Plea of former action pending. The requirement that to sustain a plea of a former action pending, it must appear to the court that the first action was for the same cause as the second, is to be strictly enforced; it is not enough that the property in controversy in both actions is the same. The rule is the same in actions of ejectment.—*Ct. of App., Jan.*, 1880. Dawley *v.* Brown, 79 N. Y. 390.

14. An answer admitting a certain sum to be due by defendant, but alleging as a reason for non-payment that a third party has attached the

indebtedness in an action against plaintiff, that said action "has since been pending," and that the defendant has never been released from its obligations by reason of such levy, is insufficient, and does not constitute a bar to the recovery of the amount, on motion, under Code of Civ. Pro., § 511. The answer should state that the said attachment and levy are still in force.—*Superior Ct., Feb.*, 1880. Marsh *v.* West, &c., Manuf. Co., 46 Superior 8.

15. Pleading matters arising after suit brought. A defendant may set up in his answer any matter arising before it is put in, whether it occurred after suit brought or not. Such an answer, although not a plea in bar, is an answer to the further maintenance of the suit, and if true and sufficient, is equally effective in preventing a recovery.—*Marine Ct., (Trial T.,) June*, 1881. Reimer *v.* Doerge, 61 How. Pr. 142.

III. Demurrer.

16. Grounds, generally. Special demurrers, as known to the former practice, were abrogated by the code; and no pleading is now demurrable unless it is subject to one or more of the objections specified in the provisions of the code, defining the grounds of demurrer. (Code of Civ. Pro., §§ 488, *et seq.*)—*Ct. of App., Nov.*, 1880. Marie *v.* Garrison, 83 N. Y. 14; *reversing* 45 Superior 158.

17. To sustain a demurrer to a complaint it is not sufficient that facts are imperfectly or informally averred, or that it lacks definiteness and precision, or that the material facts are argumentatively averred; it will be deemed to allege what can by reasonable and fair intendment be implied from the allegations. *Ib.*

18. It seems that the remedy for indefiniteness is not by demurrer, but by motion. (Code of Civ. Pro., § 546.) *Ib.*

19. In an action against a ministerial officer for executing a process valid upon its face, issued out of a court having jurisdiction of the action and of the parties, a general allegation that the process was unlawful and void can have no greater force than a previous recital of the facts which shows that it was authorized and valid, and a demurrer to such pleading in a complaint must be sustained.—*Superior Ct., (Sp. T.,) Nov.*, 1880. Clark *v.* Bowe, 60 How. Pr. 98.

20. Where, in an action brought to recover damages for a failure of defendant to perform an agreement as to the sale of a plantation, alleged in the complaint to be situated in the State of Louisiana, the defendant, in her answer, set up as a counter-claim that the plaintiff, while in possesion of "Live Oaks" "the said plantation," unnecessarily injured, wasted and damaged it to the amount of not less than $10,000, it nowhere appearing from the said answer, except by reference to the complaint, that the plantation was situated in another state, a demurrer to the counter-claim on the ground that the court had no jurisdiction of the subject thereof—as being founded upon an injury to real property situated in another state—cannot be sustained.—*Supreme Ct., (2d Dept.,) Sept.*, 1880. Cragin *v.* Quitman, 22 Hun 101.

21. Insufficient statement of cause of action. A demurrer to a complaint on the ground that it does not state facts sufficient to constitute a cause of action, cannot prevail, unless it is apparent from an examination of the complaint, taking all its allegations to be true, that no cause of action whatever is stated.—*Supreme Ct., (1st Dept. Sp. T.,) June*, 1881. Pierson *v.* McCurdy, 61 How. Pr. 134.

22. The fact that the plaintiff may, in his complaint, have demanded relief to which he is not entitled, or may have misconceived the nature of the judgment which the court should pronounce upon the facts set forth in his complaint, does not make the complaint bad upon demurrer, if those facts entitle him to any judgment or any relief. *Ib.*

23. Time to demur—extension of time. On April 6th the defendant's attorney, whose time to answer expired April 11th, applied for an extension of time to the plaintiff's attorney, who thereupon signed the following written stipulation: "The time for the defendant, Dennis J. O'Connor, to answer the within complaint, is hereby extended twenty days. Dated N. Y., April 6th, 1880." The plaintiff's attorney having refused to receive a demurrer served by the defendant's attorney on April 30th, on the ground that the time to demur had expired, the defendant moved for an order requiring the plaintiff to receive the demurrer, which was denied. *Held,* that the stipulation extended the time twenty days from April 11th, and that the demurrer was served in time.—*Supreme Ct., (1st Dept.,) Dec.*, 1880 Pattison *v.* O'Connor, 23 Hun 307; S. C., 60 How. Pr. 141.

24. Hearing and decision upon demurrer. That upon the trial of a demurrer, judgment will be given against the first party whose pleadings are defective in substance, see Gleason *v.* Youmans, 9 Abb. N. Cas. 107.

25. When the validity or propriety of an order, allowing a person to be made a party defendant, cannot be considered on a demurrer to the complaint, see Smith *v.* Rathbun, 22 Hun 150.

26. Withdrawal—leave to plead. After judgment has been entered upon an order overruling a demurrer without leave to plead to the merits, or with leave not availed of, the court, in the exercise of its discretion, will not, as a general rule, grant leave to withdraw the demurrer and to plead.—*Ct. of App., June*, 1880. Fisher *v.* Gould, 81 N. Y. 228, 231.

IV. Reply.

27. When proper—leave of court. Section 516 contains nothing authorizing the court to require a reply to a counter-claim. Its provision is that when an answer contains new matter constituting a defence by way of avoidance, the court may in its discretion, on the defendant's application, direct the plaintiff to reply to the new matter.—*Supreme Ct., (1st Dept.), May*, 1881. Adams *v.* Roberts, 1 Civ. Pro. 204.

28. Where an answer contains only new matter constituting a defence by way of avoidance, a reply put in without the direction of the court is irregular, and should be stricken out. Code of Civ. Pro., §§ 516, 517, should be construed together.—*Superior Ct., Feb.*, 1880. Dillon *v.* Sixth Ave. R. R. Co., 46 Superior 21.

29. Sufficiency. A denial in the reply, upon information and belief, of allegations in defendant's answer, is insufficient where it appears from the complaint that the facts set up in the answer are clearly within plaintiff's

knowledge. — *Supreme Ct.*, (*Sp. T.*,) *Dec.*, 1880. Fallon *v.* Durant, 60 How. Pr. 178.

30. Service of reply. Where an answer was served containing a counter-claim, and the cause was then noticed and cross-noticed for trial, and plaintiff, subsequently discovering the counter-claim, countermanded the notice of trial, and then served his reply, which service was within twenty days from the service of the answer—*Held*, on defendant's motion to strike out the reply, that the service was irregular.—*Supreme Ct.*, (1*st Dept. Sp. T.*,) *March*, 1881. Reilly *v.* Byrne, 1 Civ. Pro. 201.

31. *It seems* that defendant, in serving a notice of trial for April, (having previously noticed the cause for trial at the March Circuit,) and, in serving a bill of particulars, both after receipt of the reply, did not waive defective service of such reply. *Ib.*

V. Verification of Pleadings.

32. Verification by attorney. An answer denying any knowledge or information sufficient to form a belief as to the truth of material allegations of the complaint, which is verified by the defendant's attorney, who gives as a reason why the verification was not made by the defendant, that the latter was not a resident of the county in which the attorney resided, and states that the grounds of his belief were statements made to him by his client, raises an issue, and it cannot be stricken out on motion as sham.—*Supreme Ct.*, (1*st Dept.*,) *April*, 1881. Neuberger *v.* Webb, 24 Hun 347.

VI. The Issue. Effect of Admissions in Answer.

33. Express admissions. Where the complaint alleged that the plaintiff was injured upon the premises owned by the defendant, and used by him, his agents and servants, for the purpose of carrying on a school; and, in his answer, defendant admitted the ownership of the premises, and denied the other allegations in the general form above stated—*Held*, that it might properly be assumed, in considering the case on appeal, that the school was carried on by the defendant.—*Supreme Ct.*, (1*st Dept.*,) *March*, 1881. Miller *v.* McCloskey, 1 Civ. Pro. 252.

34. Implied admissions. Where a material fact is alleged which is met by new matter set up in avoidance, and so is impliedly admitted, and the matter in avoidance is sustained by the findings, the implied admission does not work an estoppel.—*Ct. of App.*, *Sept.*, 1880. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474.

VII. Evidence under the Pleadings.

35. What facts must be specially pleaded. In an action against a bank to recover a deposit, evidence that the deposit had been attached, is properly excluded, when not set up in the answer.—*Ct. of App.*, *March*, 1881. McGraw *v.* Tatham, 84 N. Y. 677.

36. Where an exception is contained in the enacting clause of a prohibitory statute, one who pleads the statute must negative the exception, and must prove the negative, unless the subject matter of the negative and the means of proof are peculiarly within the knowledge and power of the opposite party, or where the negative does not admit of direct proof.—*Ct. of App.*, *Sept.*, 1880. Harris *v.* White, 81 N. Y. 532.

37. What need not be. Defendant is not precluded by Code of Pro., § 149, subd. 2, (Code of Civ. Pro., § 500, subd. 2,) from resting upon a defence in the nature of matter of avoidance, which is not set up in the answer, when the facts upon which the defence is based are stated in the complaint.—*Superior Ct.*, *Jan.*, 1880. Fairchild *v.* Lynch, 46 Superior 1.

38. Instances. In an action to recover damages for injuries received by plaintiff in consequence of falling through a coal-hole in the sidewalk, in front of defendants' premises, the answer was a general denial. Defendants offered to prove on the trial that they had obtained the usual permit from the proper authorities, authorizing the construction of the vaults under the walk and the coal-hole. This was objected to and excluded, on the ground, among others, that it was not pleaded. *Held*, no error; that, if a permit was material, it could only be to mitigate the act from an absolute nuisance to one involving care in the construction and maintenance; that it was necessary not only to plead it, but to allege and prove a compliance with its terms, and that the structure was properly made and maintained, to secure the same safety to the public that the sidewalk would have done without it.—*Ct. of App.*, *April*, 1880. Clifford *v.* Dam, 81 N. Y. 52.

39. Where plaintiffs claimed the right to maintain the action in a representative capacity conferred on them by a foreign tribunal, and that the cause of action passed to them by virtue of their appointment and by virtue of the operation of the laws of a foreign country—*Held*, that these matters constituted traversable facts as to which defendants should have definite information.—*Superior Ct.*, (*Gen. T.*,) *June*, 1881. De Nobele *v.* Lee, 61 How. Pr. 272.

VIII. Amended and Supplemental Pleadings.

40. Service of an amended complaint within the prescribed time will defeat a motion to make the original complaint more definite and certain; and such amended complaint may set forth a different cause of action from that contained in the original complaint.—*Supreme Ct.*, (1*st Dept. Sp. T.*,) *Aug.*, 1881. Spuyten Duyvill Rolling Mill Co. *v.* Williams, 1 Civ. Pro. 280.

41. Supplemental answer. An answer alleged that defendants, on petition of certain of their creditors, were duly adjudged bankrupts under the law of the United States, and such proceedings were thereafter had that a trustee was duly elected and appointed, having certain persons for his committee. The supplemental answer alleged that, in pursuance of the bankruptcy proceedings, mentioned in the original answer, the District Court of the United States for the Southern District, sitting as s court of bankruptcy, had (since the service of the original answer) granted to the defendants certificates of discharge under the seal of said court. *Held*, a sufficient averment of judgment—*Superior Ct.*, *June*, 1880. Hennequin *v.* Clews 46 Superior 330.

IX. REMEDIES FOR ERRORS AND DEFECTS.

42. Striking out frivolous pleadings. An answer containing a counter-claim for the amount for which the action is brought, which fails to allege that such set-off belonged to defendant before he had notice of the assignment to the plaintiff of the claim sued upon, is frivolous under Code of Civ. Pro., § 502.—*Com. Pleas, (Sp. T.,) June*, 1881. Venable *v.* Harlin, 1 Civ. Pro. 215.

43. In an action by one of several residuary legatees to recover his share of the estate, a demurrer interposed by the executor, the sole defendant, on the ground that the other residuary legatees should be made parties thereto, cannot be adjudged frivolous.—*Supreme Ct., (1st Dept.,) Nov.,* 1880. Leavy *v.* Leavy, 22 Hun 499.

44. When an answer cannot be stricken out as frivolous, see Dickinson *v.* Auld, 23 Hun 275.

45. Judgment on frivolous pleadings. Under Code of Pro., § 247, where "a demurrer, answer or reply is frivolons, the party prejudiced thereby, upon a previous notice of five days, may apply to a judge of the court, either in or out of court, for judgment thereon, and judgment may be given accordingly." This practice is not changed, but remains the same under Code of Civ. Pro., § 537.—*Supreme Ct., (Jefferson Sp. T.,) Dec.,* 1880. Roblin *v.* Long, 60 How. Pr. 200.

46. Striking out sham pleadings. In an action brought in this state to enforce the judgment and decree of the courts of a foreign state or country, an answer denying any knowledge or information sufficient to form a belief as to all the material allegations of the complaint will be stricken out as sham where the defendant appeared in the original action. *Ib.*

47. Making more definite and certain. *It seems* that where defendant has moved to make plaintiff's complaint more definite and certain, in a respect material to the question as to whether a receiver should be appointed, the motion to make more definite and certain should be determined before the motion for a receiver.—*Supreme Ct., (1st Dept.,) June,* 1881. People *v.* Manhattan R. R. Co., 9 Abb. N. Cas. 448.

48. Returning pleadings. The plaintiff having demurred to an answer interposed by the defendant, the latter, within the time allowed by law, amended it. The plaintiff then procured an order striking out, as sham, false and frivolous, the second defence set up in the amended answer, and demurred to the first, third and fourth defences contained therein. Afterwards the defendant, without procuring leave from the court so to do, served a third answer, setting up in due form his discharge in bankruptcy, this being the same defence insufficiently pleaded in the third defence of the amended answer. The third answer was returned by the plaintiff, on the ground that it could not be served without the leave of the court. Thereafter the demurrer was sustained, the defendant being allowed to amend the said first, third and fourth defences, within twenty days, on payment of the costs. Within that time the defendant paid the costs, and served an answer, setting up simply his discharge in bankruptcy, such answer being the same one already served and returned by the plaintiff. The plaintiff returned this answer as unauthorized by the order sustaining the demurrer, and because it had already been served and returned, and thereafter entered a judgment in his favor, by default, as for want of an answer.

On a motion by the defendant to vacate the judgment and compel the plaintiff to accept the answer last served—

Held, 1. That such answer was properly served, and that the plaintiff had no right to return it.

2. That the entering of the judgment by the plaintiff, after the service of the said answer, was not a mere irregularity, within the meaning of that term, as used in rule 37, requiring the irregularity complained of to be specified in the notice of motion.—*Supreme Ct., (4th Dept.,) June,* 1880. Decker *v.* Kitchen, 21 Hun 334.

For rules governing the *Amendment* of pleadings, see, also, AMENDMENT, 2-8.

For rules of pleading peculiar to any *Particular form*, or *Cause of action*, see the title of the action or cause of action in question.

As to pleading in suits by or against *Personal representatives*, see EXECUTORS AND ADMINISTRATORS, 118. In actions by or against *Husband and wife*, see HUSBAND AND WIFE, VIII.

PLEDGE.

BAILMENT, 3-7.

POLICE.

NEW YORK CITY, 73-75.

POOR.

Presentment of claims to superintendent. No action will lie against a superintendent of the poor for neglect of duty in failing to audit, allow and pay by warrant the claim of one who has rendered services as a physician to a pauper, when the claimant has failed to present to him an itemized account verified by his affidavit, as required by 1 Rev. Stat. (6th ed.,) 845, § 70.—*Supreme Ct., (4th Dept.,) April,* 1881. Hawley *v.* McIntyre, 24 Hun 459.

As to the liability of *Parents* to support their children, see PARENT AND CHILD, 1.

Of *Husband*, to support wife, see HUSBAND AND WIFE, 6, 7.

POUGHKEEPSIE.

MUNICIPAL CORPORATIONS, 54-57

PRACTICE.

[Includes only such decisions upon questions of practice. as could not be conveniently arranged under the various practice titles, or elsewhere in the digest. For rules of practice in actions, and special proceedings, generally, see the title of the *action* or *proceeding* in question, or that of the *cause of action* out of which it would naturally arise.]

1. **An agreement of counsel** on the trial as to the amount of cargo jettisoned, is binding on the parties.—*Superior Ct., Dec.*, 1880. Borland *v.* Mercantile Mut. Ins. Co., 46 Superior 433.

2. **Lis pendens.** Where the plaintiff claimed to be a tenant in common of certain premises, and entitled to a part of the net interest and income arising therefrom, the rents, issues and profits of which had been collected by one of the defendants, and prayed for an accounting, and an examination of the respective rights of the parties in regard to the premises, and for a sale thereof under the direction of the court, and distribution according to the several rights of the parties as they might be declared; and the answer denied that the defendant was so entitled—*Held*, that the action was one brought to recover a judgment affecting the title to, and the use and possession of, real property; and is embraced within the provisions of Code of Civ. Pro., § 1670, respecting the filing of notices of pendency of action.—*Supreme Ct.*, (1*st Dept., July*,) 1881. Kunz *v.* Bachman, 1 Civ. Pro. 281; S. C., 61 How. Pr. 519.

3. **Discontinuance.** When the attorney-general may properly discontinue an action brought by him in the name of the people for the benefit of private persons, see People *v.* Central Cross-town R. R. Co., 21 Hun 476.

As to the mode of *Commencing* an action, see PROCESS.

For rules relative to *Parties*, generally, and parties appearing in a *Representative capacity*, see PARTIES; also, BANKRUPTCY, 1, 2; EXECUTORS AND ADMINISTRATORS, IV.; GUARDIAN AD LITEM.

For rules of *Pleading* and *Evidence*, see PLEADING; EVIDENCE; and the titles of the various forms and causes of action.

For matters of practice in connection with the various *Provisional remedies* and *Special proceedings*, see their titles, chiefly, ARREST; ATTACHMENT; BAIL; CERTIORARI; INJUNCTION; MANDAMUS; PROHIBITION; RECEIVERS; SPECIAL PROCEEDINGS, &c.

As to the *Mode of trial* of actions, see ARBITRATION; REFERENCE; TRIAL.

As to *Place of trial;* changing it; and what actions are local, and what transitory, see TRIAL, II.

For various proceedings *Incidental* to an action, see AMENDMENT; CONTEMPT OF COURT; REMOVAL OF CAUSES; STAY OF PROCEEDINGS.

For rules governing the *Enforcement of judgments*, see CONTEMPT OF COURT; EXECUTION; IMPRISONMENT; JUDICIAL SALE; SET-OFF.

PRAYER.

For *Relief* or *Damages*, see PLEADING, I.
For *Instructions*, see TRIAL, VI., VIII.

PRELIMINARY PROOFS.

To obtain admission of *Secondary evidence*, see EVIDENCE, 19-21.

Of *Loss*, to obtain insurance money, see INSURANCE, 8-12, 41, 42, 55, 56.

PREMIUMS.

INSURANCE, 50-53, 91.

PRESUMPTIONS.

APPEAL, 23; EVIDENCE, 11-18.

PRINCIPAL AND AGENT.

I. APPOINTMENT OF AGENTS; AND THEIR POWERS, GENERALLY.
II. RIGHTS, DUTIES, AND LIABILITIES OF AGENTS.
III. RIGHTS AND LIABILITIES OF PRINCIPALS.
IV. DECISIONS RELATIVE TO PARTICULAR CLASSES OF AGENTS.

I. APPOINTMENT OF AGENTS; AND THEIR POWERS, GENERALLY.

1. **Implied powers of agents.** An authority to an agent to collect and receive moneys for his principal does not authorize the agent to extend the time of payment.—*Ct. of App., Nov.*, 1880. Ritch *v.* Smith, 82 N. Y. 627; S. C., 60 How. Pr. 157.

2. **Purchase of agent's interest.** In the purchase of an agent's interest in an agency for a term of years, provided the principal's consent, if necessary, should be obtained, it is a condition precedent to the recovery of the purchase money that there should be a valid subsisting contract, whereby the vendor is constituted agent for the term.—*Superior Ct., Feb.*, 1880. Felton *v.* McClave, 46 Superior 53.

II. RIGHTS, DUTIES AND LIABILITIES OF AGENTS.

3. **Right of agent to deal for his own benefit.** Where a duty rests upon a party in respect to the property of another, the violation or omission of which will result in a sale of the property, and where a sale is made because of such breach of duty, the person owing it is absolutely disqualified from becoming a purchaser at the sale for his own account.—*Ct. of App., June*, 1880. Bennett *v.* Austin, 81 N. Y. 308, 332.

4. **Duty to account to principal.** Where one has received and assumed to sell, as agent of the owner, the personal property belonging to another, the law raises an implied contract, that he will account to the owner for the proceeds.—*Supreme Ct.*, (4*th Dept.*,) *Oct.*,

1880. Commercial Bank of Keokuk *v.* Pfeiffer, 22 Hun 327, 335.

5. Liability for negligence, losses, &c. As a general rule, and in the absence of an express agreement imposing a different liability, an agent engages simply for ordinary care and skill in the discharge of the duties of his agency, and is only liable to his principal for injuries resulting from a want thereof. The liabilities, however, of the agent may be enlarged by express contract, and he may undertake to insure his principal.—*Ct. of App., Nov.,* 1880. Loeb *v.* Hellman, 83 N. Y. 601.

III. Rights and Liabilities of Principals.

6. When bound by agent's contracts. In an action to recover back moneys alleged to have been paid for forged bonds purchased by plaintiff, through his agents, of defendant, it appeared that the agents charged and the plaintiffs paid more for the bonds than was paid by the former. *Held,* that plaintiff could not recover the excess of defendant.—*Ct. of App., Oct.,* 1880. Greenwood *v.* Schumacker, 82 N. Y. 614.

7. When affected by agent's knowledge. The knowledge of an agent in regard to the use of an easement in premises committed to his charge, will be attributed to his principal.—*Ct. of App., Oct.,* 1880. Ward *v.* Warren, 82 N. Y. 265; *affirming* 15 Hun 600.

8. When a principal is not chargeable with notice of a fact which came to the knowledge of his agent while not engaged in the business of the agency, see Atlantic State Bank *v.* Savery, 82 N. Y. 291.

9. Liability for agent's wrongful acts. A principal is liable, as a general rule, for such wrong of his agent as is committed in the course of his employment and for the benefit of the principal; and this, although no express command or privity is proven.—*Ct. of App., Feb.,* 1880. Fishkill Savings Inst. *v.* Nat. Bank of Fishkill, 80 N. Y. 162.

10. When he may repudiate agent's acts. The fact that an agent, intrusted with money of his principal to invest, exacts a bonus for himself, without the knowledge or assent of his principal, as a condition of making a loan, does not establish usury. The principal is not liable for such an unauthorized act of the agent, in the absence of proof that he received a portion of the bonus or in some form reaped a benefit or advantage from the same.—*Ct. of App., June,* 1880. Van Wyck *v.* Watters, 81 N. Y. 352.

11. The plaintiff, who was the owner of certain bonds which had been deposited with a trust company, and for which a non-negotiable receipt had been issued in the name of her son "as trustee," delivered the receipt to her son and authorized him to use it for his own benefit with the defendant to the extent of $750. The son pledged it with the defendant to secure a note for $1650, and received from it obligations of his own amounting to that sum, among which were two upon which his mother was liable, which amounted to $750. The mother having disaffirmed the arrangement, tendered to the defendant the securities surrendered to her son, and demanded a return of the receipt, and upon the refusal of the defendant to comply with the demand, brought this action to recover the receipt.

Held, 1. That the fact that the son was described in the receipt as a trustee was notice to the defendant that he was not the absolute owner of it, and imposed upon the defendant the duty of ascertaining the limits of his authority over it, and of restricting its transactions with him within such limits.

2. That the plaintiff was entitled to recover.—*Supreme Ct.,* (1st *Dept.,*) *March,* 1881. Swan *v.* Produce Bank, 24 Hun 277.

12. Ratification of agent's act. To establish a ratification by a principal of an unauthorized act of his agent, it must appear that the principal acted with knowledge of the facts; he cannot be held to have ratified acts which did not come to his knowledge.—*Ct. of App., Nov.,* 1880. Ritch *v.* Smith, 82 N. Y. 627; S. C., 60 How. Pr. 157.

13. In an action to foreclose a mortgage, one of the obligors in the bond secured by the mortgage claimed that he was discharged by reason of extension of time granted to S., a purchaser of the mortgaged premises, who had assumed and agreed to pay the mortgage. It appeared that an agreement was made between S. and one H., who was authorized by plaintiff to receive and collect the payments falling due on the securities, to the effect that S. should pay a portion of the principal in advance, and that the time for the payment of the residue should be extended. H. had no express authority to make the agreement for the extension. At his request, plaintiff consented to take the payments in advance, but was not notified and did not know of the agreement for extension. It did not appear that either the bond or the mortgage were in the possession of H.; he received the payments, gave receipts, forwarded the moneys to plaintiff, who endorsed them on the mortgage. *Held,* that the evidence failed to show authority in H. to extend the time, and that no ratification of the agreement was established. *Ib.*

IV. Decisions relative to Particular Classes of Agents.

14. Brokers, generally. The duty of a broker, employed to sell property, is to bring the buyer and seller to an agreement. While it is not essential that he should be present and an active participator in the agreement or sale when it is actually concluded, to entitle him to his commissions, he must produce a purchaser ready and willing to enter into a contract on the employer's terms. He is not entitled to commissions for unsuccessful efforts to effect a sale, unless the failure is caused by the fault of the principal.—*Ct. of App., Jan.,* 1881. Sibbald *v.* Bethlehem Iron Co., 83 N. Y. 378.

15. Where no time for the continuance of the contract between the broker and his principal is fixed, either party is at liberty to terminate it at will, subject only to the ordinary requirements of good faith. *Ib.*

16. Where the broker has been allowed a reasonable time to procure a purchaser and effect a sale, and has failed so to do, and the principal in good faith has terminated the agency, and sought other assistance by means of which a sale is consummated, the fact that the purchaser is one whom the broker introduced, and that the sale was in some degree aided by his previous unsuccessful efforts, does not give him a right to commissions. *Ib.*

17. Merchandise brokers. A broker employed to purchase as such, for his principals, from a specified person, a certain commodity, without authority to purchase in his own name, and who by reason of his failure to disclose his principals, is personally charged with and pays a judgment for the purchase price thereof, has no rights against his principals, arising out of said transactions, except those gained upon principles of equity, giving him such claim as the vendor may have against such principals. Consequently, a release of all claims arising out of said sale, given by the vendor to one of said principals, (act of 1838, for relief of partners and joint debtors,) prior to the commencement of the vendor's action against said broker, furnished to the party so released a good defence to a subsequent action brought by the broker against his principals, to recover the amount paid by him as above stated.—*Superior Ct., June,* 1880. Knapp *v.* Simon, 46 Superior 225.

18. Stock-brokers. Where a stock-broker sells, without due notice, stock purchased by him for a customer on a margin, and held in pledge to secure the advance made by him to make the purchase, he does not thereby, as matter of law, extinguish all claim against the customer for the advance. The unauthorized sale is a conversion, and the broker is liable for the damages sustained by his customer in consequence thereof; but the latter can claim no greater benefit than would have accrued to him if the act complained of had not been committed.—*Ct. of App., April,* 1880. Gruman *v.* Smith, 81 N. Y. 25.

19. Accordingly—*Held,* in an action to recover a balance alleged to be due for such an advance, after credit of the amount realized upon the unauthorized sale of the stock, that a dismissal of the complaint was error; but that defendant was entitled to be allowed as damages the difference between the price for which the stock sold and for which he received credit and its market price then or within such reasonable time after notice of sale as would have enabled defendant to replace the stock, in case such market price exceeded the price realized. *Ib.*

20. As to the authority of a stock-broker to sell, and his liability for negligence, see Harris *v.* Tumbridge, 83 N. Y. 92.

21. Factors. A factor to whom goods are consigned for sale is bound to follow the instructions of his principal as to terms of sale, although he has made advances on the goods, unless the principal, after reasonable notice, fails to repay such advances. —*Ct. of App., Nov.,* 1880. Hilton *v.* Vanderbilt, 82 N. Y. 592.

22. A factor may bring an equitable action to foreclose his lien upon goods of the consignor in his possession for general balance of account, and is entitled therein to judgment for deficiency after the sale of the consigned goods.—*Superior Ct., Dec.,* 1880. Whitman *v.* Horton, 46 Superior 531.

For decisions relative to the powers, duties, and liabilities of *Particular classes of agents,* see ATTORNEY AND CLIENT; BANKS; CARRIERS.

As to agents of *Corporations,* see CORPORATIONS, VI.; also, INSURANCE, 88-91; MUNICIPAL CORPORATIONS, IV.; RAILROAD COMPANIES, III.

PRINCIPAL AND SURETY.

I. GENERAL PRINCIPLES.
II. RIGHTS AND LIABILITIES OF THE PARTIES.
III. WHAT WILL EXONERATE THE SURETY.

I. GENERAL PRINCIPLES,

II. RIGHTS AND LIABILITIES OF THE PARTIES.

1. Liability of sureties, generally. The liability of a surety is limited to the express terms of the contract; his obligation, so far as warranted by the terms employed, should be construed strictly and favorably to him.—*Ct. of App., June,* 1880. Ward *v.* Stahl, 81 N. Y. 406.

2. Where the engagement of a surety is for the future, he cannot be made liable for the past, as to which he has not covenanted.—*Ct. of App., Sept.,* 1880. Thomson *v.* MacGregor, 81 N. Y. 592.

3. Contribution between co-sureties. The death of one of two or more co-sureties does not relieve his estate from a liability to contribute; the law implies a contract between the sureties, originating at the time they executed the obligation by which they became such, to contribute ratably toward discharging any liability which they incur in behalf of their principal; and in case of the death of either, the obligation devolves upon his legal representatives the same as any other contract made by him, the breach of which occurs after his death.—*Ct. of App., March,* 1881. Johnson *v.* Harvey, 84 N. Y. 363.

4. The authorities holding that as against the creditor, the estate of a deceased surety who has executed a joint obligation with others is discharged, distinguished. *Ib.*

5. Where, in an action brought against the two sureties to a joint undertaking, both of the sureties are served, but judgment is entered against one only, such judgment cannot be enforced against the surety against whom it is entered for more than one-half of the amount due on the undertaking.—*Supreme Ct., (4th Dept.,) April,* 1881. Waggoner *v.* Walrath, 24 Hun 443.

6. The other surety is by such entry of judgment against his co-surety only, released from all liability to the obligor, and cannot be called upon for contribution by his co-surety. *Ib.*

7. An assignee of such judgment is chargeable with notice of all the facts contained in the judgment-roll, and has no greater rights than had his assignor. *Ib.*

8. In 1873, the plaintiff, the defendants' testator, Ives, De Lano and Harris, purchased a parcel of land for $10,000, the plaintiff owning one-quarter, Harris one-half, and Ives and De Lano together the remaining quarter. A joint and several bond secured by a mortgage, in which they all united, was given to secure a portion of the purchase-money. Ives died in 1877. Thereafter, in an action brought to foreclose the mortgage, to which the plaintiff, Harris and De Lano, and Ives' widow and heirs-at-law, but not the defendants, his executors, were made parties, a judgment for deficiency was recovered against

the plaintiff, Harris and De Lano, which was thereafter paid by the plaintiff, Harris and De Lano being insolvent. In an action by the plaintiff to compel the defendants, Ives' executors, to contribute towards the payment of the said judgment—

Held, 1. That the defendants were liable for one-eighth of the deficiency, and also for one-half of the amount which the plaintiff had been obliged to pay by reason of the insolvency of Harris and De Lano.

2. That neither the death of Ives nor the fact that the defendants had not been made parties to the foreclosure action, and that no judgment for deficiency had been asked or recovered against them therein, relieved them from such liability to the plaintiff.—*Supreme Ct.*, (*3d Dept.*,) *May*, 1881. Weed *v.* Calkins, 24 Hun 582.

III. What will Exonerate the Surety.

[Consult, also, Guaranty, 9-11.]

9. In general. Effect of a verbal promise by the obligee of a bond to the sureties thereon, that if the principal named in the bond did not pay over moneys collected promptly, he would stop his business and notify the sureties, considered.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Emery *v.* Baltz, 22 Hun 434.

10. Giving further time to principal. Where, in an agreement for the extension of the time of payment, made between a creditor and the principal debtor, the right to proceed against the surety is reserved, such agreement is held to be conditional upon the assent of the surety, and he is not discharged thereby.—*Ct. of App.*, *Nov.*, 1880. Nat. Bank of Newburgh *v.* Bigler, 83 N. Y. 51.

11. Neglect to proceed against principal, on request. In order to exonerate a surety because of delay in proceeding against the principal, the surety must show explicit notice or request to the creditor to take legal proceedings to collect the debt or enforce the liability.—*Ct. of App.*, *Sept.*, 1880. Howe Machine Co. *v.* Farrington, 82 N. Y. 121; *affirming* 16 Hun 591.

12. *It seems* the doctrine that a surety may give the creditor notice to proceed against the principal, and if he refuses, to the damage of the surety, the latter is discharged, is not a favorite in the law, and will not be applied with laxity.—*Ct. of App.*, *Nov.*, 1880. Hunt *v.* Purdy, 82 N. Y. 486.

13. The surety must at least give a notice clearly informing the creditor that he is required to take proceedings in the courts to enforce the obligation. *Ib.*

14. If a sufficient notice has been given, and has not been observed by the creditor, the surety will not be relieved of liability, unless the failure to observe the notice resulted in injury to him; and the burden of showing this is upon him. *Ib.*

15. In an action to foreclose a mortgage, wherein defendant F. was sought to be held liable as surety, it appeared that about four weeks before the bond accompanying the mortgage became due, F. told the plaintiff to collect the mortgage, "and not to let it run over the time it is due." The court found that when the bond and mortgage became due, the obligor was hopelessly insolvent, and had so remained; there was no finding, or request to find, that the property would then have brought more than at present, nor was there any evidence as to the extent of the depreciation in value, if any. *Held*, that the notice was insufficient to base a claim thereon that F. was discharged by a delay in bringing an action to foreclose. Also, that F. failed to show any injury resulting from the delay. *Ib.*

16. Liability of estate of deceased surety. Code of Civ. Pro., § 758, providing that the estate of one jointly liable upon a contract shall not be discharged by his death, is not applicable to contracts made prior to its adoption.—*Supreme Ct.*, (*2d Dept.*,) *Dec.*, 1880. Richardson *v.* Draper, 23 Hun 188.

For the liability of the surety as fixed by the terms of the *Bond*, see Bonds.

For the liability of sureties on *Official bonds*, generally, see the titles of the various officers.

As to sureties of *Personal representatives* and *Trustees*, and proceedings to enforce their liability, see Executors and Administrators, 122-127.

As to the rights and liabilities of sureties upon *Bills* and *Notes*, see Bills of Exchange; Promissory Notes.

For the liability of *Bail*, see Bail.

PRIORITY.

Deeds, 4; Judgment, 43; Mortgages, 22-28, 31-35.

PRIVATE WAYS.

Easements, 12, 13.

PRIVILEGE.

Of persons under *Disabilities*, see Husband and Wife, 9, 10.

As to *Privileged communications*, see Attorney and Client, 25-29; Witnesses, 21, 22.

PROBABLE CAUSE.

Malicious Prosecution, 3, 4.

PROBATE.

Courts, 17-37; Wills, 6-14.

PROCESS.

1. Designation of unknown defendants. *It seems* that the provision (Code of Civ. Pro., § 451,) in reference to the manner of

designating and of service of summons upon unknown defendants, applies to all actions in which service of summons may be by publication, including actions for partition.—*Ct. of App., March*, 1881. Bergen *v.* Wyckoff, 84 N. Y. 659; S. C., 1 Civ. Pro. 1.

2. The title of an action in a summons and complaint did not contain the names of two of the defendants whose names were unknown, but referred to them as the wives of two other defendants whose names were given.

Held, 1. That the summons was defective and irregular, for the reason that the code requires that the summons shall contain the names of the parties, or so much of his or her name as is known, adding in that case a description identifying the person intended. (§§ 417, 451.)

2. That this defect, not altering the issue between the parties, was properly made the subject of amendment.—*Supreme Ct.*, (*1st Dept.*,), *March*, 1881, Weil *v.* Martin, 1 Civ. Pro. 133.

In such case the word "Mrs." prefixed to the name of the husband, followed by the description, "his wife," is sufficient. *Ib.*

3. Sufficiency of service, generally. Where a party legitimately and voluntarily comes within the territorial jurisdiction of the court, not having been induced to do so by fraud, trick, or device, the fact that access to him is by such means obtained, furnishes no ground for setting aside the service.—*Superior Ct., Dec.*, 1880. Atlantic, &c., Teleg. Co. *v.* Baltimore, &c., R. R. Co., 46 Superior 377.

4. Service by publication — when proper. Under Code of Civ. Pro., § 2799, relating to the distribution of surplus money in foreclosure proceedings, the citation must be served by publication, on the persons entitled to share in the proceeds. Personal service or service by mail will not confer jurisdiction on the surrogate. —*N. Y. Surr. Ct., Dec.*, 1880. Matter of Solomon, 4 Redf. 509.

5. Requisites of affidavit for order to publish. Under the provision of the Code of Pro., § 135, which authorized the service of a summons by publication, when it should appear by affidavit, "to the satisfaction of the court, or a judge thereof," that the defendant could not, "after due diligence, be found within the state," the court or judge was empowered to pass upon the sufficiency of the evidence as to the exercise of due diligence.—*Ct. of App., Oct.*, 1880. Belmont *v.* Cornen, 82 N. Y. 256.

6. Where an affidavit contained allegations tending to show that efforts had been made to find the defendant within the state, and that he was not there, it gave jurisdiction to the court, or judge, to pass upon the question of the sufficiency of the proof, and if so satisfied, neither the order for publication nor the judgment based thereon can be impeached collaterally. *Ib.*

7. An affidavit, presented on application for an order of publication in a foreclosure suit, showed that plaintiff placed in the hands of the sheriff of the city and county of New York, where the premises were situated, and where the venue was laid, a summons in the action, and received from him an official return that he had used due diligence to find the defendants in his county, but was unable to do so. The affidavit further alleged that the deponent, who was the plaintiff's attorney, had been informed by M., a counselor-at-law, who had professional dealings with the defendants, that they were non-residents of this state, living in Connecticut, which deponent verily believed to be true. Upon motion to vacate the order and the judgment, the non-residence of the defendants was conceded. *Held*, that the affidavit was sufficient to give the judge jurisdiction to pass upon the question of due diligence, and to authorize the granting of the order. *Ib.*

8. On an application for an order directing the service of the summons by publication, in an action commenced in July, 1877, an affidavit was presented which alleged "that the defendant has not resided within the State of New York since March, 1877." *Held*, that this allegation was sufficient evidence of the plaintiff's inability, after due diligence, to find the defendant within the state, and was sufficient to confer jurisdiction upon the court to make the order. — *Supreme Ct.* (*2d Dept.*), *Dec.*, 1880. Carleton *v.* Carleton, 23 Hun 251.

9. Personal service out of the state. A citizen of one state or country cannot be compelled to go into another state or country to litigate a civil action by means of process served in his own state or country. And a judgment obtained upon such service, where no appearance is made by the person so served, can impose no personal liability which will be recognized beyond the state in which the action originated.—*Supreme Ct.*,(*1st Dept. Sp. T.*,) *June*, 1880. Shepard *v.* Wright, 59 How. Pr. 512.

As to *Amendment* of process, see AMENDMENT, 1.

As to *Final process*, see EXECUTION.

PROFITS.

Recovery for *Loss of*, see DAMAGES, 1, 2.

When *Agreement to share* constitutes partnership, see PARTNERSHIP, 3, 4.

PROHIBITION, (Writ of.)

1. When it lies. The writ of prohibition is a preventive remedy, and not a corrective one, and can only be used to prevent the doing of an act about to be performed, not to remedy an act already completed; and Code of Civ. Pro., § 2100, was not intended to alter the common law rule in that respect.—*Supreme Ct.*, (*1st Dept. Sp. T.*,) *Aug.*, 1881. People, ex rel. Gould, *v.* Comm'rs of Excise, &c., 1 Civ. Pro. 244; S. C., 61 How. Pr. 514.

2. The provisions of § 2100 — that the tribunal proceeded against may be directed to annul or vacate proceedings theretofore taken in the matter—applies only to interlocutory or mesne proceedings prior to the final decision of such tribunal. *Ib.*

3. When it will not lie. Where, on the return of an alternative writ of prohibition, it appeared that the board of commissioners of excise of the city of New York had revoked the relator's license prior to the granting of the writ, and had ordered the cancellation of his license, but had not, at the time of the return, obtained actual possession of the license—*Held*,

that the judicial proceedings of the board terminated when they pronounced judgment revoking the license, and that taking physical possession thereof was a ministerial act as to which prohibition would not lie; and it thus appearing that the proceeding sought to be prohibited had been fully terminated prior to the granting of the writ, the writ must be quashed. *Ib.*

4. Upon the trial of an action brought in the Marine Court of the city of New York by one T. against one S., T. recovered a judgment, which was, upon appeal to the General Term of the Marine Court, reversed, and a new trial ordered. T. then appealed to the General Term of the Court of Common Pleas, without giving the stipulation required by ch. 545 of 1874, to the effect that judgment absolute might be rendered against him in the event of the affirmance of the order directing a new trial. The Common Pleas affirmed the order of the General Term of the Marine Court, directing a new trial. S. thereupon, claiming that the Common Pleas should have ordered a judgment absolute in his favor, procured a writ of prohibition, restraining T. and the Marine Court from taking any further proceedings in the action. Upon an appeal from the order granting the said writ—*Held*, 1. That in the absence of the stipulation required by the act of 1874, the Court of Common Pleas could not have ordered a judgment absolute in favor of S.

2. That if the appeal could have been taken without any stipulation having been given, the Common Pleas, in considering the case, were, by subd. 2 of § 43 of ch. 479 of 1875, vested with a discretion as to the disposition to be made of it, which discretion was not reviewable at a Special Term of the Supreme Court on an application for a writ of prohibition.

3. That if the relator was aggrieved by any irregularity in the form of the judgment of the Court of Common Pleas, he should apply to that court for the correction of the judgment.

4. That if the Marine Court had no authority to proceed further with the case, the relator could protect himself by raising the proper objections and by taking the proper exceptions when the case should be moved for trial, and by correcting any erroneous rulings thereon by appeal.

5. That the order granting the writ should be reversed and the writ quashed.—*Supreme Ct.*, (1*st Dept.*,) *July*, 1880. People *v.* Talcott, 21 Hun 591.

PROMISSORY NOTES.

[Consult, also, Bills of Exchange.]

I. Nature and Requisites, generally.
II. Transfers; and Rights of Purchasers.
III. Rights and Liabilities of Indorsers.
IV. Non-negotiable Notes.
V. Law of Place.
VI. Actions upon Promissory Notes.

I. Nature and Requisites, generally.

1. What is a negotiable promissory note. The following instrument: "Fourteen and one-half months after date I promise to pay to the order of the American Engine Company $450, at seven per centum, at the Havana National Bank, at Havana, N. Y., value received, being in part payment for a portable engine, which engine shall be and remain the property of the owner of this note, until the amount hereby secured is fully paid"—*Held*, to be a negotiable note, and that it was the duty of the defendant (with whom the note had been left for collection) to demand payment thereof of the maker, and notify the indorser of its non-payment.—*Supreme Ct.*, (4*th Dept.*,) *Oct.*, 1880. Mott *v.* Havana Nat. Bank, 22 Hun 354.

2. Consideration. As to the sufficiency of the consideration for a promissory note, see First Nat. Bank *v.* Tisdale, 84 N. Y. 655.

II. Transfers; and Rights of Purchasers.

3. Taking in payment of pre-existing debt. Prior equities of antecedent parties to negotiable paper, transferred in fraud of their rights, will prevail against an indorsee who has received the paper in nominal payment of a precedent debt, where there is no evidence of an intention to receive it in absolute discharge and satisfaction beyond that of accepting or receipting it in payment, or crediting it on account.—*Ct. of App.*, *June*, 1880. Phœnix Ins. Co. *v.* Church, 81 N. Y. 218.

4. What is parting with value. B., P. & Co., being indebted to plaintiff, gave to it their check in settlement of the balance due. The check, on presentation, was dishonored for want of funds. It was presented to the bank on several subsequent occasions, but was not paid, and said firm at no time had funds in the bank to pay it. Defendant executed a note for the accommodation of one W., who indorsed it before maturity to said firm, by whom it was delivered to plaintiff in part payment of their debt. Plaintiff, at the time, surrendered the check. *Held*, that such surrender did not constitute plaintiff a *bona fide* holder for value so as to shut out the defence that the note was wrongfully diverted by the payees from the purpose for which it was made. *Ib.*

5. The authorities holding that the surrender by a creditor of the debtor's own note, on receiving the negotiable note of a third person is a parting with value, collated and distinguished. *Ib.*

6. Diversion of accommodation paper. When a note is made for the general accommodation of the payee and no restrictions are placed upon him as to its use, he may use it in any way which seems beneficial to him, provided it is not negotiated usuriously, and his failure to apply the proceeds according to a prior agreement with the maker constitutes no defence to the latter in an action brought against him thereon.—*Supreme Ct.*, (4*th Dept.*,) *Jan.*, 1880. Brooks *v.* Hey, 23 Hun 372.

7. Plaintiffs, in good faith and without notice of any equities, received from the payee, in exchange for two promissory notes which they surrendered absolutely and unconditionally, a note made by defendants. In an action thereon—*Held*, that the plaintiffs were *bona fide* holders for value, and so that it was no defence that the note was executed for the accommodation of

the payee and had been fraudulently diverted from the use intended.—*Ct. of App., March*, 1881. Nickerson *v.* Ruger, 84 N. Y. 675.

III. RIGHTS AND LIABILITIES OF INDORSERS.

8. Demand and notice—notice by mail. This action was brought by the second against the first indorsers of a promissory note, made by a corporation payable at its office in the city of New York. On the day of its maturity, March 4th, 1875, separate notices of protest to the plaintiff, the defendants and the third and last indorser, the cashier of a bank at Thomaston, Maine, were prepared by a notary in New York, inclosed in one envelope and mailed to the cashier at Thomaston. The notices were received at that place after banking hours on the 5th, and by the cashier on the morning of the 6th, by whom they were forwarded by the next mail to the plaintiff, who lived at Warren, a place distant about four miles from Thomaston. The plaintiff received them on the evening of the 6th, and on the next morning went to Thomaston for advice as to his proper course. In pursuance of the advice so received he mailed at Thomaston a notice addressed to the defendants at New York by the second mail of that day, which left Thomaston at 1.40 P. M. and passed through Warren at 2 P. M. The first mail left Thomaston at 10.10 A. M., and closed at Warren at 9.30 A. M. The plaintiff, who was upwards of eighty years of age, was a lawyer by profession but had been out of practice for twenty-five years. *Held*, that the plaintiff was not chargeable with negligence in not posting the notice in time for the first mail leaving Warren on the morning of the 7th, and that the defendants were liable upon the note.—*Supreme Ct.*, (*1st Dept.*,) *Jan.*, 1881. Smith *v.* Poillon, 23 Hun 628.

9. Action for neglecting to protest. In an action for neglecting to protest a note, whereby the liability of an indorser has been lost, the party sued has a right to show, on the question of damages, any such state of facts as will tend to show that the loss of the plaintiff has been less than the face of the obligation of the maker.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Mott *v.* Havana Nat. Bank, 22 Hun 354, 357.

IV. NON-NEGOTIABLE NOTES.

10. Liability of indorser. The party indorsing his name on the back of a non-negotiable note is not estopped from setting up the statute of limitations as a defence, by the fact that he has alleged in his answer that payments have been made upon the note by the maker thereof, and that he claims that the same should be applied to reduce the amount due thereon, so long as it does not appear that such payments were made by his direction or have not been ratified by him.—*Supreme Ct.*, (*1st Dept.*,) *April*, 1881. McMullen *v.* Rafferty, 24 Hun 363.

V. LAW OF PLACE.

11. Effect of, on question of usury. In pursuance of an arrangement made in Pennsylvania between plaintiff, a corporation organized and doing business in that state, and defendant, a citizen of New York, for the renewal of a promissory note held by the former, made by the latter, plaintiff mailed to defendant a promissory note for him to execute and return. This note was dated and executed by defendant at M. in this state, and was made payable there; it was returned to plaintiff by mail with a check to pay the discount. The discount was at a rate lawful in Pennsylvania, but greater than lawful interest in this state. In an action on the note, —*Held*, that as the note was executed to be used in Pennsylvania, the law of that state must control, and that, therefore, the note was not usurious.—*Ct. of App.*, *Sept.*, 1880. Wayne Co. Savings Bank *v.* Low, 81 N. Y. 566; S. C., 8 Abb. N. Cas. 390.

12. The defendant, having gone to Illinois to receive money for the plaintiff, forwarded to him from time to time as the money was received, promissory notes, made and dated in Illinois and bearing interest at the rate of ten per cent. per annum, a rate of interest which was lawful in that state. One of the notes was made payable in this state; in the others no place of payment was specified. In an action brought upon the notes in this state the defence of usury was set up. *Held*, that the validity of the notes was to be determined by the laws of the State of Illinois, and that being valid there, they were valid and enforceable here.—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Sheldon *v.* Haxton, 24 Hun 196.

VI. ACTIONS UPON PROMISSORY NOTES.

13. The complaint. An averment in the complaint that the note in suit was, at the instance of the holder, "duly presented for payment, and payment thereof demanded, and refused," is sufficient to charge an indorser, although there is no allegation that the presentment was to the maker, nor that presentment was made at the place where the note was payable.—*Supreme Ct.*, (*Sp. T.*,) *Feb.*, 1881. Chemical Nat. Bank *v.* Carpentier, 9 Abb. N. Cas. 301.

14. Evidence for plaintiff. The complaint alleged that the respondent, being indebted to the plaintiffs for goods sold, delivered to them a promissory note made by S. & Co., and indorsed and guaranteed by the respondent. It then alleged the non-payment and protest of the note and demanded judgment for the amount due thereon. The defence was that the note was made for the accommodation of the respondent and discounted by plaintiffs at a usurious rate of interest. Upon the trial the court refused to allow plaintiffs to show that at the time the note was delivered to them the respondents stated and represented that the note was a business note, given by the makers to him for bills receivable.

Held, 1. That the court erred in excluding the evidence, as such representation would, if proved to have been made, have estopped the respondent from disputing the validity of the note.

2. That in any event the plaintiffs were entitled to recover the value of the goods sold and delivered to the respondent, for which the note was given.—*Supreme Ct.*, (*1st Dept.*,) *March*, 1881. Fleischmann *v.* Stern, 24 Hun 265; S. C., 61 How. Pr. 124.

15. The defence of usury. In an action upon a promissory note, wherein the defence was usury, defendant testified that at the time of giv-

ing it he paid interest on the amount at the rate of $1 per day for $1000; that it was given in renewal of other notes, on which the same rate of interest was paid; that the same rate was paid on the note given for the original loan, and that all the notes were received by, and interest paid to the clerks of plaintiff's testator, at his banking-house. It was not claimed that any part of the interest was paid to the clerks as commissions for their services, or for their benefit in any way, or otherwise than as clerks for the deceased. One of said clerks testified to payments as sworn to by defendant, and that he, witness, made some of the loans by direction of the deceased. *Held*, that the evidence justified a finding of usury.—*Ct. of App.*, *Feb.*, 1880. Pratt *v.* Elkins, 80 N. Y. 198.

16. The note in suit was without interest; it was transferred to plaintiff, together with twelve other notes which were business paper, at the same time and as one transaction, at a discount from the aggregate amount of the notes greater than legal interest. There was evidence tending to show that there was a difference in the value of the notes, some being poor and considered worth but little, while that of the defendant was good, and it was talked that a greater discount should be made upon the former. *Held*, that the inference was proper that plaintiff did not deduct from defendant's note at the same rate as from the others; and as there were no facts from which the referee could say, with the needed legal precision, what was the rate, he could not say it was greater than the lawful rate; and that, therefore, a finding that there was no usury was justified.—*Ct. of App.*, *June*, 1880. Bayliss *v.* Cockcroft, 81 N. Y. 363, 368.

17. Defendant set up in his answer the defence of usury, alleging that plaintiff, in discounting the notes, charged interest at the rate of from ten to fourteen per cent. Upon the trial, he offered to prove that they were discounted at the rate of sixteen per cent. *Held*, that the variance was fatal, and that the evidence was properly excluded.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Farmers', &c., Nat. Bank *v.* Lang, 22 Hun 372.

As to *Bills of exchange*, and *Checks*, see those titles.

For rules governing the admissibility of *Parol evidence to explain or vary* a promissory note, see EVIDENCE, II.

As to when taking a note will operate as *Payment*, see PAYMENT.

As to *Premium notes*, see INSURANCE, **50-53**.

As to the power of a married woman to bind her *Separate estate* by a promissory note, see HUSBAND AND WIFE, **18**.

PROTEST.

Of *Negotiable paper*, see BILLS OF EXCHANGE, **9-10**; PROMISSORY NOTES, **8, 9**.

PROVISIONAL REMEDIES.

For decisions relative to the various provisional remedies, provided by the *Code of procedure*, see their titles, such as ARREST; ATTACHMENT; INJUNCTION; RECEIVERS, &c.

PUBLICATION.

Of *City ordinance*, see NEW YORK CITY, **2**.
Of *Wills*, see WILLS, **2-4**.
Service of process by, see PROCESS, **4-9**.

PUNISHMENT.

TRIAL, VIII.

Q.

QUESTIONS OF LAW AND FACT.

[Consult, also, TRIAL, VI.; and the titles of the various remedies and rights of action.]

1. Questions of law for the court. As to when the question of negligence is one of law, see Riceman *v.* Havemeyer, 84 N. Y. 647.

2. Questions of fact for the jury. In an action to recover damages for alleged negligence, plaintiff is entitled to have the issue of negligence submitted to the jury when it depends upon conflicting evidence, or on inferences to be drawn from circumstances in regard to which there is room for a difference of opinion among intelligent men.—*Ct. of App.*, *Jan.*, 1881. Payne *v.* Troy, &c., R. R. Co., 83 N. Y. 572.

3. When a jury may infer an intent to defraud the inquirer by means of a false statement, and when the question should be submitted to the jury, see Meyer *v.* Amidon, 23 Hun 553.

4. When the question of the defendant's prudence in relying upon fraudulent representations, should be submitted to the jury, see Greene *v.* Hallenbeck, 24 Hun 116.

5. Mixed questions of law and fact. In an action for libel it is for the court to determine whether the alleged libel was a privileged communication; but the questions of good faith, belief in the truth of the statement, and the existence of actual malice remain for the jury. The rule is the same where the alleged libelous charge is made against a public officer as such.—*Ct. of App.*, *June*, 1880. Hamilton *v.* Eno, 81 N. Y. 116, 122.

QUIETING TITLE.

CLOUD ON TITLE.

QUO WARRANTO.

1. **The jurisdiction and power of the courts** was not affected by the provision of the Code of Pro., ? 428, abolishing the writ of *quo warranto* and proceedings by information in the nature thereof; it is only the form of the proceeding that was done away with. The remedies theretofore had in those forms may now be obtained by civil action. As to whether the jurisdiction of the courts in those matters can be affected by legislation, *quære.—Ct. of App., Feb.*, 1880. People, ex rel. Hatzel, *v.* Hall, 80 N. Y. 117.

2. **Evidence—burden of proof.** In an action in the nature of a *quo warranto*, as between the relator and the defendant, the burden is upon the former to make out a better title to the office than that of the latter; while, as between the people and the defendant, the latter may be called upon to show that his possession of the office is lawful. The production of a certificate of election from the proper officer is, however, sufficient.—*Ct. of App., Feb.*, 1880, People, ex rel. Watkins, *v.* Perley, 80 N. Y. 624.

R.

RAILROAD COMPANIES.

I. INCORPORATION, ORGANIZATION, AND POWERS, GENERALLY.

II. ACQUIRING RIGHT OF WAY, AND CONSTRUCTING THE ROAD.

1. *Proceedings to acquire title.*
2. *Fences, crossings, and cattle-guards.*

III. RIGHTS, POWERS, AND DUTIES OF OFFICERS, AGENTS, AND SERVANTS.

IV. POWERS, DUTIES, AND LIABILITIES IN RESPECT TO THE MANAGEMENT OF THE ROAD.

1. *Under the contract to carry.*
2. *Liabilities for injuries caused by negligence.*
   - (*a*) In general.
   - (*b*) Injuries to passengers.
   - (*c*) Injuries to persons crossing the track.
   - (*d*) Injuries to employees.
3. *Relative rights and liabilities of connecting lines.*

V. HORSE AND STREET RAILROADS.

I. INCORPORATION, ORGANIZATION, AND POWERS, GENERALLY.

1. **Powers of the legislature over railroads.** A railroad corporation cannot, by contract, when no statute authorizes it so to do, bind itself to a particular mode of propelling power, regardless of the interests of the people, which may require it to adopt a different one.—*Supreme Ct.*, (*Sp. T.*,) *June*, 1880. People *v.* Long Island R. R. Co., 60 How. Pr. 395; S. C., 9 Abb. N. Cas. 181.

2. **Validity of railroad leases—legislative permission.** A railroad corporation, organized under the general railroad act, has no authority, without the consent of the legislature, to lease its road to an individual; and where it has so done it is responsible to the public for the manner of operating the road; as to the public, those operating it must be regarded as agents of the corporation.—*Ct. of App., Feb.*, 1880. Abbott *v.* Johnstown, &c., R. R. Co., 80 N. Y. 27.

3. The right of incorporation conferred under the general law, like a special charter, is in the nature of a contract. In return for the powers and franchises granted, the corporation is placed under obligations to perform certain duties to the public, and it cannot, without the consent of the other party to the contract, change its terms or absolve itself from its obligations. *Ib.*

4. The clause in the act of 1864 (Laws of 1864, ch. 582, ? 2,) requiring that where the railroad of any railroad corporation shall be leased to any other railroad, the lessee shall perform certain acts, does not confer power to lease, but applies only when such power has been conferred. Accordingly—*Held*, where a railroad corporation so organized had leased its road without legislative authority, that it remained liable for injuries caused by the negligence of those operating the road. *Ib.*

5. *It seems* that it is competent for the legislature, in granting permission to lease, to transfer all or any liability to the lessee. *Ib.*

6. **Foreclosure of railroad mortgages.** Notwithstanding the facts that ordinary proceedings may be entirely inadequate for the foreclosure and sale of a large railroad property, and that it is proper for the parties to adopt a suitable mode for saving the property, and its use by a new organization created in their interest, and that such a course is sanctioned by the statutes, yet there must be no discrimination against those who do not approve of the plan.—*Supreme Ct.*, (*Sp. T.*,) *March*, 1878. De Betz's Petition, 9 Abb. N. Cas. 246.

7. It is the duty of the trustees on such foreclosure to see that the property is not burdened with unjust demands or unnecessary expenditures. The fact that they may be ready to con-

test any item to which the bondholders may call their attention, is not enough. *Ib.*

8. For further decisions as to the foreclosure of railroad mortgages; the duties of the trustees in such cases; and the rights of the bondholders, see James *v.* Cowing, 82 N. Y. 449; *reversing* 17 Hun 256; Maas *v.* Missouri, &c., R'y Co., 83 N. Y. 223; McHenry's Petition, 9 Abb. N. Cas. 256.

9. **Rights of stockholders on re-organization.** The provision of the act of 1853 in reference to the foreclosure of railroad mortgages, (Laws of 1853, ch 502, § 2,) which provides that a stockholder of a railroad company may, within six months after a sale of its road under foreclosure, on paying to the purchaser a proportion of the price paid equal to the proportion his stock bears to the whole stock of the company, have the same relative amount of stock or interest in the company, its road, franchises and other property, &c., was repealed by the act of 1854, amending the general railroad act, (Laws of 1854, ch. 282,) and by the act of 1874, (Laws of 1874, ch. 430,) "to facilitate the re-organization of railroads sold under mortgages," &c.—*Ct. of App., March,* 1881. Pratt *v.* Munson, 84 N. Y. 582.

10. **Rights of holders of mortgage bonds.** Under the provision of the general railroad act, (Laws of 1850, ch 140, § 28, subd. 10,) authorizing a corporation organized under it to borrow moneys necessary for completing, finishing or operating its road, to issue and dispose of its bonds, and to mortgage its property and franchises "to secure the payment of any debt contracted for the purposes aforesaid," a railroad corporation may pledge its bonds for moneys loaned, and also as security for a precedent debt incurred for moneys borrowed for the purposes specified.—*Ct. of App., March,* 1881. Duncomb *v.* New York, &c., R. R. Co., 84 N. Y. 190.

11. Upon foreclosure of a mortgage given to secure its bonds, a holder of bonds so pledged as collateral is not limited to proof of an amount simply equal to the amount of his debt, but is entitled to prove the whole amount of his bonds, and to share in the distribution accordingly up to the amount of his debt. *Ib.*

12. **Forfeiture of franchise by non-user.** Where a corporation, organized under the general railroad act, leases a portion of the route covered by its franchise to another corporation, with the right to lay tracks thereon, not for the purpose of constructing the road of the lessor, but to enable the lessee to complete its own road, the tracks, when built, not to belong to the lessor or to be operated by it, but to be constructed at the expense of, and to be operated and maintained for the use of, the lessee exclusively, this is not such a user by the lessor of its franchise as is contemplated by its charter; and in determining the question whether the corporate existence and powers of the lessor have ceased because of failure to begin the construction of its road, and to expend thereon ten per cent. of the amount of its capital within five years after filing its articles of association, as prescribed by the act of 1867, (Laws of 1867, ch. 775,) the construction and expenditure by the lessee upon the portion of the route so demised cannot be taken into consideration.—*Ct. of App., June,* 1880. Matter of Brooklyn, &c., R. R. Co., 81 N. Y. 69.

13. Such a corporation cannot retain its corporate existence without the expenditure so required, by granting to another company the privilege of laying tracks over such parts of its route as the other company may desire to use. *Ib.*

II. Acquiring Right of Way, and Constructing the Road.

1. *Proceedings to acquire title.*

14. **Acquiring land by purchase.** When, by a conveyance of land to a railroad, an absolute title thereto is conveyed, see Kenney *v.* Wallace, 24 Hun 478.

15. **Proceedings for appointment of commissioners. Consent of property-owners.** To authorize a General Term of the Supreme Court, acting under ch. 582 of 1880, to appoint commissioners to determine whether and in what manner an underground railroad shall be constructed, it must be shown affirmatively, by a statement of the facts, that application for the consent of the owners of the property bounded on the line of the proposed railroad has been made and refused, and that the persons to whom the same was made were, in fact, the owners of at least one-half in value of such property.—*Supreme Ct.,* (1*st Dept.,*) *Feb.,* 1881. Matter of Broadway Underground R'y Co., 23 Hun 693.

16. A statement that the affiant has endeavored, but failed to obtain the consent of one-half in value of the property-owners, and that he believes such consent cannot be obtained because such owners prefer that the railroad should be built under the guaranties that would be afforded by a proceeding under the statutes for the appointment of commissioners, is insufficient. *Ib.*

2. *Fences, crossings, and cattle-guards.*

17. **Fences.** The remedy of an owner of land crossed by a railroad, for a failure on the part of the corporation to comply with the provision of the railroad act of 1854 (Laws of 1854, ch. 282, § 8,) requiring railroad corporations to erect and maintain fences on the sides of their roads, is not confined to an action for damages given by said act; but he may enforce the performance of this duty.—*Ct. of App., June,* 1880. Jones *v.* Seligman, 81 N. Y. 190, 194.

18. **Farm crossings.** A railroad corporation in the discharge of its duty of providing farm crossings is not vested with any absolute discretion as to the number or character of the crossings. The power must be exercised in a proper manner, having due regard to the necessities and the convenience of the owner of the land, who may maintain an action to compel the corporation to erect necessary and suitable crossings; or where crossings have been made which are insufficient, to construct additional ones; and in such an action the question as to the propriety of additional crossings is one of fact for the court. *Ib.* 196.

19. The court has power to direct the construction of a crossing under the tracks of the road. *Ib.*

20. The award and payment of damages in proceedings to condemn land taken for the road, does not preclude the former owner from maintaining an action to compel the corporation to fulfill the duty imposed upon it as to crossings. *Ib.*

21. Where a railroad has been taken possession of under a mortgage, by trustees for bondholders, and is being operated by them, and where, by the mortgage, power is given to them to make repairs and additions to the road, they may be held for a performance of the duties imposed by said provision. *Ib.*

22. Highway crossings. A railroad corporation is not relieved from the duty imposed upon it by the general railroad act (Laws of 1850, ch. 140, § 28, subd. 5,) to restore a highway intersected by its road "to such state as not unnecessarily to have impaired its usefulness" by the fact that a street railway company whose road runs along the highway, is obligated to keep the highway between the rails of its track in repair. The duty of maintaining the crossing in proper condition is not limited or restricted by privileges granted to, or duties imposed upon others.—*Ct. of App., March,* 1881. Masterson *v.* New York Central, &c., R. R. Co., 84 N. Y. 247.

23. The provision of the general railroad act (Laws of 1850, ch. 140, § 28,) giving to every railroad company authority to construct its road across any street or highway which the route of its road shall intersect, was not repealed by implication by the acts of 1869 and 1874, providing for the laying out of the highways or avenues, known as "Ocean Parkway" (Laws of 1869, ch. 861; Laws of 1874, ch. 583,) so far as it pertains to those highways; they are highways within the meaning of the railroad act, and railroads have the same authority to cross them as they have to cross other highways.—*Ct. of App., March,* 1881. Stranahan *v.* Sea View R'y Co., 84 N. Y. 308.

24. The act of 1871 (Laws of 1871, ch. 609,) declaring that "no railway upon which locomotive steam shall be used, or is or shall be authorized or intended to be used as a motive power," shall be constructed across certain avenues therein mentioned, without the approval of the state engineer, has no application to that portion of "Ocean Parkway" constructed under said act of 1874. *Ib.*

25. The said act of 1871 has reference to railroads moving cars in the ordinary way by means of locomotive engines, it does not include railways moving their cars by a propelling rope or cable attached to stationary power. Accordingly—*Held,* that a railroad corporation organized under the act of 1866 (Laws of 1866, ch. 697,) for the purpose of constructing an elevated railroad to be operated "by means of a propelling rope or cable attached to stationary power," had authority under the said provision of the general railroad act, which by said act of 1866 is made applicable to corporations organized under it, to cross that portion of "Ocean Parkway" constructed under the act of 1874, which was intersected by the route of its road. *Ib.*

III. Rights, Powers and Duties of Officers, Agents and Servants.

26. The president of a railroad cannot occupy the position of contractor to claim payment for work done, and that of engineer to certify to its completion and the amount due. To permit him to do so is a dereliction of duty on the part of those having charge of the interests of the company.—*Supreme Ct., (Brooklyn Sp. T.,) Dec.,* 1880. Keeler *v.* Brooklyn Elevated R. R. Co., 9 Abb. N. Cas. 166. Compare Barnes *v.* Brown, 80 N. Y. 527.

27. Where the president of a railroad corporation received the notes of the corporation secured by its bonds delivered as collateral for a sum due him upon his salary—

Held, 1. That such a debt fairly and honestly incurred could be so secured; and that he was entitled to prove such bonds.

2. That one to whom bonds were pledged as security for an indebtedness for rent of offices was entitled to prove them; that a business office was essential and necessary and was embraced within the authority to issue bonds.—*Ct. of App., March,* 1881. Duncomb *v.* New York, &c., R. R. Co., 84 N. Y. 190.

IV. Powers, Duties and Liabilities in Respect to the Management of the Road.

1. *Under the contract to carry.*

28. Tickets, and the right to stop over. The holder of a limited ticket, bearing an agreement upon its face that it was good only between the date of its purchase and the end of the day designated by the punch mark on its margin, is not entitled to use such ticket after the expiration of such date, if it be the fault of the passenger that the ticket has expired before he has arrived at his destination.—*Com. Pleas, Jan.,* 1881. Auerbach *v.* New York Central, &c., R. R. Co., 60 How. Pr. 382.

29. Where a passenger, upon applying for information to a train agent or conductor, is informed by him that he may get off at a station and continue his journey by the next train upon the same ticket, and the passenger relying upon the said statement, leaves the train at that station, the company is bound to carry him on the next train to the end of his route upon that ticket, and is estopped from denying the authority of the conductor to make the said agreement.—*Supreme Ct., (3d Dept.,) Jan.,* 1881. Tarbell *v.* Northern Central R'y Co., 24 Hun 51.

30. Liability for ejecting passenger from car. *It seems* that where, in consequence of the fractious refusal of a passenger upon a railroad to pay the full fare the company has a right to demand, the train is stopped for the sole purpose of putting him off, he is not entitled to insist on continuing his trip, on paying the fare, but may be removed from the train. But where the train stops at a regular stopping place, and the passenger, before being ejected, or others in his behalf, offer to pay the full fare, it is the duty of the conductor to accept it; and if he refuses and ejects the passenger, the company is liable. —*Ct. of App., Feb.,* 1880. O'Brien *v.* New York Central, &c., R R. Co., 80 N. Y. 236.

31. Liability for passenger's baggage. Plaintiff went to defendant's depot in Philadelphia with nine trunks, to take passage with his family to Chicago. He applied to the baggage-master for checks for his baggage, but was informed that he must first procure tickets; while he was absent for that purpose, the baggage-master caused his baggage to be weighed, checked and put into the baggage-car. Upon the return of plaintiff with his tickets, he was informed, that under the rules of the company, the tickets were not sufficient to transfer

all his baggage and for the excess a charge was made, which plaintiff refused to pay. He demanded his checks; these were refused unless the extra charge was paid. He then demanded his trunks, but the baggage-master refused to deliver them, for the reason that they were covered with other baggage and could not be reached before the time for starting the train. Plaintiff declined to go on the train; his baggage went through to Chicago, and the night after its arrival, the depot was struck and set on fire by lightning, and it, with the baggage, except two trunks and some loose articles, was destroyed. The trial court found that there was no reasonable excuse for the refusal to restore the baggage to plaintiff. In an action for the conversion of the baggage—*Held*, that the facts authorized a finding of a conversion at Philadelphia.—*Ct. of App., March*, 1880. McCormick *v.* Pennsylvania Central R. R. Co., 80 N. Y. 353.

32. It appeared that after plaintiff had determined not to take the train, he called upon defendant's president and requested him to cause the baggage to be taken off at Pittsburg, as he intended to stop there. The president gave the necessary directions and the baggage-master telegraphed to Pittsburg, but the baggage was not stopped. The baggage-master also gave to plaintiff an order for the delivery of the baggage at Pittsburg without checks. During the same day plaintiff requested the baggage-master at Philadelphia, to countermand the order to stop the baggage, as he had concluded to go through to Chicago without stopping. Plaintiff took a train the same evening. On arriving at Pittsburg he presented the order and was informed that the baggage had gone on. He expressed his gratification and took an order from the baggage-master to the one at Chicago, directing the delivery of the baggage without checks. Upon his arrival at Chicago he claimed and took possession of the baggage saved. *Held*, that by the acts of plaintiff subsequent to the conversion, he resumed control of his baggage in the condition it was on board the train, and elected to hold defendant as carrier; that, as such, it was not liable for the loss, and for the original conversion was only liable in nominal damages. *Ib.*

2. *Liability for injuries caused by negligence.*

(*a*) In general.

33. Injuries to cattle in course of transportation. Plaintiff's cattle were transported by defendant from B. to W. A., under a contract which provided, among other things, that in consideration of a reduced price for transportation, plaintiff would assume the risk of damage sustained by delay in transportation; also that plaintiff should load and unload at his own risk, defendant furnishing help, and that plaintiff should send a person with the cattle to take charge of them. The train was delayed by a flood which submerged the track, and the cattle being without food were injured. In an action to recover damages for the injury—*Held*, that defendant was not bound to unload the cattle when the train was stopped, but that it was its duty, upon reasonable request, to so place the cars in which the cattle were as to be convenient to the usual and accessible means of unloading, if practicable, and for a failure so to do it was liable.—*Ct. of App., Feb.*, 1881. Bills *v.* New York Central, &c., R. R. Co., 84 N. Y. 5.

34. Plaintiff's agent made such a request. The engine drawing the train was disabled. It appeared, however, that defendant had engines at U., forty-three miles distant; also that other motive power might have been readily obtained. The court, after referring to the evidence on this subject, and to a statement of defendant's conductor that he did not telegraph to U., submitted it to the jury as a question of fact whether it was not gross negligence for defendant to omit to send for assistance if help could readily have been obtained. *Held*, no error; and that this was so even if the fair import of the charge was that the jury might determine that it was negligence not to send for assistance to U. *Ib.*

35. The engine of the train was disabled by the engineer running it into the water, and there was evidence tending to show negligence on his part in so doing. The court charged that if the engine was disabled by the negligence and recklessness of defendant's agents, then their refusal to place the cars where plaintiff could unload, was not to be excused by an absence of motive power. *Held*, no error; that defendant could not plead its own previous negligence as an excuse for its inability to perform a distinct and affirmative duty. *Ib.*

36. Plaintiff's damages could not be mitigated by speculating upon what might have happened had his request been granted and the cattle unloaded. *Ib.*

37. When the train was at U., and those on board were warned of the high water, plaintiff's agent requested the conductor to place the cars there in a convenient position for unloading. This request was declined. The court was asked, but declined to charge, that defendant was not liable for such refusal. It charged, however, that if the jury believed the conductor had reason to think he could run the train through without serious detention, defendant would not be liable because of such refusal. *Held*, no error. *Ib.*

38. Killing stock on track. As to the liability of a railroad company for an animal killed on its track, through its neglect to maintain cattle-guards and fences, and when interest on the value of the animal killed will be allowed, see Lackin *v.* Delaware and Hudson Canal Co., 22 Hun 309.

(*b*) Injuries to passengers.

39. Care required from the company. A passenger, when taking or leaving a railroad car at a station, has a right to assume that the company will not expose him to unnecessary danger, but will discharge its duty which requires it to provide passengers a safe passage to and from the train.—*Ct. of App., March*, 1881. Brassell *v.* New York Central, &c., R. R. Co., 84 N. Y. 241.

40. Contributory negligence of passenger. A passenger is not in all cases liable to the charge of contributory negligence because he attempts to cross an intervening track without looking for approaching trains. *Ib.*

41. Defendant ran a train upon its road daily from S. to E. S., primarily for the purpose of carrying its employees to E. S., where it had a machine-shop and freight-house. It carried, however, on this train persons going as ordinary passengers, on payment of fare, and it was in charge of a uniformed conductor. There was a station-

house at E. S, on the south side of the road. This train did not stop at the station, but at a point thirteen hundred feet further east, opposite the freight-house located north of the road. At this point there were about twenty tracks. The road was not planked, and there was nothing to indicate on which side passengers should leave the train. E., plaintiff's intestate, a girl seventeen years of age, took this train, in company with an old lady, at S., to go to E. S., where she resided. The train stopped at the usual place on the third track from the south. The two south tracks were used for ordinary passenger trains. E. got off on the south side of the train, and assisted her companion to alight. There was a path about seventy feet west, leading south to or near the house where she was employed, which was south of the road. The two walked a few steps in a southwesterly direction, until they reached the second track, when a passenger train from the east, which was behind time and running thirty-five or forty miles an hour, struck and killed them both. In an action to recover damages the evidence tended to show that they did not look to the east after leaving the car, and that if they had done so they could have seen the approaching train; also, that no person connected with the train gave any instructions to passengers where to alight, or any warning of the approaching train. *Held*, the fact that the deceased did not look, while it was a material and important one for the consideration of the jury upon the point of contributory negligence, did not establish it as matter of law, and that a refusal of the court to charge that it was *per se* negligence was not error. *Ib.*

42. Company not liable for negligence of postal-car officials. A railroad company is not liable to a passenger who, while entering the station for the purpose of taking an approaching train, is struck and injured by mail bags carelessly and negligently thrown from the mail car by a postal clerk employed by the United States government.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. Carpenter *v.* Boston and Albany R. R. Co., 24 Hun 104.

(*c*) Injuries to persons crossing the track.

43. Duty to look out for the train —absence of flagman. Where a person sees an engine upon a railroad, and knows, in time to avoid an injury, that it is approaching a crossing, the railroad company is not chargeable with negligence in not ringing the bell upon the engine, or because of the absence of a flagman usually stationed at the crossing, or the absence of a light upon the engine in the night time; as the sole object of ringing the bell or of keeping a flagman or of having a light, so far as travelers upon a highway are concerned, is to notify them of the approach of trains.—*Ct. of App.*, *Nov.*, 1880. Pakalinsky *v.* New York Central, &c., R. R. Co., 82 N. Y. 424.

44. Plaintiff, in attempting to cross the tracks of defendant's road, after dark, caught his foot between a rail and the planking, and before he could extricate himself was struck by the tender of an engine backing upon the track, and injured. In an action to recover damages the negligence charged was that the bell of the engine was not rung, that there was no flagman at the crossing, although one had usually been stationed there; that the regular fireman was not at the time upon the engine, and that there was no light on the rear of the tender. Plaintiff testified that he saw the engine while it was standing still, and when it was backing. He could have passed over the track in safety if his foot had not caught. It did not appear and was not claimed, that the engineer could have seen plaintiff in time to have avoided the accident, and it did not appear that the absence of the fireman in any way contributed to the accident. *Held*, that the evidence failed to show any negligence on the part of defendant which caused or contributed to the injury; and that a charge to the jury that they could base a finding of negligence against defendant on the absence of the flagman was error. *Ib.*

(*d*) Injuries to employees.

45. Injuries occasioned by defective machinery. The duty of maintaining machinery in proper repair for the protection of employees operating it, devolves upon the master, and he is liable for injuries resulting from a failure to perform it. Therefore—*Held*, where an engineer upon a railroad locomotive was killed by an explosion of a boiler which had been for some time out of repair, and had been frequently reported and sent to the repair-shop for repairs, that defendant who was operating the road was not excused from liability by the facts that there was no negligence on his part in the employment of a superintendent of repairs, or in omitting to make proper regulations, that the master mechanic having charge gave proper instructions for the thorough examination and repair of the engine, and that the negligence causing the accident was that of the mechanics directed to make the repairs.—*Ct. of App.*, *Feb.*, 1880. Fuller *v.* Jewett, 80 N. Y. 46.

46. Where two or more persons or corporations are operating a railroad, their liability to an employee for an injury resulting from defective machinery furnished by them for use in the course of his employment, is several as well as joint, and an action is maintainable against one of them.—*Ct. of App.*, *April*, 1880. Kain *v.* Smith, 80 N. Y. 458.

47. Every railroad operator owes to his employees a duty to furnish machinery adequate and proper for the use to which it is to be applied, and to maintain it in like condition. For every injury happening by reason of neglect to perform this duty, he is liable as for a tort; and this whether the act or omission causing it was due to his personal neglect, or the neglect of an agent employed by him, and whether there were one or more parties concerned as operators or employees. *Ib.*

48. Where the employee of a railroad corporation was injured by the sudden starting of a locomotive, caused by its being defective and out of repair, of which defects the corporation had notice—*Held*, that it was no defence that the engineer could have so managed the engine as to have prevented the accident.—*Ct. of App.*, *June*, 1880. Cone *v.* Delaware, &c., R. R. Co., 81 N. Y. 206.

49. — by act of co-servant. This action was brought to recover damages for an injury alleged to have been occasioned by the defendant's negligence. The plaintiff had, for several years prior to the accident, been employed by the defendant as a yard switchman, it being his duty to break up the trains coming

into the yard, and shift the cars to outgoing trains, or to the repair-shop, according to the directions contained on a card furnished to him by the yard dispatcher, whose duty it was to order sent to the repair-shop all cars marked as out of repair by the car inspector. At about four o'clock in the morning of March 1st, the plaintiff, while coupling a coal car to an outgoing train, caught his glove upon a piece of iron projecting from the bumper of the coal car, and had his hand crushed. He claimed that the car inspector was negligent in not discovering that the bumper of the coal car was out of repair, and ordering it sent to the shop instead of ordering it sent out with another train. *Held*, that the plaintiff and the car inspector were co-servants, engaged in a common service, and that the defendant was not liable for the neglect of the car inspector to discover this particular defect.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. Gibson *v.* Northern Central R'y Co., 22 Hun 289.

50. The car inspector, a man of thirty-four or five years of age, had, prior to his coming to this country, been employed as a common laborer, except for a few months, when he had worked in a railroad yard, putting brasses into freight cars. Upon entering the defendant's employment, he had no knowledge of machinery, and worked in the carpenter's shop, bolting, putting in brasses and boxes, and assisting in the shop. After so working for from one to two years, he was made car inspector. His sobriety and intelligence were unquestioned. *Held*, that the evidence failed to show that he was incompetent to act as a car inspector, or that the master of the repair shop was guilty of negligence in appointing him to that position. *Ib.*

51. In an action to recover damages for an injury received by an employee of defendant, through its alleged negligence, it appeared that plaintiff was employed in loading and unloading a dirt train; the train had been standing for about an hour on a down grade while being loaded. The evidence showed that not all, and tended to show that but two of five brakes upon the cars of the train were set. Those employed in loading were directed to get aboard, and while climbing on the cars, from some cause they started, and plaintiff, who was between two of them, attempting to get aboard, was injured. It appeared also that the brakes, although not the best in use, were such as were in common use on dirt cars, and that they had been inspected and put in order a short time before the accident; also that the cars were suitable for the purpose for which they were used. There were two brakemen on the train whose duty it was to look after and apply the brakes. It was not shown that they were incompetent. *Held*, that the court erred in refusing to dismiss the complaint; that the jury were not justified in finding that the movement of the cars was attributable to any defects in the brakes; but the only reasonable inference was that it was owing to the fact that only part of the brakes were set; and if the injury was caused by the neglect of the brakemen in this respect, it was the negligence of co-servants, for which the defendant was not liable.—*Ct. of App.*, *June*, 1880. Henry *v.* Staten Island R'y Co., 81 N. Y. 373.

52. At the time of the movement of the cars, the engine was standing on the track, reversed, the engineer was upon the tender of the engine calling to the men, the movement pushed the engine forward a few feet, the fireman let on a little steam, and the engine backed the train about the distance it had moved forward, and on the engine being again shoved forward, the fireman again backed it. This was repeated two or three times. The evidence was not clear as to the precise time plaintiff was injured. He was between the cars when they first moved forward. The evidence was to the effect that this handling of the engine was proper under the circumstances. *Held*, that, assuming plaintiff was injured by the backing of the train, the evidence failed to show that the conduct of the fireman was not discreet and prudent. *Ib.*

53. It was claimed that defendant was negligent in not sending out a conductor with the train; that if one had been sent the engineer would have been upon the engine, and might have managed the train more skillfully. *Held*, that upon the facts proved, no presumption arose that if the engineer had been upon the engine the accident would not have happened. *Ib.*

3. *Relative rights and liabilities of connecting lines*

54. Contracts and leases between them. As to whether a lease by a railroad corporation of a portion of its route to another corporation, with the right to lay tracks, is valid, *quære.*—*Ct. of App.*, *June*, 1880. In re Brooklyn, &c., R'y Co., 81 N. Y. 69.

55. Liability of lessee for negligence. Defendant was operating, as lessee, the road of another railroad corporation, which was built under the act of 1850. (Laws of 1850, ch. 140.) The road was laid through a street in the city of U., which was not restored to its former state, as required by said act, (§ 28, subd. 5,) the rails being left projecting about four and one-half inches above the surface of the street, without any planking or filling between them. M., plaintiff's intestate, was peddling kindling wood in said street, with a horse and wagon, which he left near the sidewalk, while he stepped across the walk, about six feet from the wagon, to solicit a purchase. An approaching train frightened the horse, which ran diagonally across the railroad track. The hind wheel of the wagon caught upon and slid along the further rail. About the time the horse started the attention of M. was called to the approaching train, then between two hundred and three hundred feet distant. He at once ran to catch his horse. He crossed the track, seized hold of the harness of the horse, when the engine struck the hind wheel of the wagon, and M. was thrown upon the track and killed. The rails in use at the time of the accident were laid by defendant. An ordinance of the city prohibited defendant from running its trains through the city at a rate exceeding eight miles an hour; the train was running about twelve miles an hour. In an action to recover damages—*Held*, that the evidence justified a finding of negligence on the part of defendant, and of the absence of contributory negligence on the part of M.; that in the absence of proof that the horse was vicious, unsafe or unmanageable, it was not negligence *per se* for M. to leave his horse unfastened when he was near enough so that he might reasonably expect to control him, in an emergency, by his voice, or to reach him before he

could escape; also, that it could not be said, as matter of law, that he violated an ordinance of the city which forbade any person leaving a horse in the street unless securely tied; also, that defendant could not escape liability for the condition of the road because it was lessee.—*Ct. of App., Feb.*, 1880. Wasmer *v.* Delaware, &c., R. R. Co., 80 N. Y. 212.

56. *It seems* that even if M. was chargeable with negligence in leaving his horse in the street, this could not defeat the action, as such negligence was not in any proper sense the immediate or proximate cause of the accident. *Ib.*

V. HORSE AND STREET RAILROADS.

57. Horse railroads. The provisions of the act of April 2d, 1850, in relation to the liability of railroad companies for injuries to passengers while on the platform, &c., does not apply to street railroads.—*Superior Ct., Dec.*, 1880. Lax *v.* Forty-second street, &c., R. R. Co., 46 Superior 448.

58. Elevated railroads. That the authorities of Kings county cannot restrain the construction of an elevated railroad over the Ocean Parkway to the Concourse, see Supervisors of Kings County *v.* Sea View R'y Co., 23 Hun 180.

For decisions applicable to railroad companies *in common with other carriers*, see CARRIERS.

For decisions upon the validity of *Municipal bonds* in aid of railroads, issued under the *Town bonding laws*, see MUNICIPAL CORPORATIONS, 28-32.

RATIFICATION.

Of act of *Agent*, see PRINCIPAL AND AGENT, 12, 13.

REAL PROPERTY.

[Embraces only general principles relative to title, and the rights and liabilities of the owner in the use of realty. See heads referred to at end of this title.]

1. Title to land submerged by the sea If land once submerged by the sea shall again be left by the reflex and recess of the sea, the owner shall again have his land as before, if he can make out where and what it was. Although while the land continues covered by the sea the title is in the sovereign, yet when the land by natural means emerges, the title of the original owner is restored—*Supreme Ct.*, (*2d Dept. Sp. T.*,) *May*, 1881. Murphy *v.* Norton, 61 How. Pr. 197.

2. Rights of owner in regard to drainage. The right of an owner of lands through which a water-course runs, to have the same kept open and to discharge therein surface water which naturally flows thereto, is not limited to the drainage and discharge of such water into the stream in the precise manner it was discharged when the land was in a state of nature. He may change and control the natural flow of the surface water on his lands, and by ditches or otherwise accelerate the flow, or increase the volume of water which reaches the stream, and if he does this in the reasonable use of his lands, and does not discharge the water into the stream in quantities beyond its natural capacity, he incurs no liability to a proprietor below him.—*Ct. of App., June*, 1880. McCormick *v.* Horan, 81 N. Y. 86, 89.

As to the capacity to *Hold* and *Transfer title* to land, see ALIENS; DESCENT; DEVISE; HUSBAND AND WIFE, VI.; INFANTS, 2-13; MUNICIPAL CORPORATIONS, 2, 3.

For decisions as to *How* title to land may be acquired and transferred, see ADVERSE POSSESSION; DEDICATION; DEEDS; EMINENT DOMAIN; FRAUDULENT CONVEYANCES; MORTGAGES; PARTITION.

As to *Succession* to real property, and the rights of heirs and devisees, see DESCENT; DEVISE; EXECUTORS AND ADMINISTRATORS; TRUSTS; WILLS.

As to the *Validity of contracts relating to land*, generally, and under the provisions of the *Statute of Frauds*, see CONTRACTS, 7-14; LANDLORD AND TENANT; LEASES; VENDOR AND PURCHASER.

For decisions relative to *Boundaries*, *Easements*, *Fixtures*, *Water-courses*, see those titles.

As to *Wrongs relating to real property*, see NUISANCE; TRESPASS.

RE-ARGUMENT.

APPEAL, 132.

RECEIPTS.

For decisions upon questions growing out of the relation of *Debtor and creditor*, and as to what constitutes *Payment*, and its effect, see DEBTOR AND CREDITOR; PAYMENT.

RECEIVERS.

[Consult, also, BANKS, V.; CORPORATIONS, VII.; EXECUTION, 31-37; INSURANCE, 94-103; MANUFACTURING COMPANIES, IV.; PARTNERSHIP, V.]

1. When a receiver may be appointed. Where an action is brought by a judgment creditor to reach certain shares of mining stock, claimed to belong to the judgment debtor, but which are, at the time of the commencement of the action, standing on the company's books in the name of his wife, the creditor has such "an apparent right to or interest in" the stock, as to entitle him to apply, under Code of Civ. Pro., § 713, for the appointment of a receiver thereof, when there is reasonable ground to apprehend that before the suit can be determined the stock will be removed beyond the jurisdiction of the court, or lost in some adverse turn of the defendant's affairs.—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1881. State Bank of Syracuse *v.* Gill, 23 Hun 410.

2. The fact that a receiver of the judgment debtor's property has already been appointed in proceedings supplementary to execution, does not bar such an application, nor does it make it necessary that the same receiver should be appointed in granting it. *Ib.*

3. When a receiver may be appointed in an action brought for the purpose of having set aside a conveyance of real property, see Mitchell *v.* Barnes, 22 Hun 194.

4. Who is disqualified to act as receiver. A director of a company who has known of, and acquiesced in the mismanagement for which the suit was begun, and who has been improperly interested in contracts made by the company, is not a proper person to be appointed, and exercise the powers of a receiver; and the fact that the suit is instituted for his benefit will not justify his appointment as a receiver of the company.—*Supreme Ct.*, (*Brooklyn Sp. T.*,) *Dec.*, 1880. Keeler *v.* Brooklyn Elevated R. R., 9 Abb. N Cas. 166.

5. Compensation of receiver. There is no question as to the right of the court to award to the receiver compensation out of the fund which he holds, even though the title to that fund be found to have been from the first and to be now in the defendants. The receiver's compensation cannot be made to depend upon the result of the litigation.—*Com. Pleas*, (*Gen. T.*,) *Nov.*, 1880. Hopfensack *v.* Hopfensack 61 How. Pr. 498.

6. He is the officer of the court who takes property, the right to which is involved in dispute, and by order of the court holds it for the benefit of the party who shall ultimately be found to be entitled to it. While it may sometimes happen, that by the unfounded claim of a plaintiff, the rightful owner of property is deprived temporarily of the possession of it, and that when he gets it back it is encumbered with the charges of the receiver to whom the court has given the care of it *pendente lite*, yet great as may be the misfortune to the owner, he must bear the loss unless he can obtain redress from the party on whose application the receiver was appointed. *Ib.*

7. The appellants were defendants charged with having property belonging to a co-partnership, to which they got no title because of the fraudulent character of the transfer to them. The court, by its receiver, took the disputed property into its custody to abide the determination of the action. *Held*, that there being no other fund from which the receiver's legal fees and expenses were payable, he was entitled to them out of the fund in his hands, *i. e.*, the property in dispute, no matter to which of the parties to the action possession of such property had been adjudged. *Ib.*

8. Suits against receivers. While the receiver of a railroad may be protected from an action at law, in respect to the property in the possession of the court, or in his hands as its receiver, or from the consequences of an accident occurring in its management, as to other property the management of which he has voluntarily assumed, and over which the court has no control, he is responsible individually for its careful and proper management.—*Ct. of App.*, *April*, 1880. Kain *v.* Smith, 80 N. Y. 458.

9. Defendant S., and others, who had been appointed receivers of the V. C. R. R. Co., a Vermont corporation, by the Court of Chancery of that state, with the consent and authority of said court, together with the V. C. R. R. Co., leased of the O. & L. C. R. R. Co., a New York corporation, its road, rolling-stock, etc., for a term of years; the lessees covenanting among other things to keep the demised property in good repair, and to "assume all obligations" of the lessor, "either by statute or at common law, as common carriers, warehousemen or otherwise." Under this lease the lessors took possession of and operated said road. Plaintiff was in the employ of said lessees upon the road, and while engaged in loading a car was injured by the fall of a jigger belonging to and furnished by them for such use, but which was insufficient for that purpose; S. was not present at the time, and no personal negligence on his part was claimed. *Held*, that an action to recover damages was maintainable against S. alone; that the fact of his being a receiver did not affect his liability, as he was not in possession of the road so leased as an officer of any court or by its authority, but by virtue of a contract simply permitted by the court; that, outside of the State of Vermont, the court had no jurisdiction, and S. could do no act *virtute officii* in this state; his liability was that of an individual, and he could not be shielded by a description of his office, or a declaration that he was acting in an official character. *Ib.*

10. A receiver appointed by the courts of another state cannot be sued in the courts of this state, although he has property in his hands in this state. If such a suit is begun and an attachment granted it will be vacated on motion.—*Supreme Ct.*, (*Sp. T.*,) *April*, 1880. Killmer *v.* Hobart, 8 Abb. N. Cas. 426.

11. Substitution of receiver as defendant in suit against corporation. It is not necessary that the receiver *pendente lite* of a corporation should be substituted as defendant in an independent action brought against the corporation prior to his appointment, in order to enable the plaintiff therein to proceed to judgment.—*Superior Ct.*, *Nov.*, 1880. Knauer *v.* Globe Mut. Life Ins. Co., 46 Superior 370.

12. Inspection of receiver's books and accounts. The receiver of a railroad is an officer of the court, and the books, contracts and accounts relating to his connection with the road are in the custody of the law. He is a trustee for all the bondholders, stockholders and creditors of the company, and they are entitled, upon reasonable application, to an inspection of the books, papers and accounts relating to the receivership.—*Supreme Ct.*, (*Sp. T.*,) 1878. Fowler's Petition, 9 Abb. N. Cas. 268.

13. Where a charge is made against a receiver, an inspection of his books and contracts, as distinguished from those which belonged to the company prior to his appointment, will be granted on petition. *Ib.*

14. But the examination must be limited to such time as will not interfere with the business of the company, and to such books as are in the office of the company situate in the judicial district in which the application is made. *Ib.*

15. Removal. When individuals have voluntarily placed their property in the hands of a receiver appointed by the court, by no consent of theirs can he be removed and the trust abrogated. The court has assumed a duty which is beyond their control. This doctrine is especially applicable to a proceeding against a life insurance corporation, because the course of procedure is all defined by statute.—*Supreme Ct.*, (*Alb. Sp. T.*,) *June*, 1880. People *v.* Globe Mut. Life Ins. Co., 60 How. Pr. 82, 97.

16. Suits on receivers' bonds. In an action between copartners, R. was, on July 9th, 1874, appointed receiver of the partnership assets, and upon that day entered upon the performance of the duties of the trust. On January 30th, 1875, he gave a bond with defendant as his surety, conditioned that he would "*henceforth* faithfully discharge the duties of his trust." R. was subsequently removed as receiver, and plaintiff appointed in his place. Upon the accounting of R., to which defendant was not a party, R. was ordered to pay over to plaintiff a sum which was adjudged to be the balance of the trust funds in his hands. This order R. did not obey. In an action upon the bond it did not appear when the deficiency or misappropriation of the funds occurred. Defendant offered to show that no liability accrued after the date of the bond. The evidence was objected to and excluded. *Held*, that the order was not conclusive upon defendant, and the rejection of the proof offered was error; that the contract of defendant that R. should thereafter faithfully discharge his duties did not bind him by the order, and in the absence of express terms in the bond, binding him to submit to the judgment of the court, such a liability could not be imposed upon him.—*Ct. of App., Sept.*, 1880. Thomson *v.* MacGregor, 81 N. Y. 592; *reversing* 45 Superior 197.

RECOGNIZANCE.

BAIL.

RECORDS.

As to recording *Deeds* and *Mortgages*, see DEEDS, 4, 5; MORTGAGES, 22-28, 31, 32.

As to the sufficiency of the record on *Appeal or Error*, see APPEAL, 26, 27, 48-53, 102, 125-127; ERROR, 3.

As to the admissibility and effect of records *As evidence*, see EVIDENCE, 71, 72.

RECOUPMENT.

SET-OFF.

REDEMPTION.

EXECUTION, 12, 13; MORTGAGES, 80-85; TAXES, 28.

REFERENCE.

1. What actions are referable. This action was brought by plaintiff, as committee of the estate of a lunatic, to obtain an accounting of the rents and profits of real estate owned in common by the lunatic and by defendant's testator, received by the latter, and of personal property belonging to them jointly, which the complaint alleged had been fraudulently appropriated by said testator, the defendant, and her former husband, in pursuance of a conspiracy between them in fraud of the rights of the lunatic. *Held*, that the action being for an accounting was referable; that the allegations of fraudulent conspiracy did not change its character; and that an order of reference was not reviewable here.—*Ct. of App., Feb.*, 1881. Harrington *v.* Bruce, 84 N. Y. 103.

2. An action was brought by an administrator to recover damages for a conversion and conspiracy, and the defendant had been arrested and was in jail. *Held*, not referable, but that the cause was entitled to a preference.—*Supreme Ct.*, (*1st Dept. Sp. T.*,) *March*, 1881. Reilly *v.* Byrne, 1 Civ. Pro. 201.

3. Where, from the return of an answer to an alternative *mandamus*, it appears that the trial of the issues made thereby will involve the examination of a long account, a compulsory reference may be ordered.—*Supreme Ct.*, (*3d Dept. Sp. T.*,) *April*, 1881. People, ex rel. Parmenter, *v.* Wadsworth, 61 How. Pr. 57.

4. When an action to recover damages for breach of contract is referable, see Chambers *v.* Appleton, 84 N. Y. 649.

5. When a compulsory reference will be refused. Notwithstanding the fact that in an action by attorneys for professional services and disbursements, the bill of particulars contains a large number of charges, yet, if the services were performed and the disbursements made in the prosecution of a single action, it is not a case in which a compulsory reference may be ordered.—*Supreme Ct.*, (*1st Dept.*,) Tracy *v.* Stearns, 61 How. Pr. 265. Compare Carr *v.* Berdell, 22 Hun 130.

6. As to when a reference cannot be ordered without the consent of the parties; and as to the right to order one as affected by the fact that one of the parties is a receiver, see Durkin *v.* Sharp, 22 Hun 132.

7. Effect of referee's refusal to serve. Under Code of Civ. Pro., § 1011, as amended by ch. 542 of 1879, when the referee to whom the parties have agreed to refer the action refuses to serve, the court *must*, on the application of either party, appoint another referee, unless the stipulation expressly provides otherwise. —*Supreme Ct.*, (*1st Dept.*,) *April*, 1881. May *v.* Moore, 24 Hun 351.

8. A referee in an action is not obliged to act, and may see to it before rendering service that he is reasonably certain his fees will be paid. —*Ct. of App.*, *June*, 1880. Fischer *v.* Raab, 81 N. Y. 235, 238.

9. The hearing; and powers of the referee, generally. Under Code of Civ. Pro., §§ 521, 1204, a referee does not exceed his power in giving to one defendant affirmative relief against his co-defendant.—*Superior Ct.*, (*Gen. T.*,) *Jan.*, 1881. Derham *v.* Lee, 60 How. Pr. 334.

10. In an action on trial before a referee, after the case was closed, it was re-opened by order of the court for the sole purpose of allowing defendant to put in evidence certain exhibits and records; on the re-hearing, defendant offered oral evidence to sustain a counterclaim. *Held*, that it was properly excluded.—*Ct. of App.*, *Jan.*, 1881. Stephens *v.* Fox, 83 N. Y. 313; *affirming* 17 Hun 435.

11. After plaintiff had been partially exam-

ined as a witness, the hearing was adjourned, and was set down for two successive days. The referee upon the first day informed the attorney for the parties that the case would not be proceeded with that day, but would be the next. He was advised by defendant's attorney that he could not attend the next day. He did not appear, and the case was proceeded with on the second day, several witnesses being examined for plaintiff without any one appearing for defendant. A motion was made on behalf of defendants at Special Term to strike out the evidence so given, which was denied. A similar motion was thereafter made before the referee upon a subsequent hearing. *Held*, that the motion was properly denied; that the claim of a mistrial because of the proceeding of the referee without an adjournment was a question of irregularity disposed of on the motion, and not reviewable on appeal from the judgment.—*Ct. of App., Feb.*, 1880. Comins *v.* Hetfield, 80 N.Y. 261. Compare Matter of Crooke, 23 Hun 696.

12. **— in respect to allowing amendments.** In an action on a life policy, the complaint alleged that proper proofs of death were furnished; on the trial, which was before a referee, he gave the plaintiff leave to amend the complaint, by alleging a waiver of the requirement as to proofs. This was granted upon terms, among others, that plaintiff should pay costs, which were accordingly paid, and the amendment made. *Held*, that it was within the power of the referee to allow the amendment, and, if otherwise, defendant, by accepting the costs, was precluded from raising the objection. —*Ct. of App., March*, 1880. Grattan *v.* Metropolitan Life Ins. Co., 80 N. Y. 281.

13. **Time within which to file report.** Under Code of Civ. Pro., § 1019, either party may terminate the reference, unless the referee has, within sixty days from the time when the cause was finally submitted to him, made his report and filed the same with the clerk, or delivered it to the attorney for one of the parties; it is no longer sufficient for him to have made his report and notified the party in whose favor it was made that it was ready for delivery.—*Supreme Ct.. (3d Dept.,) Nov.*, 1880. Phipps *v.* Carman, 23 Hun 150.

14. **Filing testimony with report.** Under General Rule No. 30, the testimony taken before a referee must be filed with his report, and until this is done the filing is incomplete, and the time within which exceptions to the report must be filed and served does not begin to run.—*Supreme Ct., (1st Dept.,) Sept.*, 1880. Pope *v.* Perault, 22 Hun 468.

15. Although a stenographer is not obliged to part with his notes until his bill has been paid, yet if he do deliver them to the referee to be examined by him and used as the basis of his report, he cannot limit the effect of such delivery, and it is the duty of the referee to file them with his report, even though the fees of the stenographer remain unpaid. *Ib.*

16. **Application to confirm report.** Where an order of reference, in an action for an accounting reserves certain questions for the court, an application to confirm the report and for leave to enter a judgment thereon, must, notwithstanding a stipulation that judgment may be entered on the report, be made to the court. —*Supreme Ct., (4th Dept.,) Jan.*, 1881. Bon *v.* Sanford, 23 Hun 520.

17. **Entry of judgment on report.** This action was brought for an accounting by defendant as plaintiff's agent, and was by order sent to a referee to hear and determine all the issues. After the filing of the referee's report which stated, as a conclusion of law, "that the defendant should be ordered and adjudged to account," &c., an *exparte* motion for an interlocutory judgment thereon was made by plaintiff, at Special Term, and the order entered "adjudged and decreed that it be referred to the same referee to take and state an account," &c., and proceeded to specify in detail, the manner in which the accounting should be had.

Held, 1. That the above conclusion of law was a sufficient order for judgment by the referee, as required by Code of Civ. Pro., § 1022.

2. That the court below did not exceed its powers by "ordering more than a simple judgment that defendant account," &c., the excess objected to being only a correct statement of the mode of procedure in an accounting, which was binding upon the referee.—*Superior Ct., April*, 1880. Hathaway *v.* Russell, 46 Superior 103.

18. **Time to file exceptions to report.** By force of rule 30, a referee's report becomes absolute and confirmed, unless exceptions thereto are filed and served within eight days after service of notice of filing the report. No order of confirmation, either upon motion or *ex parte*, is necessary.—*Superior Ct., Feb.*, 1880. Rust *v.* Hauselt, 46 Superior 22.

19. If, notwithstanding no exceptions are filed, a motion is made to confirm, which, after opposition, is granted, an appeal from the order of confirmation entered thereon, brings up nothing for review. *Ib.*

20. The court has power to permit the filing of exceptions *nunc pro nunc*, and to that end may make such disposition of an appeal from an order confirming a report to which no exceptions were filed, as may be necessary to prevent a failure of justice. *Ib.*

21. **Hearing and determining exceptions.** Where the findings of fact by a referee conflict, the defeated party is entitled to those most favorable to him, and may rely upon them in aid of exceptions to the referee's conclusions of law.—*Ct. of App., Dec.*, 1880. Schwinger *v.* Raymond, 83 N. Y. 192.

22. Where findings contained in the case as settled by a referee, differ from those contained in his report, the former will be deemed correct, as it is upon the case that exceptions stand. (Code of Civ. Pro., § 997.) *Ib.*

23. **Motion to vacate the order.** An order of reference cannot be set aside or vacated until it has been entered of record.—*Buff. Superior Ct., (Sp. T.,) Dec.*, 1879. Stafford *v.* Ambs, 8 Abb. N. Cas. 237.

24. Two causes against the same defendants were referred by consent to the same referee, and he heard and determined the first in favor of the plaintiff. A number of questions involved in the second cause were also involved in the first one. On motion by defendants—*Held*, that the order of reference should be vacated, and a new referee substituted.—*City Ct. of Brooklyn, (Sp. T.,) July*, 1880. Conley *v.* Petrie, 60 How. Pr. 299.

25. **Referee's fees, and how secured.** The fees of a referee who is required to act also as an auditor may properly exceed the amount the statute would allow for his actual sessions as referee.—*Com. Pleas, (Sp. T.,) May.*

1881. Matter of Hulbert, 9 Abb. N. Cas. 132.

26. A referee appointed to sell real property pursuant to a judgment in an action, other than an action to foreclose a mortgage, is, under Code of Civ. Pro., § 3297, entitled, to the same fees and disbursements as are allowed a sheriff under subd. 7 and 11 of § 3307; and also, upon distribution of the proceeds of the sale, to a commission equal to one-half of that which is allowed by law to an executor or administrator for receiving and paying out money; and § 3308 does not exclude these provisions from operating in the city of New York.—*Supreme Ct.*, (1*st Dept. Sp. T.*,) *April*, 1881. Maher *v.* O'Conner, 1 Civ. Pro. 158; S. C., 61 How. Pr. 103.

27. Laws of 1874, ch. 192, is not a "special statutory provision relating to the fees of the sheriff of the city and county of New York," and so far as that act relates to the fees of officers other than the sheriff—*e. g.*, referees—it is modified by the general and comprehensive provisions of § 3297. *Ib.*

28. Where, after payment of judgment, the surplus realized from the sale of real property was deposited by the referee with the chamberlain of the city of New York—*Held*, that the amount so deposited was not distributed or applied within the meaning of § 3297, and that the referee was entitled to no commissions thereon. *Ib.*

29. The Supreme Court has no power to grant an order, on application of the referee in an action, requiring the plaintiff to pay the referee's fees and take up the report.—*Ct. of App.*, *Nov.*, 1880. Geib *v.* Topping, 83 N. Y. 46.

30. *It seems* that as referees act voluntarily, their rights are to be enforced according to the principle of the law of contracts. *Ib.*

31. *It seems*, also, that a referee is not bound to part with his report without payment of his legal fees; and when he has his report ready within the statutory time, and offers to deliver it on payment of such fees, the offer will be deemed a sufficient delivery to prevent a forfeiture of fees declared by § 1019 of the Code of Civ. Pro. *Ib.*

32. Agreements and stipulations for compensation. A stipulation by a party, at the commencement of a reference, with the opposite party to pay half the referee's fees, will be enforced.—*Supreme Ct.*, (1*st Dept. Sp. T.*,) *March*, 1881. Brick *v.* Fowler, 61 How. Pr. 153.

As to references to *Arbitrators*, and effect of their *Award*, see ARBITRATION AND AWARD.

REFORMATION OF CONTRACTS.

EQUITY, 8-13.

REHEARING.

APPEAL, 132.

RE-INSURANCE.

INSURANCE, 32.

RELEASE.

What amounts to a release *As between debtor and creditor*, generally, see DEBTOR AND CREDITOR, II.

Power of *Partner* to release firm claims, see PARTNERSHIP, 11-15, 28.

RELIGIOUS SOCIETIES.

As to the right of a church to enforce payment of money collected by an unincorporated association for its benefit, see First Baptist Church *v.* Pryor, 23 Hun 271.

As to *Legacies* to religious corporations, see LEGACIES, 9, 10.

REMAINDERS.

ESTATES; WILLS, V.

REMOVAL OF CAUSES.

1. Grounds of removal—citizenship in different states. To warrant a removal under the act of congress of 1875, covering suits between citizens of different states, if any person who is a necessary plaintiff and any person who is a necessary defendant are citizens of the same state, there is no right of removal. All the defendants compose the "party" who may ask for a removal, and they must all be other states' citizens.—*Supreme Ct.*, (*Chamb.*,) *Feb.*, 1881. Miller *v.* Kent, 60 How. Pr. 451.

2. In an action brought by an insurance company to compel persons who had recovered a judgment against it, to interplead with others who claimed to be assignees of or to have acquired liens upon the said judgment, the plaintiff, the judgment creditors, and all of the defendants except two, were residents of this state. *Held*, that the action could not, upon the petition of one of the non-resident defendants, be removed to the United States District Court under the act of congress of 1875.—*Supreme Ct.*, (1*st Dept.*,) *Jan.*, 1881. Republic Fire Ins. Co., *v.* Keogh, 23 Hun 644.

3. — prejudice or local influence. Subd. 3 of § 639 of the Revised Statutes of the United States providing for the removal of actions into the United States courts, on account of prejudice or local influence, was not repealed by the act of March 3d, 1875, (10 U. S. Stat. at L. 470,) and is still in force.—*Supreme Ct.*, (3*d Dept.*,) *May*, 1881. Nye *v.* Northern Central R'y Co., 24 Hun 556.

4. Under the said subdivision, the case may be removed at any time before the trial or final hearing, and the fact that it has been on the calendar for five or six circuits before the application is made is no ground for refusing it. *Ib.*

5. **Right of removal as dependent on amount in dispute.** An action was brought in a state court for less than $500, and defendant, in his answer, pleaded a counter-claim exceeding $500, which was replied to by the plaintiffs. On an application for removal of the cause to the federal court—*Held*, that the counter-claim must be considered, and that the matter in dispute exceeded $500.—*U. S. Cir. Ct.*, (*So. Dist.*,) *Nov.*, 1880. Clarkson *v.* Manson, 60 How. Pr. 45; *overruling* 49 Id. 480.

6. **Time to apply for removal.** Under the provisions of the act of congress of 1875 providing for the removal of causes into the United States courts, "before or at the term at which said cause could be first tried, and before the trial thereof," it is too late to make the application after a demurrer has been interposed and duly argued and decided.—*Supreme Ct.*, (*Chamb.*,) *Feb.*, 1881. Miller *v.* Kent, 60 How. Pr. 451.

7. In all the states there is, by law or rule, a term, *i. e.*, a term at which a cause may for the first time be called for trial. This is the term at which, within the meaning of the law, the cause could first be tried, and, therefore, is the term at or before which the petition for the removal must be filed. *Ib.*

8. **The petition.** It is not necessary that the petition for removal on account of prejudice or local influence, (U. S. Rev. Stat. § 639, subd. 3,) should show that the parties to the action were residents of different states at the time of its commencement; it is sufficient if it appears that the requisite citizenship exists at the time of the filing of the petition for the removal. Nye *v.* Northern Central R'y Co., *supra*.

9. **The bond.** The petitioner need not join in the bond required to be given upon the granting of the application. *Ib.*

10. **The hearing in the state court.** The averments of the petition are not conclusive on the state court; that court has the power and the right to examine other papers than the mere affidavit of the petitioner, to ascertain whether the statute permitting the removal of the cause has been complied with. Miller *v.* Kent, *supra*.

RENT.

LANDLORD AND TENANT, III.

REPLEVIN: CLAIM AND DELIVERY.

1. **When the action will not lie.** An action of replevin cannot be maintained against a freight agent of a railroad company for a refusal to deliver freight to the consignee thereof until certain charges thereon have been paid, where he makes no claim to, and has no possession or control of the property, except as the agent or servant of the company.—*Supreme Ct.*, (*3d Dept.*,) *May*, 1881. McDougall *v.* Travis, 24 Hun 590.

2. Replevin will not lie by one tenant in common of a chattel against another for taking the chattel, and if one of them sells his interest to a third party he has the right to deliver the chattel to the purchaser, and neither he nor any one assisting him in so doing is liable to an action.—*Ct. of App.*, *Jan.*, 1881. Hudson *v.* Swan, 83 N. Y. 552.

3. **The plaintiff's claim of title.** Where, in the complaint and upon the trial of an action to recover possession of personal property, the plaintiff claims as sole owner, he must stand or fall upon that claim, and cannot, if his alleged title turns out to be invalid as against the true owner, fall back upon an alleged lien. The claim of title is a waiver of any lien; and, in any event, before the lien can be restored, the false claim of title must be abandoned, the title of the true owner conceded, and the claim reduced to one of lien. *Ib.*

4. **The undertaking.** In replevin proceedings in the District Courts, the undertaking on the part of the plaintiff must be approved by the justice, and not by the marshal.—*Com. Pleas*, (*Gen. T.*,) *May*, 1881. Grotz *v.* Hussey, 61 How. Pr. 448.

REPLY.

PLEADING, IV.

REPORT.

MANUFACTURING COMPANIES, II. REFERENCE, 13-22.

REPRESENTATIONS.

FRAUD, 2-4; INSURANCE, 3, 16, 17, 35, 36, 44. SALES, 16, 17. VENDOR AND PURCHASER, 9-11.

RESCISSION.

CONTRACTS, 52; SALES, 28-33.

RETURN.

SHERIFFS, 7-9.

REVIEW.

APPEAL; CERTIORARI; ERROR; NEW TRIAL.

REVIVAL.

As to revival of *Actions*, generally, see ABATEMENT AND REVIVAL, II.

Effect of *New Promise*, see LIMITATIONS OF ACTIONS, V.

REVOCATION.

Of *License*, see LICENSE, 3, 4.

Of *Will*, see WILLS, 5.

RHINEBECK.

MUNICIPAL CORPORATIONS, 58-63.

RIPARIAN RIGHTS.

[Consult, also, MILLS; REAL PROPERTY; WATER-COURSES.]

1. Relative rights of riparian owners and the public. The bed and banks of a fresh-water river, where the tide does not ebb and flow, are the property of the riparian proprietors, the public having an easement only for passage as on a public highway; and such proprietors may use the land or water of the river in any way not inconsistent with this easement. —*Ct. of App, Dec.*, 1880. Chenaogo Bridge Co. *v.* Paige, 83 N. Y. 178.

2. The legislature, except under the power of eminent domain, can interfere with such a river only for the purpose of regulating, preserving and protecting the public easement. *Ib.*

3. The natural flow of the stream, and right to obstruct it. The parties were adjoining proprietors. A stream of water ran across plaintiff's lands northerly upon and across defendant's lands below. Near the line was formerly a butternut tree, the stump of which remains; the natural channel of the stream is on the east of the stump, but in times of high water, some of the water of the creek flowed on the west side. Plaintiff's predecessor constructed and plaintiff maintained an embankment upon his land which caused the water of the creek in its ordinary stages as well as in times of floods to flow on the west side of the stump. Defendant thereupon constructed an embankment which prevented any water from flowing on said west side, and turned it to the east side. *Held*, that plaintiff had no right of action because thereof; that defendant had the right to dam against the water so turned upon his land, and if in order to protect himself from the consequences of plaintiff's acts he obstructed the flow of flood-water plaintiff could not complain.—*Ct. of App., Nov.*, 1880. Avery *v.* Empire Woolen Co., 82 N. Y. 582.

RISK.

INSURANCE, 31, 37.

ROBBERY.

1. What constitutes the offence—evidence. Upon the trial of an indictment for robbery in the first degree, the property taken being charged to be one key of the value of $1, evidence on the part of the prosecution was to the effect that certain persons, one of whom was the prisoner, entered the room of W., who was janitor of a bank, masked, while he was in bed; that they suffocated and handcuffed him, and by putting a pistol to his head compelled him to disclose the combination of the lock of the bank safe, and put him into such a state of terror as to be incapable of resistance; that they then took and carried away the bank keys from a table in his presence, one of them being the key of the street door, and subsequently entered and robbed the bank. There was no evidence of any intention to return the keys, or that the street door key was ever recovered.

Held, 1. That the evidence justified the jury in finding a felonious taking of the key from W. against his will and in his presence by violence to his person and by putting him in fear of immediate personal injury, and that such a finding established robbery in the first degree (2 Rev. Stat. 677, § 55); that the intent with which they took the key was a question of fact for the jury, and if they found that the robbers took it with intent to appropriate it, the use subsequently made of the key, although in the minds of the robbers at the time of the taking, could not affect the question of their guilt; and that it was immaterial whether the robbers formed the plan of taking the key before they entered the room or whether it was an after-thought suggested by seeing it on the table.

2. That evidence of the burglary committed at the bank was admissible for the purpose of showing that it was committed by the same party who committed the robbery, and by connecting the prisoner with the burglary to connect him with the robbery.—*Ct. of App., Jan.*, 1881. Hope *v.* People, 83 N. Y. 418.

2. Evidence was competent of the complicity of the prisoner in a prior scheme to enter and rob the bank. *Ib.*

3. The necessary force and violence. Upon the trial of McG. for robbery in the first degree, it appeared that on the evening of January 6th one S. entered a saloon kept by McG.'s wife, and while there took out his pocket-book to put some money in it; that McG., who stood at the end of the bar, knocked it out of his hand, and that one K., who stood behind the bar, picked it up. McG. then seized S. by the shoulders, turned him around and put him out of the saloon and shut the door; that S. demanded his pocket-book, and was told by McG. that he had better go away, as he would never see it again. The court charged that if the force used by McG. in taking the pocket-book from the hands of S. was sufficient, under the circumstances, to deprive him of his property, and if it was done with a felonious intent to steal it, that then the element of violence required by the statute to constitute the offence of robbery was made out. *Held*, that this was error.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. People *v.* McGinty, 24 Hun 62.

For decisions as to offences *Analogous to robbery*, see EMBEZZLEMENT; FALSE PRETENCES; LARCENY.

ROCHESTER.

MUNICIPAL CORPORATIONS, 64-66.

RULES OF COURT.

COURTS, 2-4.

S.

SALES.

I. The Contract. Validity; Rights of the Parties, &c.
II. Delivery and Payment.
III. Warranties. Sales by Sample.
IV. Remedies between Buyer and Seller.

I. The Contract. Validity; Rights of the Parties, &c.

1. **What amounts to a valid contract of sale.** As to what is sufficient to constitute a valid sale of goods, and when the memorandum of it need not be signed by both parties, see Steele *v.* Taft, 22 Hun 453.

2. B., the lessee of certain premises, sublet the same for the unexpired term, together with certain of his chattels thereon, by a lease providing as follows: that on performance of covenants and payment of rent (a large part of which was paid in advance by indorsed notes), B. would, at the expiration of the term, convey said chattels to the subtenant; that if a loss by fire occurred, B. was to receive out of the insurance money (the subtenant agreeing to keep the chattels insured), such proportion as the rent then due might bear to the whole rent, the balance to go to the subtenant; that upon default, re-entry could be made, and the chattels sold, and the rent due taken from the proceeds, the balance to go to the sub-tenant. *Held*, that under the above agreement, B. did not part with title to the chattels; also that a sale thereof by B. during the tenancy, unaccompanied by manual delivery, raised no presumption of fraud.—*Superior Ct., Dec.*, 1880. Bean *v.* Edge, 46 Superior 455.

3. **Requirements of the statute of frauds.** A broker's note or memorandum of sale of goods, containing the names of the vendor and vendee and the terms of sale, and delivered to both parties, makes a valid contract of sale within the statute of frauds.—*Ct. of App., March*, 1881. Newberry *v.* Wall, 84 N. Y. 576.

4. Where, after the making of an oral contract for the sale of goods, void under the statute of frauds, a payment is made thereon, and at the time of such payment, the essential terms of the contract are re-stated, this takes the case out of the operation of the statute and validates the contract.—*Ct. of App., March*, 1881. Hunter *v.* Wetsell, 84 N. Y. 549.

5. Where a check is delivered and received as a payment, which is good when drawn and is paid on presentation, this is a payment "at the time" within the meaning of said statute (2 Rev. Stat. 136, § 3, subd. 3,) and satisfies its requirements. *Ib.*

II. Delivery and Payment.

6. **Necessity and sufficiency of delivery.** Where the price of certain specific chattels is fixed and paid, *e. g.*, by orders upon a fund due the vendee from the city of New York, and delivery is to be made at a place designated by the vendee, nothing else remaining to be done by the vendor, the title passes absolutely without delivery.—*Superior Ct., Dec.*, 1880. Gray *v.* Mayor, &c., of New York, 46 Superior 494.

7. While, as a general rule, no action lies on the part of a vendor upon a contract for the sale and delivery of a specified quantity of goods, until the whole quantity is delivered, yet where the whole delivery is to be at one and the same time and the vendee elects to receive a portion and appropriates the same to his own use, and by his acts evinces that he waives the condition precedent of a complete delivery, the vendor may recover for the portion delivered.—*Ct. of App., June*, 1880. Avery *v.* Willson, 81 N. Y. 341.

8. **Conditional sales.** As to the effect of the destruction of part of the property, before payment of the price, where the sale is conditional, the title remaining in the seller, see Humeston *v.* Cherry, 23 Hun 141.

9. **When the title passes—payment as a condition precedent.** Plaintiffs contracted to sell to A. a quantity of corn to be paid for in cash on delivery. At the request of A. plaintiffs caused a portion of the corn to be loaded on board a vessel, for their account, and received the weigher's return, which they indorsed and delivered to A., to enable him to procure bills of lading in his own name and to sell his exchange drawn against the same, it being agreed that the title of the corn should not pass until payment, which was to be made on that day. A. procured the bills of lading, which he transferred to defendants as security for three bills of exchange drawn against the corn, forming part of a parcel of exchange sold to defendants by A. Defendants paid to A. a portion of the proceeds of the exchange so purchased, and forwarded the three bills with the bills of lading to their correspondents. On the same day plaintiffs notified defendants that they were the owners of the corn, and demanded the same or the bills of lading, or that defendants should agree to account to them for the proceeds; defendants refused. At that time they had in their hands, of the purchase price of the exchange, more than the value of the corn. In an action for the conversion of the corn, the defence was that defendants bought and paid for the corn in good faith without notice. *Held*, that no title to the corn passed from plaintiffs to A.; that the condition precedent of payment was not waived by the symbolical delivery; that as defendants, at the time of plaintiffs' demand, had sufficient means in their hands to protect both themselves and plaintiffs from loss, their refusal to comply was without justification; that they were to be regarded as holding the proceeds in place of the property, and were liable to pay it over to plaintiffs as the rightful owners; and that, by payment of a portion of the purchase money before notice of plaintiff's claim, defendants were entitled to protection as *bona fide* purchasers, only to the extent of such payment.—*Ct. of App., Feb.*, 1881. Dows *v.* Kidder, 84 N. Y. 121.

10. The fact that other moneys were mingled with the proceeds of plaintiffs' property did not impair their right. *Ib.*

11. The claim that the money in defendants' hands represented in part the price of bills of exchange drawn against other property as to which defendants were in the same position, was not tenable; the question between the parties must stand as of the date when plaintiffs made their demand, and a payment then would have been good against every one, no demand by other claimants having then been made. *Ib.*

12. Such a claim was not within the issues, but was inconsistent with the answer. *Ib.*

13. **Stoppage in transit.** As to whether a stoppage *in transitu*, by a vendor, of goods sold on credit, is to be regarded as a rescission of the sale, or simply as an assertion of a right to enforce a lien for the purchase price, *quære.—Ct. of App., Feb.*, 1880. Babcock *v.* Bonnell, 80 N. Y. 244.

14. Upon the theory that the right is to enforce a lien, the vendor must hold the property until the expiration of the credit, and be able to deliver it upon payment of the price, the purchaser having the right to pay the price and take the property. If not paid at the time stipulated, the vendor may sell upon giving notice. *Ib.*

15. The authorities as to the principle upon which the right of stoppage *in transitu* is founded collated; the prevailing current of American decisions stated as favoring the theory of a lien. *Ib.*

III. Warranties. Sales by Sample.

16. **Rights of buyer of goods inferior to sample.** Where, upon an executory contract for the sale of a cask of gin, the vendor represents it to be of good quality and to be worth more than the price paid for it, and at the same time exhibits a sample of gin which is of a good quality, the vendee is entitled to a reasonable time to examine the gin after its arrival, and may, if it proves to be inferior to the sample and of poor quality, set up the damages arising from the breach of warranty as a defence to an action brought to recover its price, although he has not returned or offered to return the gin, but has retained and used the same.—*Supreme Ct., (4th Dept.,) Jan.*, 1881. Marshuetz *v.* McGreevy, 23 Hun 408.

17. The defendants agreed to sell to the plaintiffs "one hundred and ten thousand pounds Russia camel's hair, to arrive from Europe. * * * Hair to be equal to sample." The hair intended to be sold arrived and was tendered to the plaintiffs, who refused to receive it, on the ground that it was inferior to the sample shown to them, and thereafter brought this action to recover damages for the breach of the contract. *Held*, that the stipulation that the goods should be equal to the sample was not a substantive part of the agreement, and did not render it conditional upon the arrival of goods of the prescribed quality, but amounted to an express warranty of the quality of the goods sold, for a breach of which the plaintiffs were entitled to recover.—*Supreme Ct., (2d Dept.,) Dec.*, 1880. Dike *v.* Reitlinger, 23 Hun 241.

IV. Remedies between Buyer and Seller.

18. **Rights of the seller—election of remedies.** Where, under a contract of sale of personal property, the place of delivery was to be designated by the vendee—*Held*, that a tender was not required on the part of the vendor before action to recover the purchase price; that readiness and an offer to deliver were sufficient.—*Ct. of App., March*, 1881. Hunter *v.* Wetsell, 84 N. Y. 549.

The measure of damages in such an action is the contract price less payments made thereon. *Ib.*

19. The vendor may, but is not bound to sell the property at auction, after due notice, and on account of the vendee. He may abandon the property, treat it as the vendee's, and sue the latter for the contract price. *Ib.*

That the property was perishable does not affect the question. *Ib.*

20. **Seller's action for the price—right of action.** Where separate purchases of goods are made at different times upon a credit for a specified time, the different sales do not constitute an entire and indivisible demand, but a cause of action accrues when the term of credit expires as to any one sale, and the vendor may bring separate actions for each sale.—*Ct. of App., Dec.*, 1880. Zimmerman *v.* Erhard, 83 N. Y. 74; S. C., 60 How. Pr. 163.

21. The pendency of an action, therefore, to recover for goods so sold at one date is not a defence to an action for goods sold at a subsequent date. *Ib.*

22. The rendering of an account by the vendor, containing all the items, does not change the nature of the contracts, or show that the transactions were not separate and distinct. *Ib.*

23. As to when an action by the seller to recover the property from an assignee of the buyer, is not a bar to an action for the purchase price, see Talcott *v.* Brouner, 46 Superior 566.

24. **Matters of defence.** In this action, brought to recover the price of goods sold and delivered to the defendant, the defence was that they were sold upon a credit which had not expired at the time when the action was commenced. To this the plaintiffs replied that the sale was procured by fraud, and that the credit had been waived. The only evidence of waiver was the avowed insolvency of the defendant within the time for which the credit was given, followed by a notice to the plaintiffs of his inability to pay the debt. *Held*, that this did not amount to a waiver of the credit.—*Supreme Ct., (1st Dept.,) Jan.*, 1881. Keller *v.* Strasburger, 23 Hun 625.

25. **Evidence.** In an action to recover the alleged purchase price of a quantity of hops, wherein the statute of frauds was set up as a defence, plaintiff's evidence was to the effect that after an oral contract of sale had been made, defendant made a payment thereon by check, and at that time the contract was restated. After defendant had been called as a witness for plaintiff to prove payment of the check, he, as a witness in his own behalf, contradicted plaintiff's evidence as to payment and restatement of contract; he was asked, on cross-examination, if the price of hops went down after the time of the alleged payment; this was objected to as immaterial and irrelevant, and the answer received under objection and exception. *Held*, no error; that the evidence was competent as showing the interest of the witness. Hunter *v.* Wetsell, *supra.*

26. In an action to recover the purchase price of goods alleged to have been sold, to ar-

rive, by plaintiffs to defendants, through a broker, it appeared that the broker entered the contract of sale in his book, made two copies thereof, one of which he delivered to the plaintiffs, and sent the other by his clerk to the defendants in the usual course of business; that subsequently the broker had a conversation with one of the defendants as to the purchase, and informed him that he had executed the broker's note; that after the arrival of the goods defendants requested plaintiffs to enter the goods at the custom-house in bond, which they did, and then sent defendants an order for the goods and an account of the sale, to which no objection was made; that defendants made arrangements with warehousemen to store the goods, stating that they had bought them, and that subsequently they rejected the goods on the ground that the quality was inferior to that contracted for. The defendants did not deny, as witnesses, the receipt of the broker's note. *Held*, that the evidence of such receipt was sufficient to require the submission of that question to the jury, and that a nonsuit was error.—*Ct. of App., March*, 1881. Newberry *v.* Wall, 84 N. Y. 576.

27. Upon the trial, the action being for the value of the goods sold, the sample by which the sale was made was not produced in court, and the evidence as to it was very vague. The plaintiff offered to read from the deposition of plaintiff's agent the answer to the question—"From what sample of wine did you take your order from said Lax?" which answer was excluded. *Held*, error for which a new trial must be granted.—*Superior Ct., April*, 1880. Sonoma Valley Wine, &c., Co. *v.* Lax, 46 Superior 137.

28. Seller's action to rescind—evidence. For the purpose of establishing a fraudulent intent on the part of a vendee in purchasing goods, it is competent to show similar transactions between him and other parties, occurring at or about the time of the purchase in question.—*Supreme Ct.*, (1st *Dept.*,) *Nov.*, 1880. Naugatuck Cutlery Co. *v.* Babcock, 22 Hun 481.

29. In an action to rescind a sale of goods on the ground that it was procured by false and fraudulent representations made by the vendee, the plaintiff was allowed, against the defendants' objection and exception, to prove that in December, 1875, a member of the defendants' firm, for the purpose of influencing the conduct of those to whom they were to apply for credit, made a statement to the reporter of a mercantile agency, who came to inquire as to the standing of the firm, as to its assets, and as to the property owned by one of its members, which statement was to the knowledge of the firm, utterly false; that in March following, the plaintiff wrote from Connecticut to a person in New York, inquiring as to the defendants' responsibility, and received a letter in reply thereto from him, in which he stated among other things, that he had made inquiry at a mercantile agency, who reported them well. He had seen the statement made to the reporter of the agency, though it was not shown that he was a subscriber thereto. *Held*, that the evidence was properly received. *Ib.*

30. Putting vendee in statu quo. A vendor, seeking to rescind a contract of sale and to recover the property on the ground of fraud, is not required to reimburse the fraudulent vendee for advances to others or for expenditures made by the latter to effectuate the fraud; and this although the vendor would have the benefit of the advances or expenditures on repossessing himself of the property.—*Ct. of App., June*, 1880. Guckenheimer *v.* Angevine, 81 N. Y. 394.

31. The doctrine of equitable subrogation will not be applied in such case to relieve the vendee from a loss occasioned by his own unlawful act. *Ib.*

32. Plaintiffs sold to J. & J. P. S., defendant's assignors, a quantity of whisky then in a U. S. bonded warehouse and subject to a government tax. The sale was induced by fraud on the part of the vendees. Defendant A., who was privy to the original fraud, paid the tax in order to get possession of the whisky. *Held*, that plaintiffs, in seeking to rescind the sale and to reclaim the property, were not bound to reimburse to A. the tax so paid. *Ib.*

33. Reclaiming the goods in hands of third person. A judgment creditor, by levying upon goods in the possession of the debtor, acquires no better or greater title thereto than the debtor has, and if the latter's title thereto is defective because procured by false and fraudulent representations, his vendor has the same right to rescind the sale and retake the goods, as against such creditor, as he had as against the vendee.—*Supreme Ct.*, (1st *Dept.*,) *Nov.*, 1880. Naugatuck Cutlery Co. *v.* Babcock, 22 Hun 481.

As to sales of *Land*, see VENDOR AND PURCHASER.
As to *Judicial sales*, see that title; also, EXECUTION, 7-13; MORTGAGES, 63-69.

SARATOGA SPRINGS.

MUNICIPAL CORPORATIONS, 67, 68.

SATISFACTION.

Of *Contracts*, generally, see CONTRACTS, VI.
Of *Mortgage*, see MORTGAGES, VIII.

SAVINGS BANKS

BANKS, VI.

SCHOOLS.

1. Power of school district to contract. A school district has power to authorize its trustee to accept a conveyance of land to be used as a site for a public school, and to agree, as part of the consideration for the conveyance, that the district shall build and keep in repair the whole of the division fence between such land and adjoining land of the grantor. Such a contract is valid though made before any tax to build or repair the fence has been voted.—*Supreme Ct.*, (4*th Dept.*,) *Oct.*, 1880. Albright *v.* Riker, 22 Hun 367.

2. The College of the City of New York, as organized by ch. 264 of 1866, is a body corporate, with the full powers and privi-

leges of a college conferred by the revised statutes, and the trustees thereof are endowed with all the powers conferred upon trustees of colleges by such statutes.—*Supreme Ct.*, (1*st Dept.*,) *Jan.*, 1881. People, ex rel. Burnet, *v.* Jackson, 23 Hun 568; S. C., 60 How. Pr. 330.

3. The college is in no legal sense a department of the city, but is an independent corporation, not subject to the control, management or visitation of the authorities of the city, except as may be specially provided for and permitted by the legislature. *Ib.*

4. The disposition of the fund authorized to be raised by ch. 471 of 1872, is conferred altogether upon the trustees of the college and the board of education of the city of New York, and no supervisory or inquisitorial control over the same is given to the finance department of the city, nor is it subject to the review or control of the auditor or comptroller. *Ib.*

SEAL.

As to the necessity and effect of a seal upon any *Particular instrument*, see the title of the instrument in question.

SECURITY.

As to bonds on *Appeal*, see APPEAL, **24, 25, 44, 152-160.**

As to the security required on granting either of the *Provisional remedies*, see ARREST, **12-16**; ATTACHMENT, **26, 27**; INJUNCTION, IV.; RECEIVERS, **16**; REPLEVIN, **4.**

As to *Official bonds*, see the titles of the various officers.

As to *Security for costs*, see COSTS, III.

SEPARATE ESTATE.

HUSBAND AND WIFE, V.

SERVANTS.

[M]ASTER AND SERVANT; RAILROAD COMPANIES, **45-53**, SERVICES.

SERVICE OF PROCESS.

PROCESS, **3-9.**

SERVICES.

1. Interpretation of contracts for services. The plaintiff and defendants entered into an agreement by which the former agreed to work for the latter for the term of one year for the sum of $1200, payable in equal weekly installments, and the defendants agreed to pay therefor, "provided his work and services should be to their satisfaction. Should there be any disagreement the installments are to be paid only to the time of such disagreement, unless an amicable settlement can be arranged." *Held*, that the employment of the plaintiff was only to continue during the pleasure of the defendants, and that the latter might discharge him at any time without assigning any reason therefor.—*Supreme Ct.*, (2*d Dept.*,) *Feb.*, 1881. Spring *v.* Ansonia Clock Co., 24 Hun 175.

2. A contract between a corporate body, a seminary, and a professor, construed with reference to its duration, and the sufficiency of a notice of termination thereof, given by the corporate body to the professor. Tyng *v.* Theological Seminary, &c., of Ohio, 46 Superior 250.

As to the *Damages* recoverable in actions upon contracts for services, see DAMAGES **5.**

For further decisions illustrating the above principles, see MASTER AND SERVANT, **1, 2.**

SET-OFF: COUNTER-CLAIM.

1. What demands may be set off. Cross-demands, though unliquidated by judgment, and although not within the statute of set-off, will in equity be set off against each other, if, from the situation of the parties, justice cannot otherwise be done.—*Ct. of App.*, *April*, 1880. Davidson *v.* Alfaro, 80 N. Y. 660.

2. To compel a set-off both debts must have been due and payable at the same time, and before a change in the ownership of either. It is not necessary, however, that, at the time, an action could have been maintained upon the debts; it is the condition or state of the demands at the time which is to be looked at, and not any special rule or regulation touching the situation of the debtor or creditor which prevents him from then bringing suit upon the demand, or requires something as a prerequisite.—*Ct. of App.*, *Sept.*, 1880. Taylor *v.* Mayor, &c., of New York, 82 N. Y. 10.

3. The fact, therefore, that by the charter of a municipal corporation no action can be maintained upon a demand against it, until after presentation and demand of payment of some officer of the corporation, does not prevent a set-off of the claim in an action by the corporation upon a demand against the owner thereof. *Ib.*

4. On April 2, 1880, the defendant deposited with the plaintiffs' assignor, one P., who was carrying on business as a private banker, $600, and received therefor a certificate stating that the same would be paid to himself or his order on return of the certificate properly indorsed, with interest at the rate of five per cent. per annum, if left four months. At that time P. held a note made by the defendant which had fallen due on January 23d, 1880 On June 2d, 1880, P. failed and made a general assignment to the plaintiffs. Prior to that time the defendant had made no demand for the money deposited. In an action by the assignees upon the note—*Held*, that the defendant was entitled to set off the amount deposited against the amount due upon the note.—*Supreme Ct.*, (3*d Dept.*,) *Jan.*, 1881. Seymour *v.* Dunham, 24 Hun 93.

5. What may not be. The plaintiff

cannot have a judgment recovered by him, from which an appeal has been taken by the defendant, set off against the costs of two motions awarded to the defendant in the same action.—*Supreme Ct.*, (1*st Dept.*,) *April*, 1881. Hardt *v.* Schulting, 24 Hun 345.

6. Three of the defendants, in an action brought by them against M., plaintiff's assignor, to recover possession of personal property, gave an undertaking executed by them and by the other defendants as sureties, on a claim for the immediate possession of the property. M. succeeded in the action, recovering a judgment for the value of the property; execution was issued thereon and returned unsatisfied. In an action upon the undertaking defendants claimed to be allowed as a set-off an indebtedness of M. to the principals in the undertaking, part of which was due and payable before the assignment of M. to plaintiff, and a part after; but all of which was due and payable before there arose a cause of action upon the undertaking. *Held*, that at law defendants were not entitled to the set-off. (1) Because it was a several indebtedness of M. to but three of the defendants, while the liability of defendants was joint. (2) Because it was due and payable before there was a cause of action in the plaintiff.—*Ct. of App.*, *April*, 1880. Coffin *v.* McLean, 80 N. Y. 560.

7. The assignment to plaintiff by M. was for the benefit of the creditors of the latter, he being insolvent; it was made before the termination of the replevin suit; the principals in the undertaking, also, before that time, became insolvent. *Held*, that, upon equitable principles, defendants were not entitled to the set-off, as the equities in plaintiff and the creditors of M. were superior to those of the defendants. *Ib.*

8. What may be interposed as a counter-claim. Upon the trial defendant moved and was permitted, without objection, to amend his answer by setting up an over-payment and demanding judgment for the amount thereof. It was proved that said over-payment was made after the commencement of the action. *Held*, that defendant was entitled to judgment for the amount of such over-payment; that under Code of Pro., § 150, subd. 1, which was in force at the time of the trial, as it was a claim arising out of the contract upon which the action was brought, it was a proper counter-claim; that defendant might have been allowed to set it up by supplemental answer (§ 177); and that the amendment was in effect a supplemental answer, and gave the same right to judgment.—*Ct. of App.*, *Oct.*, 1880. Howard *v.* Johnston, 82 N. Y. 271.

9. In an action to foreclose a purchase money mortgage, the mortgagor set up as a counter-claim in one count, that the mortgagee falsely represented that an assessment on the premises had been adjudged void, and that he, relying upon the representations, took the conveyance without deducting the assessment, which was a valid lien, and which he was compelled to pay. In another count defendant alleged that by mistake both parties supposed the assessment had been adjudged void, and so defendant took the deed subject to it; this he asked to have reformed. It appeared that the grantor made the alleged statements, and that defendant took the deed and gave the mortgage in reliance thereon. *Held*, that if the grantor believed his statement, there was a material mistake of fact; if he did not, there was a fraud; in either case it was a proper counter-claim, and defendant was entitled to the relief asked.—*Ct. of App.*, *Sept.*, 1880. Waring *v.* Somborn, 82 N. Y. 604.

10. In an action on a contract to build sewers, defendant set up, as a counter-claim, damages for breach of contract in not completing the work. *Held*, that while defendant might have claimed the contract forfeited by refusal to complete performance, yet not having done so it could not now insist upon it, but this did not preclude it from insisting upon the counter-claim.—*Ct. of App.*, *Jan.*, 1881. Taylor *v.* Mayor, &c., of New York, 83 N. Y. 625.

11. In an action by the plaintiff, to recover damages for an alleged conversion of certain wood by the defendant, the latter alleged, as a counter-claim, that the wood in controversy was the product of trees grown upon certain lands upon which it had a mortgage; that the plaintiff, being a junior mortgagee in possession, and knowing that the lands were an insufficient security for the payment of the defendant's mortgage, and that the mortgagor was insolvent, wrongfully and fraudulently, and with intent to cheat and defraud the defendant, and to impair the security of its mortgage, committed waste on the said premises, by cutting the said wood, to the defendant's damage of $500. *Held*, that the cause of action set up in the counter-claim was "connected with the subject of the action," and that it might be pleaded as a counter-claim, though the action was for a tort.—*Supreme Ct.*, (2*d Dept.*,) *Sept.*, 1880. Carpenter *v.* Manhattan Life Ins. Co., 22 Hun 49.

12. The defendant set up as a counter-claim that plaintiff had transferred to her testator a claim against the estate of James B. Taylor, by an assignment providing, among other things, that "in case the money received by me from John Langhaar cannot be collected from the representatives of James B. Taylor, I agree to pay the same to John Langhaar, with interest," and sought to recover the money so paid by John Langhaar on the ground that she had been unable to collect it from Taylor. Upon the trial it appeared that the claim was presented to and allowed by the executors of the Taylor estate, and afterwards again allowed by a receiver of the said estate, with the exception of one item, which was disallowed because the article had never been delivered by the plaintiff; that the estate was the subject of long-protracted litigation, and that the greater part of it was thereby used up and consumed; that the defendant did not incite and could not stop the litigation; that finally a dividend of twenty-five per cent. was received upon the claim by the defendant and the other creditors. *Held*, that it sufficiently appeared that the claim could not "be collected," and that the court properly allowed the defendant to recover upon the counter-claim.—*Supreme Ct.*, (2*d Dept.*,) *Feb.*, 1881. Schmitz *v.* Langhaar, 24 Hun 168.

13. Where plaintiff brought an action to recover for the professional services of his assignor, an attorney-at-law, rendered in four certain actions, and the defendant interposed a counter-claim for loss arising from the bad, illegal and foolish advice of such attorney, given in another action, and demanded an affirmative judgment, and plaintiff demurred on the ground that defendant's counter-claim was not a cause

of action arising out of the contract or transaction set forth in the complaint, as the foundation of the plaintiff's claim—*Held*, that although the plaintiff did not count upon the services rendered by his assignor in that action, in which such bad, illegal and foolish advice was given, that the contract and transaction between an attorney and client is the *employment*, and that both the plaintiff's claim for his assignor's services and the defendant's claim for incapacity grew out of such employment, and that judgment be given for the defendant upon the demurrer.—*Supreme Ct.*, (*2d Dept. Sp. T.*,) *June*, 1881. Harlock *v.* Le Baron, 1 Civ. Pro. 168.

14. What may not be. Where sureties are sued for a default of their principal in performing the condition of the bond, they cannot, where their principal is not a party to the action against them, set up as a counter-claim causes of action in favor of their principal against the plaintiff.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Emery *v.* Baltz, 22 Hun 434.

15. In an action founded on fraud, a counter-claim founded on contract cannot be allowed. —*Ct. of App.*, *March*, 1881. People *v.* Dennison, 84 N. Y. 274.

16. Plaintiff's complaint alleged in substance that, under color of a contract, defendant fraudulently obtained money from the state by means of false representations, false vouchers and collusion with state officers. Defendants set up as a counter-claim a balance due them from the state for work done under the contract. To the answer a reply was served. *Held*, that the cause of action set up as a counter-claim was not one arising out of the transaction upon which plaintiff's claim was founded, within the meaning of Code of Pro., § 150; and that a counter-claim founded on contract was not proper in such an action. *Ib.*

17. Counter-claims in actions by the general government. *It seems* that the right of a debtor of the United States government, when sued by it, to interpose a counter-claim or counter-credits, rests in all cases upon the provisions of the act of congress granting and regulating it, (Act of March 3d, 1797, §§ 3, 4); and while, under said act, a defendant, upon complying with its conditions, may give in evidence any counter-claim he may have in his own right, which is a proper subject of set-off, such counter-claim is available only to the extent necessary to defeat the claim of the government, and no affirmative judgment for any excess can be rendered against it. *Ib.*

18. Effect of reply to counter-claim. As to whether or not a plaintiff, by replying to a counter-claim, waives his right to insist that the matters therein set up are not the proper subject of a counter-claim, see Carpenter *v.* Manhattan Life Ins. Co., 22 Hun 49.

SETTLEMENT.

Of *Case*, on appeal, see Appeal, 48-53, 102.

SHAM PLEADINGS.

Pleading, 46.

SHERIFFS.

I. Rights, Powers and Duties.
II. Liabilities.

I. Rights, Powers and Duties.

1. Rights of outgoing sheriff—completing unfinished business. A judgment of foreclosure directing the sale of mortgaged premises by the sheriff, is a "mandate" in his hands within the meaning of the provision of Code of Civ. Pro., prescribing the duties of an outgoing sheriff, (§ 184, sub. 4,) and an advertisement of the premises for sale is a "seizure" within said provision.—*Ct. of App.*, *Dec.*, 1880. Union Dime Savings Inst. *v.* Anderson, 83 N. Y. 174; *affirming* 19 Hun 310.

2. Where, therefore, a sheriff of the county of Kings had, prior to the expiration of his term of office, under such a judgment, advertised premises for sale upon a day after his term had expired—*Held*, that he had authority, and was bound to proceed with and complete the sale. *Ib.*

3. Bonds of indemnity, and rights thereunder. The plaintiff, a sheriff, while attempting to levy upon certain property under an execution, was informed that it belonged to the judgment debtor's father, and thereupon demanded a bond of indemnity from the judgment creditors, the defendants in this action, who gave to him such a bond containing a proviso that, in case any suit should be brought against the sheriff, the judgment creditors should be notified and permitted to defend. The sheriff then levied upon the property, sold it, and paid over the proceeds to the defendants. Thereafter he was sued by the judgment debtor's father, who recovered from him the value of the property taken. In an action brought by him upon the undertaking—

Held, 1. That he could not recover upon it, as he had failed to notify the defendants of the suit, and to give them an opportunity to defend it.

2. That the action could not be maintained upon an implied promise to repay the money received from the sheriff, as the express contract made between the parties prevented the implication of any other or different contract.—*Supreme Ct.*, (*3d Dept.*,) *May*, 1881. Preston *v.* Yates, 24 Hun 534.

4. Fees. Under Code of Civ. Pro., § 3307, subd. 4, the sheriff is entitled to three term fees after that code took effect, although he had previously received three term fees.—*Supreme Ct.*, (*Alb. Sp. T.*,) *Oct.*, 1880. Little *v.* Coyle, 60 How. Pr. 76.

II. Liabilities.

5. For wrongful levy. Where a sheriff has levied, under an execution, upon property belonging to a person other than the judgment debtor, which property formerly belonged to and had been sold under an execution against said judgment debtor, and is at the time of the levy in the possession of the judgment debtor, holding it as a servant of its owner, an action for its conversion lies by the owner against the sheriff without any previous demand made.—

Supreme Ct., (3d Dept.,) Jan., 1881. Masten *v.* Webb, 24 Hun 90; *reversing* 60 How. Pr. 302.

6. **For surplus moneys.** While, as a general rule, a sheriff who has levied under execution upon, and sold certain property as belonging to the judgment debtor, will not be permitted, when called upon to account for the proceeds, to allege that the property in fact did not belong to him, yet when, upon a motion to compel payment of a surplus, such defendant has put himself on record, under oath, that the property taken belonged to his wife, and that he had no interest therein, his right to recover the alleged surplus is not so clear that the court should enforce it on a summary application.—*Superior Ct., (Sp. T.,) Nov.,* 1880. Frankel *v.* Elias, 60 How. Pr. 74.

7. **For failure to return execution.** The sheriff is not relieved from his obligation to make return of his proceedings upon an execution against the property of defendant, by the fact that prior to the return-day thereof he was served with a warrant of attachment against the plaintiff, granted upon the application of defendant as plaintiff in another action. If he neglects to return the execution, he is liable to be proceeded against by attachment, and it is no defence that he has not been ruled or notified to make a return. Return can be made according to the facts, and if a sufficient excuse for not paying the money is presented, the court will not compel the sheriff to pay over. The court in this case held that as the sheriff had not been ruled or notified to make a return, the order directing an attachment against him should be modified by the addition of the words "unless within ten days a return of it [the execution] shall be made according to the command thereof."—*Superior Ct., June,* 1880. Parker *v.* Bradley, 46 Superior 244.

8. Where, in an action against a sheriff for a failure to return a certain execution, defendant proved, in mitigation of damages, that prior to the return-day the judgments were levied upon by virtue of attachments issued to him against the judgment creditor—*Held,* that the fact that the sheriff failed to make a valid levy by virtue of the execution did not destroy or weaken the effect of the proof in mitigation; that it was immaterial whether the failure to return was because of a neglect to levy, or arose after levy and collection. In either event, while the attachments remained in force, plaintiff was only entitled to nominal damages.—*Ct. of App., Dec.,* 1880. Wehle *v.* Conner, 83 N. Y. 231.

9. **For false return.** Defendant, in January, 1877, as sheriff, levied under an execution upon certain goods belonging to P., the judgment debtor, and took possession. On February 3d, 1877, P. made a general assignment for the benefit of creditors. An attachment against the property of P. was issued to defendant February 6th. He sold sufficient of the property to satisfy the execution, and then, upon demand of the assignee and refusal of the attachment creditors to indemnify, delivered the residue to the assignee and returned *nulla bona* to the attachment and the execution issued upon the judgment in the attachment suit. In an action for a false return, there was evidence that defendant assumed to levy under the attachment. *Held,* that by surrendering the property without calling a jury to pass upon the title, as prescribed by the statute, (2 Rev. Stat., §§ 4, 10,) defendant assumed the burden of showing that the property was not subject to the attachment, but that the facts established that defence, and, being undisputed, the complaint was properly dismissed.—*Ct. of App., Nov.,* 1879. Mumper *v.* Rushmore, 79 N. Y. 19; *affirming* 14 Hun 591.

10. **For escape of prisoner.** In an action against a sheriff for an escape, it is a defence for him if he shows that a valid order for the discharge of the debtor has been made, though it has never been formally served upon him.—*Supreme Ct., (3d Dept.,) May,* 1881. Richmond *v.* Praim, 24 Hun 578.

11. Where a sheriff is sued for an escape from custody under an attachment of a Surrogate's Court, the plaintiff is entitled to recover the damages sustained by him, (Code of Civ. Pro., § 158,) to wit, the sums awarded to him by the surrogate's decree, with interest from its date.—*Ct. of App., March,* 1881. Dunford *v.* Weaver, 84 N. Y. 445.

12. Where an action is brought against a sheriff for an escape, he cannot set up an error in the process under which the arrest was made which renders it simply voidable, not void. *Ib.*

13. **Instances.** The complaint, in an action against a sheriff for an escape under an attachment of a surrogate, alleged that defendant wrongfully permitted the debtor to escape; no proof of assent or knowledge was given on the trial. *Held,* that a motion for a nonsuit, because of failure to prove such averment, was properly denied, as under the provision of the Code of Civ. Pro., § 158, in reference to such actions, it was immaterial whether the escape was through negligence or voluntary on the part of the sheriff; an averment and proof that the debtor was at large beyond the liberties was sufficient. *Ib.*

In such an action the fact of the insolvency of the debtor is no defence. *Ib.*

14. The administrator gave a bond as such; one of the creditors furnished money wherewith to buy up the claims against the administrator, which on payment, were assigned to plaintiff. *Held,* that this was not a payment and extinguishment of the claims. *Ib.*

15. Two attachments were issued by the surrogate and arrests made before said code went into effect; the escape occurred thereafter; it was claimed that the provision of the code did not apply. *Held,* untenable, as the cause of action was, not the issuing of process and arrest, but the escape. *Ib.*

16. One A. having been arrested by a constable by virtue of an execution against his person, issued upon a judgment recovered by the plaintiff, was allowed by the constable to go at large upon his promise to appear the next morning and give bail. On the next day the constable not finding A., left the execution at the sheriff's office, where it was received by a deputy who found A. and told him that he had the execution and had come after him, whereupon A. voluntarily went with him to the jail and there gave bail for the limits. A. having afterwards gone beyond the jail limits, this action was brought against the sheriff for an escape. *Held,* that although after the voluntary escape suffered by the constable the sheriff had no right forcibly to take and detain A. under the execution, yet that upon his voluntarily surrendering himself to the deputy the sheriff had the right

to receive him and was liable for his subsequent escape.—*Supreme Ct.,* (*4th Dept.,*) *Jan.,* 1881. Stickle *v.* Reed 23 Hun 417.

17. **Liability of outgoing sheriff for escape.** An outgoing sheriff cannot be held liable for failure to deliver to his successor, or for the escape of a prisoner held on a body execution, who was in custody of such outgoing sheriff, confined within the jail limits, where no certificate of election is shown to have been served by the incoming upon the outgoing sheriff. Until such service the powers of the outgoing sheriff, as to prisoners in his custody, remain unchanged, and therefore there can be no escape so long as the prisoner is in actual custody, and has not left the jail limits.—*Com. Pleas,* (*Gen. T.,*) *March,* 1881. Feerick *v.* Conner, 60 How. Pr. 506.

18. **Service of summons in actions against sheriffs.** Under the provision of Code of Civ. Pro., § 426, subd. 3, which authorizes the service of a summons in an action against a sheriff by delivering it at his office during office hours to his deputy, clerk or other person in charge, when a sheriff has an office in the city or village where the county courts are held, delivery of a summons at such office to a person in charge is a good service, although the sheriff has omitted to file a notice of the place in the county clerk's office, as required by the statute (2 Rev. Stat. 285, § 55); he cannot, by omitting to file notice, debar a suitor of the right to serve a summons, as provided by the code.—Dunford *v.* Weaver, *supra.*

19. Where a summons was served upon a sheriff by delivery to his deputy at his office,—*Held,* that an omission to prove the filing of notice on the trial, if required, was cured by the bringing of the notice to the General Term, on appeal from a judgment against the sheriff. *Ib.*

As to the powers and duties of sheriffs in respect to *arrests, attachments* and *executions,* see ARREST; ATTACHMENT; EXECUTION.

SHIPPING.

1. **Liability of owners for delay in transportation of freight.** October 14th, 1869, the defendant engaged to transport for account of the plaintiffs on board its steamship Minnesota or Nevada, for Liverpool, three hundred bales of cotton at one halfpenny per pound; at that time the cotton was on its way from Mobile, the date of its arrival being uncertain. The Minnesota was to sail on October 27th, and the Nevada on November 3d. The cotton arrived on October 23d, and was all delivered at the defendant's pier by the 26th. When it arrived there was sufficient cotton loaded, and on the pier, which had been specially engaged for the Minnesota, to fill that vessel. For that reason the plaintiffs' cotton was not taken by that ship, but was taken by the Nevada, and arrived in Liverpool seven days after that taken by the Minnesota. In an action brought by the plaintiffs to recover damages occasioned by a fall in the price of cotton, between the times of the arrival of the two ships—*Held,* that they were not entitled to recover.—*Supreme Ct.,* (*2d Dept.,*) *Dec.,* 1880. Fowler *v.* Liverpool, &c., Steam Co., 23 Hun 196.

2. **Contracts for towage; and rights and liabilities arising thereunder.** The owner of a cargo in a barge may recover for a loss against the owners of the steamboat towing the barge, for negligence, although there is no privity of contract. Unseaworthiness of the barge is not necessarily a defence to this action, nor is overloading.—*Superior Ct.,* (*Trial T.,*) *April,* 1880. Davidson *v.* Holden, 60 How. Pr. 327.

3. **Pilotage regulations.** Under the act of congress of August 7th, 1789, providing that all pilots in the bays and harbors of the United States shall continue to be regulated in conformity with the laws of the several states then existing, or which such states might thereafter enact, the legislature of this state has the power to create a board of pilots, and refer to it the determination of the qualifications of pilots and of the suitability and qualifications of the vessels to be employed by them.—*Supreme Ct.,* (*1st Dept.,*) *Jan.,* 1881. People, ex rel. Sisco *v.* Commissioners of Pilots, 23 Hun 603.

4. Under § 9 of ch. 467 of 1853, as amended by § 1 of ch. 196 of 1854, the board of commissioners of pilots thereby created have power to prescribe the kind of boats to be used by pilots, and may exclude steam vessels from being used for that purpose, and suspend or revoke the license of any pilot using a steamboat in the pilotage service. *Ib.*

5. **Rights of the master.** As to whether, where the master of a vessel is induced by false representations of the vendor, to give a bill of lading for a larger quantity of goods than he has received, and, in consequence, has been compelled to pay for the deficiency, he can be subrogated to the claim of the purchaser and shipper, and so recover of the vendor, see Van Santen *v.* Standard Oil Co., 81 N. Y. 171.

6. **Barratry by master.** To constitute barratry of the master, it is enough that the barratrous act was done willfully, and with a knowledge that it was wrong, irrespective of any fraudulent intent on his part.—*Superior Ct., Dec.,* 1880. Borland *v.* Mercantile Mut. Ins. Co., 46 Superior 433.

7. **Enforcement of liens upon vessels.** A sailing vessel, in process of construction, was launched before it was completed, and thereafter the plaintiff contracted to furnish her with sails, as part of and to complete the work of construction. She was then drawn out of the water, and again put upon the ways, and while there her construction was completed and the sails furnished. *Held,* that the contract was not a maritime one; and that a lien upon the vessel for the price of the sails, perfected in accordance with the provisions of the act of 1862 (Laws of 1862, ch. 482,) was valid and enforceable.—*Ct. of App., Nov.,* 1880. Wilson *v.* Lawrence, 82 N. Y. 409; *affirming* 18 Hun 56.

8. **Liability for collision.** When two steam vessels are sailing in the same direction, and the second one, which is going at more than double the speed of the first, has given the requisite signals to indicate her intention to pass the first, but has received no response thereto, it is the duty of those in charge of the second vessel to immediately repeat her signals, and to provide against the possibility of a collision, by slackening her speed, and, if necessary, changing her course in some degree; and they are guilty of negligence if, instead of so doing, they assume

that the silence of the first vessel is an acquiescence in the intention of the second, as indicated by the signals, and proceed accordingly.—*Supreme Ct.*, (*1st Dept.*,) *Jan.*, 1881. Erwin *v.* Neversink Steamboat Co., 23 Hun 573.

9. Neither the statutes of the state, nor the rules of navigation, nor the decisions of the courts require a vessel to keep a lookout stationed for the purpose of discovering and avoiding vessels approaching from the rear, and sailing in the same direction. *Ib.*

As to *Bills of lading*, see that title.

For further decisions as to the liability of ship-owners as *Carriers*, see CARRIERS.

SIDEWALKS.

MUNICIPAL CORPORATIONS, 33-35.

SIGNALS.

Liability of *Railroad company for failure to give*, see RAILROAD COMPANIES, 43.

SLANDER.

1. The complaint—innuendo. Charges that plaintiff adulterated sugar, that he cheated the government, and that, being guilty of cheating the government, he swore that he did not do so, are neither singly nor collectively actionable *per se*, but may become actionable by reason of surrounding circumstances to be pleaded and proved, from which the fair inference can be drawn that the words used were spoken and understood in such a way as to presumptively work an injury, Where these surrounding circumstances are not set forth, the meaning of the words cannot be enlarged by pleading an innuendo, for the office of an innuendo is by a reference to a preceding matter, to fix more precisely the meaning.—*Superior Ct.*, (*Gen. T.*,) *Feb.*, 1881. Havemeyer *v.* Fuller, 60 How. Pr. 316.

2. It may help to explain, but it cannot enlarge the meaning of words, unless it be connected with some matter of fact expressly averred. It cannot be used to establish a new charge, for it is not the nature of an innuendo to beget an action. *Ib.*

3. As an innuendo cannot perform the office of a colloquium, showing by extrinsic matter that the words charged are actionable cannot be supplied by an innuendo attributing to those words a meaning which renders them actionable. *Ib.*

4. Where the special damage is the foundation of the cause of action, it is a material allegation and must be fully and accurately stated. *Ib.*

5. A plaintiff who brings an action for slander, by which he lost his customers in trade, ought in his complaint to state the names of those customers, in order that the defendant may be enabled to meet the charge if it be false. The general allegation of the loss of customers is not sufficient to enable the plaintiff to show a particular injury. *Ib.*

6. Evidence in mitigation of damages. Facts proved in an action of slander in mitigation of damages must, to have that effect, have been known and believed by defendant at the time he uttered the slanderous words.—*Ct. of App.*, *June*, 1880. Hatfield *v.* Lasher, 81 N. Y. 246.

7. The provision of the code (Code of Pro., § 165; Code of Civ. Pro., § 535) authorizing proof of mitigating circumstances, notwithstanding defendant has pleaded or attempted to prove a justification, was intended simply to change the rule of pleading and not the effect or admissibility of evidence further than the change in the form of pleading did so. *Ib.*

8. In an action for slander plaintiff gave evidence tending to show that defendant accused her of having had a venereal disease. Evidence was given on the part of defendant tending to show improper intimacy between plaintiff and one W. Defendant offered proof that a son of plaintiff made statements at his, defendant's, house to the effect that W. had the disease spoken of. *Held*, that it was properly excluded, as it did not tend to prove the charge made to be true, or that defendant had information or had heard reports which should *per se* have led him to believe that they were true. *Ib.*

9. The damages recoverable. In an action for slander, the court charged the jury that plaintiff was entitled to recover for the expense necessarily attending her coming into court to vindicate her character; also, that plaintiff might recover not only the damages already occasioned, but those that might be occasioned in the future by the speaking of the words. *Held*, that the charge was erroneous.—*Supreme Ct.*, (*4th Dept.*,) *April*, 1881. Halstead *v.* Nelson, 24 Hun 395.

10. Privileged communications. As to what communications are privileged, and the nature of a plea of privileged communications, see Ib.

For the law of *Libel*, see LIBEL.

For further decisions as to *Privileged communications*, see ATTORNEY AND CLIENT, IV.; WITNESSES, II.

SOCIETIES AND ASSOCIATIONS.

[Includes only decisions applicable to unincorporated associations and charitable societies; for other cases, CORPORATIONS, and the respective titles of the various distinctive corporate bodies, should be consulted.]

1. Voluntary associations, generally—expulsion of members. An association whose members become entitled to privileges or rights of property therein, cannot exercise its power of expulsion without notice to the member, or without giving him an opportunity to be heard.—*Ct. of App.*, *Feb.*, 1881. Wachtel *v.* Noah Widows, &c., Soc., 84 N. Y. 28; S. C., 60 How. Pr. 424.

2. *It seems* that, in the absence of any agreement by the members, or any provision in the charter or by-laws for a different mode of service, notice should be served personally. *Ib.*

3. One of defendant's by-laws provided for giving written notice to any member in arrears six months for dues, calling his attention to the

fact that he will be stricken from the roll in case he does not pay his dues. Another by-law imposed a fine for an omission of a member to give notice to the association of a change of residence. At the time of joining, plaintiff's intestate gave notice of his then place of residence. He subsequently changed his residence, but did not give notice. Because of failure to pay his dues, he was struck from the rolls. No notice was given him as provided by the by-laws. In an action brought to recover the sum provided by defendant's by-laws to be paid on the death of a member—*Held*, that plaintiff was entitled to recover; that the omission of the deceased to give notice of change of residence was no excuse for a failure to give him the prescribed notice. *Ib.*

4. **— dissolution.** A voluntary association instituted for moral, benevolent and social objects, should not be dissolved by the courts for slight causes; and, if at all, only when it is entirely apparent that the organization has ceased to answer the ends of its existence, and no other mode of relief is attainable.—*Ct. of App., Sept.*, 1880. Lafond *v.* Deems, 81 N. Y. 507.

5. Such an association, where there is no power to compel the payment of dues, and where the right of the member ceases on his failure to make such payment, is not a partnership. *Ib.*

6. The parties hereto were members of an association for moral improvement, relief in sickness and in case of death. In an action brought to dissolve the association, the court granted the relief, upon the ground that the association was divided into factions; that the feelings of hostility between the members were such as to render it impossible for them to agree as to the transaction of its business and the care of its funds, and that the usefulness of the association had departed. By the constitution and by-laws of the association, provision was made for the redress of grievances and for the punishment of parties offending, and it was within the power of the association to suppress conduct of the kind complained of. An appeal was also authorized to a higher tribunal. No complaint before the association had been made against the members charged by plaintiffs with a violation of the rules. The by-laws provided that the association should not be dissolved save by a unanimous vote, and that no motion to dissolve should be entertained so long as ten members remained in good standing. *Held*, that the action was not maintainable; that plaintiffs, at least, were required, in the first instance, to resort to the remedies provided by the rules of the association before seeking the interposition of a court of equity. *Ib.*

7. The association, in order to obtain the room desired for their meetings, was obliged to hire more room than was actually required. It fitted up, furnished and sublet the portion it did not require, and rented its own room when not in use, and from the rents received, with the other income, a considerable fund had accumulated. *Held*, that this was not such a departure from the objects of the association as called for a dissolution, or as authorized a conclusion that the members were copartners. *Ib.*

8. **Benevolent societies.** As to the power of benevolent associations to make provision for sick members; that the rights of members may be taken away by an alteration of the constitution; and that no notice of such proposed alteration need be given, see McCabe *v.* Father Mathew T. A. B. Soc., 24 Hun 149.

9. **The New York stock exchange.** Plaintiff was expelled from membership of the stock exchange upon an accusation of "obvious fraud," and the court held such expulsion to be illegal. In the meantime, defendant, treating plaintiff as effectually expelled, sold his seat and appropriated the proceeds to the payment of his creditors in the exchange. *Held*, that the exchange, sued in the name of its president, was liable to plaintiff for the amount of the proceeds realized for such seat.—*Superior Ct.*, (*Sp. T.*), *May*, 1881. Sewell *v.* Ives, 61 How. Pr. 54.

10. The New York stock exchange being composed of more than seven persons, owning and having an interest in property in common, and who would be liable to an action on account of such ownership and interest, this action being brought by the plaintiff, a member, in relation to his interest in that property, is properly brought against the defendant as president. *Ib.*

11. The property wrongfully taken or appropriated by defendant in satisfaction of a demand against plaintiff, as owner, cannot be set up in bar or in mitigation of damages suffered by him. *Ib.*

12. **Trades-unions.** The orderly and peaceable assembling or co-operation of persons employed in any profession, trade or handicraft for the purpose of securing an advance in the rate of wages or compensation, or for the maintenance of such right, is now permitted by statute. — *Supreme Ct.*, (*Monroe Sp. T.*,) *Nov.*, 1880. Johnston Harvesting Co. *v.* Meinhardt, 60 How. Pr. 168.

13. This statute does not, however, permit an association or trades-union, so-called, or any body of men in the aggregate, to do any act which each one of such persons in his individual capacity and acting independently had not a right to do before the act was passed. *Ib.*

14. This act does not shield a person from liability for his action in intimidating or coercing a fellow-laborer so that he shall leave his employer's service. Such conduct is, in its nature, a trespass upon the rights of business of the employer. *Ib.*

15. If he compels by assault or violence, by threats, by acts of coercion, a fellow-craftsman to leave the employ of another, he commits an offence against the rights of such person which is hardly distinguishable from an act which should itself injure or destroy the product of that man's labor. It is a direct injury to property rights, and may be regarded as the sole proximate cause of such injury, for the laborer in such cases has not freedom of action and cannot himself be deemed to take any part in the transaction. *Ib.*

SPECIAL PROCEEDINGS.

Reference of claim against estate. A proceeding by reference under the statute to determine and enforce a disputed claim against an estate is not an action, but a special proceeding.—*Ct. of App., June*, 1880. Roe *v.* Boyle, 81 N.Y. 305.

For decisions relating to any special proceeding having a *distinct name*, see the title of the proceeding, such as CONTEMPT; DISCOVERY; HABEAS CORPUS; MANDAMUS; MECHANICS' LIEN; PROHIBITION; QUO WARRANTO.

For proceedings to obtain the *Condemnation of land* to public use, see EMINENT DOMAIN; HIGHWAYS; MUNICIPAL CORPORATIONS; RAILROAD COMPANIES.

For *Summary proceedings* to recover leased premises, see LANDLORD AND TENANT, IV.

For proceedings *Supplementary to execution*, see EXECUTION, V.

SPECIAL VERDICTS.

TRIAL,

SPECIFIC PERFORMANCE.

1. **What contracts may be enforced.** As to when a court of equity will enforce the performance of a conveyance of property, upon a verbal trust; the admissibility of oral evidence, as to the directions given by the grantor; and when the testimony of the grantee is inadmissible after the death of the grantor, see Moyer *v.* Moyer, 21 Hun 67.

2. **What will not be.** Plaintiff sued to compel defendant to execute and deliver a lease of certain premises in the city of New York, for the period of four years from May 18th, 1881, upon the ground of part performance of an agreement to lease. Defendant claimed that plaintiff was in possession under an oral lease for one year. *Held,* under the evidence, that the possession of plaintiff, as it might have been taken under a letting for a year, could not be held to be a part performance of the contract alleged by him; nor could the improvements upon the premises be a part performance, as they were not made in pursuance of any provision of the agreement.—*Com. Pleas, (Eq. T.,) June,* 1881. McIneres *v.* Hogan, 61 How. Pr. 446.

3. The parties entered into a contract by which plaintiffs agreed to deliver, transfer and set over to defendant two tax leases, made by the corporation of the city of New York, "with all and singular the premises therein mentioned and described, and the buildings thereon, with the appurtenances," for and during the residue of the term of years specified in the leases, for a certain sum which defendant agreed to pay as specified, and to secure a portion by bond and mortgage. In an action for a specific performance of said contract, the court found that the leases, and the proceedings taken to authorize them, were irregular and defective.

Held, 1. That as the agreement was not merely to transfer the leases, but the lands and buildings for the terms of the leases, and the leases being invalid, so that plaintiffs could not transfer a good title, a specific performance on the part of defendant could not be decreed.

2. That the question as to whether defendant entered into possession under the contract was not material; that if he did so enter it would not entitle plaintiffs to a specific performance if they had no title, nor would it preclude defendant from objecting to the title.—*Ct. of App., April,* 1880. Bensel *v.* Gray, 80 N. Y. 517.

4. Subsequent to the agreement, defendant purchased and received a conveyance from the owner of the lands. *Held,* that this did not cure the defects in plaintiffs' title, as the title so acquired was independent of and hostile to the one plaintiffs undertook to convey. *Ib.*

5. **Damages in lieu of specific performance.** Where, in an action brought by vendees to enforce the specific performance of a contract for the exchange of real estate, the court, on account of the refusal of the vendor's wife to join in the conveyance of one of the pieces, refuses to decree a specific performance, but retains the action for the purpose of determining and awarding to the plaintiffs the damages occasioned by the breach of the contract, it may, in case the vendor becomes insolvent and makes a general assignment during the pendency of the action, direct that the judgment be declared a lien on the premises which were to have been conveyed, and direct that the same be sold for the payment of the amount thereof.—*Supreme Ct., (4th Dept.,) Jan.,* 1881. Price *v.* Palmer, 23 Hun 504.

STATE.

I. GENERAL PRINCIPLES.
II. CONTRACTS WITH THE STATE.

I. GENERAL PRINCIPLES.

1. **What actions may be brought in the name of the people.** An action to recover real property is not within the purview of the act of 1875, (Laws of 1875, ch. 49,) authorizing actions to be brought by the people of the state to recover "money, funds, credits and property" held by public corporations, boards, officers or agents for public purposes, which have been wrongfully converted or disposed of; the word "property" associated with the preceding words of specific description in the act is to be construed as referring to property of the same general character.—*Ct. of App., March,* 1881. People *v.* New York, &c., R. R. Co., 84 N. Y. 565; *affirming* 22 Hun 95.

2. The said act was not intended to confer jurisdiction to review, by means of an action, as therein prescribed, the proceedings of towns in town meetings or to set them aside upon the allegation that the action of a town meeting was produced by corruption, intimidation or violence. Accordingly—*Held,* that an action by the people was not maintainable under said act to recover lands of a town, the title to which, it was alleged, had been wrongfully acquired, through the wrongful interference of its servants and agents with the action of a town meeting; they procuring the passage of a vote authorizing the conveyance of the lands for a grossly inadequate sum, by the action of persons not legal or qualified voters. *Ib.*

3. **Counter-claims in suits by the state.** A state, by coming into court as a suitor, does not subject itself to an affirmative judgment upon a set-off or counter-claim. Authority to

render a judgment against the state in one of its own courts cannot be implied, but must be express. It cannot be claimed under general laws in which the state is not mentioned. Accordingly—*Held*, that the provision of the Revised Statutes (2 Rev. Stat. 552, § 13,) providing that civil actions or proceedings instituted in the name of the state "shall be subject to all provisions of law respecting similar suits and proceedings" instituted by individuals, save where otherwise provided, and that the state shall be liable to be nonsuited, etc., did not authorize an affirmative judgment against it on a counter-claim.—*Ct. of App., March*, 1881. People *v.* Dennison, 84 N. Y. 274.

4. Judgment was rendered upon the report of referees in favor of plaintiff. This was reversed by the General Term. The attorney-general, on appeal to this court, gave the required stipulation for judgment absolute. *Held*, that this was not an assent to an affirmative judgment on the counter-claims, that it waived no legal objection to the counter-claim, or immunity of the state from such a judgment *Ib.*

5. It was claimed on the part of defendants that the counter-claim, having been put in issue, would be barred if no judgment was rendered thereon. *Held*, untenable; that defendants' demand for a balance due, not being the proper subject of a counter-claim in this action, was not properly in issue, and the judgment rendered would not conclude defendants in respect thereto. *Ib.*

II. Contracts with the State.

6. Powers of comptroller—auditing bills. Relator, an appraiser duly appointed by the superintendent of the insurance department, presented an itemized bill for services as such appraiser, which was approved by said superintendent. *Held*, that the duties of the state comptroller, under the acts of 1873 and 1879, requiring him then to audit such bill, were confined to an examination for the purpose of seeing whether the preliminary steps required by law had all been taken; and that he had no power, arbitrarily, and on his own sense of right and justice, either to increase, decrease or reject the bill altogether, because the charges as made did not meet his approval.—*Supreme Ct.*, (*Alb. Sp. T.*,) 1880. Matter of Murphy, 60 How. Pr. 258.

STATUTE OF FRAUDS.

Contracts, III.; Guaranty, II.; Sales, 3-5; Vendor and Purchaser,

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STATUTES.

I. Constitutionality. Validity.
II. Interpretation and Effect.
III. Repeal; and its Effect.

I. Constitutionality. Validity.

1. Constitutionality, generally. The legislature has not power to control future legislation upon matters of public interest. Thus, one legislature cannot prevent a subsequent one from legalizing the use of steam upon a particular street.—*Supreme Ct.*, (*Alb. Sp. T.*,) *June*, 1880. People *v.* Long Island R. R. Co., 9 Abb. N. Cas. 181.

2. A general law for the administration of justice, either civil or criminal, which professes to be for the government of the whole state, must operate equally upon all.—*Supreme Ct.*, (*Alb. Sp. T.*,) *June*, 1881. Matter of Bayard, 61 How. Pr. 294.

3. Unless the legislature have the grounds of the application to condemn lands, showing the necessity and the public use of the lands to be taken, laid before it and incorporated in the act, such act is unconstitutional and void.—*Supreme Ct., Dec.*, 1880. Carleton *v.* Darcy, 46 Superior 484.

4. Local statutes. An act providing for the length of the term of office of supervisors in four counties of the state, is a local bill within the meaning of § 18 of art. III. of the constitution, and is therefore void.—*Supreme Ct.*, (*Alb. Circ.*,) *Jan.*, 1881. People, ex rel. Hassell, *v.* Hoffman, 60 How. Pr. 325.

5. Statutes passed under the police power of the state. Ch. 190 of 1878, making it a misdemeanor for any person to remove any sand, earth or clay from the beach on the south shore of Staten Island opposite and contiguous to the seaside boulevard, in the town of Southfield, from within twenty feet of ordinary high-water mark, so as in any manner to injure, undermine, encroach upon or endanger the said boulevard or the meadows adjacent thereto, or render the same liable to be overflowed or washed by the tide or water of the bay of New York, is constitutional and valid as against one in possession and having title to such beach, it having been passed by the legislature under and in pursuance of the police powers vested in it. —*Supreme Ct.*, (*2d Dept.*,) *May*, 1881. Hodges *v.* Perine, 24 Hun 516.

II. Interpretation and Effect.

6. Referring to title or preamble. When the language of a statute is apt, and the construction plain, the construction cannot be affected by the title; that can only be resorted to when the statute itself is doubtful or ambiguous.—*Ct. of App., Sept.*, 1880. Matter of Village of Middletown, 82 N. Y. 196.

7. The preamble can neither restrict nor extend the enacting part of the statute where the language of the latter is plain both as to its meaning and scope.—*Supreme Ct.*, (*Sp. T.*,) *Feb.*, 1881. Hatch *v.* Amer. Union Teleg. Co., 9 Abb. N. Cas. 223.

8. Effect given to contemporaneous construction. The construction placed upon the statute of another state by the courts of that state is, as a general rule, controlling, and will be followed by the courts of this state.—*Ct. of App., April*, 1880. Jessup *v.* Carnegie, 80 N. Y. 441.

9. *It seems*, however, that where a statute has been construed by the courts of the state whose legislature enacted it, and obligations have been entered into on the faith of such decisions, a subsequent decision giving a different construction will not control as to such prior transactions. *Ib.*

10. The practical construction put upon a statute by public officers whose duty it is to obey it, is not controlling upon the courts.—*Ct. of App., Sept.*, 1880. Matter of Manhattan Savings Inst., 82 N. Y. 142.

11. Effect given to foreign statutes. The exercise of comity in admitting or restraining the application of the laws of another country, rests in sound judicial discretion dictated by the circumstances of the case. Where those laws are in contravention of the policy and the laws of this state, and to give them effect here, would be to the inconvenience and injury of citizens, the courts, at least as between citizens of this state, are not required to give them that effect.—*Ct. of App., June*, 1880. Edgerly *v.* Bush, 81 N. Y. 199, 204.

12. References to prior statutes. A general reference in an act, to another act which, at the time of the reference had been amended, is a reference to the act as amended, and not as originally passed. Therefore, where a statute provided that an act passed at a specified date should be deemed a part of it—*Held*, that the act with its amendments, and not the act as it was at the date of its passage, was intended.—*Supreme Ct.*, (*4th Dept.*,) 1880. Matter of Mundy *v.* Excise Commissioners of New York City, 9 Abb. N. Cas. 117.

13. What laws operate retrospectively. Ch. 254 of 1880, exempting corporations organized under the general manufacturing act from the operation of §§ 5, 6 and 8 of 1 Rev. Stat. 603, providing for the determination, on a summary application, of the claims of persons to have been elected officers of a corporation, operates retrospectively, and prevents the further prosecution of proceedings theretofore commenced, and then pending under and in pursuance of the said sections of the Revised Statutes.—*Supreme Ct.*, (*1st Dept.*,) *Jan.*, 1881. Matter of New York Express Co., 23 Hun 615.

14. Interpretation of penal statutes. The court will not imply a term into a statute for the purpose of extending or imposing a penalty; on the contrary, a penal statute will be strictly construed.—*Ct. of App., Feb.*, 1880. Bonnell *v.* Griswold, 80 N. Y. 128.

III. Repeal; and its Effect.

15. Implied repeal. Where a later statute, not purporting to amend a former one upon the same subject, covers the whole subject, and was plainly intended to furnish the whole law thereon, the former statute will be held to be repealed by necessary implication, although the later statute contains no repealing clause.—*Ct. of App., June*, 1880. Heckmann *v.* Pinkney, 81 N. Y. 211, 215.

STAY OF PROCEEDINGS.

[Includes only *General rules*, respecting the obtaining and effect of a stay, in an action or special proceeding. For rules applicable to any particular *Action or Proceeding*, see its title. Consult, also, Injunction, 6-8.]

Vacating stay improperly granted. During the pendency of this action and prior to the recovery of a judgment herein, defendant procured from the Court of Common Pleas of the city of New York an order directing him to make an assignment of all his property, and discharging him from his debts, under the "Two-Third Act." Thereafter this order was, upon plaintiff's application, vacated and the discharge canceled on the ground that it was fraudulently and irregularly procured. From this last order defendant appealed to the General Term of the Common Pleas, and procured a stay of all proceedings in the Court of Common Pleas during the pendency of such appeal. Thereafter plaintiff having recovered a judgment in this action and instituted proceedings to procure the appointment of a receiver, defendant obtained an order staying all proceedings in this action pending the stay granted by the Common Pleas. Upon an appeal from that order,

Held, 1. That the stay of proceedings was in effect an injunction staying proceedings upon a judgment for a sum of money, within Code of Civ. Pro., §§ 613, 618, and could only be granted upon the payment of the amount thereof into court, or upon security therefor being given as therein provided.

2. That in the absence of any averment of fraud or error, it would be subversive of right and contrary to precedent to stay the enforcement of a valid and regular judgment, without statutory authority, merely because another court might hereafter decide that the defendant was entitled to be discharged from his debts.—*Supreme Ct.*, (*1st Dept.*,) *Sept.*, 1880. Eastman *v.* Starr, 22 Hun 465.

As to stay upon *Appeal*, see Appeal, 45-47, 112.

As to staying proceedings for *Non-payment of costs*, see Costs, 63.

STENOGRAPHERS.

Liability of *Attorneys* for fees of, see Attorney and Client, 2.

STILWELL ACT.

Arrest, 1.

STOPPAGE IN TRANSIT.

Sales, 13-15.

SUMMARY PROCEEDINGS.

Landlord and Tenant, IV.

SUPPLEMENTARY PROCEEDINGS.

Execution, V.

SUPREME COURT.

COURTS, 10-13.

SURETIES.

PRINCIPAL AND SURETY.

SURROGATES' COURTS.

COURTS, III.

SYRACUSE.

MUNICIPAL CORPORATIONS, 69.

T.

TAXATION OF COSTS.

COSTS, 54-60.

TAXES.

I. THE POWER TO IMPOSE TAXES.
II. WHO MAY BE TAXED, AND FOR WHAT PROPERTY. EXEMPTIONS.
III. ASSESSMENT AND COLLECTION.
IV. SALE OF LAND FOR NON-PAYMENT. TAX TITLES.
V. REMEDIES FOR ILLEGAL TAXATION.

I. THE POWER TO IMPOSE TAXES.

II. WHO MAY BE TAXED, AND FOR WHAT PROPERTY. EXEMPTIONS.

1. **Agents.** As to the liability of an agent to taxation upon moneys held by him for investment in behalf of his principal, see Matter of Boardman *v.* Sup'rs of Tompkins Co., 22 Hun 231.

2. **Corporations, generally.** For the purposes of taxation, the designation of the place in which the principal office is to be located, in the certificate of incorporation of a company organized under the act providing for the incorporation of companies to navigate the lakes and rivers, (Laws of 1854, ch. 232,) is conclusive; and in the county thus designated alone can the personal property of the corporation be lawfully taxed.—*Ct. of App., Oct.*, 1880. Union Steamboat Co. *v.* City of Buffalo, 82 N. Y. 351.

3. *It seems* that the facts that the principal office of such a corporation was located by its certificate with a view to avoid taxation, and that the business of the company is mainly carried on in another county, are immaterial. *Ib.*

4. The certificate of plaintiff, a corporation organized under said act, located, as specified therein, the "principal office for managing the affairs of such company," instead of using the language of the statute in relation to the taxation of corporations, (1 Rev. Stat. 289, § 6) to wit, "the principal office or place for transacting the financial affairs of the company." *Held*, that the variance was immaterial; that, within the meaning of said statute, the principal office was that fixed by the certificate in accordance with the mandate of the act under which it was incorporated. *Ib.*

5. The act of 1859, (Laws of 1859, ch. 388,) "to make corporations in the city of Buffalo taxable the same as corporations in other cities," did not change the rule as to corporations doing business in that city whose principal office was located by its certificate in another county. *Ib.*

6. **Fire insurance companies** are not taxable under Laws of 1880, ch. 542, on receipts during the five months preceding the passage of the act.—*Supreme Ct.*, (*Albany Circ.*,) *Jan.*, 1881. People *v.* Nat. Fire Ins. Co., 61 How. Pr. 342.

7. **Railroads.** Laws of 1866, ch. 546, § 33, creating the Poughkeepsie and Eastern Railroad Company, provided "that the real and personal property of said corporation, and the capital stock of the same, shall be exempt from taxation for state, county, town or municipal purposes, until a single track of said road shall be completed, for a term, however, not exceeding ten years. *Held*, that it was the intention of the legislature to exempt the road from taxation until a single track should be completed; provided, however, that in no case should the exemption continue for more than ten years from the time of the passage of the act.—*Supreme Ct.*, (*3d Dept.*,) *Nov.*, 1880. Poughkeepsie, &c., R. R. Co. *v.* Simpson, 23 Hun 43.

8. Ch. 702 of 1872, providing for the regulating of the grade of the New York and Harlem Railroad Company in Fourth avenue, in the city of New York, above Forty-second street, and the construction of viaducts and bridges over the same, was intended to relieve the public from the great dangers and annoyances of a steam railroad constantly passing and repassing with its locomotives and trains upon the surface of the avenue, by so placing the tracks and structures of the railroad that the avenue might, as far as practicable, be exclusively and safely used by the public, and at the same time the railroad enjoy equal or greater facilities of ingress or egress to and from its depot in the city than before; and the alterations and changes in the avenue are to be considered, as, in effect, the laying out or alteration and construction of a street, and the work done and structures erected to put the avenue in the condition required by the act are not a subject of taxation as against the railroad company. *Supreme Ct.*, (*1st Dept.*,) *Feb.*, 1881. People, ex rel. New York, &c.,

R. R. Co., *v.* Commissioners of Taxes, 23 Hun 687.

9. By virtue of the said act the railroad company acquired a perpetual and exclusive easement in the lands upon which its tracks and other appurtenances were constructed, independently of the public generally and of the city, in which the fee of the soil remains. *Ib.*

10. This easement and the railroad constructed and used upon it are lands within the meaning of the statute relating to taxation, and are to be assessed at their fair value as a portion of a continuous railroad, having its connections and relations with the lines of railroads beyond the city and the terminus within it. *Ib.*

11. Elevated railroads. The foundations, columns and superstructure of an elevated railway are included in the words "lands" and "real estate" as defined in the statute in reference to taxation (1 Rev. Stat. 387, §§ 1, 2,) and so are taxable as real estate.—*Ct. of App., Nov.,* 1880. People, ex rel. New York Elevated R. R. Co., *v.* Comm'rs of Taxes, 82 N. Y. 459; *affirming* 19 Hun 460.

12. The person or corporation owning these fixtures may be assessed therefor, although the fee of the land to which they are affixed is in another; and this without regard to the question whether that other is a natural person, or a municipality, or whether the land is or is not liable to taxation. *Ib.*

13. The provisions of the statutes in reference to the W. S. and Y. P. R. Co., to whose rights the relator succeeded, requiring that company to pay five per cent. of its net income from passenger traffic upon Manhattan Island, into the treasury of the city of New York, as a compensation to the city for the use of its streets (Laws of 1867, ch. 489, § 9; Laws of 1868, ch. 855, §§ 2, 3, 4,) do not exempt any part of the property of the relator from taxation. *Ib.*

14. Foreign corporations are included in the provision of the act of 1855 in relation to the assessment and collection of taxes (Laws of 1855, ch. 37,) which provides that all non-resident "persons and associations" doing business in this state "shall be assessed and taxed on all sums invested in any manner in said business the same as if they were residents."—*Ct. of App., Feb.,* 1880. People, ex rel. Bay State Shoe, &c., Co. *v.* McLean, 80 N. Y. 254.

15. Under this act, a foreign corporation doing business in this state, and having a principal office or place for the transaction of that business, is to be assessed upon all sums invested therein, as the personal estate of a domestic corporation is assessed (1 Rev. Stat. 390, § 6,) *i. e.*, in the town or ward where such principal office or place of business is located, without regard to the *situs* of the property. *Ib.*

16. Where, therefore, certain materials and machinery belonging to the relator, a foreign corporation doing business in this state, and having only one office for the transaction of its financial concerns, which was in the city of New York, was assessed and taxed in the town of O., to H., an agent of the corporation, and also a resident of that town, who had charge of the property therein, for the purposes of the business of the corporation — *Held,* that no assessment upon the property could be made save in the city of New York; that the assessors of said town had no jurisdiction; and that the assessment was void. *Ib.*

17. A *certiorari* to correct the assessment-roll, by striking out the illegal assessment, was issued after the assessors had completed the roll and delivered it to the supervisor of the town. This fact appearing on the return to the writ, a supplemental writ was issued to the supervisor, commanding him to bring the roll into court, which was done, and a hearing was then had on both writs, on the merits. The objection that the writ was not the proper remedy, because of the fact that the roll had passed out of the hands of the assessors, was not raised. *Held,* that the defendants were concluded from raising it here. *Ib.* 260.

18. Exemptions in favor of national guard. The provision of the national guard act of 1870, (Laws of 1870, ch. 80, § 253,) entitling a member of the national guard to an exemption from the assessed valuation of his property to the amount of $1000, during the period of his military service, was repealed by its omission from the section as amended in 1875. (Laws of 1875, ch. 223, § 59.)—*Ct. of App., March,* 1881. People, ex rel. Sears, *v.* Board of Assessors of Brooklyn, 84 N. Y. 610.

19. No contract relation existed between the state and a member of the national guard who had enlisted prior to the passage of the repealing act, and whose term of service had not then expired, which would prevent it from taking effect as to him. He enlisted subject to the right of the state at any time to modify or repeal the exemption; and upon the repeal, his right to the exemption, as to all subsequent assessments, ceased. *Ib.*

III. Assessment and Collection.

20. The assessment-roll — affidavit of assessors, &c. To the assessment-roll of the town of Ulysses was attached, in attempted compliance with § 8 of ch. 176 of 1851, the following affidavit of its assessors: "We, the undersigned, do severally depose and swear that we have set down in the foregoing assessment-roll all the real estate situated in the town of Ulysses, according to our best information, and that, with the exception of those cases in which the value of the said real estate has been changed by reason of proof produced before us, we have estimated the value of said real estate at the sums which a majority of the assessors have decided to be *the assessed value thereof;* and also that the said assessment-roll contains a true statement of the aggregate amount of the taxable personal estate of each and every person named in such roll, over and above the amount of debts due from such person respectively, and excluding such stocks as are otherwise taxable and such other property as is exempt by law from taxation, at the value thereof, according to our best *knowledge* and belief." *Held,* that the substituting of the words "the assessed value thereof" for the words "the full and true value thereof, and at which they would appraise the same in payment of a just debt due from a solvent debtor," the omission of the words "full and true" before the words "value thereof," and the substitution of the word "knowledge" for "judgment," rendered the affidavit fatally defective, and any tax levied by the board of supervisors upon the said assessment-roll wholly void.—*Su-*

preme Ct., Sept., 1880. Hinckley *v.* Cooper, 22 Hun 253.

21. The warrant—amending assessment-roll, &c. Defendant, in December, 1878, issued its warrant to the collector of the town of F. for the collection of the annual tax levied on the town, which included items for the payment of an installment of principal and interest on bonds of the town issued to pay for a highway improvement. On January 6th, 1879, an order was granted for defendant to show cause why a writ of *certiorari* should not issue, and on February 4th, 1879, the writ was issued and judgment entered directing that the said items be stricken from the tax-roll and the warrant amended accordingly. *Held*, error; that the jurisdiction of defendant and its power to amend the roll terminated with the levy of the tax and the delivery of the roll and warrant to the proper officer; that neither the roll nor the warrant was before the court, and the directions in the judgment were wholly unavailing.—*Ct. of App., Oct.*, 1880. People, ex rel. Weekes, *v.* Supervisors of Queens Co., 82 N. Y. 275; *modifying* 18 Hun 4.

22. The valuation. Where the valuation in an assessment-roll is put merely in figures under the heading of "value of real estate," without anything to indicate whether they represent dollars or cents, there is no valuation shown by the assessment-roll.—*Supreme Ct.*, (1*st Dept.*,) *Oct.*, 1880. Matter of Church of the Holy Sepulchre, 61 How. Pr. 315.

23. Deductions. The N. E. Bank held a lot in the city of New York under a lease which contained a provision giving the lessor an option, at the expiration of the lease, to pay for a building erected on the lot by the lessee or to renew the lease for a further term; and, if so renewed, gave the lessee the right, at the expiration of the term, to remove the building. The building was erected by the bank for its own use, at an expense of $65,000, so much of the capital of the bank being invested therein. The property was assessed to the bank as real estate at $70,000. The tax commissioners, in assessing the stockholders of the bank, as authorized by the act of 1866, (Laws of 1866, ch. 761,) refused to deduct anything from the assessed value of the shares on account of such investment. *Held*, error; that for the purposes of taxation, within the purview of said act of 1866, the building was real estate of which the bank was the owner, and it was taxable to the bank as real estate; that the real estate, the assessed value of which is to be taken as a basis for the proportionate deduction from the value of the shares, is the real estate of the bank; that therefore the assessed value of the building, and that only, should have been deducted; that such assessed value was not necessarily the cost of the building; it could not be more, as no more of the capital of the bank was invested, but it might be less; that as the lot and building were assessed together at $70,000, it could only be determined by the officers making the assessment what proportion of the assessment was for the building. Proceedings, therefore, remitted for modification of assessment.—*Ct. of App., April*, 1880. People, ex rel. Van Nest, *v.* Commissioners of Taxes, 80 N. Y. 573.

24. As to the rule that a party can only be assessed for his "taxable personal property," deducting from its value the just debts owing by him, and what are just debts, see People, ex rel. Thurman, *v.* Ryan, 61 How. Pr. 452.

25. Collectors; and suits on their bonds. One McI., having been appointed collector of the village of E., gave a bond to plaintiff, its treasurer, with defendants as his sureties, conditioned that he shall "well and truly collect the tax which may be delivered to him, and faithfully discharge his duties as such collector, * * * and pay over moneys which he shall receive for taxes as such collector." In an action upon the bond—*Held*, that defendants were not liable for the failure of the collector to pay over state, county and town taxes levied upon those portions of the town included in the corporate limits and collected by him; that the taxes intended and covered by the bond were such as the village authorities had a right to impose for village purposes on the whole village; that while, by the charter of the village, (Laws of 1870, ch. 674,) all of the taxes upon property within the corporate limits are to be collected by the village treasurer, those assessed upon the towns were not assessed upon the village, and defendants' obligation did not include them.—*Ct. of App., June*, 1880. Ward *v.* Stahl, 81 N. Y. 406.

26. *Quære*, as to whether § 43 of 1 Rev. Stat., (6th ed.,) 833, providing that "every such bond shall be a lien on all the real estate held jointly or severally by the collector or his sureties within the county at the time of the filing thereof," does not create a lien upon real estate of the surety held only by an equitable title, when he is in possession thereof, lawfully exercising the rights of an owner.—*Supreme Ct.*, (4*th Dept.*,) *Jan.*, 1881. Upham *v.* Paddock, 23 Hun 377.

IV. Sale of Lands for Non-payment. Tax Titles.

27. Rights of purchaser—recovery of the land. What facts must be proved in summary proceedings by the owner of a tax-lease to recover land; and that service of a notice to redeem is not proved by the affidavit of the party serving the same, see People, ex rel. Vogler, *v.* Walsh, 22 Hun 139.

28. Redemption—notice to redeem. The plaintiff, claiming to be the owner of a lot in the city of Syracuse, brought this action to have a deed thereof executed by the county treasurer, upon the sale of the lot for unpaid taxes, set aside, as a cloud upon her title, upon the ground that no notice to redeem had been given to the owner or occupant thereof.

Held, 1. That if § 12 of ch. 858 of 1867 (the act under which the sale was made) did not make applicable to proceedings under it, the provisions of the general laws of the state relating to the giving of a notice to redeem after a sale for taxes, (Laws of 1855, ch. 427, §§ 68–75,) then no such notice was required, as the act of 1867 contained no provision requiring such notice to be given, and the defendant's deed was valid.

2. That, if the provisions of the general laws on that subject did apply, then the plaintiff's right to redeem was still perfect, and as the defendant's deed would not entitle them to recover possession of the land without the production of the treasurer's certificate, showing a failure on the part of the owner or occupant to redeem

after due notice had been given, the plaintiff had no occasion to come into a court of equity for relief.

3. That, in either event, this action could not be maintained.—*Supreme Ct.*, (*4th Dept.*,) *June*, 1880. Stewart *v.* Crysler, 21 Hun 285.

29. Laws of 1867, ch. 858, § 10, renders the deed conclusive evidence of the regularity of the sale, and prevents its validity from being attacked by proof of a misdescription of the land in the notice of sale. *Ib.*

30. Under Laws of 1855, ch. 427, § 34, the validity of a sale is not affected by any error in the description of the land in the printed notice of sale. *Quære*, as to the constitutionality of these provisions. *Ib.*

V. Remedies for Illegal Taxation.

31. Replevying property levied on. The defendant, while acting as a collector of school taxes, levied upon a cow, belonging to the plaintiff, under a warrant for a school tax assessed against the plaintiff's husband for a farm. It appeared that the farm belonged to the plaintiff, and that her husband resided with her upon it. In this action, brought by the plaintiff to replevy the cow—

Held, 1. That, as the farm was improperly assessed to the husband, the warrant under which the defendant acted was void, and furnished no justification for his acts.

2. That the statute, providing that property taken by virtue of a warrant for the collection of any tax, should not be replevied, was not applicable where property owned by, and in the possession of, one person, was seized for the tax of another, and that it did not prevent the plaintiff from maintaining this action.—*Supreme Ct.*, (*2d Dept.*,) *Sept.*, 1880. Hallock *v.* Rumsey, 22 Hun 89.

32. Action to recover back money paid for taxes. Where the assessors of a city in which the principal office of a corporation is not located have assessed its personalty, and where the corporation, coerced by a levy upon its property, has been compelled to pay the tax, an action is maintainable by it against the city to recover back the money so paid. It is not confined to a remedy by *certiorari* to correct the illegal assessment. *It seems* that the latter remedy is the appropriate one where the assessors have jurisdiction, but have simply erred in judgment.—*Ct. of App.*, *Oct.*, 1880. Union Steamboat Co. *v.* City of Buffalo, 82 N. Y. 351.

As to *Assessments for local improvements*, see Municipal Corporations, 6-19; New York City, 6-51.

TELEGRAPH COMPANIES.

1. Consolidation. A sale and conveyance by a telegraph company, incorporated under the general laws of this state, of its property, rights, privileges and franchises to another company, incorporated under said laws, for and in consideration of stock of the latter company, is valid and not against public policy.—*Supreme Ct.*, (*Sp. T.*,) *Feb.*, 1881. Hatch *v.* Amer. Union Teleg. Co., 9 Abb. N. Cas. 223.

2. The fact that such an agreement provides for the distribution of the price to the stockholders of the selling company, *pro rata*, instead of direct payments to the corporation itself, is no objection to such agreement. *Ib.*

3. An agreement between two telegraph companies, incorporated under the laws of this state, by virtue of which their receipts and expenses are added together and divided between the two companies in certain fixed proportions, is within the powers conferred upon such corporations by statute, and is not *ultra vires.*—*Supreme Ct.*, (*Sp. T.*,) *May*, 1878. Benedict *v.* Western Union Teleg. Co., 9 Abb. N. Cas. 214.

4. Stock-dividends. The provision (2 Rev. Stat., 5 ed., p. 99, tit. 4, § 2,) forbidding directors to make dividends, except from surplus profits, or to divide or pay to the stockholders any part of the capital stock, applies to telegraph companies.—*Superior Ct.*, (*Chamb.*,) *May*, 1881. Hatch *v.* Western Union Teleg. Co., 9 Abb. N. Cas. 430.

5. Increase of stock. Laws of 1848, ch. 265, as amended by Laws of 1875, ch. 319, permitting telegraph companies to increase their stock, construed, and in what cases an increase of capital stock is authorized, determined.—*Superior Ct.*, (*Chamb.*,) *March*, 1881. Williams *v.* Western Union Teleg. Co. 9 Abb. N. Cas. 419.

TENANTS.

For *Years*, see Landlord and Tenant; Leases.

By the *Curtesy* or in *Dower*, see Curtesy; Dower.

In *Common*, see Tenants in Common

TENANTS IN COMMON.

1. Trover between tenants in common—parties. Where, upon the face of the complaint, it appears that the plaintiff, claiming to be the owner of a one-third interest in a chattel, has brought the action to recover damages for the conversion of the said interest by the defendant, an objection to his omission to make the owners of the remaining two-thirds of the chattel parties to the action, must be taken by demurrer or it will be waived.—*Supreme Ct.*, (*4th Dept.*,) *April*, 1881. Maxwell *v.* Pratt, 24 Hun 448.

2. *Quære*, whether, where an owner of an undivided one-third of a chattel brings an action to recover damages for the conversion thereof, and the defendant has committed no trespass upon the rights of the owners of the other two-thirds of the chattel, but acknowledges their rights and only claims to be a joint owner with them, it is necessary for the plaintiff to make the owners of the other two-thirds parties to the action. *Ib.*

3. What amounts to conversion. The fact of the possession and use by one of two tenants in common of personal property, of the property so held, even though it prevents the possession and use by the other, furnishes no ground to the latter for an action for conversion.—*Ct. of App.*, *Dec.*, 1880. Osborn *v.* Schenck, 83 N. Y. 201; *affirming* 18 Hun 202.

4. *It seems*, however, that if the possession develops into a destruction of the property, or of the interest of the co-tenant, or into such a hostile appropriation of it as excludes the possibility of beneficial enjoyment, or if it ends in a sale of the whole property, ignoring the rights of such co-tenants, then a conversion is established. *Ib.*

5. A purchaser, however, from the co-tenant who has assumed to sell the whole property, is not made liable simply from his purchase and claim to be sole owner. *Ib.*

6. **Knowledge of one, when binds co-tenants.** Where one tenant in common acts for all the others in the care and charge of premises held in common, his knowledge will be attributed to his co-tenants.—*Ct. of App.*, *Oct.*, 1880. Ward *v.* Warren, 82 N. Y. 265; *affirming* 15 Hun 600.

TENDER.

1. **When necessary; sufficiency, &c.** In an action to rescind a sale on the ground of fraud, it is sufficient to produce upon the trial and offer to surrender the notes given for the goods purchased; no tender of them need be made before the commencement of the action. —*Supreme Ct.*, (1*st Dept.*,) *Nov.*, 1880. Naugatuck Cutlery Co., *v.* Babcock, 22 Hun 481.

2. A tender made after the commencement of an action, must include costs incurred.—*Supreme Ct.*, (2*d Dept.*,) *Sept.*, 1880. Eaton *v.* Wells, 22 Hun 123.

3. **Plea of tender, and its effect.** An averment of tender in an action, admits the cause of action stated in the complaint to the amount tendered; the defendant is bound by the averment, and the plaintiff or the court may accept it as an admission establishing the fact that a tender was made.—*Ct. of App.*, *Nov.*, 1880. Eaton *v.* Wells, 82 N. Y. 576.

TERMS.

Of tenant under *Lease*, see LANDLORD AND TENANT, I.

As to terms of *Office*, see the titles of the various particular officers.

TESTAMENTARY CAPACITY.

WILLS, 1.

THEFT.

LARCENY

TIME.

When time is of the *Essence of a contract*, see CONTRACTS, VI.

As to the time within which to sue, see LIMITATIONS OF ACTIONS, II., III.

TITLE.

To *Real property*, see REAL PROPERTY; also DESCENT; DEVISE; EJECTMENT; MORTGAGES.

To *Personal property*, see CHATTEL MORTGAGES; REPLEVIN; SALES; TROVER.

As to *Covenants* of title, see COVENANTS.

As to *Plea of title* in justices' courts, see JUSTICE OF THE PEACE, 2.

As to acquiring title by *Adverse possession*, see that title.

For rules governing *Proceedings to try title to office*, see QUO WARRANTO.

As to proceedings to acquire title by exercise of the right of *Eminent domain*, see EMINENT DOMAIN; also HIGHWAYS, I.; RAILROAD COMPANIES, II.

TORTS.

ASSAULT; CONSPIRACY; DAMAGES, 6-13; FALSE IMPRISONMENT; FRAUD; LIBEL; MALICIOUS PROSECUTION; NEGLIGENCE; NUISANCE; SEDUCTION; SHIPPING, 8, 9,; SLANDER; TRESPASS; TROVER.

TOTAL LOSS.

INSURANCE, 72.

TOW BOATS.

SHIPPING, 2.

TOWNS.

1. **Action by supervisor.** A supervisor may sue, as such, to recover a balance remaining in the hands of his predecessor, as ascertained and certified by the town auditors.—*Supreme Ct.*, (*Delaware Sp. T.*,) *Sept.*, 1880. Gleason *v.* Youmans, 9 Abb. N. Cas. 107.

2. This right of action of the supervisor in his own name, is conferred by 2 Rev. Stat., 473, § 92, and is not taken away, nor conferred upon the town, by Laws of 1866, ch. 534. *Ib.*

3. **Audit of claims against towns.** It is the duty of a board of town auditors to pass specifically upon each separate item of a claim presented for audit. An arbitrary reduction from the gross amount of a bill for various items of services, the compensation for which is regulated by statute, without passing upon and disallowing any specific item, is not an audit.—*Ct. of App.*, *Sept.*, 1880. People, ex rel. Thurston, *v.* Town Auditors of Elmira, 82 N. Y. 80; *affirming* 20 Hun 150.

4. The relator presented to defendant a bill duly verified for twenty-seven days' service as

commissioner of highways, specifying by date each day and the particular service or duty performed, and charging $2 per day, the statutory fee. Without allowing or disallowing any particular item in the account, the board allowed a gross sum of $34. *Held*, that this was not an auditing of the account, and that a *mandamus* to compel such an audit was properly awarded. *Ib.*

TRADE-MARKS.

1. **What may be appropriated as a trade-mark.** A trade-mark is not necessarily limited to a device or name, but may consist of any marks, forms or symbols, which serve to designate the true origin or ownership of the article.—*Supreme Ct.*, (1st *Dept.*,) *Jan.*, 1881. Enoch Morgan Sons' Co. *v.* Troxell, 23 Hun 632.

2. **What may not be.** To make an exclusive right to use a name or symbol as a trade-mark, such use must be new; if ever before used as applicable to a like article, it cannot be exclusively appropriated.—*Ct. of App.*, *Nov.*, 1880. Van Biel *v.* Prescott, 82 N. Y. 630.

3. If the article is known to commence in general, by the term claimed, as a trade-mark, the claim is ill founded. *Ib.*

4. If the term employed indicates the nature, kind, or quality of the article, instead of showing its origin, an exclusive right to its use is not maintainable. *Ib.*

5. **Instances.** Defendants and their predecessors in business had, for more than ten years, sold a mixture of white rock candy and rye whiskey as a beverage, using the name "rye and rock" to designate it, and, in December, 1877, displayed signs at their place of business having on them those words. Other parties, also, during that period, had sold the same mixture, known by the same name. Plaintiffs, since December, 1877, have sold the same mixture, and, in 1878, made application to the commissioner of patents for a trade-mark of "rye and rock," and letters of trade-mark were issued to them. *Held*, that plaintiff had no exclusive right to the use of the words; and that an action to restrain their use by defendants was not maintainable. *Ib.* See, also, 46 Superior 542.

6. **What constitutes an infringement.** Trade-marks may consist of pictures, symbols, or a peculiar form or fashion of label, or they may consist simply of a word or words. Where the trade-mark is of the first kind, to constitute an infringement, there must be such an imitation as to amount to a false representation, liable to deceive the public.—*Ct. of App.*, *Nov.*, 1880. Hier *v.* Abrahams, 82 N. Y. 519.

7. Where, however, the trade-mark consists of a word, it continues to be the distinguishing mark of the manufacture to which it is applied, in whatever form it is printed or represented; and its use by another, in any form, applied to similar articles, is unlawful and may be restrained. *Ib.*

8. The use of the word by another is not justified, although used in connection with different words from those in connection with which it is used by the party who has appropriated it as a trade-mark. *Ib.*

9. **When an injunction will be granted.** Plaintiffs for three years before the commencement of this action had adopted and used the word "Pride" as a trade-mark in the manufacture and sale of, and to designate their cigars. Defendants, with knowledge of this, used the same word on the labels and boxes of cigars manufactured by them.

Held, 1. That said word, as applied to cigars, was arbitrary, not descriptive of the article, and one which could lawfully be appropriated as a trade-mark; and that plaintiffs were entitled to an injunction restraining its use by defendants.

2. That as the infringement charged was the appropriation of a word, not an imitation of a symbol or label, it was no defence that defendants' labels did not resemble those of plaintiffs. *Ib.*

10. It is not essential to property in a trade-mark that it should indicate any particular person as the maker of the article to which it is attached; it may represent, to the purchaser, the quality of the things offered for sale, and in that case is of value to any person interested in putting the commodity to which it is applied, upon the market, and he is entitled to protection in its use.—*Ct. of App.*, *June*, 1880. Godillot *v.* Harris, 81 N. Y. 263, 266.

11. Plaintiff devised the ingredients of a vegetable compound which was manufactured and put up in Paris expressly for him, and was imported by him; sales were made in the names of third parties, but he was interested in the result. To designate the article he prepared and had engraved and printed a label containing words designating the origin and the article itself, which he attached to the packages as a trade-mark. Defendant, after a market had been established for the article, prepared and offered for sale substantially the same kind of goods, placing upon the packages a label so nearly like that of plaintiff's that a buyer would be easily deceived. *Held*, that plaintiff had acquired the right to the exclusive use of the trade-mark by its prior use and application; and this although the goods were manufactured for and not by him; and that an action restraining defendant from using the label was maintainable. *Ib.*

12. **When refused.** The parties hereto were formerly partners in the business of manufacturing glass chimneys for lamps, and they adopted the word "Silex" as a trade-mark. The firm was dissolved in June, 1877; the defendants sold to the plaintiff their interest in the real estate used for the business, and in certain specified personal property connected with it. Nothing was said at the time about the good-will of the business, or the trade-mark, and there was no reference to it in the bill of sale. Thereafter the plaintiff continued the business at the same place, using the same trade-mark. In October, 1877, defendants commenced and thereafter carried on the same business in the same city, using the same trade-mark. In an action to restrain such use—*Held*, that assuming the word "Silex" could be used as a trade-mark, and that the firm while it existed had the exclusive right so to use it, such exclusive right was not acquired by plaintiff, and the action was not maintainable; that after the dissolution either of the late partners could use it until in some way he had divested himself of that right; that as the trade-mark was not in its

nature local, it did not pass as an incident to what was sold; that it was incumbent upon the plaintiff to show himself vested, by some agreement, with the exclusive right to use it; and that this he had failed to do.—*Ct. of App., Nov.,* 1880. Huwer *v.* Dannenhoffer, 82 N. Y. 499.

13. The complaint. When the complaint in an action to restrain the use of a trade-mark states facts sufficient to constitute a cause of action, see Linde *v.* Bensel, 22 Hun 601.

As to enjoining *Infringements* of trade-marks, see, also, INJUNCTION, 18-21.

TREASURER.

COUNTIES, 5; NEW YORK CITY, 69.

TRESPASS.

1. When trespass quare clausum will lie. As an action of trespass *quare clausum fregit* is local in its character, it will not lie in this state where the land is located in another state.—*Ct. of App., March,* 1880. American Union Teleg. Co. *v.* Middleton, 80 N. Y. 408.

2. Pleading and evidence. In an action of trespass it is not necessary, in order to recover damages which necessarily and naturally result from the injury complained of, to specifically allege them in the complaint.—*Ct. of App., Oct.,* 1880. Argotsinger *v.* Vines, 82 N. Y. 308.

3. In an action of trespass on land, plaintiff proved a chain of title, beginning with a deed executed more than thirty years prior to the commencement of the action, to a farm of one hundred and twenty-two acres, of which one hundred acres were cultivated and twenty-two acres contiguous woodland. The latter were not fenced or inclosed, but this, it appeared, was in accordance with the custom of the country. Plaintiff gave evidence to the effect that he and his predecessors in title had occupied continuously from the time of said conveyance, paying taxes on the entire farm, cutting from the whole woodland indiscriminately, wood and lumber for fuel, fencing and repairing buildings on the farm, and cutting logs for lumber and for sale. The *locus in quo* was eleven acres of the woodland, to which defendant claimed title under a grant from the state to W., executed in 1829, and a conveyance to his grantor from W., executed in 1877. Defendants proved that W., who died over forty years before the trial, lived on a farm contiguous to the eleven acres for a time, but moved therefrom to another farm three or four miles distant. There was no proof of possession or claim of ownership by him or under his title until the trespass complained of.

Held, 1. That plaintiff established conclusively an adverse possession of the *locus in quo,* and that the trial court properly refused to submit the question to the jury.

2. That plaintiff was not bound to resort to ejectment or any other remedy to vindicate his rights, but that the evidence of actual possession was sufficient to maintain trespass. *Ib.*

4. Defendants' answer set forth the conveyance to W., and alleged title and possession in him and his successors down to the time of the alleged trespass. *Held,* that the Code of Pro., § 153, did not require a reply. *Ib.*

TRIAL.

I. MODE OF TRIAL. WHETHER BY JURY OR BY COURT.
II. PLACE OF TRIAL; AND HOW CHANGED.
III. BRINGING ON THE TRIAL. THE CALENDAR.
IV. IMPANELING THE JURY.
V. CONDUCTING THE TRIAL.
VI. INSTRUCTIONS TO THE JURY.
VII. THE VERDICT OR FINDING.
VIII. TRIAL IN CRIMINAL CASES.

I. MODE OF TRIAL. WHETHER BY JURY OR BY COURT.

1. Right to jury trial. An action against trustees of a savings bank to recover damages for negligence in the discharge of their duties, is properly tried by jury.—*Ct. of App., Sept.,* 1880. Hun *v.* Cary, 82 N. Y. 65.

2. In an action brought by the administrator of a deceased person to recover articles of personal property alleged to form part of his estate, where equitable relief by way of an injunction and the appointment of a receiver is demanded, the plaintiff has no right to a trial by jury, unless the defendant consent thereto, unless issues be framed and settled in accordance with the usual practice in equity cases.—*Supreme Ct., (4th Dept.,) Jan.,* 1881. Ward *v.* Plato, 23 Hun 402.

3. Waiver of the right. The cause was noticed and moved for trial at Special Term. Before the counsel for plaintiff opened his case, defendants' counsel "objected to the jurisdiction of the court and demanded a jury trial." The court reserved its decision, and the parties proceeded with the trial. Evidence was given on both sides and the case submitted to the court. It did not appear, by the case, that either party asked the court to decide the question so reserved, or objected to finishing the trial before him.

Held, 1. That the action was one at law, and defendants were entitled to a jury trial; but that, by completing the trial without insisting upon a ruling as to their right to a jury, they waived that right.

2. That an exception, filed after the decision of the action, to the failure of the court to decide the question, was not available.—*Ct. of App. Dec.,* 1880. Hand *v.* Kennedy, 83 N. Y. 149; *affirming* 45 Superior 385.

4. *It seems* that defendants should have insisted upon a ruling, and if the court ruled adversely to them, or if it declined to rule at all, or reserved its decision, should have excepted; or, as soon as the nature of the case was developed, should have insisted upon a ruling and taken an exception. *Ib.*

II. PLACE OF TRIAL; AND HOW CHANGED.

5. Grounds for change of venue.

This action was brought in the county of New York to restrain the defendant J., who had in his possession a satisfaction-piece of a judgment recovered by the plaintiff against the defendant N., from delivering the same to N. The complaint showed that N. owned real property in Ulster, but none in Kings county. The defendant, upon an affidavit stating that N. had sold the land in Ulster county, and then owned no real estate except in Kings county, moved for an order changing the place of trial to Kings county, on the ground that the action was brought "to recover or to procure a judgment establishing, determining, defining, forfeiting, annulling or otherwise affecting an estate, right, title, lien or other interest in real property, or a chattel real," within the meaning of Code of Civ. Pro., § 982.

Held, 1. That whether or not the action was within that section must be determined by the complaint, and that the decision of that question could not be affected by affidavits.

2. That the action did not have for its object the recovery of a judgment establishing or otherwise affecting a right, lien or other interest in real property, and that the motion was therefore properly denied.—*Supreme Ct.*, (1*st Dept.*,) *Nov.*, 1880. Knickerbocker Life Ins. Co. *v.* Clark, 22 Hun 506.

6. Practice on the motion—re-transfer after change. On a motion to change the place of trial for the convenience of witnesses, the court will consider the state of the calendars in the two places, in passing upon the application.—*Supreme Ct.*, (1*st Dept.*,) *Nov.*, 1880. Abrahams *v.* Bensen, 22 Hun 605.

7. Where the place of trial has been changed on the application of a co-defendant, and acquiesced in by the other defendant, the sheriff, under what circumstances it will be re-transferred on application of defendant sheriff, see Abrahams *v.* Bensen, 60 How. Pr. 208.

8. Second motion to change venue. In an action to charge a trustee of a manufacturing company with a debt of the company, because of the filing of a false annual report, where the venue had been laid in the wrong county, defendant served with his answer a demand that the venue be changed to the proper county, and this not having been complied with, moved to change, both on the ground that the wrong county was stated, and for the convenience of witnesses. Plaintiff demurred to one of the defences set up in the answer. The demurrer and the motion were argued together; the former was overruled on the ground that the complaint did not state a cause of action, and the motion was denied. Plaintiff served an amended complaint; defendant answered, serving with his answer a new demand to change the place of trial to the proper county; this not having been complied with, he moved to make the change; the motion was denied on the ground that a similar motion had been made and denied, and no leave to renew granted. *Held*, untenable; that as when the motion was first made the complaint stated no cause of action, the motion could and it may have been denied on that ground, and when a sufficient complaint was served defendant was entitled to make a new demand and another motion, without leave of the court.—*Ct. of App.*, *Dec.*, 1880. Veeder *v.* Baker, 83 N. Y. 156.

III. Bringing on the Trial. The Calendar.

9. General calendar. As to the control of the court over the calendar and the order of trying causes thereon, see Compton *v.* Compton, 46 Superior 579.

10. Special circuit calendar. The failure of a plaintiff to reply in a case where a reply is necessary under the code, does not prevent him from bringing his cause on for trial. He has a right, no doubt, to do so, without a reply, and when it is reached upon the calendar the defendant can then assert any rights acquired by the omission of the plaintiff to serve a reply. The plaintiff is not bound to wait until the defendant chooses to make a motion for judgment under Code of Civ. Pro., § 515, before bringing the cause to trial. Accordingly —*Held*, that plaintiff being in default for want of such reply, there is no issue to be tried, and a dismissal of his motion to place the cause on the special circuit calendar was proper.—*Supreme Ct.*, (1*st Dept.*,) *May*, 1881. Adams *v.* Roberts, 1 Civ. Pro. 204.

IV. Impaneling the Jury.

11. Competency of jurors. In this action, brought by the plaintiff upon a policy of insurance issued by the defendant to her upon the life of her husband, one of the defences was that the husband had committed suicide, and thereby avoided the policy. When the case was brought on for trial, several of the jurors stated, on being examined by the defendant's counsel, that they should consider the fact that a man had committed suicide as some evidence of insanity; some stating that they should so consider it in some cases, and all stating that they should require other and additional evidence to establish it. *Held*, that the jurors were competent, and that a challenge interposed by the defendant's counsel was property overruled. —*Supreme Ct.*, (3*d Dept.*,) *Sept.*, 1880. Hagadorn *v.* Connecticut Mut. Life Ins. Co., 22 Hun 249.

V. Conducting the Trial.

12. The right to open and close. An unnecessary allegation in the complaint should be disregarded, although denied by the answer, and such an allegation not deprive defendant of the affirmative of the issue if he would be otherwise entitled thereto.—*Ct. of App.*, *April*, 1881. Murray *v.* New York Ins. Co., 9 Abb. N. Cas. 309.

13. Reception of evidence. Where testimony is offered, which taken alone is incompetent, but which may be made competent by other evidence, and this the party offering it promises to produce, the reception of it at the time is not error, and if the party fails to produce the promised evidence, the opposite party, to save his point, must move to strike out the testimony before the close of the case.—*Ct. of App.*, *June*, 1880. Bayliss *v.* Cockcroft, 81 N. Y. 363.

14. Objections and exceptions. Where an objection is interposed to an answer to a question after it is given, it is not a ground of reversal if a portion of the answer is compe-

tent; the objection must point out specifically the objectionable portion.—*Ct. of App., June*, 1880. Wallis *v.* Randall, 81 N. Y., 164, 170.

15. Where an objection to evidence has once been made and overruled, it is not required to repeat the objection, where subsequent questions call for the same class of evidence, relating to the same subject matter.—*Ct. of App., Jan.*, 1880. Church *v.* Howard, 79 N. Y. 415.

16. Upon the trial of an action brought against the representatives of a deceased person, the plaintiff having been called as a witness in his own behalf, the counsel for the defendants, before the plaintiff had been sworn or given any testimony, objected to him "on the ground that he is (was) an interested party, and incompetent under § 829 of the Code of Civil Procedure." The objection was overruled, and the plaintiff having been sworn, gave testimony as to personal transactions had with the deceased, without any specific objection thereto being made by the defendants. *Held*, that the objection was invalid, as being too general, and that it was properly overruled by the court.—*Supreme Ct.*, (*3d Dept.*,) *Nov.*, 1880. Hoar *v.* Hoar, 23 Hun 33.

17. Withdrawal of counter-claim. Where the defendant has set up a counter-claim, based on transactions directly involved in the accounting for which the action is brought the court is justified in refusing to allow defendant to withdraw it at the close of the testimony.—*Superior Ct., Dec.*, 1880. Whitman *v.* Horton, 46 Superior 531.

18. Non-suit. When a complaint contains a statement of the facts necessary to constitute two distinct causes of action, the failure of the plaintiff to separately state and number them, cannot be urged as a ground for a non-suit at the trial; if there be any doubt as to which cause of action the plaintiff intends to rely upon, the remedy of the defendant is by a motion to make the complaint more definite and certain.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Commercial Bank ot Keokuk *v.* Pfeiffer, 22 Hun 327.

19. Although the plaintiff in an action fails to make out his cause of action on trial, the defendant is not, in all cases, entitled to have a verdict directed which will be a final bar to plaintiff's right of action; where the defence set up is a release from liability, and this is not made out so conclusively as to entitle defendant to have a verdict directed in his favor thereon, he is entitled to a non-suit, not to a verdict.—*Ct. of App., Jan.*, 1881. Briggs *v.* Waldron, 83 N. Y. 582.

VI. Instructions to the Jury.

20. What instructions are proper. A chance expression of opinion as to the credibility of a material witness, made by the judge in his charge, and which he subsequently qualifies by a statement to the effect that the jury are not bound thereby, does not necessarily furnish good ground for exception.—*Superior Ct., Dec.*, 1880. Hoffman *v.* New York Central, &c., R. R. Co., 46 Superior 526.

21. Where the court erroneously charges the jury, as a matter of law, that a certain material fact is as contended by plaintiff, such error is not cured by a subsequent charge made upon request of defendant's counsel, to the effect that the burden of proof is on the plaintiff to show the said fact as claimed by him, and that on the evidence in the case it is a question for the jury whether it is so or not, and if they believe such to be the fact, they will find, &c.—the original charge, in that regard, not having been withdrawn.—*Superior Ct., June*, 1880. Canfield *v.* Baltimore, &c., R. R. Co., 46 Superior 238.

22. The court, in charging the jury, called their attention to the fact that an execution against the person of the defendant could be issued upon a judgment entered upon a verdict in favor of the plaintiffs. *Held*, no error; that it only served to impress upon the jury the fact that it was essential to the plaintiffs' right to recover, to establish fraud on the part of the defendant,—*Supreme Ct.*, (*1st Dept.*,) *Jan.*, 1881. Keller *v.* Strasburger, 23 Hun 625.

23. The court charged that "if the defendant bought the goods in good faith, supposing he would be able to pay for them when the credit expired, even if he knew he could not pay all his debts at that time, but would be able to work his way out," the plaintiffs could not recover. *Held*, no error. *Ib.*

24. Directing a verdict. In an action against the indorser of a promissory note, who was the original debtor, the complaint stated that he was indebted to plaintiffs for goods sold and delivered in an amount about equal to the note, and that fact was proved by the defendant. *Held*, that it was the duty of the judge to direct a verdict for the amount of the goods, and, if, an amendment to the complaint was necessary he should have ordered it on the spot.—*Supreme Ct.*, (*1st Dept*,) Fleischmann *v.* Stern, 61 How. Pr. 124.

VII. The Verdict, or Finding.

25. Polling the jury. Upon the polling of a jury, one of them stated that he was not satisfied with the verdict. Having stated, in answer to a question put by the court, that he had agreed to the verdict, the court, against the objection of the defendant's counsel, directed the verdict to be entered. *Held*, that this was error; that the right of a juror to dissent from a verdict to which he has before agreed, is not lost until the verdict has been recorded.—*Supreme Ct.* (*2d Dept.*,) *Feb.*, 1881. Weeks *v.* Hart, 24 Hun 181.

26. General and special verdicts. *Quære*, as to whether, after special questions have been submitted to a jury, they can be withdrawn without the consent of the parties, when the jury intimate that they cannot come to an agreement thereupon; and as to whether, in any case, a general verdict and a report that they cannot agree on the special findings, can be allowed to stand.—*Supreme Ct.*, (*3d Dept.*,) *Nov.*, 1880. Ebersole *v.* Northern Central R'y Co., 23 Hun 114.

27. Grounds for setting aside verdict. Where a case presents a question of law solely upon uncontroverted facts, and a verdict merely formal is directed for plaintiff, it is not error for the trial court, in setting aside the verdict on motion, to direct final judgment for the defendant, at least where no objection to this course is made at the time.—*Ct. of App., June*, 1880. Hall *v.* Hall, 81 N. Y. 130, 139; *followed* in Fitzgerald *v.* Quann, 1 Civ. Pro. 273.

28. Ordering exceptions to be heard in first instance at General Term. It is not an irregularity for the trial judge at the same time that he denies defendant's motion for a new trial on the minutes, to order the exceptions to be heard in the first instance at General Term, there being but one motion, viz., for a new trial. A motion that the exceptions be heard in the first instance at General Term, may be made after the denial of a prior motion for a new trial on the minutes, upon exceptions.—*Superior Ct., Nov.,* 1880. Garner *v.* Mangam, 46 Superior 365.

29. The judge upon the trial, after the parties had rested, stated that if the plaintiff would stipulate to make and print a case for the General Term, and that in case of his failure there to maintain his verdict, a verdict should be entered for defendant, he would direct a verdict for plaintiff, and order the exceptions to be heard in the first instance at General Term. The required stipulation being given, a verdict was thereupon, by consent of counsel for both parties, directed for the plaintiff, and the exceptions ordered to be heard in the first instance at General Term. *Held,* that in the absence of any exception to the direction of a verdict, defendant can have no relief from the General Term, other than a new trial, upon the ground that there was a mistrial; that the foregoing arrangement was a confounding of the two remedies by which the proceedings upon a jury trial can be reviewed in the first instance at General Term, before judgment.—*Superior Ct., June,* 1880. Westervelt *v.* Westervelt, 46 Superior 298.

VIII. Trial in Criminal Cases.

30. A challenge to the array of jurors upon a criminal trial is not within the provision of the statute (2 Rev. Stat. 731, § 1,) which declares that no plea in abatement or other dilatory plea to an indictment shall be received, unless the truth thereof be proved.—*Ct. of App., April,* 1880. Cox *v.* People, 80 N. Y. 500.

31. *It seems* that if a verification of the challenge is required, a demurrer to the challenge is not a proper way to raise the objection of want of verification. *Ib.* 510.

32. Upon the trial of an indictment for murder, the prisoner's counsel interposed a challenge to the array of jurors, in writing, signed by the prisoner, denying the performance by the proper officers of the various acts and duties imposed upon them by the jury law. The district attorney demurred orally to the challenge on the ground, among others, of omission of the prisoner to verify the same. The court sustained the demurrer and overruled the challenge. The jurors were then called, and all who answered to their names were either excused or peremptorily challenged, except three, who took their seats in the jury box, but were not sworn. Subsequently, and before the jury were sworn, the court announced to the prisoner's counsel that it had concluded to allow him to renew the challenge, and to accept it without a verification, and upon its traverse would proceed to try the issues raised thereby; also that it would let the jurors in the box stand aside. The district attorney thereupon offered to traverse the facts alleged in the challenge, if renewed, and to consent that the jurors might stand aside. The prisoner's counsel declined to accept the offer of the court, and insisted upon going on with the trial; the jury was thereupon completed; two of the jurors who sat in the case were selected from the panel to which the challenge was interposed. *Held,* that assuming the facts alleged in the challenge constituted in law a ground of challenge to the array, and that the demurrer was erroneously sustained, the prisoner, by declining to accept the offer, and by insisting that the trial should proceed, precluded himself from insisting upon the exception to the ruling, and must be regarded as having abandoned his challenge. *Ib.*

33. Challenge for cause, or for favor; opinion of juror. Under the acts of 1872, (Laws of 1872, ch. 475,) and 1873, (Laws of 1873, ch. 427,) in reference to challenges of jurors, if a juror in a criminal case, on being challenged for principal cause, discloses on his examination that he has a fixed and definite opinion in the case on the merits, and nothing else is shown, the court is bound as matter of law to reject the juror as incompetent.—*Ct. of App., April,* 1880. Balbo *v.* People, 80 N. Y. 484.

34. But if in addition he testifies that he believes he can render an impartial verdict on the evidence—that such previously-formed opinion, will not bias or influence him as a juror—the question of his competency is to be determined by the court as a question of fact. *Ib.*

35. The decision of the trial court is subject to review upon appeal; and the appellate court is to determine the question from its own examination of the evidence; giving due weight to the circumstance that the trial court had the juror before it. *Ib.*

36. A juror who was challenged for cause and for favor, on being examined by the prisoner's counsel, testified that he had read of the case and had formed a decided opinion as to the guilt of the prisoner, which would require evidence to remove, and that if sworn as a juror he would enter the jury-box with this opinion. On his examination by the district attorney he testified, in substance, that his opinion was formed from having read in the newspapers accounts of the transaction; and, among other things, a statement purporting to be a confession by the prisoner of the crime; that he accepted this account as true, for the reason that he had read nothing to the contrary, and that he believed statements in the newspapers, which were not unreasonable, until they were contradicted, and in that sense he had an opinion of the guilt of the prisoner; that he had no knowledge whether the statements he read were true or not, and that his opinion was a contingent one, based on the supposed truth of the statements; that he had no pride of opinion, and had no doubt of his ability to set aside the opinion he had on entering the jury-box and to decide the case according to the evidence, without being influenced thereby, or by what he had read. *Held,* that the challenges were properly overruled. Cox *v.* People, *supra.*

37. Upon the trial of an indictment for murder, a juror was challenged for principal cause, and this being overruled, was challenged for favor; on his examination-in-chief in support of the challenges, he testified in substance, that he read at the time an account of the murder in a newspaper, which account, it was his impression, was a report of the testimony taken before the coroner's inquest; that he had not talked the

matter over with any person; and, in answer to a leading question, that he formed a positive and clearly-marked opinion as to the guilt or innocence of the accused, which was still in his mind, and that it would require strong evidence to remove the opinion he then entertained in regard to the case. The prisoner was an Italian. The juror also testified "that it was a race he was not particularly fond of, and did not think much of, judging from those we have here." On his cross-examination the juror testified that he read the account in the same way he read other items; that he took no particular interest in the case, and knew none of the parties, and had no knowledge of the circumstances, except as he read them at the time; that if a statement in the papers was contradicted in the next day's papers he believed the contradiction; that his impression in the case was based on the assumption that things reported are probably true; that he did not make a great deal of distinction between an opinion and an impression; that he should call an opinion of the truth or falsity of a statement he saw in a newspaper an impression, if he read it casually, and it slipped out of his mind, and is afterwards revived; that he did not know that he had anything more than that in his mind about this case; that he did not know what the defence was; that all he remembered was that a man killed his wife; that he was not conscious of having any impressions which would prevent his acting fairly and impartially in the case; that he had no doubt he could give a verdict upon the evidence without being influenced or biased by any opinion he had. In response to questions by the court the juror testified that he did not suppose that any opinion he had would bias, influence or prejudice him in any manner in the consideration of the evidence; that he believed it would not, and that he could give full weight and effect to the evidence the same as if he had no opinion. The court thereupon, as the record states, "from observation of the appearance of the juror, his age, intelligence, his manner on the stand and his answers to questions, found that he was fair, impartial and unprejudiced, and held the challenge not true." *Held*, that there was no error in overruling the challenges. Balbo *v.* People, *supra.*

38. Peremptory challenges. Upon a criminal trial a juror was challenged by the prisoner for principal cause and to favor; he testified in substance that he had read in the newspapers of great frauds perpetrated against the city; that he had read of the prisoner's case, and had formed, in some degree, an opinion in regard thereto, which he had yet, and it would require evidence to remove it; but that his opinion was contingent, founded on an assumption of the truth of what he had read, which he had not investigated; that his opinion was the general impression a man derives from reading a statement in a newspaper; that he verily believed he could render an impartial verdict, and that his previously-formed opinion would not bias or affect such verdict, nor would he be influenced at all on the trial thereby; that if put upon the jury he would discard his opinion and decide upon the testimony, and in that event it would not require evidence to overcome his opinion, and he would try the case without being influenced by it. The challenges were overruled and the juror was then challenged peremptorily. After the full number of peremptory challenges had been exhausted another juror was called whom the prisoner's counsel proposed to challenge peremptorily upon the ground that they had been unlawfully compelled to exhaust challenges by the alleged erroneous decision of the court as to the competency of said juror. The court denied the right to further peremptory challenges. *Held*, no error; that if the question could be thus raised, as to which *quære*, the ruling as to competency was correct, and the exhaustion of the peremptory challenges was not compelled by any error of the court.—*Ct. of App., Jan.,* 1881. People, ex rel. Phelps, *v.* Oyer and Terminer, 83 N. Y. 436.

39. What evidence is admissible. Upon the trial of an indictment, evidence of the commission of another crime by the prisoner is competent, where it is relevant and material on the question of the guilt of the prisoner of the crime for which he is on trial.—*Ct. of App., Jan.,* 1881. Hope *v.* People, 83 N. Y. 418.

40. Evidence of a prisoner's good character is admissible in all criminal cases, and is to be considered by the jury, whether the evidence of the prisoner's guilt be doubtful and uncertain, or strong and conclusive; but, in the latter case, it is of comparatively little importance.—*Supreme Ct.,* (*3d Dept.,*) *Nov.,* 1880. People *v.* Moett, 23 Hun 60.

41. Objections, and how waived. Upon trial of an indictment for assault with intent to kill, the prosecution, without objection, gave in evidence certain notes purporting to have been made or indorsed by H., the complainant; also a book of account; these, the witness producing them, testified, came lawfully into his possession at the prisoner's house, and in his presence. Testimony was then given by H. and others, showing that the signatures of H. to the notes were forged. H. was cross-examined at considerable length. Entries in the book of account were also read to the jury. After the case for the prosecution was closed, the prisoner's counsel "moved that the court direct the jury to disregard all the evidence tending to establish the forgery," he admitting and asking it to be entered on the minutes that, if the jury should find that the prisoner committed an assault and battery, it was with intent to kill. The court denied the motion. *Held*, that an exception to the ruling was unavailing; that, after acquiescing in the reception of the evidence, and improving the opportunity afforded by it for cross-examination, it was too late to ask to have the evidence stricken out.—*Ct. of App., Oct.,* 1880. Pontius *v.* People, 82 N. Y. 339; *affirming* 21 Hun 382.

42. Where a party does not object to improper evidence offered, it is discretionary with the trial court whether or not to exclude it on motion. *It seems* that the remedy of the party is to ask for instructions to the jury that they should disregard the evidence. *Ib.*

43. The prosecution gave evidence of declarations of the prisoner, made two days before the alleged assault, while he was examining a note signed by H., tending to show an intimate acquaintance on his part with the signature of H. *Held*, competent. *Ib.*

44. What instructions are proper. The counsel for the accused requested the court to charge that the people must satisfy the jury,

beyond all reasonable doubt, that, at the moment the act alleged in the indictment was committed by the prisoner, he had reason, perception and understanding sufficient to know that the laws of God and of the land forbade him from committing it. The court declined to charge as requested, but charged, in the language of the Court of Appeals, in Flanagan *v.* People, 52 N. Y. 467, and read to the jury that portion of the opinion which stated the settled law, as to the test of responsibility, to be the capacity of the defendant to distinguish between right and wrong, at the time of, and with respect to, the act which is the subject of inquiry. *Held,* no error. People *v.* Moett, *supra.*

45. Further instructions. As to what errors in the judge's charge to the jury may be cured by subsequent instructions, see People *v.* Greenfield, 23 Hun 454, 471.

46. When a conviction is proper. Upon the trial of a criminal action, the jury is to deal with probabilities, not possibilities. In order to convict, it is not required to find that it was not possible for another than the prisoner to have committed the crime; it is sufficient that all the material circumstances point to his guilt, and that they are inexplicable on the theory of his innocence.—*Ct. of App., March,* 1880. Poole *v.* People, 80 N. Y. 645.

As to trials before *Arbitrators,* see ARBITRATION AND AWARD, I. Before *Referees,* see REFERENCE, 9-12.

In *Justices' courts,* see JUSTICE OF THE PEACE, II.

As to the hearing of an *Equity cause,* see EQUITY, 5-7.

For rules governing the *Examination of witnesses,* see WITNESSES, IV.

TROVER.

I. WHEN IT LIES.
II. PROCEDURE.

I. WHEN IT LIES.

1. What amounts to a conversion. Plaintiff and P. owned a planing machine, which, with the building in which it stood, they leased for a term of years. P. being indebted to defendants gave them, as security, a chattel mortgage upon the whole machine; he informed them, however, at the time, that he owned only half, and plaintiff the other half. The payments stipulated in the mortgage were fixed so as to correspond, in amounts and dates, with the rents reserved in the lease which was looked to to discharge the mortgage debt. In an action for conversion of plaintiff's interest—*Held,* that the taking of the mortgage did not amount to a conversion by defendants, conceding that the giving of it was a conversion by P.; that the effect of the mortage was simply to vest the interest of P., upon default, in defendants.—*Ct. of App., Dec.,* 1880. Osborn *v.* Schenck, 83 N. Y. 201; *affirming* 18 Hun 202.

2. Defendant, H. B. S., after default, removed the machine from the possession of the lessees, claiming a right so to do. It appeared that no demand was made upon him before suit brought, and until after that time he neither did nor said anything in denial of plaintiff's right as co-tenant. *Held,* that the taking possession was simply the exercise of defendants' rights as co-tenants, and neither made the defendants jointly nor H. B. S. individually liable. *Ib.*

3. As to what will amount to the conversion of a building, see Lyon *v.* Kramer, 24 Hun 231.

4. Who may maintain trover. The necessary title or possession. A vendee claiming title under a contract of sale, void as against public policy, cannot maintain trover unless he has had actual possession; the contract must have been so fully executed that his demand can be enforced at law without aid from the illegal transaction.—*Ct. of App., June,* 1880. Clements *v.* Yturria, 81 N. Y. 285.

5. A constructive possession must relate to and rest upon a legal title; it is made of acts short of possession in fact, which, supported by the legal title, amount in law to actual possession; without a valid title, therefore, there can be no constructive possession. *Ib.*

6. In an action for the alleged conversion of a quantity of cotton, it appeared that plaintiff, a citizen of the United States, contracted with the confederate government, while that power was carrying on war against the United States, to receive cotton in payment for goods contraband of war furnished by him to that power. Plaintiff delivered the goods, and certain bales of cotton in the hands of confederate agents at San Antonio, were set aside and marked for him, and shipped to Matamoras by a carrier employed by the confederate government. Plaintiff received subsequently a bill of lading. The cotton was turned over by a confederate officer to a commercial firm, who sold and delivered it to defendant. *Held,* that as plaintiff acquired no title under the contract of sale, which was illegal and void, and as he never had actual possession of the cotton, he was not entitled to recover. *Ib.*

7. Who is liable. The sheriff, under a distress warrant authorizing him to "distrain the goods, etc., of the tenant," having taken the property of a third person, the party who issued the process (the defendant herein,) caused the goods to be appraised under the statute, (of New Jersey,) and subsequently received the proceeds of the sale thereof. *Held,* that the defendant thereby became liable for the conversion of the said chattels.—*Superior Ct., Dec.,* 1880. Bean *v.* Edge, 46 Superior 455.

II. PROCEDURE.

8. The complaint. Where, by the complaint in an action against the sheriff, for wrongfully taking and converting certain chattels, it appears that plaintiff claimed title to the property as mortgagee under a chattel mortgage, in the form of a bill of sale, with condition that on payment of a certain sum on demand it should be void, the mortgagor to remain in possession until default, &c., an allegation that the plaintiff was the owner of the chattels in question is sufficient to sustain the action, without any averment on the part of the mortgagor.—*Superior Ct., June,* 1880. Malcolm *v.* O'Reilly, 46 Superior 222.

9. Evidence of value of property converted. In an action for conversion the

value of the articles must be proved, whether denied in the answer or not.—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Starr *v.* Cragin, 24 Hun 177.

10. In an action for conversion of unfinished stock, evidence of net proceeds of a sale thereof after completion is not competent.—*Ct. of App.*, *June*, 1880. Flannagan *v.* Maddin, 81 N. Y. 623.

11. The question of intent is for the jury. The plaintiffs brought this action to recover damages for the conversion of their two-tenths interest in a steamboat known as the "Francis Skiddy," which was, in 1864, engaged in running between Troy and New York. On her last downward trip for that year she struck upon a rock, and was so badly damaged that, to prevent her from sinking, she was run upon the shore and stranded. A few days thereafter the defendant, the owner of the other eight-tenths of the vessel, without consulting or notifying the plaintiffs, took the machinery and other portions of the vessel and converted them to its own use, and sold the hull and received the proceeds thereof. The plaintiffs claimed and evidence was given tending to show that the vessel could have been raised, floated to a dock and repaired, at a cost not exceeding $5000, and would then have been a valuable property. The defendant claimed that, owing to the doubt whether the vessel could be raised before the river was closed by ice, in which case she would have been destroyed by the ice and floods, it deemed it wiser to take out the machinery and dispose of the hull at the best price it could obtain. The principal question was whether the defendant was to be held liable as for the conversion of a valuable steamboat slightly damaged, but easily repairable, or whether it was to be held liable only for the conversion of the articles and machinery taken from it. *Held*, that the decision of this question turned upon the intent with which the defendant took possession of the vessel, and that the court erred in taking the question of intent from the jury.—*Supreme Ct.*, (*1st Dept.*,) *Jan.*, 1881. Andrews *v.* New Jersey Steamboat Co., 23 Hun 545.

As to conversion by *Pledgee*, see BAILMENT, 2.
By *Agent*, see PRINCIPAL AND AGENT, 4.
By *Trustee*, see TRUSTS, 42-44.

TROY.

MUNICIPAL CORPORATIONS, 70, 71.

TRUSTS.

I. CREATION AND DURATION. INTERPRETATION, VALIDITY, &c.

II. THE TRUSTEE.

1. *Rights, powers and duties of trustees.*
2. *Liabilities of trustees.*
3. *Resignation, removal and substitution.*

III. RIGHTS AND REMEDIES OF CESTUI QUE TRUST.

I. CREATION AND DURATION. INTERPRETATION, VALIDITY, &c.

1. How created, and validity, generally. To create a trust where the donor retains the property, the acts or words relied upon must be unequivocal, implying that he holds the property as trustee for the benefit of another. —*Ct. of App.*, *April*, 1880. Young *v.* Young, 80 N. Y. 422.

2. The creator of a trust requiring the investment of money may designate how the investment may be made and what security may be taken, and he may dispense with all security. —*Ct. of App.*, *Feb.*, 1881. Denike *v.* Harris, 84 N. Y. 89.

3. Precatory words will not create a trust where, either by a consideration of all the provisions of the will, or by the express words of the testator, it appears that the recommendation was not intended to be obligatory.—*N. Y. Surr. Ct.*, *May.*, 1880. Wood *v.* Seward, 4 Redf. 271, 276.

4. When the payment of money to be used in the purchase of securities will be held to create a trust to purchase for the purpose for which the money was paid, see Johnson *v.* Brooks, 46 Superior 13.

5. As to what is sufficient to establish a trust for the payment of outstanding checks of its creator, see Watts *v.* Shipman, 21 Hun 598.

6. Construction of deeds creating trusts. In 1857, in contemplation of marriage, the plaintiff conveyed her property by a trust-deed, to trustees, to pay her the income for life, with a provision for her husband if he survived her, but if she survived, the property to go to such person or persons as she might by will direct, and in default of such direction, it was to descend to her heirs. Plaintiff survived her husband and remarried, and subsequently, in 1872, the trust property was reconveyed to her by the surviving trustee, under the provisions of the act of 1849. In an action for the partition of some of this property, which plaintiff held as tenant in common with one of the defendants—*Held*, that plaintiff, by the trust-deed, divested herself of all her estate in the property, and that she could not recall the trust; that the Supreme Court, before the act of 1849, had not power to destroy such trust, and said act did not give authority for its extinguishment, the purpose of the act being to enable trustees, after the act of 1848 had freed married women from their peculiar disabilities, to reconvey to the beneficiaries trusts created prior to that act for the benefit of women contemplating marriage.—*Supreme Ct.*, (*1st Dept. Sp. T.*,) *June*, 1881. Thebaud *v.* Schermerhorn, 61 How. Pr. 200. Compare Mahon *v.* Smith, 60 How. Pr. 385.

7. When, a trust deed for the benefit of creditors having been executed, a release by the creditors who join in the deed is valid; when the property does not revert to the grantors on the failure of the trustees to sell within the time limited in the deed; and the duty of trustees as to selling at inventoried values, discussed, in a particular case.—*Supreme Ct.*, (*2d Dept.*,) *Sept.*, 1880. Parsons *v.* Rhodes, 22 Hun 80.

8. A trust deed given to enable the grantee to carry on business previously carried on by the creator of the trusts to pay certain debts of the grantor, and turn over the property, construed, and the powers of the trustee determined

in a case depending upon particular facts. Storrs *v.* Flint, 46 Superior 498.

9. Deeds of trust containing peculiar and unusual provisions, construed. Bennett *v.* Garlock, 79 N. Y. 302; Douglas *v.* Cruger, 80 N. Y. 15.

10. Validity. One Hatfield executed an instrument under seal, whereby he sold and conveyed all his property, both real and personal, to one Hall, "in trust, nevertheless, for my use, benefit and advantage; that is to say, the said Wright Hall shall manage and control the same in his discretion, and shall, from time to time, give me therefrom such sum or sums as I may need or require, and he shall deem reasonable and prudent for my comfort, support and interest, and shall pay therefrom such debts as I may contract and desire him to pay, and he shall deem it just and prudent to pay." Thereafter Hall, having received the money upon the sale of real estate belonging to Hatfield, applied by petition for leave to resign the trust, and for the appointment of a successor.

Held, 1. That as the trust was not authorized by the Revised Statutes, Hall was not a trustee within the meaning of the statute (1 Rev. Stat. 730, § 69,) authorizing the court to accept the resignation of a trustee.

2. That the application should be denied, and the money in Hall's hands ordered to be paid over to Hatfield, as being his property.—*Supreme Ct.*, (*2d Dept.*,) *Feb.*, 1881. Matter of Hall, 24 Hun 153.

11. Resulting trusts. The provision of the statute of uses and trusts (1 Rev. Stat. 728, §§ 51, 53,) declaring that where a grant shall be made to one person for a valuable consideration paid by another, no use or trust shall result in favor of the one making the payment, but title shall vest in the grantee, implies the assent and co-operation of the one paying the money, and so inducing the grant from the one receiving it; it does not apply unless he was aware that the grant was so taken.—*Ct. of App.*, *April*, 1880. Reitz *v.* Reitz, 80 N. Y. 538.

12. *It seems*, therefore, that where an agent has invested the moneys of his principal, in his hands, in the purchase of real estate, taking title in his own name in order to claim the benefit of said provision, he must show that the title was so taken with the knowledge and consent of his principal. *Ib.*

13. In an action to have it adjudged that lands so alleged to have been purchased by an agent are held by him in trust, the complaint, after alleging the purchase with the money of the principal, and the grant to the agent in his own name, alleged that it was understood and agreed that the investments should be made in the name of the principal, and that it was taken without her knowledge or consent in the name of defendant. Plaintiff's evidence established these allegations. In the answer and in his testimony, defendant denied that the purchase was made with the money of his principal, and denied the agreement alleged. The referee found that the lands were purchased for the principal. There was no express finding that the deed was taken without the consent or knowledge of the principal. *Held*, that the findings made, necessarily implied an absence of consent or knowledge that he should take title in his own name; that consent to a conveyance vesting the entire interest, both legal and equitable, in the agent, would be inconsistent with the finding that the lands were purchased for the principal. *Ib.*

14. Constructive trusts. One who, without authority, assumes the management of property in which others are beneficially interested becomes in equity a trustee, by construction for their benefit; and during the continuance of such management is subject to the same rules and remedies as other constructive trustees.—*Ct. of App.*, *June*, 1880. Bennett *v.* Austin, 81 N. Y. 308, 333.

II. The Trustee.

1. *Rights, powers and duties of trustees.*

[Consult, also, Executors and Administrators, III.]

15. Acceptance by trustee—disclaimer. The presumption of an acceptance of a trust, arising from the acceptance of the office of executor, may be overcome by proof that the trust was declined. One may disclaim a trust as effectually by words or acts without deed, as by deed.—*Westchester Co. Surr. Ct.*, *Nov.*, 1879. Green *v.* Green, 4 Redf. 357.

16. Powers and duties of trustees, generally. In general, all the trustees must act together, but where the will creating the trust expressly authorizes a majority to act and execute their acts, their acts in pursuance of the trust, done in good faith, are valid and effectual.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Crane *v.* Decker, 22 Hun 452.

17. When a mortgage, given to secure the payment of bonds issued by the mortgagor, is executed and delivered to a person in trust for the security of those who may thereafter become the owners of the bonds, and such trust is accepted, and an indorsement to that effect made upon each of the bonds, a duty is imposed upon the trustee of enforcing the mortgage against the property, in case default is made in the payment of the bonds, and of making such a disposition thereof as will best promote the interests of the bondholders. The duty so imposed upon the trustee is a personal one, and he cannot divest himself of it by delegating its performance to any other person or persons.—*Supreme Ct.*, (*1st Dept.*,) *March*, 1881. Merril *v.* Farmers' Loan, &c., Co., 24 Hun 297.

18.—as to investments of trust funds. A trustee cannot invest the trust funds in bonds and mortgages on real property situated out of this state, unless expressly authorized so to do by the court, or by the instrument creating the trust.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. Ormiston *v.* Olcott, 22 Hun 270.

19. Where a trustee takes from the solvent estate of a deceased co-trustee, in whose hands the funds of the estate have been left, unauthorized securities, instead of money, he stands in the same position as if he had himself invested the funds of the estate in such securities, and is responsible for any loss that the estate may sustain thereby. *Ib.*

20. Commissions. The commissions allowed to a trustee are to be computed upon the entire fund in his hands, whatever may be the nature of the property, and even though he may transfer to the beneficiaries the same securities which were received by him at the time of the creation of the trust.—*Supreme Ct.*, (*1st Dept.*,) *March*, 1881. Matter of Moffat, 24 Hun 325.

21. Trustees appointed prior to the passage of ch. 362 of 1863, giving not to exceed three commissions to executors when the personal estate amounts to not less than $100,000, are within the equity of that statute, and are entitled, upon an accounting, had subsequent to the passage thereof, to the commissions given by it when the value of the estate vested in them, whether it consists of real or personal estate, or both, amounts to the sum therein named.—*Supreme Ct.*, (1*st Dept.*,) *March*, 1881. Savage *v.* Sherman, 24 Hun 307.

22. Three sets of commissions can be allowed only upon the value of the property received by the trustees from the creator of the trust; they cannot be allowed upon the rents and profits thereof received by them, though such rents and profits exceed in amount $100,000, especially when the said rents and profits have been paid over from time to time in amounts smaller than that named. *Ib.*

23. The entire management of an estate vested in four trustees was committed to one of them, who charged, in the accounts rendered by him from time to time to the beneficiaries, for his services the sum of five per cent upon the moneys collected and disbursed by him. No objection to this proceeding was made by the beneficiaries or the co-trustees. *Held*, that upon an accounting the referee properly adopted the amounts so charged as the full measure of compensation to be allowed to the trustees for their services. *Ib.*

24. After the death of the trustee who had managed the estate, the survivors committed the care and management thereof to the son of one of them, upon the agreement that he was to receive the same compensation as had been received by the former trustee, there being no agreement between the trustees that any further charge was to be made on account of their services. *Held*, that the referee properly refused to allow the trustees any compensation for their services in addition to the amount allowed to the person so intrusted with the care of the estate. *Ib.*

25. Though the fact that a trustee is charged with moneys lost by his negligence does not deprive him of his right to commissions, yet where he is charged with the moneys because he has expended them improperly and in a manner subversive of the purposes of the trust, the court may properly refuse to allow him any commission.—*Supreme Ct.*, (1*st Dept.*,) *Jan.*, 1881. Stephens *v.* Marshall, 23 Hun 641.

26. Sales of trust property—rights of purchasers. One who purchases an interest in a trust estate from the heirs of one who was a party to an action brought to determine the validity of the trust, is bound by the decree entered in such action. Savage *v.* Sherman, *supra.*

27. Although, where a power to sell real estate is given to a trustee, the persons entitled to the proceeds thereof may all elect to take the property itself, and so prevent the execution of the power, the owner of an undivided interest therein cannot prevent a sale when that is desired by the other parties in interest, and is essential to the due division of the property. *Ib.*

28. Rights of third persons dealing with trustees. The fact that in a receipt for bonds deposited, the person is described as a trustee, is notice to those dealing with him.—*Supreme Ct.*, (1*st Dept.*,) *March*, 1881. Swan *v.* Produce Bank, 24 Hun 277.

2. *Liabilities of trustees.*

29. Liability for losses, misappropriations, &c. Where loss is occasioned by the failure of a trustee to exercise ordinary care and judgment, he cannot excuse himself by claiming that he did not possess them; by voluntarily taking the position, he undertakes that he does possess and will exercise them, and it is immaterial that the services are rendered gratuitously.—*Ct. of App.*, *Sept.*, 1880. Hun *v.* Cary, 82 N. Y. 65.

30. If the trust property has been mingled with his own by the trustee, the court will take the whole, if necessary, in order to indemnify the trust estate.—*Ct. of App.*, 1880. Hooley *v.* Gieve, 9 Abb. N. Cas. 8, 24.

31.—for debt due from trust estate. In an action brought by a creditor of B. against trustees holding a trust estate for his benefit, to reach and collect the debt out of said estate, a judgment was rendered which fixed the amount of "the surplus income of said trust estate * * * during the three years subsequent to the commencement of the action," and directed that plaintiff's debt and costs be paid out of said surplus. No appeal was taken from this judgment; a copy thereof was served on defendants' attorney and on defendants, with a formal demand requiring payment according to the terms of the judgment. The demand not having been complied with, an order was granted on motion, directing execution against the property of T., one of the defendants. *Held*, no error; that the order was within the power and discretion of the court; that the judgment in effect determined that so much of accrued income was in defendants' hands, and defendants were concluded thereby from showing that such was not the fact; and that, by disobeying the command of the judgment, T. became personally liable for the debt.—*Ct. of App.*, *June*, 1880. Williams *v.* Thorn, 81 N. Y. 381.

32. *It seems* that defendants' remedy in case the judgment was not correct, in determining that the amount stated was in their hands, was by motion to correct the judgment. *Ib.*

33. — for costs. When a trustee during the pendency of an action brought by him, receives and voluntarily disburses money belonging to the estate, and the defendant thereafter recovers a judgment against him for costs, the court may, if the trustee has no money wherewith to pay the judgment, allow the defendant to enter a judgment against him personally for the amount thereof.—*Supreme Ct.*, (3*d Dept.*,) *Jan.*, 1881. Butler *v.* Boston and Albany R. R. Co., 24 Hun 99.

3. *Resignation, removal and substitution.*

34. Resignation, and substitution of new trustee. The will appointed four trustees of certain trusts, and gave the testator's widow, and, after her death, the competent trustees, the power to appoint a trustee or trustees in the place of such as should die, or be unwilling or incompetent to execute the trusts. Two of the trustees failed to qualify; of the other two, one promised to resign; the widow

nominated another trustee. Upon motion to compel such substituted trustee to file a bond—*Held*, that the power of appointment was valid; that while under Code of Civ. Pro., § 2418, the surrogate could entertain the application of the resigning trustee, and, under Laws of 1879, ch. 406, could appoint his successor and require a bond from him, the appointment by the widow was not dependent on such resignation, and that the surrogate had no power to require a bond from her appointee.—*Westchester Co. Surr. Ct., Jan.*, 1881. Rogers *v.* Rogers, 4 Redf. 521.

35. Grounds for removal. It is sufficient to authorize the removal of a trustee, that it is shown that his relations with his two co-trustees are so unfriendly and hostile as to endanger the execution of the trust, and that the differences between them are irreconcilable, without inquiring into the causes of such hostility and differences.—*Supreme Ct.*, (*2d Dept.*,) *Sept.*, 1880. Deraismes *v.* Dunham, 22 Hun 86.

36. Delegation to others of the exercise due from a trustee of his judgment, is evidence of incompetency, and so is the investing of trust funds on second mortgages and conversion of good securities for re-investment.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1880. Savage *v.* Gould, 60 How. Pr. 234.

37. The taking of commissions on loans made by a trustee, or by his partner for him, is evidence of dishonesty warranting removal. *Ib.*

38. Where the will directs the trustees to withdraw the trust property from the testator's business and invest it in a specified manner, and they, instead of so doing, continue the business for their own profit, using therein the trust property, this constitutes such a breach of trust as to render their removal proper.—*Ct. of App.*, 1880. Hooley *v.* Gieve, 9 Abb. N. Cas. 8.

39. Effect of removal. Where an executor and trustee is removed and a new one appointed, this does not affect a separate trust created independent of the will, and the old trustee is entitled, unless removed in appropriate proceedings, to hold and control such separate trust fund.— *Ct. of App.*, *March*, 1880. Matter of Clute, 80 N. Y. 651.

40. Effect of death of trustee. The executor or administrator of a deceased trustee of personal property found separate from the decedent's assets, succeeds to the trust, and in the absence of an assertion of claim by the beneficiary, may take possession of the fund, and a depositary of it will be exonerated on payment or delivery to him.—*Ct. of App.*, *Feb.*, 1881. Boone *v.* Citizens' Savings Bank, 9 Abb. N. Cas. 146; *reversing* 21 Hun 235. See, also, Matter of Howell, 61 How. Pr. 179.

III. Rights and Remedies of the Cestui que Trust.

41. In general. When accumulated income arising under a trust goes to those entitled to the principal sum from which the income was derived, see Ellingwood *v.* Beare, 59 How. Pr. 504.

42. Right to follow trust funds diverted by trustee. The *cestui qui trust* may follow, not only the trust estate, but also other property bought with the proceeds of the trust estate and remaining in the hands of the trustees; but that which is not part of the trust estate, nor was purchased with its proceeds, cannot be reached except by execution or attachment. A Court of Chancery cannot, for the purpose of enforcing the equity of the *cestui que trust*, authorize a receiver to seize and retain property of the trustee not embezzled from the trust estate.—*Ct. of App.*, 1880. Hooley *v.* Gieve, 9 Abb. N. Cas. 8, 17.

43. Where there has been a misappropriation of a trust fund, and the fund is traced, the lien of the *cestui que trust* is prior to the rights of the trustee's individual creditors. *Ib.*

44. Trustees formed a copartnership, and traded with the trust property, commingling it with their own. *Held*, that the *cestuis que trust* had a right to satisfaction out of the mingled mass, and that a receiver appointed at their instance having obtained possession of it, he held it free from the claims of the general creditors of the firm, and with rights prior to those of a receiver subsequently appointed at their instance. *Ib.*

For rules applying to any *Particular class* of trustees, or to persons occupying *Fiduciary relations*, see such titles as Assignments for Benefit of Creditors; Attorney and Client; Executors and Administrators; Guardian ad Litem; Guardian and Ward; Infants; Insane Persons; Principal and Agent; Receivers.

TURNPIKE COMPANIES.

1. Liability for obstructing the road. Where a turnpike company placed beside the traveled part of its road a pile of stones for the purpose of making repairs, which had a tendency to and did frighten horses traveling upon the road, of which it had notice, and neglected to remove the stones—*Held*, that it was liable for damages to a traveler upon the road, occurring after the lapse of a reasonable time (in this case, four or five days,) after such notice, occasioned by his horse having been so frightened.—*Ct. of App.*, *Oct.*, 1880. Eggleston *v.* Columbia Turnpike Co., 82 N. Y. 278.

2. Where such notice was given to one who was the secretary and treasurer of the company, and it appeared that he had some part in the practical management and superintendence of the road—*Held*, that this was a sufficient notice to the company. *Ib.*

For the law of *Highways*, see that title.

U.

UNDERTAKINGS.

APPEAL, 24, 25, 44, 152-160; ARREST, 12-16; ATTACHMENT, 26, 27; COSTS, 30-45; INJUNCTION, 24, 31-36; RECEIVERS, 16; REPLEVIN, 4.

UNDUE INFLUENCE.

CONTRACTS, 38; WILLS, 42, 43.

USAGE.

CUSTOM AND USAGE.

USES.

TRUSTS.

USURY.

[Consult, also, INTEREST.]

1. **What constitutes usury in respect to loans.** A mortgage on certain premises owned by plaintiff having been foreclosed, and a sale of the premises being about to take place under the judgment, he agreed with the agent of defendant B., to pay a bonus of ten per cent. for a loan of $2000, the judgment to be assigned to B. as collateral security. In pursuance of the agreement, said agent gave to plaintiff the $2000, which he paid to the holder of the mortgage, who thereupon assigned the judgment to B., and plaintiff paid the bonus agreed upon. B. subsequently caused the premises to be sold under the decree, and they were bid off by defendant G., and judgment entered against plaintiff for a deficiency. G. paid no consideration, but acted as agent for B. *Held*, that the transaction with B. was a usurious loan, not a purchase by him of the foreclosure judgment; that the agreement to pay the bonus was part of the contract of loan, not a separate agreement to pay the agent, and, so far as appeared, was for B.'s benefit; that the contract between the parties being void, the assignment made as security for its performance was also void, and transferred to B. no right to enforce the judgment; and that a judgment setting aside the assignment and all subsequent proceedings under the foreclosure judgment was proper.—*Ct. of App., March,* 1881. Wyeth *v.* Braniff, 84 N. Y. 627; *reversing* 14 Hun 537.

2. **Effect of usury.** Where a national bank, in the discount of a note, has usuriously reserved a sum greater than the lawful rate of interest, the amount so reserved is forfeited, (U. S. Rev. Stat., § 5198,) and cannot be recovered in an action upon the note.—*Ct. of App., April,* 1880. Nat. Bank of Auburn *v.* Lewis, 81 N. Y. 15.

3. **Who may avail himself of the defence.** A corporation cannot set up the defence of usury when sued upon its own obligations.—*Supreme Ct.,* (1st *Dept.,*) *March,* 1881. Frazier *v.* Trow's Printing, &c., Co., 24 Hun 281.

4. The assignee of a mortgage given by the defendants having threatened to foreclose the same, and the defendants having applied to the plaintiff to take an assignment thereof, the latter agreed to take such assignment and extend the time of payment for one year, in consideration of which the defendants paid to him the sum of $250. The plaintiff took the assignment in good faith, and without any notice or knowledge that the mortgage had been given to secure an usurious debt. In an action brought by him to foreclose the mortgage—*Held*, that the defendants were estopped from alleging that the mortgage was void for usury.—*Supreme Ct.,* (1st *Dept.,*) *March,* 1881. Barnett *v.* Zacharias, 24 Hun 304.

5. For an illustration of the principle that an agreement to waive the defence of usury, and not to set it up as a defence is void, and cannot be enforced, see Mahee *v.* Crozier, 22 Hun 264.

6. **Pleading usury as a defence.** In an action brought to recover the amount of a promissory note discounted by a national bank, it cannot be set up by way of counter-claim or set-off that the bank, in discounting a series of notes, the proceeds of which were used to pay other notes, knowingly took a greater rate of interest than that allowed by law. The remedy in such case is an action of debt to recover back twice the amount paid. Nat. Bank of Auburn *v.* Lewis, *supra.* S. P., Farmers', &c., Nat. Bank *v.* Lang, 22 Hun 372.

V.

VALUE.

Opinions of witnesses, to prove, see WITNESSES, 57.

VENDOR AND PURCHASER.

[Includes only decisions relative to the requisites of, and rights and liabilities arising out of, *Executory contracts* for the sale of land. For the law applicable to *Conveyances*, and the *Covenants* contained in them, see COVENANTS; DEEDS. As to the *Specific performance* of contracts to sell land, see, also, SPECIFIC PERFORMANCE.]

1. **Rights of the purchaser, generally.** When, after a statement by the vendor of the use to which adjoining buildings owned by him are to be applied, the vendee may restrain him from applying them to other uses, see Musgrave *v.* Sherwood, 23 Hun 669; 60 How. Pr. 339.

2. Under the provision of the Revised Statutes (1 Rev. Stat. 749, § 3,) which provides that the title of a *bona fide* purchaser, for a valuable consideration, from the heirs-at-law of a person who died seized of real estate, shall not be defeated or impaired by a devise by such person of the real estate so purchased, unless the will containing the devise shall have been duly proved or recorded within four years after the death of the testator, except, among other things, where it appears that the will has been concealed by the heirs or some one of them, the exception does not apply where the devisees or some one of them have knowledge and possession of the will, and it is taken from such possession clandestinely by an heir and secreted or destroyed; it only applies to a concealment, which leaves the devisees in ignorance of their rights under the will, and deprives them of knowledge of its existence.—*Ct. of App., Jan.,* 1880. Cole *v.* Gourley, 79 N. Y. 527.

3. **Constructive notice—duty to inquire.** The facts which will put a purchaser of land upon inquiry, and which will charge him with knowledge of equities arising from unrecorded instruments, considered and held to exist in this case.—*Supreme Ct.,* (*4th Dept.,*) *April,* 1881. Brumfield *v.* Boutall, 24 Hun 451.

4. A purchaser, for a valuable consideration, is not chargeable with constructive notice that the conveyance to him was made by his vendor with intent to defraud creditors; actual notice is required to impair or affect his title. (2 Rev. Stat. 137, § 5.)—*Ct. of App., Dec.,* 1879. Stearns *v.* Gage, 79 N. Y. 102.

5. **Action for specific performance.** Where, by a contract for the sale of lands, the vendor agreed to pay all taxes and assessments, from its date, until the purchase money was paid as provided, and then to convey by warranty deed, and where at the time fixed for performance of the contract, there were taxes and assessments upon the lands—*Held,* that upon refusal of the vendor to perform, the vendee was entitled to maintain an action for specific performance; that she was not confined to an action at law upon the covenant to pay the taxes.—*Ct. of App., Feb.,* 1880. Stone *v.* Lord, 80 N. Y. 60.

6. The vendor tendered a deed, executed by himself and wife, containing a covenant on the part of the grantee to pay such taxes and assessments. Upon objection being made, he struck out said covenant. *Held,* that the vendee was not required to accept the same, as the alteration, without the consent of the wife, did not remedy the defect, and it vitiated the deed. *Ib.*

7. **Right to relief for defect of title.** A purchaser of land, who has paid part of the purchase money and given a mortgage for the residue, will not be relieved against the security given on the ground of defect of title, where there is no allegation of fraud in the sale, and he has not been evicted.—*Ct. of App., June,* 1880. Ryerson *v.* Willis, 81 N. Y. 277, 280.

8. By a contract of sale of certain premises in the city of New York, defendant agreed to give a warranty deed, and also a quit-claim deed, or release from the corporation. If this could not be done at the time of the delivery of the warranty deed, defendant was to indemnify so as to insure a delivery by May 25th, 1875, but this not to affect defendant's responsibility under his warranty. Plaintiff was to give a mortgage for a portion of the purchase price, which, it was agreed, was to remain as security for the delivery of the quit-claim or release, and was not to be collectible until such delivery. Defendant executed and delivered his warranty deed, receiving the mortgage as stipulated. *Held,* that an action to have the mortgage canceled and discharged because of defendant's failure to procure and deliver the quit-claim or release within the time specified was not maintainable. *Ib.*

9. **Rescission.** A vendee, entitled to rescind a sale for fraud, must act promptly on discovery of the fraud, and restore or offer to restore the property. By dealing with it as owner after such discovery, he deprives himself of this remedy.—*Ct. of App., Jan.,* 1881. Schiffer *v.* Dietz, 83 N. Y. 300.

10. Where fraud upon the part of the vendor is claimed on the sale of real estate, a continuance in possession by the vendee after discovery of the fraud is evidence of an intent to abide by the contract. *Ib.*

11. Defendant, in execution of a contract to convey certain premises to plaintiff by deed, with warranty free and clear from all incumbrances, executed a conveyance May 10th, 1872. At the time of the execution of the contract and of the delivery of the deed, defendant was married, but his marriage was kept secret. Defendant then supposed it to be invalid. Plaintiff had no knowledge of it until the fall of 1873, and defendant knew that plaintiff believed him to be unmarried. In an action to rescind the sale and conveyance—*Held,* that defendant's belief in the invalidity of the marriage did not justify his omission to disclose the fact to plaintiff, as, if void, or if it could be annulled, the fact of the formal marriage would be a cloud on title; that, therefore, a finding of fraud was jus-

tified, and on the discovery thereof plaintiff was entitled to demand a rescission. *Ib.*

As to *Judicial sales*, and rights of purchasers thereunder, see EXECUTION, 7-11; JUDICIAL SALES; MORTGAGES, 63-73.
As to sales of *Chattels*, see SALES.

VENUE.

REMOVAL OF CAUSES; TRIAL, II.

VERDICT.

TRIAL, VII.

VERIFICATION.

PLEADING, V.

VILLAGES.

MUNICIPAL CORPORATIONS, 52, 58-63, 67, 68, 72.

W.

WAGERS.

As to *Contracts* in the nature of wagers, see CONTRACTS, 27-36.

WAGES.

MASTER AND SERVANT, 1; SERVICES.

WAIVER.

Of *Strict performance* of contract, see CONTRACTS, 50, 51.
Of *Demand and Notice*, see BILLS OF EXCHANGE, 9, 10.
Of objections that should be *Taken at the trial*, see APPEAL, 15-18, 59, 119-123.
Of *Right to trial by jury*, see TRIAL, 3, 4.
Of *Preliminary proofs* of loss, see INSURANCE, 8-12, 41, 42.
Of *Condition* in fire policy, see INSURANCE, 15-32.
Effect of *Appearance* as a waiver of defects, see ACTION, 12.

WAR.

1. **Proceedings under the confiscation acts** of congress, while in the nature of procedings *in rem*, operate only to divest the title of the party alleged to be the owner of the property seized, and judgment of confiscation and forfeiture does not divest or affect the title of third persons originating prior to the seizure, or of the real owner not proceeded against.—*Ct. of App., Jan.*, 1881. Risley *v.* Phenix Bank of New York, 83 N. Y. 318, 332.
2. The confiscation acts do not contemplate or authorize the confiscation of the property of a corporation. *Ib.*, 335.

WARD.

GUARDIAN AND WARD.

WARRANTS.

ARREST. II.; ATTACHMENT, 22-25; EXTRADITION, 2, 3.

WARRANTY.

COVENANTS, 7; SALES, 16, 17.

WATER-COURSES.

[Consult, also, MILLS; RIPARIAN RIGHTS.]

Natural flow of stream—obstructions. Plaintiffs opened a quarry on their lands, the excavation forming a reservoir into which the surface water from the contiguous lands collected. In the spring, when plaintiffs commenced work, they pumped this water, together with that coming from the melting snows and from small water-courses cut off by the excavation, into a water-course which flowed from their lands across defendant's land below. This water, if the excavation had not been made, would have naturally flowed into the stream and although the flow of water was greater when pumping than it otherwise would have been, the natural capacity of the water-course was sufficient to carry off the water so discharged together with the other waters running in the stream. Defendant filled up the channel of the stream and erected a dam across it upon his premises, thus throwing back the water on to plaintiff's land. *Held*, that an action was maintainable to compel defendant to remove such obstructions and to restrain him from interfering with the flow of water in the stream.—*Ct. of App., June*, 1880. McCormick *v.* Horan, 81 N. Y. 86.

WEST TROY.

MUNICIPAL CORPORATIONS, 72.

WHARVES.

As to the *Regulation* of wharves and piers in New York city, see NEW YORK CITY, 3, 4.

WIDOW.

Right of, to *Dower*, see DOWER.

WILLS.

I. THE POWER TO MAKE A WILL; AND HOW EXERCISED.
II. PROVING A WILL.
III. VALIDITY.
IV. LAW OF PLACE.
V INTERPRETATION AND EFFECT.
1. *General rules of construction.*
2. *The residuary clause.*
3. *The doctrine of equitable conversion.*
4. *Actions for the construction of wills.*
VI. CONTESTING A WILL FOR INCAPACITY OR UNDUE INFLUENCE.

I. THE POWER TO MAKE A WILL; AND HOW EXERCISED.

1. **Testamentary capacity.** Mere eccentricity, and disbelief, on the part of the testator, in any specific religious doctrines, will not suffice to destroy his testamentary capacity.—*Westchester Co. Surr. Ct., Dec.*, 1880. Hartwell *v.* McMaster, 4 Redf. 389.

2. **Execution and publication.** An imperfect or indistinct subscription of the testator's name may be regarded as his mark, and will thus constitute a compliance with the requirements of the statute. *Ib.*

3. A. came, with his will in his pocket, to the house of his brother Jeremiah, who lived with his daughter Isabel, and said, "Jeremiah, I want you and Bell to witness my will." He then asked for a pen and ink, put his hand in his pocket, took out the will and signed it. It was then signed by the brother and daughter, under the usual attestation clause, and he then put it in his pocket and carried it away. *Held*, that there was a sufficient publication of the will.—*Supreme Ct., (2d Dept.,) Sept.*, 1880. Darling *v.* Arthur, 22 Hun 84.

4. As to what constitutes a sufficient execution and publication of a will by the testator, see Von Hoffman *v.* Ward, 4 Redf. 244; Stein *v.* Wilzinski, Id. 441; Dack *v.* Dack, 84 N. Y. 663.

5. **Revocation.** Where, after the execution of his will, the testator makes erasures and interlineations therein, without intending to re voke, and without re-executing the same, the will will be admitted to probate as originally executed. The cancellation, obliteration or destruction of a will with intent to revoke it, declared by the statute to constitute a revocation, (3 Rev. Stat. 63, [6th ed,] § 40,) refers to the whole will, and not to particular provision thereof.—*N. Y. Surr. Ct., Dec.*, 1879. Matter of Prescott, 4 Redf. 178.

II. PROVING A WILL.

6. **What proof is admissible and sufficient.** An executor of a will is a competent witness to prove its due execution, although not a subscribing witness.—*Ct. of App., Jan.*, 1881. Rugg *v.* Rugg, 83 N. Y. 592; *affirming* 21 Hun 383.

7. Upon the probate of a will, the beneficiaries thereunder cannot testify as to personal transactions with the testatrix tending to establish her testamentary capacity.—*Supreme Ct., (3d Dept.,) Nov.*, 1880. Snyder *v.* Sherman, 23 Hun 139.

8. When the admission of improper evidence by a surrogate, furnishes no ground for reversing a decree admitting a will to probate, see *Ib.*

9. Upon an application for the admission to probate of a will and three codicils thereto, it appeared that both of the attesting witnesses to the first codicil resided in the State of New Jersey, and that the codicil was there executed. One of the witnesses was called and testified to the formal execution of such codicil. While the other witness thereto, who was present in court, was being examined as to other matters, the counsel for the contestants, none of whom were infants, admitted the formal execution of the said codicil, and that the signature of the witness thereto was in his handwriting and was made by him. *Held*, that the statutory requirement that all the witnesses to a will must be examined, is subject to the qualification that they are all residents of this state, and that under the circumstances of this case the proof of the due execution of the codicil by the witness who testified to its execution was sufficient to require it to be admitted to probate.—*Supreme Ct., (2d Dept.,) Sept.*, 1880. Swenarton *v.* Hancock, 22 Hun 38; *affirmed*, 9 Abb. N. Cas. 326.

10. That a recital in the attestation clause, which asserts that a request was made by the testator to the witnesses to sign, will supply the defect of failing to prove such request by the testimony of the witnesses examined on the probate, see Walsh *v.* Walsh, 4 Redf. 165.

11. **Effect of uncertainty or discrepancy in testimony of subscribing witnesses.** The failure of recollection of the subscribing witnesses to a will, as to what occurred at the time of signing, will not defeat the probate thereof if the attestation clause and the surrounding circumstances satisfactorily establish its execution.—*Ct. of App., Jan.*, 1881. Rugg *v.* Rugg, 83 N. Y. 592.

12. Where the witnesses differ in their testimony as to the mode of execution of the will, and one of them is the lawyer who drew the will and attended to its execution, his testimony is entitled to greater weight than that of the other witness, who is unfamiliar with the execution of wills.—*Kings Co. Surr. Ct., July*, 1880. Neiheisel *v.* Toerge, 4 Redf. 328.

13. **When probate will be refused.** Probate of two codicils to a will refused, on the

ground that they were not the free or voluntary act of the testator, but were procured by fraudulent misrepresentations. Swenarton *v.* Hancock, *supra.*

14. Circumstances under which the court will refuse to admit a will to probate, on the ground that it was procured by undue influence, considered; and in this case the decision of the surrogate in refusing probate to the will in question, affirmed, on the ground that the illness and mental condition of the testator at the time of its execution, imposed upon the legatee the burden of establishing, by clear and satisfactory evidence, that she had not unduly used her influence in procuring its execution; and that she had failed to give such evidence.—*Supreme Ct.*, (1*st Dept.*,) *Nov.*, 1880. Phipps *v.* Van Kleeck, 22 Hun 541.

III. Validity.

15. Accumulations of income. A testator devised and bequeathed to his executor the sum of $11,000 in trust, to invest the same in bond and mortgage, and keep the accumulations on the same invested until the decease of his sister-in-law, and then to pay the same to her children, as therein provided. The balance, rest and remainder of his estate he devised and bequeathed to two persons named in his will. *Held*, 1. That the direction as to the accumulation of the interest on the $11,000 was void.

2. That the said interest should be paid over to the residuary legatees, and not to those entitled to the fund on the death of the sister-in-law of the testator.—*Supreme Ct.*, (3*d Dept.*,) *Jan.*, 1881. Matter of Dey Ermand, 24 Hun 1.

16. The testator directed his trustees to set apart a third of the income of his residuary estate for the use of his great-granddaughter during her life; the principal sum to go to her children, or, in case of her death without issue, to others. By a codicil, he directed that so much of such income as should not be needed, in the judgment of his executors, for her support, should be invested during her minority, and any accumulation of interest should be added to the principal. *Held*, that though the terms of the codicil, as to accumulations of income, were in conflict with the provisions of the Revised Statutes, yet that this invalidity did not affect the residue of the trust, and that the invalid portion might be dropped.—*Supreme Ct.*, (1*st Dept. Sp. T.*,) *May*, 1881. Barbour *v.* De Forrest, 61 How. Pr. 181.

17. The testator directed that $30,000 which he had invested in United States bonds, be "kept invested until my youngest grandchild, now born, or that may hereafter be born before the final distribution of my estate, shall be of full and lawful age," and that his executor should, out of the income thereof, pay for repairs to stones in a cemetery lot, and make up any deficiencies in the funds provided for the payment of legacies, and that they might, from time to time, after five years from the time of his death, make division and distribution of any surplus that might then be in their hands, and also, if they should see fit at the same time, divide and distribute $10,000 of said principal and bonds, thus invested, between his children and grandchildren, and that the remaining $20,000 should be divided among them when the youngest grandchild, born, and that might within twenty years be born, should arrive at full age, or, if a granddaughter, should sooner be lawfully married. *Held*, that the clause involved a violation of the statute against the accumulation of income, and of the statute against the suspension of the absolute ownership of personal property, and that, as the part which was good could not be separated from that which was bad, that the whole must be rejected.—*Supreme Ct.*, (2*d Dept.*,) *Dec.*, 1880. Smith *v.* Edwards, 23 Hun 223.

18. Suspension of power of alienation. A testator, by his will, directed his executor to sell and dispose of all the rest, residue and remainder of his estate, real and personal, "such portion of the said real estate as may be in the State of New York, to be sold at public sale in the city of New York, notice thereof having first been given of the time and place of sale for three successive weeks, in four of the daily newspapers of the said city," and to dispose of the proceeds as therein directed. He also provided that, "in view of the present depreciation in real estate, it is my will that my executors, or such of them as shall qualify, exercise their discretion as to the time to sell the same—not longer than three years after my decease. * * * All rents, income or profits from my estate, until it is finally distributed, I direct my said executors to divide semi-annually among those to whom the bequests are made, in the proportion the amount of the said bequests bears to the said net income or profit." *Held*, that the direction to divide the rents, income and profits of the estate did not vest a fee in the executors by implication, and that the direction as to the time and mode of sale created no unlawful suspension of the power of alienation.—*Supreme Ct.*, (1*st Dept.*,) *Dec.*, 1880. Robert *v.* Corning, 23 Hun 299.

IV. Law of Place.

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V. Interpretation and Effect.

1. *General rules of construction.*

19. Ascertaining the testator's intent. A testator, by his will, directed his executor "to sell and dispose of" sufficient real estate to pay off a specified mortgage, and then provided that, "at the death of my said beloved wife, my executor *shall and dispose* of all my estate, and the accumulations and profits thereof, either by public or private sale," and divide the avails thereof as therein provided. *Held*, that the word "sell" might be supplied before the word "and," or the word "and" be omitted, in order to carry out the evident intention of the testator.—*Supreme Ct.*, (1*st Dept.*,) *Dec.*, 1880. Hall *v.* Thompson, 23 Hun 334.

20. The second item of the testator's will was as follows: "As to my worldly estate, and all the property, real, personal and mixed, of which I shall die seized and possessed, and to which I shall and may be entitled to at the time of my decease, I devise, bequeath and dispose of in the following manner, viz." He then gave directions as to the payment of certain sums, and provided that, upon the death of his wife, the executor should sell his estate and dispose of the avails among certain persons therein named. *Held*, that the intention of the

testator was to blend all his property, real, personal and mixed, into one estate, and appropriate it to the objects expressed in the will, and to the discharge of all the burdens created by the terms thereof; and that the legacies were, therefore, a charge upon the real estate. *Ib.*

21. The will of T., after directing the payment of his debts and funeral expenses, and after giving a series of legacies, gave the residue of his estate, real and personal, to his wife. Then followed this clause: "And I authorize my executors, after paying my just debts and funeral expenses, to pay over to my wife $5000 in cash out of the bequeath to her, and before any of the other bequeaths are paid off." The executors were authorized and direc ed to sell and dispose of all of the real and personal estate, with power to reserve certain parcels of real estate until prices specified could be obtained therefor. In an action to obtain a construction of the will—*Held*, that the intent of the testator was to charge the payment of the legacies upon the real estate; also, that the gift to the wife was in lieu of dower.—*Ct. of App., Feb.*, 1881. Le Fevre *v.* Toole, 84 N. Y. 95.

22. The testator devised a house and lot to his wife, and authorized his executors "to pay off any mortgages or other encumbrances there may be on said house and lot at my death, provided the title is in me." It appeared that when the testator purchased the premises, the conveyance was made directly to his wife, and the title remained in her up to the time of his death. She, in the deed, assumed payment of a mortgage on the property. The payment upon the purchase price was paid by the testator, and he paid the taxes and a portion of the principal of the mortgage, and personally guaranteed the payment of the remainder. *Held*, that the testator intended that the executors should pay off this mortgage if the title remained at his death in the condition in which he had placed it.—*Supreme Ct.*, (1*st Dept. Sp. T.*,) *June*, 1881. Sutherland *v.* Clark, 61 How. Pr. 310.

23. Construction as to property devised. The testatrix devised two lots and a gore "on the southerly side of Forty-ninth street, near Eighth avenue." Upon the trial of an action for the construction of the will, extrinsic evidence showed that the testatrix owned no property on Forty-ninth street, but did own property on One Hundred and Forty-ninth street, answering fully in other respects, the terms of the devise; and further, that persons living above One Hundredth street drop the One Hundred, and designate the lot by the remaining figures. *Held*, that the devisee under the will should take the two lots in question.—*Supreme Ct.*, (*Sp. T.*,) *Dec.*, 1880. Peters *v.* Porter, 60 How. Pr. 422.

24. When after-acquired property will pass. A testator, by his will made in 1858, provided that after all his lawful debts were paid and discharged, he gave, bequeathed and disposed of the residue of his estate, real and personal, as follows: "To my beloved wife Harriet, I give, devise and bequeath all my household goods and personal property, to be hers forever, I also give and bequeath to my beloved wife Harriet all my real estate now possessed by me, during the term of her natural life, and after her death to be disposed of as follows, to wit: to my son John," charged with the payment of certain legacies. After the date of the will, the testator sold the farm upon which he then resided, and moved upon and purchased another one, of which he died seized and possessed. *Held*, that the after-acquired real estate passed by the will to the devisees, and that they and not the testator's heirs-at-law were entitled thereto.—*Supreme Ct.*, (4*th Dept.*,) *April*, 1881. Lent *v.* Lent, 24 Hun 436.

25. Construing separate provisions. Where an estate is given in one part of a will in clear and decisive terms, such estate cannot be taken away or cut down by any subsequent words that are not as clear and decisive as the words of the clause giving the estate.—*Ct. of App., June*, 1880. Roseboom *v.* Roseboom, 81 N. Y. 356.

26. The will of R. contained this clause: "I give and bequeath my beloved wife Susan, one-third part of all my property, both real and personal, and to have the control of my farm as long as she remains my widow, * * * and at the death of my wife all my property, both real and personal, to be equally divided between my eight children." In an action for partition of the farm referred to, of which the testator died seized—*Held*, that the widow took a fee of one-third of the premises. *Ib.*

27. Construction as to time. When the will speaks from time of testator's death. For some purposes a will is considered to speak from the date of its execution, and for others from the death of the testator and not from its date. The general rule is that a will speaks from the death of the testator, where there is nothing in its language indicating a contrary intention. When a testator refers to an actual existing state of things, the language is referential to the date of the will.—*Supreme Ct., Aug.*, 1881. Merriam *v.* Wolcott, 61 How. Pr. 377.

28. Where a bequest of personal property contains no express words of gift, but the gift arises by implication, from a clause directing the fund to be divided among persons named, such clause is also evidence of an intent that the gift is not to vest in interest until the time for distribution has arrived.—*Supreme Ct.*, (2*d Dept.*,) *Dec.*, 1880. Smith *v.* Edwards, 23 Hun 223.

29. A testator, by his will, devised all his real and personal property to his executors, in trust, to collect and receive the income and pay over the same to his five children, in equal proportions, until his daughter Ellen, or, in case of her death, his daughter Margaret, should become of age, at which time he directed his executors to sell all his real estate and convert all his personal property into money, and to then divide his said estate between his said children equally, share and share alike; and in case any of his children should die before such distribution, leaving issue surviving, then such issue to take the share to which his, her or their parents would have been entitled if living. *Held*, that the shares did not vest in the children until the time for the distribution had arrived, and that the share of a daughter who had died previous to that time, intestate and without issue, went to the surviving children and not to her husband.—*Supreme Ct.*, (2*d Dept.*,) *Dec.*, 1880. Magill *v.* McMillan, 23 Hun 193.

30. The estate or interest which will pass. The will of F. disposed of his property as follows: "I, * * * give and bequeath all my property, real and personal, to my beloved wife, Mary, only requesting her, at

the close of her life, to make such disposition of the same among my children and grandchildren as shall seem to her good." *Held*, that the gift to the wife was absolute; that the concluding words being merely words of suggestion, not of direction or command, did not create a trust.—*Ct. of App., Nov.*, 1880. Foose *v.* Whitmore, 82 N. Y. 405.

31. The will of H. gave to his executors such portion of his estate as should be necessary to carry out certain specified purposes, among them the following: "To divide the sum of $20,000 into as many shares as there shall be lawful issue of my deceased nephew Matthew Horn, living at my death, and to invest the same and apply the interest and income from each of said shares to the use of each of said children respectively, and as they respectively depart this life, to pay over the principal of said share to their lawful issue, share and share alike." At the time of the execution of the will and of the death of the testator, there were living three children of said Horn, and seven grandchildren, two of them children of a deceased daughter. In an action for a construction of the will—*Held*, that the provision did not include the grandchildren, either the children of the deceased child or of the living children; and that they took no interest under it. *Ct. of App., March*, 1881. Palmer *v.* Horn, 84 N. Y. 516.

32. Taking per stirpes and per capita. The rule that where a gift is made by will to a person described as standing in a certain relation to the testator, and to the children of another standing in the same relation, they take *per capita*, not *per stirpes*, is not absolute; it is to be governed by the context, and will yield "to a very faint glimpse of a different intent." —*Ct. of App., June*, 1881. Ferrer *v.* Pyne, 81 N. Y. 281. S. P., Everitt *v.* Carman, 4 Redf. 341.

33. Instances of the construction of peculiar testamentary dispositions of property, and of the determination of questions arising upon unusual language employed by the testator, and the facts existing in the particular case. Ellingwood *v.* Beare, 59 How. Pr. 504; Chapman *v.* Nichols, 61 Id. 275; Lottimer *v.* Blumenthal, Id. 360; Merriam *v.* Wolcott, Id. 377; Denike *v.* Harris, 23 Hun 213; Van Voorhis *v.* Brintnall, Id. 260; Thompson *v.* Conway, Id. 621; Monarque *v.* Monarque, 80 N. Y. 320; Vincent *v.* Newhouse, 83 Id. 505; Williams *v.* Freeman, Id. 561; Delaney *v.* Van Aulen, 84 Id. 16; Denike *v.* Harris, 84 N. Y. 89; Livingston *v.* Gordon, Id. 136; Ham *v.* Van Orden, Id. 257; Ireland *v.* Ireland, Id. 321; Meeker *v.* Meeker, 4 Redf. 29; Matter of Boyd, Id. 154; Florence *v.* Sands, Id. 206; Matter of Ridgway, Id. 226; Wood *v.* Seward, Id. 271; Everitt *v.* Carman, Id. 341; Strang *v.* Strang, Id. 376; Mumford *v.* Rochester, Id. 451; Marx *v.* McGlynn, Id. 455.

2. *The residuary clause.*

34. What will pass under it. When a testator gives and bequeaths all the rest and residue of his estate, both real and personal, of every name and nature, remaining after his debts have been paid, to his wife, who is also appointed executrix, for her own use and benefit, to be disposed of as she may desire or deem just, the title to a promissory note indorsed by him in blank and deposited in a bank for collection, passes at once to his widow, individually, her title thereto being derived from the provisions made for her in the will, and not from the fact that letters testamentary were subsequently issued to her thereon.—*Supreme Ct.*, (*1st Dept.*,) *March*, 1881. Barlow *v.* Myers, 24 Hun 286.

35. What will not pass. The plaintiff's testator was a member of the Conductors' Life Insurance Company, the by-laws of which provided that, upon the death of any member, each of the survivors should pay the sum of one dollar, and that the premium so to be paid in case of the death of any member, "may be disposed of by his last will and testament, otherwise it shall belong to and be paid to his widow; or in case he shall leave no widow, then to the heirs and legal representatives of the deceased; and in the absence of such will, and in case such member leave no widow, heirs or legal representatives, such premium shall revert to the company."

Held, 1. That the power reserved to the testator to dispose of the amount payable at his death was in the nature of a power of appointment, and must be exercised as such.

2. That the said amount would not pass as a part of his estate under the residuary clause of his will, but only in pursuance of a clause expressing in clear and unmistakable terms the intention of the testator to divert it from the purposes to which by the by-laws of the company it was to be devoted.—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1881. Greeno *v.* Greeno, 23 Hun 478.

3. *The doctrine of equitable conversion.*

36. What amounts to an equitable conversion. A testamentary provision giving executors power to convert the estate into money, and directing them to distribute the money among persons named, constitutes an equitable conversion; and the will must be construed as a will of personal property.—*Supreme Ct.*, (*Sp. T.*,) *Aug.*, 1880. Flanagan *v.* Flanagan, 8 Abb. N. Cas. 413. S. P., Gallup *v.* Wright, 61 How. Pr. 286.

37. What does not so operate. A will made in 1663 directed that the "four first born children" of the testator "shall divide out of their father's property the sum of one thousand guilders, to be paid by them out of the proceeds of a certain farm * * * before any other division takes place." *Held*, that this did not work an equitable conversion of the farm from real estate into personalty; that the distinction in the English law between the descent of real and the distribution of personal estate, upon which the doctrine of equitable conversion was founded, did not exist in the law which prevailed in New Netherlands at the time the will was made; also, that the effect of the provision was simply to create a charge upon the land in the hands of the devisees; and that assuming that by implication a power and duty was imposed on the "universal heirs" to sell, this power would not devolve upon an administrator with the will annexed.—*Ct. of App., Jan.*, 1881. Van Giessen *v.* Bridgford, 83 N. Y. 348; *affirming* 18 Hun 80.

4. *Actions for the construction of wills.*

38. When an action will lie. An action to obtain the construction of a will is not a proper one in which to determine the claim of a receiver, appointed in proceedings supplementary to execution, issued upon a judgment recovered against one of the legatees, since deceased, to the share of the judgment debtor in the estate.—*Supreme Ct.*, (*2d Dept.*,) *Dec.*, 1880. Smith *v.* Edwards, 23 Hun 223.

39. Right of executors to sue. Executors and trustees can only maintain an action to obtain a construction of a will in those cases in which some continuing duty—some trust which requires and will require action for some time to come—is imposed upon them thereby.—*Supreme Ct.*, (*3d Dept.*,) *Sept.*, 1880. Powell *v.* Demming, 22 Hun 235.

40. The fact that an executor is about to close up the estate, and that the parties interested therein do not agree as to the construction to be given to certain provisions of the will, and as to the distribution of the property thereunder, does not authorize the executor to maintain an action to obtain a construction of the will; such questions should be raised and settled upon his final accounting before the surrogate. *Ib.* Compare Sutherland *v.* Clark, 61 How. Pr. 310.

41. The plaintiff's testatrix, after making certain specific and pecuniary legacies, and bequeathing the residue of her personal property to a Mrs. Dill, devised her real estate to two persons named in the will, charged with the payment of all her just debts, funeral and testamentary expenses, and pecuniary legacies. One of the said devisees, acting, as he claimed, as executor, collected the rents of the real estate from the death of the testatrix, April 6th, 1877, up to October 2d, 1878, when, discovering that the debts exceeded the value of the farm, the devisees executed a deed renouncing and releasing their interest in it. Thereafter this action was brought by the said executor for a construction of the will and to have the real estate sold to pay the debts and legacies, which exceeded in amount both the real and personal estate. It was not shown that the heir-at-law, who was the principal creditor of the estate, had been informed of the renunciation of the devisees, or had been asked or had refused to pay and discharge the debts and legacies.

Held, 1. That if the devisees accepted the devise they became personally liable for the payment of all the debts and legacies charged upon it.

2. That if they refused to accept it, the land descended to the heir-at-law of the testatrix, charged therewith, and that it was the right and duty of the creditors and legatees, and not of the executors, to enforce such charges in an appropriate action.—*Supreme Ct.*, (*3d Dept.*,) *Nov.*, 1880. Dill *v.* Wisner, 23 Hun 123.

VI. Contesting a Will for Incapacity or Undue Influence.

42. What constitutes undue influence, and how proved. Any influence brought to bear upon the mind of a testator which leads him to surrender his free agency and adopt the will of another, is undue to the extent of avoiding the will. If a person be persuaded by an appeal to his generosity, his affection or his sense of duty, to make a will contrary to what he contemplated, yet, if the act be the legitimate result of such persuasion, acting upon his untrammeled judgment, it is not an unlawful persuasion, and the will is not the result of his surrender of his free agency, but rather the result of another's persuasion upon an independent mind, capable of compliance and refusal. If, however, such a persuasive appeal be made to a person of too feeble a mind to resist, or to one who, from physical or mental weakness, is incapable of enduring or repelling the importunity, such persuasion or importunity would be undue, for the reason that it overcame and controlled the will of the testator, and his act became the expression of the will of another. —*N. Y. Surr. Ct.*, *June*, 1879. Van Kleeck *v.* Phipps, 4 Redf. 99, 128.

43. Neither an unjust will, nor the mere existence of the opportunity and motive for undue influence, without any affirmative evidence of its exercise, will warrant the presumption of such undue influence in a case where the testator's mind is unimpaired, and where it clearly appears that he had the opportunity to, and did, understand the provisions of his will.—*N. Y. Surr. Ct.*, *June*, 1879. McCoy *v.* McCoy, 4 Redf. 54, 60.

As to what is sufficient proof of undue influence, see Van Kleeck *v.* Phipps, 4 Redf. 99; Demmert *v.* Schell, Id. 409.

As to what proof is insufficient, see Neiheisel *v.* Toerge, 4 Redf. 328; Stein *v.* Wilzinski, Id. 441; Marx *v.* McGlynn, Id. 455.

As to the powers, duties and liabilities of *Executors* and *Testamentary trustees*, see Executors and Administrators; Trusts.

As to the admissibility of *Parol evidence* to explain the meaning of words used in a will, see Evidence, 39-41.

WITNESSES.

I. Attendance and Compensation.

II. Competency.
1. *Parties to the record.*
2. *Persons interested in the event.*
3. *Husband and wife.*
4. *Attorneys.*
5. *Convicts.*

III. Credibility.
1. *General rules.*
2. *Impeaching and contradicting.*

IV. Rules of Examination.
1. *Examination-in-chief.*
2. *Cross-examination.*

V. Opinions of Experts and Others.

I. Attendance and Compensation.

1. Subpœna duces tecum. In this action, brought to recover moneys alleged to have been taken from the plaintiffs' firm by the defendant, while employed by it as a bookkeeper or clerk, the latter alleged that the moneys

were taken in pursuance of an arrangement made with one Clyde, who was then the senior partner of the plaintiffs' firm, by which the defendant was to have one-fourth of the profits. The defendant having subpœnaed one of the plaintiffs to produce the books of the firm, the subpœna was thereafter set aside, on the application of the plaintiffs, based upon an affidavit of one of their attorneys, stating that he believed that the subpœna was served with a view of annoying the plaintiffs, and that the books called for were from forty-five to fifty in number. *Held*, that the court erred in granting the application; that if the subpœna was too broad, the court should have required the plaintiffs to allow the defendant to inspect the books, or have compelled them to produce copies of such portions thereof as were material to the issues.—*Supreme Ct.*, (2*d Dept.*,) *Feb.*, 1881. Clyde *v.* Rogers, 24 Hun 145.

II. COMPETENCY.

1. *Parties to the record.*

2. Testimony as to transactions with deceased persons: when competent. The provision of the Code of Civ. Pro. (§ 829), prohibiting a party from testifying, in certain cases, to a personal transaction with a deceased person, does not extend to transactions with the agents of such person.—*Ct. of App.*, *Feb.*, 1880. Pratt *v.* Elkins, 80 N. Y. 198.

3. Testimony that, during the lifetime of a deceased person, witness had examined his account book (shown to have been lost), and that he saw in it an entry in the handwriting of deceased, is not testimony to a transaction between witness and the deceased, within the meaning of § 829.—*Com. Pleas*, (*Gen T.*,) *Nov.*, 1879. Carroll *v.* Davis, 9 Abb. N. Cas. 60.

4. A party who was examined on a former trial, and who is rendered incompetent by reason of the death of his adversary before the second trial, may have his testimony on such former trial, read at any subsequent trial. The statute does not require the testimony of the deceased party to be first offered.—*Com. Pleas.*, (*Gen T.*,) *June*, 1881. Lawson *v.* Jones, 61 How. Pr. 424.

5. When the testimony of a deceased party to a former action, given in said action, is read upon the trial of a subsequent action by a party thereto, (Code of Civ. Pro., § 830,) the case does not fall within the several clause of Code of Civ. Pro., § 829. The said party to the subsequent action is precluded from testifying as to the matter contained in said testimony, so far as specified in said § 829.—*Supreme Ct.*, *April*, 1880. Potts *v.* Mayer, 46 Superior 182.

6. What is not a personal transaction or communication within Code of Civ. Pro., § 829, see Hill *v.* Heermans, 22 Hun 455.

7. Instances. After plaintiff had given testimony on the trial as to transactions with C., one of the defendants, but before his examination was completed, C. died. *Held*, that the death of C. did not authorize the striking out of the testimony; that Code of Pro., § 399, had no application, as the disqualification under that section depended entirely upon the facts existing when the testimony was given, not upon any change subsequently occurring.—*Ct. of App.*, *Feb.*, 1880. Comins *v.* Hetfield, 80 N. Y. 261.

8. After the death of C., plaintiff produced a diagram furnished by one of the defendants. He could not recollect from whom he received it, and was unable to say he did not receive it from C. He did testify, however, that he used the diagram in the presence of defendants' engineer and of defendant H. *Held*, that the diagram could not be excluded as a personal transaction with the deceased, and was properly received in evidence; that under said section, where a transaction was with a defendant living, it was not incompetent because another defendant was dead. *Ib.*

9. The plaintiff brought this action to set aside a deed, executed by herself and her deceased husband, by which certain real estate owned by the husband was conveyed to the defendant upon trust to pay the debts of the husband. She alleged that she was induced to execute the deed upon the representations then made to her by her husband, that it was in conformity with a proposed deed of trust in which she had agreed to unite, and that relying upon the truth of such representations, and believing the instrument to be what her husband said it was, she executed it without reading it; that the representations were false and that her husband was of unsound mind at the time he made them.

Held, 1. That she was entitled to maintain the action to recover the value of her dower right in the property.

2. That she was a competent witness to testify to the representations made to her by her husband, as against the defendant, and was not disqualified by Code of Civ. Pro., § 829.—*Supreme Ct.*, (1*st Dept.*,) *March*, 1881. Witthaus *v.* Schack, 24 Hun 328.

10. — when incompetent. Where the holder of a promissory note parts with the possession thereof to the maker, it is personal transaction between them, within the meaning of Code of Pro. § 399.—*Ct. of App.*, *June*, 1880. Van Gelder *v.* Van Gelder, 81 N. Y. 625.

11. Plaintiff held the check sued on as assignee of H., who died prior to the trial. *Held*, that defendant was incompetent, under § 399 of the Code of Procedure, to testify to the personal transactions between him and H.—*Ct. of App.*, *April*, 1880. Raubitschek *v.* Blank, 80 N. Y. 478.

12. To secure the joint bond of a husband and wife they executed their mortgage to C. upon lands owned by the wife alone. She thereafter conveyed the mortgaged premises to her son, who, in an action to foreclose the mortgage, brought by an assignee of the mortgagee, interposed the defence of usury; the mortgagors did not defend. The mortgagee died previous to the trial. This took place in 1878, when the original § 830 of the Code of Civil Procedure was in force, which provided in substance that where a party cannot be examined as a witness concerning a transaction with a deceased person under § 829, the husband or wife of said party cannot be examined concerning the same transaction. Upon the trial the son called his father, who negotiated the loan with the mortgagee, as a witness solely in his own behalf, to prove the usury. *Held*, that as the mother, to whose title the son succeeded, would have been precluded from testifying in his behalf as to the transaction with the deceased, the testimony of the father was properly excluded.—*Ct. of App.*, *June*, 1880. Whitehead *v.* Smith, 81 N. Y. 151.

As to whether such testimony falls within the prohibition of § 829, *quære*. *Ib.*

13. When a party cannot testify as to a personal transaction with a deceased person, (Code of Civ. Pro., § 829,) see Wilkins *v.* Baker, 24 Hun 32; Church *v.* Howard, 79 N. Y. 415.

14.—when competent as against personal representatives of the deceased person. Section 829 of the Code of Civil Procedure relative to competency of witnesses in actions against representatives of deceased persons, does not apply to an action against an executor individually.—*Supreme Ct.*, (*4th Dept.*,) *Oct.*, 1880. Hall *v.* Richardson, 22 Hun 444.

15. —when incompetent. Under § 829 a party cannot be examined as a witness in his own behalf against the administrator of a deceased person, as to any personal transaction or communication had by him with the deceased, unless the administrator has been examined in his own behalf concerning the *same* transaction or communication.—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1881. Ward *v.* Plato, 23 Hun 402.

16. Upon the trial of an action brought by the administrator of a deceased payee of a promissory note against the makers thereof, one of whom claimed to be liable as a surety only and the other of whom interposed no defence, the latter was allowed, against the plaintiff's objection and exception, to testify in behalf of his co-defendant as to personal transactions and communications had by the witness with the deceased. *Held*, that the testimony was inadmissible under §§ 828 and 829.—*Supreme Ct.*, (*4th Dept.*,) *Jan.*, 1881. Hill *v.* Hotchkin, 23 Hun 414.

17. On January 13th, 1878, one Eliza Houseworth, being sick of a disease from which she died on February 7th, delivered to the defendant B. certain securities, and directed him to apply the income, and, if necessary, the principal thereof, to the support of her husband during his life, and upon his death to divide what was left between the plaintiffs. On January 27th the husband died, and between that time and February 7th she altered the arrangement as to the said fund, and directed B. to apply a portion thereof to other purposes, which he did. In this action, brought by the plaintiffs to recover the whole of the fund, the defendant B. claimed to be allowed for the amount expended by him in pursuance of the last direction of the deceased, and the other defendants, the administrators of Eliza Houseworth, claimed to be entitled to the whole fund received by B. Upon the trial B. was called by the plaintiffs, and allowed, against the objection and exception of the other defendants, to testify as to the said transactions with the deceased, and as to what she then said to him. *Held*, that the evidence was inadmissible under Code of Civ. Pro., § 829.—*Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. Wilkins *v.* Baker, 24 Hun 32.

2. *Persons interested in the event.*

18. Persons jointly indicted. The trial was had after the passage of the act of 1876, (Laws of 1876, ch. 182,) declaring that persons jointly indicted shall be competent witnesses for each other. One L., who was jointly indicted with the prisoner, was called as a witness on his behalf. His testimony was objected to and refused. *Held*, error.—*Ct. of App.*, *March*, 1881. People *v.* Dowling, 84 N. Y. 478.

3. *Husband and wife.*

19. A wife is a competent witness in proceedings to compel her husband to support her.—*Supreme Ct.*, (*1st Dept.*,) *March*, 1881. People, ex rel. Commissioners, *v.* Barthol, 24 Hun 272.

20. Under Laws of 1876, ch. 782, § 2, a wife is not a competent witness *against* her husband, and cannot be called against him by the people without his consent.—*Oyer and T.*, (*3d Dept.*,) *Oct.*, 1880. People *v.* Briggs, 60 How. Pr. 17.

4. *Attorneys.*

21. When incompetent. In an action to recover damages for an alleged conspiracy to defraud, one K. was called as a witness and allowed to testify, under objection and exception, to communications made to him by defendant R. Prior to the reception of the evidence it appeared that K. was an attorney, was at the time engaged in the practice of law, and was also carrying on a wholesale liquor store; he had done a good deal of law business for R., and gave him legal advice before and after said communications. and then gave his opinion as a lawyer upon the case presented. The communications were made to K. in his store; no fee was paid, there was no general retainer, and no suit was then pending. K. testified that he did not consider that R. was advising with him as counsel at the time. *Held*, that the evidence as to the communications was improperly received.—*Ct. of App.*, *March*, 1880. Bacon *v.* Frisbie, 80 N. Y. 394.

22. The General Term reversed the judgment as to R., but affirmed it as to defendant F. *Held*, error; that said testimony was incompetent as against F., and that the judgment should have been reversed as to both defendants. *Ib.*

5. *Convicts.*

23. Construction of Code of Civ. Pro., § 832. The meaning of the term "convicted," in § 832 of the Code of Civil Procedure, denotes the final judgment of the court in passing sentence. It was the intention of the legislature that a person found guilty of a crime or misdemeanor by the verdict of a jury should be a competent witness as well after sentence had been pronounced as before; and it is no error to allow such a witness to explain the circumstances of his trial and conviction.—*Com. Pleas*, (*Gen. T.*,) *March*, 1881. Sacia *v.* Decker, 1 Civ. Pro. 47.

III. Credibility.

1. *General rules.*

24. Credibility of party called by opposite party. Where the plaintiff voluntarily calls the defendant as a witness, as to matters not merely formal, upon a motion for a dismissal of the complaint, the judge is bound to consider him a credible witness as to the facts testified to by him, whether upon the direct or upon the cross-examination.—*Superior Ct.*, *Dec.*, 1880. Branch *v.* Levy, 46 Superior 428.

25. In such case defendant must be held credible as against plaintiff, even as to matters testified to by him when subsequently called by the defence. *Ib.*

26. Positive and negative testimony. The testimony of a witness who testifies positively that a certain fact occurred is, generally speaking, entitled to more weight than the evidence of another witness who swears that the fact did not occur; for it is far more probable that the latter has forgotten the occurrence than that it should be distinctly impressed on the mind of the former if it never took place. —*Kings Co. Surr. Ct., July,* 1880. Neiheisel *v.* Toerge, 4 Redf. 328, 330.

2. *Impeaching and contradicting.*

27. How a witness may be impeached, generally. To impeach a witness by proof of character, a party is not confined to reputation at the time of trial.—*Ct. of App., March,* 1881. Dollner *v.* Lintz, 84 N. Y. 669.

28. Proof of bias, hostility or prejudice. Where the plaintiff has testified in her own behalf, the defendant should be allowed to prove statements made by the plaintiff that she would get even with both the defendant and her husband. — *Supreme Ct.,* (*2d Dept.,*) *Feb.,* 1881. Starr *v.* Cragin, 24 Hun 177.

29. Showing a conviction of crime. Upon the trial of an indictment for assault and battery, the offence was alleged to have been committed during an affray at a town meeting; one of the witnesses for the prisoner was asked on cross-examination whether he had been indicted for assault and battery, committed, on that day; this was objected to, objection overruled, and the witness answered "yes." *Held,* that it was a fair inference that the witness was indicted as one of the participants in the affray; and that the question was competent to show the position he occupied in respect to the controversy out of which the affray arose and his interest in the litigation, and as showing prejudice or bias.—*Ct. of App., Jan.,* 1880. Ryan *v.* People, 79 N. Y. 593.

30. *It seems* that the mere fact that a witness has been indicted cannot legitimately tend to discredit him or impeach his moral character, and that evidence thereof is therefore incompetent; (Folger and Earl, J. J., dissenting, and holding that the allowance of questions on cross-examination of a witness, as to his having been indicted, is in the discretion of the court.) *Ib.*

31. Impeaching one's own witness. While a party who has called a witness cannot impeach his general reputation for truth, he may contradict him as to any particular fact testified to, and this, although the evidence may collaterally have the effect of showing that the witness is generally unworthy of belief.—*Ct. of App., March,* 1881. Hunter *v.* Wetsell, 84 N. Y. 549.

IV. Rules of Examination.

1. *Examination-in-chief.*

32. What questions are proper. The plaintiff sought to avoid a mortgage given by the person under whom she claimed, to the defendants, on the ground of usury. The usury consisted in the over-valuation of certain railroad bonds transferred by the defendants to the mortgagor, and which formed part of the consideration for which the mortgage was given. Upon the trial, one of the defendants was asked whether, at the time the mortgage was taken, he believed the bonds were worth the price at which they were taken by the mortgagor, and whether he had any intention of violating the usury law. Upon the plaintiff's objecting, the question was excluded. *Held,* that this was error; that under the circumstances of this case, the defendant was entitled to testify as to his intention in making the arrangement for the transfer of the bonds.—*Supreme Ct.,* (*3d Dept.,*) *Sept.,* 1880. More *v.* Deyoe, 22 Hun 208.

33. In an action for the price of goods sold, defendant's son J., who purchased the goods on defendant's account, after testifying as a witness for plaintiff that the principal articles of clothing and groceries for himself and family were obtained of plaintiff, that he often went himself and sent others to plaintiff's store for goods, was asked and permitted to state, under objection and exception, the quantity and amount of articles thus purchased of plaintiff. *Held,* no error.—*Ct. of App., Nov.,* 1879. Green *v.* Disbrow, 79 N. Y. 1.

34. In an action on a fire policy, one of the plaintiffs as a witness for them was asked: "So far as you could, individually, did you get those proofs of loss forwarded as soon as it was possible for you to do so?" This was allowed under objection and exception. He answered: "I did all in my power to have them forwarded at the earliest possible moment." *Held,* competent; that the question called for a fact within the knowledge of the witness.—*Ct. of App., Feb.* 1880. Brink *v.* Hanover Fire Insurance Co., 80 N. Y. 108, 115.

35. In an action on a fire policy, on the cross-examination of defendant's local agent, who was a witness for it on the trial, it was shown that L., its general agent, was at the location of the insured property after the fire, and investigated the circumstances of the loss. Plaintiff thereafter, as a witness in his own behalf, was permitted to testify, under objection and exception, that after the fire. a person he had never before seen, and about whose identity he knew nothing, save what he then learned from him, called upon him, representing himself as L., said general agent, inquired about the foreclosure proceedings, and was advised thereof; this was before the examination of M. *Held,* that the testimony was properly received; that it could not be assumed that the person was an impostor, at least it was for the jury to say whether he was L. or not.—*Ct. of App., June,* 1880. Titus *v.* Glen's Falls Insurance Co., 81 N. Y. 410, 420; S. C., 8 Abb. N. Cas. 315.

36. In an action to recover a balance of the purchase price of plaintiff's interest in certain grist-mill property, the question at issue was as to whether a mortgage, executed by a third person to plaintiff at the time of the conveyance, was received by him as payment or as security merely. The evidence on the trial as to this was conflicting. Plaintiff testified that when the proposition to give the mortgage was made he objected; that defendant represented it to be good and ample security—that "the farm was worth it;" that he finally took it as security; that a prior mortgage was thereafter foreclosed, and the farm brought only enough to pay it. After evidence had been given on the part of

defendant tending to show that the mortgage was given in payment, he was allowed to give evidence, under objection and exception, to the effect that at the time the mortgage in question was given, the mortgaged premises were worth more than the amount of the two mortgages. *Held*, no error; that the testimony was competent in answer to, and explanation of, plaintiff's evidence; and that it was no answer to this that such evidence came out necessarily as a part of his case.—*Ct. of App., June*, 1880. Wallis *v.* Randall, 81 N. Y. 164, 167.

37. A witness for the defendant was permitted to give testimony, under objection and exception, to the effect that the contract in question was abandoned and a new verbal contract was made, and that under this the balance of the purchase price was to be paid by the mortgage. *Held*, no error. *Ib.* 168.

38. What questions are improper. In an action for malicious prosecution, wherein plaintiff alleged that defendants caused him to be arrested under a charge of stealing a deed from defendant K., plaintiff, as a witness in his own behalf, after stating the manner in which he obtained the deeds from K., and the fact that she afterward brought a suit to set aside a subsequent conveyance of the premises made by him, was asked if he made an offer in court in that case in the presence of K., to convey the premises upon being paid the expense he had been put to. This was admitted under objection and exception, and plaintiff answered in the affirmative. *Held*, that the testimony was improperly received.— *Ct. of App., June*, 1880. Thaule *v.* Krekeler, 81 N. Y. 428, 434.

39. K., as a witness in her own behalf, was asked if plaintiff, about the time the charge was made by her, had deeded the property to another person. This was objected to and excluded. *Held*, error; that the evidence bore directly upon the motives of plaintiff in getting possession of the deeds and the grounds which defendant had for the suspicions stated in her affidavit, and upon the existence of probable cause. *Ib.* 435.

40. In an action to recover the amount of a check drawn by C., plaintiff's assignor, to the order of defendant, and alleged to have been delivered to the latter to be used in purchasing a draft for the drawee, the defendant averred in his answer that the check was intended as a payment in part of a claim which C. "morally owed" the defendant, growing out of a fraud perpetrated by C. in inducing defendant to take a fraudulent note; the alleged facts in reference thereto being set forth in the answer, which also averred that defendant settled the claim with C., on his promise that he would at some time pay the loss. On the trial, after L., as a witness for plaintiff, had testified that the check was given to purchase a draft, defendant's counsel sought to show by him, on cross-examination, the facts of the fraud set forth in the answer. This was objected to and the evidence excluded. After defendant, as a witness in his own behalf, had testified that the check was given as a payment upon the claim arising out of the fradulent note, his counsel offered to prove by him the transaction in regard to said note substantially as alleged in the answer. This was objected to and excluded. Before the court ruled upon the offer it was conceded that a release under seal, which was produced, was executed by defendant with full knowledge of the facts. The release recited that, in consideration of the agreement of the other parties to indemnify defendant from the debts of a firm named during the time he was a member, he released C. from all demands "by way of checks, notes or otherwise." *Held*, that the evidence offered was properly rejected; that evidence of the details of the fraud could not legitimately tend to confirm defendant's version.—*Ct. of App., Nov.*, 1880. Canaday *v.* Krum, 83 N. Y. 67.

41. In an action to recover damages for alleged negligence, causing the death of plaintiff's intestate, plaintiff claimed that the deceased fell from the footway through the open draw on defendant's bridge, when crossing it in the night. Defendant had placed gates over the footway on each end of the draw, which were designed to be lowered when the draw was opened. Plaintiff claimed that the gate was not lowered at the time of the accident. M., a boy in defendant's employ, was called as a witness for it, and after testifying, on cross-examination, that he had been sent at times to pull down the gate, was asked if he told one B. on one occasion to pull it down. This was objected to and excluded. *Held*, no error.—*Ct. of App., Feb.*, 1881. Hart *v.* Hudson River Bridge Co., 84 N. Y. 56.

42. M. testified that he did not see a woman fall from the bridge. On cross-examination he testified that he did not say, in the presence of people at the draw, when the subject was discussed just after the splash in the water which he heard, that he saw the woman fall from the end of the bridge. One N. was called as a witness for plaintiff, who testified that he saw a boy among those gathered on the bridge after the draw was closed, but could not identify M. as the one. Plaintiff's counsel then offered to prove that the boy said he saw a woman fall off the bridge. This was excluded. *Held*, no error; that the question as to the identity of M. with the boy whom N. saw was for the court to determine; also, that the attention of M. was not called with sufficient particularity to the time, place, persons, &c., to lay a foundation for the impeaching evidence. *Ib.*

43. One W., a witness for the defence, who lived in the house of one T., about a mile and a half from the prisoner's house, testified that, at about four o'clock in the morning of the day of the murder, he was awakened by the barking of a dog, and on looking out of the window he saw the two Kelloggs and T. standing back of the house; that Alden Kellogg had a double-barreled gun and T. a bag with something in it; that one of the men washed his hands at the pump; that they changed their coats; that the Kelloggs went away with the gun and bag, and T. came into the house; that he heard a part but not all of the conversation. The counsel for the prisoner then offered to prove that on that occasion the witness heard T. say to Kellogg, "You were damned fools to do it," and that one of the Kelloggs replied, "If we had not done it we should all have been hung." No other evidence was given tending to show that T. was with the Kelloggs on that night, or to connect the Kelloggs or either of them with the murder, or to show that the parties, or the gun and bag, came from the prisoner's house. *Held*, that the court properly refused to allow the question to be put.—*Supreme Ct., (4th Dept.,) Jan.*, 1881. People *v.* Greenfield, 23 Hun 454.

2. *Cross-examination.*

44. Extent of the right to cross-examine. Upon the cross-examination of the plaintiff's attorney upon the trial he was asked how much of the judgment was to be his in case of success. An objection to this question was sustained by the court, to which ruling the defendant excepted. *Held*, that the exception was not well taken as the question related to a collateral issue, and that the extent of the cross-examination was in the discretion of the court. — *Supreme Ct.*, (*3d Dept.*,) *Jan.*, 1881. Saulsbury *v.* Village of Ithaca, 24 Hun 12. See, also, People, ex rel. Phelps, *v.* Oyer and Terminer, 83 N. Y. 436.

45. What questions are proper. Upon the trial of an indictment for obtaining goods by false pretences, S., a witness for the prosecution, was asked on cross-examination as to a conversation with one M. On re-direct examition he testified to statements made to him by M. in that conversation, to the effect that the prisoner and his partner had done a great wrong. M. was thereafter called as a witness for the prisoner, and gave material testimony of statements made by the prosecutor, contradicting his testimony, and tending to show the prisoner's innocence; he also positively contradicted the testimony of S. On his cross-examination he was asked if he had not said to anybody that the prisoner and his partner had been guilty of a great wrong, also if he had not said that they had acted as thieves; these questions were objected to, objection overruled and exception taken; the witness answered in substance that he did not remember. *Held*, that the allowance of the questions was not error.—*Ct. of App.*, *March*, 1880. Mayer *v.* People, 80 N. Y. 364.

46. Leading questions. A party seeking to elicit new matter constituting an element of his case, upon cross-examination of a witness produced by the opposite side, has not the right to put leading questions; as to such new matter the witness becomes his own.—*Ct. of App.*, *Jan.*, 1881. People, ex rel. Phelps, *v.* Oyer and Terminer, 83 N. Y. 436.

47. Sufficiency and effect of witness' answer. One of the witnesses for the prosecution on a trial for assault and battery, when asked what he saw of the occurrence, answered among other things, "I should judge he [the complainant] struck a stone;" this was on motion struck out. *Held*, no error, as it was not responsive to the question, and was a conjecture, not knowledge. Also, that evidence that the prisoner made an effort to keep out of the way of the sheriff was competent.—*Ct. of App.*, *Jan.*, 1880. Ryan *v.* People, 79 N. Y. 593.

48. Objections — motion to strike out, &c. Where, after the evidence of a witness as to a matter is excluded, the same witness is allowed to testify fully in reference thereto, this obviates the error, if any, in the prior ruling.—*Ct. of App.*, *June*, 1880. Matter of Crosby *v.* Day, 81 N. Y. 242.

49. A general objection to a question calling for an opinion as to the existence of a fact will not sustain an exception to the reception of the testimony where the fact is material; the objection should be put upon the ground that the fact could not be thus proved. *Ib.*

50. A witness, in answer to a question as to what he said to defendant in reference to a certain transaction, answered that he told defendant "exactly what was done." Defendant's counsel moved to strike out the answer, on the ground that the witness should state what was said. The motion was denied and exception taken. The witness then proceeded to give a particular narration of what occurred between him and defendant. *Held*, that the exception was untenable, as the answer could not have prejudiced. *Ib.*

51. Re-examining—refreshing the memory. When a refusal to allow a witness to state whether he desired to correct any mistake he had made in his testimony will be sustained, see Bissell *v.* Russell, 23 Hun 659.

52. When a memorandum made by a witness is inadmissible, see Fisher *v.* Verplanck, 23 Hun 286.

V. Opinions of Experts and others.

53. Opinions of ordinary witnesses, when inadmissible. *It seems* that it is incompetent for a witness to testify as to what another person did or did not understand from a transaction.—*Ct. of App.*, *June*, 1880. Wallis *v.* Randall, 81 N. Y. 164.

54. A witness, not a physician, who saw the mother of the insured in her last sickness, was asked to state his conclusion in reference to the character of her disease. This was objected to and excluded. *Held*, no error.—*Ct. of App.*, *March*, 1880. Grattan *v.* Metropolitan Life Insurance Co., 80 N. Y. 281.

55. Limits and exceptions to the rule. Plaintiff was allowed to testify, under objection and exception, that he believed in the truth of a certificate required of and given by defendant to the effect that the note in suit was business paper, and that he had no intention to use it to evade the statute of usury. *Held*, no error.—*Ct. of App.*, *June*, 1880. Bayliss *v.* Cockcroft, 81 N. Y. 363.

56. In what cases a witness' belief is admissible as to a past occurrence, and when it is not, see Tolman *v.* King, 24 Hun 480.

57. Admissibility of opinion on question of value. After a witness has testified to facts showing that he has some knowledge of the cost or value of buildings, acquired as a dealer or builder, his testimony as to the value of a building is competent.—*Ct. of App.*, *Dec.*, 1880. Woodruff *v.* Imperial Fire Ins. Co., 83 N. Y. 133.

58. — as to whether certain substance is blood. The plaintiff in error was indicted, tried and convicted of murder in the first degree for killing his wife. The wife was found dead in her bed-room, with the mark of a severe blow from a club upon her head, and with her throat cut; the walls of the room and articles therein were spattered with blood, and a pool of it lay upon the floor under her bed. Upon the trial a witness called for the prosecution having testified that on the morning of the day of the murder he saw a spatter or spot of a darkish red color on a flat stone in the path leading from the prisoner's house to the road, and having stated that he could swear, as a matter of fact, what the substance on the stone was, was asked to state what it was. The prisoner's counsel having objected to this question, on the ground that it was immaterial and irrelevant,

and that the witness was not qualified to express an opinion whether it was blood or not, as he was not an expert, the court instructed the witness that his opinion was not asked for, and if he answered he would only be allowed to answer, as a fact, what the spot was. The witness then answered that the spot was blood. *Held,* that the witness was properly allowed to answer the question, as the evidence referred to a matter of common observation, as to which an ordinary witness could speak.—*Supreme Ct.,* (*4th Dept.,*) *Jan.,* 1881. People *v.* Greenfield, 23 Hun 454, 462.

59. Expert testimony, when competent. In an action for injuries sustained by falling through the open draw of a bridge at night, a civil engineer having experience in the erection of bridges, as a witness for defendant, was allowed to testify, under objection and exception, that it was not customary to have gates of any kind on draw-bridges. *Held,* no error; that it was competent for the defence to show that the bridge was constructed with extraordinary care.—*Ct. of App., Feb.,* 1881. Hart *v.* Hudson River Bridge Co., 84 N. Y. 56.

60. The same witness was asked, on cross-examination, whether it was safe and proper to have draws with drop-gates across the footpath of a bridge when the draw was open; this was objected to and excluded. *Held,* no error; that it was a matter of opinion and not within the range of expert evidence. *Ib.*

61. Testimony of physicians, in an action against a physician for negligence, that they never knew of a case as claimed by plaintiff,—*Held,* competent.—*Ct. of App., Feb.,* 1880. Doyle *v.* New York Eye and Ear Infirmary, 80 N. Y. 631, 633.

62. Qualifications of experts, generally. One who has personal knowledge of the facts of a case may give his opinion as an expert, but he cannot give such opinion when he possesses no knowledge of the facts except such as he derives from having heard the testimony of other witnesses.—*Supreme Ct.,* (*3d Dept.,*) *Sept.,* 1880. Ayres *v.* Water Comm'rs of Binghamton, 22 Hun 297.

63 —of experts in handwriting. Comparison of handwriting. An expert in handwriting, when speaking as a witness only from a comparison of handwriting, should have before him in court the two writings compared.—*Ct. of App., Sept.,* 1880. Hynes *v.* McDermott, 82 N. Y. 41; *affirming* 7 Daly 513.

64. A comparison of a signature in dispute with photographic copies of other writings, for the purpose of getting an opinion from an expert as to the character of the signature as real or feigned, where the originals from which the copies are made are not brought before the jury and cannot be shown to other witnesses, should not be permitted, at least where there is no proof as to the manner and exactness of the photograpic method used. *Ib,* 50.

65. L., a detective employed by defendants to procure evidence against plaintiffs, after the commencement of the action, and while engaged in taking evidence, on commission, of a witness in behalf of defendants, saw certain signatures which plaintiff M. (the alleged widow) admitted to be her genuine signatures. L. was called as a witness to prove the signature of M. to a lease, executed in another name while she claimed to be the wife of deceased. The evidence was rejected. *Held,* that L. showed sufficient knowledge to authorize him to give an opinion; but that the case could not be distinguished from that of genuine writings furnished to a witness to enable him to become a witness; and so that the rejection of the evidence was not error. *Ib.*

66. Upon an issue as to the genuineness of a signature to a deed, witnesses called to prove that the signature was not genuine and who testified they had seen the alleged grantor write and knew his handwriting, on cross-examination stated that their opinion was partly based on the examination of other instruments which it had previously been proved were genuine, and by a comparison of the signatures thereto with the one in question; but they also testified that they were able to express an opinion independent of the knowledge derived from such comparison. *Held,* that a refusal of the referee to reject the opinions of said witnesses, so far as based upon such comparison, was not error.—*Ct. of App., Sept.,* 1880. Remington Paper Co. *v.* O'Dougherty, 81 N. Y. 474.

67. Rules for the examination of experts—hypothetical questions. It is not the province of a witness, testifying as an expert, to draw inferences from the evidence of other witnesses, unless the facts testified to are clear and uncontroverted, or to take into consideration such facts as he can recollect that have been testified to and thus form an opinion, but he should have full information of the ascertained or supposed state of facts upon which his opinion is based.—*Ct. of App., Jan.,* 1881. Guiterman *v.* Liverpool, &c., Steamship Co., 83 N. Y. 358.

68. Where the facts are controverted or are not entirely clear, a hypothetical question may be put, based upon the facts claimed to have been proved. *Ib.*

69. In an action against a common carrier by sea to recover damages for injuries to the freight by a collision with a collier, after a protest or statement as to the circumstances attending the injury and the management of the vessel had been given in evidence, and after witnesses had testified in reference thereto, there being a discrepancy between the protest and some of the testimony and the evidence covering a great variety of facts, a witness called as an expert by plaintiff, after having testified that he had heard the testimony read to the jury the previous day, and the protest, and had heard the testimony of one or two of the witnesses, and the circumstances as detailed by them, was asked "under the circumstances detailed by these witnesses and in the protest," and under certain circumstances which were specified, "what in your opinion should have been done by the persons in charge of the steamship?" *Held,* incompetent. *Ib.*

70. In putting hypothetical questions to expert witnesses counsel may assume the facts in accordance with his theory of them; it is not essential that he state the facts as they exist.—*Ct. of App., Jan.,* 1881. Cowley *v.* People, 83 N. Y. 464; *affirming* 21 Hun 415.

71. On the hearing of an issue as to whether an excavation in a city street was properly refilled, an expert witness who had heard the evidence as to such refilling, was asked and allowed to answer the following question: "How would *you* fill such an excavation?" *Held,* that while it was proper for the witness to state what would have been a proper manner of refilling the ex-

cavation, it was an error to allow him to testify how *he* would have refilled it.—*Supreme Ct.*, (3d *Dept.*,) *Sept.*, 1880. Ayres *v.* Water Comm'rs of Binghamton, 22 Hun 297.

72. Where a witness, offered as an expert, has not personal knowledge as to the facts, he can only testify in answer to hypothetical questions which assume the existence of the facts claimed by the party conducting the examination to have been proved. *Ib.*

73. A physician, called by the plaintiff, in an action on a life policy, having testified that he had been present in court during all the testimony, and had heard the evidence as to the symptoms exhibited by the deceased, was asked the following question: "Assuming the statement in reference to the condition of the deceased, and his history up to the time of his death, what is the opinion of the witness in respect to the condition of his mind at the time of his death?" *Held*, that it was error to allow the witness to answer the question. A hypothetical question should have been put.—*Supreme Ct.*, (3d *Dept.*,) *Sept.*, 1880. Hagadorn *v.* Connecticut Mut. Life Ins. Co., 22 Hun 249.

As to obtaining *Inspection of books and papers*, before trial, see DISCOVERY AND INSPECTION.

As to taking testimony of witnesses by *Deposition*, see DEPOSITIONS.

As to the examination of witnesses on the *Probate of wills*, see WILLS, **6-12**.

For *Rules of evidence*, generally, irrespective of the competency of witnesses or the manner of examining them, see EVIDENCE.

WRITS.

For decisions relative to writs *In present use*, see CERTIORARI; EXECUTION; HABEAS CORPUS; MANDAMUS; PROHIBITION.

As to *Writs of error*, see ERROR.

WRONGS.

ASSAULT; CONSPIRACY; FALSE IMPRISONMENT; FRAUD; LIBEL; MALICIOUS PROSECUTION; NEGLIGENCE; NUISANCE; SLANDER; TRESPASS; TROVER.

CASES CRITICISED.

CASES DIGESTED.

GENERAL INDEX.

CASES CRITICISED.

A TABLE OF CASES

Affirmed, Applied, Approved, Commented on, Compared, Changed by Statute, Denied, Disapproved, Distinguished, Doubted, Explained, Followed, Limited, Modified, Not Followed, Opposed, Overruled, Questioned, Reconciled, Reversed, or Otherwise Criticised by Subsequent Decisions.

In addition to the criticisms contained in the reports digested in this volume, below will be found several thousands of references which did not appear in the corresponding TABLE in the first volume of this Digest, for the reason that they did not, for the most part, fall within its scope and intent, which was limited to references to cases which were either *affirmed, reversed, overruled,* or *criticised* adversely.

Shortly after its publication, SILAS W. CRANDALL, ESQ., of Binghamton, began to make additions to the TABLE given in volume I., using, to indicate the character of the criticisms so added, such terms (in addition to those in the TABLE) as are enumerated above; and, after devoting to this task, for nearly three years, all the time his professional duties would permit, he has contributed the result of his labor to this work, greatly increasing its usefulness and value, and placing the compiler under an obligation which he desires to publicly acknowledge.

A.

Abbott v. American Hard Rubber Co., 20 How. Pr. 199. AFFIRMED, 33 Barb. 578; 21 How. Pr. 193.

Abbott v. Allen, 2 Johns. Ch. 519. APPROVED, 3 Edw. 124.

Abbott v. Allen, 14 Johns. 248. FOLLOWED, 5 Bosw. 572, 575.

Abbott v. Draper, 4 Den. 51. LIMITED, 26 Mich. 421.

Abbott v. Smith, 8 How. Pr. 463. OVERRULED, 2 Daly 50. *See* 7 How. Pr. 357.

Abeel v. Radcliff, 15 Johns. 505, 507. DISTINGUISHED, 4 Cow. 351. DOUBTED, 2 Duer 448.

Abels v. Westervelt, 24 How. Pr. 284. AFFIRMED, 15 Abb. Pr. 230.

Abels v. Westervelt, 15 Abb. Pr. 230. CRITICISED, 8 Abb. Pr., N. S., 379. DISTINGUISHED, 43 Barb. 191.

Abercrombie, Matter of, 4 Hun 141. AFFIRMED, 63 N. Y. 628.

Aberdeen v. Blackmar, 6 Hill 324. APPROVED, 21 Conn. 125. *See* 1 N. Y. 555.

Abraham v. Plestoro, 3 Wend. 538. FOLLOWED, 34 Barb. 67. REVIEWED, 5 N. Y. 320, 341, 352. *See* 3 Barb. Ch. 394; 4 Bosw. 463.

Acker v. Acker, 16 Hun 173. REVERSED, 81 N. Y. 143.

Acker v. Acker, 81 N. Y. 143. FOLLOWED, 83 N. Y. 110.

Acker v. Campbell, 23 Wend. 372. LIMITED, 3 Hill 348.

Acker v. White, 25 Wend. 614. DISTINGUISHED, 1 N. Y. 168. EXPLAINED, 6 Hill 558.

Ackerman v. Emott, 3 Leg. Obs. 337. AFFIRMED, 4 Barb. 626. CONSIDERED, 50 Barb. 483.

Ackerman v. Emott, 4 Barb. 626. REVIEWED, 4 Redf. 438.

Ackerman v. Finch, 15 Wend. 652. EXAMINED, 1 Doug. (Mich.) 58. EXPLAINED, 23 Wend. 336.

Ackerman v. Hunsicker, 21 Hun 53. REVERSED, 24 Hun V.

Ackerman v. Hunsicker, 10 Week. Dig. 69. REVERSED, 12 Week. Dig. 265.

Ackley v. Dygert, 33 Barb. 176. APPEAL DISMISSED, 30 How. Pr. 592 *n*.

Ackley v. Kellogg, 8 Cow. 223. DISTINGUISHED, 20 N. Y. 263.

Ackley v. Tarbox, 29 Barb. 512. OVERRULED, 5 Daly 17.

Ackley v. Tarbox, 31 N. Y. 564. FOLLOWED, 5 Daly 17.

Acome v. American Mineral Co., 11 How. Pr. 24. OVERRULED, 14 How. Pr. 184, 186.

Adair v. Brimmer, 74 N. Y. 539. DISTINGUISHED, 24 Hun 113. REVIEWED, 4 Redf. 437.

Adair v. Lott, 3 Hill 182. DISTINGUISHED, 22 Hun 270.

Adams v. Alstyne, 25 N. Y. 236. FOLLOWED, 50 N. H. 139.

Adams v. Curtis, 4 Lans. 164. FOLLOWED, 4 Hun 173, 176; 6 Thomp. & C. 467.

Adams v. Davidson, 10 Hun 309. DISTINGUISHED, 84 N. Y. 393, 394.

Adams v. Farmer, 1 E. D. Smith 588. CONTRA, 38 Superior 71.

Adams v. Fort Plain Bank, 23 How. Pr. 45. REVERSED *in part*, 36 N. Y. 255.

Adams v. Fort Plain Bank, 36 N. Y. 255. DISTINGUISHED, 1 Hun 655, 667; 1 Lans. 55. FOLLOWED, 23 Hun 101.

Adams v. Fox, 27 How. Pr. 409; 40 Barb. 442. APPEAL DISMISSED, 27 N. Y. 640.

Adams v. Hopkins, 5 Johns. 252. DISTINGUISHED, 83 N. Y. 48. FOLLOWED, 9 Johns. 114; 23 Hun 39.

Adams v. Houghton, 3 Abb. Pr., N. S., 46. DISTINGUISHED, 36 How. Pr. 479.

Adams v. Ives, 3 Thomp. & C. 471. AFFIRMED, 63 N. Y. 650.

Adams v. Leland, 5 Bosw. 411. AFFIRMED, 27 How. Pr. 599.

Adams v. Perkins, 25 How. Pr. 368. APPROVED, 30 How. Pr. 104.

Adams v. Rivers, 11 Barb. 390. DISTINGUISHED, 52 Md. 227.

Adams v. Rockwell, 16 Wend. 285. COMMENTED ON, 19 Wend. 325. FOLLOWED, 37 Superior 171. NOT OVERRULED, 47 Barb. 293.

Adams v. Sage, 28 N. Y. 103. DISTINGUISHED, 47 N. Y. 564.

Adams v. Saratoga, &c., R. R. Co., 11 Barb. 414. OVERRULED, 20 Barb. 34.

Adams v. Sherrill, 14 How. Pr. 297. APPROVED, 9 Abb. N. Cas. 302; 14 Abb. Pr. 219.

Adderly v. Storm, 6 Hill 624. APPROVED, 11 N. Y. 152.

Adee v. Campbell, 14 Hun 551. AFFIRMED, 79 N. Y. 52.

Admission of Graduates, &c., Matter of, 19 How. Pr. 136. REVERSED, 20 How. Pr. 1.

Adolph v. Central Park, &c., R. R. Co., 33 Superior 186. *See* 43 Superior 199.

Adriance v. Lagrave, 15 Abb. Pr., N. S., 272; 47 How Pr. 71. REVERSED, 47 How. Pr. 385; 1 Hun 689; 4 Thomp. & C. 215. *See* 59 N. Y. 110; 4 Thomp. & C. III.

Adriance v. Lagrave, 4 Thomp. & C. 215. REVERSED, 59 N. Y. 110.

Adsit v. Adsit, 2 Johns. Ch. 448. APPROVED, 9 N. Y. 517; 2 Dutch. (N. J.) 415.

Adsit v. Brady, 4 Hill 630. APPROVED, 34 N. Y. 390, 397; 44 Id. 116, 125. DISAPPROVED, 5 Neb. 389. DISTINGUISHED, 1 Hun 570, 572. FOLLOWED, 5 Lans. 344.

Adsit v. Wilson, 7 How. Pr. 64, 68. FOLLOWED, 8 How Pr. 377.

Ætna Fire Ins. Co. v. Tyler, 16 Wend. 385. LIMITED, 55 N. Y. 356.

Ætna Fire Ins. Co. v. Wheeler, 49 N. Y. 616. FOLLOWED, 50 N. Y. 661.

Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82. DISTINGUISHED, 52 N. Y. 11.

Agate v. Lowenbein, 4 Daly 262. REVERSED, 57 N. Y. 604.

Agate v. Lowenbein, 57 N. Y. 604. FURTHER APPEAL, 84 N. Y. 672.

Agate v. Sands, 8 Daly 66. AFFIRMED, 73 N. Y. 620.

Agawam Bank v. Strever, 18 N. Y. 502. FOLLOWED, 5 Lans. 233.

Ahern v. Nat. Steamship Co., 8 Abb. Pr., N. S., 283; 39 How. Pr. 403. *See* 11 Abb. Pr., N. S., 356; 3 Daly 399.

Ahern v. Standard Life Ins, Co., 40 How. Pr. 190. CONTRA, 10 Abb. Pr., N. S., 331.

Aikin v. Albany, &c., R. R. Co., 26 Barb. 289. DISTINGUISHED, 31 Barb. 647.

Aikin v. Wasson, 24 N. Y. 482. APPROVED, 46 N. Y. 525. DISTINGUISHED, 49 Barb. 294; 58 N. Y. 367.

Ainslie v. Mayor, &c., of New York, 1 Barb. 168. DISAPPROVED, 37 Cal. 395.

Aitken v. Clark, 15 Abb. Pr. 319. FURTHER DECISION, 16 Abb. Pr. 328 *n*.

Aitken v. Clark, 16 Abb. Pr. 328 *n*. REVERSED, 15 Abb. Pr. 319.

Albany, &c., R. R. Co. v. Cady, 6 Hill 265. DISTINGUISHED, 22 Hun 183.

Albany, &c., R. R. Co. v. Osborn, 12 Barb. 223. OVERRULED, 48 Barb. 181.

Albany City Bank v. Schermerhorn, Clarke 297. REVERSED, 9 Paige 372.

Albany City Bank v. Schermerhorn, 9 Paige 372, 375. FOLLOWED, 43 Superior 126.

Albany Fire Ins. Co. v. Bay, 4 N. Y. 9. APPROVED, 4 Bosw. 293, 294.

Albany Northern R. R. Co. v. Brownell, 24 N. Y. 345. DISTINGUISHED, 43 Mich. 146, 147. REVIEWED, 24 Hun 217, 218.

Albany Street, Matter of, 11 Wend. 149. QUALIFIED, 3 N. Y. 516. REVIEWED, 1 Neb. 31.

Alden v. Clark, 11 How. Pr. 209. APPROVED, 61 Barb. 361.

Alden v. N. Y. Central R. R Co., 26 N. Y. 102. CRITICISED, 58 N. Y. 139.

Alderman v. Tirrell, 8 Johns. 418. FOLLOWED, 60 Barb. 121.

Aldrich v. Reynolds, 1 Barb. Ch. 613. FOLLOWED, 9 Mo. App. 3.

Alexander v. Bennett, 38 Superior 492. REVERSED, 60 N. Y. 204.

Alexander v. Bennett, 60 N. Y. 204. DISTINGUISHED, 66 N. Y. 191.

Alexander v. Germania Fire Ins. Co., 5 Thomp. & C. 208. REVERSED, 66 N. Y. 464.

Alexander v. Germania Fire Ins. Co., 66 N. Y. 464. DISTINGUISHED, 83 N. Y. 140. CONTRA, 68 N. Y. 434.

Alexander v. Greene, 3 Hill 9. *See* 2 N. Y. 204; S. C., 8 N. Y. 375.

Alexander v. Hard, 42 How. Pr. 131. *See* 42 How. Pr. 384.

Alexander v. Hoyt, 7 Wend. 89. CRITICISED, 2 Hill 334, 335.

Alger v. Scott, 54 N. Y. 14. FOLLOWED, 39 Superior 137. *See* 81 N. Y. 451.

Alger v. Scoville, 6 How. Pr. 131. FOLLOWED, 7 How. Pr. 134. OVERRULED, 7 N. Y. 486.

Algie v. Wood, 43 Superior 46. APPEAL DISMISSED, 75 N. Y. 610.

Algur v. Gardner, 54 N. Y. 360. DISTINGUISHED, 66 N. Y. 451. DISAPPROVED, 2 Stew. (N. J.) 455. FOLLOWED, 6 Hun 46, 48; 84 N. Y. 632, 633.

Allcott v. Barber, 1 Wend. 526. EXPLAINED AND FOLLOWED, 2 Hall 465.

Allen v. Allen, 14 How. Pr. 248. *See* 14 How. Pr. 360.

Allen v. Allen, 59 How. Pr. 27. CONTRA, 59 How. Pr. 42, 43.

Allen v. Brown, 5 Lans. 280. DISTINGUISHED, 53 N. Y. 91.

Allen v. Brown, 5 Lans. 511. FOLLOWED, 22 Hun 512.

Allen v. City of Buffalo, 39 N. Y. 386. CONSIDERED, 56 Barb. 340.

Allen v. Cook, 26 Barb. 374. APPROVED, 36 Barb. 574.

Allen v. Crary, 10 Wend. 349. DISAPPROVED, 50 N. H. 486. FOLLOWED, 27 N. Y. 280.

Allen v. Crofoot, 2 Wend. 515. APPROVED, 31 Barb. 471.

Allen v. Franklin Fire Ins. Co., 9 How. Pr. 501. FOLLOWED, 10 How. Pr. 395, 399. *See* 9 How. Pr. 524.

Allen v. Mapes, 20 Wend. 633. CRITICISED, 1 Daly 278. *See* 13 Abb. Pr. 268 *n.*

Allen v. Mayor, &c., of New York, 4 E. D. Smith, 404. DISTINGUISHED AND DISAPPOVED, 12 Abb. Pr. 32. FOLLOWED, 2 Hun 306; 4 Thomp. & C. 490.

Allen v. Merchants' Bank, 22 Wend. 215. EXPLAINED, 3 Hill 560. FOLLOWED, 13 Vr. (N. J.) 31.

Allen v. Meyer, 71 N. Y. 594. FOLLOWED, 80 N. Y. 642.

Allen v. New Jersey Southern R. R. Co., 49 How. Pr. 14. *See* 54 How. Pr. 272.

Allen v. Patterson, 7 N. Y. 476. COMMENTED ON, 26 Barb. 9, 14. *See* 12 How. Pr. 329.

Allen v. Pell, 4 Wend. 505. LIMITED, 7 Hill 53.

Allen v. Public Administrator, 1 Bradf. 378. AFFIRMED, Seld. No. 93.

Allen v. Rightmere, 20 Johns. 365. FOLLOWED, 48 Mo. 527.

Allen v. Sackrider, 37 N. Y. 341. FOLLOWED, 2 Lans. 179.

Allen v. Williamsburg Savinge Bank, 2 Abb. N. Cas. 342. AFFIRMED, 69 N. Y. 314.

Allen v. Williamsburg Savings Bank, 69 N. Y. 314, 317. FOLLOWED, 9 Abb. N. Cas. 150; 84 N. Y. 87, 88.

Allis v. Leonard, 46 N. Y. 688. FOLLOWED, 38 Superior 137.

Allie v. Leonard, 58 N. Y. 288. DISTINGUISHED AND APPROVED, 6 Hun 318.

Allis v. Wheeler, 56 N. Y. 50. DISTINGUISHED, 22 Hun 182. FOLLOWED, 10 Hun 131.

Allison v. Matthieu, 3 Johns. 234. FOLLOWED, 80 N. Y. 374 *n.*

Allison v. Weller, 3 Hun 608; 6 Thomp. & C. 291. AFFIRMED, 66 N. Y. 614.

Allyn v. Thurston, 53 N. Y. 622. APPROVED, 23 Hun 48. FOLLOWED, 67 N. Y. 266.

Altemus v. Mayor, &c., of New York, 6 Duer 446. DISTINGUISHED, 7 Robt. 217.

Althorf v. Wolfe, 22 N. Y. 355; 2 Hilt. 344. DISTINGUISHED, 80 N. Y. 392.

American Bible Soc. v. Hebard, 51 Barb. 552. AFFIRMED, 41 N. Y. 619.

American Ins. Co. v. Bryan, 1 Hill 25. AFFIRMED, 26 Wend. 563. APPROVED, 84 N. Y. 503. FOLLOWED, 80 Id. 71, 79.

American Ins. Co. v. Hutton, 24 Wend. 330. EXPLAINED, 3 Hill 118.

American Life Ins. Co. v. Van Epps, 14 Abb. Pr., N. S., 253. REVERSED, 56 N. Y. 601.

American Medicine Co. v. Kessler, 38 Superior 407. *See* 44 Superior 557.

American Nat. Bank v. Wheelock, 45 Superior 205. APPEAL DISMISSED, 82 N. Y. 118.

American Transportation Co. v. City of Buffalo, 23 Barb. 272. AFFIRMED, 20 N. Y. 388 *n.*

American Union Teleg. Co. v. Middleton, 80 N. Y. 408. REVIEWED, 46 Superior 386.

Ames v. Duryea, 6 Lans. 155. AFFIRMED, 61 N. Y. 609.

Ames v. Merriman, 9 Wend. 498. EXPLAINED, 3 Hill 447.

Ames v. N. Y. Union Ins. Co., 14 N. Y. 253. FOLLOWED, 2 Hun 655, 659; 5 Thomp. & C. 211.

Amory v. Lord, 9 N. Y. 403. DISTINGUISHED, 61 N. Y. 641.

Amoskeag Manuf. Co. v. Mayor, &c., of New York, 63 N. Y. 637. DISTINGUISHED, 24 Hun 596.

Amoskeag Manuf. Co. v. Spear, 2 Sandf. 599. APPROVED, 23 Hun 638, 640.

Anable v. Anable, 24 How. Pr. 92. *See* 7 Abb. Pr. 350; 15 How. Pr. 169.

Anderson, Matter of, 2 Hun 377; 4 Thomp. & C. 658. MODIFIED, 60 N. Y. 457.

Anderson v. Dickie, 26 How. Pr. 199. MOTION DENIED, 17 Abb. Pr. 83.

Anderson v. Hill, 53 Barb. 238. OPPOSED, 9 Abb. Pr., N. S., 294, 297, 304; 40 How. Pr. 171.

Anderson v. James, 4 Robt. 35. AFFIRMED, 6 Alb. L. J. 166.

Anderson v. Rapelye, 7 Paige 483. REVERSED, 4 Hill 472.

Anderson v. Rochester, &c., R. R. Co., 9 How. Pr. 553. CRITICISED, 53 N. Y. 578.

Anderson v. Rome, &c., R. R. Co., 54 N. Y. 334. APPROVED, 37 Wis. 327, 332. DISTINGUISHED, 56 N. Y. 667. FOLLOWED, 3 Hun 208; 39 Superior 360; 5 Thomp. & C. 379.

Anderson v. Speers, 21 Hun 568. *See* 8 Abb. N. Cas. 455.

Andrew v. N. Y. Bible, &c., Soc., 8 Leg. Obs. 361. REVERSED, 8 N. Y. 559 *n.*

Andrews, Matter of, 22 Hun 608 *n.* FOLLOWED, 22 Hun 608.

Andrews v. Ætna Life Ins. Co., 8 Week. Dig. 434. REVERSED, 12 Week. Dig. 452.

Andrews v. Beecker, 1 Johns. Cas. 411. OBSERVED ON, 11 Johns. 49.

Andrews v. Betts, 8 Hun 322. FOLLOWED, 17 Hun 130.

Andrews v. Durant, 11 N. Y. 35. APPROVED, 7 Vr. (N. J.) 452. DISAPPROVED, 11 Phil. (Pa.) 628, 629.

Andrews v. Glenville Woolen Co., 50 N. Y. 282, 287. DISTINGUISHED, 22 Hun 512, 513, 514; 52 N. Y. 655. QUALIFIED, 16 Abb. Pr., N. S., 1, 7.

Andrews v. Keeler, 19 Hun 87. APPROVED, 60 How. Pr. 12.

Andrews v. Long, 79 N. Y. 573. FOLLOWED, 24 Hun 137.

Andrews v. Long, 9 Week. Dig. 513. FOLLOWED, 22 Hun 294, 306.

Angel v. Town of Hume, 17 Hun 374. FOLLOWED, 8 Fed. Rep. 852.

Angell v. Lawton, 14 Hun 70. APPEAL DISMISSED, 75 N. Y. 520.

Anibal v. Hunter, 6 How. Pr. 255. FOLLOWED, 6 How. Pr. 401.

Annett v. Foster, 1 Daly 502. FOLLOWED, 71 Mo. 310.

Annett v. Kerr, 2 Robt. 556. DISTINGUISHED, 81 N. Y. 580, 583.

Anonymous, 17 Abb. Pr. 48. DISTINGUISHED, 61 N. Y. 410.

Anonymous, 2 Duer 613. DISAPPROVED, 2 Hilt. 179.

Anonymous, 4 How. Pr. 112. OVERRULED, 16 How. Pr. 145, 152.

Anonymous, 6 How. Pr. 160. CONTRA, 8 How. Pr. 434.

Anonymous, 59 N. Y. 313. FOLLOWED, 80 N. Y. 642.

Anonymous, 67 N. Y. 598. DISTINGUISHED, 60 How. Pr. 148.

Anonymous, 10 Paige 20. NOT FOLLOWED, 13 Otto (U. S.) 69. REVIEWED, 6 Fed. Rep. 60.

Anonymous, 5 Wend. 82. APPLIED, 4 How. Pr. 30.

Ansonia Brass, &c., Co. v. Babbitt, 8 Hun 157. REVERSED, 74 N. Y. 395.

Appley v. Trustees of Montauk, 38 Barb. 275. FOLLOWED, 16 Hun 134.

Arctic Fire Ins. Co. v. Austin, 54 Barb. 559. *See* 69 N. Y. 470.

Arctic Fire Ins. Co. v. Austin, 6 Thomp. & C. 63. REVERSED, 69 N. Y. 470.

Arend v. Liverpool, &c., Steamship Co., 6 Lans. 457. AFFIRMED, 53 N. Y. 623.

Argall v. Jacobs, 56 How. Pr. 167. FOLLOWED, 46 Superior 8.

Argal v. Pitts, 17 Hun 561. AFFIRMED, 78 N. Y. 239.

Armstrong v. Craig, 18 Barb. 387. DISAPPROVED, Sheld. 385.

Armstrong v. Dubois, 1 Abb. App. Dec. 8, 11. DISTINGUISHED, 83 N. Y. 526.

Armstrong v. New York Central, &c., R. R. Co., 66 Barb. 437. AFFIRMED, 64 N. Y. 635.

Armstrong v. New York Central, &c., R. R. Co., 2 Hun 482. ORDER AFFIRMED, 66 N. Y. 407.

Armstrong v. Smith, 44 Barb. 120. DISTINGUISHED, 4 Hun 264.

Armstrong v. Wing, 10 Hun 520. DISTINGUISHED, 24 Hun 276.

Arnold, Matter of, 60 N. Y. 26. DISTINGUISHED, 62 N. Y. 589.

Arnold v. Angell, 62 N. Y. 508, 510. FOLLOWED, 11 Hun 447, 449.

Arnold v. Gilbert, 3 Sandf. Ch. 531. MODIFIED, 5 Barb. 190.

Arnold v. Hudson River R. R. Co., 49 Barb. 108. REVERSED, 55 N. Y. 661.

Arnold v. Kinloch, 50 Barb. 44. REVERSED, 6 Alb. L. J. 196.

Arnold v. Robertson, 3 Daly 298. APPEAL DISMISSED, 50 N. Y. 683.

Arnold v. Rock River Valley Union R. R. Co., 5 Duer 207. FOLLOWED, 64 Me. 39.

Arnold v. Suffolk Bank, 27 Barb. 424. DISTINGUISHED, 59 N. Y. 108.

Arnold v. Thomas, 2 How. Pr. 91. APPROVED, 8 Abb. N. Cas. 236; 81 N. Y. 45.

Arnot v. Pittston, &c., Coal Co., 5 Thomp. & C. 143. REVERSED, 68 N. Y. 558.

Arthur v. Brooks, 14 Barb. 533. CONTRA, 12 How. Pr. 313, 315.

Arthur v. Griswold, 2 Hun 606; 5 Thomp. & C. 696. APPEAL DISMISSED, 60 N. Y. 143.

Arthurton v. Dalley, 20 How. Pr. 311. CONTRA, 4 Abb. Pr. 441; 23 How. Pr. 510, 511. NOT FOLLOWED, 61 Id. 367. *And see* 8 Abb. N. Cas. 197 *n.;* 1 Civ. Pro. 228; 2 Daly 225.

Ashley v. Marshall, 30 Barb. 426. AFFIRMED, 27 How. Pr. 599.

Ashley v. Marshall, 29 N. Y. 494. NOT IN CONFLICT, 82 N. Y. 275.

Astor, Matter of, 50 N. Y. 363. DISTINGUISHED, 60 N. Y. 461; 62 Id. 226.

Astor, Matter of, 53 N. Y. 617. DISTINGUISHED, 67 N. Y. 443.

Astor, Petition of, 2 Thomp. & C. 488. AFFIRMED, 2 Thomp. & C. IV.; 56 N. Y. 625.

Astor v. Lamoreaux, 1 N. Y. 522; 8 Id. 107; 4 Sandf. 524. EXPLAINED, 23 Hun 218, 221; 16 N. Y. 543; 17 Id. 28.

Astor v. Mayor, &c., of New York, 39 Superior 120. AFFIRMED, 62 N. Y. 580.

Astor v. Miller, 2 Paige 68. DISTINGUISHED, 16 W. Va. 520.

Atcheson v. Mallon, 43 N. Y. 147. DISTINGUISHED, 66 N. Y. 292.

Atcherson v. Troy, &c., R. R. Co., 6 Abb. Pr., N. S., 329. FOLLOWED, 46 N. Y. 525.

Atkins v. Lefever, 4 Abb. Pr., N. S., 221. DISTINGUISHED, 22 Hun 182, 186.

Atlantic, &c., Teleg. Co. v. Barnes, 39 Superior 40. AFFIRMED, 64 N. Y. 385.

Atlantic Dock Co. v. Libby, 45 N. Y. 499. DISTINGUISHED, 63 Barb. 552.

Atlantic Ins. Co. v. Storrow, 1 Edw. 621. MODIFIED, 5 Paige 285.

Atlantic Ins. Co. v. Storrow, 5 Paige 285. APPROVED, 80 N. Y. 79.

Atlantic Mut. Ins. Co. v. Bird, 2 Bosw. 195, 196. NOT APPLICABLE, 44 N. Y. 442.

Atlantic Nat. Bank v. Franklin, 55 N. Y. 235. DISTINGUISHED, 23 Hun 540, 545.

Atlantic State Bank v. Savery, 18 Hun 36. AFFIRMED, 82 N. Y. 291.

Attorney-General v. Continental Life Ins. Co., 53 How. Pr. 16. DISTINGUISHED, 60 How. Pr. 87. FOLLOWED, 56 Id. 165.

Attorney-General v. Continental Life Ins. Co., 71 N. Y. 325. NOT FOLLOWED, 1 McCrary (U. S.) 504.

Attorney-General, Matter of, v. North America Life Ins. Co., 56 How. Pr. 160. DISTINGUISHED, 60 How. Pr. 87. FOLLOWED, Id. 94.

Attorney-General, Matter of, v. North America Life Ins. Co., 18 Hun 470. AFFIRMED, 80 N. Y. 152.

Attorney-General, Matter of, v. North America Life Ins. Co., 21 Hun. 283. AFFIRMED *as modified*, 82 N. Y. 172.

Atwater v. Atwater, 53 Barb. 621; 36 How. Pr. 431. FOLLOWED, 1 Hun 446; 3 Thomp. & C. 455.

Atwater v. Fowler, 1 Edw. 417. DISTINGUISHED, 54 Cal. 469.

Atwell v. Brown, 1 Hun 439; 3 Thomp. & C. 779. AFFIRMED, 59 N. Y. 655.

Auchmuty, Matter of, 18 Hun 324. APPEAL DISMISSED, 79 N. Y. 622.

Augustine v. Britt, 15 Hun 395. AFFIRMED, 80 N. Y. 647.

Austin v. Dye, 46 N. Y. 500. FOLLOWED, 1 Hun 515.

Austin v. Munro, 47 N. Y. 360. FOLLOWED, 8 Abb. N. Cas. 90; 38 Superior 127. *See* 44 Id. 26.

Austin v. Rawdon, 44 N. Y. 63. DISTINGUISHED, 67 N. Y. 51.

Austin v. Searing, 16 N. Y. 112. DISTINGUISHED, 54 N. Y. 564.

Averill v. Loucks, 6 Barb. 470. REVIEWED, 53 Vt. 326.

Averill v. Patterson, 10 How. Pr. 85. *See* 14 How. Pr. 95, 96.

Avery v. Foley, 4 Hun 415. FOLLOWED, 42 Superior 25.

Avery v. Slack, 17 Wend. 85. FOLLOWED, 24 Hun 555.

Avery v. Smith, 9 How. Pr. 349. CONTRA, 12 Abb. Pr. 78 *n.;* 14 How. Pr. 508, 511; 20 Id. 59.

Ayers v. Lawrence, 63 Barb. 454; 1 Thomp. & C. Add. 5. REVERSED, 59 N. Y. 192. FOLLOWED, 9 Hun 358, 362; 1 Thomp. & C. 151.

Ayers v. Lawrence, 59 N. Y. 192. FOLLOWED, 9 Hun 358, 362. LIMITED, 12 Id. 186.

Ayrault v. Pacific Bank, 47 N. Y. 570, 573. FOLLOWED, 13 Vr. (N. J.) 31.

Ayrault v. Sackett, 17 How. Pr. 461. AFFIRMED, 17 How. Pr. 508.

Ayres v. O'Farrell, 10 Bosw. 143. AFFIRMED, 6 Alb. L. J. 166. OVERRULED *by implication*, 22 Hun 52.

Ayres v. O'Farrell, 4 Robt. 668. AFFIRMED, 6 Alb. L. J. 166.

Ayres v. Trustees of the Methodist Episcopal Church, 3 Sandf. 351, 357. APPROVED, 34 N. Y. 584.

B.

Babcock v. Bonnell, 44 Superior 568. AFFIRMED, 80 N. Y. 244.

Babcock v. City of Buffalo, 1 Sheld. 317; 56 N. Y. 268. APPROVED, 83 N. Y. 190.

Babcock v. Eckler, 24 N. Y. 623. FOLLOWED, 38 Superior 471.

Babcock v. Libbey, 17 Hun 131. AFFIRMED, 82 N. Y. 144.

Babcock v. Utter, 1 Abb. App. Dec. 27. DISTINGUISHED, 84 N. Y. 39. FOLLOWED, Id. 40, 42.

Bache v. Purcell, 51 How. Pr. 270. AFFIRMED, 6 Hun 518.

Bacon v. Frisbie, 15 Hun 26. REVERSED *in part*, 80 N. Y. 394.

Bacon v. Gilman, 4 Lans. 456. AFFIRMED, 57 N. Y. 656.

Bacon v. Reading, 1 Duer 622. FOLLOWED, 11 How. Pr. 572, 573. CONTRA, 6 Id. 32; 8 Id. 285; 12 Id. 435.

Badeau v. Mead, 14 Barb. 328. EXPLAINED, 60 How. Pr. 275.

Badeau v. Rogers, 2 Paige 209. FOLLOWED, 35 Superior 372.

Badgley v. Decker, 44 Barb. 577. APPROVED, 23 Hun 72.

Bagg, Exp., v. Jefferson Com. Pleas, 10 Wend. 615. FOLLOWED, 4 How. Pr. 168, 172.

Baggott v. Boulger, 2 Duer 160. DISTINGUISHED, 16 Hun 236. *See* 12 How. Pr. 134.

Bagley v. Clarke, 7 Bosw. 94. DISTINGUISHED, 66 N. Y. 332.

Bagley v. Smith, 10 N. Y. 489. DISTINGUISHED, 5 Lans. 236; 81 N. Y. 304.

Bailey v. Bancker, 3 Hill 188. LIMITED, 28 Barb. 661.

Bailey v. Briggs, 56 N. Y. 407, 415. DISTINGUISHED, 23 Hun 442.

Bailey v. Buell, 59 Barb. 158; 50 N. Y. 662. DISTINGUISHED, 61 Barb. 609. FOLLOWED, 24 Hun 425, 426.

Bailey v. Homestead Fire Ins. Co., 16 Hun 503. AFFIRMED, 80 N. Y. 21.

Bailey v. Lane, 21 How. Pr. 475. MODIFIED, 13 Abb. Pr. 354.

Bailey v. Mayor, &c., 2 Den. 433. DISTINGUISHED, 62 N. Y. 170.

Bailey v. Stone, 41 How. Pr. 346. DISTINGUISHED, 64 Barb. 417.

Bain v. Brown, 7 Lans. 506. AFFIRMED, 56 N. Y. 285.

Baird v. Daly, 4 Lans. 426. REVERSED, 57 N. Y. 236.

Baird v. Daly, 68 N. Y. 547, 551. REVIEWED, 24 Hun 38.

Baker v. Arnold, 1 Cai. 258. *See* 17 Johns. 338.

Baker v. Arnot, 5 Thomp. & C. 215. AFFIRMED, 67 N. Y. 448.

Baker v. Drake, 53 N. Y. 211. FOLLOWED, 81 N. Y. 27.

Baker v. Hoag, 7 Barb. 113. FOLLOWED, 35 Superior 372.

Baker v. Home Life Ins. Co., 4 Thomp. & C. 582. AFFIRMED, 64 N. Y. 648.

Baker v. Lamb, 11 Hun 519, 522. FOLLOWED, 60 How. Pr. 481.

Baker v. Mayor, &c., of New York, 9 Abb. Pr. 82. FOLLOWED, 45 Superior 373.

Baker v. People, 15 Hun 256. REVERSED, 19 Alb. L. J. 201.

Baker v. Stackpoole, 9 Cow. 420. APPROVED, 24 Hun 512.

Baker v. Thrasher, 4 Den. 493. EXPLAINED, 23 Hun 614.

Baker v. Union Mut. Life Ins. Co., 43 N. Y. 283. DISTINGUISHED, 7 Fed. Rep. 175, 176.

Baker v. Van Epps, 58 How. Pr. 401. AFFIRMED, 22 Hun 460.

Baker v. Wheeler, 8 Wend. 505. DISTINGUISHED, 44 Barb. 448.

Balbo v. People, 19 Hun 424. AFFIRMED, 80 N. Y. 484.

Balbo v. People, 80 N. Y. 484. FOLLOWED, 80 N. Y. 513.

Balch v. New York, &c., R. R. Co., 46 N. Y. 521. FOLLOWED, 9 Abb. N. Cas. 278.

Baldwin v. Brown, 37 How. Pr. 385. NOT CONCURRED IN, 39 How. Pr. 93.

Baldwin v. Brown, 16 N. Y. 359. FOLLOWED, 37 Superior 171.

Baldwin v. City of Buffalo, 29 Barb. 396. AFFIRMED, 35 N. Y. 375.

Baldwin v. New York Life Ins. Co., 3 Bosw. 530. CONSIDERED OVERRULED, 82 N. Y. 552.

Baldwin v. Ryan, 3 Thomp. & C. 251. FOLLOWED, 38 Superior 471.

Ball v. Gardner, 21 Wend. 270. DISTINGUISHED, 58 N. Y. 588.

Ball v. Larkin, 3 E. D. Smith 555. CONTRA, 4 Hill 13.

Ball v. Liney, 48 N. Y. 6. *See* 44 Superior 416.

Ballard v. Burgett, 40 N. Y. 314. APPROVED, 13 Vr. (N. J.) 314. FOLLOWED, 1 Hun 513, 515; 46 N. Y. 500, 503.

Ballin v. Dillaye, 36 How. Pr. 216. FOLLOWED, 35 How. Pr. 279, 280.

Ballin v. Dillaye, 37 N. Y. 35. APPROVED, 10 W. Va. 171, 175. DISTINGUISHED, 42 N. Y. 633.

Ballou v. Cunningham, 4 Lans. 74. *See* 60 Barb. 425.

Ballou v. Cunningham, 60 Barb. 425. REVIEWED, 25 Kan. 287.

Ballou v. Parsons, 67 Barb. 19. AFFIRMED, *see* 55 N. Y. 673.

Bangs v. Strong, 4 N. Y. 315. *See* 9 N. Y. 241.

Bank for Savings v. Frank, 56 How. Pr. 403. AFFIRMED, 45 Superior 404.

Bank of Albion v. Burns, 46 N. Y. 170. FOLLOWED, 2 Thomp. & C. 60.

Bank of Attica v. Wolf, 18 How. Pr. 102. FOLLOWED, 18 How. Pr. 397.

Bank of Auburn v. Roberts, 44 N. Y. 192. FOLLOWED, 41 Superior 279.

Bank of Commonwealth v. Mayor, 43 N. Y. 184. FOLLOWED, 45 N. Y. 682.

Bank of Genesee v. Patchin Bank, 13 N. Y. 309. DISTINGUISHED, 4 Lans. 306. FOLLOWED, 18 How. Pr. 308, 309; 19 Id. 51, 52.

Bank of Geneva v. Hotchkiss, 5 How. Pr. 478. *See* 7 How. Pr. 197.

Bank of Havana v. Magee, 20 N. Y. 355, 361. FOLLOWED, 61 How. Pr. 394.

Bank of Ithaca v. Bean, 1 Code 133. DICTUM OVERRULED, 11 Barb. 651.

Bank of Lansingburgh v. McKie, 7 How. Pr. 360. OVERRULED, 16 How. Pr. 78.

Bank of Michigan v. Jessup, 19 Wend. 10. EXAMINED, 1 Doug. (Mich.) 58.

Bank of Monroe v. Culver, 2 Hill 531. FOLLOWED, 38 Superior 263.

Bank of Monroe v. Schermerhorn, Clarke 297. REVERSED, 9 Paige 372.

Bank of New York v. Bank of Ohio, 29 N. Y. 619. DISTINGUISHED, 46 Superior 517.

Bank of Orange v. Brown, 3 Wend. 158. FOLLOWED, 32 Wis. 400.

Bank of Orleans v. Flagg, 3 Barb. Ch. 316, 318. CRITICISED, 23 Hun 137.

Bank of Orleans v. Smith, 3 Hill 560. REVERSED, 7 Hill 595.

Bank of Poughkeepsie v. Ibbotson, 24 Wend. 473. EXPLAINED, 8 Mo. App. 505, 507. FOLLOWED, 80 N. Y. 387. REVIEWED, 34 Ark. 336.

Bank of Rochester v. Gould, 9 Wend. 279. *See* 2 Hill 587.

Bank of Rochester v. Jones, 4 Den. 489. REVERSED, 4 N. Y. 497.

Bank of Rochester v. Jones, 4 N. Y. 497. FOLLOWED, 47 N. Y. 638; 57 N. Y. 37.

Bank of Rome v. Village of Rome, 18 N. Y. 38. DISTINGUISHED, 53 N. Y. 138. FOLLOWED, 59 Barb. 446; 82 N. Y. 622. REVIEWED, 2 Trans. Rep. 762, 768.

Bank of Rome v. Village of Rome, 19 N. Y. 20. DISTINGUISHED, 23 N. Y. 439, 440; 84 N. Y. 540.

Bank of Rutland v. Buck, 5 Wend. 66. QUALIFIED, 2 Abb. N. Cas. 310.

Bank of St. Albans v. Gilliland, 23 Wend. 311. COMMENTED ON, 59 How. Pr. 300. DISTINGUISHED, 81 N. Y. 226.

Bank of Salina v. Abbott, 3 Den. 181. OVERRULED, 3 Barb. 12.

Bank of Sandusky v. Scoville, 24 Wend. 115. COMMENTED ON, 59 How. Pr. 300. DISTINGUISHED, 81 N. Y. 226.

Bank of Troy v. Tapping, 9 Wend. 273. REVIEWED, 13 So. Car. 337.

Bank of United States v. Davis, 2 Hill 451, 463. NOT APPLICABLE, 82 N. Y. 306. REVIEWED, 55 Cal. 162.

Bank of Watertown, Exp., v. Assessors of the Village of Watertown, 25 Wend. 686. INCORRECTLY REPORTED, 2 Hill 353.

Banta v. Garmo, 1 Sandf. Ch. 383, 385, 386. NOT FOLLOWED, 16 W. Va. 636.

Barber v. Crossett, 6 How. Pr. 45. CONTRA, 6 How. Pr. 172, 174 *n.*

Barber v. Harris, 15 Wend. 615. OBITER, 37 Ind. 400, 402.

Barber v. Hubbard, 3 Code 156. AFFIRMED, 3 Code 169.

Barber v. Marble, 2 Thomp. & C. 114. DISTINGUISHED, 1 Hun 421, 428; 3 Thomp. & C. 595.

Barber v. Rose, 5 Hill 76. DISTINGUISHED, 80 N. Y. 362.

Barbour v. Everson, 16 Abb. Pr. 366. EXPLAINED, 5 Abb. Pr., N. S., 333, 337.

Barclay v. Talman, 4 Edw. 123. AFFIRMED, 3 Ch. Sent. 56.

Barclay v. Wilcox, 9 Week. Dig. 298. AFFIRMED, 13 Week. Dig. 173.

Barger v. Durvin, 22 Barb. 68. OVERRULED, 34 Barb. 193; 34 N. Y. 178.

Barhyte v. Shepherd, 35 N. Y. 238, 245. CRITICISED, 53 N. Y. 56; 6 Kan. 500, 508. FOLLOWED, 4 Lans. 163.

Barker v. Cook, 40 Barb. 254. FOLLOWED, 5 Hun 624.

Barker v. Russell, 1 Code 5. MODIFIED, 1 Code, N. S., 57.

Barker v. Savage, 45 N. Y. 191. FOLLOWED, 35 Superior 390.

Barker v. Savage, 1 Sweeny 288. APPROVED, 33 Superior 185, 186.

Barlow v. Scott, 24 N. Y. 40. EXPLAINED, 40 N. Y. 504, 509.

Barnard v. Darling, 1 Barb. Ch. 218. FOLLOWED, 9 Abb. N. Cas. 461.

Barnard v. Heydrick, 49 Barb. 62, 70. FOLLOWED, 80 N. Y. 551. CONTRA, 17 How. Pr. 477.

Barnard v. Kobbe, 3 Daly 35, 373. AFFIRMED, 54 N. Y. 516.

Barnard v. Monnot, 34 Barb. 90. REVERSED, 1 Abb. App. Dec. 108; 33 How. Pr. 440; 3 Keyes 203.

Barnard v. Viele, 21 Wend. 88. FOLLOWED, 80 N. Y. 209.

Barnard v. Wheeler, 3 How. Pr. 71, 73. EXPLAINED, 4 How. Pr. 246, 249, 409, 410.

Barnes v. Atlantic, &c., R. R. Co. of Brooklyn, Supreme Ct., MSS. FOLLOWED, 9 Abb. N. Cas. 184; 6 How. Pr. 400.

Barnes v. Barrow, 61 N. Y. 39, 41. DISTINGUISHED, 24 Hun 615.

Barnes v. Brown, 11 Hun 315. REVERSED *in part,* 80 N. Y. 527.

Barnes v. Brown, 80 N. Y. 527, 534. FOLLOWED, 9 Abb. N. Cas. 435.

Barnes v. Harris, 4 N. Y. 374. EXPLAINED, 8 Abb. Pr. 119.

Barnes v. Hathaway, 66 Barb. 452. FOLLOWED, 22 Hun 429.

Barnes v. McAllister, 18 How. Pr. 534. CONTRA, 14 Abb. Pr., N. S., 273.

Barnes v. Mott, 16 Abb. Pr., N. S., 57. AFFIRMED, 6 Daly 150.

Barnes v. Mott, 6 Daly 150. AFFIRMED, 64 N. Y. 397.

Barnes v. Mott, 64 N. Y. 397. APPLIED, 6 Abb. N. Cas. 469, 472.

Barnes v. Perine, 12 N. Y. 18. FOLLOWED, 35 Superior 223.

Barnes v. Quigley, 59 N. Y. 265. DISTINGUISHED, 63 N. Y. 614; 2 Utah T. 235. NOTICED, 44 Superior 424.

Barnes v. Stoughton, 6 Hun 254. APPEAL DISMISSED, 58 N. Y. 645.

Barnes v. Underwood, 3 Lans. 526; 47 N. Y. 351. DISTINGUISHED, 4 Hun 246.

Barnes v. West, 16 Hun 68. FOLLOWED, 61 How. Pr. 242.

Barnet v. Muncie Nat. Bank of Indiana, 8 Otto (U. S.) 555. FOLLOWED *as controlling,* 81 N. Y. 15, 17.

Barnett, Matter of, 52 How. Pr. 73. MODIFIED, 53 How. Pr. 247; 11 Hun 471.

Barnett v. Chicago, &c., R. R. Co., 6 Thomp. & C. 489 *n.* AFFIRMED, 4 Hun 114; S. C., 6 Thomp. & C. 358.

Barnett v. Kincaid, 2 Lans. 320. EXPLAINED, 16 Hun 6.

Barnett v. Lichtenstein, 39 Barb. 194. APPROVED, 10 W. Va. 175. CRITICISED, 57 Barb. 227.

Barney v. Griffin, 2 N. Y. 365. DISAPPROVED, 7 Neb. 429, 433.

Barney v. Oyster Bay and Huntington Steamboat Co., 2 Thomp. & C. 598. AFFIRMED, 67 N. Y. 301.

Barnum v. Seneca County Bank, 6 How. Pr. 82. FOLLOWED, 10 How. Pr. 415, 420.

Barret v. Gracie, 34 Barb. 20. CONTRA, 4 Duer 642; 11 How. Pr. 1.

Barrett v. Warren, 3 Hill 348, 353. FOLLOWED, 76 Ill. 482. NOT FOLLOWED, 55 Cal. 58.

Barringer v. New York Central, &c., R. R. Co., 18 Hun 398. DISTINGUISHED, 84 N. Y. 254.

Barrow v. Rhinelander, 3 Johns. Ch. 614. REVERSED *in part,* 17 Johns. 538.

Barry v. Equitable Life Assur. Soc., 59 N. Y. 587. FOLLOWED, 71 N. Y. 267.

Barry v. Merchants' Exchange Co., 1 Sandf. Ch. 280. COMMENTED ON, 15 N. Y. 62, 262.

Barteau v. Phœnix Mut. Life Ins. Co., 3 Thomp. & C. 576. AFFIRMED, 67 N. Y. 595.

Bartlett, Exp., 4 Bradf. 221, 224. APPROVED, 72 Mo. 207.

Bartlett, Matter of, 9 How. Pr. 414. *See* 42 Barb. 206.

Bartlett v. Bartlett, Clarke 460. FOLLOWED, 59 How. Pr. 43. NOT FOLLOWED, 59 How. Pr. 27.

Bartlett v. Campbell, 1 Wend. 50. EXPLAINED, 15 N. Y. 405.

Bartlett v. Crozier, 17 Johns. 439. COMMENTED ON, 4 Hill 630. DISTINGUISHED, 46 Superior 114.

Bartlett v. Drew, 60 Barb. 648; 4 Lans. 444. AFFIRMED, 57 N. Y. 587.

Bartlett v. McNeil, 5 Thomp. & C. 675. AFFIRMED, 60 N. Y. 53.

Bartley v. Richtmyer, 4 N. Y. 38. REVIEWED, 52 Wis. 617.

Barto v. Himrod, 8 N. Y. 483. DISTINGUISHED, 61 N. Y. 84.

Barton v. Beer, 21 How. Pr. 309. FOLLOWED, 24 How. Pr. 31, 32.

Barton v. City of Syracuse, 37 Barb. 292. AFFIRMED, 36 N. Y. 54.

Barton v. City of Syracuse, 36 N. Y. 54. FOLLOWED, 20 Minn. 117, 123.

Barton v. Hermann, 11 Abb. Pr., N. S., 378. FOLLOWED, 42 Superior 256.

Barton v. New York Central, &c., R. R. Co., 1 Thomp. & C. 297. AFFIRMED, 56 N. Y. 660.

Barton v. Port Jackson, &c., Plank Road Co., 17 Barb. 397. REVIEWED, 7 Bradw. (Ill.) 564.

Baskin v. Baskin, 36 N. Y. 416. DISTINGUISHED, 67 N. Y. 413.

Baskins v. Shannon, 3 N. Y. 310. FOLLOWED, 43 Superior 335.

Bass v. Comstock, 38 N. Y. 21. DISTINGUISHED, 60 N. Y. 429.

Bass v. White, 7 Lans. 171. REVERSED, 65 N. Y. 565.

Bassett v. Bassett, 55 Barb. 505. AFFIRMED, 6 Alb. L. J. 166; 46 N. Y. 170.

Bassett v. Fish, 75 N. Y. 303. EXPLAINED, 46 Superior 115.

Bassett v. Spofford, 2 Daly 432. FOLLOWED, 5 Lans. 424.

Bassford, Matter of, 50 N. Y. 509. FOLLOWED, 4 Hun 439.

Bastable v. City of Syracuse, 8 Hun 587. APPEAL DISMISSED, 72 N. Y. 64.

Bate v. Graham, 11 N. Y. 237. DISTINGUISHED, 24 Hun 468, 470; 81 N. Y. 272.

Bates v. Coster, 1 Hun 400. FOLLOWED, 4 Hun 273.

Bates v. Relyea, 23 Wend. 336. OVERRULED, 4 N. Y. 254.

Bates v. Rosecrans, 37 N. Y. 412. FOLLOWED, 43 Superior 131.

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Bathgate v. Haskin, 5 Daly 361. REVERSED, 63 N. Y. 261.

Bathgate v. Haskin, 59 N. Y. 533. FOLLOWED, 23 Hun 99, 101.

Battell v. Torrey, 65 N. Y. 294. FOLLOWED, 3 Abb. N. Cas. 285, 288.

Batterman v. Finn, 32 How. Pr. 501. APPEAL DISMISSED, 40 N. Y. 340.

Batterman v. Finn, 34 How. Pr. 108. *See* 32 How. Pr. 501.

Batterman v. Finn, 40 N. Y. 340. DISTINGUISHED, 47 N. Y. 45, 46.

Batterman v. Pierce, 3 Hill 171, 176. CONSIDERED, Hill & D. 174.

Batterson v. Sandford, 45 Superior 27. FOLLOWED, 1 Civ. Pro. 42.

Battle v. Rochester City Bank, 5 Barb. 414. DISTINGUISHED, 52 Md. 681.

Baulec v. New York, &c., R. R. Co., 59 N. Y. 356. REVIEWED, 73 Ind. 273.

Baxter v. Arnold, 9 How. Pr. 445. FOLLOWED, 11 How. Pr. 138, 139.

Baxter v. Drake, 22 Hun 565. AFFIRMED, 24 Hun v.; 1 Civ. Pro. 226.

Baxter v. Putney, 37 How. Pr. 140. CONTRA, 41 How. Pr. 86.

Baxter v. Ryerss, 13 Barb. 267. OVERRULED, 29 How. Pr. 20, 26.

Baxter v. Second Ave. R. R. Co., 3 Robt. 510. APPROVED, 33 Superior 185, 186.

Bay v. Coddington, 5 Johns. Ch. 54. CRITICISED, 22 Alb. L. J. 191; 12 Otto (U. S.) 25, 44. *See* CODDINGTON *v.* BAY.

Bayard v. Hoffman, 4 Johns. Ch. 450. APPROVED, 6 Stew. (N. J.) 298. DISAPPROVED, 2 Tenn. Ch. 421.

Baylis v. Travellers' Ins. Co., MSS. Op. FOLLOWED, 22 Hun 188.

Beach v. Bay State Steamboat Co., 6 Abb. Pr. 415; 27 Barb. 248; 16 How. Pr. 1. REVERSED, 10 Abb. Pr. 71; 18 How. Pr. 335.

Beach v. Bradley, 8 Paige 146. EXPLAINED, 3 Barb. Ch. 24.

Beach v. Cook, 39 Barb. 360. AFFIRMED, 26 How. Pr. 601.

Beach v. Cook, 28 N. Y. 508. DISTINGUISHED, 57 N. Y. 565.

Beach v. Crain, 2 N. Y. 86. DISTINGUISHED, 54 Barb. 191; 55 N. Y. 598.

Beach v. Furman, 9 Johns. 229. DISTINGUISHED, 2 Lans. 354.

Beach v. Gray, 2 Den. 84. EXPLAINED, 13 Abb. Pr. 388, 392.

Beach v. Gregory, 2 Abb. Pr. 203. APPROVED, 59 How. Pr. 389.

Beach v. Mayor, &c., of New York, 14 Hun 79. APPROVED, 24 Hun 168.

Beach v. Raritan, &c., R. R. CO., 37 N. Y. 457. DISTINGUISHED, 24 Hun 373.

Beach v. Reynolds, 53 N. Y. 1. FOLLOWED, 47 How. Pr. 288; 1 Hun 312; 38 Superior 367. DISTINGUISHED, 82 N. Y. 513.

Beach v. Smith, 28 Barb. 254. NOT FOLLOWED, 61 How. Pr. 459.

Beach v. Smith, 30 N. Y. 116. DISTINGUISHED, 61 How. Pr. 459.

Beach v. Southworth, 6 Barb. 173. FOLLOWED, 12 How. Pr. 381, 384.

Beal v. Finch, 11 N. Y. 128. COMMENTED ON, 3 E. D. Smith 595.

Beale v. Benjamin, 29 How. Pr. 101. CONTRA, 29 How. Pr. 97.

Beals v. Guernsey, 8 Johns. 446. APPROVED, 12 Johns. 324.

Beams, Matter of, 17 How. Pr. 459. *See* 19 How. Pr. 518.

Bean v. Edge, 11 Week. Dig. 510. AFFIRMED, 12 Week. Dig. 111.

Bean v. Pettingill, 2 Abb. Pr., N. S., 58. AFFIRMED, 7 Robt. 7.

Beards v. Wheeler, 11 Hun 539. APPEAL DISMISSED, 76 N. Y. 213.

Beards v. Wheeler, 76 N. Y. 213. DISTINGUISHED, 23 Hun 428.

Beardsley v. Dickerson, 4 How. Pr. 81. EXPLAINED, 4 How. Pr. 409, 411.

Beardsley v. Maynard, 4 Wend. 336. AFFIRMED, 7 Wend. 560.

Bearns v. Gould, 8 Daly 384. AFFIRMED, 77 N. Y. 595.

Beattie v. Niagara Savings Bank, 41 How. Pr. 137. OVERRULED, 54 N. Y. 147, 150.

Bech v. Ruggles, 6 Abb. N. Cas. 69. FOLLOWED, 58 How. Pr. 183, 184.

Beck v. Allison, 4 Daly 421. REVERSED, 56 N. Y. 366.

Beck v. East River Ferry Co., 6 Robt. 82. DISTINGUISHED, 24 Hun 103; 66 N. Y. 11, 13.

Beck v. Stephani, 9 How. Pr. 193. FOLLOWED, 20 Minn. 175.

Becker v. Howard, 47 How. Pr. 423. REVERSED, 4 Hun 359; 66 N. Y. 5.

Beckwith, Matter of, 15 Hun 326. *See* 82 N. Y. 83.

Beckwith v. New York Central R. R. Co., 64 Barb. 299. *See* 9 Alb. L. J. 45.

Beckwith v. Union Bank of New York, 9 N. Y. 211. DISTINGUISHED, 24 Hun 97, 98.

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Beckwith v. Whalen, 5 Lans. 376. FOLLOWED, 3 Hun 502.

Bedell v. Sturta, 6 Abb. Pr. 319 *n.* CONTRA, 9 Abb. Pr. 58 *n.*, 240.

Bedford v. Terhune, 1 Daly 371. AFFIRMED, 30 N. Y. 453.

Bedford v. Terhune, 30 N. Y. 453. EXPLAINED, 56 N. Y. 163.

Beebe, Matter of, 20 Hun 462. DOUBTED, 1 Civ. Pro. 324.

Beebe v. Dowd, 22 Barb. 255. FOLLOWED, 61 How. Pr. 143.

Beebe v. Hutton, 47 Barb. 187. DISAPPROVED, 6 Abb. Pr., N. S., 143.

Beebee v. Pyle, 1 Abb. N. Cas. 412. NOT FOLLOWED, 129 Mass. 523.

Beekman's Petition, 19 Abb. Pr. 244. AFFIRMED, 1 Abb. Pr., N. S., 449.

Beekman v. Bonsor, 23 N. Y. 317. LIMITED, 4 Hun 287, 291.

Beekman v. Lansing, 3 Wend. 446. EXPLAINED, 6 Hill 382. REVIEWED AND APPROVED, 42 Mich. 79.

Beekman v. People, 27 Barb. 260. AFFIRMED, 23 N. Y. 575.

Beers v. Hendrickson, 6 Robt. 53. MODIFIED, 45 N. Y. 665.

Beisiegel v. New York Central R. R. Co., 14 Abb. Pr., N. S., 29. FOLLOWED, 38 Superior 133.

Beisiegel v. New York Central R. R. Co., 33 Barb. 429. REVERSED, 40 N. Y. 9.

Beisiegel v. New York Central R. R. Co., 34 N. Y. 622. PARTIALLY OVERRULED, 34 Iowa 276, 279.

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Belden v. Devoe, 12 Wend. 223, 225. DISTINGUISHED, 9 Abb. N. Cas. 461.

Belden v. Meeker, 47 N. Y. 307. FOLLOWED, 2 Hun 610.

Belding v. Conklin, 4 How. Pr. 196. COMMENTED ON, 4 How. Pr. 269, 271. CONTRA, Id. 67, 134.

Belger v. Dinsmore, 34 How. Pr. 421; 51 Barb. 69. REVIEWED, 35 Superior 182.

Belger v. Dinsmore, 51 N. Y. 166. EXPLAINED, 2 Hun 49. FOLLOWED, 66 Barb. 286.

Belknap v. Bender, 4 Hun 414; 6 Thomp. & C. 611. AFFIRMED, 75 N. Y. 446.

Belknap v. North America Life Ins. Co., 11 Hun 282. FOLLOWED, 61 How. Pr. 349; 23 Hun 255.

Belknap v. Sealey, 14 N. Y. 143, 144. DISTINGUISHED, 83 N. Y. 120.

Bell v. Dagg, 2 Thomp. & C. 623. REVERSED, 60 N. Y. 528.

Bell v. Day, 32 N. Y. 165. DISTINGUISHED, 6 Hun 46, 47; 53 Iowa 630. FOLLOWED, 1 Hun 434; 50 How. Pr. 350; 45 Superior 61.

Bell v. Esopus, 49 Barb. 506. LIMITED, 1 Hun 554, 556.

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Bellinger v. Craigue, 31 Barb. 534. DISTINGUISHED, 83 N. Y. 197.

Bellinger v. Gray, 51 N. Y. 610. DISTINGUISHED, 62 N. Y. 361; 7 Fed. Rep. 158.

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Bellinger v. New York Central R. R. Co., 23 N. Y. 42. DISTINGUISHED, 58 N. Y. 423. FOLLOWED, 3 Hun 523, 527; 5 Thomp. & C. 653, 654.

Bellows v. Folsom, 2 Robt. 138. DISTINGUISHED, 60 N. Y. 151.

Belmont v. Coleman, 1 Bosw. 188. CRITICISED, 50 N. Y. 143.

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Belmont v. Erie R'y Co., 52 Barb. 637, 639, 665. APPROVED, 24 Hun 338.

Belmont v. Ponvert, 3 Robt. 693. AFFIRMED, 3 Robt. 698 *n.*

Belmont v. Ponvert, 35 Superior 208. *See as to costs,* 38 Superior 425.

Belton v. Baxter, 14 Abb. Pr., N. S., 404. DISTINGUISHED, 58 N. Y. 411.

Belton v. Baxter, 33 Superior 182. REVERSED, 54 N. Y. 245. *See* 58 N. Y. 411.

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Bendernagle v. Cocks, 19 Wend. 151; Id. 207. CRITICISED, 47 Conn. 326, 327.

Bendetson v. French, 46 N. Y. 266. DISTINGUISHED, 54 N. Y. 266.

Bendit v. Annesley, 27 How. Pr. 184. FOLLOWED, 61 How. Pr. 143.

Benedict v. Benedict, 15 Hun 305. AFFIRMED, 24 Hun v.

Benedict v. Benedict, 9 Week. Dig. 123. AFFIRMED, 12 Week. Dig. 249.

Benedict v. Caffe, 3 Duer 669. CONTRA, 5 How. Pr. 337, 361; 14 How. Pr. 522.

Benedict v. Cowden, 49 N. Y. 396. DISTINGUISHED, 54 N. Y. 240.

Benedict v. Field, 16 N. Y. 595. FOLLOWED, 18 How. Pr. 383, 384.

Benedict v. Gilman, 4 Paige 58. APPROVED, 22 Hun 531.

Benedict v. Harlow, 5 How. Pr. 347. *See* 62 Barb. 500.

Benedict v. Howard, 31 Barb. 569. DISTINGUISHED, 83 N. Y. 206.

Benedict v. Seymour, 6 How. Pr. 298. *See* 8 How. Pr. 242, 243.

Benedict v. Warriner, 14 How. Pr. 568. DISTINGUISHED, 58 N. Y. 112.

Benedict v. Western Union Teleg. Co., 9 Abb. N. Cas. 221. APPROVED, Id. 228.

Benediot, &c., Manuf. Co. v. Thayer, 20 Hun 547. MOTION TO DISMISS APPEAL DENIED, Oct. 5th, 1880.

Benedict, &c., Manuf. Co. v. Thayer, 21 Hun 614. MOTION TO DISMISS APPEAL DENIED, 82 N. Y. 610.

Benjamin v. Arnold, 2 Hun 447; 5 Thomp. & C. 54. OVERRULED, 64 N. Y. 461.

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Benjamin v. Elmira, &c., R. R. Co., 49 Barb. 441. APPROVED, 72 Mo. 186. DISTINGUISHED, 23 Hun 136.

Benjamin v. Taylor, 12 Barb. 328. *See* 44 Superior 26.

Bennett v. Austin, 10 Hun 451. REVERSED, 20 Alb. L. J. 240.

Bennett v. Brown, 20 N. Y. 99. DISTINGUISHED, 58 N. Y. 587.

Bennett v. Buchan, 5 Abb. Pr., N. S., 412. REVERSED, 61 N. Y. 222.

Bennett v. Buchan, 53 Barb. 578. REVERSED, 10 Alb. L. J. 239.

Bennett v. Cook, 43 N. Y. 537. FOLLOWED, 57 N. H. 168, 170.

Bennett v. Judson, 21 N. Y. 238. COMMENTED ON, 55 Barb. 534; 57 Id. 414; 39 How. Pr. 172, 174. CRITICISED, 51 N. Y. 33; 5 Oreg. 400, 403. DISTINGUISHED, 66 Barb. 205. EXPLAINED, 40 N. Y. 562, 566; 4 Thomp. & C. 531. FOLLOWED, 25 How. Pr. 389, 392. LIMITED, 2 Hun 318, 320, 321. QUALIFIED, 48 How. Pr. 193, 201. QUESTIONED, 23 Hun 208.

Bennett v. Lake, 47 N. Y. 93. *See* 44 How. Pr. 495, 496.

Bennett v. North British, &c., Ins. Co., 8 Daly 471. AFFIRMED, 81 N. Y. 273.

Bennett v. Silliman, 24 How. Pr. 337. OBSOLETE, 3 Abb. Pr., N. S., 443.

Bennett v. Van Syckel, 18 N. Y. 481. DISTINGUISHED, 58 N. Y. 210. FOLLOWED, 11 Abb. Pr., N. S., 123; 45 N. Y. 209.

Bensel v. Gray, 62 N. Y. 632. FURTHER APPEAL, 80 N. Y. 517.

Bensel v. Gray, 44 Superior 372. AFFIRMED, 80 N. Y. 517.

Benson v. Le Roy, 4 Johns. Ch. 651. DISTINGUISHED, 23 Hun 127.

Benson v. Mayor, &c., of New York, 10 Barb. 223. EXPLAINED, 40 Superior 232. REVIEWED, 31 N. Y. 202.

Benson v. Tilton, 24 How. Pr. 494. AFFIRMED, 41 N. Y. 619.

Bentley v. Jones, 4 How. Pr. 335. DISAPPROVED, 1 Daly 452. FOLLOWED, 6 How. Pr. 127. *See* 5 Id. 30, 31; 6 Id. 413, 417.

Benton v. Martin, 31 N. Y. 382. OVERRULED, 40 N. Y. 345.

Benton v. Martin, 52 N. Y. 570. DISTINGUISHED, 22 Hun 244.

Benton v. Pratt, 2 Wend. 385. OVERRULED, 5 Thomp. & C. 15.

Bergen v. Carman, 18 Hun 355. REVERSED, 8 Abb. N. Cas. 50; 79 N. Y. 146.

Berlin v. Hall, 48 Barb. 442. LIMITED, 14 Abb. Pr., N. S., 111, 115.

Berner v. Mittnacht, 2 Sweeney 582. FOLLOWED, 1 Thomp. & C. 290.

Bernhard v. Seligman, 54 N. Y. 661. NOTICED, 44 Superior 424.

Bernhardt v. Rensselaer, &c., R. R. Co., 18 How. Pr. 427. REVERSED, 19 How. Pr. 199.

Berrion's Estate, 16 Abb. Pr., N. S., 23. CONTRA, 1 Redf. 323.

Berry v. Mutual Ins. Co., 2 Johns. Ch. 603. *See* 2 Disn. (Ohio) 98.

Berry v. People, 8 Week. Dig. 15. AFFIRMED, 77 N. Y. 588.

Berthelon v. Betts, 4 Hill 577. COMMENTED ON. 2 Barb. Ch. 291.

Bertholf v. O'Reilly, 8 Hun 16. APPROVED, 24 Hun 102.

Besel v. New York Central, &c., R. R. Co., 70 N. Y. 171. APPLIED, 8 Abb. N. Cas. 48.

Besley v. Palmer, 1 Hill 482. DISTINGUISHED, 18 N. Y. 471.

Bettis v. Goodwill, 32 How. Pr. 137. DISTINGUISHED, 63 N. Y. 265.

Betts v. Bache, 23 How. Pr. 197. AFFIRMED, 14 Abb. Pr. 279; 6 Bosw. 614.

Betts v. Betts, 4 Abb. N. Cas. 317. *See* 57 How. Pr. 355 *n.*

Betts v. Garr, 26 N. Y. 383. FOLLOWED. 9 Abb. N. Cas. 320, 321.

Bevan v. Cooper, 72 N. Y. 317, 327, 329. APPROVED, 23 Hun 338. DISTINGUISHED AND LIMITED, 24 Hun 336, 337. LIMITED, 4 Redf. 34.

Bidwell v. Lament, 17 How. Pr. 357. REVIEWED AND DISTINGUISHED, 34 Superior 145.

Bidwell v. Northwestern Ins. Co., 19 N. Y. 179. DISTINGUISHED, 65 N. Y. 14.

Bielschofsky v. People, 3 Hun 40. DISTINGUISHED, 10 Hun 158, 159.

Bigelow v. Benton, 14 Barb. 123. DISTINGUISHED, 66 N. Y. 332.

Bigsby v. Warden, 62 N. Y. 27. DISTINGUISHED, 11 Hun 230, 231.

Bildersee v. Aden, 10 Abb. Pr., N. S., 163. REVERSED, 62 Barb. 175.

Billborough v. Metropolis Ins. Co., 5 Duer 587. REVIEWED, 6 Fed. Rep. 675.

Billings v. Baker, 28 Barb. 343; 15 How. Pr. 525. *See* 2 Lans. 21.

Bills v. New York Central R. R. Co., 53 N. Y. 608. FURTHER APPEAL, 84 N. Y. 6.

Binck v. Wood, 43 Barb. 315. AFFIRMED, Ct. of App., 1869.

Bingham v. Disbrow, 14 Abb. Pr. 251. REVERSED, 5 Trans. App. 198.

Binnard v. Spring, 42 Barb. 470. APPROVED, 2 Lans. 67.

Binsse v. Wood, 47 Barb. 624. AFFIRMED, 34 How. Pr. 629.

Binsse v. Wood, 37 N. Y. 526. DISTINGUISHED, 46 N. Y. 99.

Birckhead v. Brown, 5 Hill 634; 2 Den. 375. CRITICISED, 24 Hun 613, 614, 615.

Birdsall v. Phillips, 17 Wend. 464. APPROVED, 60 How. Pr. 446; 84 N. Y. 293. CONTRA, *as to 2d and 3d points,* 5 N. Y. 383.

Birdseye v. Ray, 4 Hill 158. AFFIRMED, 5 Den. 619.

Birmingham v. Empire Fire Ins. Co., 42 Barb. 457, 459. REVIEWED, 53 Md. 286.

Bisbey v. Shaw, 12 N. Y. 67. FOLLOWED, 34 How. Pr. 488, 490. *See* 13 How. Pr. 97, 100.

Bishop v. Barton, 5 Thomp. & C. 6. AFFIRMED, 64 N. Y. 637.

Bishop v. Bishop, 11 N. Y. 123. DISTINGUISHED, 1 Lans. 219.

Bishop v. Garcia, 14 Abb. Pr., N. S., 69, 70. DISTINGUISHED, 6 Fed. Rep. 220.

Bissell v. Balcom, 39 N. Y. 284. COMMENTED ON, 45 N. Y. 142, 151.

Bissell v. Kellogg, 60 Barb. 617. DISTINGUISHED, 60 N. Y. 21.

Bissell v. Michigan Southern, &c., R. R. Co., 22 N. Y. 258, 305. APPROVED, 24 Hun 508. DISTINGUISHED, 91 Pa. St. 377. FOLLOWED, 40 N. Y. 168, 172.

Bissell v. New York Central R. R. Co., 29 Barb. 602. REVERSED, 25 N. Y. 442.

Bissell v. New York Central R. R. Co., 25 N. Y. 442. DISAPPROVED, 19 Ohio St. 1, 14. DILTINGUISHED, 2 Hun 51; 66 N. Y. 317.

Bissell v. New York Central, &c., R. R. Co., 67 Barb. 385. AFFIRMED *at Gen. Term,* 67 Barb. 393 *n.* (a).

Bissell v. Pearce, 28 N. Y. 252. DISTINGUISHED, 5 Lans. 372; 65 N. Y. 132. FOLLOWED, 37 Superior 18.

Bixby v. Warden, 46 How. Pr. 239. FOLLOWED, 14 Hun 629; 20 Id. 449.

Black v. White, 37 Superior 320. FOLLOWED, 42 Superior 238.

Black River, &c., R. R. Co. v. Barnard, 9 Hun 104. FOLLOWED, 22 Hun 179.

Blackmar v. Van Inwager, 5 How. Pr. 367. CONTRA, 14 How. Pr. 100, 101.

Blackstone v. Allemania Fire Ins. Co., 4 Daly 299. AFFIRMED, 56 N. Y. 104.

Blackwell v. Wiswall, 14 How. Pr. 257. AFFIRMED, 24 Barb. 362.

Blair v. Bartlett, 75 N. Y. 150. DISTINGUISHED, 83 N. Y. 197.

Blake v. Ferris, 5 N. Y. 48. APPLIED, 2 E. D. Smith 255. FOLLOWED, 38 Superior 197. REVIEWED, 17 N. Y. 104.

Blake v. Griswold, 1 Hun 332. AFFIRMED, 68 N. Y. 294.

Blake v. People, 73 N. Y. 586. EXPLAINED, 23 Hun 167, 168; 24 Hun 482.

Blake v. Sands, 3 Redf. 168. OPPOSED, 60 How. Pr. 234.

Blake v. Wheeler, 18 Hun 496. AFFIRMED, 80 N. Y. 128.

Blakeley v. Calder, 15 N. Y. 617. DISTINGUISHED, 22 Hun 490. FOLLOWED, 3 Daly 186; 56 N. Y. 229.

Blakiston v. Dudley, 5 Duer 373. FOLLOWED, 72 Mo. 526.

Blanchard v. Ely, 21 Wend. 342. EXPLAINED, 16 N. Y. 489. *See* 44 Superior 401.

Blanchard v. Strait, 8 How. Pr. 83. CONTRA, 9 How. Pr. 78, 80.

Blanchard v. Western Union Teleg. Co., 67 Barb. 228; 3 Thomp. & C. 775. REVERSED, 60 N. Y. 510.

Blason v. Bruno, 21 How. Pr. 112. DISTINGUISHED, 40 How. Pr. 226, 240.

Blauvelt v. Woodworth, 31 N. Y. 285. FOLLOWED, 67 N. Y. 565.

Bleecker v. Smith, 37 How. Pr. 28. CONTRA, 2 How. Pr. 89, 181.

Bleeker v. Johnson, 51 How. Pr. 380. *See* 7 Daly 505.

Bliss v. Lawrence, 48 How. Pr. 21. DISTINGUISHED, 50 How. Pr. 143, 149.

Bliss v. Lawrence, 58 N. Y. 442. APPROVED, 8 Mo. App. 204.

Bliss v. Schaub, 48 Barb. 342. FOLLOWED, 2 Thomp. & C. 445.

Bliss v. Sheldon, 7 Barb. 152; 8 N. Y. 31. FOLLOWED, 53 Vt. 56.

Bliss v. Shwartz, 65 N. Y. 444. FOLLOWED, 43 Superior 170.

Blood v. Humphrey, 17 Barb. 660. REVIEWED, 36 Ark. 367.

Bloodgood v. Clark, 4 Paige 574. REVIEWED, 6 Fed. Rep. 776.

Bloodgood v. Mohawk, &c., R. R. Co., 18 Wend. 9. DISTINGUISHED, 54 N. Y. 144. REVIEWED, 7 Bradw. (Ill.) 467.

Bloom v. Burdick, 1 Hill 130. DISTINGUISHED, 3 Hun 673, 687.

Bloomfield, &c., Gas Light Co. v. Calkins, 1 Thomp. & C. 549. AFFIRMED, 62 N. Y. 386.

Blossom v. Champion, 28 Barb. 217. OVERRULED, 37 Barb. 570.

Blossom v. Dodd, 43 N. Y. 264. DISTINGUISHED, 51 N. Y. 171; 54 Id. 515; 62 Id. 179.

Blossom v. Estes, 22 Hun 472. AFFIRMED, 84 N. Y. 614. APPROVED, 1 Civ. Pro. 46.

Blossom v. Estes, 10 Week. Dig. 428. AFFIRMED, 12 Week. Dig. 131.

Blunt v. Aikin, 15 Wend. 522. LIMITED, 1 Lans. 293; 3 Id. 306; 2 N. Y. 181.

Blunt v. Greenwood, 1 Cow. 15. OVERRULED, 2 How. Pr. 59.

Blythenburgh v. Cotheal, 4 N. Y. 418. APPLIED, 6 How. Pr. 286, 287.

Boardman v. Lake Shore, &c., R. R. Co., 84 N. Y. 157. REVIEWED, 24 Hun 362.

Boardman v. Lake Shore, &c., R. R. Co., 8 Week. Dig. 347. AFFIRMED, 12 Week. Dig. 330.

Boardman, Matter of, v. Supervisors of Tompkins County, 10 Week. Dig. 526. REVERSED, 12 Week. Dig. 388.

Bockes v. Lansing, 74 N. Y. 437. DISTINGUISHED, 22 Hun 198.

Bodine v. Exchange Fire Ins. Co., 51 N. Y. 123. FOLLOWED, 68 Ill. 463, 469.

Boese v. Locke, 53 How. Pr. 148. AFFIRMED, 17 Hun 270.

Bogart v. Perry, 1 Johns. Ch. 52. AFFIRMED, 17 Johns. 351.

Bogart v. Vermilyea, 1 Code, N. S., 212. AFFIRMED, 10 N. Y. 447.

Bogart v. Morse, 1 N. Y. 377. FOLLOWED, 42 Superior 446.

Bohnet v. Lithauer, 7 Hun 238. APPEAL DISMISSED, 66 N. Y. 645.

Boington v. Lapham, 14 How. Pr. 360. APPROVED, 15 How. Pr. 565, 566.

Boisaubin v. Reed, 2 Keyes 323. APPROVED, 82 N. Y. 482.

Bokel v. Bokel, 3 Edw. 376. DISTINGUISHED, 61 N. Y. 406.

Bolen v. Crosby, 49 N. Y. 183. DISTINGUISHED, 4 Hun 614, 615, 616. FOLLOWED, 1 Thomp. & C. 143.

Boller v. Mayor, &c., of New York, 40 Superior 523. OVERRULED *in part*, 69 N. Y. 143.

Bolles v. Duff, 55 Barb. 313. CONTRA, 56 Barb. 567.

Bolton v. Jacks, 6 Robt. 166, 228. CRITICISED, 63 N. Y. 75, 469. DISTINGUISHED, 22 Hun 407. FOLLOWED, 40 Superior 523. REVIEWED, 4 Redf. 202.

Bolton v. Taylor, 18 Abb. Pr. 385. DISAPPROVED, 5 Hun 594. FOLLOWED, 1 Bann. & A. (U. S.) Pat. Cas. 628.

Bolton v. Taylor, 3 Robt. 647. FOLLOWED *unwillingly*, 46 Superior 361. CONTRA, 5 Hun 594.

Bommer v. American Spiral Spring Butt, &c., Co., 44 Superior 454. AFFIRMED, 81 N. Y. 468.

Bonard's Will, 16 Abb. Pr., N. S., 128. DISTINGUISHED, 22 Hun 252.

Bond v. McNiff, 38 Superior 83. AFFIRMED, 41 Superior 543.

Bond v. Willett, 29 How. Pr. 47; 31 N. Y. 102. DISTINGUISHED AND LIMITED, 54 N. Y. 107.

Bonesteel v. Flack, 41 Barb. 435. DISTINGUISHED, 9 Hun 655.

Bonesteel v. Lynde, 8 How. Pr. 226. DISTINGUISHED, 5 Daly 413.

Bonesteel v. Lynde, 8 How. Pr. 352. *See* 13 How. Pr. 542, 544.

Bonito v. Mosquera, 2 Bosw. 401. CONSIDERED OVERRULED, 10 Bosw. 511. OVERRULED, 24 N. Y. 530, 535.

Bonnell v. Griswold, 68 N. Y. 294. FURTHER APPEAL, 80 N. Y. 128.

Bonnell v. Griswold, 80 N. Y. 128. FOLLOWED, 80 N. Y. 631.

Bonnell v. Wheeler, 18 Hun 496. *See* 80 N. Y. 128.

Bonynge v. Field, 44 Superior 581. AFFIRMED, 81 N. Y. 159.

Bonynge v. Waterbury, 12 Hun 534. FOLLOWED, 12 Hun 660, 661; 44 Superior 581.

Bookstaver v. Glenny, 3 Thomp. & C. 248. CONSIDERED OVERRULED, 60 N. Y. 146.

Bookstaver v. Jayne, 60 N. Y. 146. DISTINGUISHED, 22 Hun 244.

Boomer v. Koon, 6 Hun 645. CONFLICTS WITH 6 Thomp. & C. 645. FOLLOWED, 7 Hun 484. RECONCILED, 56 How. Pr. 156. *See* 74 N. Y. 307.

Boomer v. Koon, 6 Thomp. & C. 645. *See* 56 How. Pr. 156.

Boone v. Citizens' Saving Bank, 21 Hun 235. REVERSED, 84 N. Y. 83.

Boorman v. Jenkins, 12 Wend. 566. FOLLOWED, 38 Superior 180.

Booth v. Ammerman, 4 Bradf. 129. APPROVED, 14 Vr. (N. J.) 45.

Booth v. Boston, &c., R. R. Co., 73 N. Y. 38. FOLLOWED, 80 N. Y. 46, 52.

Booth v. Bunce, 35 Barb. 496. REVERSED, 24 N. Y. 592.

Booth v. Cleveland Rolling Mill Co., 11 Hun 278, 279. AFFIRMED, 74 N. Y. 215.

Booth v. Farmers', &c., Bank, 11 Hun 258. *See* 50 N. Y. 396.

Booth v. Farmers', &c., Bank, 50 N. Y. 396. SECOND TRIAL, 74 N. Y. 228.

Booth v. Spuyten Duyvil Rolling Mill Co., 3 Thomp. & C. 368, 372. FOLLOWED, 5 Hun 107.

Bork v. People, 16 Hun 476. AFFIRMED, 83 N. Y. 609.

Borsdorff, Matter of, 17 Abb. Pr. 168, 169. LIMITED, 53 N. Y. 5.

Borst v. Corey, 16 Barb. 136. AFFIRMED, 15 N. Y. 505.

Borst v. Corey, 15 N. Y. 505. APPROVED, 33 Gratt. (Va.) 196.

Borst v. Lake Shore, &c., R'y Co., 4 Hun 346, 349. FOLLOWED, 42 Superior 225.

Boston, &c., R. R. Co., Matter of, 53 N. Y. 574. DISTINGUISHED, 84 N. Y. 312.

Boston, &c., R. R. Co. v. President of Greenbush, 5 Lans. 461. AFFIRMED, 52 N. Y. 510.

Bostwick v. Baltimore and Ohio R. R. Co., 45 N. Y. 712. DISTINGUISHED, 7 Hun 233, 234.

Bostwick v. Beizer, 10 Abb. Pr. 197. *See* 40 N. Y. 383.

Bostwick v. Burnett, 11 Hun 301. CONTRA, 6 Hill 9. CRITICISED, 55 How. Pr. 331.

Bostwick v. Goetzel, 57 N. Y. 582, 585. FOLLOWED, 22 Hun 492.

Bostwick v. Menck, 8 Abb. Pr., N. S., 169. REVERSED, 4 Daly 68.

Bostwick v. Tioga R. R. Co., 17 How. Pr. 456. FOLLOWED, 35 Superior 214.

Bosworth v. Vandewalker, 53 N. Y. 597. DISTINGUISHED, 1 Civ. Pro. 152, 156. EXPLAINED, 61 How. Pr. 151; 24 Hun 203.

Bottsford v. McLean, 42 Barb. 445. AFFIRMED, 6 Alb. L. J. 196.

Bottsford v. McLean, 45 Barb. 478; 48 N. Y. 343. FOLLOWED, 2 Thomp. & C. 414.

Bouchaud v. Dias, 10 Paige 445. REVERSED, How. App. Cas. 509; 1 N. Y. 201.

Boughton v. Bruce, 20 Wend. 234, 235. COMMENTED ON, 5 Den. 242.

Boutel v. Owens, 2 Sandf. 654. LIMITED, 4 Sandf. 684.

Bouton v. Bouton, 40 How. Pr. 217. REVERSED, 42 How. Pr. 11.

Bowen v. Bradley, 9 Abb. Pr., N. S., 395. DISAPPROVED, 58 How. Pr. 24, 30. 37 *n.* DISTINGUISHED, 7 Abb. N. Cas. 66, 76.

Bowen v. Lease, 5 Hill 221, 225. REVIEWED, 9 Abb. N. Cas. 433.

Bowery Extension Case, 2 Abb. Pr. 368. CONTRA, 5 Abb. Pr. 272; 61 Barb. 45; 4 Lans. 467.

Bowery Nat. Bank v. Duryea, 54 How. Pr. 450. REVERSED, 55 How. Pr. 88; 74 N. Y. 491. CONTRA, 55 How. Pr. 1. CRITICISED, 54 Id. 509, 519.

Bowery Nat. Bank v. Duryea, 55 How. Pr. 88. AFFIRMED, 56 How. Pr. 42; 74 N. Y. 491. DISTINGUISHED, 18 Hun 346.

Bowery Savings Bank v. Richards, 3 Hun 366; 6 Thomp. & C. 59. APPEAL DISMISSED, 62 N. Y. 631.

Bowles v. Van Horne, 11 Abb. Pr. 84; 19 How. Pr., 346. OVERRULED, 14 Abb. Pr., N. S., 47 *n.*

Bowman v. Agricultural Ins. Co., 2 Thomp. & C. 261. AFFIRMED, 59 N. Y. 521.

Bowman v. De Peyster, 2 Daly 203. FOLLOWED, 39 Superior 277. CONTRA, 27 How. Pr. 179.

Bowman v. Ely, 2 Wend. 250. EXPLAINED, 1 Hill 179.

Bowman v. Tallman, 27 How. Pr. 212; 2 Robt. 385. AFFIRMED, 3 Abb. App. Dec. 182 *n.;* 40 How. Pr. 1; 41 N. Y. 619.

Bowman v. Teall, 23 Wend. 306. DISTINGUISHED, 80 N. Y. 362.

Bowman v. Troy, &c., R. R. Co., 37 Barb. 516. DISTINGUISHED, 1 Hun 378, 379; 3 Thomp. & C. 538.

Bowne v. Mellor, 6 Hill 496. FOLLOWED, 17 Hun 499.

Bowne v. Potter, 17 Wend. 164. OVERRULED, 8 Barb. 406.

Bowne v. Seymour, 9 Johns. 221. FOLLOWED, 12 Johns. 101.

Bowyer v. Schofield, 1 Abb. App. Dec. 177; 2 Keyes 628. FOLLOWED, 60 How. Pr. 112.

Boyce v. Bates, 8 How. Pr. 495. CONTRA, 6 How. Pr. 121, 265, 311; 13 Id. 191.

Boyce v. Brown, 7 Barb. 80. CONTRA, 12 How Pr. 313, 314.

Boyd v. Bigelow, 14 How Pr. 511. FOLLOWED, 20 How. Pr. 59, 62. CONTRA, 7 How. Pr. 208; 9 Id. 349.

Boyd v. Colt, 20 How Pr. 384. FOLLOWED, 42 Superior 11.

Boyd v. Dunlap, 1 Johns. Ch. 478. FOLLOWED, 8 Fed. Rep. 504. REVIEWED, 47 Conn. 508.

Boyd v. M'Lean, 1 Johns. Ch. 582. FOLLOWED, 64 Me. 26.

Boyd v. Schlessinger, 59 N. Y. 301. DISTINGUISHED, 80 N. Y. 521.

Boyer v. Schofield, 2 Keyes 628. DISTINGUISHED, 24 Hun 589.

Boynton v. Boynton, 25 How. Pr. 490. AFFIRMED, 41 N. Y. 619.

Brabin v. Hyde, 30 Barb. 265. REVERSED, 32 N. Y. 519.

Brace v. Beatty, 5 Abb. Pr. 221. REVERSED, 7 Abb. Pr. 445.

Bracket v. Wilkinson, 13 How. Pr. 102. OVERRULED, 23 How. Pr. 140, 145.

Bradford v. Fox, 16 Abb. Pr. 51; 39 Barb. 203. REVERSED, 38 N. Y. 289.

Bradish v. Schenk, 8 Johns. 151. REVIEWED, 39 N. Y. 134.

Bradley v. Buffalo, &c., R. R. Co., 34 N. Y. 432. FOLLOWED, 5 Hun 344.

Bradley v. Burwell, 3 Den. 61. APPROVED, 84 N. Y. 365. FOLLOWED, 22 Hun 460.

Bradley v. Mut. Benefit Life Ins. Co., 3 Lans. 341. REVERSED, 4 N. Y. 422.

Bradley v. New York Central R. R. Co., 3 Thomp. & C. 288. AFFIRMED, 62 N. Y. 99.

Bradley v. Ward, 1 Thomp. & C. 413. AFFIRMED, 58 N. Y. 401.

Bradley v. Wheeler, 4 Robt. 18. AFFIRMED, 44 N. Y. 495.

Bradner v. Faulkner, 12 N. Y. 472. FOLLOWED, 2 Redf. 437.

Bradner v. Superintendent of Poor of Orange County, 9 Wend. 433. *See* 2 How. Pr. 256.

Bradshaw v. Callaghan, 5 Johns. 80. MODIFIED, 8 Johns. 558.

Bradshaw v. Rogers, 20 Johns. 103. REVERSED, 20 Johns. 735.

Bradstreet v. Ferguson, 17 Wend. 181. AFFIRMED, 23 Wend. 638.

Bradt v. Benedict, 17 N. Y. 93. DISTINGUISHED, 80 N. Y. 386, 389.

Brady, Matter of, 8 Hun 437. AFFIRMED, 53 How. Pr. 128. FOLLOWED, 59 Id. 153.

Brady, Matter of, 69 N. Y. 215. DISTINGUISHED, 23 Hun 586.

Brady v. Bissell, 1 Abb. Pr. 76. APPROVED, 2 Abb. Pr. 444, 445.

Brady v. Brundage, 2 Thomp. & C. 621. APPEAL DISMISSED, 59 N. Y. 310.

Brady v. Brundage, 59 N. Y. 310, 313. FOLLOWED, 82 N. Y. 574.

Brady v. Durbrow, 2 E. D. Smith 78. FOLLOWED, 3 Hun 59.

Brady v. Mayor, &c., of New York, 20 N. Y. 312. COMMENTED ON, 3 Robt. 100, 121. DISTINGUISHED, 84 N. Y. 604.

Brady v. Supervisors of New York, 2 Sandf. 460. FOLLOWED, 13 Kan. 191.

Brague v. Lord, 2 Abb. N. Cas. 1. *See* 51 How. Pr. 103.

Brague v. Lord, 41 Superior 193. FOLLOWED, 42 Superior 427.

Brahe v. Pythagoras Assoc., 4 Duer 658; 11 How. Pr. 44. OVERRULED, 35 Superior 111. QUALIFIED, 13 Abb. Pr., N. S., 325-332.

Brainard v. Jones, 11 How. Pr. 569. CONTRA, 33 How. Pr. 80, 81, 82, 83.

Branch v. Harrington, 49 How. Pr. 196. SAID TO BE OVERRULED, 60 How. Pr. 79.

Brand v. Brand, 49 Barb. 346; 33 How. Pr. 167. REVERSED, 48 N. Y. 675.

Brandon v. Avery, 22 N. Y. 469. DISTINGUISHED, 40 Barb. 408. FOLLOWED, 2 Hun 156.

Brandon v. People, 42 N. Y. 265. DISTINGUISHED, 8 Hun 562, 564; 76 N. Y. 291. FOLLOWED, 50 N. Y. 242.

Brandt, d. Walton, v. Ogden, 3 Cai. 5, 6. *See* 1 Johns. 156.

Brant, d. Van Cortlandt, v. Dyckman, 1 Johns. Cas. 275. APPLIED, 12 Johns. 247.

Brasher v. Van Cortlandt, 2 Johns. Ch. 242, 400. EXPLAINED, 3 Barb. Ch. 24.

Breasted v. Farmers' Loan, &c., Trust Co., 4 Hill 73; 8 N. Y. 299. DISTINGUISHED, 4 Lans. 202; 55 N. Y. 173.

Breck v. Cole, 4 Sandf. 79. APPROVED, 39 Conn. 556.

Breck v. Smith, 54 Barb. 212. FOLLOWED, 4 Lans. 184.

Breed v. Cook, 15 Johns. 241. CONTRA, 36 How. Pr. 511.

Breese v. Bange, 2 E. D. Smith 474, 475. DISTINGUISHED AND REVIEWED, 34 Ark. 430.

Breese v. United States Teleg. Co., 31 How. Pr. 86. AFFIRMED, 48 N. Y. 132.

Breese v. United States Teleg. Co., 48 N. Y. 132; 8 Am. Rep. 526. REVIEWED, 11 Neb. 91.

Brehm v. Great Western R'y Co., 34 Barb. 256. FOLLOWED, 2 Col. T. 457.

Brennan v. Mayor, &c., of New York, 47 How. Pr. 178. REVERSED, 62 N. Y. 365.

Brennan v. Mayor, &c., of New York, 62 N. Y. 365. LIMITED, 83 N. Y. 377.

Brennan v. Willson, 71 N. Y. 502. FOLLOWED *unwillingly*, 22 Hun 247, 248.

Brett v. Brown, 13 Abb. Pr., N. S., 295. CONTRA, 7 Abb. Pr., N. S., 70.

Brevoort v. Brevoort, 70 N. Y. 136. DISTINGUISHED, 22 Hun 490.

Brevoort v. Warner, 8 How. Pr. 321. *See* 13 How. Pr. 542, 545.

Brewer v. Isish, 12 How. Pr. 481. FOLLOWED, 13 How. Pr. 149. *See* 35 Barb. 433.

Brewer v. Salisbury, 9 Barb. 511. DISAPPROVED, 62 Barb. 600.

Brewster v. Baker, 16 Barb. 613. OVERRULED, 20 Barb. 364, 370.

Brewster v. Bostwick, 6 Cow. 34, 37. FOLLOWED, 38 Superior 137.

Brewster v. City of Syracuse, 19 N. Y. 116. DISTINGUISHED, 23 Hun 329. FOLLOWED, 4 Thomp. & C. 378.

Brewster v. Hall, 6 Cow. 34, 37. FOLLOWED, 48 How. Pr. 82.

Brewster v. Power, 10 Paige 562, 569. APPROVED, 15 N. Y. 477. EXPLAINED, 46 N. Y. 20.

Brewster v. Silence, 8 N. Y. 207; 11 Barb. 144. DISAPPROVED, 8 Hun 111. DISTINGUISHED, 21 N. Y. 321, 336. EXPLAINED, 20 N. Y. 337, 342. RE-AFFIRMED, 29 Barb. 486.

Brewster v. Striker, 2 N. Y. 19. DISTINGUISHED, 23 Hun 303; 4 Keyes 589.

Brick v. Brick, 66 N. Y. 144. FOLLOWED, 23 Hun 139, 140.

Bridenbecker v. Lowell, 32 Barb. 9. DISTINGUISHED, 1 Hun 325, 329; 83 N. Y. 86.

Bridenbecker v. Mason, 16 How. Pr. 203. *See* 22 How. Pr. 265, 266.

Bridge v. Mason, 45 Barb. 38. FOLLOWED, 1 Hun 612; 4 Thomp. & C. 76.

Bridge v. Payson, 5 Sandf. 210. FOLLOWED, 10 How. Pr. 162, 164. CONTRA, 14 Id. 61, 63.

Bridgeport Fire, &c., Ins. Co. v. Wilson, 7 Bosw. 427. REVERSED, 34 N. Y. 275. REVIEWED, 3 Abb. Pr., N. S., 58.

Bridgeport Fire, &c., Ins. Co. v. Wilson, 34 N. Y. 275, 280. REVIEWED, 8 Mo. App. 31.

Bridges v. Canfield, 2 Edw. 208, 217. CONTRA, 4 Abb. Pr. 460.

Bridges v. Wyckoff, 67 N. Y. 130. DISTINGUISHED, 24 Hun 148.

Bridgewater Paint Manuf. Co. v. Messmore, 15 How. Pr. 12. CONTRA, 17 How. Pr. 68.

Bridgeford v. Crocker, 3 Thomp. & C. 273. AFFIRMED, 60 N. Y. 627.

Briggs v. Briggs, 20 Barb. 477. EXPLAINED, 1 Lans. 488.

Briggs v. Davis, 20 Barb. 392. MODIFIED, 20 N. Y. 15.

Briggs v. Easterly, 62 Barb. 51. FOLLOWED, 4 Hun 614, 615, 616.

Briggs v. New York Central, &c., R. R. Co., Sheld. 402, 433. *See* 72 N. Y. 26.

Briggs v. North British Mercantile Ins. Co., 66 Barb. 325. AFFIRMED, 53 N. Y. 446. FOLLOWED, 66 Barb. 330.

Briggs v. Partridge, 64 N. Y. 357, 364. DISTINGUISHED, 24 Hun 574. FOLLOWED, 8 Abb. N. Cas. 219.

Briggs v. Penniman, 8 Cow. 387. DISTINGUISHED, 43 Superior 495. REVIEWED, 8 Mo. App. 505, 506.

Briggs v. Rowe, 4 Keyes 424, 426. EXPLAINED, 56 N. Y. 294.

Bright v. Judson, 47 Barb. 29. REVIEWED, 34 Superior 370.

Brill v. Flagler, 23 Wend. 354. REVIEWED, 16 W. Va. 261.

Brill v. Tuttle, 15 Hun 289. REVERSED, 81 N. Y. 454.

Brinckerhoff v. Phelps, 24 Barb. 100. RE-AFFIRMED, 43 Barb. 469.

Brink v. Hanover Fire Ins. Co., 70 N. Y. 593. FURTHER APPEAL, 80 N. Y. 108. EXPLAINED, Id. 111.

Brink v. Hanover Fire Ins. Co., 80 N. Y. 108. DISTINGUISHED, 83 N. Y. 173.

Brink v. Republic Fire Ins. Co., 2 Thomp. & C. 550. APPEAL DISMISSED, 56 N. Y. 679.

Brinkerhoff v. Brown, 6 Johns. Ch. 139. APPLIED, 4 Cow. 682. REVIEWED AND FOLLOWED, 8 Fed. Bep. 771, 772.

Brinkerhoof v. Remsen, 8 Paige 488, 496. REVIEWED, 4 Redf. 260, 262.

Brinkley v. Brinkley, 47 N. Y. 40, 49. APPROVED, 24 Hun 248. FOLLOWED, 1 Id. 296.

Brinkley v. Brinkley, 2 Thomp. & C. 501. SUSTAINED AND APPEAL DISMISSED, 56 N. Y. 192.

Brisbane v. Macomber, 56 Barb. 375. AFFIRMED, 6 Alb. L. J. 196.

Brisbane v. Pratt, 4 Den. 63. OVERRULED, 17 Barb. 530.

British Commercial Life Ins. Co. v. Comm'rs of Taxes, &c., 1 Keyes 303. FOLLOWED, 80 N. Y.. 259.

Brittan v. Peabody, 4 Hill 61, 66. APPROVED, 23 Hun 407.

Britton v. Lorenz, 3 Daly 23. AFFIRMED, 45 N. Y. 51.

Brizsee v. Maybee, 21 Wend. 144. FOLLOWED, 4 Lans. 270.

Broadhead v. Lycoming Fife Ins. Co., 14 Hun 452. DISTINGUISHED, 23 Hun 401.

Brockway v. Burnap, 12 Barb. 347. APPROVED, 50 N. H. 489, 490. CONTRA, 11 How. Pr. 106, 108.

Brockway v. Burnap, 16 Barb. 309. FOLLOWED, 11 How. Pr. 106, 108.

Broderick v. Smith, 15 How. Pr. 434. EXPLAINED, 28 Barb. 29.

Bronner v. Frauenthal, 37 N. Y. 166. FOLLOWED, 38 Superior 197.

Bronson's Will, 1 Tuck. 464, 467. FOLLOWED, 2 Hun 555; 5 Thomp. & C. 101.

Bronson v. Bronson, 48 How. Pr. 481. DISTINGUISHED, 59 How. Pr. 506.

Bronson v. Fitzhugh, 1 Hill 183. APPROVED, 50 Wis. 146.

Bronson v. Wiman, 10 Barb. 406. REVIEWED, 62 Barb. 529.

Brooklyn, &c., R. R. Co., Matter of, 19 Hun 314. AFFIRMED, 81 N. Y. 69.

Brooklyn, &c., R. R. Co., Matter of, 75 N. Y. 335. DISTINGUISHED, 9 Abb. N. Cas. 204; 60 How. Pr 418.

Brooklyn, &c., R. R. Co v. Brooklyn City R. R. Co., 32 Barb. 358. EXPLAINED, 35 Barb. 364.

Brooklyn, City of, v. Brooklyn City R. R. Co., 8 Abb. Pr., N. S., 356. AFFIRMED, 47 N. Y. 475.

Brooklyn, City of, v. Fulton Municipal Gas Co., 7 Abb. N. Cas. 19. DISTINGUISHED, 7 Abb. N. Cas. 23.

Brooklyn Trust Co. v. Bulmer, 49 N. Y. 84. FOLLOWED, 40 Wis. 571, 574.

Brooklyn White Lead Co. v. Masury, 25 Barb. 416. FOLLOWED, 35 How. Pr. 108, 113.

Brookman v. Hamill, 54 Barb. 209. AFFIRMED, 43 N. Y. 554.

Brookman v. Hamill, 43 N. Y. 554. DISTINGUISHED, 7 Fed. Rep. 732. MOTION FOR RE-ARGUMENT DENIED, 46 N. Y. 636. SUSTAINED, 51 N. Y. 82.

Brookman v. Metcalf, 34 How. Pr. 429. DISAPPROVED, 42 N. Y. 455.

Brooks v. Curtis, 4 Lans. 283. AFFIRMED, 50 N. Y. 639.

Brooks v. Curtis, 50 N. Y. 639. EXPLAINED, 23 Hun 675 *n.*, 676 *n.*, 682 *n.* FOLLOWED, Id. 685.

Brooks v. Hanford, 15 Abb. Pr. 342. OVERRULED, 66 Barb. 341.

Brooks v. Schwerin, 54 N. Y. 343. CRITICISED, 6 Thomp. & C. 465. DISTINGUISHED, 64 N. Y. 593.

Broome v. Taylor, 13 Hun 341. REVERSED, 19 Alb. L. J. 337; 76 N. Y. 564.

Broome County Bank v. Lewis, 18 Wend. 565, 566. FOLLOWED, 48 How. Pr. 82; 38 Superior 137.

Brotherson v. Consalus, 26 How. Pr. 213. AFFIRMED, 6 Alb. L. J. 196.

Brouwer v. Harbeck, 9 N. Y. 589. DISTINGUISHED, 59 N. Y. 10.

Brower v. Mayor, &c., of New York, 3 Barb. 254. EXPLAINED, 7 Abb. Pr. 126.

Brown v. Babcock, 3 How. Pr. 305. FOLLOWED, 13 How. Pr. 466, 468, 469.

Brown v. Bowen, 30 N. Y. 519, 541. DISTINGUISHED, 84 N. Y. 39.

Brown v. Brown, 34 Barb. 533. AFFIRMED, 6 Alb. L. J. 167.

Brown v. Brown, 53 Barb. 217. AFFIRMED, 6 Alb. L. J. 167.

Brown v. Brown, 6 How. Pr. 320. *See* 7 How. Pr. 404.

Brown v. Brown, 31 How. Pr. 481. AFFIRMED, 6 Alb. L. J. 167.

Brown v. Brown, 1 Hun 443. *See* 2 Hun 677.

Brown v. Buffalo, &c., R. R. Co., 22 N. Y. 191. DISAPPROVED, 55 Ala. 387, 403. FOLLOWED, 7 Fed. Rep. 704. OVERRULED, 14 Abb. Pr., N. S., 34; 64 N. Y. 531.

Brown v. Cayuga, &c., R. R. Co., 12 N. Y. 486. FOLLOWED, 80 N. Y. 216.

Brown v. Cherry, 59 Barb. 628. REVERSED, 57 N. Y. 645.

Brown v. Clifford, 7 Lans. 46. APPEAL DISMISSED, 54 N. Y. 636.

Brown v. Combs, 36 Superior 572. *See* 63 N. Y. 598.

Brown v. Crowl, 5 Wend. 298. DISTINGUISHED, 24 Hun 82.

Brown v. Curtiss, 2 N. Y. 225. EXPLAINED, 20 N. Y. 338. FOLLOWED, 80 N. Y. 271. RE-ASSERTED, 6 Lans. 234.

Brown v. Feeter, 7 Wend. 301. DISTINGUISHED, 83 N. Y. 526.

Brown v. Goodwin, 1 Abb. N. Cas. 452. APPLIED, 56 How. Pr. 519, 525.

Brown v. Kimball, 25 Wend. 259. LIMITED, 7 Hill 478.

Brown v. Leavitt, 31 N. Y. 113. DISTINGUISHED, 81 N. Y. 223, 224, 225.

Brown v. Leigh, 50 N. Y. 427. EXPLAINED *on rehearing*, 52 N. Y. 78.

Brown v. Marrigold, 50 How. Pr. 248. DISAPPROVED, 9 Hun 567, 568.

Brown v. Mayor, &c., of New York, 5 Daly 481. AFFIRMED, 66 N. Y. 385.

Brown v. Mayor, &c., of New York, 1 Hun 30. *See* 63 N. Y. 239.

Brown v. Mayor, &c., of New York, 11 Hun 21. FOLLOWED, 23 Hun 285.

Brown v. Montgomery, 20 N. Y. 287. DISTINGUISHED, 81 N. Y. 109.

Brown v. Mott, 7 Johns. 361. CRITICISED, 41 N. Y. 283.

Brown v. New York Central R. R. Co., 32 N. Y. 597. APPROVED, 28 Wis. 487, 495. CRITICISED, 66 N. Y. 14.

Brown v. Nichols, 42 N. Y. 26, 42. CRITICISED, 23 Hun 229. DISTINGUISHED, 12 Hun 444. EXPLAINED, 65 N. Y. 186.

Brown v. Orvis, 6 How. Pr. 376. APPROVED, 2 Robt. 715. FOLLOWED, 6 How. Pr. 401. CONTRA, 10 Id. 79, 81.

Brown v. Penfield, 36 N. Y. 475. APPROVED, 45 N. Y. 727.

Brown v. Pentz, 11 Leg. Obs. 24. REVERSED, 1 Abb. App. Dec. 227.

Brown v. Richardson, 4 Robt. 603. CONTRA, 7 Robt. 57.

Brown v. St. Nicholas Ins. Co., 34 Superior 231. AFFIRMED, 61 N. Y. 332.

Brown v. Smith, 24 Barb. 419. IN POINT, 35 N. Y. 243.

Brown v. Smith, 13 Hun 408. AFFIRMED, 80 N. Y. 650.

Brown v. Town of Canton, 4 Lans. 409. REVERSED, 6 Alb. L. J. 167.

Brown v. Treat, 1 Hill 225. CRITICISED, 7 Hill 182. DISTINGUISHED, 22 Hun 385.

Brown v. Volkening, 64 N. Y. 76. CRITICISED, 23 Hun 137.

Brown v. Weber, 38 N. Y. 187. FOLLOWED, 2 Thomp. & C. 418.

Brown v Windmuller, 36 Superior 75. APPEAL DISMISSED, 53 N. Y. 642.

Brown's Water Furnace Co. v. French, 34 How. Pr. 94. AFFIRMED, 6 Alb. L. J. 196.

Browne v. Bradley, 5 Abb. Pr. 141. DISTINGUISHED, 24 Hun 579, 580, 581.

Brownell v. Akin, 6 Hun 378. APPEAL DISMISSED, 66 N. Y. 617. EXPLAINED, 24 Hun 112.

Brownell v. Carnley, 3 Duer 9. CITED, 54 Tex. 600.

Brownell v. Curtis, 10 Paige 210. DISAPPROVED, 6 Stew. (N. J.) 298.

Brownell v. Winnie, 29 N. Y. 408. DISAPPROVED, 21 Ohio St. 171. DISTINGUISHED, 1 Hun 506.

Browning v. Home Ins. Co. of Columbus, 71 N. Y. 508. FOLLOWED, 83 N. Y. 140.

Bruce v. Burr, 67 N. Y. 237. DISTINGUISHED, 50 Wis. 278. FOLLOWED, 80 N. Y. 271.

Bruce v. Davenport, 36 Barb. 346. REVERSED, 1 Abb. App. Dec. 233; 5 Abb. Pr., N. S., 185; 3 Keyes 472.

Bruen v. Marquand, 17 Johns. 58. FOLLOWED, 43 Md. 44.

Bruff v. Mali, 36 N. Y. 200. FOLLOWED, 83 N. Y. 34.

Brummer v. Cohen, 6 Abb. N. Cas. 409; 57 How. Pr. 386. AFFIRMED, 58 How. Pr. 239.

Brummer v. Cohn, 58 How. Pr. 239. FOLLOWED, 46 Superior 132, 133.

Brush v. Lee, 18 Abb. Pr. 398. AFFIRMED, 36 N. Y. 49.

Bryan v. Baldwin, 7 Lans. 174. AFFIRMED, 52 N. Y. 232.

Bryan v. Brennon, 7 How. Pr. 359. DISAPPROVED, 54 Iowa 548.

Bryan v. Butts, 27 Barb. 503. FOLLOWED, 7 Hun 380, 384, 6.

Buchan v. Sumner, 2 Barb. Ch. 165. APPROVED, 74 Pa. St. 397. DISTINGUISHED, 1 Thomp. & C. 515.

Buckbee v. United States Ins., &c., Co., 18 Barb. 541. DISTINGUISHED, 1 Flipp. (U. S.) 336.

Buckley v. Bentley, 48 Barb. 283. FOLLOWED, 36 Superior 234.

Buckley v. Leonard, 4 Den. 500. REVIEWED, 81½ Pa. St. 255.

Bucklin v. Bucklin, 1 Abb. App. Dec. 242. FOLLOWED, 61 How. Pr. 180.

Buckman v. Carnley, 9 How. Pr. 180. *See* 9 How. Pr. 188, 189.

Buel v. Boughton, 2 Den. 91. FOLLOWED, 45 Superior 434.

Buel v. People, 18 Hun 487. FOLLOWED, 80 N. Y. 515.

Buess v. Koch, 52 How. Pr. 478, 479. AFFIRMED, 53 How. Pr. 92.

Buffalo, &c., R. R. Co. v. Reynolds, 6 How. Pr. 96. FOLLOWED, 4 Hun 636.

Buffalo City Bank v. North Western Ins. Co., 30 N. Y. 251. FOLLOWED, 10 Hun 167, 170.

Buffalo City Cemetery v. City of Buffalo, 46 N. Y. 506. DISTINGUISHED, 49 How. Pr. 208, 216.

Buffalo, City of, Matter of, 68 N. Y. 167. DISTINGUISHED, 84 N. Y. 312.

Buffalo Savings Bank v. Newton, 23 N. Y. 160. FOLLOWED, 37 Wis. 87, 89.

Buffalo, Village of, v. Webster, 10 Wend. 100. APPROVED, 82 N. Y. 318, 323.

Bulger v. Albany Railway, 42 N. Y. 459. FOLLOWED, 1 Cinc. (Ohio) 180, 181.

Bullis v. Montgomery, 3 Lans. 255. AFFIRMED, *in part*, 50 N. Y. 352.

Bullis v. Montgomery, 50 N. Y. 352. DISTINGUISHED, 9 Hun 686, 689.

Bullock v. Babcock, 3 Wend. 391. DISTINGUISHED, 60 How. Pr. 450.

Bullock v. Boyd, 2 Edw. 293. DISTINGUISHED, 65 N. Y. 497.

Bullymore v. Cooper, 2 Lans. 71, 78. DISTINGUISHED, 24 Hun 579, 580.

Bullymore v. Cooper, 46 N. Y. 236. DISTINGUISHED, 53 N. Y. 35; 84 N. Y. 417. FOLLOWED, 24 Hun 578, 580.

Bumpus v. Platner, 1 Johns. Ch. 213. REVIEWED, 52 Wis. 515.

Bunge v. Koop, 5 Robt. 1. AFFIRMED, 48 N. Y. 225. FOLLOWED, 34 Superior 344.

Bunge v. Koop, 48 N. Y. 225. CRITICISED, 1 Thomp. & C. 654. DISTINGUISHED, 55 N. Y. 71.

Bunn v. Riker, 4 Johns. 426. APPROVED, 8 Johns. 454; 11 Id. 28.

Bunn v. Vaughan, 3 Keyes 345. DISTINGUISHED, 60 Barb. 9.

Bunting v. Brown, 13 Johns. 425. CHANGED *by statute*, 1 Hill 373.

Burbank v. Reed, 11 Week. Dig. 576. FOLLOWED, 1 Civ. Pro. 42.

Burbridge v. Marcy, 54 How. Pr. 446. FOLLOWED, 55 How. Pr. 333, 335.

Burdell v. Burdell, 54 How. Pr. 91. DISTINGUISHED, 22 Hun 198.

Burdett v. Lowe, 22 Hun 588. REVERSED, 24 Hun v.

Burdett v. Lowe, 11 Week. Dig. 323. REVERSED, 12 Week. Dig. 135.

Burdick v. McVanner, 2 Den. 170. FOLLOWED, 43 Superior 335.

Burgart v. Stork, 12 How. Pr. 559. CONTRA, 11 How. Pr. 403; 12 Id. 73.

Burgher v. Columbian Ins. Co. of Phila. DISSENTING OPINION AFFIRMED, 1 Bright. Dig. XXII.

Burhans v. Tibbitts, 7 How. Pr. 21. FOLLOWED, 40 Superior 271.

Burke, Matter of, 4 Thomp. & C. 653; 2 Hun 281. MODIFIED, 62 N. Y. 224.

Burke, Matter of, 62 N. Y. 224. DISTINGUISHED, 81 N. Y. 141.

Burke v. Candee, 63 Barb. 552. FOLLOWED, 61 How. Pr. 307; 1 Civ. Pro. 198.

Burke v. Nichols, 34 Barb. 430. AFFIRMED, 31 How. Pr. 640.

Burke v. Valentine, 5 Abb. Pr., N. S., 164; 52 Barb. 412. AFFIRMED, 6 Alb. L. J. 167.

Burkitt v. Harper, 14 Hun 581; 79 N. Y. 273. FOLLOWED, 24 Hun 540.

Burkle v. Luce, 6 Hill 558. AFFIRMED, How. App. Cas. 330.

Burkle v. Luce, 1 N. Y. 163. DISTINGUISHED, 23 Hun 488.

Burleigh v. Center, 41 Superior 441. APPEAL DISMISSED, 74 N. Y. 608.

Burmeister, Matter of, 9 Hun 613. *See* 76 N. Y. 174.

Burmeister, Matter of, 12 Hun 478. REVERSED, 56 How. Pr. 416.

Burmeister, Matter of, 76 N. Y. 174. DISTINGUISHED, 81 N. Y. 141.

Burnell v. New York Central R. R. Co., 45 N. Y. 184. DISTINGUISHED, 53 N. Y. 370. FOLLOWED, 36 Superior 32. REVIEWED, 35 Id. 182. *See* 51 N. Y. 186.

Burnett v. Snyder, 43 Superior 238. DISTINGUISHED, 45 Superior 577.

Burnett v. Snyder, 45 Superior 577. REVERSED, 81 N. Y. 550.

Burnett v. Snyder, 45 Superior 582. REVERSED, 81 N. Y. 651.

Burnham v. Onderdonk, 41 N. Y. 425. EXPLAINED, 2 Hun 620, 622, 625.

Burnham v. Wilbur, 7 Bosw. 169, 190. AFFIRMED, 3 Abb. App. Dec. 321.

Burns v. Erben, 40 N. Y. 463. FOLLOWED, 39 Superior 384.

Burr v. American Spiral Spring Butt, &c., Co., 17 Hun 188. AFFIRMED, 8 Abb. N. Cas. 403; 81 N. Y. 175.

Burr v. Beers, 24 N. Y. 178. FOLLOWED, 47 N. Y. 237; 82 N. Y. 387.

Burr v. Mills, 21 Wend. 290, 292. CRITICISED, 53 Md. 271.

Burr v. Stenton, 52 Barb. 377. DISTINGUISHED, 2 Lans. 238.

Burr v. Van Buskirk, 3 Cow. 263. EXPLAINED, 6 Hill 20. OVERRULED, 5 Cow. 408.

Burrall v. Bushwick R. R. Co., 75 N. Y. 211, 216. EXPLAINED, 9 Abb. N. Cas. 423.

Burrall v. Jewett, 2 Paige 134. DISTINGUISHED, 57 N. Y. 124.

Burrill v. Chenango County Mut. Ins. Co., 1 Edm. Sel. Cas. 233. REVIEWED, 11 Phil. (Pa.) 357. CONTRA, 6 N. Y. 153.

Burroughs v. Bloomer, 5 Den. 532. APPROVED, 10 How. Pr. 516, 527. CRITICISED, 26 Barb. 208.

Burroughs v. Erie R'y Co., 3 Thomp. & C. 44. REVERSED, 63 N. Y. 556.

Burt v. Burt, 41 N. Y. 46. DISTINGUISHED, 60 How. Pr. 514.

Burt v. Dewey, 40 N. Y. 283. DISTINGUISHED AND APPROVED, 45 N. Y. 497, 499.

Burt v. Dutcher, 34 N. Y. 493. *See* 51 N. Y. 76.

Burtis v. Burtis, Hopk. 557. REVIEWED, 8 Abb. N. Cas. 374.

Burtis v. Doughty, 3 Bradf. 287. DISTINGUISHED, 3 Redf. 148, 150.

Burton v. Burton, 26 How. Pr. 474. REVERSED, 1 Abb. App. Dec. 271.

Burton v. Burton, 1 Keyes 359, 371. FOLLOWED, 63 Ga. 465.

Burwell v. Jackson, 9 N. Y. 535. APPROVED, 6 Oreg. 51, 53. DISTINGUISHED, 53 N. Y. 398. FOLLOWED, 62 Barb. 591; 38 Superior 450.

Bush v. Cole, 28 N. Y. 269. DISTINGUISHED, 1 Hun 565.

Bush v. Dennison, 14 How. Pr. 307. CONTRA, 17 How. Pr. 255.

Bush v. Hicks, 2 Thomp. & C. 356. AFFIRMED, 60 N. Y. 298.

Bush v. Lathrop, 22 N. Y. 535. DISTINGUISHED, 64 N. Y. 162. OVERRULED, (?) 22 Hun 345, 346, 347; 71 Mo. 198.

Bush v. Prosser, 13 Barb. 221. APPROVED, 10 How. Pr. 131. FOLLOWED, Id. 81.

Bush v. Prosser, 11 N. Y. 347. DOUBTED, 2 Robt. 715. FOLLOWED, 13 How. Pr. 99; 34 Id. 488, 490; 81 N. Y. 249.

Bush v. Trustees of Geneva, 3 Thomp. & C. 409. FOLLOWED, 74 Ind. 391.

Bush v. Westchester Fire Ins. Co., 2 Thomp. & C. 629. REVERSED, 63 N. Y. 531.

Bushnell v. Bushnell, 15 Barb. 399; 7 How. Pr. 389. FOLLOWED, 4 Lans. 184. CONTRA, 25 How. Pr. 182, 187.

Butchers', &c., Bank v. Jacobson, 15 Abb. Pr. 219; 24 How. Pr. 204. AFFIRMED, 33 How. Pr. 620.

Butchers', &c., Bank of Providence, v. Jacobson, 22 How. Pr. 470. FOLLOWED, 49 How. Pr. 89. CONTRA, 7 Id. 354, 396; 19 Id. 450.

Butler v. Benson, 1 Barb. 526. MODIFIED, 1 Hun 344, 348.

Butler v. Evening Mail Assoc., 34 Superior 58. REVERSED, 61 N. Y. 634.

Butler v. Galletti, 21 How. Pr. 465. EXPLAINED, 38 Superior 158.

Butler v. Mason, 16 How. Pr. 546. APPROVED, 23 How. Pr. 140, 144.

Butler v. New York, &c., R. R. Co., Supreme Ct., MSS. APPROVED, 9 Abb. N. Cas. 273.

Butler v. Palmer, 1 Hill 324. CRITICISED, 4 Barb. 64. EXPLAINED, 1 Flipp. (U. S.) 534. REVIEWED, 54 Cal. 323, 325.

Butler v. Van Wyck, 1 Hill 438. COMMENTED ON, 6 Hill 433.

Butterfield v. Radde, 38 Superior 44. APPEAL DISMISSED, 58 N. Y. 489. FOLLOWED, 40 Superior 289. *See* Id. 169; 41 Id. 181.

Butterfield v. Radde, 40 Superior 169, 172. FOLLOWED, 42 Superior 124. *See* 58 N. Y. 489.

Butterworth v. Gould, 41 N. Y. 450. DISTINGUISHED, 62 N. Y. 445. FOLLOWED, 5 Lans. 311; 83 N. Y. 44.

Butts v. Genung, 5 Paige 254, 259. EXPLAINED, 24 Hun 276.

Bylandt v. Comstock, 25 How. Pr. 429. CRITICISED, 84 N. Y. 416.

Byrnes v. City of Cohoes, 5 Hun 602; 67 N. Y. 204. FOLLOWED, 22 Hun 163.

Byxbie v. Wood, 24 N. Y. 607. APPROVED, 33 Superior 141. FOLLOWED, 9 Abb. N. Cas. 6; 83 N. Y. 250.

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Cadwell v. Manning, 24 How. Pr. 33. APPROVED, 29 How. Pr. 379, 381.

Cady v. Fairchild, 18 Johns. 129. FOLLOWED, 32 N. Y. 351.

Cagwin v. Town of Hancock, 22 Hun 201. REVERSED, 84 N. Y. 532.

Cagwin v. Town of Hancock, 10 Week. Dig. 496. REVERSED, 12 Week. Dig. 96.

Cahoon v. Bank of Utica, 4 How. Pr. 422. AFFIRMED, 7 How. Pr. 134.

Cairnes v. Bleecker, 12 Johns. 300. DISTINGUISHED, 68 N. Y. 527.

Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282. DISTINGUISHED, 56 N. Y. 299.

Calhoun v. Lee, 29 How. Pr. 1. CONTRA, 28 How. Pr. 87, 405.

Calkins v. Brand, 5 How. Pr. 395. CONTRA, 9 How. Pr. 465.

Calkins v. Falk, 39 Barb. 620. AFFIRMED, 38 How. Pr. 62; 41 N. Y. 619.

Calkins v. Long, 22 Barb. 97, 99. FOLLOWED, 13 Vr. (N. J.) 523.

Calkins v. Williams, 5 How. Pr. 393. CONTRA, 6 How. Pr. 172; 9 Id. 465.

Callahan v. Mayor, &c., of New York, 6 Daly 230. AFFIRMED, 66 N. Y. 656.

Callahan v. Mayor, &c., of New York, 66 N. Y. 656. CITED, 46 Superior 394.

Callahan v. Van Vleck, 36 Barb. 324. AFFIRMED, 41 N. Y. 619.

Calvo v. Davies, 8 Hun 222; 73 N. Y. 211. FOLLOWED, 83 N. Y. 147. REVIEWED, 8 Mo. App. 22.

Camp v. Camp, 2 Redf. 141. REVERSED, 18 Hun 217.

Camp v. Chamberlain, 5 Den. 198. REVIEWED, 42 Mich. 80.

Campbell v. Adams, 38 Barb. 132. OVERRULED, 44 Barb. 117 *n.*

Campbell v. Arnold, 1 Johns. 511, 512. FOLLOWED, 12 Johns. 184.

Campbell v. Bruen, 1 Bradf. 225. *See* 3 Redf. 538.

Campbell v. Campbell, 54 How. Pr. 115. AFFIRMED, 12 Hun 636.

Campbell v. Consalus, 25 N. Y. 613. FOLLOWED, 22 Hun 326.

Campbell v. Cothran, 65 Barb. 534; 1 Thomp. & C. 70. AFFIRMED, 56 N. Y. 279.

Campbell v. Cothran, 56 N. Y. 279. FOLLOWED, 23 Hun 39.

Campbell v. Evans, 54 Barb. 566. *See* 41 How. Pr. 193, 197.

Campbell v. Ewalt, 7 How. Pr. 399. *See* 6 How. Pr. 110.

Campbell v. Foster, 35 N. Y. 361. FOLLOWED, 5 Hun 427; 42 Superior 150.

Campbell v. Hoge, 4 Hun 672. FOLLOWED, 6 Hun 523.

Campbell v. Johnston, 1 Sandf. Ch. 148. EXPLAINED, 50 N. Y. 436.

Campbell v. McCormick, 1 How. Pr. 251. *See* 2 How. Pr. 272.

Campbell v. Mesier, 4 Johns. Ch. 334. DOUBTED. 15 N. Y. 601.

Campbell v. Seaman, 2 Thomp. & C. 231. AFFIRMED, 63 N. Y. 568.

Campbell v. Seaman, 63 N. Y. 568. FOLLOWED, 22 Hun 162.

Campbell v. Smith, 71 N. Y. 26. DISTINGUISHED, 82 N. Y. 435. FOLLOWED, 83 Id. 154.

Campbell v. Stakes, 2 Wend. 137. APPROVED, 1 Hun 580.

Campbell v. Tate, 7 Lans. 370. FOLLOWED, 2 Hun 449; 5 Thomp. & C. 54. OVERRULED, 64 N. Y. 461.

Campbell v. Vedder, 3 N. Y. 174. FOLLOWED, 45 Superior 404.

Campbell v. Woodworth, 20 N. Y. 499. DISTINGUISHED, 81 N. Y. 624.

Canaday v. Stiger, 35 Superior 423. FOLLOWED, 40 Superior 255.

Canal and Walker Streets, Matter of, 12 N. Y. 406, 411. CONTRA, 61 Barb. 45; 4 Lans. 467.

Canal Bank v. Bank of Albany, 1 Hill 287. APPROVED, 59 Barb. 554; 1 Lans. 19; 40 N. Y. 396. FOLLOWED, 75 Ill. 644.

Canandaigua, &c., R. R. Co. v. Payne 16 Barb. 273. APPROVED, 10 Abb. Pr., N. S., 183, 185.

Cancemi v. People, 16 N. Y. 501. REVIEWED, 71 Mo. 300.

Cancemi v. People, 18 N. Y. 128. FOLLOWED, 16 Mich. 351, 356; 11 Nev. 119, 128.

Candee v. Gundelsheimer, 8 Abb. Pr. 435; 17 How. Pr. 434. OVERRULED, 20 How. Pr. 230, 231.

Card v. Card, 39 N. Y. 317. FOLLOWED, 23 Hun 31, 32, 34.

Cardell v. McNiel, 21 N. Y. 336. FOLLOWED, 80 N. Y. 271.

Cardot v. Barney, 63 N. Y. 281. DISTINGUISHED, 80 N. Y. 469, 471, 472.

Cardwell v. Hicks, 37 Barb. 458. *See* 3 Alb. L. J. 97.

Carhart v. French, Hill & D. 17; 2 Leg. Obs. 367. REVERSED, How. App. Cas. 40.

Caring v. Richmond, 16 Hun 458. DISTINGUISHED, 22 Hun 371.

Carleton v. Carleton, 23 Hun 251. REVERSED, 24 Hun v.

Carleton v. Carleton, 11 Week. Dig. 246. REVERSED, 12 Week. Dig. 197.

Carlton Street, Matter of, 16 Hun 497. AFFIRMED, 78 N. Y. 362.

Carman v. McIncrow, 13 N. Y. 70. EXPLAINED, 60 N. Y. 129, 130.

Carman v. Plass, 23 N. Y. 286. FOLLOWED, 8 Hun 111.

Carnes v. Platt, 7 Abb. Pr., N. S., 42; 38 How. Pr. 100. REVERSED, 2 Abb. App. Dec. 159 *n.*

Carnes v. Platt, 1 Sweeny 140, 145. ERRONEOUSLY REPORTED, 36 Superior 361; 15 Abb. Pr., N. S., 338.

Carpenter v. Atherton, 28 How. Pr. 303. CONTRA, 30 How. Pr. 386.

Carpenter v. Bell, 19 Abb. Pr. 258, 263. FOLLOWED, 61 How. Pr. 143.

Carpenter v. Butterfield, 3 Johns. Cas. 145. DISTINGUISHED, 82 N. Y. 23.

Carpenter v. Danforth, 52 Barb. 581. *See* 12 Alb. L. J. 195.

Carpenter v. Eastern Transportation Co., 71 N. Y. 574. DISTINGUISHED, 80 N. Y. 116.

Carpenter v. Griffin, 9 Paige 310. FOLLOWED, 2 Thomp. & C. 381.

Carpenter v. Oswego, &c., R. R. Co., 24 N. Y. 655. DISTINGUISHED, 64 N. Y. 75. FOLLOWED, 25 N. Y. 532, 534.

Carpenter v. Roe, 10 N. Y. 227. DISTINGUISHED, 81 N. Y. 590, 591; 53 How. Pr. 406.

Carpenter v. Secor, 11 How. Pr. 403. FOLLOWED, 12 How. Pr. 73.

Carpenter v. Spooner, 2 Sandf. 717. REVIEWED, 35 Ark. 335.

Carpenter v. West, 5 How. Pr. 53. CONCURRED IN, 5 How. Pr. 470, 475.

Carpenter v. Wright, 4 Bosw. 655. DISTINGUISHED, 61 How. Pr. 41.

Carr v. Breese, 18 Hun 134. REVERSED, 81 N. Y. 584.

Carr v. Carr, 52 N. Y. 251. DISTINGUISHED, 55 N. Y. 639. FOLLOWED, 1 Thomp. & C. 489. REVIEWED, 52 Wis. 352.

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Carroll v. New York, &c., R. R. Co., 1 Duer 571. DISTINGUISHED, 92 Pa. St. 32.

Carson v. Murray, 3 Paige 483. FOLLOWED, 54 How. Pr. 409, 411.

Carter v. Balch, 18 Barb. 608. DISTINGUISHED, 23 Hun 218, 221.

Carter v. Clark, 2 Sweeny 189. OVERRULED, 14 Abb. Pr., N. S., 47 *n.*

Carter v. Dolby, 2 Hun 523. AFFIRMED, 63 N. Y. 631.

Carter v. Hammett, 18 Barb. 608. DISTINGUISHED, 23 Hun 221.

Carter v. People, 2 Hill 317. OVERRULED, 7 N. Y. 378; 1 Park. Cr. 308.

Carter v. Simpson, 7 Johns. 535. FOLLOWED, 12 Johns. 215.

Carter v. Werner, 27 How. Pr. 385. DISAPPROVED, 19 Abb. Pr. 165, 166; 48 Barb. 342.

Cartwright v. Wilmerding, 24 N. Y. 521. DISTINGUISHED, 60 N. Y. 83.

Carver v. Creque, 48 N. Y. 385; 46 Barb. 507. DISTINGUISHED, 59 N. Y. 279. REVIEWED, 1 Hun 424.

Cary v. Gregory, 38 Superior 127. *See* 44 Superior 26.

Cary v. Gruman, 4 Hill 625. DISTINGUISHED, 81 N. Y. 624.

Cary v. Hotailing, 1 Hill 311. FOLLOWED, 80 N. Y. 375 *n.*

Cary v. White, 52 N. Y. 138. DISTINGUISHED, 23 Hun 540; 67 N. Y. 87. FOLLOWED, 67 Barb. 345.

Cary v. White, 59 N. Y. 336. FOLLOWED, 24 Hun 331. CRITICISED, 42 Superior 427.

Case v. Boughton, 11 Wend. 106. REVIEWED, 97 Ill. 644.

Case v. De Goes, 3 Cai. 261. APPROVED, 11 Johns. 384.

Case v. Mechanics' Banking Assoc., 4 N. Y. 166. NOT APPLICABLE, 46 Superior 517.

Case v. People, 76 N. Y. 242. APPROVED, 9 Abb. N. Cas. 88. EXPLAINED AND DISTINGUISHED, 61 How. Pr. 11.

Case v. Phelps, 39 N. Y. 164. DISTINGUISHED, 81 N. Y. 589; 53 How. Pr. 407. FOLLOWED, 54 Id. 49.

Case v. Potter, 8 Johns. 163. REVIEWED, 38 Superior 263.

Casey, Matter of, v. Mayor, &c., of New York, 5 Hun 463. DISTINGUISHED, 11 Hun 79, 80.

Cashman v. Henry, 44 Superior 93; 75 N. Y. 103. DISTINGUISHED, 60 How. Pr. 481.

Casoni v. Jerome, 58 N. Y. 315. FOLLOWED, 81 N. Y. 573, 578, 583.

Cassard v. Hinman, 1 Bosw. 207. FOLLOWED, 43 Superior 451.

Cassidy v. City of Brooklyn, 47 N. Y. 659; 60 Barb. 105. FOLLOWED, 12 Hun 415.

Cassidy v. Lefevre, 45 N. Y. 562. *See* 44 Superior 401.

Cassin v. Delany, 38 N. Y. 178. CONSIDERED OVERRULED, 8 Hun 289.

Castellanos v. Jones, 5 N. Y. 164. FOLLOWED, 2 Lans. 80.

Caswell v. Davis, 4 Abb. Pr., N. S., 6; 35 How. Pr. 76. AFFIRMED, (?) 58 N. Y. 223. DISTINGUISHED, 23 Hun 638.

Catlin v. Adirondack Co., 19 Hun 389. APPEAL DISMISSED, 81 N. Y. 379.

Catlin v. Adirondack Co., 20 Hun 19. REVERSED, 81 N. Y. 639.

Catlin v. Hansen, 1 Duer 309. DISAPPROVED, 14 Abb. Pr. 36. FOLLOWED, 9 How. Pr. 501, 503.

Catlin v. Tobias, 26 N. Y. 217. DISTINGUISHED AND EXPLAINED, 81 N. Y. 341, 345.

Catskill Bank v. Sanford, 4 How. Pr. 101. *See* 4 How. Pr. 257.

Caulfield v. Sullivan, 21 Hun 227. AFFIRMED *and re-argument denied,* 24 Hun v.

Caulkins v. Hellman, 47 N. Y. 449. IN POINT, 11 Neb. 314.

Caussidiere v. Beers, 2 Keyes 198. DISTINGUISHED AND FOLLOWED, 3 Hun 713, 715; 6 Thomp. & C. 149.

Caylus v. New York, &c., R. R. Co., 49 How. Pr. 100. AFFIRMED, 76 N. Y. 609.

Cazeaux v. Mali, 25 Barb. 578. FOLLOWED, 83 N. Y. 34.

Center v. Finney, 17 Barb. 94. AFFIRMED, Seld. No. (2d ed.) 80.

Central Bank v. Empire Stone Dressing Co., 26 Barb. 23. REVERSED, 22 How. Pr. 571 *n.*

Central Bank of Brooklyn v. Lang, 1 Bosw. 202. AFFIRMED, Ct. of App., Oct., 1859.

Chace v. Hinman, 8 Wend. 452. DOUBTED, 15 Minn. 469. FOLLOWED, 36 Superior 79.

Chadwick v. Brother, 4 How. Pr. 283. CONTRA, 6 How. Pr. 172, 173.

Chamberlain v. Beller, 18 N. Y. 115. DISTINGUISHED, 1 Hun 646; 4 Thomp. & C. 230.

Chamberlain v. Chamberlain, 43 N. Y. 424. APPROVED, 47 Conn. 599. FOLLOWED, 57 How. Pr. 270, 271; 1 Thomp. & C. 585.

Chamberlain v. Dempsey, 14 Abb. Pr. 212. REVERSED, 15 Abb. Pr. 1.

Chamberlain v. Gorham, 20 Johns. 746. COMMENTED ON, 3 Hill 258.

Chamberlain v. Martin, 43 Barb. 607. DISAPPROVED, 4 Lans. 74. *See* 60 Barb. 425.

Chamberlain v. Towneend, 26 Barb. 611. FOLLOWED, 17 How. 569, 570.

Chamberlain v. Western Transp. Co., 44 N. Y. 305. APPROVED, 6 Fed. Rep. 415.

Chamberlin v. Cuyler, 9 Wend. 126. FOLLOWED, 5 Lans. 138.

Chambers v. Lewis, 11 Abb. Pr. 210. AFFIRMED, 28 N. Y. 454.

Chambers v. Lewis, 28 N. Y. 454. FOLLOWED, 35 How. Pr. 205, 208.

Chamboret v. Cagney, 2 Sweeny 378, 385. FOLLOWED, 40 Superior 100.

Champion v. Bostwick, 11 Wend. 571. DISTINGUISHED, 20 N. Y. 95.

Champion v. Webster, 15 Abb. Pr. 4. OVERRULED, 14 Abb. Pr., N. S., 47 *n.*

Champlin v. Rowley, 18 Wend. 187; 13 Id. 258. COMMENTED ON, 48 Barb. 167. DISTINGUISHED, 81 N. Y. 344.

Champney v. Coope, 34 Barb. 539. REVERSED, 32 N. Y. 543.

Chandler v. Hoag, 5 Thomp. & C. 197. AFFIRMED, 63 N. Y. 624.

Chapin v. Dobson, 78 N. Y. 74. FOLLOWED, 61 How. Pr. 38.

Chapin v. Merrill, 4 Wend. 657. OVERRULED, 4 Barb. 131; 2 Tenn. Ch. 448.

Chapin v. Seeley, 13 How. Pr. 490. FOLLOWED, 14 How. Pr. 443, 444.

Chapin v. Thompson, 16 Hun 53. APPROVED, 24 Hun 168. CONTRA, 3 Abb. N. Cas. 115; 54 How. Pr. 498; 59 Id. 473.

Chapin v. Thompson, 18 Hun 446. REVERSED, 80 N. Y. 275.

Chapin v. Thompson, 23 Hun 12. DISTINGUISHED, 24 Hun 493.

Chapman v. Chapman, 34 How. Pr. 281. CONTRA, 18 How. Pr. 240.

Chapman v. City of Brooklyn, 40 N. Y. 372. CONSIDERED, 45 N. Y. 685. DISTINGUISHED, 80 N. Y. 311.

Chapman v. Draper, 10 How. Pr. 367. AFFIRMED, 17 N. Y. 125.

Chapman v. Dyett, 11 Wend. 31. DISTINGUISHED, 46 Superior 466.

Chapman v. Erie R'y Co., 55 N. Y. 579. FOLLOWED, 23 Hun 472.

Chapman v. McKay, 47 N. Y. 670. APPROVED, 1 Thomp. & C. 532.

Chapman v. New Haven R. R. Co., 19 N. Y. 341. APPROVED, 36 Ohio St. 92. OVERRULED, 5 Robt. 549; 32 N. Y. 601.

Chapman v. Robertson, 6 Paige 627. QUESTIONED, 15 N. Y. 88. REVIEWED, 1 Flipp. (U. S.) 21.

Chapman v. Rose, 56 N. Y. 137. APPROVED, 58 Ind. 425, 429. DISTINGUISHED, 7 Hun 579.

Chapman v. White, 6 N. Y. 412. FOLLOWED, 17 Blatchf. (U. S.) 322.

Chapman Slate Co. v. Sutcliffe, 5 Thomp. & C. 686. AFFIRMED, 63 N. Y. 616.

Chappel v. Chappel, 12 N. Y. 215. FOLLOWED, 6 Abb. Pr. 358, 367; 12 How. Pr. 143.

Chappel v. Skinner, 6 How. Pr. 338. DISTINGUISHED, 56 N. Y. 459.

Chappell v. Potter, 11 How. Pr. 365. FOLLOWED, 15 How. Pr. 65.

Chappell v. Spencer, 23 Barb. 584. REAFFIRMED, 46 Barb. 379.

Charles v. People, 1 N. Y. 180, 184. FOLLOWED, 82 N. Y. 448.

Chase v. Hamilton Ins. Co., 20 N. Y. 52. DISTINGUISHED, 83 N. Y. 140.

Chautauque County Bank v. Risley, 19 N. Y. 369, 375. FOLLOWED, 10 Hun 68, 71, 72.

Chautauque County Bank v. White, 6 N. Y. 236. *See* 12 How. Pr. 107, 115.

Cheesebrough, Matter of, 78 N. Y. 232. FOLLOWED, 61 How. Pr. 325; 83 N. Y. 613.

Chegaray v. Mayor, &c., of New York, 13 N. Y. 220. CONSIDERED, 45 N. Y. 684.

Chenango Bridge Co. v. Binghamton Bridge Co., 26 How. Pr. 124; 27 N. Y. 87. REVERSED, 3 Wall. (U. S.) 51. APPROVED, 83 N. Y. 185. *See* 30 How. Pr. 346.

Chenango Bridge Co. v. Paige, 8 Hun 292. MODIFIED, 83 N. Y. 178.

Cheney v. Arnold, 15 N. Y. 353. FOLLOWED, 36 Superior 180.

Cheney v. Garbutt, 5 How. Pr. 467. APPROVED, 8 How. Pr. 47, 49. CONCURRED IN, 6 Id. 315, 316, 317. *See* Id. 241.

Cheney v. Troy Hospital Assoc., 65 N. Y. 282. APPROVED, 83 N. Y. 284.

Chesbrough v. Wright, 41 Barb. 28. AFFIRMED, 51 N. Y. 662.

Chester v. Comstock, 40 N. Y. 545 *n.* APPROVED, 36 Superior 544.

Chesterman v. Eyland, 17 Hun 520. AFFIRMED, 81 N. Y. 398.

Chichester v. Cande, 3 Cow. 39, 42. DISTINGUISHED, 21 Hun 511.

Chichester v. Livingston, 3 Sandf. 718. CONTRA, 30 How. Pr. 61.

Children's Aid Society v. Loveridge, 70 N. Y. 387. FOLLOWED, 83 N. Y. 594.

Childs v. Lyons, 3 Robt. 704. FOLLOWED, 22 Hun 512.

Chipman v. Montgomery, 63 N. Y. 221. DISTINGUISHED, 23 Hun 442; 3 Redf. 136, 141, 143.

Chouteau v. Suydam, 21 N. Y. 179. DISTINGUISHED, 22 Hun 449. EXPLAINED, 47 N. Y. 365.

Christianson v. Linford, 3 Robt. 215. FOLLOWED, 49 How. Pr. 535.

Christie v. Bloomingdale, 18 How. Pr. 12. DISAPPROVED, 61 How. Pr. 436.

Christie v. Corbett, 34 How. Pr. 19. FOLLOWED, 36 How. Pr. 540, 542.

Christie v. Phyfe, 22 Barb. 195. REVERSED, 19 N. Y. 344.

Christman v. Floyd, 9 Wend. 340. EXPLAINED, 6 Hill 20.

Christopher v. Mayor, &c. of New York, 13 Barb. 567. CRITICISED, 7 Abb. Pr. 126, 127; 2 Duer 663.

Chubbuck v. Morrison, 6 How. Pr. 367. FOLLOWED, 10 How. Pr. 415, 421.

Chubbuck v. Vernam, 42 N. Y. 432. EXPLAINED, 44 N. Y. 606.

Church v. Howard, 17 Hun 5. FOLLOWED, 23 Hun 416.

Church v. Rhodes, 6 How. Pr. 281. APPROVED, 6 How. Pr. 489. *See* 7 Id. 108.

Church v. Simmons, 19 Hun 220. REVERSED, 83 N. Y. 261.

Church of the Redeemer v. Crawford, 14 Abb. Pr., N. S., 200. REVERSED, 36 Superior 307.

Churchill v. Hunt, 3 Den. 321. FOLLOWED, 15 Minn. 471.

Churchill v. Marsh, 4 E. D. Smith 369. FOLLOWED, 8 Abb. Pr., N. S., 288, 293; 3 Daly 207.

Churchill v. Onderdonk, 59 N. Y. 134. FOLLOWED, 7 Hun 616, 619.

Cisco v. Roberts, 36 N. Y. 292. DISTINGUISHED, 60 N. Y. 452.

City. *See name of city in question.*

City Bank of Brooklyn v. Dearborn, 20 N. Y. 244. IN POINT, 71 Me. 307.

City Bank of New Haven v. Perkins, 29 N. Y. 568. APPROVED, 45 N. Y. 727.

City Savings Bank v. Bidwell, 29 Barb. 325. *See* 53 How. Pr. 40.

Claflin v. Farmers' and Citizens' Bank, 25 N. Y. 293. DISTINGUISHED, 5 Lans. 250; 61 N. Y. 243.

Clancy v. O'Gara, 4 Abb. N. Cas. 268. FOLLOWED, 55 How. Pr. 495.

Clapp v. Fullerton, 34 N. Y. 190. DISTINGUISHED, 42 N. Y. 270, 282.

Clapp v. Rogers, 12 N. Y. 283. REVIEWED, 53 Md. 25.

Clapper v. Fitzpatrick, 3 How. Pr. 314. *See* 14 How. Pr. 151, 152.

Clark, Matter of, 20 Hun 551. APPEAL DISMISSED, 81 N. Y. 638.

Clark, Matter of, 9 Wend. 212, 222. FOLLOWED, 84 N. Y. 445.

Clark v. Baird, 9 N. Y. 183. FOLLOWED. 2 Thomp. & C. 629, 634.

Clark v. Boreel, 21 Hun 594. FOLLOWED, 1 Civ. Pro. 221.

Clark v. Brooks, 2 Abb. Pr., N. S., 385. COMPARED, 38 N. Y. 172, 174.

Clark v. Bush, 3 Cow. 151. REVIEWED, 16 W. Va. 484.

Clark v. Clark, 14 Abb. Pr. 299; 7 How. Pr. 62. AFFIRMED, 6 Alb. L. J. 168.

Clark v. Clark, 24 Barb. 581. CONTRA, 15 How. Pr. 525.

Clark v. Clark, 8 Paige 152. DISTINGUISHED, 3 Redf. 233.

Clark v. Clark, 7 Robt. 276. AFFIRMED, 6 Alb. L. J. 168.

Clark v. Clark, 7 Robt. 284. AFFIRMED, 6 Alb. L. J. 168.

Clark v. Cleveland, 6 Hill 344. DISAPPROVED, 30 Barb. 300.

Clark v. Crego, 47 Barb. 599. DISTINGUISHED, 23 Hun 127.

Clark v. Eighth Ave. R. R. Co., 36 N. Y. 135. FOLLOWED, 46 Superior 452.

Clark v. Harwood, 8 How. Pr. 470. CONTRA, 4 Bosw. 545; 13 How. Pr. 102.

Clark v. Luce, 15 Wend. 479. FOLLOWED, 23 Wend. 336. OVERRULED, 4 N. Y. 254.

Clark v. Marsiglia, 1 Den. 317. COMMENTED ON, 50 Barb. 329. REVIEWED, 7 Bradw. (Ill.) 590. *See* 44 Superior 401.

Clark v. Mayor, &c., of New York, 3 Barb. 288. *See* 1 Keyes 9.

Clark v. People, 26 Wend. 599. DISTINGUISHED, 58 N. Y. 524. EXPLAINED, 5 Daly 180.

Clark v. Rawson, 2 Den. 135. REVIEWED, 128 Mass. 541.

Clark v. Rowling, 3 N. Y. 216. CRITICISED, 8 Mo. App. 382.

Clark v. Woodruff, 18 Hun 419. AFFIRMED, 83 N. Y. 518.

Clarke v. City of Rochester, 24 Barb. 446. *See* 57 N. Y. 177.

Clarke v. City of Rochester, 13 How. Pr. 204. REVERSED, 28 N. Y. 605. *See* 57 N. Y. 177.

Clarke v. City of Rochester, 29 How. Pr. 97. CONTRA, 29 How. Pr. 111, 112.

Clarke v. Crandall, 27 Barb. 73. FOLLOWED, 42 Superior 119.

Clarke v. Davenport, 1 Bosw. 95. AFFIRMED, *see* 70 N. Y. 307.

Clarke v. Goodridge, 44 How. Pr. 226. COMMENTED ON, 36 Superior 110. DISTINGUISHED, 46 How. Pr. 431. EXPLAINED, 14 Abb. Pr., N. S., 322. *See* 45 How. Pr. 455.

Clarke v. Goodridge, 41 N. Y. 210. APPROVED, 36 Superior 110. CONSIDERED, 46 How. Pr. 430; 35 Superior 70. CRITICISED, 44 How. Pr. 228. EXPLAINED, 14 Abb. Pr., N. S., 321; 15 Id. 224. *See* 45 How. Pr. 455.

Clarke v. Lourie, 21 Hun 618. APPEAL DISMISSED, 82 N. Y. 580.

Clarke v. Sawyer, 3 Sandf. Ch. 351. Chancellor AFFIRMED and Vice Chancellor REVERSED, 2 N. Y. 498.

Clarke v. Smith, 46 Barb. 30. CRITICISED, 6 Hun 103.

Clarke Nat. Bank v. Bank of Albion, 52 Barb. 592. DISTINGUISHED, 59 Barb. 226; 24 Hun 283.

Clarkson v. Manson, 59 How. Pr. 480. OVERRULED, 60 How. Pr. 45.

Clason v. Bailey, 14 Johns. 484. FOLLOWED, 42 N. Y. 511, 523.

Clason v. Morris, 10 Johns. 524. *See* 2 Tenn. Ch. 573.

Clau v. McPherson, 1 Bosw. 480, 489. FOLLOWED, 35 Superior 106.

Clemens v. Clemens, 37 N. Y. 59. DISTINGUISHED, 22 Hun 490.

Clement v. Brush, 3 Johns. Cas. 180. REVIEWED, 98 Ill. 35.

Clements v. Yturria, 14 Hun 151. AFFIRMED, 81 N. Y. 285.

Cleveland v. Boerum, 23 Barb. 201. RECONCILED, 39 N. Y. 309.

Cleveland v. Boerum, 27 Barb. 252. APPLICABLE, 13 Abb. Pr., N. S., 267. RECONCILED, 39 N. Y. 309.

Cleveland v. Boerum, 24 N. Y. 613; 3 Abb. Pr. 294. RECONCILED, 39 N. Y. 309.

Cleveland v. Cleveland, 12 Wend. 172. FOLLOWED, 6 Hun 604, 607.

Cleveland v. New Jersey Steamboat Co., 68 N. Y. 306. FOLLOWED, 84 N. Y. 460.

Cleveland v. Whiton, 31 Barb. 544. REVERSED, 25 How. Pr. 593.

Clinton v. Hope Ins. Co., 45 N. Y. 454. DISTINGUISHED, 5 Hun 264.

Clinton v. Myers, 46 N. Y. 511. DISTINGUISHED, 53 N. Y. 13.

Clothier v. Adriance, 51 N. Y. 322. DISTINGUISHED, 81 N. Y. 224.

Clough v. Murray, 3 Robt. 7. FOLLOWED, 41 Superior 235.

Clumplia v. Whiting, 10 Abb. Pr. 448. EXPLAINED, 8 Abb. Pr., N. S., 122, 132.

Coates v. Coates, 1 Duer 664. DISTINGUISHED, 61 How. Pr. 42.

Cobb v. Harmon, 23 N. Y. 148; 29 Barb. 472. FOLLOWED, 1 Thomp. & C. 558.

Cobb v. Hatfield, 46 N. Y. 533. FOLLOWED, 31 Wis. 474, 476.

Cobine v. St. John, 12 How. Pr. 333. *See* 16 How. Pr. 93, 95.

Cochran v. Ingersoll, 13 Hun 368. APPEAL DISMISSED, 73 N. Y. 613.

Cochran v. Van Surlay, 20 Wend. 365. APPROVED, 14 N. Y. 423.

Cochrane v. Dinsmore, 49 N. Y. 249. FOLLOWED, 41 Superior 231. *See* 6 Lans. 319.

Cockey v. Hurd, 12 Abb. Pr., N. S., 307. *See* 14 Abb. Pr., N. S., 183; 4 Thomp. & C. 553.

Cockey v. Hurd, 45 How. Pr. 70. OVERRULED, 58 N. Y. 386.

Cockey v. Hurd, 36 Superior 42. CONTRA, 47 How. Pr. 412; 2 Hun 341; 4 Thomp. & C. 551, 553.

Cockle v. Underwood, 1 Abb. Pr. 1. *See* 36 How. Pr. 240.

Cockle v. Underwood, 3 Duer 676. CONTRA, 13 How. 258, 259.

Codd v. Codd, 2 Johns. Ch. 224. DISTINGUISHED, 61 N. Y. 403.

Coddington v. Bay, 20 Johns. 637. APPROVED, 6 Hill 93. CRITICISED, 22 Alb. L. J. 191. FOLLOWED, 59 How. Pr. 296, 299, 300; 73 N. Y. 269, 276; 81 N. Y. 222, 226; 36 Superior 50; 39 Id. 396. REVIEWED, 12 Otto (U. S.) 44.

Coddington v. Davis, 3 Den. 16. AFFIRMED, 3 Den. 610.

Coddington v. Gilbert, 17 N. Y. 489. FOLLOWED, 23 Hun 564.

Coffey v. Home Life Ins. Co., 35 Superior 314. APPROVED, 35 Superior 386.

Coffin v. Reynolds, 37 N. Y. 640. DISTINGUISHED, 58 N. Y. 367. FOLLOWED, 9 Abb. N. Cas. 278. LIMITED, 12 Abb. Pr., N. S., 254. REVIEWED, 33 Superior 506.

Coggeshall v. Pelton, 7 Johns. Ch. 292. REVIEWED, 55 Cal. 523.

Cohen v. Frost, 2 Duer 335. *See* 1 Daly 151.

Cohen v. N. Y. Mutual Life Ins. Co., 50 N. Y. 610. APPROVED, 24 Gratt. (Va.) 507. DISAPPROVED, 1 Flipp. (U. S.) 235. DISTINGUISHED, 82 N. Y. 551. CONTRA, 3 Otto (U. S.) 24.

Cohn v. Colby, 57 How. Pr. 168. AFFIRMED, 57 How. Pr. 250.

Cohn v. Goldman, 43 Superior 436. REVERSED, 9 Alb. L. J. 163. APPROVED, 1 Civ. Pro. 51.

Cohoes, Village of, v. Moran, 25 How. Pr. 385. FOLLOWED, 7 Hun 345, 347, 350.

Coit v. Campbell, 20 Hun 50. AFFIRMED, 82 N. Y. 509.

Coit v. Campbell, 82 N. Y. 509. FOLLOWED, 84 N. Y. 648.

Coit v. Coit, 4 How. Pr. 232. CONTRA, 4 How. Pr. 346.

Colah, Matter of, 6 Daly 51. CONTRA, 9 Paige 440.

Cole v. Cole, 53 Barb. 607. AFFIRMED, 6 Alb. L. J. 168.

Cole v. Hughes, 54 N. Y. 444. DISTINGUISHED, 57 N. Y. 684.

Cole v. Jessup, 2 Barb. 309. OVERRULED, 10 How. Pr. 515, 516, 523.

Cole v. Malcolm, 66 N. Y. 363. APPROVED AND FOLLOWED, 82 N. Y. 158.

Cole v. Mann, 3 Thomp. & C. 380. APPROVED, 13 Vr. (N. J.) 313.

Cole v. Reynolds, 18 N. Y. 74. COMMENTED ON, 2 Lans. 17.

Cole v. Sackett, 1 Hill 516. APPROVED, 5 Hill 448.

Cole v. White, 26 Wend. 511. REVIEWED, 4 Hill 273.

Colegrove v. New York, &c., R. R. Co., 6 Duer 382. *See* 5 Robt. 548.

Colegrove v. New York, &c., R. R. Co., 20 N. Y. 492. APPROVED, 36 Ohio St. 92.

Coleman v. Crump, 40 Superior 548. AFFIRMED, 70 N. Y. 573.

Coleman v. Guarrigues, 18 Barb. 60. CONTRA, 53 Barb. 21.

Coleman v. Livingston, 36 Superior 32. AFFIRMED, 56 N. Y. 658. FOLLOWED, 41 Superior 284; 42 Id. 135.

Coleman v. People, 1 Thomp. & C. 3 *Add.* REVERSED, 55 N. Y. 81.

Coleman v. People, 55 N. Y. 81. DISTINGUISHED, 80 N. Y. 331.

Coleman v. People, 58 N. Y. 555. FOLLOWED, 43 Superior 506.

Coleman v. Pleystead, 40 N. Y. 341. DISAPPROVED, 47 N. Y. 248.

Coleman v. Southwick, 9 Johns. 45, 51. FOLLOWED, 73 Ind. 274.

Coles v. Bowne, 10 Paige 526, 534. DISTINGUISHED, 55 N. Y. 243. FOLLOWED, 46 How. Pr. 506.

Coles v. Village of Williamsburgh, 10 Wend. 659. EXPLAINED, 4 Hill 93.

Colgrove v. Tallman, 2 Lans. 97. DISTINGUISHED, 1 Hun 451, 453.

Colgrove v. Tallman, 67 N. Y. 95. FOLLOWED, 83 N. Y. 147.

Colie v. O'Keel, 3 Alb. L. J. 13. FOLLOWED, 23 Hun 366.

Collier v. Munn, 41 N. Y. 143. FOLLOWED, 13 Abb. Pr., N. S., 368.

Collier v. Whipple, 13 Wend. 224, 225. APPROVED, 62 Barb. 290.

Collins v. Campfield, 9 How. Pr. 519. DISTINGUISHED, 4 Hun 317.

Collins v. Collins, 17 Hun 598. AFFIRMED, 80 N. Y. 24.

Collins v. Collins, 71 N. Y. 269. FURTHER APPEAL, 80 N. Y. 1.

Collins v. Knapp, 18 Barb. 532. CONTRA, 11 How. Pr. 248, 250.

Collins v. Mayor, &c., of New York, 3 Hun 680. DISTINGUISHED, 67 Barb. 223; 4 Hun 644.

Collins v. Ralli, 20 Hun 246. AFFIRMED, 24 Hun v.

Collins v. Rowe, 1 Abb. N. Cas. 97. DISTINGUISHED, 56 How. Pr. 330, 331.

Collomb v. Caldwell, 5 How. Pr. 336. FOLLOWED, 6 How. Pr. 9, 10.

Colson v. Arnot, 57 N. Y. 253. DISTINGUISHED, 7 Hun 579.

Colton v. Jones, 7 Robt. 164. AFFIRMED, 6 Alb. L. J. 168.

Colton v. Jones, 7 Robt. 649. AFFIRMED, 6 Alb. L. J. 168.

Columbia Ins. Co. v. Force, 8 How. Pr. 353. FOLLOWED, 47 How. Pr. 417.

Columbia Turnp. Road v. Hayward, 10 Wend. 422. OVERRULED, 18 Wend. 141.

Colvert v. Hall, 43 How. Pr. 80. FOLLOWED, 43 How. Pr. 82, 83.

Collville v. Besly, 2 Den. 139, 142. FOLLOWED, 45 Superior 434.

Colvin v. Bragden, 5 How. Pr. 124. CONCURRED IN, 5 How. Pr. 263, 264.

Colvin v. Burnet, 2 Hill 620. FOLLOWED, 37 Superior 3.

Colvin v. Colvin, 2 Paige 385. REVIEWED, 8 Abb. N. Cas. 173.

Colvin v. Corwin, 15 Wend. 557. OVERRULED, 16 N. Y. 548.

Colvin v. Currier, 22 Barb. 371. DISAPPROVED, 3 Lans. 116.

Coman v. Allen, 21 How. Pr. 114. CONTRA, 9 Abb. Pr. 58 *n.*, 240.

Comfort v. Fulton, 13 Abb. Pr. 276. CRITICISED, 17 Abb. Pr. 247; 38 Barb. 346.

Comfort v. Fulton, 39 Barb. 56. CRITICISED, 17 Abb. Pr. 247.

Comfort v. Kiersted, 26 Barb. 472. DISTINGUISHED, 3 Thomp. & C. 30.

Comins v. Hetfield, 12 Hun 375. AFFIRMED, 80 N. Y. 261.

Comins v. Supervisors of Jefferson County, 64 N. Y. 626; 3 Thomp. & C. 296. FOLLOWED, 1 Civ. Pro. 198; 61 How. Pr. 307.

Commercial Bank of Albany v. Canal Comm'rs, 10 Wend. 26. FOLLOWED, 14 Vr. (N. J.) 85.

Commercial Bank of Buffalo v. Kortright, 22 Wend. 348. APPROVED, 55 N. Y. 46. REVIEWED, 46 N. Y. 337.

Commercial Bank of Clyde v. Marine Bank, 6 Abb. Pr., N. S., 33; 3 Keyes 337. REVIEWED, 34 Superior 370.

Commercial Bank of Pennsylvania v. Union Bank of New York, 11 N. Y. 214. DISTINGUISHED, 5 Robt. 554, 592.

Commercial Bank of Rochester v. City of Rochester, 41 Barb. 341. AFFIRMED, 41 N. Y. 619.

Comm'rs of Canal Fund v. Kempshall, 26 Wend. 404. EXPLAINED, 4 Hill 369.

Comm'rs of Central Park, Matter of, 50 N. Y. 493. EXPLAINED, 4 Hun 605.

Comm'rs of Excise v. Doherty, 16 How. Pr. 46. FOLLOWED, 16 How. Pr. 211.

Comm'rs of Excise v. Glennon, 21 Hun 244. FOLLOWED, *unwillingly*, 23 Hun 68.

Comm'rs of Excise v. Purdy, 22 How. Pr. 312. REVERSED, 36 Barb. 266; 22 How. Pr. 506.

Comm'rs of Highways of Bushwick v. Meserole, 10 Wend. 122. CRITICISED AND LIMITED, 12 Hun 193.

Comm'rs of Highways of Carmel v. County Courts of Putnam, 7 Wend. 264. CRITICISED AND LIMITED, 12 Hun 193.

Comm'rs of Highways of Warwick v. Judges of Orange County, 9 Wend. 434. CONTRA, 5 How. Pr. 379.

Comm'rs of Highways of Warwick v. Judges of Orange County, 13 Wend. 432. FOLLOWED, 2 Thomp. & C. 141.

Comm'rs of Pilots v. Spofford, 3 Hun 52; 5 Thomp. & C. 357. REVERSED, 58 N. Y. 103.

Comm'rs of Washington Park, Matter of, 56 N. Y. 144. DISTINGUISHED, 63 N. Y. 139.

Comstock v. Drohan, 71 N. Y. 9. REVIEWED, 24 Hun 586.

Comstock v. Halleck, 4 Sandf. 671. CONTRA, 13 How. Pr. 31, 33.

Comstock v. Hier, 74 N. Y. 269. DISTINGUISHED, 61 How. Pr. 174; 80 N. Y. 483; 84 Id. 433.

Comstock v. Johnson, 46 N. Y. 615. DISTINGUISHED, 68 N. Y. 69.

Comstock v. Porter, 5 Wend. 98. *See* 2 How. Pr. 256.

Conaughty v. Nichols, 42 N. Y. 83. DISTINGUISHED, 61 N. Y. 652. RECONCILED, 2 Hun 467.

Condit v. Baldwin, 21 N. Y. 219. DISTINGUISHED, 6 Hun 47; 54 N. Y. 365; 84 N. Y. 632; 53 Iowa 630. FOLLOWED, 50 How. Pr. 350; 1 Hun 434; 3 Lans. 36; 45 Superior 61.

Cone v. Delaware, &c., R. R. Co., 15 Hun 172. AFFIRMED, 81 N. Y. 206.

Cone v. Niagara Fire Ins. Co., 3 Thomp. & C. 33; 60 N. Y. 619. FOLLOWED, 83 N. Y. 140.

Conger v. Conger, 77 N. Y. 432. FOLLOWED, 23 Hun 231, 232.

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Conger v. Van Aernum, 43 Barb. 602. REVERSED, 6 Alb. L. J. 197.

Congregation Shaaer Hash Moin v. Halliday, 3 Robt. 386. REVERSED, 50 N. Y. 664.

Congress, &c., Spring Co. v. High Rock, &c., Spring Co., 45 N. Y. 291. DISTINGUISHED, 82 N. Y. 503, 524.

Conklin v. Bauer, 62 N. Y. 620. DISTINGUISHED, 79 N. Y. 276.

Conklin v. Dutcher, 5 How. Pr. 386. FOLLOWED, 7 How. Pr. 360, 363. OVERRULED, 16 Id. 78. *See* 7 Id. 357, 358.

Conklin v. Egerton, 21 Wend. 430. APPROVED, 53 Vt. 172.

Conklin v. Stamler, 2 Hilt. 422. EXPLAINED, 38 Superior 263.

Conklin v. Vandervoort, 7 How. Pr. 483. FOLLOWED, 11 How. Pr. 395 399. CONTRA, 1 Abb. Pr. 118; 7 How. Pr. 59; 8 Id. 485; 9 Id. 217; 10 Id. 455; 12 Id. 500.

Conley v. Meeker, 9 Week. Dig. 288. AFFIRMED, 12 Week. Dig. 220.

Conlin v. Cantrell, 64 N. Y. 217. DISTINGUISHED, 23 Hun 89.

Connecticut Fire Ins. Co. v. Erie R'y Co., 73 N. Y. 399. REVIEWED, 7 Fed. Rep. 259.

Connecticut Mut. Life Assur. Co. v. Cleveland, &c., R. R. Co., 23 How. Pr. 180. AFFIRMED, 26 How. Pr. 225.

Conner v. Mayor, &c., of New York, 5 N. Y. 285. DISTINGUISHED, 80 N. Y. 190. FOLLOWED, 24 Hun 263; 82 N. Y. 204, 211. REVIEWED, 55 Cal. 499; 5 Lans. 125.

Conner v. Mayor, &c., of New York, 2 Sanf. 355. REVIEWED, 55 Cal. 499.

Connolly v. Poillon, 41 Barb. 366. AFFIRMED, 41 N. Y. 619.

Connors v. People, 50 N. Y. 240. DISTINGUISHED, 76 N. Y. 291.

Conrad v. Williams, 6 Hill 447. FOLLOWED, 34 Superior 269.

Conrad v. Village of Ithaca, 16 N. Y. 158. DISTINGUISHED, 62 N. Y. 170.

Conroe v. Nat. Protection Ins. Co., 10 How. Pr. 403. *See* 11 How. Pr. 149, 151.

Consalus v. Brotherson, 54 How. Pr. 62. OVERRULED, 56 How. Pr. 89.

Continental Nat. Bank v. Nat. Bank of Commonwealth, 50 N. Y. 575. DISTINGUISHED, 64 N. Y. 321; 80 N. Y. 40. FOLLOWED, 3 Hun 754; 6 Thomp. & C. 181.

Conway, Matter of, 62 N. Y. 504. EXPLAINED, 82 N. Y. 245.

Cook v. Brockway, 21 Barb. 331. CRITICISED, 37 Barb. 290. DISTINGUISHED, 82 N. Y. 314.

Cook v. Ellis, 6 Hill, 466. APPROVED, 26 Wis. 377.

Cook v. Esleeck, 17 How. Pr. 134. FOLLOWED, 17 How. Pr. 266.

Cook v. Friedenthal, 14 Hun 542. AFFIRMED, 80 N. Y. 202.

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Cook v. Holt, 48 N. Y. 275. APPROVED, 35 Superior 372.

Cook v. Horwitz, 14 Hun 542. AFFIRMED, 80 N. Y. 202.

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Cook v. Litchfield, 9 N. Y. 279; 5 Sandf. 330. DISTINGUISHED, 2 Bosw. 149. LIMITED, 28 N. Y. 558, 559.

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Cook v. Pomeroy, 10 How. Pr. ,103. FOLLOWED, 17 How. Pr. 97, 99.

Cook v. Whipple, 55 N. Y. 150. APPROVED, 58 Ind. 502, 507.

Cooke v. Meeker, 42 Barb. 533. AFFIRMED, 36 N . Y. 15.

Cooke v. Meeker, 36 N. Y. 15. DISTINGUISHED, 14 Vr. (N. J.) 47. FOLLOWED, 52 How. Pr. 370, 371; 2 Redf. 438.

Cooke v. Passage, 4 How. Pr. 360. FOLLOWED, 1 Civ. Pro. 224; 61 How. Pr. 123.

Cooke v. State Nat. Bank of Boston, 1 Lans. 494; 52 N. Y. 96. OVERRULED, 74 N. Y. 53.

Cooke v. State Nat. Bank of Boston, 52 N. Y. 96. FOLLOWED, 9 Hun 397, 399.

Cooley v. Howe Machine Co., 53 N. Y. 620. DISTINGUISHED, 82 N. Y. 435.

Coon v. Knap, 8 N. Y. 402. DISTINGUISHED, 31 N. Y. 500; 5 Robt. 160, 167.

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Cooper v. Barber, 24 Wend. 105. FOLLOWED, 81 N. Y. 249.

Cooper v. Bigalow, 1 Cow. 56. FOLLOWED, 4 How. Pr. 168, 172.

Cooper v. Felter, 6 Lans. 485. DOUBTED, 4 Redf. 499.

Cooper v. Kerr, 3 Johns. Cas. 606. APPROVED, 11 Johns. 53.

Cooper v. Shafer, 41 Barb. 151. OVERRULED, 4 Abb. App. Dec. 149 *n.*

Cooper v. Smith, 43 Superior 9. FOLLOWED, 45 Superior 242.

Corbett v. De Comeau, 4 Abb. N. Cas. 252. REVERSED, 44 Superior 306.

Cordell v. New York Central, &c., R. R. Co., 6 Hun 461. *See* 70 N. Y. 119; 75 Id. 330.

Cordell v. New York Central, &c., R. R. Co., 70 N. Y. 119. REVIEWED, 8 Fed. Rep. 731.

Cordell v. New York Central, &c., R. R. Co., 75 N. Y. 330. DISTINGUISHED, 23 Hun 280. EXPLAINED, 23 Id. 76. FOLLOWED, 22 Id. 79; 84 N. Y. 62.

Corlies v. Cumming, 8 Cow. 181. DISTINGUISHED, 129 Mass. 303, 305.

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Corn Exchange Ins. Co. v. Babcock, 42 N. Y. 613. APPROVED, 33 Superior 499; 36 Id. 254. CONSTRUED, 82 Ill. 454. DISTINGUISHED, 65 Barb. 322. FOLLOWED, 59 Id. 641; 60 Id. 462.

Cornee v. Wilkins, 14 Hun 428. FOLLOWED, 22 Hun 460.

Corning v. Corning, 6 N. Y. 97. DISTINGUISHED, 11 Hun 388.

Corning v. Greene, 23 Barb. 33. REVIEWED, 26 N. Y. 472.

Corning v. McCullough, 1 N. Y. 47, DISTINGUISHED, 80 N. Y. 457.

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Corning v. Slosson, 16 N. Y. 294. DISTINGUISHED, 5 Thomp. & C. 448.

Corning v. Southland, 3 Hill 552. APPROVED, 6 Lans. 214.

Corning v. Troy Iron, &c., Factory, 6 How. Pr. 89. CONTRA, 14 How. Pr. 470, 472. FOLLOWED, 7 Id. 17.

Cornwell v. Woolley, 47 Barb. 327. AFFIRMED, 2 Trans. App. 380.

Corson v. Ball, 47 Barb. 452, 453. INAPPLICABLE AND OBSOLETE, 9 Abb. Pr., N. S., 143.

Cortelyou v. Lansing, 2 Cai. Cas. 201. APPROVED, 12 Johns. 149. *But see* 5 Id. 260.

Corwin v. Freeland, 6 How. Pr. 241. REVERSED, 6 N. Y. 560. CONTRA, 6 How. Pr. 315.

Corwin v. New York and Erie R'y Co., 13 N. Y. 42. FOLLOWED, 5 Hun 344. *See* 21 Ohio St. 594.

Cosgrove v. New York Central, &c., R. R. Co., 13 Hun 329. DISTINGUISHED, 84 N. Y. 254.

Costello v. Meade, 55 How. Pr. 356. OVERRULED, 82 N. Y. 39.

Coster v. Lorillard, 14 Wend. 265. EXPLAINED, 51 N. Y. 343.

Coster v. Mayor of Albany, 43 N. Y. 399. FOLLOWED, 53 N. Y. 629.

Coster v. Peters, 7 Robt. 620. *See* 5 Robt. 192.

Cotheal v. Talmage, 9 N. Y. 551. DISTINGUISHED, 38 Barb. 643.

Cotheal v. Talmadge, 1 E. D. Smith 573. FOLLOWED, 51 How. Pr. 39.

Cottle v. Vanderheyden, 56 Barb. 622; 39 How. Pr. 289. AFFIRMED, 11 Abb. Pr., N. S., 17.

Coughtry v. Globe Woolen Co., 56 N. Y. 124. DISTINGUISHED, 66 N. Y. 187.

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Courtney v. Baker, 34 Superior 529. APPEAL DISMISSED, 60 N. Y. 1.

Courtright v. Stewart, 19 Barb. 456. APPROVED, 5 Lans. 245.

Covert v. Hughes, 8 Hun 305. DISTINGUISHED, 23 Hun 89.

Cowden v. Pease, 10 Wend. 334. FOLLOWED, 29 Mich. 211.

Cowdin v. Stanton, 12 Wend. 120. FOLLOWED, 29 Mich. 211.

Cowen v. Banks, 24 How. Pr. 72. CRITICISED, 13 Wall. (U. S.) 615.

Cowley v. People, 21 Hun 415. AFFIRMED, 83 N. Y. 464.

Cowperthwaite v. Sheffield, 1 Sandf. 416; 3 N. Y. 243. DISTINGUISHED, 83 N. Y. 86.

Cox v. Gould, 4 Blatchf. 341. DISTINGUISHED, 80 N. Y. 345, 352.

Cox v. McBurney, 2 Sandf. 561. DISAPPROVED, 5 Hun 413.

Cox v. New York Central, &c., R. R. Co., 61 Barb. 615. APPROVED, 42 Superior 19.

Cox v. New York Central, &c., R. R. Co., 63 N. Y. 414. EXPLAINED, 23 Hun 489.

Cox v. People, 19 Hun 430. AFFIRMED, 80 N. Y. 500.

Cox v. Schermerhorn, 18 Hun 16. FOLLOWED, 24 Hun 114, 115.

Coyle v. City of Brooklyn, 53 Barb. 41. AFFIRMED, 41 N. Y. 619.

Cozzens v. Higgins, 1 Abb. App. Dec. 451; 3 Keyes 206. FOLLOWED, 83 N. Y. 479.

Cragin v. New York Central R. R. Co., 51 N. Y. 61. DISTINGUISHED, 24 Hun 180. FOLLOWED, 6 Thomp & C. 609.

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Craig v. Hone, 2 Edw. 554. EXPLAINED, 51 N. Y. 344.

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Cram v. Dresser, 2 Sandf. 120. EXPLAINED, 4 Hun 581.

Cramer v. Blood, 57 Barb. 155. *See* 57 Barb. 671.

Crandall v. Bryan, 5 Abb. Pr. 162. OVERRULED, 32 Barb. 83.

Crane v. Baudoine, 65 Barb. 260, 263. REVERSED, 52 N. Y. 526.

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Crary v. Goodman, 22 N. Y. 170. EXPLAINED, 53 N. Y. 296.

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Craw v. Easterly, 54 N. Y. 679. DISTINGUISHED, 65 N. Y. 256.

Crawford v. Collins, 45 Barb. 269. FOLLOWED, 5 Thomp. & C. 617.

Crawford v. New York Central, &c., R. R. Co., 18 Hun 108. FOLLOWED, 22 Hun 309.

Crawford v. Waters, 46 How. Pr. 210. APPROVED, 42 Superior 390.

Creed v. Hartman, 29 N. Y. 591. FOLLOWED, 35 Superior 1.

Cregin v. Brooklyn Crosstown R. R. Co., 56 How. Pr. 32. AFFIRMED, 56 How. Pr. 465.

Cregin v. Brooklyn Crosstown R. R. Co., 19 Hun 341. REVERSED, 83 N. Y. 595.

Cregin v. Brooklyn Crosstown R. R. Co., 75 N. Y. 192. DISTINGUISHED, 23 Hun 73, 74. FOLLOWED, 24 Id. 622.

Crippen v. Thompson, 6 Barb. 532. DISTINGUISHED, 9 Pa. St. 124, 125.

Crisfield v. Perine, 15 Hun 200. AFFIRMED, 81 N. Y. 622.

Crispin v. Babbitt, 81 N. Y. 516. FOLLOWED, 84 N. Y. 81.

Crittenden v. Adams, 1 Code, N. S., 21; 5 How. Pr. 310. CONTRA, 5 How. Pr. 337, 361; 7 Id. 112; 14 Id. 522. *See* 26 Id. 247.

Crocker v. Claugly, 2 Duer 684. DISTINGUISHED, 16 Abb. Pr. 105.

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Crocheron v. North Shore Staten Island Ferry Co., 1 Thomp. & C. 446. REVERSED, 56 N. Y. 656.

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Crofoot v. Bennett, 2 N. Y. 158. DISTINGUISHED, 65 N. Y. 365.

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Croghan v. Livingston, 17 N. Y. 218. APPROVED, 1 Civ. Pro. 157.

Cromelines v. Beldens, 1 Wend. 107. EXPLAINED, 2 Hill 379.

Cromwell v. Brown, 17 How. Pr. 68. CONTRA, 9 How. Pr. 474; 15 Id. 12.

Cronin v. People, 20 Hun 137. AFFIRMED, 82 N. Y. 318.

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Crotty v. MacKenzie, 52 How. Pr. 54. CONTRA, 4 Sandf. 661.

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Crounse v. Fitch, 14 Abb. Pr. 346. REVERSED, 1 Abb. App. Dec. 475.

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Cruger v. Hudson River R. R. Co., 12 N. Y. 190. EXPLAINED, 56 N. Y. 378.

Cruger v. Jones, 18 Barb. 267. FOLLOWED, 81 N. Y. 19.

Cudney v. Cudney, 68 N. Y. 148. DISTINGUISHED, 4 Redf. 131. REVIEWED, Id. 472, 473, 474.

Cuff v. Dorland, 50 Barb. 438. *See* 55 Barb. 481.

Cuff v. Dorland, 55 Barb. 481. REVERSED, 57 N. Y. 560.

Culver v. Haslam, 7 Barb. 314. APPROVED, 13 Barb. 550.

Cumming v. Edgerton, 9 Bosw. 684, 685. OVERRULED, (?) 60 How. Pr. 79.

Cumming v. Hackley, 8 Johns. 202, 206. DISTINGUISHED, 11 Johns. 468.

Cumming v. Williamson, 1 Sandf. Ch. 17. FOLLOWED, 58 Miss. 617.

Cummins v. Agricultural Ins. Co., 67 N. Y. 260. REVIEWED, 43 Mich. 371.

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Cunningham v. Freeborn, 11 Wend. 241, 256. FOLLOWED, 11 Bankr. Reg. 268. QUALIFIED, 6 Abb. Pr. 358, 370.

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Cure v. Crawford, 5 How. Pr. 293. NOT CONCURRED IN, 6 How. Pr. 89, 92. CONTRA, 7 Id. 17.

Currie v. Noyes, 1 Code, N. S., 198. CONTRA, 15 How. Pr. 10, 11, 12.

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Curtis v. Brooks, 37 Barb. 476. OVERRULED, 59 Barb. 505.

Curtis v. Delaware, &c., R. R. Co., 74 N. Y. 116. DISTINGUISHED, 82 N. Y. 420.

Curtis v. Leavitt, 15 N. Y. 9. APPROVED AND FOLLOWED, 61 How. Pr. 96, 97; 80 N. Y. 234. REVIEWED, 8 Bradw. (Ill.) 349.

Curtis v. Patterson, 8 Cow. 65. OVERRULED, 11 Hun 565, 570.

Curtis v. Smith, 60 Barb. 9. NOT FOLLOWED, 61 How. Pr. 180.

Curtis v. Stillwell, 32 Barb. 354. REVERSED, 25 How. Pr. 592 *n.*

Curtiss v. Ayrault, 47 N. Y. 73, 81. FOLLOWED, 81 N. Y. 563.

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Davis v. Hudson, 5 Abb. Pr. 61, 63. DISAPPROVED, 2 Hilt. 519. OVERRULED, 5 Abb. Pr. 205 *n.;* 39 How. Pr. 121, 122.

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Delamater v. Pierce, 3 Den. 315. AFFIRMED, 3 Den. 610.

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Denike v. Harris, 23 Hun 213. REVERSED, 84 N. Y. 89.

Denny v. New York Central, &c., R. R. Co., 5 Daly 50. DISTINGUISHED, 24 Hun 54.

Denton v. Nanny, 8 Barb. 618. CRITICISED, 101 Mass. 432. CONTRA, 10 Paige 49. *See* 13 How. Pr. 293.

Denton v. Noyes, 6 Johns. 296. DISTINGUISHED, 65 N. Y. 188. *See* 10 Paige 49.

Dept. of Public Parks, Matter of, 6 Hun 486. REVERSED, 73 N. Y. 560.

Dept. of Public Parks, Matter of, 73 N. Y. 560. DISTINGUISHED, 81 N. Y. 436, 447.

De Peyster, Matter of, 18 Hun 445. AFFIRMED, 80 N. Y. 565.

De Peyster, Matter of, 4 Sandf. Ch. 511. NOT IN POINT, 24 Hun 115.

De Peyster v. Michael, 6 N. Y. 467. APPROVED, 29 Mich. 95. CRITICISED, 19 N. Y. 75. REVIEWED, 54 Iowa 315.

De Peyster v. Murphy, 39 Superior 256. REVIEWED, 4 Redf. 63.

De Peyster v. Sun Mutual Ins. Co., 19 N. Y. 272. REVIEWED, 44 N. Y. 218, 222.

De Pierris, Matter of, 20 Hun 305. REVERSED, 82 N. Y. 243.

De Pol v. Sohlke, 7 Robt. 280. EXPLAINED, 38 Superior 158.

Deposit, Village of, v. Vail, 5 Hun 310. FOLLOWED AND APPROVED, 7 Hun 345, 347.

Deraismes v. Merchants' Mut. Ins. Co., 1 N. Y. 371. RE-AFFIRMED 4 N. Y. 51.

Derby v. Hannin, 15 How. Pr. 32. *See* 16 How. Pr. 17; 17 How. Pr. 255.

De Ridder v. Schermerhorn, 10 Barb. 638. CONTRA, 4 How. Pr. 48.

De Rivafinoli v. Corsetti, 4 Paige 264. EXPLAINED, 38 Superior 158.

De Rutte v. New York, &c., Teleg. Co., 30 How. Pr. 403. *See* 31 How. Pr. 87.

Deuchars v. Wheaton, 16 How. Pr. 471. CRITICISED, 27 How. Pr. 478. *See* 65 N. Y. 179.

Deuel v. Rust, 24 Barb. 438, 444. FOLLOWED, 1 Hun 157, 159.

Devanbagh v. Devanbagh, 5 Paige 554. DISTINGUISHED, 8 Abb. N. Cas. 193 *n.*, 206 *n.*

Deveau v. Fowler, 2 Paige 400. APPROVED, Clarke 195. DISAPPROVED, 1 Barb. Ch. 484.

Devendorf v. Beardsley, 23 Barb. 656. FOLLOWED, 18 How. Pr. 161, 162, 163.

Devendorf v. Wert, 42 Barb. 227. FOLLOWED, 40 Superior 87; 42 Id. 217.

Devine v. People, 20 Hun 98. FOLLOWED, 83 N. Y. 243.

Devlin v. Brady, 36 N. Y. 531. FOLLOWED, 4 Lans. 72.

Devlin v. Cooper, 20 Hun 188. AFFIRMED, 84 N. Y. 410.

Devlin v. Crary, 1 Hun 489. AFFIRMED, 60 N. Y. 635.

Devlin v. Devlin, 4 Hun 651; S. C., 67 Barb. 290.

Devlin v. Devlin, 67 Barb. 290. APPROVED, 5 Abb. N. Cas. 278. *See* 69 N. Y. 212.

Devlin v. Mayor, &c., of New York, 48 How. Pr. 457. REVERSED, 63 N. Y. 8. *See* 50 How. Pr. 2.

Devlin v. Mayor, &c., of New York, 54 How. Pr. 11. FOLLOWED, 81 N. Y. 379, 381. CONTRA, 54 How. Pr. 313.

Devlin v. Mayor, &c., of New York, 11 Week. Dig. 116. DISTINGUISHED, 24 Hun 352.

Devlin v. Murphy, 56 How. Pr. 326. DISTINGUISHED, 58 How. Pr. 190, 191.

Devlin v. Platt, 11 Abb. Pr. 398. DISTINGUISHED, 59 How. Pr. 418; 22 Hun 470.

Devoy v. Mayor, &c., of New York, 39 Barb. 169. AFFIRMED, 36 N. Y. 449.

Dewey v. Goodenough, 56 Barb. 54. DISTINGUISHED, 67 N. Y. 391.

Dewey v. Moyer, 72 N. Y. 70, 87; 9 Hun 473. REVIEWED AND FOLLOWED, 24 Hun 85.

Dewitt v. Barley, 9 N. Y. 371. EXPLAINED, 17 N. Y. 340.

Dewitt v. Buchanan, 54 Barb. 31, 32. FOLLOWED, 3 Hun 71; 5 Thomp. & C. 299.

De Witt v. Barley, 17 N. Y. 340. COMMENTED ON, 44 Barb. 120. NOT IN CONFLICT WITH, 2 N. Y. 514.

De Witt ads. Swift, 3 How. Pr. 280. FOLLOWED, 8 How. Pr. 177, 182.

De Witt v. Walton, 9 N. Y. 571. CRITICISED, 5 Thomp. & C. 26.

De Wolf v. Williams, 69 N. Y. 621. DISTINGUISHED, 80 N. Y. 54, 57.

Dexter v. Norton, 47 N. Y. 62. DISTINGUISHED, 60 N. Y. 491.

Dezell v. Odell, 3 Hill 215. DISTINGUISHED, 17 Hun 485.

De Zeng v. Fyfe, 1 Bosw. 335. AFFIRMED, Ct. of App., Oct., 1859.

Dias v. Bouchaud, 3 Edw. 485. REVERSED, 1 N. Y. 201.

Dias v. Bouchaud, 10 Paige 445. REVERSED, 3 Den. 610.

Dickerson v. Wason, 48 Barb. 412. REVERSED, 6 Alb. L. J. 169.

Dickerson v. Wason, 54 Barb. 230. COMMENTED ON, 59 Barb. 265.

Dickinson v. Dickey, 14 Hun 617. APPEAL DISMISSED, 76 N. Y. 602.

Dickinson v. Dudley, 17 Hun 569. DISTINGUISHED, 24 Hun 280.

Dickinson v. Edwards, 2 Abb. N. Cas. 300. REVERSED, 7 Abb. N. Cas. 65; 13 Hun 405.

Dickinson v. Edwards, 13 Hun 405; 53 How. Pr. 40. AFFIRMED, 58 How. Pr. 24. DISTINGUISHED, 13 Hun 404.

Dickinson v. Edwards, 77 N. Y. 573. APPROVED, 84 N. Y. 378. DISTINGUISHED, 81 N. Y. 570; 22 Alb. L. J. 346.

Dickson v. Broadway, &c., R. R. Co., 41 How. Pr. 151. APPEAL DISMISSED, 47 N. Y. 507.

Dickson v. Mackcoy, 39 N. Y. 400. EXPLAINED, 2 Thomp. & C. 289.

Didier v. Davison, 2 Barb. Ch. 477. APPROVED, 10 How. Pr. 516, 526, 527.

Dillaye v. Commercial Bank of Whitehall, 51 N. Y. 345. DISTINGUISHED, 61 N. Y. 106. EXPLAINED, 22 Hun 347, 348.

Dillaye v. New York Central R. R. Co., 56 Barb. 30. AFFIRMED, 6 Alb. L. J. 197. *See* 2 Id. 356.

Dillenback v. Jerome, 7 Cow. 294. *See* 16 Wend. 352.

Dimon v. Hazard, 32 N. Y. 65. DISTINGUISHED, 52 N. Y. 160.

Dinehart v. Wells, 2 Barb. 432. AFFIRMED, Ct. of App., 1850. FOLLOWED, 8 Hun 280, 281.

Dininny v. N. Y. & N. H. R. R. Co., 49 N. Y. 546. DISTINGUISHED, 57 N. Y. 556.

Dinsmore v. Adams, 5 Hun 149. APPEAL DISMISSED, 66 N. Y. 618.

Dinsmore v. Duncan, 4 Daly 199. REVERSED, 57 N. Y. 573.

Direct U. S. Cable Co. v. Dominion Teleg. Co., 22 Hun 568. REVERSED, 84 N. Y. 153.

Disbrow v. Garcia, 52 N. Y. 654. DISTINGUISHED, 24 Hun 42. FOLLOWED, 6 Hun 224.

Disosway v. Bank of Washington, 24 Barb. 60. FOLLOWED, 17 How. Pr. 263, 265.

Disosway v. Winant, 13 Abb. Pr. 216. REVERSED, 1 Abb. App. Dec. 508.

D'Ivernois v. Leavitt, 23 Barb. 63, 80. DISTINGUISHED, 53 Tex. 590.

Dix v. Palmer, 5 How. Pr. 233, 234. FOLLOWED, 9 How. Pr. 91, 265. *See* 5 How. Pr. 238, 241.

Dixon v. Buck, 42 Barb. 70. FOLLOWED, 34 Superior 228.

Dixon Crucible Co. v. Steel Works, 9 Abb. Pr., N. S., 195; 57 Barb. 447. *See* 13 Hun 180.

Doane v. Eddy, 16 Wend. 523. CONSIDERED OVERRULED, 3 Sandf. 69.

Dobson v. Pearce, 12 N. Y. 156. REVIEWED, 35 Ark. 341.

Dodd, Matter of, 27 N. Y. 629. FOLLOWED, 30 How. Pr. 277. LIMITED, 54 How. Pr. 227. OVERRULED, 4 Keyes 66.

Dodd v. Dryfus, 57 How. Pr. 319. *See* 57 How. Pr. 504.

Dodge v. County of Platts, 16 Hun 285. REVERSED, 82 N. Y. 218.

Dodge v. Potter, 18 Barb. 193. FOLLOWED, 23 Hun 494, 497.

Dodge, &c., Manuf. Co., Matter of, 14 Hun 440. REVERSED, 19 Alb. L. J. 364.

Doedt v. Wiswall, 15 How. Pr. 128. *See* 15 How. Pr. 227.

Dolan v. Mayor, &c., of New York, 8 Hun 440. AFFIRMED, 68 N. Y. 274.

Dolan v. Mayor, &c., of New York, 68 N. Y. 274. FOLLOWED, 80 N. Y. 185, 191.

Dolan v. People, 64 N. Y. 485. FOLLOWED, 80 N. Y. 500, 515.

Dole v. Gold, 5 Barb. 490. CONTRA, *as to 2d point,* 1 N. Y. 415.

Dominick v. Michael, 4 Sandf. 374. REVIEWED, 4 Redf. 201.

Donnell v. Williams, 21 Hun 216, 218, EXPLAINED, 61 How. Pr. 270, 271.

Donovan v. Finn, 1 Hopk. Ch. 59. CRITICISED, 23 Hun 45, 49; 6 Fed. Rep. 770. FOLLOWED, 2 Tenn. Ch. 421.

Donovan v. Vandemark, 18 Hun 200. REVERSED, 20 Alb. L. J. 275.

Donovan v. Willson, 26 Barb. 138. FOLLOWED, 62 Barb. 517.

Donovan v. Woodruff, 3 Thomp. & C. 773. REVERSED, 63 N. Y. 636.

Doolin v. Ward, 6 Johns. 194. DISTINGUISHED, 66 N. Y. 292.

Doolittle v. Lewis, 7 Johns. Ch. 45, 46. REVIEWED AND APPROVED, 14 So. Car. 582.

Doolittle v. Supervisors of Broome County, 18 N. Y. 155; 16 How. Pr. 512. FOLLOWED, 61 Barb. 124; 3 Thomp. & C. 296, 297; 46 Ind. 96, 103. *See* 20 How. Pr. 134.

Doran v. Dempsey, 1 Bradf. 490. *See* 3 Lans. 408.

Dorlon v. City of Brooklyn, 46 Barb. 604. *See* 1 Alb. L. J. 315.

Dorlon v. Lewis, 7 How. Pr. 132. CONTRA, 13 How. Pr. 250.

Dorlon v. Lewis, 9 How. Pr. 1. *See* 12 How. Pr. 297, 299.

Dorn v. Backer, 61 Barb. 597. REVERSED, 10 Alb. L. J. 239.

Dorr v. New Jersey Steam Navigation Co., 11 N. Y. 485. APPROVED, 64 Barb. 188.

Dorr v. Peters, 3 Edw. Ch. 132. DISTINGUISHED, 84 N. Y. 662.

Dorris v. Sweeney, 64 Barb. 636. DISTINGUISHED, 4 Hun 294; 6 Thomp. & C. 582.

Dorwin v. Potter, 5 Den. 306. APPROVED, 47 N. Y. 482.

Doscher v. Shaw, 35 Superior 562. AFFIRMED, 52 N. Y. 602.

Doty v. Brown, 4 N. Y. 71. RE-AFFIRMED, 14 N. Y. 329.

Doubleday v. Kress, 50 N. Y. 410. FOLLOWED, 3 Thomp. & C. 531, 535.

Doubleday, Matter of, v. Supervisors of Broome County, 2 Cow. 533. DISTINGUISHED, 58 N. Y. 113.

Dougan v. Champlain Transporta- Co., 56 N. Y. 1. DISTINGUISHED, 5 Hun 75, 77. FOLLOWED, 84 N. Y. 460; 24 Hun 38, 39. REVIEWED, 24 Hun 108.

Doughty v. Hope, 1 N. Y. 79. FOLLOWED, 47 N. Y. 459.

Douglas, In re, 46 N. Y. 42. DISTINGUISHED, 47 N. Y. 556.

Douglas v. Cruger, 80 N. Y. 15. FOLLOWED, 61 How. Pr. 204.

Douglas v. Knickerbocker Life Ins. Co., 45 Superior 313. AFFIRMED, 83 N. Y. 492.

Douglass, Matter of, 9 Abb. Pr. 84; 58 Barb. 174; 40 How. Pr. 201. REVERSED, 12 Abb. Pr., N. S., 161. FOLLOWED, 4 Hun 435, 438.

Douglass v. Haberstro, 21 Hun 320. APPEAL DISMISSED, 82 N. Y. 572.

Douglass v. Howland, 24 Wend. 35, 58. CRITICISED, 1 Mo. App. 421. DISTINGUISHED, 65 N. Y. 498. EXPLAINED, 4 Hill 522. FOLLOWED, 17 Ch. D. 668.

Douglass v. Ireland, 73 N. Y. 100. DISTINGUISHED, 80 N. Y. 441, 457. FOLLOWED, 61 How. Pr. 375.

Dounce v. Dow, 6 Thomp. & C. 653. APPARENTLY OVERRULED, 58 N. Y. 358.

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Dow v. Hope Ins. Co., 1 Hall 166. FOLLOWED, 35 Superior 208.

Dow v. Whetten, 8 Wend. 160. FOLLOWED, 35 Superior 208.

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Downing v. Marshall, 23 N. Y. 366. EXPLAINED, 81 N. Y. 130, 138. *See* 23 How. Pr. 4.

Downing v. Marshall, 37 N. Y. 380, 384. APPROVED, 23 Hun 82, 85.

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Dows v. Perrin, 16 N. Y. 325. QUESTIONED, 24 N. Y. 638.

Doyle v. Lord, 48 How. Pr. 142; 39 Superior 421. REVERSED, 64 N. Y. 432.

Doyle v. Peerless Petroleum Co., 44 Barb. 239. DISTINGUISHED, 63 Barb. 31.

Doyle v. Russell, 30 Barb. 300. CONTRA, 6 Hill 344.

Doyle v. Sharp, 43 Superior 545. *See* 41 Superior 312.

Drake v. Cockroft, 10 How. Pr. 377. *See* 14 How. Pr. 116, 125.

Drake v. Goodridge, 54 Barb. 78. CONSIDERED, 46 How. Pr. 429, 430, 431, 435. EXPLAINED, 15 Abb. Pr., N. S., 222, 224.

Drake v. Hudson River R. R. Co., 7 Barb. 508. REVIEWED, 46 Superior 161.

Draper v. Stouvenel, 35 N. Y. 507. APPROVED, 10 W. Va. 171, 175. EXPLAINED, 3 McArth. (U. S.) 557.

Dresser v. Brooks, 3 Barb. 429. APPROVED, 9 Barb. 498. CRITICISED, 8 Mo. App. 382.

Dresser v. Dresser, 35 Barb. 573. FOLLOWED, 62 N. Y. 564; 1 Hun 529; 3 Thomp. & C. 632.

Driggs v. Rockwell, 11 Wend. 504. APPROVED, 4 Hill 197.

Drinkwater v. Dinsmore, 16 Hun 250. REVERSED, 81 N. Y. 390.

Driscoll v. West, &c., Manuf. Co., 36 Superior 488. AFFIRMED, 59 N. Y. 96.

Drummond v. Husson, 14 N. Y. 60. DENIED, 5 Oreg. 86, 88. DISTINGUISHED, 5 Daly 32.

Duanesburgh, Town of, v. Jenkins, 57 N. Y. 177. FOLLOWED, 1 Thomp. & C. 223. REVIEWED AND APPLIED, 13 Otto (U. S.) 813; 2 Trans. Rep. 764, 766, 768.

Dubois v. Baker, 30 N. Y. 355. EXPLAINED, 1 Lans. 161.

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Duckworth v. Roach, 8 Daly 159. AFFIRMED, 81 N. Y. 49.

Dudley v. Mayhew, 3 N. Y. 9. FOLLOWED, 57 N. Y, 123; 4 Hun 33; 6 Thomp. & C. 229.

Duff, Matter of, 41 How. Pr. 350. FOLLOWED, 34 Superior 211.

Duguet v. Rhinelander, 1 Johns. Cas. 360. REVERSED, 1 Cai. Cas. xxv.

Duke of Cumberland v. Graves, 7 N. Y. 305. FOLLOWED, 41 N. Y. 397, 402.

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Duncan v. Lyon, 3 Johns. Ch. 351. APPROVED, 72 Mo. 647.

Duncan v. Stanton, 30 Barb. 533. REVERSED, Ct. of App. 1865.

Duncomb v. New York, &c., R. R. Co., 23 Hun 291. REVERSED, 84 N. Y. 190.

Dunford v. Weaver, 21 Hun 349. AFFIRMED, 84 N. Y. 445.

Dung v. Parker, 3 Daly 89. REVERSED, 52 N. Y. 494.

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Dunham v. Sage, 7 Lans. 419. AFFIRMED, 52 N. Y. 229.

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Dunlap v. Hawkins, 59 N. Y. 342. FOLLOWED, 81 N. Y. 584, 591.

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Dunn v. People, 29 N. Y. 523, 527. APPROVED, 62 Barb. 490. FOLLOWED, 83 N. Y. 415.

Dunning v. Clark, 2 E. D. Smith 535. FOLLOWED, 61 How. Pr. 275.

Dunning v. Stearns, 9 Barb. 630. CONTRA, 8 How. Pr. 18.

Dupuy v. Wurtz, 53 N. Y. 556. FOLLOWED, 4 Redf. 258.

Durant v. Abendroth, 41 Superior 53. REVIEWED, 43 Superior 470.

Durant v. Abendroth, 44 Superior 463, 468. AFFIRMED, 80 N. Y. 244.

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Durian v. Central Verein, &c., 7 Daly 168. CONTRA, 49 How. Pr. 190.

Durkee v. Saratoga, &c., R. R. Co., 4 How. Pr. 226. FOLLOWED, 8 How. Pr. 177, 182. OVERRULED, 14 Id. 186. CONTRA, 9 Id. 128.

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Dusenbury v. Keiley, 9 Week. Dig. 275. AFFIRMED, 12 Week. Dig. 389.

Dustain v. McAndrew, 44 N. Y. 72, 78. APPROVED, 42 Superior 123. FOLLOWED, 1 Hun 611.

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Dyett v. Pendleton, 8 Cow. 727. CRITICISED AND MODIFIED, 8 Mo. App. 333, 334. LIMITED, 5 Hill 52.

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Eadie v. Slimmon, 26 N. Y. 9. CRITICISED, 8 C. E. Gr. (N. J.) 492. DISTINGUISHED, 51 Wis. 334.

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East River Nat. Bank v. M'Caffrey, 3 Redf. 97. DISTINGUISHED AND APPROVED, 9 Abb. N. Cas. 379.

Eastburn v. Kirk, 2 Johns. Ch. 317, 318. EXPLAINED, 23 Hun 82, 85.

Easterly v. Barber, 4 Hun 426. AFFIRMED *on condition*, 66 N. Y. 433.

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Eastwood v. People, 3 Park. Cr. 25. EXPLAINED AND LIMITED, 13 Abb. Pr., N. S., 208, 231.

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Eaton, Cole, &c., Co. v. Avery, 18 Hun 44. AFFIRMED, 83 N. Y. 31.

Eckerson v. Spoor, 4 How. Pr. 361. FOLLOWED, 6 How. Pr. 413, 414. CONTRA, 6 Id. 121, 124, 265, 268, 311; 13 Id. 191.

Eckhardt v. People, 22 Hun 525. AFFIRMED, 83 N. Y. 462.

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Edgell v. Hart, 9 N. Y. 213. DISTINGUISHED, 7 Bush (Ky.) 29, 35.

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Edgerton v. Page, 12 How. Pr. 58. REVERSED, 1 Hilt. 320; 14 How. Pr. 116.

Edgerton v. Page, 14 How. Pr. 116. AFFIRMED, 18 How. Pr. 360.

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Edington v. Ætna Life Ins. Co., 13 Hun 543. REVERSED, 20 Alb. L. J. 240. REVIEWED, 8 Mo. App. 370.

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Elevated R'y Co., Matter of, 18 Hun 378. REVERSED, 20 Alb. L. J. 320.

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Ellis v. Andrews, 56 N. Y. 83. FOLLOWED, 40 Superior 284.

Ellis v. Lersner, 48 Barb. 539. AFFIRMED, 6 Alb. L. J. 197.

Ellis v. Merit, 2 Code 68. OVERRULED, 12 Barb. 23.

Ellison v. Bernstein, 60 How. Pr. 145. AFFIRMED, 60 How. Pr. 149 *n.*

Ellsworth v. Caldwell, 27 How. Pr. 188. AFFIRMED, 6 Alb. L. J. 197.

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Elston v. Potter, 9 Bosw. 636. DISAPPROVED, 50 Barb. 70. FOLLOWED, 6 Daly 324. CONTRA, 35 How. Pr. 209.

Elsworth v. Caldwell, 18 Abb. Pr. 20. AFFIRMED, 6 Alb. L. J. 197.

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Elwell v. Grand Street, &c., R. R. Co., 67 Barb. 83. AFFIRMED, 67 Barb. 85 *n.*

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Ely v. Spofford, 22 Barb. 231. REVERSED, 41 N. Y. 619.

Ely v. Supervisors of Niagara County, 36 N. Y. 297. APPROVED, 83 N. Y. 190. REVIEWED, 90 Pa. St. 415.

Emerson v. Bleakley, 5 Abb. Pr., N. S., 350. FOLLOWED, 61 How. Pr. 180.

Emerson v. Bowers, 14 N. Y. 449. DISTINGUISHED, 60 How. Pr. 254.

Emerson v. Burney, 6 How. Pr. 32. CRITICISED, 11 How. Pr. 572, 575. FOLLOWED, 12 Id. 435.

Emery v. Pease, 20 N. Y. 62. DISTINGUISHED, 57 N. Y. 565.

Emigrant Industrial Savings Inst., Matter of, 75 N. Y. 388. FOLLOWED, 80 N. Y. 642; 82 Id. 131, 142; 84 Id. 603.

Emmet v. Hoyt, 17 Wend. 410, 416. DISTINGUISHED, 82 N. Y. 95, 101.

Empire City Bank, In re, 18 N. Y. 199. REVIEWED, 8 Fed. Rep. 59.

Enders v. Sternbergh, 52 Barb. 222. REVERSED, 41 N. Y. 619.

Engh v. Greenebaum, 2 Hun 136. NOT APPLICABLE, 46 Superior 517.

Ennis v. Harmony Fire Ins. Co., 3 Bosw. 516, 517. FOLLOWED, 41 Superior 279.

Eno v. Mayor, &c., of New York, 68 N. Y. 214. COMMENTED ON, 45 Superior 509.

Enoch Morgan's Sons Co. v. Schwachhoefer, 55 How. Pr. 37, 38. FOLLOWED, 23 Hun 632, 639.

Enos v. Thomas, 5 How. Pr. 361. FOLLOWED, 7 How. Pr. 108, 112. CONTRA, 5 How. Pr. 310; 14 Id. 430, 434, 435; 3 Duer 669.

Ensign v. Sherman, 14 How. Pr. 439 FOLLOWED, 16 How. Pr. 308, 312.

Erben v. Lorillard, 19 N. Y. 299. DISTINGUISHED, 51 Barb. 100; 23 Hun 454, 471. FOLLOWED, 41 Superior 16; 39 Id. 371; 5 Thomp. & C. 301.

Erickson v. Quinn, 3 Lans. 299. MODIFIED, 47 N. Y. 410.

Erickson v. Smith, 2 Abb. App. Dec. 64. APPROVED, 83 N. Y. 470.

Ericsson v. Brown, 38 Barb. 390. DISTINGUISHED, 58 N. Y. 367.

Erie R'y Co. v. Champlain, 35 How. Pr. 74. FOLLOWED. 3 Thomp. & C. 452.

Erie R'y Co. v. Owen, 32 Barb. 616. DISTINGUISHED, 22 Hun 362; 24 Id. 394.

Erie R'y Co. v. Ramsey, 45 N. Y. 637. FOLLOWED, 47 N. Y. 46. LIMITED, 26 Minn. 481.

Ernst v. Hudson River R. R. Co., 19 How. Pr. 205. *See* 32 How. Pr. 262.

Ernst v. Hudson River R. R. Co., 24 How. Pr. 97. *See* 32 How. Pr. 262.

Ernst v. Hudson River R. R. Co., 32 How. Pr. 61. FOLLOWED, 34 How. Pr. 91, 92, 93. *See* 32 Id. 262.

Ernst v. Hudson River R. R. Co., 35 N. Y. 9, 27. DISTINGUISHED, 71 Mo. 487. PARTIALLY OVERRULED, 34 Iowa 279.

Ernst v. Hudson R. R. R. Co., 39 N. Y. 61. FOLLOWED, 41 N. Y. 296, 299.

Erwin v. Hamilton, 50 How. Pr. 32. CONTRA, 11 How. Pr. 260.

Erwin v. Loper, 43 N. Y. 527. EXPLAINED, 3 Redf. 506.

Erwin v. Olmsted, 7 Cow. 229. DISTINGUISHED, 64 N. Y. 294.

Erwin v. Schriver, 19 Johns. 379, 380. NOT APPLICABLE, 55 Cal. 536, 540.

Erwin v. Voorhees, 26 Barb. 127. REVERSED in 1862, (not reported.)

Esmond v. Bullard, 16 Hun 65. AFFIRMED, 79 N. Y. 404.

Estes v. Wilcox, 67 N. Y. 264. EXPLAINED, 23 Hun 45, 48. NOT APPLICABLE, 24 Id. 471.

Estevez v. Purdy, 6 Hun 46. DISAPPROVED, 2 Stew. (N. J.) 455.

Estevez v. Purdy, 66 N. Y. 446. DISTINGUISHED, 53 Iowa 630. FOLLOWED, 12 Hun 576; 45 Superior 64.

Evans v. Chapin, 12 Abb. Pr. 161; 20 How. Pr. 289. EXPLAINED, 5 Abb. Pr., N. S., 333, 337.

Evans v. Hill, 18 Hun 464, 465. FOLLOWED, 23 Hun 37, 39.

Evans v. Kalbfleisch, 16 Abb. Pr., N. S., 13. DISTINGUISHED, 63 N. Y. 317. FOLLOWED, 16 Abb. Pr., N. S., 247, 249; 2 Hun 665.

Evans v. Kalbfleisch, 36 Superior 450. FOLLOWED, 37 Superior 289.

Evans v. United States Life Ins. Co. 64 N. Y. 304. FOLLOWED, 82 N. Y. 543, 551.

Everett v. Vendryes, 19 N. Y. 436. FOLLOWED, 84 N. Y. 381.

Everingham v. Vanderbilt, 51 How. Pr. 177. AFFIRMED, 12 Hun 75.

Everitt v. Everitt, 41 Barb. 385. AFFIRMED, 6 Alb. L. J. 197.

Everitt v. Everitt, 29 N. Y. 39. DISTINGUISHED, 67 N. Y. 352. FOLLOWED, 49 How. Pr. 229, 230; 3 Thomp. & C. 115, 118.

Everson v. Gehrman, 10 How. Pr. 301. *See* 14 How. Pr. 446, 448; 22 Id. 265, 266.

Everts v. Everts, 62 Barb. 577, 583. FOLLOWED, 24 Hun 112; 81 N. Y. 573, 583.

Excelsior Fire Ins. Co. v. Royal Ins. Co. of Liverpool, 55 N. Y. 343. APPROVED, 5 Hun 325.

Excelsior Grain Binding Co. v. Stayner, 58 How. Pr. 273. AFFIRMED, 61 How. Pr. 456.

Excelsior Ins. Co., Matter of, 38 Barb. 297. AFFIRMED, 25 How. Pr. 591 *n.*

Excelsior Petroleum Co. v. Embury, 4 Hun 648. AFFIRMED, 63 N. Y. 422.

Exchange Bank v. Monteath, 17 Barb. 171. NOT APPLICABLE, 46 Superior 517.

Exchange Fire Ins. Co. v. Early, 54 How. Pr. 279. *See* 55 How. Pr. 342.

Extension of the Bowery, Matter of, 12 How. Pr. 97. CONTRA, 5 Abb. Pr. 272; 61 Barb. 45.

F.

Fagan v. Dugan, 2 Redf. 341. REVIEWED, 4 Redf. 474.

Fagan v. Mayor, &c., of New York, 84 N. Y. 348. FOLLOWED, 84 N. Y 657.

Fagen v. Davison, 2 Duer 153. DISAPPROVED, 14 Abb. Pr. 36.

Fairbanks v. Mathersell, 41 How. Pr. 274; 60 Barb. 406. CRITICISED, 7 Lans. 27, 33. DISTINGUISHED, 63 N. Y. 613.

Fairbanks v. Tregent, 16 How. Pr. 187. *See* 17 How. Pr. 427, 428.

Fairbanks v. Wood, 17 Wend. 329. CORRECTED, 2 Hill 238; 5 Id. 408.

Fairchild v. Gwynne, 16 Abb. Pr. 23. REVIEWED AND FOLLOWED, 24 Hun 124, 125.

Fairfax v. New York, &c., R. R. Co., 67 N. Y. 11. RE-AFFIRMED, 73 N. Y. 167.

Fake v. Eddy, 15 Wend. 76. DISTINGUISHED, 3 Hun 249. FOLLOWED, 32 Ind. 330.

Falkland v. St. Nicholas Nat. Bank, 21 Hun 450. REVERSED, 84 N. Y. 145.

Falkland v. St. Nicholas Nat. Bank, 10 Week. Dig. 222. REVERSED, 12 Week. Dig. 27.

Fallon v. Central Park, &c., R. R. Co., 6 Daly 8. AFFIRMED, 64 N. Y. 13.

Fallon v. Mayor, &c., of New York, 4 Hun 583. FOLLOWED, 40 Superior 523.

Fanning v. Consegua, 17 Johns. 510. APPROVED, 84 N. Y. 378.

Fanning v. Trowbridge, 5 Hill 428. LIMITED, 1 Den. 175.

Farley v. Flanagan, 1 E. D. Smith 313. RE-AFFIRMED, 2 E. D. Smith 386.

Farmers', &c., Bank v. Butchers', &c., Bank, 14 N. Y. 633. FOLLOWED, 26 Wis. 669.

Farmers', &c., Bank, v. Butchers', &c., Bank, 16 N. Y. 125. *See* 26 Wis. 669.

Farmers', &c., Bank v. Empire Stone Dressing Co., 5 Bosw. 289. REVIEWED, 34 Superior 370.

Farmers', &c., Bank of Buffalo v. Dearing, 59 N. Y. 659. REVERSED, 1 Otto (U. S.) 29. REVIEWED, 6 Hun 584.

Farmers', &c., Bank of Buffalo v. Sprague, 52 N. Y. 605. DISTINGUISHED, 9 Hun 284, 285.

Farmers', &c., Bank of Michigan v. Evans, 4 Barb. 487. DISTINGUISHED, 24 Hun 390.

Farmers', &c., Nat. Bank v. Hazeltine, 45 Superior 576. AFFIRMED, 78 N. Y. 104.

Farmers' Bank of Fayetteville v. Hale, 59 N. Y. 53. OVERRULED, 64 N. Y. 214. REVIEWED, 10 Alb. L. J. 358.

Farmers' Loan, &c., Co. v. Dickson, 17 How. Pr. 477. CONTRA, 32 How. Pr. 1.

Farmers' Loan, &c., Co. v. Harmony Fire, &c., Ins. Co., 51 Barb. 33. AFFIRMED, 41 N. Y. 619.

Farmers' Loan, &c., Co. v. Kursch, 5 N. Y. 558, 560. *See* 5 How. Pr. 414; 10 Id. 259.

Farmers' Loan, &c., Co. v. Maltby, 8 Paige 361, 362. DISTINGUISHED, 61 N. Y. 108.

Farmers' Loan, &c., Co v. Mayor, &c., of New York, 4 Bosw. 80. DISTINGUISHED, 83 N. Y. 214.

Farnham v. Hildreth, 32 Barb. 277. FOLLOWED, 1 Abb. N. Cas. 311.

Farrell v. Calkins, 10 Barb. 348. COMMENTED ON, 6 N. Y. 86 *n.*, 87 *n.* CONTRA, 8 How. Pr. 377, 379.

Farrell v. People, 21 Hun 485. AFFIRMED, 84 N. Y. 656.

Farrell v. People, 10 Week. Dig. 318. AFFIRMED, 12 Week. Dig. 57.

Fash v. Third Ave. R. R. Co., 1 Daly 148. FOLLOWED, 3 Daly 278.

Fasnacht v. Stehn, 53 Barb. 650. FOLLOWED, 1 Thomp. & C. 622.

Fatman v. Lobach, 1 Duer 354. IN POINT AND APPROVED, 46 N. Y. 335.

Faulkner v. Hart, 44 Superior 471. REVERSED, 82 N. Y. 413.

Faulkner v. Mayor, &c., of Brooklyn, 2 How. Pr. 151. APPROVED, 2 How. Pr. 168.

Feeter v. Heath, 11 Wend. 477, 485. DISTINGUISHED, 8 Mo. App. 378.

Feeter v. Weber, 44 Superior 255. AFFIRMED, 78 N. Y. 334.

Fellows v. Cook, 50 How. Pr. 95. REVERSED, 6 Daly 204. FOLLOWED, 61 How. Pr. 367.

Fellows v. Fellows, 4 Cow. 682, 701. REVIEWED, 8 Mo. App. 259, 260.

Fellows v. Harrington, 3 Barb. Ch. 652. DISTINGUISHED, 3 Hun 249.

Fellows v. Heermans, 4 Lans. 230. REVIEWED, 7 Fed. Rep. 569, 570.

Fenby v. Pritchard, 2 Sandf. 151. OVERRULED, 58 N. Y. 77.

Fenner v. Buffalo, &c., R. R. Co., 44 N. Y. 505. APPROVED, 16 Kans. 333, 337.

Fenner v. Lewis, 10 Johns. 38. DISTINGUISHED, 65 N. Y. 497.

Fenton v. People, 4 Hill 126. DISTINGUISHED, 4 Park. Cr. 56.

Ferguson, Exp., 6 Cow. 596. COMMENTED ON, 5 Hill 395.

Ferguson v. Broome, 1 Bradf. 10, 18. Explained, 9 Abb. N. Cas. 379.

Ferguson v. Ferguson, 2 N. Y. 360. Distinguished, 55 N. Y. 598.

Fernandez v. Great Western Ins. Co., 3 Robt. 457. Reversed, 6 Alb. L. J. 197.

Fero v. Ruscoe, 4 N. Y. 162. Superseded by code, 11 N. Y. 349.

Ferrer v. Pyne, 18 Hun 411. Affirmed, 81 N. Y. 281.

Ferrin v. Myrick, 41 N. Y. 315. Applicable, 8 Abb. N. Cas. 90. Distinguished, 63 N. Y. 288. Followed, 37 Superior 127. *See* 44 Id 26.

Ferris v. Ferris, 16 How. Pr. 102. *See* 19 How. Pr. 349, 350.

Ferris v. Kilmer, 47 Barb. 211. Reversed, 6 Alb. L. J. 197.

Ferris v. Paris, 10 Johns. 285. Commented on, 5 Hill 395.

Fettretch v. Leamy, 9 Bosw. 510, 525. Approved, 49 How. Pr. 527, 532.

Fettrich v. Totten, 2 Abb. Pr., n. s., 264. Approved, 5 Daly 241.

Fibel v. Livingston, 64 Barb. 179. Criticised, 2 Hun 49.

Fiedler v. Darrin, 59 Barb. 651. Reversed, 50 N. Y. 437.

Fiedler v. Darrin, 50 N. Y. 437. Distinguished, 22 Hun 223. Followed, 3 Thomp. & C. 397.

Field v. Field, 77 N. Y. 294. Followed, 83 N. Y. 516.

Field v. Hunt, 22 How. Pr. 329. Contra, 23 How. Pr. 80.

Field v. Mayor, &c., of New York, 6 N. Y. 179. Followed, 50 How. Pr. 143, 149. Reviewed, 91 Pa. St. 299.

Field v. New York Central R. R. Co., 29 Barb. 176. Affirmed, 28 How. Pr. 583.

Field v. New York Central R. R., Co., 32 N. Y. 339. Commented on, 3 Lans. 453.

Field v. Schieffelin, 7 Johns. Ch. 150. Followed, 59 Barb. 343.

Field v. Williamson, 4 Sandf. Ch. 613. Reviewed, 58 Miss. 525.

Fielden v. Lahens, 9 Bosw. 436. Modified, 2 Abb. App. Dec. 111.

Fielding v. Lucas, 22 Hun 22. Reversed, Ct. of App., March 15th, 1881.

Fielding v. Waterhouse, 40 Superior 424. Distinguished, 56 How. Pr. 382, 386.

Filer v. New York Central R. R. Co., 49 N. Y 47. Distinguished, 54 N. Y. 350; 63 Id. 560. Doubted, 6 Daly 527. Followed, 1 Hun 542; 3 Thomp. & C. 45; 4 Id. 136.

Fillo v. Jones, 2 Abb. App. Dec. 121. Distinguished, 80 N. Y. 579, 584. Reviewed, 8 Abb. N. Cas. 362.

Finch v. Parker, 49 N. Y. 1. Followed, 3 Hun 79; 42 Superior 11.

Finck, Matter of, 59 How. Pr. 145. Contra, 59 How. Pr. 148, 154.

Fincke v. Fincke, 53 N. Y. 528. *See* 68 N. Y. 239.

Fire Dep't of New York v. Noble, 3 E. D. Smith 440, 453. Followed, 3 Hun 94, 96; 5 Thomp. & C. 310.

First Nat. Bank of Jersey City v. Leach, 52 N. Y. 350, 352. Followed, 61 How. Pr. 257.

First Nat. Bank of Lyons v. Ocean Nat. Bank, 48 How. Pr. 148. Reversed, 11 Alb. L. J. 250.

First Nat. Bank of Lyons v. Ocean Nat. Bank, 60 N. Y. 278. Criticised and limited, 80 N. Y. 82, 93.

First Nat. Bank of Meadvills v. Fourth Nat. Bank of New York, 16 Hun 332. Reversed, 19 Alb. L. J. 438.

First Nat. Bank of Meadville v. Fourth Nat. Bank of New York, 22 Hun 563. Reversed, 84 N. Y. 469; 1 Civ. Pro. 317.

First Nat. Bank of Meadville v. Fourth Nat. Bank of New York, 77 N. Y. 320. Further appeal, 84 N. Y. 469.

First Nat. Bank of Meadville v. Fourth Nat. Bank of New York, 11 Week. Dig. 346. Reversed, 12 Week. Dig. 10.

First Nat. Bank of New York v. Morris, 1 Hun 680. Distinguished, 77 N. Y. 584.

First Nat. Bank of Utica v. Ballou, 49 N. Y. 155. Distinguished, 24 Hun 366.

First Nat. Bank of Whitehall v. Lamb, 50 N. Y. 95. Followed, 3 Hun 346; 5 Thomp. & C. 486. Overruled, 64 N. Y. 214; 1 Otto (U. S.) 36.

Fischer v. Raab, 58 How. Pr. 221; 56 Id. 218. Reversed, 81 N. Y. 235. Distinguished, 83 Id. 47.

Fish v. Cram, 9 Abb. Pr., n. s., 252. Overruled, 3 Abb. N. Cas. 95 *n.*

Fish v. Folley, 6 Hill 54. Reviewed, 9 Mo. App. 379.

Fisher v. Hersey, 17 Hun 370. Appeal dismissed, 78 N. Y. 387.

Fisher v. Mayor, &c., of New York, 4 Lans. 451. Reversed, 57 N. Y. 344.

Fisher v. Mayor, &c., of New York, 6 Thomp. & C. 100. Reversed, 67 N. Y. 73.

Fisher v. New York, &c., R. R. Co., 46 N. Y. 644. Distinguished, 52 N. Y. 388; 64 Id. 217.

Fisher v. World Mut. Life Ins. Co., 47 How. Pr. 451. Distinguished, 60 How. Pr. 87.

Fishkill Savings Inst. v. Nat. Bank of Fishkill, 19 Hun 354. Affirmed, 80 N. Y. 162.

Fisk v. Chicago, &c., R. R. Co., 3 Abb. Pr., N. S., 430. CONTRA, 3 Daly 70; 47 How. Pr. 412.

Fitch, Matter of, 2 Wend. 298. DISAPPROVED, 5 Hill 608. *See* 18 Wend. 613.

Fitch v. Bates, 11 Barb. 471. APPROVED, 18 Barb. 409. CONTRA, 9 How. Pr. 501; 10 Id. 395.

Fitch v. Bigelow, 5 How. Pr. 237. *See* 5 How. Pr. 238.

Fitch v. Commissioners, &c., of Kirkland, 22 Wend. 132. CRITICISED, 15 Barb. 471.

Fitch v. Humphrey, 1 Den. 163. DISTINGUISHED, 2 Hun 69.

Fitzgerald, Matter of, 2 Cai. 317, 318. OVERRULED, 2 Barb. 436; 5 Cow. 293; 3 How. Pr. 209.

Fitzgerrold v. People, 37 N. Y. 413. DISAPPROVED, 30 Wis. 428, 437. FOLLOWED, 80 N. Y. 514.

Flagg v. Munger, 9 N. Y. 483. APPROVED, 56 How. Pr. 326.

Flagg v. Thurber, 14 Barb. 196. MODIFIED, 9 N. Y. 483.

Flake v. Van Wagenen, 54 N. Y. 25. FOLLOWED, 58 N. Y. 389.

Flammer v. Kline, 9 How. Pr. 216. FOLLOWED, 11 How. Pr. 395, 399.

Flanagan v. Demarest, 3 Robt. 173. FOLLOWED, 35 Superior 218.

Flanagan v. Tinen, 53 Barb. 587. OVERRULED, 64 N. Y. 195.

Flandrow, Matter of, 20 Hun 36. AFFIRMED, 84 N. Y. 1.

Fleeman v. McKean, 25 Barb. 474. APPROVED, 28 Barb. 393.

Fleet v. Hegeman, 14 Wend. 42. OPPOSED, 11 Barb. 251.

Fleming v. People, 27 N. Y. 329. EXPLAINED, 81 N. Y. 532, 547.

Fleury v. Brown, 9 How. Pr. 217. FOLLOWED, 11 How. Pr. 395, 399.

Fleury v. Roger, 9 How. Pr. 215. FOLLOWED, 11 How. Pr. 395, 399.

Flike v. Boston, &c., R. R. Co., 53 N. Y. 549. APPROVED, 13 Vr. (N. J.) 471. DISTINGUISHED, 58 N. Y. 219; 64 Id. 10. FOLLOWED, 80 N. Y. 52; 81 Id. 516, 521.

Floyd v. Blake, 19 How. Pr. 542. OVERRULED, 43 Barb. 503. CONTRA, 29 How. Pr. 55, 67.

Flynn v. Equitable Life Ass. Soc., 67 N. Y. 500. SUSTAINED, 15 Hun 523.

Flynn v. Equitable Life Ins. Co., 78 N. Y. 568. FOLLOWED, 80 N. Y. 281, 294.

Flynn v. Hudson River R. R. Co., 6 How. Pr. 308. *See* 6 How. Pr. 315, 318.

Foersch v. Blackwell, 14 Barb. 607. APPLICABLE, 1 Flipp. (U. S.) 207.

Foley, Matter of, 39 How. Pr. 356. OVERRULED, Bright. Dig., vol. I., p. XXXVII.

Folger v. Fitzhugh, 41 N. Y. 228. REVIEWED, 34 Superior 31.

Folsom, Matter of, 56 N. Y. 60. DISTINGUISHED, 62 N. Y. 227.

Folts v. Huntley, 7 Wend. 210. REVIEWED, 7 Bradw. (Ill.) 478, 481 *n.*

Fonda v. Borst, 2 Abb. App. Dec. 155; 2 Keyes 48. APPLIED, 2 Abb. N. Cas. 386, 397. APPROVED, 2 Hun 651; 5 Thomp. & C. 175.

Fontaine v. Phœnix Ins. Co., 10 Johns. 58. DISTINGUISHED, 46 Superior 74.

Foot v. Ætna Life Ins. Co., 4 Daly 285. REVERSED, 61 N. Y. 571. *See* 59 N. Y. 557.

Foot v. Ætna Life Ins. Co., 61 N. Y. 571. FOLLOWED, 42 Superior 409.

Foot v. Brown, 8 Johns. 64. NOT LAW, 18 Barb. 425.

Foot v. Harris, 2 Abb. Pr. 454. DISTINGUISHED, 4 Hun 317.

Foot v. Lathroop, 41 N. Y. 358. FOLLOWED, 58 N. Y. 630.

Foote v. Beecher, 12 Hun 374. REVERSED, 20 Alb. L. J. 240.

Foote v. Beecher, 78 N. Y. 155. FOLLOWED, 23 Hun 139.

Foote v. Colvin, 3 Johns. 216. APPROVED, 11 Johns. 97.

Ford v. Babcock, 2 Sandf. 518. FOLLOWED, 10 How. Pr. 516, 523, 527.

Ford v. Cobb, 20 N. Y. 344. DISTINGUISHED, 40 N. Y. 288, 294.

Ford v. Ford, 41 How. Pr. 169; 10 Abb. Pr., N. S., 74. FOLLOWED, 8 Abb. N. Cas. 187.

Ford v. Harrington, 16 N. Y. 285. DISTINGUISHED, 11 Hun 257. FOLLOWED, 4 Thomp. & C. 153.

Ford v. Mayor, &c., of New York, 4 Hun 587. FOLLOWED, 40 Superior 523.

Ford v. Monroe, 20 Wend. 210. REVIEWED, 14 So. Car. 23.

Fordham v. Smith, 46 N. Y. 683. DISTINGUISHED, 52 N. Y. 439.

Forgey v. Sutliff, 5 Cow. 713. FOLLOWED, 16 Wend. 620. OVERRULED, 1 Hill 463.

Forman v. Forman, 17 How. Pr. 255. CONTRA, 14 How. Pr. 307; 15 Id. 32.

Forrest v. Forrest, 10 Barb. 46; 5 How. Pr. 125. FOLLOWED, 7 How. Pr. 389, 393; 4 Lans. 184. CONTRA, 25 How. Pr. 182, 183, 189.

Forrest v. Forrest, 3 Bosw. 661. FOLLOWED, 34 Superior 211. RE-AFFIRMED, 8 Bosw. 640.

Forrest v. Forrest, 3 Code 121. OVERRULED, 5 How. Pr. 125.

Forrest v. Forrest, 25 N. Y. 501. FOLLOWED, 61 Barb. 31; 4 Lans. 475; 3 Thomp. & C. 717.

Forrest v. Kissam, 7 Hill 463. CRITICISED, 43 N. Y. 512, 513.

Forrestville Baptist Soc. v. Farnham, 15 Hun 381. REVERSED, 82 N. Y. 618.

Forsyth v. Edminston, 11 How. Pr. 409. DISTINGUISHED, 63 N. Y. 201.

Forsyth v. Ferguson, 27 How. Pr. 67. CONSIDERED, 28 How. Pr. 232, 234, 235. *See* 63 Barb. 305.

Fort v. Burch, 5 Den. 187. DISTINGUISHED, 66 N. Y. 161.

Fort v. Gooding, 9 Barb. 388, 394. CONTRA, 15 How. Pr. 304.

Foshay v. Ferguson, 2 Den. 617. FOLLOWED, 39 Superior 384.

Foshay v. Ferguson, 5 Hill 154. EXPLAINED, 23 Hun 35, 36.

Foster v. Bryan, 26 How. Pr. 164. FOLLOWED, 26 How. Pr. 409, 410.

Foster v. Persch, 6 Daly 164. REVERSED, 68 N. Y. 400.

Foster v. Townshend, 12 Abb. Pr., N. S., 469; 6 Daly 136. REVERSED, 68 N. Y. 203.

Fougera v. Moissen, 16 Hun 237. HEAD-NOTE INCORRECT.*

Fowler v. Butterly, 44 Superior 148. AFFIRMED, 78 N. Y. 68.

Fowler v. Clearwater, 35 Barb. 143. FOLLOWED, 80 N. Y. 269, 271.

Fowler v. Griffin, 3 Sandf. 385. FOLLOWED, 22 Hun 269.

Fowler v. Huber, 7 Robt. 52. *See* 51 How. Pr. 289, 291.

Fowler v. Hunt, 10 Johns. 464. OVERRULED, 10 How. Pr. 516, 523. SUSTAINED, 2 Sandf. 518.

Fowler v. Poling, 2 Barb. 300. REVERSED, 6 Barb. 165.

Fowler v. Seaman, 40 N. Y. 592. DISTINGUISHED, 63 N. Y. 613.

Fox v. Dunckel, 55 Barb. 431. AFFIRMED, 6 Alb. L. J. 170.

Fox v. Dunckel, 38 How. Pr. 136. FOLLOWED, 41 How. Pr. 193, 197.

Fox v. Kidd, 77 N. Y. 489. FOLLOWED, 82 N. Y. 620.

Fox v. Nellis, 25 How. Pr. 144. CONSIDERED, 28 How. Pr. 232, 233, 237. FOLLOWED, 31 Id. 270. SUSTAINED, 63 Barb. 302.

Foy v. Troy, &c., R. R. Co., 24 Barb. 382. *See* 5 Daly 395.

Francis v. Ocean Ins. Co., 6 Cow. 404, 416. *See* 2 Wend. 64.

Frane v. Vantine, 16 Hun 528. DISTINGUISHED, 23 Hun 393, 394.

* 2d paragraph should read: "Held that these facts did not constitute a defence and that the answer should be stricken out as frivolous."

Frank v. Chemical Nat. Bank, 45 Superior 452. AFFIRMED, 84 N. Y. 209.

Franklin v. Osgood, 14 Johns. 527. COMMENTED ON, 3 Hill 361.

Franklin v. Underhill, 2 Johns. 374. LIMITED, 1 Hill 668.

Frantz v. Ireland, 66 Barb. 386. APPEARS TO BE OVERRULED, 68 N. Y. 459.

Frary v. Dakin, 7 Johns. 75. LIMITED, 11 Johns. 226.

Fraschieris v. Henriques, 6 Abb. Pr., N. S., 251. DISTINGUISHED, 23 Hun 114, 117.

Frazer v. Western, 1 Barb. Ch. 220. AFFIRMED, 3 Den. 610.

Frazer v. Western, 3 How. Pr. 235. CONTRA, 5 N. Y. 455.

Frazier v. McCloskey, 2 Thomp. & C. 266. REVERSED, 60 N. Y. 337.

Frecking v. Rolland, 53 N. Y. 422. FOLLOWED, 4 Thomp. & C. 448.

Fredricks v. Mayer, 1 Bosw. 227; 13 How. Pr. 566. EXPLAINED, 38 Superior 158. FOLLOWED, 21 How. Pr. 466.

Freeland v. McCullough, 1 Den. 414. REVERSED, 3 Den 589 *n*.

Freelove v. Cole, 41 Barb. 318. AFFIRMED, 41 N. Y. 619. DISTINGUISHED, 11 Hun 257.

Freeman v. Auld, 37 Barb. 587. OVERRULED, 44 N. Y. 50.

Freeman v. Auld, 44 Barb. 14. REVERSED, 44 N. Y. 50.

Freeman v. Auld, 44 N. Y. 50. DISTINGUISHED, 53 How. Pr. 195; 81 N. Y. 61.

Freeman v. Cram, 3 N. Y. 305. FOLLOWED, 23 Hun 361, 366.

Freeman v. Falconer, 45 Superior 383. FOLLOWED, 46 Superior 183.

Freeman v. Freeman, 43 N. Y. 34. APPROVED, 23 Hun 29, 32.

Freeman v. Fulton Fire Ins. Co., 14 Abb. Pr. 398. EXPLAINED, 1 Abb. Pr., N. S., 343, 345. *See* 45 Barb. 384.

Freeman v. Orser, 5 Duer 476. DISTINGUISHED, 2 Bosw. 92.

Frees v. Ford, 6 N. Y. 176. APPROVED, 5 Lans. 70.

Freeson v. Bissell, 63 N. Y. 168. DISTINGUISHED, 63 N. Y. 305.

Freiberg v. Branigan, 18 Hun 344. AFFIRMED, 82 N. Y. 627.

Fremont v. Stone, 42 Barb. 169, 170. REVIEWED, 43 Superior 506.

French v. Kennedy, 7 Barb. 452. DISTINGUISHED, 3 Hun 249.

French v. Powers, 80 N. Y. 146. FOLLOWED, 84 N. Y. 286.

French v. Shotwell, 5 Johns. Ch. 555. REVIEWED, 12 Otto (U. S.) 154; 1 Trans. Rep. 72.

Frink v. Morrison, 13 Abb. Pr. 80. APPROVED, 61 Barb. 361.

Frisbee v. Hoffnagle, 11 Johns. 50. OVERRULED *in part*, 3 Hill 171, 176.

Frith v. Crowell, 5 Barb. 209. CONTRA, 2 Sandf. 379.

Frost v. Hotchkiss, 1 Abb. N. Cas. 27. DISTINGUISHED, 5 Abb. N. Cas. 184, 189.

Frost v. M'Carger, 14 How. Pr. 131. APPROVED, 34 Barb. 20. CONTRA, 4 Duer 642; 11 How. Pr. 1.

Frost v. Yonkers Savings Bank, 70 N. Y. 553. EXPLAINED, 23 Hun 233, 236.

Frary v. Dakin, 8 Johns. 353. REVIEWED, 24 Hun 441, 442.

Fry v. Evans, 8 Wend. 530. FOLLOWED, 59 N. Y. 579.

Fry v. People, 21 Hun 282. AFFIRMED, 84 N. Y. 650.

Fudikar v. Guardian Mut. Life Ins. Co., 62 N. Y. 392. FOLLOWED, 82 N. Y. 27, 31.

Fuller v. Emeric, 2 Sandf. 626. CONTRA, 22 How. Pr. 500. RE-AFFIRMED, 1 Robt. 642.

Fuller v. Lewis, 13 How. Pr. 219. OVERRULED, 33 Superior 179.

Fuller v. Robinson, 10 Week. Dig. 487. REVERSED, Oct. 11th, 1881.

Fulton v. Whitney, 66 N. Y. 548. FOLLOWED, 81 N. Y. 308, 322, 327, 337.

Funck v. Merian, 2 Leg. Obs. 126. REVERSED, 4 Den. 110; 4 How. Pr. 368.

Furman Street, Matter of, 17 Wend. 649, 670. FOLLOWED, 56 Barb. 463.

Furniss v. Hone, 8 Wend. 247, 256. FOLLOWED, 38 Superior 148.

Furst v. Second Ave. R. R. Co., 72 N. Y. 542. DISTINGUISHED, 83 N. Y. 417.

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Gage v. Angell, 8 How. Pr. 335. CRITICISED, 3 Lans. 188.

Gage v. Dauchy, 28 Barb. 622. REVERSED, 34 N. Y. 293.

Gage v. Kendall, 15 Wend. 640. EXPLAINED, 45 N. Y. 728.

Gale, Matter of, 75 N. Y. 526. DISTINGUISHED, 82 N. Y. 161, 165.

Gale v. Miller, 44 Barb. 420. AFFIRMED, 54 N. Y. 536. *See* 1 Lans. 451.

Gallagher v. Egan, 2 Sandf. 742, 744. DISTINGUISHED, 58 N. Y. 112.

Gallup v. Babsen, 3 Hun 598. APPEAL DISMISSED, 68 N. Y. 615.

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Gandal v. Finn, 13 How. Pr. 418. DISAPPROVED, 15 How. Pr. 67, 69, 70.

Gantz, Matter of, 11 Week. Dig. 437. REVERSED, 12 Week. Dig. 449.

Gardiner v. Clark, 6 How. Pr. 449. CONCURRED IN, 14 How. 61, 63, 64, 66. CONTRA, 10 Id. 162, 164.

Gardiner v. Tyler, 3 Keyes 505. FOLLOWED, 34 Superior 274.

Gardner, Matter of, 6 Hun 67. CONTRA, 69 N. Y. 452.

Gardner v. Barney, 24 How. Pr. 467. DISTINGUISHED, 58 N. Y. 588.

Gardner v. Board of Health of New York, 10 N. Y. 409. REVIEWED, 2 Hun 268.

Gardner v. Commissioners of Highways of the Town of Warren, 10 How. Pr. 181. FOLLOWED, 2 Hun 70, 73.

Gardner v. Gardner, 7 Paige 112. QUALIFIED, 3 Redf. 497.

Gardner v. Luke, 12 Wend. 269. *See* 10 How. Pr. 188, 190.

Gardner v. McEwen, 19 N. Y. 123. DISSENTED FROM, 72 Mo. 185. DISTINGUISHED, 65 N. Y. 467.

Gardner v. Miller, 19 Johns. 188. FOLLOWED, 3 Redf. 371.

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Garfield v. Kirk, 65 Barb. 464, 465. FOLLOWED, 42 Superior 126.

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Garnsey v. Rogers, 47 N. Y. 233, 237. APPROVED, 82 N. Y. 385, 387, 391. FOLLOWED, 22 Hun 114; 82 N. Y. 431, 435; 84 Id. 514.

Garr v. Selden, 4 N. Y. 91. APPROVED, 31 Barb. 471.

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Garrison v. Howe, 17 N. Y. 458. EXPLAINED, 4 Robt. 635, 638.

Garrity v. Haynes, 53 Barb. 596. AFFIRMED, 6 Alb. L. J. 170.

Garvey, Matter of, 77 N. Y. 523. DISTINGUISHED, 81 N. Y. 139, 141.

Garvey v. McDevitt, 72 N. Y. 556, 563. DISTINGUISHED, 23 Hun 299, 303.

Garwood v. New York Central, &c., R. R. Co., 17 Hun 356. AFFIRMED, 83 N. Y. 400.

Gaskin v. Anderson, 55 Barb. 259. AFFIRMED, 55 Barb. 262.

Gaskin v. Meek, 42 N. Y. 188. DISTINGUISHED, 9 Hun 191; 68 N. Y. 384.

Gates v. Brower, 9 N. Y. 205. DISTINGUISHED, 63 N. Y. 613.

Gates v. Green, 4 Paige 354. REVIEWED, 25 Kan. 689.

Gates v. McKee, 13 N. Y. 232. REAFFIRMED, 24 N. Y. 64.

Gates v. Preston, 41 N. Y. 113. DISTINGUISHED, 83 N. Y. 197.

Gates v. Ward, 17 Barb. 424. OVERRULED, 5 Daly 17. *See* 11 How. Pr. 148.

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Gay v. Ballou, 4 Wend. 403. OVERRULED, 11 Barb. 224.

Gazeaux v. Mali, 25 Barb. 578. APPROVED, 38 Barb. 445.

Gazley v. Price, 16 Johns. 267. OVERRULED, 14 Barb. 418. QUESTIONED, 4 N. Y. 396.

Gedney v. Earl, 12 Wend. 98. EXPLAINED, 7 Barb. 297.

Geery v. Cockroft, 33 Superior 146. FOLLOWED, 36 Superior 50.

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Genet v. Mayor, &c., of New York, 76 N. Y. 625. DISTINGUISHED, 60 How. Pr. 488.

Genet v. Sawyer, 61 Barb. 211. FOLLOWED, 5 Hun 539; 7 Id. 440.

Gerard v. Prouty, 34 Barb. 454. AFFIRMED, 41 N. Y. 619.

Geraty v. Kein, 13 Hun 313. REVERSED, 20 Alb. L. J. 274.

Gere v. Gundlach, 57 Barb. 13. DISTINGUISHED, 84 N. Y. 618.

Gere v. Supervisors of Cayuga Co., 7 How. Pr. 255. *See* 12 How. Pr. 50, 54.

German Bank v. Edwards, 53 N. Y. 541. DISTINGUISHED, 9 Hun 284, 285.

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Germond v. Germond, 6 Johns. Ch. 347. DISTINGUISHED, 61 N. Y. 403.

Germond v. Jones, 2 Hill 569. DISTINGUISHED, 4 Redf. 156. EXPLAINED, 50 N. Y. 436.

Gerould v. Wilson, 16 Hun 530. AFFIRMED, 81 N. Y. 573.

Getty v. Binsse, 49 N. Y. 385. APPROVED, 1 Thomp. & C. 646. DISTINGUISHED, 4 Hun 526.

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Gilbert v. Crawford, 46 How. Pr. 222. OVERRULED, 65 Barb. 455.

Gilbert v. Knox, 52 N. Y. 125. REVIEWED, 4 Redf. 261.

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Gilbert v. Sheldon, 13 Barb. 623. QUESTIONED, 36 Barb. 446.

Gilbert v. Wiman, 1 N. Y. 550. EXPLAINED, 83 N. Y. 61.

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Gillespie v. Torrance, 25 N. Y. 306; 4 Bosw. 36. Distinguished, 60 N. Y. 150. Followed, 30 Wis. 642.

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Gillett v. Stanley, 1 Hill 121. Overruled, 2 Barb. 340.

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Gillihan v. Spratt, 8 Abb. Pr., n. s., 13. Reviewed, 3 Daly 440; 41 How. Pr. 27.

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Goddard v. Merchants' Bank, 4 N. Y. 147. Criticised, 7 Abb. Pr., n. s., 149.

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Goll v. Hinton, 8 Abb. Pr. 120. Approved, 43 Barb. 187. Reconciled, 8 Abb. Pr., n. s., 369, 379.

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Gordon v. Gaffey, 11 Abb. Pr. 1. Approved, 29 How. Pr. 67.

Gordon v. Hostetter, 37 N. Y. 99. Followed, 37 Superior 395.

Gorham v. Gale, 7 Cow. 739. Reviewed, 71 Me. 417.

Goshen, &c., Turnpike Road v. Hurtin, 9 Johns. 217, 218. Distinguished, 11 Johns. 100.

Gotendorf v. Goldschmitt, MSS. Opin., 1880. Distinguished, 1 Civ. Pro. 157.

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Gould v. McCarty, 11 N. Y. 575. *See* 13 How. Pr. 427.

Gould v. Moring, 28 Barb. 444. DISAPPROVED, 8 Hun 111.

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Gould v. Town of Oneonta, 71 N. Y. 298. APPROVED, 83 N. Y. 106.

Gould v. Town of Sterling, 23 N. Y. 456. FOLLOWED, 59 Barb. 446; 1 Thomp. & C. 134.

Goulding v. Davidson, 26 N. Y. 604. DISTINGUISHED, 1 Lans. 101.

Gouverneur v. Lynch, 2 Paige 300. OVERRULED, 61 N. Y. 89.

Governors of Alms House, &c., v. American Art Union, 7 N. Y. 228. REVIEWED, 72 Mo. 164.

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Grace v. Wilber, 10 Johns. 453. REVERSED, 12 Johns. 68.

Graduates of Columbia College, Matter of, 11 Abb. Pr. 301. DISTINGUISHED, 67 N. Y. 121.

Graham v. First Nat. Bank of Norfolk, 20 Hun 326. AFFIRMED, 84 N. Y. 393.

Graham v. Machado, 6 Duer 514. CONTRA, 2 Abb. Pr. 402.

Graham v. Milliman, 4 How. Pr. 435. *See* 5 How. Pr. 435, 436.

Graham v. Phœnix Ins. Co., 12 Hun 446. *See* 17 Hun 156.

Graham v. Stone, 6 How. Pr. 15. APPROVED, 2 Robt. 715. FOLLOWED, 6 How. Pr. 401. OVERRULED, 11 N. Y. 350. CONTRA, 10 How. Pr. 81.

Gram v. Cadwell, 5 Cow. 489. DISTINGUISHED, 82 N. Y. 591, 596. *See* Id. 599.

Gram v. Prussia, &c., German Society, 36 N. Y. 161. FOLLOWED, 4 Hun 225; 6 Thomp. & C. 545.

Grand Rapids, &c., R. R. Co. v. Sanders, 54 How. Pr. 214. REVERSED, 17 Hun 552.

Grand Trunk R'y Co. v. Edwards, 56 Barb. 408. AFFIRMED, 6 Alb. L. J. 170.

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Gray v. City of Brooklyn, 50 Barb. 365. AFFIRMED, 41 N. Y. 619.

Gray v. Fiske, 53 N. Y. 630. FOLLOWED, 48 How. Pr. 124; 4 Thomp. & C. 546, 580.

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Green v. Edick, 66 Barb. 564. REVERSED, 56 N. Y. 613.

Green v. Homestead Fire Ins Co., 17 Hun 467. AFFIRMED, 82 N. Y. 517.

Green v. Hudson River R. R. Co., 28 Barb. 9. AFFIRMED, 28 Barb. 22 *n.*

Green v. Kennedy, 46 Barb. 16. AFFIRMED, 6 Alb. L. J. 197.

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Green v. Patchin, 13 Wend. 293. EXPLAINED, 2 Hill 387.

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Greene v. Bates, 7 How. Pr. 296. *See* 13 How. Pr. 149.

Greene v. Martine, 21 Hun 136. AFFIRMED, 84 N. Y. 648.

Greene v. Mayor, &c., of New York, 3 Thomp. & C. 753. REVERSED, 60 N. Y. 303.

Greene v. Mayor, &c., of New York, 60 N. Y. 303. ABROGATED *by statute*, 82 N. Y. 131, 135, 137, 141. DISTINGUISHED, 63 N. Y. 538.

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Greenfield v. People, 11 Week. Dig. 419. AFFIRMED, 12 Week. Dig. 355.

Greenleaf v. Mumford, 50 Barb. 543. *See* 50 N. Y. 84.

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Griffin v. Clark, 33 Barb. 46. FOLLOWED, 3 Thomp. & C. 183 *n*.

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Griffith v. Reed, 21 Wend. 502. COMMENTED ON, 26 N. Y. 542. *See* 2 Den. 218.

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Grim v. Phœnix Ins. Co., 13 Johns. 451. OVERRULED, 13 Barb. 234.

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Guilford, Town of, v. Supervisors of Chenango Co., 13 N. Y. 143. DISTINGUISHED, 23 Hun 327.

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Gurney v. Sharp, 17 Abb. Pr. 410. AFFIRMED, 41 N. Y. 619.

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Hackett v. Belden, 10 Abb. Pr., n. s., 123; 40 How. Pr. 289. Affirmed, 47 N. Y. 624.

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Haight v. Hayt, 19 N. Y. 464. Approved, 56 Barb. 59. Followed, 24 Hun 206.

Haight v. Holcomb, 16 How. Pr. 160. Affirmed, 16 How. Pr. 173.

Haight v. Holcomb, 16 How. Pr. 173. Followed, 24 How. Pr. 409, 415, 416, 417.

Haight v. Prince, 2 Code 95. Approved, 3 Code 1.

Hale v. Hayes, 48 Barb. 574, 576. Re-argument, 6 Alb. L. J. 197.

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Hale v. Sweet, 40 N. Y. 97. Distinguished, 24 Hun 579.

Hall v. City of Buffalo, 1 Keyes 193. Distinguished, 71 N. Y. 328.

Hall v. Emmons, 2 Sweeny 396. *Sp. Term,* Affirmed, 6 Alb. L. J. 171. *Gen. Term,* Reversed, 9 Abb. Pr., n. s., 370.

Hall v. Gird, 7 Hill 586. Commented on, 2 Barb. Ch. 306.

Hall v. Hall, 13 Hun 306. Affirmed, 81 N. Y. 130.

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Hall v. Hodskins, 30 How. Pr. 15. Followed, 35 How. Pr. 2, 5. *See* 34 Id. 418, 420

Hall v. Merrill, 5 Bosw. 266. Followed. 35 Superior 34.

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Hall v. Nelson, 23 Barb. 88, 98. Approved, 6 Abb. Pr. 113, 120. Disapproved, Id. 83, 85; 26 Barb. 218. Overruled, 17 How. Pr. 35.

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Hall v. Siegel, 13 Abb. Pr., n. s., 178; 7 Lans. 206. Affirmed, 53 N. Y. 607.

Hall v. Suydam, 6 Barb. 83. Followed, 58 Barb. 431.

Hallenbeck v. Garner, 20 Wend. 22. Followed, 60 How. Pr. 446.

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Haller, Matter of, 3 Abb. N. Cas. 65. Approved, 61 How. Pr. 22.

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Hallock v. De Munn, 2 Thomp. & C. 350. Distinguished, 2 Hun 423.

Hallock v. Miller, 2 Barb. 630. Followed, 60 How. Pr. 322.

Halsey v. Sinsebaugh, 15 N. Y. 485. Followed, 45 How. Pr. 450.

Ham v. Mayor, &c., of New York, 37 Superior 458. *See* 44 Superior 53.

Ham v. Mayor, &c., of New York, 70 N. Y. 459, 463. Distinguished, 83 N. Y. 534.

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Hamilton v. Third Avenue R. R. Co., 53 N. Y. 25. Explained, 56 N. Y. 299. Followed, 48 How. Pr. 52.

Hamilton v. Van Rensselaer, 43 N. Y. 244. Followed, 44 N. Y. 678. Not in point, 9 Abb. N. Cas. 377.

Hamilton, &c., Plank Road Co. v. Rice, 7 Barb. 157. Distinguished, 81 N. Y. 600, 614.

Hammond v. Harris, 2 How. Pr. 115. CONTRA, 2 How. Pr. 21.

Hammond v. Hudson River Iron, &c., Co., 20 Barb. 378. EXPLAINED, 8 Mo. App. 259.

Hammond v. Terry, 3 Lans. 186, 188. OVERRULED *by implication*, (67 N. Y. 51) 22 Hun 52.

Hand v. Kennedy, 45 Superior 385. AFFIRMED, 83 N. Y. 149.

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Hanlon v. Supervisors of Westchester County, 57 Barb. 383. CONTRA, 8 Hun 98.

Hanmer v. Wilsey, 17 Wend. 91. EXPLAINED, 6 Hill 10.

Hann v. Van Voorhis, 15 Abb. Pr., N. S., 79. DISTINGUISHED, 1 Abb. N. Cas. 37. OVERRULED, 70 N. Y. 270.

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Hanover County v. Sheldon, 9 Abb. Pr. 240. CONTRA, 11 Abb. Pr. 355; 21 How. Pr. 114; 42 Id. 319 *n.*

Hanover Fire Ins. Co. v. Tomlinson, 37 Superior 221. APPEAL DISMISSED, 58 N. Y. 651.

Harbeck v. Vanderbilt, 20 N. Y. 395, 398. APPROVED, 72 Mo. 359.

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Harmony v. Bingham, 12 N. Y. 99. FOLLOWED, 1 Thomp. & C. 559.

Harmony Ins. Co., Matter of, 9 Abb. Pr., N. S., 347. FOLLOWED, 4 Hun 127.

Harp v. Osgood, 2 Hill 216. DISTINGUISHED, 53 Barb. 387; 80 N. Y. 210.

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Harrington v. Higgins, 17 Wend. 532. COMMENTED ON, 5 Hill 107.

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Harris v. Burdett, 43 Superior 57. *See* 73 N. Y. 136; 43 Superior 81.

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Harrison v. Glover, 4 Hun 121. *See* 72 N. Y. 451.

Harrison v. Stevens, 7 Wend. 519. APPLIED, 4 How. Pr. 30.

Harrold v. New York Elevated R. R. Co., 21 Hun 268. FOLLOWED, 60 How. Pr. 144.

Harrower v. Heath, 19 Barb. 331. DISTINGUISHED, 64 Barb. 431.

Hart v. City of Brooklyn, 36 Barb. 226. OVERRULED, 3 Abb. App. Dec. 85.

Hart v. Hudson River Bridge Co., 80 N. Y. 622. FOLLOWED, 83 N. Y. 574.

Hart v. Hudson River Bridge Co., 84 N. Y. 56. FOLLOWED, 24 Hun 38.

Hart v. Mayor, &c., of Albany, 9 Wend. 571. DISTINGUISHED, 64 N. Y. 620. FOLLOWED, 7 Bradw. (Ill.) 603. REVIEWED, 98 Ill. 311.

Hart v. Rensselaer and Saratoga R. R. Co., 8 N. Y. 37. DISTINGUISHED, 53 N. Y. 370.

Hart v. Ten Eyck, 2 Johns. Ch. 62. *See* 1 Cow. 743.

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Harvey v. Skillman, 22 Wend. 571. EXPLAINED, 6 Hill 386.

Hasbrouck v. Hasbrouck, 37 Barb. 579. REVERSED, 25 How. Pr. 592 *n.*

Hastings v. Westchester Fire Ins. Co., 73 N. Y. 141. DISTINGUISHED, 75 N. Y. 12. REVIEWED, 97 Ill. 455, 459.

Haswell v. Goodchild, 12 Wend. 373. EXPLAINED, 1 Hill 277.

Hatch v. Coleman, 29 Barb. 201. DISTINGUISHED, 8 Mo. App. 205.

Hatch v. Mann, 15 Wend. 44. DISTINGUISHED, 53 Barb. 387.

Hatch v. Mayor, &c., of New York, 45 Superior 599. REVERSED, 82 N. Y. 436.

Hatch v. Weyburn, 8 How. Pr. 163. OVERRULED, 8 How. Pr. 313, 316, 318; 11 Id. 446, 448.

Hatfield v. Lasher, 17 Hun 23. AFFIRMED, 81 N. Y. 246.

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Hathaway v. Howell, 54 N. Y. 97. DISTINGUISHED, 7 Hun 412, 421.

Hathaway v. Town of Cincinnatus, 62 N. Y. 434, 447. APPROVED, 83 N. Y. 106.

Hathaway v. Town of Homer, 5 Lans. 267. REVERSED, 54 N. Y. 655.

Hathaway v. Warren, 44 How. Pr. 161. CONTRA, 43 How. Pr. 481.

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Haviland v. White, 7 How. Pr. 154. FOLLOWED, 27 How. Pr. 158, 159, 160. CONTRA, 7 Id. 166.

Hawks v. Swett, 4 Hun 146; 6 Thomp. & C. 529. REVERSED, 66 N. Y. 206.

Hawks v. Winans, 42 Superior 451. AFFIRMED, 74 N. Y. 609.

Hawley v. Clowes, 2 Johns. Ch. 122. FOLLOWED, 51 Wis. 281.

Hawley v. James, 16 Wend. 61, 134, 171. FOLLOWED, 23 Hun 299, 303.

Hawley v. Northern Central R'y Co., 17 Hun 115. AFFIRMED, 82 N. Y. 370.

Hawley v. Ross, 7 Paige 103. NOT FOLLOWED, 61 How. Pr. 180.

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Hay v. Cohoes Company, 2 N. Y. 159. APPLIED, 46 Superior 169, 170, 171. DISTINGUISHED, 51 N. Y. 479; 55 Id. 558; 61 Id. 185. FOLLOWED, 13 Vr. (N. J.) 191.

Hayden v. Agent of the State Prison at Auburn, 1 Sandf. Ch. 195. DISTINGUISHED, 62 N. Y. 94.

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Haye v. Robertson, 38 Superior 59. CRITICISED, 59 How. Pr. 495; DENIED, 22 Hun 185.

Hayner v. American Popular Life Ins. Co., 35 Superior 266. MODIFIED, 36 Superior 211.

Haynes v. Rudd, 17 Hun 477. REVERSED, 83 N. Y. 251.

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Hayward v. Liverpool, &c., Fire and Life Ins. Co., 7 Bosw. 385. CONSIDERED OVERRULED, 19 Abb. Pr. 116, 119.

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Hazard v. Fiske, 18 Hun 277. AFFIRMED, 83 N. Y. 287.

Hazard v. Hanford, 2 Hun 45. CRITICISED, 4 Redf. 99.

Hazard v. Hefford, 2 Hun 445. CRITICISED, 4 Redf. 58, 127.

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Heard v. City of Brooklyn, 60 N. Y. 242. RE-AFFIRMED, 68 N. Y. 1, 2.

Hearsey v. Pruyn, 7 Johns. 179. FOLLOWED, 37 Superior 3.

Heath, Exp., 3 Hill 42. COMMENTED ON, 5 Hill 616.

Hecker v. New York Balance Dock Co., 13 How. Pr. 549. REVERSED, 24 Barb. 215.

Heckmann v. Pinckney, 8 Daly 466. AFFIRMED, 81 N. Y. 211.

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Heeney, In re, 2 Barb. Ch. 326. DISTINGUISHED, 23 Hun 641, 642.

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Hegeman v. Western R. R. Corporation, 13 N. Y. 9. DISTINGUISHED, 3 Thomp. & C. 255, 256. CONTRA, 26 N. Y. 103.

Height v. People, 50 N. Y. 392. *See* 46 How. Pr. 121.

Heishon v. Knickerbocker Ins. Co., 45 Superior 34. REVERSED, 77 N. Y. 278.

Helms v. Goodwill, 4 Thomp. & C. 645. REVERSED, 64 N. Y. 642.

Hempstead v. Weed, 20 Johns. 64, 73. FOLLOWED, 60 How. Pr. 508.

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Henderson v. Jackson, 9 Abb. Pr., N. S., 293; 2 Sweeny 324. OVERRULED, 5 Hun 61.

Henderson v. Marvin, 31 Barb. 297. DISTINGUISHED, 66 N. Y. 332.

Henderson v. Sturgis, 1 Daly 336. FOLLOWED, 8 Abb. N. Cas. 426.

Hendricks v. Bloodgood, 18 Wend. 670. EXPLAINED, 2 Hill 382.

Hendricks v. Judah, 2 Cai. 24, 25. FOLLOWED, 11 Bankr. Reg. 67.

Hendricks v. Stark, 37 N. Y. 106. FOLLOWED, 43 Superior 320.

Hendrickson v. People, 1 Park. Cr. 406. AFFIRMED, 10 N. Y. 13.

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Hennequin v. Clews, 77 N. Y. 427. DISTINGUISHED, 61 How. Pr. 431. EXPLAINED, 24 Hun 477. FOLLOWED, 23 Id. 445, 448.

Hennessey v. Patterson, 10 Week. Dig. 493. AFFIRMED, 12 Week. Dig. 342.

Hennessy v. Wheeler, 51 How. Pr. 457. REVERSED, 69 N. Y. 271.

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Herrick v. Carman, 12 Johns. 159. DISAPPROVED, 3 Hill 233. EXPLAINED, 7 Id. 416.

Herring v. Hoppock, 15 N. Y. 409. APPROVED, 13 Vr. (N. J.) 312.

Herrman v. Merchants' Ins. Co., 44. Superior 444. AFFIRMED, 81 N. Y. 184.

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Heywood v. City of Buffalo, 14 N. Y. 534. FOLLOWED, 3 Thomp. & C. 354.

Hibbard v. Burwell, 11 How. Pr. 572. CONTRA, 6 How. Pr. 32; 8 Id. 285; 12 Id. 435.

Hibbard v. N. Y. and Erie R. R. Co., 15 N. Y. 467. EXPLAINED, 46 N. Y. 23, 29. REVIEWED, 47 N. Y. 126.

Hibernia Nat. Bank v. Lacombe, 21 Hun 166. AFFIRMED, 84 N. Y. 368.

Hibernia Nat. Bank v. Lacombe, 10 Week. Dig. 168. AFFIRMED, 12 Week. Dig. 138.

Hickok v. Trustess of Plattsburg, 15 Barb. 427. REVERSED, 16 N. Y. 161 *n.*

Hickox v. Fay, 36 Barb. 9. NOT FOLLOWED, 1 Hun 352.

Hicks, Matter of, 6 Leg. Obs. 113. REVERSED, 4 How. Pr. 316.

Hicks v. Dorn, 1 Lans. 81. AFFIRMED, 9 Abb. Pr., N. S., 47; 42 N. Y. 47.

Hicks v. Dorn, 42 N. Y. 47. APPROVED, 56 How. Pr. 114.

Hicks v. Knickerbacker, 2 Wend. 288. APPLIED, 4 How. Pr. 30.

Hicks v. Whitmore, 12 Wend. 548. DISTINGUISHED, 63 N. Y. 651.

Hildebrand v. People, 1 Hun 19; 3 Thomp. & C. 654. FOLLOWED, 6 Hun 654.

Hildebrant v. Crawford, 6 Lans. 502. AFFIRMED, 65 N. Y. 107.

Hildreth v. Ellice, 1 Cai. 192. FOLLOWED, 23 Hun 37, 39.

Hildreth v. Shepard, 65 Barb. 265, 270. DISAPPROVED, 2 Abb. N. Cas. 303. *See* 13 Hun 407.

Hill v. Newichawanick Co., 8 Hun 459; 71 N. Y. 593. DISTINGUISHED, 84 N. Y. 179.

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Hill v. Supervisors of Livingston Co., 12 N. Y. 52. CONSIDERED, 45 N. Y. 685.

Hinckley v. Smith, 51 N. Y. 21. FOLLOWED, 1 Hun 121; 3 Thomp. & C. 106.

Hinds v. Canandaigua, &c., R. R. Co., 10 How. Pr. 487. FOLLOWED, 12 How. Pr. 136, 137.

Hinds v. Doubleday, 21 Wend. 223, 227. FOLLOWED, 60 How. Pr. 509.

Hinds v. Myers, 4 How. Pr. 356. APPROVED, 23 Hun 82, 85. FOLLOWED, 10 How. Pr. 142.

Hinds v. Tweddle, 7 How. Pr. 278. *See* 7 How. Pr. 316.

Hinman v. Bergen, 5 How. Pr. 245, 246. CONTRA, 4 How. Pr. 246.

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Hinton v. Locke, 5 Hill 437. FOLLOWED, 5 Lans. 235.

Hitchcock v. Carpenter, 9 Johns. 344. OVERRULED, 8 Barb. 406. *See* 1 N. Y. 259.

Hitchcock v. Northwestern Ins. Co., 26 N. Y. 68. DISTINGUISHED, 2 Hun 541. FOLLOWED, 43 How. Pr. 463.

Hoag v. Lamont, 60 N. Y. 96. COMMENTED ON, 7 Daly 197. *See* 11 Alb. L. J. 115.

Hoagland v. Miller, 16 Abb. Pr. 103. NOT FOLLOWED, 8 Hun 625.

Hodges v. City of Buffalo, 2 Den. 110. FOLLOWED, 45 Superior 373.

Hodges v. Tennessee Fire and Marine Ins. Co., 8 N. Y. 416. EXPLAINED, 20 N. Y. 40.

Hodgkin v. Atlantic, &c., R. R. Co., 5 Abb. Pr., N. S., 73. AFFIRMED, 3 Daly 70. FOLLOWED, 12 Abb. Pr., N. S., 308, 309; 4 Thomp. & C. 555. CONTRA, 14 Abb. Pr., N. S., 183, 186.

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Hodgkins v. Montgomery County Mutual Ins. Co., 34 Barb. 213. DOUBTED, 4 Thomp. & C. 503.

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Hollister v. Livingston, 9 How. Pr. 140. OVERRULED, 1 Abb. N. Cas. 477; 22 How. Pr. 230, 232; 52 Id. 288.

Holloway v. Stephens, 1 Hun 308; 2 Thomp. & C. 562. APPEAL DISMISSED, 58 N. Y. 670.

Holmes v. Davis, 21 Barb. 265. REVERSED, 19 N. Y. 488.

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Holmes v. Tremper, 20 Johns. 29. FOLLOWED, 1 Tenn. Ch. 28.

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Holtsinger v. Nat. Corn Exchange Bank, 37 How. Pr. 203. AFFIRMED, 6 Alb. L. J. 171.

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Hone v. Henriguez, 13 Wend. 240. DISTINGUISHED, 61 How. Pr. 72; 84 N. Y. 531.

Hone v. Mut. Safety Ins. Co., 1 Sandf. 137. FOLLOWED, *in effect*, 56 N. Y. 104.

Hone v. Van Shaick, 7 Paige 221. FOLLOWED, 60 How. Pr. 198.

Honegsberger v. Second Ave. R. R. Co., 1 Keyes 570. DISAPPROVED, 65 Barb. 92.

Hooker v. Rogers, 6 Cow. 577. FOLLOWED, 3 How. Pr. 50.

Hooker v. Vandewater, 4 Den. 349. DISTINGUISHED, 66 N. Y. 293.

Hooley v. Gieve, 7 Abb. N. Cas. 271. AFFIRMED, 73 N. Y. 599.

Hopkins v. Everett, 6 How. Pr. 159. OVERRULED, 9 How. Pr. 481, 482.

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Hopson, Matter of, 40 Barb. 34. CONTRA, 25 How. Pr. 380.

Horn v. Keteltas, 46 N. Y. 605. DISTINGUISHED, 23 Hun 611, 614; 55 N. Y. 639.

Hornbeck v. Westbrook, 9 Johns. 73. FOLLOWED, 12 Johns. 201.

Hornfager v. Hornfager, 6 How. Pr. 13. FOLLOWED, 20 Minn. 175.

Horton v. Garrison, 23 Barb. 176. *See* 14 How. Pr. 302, 305 *n.*

Horton v. Town of Thompson, 71 N. Y. 513, 520. CRITICISED AND DISAPPROVED, 2 Trans. Rep. 767, 768; 13 Otto (U. S.) 817, 818.

Hossack v. Heyerdahl, 38 Superior 391. APPEAL DISMISSED, 60 N. Y. 634.

Houghton v. Ault, 16 How. Pr. 77, 78. APPROVED, 16 How. Pr. 552, 559, 560.

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House v. McCormick, 57 N. Y. 310, 320. REVIEWED, 46 Superior 325.

Hoyt v. Hoyt, 17 Hun 192. AFFIRMED, 24 Hun VI.

Hover v. Barkhoof, 44 N. Y. 113, DISTINGUISHED, 1 Hun 572; 23 Id. 133.

Hovey v. Hill, 3 Lans. 167. DISTINGUISHED, 65 N. Y. 39.

Hovey v. Rubber-Tip Pencil Co., 50 N. Y. 335. FOLLOWED, 38 Superior 79.

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Howard Ins. Co. v. Scribner, 5 Hill 298. OVERRULED, 50 N. Y. 390.

Howe v. Deuel, 43 Barb. 504. APPROVED, 52 Barb. 668.

Howe v. Hasbrouck, 1 How. Pr. 67. APPROVED, 23 Hun 407.

Howe v. Lloyd, 9 Abb. Pr., N. S., 257. APPROVED, 3 Abb. N. Cas. 95 *n.*

Howe v. Savory, 49 Barb. 403. REVERSED, *unless plaintiff deduct, &c.*, 51 N. Y. 631.

Howe Machine Co. v. Farrington, 16 Hun 591. AFFIRMED, 82 N. Y. 121.

Howe Machine Co. v. Pettibone, 12 Hun 657. APPEAL DISMISSED, 74 N. Y. 68.

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Hoyt v. American Exchange Bank, 8 How. Pr. 89. *See* 13 How. Pr. 542, 545.

Hoyt v. Bennett, 58 Barb. 529; 1 Tuck. 491. REVERSED, 50 N. Y. 538.

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Hubbell v. Moulson, 53 N. Y. 225, 228, 229. APPROVED, 22 Hun 531.

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Hudson River R. R. Co. v. Outwater, 3 Sandf. 689. DISTINGUISHED, 8 Hun 36.

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Hulbert v. New York Central R. R. Co., 40 N. Y. 145. FOLLOWED, 42 Superior 156.

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Hun v. Cary, 59 How. Pr. 439. AFFIRMED, 82 N. Y. 65.

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Hunt v. Meacham, 6 How. Pr. 400. CONTRA, 5 Sandf. 650.

Hunt v. Middlebrook, 14 How. Pr. 300. CONTRA, 14 How. Pr. 357.

Hunt v. Singer, 1 Daly 209. AFFIRMED, 41 N. Y. 620.

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Hurlbut v. Post, 1 Bosw. 28. FOLLOWED, 42 Superior 8.

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Ingersoll v. Bostwick, 22 N. Y. 425. FOLLOWED, 5 Hun 234, 235.

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Ingersoll v. Mangam, 24 Hun 202. AFFIRMED, 84 N. Y. 622.

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Mahan, Matter of, 81 N. Y. 621. FOLLOWED, 82 N. Y. 142, 143. DISTINGUISHED, 83 Id. 434. SUSTAINED, 84 Id. 603.

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Marsh, Matter of, 21 Hun 582. AFFIRMED, 83 N. Y. 431. FOLLOWED, 22 Hun 608.

Marsh v. Dodge, 6 Thomp. & C. 568. REVERSED, 66 N. Y. 533.

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Marsh v. Potter, 30 Barb. 506. APPROVED, 43 Barb. 292.

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Marshall v. Peters, 12 How. Pr. 218. CRITICISED, 55 How. Pr. 376, 380.

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Marston v. Swett, 6 Thomp. & C. 534, REVERSED, 66 N. Y. 206.

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Mason v. Brown, 6 How. Pr. 481. REVIEWED, 8 Abb. N. Cas. 248, 250.

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Mechanics', &c., Bank of Albany v. Rider, 5 How. Pr. 401. OBSOLETE, *see act of* 1851.

Mechanics', &c., Bank of Jersey City v. Dakin, 50 Barb. 587; 28 How. Pr. 502. REVIEWED, 3 Hun 2. *See* 50 N. Y. 80.

Mechanics', &c., Bank of Jersey City v. Dakin, 51 N. Y. 519. AUTHORITY OVERTHROWN IN, 50 N. Y. 83. DISTINGUISHED, 5 Daly 540. NOT FOLLOWED, 24 Hun 259. CONTRA, 12 Hun 584.

Mechanics', &c., Nat. Bank v. Crow, 60 N. Y. 85. DISTINGUISHED, 81 N. Y. 218, 225; 84 Id. 135.

Mechanics', &c., Savings Inst. v. Roberts, 1 Abb. Pr. 381. DISTINGUISHED, 23 Hun 134, 137.

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Mentz v. Second Ave. R. R. Co., 2 Robt. 356. AFFIRMED, 41 N. Y. 619.

Mercein v. People, 25 Wend. 64. DISTINGUISHED, 1 Hun 28; 56 N. Y. 192. FOLLOWED, 3 Thomp. & C. 191.

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Merchants' Bank v. Thompson, 55 N. Y. 7. FOLLOWED, 23 Hun 134, 136.

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Merchants' Exchange Nat. Bank v. Commercial Warehouse Co. of N. Y., 49 N. Y. 635, 636. DISTINGUISHED, 60 N. Y. 612. FOLLOWED, 22 Hun 218.

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Metcalf v. Garlinghouse, 40 How. Pr. 50. AFFIRMED, 6 Alb. L. J. 173.

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Meyer v. Peck, 33 Barb. 532. AFFIRMED, 26 How. Pr. 601.

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Middletown, Town of, v. Rondout, &c., R. R. Co., 12 Abb. Pr., N. S., 276; 43 How. Pr. 144. AFFIRMED, 43 How. Pr. 481.

Middletown, Town of, v. Rondout, &c., R. R. Co., 43 How. Pr. 481. CONTRA, 44 How. Pr. 161.

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Mier v. Cartledge, 8 Barb. 75. CRITICISED, 6 How. Pr. 360 *n.* FOLLOWED, 11 Id. 395, 399. QUESTIONED, 9 Id. 217, 218.

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Mills v. New York, &c., R. R. Co., 2 Robt. 326. AFFIRMED, 41 N. Y. 619.

Mills v. Thursby, 1 Code 121. OVERRULED, 8 How. Pr. 440.

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Minick v. City of Troy, 19 Hun 253. AFFIRMED, 83 N. Y. 514.

Minier v. Minier, 4 Lans. 421. CONTRA, 7 Lans. 29.

Minnesota Central R'y Co. v. Morgan, 52 Barb. 217. AFFIRMED, 6 Alb. L. J. 173.

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Moore v. Cockroft, 9 How. Pr. 479. FOLLOWED, 12 Abb. Pr. 225; 20 How. Pr. 488, 489.

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Moore v. Moore, 47 Barb. 257. AFFIRMED, 6 Alb. L. J. 173.

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Morey v. Webb, 65 Barb. 22. AFFIRMED, 58 N. Y. 350.

Morgan v. Avery, 7 Barb. 656. AFFIRMED, 7 Barb. 664 *n.* APPROVED, 13 Barb. 412. CONTRA, 7 How. Pr. 360, 364.

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Morse v. Keyes, 6 How. Pr. 18. *See* 8 How. Pr. 75.

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Mosher v. Hotchkiss, 3 Keyes 161. FOLLOWED, 38 Superior 441. REVIEWED, 9 Abb. N. Cas. 378.

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Moss v. Averill, 10 N. Y. 459. FOLLOWED, 42 Superior 1.

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Moss v. Priest, 19 Abb. Pr. 314. DISTINGUISHED, 23 Hun 114, 116.

Mott v. Consumers' Ice Co., 52 How. Pr. 148. AFFIRMED, 52 How. Pr. 244.

Mott v. Hicks, 1 Cow. 513. DISTINGUISHED, 8 Mo. App. 378.

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Mott v. Small, 20 Wend. 212, 214. AFFIRMED, 22 Wend. 403.

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Moulton v. Beecher, 52 How. Pr. 230. AFFIRMED, 53 How. Pr. 86.

Moulton v. Norton, 5 Barb. 286. IN PART OVERRULED, 9 N. Y. 605.

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Moyer v. Hinman, 17 Barb. 137. MODIFIED, 13 N. Y. 180. CRITICISED, 41 Barb. 60.

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Mullaley v. People, 12 Week. Dig. 236. AFFIRMED, Oct. 11th, 1881.

Muller v. Eno, 14 N. Y. 597. FOLLOWED, 3 Lans. 236.

Muller v. Pondir, 55 N. Y. 325, 332. FOLLOWED, 39 Superior 302.

Muller v. Sautler, 28 How. Pr. 87. CONTRA, 29 How. Pr. 1.

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Munn v. Commission Co., 15 Johns. 44, 55. FOLLOWED, 76 Ill. 246.

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Munson v. Howell, 12 Abb. Pr. 77; 20 How. Pr. 59. CONTRA, 7 How. Pr. 208; 9 Id. 349.

Murdock v. Chenango Co. Mutual Ins. Co., 2 N.Y. 210. EXPLAINED, 1 Lans. 30.

Murdock v. Gifford, 18 N. Y. 28. DISTINGUISHED, 40 N. Y. 288, 292; 66 Id. 497.

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Murphy v. People, 3 Hun 114. AFFIRMED, 63 N. Y. 590.

Murray v. Bethune, 1 Wend. 191. FOLLOWED, 14 So. Car. 278.

Murray v. Haskins, 4 How. Pr. 263. CONCURRED IN, 4 How. Pr. 283. CONTRA, 6 Id. 172.

Murray v. Hudson River R. R. Co., 47 Barb. 196. AFFIRMED, 6 Alb. L. J. 198. FOLLOWED, 28 Wis. 304.

Murray v. Judson, 11 Week. Dig. 28, 29; 22 Hun 386. DISTINGUISHED, 24 Hun 26.

Murray v. Lylburn, 2 Johns. Ch. 441. REVIEWED, 72 Me. 401.

Murray v. New York Life Ins. Co., 19 Hun 350. REVERSED, 24 Hun VII.

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Napier v. McLeod, 9 Wend. 120. DISTINGUISHED, 82 N. Y. 591, 595. *See* Id. 599.

Nason v. Luddington, 55 How. Pr. 342. AFFIRMED, 56 How. Pr. 172.

Nathan v. Whitlock, 3 Edw. Ch. 215; 9 Paige 152. REVIEWED, 1 McCrary (U. S.) 91.

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Nat. Bank of Chemung v. Elmira, 53 N. Y. 49. DISTINGUISHED, 80 N. Y. 302, 311. FOLLOWED, 82 Id. 351, 357.

Nat. Bank of Fort Edward v. Washington County Nat. Bank, 5 Hun 605. APPEAL DISMISSED, 72 N. Y. 606.

Nat. Bank of Newburgh v. Bigler, 18 Hun 400. AFFIRMED, 83 N. Y. 51.

Nat. Bank of Newburgh v. Smith, 5 Hun 183. AFFIRMED, 66 N. Y. 271.

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Nat. Fire Ins. Co. v. McKay, 21 N. Y. 191. FOLLOWED, 3 Hun 744; 6 Thomp. & C. 100.

Nat. Life Ins. Co. v. Minch, 6 Lans. 100. REVERSED, 53 N. Y. 144.

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Nat. Union Bank of Watertown v Landon, 45 N. Y. 410. DISTINGUISHED, 66 N. Y. 429.

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Nelson v. Plimpton Fireproof Elevating Co., 55 N. Y. 484. FOLLOWED, 42 Superior 119.

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Nessle v. Reese, 19 Abb. Pr. 240; 29 How. Pr. 282. *See* 14 Abb. Pr., N. S., 273; 19 Id. 240.

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New York, &c., R. R. Co. v. Van Horn, 57 N. Y. 473, 477. APPROVED, 24 Hun 465.

New York Balance Dock Co. v. Mayor, &c., of N. Y., 8 Hun 247. FOLLOWED, 83 N. Y. 535.

New York Catholic Protectory, Matter of, 8 Hun 91. FOLLOWED, 10 Hun 546.

New York Central, &c., R. R. Co., Matter of, 5 Hun 86. AFFIRMED, 66 N. Y. 407. FOLLOWED, 10 Hun 49, 52.

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New York Fire Ins. Co. v. Burrell, 9 How. Pr. 398. DISTINGUISHED, 58 How. Pr. 100, 101. *See* 9 Id. 254.

New York Guaranty, &c., Co. v. Gleason, 45 Superior 613. REVERSED, 78 N. Y. 503.

New York Guaranty &c., Co. v. Roberts, 43 Superior 551. REVERSED, 9 Week. Dig. 373.

New York Ice Co. v. Northwestern Ins. Co., 20 How. Pr. 424. CONTRA, 21 How. Pr. 296.

New York Life Ins. Co. v. Staats, 21 Barb. 571. AFFIRMED, 17 N. Y. 469.

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New York Piano Co. v. New Haven Steamboat Co., 2 Abb. Pr., N. S., 357, 358 CRITICISED, 25 Wis. 146.

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Newton v. Wales, 3 Robt. 453. AFFIRMED, 6 Alb. L. J. 198. FOLLOWED, 40 Superior 277.

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Nichols v. Chapman, 9 Wend. 452, 455. CRITICISED, 59 Barb. 496.

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Owen v. Cawley, 36 N. Y. 600. APPROVED, 33 Superior 499.

Owen v. Dupignac, 9 Abb. Pr. 180. DISSENTING OPINION, 17 How. Pr. 512.

Owen v. Farmers' Joint Stock Ins. Co., 57 Barb. 518. DISTINGUISHED, 16 Hun 504.

Owen v. New York Central R. R. Co., 1 Lans. 108. AFFIRMED, 6 Alb. L. J. 174.

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Owens v. Missionary Soc. of the M. E. Church, 14 N. Y. 380. EXAMINED AND CRITICISED, 33 N. Y. 97, 122.

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Pacific Mail Steamship Co. v. Comm'rs of Taxes of New York, 47 How. Pr. 164. *See* 3 Thomp. & C. 678.

Pacific Mail Steamship Co. v. Toll, 10 Week. Dig. 269. AFFIRMED, 12 Week. Dig. 386.

Pacific Pneumatic Gas Co. v. Wheelock, 44 Superior 566. AFFIRMED, 80 N. Y. 278.

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Paine v. Barnum, 59 How. Pr. 303. FOLLOWED, 59 How. Pr. 316, 318.

Paine v. Irwin, 16 Hun 390, 393. AFFIRMED, 80 N. Y. 660.

Paine v. Noelke, 53 How. Pr. 273. AFFIRMED, 54 How. Pr. 333.

Pake v. Proal, 2 Abb. N. Cas. 418; 54 How. Pr. 93. CONTRA, 56 How. Pr. 214, 240.

Palen v. Johnson, 18 Abb. Pr. 304. AFFIRMED, 6 Alb. L. J. 174.

Palmer's Petition, 1 Abb. Pr., N. S., 30. DISTINGUISHED, 9 Abb. Pr., N. S., 203, 204.

Palmer v. Avery, 41 Barb. 290. AFFIRMED, 41 N. Y. 619.

Palmer v. DeWitt, 5 Abb. Pr., N. S., 130. AFFIRMED, 6 Alb. L. J. 174.

Palmer v. De Witt, 36 How. Pr. 222; 7 Robt. 530. AFFIRMED, 47 N. Y. 532.

Palmer v. De Witt, 42 How. Pr. 466. CONTRA, 49 How. Pr. 204.

Palmer v. Foley, 44 How. Pr. 308. MODIFIED AND AFFIRMED, 45 How. Pr. 110.

Palmer v. Foley, 71 N. Y. 106. FOLLOWED, 82 N. Y. 362, 365.

Palmer v. Haskins, 28 Barb. 90. CONTRA, 4 Duer 247.

Palmer v. Horn, 20 Hun 70. AFFIRMED, 84 N. Y. 516.

Palmer v. Lawrence, 5 N. Y. 455. CONTRA, 3 How. Pr. 235.

Palmer v. Phœnix Ins. Co., 22 Hun 224. APPROVED, 84 N. Y. 287.

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Pam v. Vilmar, 54 How. Pr. 235. EXPLAINED, 55 How. Pr. 210, 214.

Pardee v. Fish, 67 Barb. 407. AFFIRMED, 67 Barb. 410 *n.* (a.)

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Park v. Park, 18 Hun 466; 9 Week. Dig. 391. AFFIRMED, 80 N. Y. 156. FOLLOWED, 23 Hun 356, 360. RECONCILED, 46 Superior 219, 220.

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Parks v. Comstock, 59 Barb. 16. AFFIRMED, 59 Barb. 37 *n.*

Parks v. Jackson, 11 Wend. 442. REVIEWED, 1 Flipp. (U. S.) 430.

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Parsell v. Stryker, 41 N. Y. 480. FOLLOWED, 4 Hun 796.

Parshall v. Eggart, 52 Barb. 367. REVERSED, 54 N. Y. 18.

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Parsons v. Lyman, 20 N. Y. 103. FOLLOWED, 57 How. Pr. 209, 213; 4 Lans. 188.

Parsons v. Nash, 8 How. Pr. 454. EXPLAINED, 1 Lans. 488.

Partridge v. Colby, 19 Barb. 248. REVIEWED, 29 N. Y. 409.

Partridge v. Menck, 2 Barb. Ch. 101. AFFIRMED, 3 Den. 610.

Partridge v. Westervelt, 13 Wend. 500, 504. APPROVED, 60 How. Pr. 509.

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Patrick v. Metcalf, 37 N. Y. 332. DISTINGUISHED, 62 N. Y. 445. FOLLOWED, 5 Lans. 311; 41 N. Y. 456; 83 Id. 45.

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Patterson v. Patterson, 47 How. Pr. 242. AFFIRMED, 1 Hun 323. *See* 59 N. Y. 574.

Patterson v. Patterson, 1 Hun 323. AFFIRMED *as modified,* 59 N. Y. 574.

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Pattison v. Hull, 9 Cow. 747. APPROVED, 83 N. Y. 88.

Pattison v. Syracuse Nat. Bank, 17 Hun 419. AFFIRMED, 80 N. Y. 82.

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Peck v. Armstrong, 38 Barb. 215. FOLLOWED, 35 Superior 106.

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Peck v. Yorks, 47 Barb. 131. DISAPPROVED, 1 Hun 436; 3 Thomp. & C. 524.

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Peebles v. Rogers, 5 How. Pr. 208. NOT CONCURRED IN, 3 Abb. Pr. 186; 6 How. Pr. 367, 369. *See* 5 How. Pr. 238.

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People v. Abbot, 19 Wend. 192. APPROVED, 62 Barb. 487. FOLLOWED, 41 How. Pr. 188. OVERRULED, 53 Barb. 136.

People v. Adams, 3 Den. 190. AFFIRMED, 3 Den. 610; How. Cas. 365.

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People v. Van Alstyne, 3 Keyes 35, 37. FOLLOWED, 2 Thomp. & C. 141.

People v. Van Rensselaer, 8 Barb. 189. REVERSED, 9 N. Y. 291.

People v. Vane, 12 Wend. 78. DISAPPROVED, 39 Iowa 278.

People v. Vermilyea, 7 Cow. 369, 383. FOLLOWED, 3 How. Pr. 50.

People v. Vilas, 36 N. Y. 459. DISTINGUISHED, 60 N. Y. 160.

People v. Warner, 5 Wend. 271. FOLLOWED, 4 Hun 5.

People v. Webb, 1 Hill 179. *See* 20 How. Pr. 248, 249, 253.

People v. Wentz, 37 N. Y. 303. FOLLOWED, 80 N. Y. 484, 499.

People v. White, 24 Wend. 520; 22 Id. 167. DISAPPROVED, 2 Park. Cr. 606. FOLLOWED, 80 N. Y. 500, 514.

People v. Williams, 4 Hill 9. NOT FOLLOWED, 83 N. Y. 449.

People v. Wright, 9 Wend. 193. COMMENTED ON, 21 Wend. 409. EXPLAINED, 4 Hill 126.

People v. Young, 7 Hill 44. OVERRULED, 4 Den. 530; 2 N. Y. 85.

People, ex rel., v. Baker, 35 Barb. 105. *See* 4 Thomp. & C. 9.

People, ex rel., v. Sturtevant, 3 Duer 616. CRITICISED, 13 Hun 228.

People, ex rel. Abrams, v. Commissioners of Taxes, &c., of N. Y., 52 N. Y. 659. DISTINGUISHED, 80 N. Y. 575.

People, ex rel. Academy of the Sacred Heart, v. Comm'rs of Taxes, 6 Hun 109. FOLLOWED, 10 Hun 246.

People, ex rel. Adsit, v. Allen, 1 Lans. 248. REVERSED, 42 N. Y. 378.

People, ex rel. Aikin, v. Morgan, 1 Thomp. & C. 101. REVERSED, 55 N. Y. 587. FOLLOWED, 3 Thomp. & C. 798.

People, ex rel. Aikin, v. Morgan, 55 N. Y. 587. DISTINGUISHED, 67 N. Y. 583; 68 Id. 410. FOLLOWED, 2 Hun 388; 4 Thomp. & C. 639.

People, ex rel. Albany, &c., R. R. Co., v. Mitchell, 35 N. Y. 551. DISTINGUISHED, 84 N. Y. 539. REVIEWED, 13 Otto (U. S.) 812; 2 Trans. Rep. 762, 768.

People, ex rel. Allaben, v. Supervisors of Delaware County, 12 How. Pr. 50. *See* 7 How. Pr. 255.

People, ex rel. Allen, v. Burtnett, 5 Park. Cr. 113. CONTRA, 3 How. Pr. 39.

People, ex rel. Alexander, v. Alexander, 3 Hun 211. FOLLOWED, 6 Hun 237.

People, ex rel. Aspinwall, v. Supervisors of Richmond, 28 N. Y. 112. DISTINGUISHED, 54 N. Y. 535.

People, ex rel. Atkins, v. Snyder, 10 How. Pr. 143. OVERRULED, 10 How. Pr. 468.

People, ex rel. Averill, v. Adirondack Co., 57 Barb. 656. AFFIRMED, 6 Alb. L. J. 174.

People, ex rel. Averill, v. Works, 7 Wend. 487. NOT APPLICABLE, 2 Duer 635.

People, ex rel. Babcock, v. Murray, 5 Hun 42. CRITICISED, 68 N. Y. 517.

People, ex rel. Baldwin, v. Haws, 15 Abb. Pr. 115; 24 How. Pr. 148; 37 Barb. 440. REVIEWED, 31 N. Y. 203, 204.

People, ex rel. Bank of Commerce, v. Comm'rs of Taxes, 25 How. Pr. 9. FOLLOWED, 28 How. Pr. 41.

People, ex rel. Bank of Commonwealth, v. Commissioners of Taxes, &c., 32 Barb. 509; 23 N. Y. 192. REVERSED, 2 Black (U. S.) 620; 2 Wall. (U. S.) 200. *See* 25 How. Pr. 9.

People, ex rel. Banks, v. Colgate, 9 Hun 708. AFFIRMED, 67 N. Y. 512.

People, ex rel. Barry, v. Mercein, 8 Paige 47. DISAPPROVED, 58 Miss. 525.

People, ex rel. Bay State Shoe, &c., Co., v. McLean, 17 Hun 204. AFFIRMED, 80 N. Y. 254.

People, ex rel. Belden, v. Contracting Board, 27 N. Y. 378. APPLIED, 56 How. Pr. 470, 476.

People, ex rel. Bently, v. Comm'rs of Highways of Hudson, 7 Wend. 474. COMMENTED ON, 4 Hill 630.

People, ex rel. Bentley, v. Hanna, 3 How. Pr. 39. FOLLOWED, 60 Barb. 481.

People, ex rel. Blossom, v. Nelson, 10 Abb. Pr., N. S., 200. REVERSED, 11 Abb. Pr., N. S., 106.

People, ex rel. Blossom, v. Nelson, 3 Lans. 394. REVERSED, 46 N. Y. 477.

People, ex rel. Botsford, v. Darling, 47 N. Y. 666. FOLLOWED, 6 Daly 507, 510.

People, ex rel. Bradley, v. Stephens, 2 Abb. Pr., N. S., 348. REVERSED, 41 N. Y. 619.

People, ex rel. Bradley, v. Stevens, 51 How. Pr. 103. REVERSED, 51 How. Pr. 168.

People, ex rel. Brooklyn Industrial School, &c., v. Kearney, 19 How. Pr. 493. *See* 21 How. Pr. 74, 77.

People, ex rel. Brown, v. Board of Apportionment, 52 N. Y. 224. FOLLOWED, 56 N. Y. 679.

People, ex rel. Bullard, v. Contracting Board, 33 Barb. 510. AFFIRMED, 28 How. Pr. 583.

People, ex rel. Burroughs, v. Brinckerhoff, 7 Hun 668. MODIFIED, 68 N. Y. 259.

People, ex rel. Cagger, v. Supervisors of Schuyler Co., 2 Abb. Pr., N. S., 78. FOLLOWED, 7 Hun 23.

People, ex rel. Cahoon, v. Dodge, 5 How. Pr. 47. FOLLOWED, 34 Superior 476.

People, ex rel. Canajoharie Nat. Bank, v. Supervisors of Montgomery Co., 67 N. Y. 159. *See* 55 How. Pr. 494.

People, ex rel. Case, v. Collins, 19 Wend. 56. APPROVED, 13 Otto (U. S.) 484; 2 Trans. Rep. 585.

People, ex rel. Church, v. Supervisors of Allegany County, 15 Wend. 198. FOLLOWED, 2 Hun 73.

People, ex rel. Citizens' Gas Light Co., v. Board of Assessors, 39 N. Y. 81. DISTINGUISHED, 82 N. Y. 506, 508. EXPLAINED, 6 Lans. 105.

People, ex rel. City of Rochester, v. Briggs, 50 N. Y. 553. DISTINGUISHED, 65 N. Y. 588. FOLLOWED, 22 Hun 220; 82 N. Y. 204, 211.

People, ex rel. Clark, v. Comm'rs of Reading, 1 Thomp. & C. 193. DISTINGUISHED, 67 N. Y. 62.

People, ex rel. Comaford, v. Dutcher, 20 Hun 241. REVERSED, 83 N. Y. 240.

People, ex rel. Comm'rs of Emigration, v. Supervisors of Richmond Co., 21 How. Pr. 335. AFFIRMED, 22 How. Pr. 275. APPROVED, 50 Id. 152.

People, ex rel. Comm'rs of Washington Park, v. Banks, 67 N. Y. 568, 572. FOLLOWED, 60 How. Pr. 292, 417.

People, ex rel. Cook, v. Board of Metropolitan Police, 26 How. Pr. 450. AFFIRMED *in part*, 39 N. Y. 506.

People, ex rel. Cooke, v. Wood, 71 N. Y. 371. EXPLAINED, 23 Hun 55, 59.

People, ex rel. Cooper v. Field, 52 Barb. 198. APPROVED, 1 Lans. 222. *See* 6 Alb. L. J. 174.

People, ex rel. Cooper, v. Field, 58 Barb. 270, 273. *See* 6 Alb. L. J. 174.

People, ex rel. Cooper, v. Fields, 1 Lans. 222. *See* 6 Alb. L. J. 174.

People, ex rel. Crouse, v. Cowles, 3 Abb. App. Dec. 507. FOLLOWED, 23 Hun 356, 360.

People, ex rel. Cunningham, v. Roper, 35 N. Y. 629. FOLLOWED, 84 N. Y. 613, 614.

People, ex rel. Curry, v. Green, 64 Barb. 493. FOLLOWED, 6 Hun 93. REVIEWED, 24 Hun 421.

People, ex rel. Dailey, v. Livingston, 79 N. Y. 279. FOLLOWED, 24 Hun 178.

People, ex rel. Davies, v. Comm'rs of Taxes of N. Y., 47 N. Y. 501. FOLLOWED, 8 Vr. (N. J.) 236.

People, ex rel. Davis, v. Compton, 1 Duer 512. FOLLOWED, 4 Abb. N. Cas. 75.

People, ex rel. Davis, v. Hill, 65 Barb. 435. APPEAL DISMISSED, 53 N. Y. 547.

People, ex rel. Davis, v. Hill, 53 N. Y. 547. FOLLOWED, 82 N. Y. 506, 508.

People, ex rel. Demarest, v. Gray, 10 Abb. Pr. 468. IN POINT, 2 Abb. N. Cas. 372, 376.

People, ex rel. Dennis, v. Brennan, 45 Barb. 457. DISSENTING OPINION, 30 How. Pr. 417.

People, ex rel. Devlin, v. Peabody, 5 Abb. Pr. 194. DISTINGUISHED, 59 How. Pr. 418; 22 Hun 471.

People, ex rel. Dilcher, v. Trustees of St. Stephen's Church, 3 Lans. 434. AFFIRMED, 53 N. Y. 103.

People, ex rel. Disosway, v. Flake, 14 How. Pr. 527. FOLLOWED, 27 How. Pr. 158, 159, 160. *See* 20 How. Pr. 306.

People, ex rel. Donovan, v. Connor, 6 Hun 250. WRIT OF ERROR QUASHED, 64 N. Y. 481.

People, ex rel. Doyle, v. Green, 3 Hun 755. APPROVED, 60 How. Pr. 488.

People, ex rel. Dumont, v. Tompkins General Sessions, 19 Wend. 154. CORRECTED, 5 Hill 443.

People, ex rel. Dunkirk, &c., R. R. Co., v. Batchellor, 53 N. Y. 128. DISTINGUISHED, 3 Hun 95; 4 Thomp. & C. 382; 5 Id. 321. FOLLOWED, 24 Hun 523. LIMITED, 57 N. Y. 192. REVIEWED, 13 Otto (U. S.) 813; 2 Trans. Rep. 763.

People, ex rel. Dunkirk, &c., R. R. Co., v. Cassity, 2 Lans. 294. AFFIRMED, 6 Alb. L. J. 174.

People, ex rel. Dunkirk, &c., R. R. Co., v. Cassity, 46 N. Y. 46. FOLLOWED, 80 N. Y. 573, 577; 82 Id. 459, 462.

People, ex rel. Durfee, v. Commissioners of Emigration, 15 How. Pr. 176. REVERSED, 27 Barb. 562.

People, ex rel. Egan, v. Marine Court, 18 Hun 333. REVERSED, 81 N. Y. 500. REARGUMENT DENIED, 22 Hun VI. OVERRULED, 59 How. Pr. 413.

People, ex rel. Ellis, v. Flagg, 15 How. Pr. 553. DISAPPROVED, 5 Daly 206; 56 N. Y. 475. EXPLAINED, 46 How. Pr. 302. LIMITED, 2 Thomp. & C. 18.

People, ex rel. Erie R'y Co., v. Beardsley, 52 Barb. 105. AFFIRMED, 41 N. Y. 619.

People, ex rel. Falconer, v. Meyer, 2 Code 49. COMMENTED ON, 3 Code 59. EXPLAINED, 4 How. Pr. 373, 375.

People, ex rel. Fay, v. Judges of Common Pleas, 6 Cow. 598. FOLLOWED, 4 How. Pr. 168, 172.

People, ex rel. Fiedler v. Mead, 24 N. Y. 114. DISTINGUISHED, 36 N. Y. 224, 229. FOLLOWED, 34 How. Pr. 294, 295.

People, ex rel. Falk, v. Board of Police, 69 N. Y. 408, 409. DISTINGUISHED, 82 N. Y. 247, 255.

People, ex rel. Fowler, v. Bull, 46 N. Y. 57. DISTINGUISHED, 66 N. Y. 243.

People, ex rel. Francis, v. City of Troy, 17 Hun 20. REVERSED, 20 Alb. L. J. 240.

People, ex rel. Frost, v. Wilson, 5 Thomp. & C. 636. REVERSED, 62 N. Y. 186.

People, ex rel. Furman, v. Clute, 50 N. Y. 451. FOLLOWED, 27 Minn. 470.

People, ex rel. Galsten, v. Brooks, 40 How. Pr. 165. APPROVED, 56 How. Pr. 192.

People, ex rel. Gilchrist, v. Mun 73 N. Y. 535. APPROVED, 8 Abb. N. Cas.

People, ex rel. Gorman, v. Boarc Police, &c., 35 Barb. 527. REVERSE Bright. Dig. LXVIII.

People, ex rel. Griffin, v. Mayor, of Brooklyn, 9 Barb. 535. REVERSED, Y. 419.

People, ex rel. Griffin, v. Steel Barb. 397. NOT APPROVED, 7 How. Pr. 1

People, ex rel. Hackley, v. Kelly N. Y. 74. FOLLOWED, 4 Thomp. & C. 47

People, ex rel. Haines, v. Smith N. Y. 776. FOLLOWED, 5 Thomp. & C. 2

People, ex rel. Hall, v. Board of pervisors, 32 N. Y. 473. FOLLOWED Kan. 182.

People, ex rel. Hambrecht, v. Ca bell, 22 Hun 574. FOLLOWED, 23 Hun 666.

People, ex rel. Hanrahan, v. Boar Police, &c., 35 Barb. 644. REVERSED How. Pr. 611.

People, ex rel. Hanraham, v. Bo of Metropolitan Police, 26 N. Y. FOLLOWED, 24 How. Pr. 611.

People, ex rel. Harvey, v. Heat How. Pr. 304. FOLLOWED, 39 N. Y. 521. TRA, 7 How. Pr. 154; 27 Id. 158, 160.

People, ex rel. Hasbrouck, v. Su visors of New York, 21 How. Pr. 322. 40 How. Pr. 23, 59.

People, ex rel. Hasbrouck, v. Su visors of New York, 22 How. Pr. 71. 40 How. Pr. 53, 59.

People, ex rel. Hatch, v. Lake Sh &c., R. R. Co., 11 Hun 1. APPEAL MISSED, 70 N. Y. 220.

People, ex rel. Hatfield, v. Comst 18 Hun 311. AFFIRMED, 20 Alb. L. J. 30

People, ex rel. Hatzell, v. Hall, 8 Y. 117. FOLLOWED, 80 N. Y. 185, 189.

People, ex rel. Haynes, v. Smit N. Y. 776. FOLLOWED, 3 Hun 16, 17.

People, ex rel. Henry, v. Nostra 46 N. Y. 375. DISTINGUISHED, 52 N. Y 57 Id. 404; 63 Id. 297.

People, ex rel. Herrick, v. Smit N. Y. 595, 597. APPROVED, 1 Flipp. (U 140.

People, ex rel. Higgins, v. McAd 58 How. Pr. 442; 60 Id. 139. REVERSE How. Pr. 444.

People, ex rel. Higgins, v. McAd 22 Hun 559. REVERSED, 84 N. Y. 289.

People, ex rel. Higgins, v. McAd 11 Week. Dig. 112. REVERSED, 12 Week. 29.

People, ex rel. Hogan, v. Flynn How. Pr. 280. REVERSED, 62 N. Y. 375.

People, ex rel. Holley, v. Supervisors of Columbia County, 4 Cow. 146. Distinguished, 66 N. Y. 595.

People, ex rel. Hovey, v. Ames, 19 How. Pr. 551. Distinguished, 65 N. Y. 228.

People, ex rel. Howlett, v. Mayor of Syracuse, 5 Thomp. & C. 61. Reversed, 63 N. Y. 291.

People, ex rel. Hoyt, v. Commissioners of Taxes, 33 Barb. 523. Reversed, 21 How. Pr. 385; 23 N. Y. 224.

People, ex rel. Hoyt, v. Commissioners of Taxes, 23 N. Y. 228. Approved, 84 N. Y. 401. Followed, 4 Hun 598.

People, ex rel. Hoyt, v. Supervisors of Kings County, 16 Wend. 520. Explained, 24 Hun 595. Followed, 60 How. Pr. 262.

People, ex rel. Hubbard, v. Harris, 63 N. Y. 391. Followed, 12 Hun 193.

People, ex rel. Hudson, v. Fire Commissioners, 77 N. Y. 605. Followed, 82 N. Y. 506, 508.

People, ex rel. Irwin, v. Sawyer, 52 N. Y. 296. Followed, 1 Thomp. & C. 115.

People, ex rel. Israel, v. Tibbetts, 4 Cow. 384. Reviewed, 71 Me. 383.

People, ex rel. Jackson, v. Potter, 47 N. Y. 375, 376. In point, 14 So. Car. 204.

People, ex rel. Jefferson, v. Gardner, 51 Barb. 352. Followed, 4 Hun 598; 24 Id. 492; 42 Conn. 441.

People, ex rel. Johnson, v. Nevins, 1 Hill 154. Followed, 3 Hun 636, 637; 6 Thomp. & C. 117, 118.

People, ex rel. Johnson, v. Supervisors of Delaware County, 9 Abb. Pr., n. s, 408. Modified, 45 N. Y. 196.

People, ex rel. Johnson, v. Supervisors of Delaware County, 45 N. Y. 196, 199. Re-affirmed, 82 N. Y. 80, 83.

People, ex rel. Kearney, v. Kelly, 22 How. Pr. 309. Contra, 13 How. Pr. 173; 14 Id. 465.

People, ex rel. Kedian, v. Neilson, 5 Thomp. & C. 367. Approved, 23 Hun 568, 571.

People, ex rel. Keiley v. Dusenbury, 2 Abb. N. Cas. 360. Reversed, 54 How. Pr. 73.

People, ex rel. Keiley, v. Spier, 54 How. Pr. 73; 12 Hun 70. Reversed, 57 How. Pr. 274.

People, ex rel. Kelly, v. Haws, 12 Abb. Pr. 192; 21 How. Pr. 117. Followed, 16 Abb. Pr., n. s., 64, 69; 5 Daly 198.

People, ex rel. Kenyon, v. Sutherland, 16 Hun 192. Reversed, 81 N. Y. 1.

People, ex rel. Kinney, v. Supervisors of Cortland County, 58 Barb. 139. Distinguished, 24 Hun 57.

People, ex rel. Lansing, v. Tremain, 9 Hun 573. Affirmed, 68 N. Y. 628.

People, ex rel. Larrabee, v. Mulholland, 19 Hun 548. Affirmed, 82 N. Y. 324.

People, ex rel. Latorre, v. O'Brien, 6 Abb. Pr., n. s., 63. Affirmed, 41 N. Y. 619. Approved, 8 Abb. N. Cas. 427, 430. Criticised, 2 Sweeny 344. *See* 40 How. Pr. 35, 36.

People, ex rel. Lent, v. Hascall, 18 How. Pr. 118. Distinguished, 50 Wis. 665.

People, ex rel. Loew, v. Batchelor, 28 Barb. 310; 22 N. Y. 128. Overruled, 52 N. Y. 374.

People, ex rel. Lovett, v. Rogers, 2 Paige 103. Explained, 1 Hill 169. Followed, 43 Superior 344.

People, ex rel. Lowell, v. Town Auditors of Westford, 53 Barb. 555. Affirmed, 41 N. Y. 619.

People, ex rel. Lumley, v. Lewis, 28 How. Pr. 470. Affirmed, 41 N. Y. 619.

People, ex rel. Luther v. Onondaga Com. Pleas, 19 Wend. 79. Distinguished, 16 W. Va. 642, 643.

People, ex rel. McConvill, v. Hills, 35 N. Y. 449. Distinguished, 50 N. Y. 561.

People, ex rel. McLean, v. Flagg, 46 N. Y. 401. Distinguished, 53 N. Y. 138.

People, ex rel. McMullen, v. Shepard, 36 N. Y. 285. Criticised, 55 N. Y. 65.

People, ex rel. Manning, v. New York Com. Pleas, 13 Wend. 649. Explained, 2 Hill 357.

People, ex rel. Martin, v. Brown, 55 N. Y. 180, 196. Approved, 84 N. Y. 539.

People, ex rel. Mayor, &c., of New York, v. Nichols, 58 How. Pr. 200 *See* 58 How. Pr. 359.

People, ex rel. Merritt, v. Lawrence, 6 Hill 244. Considered overruled, 5 Lans. 127.

People, ex rel. Mitchell, v. Lawrence, 54 Barb. 589. Followed, 40 How. Pr. 50, 52.

People, ex rel. Munday, v. Fire Commr's, 72 N. Y. 445. Approved and distinguished, 60 How. Pr. 133. Explained, 23 Hun 317, 320.

People, ex rel. Murphy, v. Kelly, 76 N. Y. 474, 490. Followed, 23 Hun 568, 572.

People, ex rel. Murray, v. Justices of the Special Sessions, 74 N. Y. 406. Followed, 83 N. Y. 244.

People, ex rel. Musgrove, v. Common Pleas, 9 Wend. 429. Disapproved, 41 How. Pr. 164, 166.

People, ex rel. Mygatt, v. Supervisors of Chenango Co., 11 N. Y. 563. Considered, 45 N. Y. 682, 684.

People, ex rel. Navano, v. Van Nort, 64 Barb. 205. Distinguished, 1 Hun 26; 3 Thomp. & C. 753. Followed, 2 Id. 63.

People, ex rel. New York, &c., R. R. Co., v. Comm'rs of New York City, 23 Hun 687. FOLLOWED, 23 Hun 697.

People, ex rel. New York, &c., R. R. Co., v. Havemeyer, 4 Thomp. & C. 365. DISTINGUISHED, 64 N. Y. 106.

People, ex rel. New York Elevated R. R. Co., v. Comm'rs of Taxes, 19 Hun 460. AFFIRMED, 82 N. Y. 459.

People, ex rel. Nichols, v. Cooper, 57 How. Pr. 463. *See* 58 How. Pr. 359.

People, ex rel. Noble, v. Abel, 3 Hill 109. COMMENTED ON, 2 Barb. Ch. 291.

People, ex rel. Odle, v. Kniskern, 50 Barb. 87. REVERSED, 54 N. Y. 52.

People, ex rel. Otsego County Bank, v. Supervisors of Otsego County, 51 N. Y. 401. REVIEWED, 24 Hun 420.

People, ex rel. Ottman, v. Commissioners of Highways of Seward, 27 Barb. 94. DISTINGUISHED, 63 N. Y. 396.

People, ex rel. Pacific Mail Steamship Co., v. Comm'rs of Taxes, 1 Thomp. & C. 611. *See* 3 Thomp. & C. 678.

People, ex rel. Patchen, v. Supervisors of Kings Co., 7 Wend. 530. OVERRULED *in part*, 60 How. Pr. 262.

People, ex rel. Perkins, v. Hawkins, 46 N. Y. 9. APPROVED, 83 N. Y. 106.

People, ex rel. Pinckney, v. Fire Commissioners, 54 How. Pr. 240. AFFIRMED, 7 Hun 248.

People, ex rel. Platt, v. Stout, 19 How. Pr. 171. APPROVED AND FOLLOWED, 35 Barb. 254.

People, ex rel. Reynolds, v. Flagg, 16 Barb. 503. DOUBTED, 22 How. Pr. 286, 287. LIMITED, 13 Abb. Pr. 375, 385.

People, ex rel. Roberts, v. Bowe, 20 Hun 85. REVERSED, 81 N. Y. 43.

People, ex rel. Robison, v. Supervisors of Ontario County, 17 Hun 501. REVERSED, 24 Hun VII.

People, ex rel. Roman Catholic Orphan Asylum Soc., v. Board of Education, 13 Barb. 400. FOLLOWED, 34 How. Pr. 227, 229.

People, ex rel. Rosekrans, v. Haskins, 7 Wend. 463. REVIEWED, 55 Cal. 540.

People, ex rel. Ross, v. City of Brooklyn, 69 N. Y. 605. *See* 55 How. Pr. 494.

People, ex rel. Ryan, v. Green, 46 How. Pr. 169. REVERSED, 58 N. Y. 295.

People, ex rel. Satterlee, v. Board of Police, 12 Hun 653. REVIEWED, 24 Kan. 297.

People, ex rel. Satterlee, v. Board of Police, 75 N. Y. 38. FOLLOWED, 83 N. Y. 535.

People, ex rel. Sears, v. Assessors of Brooklyn, 18 Hun 386. AFFIRMED, 84 N. Y. 610.

People, ex rel. Sharkey, v. Goodwin, 50 Barb. 562, 564. APPROVED, 8 Abb. N. Cas. 430.

People, ex rel. Sims, v. Fire Department, 73 N. Y. 437. APPROVED, 60 How. Pr. 133; 23 Hun 320.

People, ex rel. Smith, v. Village of Nelliston, 18 Hun 175. APPEAL DISMISSED, 78 N. Y. 610.

People, ex rel. Stanton, v. Tioga Com. Pleas, 19 Wend. 73. *See* 62 Barb. 500.

People, ex rel. Stetzer, v. Rawson, 61 Barb. 619. FOLLOWED, 83 N. Y. 243.

People, ex rel. Stryker, v. Stryker, 24 Barb. 649. FOLLOWED, 23 Hun 583, 585.

People, ex rel. Supervisors of Westchester Co., v. Hadley, 14 Hun. 183. REVERSED, 20 Alb. L. J. 134.

People, ex rel. Thurman, v. Ryan, Gen. T., Sept., 1881. AFFIRMED, 61 How. Pr. 452.

People ex rel. Thurston, v. Auditors of Elmire, 20 Hun 150. AFFIRMED, 82 N. Y. 80.

People, ex rel. Town of Schaghticoke, v. Troy, &c., R. R. Co., 37 How. Pr. 427. AFFIRMED, 6 Alb. L. J. 174.

People, ex rel. Tweed, v. Liscomb, 60 N. Y. 559. CONSIDERED, 11 Hun 392. DISTINGUISHED, 66 N. Y. 10; 6 App. Cas. (Eng. L. R.) 241, 245, 246, 249.

People, ex rel. Ulster, &c., R. R. Co., v. Smith, 24 Hun 66; 11 Week. Dig. 224. APPEAL DISMISSED, 24 Hun VII.; 12 Week. Dig. 224.

People, ex rel. Valiente, v. Dyckman, 24 How. Pr. 222, 224. OVERRULED, 5 Daly 413.

People, ex rel., Vanderbilt, v. Stilwell, 19 N. Y. 531. DISTINGUISHED AND FOLLOWED, 82 N. Y. 506, 508.

People, ex rel. Van Keuren, v. Board of Town Auditors, 74 N. Y. 310, 311. FOLLOWED, 80 N. Y. 302, 311.

People, ex rel. Van Nest, v. Comm'rs of Taxes, 80 N. Y. 573. FOLLOWED, 82 N. Y. 459, 463.

People, ex rel. Van Rensselaer, v. Van Alstyne, 3 Abb. App. Dec. 575. FOLLOWED, 13 Hun 231.

People, ex rel. Vasser, v. Berberrich, 11 How. Pr. 289. CONTRA, 11 How. Pr. 530, 542; 12 Id. 83.

People, ex rel. Ward, v. Asten, 6 Daly 18. AFFIRMED, 62 N. Y. 623.

People, ex rel. Weeks, v. Supervisors of Queens County, 18 Hun 4. MODIFIED, 82 N. Y. 276.

People, ex rel. Westray, v. Mayor, &c., of New York, 16 Hun 309. AFFIRMED, 82 N. Y. 491.

People, ex rel. Williams, v. Dayton, 1 Thomp. & C. 14 add. REVERSED, 55 N. Y. 367.

People, ex rel. Williams, v. Dayton, 55 N. Y. 367. DISTINGUISHED, 82 N. Y. 142, 144.

People, ex rel. Williams, v. Hulbert, 1 Code, N. S., 75; 5 How. Pr. 446. CRITICISED, 10 Hun 438, 440.

People, ex rel. Williams, v. Kingman, 24 N. Y. 559. FOLLOWED, 39 Conn. 235.

People, ex rel. Yawger, v. Allen, 52 N. Y. 538, 542. FOLLOWED, 84 N. Y. 410.

People, ex rel. Youmans, v. Supervisors of Delaware County, 47 How. Pr. 24. REVERSED, 2 Hun 102; 4 Thomp. & C. 336.

People, ex rel. Youmans, v. Supervisors of Delaware County, 2 Hun 102; 4 Thomp. & C. 336. REVERSED, 60 N. Y. 381.

Peoples' Bank of New York v. Bogart, 16 Hun 270. AFFIRMED, 81 N. Y. 101.

Pepper v. Goulding, 4 How. Pr. 310. CONTRA, 4 How. Pr. 325.

Percy, Matter of, 36 N. Y. 651. DISTINGUISHED, 82 N. Y. 161, 165, 166.

Perkins v. Mead, 22 How. Pr. 476. *See* 22 How. Pr. 477.

Perkins v. N. Y. Central R. R. Co., 24 N. Y. 196. INAPPLICABLE, 2 Hun 51.

Perkins v. Savage, 15 Wend. 412, 414. EXPLAINED, 57 N. Y. 545.

Perkins v. Squier, 1 Thomp. & C. 620. DISAPPROVED, 8 Hun 222, 223.

Perkins v. Taylor, 19 Abb. Pr. 146, 148. FOLLOWED, 83 N. Y. 48.

Perkins v. Warren, 6 How. Pr. 341. *See* 7 How. Pr. 17, 19.

Perrin v. New York Central R. R. Co., 36 N. Y. 120. DISTINGUISHED, 64 N. Y. 75.

Perry v. Chester, 12 Abb. Pr., N. S., 131. REVERSED, 53 N. Y. 240.

Perry v. Chester, 53 N. Y. 240. DISTINGUISHED, 60 How. Pr. 505.

Perry v. Griffin, 7 How. Pr. 263. CONTRA, 13 How. Pr. 13; 19 Id. 572.

Perry v. Livingston, 6 How. Pr. 404. DISTINGUISHED, 22 Hun 183. FOLLOWED, 6 How. Pr. 408.

Peters v. Delaplaine, 58 Barb. 401. AFFIRMED, 6 Alb. L. J. 175.

Peters v. Diossy, 3 E. D. Smith 115. EXPLAINED, 41 How. Pr. 30, 33.

Peterson v. Humphrey, 4 Abb. Pr. 394. CRITICISED AND DISAPPROVED, 12 Abb. Pr., N. S., 93, 99.

Peterson v. Mayor, &c., of New York, 17 N. Y. 449, 453. REVIEWED, 1 Flipp. (U. S.) 197.

Peterson v. Walsh, 1 Daly 182. OVERRULED, 10 Abb. Pr., N. S., 144, 146.

Petrie v. Fitzgerald, 1 Daly 401. DISTINGUISHED, 1 Hun 691; 4 Thomp. & C. 217.

Petty v. Tooker, 29 N. Y. 267. FOLLOWED, 4 Hun 225; 3 Thomp. & C. 280, 281; 6 Id. 545.

Peyser v. Mayor, &c., of New York, 70 N. Y. 497. DISTINGUISHED, 83 N. Y. 104.

Pfohl v. Simpson, 74 N. Y. 137. DISTINGUISHED, 22 Hun 499.

Phelan's Case, 9 Abb. Pr. 286. CONTRA, 21 How. Pr. 68, 73.

Phelps v. Gebhard Fire Ins. Co., 9 Bosw. 404. DISTINGUISHED, 58 Barb. 325.

Phelps v. Nowlen, 72 N. Y. 39. APPROVED, 83 N. Y. 190.

Phelps v. People, 6 Hun 401. OVERRULED *in part*, 6 Abb. N. Cas. 2. *See* 74 N. Y. 277.

Phelps v. People, 6 Hun 428. AFFIRMED, 72 N. Y. 365.

Phelps v. People, 72 N. Y. 334. *See* 74 N. Y. 277.

Phelps v. Racey, 60 N. Y. 10. APPROVED, 13 Vr. (N. J.) 345. IN POINT, 97 Ill. 332, 337.

Philbin v. Patrick, 22 How. Pr. 1. FOLLOWED, 36 Superior 75.

Philips v. Gorham, 17 N. Y. 270. FOLLOWED, 41 N. Y. 107, 110.

Philips v. James, 1 Abb. Pr., N. S., 311, 314. REVERSED, 5 Thomp. & C. 274; 3 Hun 1.

Philips v. Peters, 21 Barb. 351. CONTRA, *in part*, 9 N. Y. 85.

Phillips, Matter of, 60 N. Y. 16. DISTINGUISHED, 60 N. Y. 461; 81 Id. 139, 141. EXPLAINED, 9 Hun 615.

Phillips, Petition of, 4 Thomp. & C. 484. FOLLOWED, 5 Thomp. & C. 344.

Phillips v. Berick, 16 Johns. 136, 140. APPROVED, 49 Barb. 550.

Phillips v. McCombs, 53 N. Y. 494. CRITICISED, 82 N. Y. 103, 108.

Phillips v. Mayor, &c., of New York, 2 Hun 212. FOLLOWED, 3 Hun 215.

Phillips v. Rensselaer, &c., R. R. Co., 49 N. Y. 177. DISTINGUISHED, 1 Hun 147; 3 Thomp. & C. 687.

Phillips v. Wicks, 36 Superior 254. FOLLOWED, 39 Superior 183.

Phinney v. Broschell, 19 Hun 116. AFFIRMED, 58 How. Pr. 492; 80 N. Y. 544.

Phinney v. Broschell, 80 N. Y. 544. FOLLOWED, 80 N. Y. 553, 554.

Phinney v. Phinney, 17 How. Pr. 197. DISTINGUISHED, 60 How. Pr. 100.

Phipps v. Carman, 23 Hun 150. AFFIRMED, 84 N. Y. 650.

Phœnix v. Dupy, 53 How. Pr. 158. NOT AUTHORITY, 55 How. Pr. 260.

Phœnix Ins. Co. v. Church, 56 How. Pr. 29. REVERSED, 56 How. Pr. 493.

Phœnix Ins. Co. v. Continental Ins. Co., 14 Abb. Pr., N. S., 266. FOLLOWED, 24 Hun 384. CONTRA, 19 Abb. Pr. 240; 18 How. Pr. 534; 29 Id. 282.

Phœnix Ins. Co. v. Floyd, 19 Hun 287. AFFIRMED, 83 N. Y. 613.

Pierce v. Tuttle, 51 How. Pr. 193. FOLLOWED, 24 Hun 346.

Pierce v. Tuttle, 1 Thomp. & C. 139. REVERSED, 58 N. Y. 650.

Pierrepont v. Barnard, 6 N. Y. 279, 304. DISTINGUISHED, 84 N. Y. 39.

Pierson v. People, 79 N. Y. 424. DISTINGUISHED, 80 N. Y. 301.

Pike v. Van Wormer, 5 How. Pr. 171. *See* 6 How. Pr. 99.

Pike v. Van Wormer, 6 How. Pr. 99. FOLLOWED, 6 How. Pr. 255.

Pilling v. Pilling, 45 Barb. 86. CONTRA, 1 Lans. 150.

Pilsbury, Matter of, 56 How. Pr. 290. *See* 58 How. Pr. 260, 263.

Pinckney's Case, 18 Abb. Pr. 356. OVERRULED, 30 How. Pr. 276, 277.

Pinckney, Matter of, 22 Hun 474. AFFIRMED, 84 N. Y. 645.

Pinckney v. Hagadorn, 1 Duer 89. APPROVED, 14 N. Y. 584.

Pinckney v. Pinckney, 1 Bradf. 269. REVIEWED, 4 Redf. 50.

Pindar v. Continental Ins. Co., 38 N. Y. 366. DISTINGUISHED, 47 N. Y. 602, 606.

Pindar v. Resolute Fire Ins. Co., 47 N. Y. 114. DISTINGUISHED, 68 N. Y. 441.

Pinneo v. Higgins, 12 Abb. Pr. 334. FOLLOWED, 6 Daly 100.

Pinney v. Gleason, 5 Wend. 393. DISTINGUISHED, 59 N. Y. 371.

Piper v. New York Central, &c., R. R. Co., 1 Thomp. & C. 290. AFFIRMED, 56 N. Y. 630. FOLLOWED, 3 Hun 339; 5 Thomp. & C. 559.

Pirnie, Matter of, 1 Tucker 119. NOT IN POINT, 4 Redf. 47.

Pitcher v. Carter, 4 Sandf. Ch. 1. REVERSED, Ct. of App., Dec. 30th, 1850.

Pitcher v. Turin Plank Road Co., 10 Barb. 436. NOT IN POINT, 4 Hun 249.

Pitt v. Davison, 37 N. Y. 235. FOLLOWED, 3 Hun 211; 5 Thomp. & C. 299. REVIEWED, 47 N. Y. 44.

Pittman v. Mayor, &c., of New York, 3 Hun 370. EXPLAINED, 9 Hun 216, 217.

Pitts v. Pitts, 44 How. Pr. 64. AFFIRMED, 45 How. Pr. 45. *See* 52 N. Y. 593.

Pitts v. Pitts, 44 How. Pr. 300. AFFIRMED, 52 N. Y. 593.

Pixley v. Clark, 35 N. Y. 520. EXPLAINED, 8 Abb. N. Cas. 360.

Place v. Butternuts Woolen, &c., Manuf. Co., 28 Barb. 503. *See* 26 How. 601 *n.*

Place v. Butternuts Woolen, &c., Manuf. Co., 28 How. Pr. 184. FOLLOWED, 13 Abb. Pr., N. S., 298, 299.

Plank v. Central R. R. Co., 60 N. Y. 607. EXPLAINED, 23 Hun 490, 491, 492, 493.

Plant v. Long Island R. R. Co., 10 Barb. 26. FOLLOWED, 60 How. Pr. 400.

Platner v. Platner, 78 N. Y. 90. FOLLOWED, 82 N. Y. 339, 347.

Platt v. Coman, 37 N. Y. 440. LIMITED, 52 N. Y. 142.

Platt v. Platt, 11 Abb. Pr., N. S., 110; 61 Barb. 52. DISAPPROVED, 54 How. Pr. 370, 374. CONTRA, 12 Hun 121, 124.

Platt v. Robine, 1 Johns. Cas. 276. OVERRULED, 7 Cow. 701.

Plumb v. Cattaraugus Co. Mut. Ins. Co., 18 N. Y. 392. DISTINGUISHED, 2 Hun 405; 20 N. Y. 53.

Plummer v. Plummer, 7 How. Pr. 62. NOT CONCURRED IN, 7 How. Pr. 458, 460.

Plunkett v. Appleton, 41 Superior 159. APPEAL DISMISSED, 66 N. Y. 645.

Pohalski v. Mut. Life Ins. Co., 36 Superior 234. AFFIRMED, 56 N. Y. 640.

Poillon v. Lawrence, 43 Superior 385. REVERSED, 20 Alb. L. J. 95.

Poillon v. Volkenning, 11 Hun 385. REVERSED, 72 N. Y. 300.

Pollak v. Gregory, 9 Bosw. 116. DISTINGUISHED, 60 N. Y. 370.

Pollen v. Le Roy, 30 N. Y. 556. APPROVED, 42 Superior 119.

Pollitt v. Long, 3 Thomp. & C. 232. REVERSED, 56 N. Y. 200.

Pomeroy v. Hulin, 7 How. Pr. 161. FOLLOWED, 5 Hun 642.

Pond v. Comstock, 20 Hun 492. FOLLOWED, 23 Hun 95, 99.

Pontius v. People, 21 Hun 328. AFFIRMED, 82 N. Y. 339.

Popham v. Baker, 1 How. Pr. 166. *See* 2 How. Pr. 137.

Popham v. Cole, 66 N. Y. 69. FOLLOWED, 82 N. Y. 519, 523.

Popham v. Wilcox, 14 Abb. Pr., N. S., 206. AFFIRMED, 66 N. Y. 69. *See* 38 Superior 274.

Porter v. Clark, 12 How. Pr. 107. *See* 15 How. Pr. 355, 357.

Porter v. Kemball, 53 Barb. 467. REAFFIRMED, 3 Lans. 330.

Porter v. Knapp, 6 Lans. 125. REVERSED, 65 N. Y. 564.

Porter v. Parmley, 13 Abb. Pr., N. S., 104; 43 How. Pr. 445. REVERSED, 14 Abb. Pr., N. S., 16.

Porter v. Talcott, 1 Cow. 359. APPROVED, 10 Tex. App. 174.

Porter v. Williams, 5 How. Pr. 441. *See* 5 How. Pr. 446.

Post v. Campbell, 18 Hun 51. AFFIRMED, *but principle overruled,* 83 N. Y. 279.

Post v. Hover, 33 N. Y. 593. EXPLAINED, 23 Hun 299, 304.

Post v. Phœnix Ins. Co., 10 Johns. 79. EXPLAINED AND APPROVED, 11 Johns. 313.

Potsdam, &c., R. R. Co. v. Jacobs, 10 How. Pr. 453. CONTRA, 8 How. Pr. 1, 5.

Potter v. Bushnell, 10 How. Pr. 94, 96. FOLLOWED, 12 How. Pr. 73, 76.

Potter v. Etz, 5 Wend. 74. EXPLAINED, 6 Hill 389.

Potter v. Van Vranken, 36 N. Y. 619. DISAPPROVED, 47 N. Y. 248.

Potter v. Whittaker, 27 How. Pr. 10. FOLLOWED, 62 Barb. 563; 5 Lans. 504.

Potts v. Mayer, 53 How. Pr. 368. REVERSED, 74 N. Y. 594.

Poucher v. N. Y. Central R. R. Co., 49 N. Y. 263. DISTINGUISHED, 66 N. Y. 317.

Poughkeepsie and Salt Point Plank Road Co. v. Griffin, 24 N. Y. 150. FOLLOWED, 58 N. Y. 401.

Powell v. Powell, 6 Thomp. & C. 51. REVERSED, 71 N. Y. 71.

Powers v. Bergen, 6 N. Y. 358. DISTINGUISHED, 19 N. Y. 445, 461.

Powers v. French, 4 Thomp. & C. 65. DISTINGUISHED, 71 N. Y. 411.

Powers v. Shepard, 45 Barb. 524. *See* 49 Barb. 418.

Powers v. Shepard, 35 How. Pr. 53. AFFIRMED, 6 Alb. L. J. 199.

Pramagiori v. Pramagiori, 7 Robt. 302. DISTINGUISHED, 61 N. Y. 411.

Pratt v. Allen, 19 How. Pr. 450. CONTRA, 7 How. Pr. 97; 10 Id. 451; 12 Id. 26, 399; 22 Id. 470, 471.

Pratt v. Coman, 37 N. Y. 440. DISTINGUISHED, 81 N. Y. 218, 224.

Pratt v. Gulick, 13 Barb. 297. DISTINGUISHED AND EXPLAINED, 81 N. Y. 341, 345.

Pratt v. Hoag, 5 Duer 631. DISTINGUISHED, 41 Superior 274.

Pratt v. Hudson River R. R. Co., 21 N. Y. 305. DISTINGUISHED, 81 N. Y. 268, 272. FOLLOWED, 38 Superior 455.

Prentice v. Knickerbocker Life Ins. Co., 77 N. Y. 483. DISTINGUISHED AND EXPLAINED, 80 N. Y. 43. FOLLOWED, 80 N. Y. 108, 112.

Prentiss v. Graves, 33 Barb. 621. DISTINGUISHED, 22 Hun 244.

Presbyterian Congregation of Salem v. Williams, 9 Wend. 147. EXPLAINED, 55 N. Y. 229.

President, &c., of the Manhattan Co. v. Lydig, 4 Johns. 377. DISTINGUISHED, 57 N. Y. 602.

Preston v. Morrow, 66 N. Y. 452. DISTINGUISHED, 24 Hun 352.

Preston v. Russ, 4 Hun 427. AFFIRMED, 66 N. Y. 638.

Price v. McClave, 6 Duer 544; 3 Abb. 253, 254. DISAPPROVED, 9 Abb. N. Cas. 302.

Priest v. Cummings, 20 Wend. 338. APPROVED, 1 Hill 463.

Prime v. Twenty-third St. R. R. Co., 1 Abb. N. Cas. 63. CONTRA, 1 Abb. N. Cas. 75 *n.*

Prince v. Cujas, 7 Robt. 76. APPROVED, 51 N. Y. 7.

Prindle v. Caruthres, 15 N. Y. 425. DISTINGUISHED, 34 Barb. 522.

Pringle v. Phillips, 5 Sandf. 157. LIMITED, 54 N. Y. 289.

Prospect Park, &c., R. R. Co., Matter of, 24 Hun 199. APPEAL DISMISSED, 24 Hun VI.

Prospect Park, &c., R. R. Co., Matter of, 67 N. Y. 371. FOLLOWED, 60 How. Pr. 417.

Prosser v. Secor, 5 Barb. 607. DISTINGUISHED, 47 Barb. 320. OVERRULED, 24 Id. 419.

Prouty v. Lake Shore, &c., R. Co., 52 N. Y. 363. DISTINGUISHED, 84 N. Y. 181.

Pruyn v. Tyler, 18 How. Pr. 331. ILLUSTRATED, 9 Abb. N. Cas. 323.

Public Administrator v. Peters, 1 Bradf. 100. FOLLOWED, 24 N. Y. 417.

Public Administrator v. Ward, 3 Bradf. 244. FOLLOWED, 59 How. Pr. 328.

Pugsley v. Kesselburgh, 7 How. Pr. 402. *See* 7 How. Pr. 404, 406.

Pumpelly v. Phelps, 40 N. Y. 60. DISTINGUISHED, 57 N. Y. 160.

Pumpelly v. Village of Owego, 22 How. Pr. 385. *See* 30 How. Pr. 76, 77.

Purchase v. Matteson, 25 N. Y. 211. DISTINGUISHED, 5 Hun 602. REVIEWED, 38 N. Y. 183.

Purdy v. Carpenter, 6 How. Pr. 361. FOLLOWED, 6 How. Pr. 401; 7 Id. 278, 280. CONTRA, 8 Id. 177; 5 N. Y. 357. *See* 7 How. Pr. 316.

Purdy v. Doyle, 1 Paige 558. OVERRULED, 6 Thomp. & C. 644.

Purdy v. Peters, 35 Barb. 239. AFFIRMED, 27 How. Pr. 600.

Putnam v. Broadway, &c., R. R. Co., 55 N. Y. 108. REVIEWED, 24 Hun 107, 108.

Putnam v. Heath, 41 How. Pr. 262. FOLLOWED, 43 How. Pr. 82, 83; 3 Thomp. & C. 794.

Putnam v. Man, 3 Wend. 202. DOUBTED, 15 Barb. 47.

Putnam v. Ritchie, 6 Paige 390. APPROVED, 28 Wis. 415.

Putnam v. Wyley, 8 Johns. 432. FOLLOWED, 11 Johns. 383.

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Querisele v. Hilliard, 3 Abb. Pr. 31. CONTRA, 15 How. Pr. 278, 281.

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Quin v. Mayor, &c., of New York, 44 How. Pr. 266. DISTINGUISHED, 6 Hun 506, 507.

Quin v. Moore, 15 N. Y. 432, 435. DISAPPROVED, 51 Wis. 602.

Quincey v. Francis, 5 Abb. N. Cas. 286. EXPLAINED, 60 How. Pr. 439.

Quincey v. Young, 5 Daly 327. REVERSED, 63 N. Y. 370.

Quinn v. Hardenbrook, 54 N. Y. 83. DISTINGUISHED, 24 Hun 439.

Quinn v. People, 71 N. Y. 561. DISTINGUISHED, 80 N. Y. 334.

Quinn v. Skinner, 49 Barb. 128. DISTINGUISHED, 41 N. Y. 289, 293.

Quinn v. Van Pelt, 56 N. Y. 417. DISTINGUISHED, 64 N. Y. 644.

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Radcliff v. Mayor, &c., of Brooklyn, 4 N. Y. 195. APPROVED, 51 Wis. 663. DISTINGUISHED, 58 N. Y. 423.

Radcliff v. Rowley, 2 Barb. Ch. 23, 31, 32. APPROVED, 8 Fed. Rep. 776.

Radway v. Graham, 4 Abb. Pr. 468. FOLLOWED, 38 Superior 490.

Rae, Matter of, 5 Hun 455. APPEAL DISMISSED, 63 N. Y. 645.

Rae v. Mayor, &c., of New York, 39 Superior 192. APPEAL DISMISSED, 62 N.Y. 631.

Railway Passenger Assur. Co. v. Warner, 1 Thomp. & C. 21 *add.* REVERSED, 62 N. Y. 651.

Rainsford v. Rainsford, 57 Barb. 58. AFFIRMED, 6 Alb. L. J. 175.

Ramaley v. Leland, 6 Robt. 358. REVERSED, 43 N. Y. 539.

Ramsdell v. Morgan, 16 Wend. 574. CRITICISED, 3 Thomp. & C. 361.

Ramson v. Mayor, &c., of New York, 24 Barb. 226. APPROVED, 5 Abb. Pr. 41, 46.

Randall v. Crandall, 6 Hill 342. CONTRA, 57 How. Pr. 56.

Randall v. Smith, 1 Den. 214. OVERRULED, 58 N. Y. 89, 90.

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Ranney v. Peyser, 20 Hun 11. REVERSED, 83 N. Y. 1.

Ransford v. Marvin, 8 Abb. Pr., N. S., 432. CONTRA, 39 How. Pr. 287.

Rapalye v. Rapalye, 27 Barb. 610. FOLLOWED, 3 Hun 453.

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Rathbone v. Hooney, 58 N. Y. 463. DISTINGUISHED, 59 N. Y. 284.

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Rathbun v. Ross, 46 Barb. 127. LIMITED, 3 Thomp. & C. 429.

Rathbun v. Sawyer, 15 Wend. 451. OVERRULED, 55 N. Y. 31.

Raubitschek v. Blank, 44 Superior 564. AFFIRMED, 80 N. Y. 478.

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Rawle v. Carr, 17 Abb. Pr. 96. CONTRA, 12 How. Pr. 465.

Rawls v. Deshler, 3 Keyes 572. DISTINGUISHED, 60 N. Y. 49.

Rawson v. Copland, 3 Barb. Ch. 166. DISAPPROVED, 12 Hun 514. LIMITED, 59 N. Y. 581.

Rawson v. Pennsylvania R. R. Co., 48 N. Y. 212. DISTINGUISHED, 54 N. Y. 515. FOLLOWED, 1 Thomp. & C. 227; 7 Ben. (U. S.) 451.

Ray v. Bogart, 2 Johns. Cas. 432, 438. DISTINGUISHED, 54 Cal. 469.

Raymond v. Husson, 12 Week. Dig. 279. APPEAL DISMISSED, Oct. 11th, 1881.

Read v. Decker, 5 Hun 646. AFFIRMED, 67 N. Y. 182.

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Reade v. Livingston, 3 Johns. Ch. 481. CONSIDERED AND APPLIED, 5 Cow. 67; 10 W. Va. 98.

Reade v. Waterhouse, 12 Abb. Pr., N. S., 255. REVERSED, 52 N. Y. 587.

Reade v. Waterhouse, 52 N. Y. 587. FOLLOWED, 45 Superior 154.

Real v. People, 55 Barb. 551. *See* 8 Abb. Pr., N. S., 314.

Real v. People, 42 N. Y. 270. FOLLOWED, 1 Thomp. & C. 569.

Reciprocity Bank, Matter of, 22 N. Y. 9. EXPLAINED, 23 N. Y. 508.

Rector v. Clark, 12 Hun 189. REVERSED, 20 Alb. L. J. 240.

Rector, &c., of Trinity Church v. Higgins, 48 N. Y. 532. DISTINGUISHED, 37 Superior 79. FOLLOWED, 36 Id. 79. REVIEWED, 38 Id. 215.

Rector of Church of Redeemer v. Crawford, 43 N. Y. 476. FOLLOWED, 23 Hun 271, 272.

Redfield v. Middleton, 7 Bosw. 649. DISTINGUISHED, 1 Abb. Pr., N. S., 16, 22.

Reed v. Drake, 7 Wend. 345, 346. FOLLOWED, 59 Mo. 177.

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Reed v. Gannon, 3 Daly 414. REVERSED, 50 N. Y. 345.

Reed v. McCourt, 41 N. Y. 441. FOLLOWED, 37 Superior 171.

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Reed v. Randall, 29 N. Y. 358. APPROVED, 4 Lans. 5. DISTINGUISHED, 61 Barb. 238; 7 Hun 378, 542; 52 N. Y. 420; 57 N. Y. 21. EXPLAINED, 54 N. Y. 590. FOLLOWED, 7 Daly 19; 35 Superior 106.

Reformed Church of Gallupville v. Schoolcraft, 5 Lans. 206. REVERSED, 65 N. Y. 134.

Reformed Prot. Dutch Church v. Bradford, 8 Cow. 457. FOLLOWED, 4 Lans. 346.

Reformed Protestant Dutch Church v. Brown, 29 Barb. 335. AFFIRMED, 24 How. Pr. 76.

Reformed Prot. Dutch Church v. Brown, 54 Barb. 191. FOLLOWED, 59 Mo. 363.

Reformed Prot. Dutch Church v. Brown, 17 How. Pr. 287, 288. AFFIRMED, 4 Abb. App. Dec. 31.

Reilly's Case, 2 Abb. Pr., N. S., 334. CONTRA, 24 How. Pr. 247; 25 Id. 149.

Reiser, Matter of, 19 Hun 202. AFFIRMED, 81 N. Y. 629.

Reitz v. Reitz, 14 Hun 536. REVERSED, 80 N. Y. 538.

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Renouil v. Harris, 2 Code 71. APPROVED, 3 Code 7.

Rensselaer, &c., Plank Road Co. v. Wetsel, 6 How. Pr. 68. *See* 6 How. Pr. 71, 72.

Rensselaer, &c., R. R. Co. v. Davis, 43 N. Y. 137. DISTINGUISHED, 46 N. Y. 553; 53 Id. 62; 63 Id. 333; 64 Id. 63.

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Reynolds v. Freeman, 4 Sandf. 702. FOLLOWED, 10 How. Pr. 97, 100.

Reynolds v. Mayor, &c., of New York, 14 Abb. Pr. 176 *n.* CONTRA, 14 Abb. Pr. 174; 30 How. Pr. 36.

Reynolds v. New York Central, &c., R. R. Co., 58 N. Y. 248. DISTINGUISHED, 6 Hun 317. EXPLAINED, 23 Hun 76. FOLLOWED, 84 N. Y. 62.

Reynolds v. Robinson, 64 N. Y. 589. FOLLOWED, 22 Hun 251. FURTHER APPEAL, 82 N. Y. 103.

Rhinebeck, &c., R. R. Co., Matter of, 8 Hun 34. AFFIRMED, 67 N. Y. 242.

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Rice v. Manley, 5 Thomp. & C. 14. REVERSED, 66 N. Y. 82.

Richards v. Edick, 17 Barb. 260. DISAPPROVED, 51 N. H. 171. REVIEWED AND CRITICISED, 10 Abb. Pr., N. S., 495. *See* 51 How. Pr. 92, 95.

Richards v. Millard, 1 Thomp. & C. 247. REVERSED, 56 N. Y. 574.

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Richardson v, Abendroth, 43 Barb. 162. APPROVED, 49 Barb. 294.

Richardson v. Craig, 1 Duer 666. DOUBTED, 2 Abb. Pr. 441, 443; 3 Id. 184; 12 How. Pr. 383.

Richardson v. Rush, 9 Paige 248. COMMENTED ON, 16 Bankr. Reg. 448.

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Richardson v. Wilton, 4 Sandf. 708. FOLLOWED, 11 How. Pr. 395, 399.

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Rider v. Powell, 28 N. Y. 310. FOLLOWED, 2 Thomp. & C. 415.

Rider v. Vrooman, 12 Hun 299. AFFIRMED, 84 N. Y. 461.

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Riggs v. American Tract Soc., 19 Hun 481. REVERSED, 84 N. Y. 330.

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Riggs v. Murray, 2 Johns. Ch. 565. CONSIDERED AND EXPLAINED, 5 Cow. 547.

Riggs v. Pursell, 74 N. Y. 370, 374. DISTINGUISHED, 83 N. Y. 626.

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Ritch v. Smith, 60 How. Pr. 13. AFFIRMED, 60 How. Pr. 157.

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Roach v. Lafarge, 19 Abb. Pr. 67; 43 Barb. 616. OVERRULED, 53 N. Y. 6.

Rob v. Moffat, 3 Johns. 257. DISTINGUISHED, 22 Hun 385.

Robb v. Macdonald, 12 Abb. Pr. 213. APPROVED, 5 Hun 594.

Robb v. Montgomery, 20 Johns. 15. APPROVED, 82 N. Y. 108, 113.

Robbins, Matter of, 20 Hun 530. REVERSED, 82 N. Y. 131.

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Roberts, Matter of, 59 How. Pr. 136. CONTRA, 59 How. Pr. 148, 154, 155.

Roberts, Matter of, 17 Hun 559. AFFIRMED, 81 N. Y. 62.

Roberts v. Carter, 9 Abb. Pr. 106 *n.* CONTRA, 9 How. Pr. 474; 15 Id. 12.

Roberts v. Carter, 15 How. Pr. 65. REVERSED, 38 N. Y. 107.

Roberts v. Clark, 10 How. Pr. 451. CONTRA, 7 How. Pr. 354, 396; 19 Id. 450.

Roberts v. Fisher, 43 N. Y. 159. FOLLOWED, 2 Abb. N. Cas. 295, 300.

Roberts v. Fowler, 4 Abb. Pr. 263. DISTINGUISHED, 17 Hun 466.

Roberts v. Johnson, 58 N. Y. 613; 37 Superior 157. IN POINT, 9 Mo. App. 481, 483.

Roberts v. Morrison, 7 How. Pr. 396; 11 Leg. Obs. 60. OVERRULED, 1 Abb. App. Dec. 423 *n.;* 10 How. Pr. 451.

Roberts v. Prosser, 4 Lans. 369. REVERSED, 53 N. Y. 260.

Roberts v. Randel, 5 How. Pr. 327; 3 Sandf. 707. DISTINGUISHED, 7 Daly 402. FOLLOWED, 8 How. Pr. 189.

Robertson v. Bullions, 11 N. Y. 243. FOLLOWED, 4 Hun 225; 6 Thomp. & C. 545.

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Robinson v. Ames, 20 Johns. 146. DISTINGUISHED, 84 N. Y. 382.

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Robinson v. Brisbane, 7 Hun 180. APPEAL DISMISSED, 67 N. Y. 606.

Robinson v. Chamberlain, 34 N. Y. 389. FOLLOWED, 5 Lans. 294, 346; 44 N. Y. 116, 124; 47 N. Y. 131.

Robinson v. Cropsey, 2 Edw. 138. EXAMINED, 1 Sandf. Ch. 56.

Robinson v. Cushman, 2 Den. 149. FOLLOWED, 5 Kans. 422.

Robinson v. Dauchy, 3 Barb. 20, 29. FOLLOWED, 36 Superior 180.

Robinson v. Flint, 15 How. Pr. 240. *See* 58 Barb. 100.

Robinson v. Gregory, 29 Barb. 560. REVIEWED, 30 N. Y. 350. *See* 2 Daly 399.

Robinson v. International Life Ass. Soc. of London, 42 N. Y. 54. FOLLOWED, 81 N. Y. 285, 291. LIMITED, 53 N. Y. 344.

Robinson v. McManus, 4 Lans. 380. DISTINGUISHED, 10 Hun 348, 349.

Robinson v. Nat. Bank of New Berne, 58 How. Pr. 306. AFFIRMED, 59 How. Pr. 218.

Robinson v. Nat. Bank of New Berne, 19 Hun 477. AFFIRMED, 81 N. Y. 385.

Robinson v. New York Central, &c., R. R. Co., 66 N. Y. 11. DISAPPROVED, 43 Wis. 513, 529. FOLLOWED, 84 N. Y. 254.

Robinson v. Plimpton, 25 N. Y. 484. DISTINGUISHED, 58 N. Y. 586.

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Robinson v. Sinclair, 1 How. Pr. 106. DISTINGUISHED, 80 N. Y. 551.

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Robinson v. Wilcox, 2 Leg. Obs. 160. APPROVED, 35 Superior 536.

Rochester, &c., R. R. Co. v. Budlong, 6 How. Pr. 467. *See* 10 How. Pr. 169, 175.

Rochester City Bank v. Rapelje, 12 How. Pr. 26. CONTRA, 7 How. Pr. 354, 396; 19 Id. 450.

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Rochester, City of, v. Town of Rush, 15 Hun 239. REVERSED *on points not raised below*, 80 N. Y. 302.

Rochester White Lead Co. v. City of Rochester, 3 N. Y. 463. REVIEWED, 16 W. Va. 296.

Rockwell v. Hobby, 2 Sandf. Ch. 10. *See* 2 Disn. (Ohio) 99.

Rockwell v. Nearing, 35 N. Y. 302. DISTINGUISHED, 54 Barb. 566; 38 How. Pr. 141. FOLLOWED, 1 Civ. Pro. 326.

Roderigas v. East River Savings Inst., 48 How. Pr. 166. REVERSED, 63 N. Y. 460.

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Rodman v. Henry, 17 N. Y. 482. FOLLOWED, 26 How. Pr. 155, 157.

Rodman v. Munson, 13 Barb. 63. AFFIRMED, 13 Barb. 188, 205 *a*.

Roe v. Barker, 17 Hun 84. AFFIRMED, 82 N. Y. 432.

Roe v. Rogers, 8 How. Pr. 356. CONTRA, 9 How. Pr. 291; 10 Id. 46.

Roehner v. Knickerbocker Life Ins. Co., 63 N. Y. 160. FOLLOWED, 82 N. Y. 543, 551. NOT APPLICABLE, 7 Fed. Rep. 175, 179.

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Rogers v. Rogers, 3 Wend. 503. FOLLOWED, 49 How. Pr. 194; 38 Superior 89.

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Rogers v. Wheeler, 2 Lans. 486. AFFIRMED, 43 N. Y. 598.

Rogers v. Wheeler, 43 N. Y. 598. DISTINGUISHED, 63 N. Y. 288.

Rohrbach v. Ætna Ins. Co., 62 N. Y. 613. DISTINGUISHED, 68 N. Y. 439, 441.

Roll v. Northern Central R'y Co., 15 Hun 496. AFFIRMED, 80 N. Y. 647.

Rollwagen v. Rollwagen, 63 N. Y. 504. APPROVED, 4 Redf. 59. REVIEWED, Id. 127, 130, 133.

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Rood v. New York and Erie R. R. Co., 18 Barb. 80. FOLLOWED, 56 Barb. 464; 6 Hun 326.

Roome v. Philips, 27 N. Y. 357. DISTINGUISHED AND EXPLAINED, 22 Hun 407.

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Roosa v. Saugerties, &c., Turnp. Road Co., 8 How. Pr. 237. FOLLOWED, 9 How. Pr. 481. CONTRA, Id. 143, 147.

Roosevelt v. Carpenter, 28 Barb. 426. FOLLOWED, 2 Thomp. & C. 8.

Roosevelt v. Draper, 7 Abb. Pr. 108 APPROVED, 18 N. Y. 163.

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Roosevelt v. Draper, 23 N. Y. 318. FOLLOWED, 61 Barb. 124; 3 Thomp. & C. 297.

Roosevelt Hospital v. Mayor, &c., of New York, 18 Hun 582. AFFIRMED, 84 N. Y. 108.

Root v. Great Western R. R. Co., 45 N. Y. 524. FOLLOWED, 62 Barb. 160.

Root v. Lowndes, 6 Hill 518. DISTINGUISHED, 60 N. Y. 338.

Root v. Wright, 21 Hun 344. REVERSED, 84 N. Y. 72.

Rosa v. Butterfield, 33 N. Y. 665. FOLLOWED, 38 Superior 156.

Roseboom v. Roseboom, 15 Hun 309. AFFIRMED, 81 N. Y. 356.

Rosenthal v. Brush, 1 Code, N. S., 229. CONTRA, 1 Duer 596.

Ross v. Ackerman, 46 N. Y. 210. DISTINGUISHED, 3 Thomp. & C. 228, 230.

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Ross v. Harden, 44 Superior 579. AFFIRMED, 79 N. Y. 84.

Ross v. Mather, 51 N. Y. 108. DISTINGUISHED, 59 N. Y. 156, 162. FOLLOWED, 5 Hun 549; 54 N. Y. 656.

Ross v. Wood, 8 Hun 185. AFFIRMED, 70 N. Y. 8.

Rosseau v. City of Troy, 49 How. Pr. 492. APPROVED, 60 How. Pr. 371.

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Roth v. Buffalo, &c., R. R. Co., 34 N. Y. 548. EXPLAINED, 57 N. Y. 559.

Roth v. Wells, 29 N. Y. 471; 41 Barb. 194. APPROVED, 2 Abb. App. Dec. 13. LIMITED, 54 N. Y. 103.

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Rowell v. McCormick, 5 How. Pr. 337. CONTRA, 3 Duer 669; 5 How. Pr. 310; 14 Id. 430.

Rowland v. Hegeman, 59 N. Y. 643. FOLLOWED, 43 Superior 506.

Rowland v. Mayor, &c., of New York, 44 Superior 559. AFFIRMED, 83 N. Y. 372.

Rowley v. Empire Fire Ins. Co., 36 N. Y. 550. DISTINGUISHED, 2 Hun 404; 4 Thomp. & C. 584. FOLLOWED, 2 Hun 659; 1 Thomp. & C. 287; 5 Id. 211.

Roy v. Thompson, 1 Duer 636. CONTRA, 14 How. Pr. 359.

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Ruan v. Perry, 3 Cai. 120. EXPLAINED, 6 Cow. 675. OVERRULED, 2 Barb. 149.

Ruckman v. Cowell, 1 N. Y. 508. FOLLOWED, 37 Superior 18.

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Ruger v. Heckel, 21 Hun 489. AFFIRMED, 24 Hun VII.

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Rugg v. Rugg, 21 Hun 383. AFFIRMED, 83 N. Y. 592.

Ruggles v. Chapman, 1 Hun 324. AFFIRMED, 59 N. Y. 163.

Ruloff v. People, 5 Lans. 261. AFFIRMED, 11 Abb. Pr., N. S., 245; 45 N. Y. 213.

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Russell v. Weinberg, 4 Abb. N. Cas. 139. *See* 73 N. Y. 315.

Russell Manuf. Co. v. New Haven Steamboat Co., 50 N. Y. 121. EXPLAINED, 52 N. Y. 657.

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Ryerson v. Willis, 8 Daly 462. AFFIRMED, 81 N. Y. 277.

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Sande v. Birch, 19 Abb. Pr. 255. REVIEWED, 4 Abb. App. Dec. 148 *n*.

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Sands v. Crooke, 46 N. Y. 564. FOLLOWED, 50 N. Y. 684.

Sands v. Graves, 1 Thomp. & C. 13 *add.* REVERSED, 58 N. Y. 94.

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Sands v. Son, 1 Thomp. & C. 13 *add.* REVERSED, 56 N. Y. 662.

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Sanford v. White, 46 How. Pr. 205. AFFIRMED, 47 How. Pr. 96.

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Savage v. Crill, 19 Hun 4. AFFIRMED, Feb. 3d, 1880.

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Schaefer v. Henkel, 75 N. Y. 378. REVIEWED, 24 Hun 574.

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Security Life Ins. and Annuity Co., Matter of, 11 Hun 96. APPEAL DISMISSED, 71 N. Y. 222.

Sedgwick, Matter of, 23 Hun 532. AFFIRMED, 24 Hun VI.

Seely v. Prichard, 12 Leg. Obs. 245. CONTRA, 5 How. Pr. 337, 361; 12 Id. 522.

Segelken v. Meyer, 14 Hun 593. FOLLOWED, 22 Hun 7.

Seguine v. Seguine, 3 Abb. Pr., N. S., 442. FOLLOWED, 3 Thomp. & C. 115.

Seguine v. Seguine, 2 Barb. 385. AFFIRMED, Ct. App., May, 1849.

Seibert v. Erie R'y Co., 49 Barb. 583, 587. FOLLOWED, 34 Superior 269.

Seigel v. Heid, 36 How. Pr. 506. *See* 49 How. Pr. 308.

Seixas v. Woods, 2 Cai. 48. EXPLAINED, 51 N. Y. 203.

Seizer v. Mali, 32 Barb. 76. REVERSED, 41 N. Y. 619.

Selden v. Vermilyea, 1 Barb. 58. REVERSED, 3 N. Y. 525.

Seldon v. Hickock, 2 Cai. 166. FOLLOWED, 51 N. Y. 74.

Selover v. Wisner, 37 How. Pr. 176. AFFIRMED, 6 Alb. L. J. 176.

Servoss v. Stannard, 2 Code 56. OVERRULED, 7 Bosw. 640.

Seventy-sixth St., Matter of, 12 Abb. Pr. 317. CONTRA, 61 Barb. 45; 4 Lans. 467.

Sewall v. Fitch, 8 Cow. 215. DISTINGUISHED, 65 N. Y. 360.

Sewell v. City of Cohoes, 75 N. Y. 45. DISTINGUISHED, 81 N. Y. 21, 25.

Sewell v. Wheaton, 2 Abb. Pr. 175. REVIEWED, 2 Abb. N. Cas. 376.

Seward v. Jackson, 8 Cow. 406. APPROVED, 67 Me. 192. FOLLOWED, 38 Superior 324.

Seymour v. Brown, 19 Johns. 44. OVERRULED, 2 Barb. 524.

Seymour v. Canandaigua, &c., R. R. Co., 25 Barb. 284, 305. APPROVED, 72 Mo. 186.

Seymour v. Cowing, 1 Keyes 532. DISTINGUISHED, 22 Hun 244. FOLLOWED, 35 Superior 223.

Seymour v. Davis, 2 Sandf. 239. FOLLOWED, 35 Superior 218. OVERRULED, 32 Barb. 437.

Seymour v. Delancey, 6 Johns. Ch. 222, 225. APPROVED, 43 Ga. 82.

Seymour v. Fellows, 77 N. Y. 178. APPROVED, 83 N. Y. 470.

Seymour v. Judd, 2 N. Y. 464. FOLLOWED, 8 Hun 14, 16.

Seymour v. Wilson, 16 Barb. 294. CONTRA, 9 N. Y. 142.

Seymour v. Wilson, 14 N. Y. 567. FOLLOWED, 23 How. Pr. 215, 221, 222; 23 Hun 50, 54. CONTRA, 36 Ind. 330, 334; 18 Minn. 414, 423.

Shakespeare v. Markham, 10 Hun 311. AFFIRMED, 72 N. Y. 400.

Shaler, &c., Quarry Co. v. Bliss, 27 N. Y. 297. FOLLOWED, 2 Hun 614.

Shand v. Hanley, 71 N. Y. 319. DISTINGUISHED, 81 N. Y. 584, 589.

Shank's Case, 15 Abb. Pr., N. S., 38. REVERSED, 4 Thomp. & C. 467.

Shank v. Shoemaker, 18 N. Y. 489. *See* 62 Barb. 500.

Shannon v. Brower, 2 Abb. Pr. 377. CONTRA, 8 How. Pr. 448.

Sharp, Matter of, 56 N. Y. 257. DISTINGUISHED, 62 N. Y. 459.

Shaughnessy v. Rensselaer Ins. Co., 21 Barb. 605. APPROVED, 36 Ind. 430. *See* 15 How. Pr. 206, 208.

Shaver v. Western Union Teleg. Co., 57 N. Y. 459. DISTINGUISHED, 81 N. Y. 454, 460.

Shaw v. Coster, 8 Paige 339. FOLLOWED, 35 Superior 372.

Shaw v. Jayne, 4 How. Pr. 119. DISTINGUISHED, 60 How. Pr. 100. *See* 5 Id. 470, 473.

Shaw v. People, 3 Hun 272. DISTINGUISHED, 9 Hun 119; 4 Redf. 288.

Shaw v. Smith, 3 Keyes 316. DISTINGUISHED, 1 Thomp. & C. 509.

Shaw v. Tobias, 3 N. Y. 188. FOLLOWED, 29 Mich. 207, 211.

Shearman v. New York Central Mills, 1 Abb. Pr. 187. CONTRA, 3 Abb. Pr. 2; 12 How. Pr. 153, 155.

Shearman v. New York Central Mills, 11 How. Pr. 269. FOLLOWED, 12 How. Pr. 170.

Sheffield v. Watson, 3 Cai. 69. DISAPPROVED, 12 Johns. 448. FOLLOWED, Id. 388.

Sheldon v. Adams, 27 How. Pr. 1 OVERRULED, 2 Daly 203.

Sheldon v. Albro, 8 How. Pr. 305. Fo LOWED, 16 How. Pr. 538, 539.

Sheldon v. Benham, 4 Hill 129. D APPROVED, 47 Iowa 146.

Sheldon v. Wood, 2 Bosw. 267. A PROVED, 33 Superior 141.

Sheldon v. Wright, 5 N. Y. 497. D TINGUISHED, 63 N. Y. 475.

Shellington v. Howland, 67 Barb. 1 53 N. Y. 371. FOLLOWED, 23 Hun 256, 2 339, 341, 342.

Shelton v. Merchants' Dispatc Transp. Co., 36 Superior 527. REVERSED, Alb. L. J. 400.

Shepard v. Merrill, 13 Johns. 475, 4 LIMITED, 38 Conn. 46.

Shepard v. Shepard, 7 Johns. Ch. FOLLOWED, 44 N. Y. 32, 42; 62 Ill. 26.

Shepherd v. Dean, 13 How. Pr. 1 CONTRA, 13 How. Pr. 331; 22 Id. 309, 311.

Shepherd v. People, 19 N. Y. 537. Fo LOWED, 80 N. Y. 329, 332.

Shepherd v. Shepherd, 3 Thomp. & 715; 1 Hun 240. IN POINT, 7 Bradw. (Il 531, 532, 533.

Shepmoes v. Bowsson, 52 How. Pr. *See* 55 How. Pr. 259, 260.

Sheppard v. Hamilton, 29 Barb. EXPLAINED, 55 N. Y. 229.

Sheridan v. Andrews, 3 Lans. 1 AFFIRMED, 6 Alb. L. J. 176.

Sheridan v. Andrews, 80 N. Y. 6 FOLLOWED, 81 N. Y. 650.

Sheridan v. Genet, 12 Hun 660. Fo LOWED, 44 Superior 132, 581.

Sheridan v. Houghton, 16 Hun 6 MODIFIED, 84 N. Y. 643.

Sheriden v. Smith, 2 Hill 538. DISTI GUISHED, 61 N. Y. 322.

Sherlock v. Sherlock, 7 Abb. Pr., N. 22. OVERRULED, 3 Abb. N. Cas. 83 *n.*

Sherman v. Felt, 2 N. Y. 186. A PROVED, 41 N. Y. 159, 162.

Sherman v. Page, 21 Hun 59. A FIRMED, 24 Hun VII.

Sherman v. Parish, 53 N. Y. 483. Di TINGUISHED, 22 Hun 154.

Sherman v. Smith, 42 How. Pr. 198. N TICED, 44 Superior 144. CONTRA, 9 Abb. 58, 240.

Sherman v. Wells, 14 How. Pr. 5 CONTRA, 3 Duer 669; 5 How. Pr. 310; 14 430; 27 Id. 133, 135.

Sherred v. Cisco, 4 Sandf. 480. A PROVED, 15 N. Y. 601. FOLLOWED, 49 Ho Pr. 531.

Sherwood v. Barton, 23 How. Pr. 533. DISTINGUISHED, 54 N. Y. 538.

Sherwood v. Buffalo, &c., R. R. Co., 12 How. Pr. 136. *See* 12 How. Pr. 359.

Sherwood v. Johnson, 1 Wend. 444. DISAPPROVED, 75 Ill. 65.

Sherwood v. Vandenburgh, 2 Hill 303. OVERRULED, 8 Barb. 406.

Shields v. Pettie, 4 N. Y. 122, 124. DISTINGUISHED, 23 Hun 241, 243.

Shields v. Shields, 60 Barb. 56. CRITICISED, 4 Redf. 225.

Shiff v. New York Central, &c., R. R. Co., 16 Hun 278. AFFIRMED, 81 N. Y. 638.

Shindler v. Houston, 1 N. Y. 261. APPROVED, 5 Lans. 249.

Shiply v. People, 12 Week. Dig. 239. AFFIRMED, Oct. 11th, 1881.

Shipman v. Burrows, 1 Hall 411. APPROVED, 40 Superior 126.

Shipsey v. Bowery Nat. Bank, 36 Superior 501. REVERSED, 11 Alb. L. J. 67.

Shirley v. Shirley, 9 Paige 363. DISTINGUISHED, 61 N. Y. 581.

Shoemaker v. Benedict, 11 N. Y. 176. DISAPPROVED, 9 Vr. (N. J.) 36.

Shord v. Dwight, 26 How. Pr. 163. APPROVED, 30 How. Pr. 104.

Shotwell v. Mott, 2 Sandf. Ch. 46. OVERRULED, 34 N. Y. 584, 610; 52 Id. 337. *See* 40 Wis. 259.

Shufelt v. Power, 13 How. Pr. 89. APPLIED, 15 How. Pr. 156, 158.

Shults v. Andrews, 54 How. Pr. 376. *See* 54 How. Pr. 378.

Shuman v. Strauss, 34 Superior 6. APPEAL DISMISSED, 52 N. Y. 404.

Shuman v. Strauss, 52 N. Y. 404. DISAPPROVED, 9 Abb. N. Cas. 320.

Shumway v. Cooper, 16 Barb. 556. LIMITED, 2 Redf. 330.

Sibell v. Remsen, 30 Barb. 441. AFFIRMED, 29 How. Pr. 574.

Sice v. Cunningham, 1 Cow. 397. CRITICISED, 2 Disn. (Ohio) 479.

Sickels v. Fort, 15 Wend. 559. LIMITED, 7 Hill 53.

Sickels v. Pattison, 14 Wend. 257. FOLLOWED, 35 Superior 218.

Sickles v. Richardson, 14 Hun 110. FOLLOWED, 61 How. Pr. 308.

Sigourney v. Waddle, 9 Paige 381. FOLLOWED, 48 How. Pr. 431.

Silsbury v. McCoon, 3 N. Y. 379. FOLLOWED, 54 Iowa 635.

Simar v. Canaday, 53 N. Y. 298. FOLLOWED, 5 Hun 595, 596.

Simmons v. Cloonan, 7 Hun 470. AFFIRMED, 81 N. Y. 557.

Simmons v. Law, 3 Keyes 217. DISTINGUISHED, 80 N. Y. 71, 80.

Simmons v. Lyons, 55 N. Y. 671; 35 Superior 554. REVIEWED, 39 Superior 277.

Simmons v. Sherman, 30 How. Pr. 4. NOT FOLLOWED, 48 Barb. 342.

Simmons v. Sisson, 26 N. Y. 276. DISTINGUISHED, 42 Superior 427.

Simpson v. Burch, 4 Hun 315. DISTINGUISHED, 84 N. Y. 618.

Simpson v. Loft, 8 How. Pr. 234. FOLLOWED, 9 How. Pr. 481. CONTRA, Id. 143, 147.

Simpson v. Patten, 4 Johns. 422. EXPLAINED, 2 Den. 45.

Simpson v. Rhinelanders, 20 Wend. 103. CONTRA *as to first point*, 5 N. Y. 383.

Sims v. Sims, 12 Hun 231. REVERSED, 18 Alb. L. J. 500.

Simson v. Brown, 6 Hun 251. REVERSED, 68 N. Y. 355. *See* 14 Hun 500.

Simson v. Brown, 68 N. Y. 355. FOLLOWED, 84 N. Y. 514.

Simson v. Schenck, 29 N. Y. 598. REVIEWED, 47 N. Y. 551.

Sipperly v. Warner, 9 How. Pr. 332, 333. APPLIED, 15 How. Pr. 156, 158.

Sisters of Charity of St. Vincent de Paul v. Kelly, 7 Hun 290. *See* 68 N. Y. 628.

Sixth Ave. R. R. Co. v. Gilbert Elevated R. R. Co., 41 Superior 489. REVERSED, 43 Superior 292. OVERRULED, 70 N. Y. 361.

Sixth Ave. R. R. Co. v. Gilbert Elevated R. R. Co., 43 Superior 292. DISTINGUISHED, 46 Superior 160.

Sixty-fifth Street, Matter of, 23 How. Pr. 256. CONTRA, 4 Lans. 467.

Sizer v. Miller, 1 Hill 227. OVERRULED, 23 How. Pr. 215, 220.

Skinner v. Stuart, 15 Abb. Pr. 391. APPROVED, 51 N. Y. 523.

Skinner v. Stuart, 39 Barb. 206. DISTINGUISHED, 3 Hun 2.

Slack v. Heath, 1 Abb. Pr. 331. APPROVED, 6 Abb. Pr. 243, 247.

Slee v. Bloom, 20 Johns. 669. CONCURRED IN, 9 How. Pr. 436, 438. EXPLAINED, 5 Hill 131. FOLLOWED, 8 Abb. Pr., N. S., 52, 54; 57 Barb. 508; 80 N. Y. 379, 386.

Slee v. Bloom, 19 Johns. 456. FOLLOWED, 80 N. Y. 379, 386.

Slee v. President, &c., of Manhattan Co., 1 Paige 48. APPROVED, 16 N. Y. 231.

Sleight v. City of Kingston, 11 Hun 594. APPEAL DISMISSED, 73 N. Y. 592.

Sloan v. New York Central R. R. Co., 45 N. Y. 125. APPROVED, 80 N. Y. 281, 299.

Smart v. Bement, 3 Keyes 241. *See* 4 Abb. App. Dec. 253.

Smith, Matter of, 52 N. Y. 526. DISTINGUISHED, 62 N. Y. 227.

Smith v. Acker, 23 Wend. 653. APPROVED, 4 Hill 271. COMMENTED ON, 4 N. Y. 581. DOUBTED, 1 Hill 438, 467, 473.

Smith v. American Life Ins., &c., Co., Clarke 307. FOLLOWED, 1 Tenn. Ch. 177.

Smith v. Belden, 2 Hun 681. APPEAL DISMISSED, 60 N. Y. 642.

Smith v. Birdsall, 9 Johns. 328. NOT FOLLOWED, 46 How. Pr. 481, 490, 491.

Smith v. Bowen, 35 N. Y. 83. APPLIED, 56 How. Pr. 520, 530.

Smith v. Brady, 17 N. Y. 173. DISTINGUISHED, 7 Hun 614; 81 N. Y. 341, 344. FOLLOWED, 43 How. Pr. 393; 51 Id. 386; 42 Superior 256; 2 Thomp. & C. 365.

Smith v. Burke, 10 Johns. 110. DISTINGUISHED, 12 Johns. 206.

Smith v. Clark, 21 Wend. 83. APPROVED, 2 Barb. 520.

Smith v. Coe, 7 Robt. 477. AFFIRMED, 6 Alb. L. J. 197.

Smith v. Corbiere, 3 Bosw. 634. DISTINGUISHED, 22 Hun 385.

Smith v. Crouse, 24 Barb. 433. DISTINGUISHED, 58 N. Y. 588.

Smith v. Dodd, 3 E. D. Smith 348. REVIEWED, 54 Iowa 548.

Smith v. Empire Ins. Co., 25 Barb. 497. *See* 10 Hun 430.

Smith v. Floyd, 18 Barb. 522. DISTINGUISHED, 1 Lans. 32.

Smith v. Griffith, 3 Hill 333, 338. DISTINGUISHED, 81 N. Y. 623, 624.

Smith v. Hall, 67 N. Y. 48, 51. FOLLOWED, 22 Hun 52.

Smith v. Hart, 11 How. Pr. 203. SUPERSEDED, 34 How. Pr. 333, 334.

Smith v. Holmes, 19 N. Y. 271. DISTINGUISHED, 51 Wis. 612.

Smith v. Howard, 20 How. Pr. 121. DISTINGUISHED, 52 N. Y. 172.

Smith v. Lansing, 22 N. Y. 520. EXPLAINED, 84 N. Y. 199.

Smith v. Lewis, 1 Daly 452. CONTRA, 6 Duer 689; 4 How. Pr. 335; 5 Id. 30; 15 Id. 57; 3 Sandf. 724.

Smith v. Lippincott, 49 Barb. 398. AFFIRMED, 6 Alb. L. J. 199.

Smith v. Lusher, 5 Cow. 688. DISTINGUISHED, 54 N. Y. 538.

Smith v. Lyke, 13 Hun 204. DISTINGUISHED, 60 How. Pr. 175.

Smith v. MacDonald, 1 Abb. N. Cas. 350. CONTRA, 3 Abb. N. Cas. 126 *n.*

Smith v. Matson, 47 How. Pr. 118. *See* 47 How. Pr. 233.

Smith v. Mayor, &c., of New York, 6 Daly 401. *See* 68 N. Y. 552.

Smith v. Mayor, &c., of New York, 37 N. Y. 518. DISTINGUISHED, 80 N. Y. 190. FOLLOWED, 3 Thomp. & C. 131, 132.

Smith v. Mayor, &c., of New York, 68 N. Y. 552. FOLLOWED, 55 How. Pr. 138, 144; 82 N. Y. 459, 462.

Smith v. Miller, 25 N. Y. 619; 6 Robt. 413. REVERSED, 43 N. Y. 171.

Smith v. Miller, 43 N. Y. 171. DISTINGUISHED, 57 N. Y. 642.

Smith v. Mumford, 9 Cow. 26. EXPLAINED, 3 N. Y. 193.

Smith v. New York and Oswego Midland R. R. Co., 63 N. Y. 58. FOLLOWED, 81 N. Y. 190, 198.

Smith v. New York Central R. R. Co., 43 Barb. 225. EXPLAINED, 2 Lans. 199.

Smith v. New York Central R. R. Co., 4 Keyes 180. FOLLOWED, 3 Daly 506. *See* 24 N. Y. 222.

Smith v. New York Central R. R. Co., 24 N. Y. 222. INAPPLICABLE, 2 Hun 51.

Smith v. Niver, 2 Barb. 180. DISTINGUISHED, 64 Barb. 431.

Smith v. Oliphant, 7 Leg. Obs. 17. REVERSED, 2 Sandf. 306.

Smith v. Olssen, 4 Sandf. 711. EXAMINED AND QUALIFIED, 1 Abb. Pr. 443, 447.

Smith v. Orser, 43 Barb. 187. RECONCILED, 8 Abb. Pr., N. S., 369, 380.

Smith v. Rogers, 17 Johns. 340. EXPLAINED, 1 Hun 451, 452, 453.

Smith v. Rosenthall, 11 How. Pr. 442. CONTRA, 13 How. Pr. 309, 312.

Smith v. Rowley, 66 Barb. 502, 503. IN POINT, 96 Ind. 308.

Smith v. Saratoga County Mut. Fire Ins. Co., 1 Hill 497. DISTINGUISHED, 58 Barb. 325.

Smith v. Saratoga County Mut. Fire Ins. Co., 3 Hill 508. DISTINGUISHED, 46 N. Y. 529.

Smith v. Scholtz, 68 N. Y. 41. DISTINGUISHED, 23 Hun 299, 303.

Smith v. Slade, 57 Barb. 637, 641. APPROVED, 35 Superior 491. DISTINGUISHED, 1 Hun 350, 352.

Smith v. Smith, 33 Barb. 371 *n.*; 1 Sweeny 552. AFFIRMED, 6 Alb. L. J. 176.

Smith v. Smith, 15 How. Pr. 165. *See* 15 How. Pr. 169, 170.

Smith v. Smith, 40 How. Pr. 318. AFFIRMED, 6 Alb. L. J. 176.

Smith v. Smith, 2 Johns. 235, 242. FOLLOWED, 12 Johns. 143.

Smith v. Smith, 4 Paige 92. DISTINGUISHED, 23 Hun 19, 22.

Smith v. Smith, 1 Thomp. & C. 63. REVERSED, 11 Alb. L. J. 147.

Smith v. Smith, 4 Wend. 468. *See* 39 Superior 307.

Smith v. Smith, 25 Wend. 405. CORRECTED, 2 Hill 351.

Smith v. Starr, 4 Hun 123. APPEAL DISMISSED, 70 N. Y. 155.

Smith v. Stewart, 6 Johns. 46. APPROVED, 60 Barb. 477.

Smith v. Underdunck, 1 Sandf. Ch. 579. DISTINGUISHED, 69 N. Y. 583.

Smith v. Van Ostrand, 64 N. Y. 278. FOLLOWED, 4 Redf. 51, 52, 53.

Smith v. Velie, 60 N. Y. 106. DISTINGUISHED, 23 Hun 99, 102, 393, 394.

Smith v. White, 7 Hill 520. FOLLOWED, 14 How. Pr. 95, 96.

Smith v. Woodruff, 1 Hilt. 462. CONTRA, 9 N. Y. 142.

Smith v. Wright, 5 Sandf. 113. OVERRULED, 4 Abb. App. Dec. 274.

Smith, d. Teller, v. Burtis, Anth. N. P. 152. REVERSED, 6 Johns. 197.

Smyth v. Knickerbocker Life Ins. Co., 21 Hun 241. AFFIRMED, 84 N. Y. 589.

Smyth v. Munroe, 19 Hun 550. AFFIRMED, 84 N. Y. 354.

Snook, Petition of, 2 Hilt. 566. APPROVED, 83 N. Y. 269.

Snow v. Columbian Ins. Co., 48 Barb. 469; 48 N. Y. 624. *See* 35 Superior 247.

Snow v. Roy, 22 Wend. 602. FOLLOWED, 3 How. Pr. 90.

Snyder v. Collins, 12 Hun 383. DISTINGUISHED, 1 Civ. Pro. 310.

Snyder v. Plass, 28 N. Y. 465. FOLLOWED, 38 N. Y. 355, 357.

Solinger v. Earle, 45 Superior 80. AFFIRMED, 82 N. Y. 393.

Solinger v. Earle, 45 Superior 604. AFFIRMED, 60 How. Pr. 116.

Southard v. Rexford, 6 Cow. 254. FOLLOWED, 42 N. Y. 475, 482.

Southern Central R. R. Co. v. Town of Moravia, 61 Barb. 180, 189. APPROVED, 23 Hun 79, 80, 81. FOLLOWED, 38 Superior 478.

Southwick v. First Nat. Bank of Memphis, 20 Hun 349. REVERSED, 84 N. Y. 420.

Southwick v. First Nat. Bank of Memphis, 9 Week. Dig. 520. REVERSED, 12 Week. Dig. 478.

Southworth v. Curtis, 6 How. Pr. 271. CONTRA, 5 Duer 601.

Spalding v. Spalding, 3 How. Pr. 297. CONTRA, 3 How. Pr. 379.

Spaulding v. Strang, 32 Barb. 235. DISTINGUISHED, 50 Barb. 414.

Spaulding v. Strang, 37 N. Y. 135; 38 Id. 9. EXPLAINED, 53 N. Y. 74.

Spear v. Wardell, 1 N. Y. 144. DISTINGUISHED, 13 Barb. 603.

Spears v. Mayor, &c., of New York, 10 Hun 160. APPEAL DISMISSED, 72 N. Y. 442.

Spellman v. Weider, 5 How. Pr. 5. DISAPPROVED, 9 Abb. N. Cas. 302.

Spencer v. Barnett, 35 N. Y. 94. DISTINGUISHED, 10 Hun 506, 508. EXPLAINED, 14 Abb. Pr., N. S., 284, 302, 313. FOLLOWED, 9 Hun 424, 428.

Spencer v. Cuyler, 17 How. Pr. 157. FOLLOWED, 18 How. Pr. 33, 35, 36.

Spencer v. Halstead, 1 Den. 606. AFFIRMED, 3 Den. 610.

Spencer v. Utica, &c., R. R. Co., 5 Barb. 337. FOLLOWED, 34 How. Pr. 239.

Sperling v. Levy, 10 Abb. Pr. 426. CONTRA, 15 How. Pr. 410; 17 Id. 157; 18 Id. 33.

Sperling v. Levy, 1 Daly 95. FOLLOWED, 45 Superior 92.

Sperry v. Reynolds, 5 Lans. 407. FOLLOWED, 3 Thomp. & C. 32.

Speyers v. Lambert, 37 How. Pr. 315. CONTRA, 10 Hun 343, 347.

Spinnetti v. Atlas Steamship Co., 14 Hun 100. REVERSED, 80 N. Y. 71.

Spooner v. Brooklyn City R. R. Co., 31 Barb. 419. *See* 54 N. Y. 230.

Spooner v. Brooklyn City R. R. Co., 36 Barb. 217. REVERSED, 54 N. Y. 230.

Sprague v. Birdsall, 2 Cow. 419. EXPLAINED, 7 Cow. 33.

Sprague v. Blake, 20 Wend. 61. APPROVED, 2 Hilt. 184.

Sprague v. Butterworth, 22 Hun 502. APPEAL DISMISSED, 84 N. Y. 649.

Spraights v. Hawley, 39 N. Y. 441. DISTINGUISHED, 6 Hun 331, 337.

Spraker v. Cook, 16 N. Y. 567. FOLLOWED, 60 How. Pr. 446; 84 N. Y. 293.

Springer v. Dwyer, 50 N. Y. 19. DISTINGUISHED, 56 N. Y. 674.

Springport, Town of, v. Teutonia Savings Bank, 75 N. Y. 397. DISTINGUISHED, 22 Hun 206; 84 N. Y. 540. FURTHER APPEAL, Id. 404, 406.

Springstein v. Schermerhorn, 12 Johns. 357. DISTINGUISHED, 68 N. Y. 353.

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Staats v. Bristow, 73 N. Y. 264. DISTINGUISHED, 61 How. Pr. 270, 271.

Staats v. Hudson River R. R. Co., 23 How. Pr. 463. FOLLOWED, 26 How. Pr. 528, 531.

Stackpole v. Robbins, 47 Barb. 212. AFFIRMED, 6 Alb. L. J. 199.

Stafford v. Richardson, 15 Wend. 302. COMMENTED ON, 5 Hill 395.

Stalker v. M'Donald, 6 Hill 93. COMMENTED ON, 22 Alb. L. J. 191. REVIEWED, 12 Otto (U. S.) 25, 44.

Stannard v. Mattice, 7 How. Pr. 4. *See* 11 How. Pr. 149, 152.

Stanton v. Allen, 5 Den. 434. DISTINGUISHED, 66 N. Y. 293.

Stanton v. Ellis, 12 N. Y. 575. DISTINGUISHED, 2 Abb. N. Cas. 372, 377.

Stanton v. King, 8 Hun 4. FOLLOWED, 12 Hun 431, 433.

Stape v. People, 21 Hun 399. REVERSED, 24 Hun VII.

Stape v. People, 10 Week. Dig. 423. REVERSED, 12 Week. Dig. 271.

Starbuck v. Murray, 5 Wend. 148. APPROVED, 48 Ga. 50; 51 Mo. 75. *See* 2 Dill. (U. S.) 424.

Starin v. Town of Genoa, 23 N. Y. 439. DISAPPROVED, 48 Mo. 167, 179. EXPLAINED, 24 N. Y. 114, 127. FOLLOWED, 59 Barb. 446; 34 How. Pr. 294, 295; 36 N. Y. 224, 229; 1 Thomp. & C. 134.

Starks v. Bates, 12 How. Pr. 465. CONTRA, 4 Abb. Pr., N. S., 403; 17 Abb. Pr. 99.

Starr v. Trustees of Village of Rochester, 6 Wend. 564. DISTINGUISHED, 82 N. Y. 95, 102. *See* 2 How. Pr. 256.

State v. Weare, 38 N. Y. 319. FOLLOWED, 38 Iowa 375.

State Bank of Troy v. Bank of the Capitol, 27 How. Pr. 57. S. C., 41 Barb. 343.

Steam Navig. Co. v. Weed, 8 How. Pr. 49. FOLLOWED, 10 How. Pr. 415, 421.

Steamboat Josephine, In re, 39 N. Y. 19. DISTINGUISHED, 43 N. Y. 52, 55. FOLLOWED, 44 Id. 417, 419. LIMITED, 43 Id. 555, 556; 33 Superior 337.

Steamship Circassian, Matter of, 50 Barb. 490. *See* 39 N. Y. 19.

Stebbins v. Phœnix Fire Ins. Co., 3 Paige 350, 356. REVIEWED, 46 N. Y. 332.

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Steele v. Benham, 21 Hun 411. REVERSED, 84 N. Y. 634.

Steele v. Whipple, 21 Wend. 103. EXPLAINED, 4 Hill 225. QUESTIONED, 21 N. Y. 533.

Steinbach v. La Fayette Ins. Co., 54 N. Y. 90. CONTRA, 13 Wall. (U. S.) 183.

Steinweg v. Erie R'y Co., 43 N. Y. 123. APPROVED, 37 Ind. 448, 455. IN POINT, 58 Miss. 915.

Stenton v. Jerome, 54 N. Y. 480. ADOPTED, 44 Superior 424.

Stepenhorst v. Wolff, 35 Superior 25. AFFIRMED, 65 N. Y. 596.

Stephens v. Board of Education of Brooklyn, 79 N. Y. 183. EXPLAINED, 61 How. Pr. 175. FOLLOWED, 84 N. Y. 434.

Stephens v. Buffalo, &c., R. R. Co., 20 Barb. 332. APPROVED, 13 Vr. (N. J.) 282.

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Stephens v. Fox, 17 Hun 435. AFFIRMED, 83 N. Y. 313.

Stephens v. Santee, 51 Barb. 532, 545. APPROVED, 5 Lans. 246.

Stephens v. Waite, 10 Week. Dig. 421. AFFIRMED, 12 Week. Dig. 9.

Stephenson v. New York, &c., R. R. Co., 2 Duer 341. CRITICISED, 28 Mich. 300.

Sternberger v. McGovern, 4 Daly 456. REVERSED, 15 Abb. Pr., N. S., 257; 56 N. Y. 12.

Sternberger v. McGovern, 15 Abb. Pr., N. S., 257. FOLLOWED, 37 Superior 396; 38 Id. 208.

Sterne v. Goep, 20 Hun 395. AFFIRMED, 84 N. Y. 641.

Sterne v. Herman, 11 Abb. Pr., N. S., 376. CONTRA, 11 Abb. Pr., N. S., 455.

Steuben County Bank v. Alberger, 55 How. Pr. 481. REVERSED, 56 How. Pr. 345.

Steuben County Bank v. Alberger, 56 How. Pr. 345. DISTINGUISHED, 60 How. Pr. 191.

Stevens v. Phœnix Ins. Co. of Hartford, 24 How. Pr. 517. NOT APPLICABLE, 3 Abb. Pr., N. S., 457. QUESTIONED, 48 Barb. 132. *See* 25 Wis. 146.

Stevens v. Veriane, 2 Lans. 90. DISTINGUISHED, 23 Hun 424, 428. OVERRULED, 63 N. Y. 264.

Stevens v. Wilson, 3 Den. 472; 6 Hill 512. CRITICISED, 43 Wis. 289.

Stevenson v. Lesley, 49 How. Pr. 229. *See* 9 Hun 637; 70 N. Y. 512.

Steves v. Oswego, &c., R. R. Co., 18 N. Y. 422. APPROVED, 23 How. Pr. 492, 495, 502.

Steward v. Hotchkiss, 2 Cow. 634. FOLLOWED, 38 Superior 137.

Stewart v. Fonda, 9 Week. Dig. 90. AFFIRMED, Oct. 11th, 1881.

Stewart v. Howard, 15 Barb. 26. OVERRULED, 47 How. Pr. 415, 416, 417.

Stewart v. Lispenard, 26 Wend. 255 APPROVED *in part,* 3 Den. 37. CRITICISED, 56 Mo. 376. OVERRULED, 25 N. Y. 9, 100.

Stewart v. Metropolitan Board of Health, 33 How. Pr. 3. CONTRA, 18 How Pr. 468.

Stewart v. Petree, 55 N. Y. 621. DISTINGUISHED, 67 N. Y. 170.

Stewart v. Powers, 38 Superior 56. REVERSED, 38 Superior 366.

Stewart v. Saratoga, &c., R. R. Co., 12 How. Pr. 435. CONTRA, 1 Duer 622; 8 How. Pr. 488; 11 Id. 512.

Stewart v. Slater, 6 Duer 83, 102. FOLLOWED, 34 Superior 476.

Stewart v. Smith, 39 Barb. 167. *See* 1 Keyes 59.

Stewart v. Wells, 6 Barb. 79. DISAPPROVED, 50 N. H. 490. DISTINGUISHED, 83 N. Y. 526.

Stiebeling v. Lockhaus, 21 Hun 457. NOT FOLLOWED, 60 How. Pr. 278.

Stief v. Hart, 1 N. Y. 20. CONTRA, 4 Abb. App. Dec. 425 *n.*

Stiles v. Stewart, 12 Wend. 473. COMMENTED ON, 7 Hill 37 *n.* EXPLAINED, 3 N. Y. 193.

Stilwell v. Coope, 4 Den. 225. DISTINGUISHED, 7 Bradw. (Ill.) 539.

Stilwell v. Hasbrouck, 1 Hill 561. OVERRULED, 3 Barb. 543.

Stilwell v. Staples, 4 Robt. 639. *See* 46 N. Y. 603.

Stimson v. Huggins, 9 How. Pr. 86. FOLLOWED, 9 How. Pr. 263.

Stimson v. Van Pelt, 66 Barb. 151. REVERSED, 38 How. Pr. 669.

Stimson v. Wrigley, 10 Week. Dig. 10. AFFIRMED, Oct. 11th, 1881.

Stinde v. Ridgway, 55 How. Pr. 301. APPROVED, 4 Redf. 226.

Stinson v. New York Central R. R. Co., 32 N. Y. 333. DISTINGUISHED, 66 N. Y. 317.

Stitt v. Little, 63 N. Y. 427, 435. DISTINGUISHED, 23 Hun 445, 447. NOTICED, 44 Superior 144.

Stocker v. Partridge, 2 Robt. 193. REVERSED, 41 N. Y. 620.

Stockwell v. Phelps, 34 N. Y. 363. DISTINGUISHED, 65 N. Y. 419.

Stoddard v. Clarke, 9 Abb. Pr., N. S., 310. APPROVED, 50 N. Y. 672.

Stoddard v. Whiting, 46 N. Y. 627. DISTINGUISHED, 55 N. Y. 639; 41 Superior 84. LIMITED, 68 N. Y. 506.

Stokes v. Landgraff, 17 Barb. 608. APPROVED, 7 Bosw. 229; 9 Id. 199; 3 Keyes 596.

Stokes v. People, 53 N. Y. 164. EXPLAINED, 55 Ala. 31, 38. FOLLOWED, 2 Thomp. & C. 223.

Stone v. Browning, 49 Barb. 244. REVERSED, 44 How. Pr. 131.

Stone v. Burgess, 2 Lans. 439. AFFIRMED, 47 N. Y. 521.

Stone v. Flower, 47 N. Y. 566. FOLLOWED, 37 Superior 171.

Stoneman v. Erie R'y Co., Sheld. 286. AFFIRMED, 52 N. Y. 429.

Storey v. Brennan, 15 N. Y. 524. FOLLOWED, 38 Superior 461.

Storm v. Davenport, 1 Sandf. Ch. 135. NOT FOLLOWED, 6 Fed. Rep. 61.

Storm v. Waddell, 2 Sandf. Ch. 494, 510, 512. REVIEWED, 6 Fed. Rep. 769, 772.

Storrs v. City of Utica, 17 N. Y. 104. APPROVED, 53 Md. 117. DISTINGUISHED, 61 N. Y. 182.

Story v. Duffy, 8 How. Pr. 488. FOLLOWED, 11 How. Pr. 572, 573, 574. CONTRA, 6 Id. 32; 8 Id. 285; 12 Id. 435.

Story v. Furman, 25 N. Y. 214. FOLLOWED, 2 Lans. 12.

Stout v. People, 4 Park. Cr. 71, 125. APPROVED, 27 Mich. 503.

Stoutenburgh v. Vandenburgh, 7 How. Pr. 229. *See* 7 How. Pr. 383; 22 Id. 265, 266, 267.

Stow v. Hamlin, 11 How. Pr. 452. FOLLOWED, 42 Superior 126.

Stow v. Tifft, 15 Johns. 458. DISAPPROVED, 32 Ind. 512. FOLLOWED, 13 Vr. (N. J.) 9.

Stowell v. Chamberlain, 60 N. Y. 272. FOLLOWED, 22 Hun 326.

Stratton v. People, 20 Hun 288. AFFIRMED, 81 N. Y. 629.

Strauss v. Parker, 9 How. Pr. 342. CONTRA, 9 How. Pr. 378.

Strickland v. Harger, 16 Hun 465. AFFIRMED, 81 N. Y. 623.

Striker, Matter of, 23 Hun 647. AFFIRMED, 24 Hun VI.

Striker v. Kelly, 2 Den. 323. EXPLAINED, 1 Flipp. (U. S.) 480, 482.

Striker v. Mott, 28 N. Y. 82. DISTINGUISHED, 4 Keyes 589. FOLLOWED, 68 N. Y. 53.

Striker v. Mott, 2 Paige 387. FOLLOWED, 68 N. Y. 53.

Striker v. Mott, 6 Wend. 465. EXPLAINED, 6 Hill 342.

Strong v. De Forest, 15 Abb. Pr. 427. APPROVED, 5 Lans. 514.

Strong v. New York Laundry Manuf. Co., 37 Superior 279. DISTINGUISHED, 38 Superior 154.

Strong v. Skinner, 4 Barb. 546, 552. DISTINGUISHED, 59 Barb. 505.

Strong v. Strickland, 32 Barb. 284. FOLLOWED, 23 Hun 12, 18.

Strong v. Strong, 3 Robt. 719. DISTINGUISHED, 61 N. Y. 410.

Stroud v. Tilton, 3 Keyes 139. FOLLOWED, 38 Superior 263.

Struthers v. Pearce, 51 N. Y. 365. FOLLOWED, 83 N. Y. 91, 92.

Stryker v. Cassidy, 10 Hun 18. REVERSED, 19 Alb. L. J. 240.

Stuart v. Columbian Fire Ins. Co., 1 Daly 471. REVERSED, 6 Alb. L. J. 199. *See* 3 Id. 96.

Stuart v. Kissam, 2 Barb. 493. REVERSED, 11 Barb. 271. *See* 44 Superior 148.

Stuart v. Palmer, 74 N. Y. 183. DISTINGUISHED, 80 N. Y. 572. FOLLOWED, 83 Id. 103, 104.

Sturgis v. Spofford, 52 Barb. 436. AFFIRMED, 6 Alb. L. J. 199.

Sturgis v. Spofford, 45 N. Y. 446. DISTINGUISHED, 64 N. Y. 217.

Stuyvesant v. Mayor, &c., of New York, 11 Paige 414. REVIEWED, 9 Mo. App. 379.

Stuyvesant v. Pearsall, 15 Barb. 244. CRITICISED, 7 Abb. Pr. 126.

Stuyvesant v. Tompkins, 9 Johns 61. FOLLOWED, 37 Superior 171.

Sudlow v. Knox, 7 Abb. Pr., N. S., 411. APPROVED, 47 N. Y. 45, 48. FOLLOWED, 45 Id. 643.

Suffern v. Townsend, 9 Johns. 35. DISTINGUISHED, 64 N. Y. 294.

Sullivan v. Mayor, &c., of New York, 53 N. Y. 652. DISTINGUISHED, 63 N. Y. 49.

Sullivan v. People, 1 Park. Cr. 347. DISTINGUISHED, 61 How. Pr. 15.

Sullivan v. Sullivan, 6 Thomp. & C. 433. REVERSED, 66 N. Y. 37.

Sullivan v. Sullivan, 66 N. Y. 37. DISTINGUISHED, 23 Hun 439, 441.

Sun Mut. Ins. Co. v. Mayor, &c., of New York, 8 N. Y. 253. FOLLOWED, 60 How. Pr. 292.

Sunderland v. Loder, 5 Wend. 58. FOLLOWED, 36 Superior 169.

Supervisors of Albany County v. Dorr, 25 Wend. 440. AFFIRMED *by divided court,* 7 Hill 583. *See* 18 Minn. 206.

Supervisors of Albany County v. Dorr, 7 Hill 583. OVERRULED, 7 Hill 584 *n.* *See* 1 Den. 233.

Supervisors of Chenango v. Birdsall, 4 Wend. 453. DISTINGUISHED, 65 N. Y. 228; 67 Id. 114.

Supervisors of Dutchess County v. Sisson, 24 Wend. 387. APPROVED, 83 N. Y. 106.

Supervisors of Onondaga County v. Briggs, 2 Den. 26. DISTINGUISHED, 59 N. Y. 626; 65 Id. 228; 67 Id. 114. REVIEWED, 1 Hun 454, 456. *See* 3 Thomp. & C. 460.

Supervisors of Richmond County v. Ellis, 59 N. Y. 620. FOLLOWED, 45 Superior 373.

Supervisors of Saratoga County v. Deyoe, 15 Hun 526. REVERSED, 57 How. Pr. 134.

Sutherland v. New York, &c., R. R. Co., 41 Superior 17. DISTINGUISHED, 42 Superior 225. *See* 60 N. Y. 331.

Sutliff v. Forgey, 1 Cow. 89. FOLLOWED, 16 Wend. 620.

Sutton v. Davis, 6 Hun 237. APPEAL DISMISSED, 64 N. Y. 633.

Suydam v. Barber, 18 N. Y. 468. COMMENTED ON, 6 Bosw. 567.

Suydam v. Jenkins, 3 Sandf. 614. APPROVED, 53 N. Y. 224, FOLLOWED, 4 Lans. 271; 8 Nev. 356.

Suydam v. Smith, 7 Hill 182. AFFIRMED, 6 Alb. L. J. 199.

Suydam v. Smith, 52 N. Y. 383, 388. DISTINGUISHED, 73 N. Y. 479.

Suydam v. Suydam, 11 How. Pr. 518. CONTRA, 30 How. Pr. 61; 64 N. Y. 120.

Sweatman, Matter of, 1 Cow. 144. APPROVED, 39 Conn. 84.

Sweeny v. Mayor, &c., of New York, 5 Daly 274. DISTINGUISHED, 9 Hun 659, 660.

Sweeny v. Mayor, &c., of New York, 58 N. Y. 625. DISTINGUISHED, 9 Hun 659, 660. FOLLOWED, 83 N. Y. 377.

Sweet v. Bartlett, 4 Sandf. 661. DISTINGUISHED, 42 Superior 192, 193. CONTRA, 52 How. Pr. 54, 56.

Sweet v. Sweet, 15 How. Pr. 169. S. P., 24 How. Pr. 92, 93. CONTRA, 7 Abb. Pr. 350.

Sweet v. Tuttle, 10 How. Pr. 40. CONTRA, 14 How. Pr. 61, 63, 64.

Sweet v. Tuttle, 14 N. Y. 465. DISTINGUISHED, 80 N. Y. 54, 57. FOLLOWED, 47 How. Pr. 80, 82; 21 N. Y. 401.

Sweetman v. Prince, 26 N. Y. 224. APPROVED, 45 N. Y. 497.

Swenarton v. Hancock, 22 Hun 38. AFFIRMED, 9 Abb. N. Cas. 326; 84 N. Y. 653.

Swett v. Colgate, 20 Johns. 196. EXPLAINED, 51 N. Y. 204.

Swick v. Sears, 1 Hill 17. EXPLAINED, 42 N. Y. 529.

Swift v. Beers, 3 Den. 70. DISTINGUISHED, 35 Barb. 239.

Swift v. City of Poughkeepsie, 37 N. Y. 511. CONSIDERED, 45 N. Y. 684. FOLLOWED, 45 Superior 509. LIMITED, 53 N. Y. 56. REVIEWED, 43 N. Y. 186.

Swift v. Flanagan, 12 How. Pr. 438. CONTRA, 9 How. Pr. 245; 14 Id. 392.

Swift v. Hart, 12 Barb. 530. DOUBTED, 5 Thomp. & C. 28. CONTRA, 2 Hun 451.

Swift v. Massachusetts Life Ins. Co., 63 N. Y. 186. DISTINGUISHED, 67 N. Y. 193.

Swift v. Mayor, &c., of New York, 17 Hun 518. REVERSED, 83 N. Y. 528.

Swift v. Wells, 2 How. Pr. 79. *See* 2 How. Pr. 171.

Swinnerton v. Columbian Ins. Co., 37 N. Y. 174, 188. REVIEWED, 71 Me. 367.

Switzer v. Valentine, 4 Duer 96. DISTINGUISHED, 5 Duer 125.

Swords v. Edgar, 59 N. Y. 28. REVIEWED, 8 Bradw. (Ill.) 219.

Swords v. Owen, 34 Superior 277. EXPLAINED, 41 Superior 215.

Sylvester v. Reed, 3 Edw. Ch. 296. FOLLOWED, 23 Hun 223, 229.

Syracuse Chilled Plow Co. v. Wing, 20 Hun 206. AFFIRMED, 24 Hun VIII.

Syracuse Chilled Plow Co. v. Wing, 9 Week. Dig. 423. AFFIRMED, 12 Week. Dig. 396.

Syracuse City Bank v. Davis, 16 Barb. 188. COMMENTED ON, 48 Cal. 516.

Syracuse Savings Bank v. Town of Seneca Falls, 10 Week. Dig. 322. AFFIRMED, Oct. 11th, 1881.

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Taddiken v. Cantrell, 1 Hun 710. DISTINGUISHED, 4 Hun 317.

Taggart v. Murray, 53 N. Y. 233. APPLIED, 56 How. Pr. 520, 529.

Taintor v. Hemmingway, 18 Hun 458. AFFIRMED, 83 N. Y. 610.

Tait v. Culbertson, 57 Barb. 9. AFFIRMED, 6 Alb. L. J. 177.

Talbot v. Bank of Rochester, 1 Hill 295. FOLLOWED, 6 Hun 124, 125.

Tallmadge v. East River Bank, 26 N. Y. 105. FOLLOWED, 23 Hun 669, 683.

Tallmadge v. Wallis, 25 Wend. 107, 116. CONSIDERED, Hill & D. 174.

Tallman v. Green, 3 Sandf. 437, 442. CRITICISED, 56 Barb. 59.

Talmage v. Pell, 7 N. Y. 328. CONFIRMED, 15 N. Y. 133, 181, 183, 187, 247.

Tappen v. Grey, 3 Edw. 450. REVERSED, 7 Hill 259; 9 Paige 507.

Tarbell v. Griggs, 3 Paige 207. APPROVED AND FOLLOWED, 23 Hun 648, 649.

Taylor v. Allen, 36 Barb. 294. *See* 38 N. Y. 100.

Taylor v. Bates, 5 Cow. 376. COMMENTED ON, 5 Hill 395.

Taylor v. Betsford, 13 Johns. 487. LIMITED, 1 Hill 61.

Taylor v. Church, 8 N. Y. 452. FOLLOWED, 46 N. Y. 190, 192.

Taylor v. Delaney, 2 Cai. Cas. 143, 150. REVIEWED, 54 Cal. 356.

Taylor v. Gardner, 4 How. Pr. 67. CONTRA, 4 How. Pr. 196, 200, 269.

Taylor v. Harlow, 11 How. Pr. 285. *See* 11 How. Pr. 465.

Taylor v. Heath, 4 Den. 592. FOLLOWED, 4 N. Y. 254.

Taylor v. Ketchum, 35 How. Pr. 289, 296. DISTINGUISHED, 23 Hun 114, 117.

Taylor v. Mayor, &c., of New York, 5 Daly 485. *See* 67 N. Y. 87.

Taylor v. Mayor, &c., of New York, 20 Hun 292. AFFIRMED, 82 N. Y. 10.

Taylor v. Morris, 1 N. Y. 341. DISTINGUISHED, 22 Hun 407.

Taylor v. Porter, 4 Hill 140. FOLLOWED, 1 Civ. Pro. 326.

Taylor v. Root, 4 Keyes 335. AFFIRMED, 6 Alb. L. J. 199. DISTINGUISHED, 60 How. Pr. 505.

Taylor v. Wendell, 4 Bradf. 324. QUALIFIED, 3 Redf. 506.

Taylor v. Wing, 23 Hun 233. MODIFIED, 84 N. Y. 471.

Teachout v. People, 41 N. Y. 7. FOLLOWED, 13 Abb. Pr., N. S., 25.

Tebbetts v. Dowd, 23 Wend. 379. APPROVED, 2 Disn. (Ohio) 479.

Teed v. Morton, 60 N. Y. 502. APPROVED, 83 N. Y. 511.

Teerpenning v. Corn Exchange Ins. Co., 43 N. Y. 279. DISTINGUISHED, 2 Thomp. & C. 633.

Tenbroeck v. Paige, 6 Hill 267. FOLLOWED, 6 How. Pr. 9, 11; 22 Hun 183.

Ten Eick v. Simpson, 1 Sandf. Ch. 244. DISTINGUISHED, 61 N. Y. 108.

Terhune v. Terhune, 40 How. Pr. 258. NOT FOLLOWED, 23 Hun 22.

Terrett v. Cowenhoven, 11 Hun 320. *See* 79 N. Y. 400.

Terry v. Chandler, 16 N. Y. 354. APPROVED, 37 Superior 171. FOLLOWED, 20 Mich. 433, 438.

Terry v. Dayton, 31 Barb. 519. REVERSED, MSS. Ct. of App.

Terry v. Jewett, 17 Hun 395. AFFIRMED, 78 N. Y. 338.

Terry v. Jewett, 78 N. Y. 338. FOLLOWED, 84 N. Y. 245.

Terry v. Wiggins, 47 N. Y. 512. DISTINGUISHED, 4 Redf. 52.

Thatcher v. Bank of the State of New York, 5 Sandf. 121. CRITICISED, 57 N. Y. 602.

Thatcher v. Candee, 3 Keyes 157. FOLLOWED, 42 Superior 238.

Thaule v. Krekeler, 17 Hun 338. REVERSED, 81 N. Y. 428.

Thayer v. Clark, 48 Barb. 243. Affirmed, 41 N. Y. 620.

Thayer v. Lewis, 4 Den. 269, 271. Approved, 42 Superior 19.

Thayer v. Willett, 9 Abb. Pr. 325. *See* 22 How. Pr. 15.

Therasson v. People, 20 Hun 55. Reversed, 82 N. Y. 238.

Thomas v. Bennett, 56 Barb. 197. Followed, 59 How. Pr. 25.

Thomas v. Harrop, 7 How. Pr. 57. Followed, 8 How. Pr. 234, 235; 9 Id. 481, 483.

Thomas v. Murray, 32 N. Y. 605. Followed, 40 N. Y. 248, 255.

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Thomas v. Quintard, 5 Duer 80. Distinguished, 4 Hun 151.

Thomas v. Tanner, 14 How. Pr. 426. Followed, 59 How. Pr. 332.

Thomas v. Winchester, 6 N. Y. 397. Distinguished, 51 N. Y. 497. Explained, 42 Id. 357.

Thompson v. Bank of British North America, 45 Superior 1. Affirmed, 82 N. Y. 1.

Thompson v. Blanchard, 3 N. Y. 335. Distinguished, 60 N. Y. 375.

Thompson v. Brown, 4 Johns. Ch. 619. Followed, 51 Mo. 267. Reviewed, 4 Redf. 435.

Thompson v. Burhans, 61 Barb. 260. Reversed, 10 Alb. L. J. 239.

Thompson v. Burhans, 15 Hun 580. *See* 61 N. Y. 52.

Thompson v. Culver, 38 Barb. 442. Contra, 22 How. Pr. 278.

Thompson v. Culver, 24 How. Pr. 286. Followed, 1 Civ. Pro. 210.

Thompson v. Erie R'y Co., 45 N. Y. 468. Applied, 45 Superior 311. Distinguished, 8 Abb. N. Cas. 442, 443; 62 N. Y. 315; 82 Id. 260, 264. Followed, 50 N. Y. 673; 38 Superior 137. *See* 64 Barb. 463.

Thompson v. Friedberg, 54 How. Pr. 59. Followed, 55 How. Pr. 1, 85.

Thompson v. Hewitt, 6 Hill 254. Explained, 3 N. Y. 216. Limited, 3 Barb. Ch. 360. Questioned, 3 Barb. 429.

Thompson v. Lumley, 7 Daly 74. Explained, 59 How. Pr. 394. Reviewed, 8 Abb. N. Cas. 155; 46 Superior 43.

Thompson v. Schermerhorn, 6 N. Y. 92. Distinguished, 57 N. Y. 594.

Thompson v. Sherrard, 35 Barb. 593. Distinguished, 22 Hun 198. Followed, 54 How. Pr. 92.

Thompson v. Sickles, 3 Abb. N. Cas. 121 *n.* Contra, 3 Abb. N. Cas. 117 *n.*; 56 How. Pr. 214.

Thompson v. Stevens, 62 N. Y. 634. Reviewed, 4 Redf. 261.

Thompson, Matter of, v. Rockwood, 2 How. Pr. 136. *See* 2 How. Pr. 256.

Thomson v. Ebbets, Hopk. 272. Distinguished, 61 N. Y. 271.

Thomson v. MacGregor, 45 Superior 197. Reversed, 81 N. Y. 592.

Thomson v. Thomson, 55 How. Pr. 494. Approved, 61 How. Pr. 60. Followed, 24 Hun 371.

Thorp v. Keokuk Coal Co., 48 N. Y. 253. Followed, 83 N. Y. 154.

Thorp v. Woodhull, 1 Sandf. Ch. 411. Not followed, 61 How. Pr. 458.

Thorpe v. Baulch, 3 Abb. Pr. 13 *n.* Considered overruled, 11 Abb. Pr., n. s., 430.

Thurber v. Blanck, 50 N. Y. 80. Followed, 12 Hun 584; 24 Id. 259. Contra, 51 N. Y. 519.

Thurber v. Chambers, 4 Hun 725. Modified, 66 N. Y. 42.

Thurber v. Harlem Bridge, &c., R. R. Co., 60 N. Y. 327, 331. Followed, 42 Superior 225.

Thurber v. Townsend, 22 N. Y. 517, 518. Distinguished, 82 N. Y. 95, 102.

Thurman v. Fiske, 30 How. Pr. 397. Followed, 36 Superior 75.

Thurston v. Cornell, 38 N. Y. 281. Limited and approved, 81 N. Y. 363, 370. Followed, 22 Hun 223, 224. Contra, 36 Ind. 334; 18 Minn. 414, 423.

Thurston v. Marsh, 14 How. Pr. 572. *See* 15 How. Pr. 27.

Tibbles v. O'Connor, 28 Barb. 538. Distinguished, 58 N. Y. 588.

Tibbs v. Morris, 44 Barb. 138. Reviewed, 38 Superior 215.

Tice v. Annin, 2 Johns. Ch. 125. Distinguished, 6 Stew. (N. J.) 212.

Tice v. Tice, 3 Hun 553. Reversed, 68 N. Y. 614.

Tice v. Zinsser, 13 Hun 366. Reversed, 19 Alb. L. J. 377.

Tiedemann v. Ackerman, 16 Hun 307. Affirmed, 84 N. Y. 677.

Tiernan v. Wilson, 6 Johns. Ch. 411. Followed, 4 Thomp. & C. 624.

Tiffany v. Lord, 65 N. Y. 310. Distinguished, 22 Hun 165.

Tifft v. Porter, 8 N. Y. 516. Reviewed, 4 Redf. 3.

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Tilden v. Blair, 21 Wall. (U. S.) 241. Followed, 81 N. Y. 566, 570.

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Tillou v. Kingston Mut. Ins. Co., 7 Barb. 570. APPROVED, 1 Robt. 501.

Tillou v. Kingston Mut. Ins. Co., 5 N. Y. 405. EXPLAINED, 1 Lans. 30.

Tillou v. Sparks, 9 How. Pr. 465. CONTRA, 5 How. Pr. 393, 395.

Tilson v. Terwilliger, 56 N. Y. 273. FOLLOWED, 42 Superior 144.

Tilton v. Beecher, 59 N. Y. 176. FOLLOWED, 22 Hun 172.

Tilton v. Ormsby, 10 Hun 7; 70 N. Y. 609. FOLLOWED, 46 Superior 304.

Tim v. Tim, 47 How. Pr. 253. DISTINGUISHED, 61 N. Y. 412.

Timon v. Claffy, 45 Barb. 438. AFFIRMED, 41 N. Y. 619.

Tinson v. Welch, 51 N. Y. 244. SUPERSEDED, 1 Civ. Pro. 293.

Tisdale v. Jones, 38 Barb. 523. DISTINGUISHED, 59 Barb. 505.

Titus v. Relyea, 16 How. Pr. 371. OVERRULED, 17 How. Pr. 134.

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Tobias v. Harland, 4 Wend. 537. FOLLOWED, 60 How. Pr. 322.

Tobias v. Ketchum, 32 N. Y. 319. DISTINGUISHED, 23 Hun 299, 303.

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Todd v. Shelbourne, 8 Hun 510. APPLIED, 54 How. Pr. 214, 224.

Toles v. Adee, 9 Week. Dig. 211. REVERSED, 12 Week. Dig. 492.

Toles v. Hazen, 57 How. Pr. 516. DISTINGUISHED AND LIMITED, 60 How. Pr. 166, 167.

Tomlinson v. Borst, 30 Barb. 42. APPROVED, 38 Superior 263.

Tomlinson v. Miller, Sheld. 197. AFFIRMED, Sheld. 208 *n.*

Tompkins v. Fonda, 4 Paige 448. DISTINGUISHED, 22 Hun 31.

Tompkins v. Greene, 21 Hun 257. AFFIRMED, 82 N. Y. 619.

Tompkins v. Ives, 3 Abb. Pr., N. S., 267. DISTINGUISHED, 63 N. Y. 267.

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Tonawanda R. R. Co. v. Munger, 5 Den. 255. EXPLAINED, 7 Barb. 297. REVIEWED, 71 Ind. 505, 506.

Tone v. Mayor, &c., of New York, 6 Daly 343. AFFIRMED, 70 N. Y. 157.

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Townsend, Matter of, 4 Hun 31. APPEAL DISMISSED, 63 N. Y. 631.

Townsend v. Bogart, 11 Abb. Pr. 355. CRITICISED, 39 How. Pr. 440. CONTRA, 9 Abb. Pr. 58 *n.*, 240.

Townsend v. Corning, 1 Barb. 627. *See* 3 Barb. 220.

Townsend v. Corning, 3 Leg. Obs. 95. *See* 67 N. Y. 162.

Townsend v. Gilsey, 7 Abb. Pr., N. S., 59; 1 Sweeny 155. REVERSED, 6 Alb. L. J. 177.

Townsend v. Goelet, 11 Abb. Pr. 187. DISTINGUISHED, 52 How. Pr. 360, 365; 60 N. Y. 21.

Townsend v. Graves, 3 Paige 453. OVERRULED, 2 Barb. 149.

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Townsend v. Hendricks, 40 How. Pr. 143. DISTINGUISHED, 12 Abb. Pr., N. S., 250; 63 N. Y. 315. FOLLOWED, 2 Abb. N. Cas. 188.

Townsend v. Keenan, 2 Hilt. 544. DISAPPROVED, 14 Hun 376.

Townsend v. New York Central, &c., R. R. Co., 56 N. Y. 295. DISTINGUISHED, 66 N. Y. 458.

Townsend Manuf. Co. v. Foster, 51 Barb. 346. AFFIRMED, 41 N. Y. 620. FOLLOWED, 3 Hun 79.

Townshend v. Register of Deeds, 7 How. Pr. 318, 322. CONTRA, 14 How. Pr. 61.

Towsey v. Harrison, 25 How. Pr. 266. CONTRA, 2 Duer 635.

Tracey v. Altmeyer, 46 N. Y. 598. DISAPPROVED, 81 N. Y. 228, 230. EXPLAINED, 50 N. Y. 687. FOLLOWED, 36 Superior 1.

Tracy v. Leland, 2 Sandf. 629. DISAPPROVED, 2 Hilt. 179.

Tracy v. Talmage, 18 Barb. 456. APPROVED, 82 N. Y. 291, 302.

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Tracy v. Tracy, 15 Barb. 503. APPROVED, 54 Miss. 235. OVERRULED, 16 N. Y. 261.

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Train v. Holland Purchase Ins. Co., 1 Hun 527; 3 Thomp. & C. 777. REVERSED, 62 N. Y. 598. FURTHER APPEAL, 68 N. Y. 208.

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Trapp v. New York, &c., R. R. Co., 6 How. Pr. 237. CONTRA, 14 How. Pr. 395.

Traver v. Traver, 3 How. Pr. 351. *See* 4 How. Pr. 83.

Travers v. Nichols, 7 Wend. 434. DISTINGUISHED, 58 N. Y. 588.

Treadwell v. Fassett, 10 How. Pr. 184. *See* 11 How. Pr. 149, 152.

Treadwell v. Pomeroy, 2 Thomp. & C. 470. FOLLOWED, 24 Hun 350.

Tremain v. Cohoes Company, 2 N. Y. 163. FOLLOWED, 13 Vr. (N. J.) 191.

Trench v. Chenango Mut. Ins Co., 7 Hill 122. FOLLOWED, 10 Hun 428, 431.

Trench v. Onondaga County Mut. Ins. Co., 7 Hill 122. DENIED, 25 Barb. 499. DOUBTED, 6 N. Y. 53. FOLLOWED, 10 Hun 428, 431.

Trenor v. Fachin, 20 How. Pr. 405. CONTRA, 29 How. Pr. 1.

Tribune Assoc. v. Smith, 40 Superior 251. APPEAL DISMISSED, 68 N. Y. 621.

Trigg v. Hitz, 17 Abb. Pr. 436. DISTINGUISHED AND APPROVED, 4 Abb. Pr., N. S., 150, 151.

Trimble v. Thorne, 16 Johns. 152. *See* 2 Disn. (Ohio) 479.

Tripp v. De Bow, 5 How. Pr. 114. FOLLOWED, 7 How. Pr. 108, 110.

Trolan v. Fagen, 48 How. Pr. 240. FOLLOWED, 50 How. Pr. 252. NOT FOLLOWED, 9 Hun 567, 568.

Trotter v. Hughes, 12 N. Y. 74. APPROVED, 82 N. Y. 385, 388.

Trotter v. Latson, 7 How. Pr. 261. OVERRULED, 8 How. Pr. 226, 232.

Trow v. Shannon, 78 N. Y. 446. DISTINGUISHED, 80 N. Y. 435.

Trow's Printing, &c., Co. v. Hart, 11 Week. Dig. 292. AFFIRMED, 12 Week Dig. 380. APPROVED, 1 Civ. Pro. 46.

Troy, &c., R. R. Co. v. Lee, 13 Barb. 169. FOLLOWED, 56 Barb. 463.

Troy, &c., R. R. Co. v. Tibbits, 18 Barb. 297. DISTINGUISHED, 22 Hun 362. FOLLOWED, 58 N. Y. 400.

Trufant v. Merrill, 37 How. Pr. 531. FOLLOWED, 3 Thomp. & C. 174.

Truscott v. King, 6 N. Y. 147, 161. APPROVED, 23 Hun 509, 512.

Trustees of East Hampton v. Kirk, 68 N. Y. 459, 464. FOLLOWED, 82 N. Y. 443, 448, 449.

Trustees of First Baptist Church v. Brooklyn Fire Ins. Co., 19 N. Y. 305. DISTINGUISHED, 53 Iowa 407, 414.

Trustees of First Baptist Church v. Brooklyn Fire Ins. Co., 28 N. Y. 153. DISTINGUISHED, 77 N. Y. 310. FOLLOWED, 36 Superior 234.

Trustees of Forrestville Baptist Soc. v. Farnham, 15 Hun 381. REVERSED, 82 N. Y. 618.

Trustees of Hamilton College v. Stewart, 1 N. Y. 581. DISAPPROVED, 27 Wis. 214, 229.

Trustees of Meth. Episc. Church v. Jaques, 3 Johns. Ch. 77. DENIED, 2 McArth. (U. S.) 296. REVIEWED, 84 N. C. 670.

Trustees of N. Y. P. E. Pub. School, Matter of, 31 N. Y. 574. EXPLAINED, 34 N. Y. 584, 599.

Trustees of Salina v. Gilbert, 18 Wend. 175. DISTINGUISHED, 20 N. Y. 95.

Trustees of Union College v. Wheeler, 61 N. Y. 88. EXPLAINED AND LIMITED, 22 Hun 346. FOLLOWED, 45 Superior 404.

Trustees of Village of Penn Yan v. Forbes, 8 How. Pr. 285. FOLLOWED, 12 How. Pr. 435. CONTRA, 1 Duer 622; 8 How. Pr. 488; 11 Id. 572, 575.

Tucker v. Tucker, 4 Keyes 136. CRITICISED AND DISTINGUISHED, 61 How. Pr. 141; 4 Redf. 499.

Tucker v. White, 27 How. Pr. 97. OVERRULED, 46 N. Y. 603.

Tuffts v. Braisted, 1 Abb. Pr. 83. APPROVED, 4 Abb. Pr. 441, 443.

Tugwell v. Bussing, 48 How. Pr. 89, 90. DISTINGUISHED, 22 Hun 411.

Tuomey v. Dunn, 42 Superior 291. REVERSED, 20 Alb. L. J. 118.

Turner v. Bank of Fox Lake, 3 Keyes 425. EXAMINED AND APPROVED, 6 Abb. Pr., N. S., 234, 239. FOLLOWED, 40 How. Pr. 327; 42 N. Y. 542.

Turner v. Church, 1 Abb. Pr. 299. DISTINGUISHED, 68 N. Y. 374.

Turner v. Jaycox, 40 Barb. 164. DISTINGUISHED, 68 N. Y. 299.

Turner v. Jaycox, 40 N. Y. 470. DISTINGUISHED, 61 How. Pr. 76.

Turner v. McCarthy, 4 E. D. Smith 247. FOLLOWED, 37 Superior 72.

Turner v. Taylor, 2 Daly 278. *See* 40 How. Pr. 143.

Turner v. Van Riper, 43 How. Pr. 33. FOLLOWED, 66 Barb. 256.

Turnure v. Hohenthal, 36 Superior 79. FOLLOWED, 41 Superior 235.

Tuthill v. Tracy, 31 N. Y. 157. DISAPPROVED, 4 Lans. 489, 491. FOLLOWED, 12 Hun 333, 336.

Tuttle v. Albany, &c., Iron and Steel Co., 61 How. Pr. 439 *n.* FOLLOWED, 61 How. Pr. 441.

Tuttle v. Smith, 14 How. Pr. 395. APPROVED, 15 How. Pr. 565, 566. *See* 14 Id. 474.

Twombly v. Cassidy, 21 Hun 277. AFFIRMED, 82 N. Y. 155.

Tylee v. Yates, 3 N. Y. 222. OVERRULED *in part,* 67 N. Y. 162.

Tyler v. Burrows, 6 Robt. 110. FOLLOWED, 43 Superior 451.

Tyler v. Gardiner, 35 N. Y. 559. FOLLOWED, 60 Barb. 69; 4 Redf. 125, 127, 132, 136. REVIEWED, Id. 476.

Tyler v. Heidorn, 46 Barb. 439. AFFIRMED, 6 Alb. L. J. 199. DISTINGUISHED, 59 N. Y. 50.

U.

Ubsdell v. Root, 3 Abb. Pr. 142. FOLLOWED, 38 Superior 490.

Ulster County Savings Inst. v. Decker, 11 Hun 515. *See* 74 N. Y. 604.

Underwood v. Green, 36 Superior 481. APPROVED AND APPEAL DISMISSED, 56 N. Y. 247.

Underwood v. Sutcliffe, 10 Hun 453. REVERSED, 19 Alb. L. J. 322.

Union, &c., Mining Co. of Tennessee v. Raht, 9 Hun 208. DISMISSED, 68 N. Y. 629.

Union Bank v. Clossey, 10 Johns. 271, 273. REVERSED, *but not on points discussed below,* 11 Johns. 183.

Union Bank v. Coster, 3 N. Y. 203. DISAPPROVED, 29 Barb. 486. DISTINGUISHED, 20 N. Y. 337, 339. *See* 8 N. Y. 207.

Union Bank v. Mayor, &c., of New York, 51 Barb. 159. REVERSED. 51 N. Y. 638.

Union Bank v. Mott, 18 How. Pr. 506. FOLLOWED, 35 How. Pr. 322, 324, 328.

Union Bank v. Mott, 19 How. Pr. 114. REVERSED, 19 How. Pr. 267.

Union Bank of Troy v. Sixth Nat. Bank of New York, 43 N. Y. 456. APPLIED, 6 Fed. Rep. 854.

Union Dime Savings Inst. v. Andariese, 19 Hun 310. AFFIRMED, 83 N. Y. 174.

Union Trust Co. v. Whiton, 17 Hun 593. APPEAL DISMISSED, 78 N. Y. 491. FOLLOWED, 1 Civ. Pro. 317.

Union Trust Co. v. Whiton, 78 N. Y. 491. DISTINGUISHED, 60 How. Pr. 437. FOLLOWED, 1 Civ. Pro. 317, 319.

Union Turnpike Road v. Jenkins, 1 Cai. 381. DISAPPROVED, 61 How. Pr. 460.

United States Rolling Stock Co., Matter of, 55 How. Pr. 286. *See* 57 How. Pr. 9.

Utica City Bank v. Buel, 17 How. Pr. 498. FOLLOWED, 18 How. Pr. 33, 34.

Utica Cotton Manuf. Co. v. Supervisors of Oneida County, 1 Barb. Ch. 432, 447. OVERRULED, 11 Hun 527.

Utica Ins. Co. v. Bloodgood, 4 Wend. 652. DOUBTED, 15 N. Y. 97.

Utica Ins. Co. v. Cadwell, 3 Wend. 296. APPROVED, 3 Edw. 199. DOUBTED, 15 N. Y. 97.

Utica Ins. Co. v. Kip, 3 Wend. 369. DOUBTED, 15 N. Y. 97.

Utica Ins. Co. v. Scott, 19 Johns. 1. DOUBTED, 15 N. Y. 97.

V.

Vail v. Hamilton, 20 Hun 355. AFFIRMED, 24 Hun VIII.

Vail v. Owen, 19 Barb. 22. EXPLAINED, 4 Lans. 162.

Vail v. Vail, 4 Paige 317. DISTINGUISHED, 3 Redf. 296. EXPLAINED, Id 502.

Valarino v. Thompson, 7 N. Y. 576. FOLLOWED, 11 How. Pr. 1, 7.

Valentine v. Valentine, 2 Barb. Ch. 430. REVIEWED, 4 Redf. 40, 43, 44, 45.

Valton v. Nat. Loan Fund Life Assurance Co., 17 Abb. Pr. 268. REVERSED, 1 Keyes 21.

Valton v. Nat. Loan Fund Life Assurance Co., 20 N. Y. 32. DISTINGUISHED, 1 Thomp. & C. 509.

Valton v. Nat. Loan Fund Life Assurance Soc., 19 How. Pr. 515. *See* 22 How. Pr. 195.

Van Akin v. Caler, 48 Barb. 58. AFFIRMED *by default,* 6 Alb. L. J. 199.

Van Alen v. American Nat. Bank, 10 Abb. Pr., N. S. 331. CONTRA, 40 How. Pr. 190.

Van Alen v. American Nat. Bank, 52 N. Y. 1. FOLLOWED, 84 N. Y. 131.

Van Allen v. Farmers' Joint Stock Ins. Co., 6 Thomp. & C. 591. REVERSED, 64 N. Y. 469.

Van Allen v. Mooers, 5 Barb. 110. AFFIRMED, 5 Barb. 114.

Van Alstyne v. Commercial Bank of Albany, 7 Trans. App. 241. FOLLOWED, 4 Thomp. & C. 80.

Van Amburgh v. Baker, 14 Hun 615. AFFIRMED, 81 N. Y. 46.

Van Antwerp, Matter of, 56 N. Y. 261. DISTINGUISHED, 84 N. Y. 113.

Van Bergen v. Bradley, 36 N. Y. 316. DISAPPROVED, 47 N. Y. 248. DISTINGUISHED, 36 N. Y. 371. FOLLOWED, 40 Id. 341, 342.

Van Blarcom v. Broadway Bank, 9 Bosw. 532. AFFIRMED, 5 Trans. App. 132.

Van Bokkelen v. Taylor, 4 Thomp. & C. 422. REVERSED, 62 N. Y. 105.

Van Brunt v. Day, 17 Hun 166. REVERSED, 81 N. Y. 251.

Vanbuskirk v. Warren, 4 Abb. App. Dec. 457; 34 Barb. 457; 2 Keyes 119. REVERSED, 7 Wall. (U. S.) 139.

Van Cleef v. Fleet, 15 Johns. 147. CONSIDERED OVERRULED, 11 Hun 565, 570. *See* 43 Barb. 376.

Van Cleef v. Sickels, 2 Edw. 392. REVERSED, 5 Paige 505.

Van Cleve v. Abbott, 3 Abb. Pr., N. S., 144. DISAPPROVED, 5 Daly 242.

Van Cortlandt v. Underhill, 17 Johns. 405. FOLLOWED, 82 N. Y. 27, 31.

Vandenburgh v. Biggs, 3 How. Pr. 316. CONTRA, 47 How. Pr. 231.

Vanderkemp v. Shelton, 11 Paige 28. FOLLOWED, 2 Lans. 470; 83 N. Y. 220; 45 Superior 404.

Vanderpoel v. Van Allen, 10 Barb. 157. DISTINGUISHED, 66 N. Y. 498.

Vanderzee v. Vanderzee 30 Barb. 331. DISTINGUISHED, 59 N. Y. 50.

Van Deusen v. Sweet, 51 N. Y. 378. EXPLAINED, 22 Hun 198, 199, 200.

Vandeventer v. New York, &c., R. R. Co., 27 Barb. 244. APPROVED, 30 Barb. 107.

Vandevoort v. Palmer, 4 Duer 677. EXPLAINED, 1 Lans. 494. FOLLOWED, 3 Hun 410; 6 Thomp. & C. 56.

Van Doren v. Balty, 11 Hun 239. DISTINGUISHED, 83 N. Y. 206.

Van Doren v. Horton, 19 Hun 7. FOLLOWED, 61 How. Pr. 433.

Van Doren v. Mayor, &c., of New York, 9 Paige 388. FOLLOWED, 4 Mo. App. 469.

Van Duyne v. Coope, 1 Hill 557. CONTRA, 26 How. Pr. 411, 412.

Van Duzer v. Howe, 21 N. Y. 531. DISTINGUISHED, 56 N. Y. 37.

Van Dyke v. McQuade, 20 Hun 262. AFFIRMED, 24 Hun VIII.

Van Eps v. Dillaye, 6 Barb. 244. REVIEWED, 1 Flipp. (U. S.) 468.

Van Epps v. Van Epps, 9 Paige 237. FOLLOWED, 81 N. Y. 308, 322.

Van Giesen v. Bridgford, 18 Hun 73. AFFIRMED, 83 N. Y. 348.

Van Giesen v. Bridgford, 8 Week. Dig. 484. AFFIRMED, 12 Week. Dig. 61.

Van Guysling v. Van Kuren, 35 N. Y. 70. FOLLOWED, 60 Barb. 69.

Van Hook v. Whitlock, 26 Wend. 42. DISTINGUISHED, 13 So. Car. 375.

Van Keeck v. Le Roy, 37 Barb. 544. AFFIRMED, 34 How. Pr. 625.

Van Keuren v. Corkins, 66 N. Y. 77. DISTINGUISHED, 25 Kan. 631.

Van Keuren v. Parmelee, 2 N. Y. 523. DISAPPROVED, 9 Vr. (N. J.) 36. DISTINGUISHED, 15 Barb. 168. REVIEWED, 24 Hun 512.

Van Kirk v. Wilds, 11 Barb. 520. COMMENTED ON, 4 N. Y. 254. *See* 36 How. Pr. 326, 327.

Van Kleeck v. Phipps, 4 Redf. 99. REVIEWED, 4 Redf. 477.

Van Kleeck v. Reformed Prot. Dutch Church, 6 Paige 600; 20 Wend. 457, 458. EXPLAINED AND DISTINGUISHED, 45 N. Y. 258.

Van Leuven v. First Nat. Bank of Kingston, 54 N. Y. 671. DISTINGUISHED, 60 N. Y. 293.

Van Loon v. Lyon, 4 Daly 149. REVERSED, 10 Alb. L. J. 239.

Van Namee v. Peoble, 9 How. Pr. 198. FOLLOWED, 14 How. Pr. 70, 71. OVERRULED, Id. 184, 186. *See* 9 Id. 378.

Van Ness v. Bush, 14 Abb. Pr. 33. OVERRULED, 53 Barb. 530. *See* 1 Duer 309; 2 Id. 153.

Van Ness v. Bush, 22 How. Pr. 481. *See* 1 Duer 309; 2 Id. 153.

Van Neste v. Conover, 8 Barb. 509. CONTRA, 8 How. Pr. 111.

Van Neste v. Conover, 5 How. Pr. 148. FOLLOWED, 11 How. Pr. 106, 108. CONTRA, 5 Id. 327.

Van Order v. Van Order, 8 Hun 315. DISTINGUISHED, 24 Hun 404.

Van Pelt v. McGraw, 4 N. Y. 110. FOLLOWED, 13 Vr. (N. J.) 34.

Van Rensselaer v. Chadwick, 24 Barb. 333. AFFIRMED, 22 N. Y. 32.

Van Rensselaer v. Chadwick, 7 How. Pr. 297. *See* 15 How. Pr. 567.

Van Rensselaer v. Dennison, 35 N. Y. 393. APPROVED, 41 N. Y. 220, 224.

Van Rensselaer v. Emery, 9 How. Pr. 135. CONCURRED IN, 9 How. 424, 425.

Van Rensselaer v. Jewett, 2 N. Y. 135. COMMENTED ON, 37 Wis. 149, 152. DISTINGUISHED, 10 Hun 525, 526.

Van Renselaer v. Kidd, 5 How. Pr. 242. FOLLOWED, 6 How. Pr. 172, 173.

Van Rensselaer v. Livingston, 12 Wend. 490. DISTINGUISHED, 7 Barb. 445.

Van Rensselaer v. Platner, 1 Johns. 276. EXAMINED, 5 Den. 139.

Van Rensselaer v. Snyder, 13 N. Y. 299. FOLLOWED, 39 How. Pr. 162, 167.

Van Rensselaer v. Vickery, 3 Lans. 57. FOLLOWED, 3 Hun 351; 5 Thomp. & C. 492.

Van Rensselaer v. Witbeck, 7 N. Y. 517. COMMENTED ON, 58 N. Y. 406. FOLLOWED, 22 Hun 257.

Van Riper, Exp., 20 Wend. 614. DOUBTED, 34 How. Pr. 180, 183.

Van Riper v. Baldwin, 19 Hun 344. AFFIRMED, 24 Hun VIII.

Van Santen v. Standard Oil Co., 17 Hun 140. AFFIRMED, 81 N. Y. 171.

Van Santvoord v. St. John, 6 Hill 157. DISTINGUISHED, 2 Lans. 199.

Van Schaick v. Hudson River R. R. Co., 43 N. Y. 527. FOLLOWED, 24 Hun 600.

Van Schaick v. Sigel, 58 How. Pr. 211. AFFIRMED, 60 How. Pr. 122.

Van Schaick v. Third Ave. R. R. Co., 8 Abb. Pr. 380. AFFIRMED, 25 How. Pr. 446.

Van Schaick v. Third Ave. R. R. Co., 25 How. Pr. 446. *See* 49 Barb. 409.

Van Schoonhoven v. Curley, 10 Week. Dig. 126. AFFIRMED, Oct. 4th, 1881.

Van Schuyver v. Mulford, 59 N. Y. 426, 431. DISTINGUISHED, 23 Hun 439, 442.

Van Shoick v. Niagara Fire Ins. Co., 68 N. Y. 434. DISTINGUISHED, 23 Hun 393, 394. FOLLOWED, 81 N. Y. 273, 276.

Van Sickler v. Graham, 7 How. Pr. 208. CONTRA, 12 Abb. Pr. 78 *n.;* 14 How. Pr. 508, 511; 20 Id. 59.

Van Slyck v. Kimball, 8 Johns. 198. DISTINGUISHED, 11 Johns. 478.

Van Slyke v. Hyatt, 9 Abb. Pr., N. S., 58. APPEAL DISMISSED, 46 N. Y. 259.

Van Slyke v. Hyatt, 46 N. Y. 259. FOLLOWED, 38 Superior 441.

Van Slyke v. Shelden, 9 Barb. 278. DISTINGUISHED, 62 Barb. 223.

Van Tassell v. Wood, 12 Hun 388. REVERSED, 19 Alb. L. J. 217.

Van Valen v. Lapham, 13 How. Pr. 240. DISTINGUISHED, 82 N. Y. 271, 275.

Van Vechten v. Hopkins, 5 Johns. 211. DISAPPROVED, 52 Id. 240.

Van Vleck v. Burroughs, 6 Barb. 31. FOLLOWED, 10 Hun 97, 101, 104.

Van Vleet v. Slauson, 45 Barb. 317. EXPLAINED, 5 Abb. Pr., N. S., 333, 337.

Van Voorhis v. Brintnall, 11 Week. Dig. 229. REVERSED, Oct. 4th, 1881.

Van Wart v. Smith, 2 Wend. 220, 221. CONTRA, 7 How. Pr. 41.

Van Winkle v. Constantine, 6 Hill 177. AFFIRMED, 10 N. Y. 422.

Van Wyck, Matter of, 1 Barb. Ch. 565. REVIEWED, 4 Redf. 203.

Van Wyck v. Baker, 11 Hun 309. DISTINGUISHED, 1 Civ. Pro. 310; 23 Hun 82, 84.

Van Wyck v. Hardy, 11 Abb. Pr. 473. CRITICISED, 12 Abb. Pr., N. S., 173.

Van Wyck v. Hardy, 20 How. Pr. 222. AFFIRMED, 39 How. Pr. 393. FOLLOWED, 35 Id. 356, 359.

Van Wyck v. Hardy, 39 How. Pr. 392. FOLLOWED, 47 How. Pr. 233, 235.

Van Wyck v. Seward, 1 Edw. 327. *See* 6 Paige 62; 18 Wend. 375.

Van Wyck v. Walters, 16 Hun 209. AFFIRMED, 81 N. Y. 352.

Van Zandt v. Mutual Benefit Life Ins. Co., 55 N. Y. 169. DISTINGUISHED, 10 Hun 558, 559.

Varian v. Stevens, 2 Duer 635. CONTRA, 25 How. Pr. 266.

Varick v. Tallman, 2 Barb. 113. APPROVED, 5 N. Y. 368.

Vartie v. Underwood, 18 Barb. 561. CRITICISED, 101 Mass. 432. CONTRA, 10 Paige 49.

Vary v. Godfrey, 6 Cow. 587. REVIEWED, 8 Abb. N. Cas. 242.

Veeder v. Cooley, 2 Hun 74. APPROVED, 83 N. Y. 250.

Veltman v. Thompson, 3 N. Y. 438. DISTINGUISHED, 57 N. Y. 119.

Venice, Town of, v. Woodruff, 62 N. Y. 462, 470. FOLLOWED, 55 How. Pr. 138, 145.

Verdin v. Slocum, 71 N. Y. 345. DISTINGUISHED, 78 N. Y. 248.

Vermilyea v. Beatty, 2 How. Pr. 57. FOLLOWED, 3 How. Pr. 109.

Vernam v. Smith, 15 N. Y. 328. FOLLOWED, 8 Nev. 126, 129.

Vernon, Estate of, N. Y. Surr. Ct., March, 1881. FOLLOWED, 1 Civ. Pro. 304.

Vernon v. Manhattan Co., 22 Wend. 183. REVIEWED, 53 Md. 24.

Vernon v. Vernon, 53 N. Y. 351. DISTINGUISHED, 23 Hun 299, 306.

Verplanck v. Van Buren, 11 Hun 328. REVERSED, 19 Alb. L. J. 163.

Viall v. Genesee Mutual Insurance Co., 19 Barb. 440. CONTRA, 3 Hill 508; 7 Id. 49.

Victory Webb, &c., Manuf. Co. v. Beecher, 55 How. Pr. 193. APPLIED, 58 How. Pr. 68, 70; 59 Id. 91, 92. APPROVED, 8 Abb. N. Cas. 384.

Viele v. Goss, 49 Barb. 96. AFFIRMED, 6 Alb. L. J. 199.

Viele v. Judson, 15 Hun 328. REVERSED, 82 N. Y. 32.

Village. *See name of village in question.*

Vincent v. Sands, 33 Superior 511. FOLLOWED, 38 Superior 142.

Viner v. New York, &c., Steamship Co., 50 N. Y. 23. FOLLOWED, 2 Thomp. & C. 598.

Vischer v. Yates, 11 Johns. 23. REVERSED, 12 Johns. 1.

Voessing v. Voessing, 12 Hun 678. FOLLOWED, 23 Hun 439, 441.

Volkening, Matter of, 52 N. Y. 650. FOLLOWED, 82 N. Y. 204, 211.

Volkening v. DeGraaf, 44 Superior 424. AFFIRMED, 81 N. Y. 268.

Voltz v. Blackmar, 4 Hun 139. REVERSED, 64 N. Y. 446.

Von Beck v. Village of Rondout, 15 Abb. Pr. 48. AFFIRMED, 41 N. Y. 619.

Von Latham v. Libby, 38 Barb. 339. DISTINGUISHED, 52 N. Y. 413. CONTRA, 13 Abb. Pr. 276.

Von Latham v. Rowan, 17 Abb. Pr. 237. CONTRA, 13 Abb. Pr. 276.

Von Rhade v. Von Rhade, 2 Thomp. & C. 491. DISTINGUISHED, 3 Hun 64; 5 Thomp. & C. 283.

Voorhees v. Burchard, 55 N. Y. 98. DISTINGUISHED, 68 N. Y. 69. FOLLOWED, 81 N. Y. 557, 564.

Voorhees v. McGinnis, 48 N. Y. 278. APPROVED, 50 How. Pr. 53. DISTINGUISHED, 9 Hun 452, 456; 2 Thomp. & C. 285. FOLLOWED, 53 N. Y. 380.

Voorhies v. Scofield, 7 How. Pr. 51. CONTRA, 14 How. Pr. 360, 362.

Voorhis v. Child, 17 N. Y. 354. FOLLOWED, 1 Thomp. & C. 646.

Vorebeck v. Roe, 50 Barb. 302. CONCURRED IN, 39 How. Pr. 377, 381.

Vos v. United Ins. Co., 2 Johns. Cas. 180. REVERSED, 1 Cai. Cas. VII.

Vosburgh v. Teator, 32 N. Y. 561. FOLLOWED, 37 Superior 171.

Vosburgh v. Thayer, 12 Johns. 461. EXPLAINED, 38 Superior 263.

Vose v. Cockcroft, 44 N. Y. 415. DISTINGUISHED, 46 N. Y. 636. FOLLOWED, 40 Superior 118. SUSTAINED, 51 N. Y. 81.

Vose v. Yulee, 4 Hun 628; 64 N. Y. 449. REVERSED, 19 Alb. L. J. 299; 9 Otto (U. S.) 539.

Vrooman v. Turner, 69 N. Y. 280. APPROVED, 82 N. Y. 385, 388. FOLLOWED, 22 Hun 114. *See* 44 Superior 93.

W.

Wade v. Baker, 14 Hun 615. AFFIRMED, 81 N. Y. 46.

Wade v. De Leyer, 40 Superior 541. APPEAL DISMISSED, 63 N. Y. 318.

Wade v. Kalbfleisch, 58 N. Y. 282. DISTINGUISHED, 24 Hun 622. FOLLOWED, 23 Id. 71, 74.

Wadsworth v. Sherman, 14 Barb. 169. AFFIRMED, 8 N. Y. 388.

Wadsworth v. Wendell, 5 Johns. Ch. 224. FOLLOWED, 58 Miss. 486.

Waffle v. Goble, 53 Barb. 517. DISTINGUISHED, 4 Hun 317. EXPLAINED, 1 Hun 711. FOLLOWED, 47 How. Pr. 233, 235; 84 N. Y. 618; 4 Thomp. & C. 222.

Waffle v. New York Central R. R. Co., 58 Barb. 413. DISTINGUISHED, 66 N. Y. 65.

Wager v. Troy Union R. R. Co., 25 N. Y. 526. DISTINGUISHED, 60 How. Pr. 415.

Wager v. Wager, 23 Hun 439. FOLLOWED, 23 Hun 431, 432.

Wagner v. Long Island R. R. Co., 2 Hun 633. APPEAL DISMISSED, 70 N. Y. 614.

Wait v. Green, 46 How. Pr. 449. NOT AUTHORITY, 46 How. Pr. 530 *n.*

Wait v. Ray, 5 Hun 649. AFFIRMED, 67 N. Y. 36.

Wakeman v. Dalley, 51 N. Y. 27. APPROVED, 36 Superior 544.

Wakeman v. Grover, 4 Paige 23. APPROVED, 61 How. Pr. 69. FOLLOWED, 84 N. Y. 528.

Wakeman v. Grover, 11 Wend. 187. APPROVED, 61 How. Pr. 69.

Wakeman v. Price, 3 N. Y. 334. DISTINGUISHED, 82 N. Y. 95, 102.

Waldele v. New York Central, &c., R. R. Co., 19 Hun 69. FOLLOWED, 23 Hun 279, 280.

Walden v. Le Roy, 2 Cai. 262, 263. DISTINGUISHED, 11 Johns. 321.

Waldorph v. Bortle, 4 How. Pr. 358. CONTRA, 7 How. Pr. 31. *See* 22 Id. 353.

Waldron v. M'Carty, 3 Johns. 471. DISTINGUISHED, 65 N. Y. 504.

Waldron v. Waldron, 4 Bradf. 114. QUALIFIED, 3 Redf. 505.

Walker v. Erie R'y Co., 63 Barb. 260. LIMITED, 58 N. Y. 391, 396.

Walker v. Hubbard, 4 How. Pr. 154. *See* 5 How. Pr. 241.

Walker v. Millard, 29 N. Y. 375. DISTINGUISHED, 5 Robt. 160, 167.

Walker v. Sherman, 20 Wend. 636. DISTINGUISHED, 66 N. Y. 498.

Walker v. Walker, 20 Hun 400. AFFIRMED, 82 N. Y. 260.

Wallace v. American Linen Thread Co., 46 How. Pr. 403. FOLLOWED, 24 Hun 450.

Wallace v. Castle, 68 N. Y. 370. FOLLOWED, 80 N. Y. 642; 82 Id. 572, 574.

Wallace v. Drew, 59 Barb. 413. REVERSED, 54 N. Y. 678.

Wallace v. Morss, 5 Hill 391. FOLLOWED, 1 Daly 335.

Wallerstein v. Columbian Ins. Co., 44 N. Y. 204. FOLLOWED, 34 Superior 321. REVIEWED, 46 Id. 120.

Wallis v. Randall, 16 Hun 33. AFFIRMED, 81 N. Y. 164.

Walls v. Bailey, 49 N. Y. 464, 472. FOLLOWED, 43 Superior 451.

Walsh v. Hartford Fire Ins. Co., 73 N. Y. 5. DISTINGUISHED, 83 N. Y. 141.

Walsh v. Kelly, 42 Barb. 98. FOLLOWED, 47 How. Pr. 80, 82.

Walsh v. Sayre, 52 How. Pr. 334. APPROVED, 60 How. Pr. 144.

Walter, Matter of, 21 Hun 533. AFFIRMED, 83 N. Y. 538.

Walter v. Bennett, 16 N. Y. 250. FOLLOWED, 21 How. Pr. 289, 291.

Walton v. Bryenth, 24 How. Pr. 357. CONTRA, 25 How. Pr. 388.

Walton v. Walton, 4 Abb. App. Dec. 512. APPLIED, 56 How. Pr. 285.

Walton v. Walton, 32 Barb. 203. REVERSED, 27 How. Pr. 600.

Walton v. Walton, 1 Keyes 15, 18. DISTINGUISHED, 84 N. Y. 320.

Wanzer v. De Baun, 1 E. D. Smith 261. FOLLOWED, 61 How. Pr. 367. CONTRA, 4 Abb. Pr. 443; 23 How. Pr. 507.

Ward v. Begg, 18 Barb. 139. CONTRA, 29 How. Pr. 55.

Ward v. Dewey, 7 How. Pr. 17. CONTRA, 14 How. Pr. 470, 472.

Ward v. Kelsey, 42 Barb. 582. AFFIRMED, 5 Trans. App. 315.

Ward v. Kilpatrick, 9 Week. Dig. 342. AFFIRMED, 12 Week. Dig. 401.

Ward v. Newell, 42 Barb. 482. DISTINGUISHED, 62 N. Y. 520.

Ward v. People, 3 Hill 395. COMMENTED ON, 5 Hill 260.

Ward v. Shaw, 7 Wend. 404. DISTINGUISHED, 7 Bradw. (Ill.) 456.

Ward v. Ward, 6 Abb. Pr., N. S., 79. DISAPPROVED, 10 Abb. Pr., N. S., 74, 79; 41 How. Pr. 169.

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Ward v. Warren, 15 Hun 600. AFFIRMED, 82 N. Y. 265.

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Warhus v. Bowery Savings Bank, 21 N. Y. 543. DISTINGUISHED, 2 Hun 49.

Waring v. Lockwood, 10 Johns. 108 FOLLOWED, 12 Johns. 206.

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Warner v. Blakeman, 36 Barb. 501. AFFIRMED, 4 Keyes 568.

Warner v. Erie Railway Co., 39 N. Y. 468. CRITICISED, 1 Thomp. & C. 528.

Warner v. Hudson River R. R. Co., 5 How. Pr. 454. CONTRA, 9 How. Pr. 217.

Warner v. Lee, 6 N. Y. 144. FOLLOWED, 9 Bosw. 334.

Warner v. Nelligar, 12 How. Pr. 402. DISAPPROVED, 4 Abb. Pr. 307, 308. OVERRULED, 23 Barb. 228.

Warner v. New York Central R. R. Co., 44 N. Y. 465. CRITICISED, 65 Barb. 92. EXPLAINED, 56 N. Y. 46. FOLLOWED, 84 N. Y. 62; 39 Superior 347.

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Warren v. Leland, 2 Barb. 613. DISTINGUISHED, 57 Barb. 243; 39 How. Pr. 381.

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Washburn v. Jones, 14 Barb. 193. FOLLOWED, 6 Lans. 112; 61 N. Y. 39.

Washington Life Ins. Co. v. Lawrence, 53 Barb. 307. AFFIRMED, 41 N. Y. 620.

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Waters v. Crawford, 2 Thomp. & C. 602. APPROVED, 42 Superior 390.

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Waydell v. Luer, 5 Hill 448. DISAPPROVED, 6 Barb. 201.

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Wayne, &c., Collegiate Institute v. Greenwood, 40 Barb. 72. REVERSED, 41 N. Y. 620.

Wayne County Savings Bank v. Low, 6 Abb. N. Cas. 76. AFFIRMED, 8 Abb. N. Cas. 390; 81 N. Y. 566. DISAPPROVED, 58 How. Pr. 24, 34, 37 *n.*

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Weaver v. Devendorf, 3 Den. 117. CRITICISED, 6 Kan. 508. FOLLOWED, 26 Wis. 398.

Weaver v. Livingston, Hopk. 595. EXPLAINED, 8 Paige 591.

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Weed v. Saratoga, &c., R. R. Co., 19 Wend. 534. DISTINGUISHED, 53 N. Y. 370.

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Weir v. Groat, 4 Hun 193. FOLLOWED, 23 Hun 87, 89.

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Weller v. Hersee, 10 Hun 431. AFFIRMED, 74 N. Y. 609.

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Wells v. City of Buffalo, 14 Hun 438. AFFIRMED, 80 N. Y. 253.

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Welts v. Connecticut Mut. Life Ins. Co., 48 N. Y. 34. DISTINGUISHED, 66 N. Y. 445.

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Wendell v. Mayor, &c., of Troy, 39 Barb. 329. AFFIRMED, 4 Keyes 261.

Wendell v. Mayor, &c., of Troy, 4 Keyes 261. DISTINGUISHED, 58 N. Y. 394.

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Wetmore v. Story, 22 Barb. 414. *See* 7 Abb. Pr. 127; 19 How. Pr. 518, 519, 520.

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