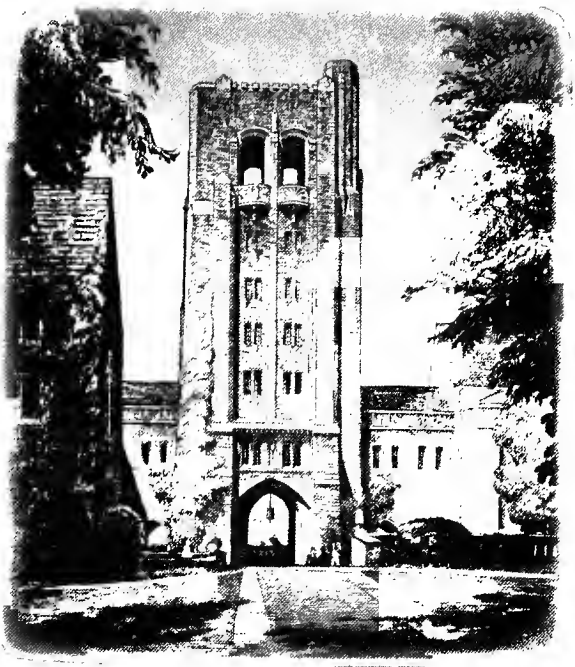

CASES

UNDER THE

ew ork Code of Civil Procedure

SELECTED BY

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PREFACE.

That a practical knowledge of the New York Code of Civil Procedure cannot be obtained by the study of the code alone or merely with incidental references to cases is made too plain for argument by the multitude of cases reported every year in which the only or chief question litigated by attorneys who must be presumed to have read the relevant provisions of the code is as to the application of some section of that statute. The student must acquaint himself, at least to some extent, with the evolution of the various important provisions and with the attitude the courts have taken toward the innovations sought to be made by the legislature. This can be done only by the study of reported cases.

The chief difficulty in preparing a set of cases for such study is to keep it down to workable size. Accordingly only those cases have been selected which it is believed will serve to prevent misconception of the code provision, either by throwing light upon its history or by showing its actual application by the courts to situations in which doubt might arise as to its precise meaning, and, as a rule, only those parts of the opinions which relate to the point under consideration have been included.

The cases follow the lines of the course so successfully given for many years in New York University Law School. The departures are mainly by way of amplification.

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CASES UNDER CODE CIVIL PROCEDURE.

CHAPTER I.

SUMMONS.

1. Jurisdiction. Code Civ. Pro., §§ 416, 3333–8.

AKIN v. ALBANY N. R. CO.

14 How. Pr. 337.

Action for specific performance originally commenced against the Albany Northern Railroad Company as sole defendant. Subsequently the plaintiff upon due notice obtained an order that Chauncey Willard, John L. Schoolcraft, and Andrew White, who had been appointed receivers of the company, be added as parties defendants, and that the pleadings and proceedings be amended by adding said receivers as parties and that plaintiff have liberty to amend his complaint by inserting therein the necessary allegations to connect the said parties defendants with the cause of action set forth in the complaint. The receivers were not served with a copy of the order nor with the summons or complaint, but without further notice the plaintiff took judgment against all the defendants by default. Defendants moved to set aside the judgment for irregularity.

Harris, Justice: "Civil actions, in the courts of record of this state, shall be commenced by the service of a summons." This is the mandate of the Legislature; and I know of no other mode of bringing a party into court against his will. Until served with process, the court has no jurisdiction over him and yet, in this case, we have three persons made defendants in an action, and that action brought to trial, and final judgment rendered against them, without service of process, or any other notice except that an application would be made for leave to sue them.

The record of the judgment presents the anomaly of a suit commenced against one defendant, a complaint against the same defendant, and then a final judgment against three persons who are strangers to the pleadings: their names appear for the first time in the judgment. It needs but to state the facts to show that the proceedings cannot be upheld.

Nor was the plaintiff in a situation to proceed to trial upon the issue already joined. Having obtained leave to amend the complaint, he was required to serve a copy of the amended complaint upon all the defendants. The effect of amending was, to strike out the issue that had been joined. It was the right of the defendant, who had already answered, to put in a new answer to the amended complaint.

See section 1693 and cases herein under "Provisional Remedies."

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2. Form of Summons. §§ 417–8.

Summons.

To the above-named defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken

against you by default for the relief demanded in the complaint.

Dated, ..., 19..

.....,
Plaintiff's Attorney.

Office and Post-Office Address
No. .....

.....

HULL v. CANANDAIGUA E. L. & R. CO., DEFOREST A. WILCOX AND WALTER D. WILCOX.

55 APP. DIV. 419.

FORECLOSURE. The two defendants, Wilcox, were judgment creditors of the defendant company. The copy summons served on defendant, Walter D. Wilcox, did not contain the name of the attorney who commenced the action of foreclosure, though the office and post-office address were correctly stated. The original summons was properly subscribed by the attorney for plaintiff, and this, with the complaint and proper notice of the pendency of the action was duly filed. The copy summons served on said Wilcox was attached to a copy of the complaint which had indorsed upon it the name and post-office address of the attorney for the plaintiff. After judgment for plaintiff, Walter D. Wilcox moved to vacate the judgment upon the above grounds.

SPRING, J. * * * There is no real merit in this application. The defense of the father and son were identical. Their interests were joint, and a fair trial has been had upon the issues raised by the father. The only question, therefore, is whether the omission of the name of the attorney for the plaintiff upon the copy of summons served was a mere irregularity, or rendered the process void. If the omission did not vitiate the summons in toto, the application can be considered on its merits, otherwise not. As

Alderson, in his work on Judicial Writs and Process, puts it (at § 72, p. 128): "We submit as the true and broad rule governing the subject, that defects in a writ that do not render it void are amendable; and that imperfections which so affect the writ as to entirely destroy its validity are not susceptible of amendment. In brief, process that is voidable only is amendable, but void process is not."

In Osborn v. McCloskey (55 How. Pr. 345), the summons failed to state the county in which the plaintiff desired the trial, and Mr. Justice Daniels, without an opinion, held that the Code provision (§ 417) was mandatory, and set aside the summons.

Later, Wallace v. Dimmick (24 Hun, 635) was decided by the General Term of the first department, and the same justice wrote the opinion of the court. The same defect existed as in the case before referred to. The court did not in terms overrule the preceding case, but held that the omission was an irregularity and subject to amendment which, in effect, is in contravention of the doctrine that the defect renders the process a nullity.

In Wiggins v. Richmond (58 How. Pr. 376), the summons omitted to specify the office, post-office address or street number of the plaintiff's attorney, and the notice of no personal claim accompanying the summons contained no reference thereto. The court held that section 417 of the Code of Civil Procedure was not mandatory, and that the summons was amendable. In Thomson v. Tilden (24 Misc. Rep. 513), it was held that the omission from the summons of the name of the county in which the trial was desired was not a fundamental error, but an irregularity. See also Yates v. Blodgett (8 How. Pr. 278). In Gribbon v. Freel (93 N. Y. 93), a summons issued out of the Marine Court of the City of New York stated the time in which the defendant was required to answer as six days instead of ten, as provided in section 3165, subdivision 2, Code of

Civil Procedure. The Court of Appeals held this was an irregularity merely, saying (at p. 96): "But the summons was not an absolute nullity. The insertion of six days instead of ten was an irregularity merely. The defect could have been waived by the general appearance of the defendant, or consent, express or implied. The judgment entered by default after the service of such a summons would not have been absolutely void, but simply irregular or erroneous, to be corrected by motion or by appeal."

The obvious aim of the Code provision permitting amendments "in furtherance of justice" (Code Civ. Proc., § 723), is to relegate this authority to the courts as to every process or pleading. Section 721 enumerates a great variety of defects covering nearly every conceivable case, which are cured by a verdict or decision. Section 722, after providing for an amendment in each of these specified defects, adds, "and any other of like nature, not being against the right and justice of the matter, * * * must * * * be supplied and the proceedings amended," and a further enlargement of the power of the court is given in the succeeding section.

The trend of the authorities, aside from the cases cited, is to give full scope to these sections and to treat every defect in the summons or pleading as an irregularity and hence subject to control and correction by the courts. (Clapp v. Graves, 26 N. Y. 418; Sears v. Sears, 9 Civ. Proc. 432; McCoun v. N. Y. C. & H. R. R. R. Co., 50 N. Y. 176.)

The summons is the notice required to bring the defendant into court. Whatever information he could have gathered from the process in the present case he was apprised of by the indorsement on the complaint which was annexed to the summons; together they made a substantial compliance with the Code requirement so that the defendant was not misled by the omission in the summons, and that is the test in the determination of a question of this character.

PEASELEE v. HABERSTRO.

15 Blatchf. 472.

Wallace, Circuit Judge. The motion to set aside the summons in this action must be granted, upon the ground that the summons was not signed by the clerk or under the seal of the court. Section 911 of the Revised Statutes of the United States prescribes, that "all writs and processes issuing from the courts of the United States shall be under the seal of the court from which they issue, and shall be signed by the Clerk thereof." This provision is not inconsistent with, and, therefore, is not repealed by, the subsequent act of Congress, now embodied in section 914 of the Revised Statutes, which enacts, that "the practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held." Giving due effect to the latter act, the practice, and forms and modes of proceeding, in the courts of the United States, in common-law actions, is to conform to, and be regulated by, that of the State courts, when there is no statute of the United States prescribing different practice or forms or modes of procedure. When the statutes of the United States are silent, the practice of the State courts will prevail, but, when those statutes speak, they are controlling. If the summons in this case had been signed by the clerk, it could be amended as regards the seal. As it is, there is no summons in the nature of process known to this court. The summons is set aside.

BARNARD v. HEYDRICK.

49 BARB. 62.

LOTT, J. This is an application on behalf of a purchaser of mortgaged premises sold under a judgment of foreclosure and sale, to be discharged from his purchase, on the following grounds:

1. That the summons is not subscribed by the plaintiff, or his attorney. * * *

The first objection is based on the fact, appearing by the judgment-roll, that the names of the plaintiff's attorneys are *printed* at the end of the summons forming part of the roll. This, it is claimed, is not a compliance with the requirements of the Code, which provides that "the summons shall be subscribed by the plaintiff, or his attorney," and shall require the defendant to "serve a copy of his answer on the person whose name is subscribed to the summons."

It then becomes necessary to determine whether a summons, issued by an attorney, with his name printed at the end thereof, is subscribed by him, within the meaning of that provision. * * *

Previous to the adoption of the Code, it was provided by the Revised Statutes (2 R. S. 278, § 9), that all writs and process issued out of any court of record should, before the delivery of same to any officer to be executed "be subscribed or indorsed with the name of the attorney, solicitor or other person," by whom the same was issued; and yet, in the same title, at p. 283, § 70, it is declared that "if any attorney, or solicitor, shall knowingly permit any person, not being his general law partner, or a clerk in his office, to sue out any process, or to prosecute or defend any action in his name, such attorney, or solicitor, and every person who shall so use the name of any attorney, or solicitor, shall severally forfeit to the person against whom such process shall have been sued out, or such action prosecuted or defended, the sum of $50."

This last provision is still in force, and by exempting the general law partner, and the clerk of an attorney, from the penalty imposed from using his name in issuing process and prosecuting and defending actions, it is clearly implied that it may be so used by them, by his permission and authority.

Although the Revised Statutes provide that the process "shall be subscribed or indorsed *with the name* of the attorney, solicitor or other person," issuing the same, and the requirement of the Code, is that the summons shall be subscribed by the plaintiff or his attorney, the difference in the phraseology does not, in my opinion, justify the conclusion that a difference in practice was intended.

It will be observed that the use, by a clerk, of the attorney's name, appears to be authorized under the provisions above referred to, in actions in which the attorney himself has no interest or connection, and it has, I believe, been the general practice of attorneys, to allow a clerk in their office to sign their name to process issued by them. The authority given to the clerk by the attorney, in such a case, makes it his act, and he is responsible therefor to the court and the party proceeded against, and I have found no case where the practice has been called in question. There certainly appears no reason, in principle, why it should not be permitted. There are many instruments which the law requires to be subscribed or signed by the party to be bound thereby, and yet a subscription, or signature, by him personally, is not necessary. Thus, the statute regulating the execution of wills, after expressly providing that every will "shall be subscribed by the testator," recognizes the signing of his name by another person as a compliance with that provision, by a subsequent requirement that "every person who shall sign the testator's name to any will, by his direction, shall write his own name as a witness to the will;" and it was distinctly decided in Robins v. Coryell (27 Barb. 556)

after a full and careful examination of the question, that the writing of the testator's name to a will, by another person, in his presence and by his direction, is a subscription by him, within the meaning of that statute. * * * So the statute of frauds requiring certain agreements to be in writing and to be signed or subscribed by the party to be charged therewith, is satisfied by the signature or subscription of the name of such party thereto, by another person duly authorized to make it.

If such is the rule applicable to statutes in the case of wills and other written instruments requiring the subscription of parties, I am unable to discover any reason why a different construction should be given to that in relation to legal process.

The views thus presented lead us to the conclusion that a subscription of the name of an attorney issuing a summons is not required to be made by himself personally, but that it may be made by another with his authority; and assuming this to be correct, it seems to follow that a name may be printed, as a substitute for his written signature. * * *

It is a common practice for a person who is unable to write his name to make his mark; and the making of such mark is held to be a good signing or subscription, within the requirements of the law, by a testator, to a will. * * *

It appears also to be settled that where a person is in the habit of using documents with his name printed thereon, this will be his signature, within the meaning of the statute of frauds. * * *

There are also many cases where printing is substituted for writing, in instruments which under our statute are required to be in writing. It is the general practice for deeds, or conveyances of real estate, and bills of sale of personal property, to be printed; and it is very common to use printed agreements for the sale of both real

and personal estate, and their validity is conceded; yet the statute declares that all conveyances of land, and all contracts for the sale of lands, or a note or memorandum thereof, shall be in *writing,* subscribed by the party by whom the conveyance or sale is made, and also makes it necessary for a note or memorandum of every contract for a sale of goods, when the price thereof is $50 or more, to be in *writing,* except in cases of part payment of the purchase money, or delivery of part of the goods.

Assuming, then that such instruments, when printed, are "in writing," within the requirements of these provisions of the statute, is there any good reason why printing an attorney's name may not be permitted, as and for his signature to a summons or other legal process? In this connection I will refer to the fact that the Code provides for the service of a summons on a defendant by delivering a copy thereof, without the necessity of showing him the original (§ 134), and also authorizes a copy to be inserted in the judgment-roll (§ 281). This appears to me a material fact in determining the question now under consideration. It is by the service of the summons that the action is commenced, and jurisdiction over the party is acquired; and if the service of a printed copy (for there is nothing to prohibit such a copy), is sufficient for that purpose, and such a copy may properly form a part of the judgment-roll, there is no valid reason for requiring the paper spoken of, and denominated *the* summons (but which may never be filed, but be forever kept in the pigeon holes of an attorney's desk) to be subscribed with the *written* name of the attorney, and for holding a printed subscription to be a nullity.

The *name* of the attorney issuing the summons is as effectually disclosed when it is printed, as if it were written; and his responsibility to the defendant and to the court, in either case, is the same. It would be necessary in any proceeding against him, to show that he was in fact the attor-

ney issuing the process; and although there might be more difficulty in making that proof when his name was printed than there would be if it were written by himself, or by another with his authority, that difficulty exists in all cases of agency, is not sufficient, on the ground of public policy, or of any inconvenience to suitors, to require a different or a more stringent rule in the case of legal process than in any other case affecting the private rights of individuals.

The different considerations above presented, lead me to the conclusion that the summons in this case was subscribed, within the requirements of the Code.

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3. Names of Parties.

GRANT v. BIRDSALL.
16 J. & S. 427.

FREEDMAN, J. This is an appeal from an order entered in April, 1882, refusing to vacate the judgment entered in this action against the defendant for want of an answer, April 4, 1863, for $349.10, and directing the defendant to appear on a certain day and submit to an examination concerning his property, pursuant to an order made October 13, 1881. The motion to vacate the judgment was made after a lapse of eighteen years, upon the ground that in the summons and complaint the christian names of both the plaintiff and defendant had been designated only by their initial letters. It was not denied that the moving defendant was the proper party, nor was it denied that he had been served with the summons and complaint. Moreover, it appeared that the defendant, who is a lawyer, had adopted "W. T. Birdsall" as his name in indorsing the note upon which he was sued; that in 1875 he had appeared in obedi-

ence to an order made in proceedings supplementary to execution; had obtained and signed several adjournments; and that the last of the adjournments had been obtained in consequence of his promise to pay the judgment. Nor was there any question as to the identity of the plaintiff. Under these circumstances there were no merits in the motion, unless the defect complained of is a jurisdictional one. In my judgment it constituted a mere irregularity, which has been waived. But even without a waiver, the court below would have been bound, under our system of practice in civil actions and proceedings, to disregard it as not affecting a substantial right, though a different rule may prevail as to indictments.

Order affirmed.

See also Gottlieb v. Alton Grain Co., 87 App. Div. 380, where judgment was upheld in which defendant was designated as "W. B. Gottleib."

BANNERMAN v. QUACKENBUSH.

11 DALY, 529.

DALY, C. J. The court had jurisdiction to allow the words " & Son " to be stricken from the title and to direct that the name Abraham Quackenbush be inserted instead.

The action was brought against the defendants as co-partners; and where that is the case the Code provides, § 1932, that if the summons is served upon one or more but not upon all the defendants, the plaintiff may proceed against the defendant or defendants served, unless the court shall otherwise direct; and if he recovers, may take final judgment against all the defendants jointly indebted; upon which judgment, the execution issues in form against all the defendants, §§ 1934, 1935,—but is not enforced against a defendant who has not been served with the summons, except that it can be collected out of property jointly owned by him with a defendant who has been served.

The answer in this action is by J. E. Quackenbush, one of the partners, from which it may be assumed that he was the only one served in the action; and the amendment appears to have been made for the purpose of having the name of both partners inserted in the summons and complaint, instead of J. E. Quackenbush & Son, as it was in the summons and complaint; which amendment may be made under section 451; and which, in fact, the court, under the Code, must, when the true name becomes known, order to be made, upon such notice and such terms as it may prescribe.

The cases to which counsel for the appellants refer, are cases where a new defendant is sought to be brought in, merely by an amendment, which can be done only by the service upon him of a supplemental summons; or, in other words, where defendants are attempted to be added without the service of process, by simply amending the pleadings; which cannot be done. Such was not the nature of the amendment here. It did not and could not authorize an individual judgment against Abraham Quackenbush, the judgment in the action being one that could be collected only out of property jointly owned by him and the partner who had been served.

ANDERSON v. HORN.

23 Abb. N. C. 475.

Motion to vacate judgment. Defendant, sued as John Horn, served an answer under the name of John A. Horan. Two days later plaintiff returned the answer on the ground that there was no action pending between plaintiff and John A. Horan, and entered judgment by default.

McAdam, Ch. J. A defendant ought to be sued in the surname of his ancestors, and the christian name given to him in baptism, (Bank of Havana v. Magee, 20 N. Y. 355,

363). If the defendant is known by two names he may be sued by either, or that by which he is generally known, though not his real name, or if the real name be unknown he may be sued by a fictitious name, adding a description identifying the person intended (Code Civ. Proc., § 451), such as "The man in command of ship Hornet." (Pindor v. Black, 4 How. Pr. 95.) This liberality in practice fails, however, to prevent the ever recurring confusion caused by misnaming the defendant, an error which becomes more difficult to repair as the proceedings advance. The plaintiff charges that the defendant engaged board under the name of "John Howard," and that his correct name is "John Horn," and by this name the defendant was sued. He undertook to defend in the name of "John A. Horan," which he claims to be his correct cognomen. His plea was returned. It is not a case of mis-spelling or of *idems sonans,* but of misnomer or nothing. The court must first ascertain the defendant's true name or his *alias dictus* before it can undertake to decide whether he has been correctly proceeded against or not. When the facts are settled there will be no trouble in correctly applying the law.

The parties must appear in court for oral examination on June 11, at 2 P. M. On the conclusion of examination the application will be decided.

See Code, § 1015. Where part of defendant's name is known, the summons should contain as much of the name as is known, supplemented by a fictitious first or last name, as the case may require, and a brief description tending to identify defendant. See Weil v. Martin, 24 Hun, 645.

SMITH v. JACKSON.

20 ABB. N. C. 422.

MCADAM, Ch. J. There are two Jacksons, "Morris J." and "Meyer." The plaintiff intended to sue and serve process upon "Morris J.," and claims that he has been

properly served therewith. Meyer Jackson claims that process was served upon him, that he thereupon employed attorneys and defended under the name of "Meyer Jackson sued as Morris J. Jackson," and all the papers emanating from his attorneys are so entitled. It is apparent throughout that Solomon, Kantrowitz & Esberg were appearing for "Meyer" Jackson, and not for "Morris J." Jackson. If Meyer Jackson was not the party intended to be sued, the plaintiff was under no more obligation to accept the answer tendered, than if the process had been served upon John Smith, and he had appeared and defended under the title of "John Smith sued as Morris J. Jackson."

There is no law or practice that permits a stranger, because erroneously served with process intended for someone else, to come into the record and defend upon the merits by alleging that he (the stranger) does not owe the debt or duty charged, when it is obvious that no one intended to allege he did. The stranger cannot force the plaintiff to accept such a plea, nor can he in any manner prejudice the real defendant intended to be — but not — served.

The plaintiff, however, voluntarily accepted the plea tendered by the stranger and went to trial upon it. The trial judge declined to consider the question whether the process was properly served, and directed judgment against Morris J. Jackson, who did not appear. This practice is without warrant or precedent. If no process was served upon Morris J., an appearance and answer by Meyer Jackson sued as Morris J. Jackson, gave the court no jurisdiction to award such a judgment; and even if Morris J. was served, an interloper could not mulct him in the costs of a trial, if he determined to suffer judgment by default. In either event the court at Trial Term was without jurisdiction, and the judgment directed thereat is *coram non judice* and void. The plaintiff should have declined to receive

such a plea from a stranger, or by moving to set it aside as irregular, have tested its propriety.

It is not to be inferred from this that the practice of the other side has been any better. Meyer Jackson, if not sufficiently informed by the process, might have ascertained upon inquiry that he was not the person intended to have been sued, and in case of serious doubt could have ascertained to a certainty by a motion to set aside the service. Upon such a motion the plaintiff would either have to disavow the service on Meyer Jackson as her debtor, or amend by inserting his true name, so as to commit her to an election to hold him. * * *

The action is now before the court on a motion made by Morris J. Jackson to vacate the judgment, and it must be disposed of according to legal principles in a manner calculated to bring order out of chaos. If process was personally served upon Morris J. Jackson, the plaintiff is entitled to enter judgment against him as by default; for he has not appeared in the action and has failed to answer. The judgment in such case must be entered by the clerk (Code Civ. Proc., § 1212), if process has not been served upon Morris J. Jackson, the attempt to commence the action has proved abortive, and plaintiff must begin *de novo*. It is fundamental that the want of jurisdiction may always be set up against a judgment, and if its absence is proved the judgment must be annulled, as the record of a court is never conclusive on the existence of a jurisdictional fact (Craig v. Town of Andes, 93 N. Y., at p. 411).

It follows that the judgment directed against Morris J. Jackson at the trial term, on the answer interposed by Meyer Jackson, is not only irregular but void for want of jurisdiction in the court to make such direction, and it will be vacated, but, under the circumstances, without costs, and the plea interposed by Meyer Jackson will be declared unauthorized by the practice and the service thereof set

aside. Meyer Jackson has joined in the present application, and may, therefore, be lawfully concluded by the adjudication thereof.

STUYVESANT v. WEIL.
167 N. Y. 421.

PARKER, Ch. J. This action is brought on the equity side of the court to compel the defendant to convey the title of certain premises to the plaintiff in pursuance of the terms of a written contract, or, if unable to convey a marketable title, that he be decreed to return a partial payment made by the plaintiff. The trial court held that the title was marketable and decreed specific performance. The Appellate Division reached a contrary conclusion and so reversed the judgment.

The defendant's title comes through a foreclosure of a mortgage while Mary J. Stockton was the owner of the fee, but in the summons and complaint, both of which were duly served upon her, she was called Emma J. Stockton. Later, the attorney for the plaintiff, without notice to Mary J. Stockton, obtained an order amending the summons and complaint so as to correctly state her given name, in pursuance of the authority conferred by section 723 of the Code of Civil Procedure, which provides that the court may, "before or after judgment, in furtherance of justice, * * * amend any *process,* pleading, or other proceeding, by adding or striking out the name of a person as a party, or by correcting a mistake in the name of a party."

The contention that the court had no power to amend the summons and complaint as provided by the order is founded upon the claim that the court had not acquired jurisdiction of defendant Stockton by the personal service of the summons and complaint upon her because of the error therein in respect to her given name. But we cannot

concur with a view that insists upon it that any error appearing in a summons in the name of a defendant prevents the court from acquiring jurisdiction of such defendant, notwithstanding he was fully apprised, when service of the summons was made upon him, that he was the party intended to be named therein and affected thereby: a view directly antagonistic to both the letter and the spirit of sections 721 and 723 of the Code, the first of which declares that a judgment of a court of record shall not "be impaired or affected, by reason of either of the following imperfections, omissions, defects, matters, or things, in the *process,* pleadings, or other proceedings:

"* * * 9. For a mistake in the name of a party or other person * * * where the correct name * * * has been once rightly stated, in any of the pleadings or other proceedings," while the latter section provides for correcting a mistake in the name of a party as it appears in the summons, which, of course, presupposes, in case of prior service, that jurisdiction has already been acquired. The object of the summons is to apprise the party defendant that the plaintiff therein seeks a judgment against him so that he may take such steps as may seem advisable to protect his interests, and in order to assure its coming to his attention the statute requires personal service of the summons to be made when it is possible to do so. It may happen, as in this case, that the defendant's name is not correctly stated in the summons, and in such case it is the duty of the court, when properly moved, to determine whether, notwithstanding the error, the defendant was fairly apprised whether he was the party the action was intended to affect, and if the answer of the court be in the affirmative, its determination must be that the court acquired jurisdiction. In our judgment the facts disclosed by this record permit only one answer to the question, Was Mary J. Stockton fairly apprised by the summons and com-

plaint served upon her that the object of the action was to foreclose a mortgage upon the premises owned by her? viz., that she was. That being so, it follows that it was the duty of the court, when applied to, to hold that jurisdiction had been acquired and thereupon to grant such amendments in furtherance of justice as the statute authorized. That is precisely the course of procedure taken in the foreclosure action. After the summons had been personally served upon Mrs. Stockton more than twenty days the fact that there was an error in her given name, as it appeared in the summons, and of what that error consisted was brought to the attention of the court, which thereupon decided to amend the summons and complaint so that the defendant's name should correctly appear in every paper entitled in the action. The decision expressed necessarily involved a decision not expressed, but nevertheless made, that the court had acquired jurisdiction of the defendant in the action, and hence it follows that the court could and should have made the order amending the summons and complaint so as to state defendant's given name properly. The decision was correctly made, and it follows necessarily that the purchaser at the foreclosure sale acquired a marketable title.

We have not alluded to the decisions of the several Special and General Terms which the Appellate Division felt called upon to follow. Their foundations were laid long before sections 721 and 723 of the Code came into existence as marking features of a distinct legislative policy to stop the sacrifice of things of real substance upon the altar of mere technicality, and hence a discussion of them can serve no useful purpose.

The order of the Appellate Division should be reversed, and the judgment of the Trial Term affirmed.

In Holman v. Goslin, 63 App. Div. 204, Alfred R. Goslin had been served with a copy of a summons, in which his name was stated as Alfred R. Joslin. An order setting aside a judgment taken on default

by reason of the irregularity was reversed, it not appearing that defendant had been misled. If the name given in the complaint differs from that given in the summons, it is the complaint which is irregular. The complaint is in legal contemplation a subsequent step in the procedure and must be consistent with the summons. See Tuttle v. Smith, 14 How. Pr. 395, and § 418, note, Bliss Ann. Code.

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4. Notices to be Served with Summons in Certain Cases. §§ 419-20, 423, 1774, 1897.

FARMERS', ETC., BANK v. STRINGER.

75 App. Div. 127.

Appeal from an order denying defendant's motion to set aside the service of the summons and for leave to withdraw his notice of appearance.

Per Curiam: In this action a summons in the ordinary form was served upon the defendant. A general notice of retainer was served and demand for copy of the complaint. The complaint was thereafter served, by which defendant was claimed to be liable under section 12 of chapter 40 of the Laws of 1848. Thereafter this motion was made. Upon the hearing of the motion, plaintiff's attorney made affidavit that after the service of the summons he had a talk with defendant, in which the defendant was informed of the nature of the action. The learned justice at Special Term denied the motion, and in his memorandum handed down with the decision, he said: "This motion, however, is addressed to the discretion of the Court, asking for permission to withdraw the defendant's notice of appearance. I do not see how the defendant is to be benefited, or aided, by such relief. The motion must, therefore, be denied, with $10 costs; but with leave to this defendant to renew the same on papers which may disclose the real object of the motion and of the relief sought." The motion was not

renewed, but this appeal was taken from the order made. Upon the argument of the appeal, the appellant's attorney, stated frankly that if this motion be granted, the Statute of Limitations has now run against the claim and the granting of the motion will result in defeating the plaintiff's right of recovery.

It is true that this motion is a technical one in view of the information the defendant had before service of the notice of retainer, but, on the other hand, it may be noted that the action is a technical one. That the action is one purely for a penalty has been held in Gadsden v. Woodward (103 N. Y. 244), in which Judge Rapallo said of a similar action: "This action is brought against the defendant to recover a debt due by a manufacturing corporation of which he was a trustee and he is sought to be made liable therefor on the ground that he failed to make the annual report required by the general manufacturing law. The action is not to recover a debt which he owes, but to impose upon him, as a penalty for his default, the payment of the debt of the corporation. We have repeatedly held that such an action is an action for a penalty or forfeiture. * * * The liability sought to be enforced against the defendant does not arise out of any contract obligation but is imposed by the statute as a penalty for disobedience of its requirement. * * * This action is not founded on any debt owing by the defendant. The debts owing by the company are made the measure (of) the penalty." In determining whether a technical rule shall be applied to defeat a technical right, it may be well to have in mind further that this law has now been modified. The Legislature has recognized its harshness and as the law now stands this defendant would not be liable upon the cause of action stated in the complaint. * * *

We are of the opinion that the defendant has not by his general appearance waived his right to claim the benefit of section 1897 of the Code of Civil Procedure.

He was summoned to appear in court by a valid legal process. To that summons he was bound to respond or be subjected to liability for judgment upon any cause of action plaintiff might plead, and upon which judgment might be taken upon his default. Defendant was not authorized to appear specially and make his motion to set aside the summons, because, until the nature of the action was fixed by the complaint, the action was not one for a penalty, and plaintiff might at any time have served a complaint setting up any cause of action other than the one of which he orally notified defendant. We approve of the remarks of Chief Justice Sedgwick, in the case of Delisser v. N. Y., N. H. & H. R. R. Co. (39 N. Y. St. Rep. 242). In that case Judge Sedgwick says: "The only legal evidence of the contents and claims of a complaint is the complaint itself, and it is the only evidence of what is the object of the action. No amount of evidence as to the intent of an attorney or party can show the object of an action, for that intent cannot make the object, or, if it be properly made, change it." Compelled then to appear and demand a copy of the complaint in order to determine conclusively what was the object of the action, it would seem to us a legal anomaly to hold that by that appearance he has waived the benefit of a statute to which he is otherwise entitled. It may be that the object of the statute was to give notice to the defendant of the nature of the action. If it be held that with such knowledge the defendant has not been prejudiced by failure to comply with the statute, a motion to set aside the summons could never be made because such motion must be based upon such knowledge. It may be that the object of the statute is to prevent a judgment by default upon such a cause of action without notice in the summons of the nature of the action. If so, however, the Legislature has chosen its own method of accomplishing that object. By section 1774 of the Code, a similar purpose is indi-

cated in an action for divorce, but it is there provided, not that the summons must contain the notice of the action, but that judgment by default shall not be entered upon such a cause of action unless the summons does contain that notice. In an action for a penalty, however, by section 1897, the form of the summons is specified which gives jurisdiction to the court of that action. When the complaint is served which gives character to the action, then and not till then, is the summons legally characterized as insufficient to give jurisdiction. This event happening after a notice of retainer should not be held to be waived by the defendant's prior general appearance in the action.

Section 1897 does not apply to a case where treble damages are given by statute. Layton v. McConnell, 61 App. Div. 447.

PEOPLE EX REL. MARTIN V. WALTERS.

15 ABB. N. C. 461.

From opinion of WESTBROOK, J. "It cannot be denied that there are grave questions to be passed upon by a court which has power to review the judgment rendered against the relator. The return of the constable upon the summons did not show that the copy thereof delivered to the defendant (a copy summons must now be delivered to make the service of summons valid, Code Civ. Proc. § 2878), was indorsed as the statute required (§ 1897). Formerly when the indorsement was required to be made upon the summons itself, it might possibly be argued that the indorsement was a part of the summons, and therefore proof of the service of the summons itself, upon which the indorsement appeared, was proof of the service of the notice as well. The argument, however, is inapplicable to the present statute. The indorsement now forms no part of the summons and need not appear thereon, but it must appear on the copy

delivered to the defendant as a notice for what cause he is sued. It consequently follows that proof of the service of the summons only, cannot, and does not, show that the copy delivered contained an indorsement required to be upon such copy and not upon the original process.

Forms of notices.

§ 419. Take notice that upon your default judgment will be taken against you for $....., with interest from .....

....., Plff's Atty.

§ 423. Take notice. The object of this action is to foreclose a mortgage upon real [*or* personal] property in the city of ....., described as follows:

No personal claim is made against you.

....., Plff's Atty.

§ 1774. The appropriate one of the following statements must legibly appear upon the face of the summons: Action for divorce. Action for a separation. Action to annul a marriage.

§ 1897. According to the provisions of section ..., chapter ..., Laws of 19... And see Schoonmaker v. Brooks, 24 Hun, 553.

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5. Service of Summons. a. Personal. §§ 425–34.

MEYERS v. OVERTON.

2 Abb. Pr. 344.

Ingraham, F., J. The summons and complaint in this cause were served by the plaintiff upon the defendant. The defendant did not appear therein, and a judgment by default was entered against him on an affidavit of service made by the plaintiff.

The defendant moved to set aside the judgment on an affidavit in which he admitted the service of the papers, and upon the ground that the plaintiff could not serve the

process. The motion was denied and the defendant now appeals to the General Term.

The defendant contends that the court had no jurisdiction in consequence of the defective service, and, therefore, the judgment is void. If this view is correct, the appeal should be sustained. I do not consider the law so to be. This court had jurisdiction both of the subject-matter and the person, and the mode of service has nothing to do with the question of jurisdiction, where the proceedings are in a court of general jurisdiction. The irregularity arises not from the want of service, but from the mode of making it. In such a case, a defendant should appear and make the objection and move to set aside the proceedings. If he neglect to do so, he is to be deemed to have waived the objection.

In an action by a common informer the summons can be served only by an officer authorized by law to collect an execution issued out of the same court. Code, § 1895.

SCOTT S. M. CO. v. DANCEL.

63 App. Div. 172.

McLaughlin, J. This is an appeal from an order directing the plaintiff's attorneys to accept an alleged answer. The summons and complaint were served on Sunday, February 10, 1901. Four days later another summons and complaint were served, in which relief was asked upon substantially the same ground as that stated in the complaint first served. On the 2d of March following, the defendant's attorney served an answer to the complaint in each action, and on the 4th of March the plaintiff's attorneys returned the answer to the complaint first served, on the ground that that service was null and void. Thereafter a motion was made by the defendant to compel the plaintiff's attorneys to accept the answer. The motion was granted and the plaintiff has appealed.

The order appealed from must be reversed. At common law Sunday is *dies non juridicus*. Process in a civil action can neither be issued, served, or a return made on that day. A judgment cannot be entered on Sunday, and if entered it is void. Service of process on Sunday, in a civil action, except certain cases, is expressly prohibited by statute. Thus, section 268 of the Penal Codes provides: "All service of legal process of any kind whatever upon the first day of the week is prohibited, except in case of breach of peace, or apprehended breach of the peace, or when sued out for the apprehension of a person charged with crime, or except where such service is especially authorized by statute. Service of any process upon said day, except as herein permitted, is absolutely void for any and every purpose whatever." *

Here service of the summons and complaint was a nullity. It was absolutely void, and the plaintiff could not have obtained a judgment upon such service had the defendant neglected or refused to appear. Had a judgment been entered it would have been void upon its face. It would have been *coram non judice*. The proof of service would have disclosed the fact that the service was made on the 10th of February, and the court would have taken judicial notice that the 10th of February was Sunday. There was, therefore, no occasion or necessity for the defendant to interpose an answer, because the plaintiff could not have acquired anything by reason of such service or taken any advantage of the defendant in case of his non-appearance or failure to serve an answer to the complaint. In addition to this, it appeared that intermediate service of the first summons and complaint and the second one the defendant's attorney was informed of the fact that the service having been made on Sunday it was void and would be so treated, unless the defendant would consent to voluntarily appear, which the attorney refused to do, on the ground of the want

of authority, and when the answer was served it was immediately returned upon the ground that "10th day of February having been a Sunday, process served on that day was absolutely void and had no effect whatever."

It follows, therefore, that the order appealed from must be reversed.

* Now Penal Law, § 2148. See also Penal Law, § 2150.

For exceptions to the rule above stated see Code Civ. Proc., § 6 and § 2015.

Service of summons upon any holiday is good. Slater v. Jackson, 25 Misc. 783.

INGERSOLL v. MANGAM.
84 N. Y. 622.

ANDREWS, J. The purchaser objects to the title on the ground that the summons was not served on the infant, William Mangam. The action was for the foreclosure of a mortgage executed by the father of the infant, who died before the commencement of the action. The infant is under fourteen years of age and had an interest in the mortgaged premises, and resided, when the action was commenced, with his mother in New Jersey. The summons was personally served on the mother in this State, and after such service, upon her application, she was, by an order of the court, appointed guardian *ad litem* of the infant defendant, and appeared and put in a general answer as such guardian. The summons was not served on the infant, either personally or by publication, and if such service was necessary to give the court jurisdiction to render judgment foreclosing and barring the infant's interest in the premises, the title is defective and the purchaser should not be compelled to complete his purchase.

The Code enacts that a civil action is commenced by the service of a summons (§ 416). Where the defendant is an infant under fourteen years of age, it is declared, that

personal service must be made by delivering a copy of the summons within this State to the infant, and also to his father, mother, or guardian, or if there is none within the State, to a person having the care or control of him, or with whom he resides, or in whose service he is employed (§ 426). Service on the infant alone, or on the father, mother, guardian or other person mentioned alone, does not constitute a personal service within the statute. Service upon both must concur to answer its requirement. There was, therefore, no personal service of the summons in this case, and there was no attempt to serve by publication.

The Code also provides that a voluntary general appearance of the defendant is equivalent to personal service of the summons (§ 424). It is claimed that the appearance by the guardian *ad litem* was a voluntary appearance by the infant within this section. An infant must appear by guardian (§ 471); but a guardian can only be regularly appointed for an infant defendant after service of the summons personally or by the substituted mode (in certain specified cases), as prescribed. This is clearly implied by the language of the section last cited. It provides that the guardian is to be appointed upon the application of the infant, if he is of the age of fourteen years and upwards, and applies within twenty days after personal service of the summons, or after service thereof is complete, if made in the other mode prescribed; or if he is under that age, or neglects so to apply, upon the application of any other party to the action, or of a relative or friend of the infant. The application in both cases is to be made after the personal or substituted service of the summons has been made. The order for the appointment of the guardian *ad litem* in this case authorized the guardian appointed to appear and defend the action in behalf of the infant; but the difficulty is, that the order was unauthorized, because the court had no jurisdiction over the infant or to appoint a guardian *ad*

litem when the order was made, by reason of the fact that the infant had not been brought in and the action had not been commenced against him by the service of the summons, which is the statutory mode by which the court acquires jurisdiction of the person or property of an infant. The appearance by the guardian was not, therefore, an appearance by the infant, and was not within section 424. The infant was incapable of consenting to such appearance, and the guardian could not consent to the exercise of jurisdiction over him by an appearance not preceded by the service of process. * * * Infants are deemed to be wards of the court, and when brought in by service of process the court will look after and protect their interest. But the court must first acquire jurisdiction before they are bound by its judgment. * * * It is no answer to the objection that the statute has not been complied with in respect to the mode of service, that the infant is of such tender years that he would have derived no benefit from the service if made; or that it would have been competent for the legislature to have provided that service upon the parent or guardian should stand as service upon the infant. The statute has prescribed how jurisdiction shall be acquired, and courts cannot dispense with its observance.

GRANT v. HUMBERT.

114 App. Div. 462.

Appeal from an order enjoining plaintiff from proceeding with this action.

Laughlin, J. The action is brought on a promissory note for $1,500, alleged to have been made by the defendant, payable to the order of the plaintiff.

At the time of the commencement of the action the defendant was an inmate of Bloomingdale Asylum, but no

committee of his person or property had been appointed. Before commencing the action an application was made in behalf of the plaintiff to one of the justices of the Supreme Court, evidently with a view to complying with the regulation of the State Lunacy Commission precluding service on an inmate of a State hospital for the insane without an order of a judge of a court of record for leave to serve the defendant. Leave was granted and service was made upon the 25th day of November, 1905. On the 8th day of December thereafter, by an order of the Supreme Court, the defendant was duly adjudged incompetent, and Susan Humbert was duly appointed committee of his person and property. She qualified, and a commission was duly issued to her on the 12th day of December. On the 13th day of December, Messrs. Bowers and Sands, attorneys, served a formal notice of appearance, stating that the defendant, "an incompetent person, by Susan Humbert, committee of his person and property," appeared in the action; and thereafter the defendant, by his committee, served an answer setting forth that he had been judicially declared incompetent and the appointment of the committee, and putting in issue all of the allegations of the complaint, and setting up as a separate defense that the note was made without consideration. * * *

If leave of the court to bring the action was necessary, I think the order permitting service of the summons cannot be construed as such leave. It was not so intended, and it was not made by the court.

The theory urged by the respondent to sustain the order is that the action cannot be maintained without leave of the court. That contention is not sustained by the authorities. Incompetency neither suspends the running of the statute of limitations on claims against the incompetent nor does it deprive the court of jurisdiction or bar a claimant from instituting an action or proceeding against an incompetent

person and prosecuting the same to judgment and enforcing satisfaction thereof by execution. If the action had not been commenced until after the inquisition and the appointment of the committee, the service of the summons upon the defendant or his committee without leave of the court might have been set aside by the court, or the prosecution of the action enjoined; and the plaintiff would also be subject to punishment for contempt, because although the title to the property remains in the lunatic, the court, by the committee, takes unto itself the custody, care and management of the property for the purpose of preserving it from waste or destruction, and providing for the payment of his debts and the maintenance of himself and family, and the education of his children, and it will brook no interference with the property or with the committee, who is its officer or bailiff. The court, which by its committee takes possession of the property of the incompetent person, is clothed with full authority to pay all just claims against the incompetent to the extent of his estate, and to determine the validity of claims by reference, if the facts are disputed. This summary remedy is favored by the courts, and is adopted in all cases unless some special facts or circumstances exist which render it necessary or appropriate that the claimant should be permitted by the court to maintain an action for the purpose of having his claim or the extent thereof adjudged.

The established practice with respect to the enforcement of claims against an incompetent person for whom a committee has been appointed, is to present a petition to the court, praying that the claim be allowed and paid, or, in the alternative, that leave be granted to sue thereon. * * * It was competent for the court on the motion for a stay to have denied the stay and granted leave to the plaintiff to prosecute his action to judgment; and this, we think, should have been done.

It follows that the order should be reversed and leave

granted to plaintiff to prosecute his action to final judgment.

If the person has been officially declared a lunatic and a committee appointed to look after his interests, then the service should be made upon the committee; but the lunatic should also be served unless it would be injurious to him or dangerous to make the service, in which latter case the Code authorizes the judge to make an order dispensing with such personal service. As a general rule, however, all disqualified persons should be served personally as well as the party or parties having control of them, or with whom they reside, or by whom they are employed, etc. When the proposed defendant is believed to be of doubtful intelligence, an affidavit should be presented to the judge showing the grounds for such belief, and stating that, although he has not been officially declared insane, it is desired to protect his interests, adding a request that the court name some person to accept service and look after the welfare of the defendant in the suit. It is well, in all suspicious cases, to use this practice, else if the defendant is declared insane pending the action, the decree will relate back to the service of the summons, and it will be necessary to begin all over again. See sections 427, 428; Amer. Mtg. Co. v. Dewey, 106 App. Div. 389.

A convict under sentence for a felony cannot sue but may be sued. Davis v. Duffie, 4 Abb. N. S. 478.

CORRELL v. GRANGET.

12 Misc. 209.

Motion to set aside service of summons and complaint as irregular.

Gildersleeve, J. It seems to me that the preponderance of evidence shows that the service of the summons and complaint was irregular. Defendant presents the affidavit of a disinterested eye witness, in addition to her own, stating that a stranger came into the room in which defendant happened to be at the time, and, without asking for defendant by name nor stating the nature of the papers, deposited them in a chair and directly afterward departed, without offering to deliver them into defendant's hands. This was not a good service. The papers should have been handed

to defendant, and, if she refused to take them, the server should have informed defendant of the nature of the papers and of his purpose to make service of them, and then he should have laid them down at any appropriate place in the presence of the defendant.

Where it appeared that defendant was evading service, throwing the summons upon the floor several feet from defendant, and telling him what it was, was held proper service in Wright v. Bennett, 30 Abb. N. C. 65, note.

OLSON v. McCONIHE.

54 Misc. 48.

Motion to set aside the service of the summons and complaint upon affidavits showing that a female process server called at the servants' entrance of defendant's residence, rang the bell and the defendant's cook on opening the door was told by this process server that she would like to see "Kate" meaning one of the upstairs maids; the cook invited the stranger into the house and asked her to sit down in the kitchen, and she would send for her. While the cook was telephoning upstairs for Kate the process server ran up the back stairs and rushed through the pantry, brushing aside the butler, and ran into the defendant's dining-room, where the defendant and her family were dining, and threw upon the dining-room table a summons and complaint enclosed in an envelope.

McLean, J. It is uncontradicted that the person who deposes to the service of the summons herein was admitted at the servants' entrance to the house where defendant resided and asked to see one "Kate," presumably and apparently not this defendant. Such admission, under the circumstances, might not be said to carry the freedom of the house or to warrant forcible access to the dining-room upstairs for the purpose of service of process. Entry there

and in the manner described was wrongful and the service improper. Mason v. Libbey, 1 Abb. N. C. 354. Application to set service aside granted, with ten dollars costs.

Anderson v. Abeel, 96 App. Div. 370. In Matter of McGarren, 112 App. Div. 503, defendant being offered a copy of the summons upon the street refused to take it, thrust it away and allowed it to fall to the sidewalk, where it was left by the process server. Held good service.

BULKLEY v. BULKLEY.

6 Abb. Pr. 307.

Motion to set aside judgment in an action for divorce on the ground of an irregular or fraudulent service of summons.

It appeared that on Oct. 6, 1856, defendant, with plaintiff's consent left the City of New York, on board the *S. S. Illinois,* to pay a visit to her mother, then living in California. The plaintiff accompanied her to the steamship, and spent the last hour before its departure in apparently friendly and affectionate conversation with her on board. At the moment of bidding her farewell, a clerk accompanying plaintiff handed the defendant a package consisting of a small tin box, closed, covered with paper and the paper sealed. At the same time plaintiff informed defendant that the box contained a present for her mother and also a note for herself. After the defendant had passed Sandy Hook and was out at sea, her curiosity induced her to unseal and open the package. Upon opening the tin box she discovered therein a summons directed to herself as defendant and in which her husband was plaintiff filled out in the handwriting of her husband and signed by himself as his own attorney, containing the usual notice to her that an action was thereby commenced in the Supreme Court; and that the complaint would be filed in the clerk's office in Saratoga county; and that if she failed to put in an answer in twenty days, the

plaintiff would apply to the court for the relief demanded in the complaint. The box contained no present to her mother. Defendant had not with her the necessary pecuniary means to obtain her passage back from Aspinwall, the first stopping place of the vessel. She went on to California and returned to New York in January, 1857. Thereupon this motion was made.

From opinion of POTTER, J. If the summons in this case was not legally served, the court have never had jurisdiction of the party defendant; and in such case all proceedings based upon the pretended service is void, and the judgment or decree without force or effect. * * * The summons is a proceeding which both gives, and limits the defendant to, a period of time in which to appear in the action to defend it. Its first undoubted office is to give to the defendant a certain authentic and fair notice that an action has been commenced; and next, to notify him of that reasonable time which the statute has afforded as an opportunity for preparation of his defense; or in other words, a time to advise and consult with counsel and friends as to the nature, propriety and character of the defense to be interposed, if a defense is intended. When a defendant, by reason of such a notice, has been fairly brought into court, he is entitled, by virtue of the other provisions of law (in cases that may require it), to apply to the court for any additional time that may be necessary to make preparation for the defense. These are the commonest rights which the spirit of the statute, as well as the fair demands of justice, allows to every citizen, in order to place him in a condition to have a fair and impartial trial; and, if desired, a trial by the jury of the country. Any trick or device, which deprives the defendant of these just and reasonable provisions, is a fraud upon the spirit and intent of the statute, and upon the rights of the party. In cases where a wife is a party to an action for divorce against her husband, she is permitted, by other equally just and wise provisions of law,

a time and opportunity to apply to the court for an allowance (in discretion) for alimony, to be furnished and supplied by her husband during the pendency of the suit, and also that she be supplied with all reasonable and necessary means to employ counsel, and to defray all other expenses of defending her just rights, her character and her fame.

What one of these ordinary legal rights, can it be said, was allowed to this defendant in this case? What one of those rights could she have obtained by an effort that she could have made, after the service or pretended service of this summons? Not one. * * *

It is entirely immaterial, then, whether this package was received by the defendant from the hands of her husband, or from the hands of his clerk, so far as that act imparted to her any knowledge of what was intended to be effected by it. * * * Divesting this act, if we may — if we can — of all fraudulent intent, or fraudulent representations, taking the view we have of the office of a summons and the rights of the parties afterwards, can this court, sitting here to dispense equal justice, hold that the unknown possession of a summons thus disguised — thus enveloped — thus concealing from the party the very knowledge which it was the intent of the law should be communicated — constitutes it a good service within the spirit of the statute? Such a holding would not only bring a reproach upon the administration of justice, but would be an impeachment of the universal dictates of common sense.

* * * * * * * * *

Motion granted.

BAKER v. WALES.

3 J. & S. 403.

Motion to set aside service of summons.

Sedgwick, J. The facts seem to be that the plaintiffs kept in their office parcels of summons with places left blank for

defendants' names, and amounts to be claimed. The inference is, that if a business interview were not satisfactory, service of summons would follow, after the blanks had been filled up.

On January nineteenth, one of the plaintiffs wrote to defendant, who lived in Connecticut, to come to New York to settle the claim in dispute, and to answer by return mail whether he would come. He did not answer until the twenty-sixth, and did not come until the thirtieth. Then he had an unsuccessful negotiation with plaintiff's clerk, who served him with the summons in this case, after he had filled in the defendant's name. This summons was dated twentieth January, the day after the plaintiff's letter to defendant to come to New York.

There would be no doubt in the case, if it were not for the plaintiff's affidavits that the letter was written and the interview sought for the purpose of settlement, solely.

But there is a conclusion consistent with this to be drawn from all the facts; that is, that irrespective of a particular interest in this particular case, there was a general purpose to have interviews with business customers, who went there only for business purposes, and then the clerk, having blank summons in reserve, to serve them if the customer did not come to terms — so the clerk would be instructed. Under this general system of business, it would be only necessary for the plaintiffs to write a letter solely for the purpose of settlement in a particular case, and the clerk would serve the summons under the general instruction. Nevertheless, the result would be that a defendant would be deceived, and the deceit would be used for the purpose of effecting a service. Motion granted with $10 costs.

PERSON v. GRIER.

66 N. Y. 124.

APPEAL from an order of the General Term of the Supreme Court affirming an order of the Special Term setting aside a service of the summons upon defendant Grier.

ALLEN, J. It is the policy of the law to protect suitors and witnesses from arrests upon civil process while coming to and attending the court and while returning home. Upon principle as well as upon authority their immunity from the service of process for the commencement of civil actions against them is absolute *eundo, morando et redeundo.* This rule is especially applicable in all its force to suitors and witnesses from foreign States, attending upon the courts of this State. In some instances witnesses and suitors, residents of the State, have only been discharged from arrest upon filing common bail; but the service of process upon nonresident witnesses and suitors has been absolutely set aside, thus giving color to a distinction between the two classes in respect to their immunity. Whether any distinction should or does in fact exist, is at least doubtful. This immunity is one of the necessities of the administration of justice, and the courts would often be embarrassed if suitors or witnesses, while attending court, could be molested with process. Witnesses might be deterred, and parties prevented from attending, and delays might ensue or injustice be done. In Norris v. Beach (2 J. R. 294), the defendant, a resident of the State of Connecticut, attending in this State to prove a will, was held exempt from the service of a *capias* and discharged absolutely from the arrest. The like relief was granted in Sanford v. Chase (3 Cow. 381), and the defendant, a resident of Massachusetts, arrested upon civil process while attending as a witness before arbitrators, was discharged absolutely without filing common bail, the court saying: "The privilege of a

witness should be absolute." * * * This court, in Van Lieuw v. Johnson (decided in March, 1871, but not reported), substantially adjudged that a summons could not be served upon a defendant, a nonresident of the State, while attending a court in this State, as a party. Four of the judges taking part in that decision were of the opinion that neither a party nor a witness attending a court in this State from a foreign state could be served with summons for the commencement of an action. The order denying an application to set aside the summons in that case was affirmed upon the ground that the party had lost his privilege by remaining within the State an unreasonable and unnecessary time after the close of the trial upon which he had attended. Church, Ch. J., and Folger, J., dissented from this result, being of the opinion that the privilege had not been lost. The authorities, as well as the principle upon which the privilege rests, clearly lead to an affirmance of the order. The defendant Grier attended in this State, in good faith, as a witness, and the summons was served upon him while he was so attending and during the continuance of freedom from arrest. The courts will not take jurisdiction of a party whose rights are thus invaded. It would be, in effect, and for all practical purposes, a withdrawal of the shield and protection which the law uniformly gives to witness, if a party coming from a foreign state could be served with process and an action commenced against him, the judgment in which would conclude him in all jurisdictions and could be enforced by action everywhere.

The order must be affirmed.

NETOGRAPH MFG. CO. v. SCRUGHAM.
197 N. Y. 377.

WERNER, J. The defendant, a resident of the state of Ohio, came into this State voluntarily in April, 1907. While

here he attended a legislative hearing in the City of Albany. At that time he was arrested on a warrant, issued by a magistrate in the City of New York, charging him with the crime of conspiracy. He was taken to the City of New York where he gave bail for his appearance pending the examination. The examination resulted in his being held, and he subsequently gave bail to appear and answer the charge in whatever court it might be prosecuted. In June, 1907, an indictment was found against him for conspiracy, and again he gave bail for his appearance at the trial. He returned to Ohio, and when the indictment was brought on for trial in the Court of General Sessions in the City of New York in March, 1909, he appeared and submitted himself to the jurisdiction of the court. His only purpose in coming into this State was to attend his trial upon the charge of conspiracy. A number of days were occupied in the trial, which resulted in the defendant's acquittal late in the afternoon of March 26, 1909. He remained in the City of New York until the following day, partly because he could not get a sleeping car berth on any train leaving the city on the night of his acquittal, and partly for the purpose of consulting his counsel about other indictments against him which had not yet been moved for trial. * * * At about 9 o'clock in the morning of the day after the defendant's acquittal he was served at his hotel with the summons and complaint in this action. There is no connection between the criminal charge upon which the defendant was tried and acquitted, and this civil suit for goods sold and delivered, which, for aught that appears, is brought in good faith. The learned court at Special Term held, and we shall assume, that defendant's stay in New York after his acquittal was for a proper purpose and not unreasonable in duration. These are the circumstances which give rise to this controversy on which the learned Appellate Division has certified to us the question: "Is the service of the

summons and complaint upon the defendant * * * George R. Scrugham lawful? * * * For present purposes it is enough to say that from the earliest times it has been the policy of the common law that witnesses should be produced for oral examination, and that parties should have full opportunity to be present and heard when their cases are tried. It is in furtherance of that policy and the due administration of justice that suitors and witnesses from abroad are privileged from liability to other criminal and civil prosecution, *eundo, morando, et redeundo.* It is not a natural right, but a privilege which had its origin in the necessity for protecting courts from interruption and delay, and witnesses or parties from the temptation to disobey the process of the courts. " It has always been held to extend to every proceeding of a judicial nature taken in or emanating from a duly constituted tribunal which directly relates to the trial of the issues involved. It is not simply a personal privilege, but it is also the privilege of the court, and is deemed necessary for the maintenance of its authority and dignity and in order to promote the due and efficient administration of justice " (Parker v. Marco, 136 N. Y. 585, 589, * * *. It is not only not a natural right but it is in derogation of the common natural right which every creditor has to collect his debt by subjecting his debtor to due process of law in any jurisdiction where he may find him. The privilege should, therefore, not be extended beyond the reason of the rule upon which it is founded. Since the obvious reason of the rule is to encourage voluntary attendance upon courts and to expedite the administration of justice, that reason fails when a suitor or witness is brought into the jurisdiction of a court while under arrest or other compulsion of law. Such a suitor or witness does nothing to encourage or promote voluntary submission to judicial proceedings. He comes because he cannot do otherwise. That seems to be the basis for the exception to the

general rule of privilege which is illustrated in cases where persons are brought into the jurisdiction of a court under extradition from other states or foreign countries. The privilege is held not to exist in such cases. From time immemorial it has been the law that persons actually in custody under criminal process are not exempt from service of process in civil suits.

This brings us to the concrete question whether there is any difference, so far as this question of privilege is concerned, between a person actually in custody and one who is at large under bail. The question is not free from difficulty, but we incline to the view that a person who is charged with or convicted of crime and is at large on bail, is constructively in the custody of the law. He is not in actual confinement, it is true, but he is in the custody of his bondsmen, who, by giving bail for him, have been constituted his jailors. "When bail is given, the principle is regarded as delivered into the custody of his sureties. Their dominion is a continuance of the original imprisonment. Whenever they choose to do so, they may seize him and deliver him up in their discharge; and if that cannot be done at once, they may imprison him until it can be done. They may exercise their rights in person or by agent. They may pursue him into another state; may arrest him on the Sabbath; and, if necessary, may break and enter his house for that purpose. The seizure is not made by virtue of new process. None is needed. It is likened to the rearrest by the sheriff of an escaping prisoner." (Taylor v. Taintor, 83 U. S. 366, 371.)

This concise and authoritative exposition of the law of bail leaves little to be said as to the status of a principal under a criminal bail bond. * * * Under such circumstances he cannot be said to be free to come at will, and when he submits himself to the directions of the courts having cognizance of the charge against him, he does not act voluntarily, but under compulsion of law. * * *

Question certified answered in the affirmative.

BARRETT v. A. T. & T. CO.
138 N. Y. 491.

GRAY, J. The defendant seeks to set aside the service of the summons in this action, for having been made upon its general superintendent. It is a domestic corporation, and, under section 431 of the Code, such a service, if not made upon the president, secretary, cashier, treasurer or a director, might be made upon its managing agent. It appeared from the affidavits, read on behalf of the defendant company, that the person served was the general superintendent of the work of operating the lines of the company. It was said of him that he was given that title " to distinguish him from superintendents of divisions of its lines, and from superintendents of other departments of the business." There was a sufficiently broad agency, or delegation of power, to constitute him a managing agent of the company. The design of the statute was to secure notice of the commencement of a suit to the corporation, and it is very apparent, from the description in the statute of the persons upon whom service might be made, that the legislature intended to facilitate such service, and only required that the person to be served should sustain such responsible and representative relations to the corporation, as would be comprehended in the term " managing agent." This language would exclude persons holding such subordinate, or clerical positions as impose no responsibility upon them; but, plainly, would include a person holding so responsible and representative an office as did the general superintendent of this company.

For manner of service upon the city of New York, see § 431, subd. 1; upon any other city, § 431, subd. 2; upon an unincorporated association, §§ 1919, 1921. N. Y. Bd. of Underwriters v. Whipple & Co., 36 App. Div. 49.

Service of summons upon a former officer of the corporation is not sufficient. Ervin v. Oregon S. N. Co., 22 Hun, 598.

GRANT v. CANANEA C. C. CO.
189 N. Y. 241.

HAIGHT, J. The Appellate Division, in allowing an appeal to this court, certified the following question: "Upon the facts appearing upon this application, did the Supreme Court of this State acquire jurisdiction of the Cananea Consolidated Copper Company, *Sociedad Anonima,* in this action."

* * * We are not now concerned with the question as to whether the complaint states a cause of action, for the motion to set aside the service of the summons was based upon the grounds that the Cananea company was a Mexican corporation which did not carry on business or maintain an office or possess property within this State, and did not have any officer, agent or employee authorized to accept service of papers, and that the service made was in violation of the first section of the Fourteenth Amendment of the Constitution of the United States, and consequently did not give our courts jurisdiction. The provision of the Constitution referred to is that which prohibits the depriving of any person of property without due process of law. If the defendant Cananea company is here to such an extent that we may acquire jurisdiction of it by the service of a summons, then our courts may determine as to the rights of the company in so far as it has property here over which the courts may acquire jurisdiction. If it has property or profits arising from the mining of ores in the hands of the Greene consolidation corporation which in equity belongs to our own citizens, they may apply to the courts, either State or Federal, to recover that which belongs to them, and such application is the due process of law which the Constitution recognizes and requires.

Section 1780 of the Code of Civil Procedure provides that an action against a foreign corporation may be main-

tained by a resident of the State for any cause of action, and section 432, subdivision 1, provides that personal service of a summons upon a foreign corporation may be made within the State by the delivering of a copy thereof to its president, vice-president, treasurer or secretary. The service made herein strictly conforms to the requirements of the Code, and thereby operates to give our courts jurisdiction to hear and determine the claims of the parties and award the proper judgment, upon which process may issue to reach any property of the judgment creditor that may be within this State and subject to our jurisdiction (Pope v. Terre Haute Car & Mfg. Co., 87 N. Y. 137; Atl. & Pac. Tel. Co. v. Balt. & O. R. R. Co., 87 N. Y. 355). But it is contended that the provisions of the Code are violative of the provision of the Constitution of the United States, already referred to. This we cannot admit. The great business and commercial transactions of our citizens are now largely conducted through corporations, and no reason is apparent why foreign corporations should be treated differently from foreign individuals. If our citizens have claims against such corporations or individuals, who can be found here within our jurisdiction, they should be permitted to apply to the courts for relief rather than be compelled to follow their debtors into foreign jurisdiction. It must be borne in mind that the provisions of the Code alluded to have reference to actions brought by residents of the State and not to actions brought by nonresidents or foreign corporations. The provision with reference to bringing such actions is very different. It is as follows: "An action against a foreign corporation may be maintained by another foreign corporation, or by a nonresident, in one of the following cases only: (1) Where the action is brought to recover damages for the breach of a contract, made within the State, or relating to property situated within the State, at the time of the making thereof.

(2) Where it is brought to recover real property situated within the State or a chattel, which is replevied within the State. (3) Where the cause of action arose within the State except where the object of the action is to affect the title to real property situated without the State." (Code Civ. Proc., § 1780.) Here we have specific limitations to the cases in which such actions may be brought which relate to causes of actions arising within the State for the breach of contracts made within the State, and to property situated within the State, which do not apply to actions by residents or domestic corporations. These provisions are violative of no provision of the Federal Constitution to which our attention has been called, nor do they conflict with the Federal authorities upon the subject.

It is contended that the defendant, the Cananea company, had not designated or authorized any person to accept service upon the company in this State. Very true, it had not; but under the provisions of the Code such designation is not necessary, provided the head officers of the corporation are here and can be served, such as the president, vice-president, treasurer or secretary. Section 432, subdivision 2, of the Code contains provisions with reference to the designating of persons by corporations in this State upon whom service of process may be made. These provisions are only important when there is no president, vice-president, treasurer or secretary here. Under the third subdivision of the section further provision is made for cases where no designation has been made, and when neither of the officers above specified can be found within the State, then service may be made upon a cashier, a director, or a managing agent of the company if the corporation has property within the State or the cause of action arose therein. It will thus be seen that the Legislature has proceeded with much care in framing these provisions, carefully safeguarding the rights of foreign corporations

as well as those of our own citizens. While the first subdivision of the section is exceedingly broad and authorizes the personal service of the summons upon the head officers of a corporation, specifically naming the president, vice-president, treasurer or secretary, the third subdivision, which authorizes the service upon the director, cashier or managing agent, is limited to cases only in which the corporation has property within the State or the cause of action arose therein.

It must be conceded that in so far as the service of process is concerned, the decisions of our own court are not in entire accord with those of the Supreme Court of the United States. In Pope v. Terre Haute Car & Mfg. Co. (*supra*) it was held that when the action was brought by a resident of this State, the service of a summons upon the president of a foreign corporation while temporarily in this State was valid, even though the corporation had no office, transacted no business and had no property within the State. In the case of Goldey v. Morning News (156 U. S. 518), it was held that in such a case the service was not good. While we regret the difference in the views of the two courts, we recognize the fact that arguments may be presented in support of either position. It may be unjust to a corporation to be compelled to go into a foreign State to litigate actions when its president was served while traveling through the State upon other business. On the other hand, individuals so traveling may be served, and if a citizen has a cause of action against such a corporation, it would be equally unjust to compel him to go into a foreign State to litigate his claim. In view of the fact that in recent years we have had many corporations organized in other States for the purpose of taking over the profits and proceeds of other corporations and distributing the same, whose officers and owners reside within our own State, the question of service of process upon such

corporations has become one of importance. While we entertain the view that our statute upon the subject furnishes the safer and wiser rule to follow, we shall in this case recognize and attempt to follow the rule laid down by the Federal court. In the case of Conley v. Mathieson Alkali Works (190 U. S. 406), the plaintiff, a resident of this State, brought an action in the State court against the defendant, a Virginia corporation. The record, however, does not show that the cause of action arose in this State. The defendant had designated no agent upon whom service could be made in this State, and none of its head officers were present within the State. It was doing no business and had no property within the State. Service was made upon a director who resided here. It was held that the service was not good. This decision was in accord with the provisions of the Code to which we have referred, for, under it, service can only be made upon a director where there is no designation of a person upon whom service could be made and where the officers of the corporation cannot be found within the State, in cases where the corporation has property within the State, or the cause of action arose therein. In the case of Lumbermen's Insurance Co. v. Meyer (197 U. S. 407), Meyer being the plaintiff below, it was held that, to obtain jurisdiction in New York, personal service of the summons upon the corporation must be made in the manner designated by section 432 of the Code of Civil Procedure of that State, and if the corporation has no property in the State and service cannot be made on the president, vice-president, treasurer or secretary, and no person has been designated, such service can only be made on a director or person specified in subdivision 3 of that section, in case the cause of action arose within the State. The loss having occurred in that State, the service upon a director was good. In the case of Brush Creek Coal & M. Co. v. Morgan-Gardner Elec. Co.

(136 Fed. 505), the defendant was an Illinois corporation and the plaintiff a Missouri company. The defendant's general manager was in Wyoming on business, and when returning passed through Kansas City, Mo., at which place he stopped off to confer with the plaintiff's president, with reference to the adjustments of their differences. While there the plaintiff's president caused to be served upon him, as an officer of the defendant, a summons in the action. The service was held good. Amidon, J., in delivering the opinion of the court, says: "If the officer served was a general officer of the corporation, then the extent of the business transacted by him in this State is of no importance in determining the question as to whether he is of an official rank such as to make him properly representative of the company. The precise question under consideration was before the Circuit Court for the Northern District of Illinois in the case of Houston v. Filer & Stowell Co. (85 Fed. 757), and it was there held that, when the manager of a corporation goes into another State on the business of the corporation, service of summons against the corporation in a suit relating to that business may be made on him there, although the corporation does not transact business in the State so as to make it an inhabitant thereof. In my judgment the opinion in this case is a correct exposition of the law. Any individual may be served in any State where he is found without regard to the place of his residence. A corporation is entitled to no greater exemption."

We have already stated the facts under which the service was made in this case. As we have seen, Greene was the president of the Cananea company, owning or controlling all the stock of the company. He had caused to be organized the Greene Consolidated Corporation as a holding company, to which he had transferred the principal part of the Cananea stock. He was also the president and owner, or

controller, of all of the stock of the Greene Consolidated Company. Its office was located in New York city, where Greene resided and conducted its business, which included the management and control of the business of the Cananea company. It appears to us that, under the facts appearing in this case, the service was valid, not only under the decisions of our court, but under those of the Federal court as well.

Question certified answered in the affirmative.

VITOLO v. BEE PUBLISHING CO.

66 App. Div. 582.

Hatch, J. The action was brought to recover damages for an alleged libel, published in the State of Ohio, where the defendant's paper is printed, and in the State of New York by the sale of the paper containing the article here.

The defendant is a foreign corporation, organized under the laws of the State of Ohio, and engaged in the publication of a newspaper styled the Toledo *Bee,* and having its chief office and place of business in the city of Toledo in that State.

The attempted service of summons upon the defendant consisted in the delivery of a copy of the summons and complaint to one Henry Bright, at his office in the Tribune building, in New York city, where he conducted a newspaper advertising agency, and in the course of his business solicits advertisements for a number of newspapers, one of which is the defendant. It is claimed by the plaintiff and denied by the defendant, that said Henry Bright was, at the time of the service, a managing agent of the defendant, and that, therefore, service upon him as such agent was sufficient to confer jurisdiction upon the court. After the service the defendant appeared specially for that purpose and made

this motion to set aside the attempted service, which was denied, and from the order denying the motion this appeal is brought.

(The opinion here quotes section 432, Code Civ. Proc.)

* * * It is contended by the defendant, *First,* that the person upon whom the attempted service was made herein was not a "managing agent" of the company within the meaning of the statute; and, *Second,* that if he were, the service was a nullity because the plaintiff failed to show that he had complied with the requirements of the section, which, it urges, are conditions precedent to acquiring jurisdiction by such service, viz., that the designation mentioned in subdivision 2, section 432 of the Code is not in force, or that neither the person designated nor an officer specified in subdivision 1 could be found with due diligence, and that the corporation has property within the State or the cause of action arose therein. It is not pretended that Mr. Bright is one of the officers mentioned in the first subdivision of the section, nor is it attempted to be shown either that there was no designation in force under subdivision 2, or that, if one was in force, neither the person designated nor an officer specified in subdivision 1 could be found with due diligence, and the corporation has property within the State or the cause of action arose therein. The plaintiff rests upon the proposition that if he has sufficiently shown that Bright was the managing agent of the defendant, the court acquired jurisdiction.

Assuming for the moment that he is right in his contention, we think that he fails in the sufficiency of his proof to support the same. The evidence upon which he relies is found in the circumstance that Bright had printed upon the door of his office the Toledo *Bee,* and that he kept therein files of the defendant's newspaper and sold a copy of the same to the plaintiff's attorney, and upon the occasion of the sale, in answer to the question as to whether

he was the managing agent, said, "Yes, I am its advertising manager." It is further claimed that support is given to the foregoing facts by a declaration contained in a letter written by the defendant to one Urban, presumably a person acting in the interest of the plaintiff. The letter which Urban wrote asked the defendant if they had any agent in this State authorized to make contracts for advertising in its papers for the western trade. The declaration of the defendant was contained in the answer to this letter, in which the defendant acknowledged the receipt of the letter inquiring whether it had an advertising agent in the east, and stating "Our representative in the foreign field is Mr. Henry Bright, Tribune Building, New York City, who will be glad to do business with you." It is settled by authority that the declarations of the person claimed to be the managing agent are not sufficient to establish such fact, and that proof which shows only that the claimed managing agent is a representative of the defendant for some purpose, is not sufficient upon which to predicate the fact that he is a managing agent within the meaning of the section of the Code authorizing service to be made upon him. (Coler v. Pittsburgh Bridge Co., 146 N. Y. 281.)

In Tuchband v. C. & A. R. Co., 115 N. Y. 437, service of summons upon one who was described by defendant foreign corporation as its "general agent, passenger department, 261 Broadway, New York," where it maintained a freight and passenger agency, was held sufficient to bind the company.

Service upon an assistant superintendent, insufficient. Kramer v. Buffalo, U. F. Co., 132 App. Div. 415.

Foreign insurance companies doing business here are required to designate the Superintendent of Insurance to receive service of process in actions against them, Insurance Law, § 30; foreign banking companies, the Superintendent of Banks, Banking Law, § 34; other foreign corporations, Code, § 432, subd. 2.

RANDALL v. RANDALL.

29 Misc. 423.

Gildersleeve, J. The action is for absolute divorce, instituted by the wife against the husband. Alimony is asked for. The defendant has not appeared in the action, but has suffered his default to be taken. The only evidence of proper service of the summons is that the server identified the person served from a photograph of the defendant and that the person served admitted his name to be Leon G. Randall, and also that the server was told by a man named Aberg, who appears to have been present at the time of service, that the person served was the defendant herein. Aberg himself has not been called as a witness. I am not altogether satisfied with this identification of the defendant.

Where personal service of the summons and of the complaint, or notice, if any accompany the same, shall be made by any other person than the sheriff, it shall be necessary for such person to state in his affidavit of service his age, or that he is more than twenty-one years of age; when and at what particular place, and in what manner he served the same; and that he knew the person served to be the person mentioned and described in the summons as defendant therein, and also to state in his affidavit that he left with defendant such copy, as well as delivered it to him. No such service shall be made by any person who is less than eighteen years of age.

In actions for divorce, or to annul a marriage, or for separate maintenance, the affidavit, in addition to the above requirements, shall state what knowledge the affiant had of the person served being the defendant and proper person to be served, and how he acquired such knowledge. The court may require the affiant to appear in court and be examined in respect thereto, and when service has been made by the sheriff, the court must require the officer who made the service to appear and be examined in like manner, unless there shall be presented with the certificate of service the affidavit of such officer, that he knew the person served to be the same person named as defendant in the summons, and shall also state the source of his knowledge. General Rules of Practice, Rule 18.

Murphy v. Shea, 143 N. Y. 81. From opinion of Peckham, J. "The judgment-roll contained sufficient and competent evidence of the actual service of the summons on the infant. The affidavit of the person who

actually served the summons is unnecessary so long as there is other competent proof of such service. A third person may have actual knowledge of such service, and when he swears unequivocally and positively there is a presumption that he swears from personal knowledge and not from hearsay. The affidavit in question here was made positively and not on information and belief, and being made by the father of the infant it is still more probable that it was founded upon personal knowledge. At any rate there was enough stated to call upon the court for a decision upon the fact of service, and the court must have found such fact as the basis for its order for the appointment of a guardian."

For form of admission of personal service of summons, see White v. Bogart, 73 N. Y. 256. Where it is desirable to enter judgment quickly the admission may be antedated. Peck v. Richardson, 9 Hun, 567.

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b. Substituted service. §§ 435–7.

CONTINENTAL NATIONAL BANK v. THURBER.
74 HUN, 632.

At Special Term:

"INGRAHAM, J. The question to be determined on this motion is whether or not the plaintiff had made diligent efforts to serve the summons upon the defendant, and whether the plaintiff could ascertain the place of his sojourn, not whether the defendant's intimate friends, relatives and attorney had knowledge of the defendant's place of sojourn, and I think in this case the plaintiff did make reasonable efforts to ascertain the defendant's place of sojourn. He called upon the defendant's brother, and it does not appear that information was given as to the place where the defendant at that time could be found.

"He called at his house and no information could be obtained there; he requested an appearance from the defendant's attorney, and was informed that there was no authority to appear; and it now appears as a fact that the defendant was at the time traveling in the southwest, and it

does not appear that any one at that time knew the exact place of his sojourn.

"There was no intimation given to the plaintiff's agent who had called at the defendant's house that there was a person in the house who could give any information upon the subject, nor was it intimated that there was at that time a housekeeper in the house, and there is nothing to show that any information was given to the plaintiff or his agent, nor any answer to all the inquiries that were made, by which the place of the defendant's sojourn at the time could be ascertained.

"It is not necessary to find that the defendant was endeavoring to conceal the place of his sojourn. It is enough to say that he left the State and remained away for several months without leaving any one behind to represent him or give any information that would enable a stranger to ascertain his whereabouts.

"I think, therefore, the order was properly granted, and that the motion to vacate should be denied."

At General Term:

FOLLETT, J. This action was brought to recover of the appellant the amount due on a bill of exchange, dated January 18, 1893, drawn and payable at the city of New York, and indorsed by the defendant at that city. When the bill was drawn the defendant was, and has ever since remained, a resident citizen of this State. The summons in this action was issued August 10, 1893, and on the twenty-third of the same month an order for the substituted service of it on the defendant was granted, pursuant to section 435 of the Code of Civil Procedure.

August 23, 1893, the summons and order were served on the defendant by leaving copies of them at his residence with a person of proper age, pursuant to said order and section 436 of the Code. The defendant failed to appear in

the action, and September 16, 1893, judgment was entered against him, which he moved to vacate on the following grounds:

"1. That the court had not, at the date the said order for substituted service was made, nor at the date said judgment was rendered, jurisdiction over the person of said Horace K. Thurber.

"2. That said judgment, being a personal judgment, is void, as there has been no personal service of the summons herein upon said Horace K. Thurber.

"3. That section 435 of the New York Code of Civil Procedure, under which said order for substituted service was made, is unconstitutional, being contrary to the provisions of article V and article XIV of the amendments to the Constitution of the United States.

"4. That said judgment was so rendered against said Horace K. Thurber without due process of law."

The motion was denied and said defendant appeals from the order. The appellant's sole point, which he has divided into four, is that the court did not acquire jurisdiction to render a personal judgment against him, not because all of the steps required by the Code were not duly taken, but because the legislation establishing the procedure for the substituted service is violative of the provisions of the Constitution of the United States and of this State, that a person shall not be deprived of his property without due process of law. A citizen of a state is bound by its laws, both substantive and those regulating judicial procedure. Acquiring jurisdiction of resident defendants by constructive service of process is a proceeding according to the course of the common law, and is due process of law. This kind of service was not unknown to the common law, but was an authorized mode by which the English courts of law, and of equity, from the earliest times acquired jurisdiction of resident defendants. (3 Black. Com. 383, 445.)

Anciently, if a citizen refused to appear and answer to the process of the courts of England he was outlawed and his property taken to satisfy the just demands of his creditors.

In this State outlawries in personal actions were regulated by chapter 9 of the Laws of 1787, and the practice in such cases is stated in chapter 10 of Wyche's Practice, the first published on the procedure of the courts of this State.

Every sovereignty has power to regulate the procedure of its courts and prescribe the rights which plaintiffs may acquire and the liabilities which may be imposed on resident defendants by judgments recovered in its tribunals. (Hunt v. Hunt, 72 N. Y. 217; Rigney v. Rigney, 127 id. 408; Mackay v. Gordon, 34 N. J. Law, 286; Piggott For. Judg. 130; Schibsby v. Westenholz, L. R. (6 Q. B.) 155.)

In the case last cited Lord Blackburn said: "Now, on this we think some things are quite clear on principle. If the defendants had been, at the time of the judgment, subjects of the country whose judgment is sought to be enforced against them, we think that its laws would have bound them. Again, if the defendants had been, at the time when the suit was commenced, resident in the country, so as to have the benefit of the laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them." This was said in an action brought to recover on a judgment recovered against the defendants in France. The defendants were not domiciled in France nor subject to the jurisdiction of the French court. They had no notice nor knowledge of the proceedings, and did not appear in the action. All countries having judicial systems provide modes by which resident citizens can be bound by the judgments of its courts without personal service of the process.

Orders affirmed.

Ottman v. Daly, 17 Civ. Proc., § 62, McAdam, Ch. J. "The plaintiff fails to show 'that the place of his (the defendant's) sojourn

cannot be ascertained,' as required by the Code (§ 435). This is a substantial and not a mere formal requirement, the importance of which is exemplified by the facts of this case. The defendant, a well-known theatrical manager, is on the road with his company, which has dates for the summer season in the principal cities of the Union. The defendant of necessity sojourns in these different cities while his company performs there. He is not seeking to avoid service of process, but is attending to his legitimate business. The act in reference to substituted service was never intended to include such a case."

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c. Service by Publication. §§ 438–45, 926, 1216–17.

PENNOYER v. NEFF.
95 U. S. 714.

Mr. Justice FIELD: * * *

The several states of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent states, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory. As a consequence, every state has the power to determine for itself the civil status and capacities of its inhabitants; to prescribe the subjects upon which they may contract, the forms and solemnities with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined and their obligations enforced; and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed, and transferred. The other principle of public law referred to follows from the one

mentioned; that is, that no state can exercise direct jurisdiction and authority over persons or property without its territory. Story, Confl. Laws, chap. 2; Wheat. Int. Law, pt. 2, chap. 2. The several states are of equal dignity and authority, and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one state have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. "Any exertion of authority of this sort beyond this limit," says Story, " is a mere nullity, and incapable of binding such persons or property in any other tribunals." Story, Confl. Laws, § 539.

But as contracts made in one state may be enforceable only in another state, and property may be held by non-residents, the exercise of the jurisdiction which every state is admitted to possess over persons and property within its own territory will often affect persons and property without it. To any influence exerted in this way by a state affecting persons resident or property situated elsewhere, no objection can be justly taken; whilst any direct exertion of authority upon them, in an attempt to give exterritorial operation to its laws, or to enforce an exterritorial jurisdiction by its tribunals, would be deemed an encroachment upon the independence of the state in which the persons are domiciled or the property is situated, and be resisted as usurpation.

Thus the state, through its tribunals, may compel persons domiciled within its limits to execute, in pursuance of their contracts respecting property elsewhere situated, instruments in such form and with such solemnities as to transfer the title, so far as such formalities can be complied with; and the exercise of this jurisdiction in no manner interferes

with the supreme control over the property by the state within which it is situated. Penn v. Lord Baltimore, 1 Ves. 444; Massie v. Watts, 6 Cranch, 148; Watkins v. Holman, 16 Pet. 25; Corbett v. Nutt, 10 Wall. 464.

So the state, through its tribunals, may subject property situated within its limits owned by nonresidents to the payment of the demand of its own citizens against them; and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens; and, when nonresidents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such nonresidents to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the nonresident situated within its limits that its tribunals can inquire into that nonresident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the nonresident have no property in the state, there is nothing upon which the tribunals can adjudicate.

* * * * * * * * *

Substituted service by publication, or in any other authorized form, may be sufficient to inform parties of the object of proceedings taken where property is once brought under the control of the court by seizure or some equivalent act. The law assumes that property is always in the possession of its owner, in person or by agent; and it proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceedings authorized by law upon such seizure for its condemnation and sale. Such service may also be sufficient in cases where the object of the action is to reach and dispose of property in the state, or of some interest therein, by enforcing a contract or a lien respecting the same, or to partition it among different owners, or, when

the public is a party, to condemn and appropriate it for a public purpose. In other words, such service may answer in all actions which are substantially proceedings *in rem*. But where the entire object of the action is to determine the personal rights and obligations of the defendants, that is, where the suit is merely *in personam*, constructive service in this form upon a nonresident is ineffectual for any purpose. Process from the tribunals of one state cannot run into another state, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the state where the tribunal sits cannot create any greater obligation upon the nonresident to appear. Process sent to him out of the state, and process published within it, are equally unavailing in proceedings to establish his personal liability.

The want of authority of the tribunals of a state to adjudicate upon the obligations of nonresidents, where they have no property within its limits, is not denied by the court below; but the position is assumed, that, where they have property within the state, it is immaterial whether the property is in the first instance brought under the control of the court by attachment or some other equivalent act, and afterwards applied by its judgment to the satisfaction of demands against its owner; or such demands be first established in a personal action, and the property of the nonresident be afterwards seized and sold on execution. But the answer to this position has already been given in the statement, that the jurisdiction of the court to inquire into and determine his obligations at all is only incidental to its jurisdiction over the property. Its jurisdiction in that respect cannot be made to depend upon facts to be ascertained after it has tried the cause and rendered the judgment. If the judgment be previously void, it will not become valid by the subsequent discovery of property of the defendant, or by his subsequent acquisition of it. The judgment if void

when rendered, will always remain void; it cannot occupy the doubtful position of being valid if property be found and void if there be none. Even if the position assumed were confined to cases where the nonresident defendant possessed property in the state at the commencement of the action, it would still make the validity of the proceedings and judgment depend upon the question whether, before the levy of the execution, the defendant had or had not disposed of the property. If before the levy the property should be sold, then, according to this position, the judgment would not be binding. This doctrine would introduce a new element of uncertainty in judicial proceedings. The contrary is the law; the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently.

BRYAN v. UNIVERSITY PUB. CO. ET AL.
112 N. Y. 382.

DANFORTH, J. The action is by a judgment-creditor of Mrs. Richardson, against her as debtor, and other defendants, one of whom is Mrs. Wilkinson, and the order of publication recites that the action relates to personal property within the state and in which the then defendants "have or claim the entire property or income, and that the relief demanded by the plaintiff consists partly in excluding the defendants from any lien upon or interest in it until the plaintiff's judgment is satisfied." This statement may bring the case, in terms, but not in spirit, within subdivision 5 of section 438 (Code Civ. Pro.), but that is not necessary to consider, for neither the complaint nor the affidavits on which the order was founded, contain any warrant for such assumption, and the order was sustained against the motion to vacate it upon the sole ground that the defendant was a

nonresident of the state. The proceeding was a statutory one, and to give the judge jurisdiction to entertain it, something more than the nonresidence of the defendant must appear. A summons is issued as the first step towards the commencement of an action, and this signifies in the Code (§ 3333) an ordinary prosecution by one party against another party for the enforcement or protection of a right, or the redress or prevention of a wrong. The service of the summons is the commencement of the action. It can be made, as of course, upon a defendant within the state. It can be served upon a nonresident within the state, or by publication only, by direction of a judge, but his order must be founded not only upon an affidavit showing the nonresidence, but also upon a verified complaint showing a sufficient cause of action against the defendant to be served. (Code of Civ. Proc., § 439.) Under the former Code (§ 135), it was enough to present the judge with an affidavit disclosing to him a cause of action against the defendant, and he was then authorized to make the order for publication in certain specified cases, and, among others, (1) "when the defendant is a foreign corporation and has property within the state, or the cause of action arose therein; (2) where the defendant is not a resident of the state, but has property therein, and the court has jurisdiction of the subject of the action." These qualifying words are omitted in the Code of Civil Procedure, but that act, as is above stated, requires the complaint to show a sufficient cause of action." That condition stands in the place of the special cases enumerated in the former Code and can require nothing less, for, unless a cause of action arises within the State, or the defendant has property therein, and the court has jurisdiction over the subject of the action, neither the person nor property of a defendant could be affected by any judgment the court might render. He could neither be punished for con-

tempt in failing to obey its order, nor his estate be sold by reason of it. The jurisdiction of the court is limited by the boundaries of the State, and its process could not go beyond them.

The facts, therefore, constituting a valid claim against the defendant must be stated, and it must also appear that the case is one of which the court can take cognizance. Here nothing appears to be within its jurisdiction. So far as the appellant is concerned the subject of the action is in Massachusetts. She is alleged to be the assignee of certain copyrights, an intangible species of property, as the name implies (Stevens v. Gladding, 17 How. (U. S.) 450), acquired by compliance with conditions imposed by statute (U. S. R. S., §§ 4956, 4962) to be performed at the office of the librarian of congress, and consisting merely of the exclusive privilege of printing, publishing and selling books or other compositions, a privilege abiding with the person by whom it was originally secured, or her assignee. (U. S. R. S., §§ 4952, 4955, 4971.) She resides in Massachusetts, and, for aught that appears, always has resided there. Nothing has taken place in this State and no one is here to be affected by any judgment the courts of the State can make. If the court directs the assignment to be canceled, how is its order to be made effective? or appoints a receiver, what power will he possess over the defendant appellant? or requires her to account for money received? Neither order could be enforced. Moreover, the complaint while it shows the issuing of an execution against the debtor while a resident of this state, also shows that at some time thereafter, and before the issuing of the other execution alleged in the complaint, she left the State and became with her husband "a resident of the state of Massachusetts, with the intent of defrauding and delaying the plaintiff in the collection of the said indebtedness," and still resides there. It then alleges the assignment of the copyright to Mrs.

Wilkinson with intent to defraud the plaintiff, and the collection of royalties by her and payment of them to Mrs. Richardson, with like intent.

The action is to reach the copyright and have an accounting for those royalties as the property of Mrs. Richardson, and is within the Code, which gives to the creditor an action against his debtor and any other person, to compel the discovery of anything in action or other property belonging to the judgment-debtor, or held in trust for him. (Code of Civ. Proc. § 1871.) As the transaction sought to be undone is illegal, the action is founded on a wrong by Mrs. Wilkinson in receiving the property for an unlawful purpose and to the plaintiff's injury and for this the latter seeks a remedy. Her right as a creditor to that property is the right she desires to enforce. It is plain that the right accrued, and, therefore, the cause of action arose when and where the defendant was guilty of the wrong charged upon her, and that is when and where she stands as a shelter to the debtor, and claims and exercises rights of ownership under an instrument executed and received in fraud of the rights of a creditor. If the allegation in the complaint is true, that is the position, and that is the wrong practiced by the defendant. It is her duty to give up the property to be applied upon the debt, and the enforcement of that duty gives the cause of action. But these things did not happen in this state, nor are the interests or property here. The court can give no relief, and the impropriety of issuing an order which, if it leads to a judgment, "would operate on nothing in the state and be regarded by nobody out of it," becomes apparent. It offends every principle by which the jurisdiction of a court can be vindicated, and should not be allowed to stand.

Clarke v. Boreel (21 Hun, 594) is cited by the respondent as opposed to these views. It seems to have no application. The action was for the recovery of damages for injuries to

the person of a citizen, caused in this state by the negligence of the defendant. The court held that the cause of action arose in the state; that it had jurisdiction over it; that the defendant might perhaps appear and thus jurisdiction of the person of the defendant be added to jurisdiction of the subject-matter; and in the then condition of the proceedings they regarded the motion as premature and gave the plaintiff the benefit of the experiment. That decision is not here for review. In the complaint before us no case is made giving jurisdiction to the courts of this state over the subject of the action or its cause, and the defendant is entitled to make the motion rather than submit to the hardship of coming into this state to defend the action.

Orders reversed and motion granted.

Section 438 is accordingly held to be limited by §§ 1216, 1217.

Openly eluding the process server does not constitute ground for service by publication under subdivision 2, § 438. Van Rensselaer v. Dunbar, 4 How. Pr. 151.

With subdivision 6, § 438, read §§ 398, 399, and Clare v. Lockwood, 122 N. Y. 267, wherein it is held that section 437 makes substituted service and service by publication "of equal force in the support which they give to proceedings based thereon. Each may, therefore, be regarded as the equivalent of the other where either method of service is authorized." Accordingly it was held that, where a summons had been delivered to the sheriff for service but service could not be made because defendant avoided service and within sixty days after the Statute of Limitations had run against the action an order directing substituted service had been granted and service so made, the action was commenced within the time prescribed and was not barred.

EVERETT v. EVERETT.

22 App. Div. 473.

Willard Bartlett, J. The question on the first appeal is whether the cause of action set out in the complaint is one which authorizes the constructive service of process upon the nonresident defendant by publication of the summons.

The purpose of the present suit is to vacate and set aside a judgment obtained in this state by the husband against the wife declaring their marriage null and void. The complaint alleges that said judgment was procured by fraud and deceit on the part of the husband, and contains averments, which, if proved, would require the court to set the judgment aside. That a suit in equity, to be relieved of the decree in the matrimonial action, is maintainable by a wife claiming thus to be aggrieved appears to be clear (Johnson v. Coleman, 23 Wis. 452), although relief may also be obtained by motion in the original action. (Edson v. Edson, 108 Mass. 590; Olmstead v. Olmstead, 41 Minn. 297.) The appellant does not deny that the court would have jurisdiction of such a case as against a defendant personally served in New York, but his point is that the allegations of the complaint do not constitute the sufficient cause of action required by the Code of Civil Procedure to be shown against a defendant not residing here who is to be served by publication. (Code Civ. Proc., § 438, subd. 1; Id., § 439.) He argues that the judgment demanded in the present suit is purely *in personam,* and that the judgment which is sought to be vacated is not a *res* within the court's jurisdiction, and hence that the case does not partake of the nature of an action *in rem,* in which constructive service is held sufficient to confer authority to deal with the thing which lies within the territorial domain of the court.

To adopt this view, however, and apply it to the facts of the present case, as they are set out in the complaint, would be to hold that a husband who has successfully invoked the action of a court of this State, and who has, by fraud, obtained therefrom a judgment annulling his marriage, may simply, by becoming a nonresident and remaining outside the boundaries of New York, prevent our tribunals from ever setting aside the judgment which thus owes its existence to his deceptive practices. Such a result

would certainly be very unfortunate, and is to be avoided if possible. I think that a judgment rendered and duly entered in this State annulling a marriage is to be deemed a *res* remaining within the jurisdiction, to this extent at least, that the court retains over it the power to entertain a suit at the instance of the wronged party to set it aside on the ground of fraud, in which suit constructive service of process may be made upon the wrongdoer, if a nonresident, in such manner as the State, through the Legislature, may see fit to authorize, provided it is reasonably adapted to give the defendant actual notice of the proceeding. The cause of action arose in this State, for the fraud was committed here, if anywhere. The record of the judgment is in this State and must be canceled here, if it is to be canceled at all. Nowhere else can full and adequate relief be afforded, and the departure of the wrongdoer should not be allowed to defeat it. This jurisdiction cannot be denied without rendering the courts powerless to get rid of judgments which fugitives have procured from them by fraud.

If I am correct in this opinion, the order of publication was properly granted, and the court below was right in refusing to set it aside.

Section 438, subdivision 4, is to be understood in the light of Williams v. Williams, 130 N. Y. 193; Haddock v. Haddock, 201 U. S. 562, and Atherton v. Atherton, 181 U. S. 155.

FOSTER v. ELECTRIC HEAT REGULATOR CO.
16 Misc. 147.

Lawrence, J. In this case the defendant, for the purposes of the motion only, appears and moves to vacate an order for the service of the summons by publication, dated and filed on the 26th day of September, 1895, together with any service of such summons made thereunder. The mo-

tion is made upon the papers on file, on the ground of want of jurisdiction in the justice making said order: *First.* Because the justice making such order was then and there without power to make the same for want of a verified complaint showing a sufficient cause of action against the defendant directed to be served. *Second.* Because this court was then and there without jurisdiction of the cause of action set forth in the complaint, as appears upon the face of such complaint, under section 1780 of the Code of Civil Procedure

Section 1780 of the Code of Civil Procedure provides that an action against a foreign corporation may be maintained by a resident of the State or by a domestic corporation for any cause of action. Section 439 of the Code of Civil Procedure provides that the order of publication must be founded upon a verified complaint, showing a sufficient cause of action against the defendant to be served, etc. It was held by the General Term of this department in Ladenburg v. Commercial Bank of Newfoundland (87 Hun, 269), that in an action brought against a foreign corporation commenced by attachment, where the cause of action arose without the State of New York, the Supreme Court has no jurisdiction unless the plaintiffs are residents of the State of New York. It was held in the case of Bryan v. University Publishing Co. (112 N. Y. 382), that to authorize an order under the Code of Civil Procedure, section 438, directing service of a summons by publication on the ground that the defendant is a nonresident, not only is an affidavit of nonresidence necessary, but also a verified complaint showing a sufficient cause of action against the defendant to be served (Code Civ. Proc., § 439), and that the case is one of which the court can take cognizance. And in Paget v. Stevens (143 N. Y. 172–177), the court say that, under the provisions of the Code of Civil Procedure providing for the service of a summons by publication upon a defend-

ant out of the State (§§ 438, 439), which require that the order directing such a service shall be founded upon a verified complaint showing a sufficient cause of action against a defendant to be served, it is not sufficient that the complaint set forth facts sufficient to constitute a cause of action; the cause of action must be one of which the court can take cognizance.

It is apparent from these decisions that where an action is brought against a foreign corporation, all the facts required by section 1780 must be set forth in a verified complaint in order to enable the plaintiff to obtain an order of publication, and to give the court jurisdiction for that purpose. In this case it was necessary, under section 1780, that the plaintiff in his complaint should show that he was a resident of this State. There was no such allegation in the verified complaint which was submitted to the learned justice who granted the order of publication. On the contrary, it appeared from the contract, which was set forth at length in the complaint, that both plaintiff and defendant were nonresidents. The plaintiff relies upon an order made by one of the justices of this court, permitting him to amend his complaint *nunc pro tunc;* but as the defect in the first instance was jurisdictional, the amendatory order is of no avail. See Ladenburg v. Commercial Bank, etc. (87 Hun, 274), and cases cited. In the Ladenburg case, it had been held at the Special Term that the defect could be cured by an affidavit filed *nunc pro tunc;* but the General Term, as already stated, did not concur in that view. I am of the opinion, therefore, that this motion must be granted.

EVANS v. WEINSTEIN.
124 App. Div. 317.

Scott, J. The defendant appeals from a judgment awarding plaintiff the deposit paid upon a contract for the

sale of real estate, with damages. The sole defect in defendant's title upon which the plaintiff claims the right to rescind, is that Clara F. Nye, a former owner of the premises agreed to be sold, was not served with the summons and complaint in a foreclosure action in 1897, and that the court did not acquire jurisdiction over her in that action. The proof shows that service upon Mrs. Nye was attempted to be made by publication, and the particular point of the objection to the title is that the affidavit upon which the order of publication was granted was insufficient. That affidavit was made by a clerk in the office of the attorneys who acted for plaintiff in the foreclosure action. He swears that a summons was issued and placed in his hands for service, and proceeds as follows: "Taking with me a copy of the summons and complaint I went to the office of Ware & Gibbs at 451 Columbus Avenue, New York, and was informed by Mr. Ware personally that he was the agent for the defendant Nye in New York. I then told said Ware that I wished to serve said defendant Nye, and was informed by said Ware in substance that said Nye is not a resident of the State of New York, but resides at 15 Kleist St., Berlin, Germany, and is now without the United States. He told me that his last communication with her had been by letter to her addressed to 15 Kleist St., Berlin, Germany, as her post office address. I know of no other place where I could inquire about said Nye as I have nothing to guide me, but the fact that the name of Ware & Gibbs appears on a rental sign hanging on said property."

* * * * * * * * *

The respondent criticizes the affidavit because it contains no averment of the affiant's belief that Mrs. Nye was a nonresident, and no statement that "plaintiff has been or will be unable with due diligence to serve the defendant per-

sonally" within the State. The Code of Civil Procedure (§§ 438, 439) authorizes an order for service by publication where it appears by affidavit that the plaintiff has been or will be unable, with due diligence, to make personal service of the summons. What is required is not that the affiant, but the judge, shall be satisfied that the defendant is a non-resident and that personal service cannot be made even with due diligence. In Belmont v. Cornen (82 N. Y. 256), the court said: "If the affidavit presented to a judge to whom application was made for such an order contained allegations tending to show that efforts had been made to find the defendant within the State and that he was not there, the judge was, by the section * before referred to, vested with jurisdiction to pass upon the question of the sufficiency of the proof of those facts, and if the proof satisfied him, neither his order nor the judgment based thereon could be impeached collaterally." In that case the affidavit merely showed that the summons had been placed in the hands of the sheriff for service, and that he had certified that he had been unable with due diligence to find the defendant in the State, and the plaintiff's attorney made affidavit that he had been informed by another attorney, who had had professional dealings with the defendant, that he resided in another State. It did not appear what efforts, if any, had been made by the sheriff to serve the summons. The order for publication was upheld.

In the recent case of Kennedy v. Lamb (182 N. Y. 228), the affidavit showed that a number of defendants resided out of the State, and contained the allegation deemed so important by the respondent that "the plaintiff will be unable with due diligence to make personal service of the summons within the State." No effort was shown to serve the summons within the State, and no reason was given for

* See Code Proc., § 135; Revised in Code Civ. Proc., §§ 438–9.

not making the effort aside from the bare fact of nonresidence. After reviewing a number of cases, the court held the affidavit insufficient, " while any evidence having a legal tendency to show compliance with the statute, even if inconclusive, would warrant the exercise of judgment and thus confer jurisdiction to make the order, in this case there was no evidence as to the use of diligence, or to excuse the omission of effort to serve in this State. Even if a judge reached a wrong conclusion upon the facts presented, so that his order would be set aside on direct attack by motion to vacate, still if he had some legal evidence to act upon the order would be protected from collateral attack after the entry of judgment." In the case at bar the judge had before him proof of exactly what had been done in the effort to make service, and evidence from an apparently well-informed and reliable source that the defendant was actually outside of the State and beyond the seas. This was sufficient to enable him to form a judgment as to the facts of defendant's nonresidence and as to whether or not due diligence had been had, and whether service could be effected with due diligence. It would have added nothing if the affiant had expressed his own opinion on these points. It is not a fatal objection that the fact of nonresidence is proven by the statement as to what affiant had been told by a person apparently in possession of the facts, nor was it necessary to produce direct evidence of the fact. Information received from others as to nonresidence has frequently been received as competent. (Belmont v. Cornen, *supra;* Howe Machine Co. v. Pettibone, 74 N. Y. 68.) It will be seen that the bare allegation as to " due diligence " without facts to sustain it was held insufficient in Kennedy v. Lamb (*supra*), and the only cases in which such an allegation has been held to be important, have been those wherein the affidavit was otherwise insufficient. (Carleton v. Carleton,

85 N. Y. 313; Kennedy v. N. Y. Life Ins. & Trust Co., 101 id. 487; McCracken v. Flanagan, 127 id. 493.) In our opinion the affidavit presented to the judge who granted the order of publication against Mrs. Nye was sufficient to confer upon him jurisdiction to find that she was a nonresident of the State and that the plaintiff had been and would be unable, with due diligence, to make personal service upon her. If he had jurisdiction his order cannot be impeached collaterally.

ORR v. CURRIE.
14 Misc. 74.

Beekman, J. This is a motion to set aside an order of publication of the summons on the ground of the insufficiency of the affidavit. The affidavit reads as follows: "That heretofore, and on the 24th day of June, 1895, an attachment was issued against the defendant, as a nonresident of the state of New York, upon an action for breach of contract, other than a contract to marry, as is more particularly stated in the verified complaint hereto annexed; that defendant resides at 440 Maple avenue, Elizabeth, New Jersey; is of full age, and that plaintiff will be unable to make personal service of a summons upon said defendant; that the sources of my information and the grounds of my belief are correspondence had with defendant from her said residence in New Jersey, and from conversations had with the son and representative of the defendant.

"That the summons was duly issued herein, but by reason of the nonresidence of the defendant, as aforesaid, has not been served. That no previous application for an order of publication has been made herein."

It is contended on behalf of the defendant that the affidavit was absolutely barren of any proof from which the learned justice who granted the order could conclude that

the plaintiff would be unable with due diligence to make personal service of the summons upon the defendant as the order recites.

* * * * * * * * *

It will be observed that the only fact relevant to the point of the objection which it states is: "That defendant resides at 440 Maple avenue, Elizabeth, New Jersey; is of full age, and that plaintiff will be unable to make personal service of a summons upon said defendant." It will be noticed that the affiant does not state that he will be unable to make the service "after due diligence," in the words of the statute. Had he done so, this case would have come nearer to that of Kennedy v. N. Y. L. Ins. & Trust Co. (101 N. Y. 487), in which the court says (p. 489): "The statement as to due diligence is not absolutely an allegation of a conclusion of law, or an opinion, but, *in connection with what follows,* a statement of facts which tend to establish that due diligence has been used."

In that case, as the opinion shows, the affidavit stated that the defendants "cannot, after due diligence, be found within this state," they being residents of other States, as therein named, and "that the summons herein was duly issued for said defendants, but cannot be personally served upon them by reason of such non-residence." The comment of the court upon this is as follows: "Here is a clear statement that the defendants are nonresidents of the state and reside in other and distant states, and that the summons which has been issued cannot be served by reason thereof. * * * The allegation as to nonresidence is preceded by the statement that the defendants cannot, after due diligence, be found within this state, which, taken in connection with the subsequent averment as to nonresidence, may be considered, we think, as a statement either that an attempt has been made to find the defendants, or at least that they are so remotely located out of the state and have such a fixed

residence that it would be impossible after due diligence to find them within the state for the purpose of serving the summons on them."

An examination, however, of the affidavit under consideration will immediately disclose the fact that it falls far short of the facts upon which the reasoning in the above-quoted case rests. There is no averment of "due diligence." The statement is "that the plaintiff will be unable to make personal service of a summons upon said defendant." The gravity of this omission is demonstrated in the case of McCracken v. Flanagan (127 N. Y. 493), where the court says (p. 496) that if due diligence was to be inferred from the statement that the defendant cannot be found within the State "the legislature would doubtless have been satisfied to have the affidavit state that the defendant cannot be found within the state, and not have superadded thereto the phrase 'after due diligence.'"

Furthermore, the inferences which were considered allowable in the case of Kennedy v. N. Y. L. Ins. & Trust Co. (*supra*), from the fact that the residence of the party proceeded against was in a distant State, find no place in the case under consideration, where the defendant is alleged to reside in a border State, at a place close to the boundary, and where hundreds reside who daily transact their business within the city of New York. Carleton v. Carleton, 85 N. Y. 313.

I have examined the other cases to which I have been referred by the counsel for the plaintiff, and in each of them the affidavit expressly states, not only that the defendants reside in some other State, *but also that they are actually there at the time.* Lockwood v. Brantley, 31 Hun, 155; Chase v. Lawson, 36 id. 221; Jerome v. Flagg, 48 id. 351. Nor is the plaintiff helped by the allegation in the affidavit

tion and the grounds of his belief are correspondence had with the defendant from her said residence in New Jersey and from conversations had with the son and representative of the defendant." What was written and what was said do not appear, and the court is without the slightest information of the facts themselves upon which to determine whether service could or could not be had with the exercise of due diligence. The whole clause has the effect, and only the effect, of making the previous averment of the affidavit on information and belief.

As was said by Mr. Justice Van Brunt, in the case of Ladenburg v. Commercial Bank (87 Hun, 269, 275): "Where a party alleges upon information and belief, and states that the sources of his information are certain writings, the court is entitled to know what the writings are, in order to see whether the affiant is justified in his belief or not."

The court must be satisfied upon the facts, and not because the plaintiff is satisfied by reason of facts which he does not disclose.

Upon a careful consideration of the whole affidavit in this case, I find myself unable upon the authorities to reach any other conclusion than that it is radically deficient.

Gen. Rule 25. *Ex parte* application to contain statement as to previous application.

Whenever application is made *ex parte* on affidavit to a judge or court for an order, the affidavit shall state whether any previous application has been made for such order, and, if made, to what court or judge, and what order or decision was made thereon, and what new facts, if any, are claimed to be shown. For failure to comply with this rule, any order made on such application may be revoked or set aside. This rule shall apply to proceedings supplementary to execution, and to every application for an order or judgment made in any action or special proceeding.

PHINNEY v. BROSCHELL.
19 HUN, 116.

APPEAL from an order made at Special Term, vacating an attachment.

On May 9, 1879, a warrant of attachment was duly granted against the property of the defendants, and a levy made. As personal service of the summons on the defendants within this State could not be effected, an order for service by publication was obtained from Mr. Justice Lawrence on June fifth. That order was entitled "at a Special Term of the Supreme Court of the State of New York, held at Chambers, at the new county court house, in the city of New York, on the 5th day of June, 1879. Present — Hon. Abraham R. Lawrence, Justice," and was signed "Enter — A. R. L., *J. S. C.*" The order was, in fact, made and signed out of court, at the judge's private chambers. It is not disputed that publication was made in the designated papers, and all the other requirements of the order fulfilled. The motion to vacate was made and granted solely on the ground that the order for service of the summons by publication was made by the court and not by a judge, as required by the Code of Civil Procedure.

* * * * * * * * *

Per Curiam. It appears, by the papers in this case, that the order was, in fact, made by a judge out of court and in his private chambers, and the recitals of the order show that it was intended to be the order of the judge. The fact that a caption precedes the order is not at all conclusive as to its character. *In re* Knickerbocker Bank, 19 Barb. 602.

It is true the judge who made the order directed it to be entered, but the fact of giving that direction does not either affect the order or change its character; it does not appear that the order was entered as an order of the court, and we

are not to presume that it was for the purpose of discharging it, even if that presumption would be made if necessary to uphold it.

We think our duty is to look at the facts as they are really shown by the papers to have been, and they disclose that this order was not made by a court, but by a judge out of court.

The order should be reversed, with $10 and disbursements.

A judge's order has no caption, is usually in the first person and ends with the date, the full name of the judge and the full title of his office. A court order is at once filed and entered in the county clerk's office. No record is kept of judge's orders and the order is returned to the attorney.

LUDDEN v. DEGENER.

14 App. Div. 397.

Williams, J. We think there was a sufficient affidavit to authorize the granting of the order for the publication of the summons. The service of the summons and complaint, however, was not properly made, because a copy of the order for publication was not served therewith, as required by the order made under section 440 of the Code of Civil Procedure. The language of this section of the Code is very clear, and the requirement that a copy of the order be served, when personal service is made without the State, cannot be disregarded, and the service still be deemed sufficient to give jurisdiction of the defendant.

Section 443 has no reference to the service of a copy of the order and in no way dispenses with the requirement of section 440. Section 443 relates merely to the form of the notice to be served with the summons in case personal service is made without the State instead of by publication.

It has been held in this department that the order under section 440 is invalid when it omits the provision requiring a copy of the order to be served with the summons and complaint when service is made without the State. (McCool v. Boller, 14 Hun, 73; Johenning v. Johenning, 1 Civ. Proc. 145.) Certainly, if such omission renders the order invalid, the failure to comply with such requirement, when contained in the order, would render the service insufficient.

The order, so far as it denied the motion to vacate the order for publication, should be affirmed, and so far as it denied the motion to set aside the service of the summons and complaint should be reversed, and the motion to set aside granted, without costs of this appeal or in the court below.

Where the order directed that the copies of the papers be deposited "in the general postoffice" and these words were explained only by the caption "Supreme Court, State of New York," and the date "New York, Dec. 21, 1899," held, that the order did not "specify" a postoffice within the requirement of the Code and that the defect was jurisdictional. Ver Planck v. Godfrey, 31 Misc. 54.

MARKET NAT. BANK v. PACIFIC NAT. BANK.
89 N. Y. 397.

MILLER, J. There was an order of publication in this case, which was commenced by attachment. The summons and complaint were served on the defendant, who was a nonresident, out of the State, on the 25th of November, 1881, and judgment was entered on the 20th of January following. A motion was made at Special Term to vacate the judgment which was denied, and upon appeal the General Term reversed the order and vacated and set aside the judgment.

Under the provisions of the old Code, section 135, it is declared that, "* * * the order must direct the publica-

tion to be made in two newspapers * * * for such length of time as may be deemed reasonable — not less than once a week for six weeks. * * * When publication is ordered, personal service of a copy of the summons and complaint out of the State is equivalent to publication and deposit in the post-office." It is further provided by section 137, that, "the service of the summons shall be deemed complete at the expiration of the time prescribed by the order of publication."

There has been some conflict in the decisions in regard to the construction to be given to the language of the statute or to words of a similar import in other statutes.

The provisions of the new Code are more definite and specific, and the question as to their construction is an open one. Section 440 provides for publication for a *specified time,* not less than once a week for six successive weeks. The number of weeks is specified and not the number of times. Section 441 declares that the time shall be complete upon the day of the last publication, and section 787 that the period of publication must be computed so as to include the day which completes the *full period* of *publication.* It will be perceived that the publication must be made for a specified period of time, and when the statute provides for six weeks it is obvious that this period will not elapse prior to its expiration. It does not provide for a publication six times within six weeks, but for a time not less than once a week for six successive weeks. The publication evidently means rather more than printing the notice. Its object is to give notice by means of the newspapers, and it cannot be claimed that such notice is given for six weeks before that time expires. Looking at the various provisions referred to, it is a reasonable construction that the law intended a full six weeks' publication and not six times in six different weeks. If it were otherwise, the time would vary and lead to confusion, and the defendant might not at all times know

when it would expire as the summons need not be published on the same day in each week. Steinle v. Bell, 12 Abb. Pr. (N. S.) 171.

In cases where service of process is made by publication it is of no little importance that the time of its expiration should be fixed and certain, and we think that such was the intention of the provisions cited in reference to such service.

The order should be affirmed.

A week is a definite period of time commencing with Sunday and ending with Saturday. The summons must be published once in each such period of time, otherwise service will not be sufficient. Steinle v. Bell, 12 Abb. N. S. 174; Doheny v. Worden, 75 App. Div. 47, 52.

Service without the State is complete upon the expiration of a time equal to that prescribed for publication, *i. e.*, 42 days. The defendant then has 20 days more in which to answer, or 62 days in all.

FINK v. WALLACH.

109 App. Div. 718.

Houghton, J. The plaintiff entered into a contract to purchase certain real estate and made a payment thereon. Defendant tendered a deed, which plaintiff refused to accept on the ground that the title was defective, and he brings this action to cancel his contract and recover his deposit.

Defendant's title rests upon a judgment of foreclosure obtained against a nonresident mortgagor and owner of the equity. The foreclosure action was begun and notice of pendency filed, and thereafter, on February 5, 1896, on proper papers, an order of publication was signed by the justice sitting at Special Term, Part 2, of the Supreme Court, assigned for the granting of *ex parte* orders, including orders for service of a summons by publication. The order so signed, and the papers upon which it was granted, were handed to and taken by the clerk of that term and part, no

fee for filing or entering being demanded or payable therefor. It was the practice at that time to treat orders of publication as court orders, so far as requiring them to be taken in charge by the clerk of the part, instead of returning them to the attorneys to file in the clerk's office. The summons and notice were published in compliance with such order, and when the judgment roll came to be made up it was discovered that the clerk of Part 2 had never actually taken the order, and the papers accompanying it, to the proper place in the clerk's office, but had retained them in his possession. Thereupon an order was obtained directing that they be filed *nunc pro tunc* as of February 5, 1896, without prejudice to any proceedings theretofore had. Upon a roll thus made up judgment of foreclosure was entered and a sale had, at which this defendant was the purchaser.

If delivery of the order of publication, and the papers upon which it was granted, to the clerk of Part 2, intending thereby to file them, was a legal filing in the county clerk's office, the court obtained jurisdiction of the nonresident owner through service by publication, and the judgment of foreclosure was authorized and the defendant's title is valid. If it was not such a filing, the defect being jurisdictional, a subsequent order directing they be filed *nunc pro tunc* did not cure it, and the defendant's title is defective and the plaintiff was justified in refusing it, and his contract was properly canceled.

We think the filing was a legal one and that the judgment of foreclosure was valid. It was not necessary that the order of publication be entered, for section 442 of the Code of Civil Procedure only requires that the order and the papers upon which it is made shall be filed with the clerk on or before the day of the first publication. This direction to file refers, of course, to the county clerk's office of the county in which the venue of the action is laid, but such clerk is the clerk of the court, for it is provided by section

19 of article 6 of the Constitution that "clerks of the several counties shall be clerks of the Supreme Court, with such powers and duties as shall be prescribed by law."

The clerk of each of the parts of the court has his special duties to perform, but he is in fact a deputy of the county clerk himself. In the multitude of business coming before the various Special Terms of the first district, great confusion would arise if attorneys should be allowed to take orders and the papers upon which they are granted away with them to file and enter as they saw fit. The rule, therefore, that all orders and the papers upon which they are made shall be left with the clerk in attendance at the term is a necessary and salutary one. This rule makes it a part of the duties of such clerk to receive such papers, and to see that they are filed and entered, and in such receipt by him of them he is the direct representative of the county clerk, who is not only clerk of the county but of the court as well. The delivery to him, therefore, of signed orders and papers required by law to be filed in the county clerk's office, or office of the clerk of the court, is a delivery to the clerk himself, and a party delivering orders and papers for such purpose, upon paying such fee as the clerk may be entitled to by law, is not harmed by his failure to actually file them in the county clerk's office.

The failure of a public official to perform his duty in filing a paper does not impair the rights of an individual who has properly delivered the paper to him, or his authorized representative, for such purpose. (Bishop v. Cook, 13 Barb. 326; Dodge v. Potter, 18 id. 193; Gates v. State, 128 N. Y. 228.) This rule is further illustrated by the fact that the rights of a mortgagee are not affected by the failure of the clerk to index his duly recorded mortgage. (Mutual Life Ins. Co. of N. Y. v. Dake, 87 N. Y. 257.)

The subsequent order directing the filing of the papers *nunc pro tunc* was proper for the purpose of correcting the

record. The alleged void foreclosure being the only defect of which plaintiff complained, his complaint should have been dismissed.

The papers necessary to be filed with the clerk are all those upon which the order was granted and the order, itself,— summons, verified complaint, affidavits and order. See Whiton v. Morning Journal Assn., 23 Misc. 299.

An omission to serve or publish with the summons the notice of filing required by § 442 is fatal. See for notice required in partition, § 1541; in matrimonial actions, § 1774.

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6. Appearance. Code Civ. Proc., §§ 420–424, 479, 799, 1212, 1219.

LITTAUER v. STERN.
177 N. Y. 234.

VANN, J. On the 23d of April, 1903, this action was commenced in the Supreme Court by the service of a summons and complaint on the defendant personally. May 9, 1903, upon an affidavit of merits, made by himself, and an affidavit showing that further time to answer was necessary, made by his attorney, he procured an order from one of the justices of the Supreme Court extending his time to answer or demur for the period of twenty days. On the same day a copy of the order of the affidavits upon which it was founded were served by mail on the attorney for the plaintiffs with the following notice indorsed thereon: "Take notice that the inclosed is a copy of an order this day granted by Judge Kellogg in the within action. Dated May 9th, 1903. Hiram C. Todd, Attorney for defendant. To Andrew J. Nellis, Attorney for plaintiffs." The office address of the attorney for the defendant was neither added to his signature nor elsewhere stated, and the other "particulars" required by sections 417 and 421 of the Code of

Civil Procedure nowhere appeared. The attorney for the plaintiffs did not return the papers so served on him, but retained them without objection, so far as appears. No other attempt to appear in the action was made by or in behalf of the defendant until after May 14, 1903, when judgment by default was entered in favor of the plaintiffs for the amount demanded in the complaint, with costs; an execution was at once issued and a levy thereunder promptly made upon the property of the defendant. The judgment was vacated on motion of the defendant, made at Special Term, on notice, as irregularly entered in disregard of said order. Upon appeal to the Appellate Division the order granting said motion was affirmed, but leave to appeal to this court was duly given and the following question certified to us for decision:

"After the granting and service of the order of Mr. Justice John M. Kellogg on the 9th day of May, 1903, were plaintiffs authorized to enter judgment as upon default before the time to answer, as extended by said order, expired?"

The last day to answer, according to the summons, was on May 13th, and judgment was entered on May 14th, although an order extending the time to answer for twenty days had been made and served. The plaintiffs claim that this practice was regular upon the ground that the defendant had made no lawful appearance in the action; that the order extending the time to answer did not extend the time to appear, and that judgment was properly entered for default in appearing. They insist that the course pursued by them is authorized by certain sections of the Code of Civil Procedure, which we will briefly examine.

Section 418, in prescribing the form of a summons, contains a notice to the defendant that in case of his "failure to appear or answer," within the time provided, "judgment will be taken against" him "by default for the relief demanded in the complaint."

Section 421 provides that "the defendant's appearance must be made by serving upon the plaintiff's attorney, within twenty days after service of the summons, exclusive of the day of service, a notice of appearance, or a copy of a demurrer or of an answer. A notice or pleading so served, must be subscribed by the defendant's attorney, who must add to his signature his office address, with the particulars prescribed in section 417 * * * concerning the office address of the plaintiff's attorney."

Section 1212 authorizes judgment by default in certain actions on contract, "if the defendant has made default in appearing," and also "if the defendant has seasonably appeared, but has made default in pleading."

According to section 781, "where the time, within which a proceeding in an action, after its commencement, must be taken, has begun to run, and has not expired, it may be enlarged, upon an affidavit showing grounds therefor, by the court, or by a judge authorized to make an order in the action." Such order "may be made by any judge of the court, in any part of the state." (§ 772.)

An appearance may be made by the service of a formal notice, or a copy of an answer, or a copy of a demurrer. (§ 421.) As an answer is an appearance, an extension of the time to answer is necessarily an extension of the time to appear and would be useless without it. Unless an appearance has already been made, an answer cannot be served without thereby effecting an appearance and hence the right to answer includes by implication the right to appear. If an answer is served within the twenty days prescribed by the summons, but without a formal notice of appearance, judgment cannot be entered upon the expiration of said period for default in appearing, because an appearance goes with the answer as a part of it. It is impossible to answer without appearing, for by command of the statute service of a copy of an answer is *ipso facto*

an appearance. The order enlarging the time to answer carried with it the right to do whatever could be done by the service of an answer. The practice is general to obtain time to answer, whether by order or stipulation, without expressly including in either the right to appear, yet never before in our experience has it been claimed that for this reason judgment might be entered for default in appearing, notwithstanding the extension of the time to plead. Universal practice is generally correct practice, because it is sanctioned by the judgment of the entire bar. When a statute regulating a subject coming within the daily experience of almost every lawyer in the State, has been in force for more than twenty years but has never been held by the courts or acted upon by attorneys as authorizing a certain act, it is safe to conclude that authority for such an act does not come within the intention of the Legislature.

We think that the defendant was not in default in any respect and that the practice pursued by the plaintiffs was irregular. The order should, therefore, be affirmed, with costs, and the question certified answered in the negative.

Signing a stipulation extending his time to answer is not an appearance by defendant. Paine Lumber Co. v. Galbraith, 38 App. Div. 68. Nor moving to make the complaint more definite and certain. Valentine v. Myers, 36 Hun, 201. But see Farmer v. National Life Assn., 138 N. Y. 265.

REED v. CHILSON.

142 N. Y. 152.

O'Brien, J. The plaintiff has recovered upon a judgment rendered in the courts of Michigan for a deficiency arising upon foreclosure and sale of mortgaged premises in that State in the year 1887. When the present action was commenced the plaintiff and one of the defendants were residents of Michigan, and the other defendant a resident of North Dakota. In December, 1889, the summons

in this action was served upon both defendants without the State, pursuant to an order of publication. A warrant of attachment was also issued to the sheriff of the county where the action was brought, but no property was levied upon. On the 30th day of January, 1890, the defendants entered a general appearance in the action by an attorney of the court, who served a general notice of retainer. In April following an answer was served by the same attorney, alleging that neither of the defendants were residents of the State or had any property therein, and that the court had no jurisdiction of the action. It also alleged that in the year 1886 the plaintiff recovered in the courts of that State a judgment upon the identical cause of action contained in the complaint, and that such judgment was a bar to this suit. The appeal, therefore, presents two questions: (1) Whether the court had jurisdiction to render this judgment. (2) Whether the former judgment is a bar.

The service of the notice of retainer was a voluntary general appearance in the action, and equivalent to personal service. Code Civ. Proc., § 424; * * *.

It is urged that the defendants were obliged to appear and present the facts to the court or suffer default, and, therefore, the appearance was not voluntary. This does not change the effect of the appearance. When a party does not intend to subject himself to the jurisdiction of the court he must appear specially for the purpose of raising the question of jurisdiction by motion, or he may allow the plaintiff to go on and take judgment by default without affecting his rights, since no judgment entered without service of process in some form could bind the defendant, and the question of jurisdiction would protect him at any stage of the proceedings for its enforcement, provided it has not been waived by his own act. But if the defendant elects to come before the court and there try the questions, he cannot afterward deny the jurisdiction, or be

heard to claim that it was not a voluntary appearance. The court had jurisdiction of the subject of the action. It was the judgment of the courts of a sister State which the plaintiff had the right to enforce here if jurisdiction of the person could be obtained, though the defendant resided in another State. The former judgment was not a bar, as it was void for want of jurisdiction. There was no service of process within the State, no appearance by the defendants and no levy upon property under an attachment. In the absence of personal service within the State or a general appearance, the court had no jurisdiction to render the judgment without proof of the granting of an attachment and a levy by virtue thereof upon property of the defendants within the State. (Code, § 1217.) There was no such proof made, and it is not claimed that the facts existed upon which it could have been made. Without it, mere service out of the State, though in pursuance of an order of publication, did not give jurisdiction to render the judgment.

It follows that the judgment is right and should be affirmed, with costs.

From opinion of Ingraham, J., in Manwaring v. Lippincott, 52 App. Div. 526, 528: "The refusal of the plaintiff's attorney to accept the notice of appearance served on him by the defendant was not justified. The defendant has the right to appear at any time before the entry of final judgment and such appearance gives him the right to notice of all the subsequent proceedings in the action. The fact that his time to answer had expired, and he was thus in default in the service of an answer, does not prevent him from appearing in the action. The order denying the appellant's motion to compel the respondent to accept his notice of appearance must, therefore, be reversed, with ten dollars costs and disbursements, and the motion granted, with ten dollars costs."

Service of a notice of appearance entitles defendant to receive from plaintiff notice of all subsequent proceedings in the action, even though defendant subsequently defaults in pleading.

Defendant, though not served with the summons, may serve a notice of appearance and compel plaintiff to accept it, if defendant's rights might be injuriously affected by the action. Duer v. Fox, 27 Misc. 676.

VILAS v. P. & M. R. CO.
123 N. Y. 440.

APPEALS from orders of the General Term which affirmed orders denying motions to vacate a judgment against defendant Chase and to set aside and vacate an appearance in said action for said Chase by John N. Whiting, as his attorney.

ANDREWS, J. * * * The main question of law respects the relief, if any, to which Chase is entitled against the judgment by reason of the unauthorized appearance of Mr. Whiting. It is obvious that the court acquired no jurisdiction to render a personal judgment against Chase, unless the appearance, although unauthorized, conferred jurisdiction, or unless the authority of the attorney to appear is conclusively presumed from the fact of appearance. The case of Denton v. Noyes (*supra*),* held that a domestic judgment rendered by a court of general jurisdiction against a party who had not been served with process, but for whom an attorney of the court had appeared, though without authority, was neither void or irregular. The doctrine of the prevailing opinion in that case encountered a vigorous opposition from one of the judges at the time, and it is not too much to say that the reasoning upon which it rests has frequently been criticized by judges and justice of the rule denied. But it has been followed and must be regarded as the law of the State. Hamilton v. Wright, 37 N. Y. 502; Brown v. Nichols, 42 id. 26.

The courts in this State, while holding that domestic judgments rendered against a party not served, but for whom an attorney appeared without authority, cannot be assailed on this ground when coming in question collaterally, nevertheless grant relief, on motion, either by seting aside the judgment absolutely, or by staying proceed-

* 6 Johns. 297.

ings and permitting the party to come in and defend the action. Where the attorney is insolvent the judgment will be absolutely vacated and set aside. Campbell v. Bristol, 19 Wend. 101. In other cases the proceedings will be stayed and the party permitted to come in and defend. The latter relief was granted in Denton v. Noyes (*supra*). In the present case no relief whatever was granted, but the application therefor was denied absolutely. Even if the judgment against Chase is governed by the rule established in Denton v. Noyes (which, for reasons which will be stated, does not, we think, apply), then it would seem that the court erred in denying relief. It is shown by the affidavit of the son of Mr. Whiting, which is uncontradicted, that his father's estate, at the time of his death in 1885, was entirely inadequate to pay the amount of the judgment against Chase. It is not expressly shown what the pecuniary condition of Mr. Whiting was in 1881, when the judgment against Chase was entered; but assuming that Mr. Whiting had sufficient pecuniary ability at that time to respond in damages for the amount of the judgment, that, we think, is not controlling to prevent relief on an application made after he became insolvent, provided it was made before the rights of the party procuring the judgment had changed to his prejudice. The party against whom the judgment was rendered would still be entitled, we think, to apply for and obtain relief by the vacation of the judgment. * * *

We have so far considered the case upon the assumption that it is governed by Denton v. Noyes and the cases following it. But we are of opinion that a radical distinction exists between the cases hitherto decided and the present one, which prevents the application of the principle that, in the case of a domestic judgment strictly, a party not served, but for whom an unauthorized appearance was entered by an attorney, cannot, on these grounds, assail the

judgment for want of jurisdiction. The distinction adverted to lies in the fact, that in the cases hitherto decided in this State arising on domestic judgments, the judgment rendered was against a citizen of the State, who was within the jurisdiction, while in the present case the defendant in the judgment was at all time a nonresident and out of the jurisdiction. It is well settled that, in an action brought in our courts on a judgment of a court of a sister State, the jurisdiction of the court to render the judgment may be assailed by proof that the defendant was not served and did not appear in the action, or where an appearance was entered by an attorney, that the appearance was unauthorized, and this even where the proof directly contradicts the record. * * * There is undoubtedly a logical difficulty in applying a different rule, as our courts do, in an action upon a domestic judgment, where the only thing giving color of jurisdiction over the person is an unauthorized appearance by an attorney. The different rule in the two cases has been supposed to rest on the unreasonableness of compelling a party against whom judgment has been rendered in another State on an unauthorized appearance by an attorney, to go to the foreign jurisdiction to attack it. (See Dillon, J., in Harshay v. Blackman, 20 Iowa 161.) The same reason, in justice, would seem to apply, in case of domestic judgment against a nonresident of the State, and, besides, it may be said that a nonresident, not served with process and for whom an unauthorized appearance had been entered in the foreign jurisdiction, would be much less likely to become appraised of the pendency of the action than if he had been a resident. * * *

We are bound, under our decisions to follow the doctrine of Denton v. Noyes in cases where it is strictly applicable. It is as to such cases *stare decisis*. But we are not disposed to extend the doctrine of that case to cases fairly and reasonably distinguishable, and the fact that a defendant,

against whom a judgment has been obtained here upon an unauthorized appearance by an attorney, and who was not served, was a nonresident during the pendency of the proceedings, and was not within the jurisdiction, does, we think, constitute such a distinction as renders the rule in that case inapplicable. * * *

We think the motions in this case should have been granted, and the judgment and appearance vacated.

But the party seeking relief from an unauthorized appearance must show that he has promptly repudiated the act of the attorney and has been guilty of no laches. Butcher v. Quinn, 86 App. Div. 391. An appearance can be withdrawn only by consent or by order of the court.

PARKHURST v. ROCHESTER L. M. CO.
65 HUN, 489.

APPEAL from a judgment of the County Court of Monroe county in favor of plaintiff and against defendant, a foreign corporation.

DWIGHT, P. J. The objection to the jurisdiction of the County Court in an action against a foreign corporation, though taken for the first time on this appeal, must be fatal to the judgment.

That the County Court has, by the statute which defines its powers, no jurisdiction of such actions is conceded; it is contended that in this case it obtained jurisdiction by the consent of the defendant, which appeared generally, and answered to the merits. The position is untenable. Consent may give jurisdiction of the person, but not of the subject-matter nor of the action. The question in this case was not of jurisdiction of the person, but of the limitation of the power of the court. The court had no jurisdiction of the action, because it is denied jurisdiction of *any* action against a foreign corporation.

In Burckle v. Eckhart (3 N. Y. 133), Gardner, J., says, at page 137: "The jurisdiction of courts is conferred by law, and in no case by consent of parties. When jurisdiction of the subject and of the person is required as a prerequisite to judicial action, a defendant may waive any irregularities in the mode by which his person is sought to be subjected to the jurisdiction of the court by a voluntary appearance. He may dispense with the service of process as he may waive any other personal privilege; but when the defendant is in court as a party, the *law* gives jurisdiction of the person without regard to the question whether his appearance was voluntary or by compulsion. This is necessary to give jurisdiction of the cause, not of the person. * * * The residence of a defendant within the limits of the circuit * * * is a jurisdictional fact which must exist before the court can act at all, either by issuing process or accepting the appearance of the defendant. It is necessary to give jurisdiction of the cause, not of the person. In such cases there can be no waiver." (See also Heenan v. N. Y., W. S. & B. Ry. Co., 34 Hun, 602; Davidsburgh v. Knickerbocker Life Ins. Co., 90 N. Y. 526.) In the latter case Danforth, J., says: "There are, no doubt, many cases where the court having jurisdiction over the subject-matter may proceed against a defendant who voluntarily submits to its decision; but where the State prescribes conditions under which a court may act, those conditions cannot be dispensed with by litigants."

Still more must it be impossible for litigants to dispense with the rule which prohibits the court to act at all in a given case. The cases cited by counsel for the plaintiff were actions in the Supreme Court, whose jurisdiction of the action was unquestioned, and consent gave jurisdiction of the particular defendant.

The County Court has no jurisdiction of the cause of action in this case, because it has no jurisdiction of any cause of action in any case against a foreign corporation.

The objection which, in this case, appears on the face of the complaint is fatal not only to the judgment appealed from, but to the action.

The judgment must be reversed and the complaint dismissed.

See also Weidman v. Sibley, 16 App. Div. 616.

CHAPTER II.

PARTIES.

1. Who should be made parties. Code Civ. Proc., §§ 446–57, 1814–5, Pers. Prop. Law, § 41.

LEWIS v. GUARDIAN F. & L. ASSUR. CO.
181 N. Y. 392.

CULLEN, Ch. J. The action is on a fire insurance policy, the plaintiff being the assignee of the owner of the insured premises, and the defendant MacPherson the assignee of the mortgagee. The policy insured the mortgagor, loss, if any, payable to the mortgagee "as his interest may appear." The plaintiff's assignor is a corporation organized under the laws of this state and the plaintiff himself a resident and citizen of the state. The defendant MacPherson and his assignor are residents of the Dominion of Canada, the defendant insurance company an English corporation, and the contract of insurance was made in Montreal, Canada. The complaint, after making the usual statements requisite in an action on a fire insurance policy, alleged that the mortgagee refused to join with the plaintiff in the institution of the action, and that, therefore, he was made a party defendant thereto. The insurance company answered alleging a breach of the conditions of the policy in that other insurance had been effected on the property previous to the issue of the policy, which additional insurance was not noted or indorsed thereon. The defendant MacPherson answered, substantially repeating the allegations of the complaint and asking judgment against his co-defendant that he be paid out of the insurance moneys the amount

due on his mortgage. At the close of the evidence the trial court dismissed the complaint and the claim of the defendant MacPherson. Judgment was entered on this direction and that judgment was reversed by the Appellate Division and a new trial granted. From the order granting a new trial an appeal has been taken to this court. * * *

It is strenuously contended by the appellant that the mortgagee was not a necessary or proper party defendant in the action, and that his claim was properly dismissed by the trial court, even if it be assumed that the plaintiff established the validity of the policy. It is admitted that under the authority of Winne v. Niagara Fire Insurance Company (91 N. Y. 185) a joint action may be maintained on a fire insurance policy by mortgagor and mortgagee. But it is urged the case is not an authority for the proposition that when the mortgagee refused to join as plaintiff he can, under sections 446 and 448 of the Code of Civil Procedure, be made a party defendant. Section 448 provides that where parties are united in interest they must join as plaintiffs, and if any refuses to do so he must be made a party defendant. As I understand it, the contention of the appellant is that either the mortgagor or the mortgagee may sue separately (I suppose each to the extent of his own interest in the policy), and that neither is nor can be affected by the result of the other's action, and that hence neither, within the meaning of the Code, has any interest in the subject of the action brought by the other. We think this proposition cannot be sustained. There is but a single contract between the parties by which one party is indemnified against loss but the insurance money is to be paid not to him, but to his appointee for his benefit. (Grosvenor v. Atlantic Fire Ins. Co., 17 N. Y. 391.) Under such a contract the interests of the mortgagor and the mortgagee are not separate and distinct, but the interest of the mortgagor is co-extensive with the whole amount

payable under the policy. He is interested not only in obtaining the surplus above the amount necessary to discharge the mortgagee's claim but in seeing that his debt to the mortgagee or the lien on his property held by the mortgagee is satisfied or reduced by the application of the insurance moneys. In this state a mortgagee to whom, by the policy, the loss is payable, may maintain an action in his own name and recover the whole amount payable under the policy; but in such case he recovers and holds the excess above his own claim as trustee for the mortgagor. (Cone v. Niagara Fire Ins. Co., 60 N. Y. 619.) But it does not at all follow that the mortgagor could sue in his own name on the policy holding the whole or part of the recovery as trustee for the mortgagee, or that each can maintain a separate action for his own interest. On the contrary, the right of the mortgagee to recover the entire sum payable is inconsistent with the right of the mortgagor to maintain a separate action for his part of the loss. If the interest of the mortgagor extends, as we have seen, to the whole insurance moneys, he is entitled to maintain an action co-extensive with his interest. Granting the right of the mortgagor to maintain such an action it is clear that to the action the mortgagee must be a party, for payment by the terms of the policy is first to be made to him to the extent of his interest. This was so held in Ennis v. Harmony Fire Insurance Company (3 Bosworth, 516) nearly half a century ago. The case has never been overruled or criticized and is cited by this court as authority in Winne v. Niagara Fire Insurance Company (supra). If the mortgage had been satisfied, a different rule might prevail and the mortgagor sue in his own name. But while the mortgage is outstanding the mortgagee is a necessary party to the mortgagor's action.

These views also dispose of the claim that because the defendants, the mortgagee and insurance company, are non-

residents and the contract was made without the state, our courts have no jurisdiction over the mortgagee's claim. This position might be well founded if the claims of the mortgagor and mortgagee were several and distinct. But as the mortgagor's interest pervades the whole recovery his right to maintain an action in the courts of the state cannot be impaired by the non-residence of the mortgagee.

The order appealed from should be affirmed, and judgment absolute rendered for plaintiff and for defendant MacPherson on the stipulation, with costs.

If several persons join as plaintiffs they must appear by the same attorney. Jones v. Conlon, 48 Misc. 172.

The Code has not changed the common law rule that tenants in common must join in actions to recover for injuries to the realty (De Puy v. Strong, see herein p. 224) or in ejectment (Hasbrouck v. Bunce, 62 N. Y. 475; see also § 1501). Separate owners of different parcels of real property charged to be injured or threatened with injury by the same or concurrent wrongful acts may join in one action against one or more wrongdoers to abate the nuisance and for an injunction to prevent its continuance but not to recover the damages suffered by each. Burghen v. Erie R. Co., 123 App. Div. 204; Gillespie v. Forrest, 18 Hun, 110, 112.

LAWRENCE v. McKELVEY.

80 App. Div. 514.

Woodward, J. The plaintiffs allege that during all of the times hereinafter mentioned the plaintiff James V. Lawrence was, and now is, the sole surviving partner of the firm of Lawrence Brothers, and that the plaintiff Lawrence Brothers, Incorporated, is a domestic corporation located at and having its principal place of business in the City of Yonkers; that prior to the 29th day of July, 1901, the plaintiff James V. Lawrence was and for many years past has been engaged in business individually and as sole surviving partner of the firm of Lawrence Brothers at Yonkers, N. Y., as a wholesale and retail dealer in lumber,

etc., and as such had created and built up and was the owner of a business and property of the value of a large sum of money, and largely in excess of all his just debts and liabilities, and as the owner and proprietor of said business was well and favorably known to the community and trade throughout the United States, and enjoyed and possessed a high business rating and exceptional credit for integrity and financial responsibility; that on the date above mentioned, for value received, the plaintiff James V. Lawrence, individually and as sole surviving partner of the firm of Lawrence Brothers, sold and transferred to the plaintiff corporation, Lawrence Brothers, Incorporated (which corporation had been duly formed for the purpose of taking up and carrying on said business, and of which corporation the plaintiff James V. Lawrence was and still is the president), all the assets, property and good will of said business by him at that time owned and possessed, as such surviving partner, all of which were of the value of a very large sum of money and largely in excess of all outstanding debts and liabilities, and in part payment for such property received from said Lawrence Brothers, Incorporated, certain shares of the capital stock of said corporation and as further consideration for said transfer to it, said corporation, Lawrence Brothers, Incorporated, expressly assumed and obligated itself to pay and discharge all outstanding debts and obligations at that time owed by the firm of Lawrence Brothers or by the said James V. Lawrence as sole surviving partner thereof aforesaid. The complaint further alleges that the property so transferred far exceeded the debts which the new corporation promised to pay, and that the stock received by James V. Lawrence was of great value, etc. It also alleges that in September, 1901, these defendants, without any probable cause therefor, and wrongfully and unlawfully, and with the willful and mali-

cious intent of injuring the plaintiff James V. Lawrence and the corporation Lawrence Brothers, Incorporated, of which he was president and in which he had large and valuable property interests, instigated, procured, devised, brought and commenced certain judicial proceedings in the United States District Court for the Southern District of New York in involuntary bankruptcy against the plaintiffs in this action, and caused the process of said court to be issued and served therein. The complaint then alleges a conspiracy on the part of the defendants to make use of bankruptcy proceedings to injure the plaintiffs; alleges various illegal acts and proceedings in furtherance of the alleged conspiracy, and the final disposition of the bankruptcy proceedings in favor of the plaintiffs. It then alleges that the plaintiffs have suffered special damages by reason of the prosecution of the bankruptcy proceedings, and demands judgment for the sum of $75,000.

The defendants appear separately and demur to the complaint, assigning as grounds of the demurrer (a) misjoinder of parties plaintiff, (b) misjoinder of causes of action, and (c) that the complaint does not state facts sufficient to constitute a cause of action; but upon the argument reliance was placed principally upon the first ground stated, and the learned court at Special Term has sustained the demurrers. The plaintiffs appeal.

Section 446 of the Code of Civil Procedure provides: "All persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, except as otherwise expressly prescribed in this act." The question here presented is whether the plaintiffs in this action have such an interest in the subject of this action, and in obtaining the judgment, as is contemplated by the Code provision cited. The bankruptcy proceeding was directed against the plaintiff James V. Lawrence, on the ground that he had committed an act of insolvency in

disposing of all his property with the intent to hinder, delay and defraud his creditors, and while the pleadings are somewhat involved, it is difficult to understand how the plaintiff Lawrence Brothers, Incorporated, could have been involved in the bankruptcy proceedings, except incidentally. But it is conceded that the plaintiff James V. Lawrence had disposed of all of his property to the plaintiff Lawrence Brothers, Incorporated, taking the stock of the latter, and its promise to pay his debts, in consideration of the transfer, so that he had no property except such as was represented by the stock of Lawrence Brothers, Incorporated. He could not, therefore, have been injured in his property, except as that was involved in the corporation, and he cannot recover damages apart from those which are suffered by the corporation as a whole in a personal action against these defendants. If the plaintiff James V. Lawrence suffered any injuries at the hands of these defendants, they were such as resulted to his feelings and his business reputation while the damages of the plaintiff Lawrence Brothers, Incorporated, must have been those of a business character, relating to the property which had been transferred by James V. Lawrence. In other words, while the cause of action in both cases arose out of the alleged malicious prosecution of bankruptcy proceedings against James V. Lawrence, there are necessarily two separate and distinct causes of action, assuming that the Lawrence Brothers, Incorporated, have a cause of action. One of these is for the damages resulting personally to James V. Lawrence, and the other is for such damages as Lawrence Brothers, Incorporated, may have suffered by reason of this interference with their business and property. James V. Lawrence has no legal interest in the judgment which the Lawrence Brothers, Incorporated, may recover; it is only the entity created by law into a body corporate which has an interest in that judgment, and the fact that the plaintiff James V. Lawrence

is the president of such corporation and the principal stockholder is of no importance; he is not a person interested in the action and in obtaining the judgment. (Havana City Railway Co. v. Ceballos, 49 App. Div. 263, 268.) In the cited case the court say: "To bring a person within the provision of this section (446) it must appear that he has some interest, legal or equitable, in the particular property which is the subject of the action, or in the enforcement of the cause of action which is sought to be enforced," and the court expressly holds that stockholders of a corporation do not occupy this relation to the corporation. The case is only confusing when considered in the light of the intimate relations between James V. Lawrence and Lawrence Brothers, Incorporated. If we say that James V. Lawrence sold all of his property to a private corporation, taking in payment certain shares of the stock of such corporation, and then remember that a bankruptcy proceeding was instituted against Mr. Lawrence, that it was finally brought to a determination favorable to Mr. Lawrence, and that an action was instituted against the defendants for maliciously instituting such proceedings against Mr. Lawrence, it will be seen that the latter has no interest in the subject of the action or in obtaining the judgment, in so far as the corporation is concerned, although he may have an indirect interest in the matter as the owner of the stock of the corporation. In a like manner the corporation can have no legal interest in the judgment to be procured for a tort committed against one of its stockholders; there is not joint relation of the parties, and the mere fact that the damage results to both parties by means of the same wrongful act on the part of the defendants does not justify a joint demand on the part of these plaintiffs for a common judgment. In Bradley v. Bradley (165 N. Y. 183), where the plaintiffs were father and son, bringing an action to set aside a contract of sale which defendant induced both plaintiffs to make of all the

shares of capital stock held separately by each, by a fraud ingeniously contrived to mislead both plaintiffs, who acted concurrently in handling their possessions, the court, while holding the complaint good, say: "This case is near the border line. If this complaint were at common law for the recovery of money, the demurrer would, no doubt, be well taken, since neither plaintiff had any pecuniary interest in the stock of the other, and has no interest in the damages sustained by the other." So in this case, which is an action to recover money, the plaintiffs have no common interest in the damages; James V. Lawrence has no legal interest in any judgment which the corporation of Lawrence Brothers might recover, while the corporation has no legal interest in the damages which James V. Lawrence might be granted upon a trial. Under such circumstances, there is no justification for the joinder of plaintiffs.

In the case of Loomis v. Brown (16 Barb. 325), relied upon by the appellants, the defendants had executed an undertaking, running to the plaintiffs Loomis, Kirby and Gunn, to the effect that the plaintiffs in an action for an injunction would pay the said Loomis, Kirby and Gunn, "such damages not exceeding $2,500 as they might sustain by reason of the injunction, if the court should finally decide that the plaintiffs were not entitled thereto," and the court very properly held that as the covenant was joint the covenantees might sue jointly. There was some discussion and some general language which would seem to support the contention of the appellants that the language there used is controlling in the present case. It was true that all of the plaintiffs in that action were not damaged alike, but they were all interested in the joint covenant to indemnify them against loss by reason of the injunction, and it was proper that they should dispose of the matter in one action. But here the plaintiffs, as we have seen, are not jointly interested; their interests are separate and distinct, and neither

party can have any legal interest in the judgment which may be recovered by the other, and this is the test of whether the plaintiffs are properly joined; they must have an interest in the subject of the action and in obtaining the judgment demanded, and the mere fact that an individual is the principal stockholder in a corporation does not operate to give the corporation and the individual a joint interest in an action against these defendants for maliciously prosecuting a bankruptcy proceeding against James Lawrence.

The interlocutory judgment appealed from should be affirmed, with costs.

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2. One suing on behalf of others. Code Civ. Proc., § 448.

McKENZIE v. L'AMOUREUX.

11 Barb. 516 (1851).

Demurrer. The plaintiffs stated in their complaint, that the action was brought as well on their own account as on account of the other legatees of Mary McKay, deceased. They set forth the will, from which it appeared that they, together with Margaret Heinselman, Eliza McIntosh and Mary, wife of John Norton, were entitled to legacies, and that the estate of the testatrix, real and personal, chargeable, as they alleged, with the payment of those legacies, was given and devised to Elizabeth, Caroline, Jane and Hallowell Matilda, daughters of the late Lachlane Stewart. These three residuary legatees and devisees, together with James L'Amoureux, administrator of the estate with the will annexed, were defendants in the suit. It was alleged that the personal estate was insufficient to pay the legacies. The plaintiffs demanded judgment that the will be established, that an account might be taken of the personal estate,

and also of the debts, legacies, and funeral expenses of the testatrix; that the real estate might be sold, and that the proceeds, together with the personal estate, might be applied in due course of administration in payment of the debts and legacies. To this complaint the defendants, who were residuary legatees, demurred, stating several grounds of demurrer, and among others that there was a defect of parties, plaintiff or defendants, in not making Margaret Heinselman, Eliza McIntosh and Mary Norton, three of the legatees named in the will, and interested in the matters sought to be brought in question, and involved in this action, parties, either plaintiffs or defendants, and also that the joinder of more than one, and less than the whole of such legatees was either a defective or improper joinder of plaintiffs in this action.

The cause having been argued before Mr. Justice Wright, upon the issue of law so joined, and the demurrer having been sustained, the plaintiff appealed from the decision.

By the Court, HARRIS, J. The learned judge who decided this cause at the special term, admitted that as the practice existed at the time of the adoption of the Code, this action might properly have been brought by the plaintiffs on behalf of themselves and the other legatees who were not made parties. The authorities to which he has referred, show that one legatee might sue on behalf of himself and all the rest, and that all might avail themselves of the benefit of the decree. (Brown v. Rickets, 3 Johns. Ch. 553; Thompson v. Brown, 4 id. 619. See also Ross v. Crary, 1 Paige, 416; Hallett v. Hallett, 2 id. 15. Cooper's Eq. Pl. 39, 40.) But he came to the conclusion that this rule had been changed by the Code, and that now all persons who are necessary parties to a complete determination of the questions involved in the action, must be brought before the court either as plaintiffs or defendants. Upon this ground the demurrer was sustained.

In this conclusion I cannot concur. So far was the legislature from intending any change in the rule on this subject, that in making the great changes contemplated by the adoption of the Code, it was careful to preserve this convenient practice of the court of chancery. The Code commissioners had reported a section, copied substantially from one of the rules of the Supreme Court of the United States, providing that those who are *united in interest* must be joined as plaintiffs or defendants, except that, if the consent of any one who should have been joined as plaintiff, cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. This too was the practice in the court of chancery. The legislature adopted the provision thus reported, but added to the section as follows: "And when the question is one of a common or general interest of many persons; or when the parties are very numerous and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of the whole" (Code, § 119). This was also in accordance with the then existing practice of courts of equity. The legislature seems to have apprehended that, by adopting the rule reported by the commissioners, it might be understood to have rejected the kindred rules embraced in the latter clause of the section. To prevent this misapprehension the latter clause was added, thus retaining in the new practice the same rules by which to determine whether the proper parties were before the court, which then prevailed in the court of chancery.

The section in question requires that, except in a specified case, all who are *united in interest* shall be joined as parties; and then declares that when the action involves a question of *common or general interest* to several parties, *or* when, though united in interest, the parties are very numerous and it is impracticable to bring them all before the court, then one or more may sue or defend for all. This

I understand to be the clear and obvious import of the section. The distinction between parties who are "*united in interest*" and those who have "a common or general interest" in the question, is aptly illustrated in this very case. By the will the testatrix gave to the children of her deceased sister Jane Ferguson a legacy of $400. The plaintiffs, James Ferguson, Elizabeth Ferguson and George Ferguson are those children. They are jointly, not severally, entitled to the legacy. Like three partners, suing for a debt due to them as partners, they are "united in interest," and must be joined as parties. But the plaintiffs, Isabella McKenzie and Barbara McKenzie are each entitled to a separate legacy. They have *a common interest* in establishing the will and having a fund provided for the payment of the legacies, but they are not united in interest with each other or the other legatees. So also in the case of the three legatees who are not made parties.

The error into which my learned associate has fallen arises from his failure accurately to distinguish between the two classes of cases in which it is allowable for one or more parties to sue for the benefit of others as well as themselves. He has evidently understood the statute to allow a suit to be brought in this form, when the question is one of common or general interest, and where, in such a case, the parties are very numerous and it is impracticable to bring them all before the court. Accordingly he says, "this is not a case in which the parties are very numerous," nor would it be "impracticable to bring them all before the court." "There are but three persons whose interest in the subject matter of the action is identical with the plaintiffs. These are not joined as plaintiffs, nor is there any reason assigned why they are not." I have already shown, I think, that when the question involved is one of "*common or general interest,*" the action may be brought by one or more for the benefit of all who have such common or general interest,

without showing that the parties are very numerous, or that it would be impracticable to bring them all before the court. This latter provision applies indiscriminately to all actions, whether they involve questions of common interest or not.

I think the judgment should be reversed, and that the plaintiffs should have judgment upon the demurrer, with liberty to the defendants to answer upon payment of costs.

MacARDELL v. OLCOTT.
62 App. Div. 127.

Laughlin, J. This action was commenced on the 20th day of August, 1891, by Cornelius MacArdell, a stockholder of the Houston and Texas Central Railway Company, in behalf of himself and all other stockholders of said company similarly situated, who might come in and contribute to the expense thereof. The purpose of the action, briefly stated, is to obtain a decree that large tracts of land in the State of Texas purchased by defendants Olcott and Downs, respectively, on the foreclosure of mortgages executed by said railway company, be deemed held by them in trust for said company and that they be compelled to account therefor; that said defendants and the three trust companies, also defendants, and the Houston Central Railroad Company and the Southern Pacific Company account for their transactions concerning these lands since such purchase, and convey the lands to said Houston-Texas Company; that a receiver be appointed *pendente lite,* and that an injunction issue to prevent defendants from further incumbering said lands; that three several trust deeds, each dated April 1, 1900, between defendant Olcott and the Southern Pacific Company and each of the trust companies respectively, given to secure three several issues of bonds by the Houston and Texas Central Railroad Company, the reorganization

company after the foreclosure, be declared illegal and void and a cloud on the title of the Houston and Texas Railway Company, free from the lien of said bonds. The payment of the three issues of bonds was guaranteed by the Southern Pacific Company.

The basis of the action is an alleged conspiracy between the officers and principal stockholders of the Houston and Texas Railway Company, Olcott, Downs and others, by which, through collusion, the decree in foreclosure was unnecessarily and illegally consented to for the purpose of injuring the plaintiff and other stockholders.

The petitioner and appellant owns 900 shares of stock of the Houston and Texas Railway Company of the par value of $100 each. He and other stockholders of said last-named company on the 23rd day of December, 1889, filed a bill in equity in the United States court in Texas wherein the decree of foreclosure was granted, to have the same vacated on account of the conspiracy which is the basis of this action, and prayed that they might be permitted to come in and defend said foreclosure suit, and for other relief.

An affidavit was read in opposition to this motion, showing that the complaint, a copy of which was annexed in the suit in the United States court, was dismissed, and that on appeal to the Circuit Court of Appeals the dismissal was affirmed, and a further appeal to the United States Supreme Court was dismissed on November 13, 1893. (Carey v. Houston & Texas Central Railway Company, 150 U. S. 170.) The respondents contend that the former suit in equity in the United States court is a bar to petitioner's obtaining any relief in this action. This position is untenable. The suit is not now pending, and it does not appear that it was decided upon the merits.

The Statute of Limitations is also interposed as a bar to petitioner's being admitted as a party plaintiff to this action.

It clearly appears from the petitioner's bill in equity in the United States court that he was familiar with all the material facts upon which it is sought to obtain relief in this action, more than ten years before applying to be made a party plaintiff herein. Before he made such application this action had been pending for nearly ten years without having been brought to trial. No explanation has been offered as to why the application was thus delayed, nor is any fact stated or suggested indicating any change in the attitude of the plaintiff with reference to the conduct of this action which renders it essential that petitioner be admitted to protect his rights.

Section 448 of the Code of Civil Procedure which authorizes one person to sue on behalf of himself and others similarly situated where they are interested in common, is a re-enactment of section 119 of the Code of Procedure, and in substantially the same language. Under the Code of Procedure it was held and declared to be the rule in equity that parties for whom the action was brought, but who were not named as plaintiffs, obtained no vested right until the entry of an interlocutory judgment, whereupon, by an order of the court, they were required to come in and prove their claims, and in default thereof, in the absence of fraud, they were forever barred from participating in the fund sought to be reached by the judgment. Until interlocutory judgment the parties named as plaintiffs had exclusive control of the suit and might settle or discontinue the same at will, and the defendant might, upon adjusting the plaintiff's claims and paying their costs, have the complaint dismissed. The reason for this rule was that until entry of judgment each other party was at liberty to bring an individual suit, but that upon the rendition of judgment in one it inured to

the benefit of all, and the prosecution of all other suits would then be stayed. (Mattison v. Demarest, 1 Robt. 717; Derby v. Yale, 13 Hun, 273; Kerr v. Blodgett et al., 48 N. Y. 62; Travis v. Myers, 67 id. 542.)

Section 452 of the Code of Civil Procedure, providing that " where a person, not a party to the action, has an interest in the subject thereof or in real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the courts to be made a party, it must direct him to be brought in by the proper amendment," is partly new and partly a re-enactment of the 2d sentence of section 122 of the Code of Procedure, which provided for making a person interested in an action for the recovery of real or personal property a party on his application. Since the enactment of the Code of Civil Procedure it has been stated to be the law, without the question having been directly involved, that in a representative suit like this a party having an interest in common with the plaintiff, who is willing to contribute to the expense of the litigation, is entitled, upon application duly made, to be permitted to join with the plaintiff. (Brinckerhoff et al. v. Bostwick et al., 99 N. Y. 194; Hirshfeld v. Fitzgerald, 157 id. 166.) It was also held in the Brinckerhoff Case (supra) that the bringing of the action in time stops the running of the Statute of Limitations against the parties who are not named as plaintiffs but who are affected in common with plaintiff and for whose benefit the action is brought.

But admitting, without deciding the question, that if this suit be prosecuted to judgment by the plaintiff, the petitioner will be entitled to share in the recovery, it by no means follows that he has an absolute right to be admitted as a party plaintiff after acquiescing in the conduct of the litigation by the plaintiff who brought it for nearly ten

years, until the Statute of Limitations had run against his bringing an independent action for the same relief. If, in an action brought in this form under section 448 of the Code of Civil Procedure, an interested party has an absolute right to come in and be joined as a party plaintiff, we may with propriety limit such right to his making an application while his claim is valid and enforcible by an independent suit. If the contention of appellant were to prevail, he would have the same right to be admitted as a party plaintiff to this action fifty years hence, if it were then pending. The Code provisions should not be so construed as to establish that doctrine.

The order should be affirmed, with ten dollars costs and disbursements to each respondent appearing separately.

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3. Real party in interest. Code Civ. Pro. § 449.

SHERIDAN v. MAYOR.
68 N. Y. 30.

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department affirming a judgment in favor of defendant, entered upon a verdict.

CHURCH, Ch. J. The only question submitted to the jury was whether the plaintiff was the real party in interest. A written assignment, properly executed and acknowledged before a proper officer, was produced in terms transferring absolutely for a valuable consideration the demand in suit from Morgan Jones to the plaintiff, and proof was made of the delivery thereof by the former to the latter. As to these facts there was no dispute, nor could there be any dispute

that the plaintiff held the legal title to the demand. The learned judge submitted the question to the jury in this language: "If you believe from the evidence that the real party in interest in this suit is Morgan Jones and that this is a sham transaction, then I think the plaintiff should be defeated in the action."

Precisely what the learned judge meant by a sham transaction, as applied to the transfer of the demand, is not very apparent, but I infer from this and other parts of the charge that he intended to charge, that although a legal title to the claim was transferred to the plaintiff and the assignment was valid as against the assignor, yet if the jury believed that the transaction was colorable, that is, that by any private or implied understanding the transfer was not intended as *bona fide,* or an actual and real sale of the demand as between the parties, the plaintiff could not recover. In this, with great respect, I think the learned judge erred. A plaintiff is the real party in interest under the Code, if he has a valid transfer as against the assignor, and holds the legal title to the demand. The defendant has no legal interest to inquire further. A payment to, or recovery by, an assignee occupying this position, is a protection to the defendant against any claim that can be made by the assignor. In this case, from the undisputed facts, the defendant would be protected if it paid to the assignee or if a recovery was had against it by him. No question was made and none submitted to the jury as to the execution or delivery of the assignment, and conceding that the circumstances were such as to justify the jury in finding that it was colorable as between the parties, yet that would constitute no defence on the ground that the plaintiff was not the real party in interest. Such an inquiry might become material if the rights of creditors were involved, or upon the right of interposing some defence or counter-claim against the assignor.

Nor is it of any moment that no consideration was paid for the demand by the assignee. The assignor could give the demand to the plaintiff, or sell it to him for an inadequate consideration, or without any consideration. It is enough if the plaintiff has the legal title to the demand, and the defendant would be protected in a payment or recovery by the assignee. It is not a case of *mala fide* possession which the defendant can avail itself of, as if a thief should bring an action upon a promissory note which he had stolen. These views are well settled by authority. (44 N. Y. 231; 61 id. 614; 27 Barb. 178; 38 id. 579; 29 N. Y. 554; 15 Wend. 640.)

As before remarked, there was no question as to the making and delivery of the assignment, and the remarks of the learned judges at General Term, therefore, as to when and under what circumstances a jury is or is not justified in finding contrary to the evidence of one or more witnesses, has no application to the question involved in this case, viz.: the *bona fides* as between assignor and assignee of the transfer. Suppose after the trial of this action the assignor had commenced an action. The defendant, by proving the making and delivery of the assignment to the plaintiff, could have defeated the action on the ground that he was not the party in interest, and I apprehend he would not have been permitted to show that the transfer was not as between them an actual *bona fide* sale, and the result might be that, although the defendant justly owed the debt, it would avoid liability because no one had a right to prosecute. The Code never anticipated such a result.

Judgment reversed.

One to whom commercial paper has been indorsed and who holds it as an agent for the purpose of collection only, cannot maintain an action thereon in his own name. Iselin v. Rowlands, 30 Hun, 488. Where a chose in action has been assigned as collateral security either the assignor or the assignee may enforce it by action in his own name; but the other is a necessary party. Ridgway v. Bacon, 72 Hun, 211.

ALLEN v. BROWN.
44 N. Y. 228.

APPEAL from an order at General Term affirming a judgment for plaintiff entered upon the report of a referee.

Cook, Carey, Clark and Allen having similar claims against Brown, Cook, Carey and Clark assigned to Allen who commenced this action. No consideration was in fact paid by plaintiff upon the assignment to him.

HUNT, C. The appellant insists that the assignment from Cook, Clark and Carey to the plaintiff, conveyed no title upon which his suit could be brought. This point is based upon the evidence given by Mr. Cook, when he testifies "Allen paid me nothing, and I agreed with him that I would take care of the case, and if he got beat it should not trouble or cost him anything."

I am of the opinion, that the assignment is sufficient to sustain this action.

The Code abolishes the distinction between actions at law and suits in equity, and between the forms of such actions. (Section 69.) It is also provided, in section 111, that every action must be prosecuted in the name of the real party in interest, except as otherwise provided in section 113. The latter section provides that an executor, administrator, trustee of an express trust, may sue in his own name. These provisions are intended to abolish the common-law rule, which prohibited an action at law otherwise than in the name of the original obligee or covenantee, although he had transferred all his interest in the bond or covenant to another. It accomplishes fully that object, although others than the assignee may have an ultimate beneficial interest in the recovery. In a case like the present, the whole title passes to the assignee, and he is legally the real party in interest, although others may have a claim upon him for a

portion of the proceeds. The specific claim, and all of it belongs to him. Even if he be liable to another as a debtor upon his contract for the collection he may thus make, it does not alter the case. The title to the specific claim is his. (Durgin v. Ireland, 4 Kernan, 322; Williams v. Brown, 2 Keyes, 486, and case cited; Paddon v. Williams, 1 Robt. R., 340; S. C. 2 Ab. R., N. S. 88.)

Judgment affirmed.

FIELD v. CITY OF NEW YORK.
6 N. Y. 179.

APPEAL from the general term of the Supreme Court, in the first district, where a decree, made by the late assistant vice-chancellor Lynch, dismissing the complainant's bill, with costs, had been reversed, and a decree made in favor of the plaintiff.

This was a bill in equity filed by Field, the complainant, in the late court of chancery, against the Mayor, Aldermen and Commonalty of the City of New York, and Jared W. Bell, to enforce the payment of a claim against the city, assigned by Bell to John Garread, and by him to the plaintiff.

The bill set forth that on the 14th of March, 1842, Jared W. Bell being engaged in printing for the mayor, aldermen and commonalty of the city of New York, and having various contracts with them, executed, under his hand and seal, for a valuable consideration, and delivered to John Garread, an assignment of all bills that might become due to him for job-printing, paper or stationery, done or furnished the corporation of the city of New York, to the amount of $1500, after two certain assignments should be paid or satisfied, viz., one for $1500, made to Thomas Lloyd and Joseph Hopkins, and one to William A. Coit for $300.

That on the 28th day of April 1842, Garread, for a valuable consideration, assigned to the plaintiff the said assignment, as security for certain specific demands, and afterwards, in December of the same year, released to the complainant his entire interest therein.

That on the 30th of April 1842, the plaintiff gave notice to the said mayor, aldermen and commonalty, of the two assignments first above mentioned, requesting them to settle the matters with him, and no one else; and at the same time, lodged a copy of said instruments in the office of the comptroller of the city. That Bell, after the assignment to Garread, was engaged in job-printing for the said corporation, and furnished them a large amount of paper and stationery, and that a large sum became due to him therefor, which the said mayor, aldermen and commonalty paid to the said Bell, without notice to the plaintiff, or regard to his rights, although they were informed thereof. That the two assignments to Lloyd & Hopkins, and to William A. Coit, had been satisfied, and that a large sum became due for such job-printing, paper and stationery, applicable to the assignment to the plaintiff. That he had applied to the said mayor, aldermen and commonalty to account with him therefor, and pay the same to him, which they refused to do. That Bell had been insolvent ever since the assignment to Garread was made. The bill prayed that an account might be taken of the said job-printing, paper and stationery, and of all sums due therefor, and that the said mayor, aldermen and commonalty might be directed to pay the same to the plaintiff, to the extent of satisfying the said sum of $1500, with interest from March 14th, 1842.

The principal facts charged in the bill were proved. It did not appear that any of the printing done or stationery furnished by Bell after March 14, 1842, was done or furnished pursuant to any contract existing at that date.

WELLES, J. By the assignment from Bell to Garread, of March 14th, 1842, it was intended to transfer to and vest in the latter, the right and interest of the former in and to all the bills which might thereafter become due to him, from the corporation of the city of New York, for job-printing, paper or stationery, done or furnished by Bell, either before or after the date of the assignment, to the amount of $1500; subject to the two prior assignments, to Lloyd & Hopkins, and to Coit. By the assignment from Garread to the respondent of April 28th, and the release from the former to the latter, of December 27th, 1842, the latter acquired all the right and interest of the former in the first assignment.

The case shows, that at the time of the commencement of the suit in the court of chancery, bills of the description mentioned had become due from the corporation to Bell, to an amount more than sufficient to satisfy all three of the assignments. These bills appear to have accrued, and most of the services and materials upon which they arose, appear to have been rendered and delivered, after the date of the assignment from Bell to Garread.

One of the questions presented by this appeal, is, whether the court of chancery had jurisdiction to decree payment by the corporation of the city of New York, to the respondent, of his claim. That it had such jurisdiction seems to be in accordance with reason, and the theory of equity jurisprudence.

1. The assignment of Bell to Garread was valid and operative as an agreement, by which Garread and his assigns became entitled to receive payment of the bills in question, when the same should become due, to the amount indicated in the assignment, subject to the two prior assignments. It did not operate as an assignment *in praesenti* of the choses in action, because they were not in existence, but remained in possibility merely. A possibility, however,

which the parties to the agreement expected would, and which afterwards did, in fact, ripen into an actual reality; upon which, by force of the agreement, an equitable title to the benefit of the bills thus mature and due, became vested in the respondent, as assignee of Garread. (Story's Eq. Jur. Secs. 1040, 1040b, 1055; Mitchell v. Winslow, 2 Story's Rep. 630; Langton v. Horton, 1 Hare 549.)

It is contended by the counsel for the appellants, that the assignment of Bell to Garread did not pass any interest which was the subject of an assignment, for the reason, that there was no contract, at the time, between Bell and the corporation of the City, by which the latter was under any binding obligation to furnish the former with job-printing, or to purchase of him paper or stationery; and that, therefore, the interest was of too uncertain and fleeting a character to pass by assignment. There was indeed no present, actual, potential existence of the thing to which the assignment or grant related, and, therefore, it could not, and did not, operate, *eo instanti*, to pass the claim which was expected thereafter to accrue to Bell against the corporation; but it did, nevertheless, create an equity, which would seize upon those claims as they should arise, and would continue so to operate until the object of the agreement was accomplished. On this principle, an assignment of freight to be earned in future, will be upheld, and enforced against the party from whom it becomes due. (Story's Eq. Jur. Sec. 1055, and authorities there cited; Langton v. Horton, and Mitchell and Winslow, supra; Story on Bailments Sec. 294.) Whatever doubts may have existed heretofore on this subject, the better opinion, I think, now is, that courts of equity will support assignments, not only of choses in action, but of contingent interests and expectations, and of things which have no present actual existence, but rest in possibility only, provided the agreements are fairly entered into, and it would not be against public policy to uphold

them. Authorities may be found, which seem to incline the other way, but which, upon examination, will be found to have been overruled, or to have turned upon the question of public policy.

Decree affirmed.

DICKINSON v. TYSEN.

125 App. Div. 735.

McLaughlin, J.: The complaint alleged that the defendant employed one Quimby and one Mudgett to sell certain real estate on Staten Island for $120,000; that in pursuance of such employment they procured a purchaser (one Brooks) at the price named, and a contract was entered into between him and the defendant — $4,000 of the purchase price being then paid; that at the time of the execution of the contract it was agreed between the defendant and Brooks that title was to be taken in the name of one Jones for Brooks' benefit; that Jones subsequently took title; that in consideration of procuring such purchaser the defendant agreed to pay to Quimby and Mudgett a commission of five per cent of the purchase price, or $6,000 — to be divided between them, share and share alike — $600 of which sum was to be paid at the time of the execution of the contract and the balance of $5,400 when the deed was executed; that "no part of said sum of six thousand dollars ($6,000) has been paid by the defendant to the said Quimby and Mudgett excepting the sum of six hundred dollars ($600), and that there is now due and owing from the defendant to the said Quimby and Mudgett the sum of five thousand four hundred dollars ($5,400), with interest;" that prior to the commencement of the action Quimby and Mudgett duly assigned to the plaintiff part of their right, title and interest in the commissions for making such sale, the former to the extent of $1,350 and the latter to the extent of $2,250. The judgment demanded is for $3,600, with interest.

The defendant demurred to the complaint upon the ground (1) that it did not state facts sufficient to constitute a cause of action; and (2) that it appears upon the face thereof that there is a defect of parties, in that Quimby and Mudgett, mentioned and referred to therein, are not joined as parties plaintiff or defendant. The demurrer was overruled and defendant appeals.

The rule seems to be well established by a long line of authorities that there can be but one action for a single breach of contract. * * *

The rule in equity is different. There an assignee of part of a claim may maintain an action to enforce the same (Field v. Mayor, etc., of N. Y., 6 N. Y. 179; Risley v. Phenix Bank of the City of New York, 83 id. 318; Chambers v. Lancaster, 160 id. 342), and if a complete determination of the controversy cannot be had without the presence of other parties, then the court must direct them to be brought in. (Code of Civ. Pro. § 452.) In an action at law for a money judgment only, however, the court has no such power. It cannot in such case compel the bringing in of additional parties. (Chapman v. Forbes, 123 N. Y. 532; Bauer v. Dewey, 166 id. 402; Long v. Burke, 105 App. Div. 457; Horan v. Bruning, 116 id. 482.) * * *

In the case now before us the defendant, according to the allegations of the complaint, agreed to pay the commission claimed. This was a single, indivisible obligation, to enforce which only one action at law can be maintained. Quimby and Mudgett, had they brought an action, could not have split up their claim. They would have had to recover in the action brought all to which they were legally entitled. The recovery in one action would have been a bar to a recovery in another. This, I take it, no one will dispute. It seems to me illogical, therefore, to say that they can do by assignment what the court would not permit them to do by action; in other words, that they can do through a third

party what they could not themselves do. The claim might be assigned as a whole and an action maintained thereon, but if only a part be assigned, then when an action is brought to enforce that part, defendant has a legal right to insist that all the parties who have an interest in the claim shall be made parties to the action, to the end that the one action may determine the rights of all.

It appears upon the face of the complaint that each of the plaintiff's assignors has retained an interest in the original claim and a final and complete determination of defendant's liability to pay cannot be ascertained without their presence in the action. There is, therefore, a defect of parties and this was properly raised by demurrer. Unless it had been thus raised it would have been waived. (Code Civ. Proc. §§ 488, 499; Fawcett v. City of New York, 112 App. Div. 155.) That there is a defect of parties seems to me necessarily to follow when the obligation which the defendant originally assumed is considered. He promised to pay, if the allegations of the complaint be true, $5,400 when the deed was executed. It was a separate, distinct and indivisible promise, and implied that but one action should be brought to enforce it. The persons to whom the promise was made might assign to another the right to enforce the same, either in whole or in part, but they could not give to their assignee more than they themselves had, which was the right to enforce the promise in a single action against the objection of the debtor. If they could it is not difficult to see that by assignments upwards of one hundred actions might be maintained in the Supreme Court in which the costs, if a recovery were had, would largely exceed the amount of the original claim. This is a situation which the law will not tolerate, inasmuch as defendant never contracted with reference to it.

If the foregoing views be correct, then it follows that the demurrer should have been sustained, on the ground that there is a defect of parties.

I am also of the opinion that the demurrer should have been sustained upon the ground that the complaint does not state facts sufficient to constitute a cause of action. It certainly does not if it be read literally because the allegation is that " there is now due and owing from the defendant to the said Quimby and Mudgett the sum of five thousand four hundred dollars ($5,400)." This, of course, negatives the allegation that there is anything due the plaintiff, and if it be assumed, as claimed in respondent's brief, that this is a mere clerical error and the words " on the said contract " should be substituted in place of the words " to the said Quimby and Mudgett," I still think the complaint is defective because it fails to allege non-payment. The Code of Civil Procedure, section 481, provides that a complaint must contain a plain and concise statement of the facts constituting the cause of action. Under this provision whatever facts are essential to be proved to entitle the plaintiff to recover upon the trial must be set out in the complaint. Upon a contract for the payment of money non-payment is a fact which constitutes the breach of the contract and is the essence of the cause of action, and being such, within the provision of the Code, that fact must be alleged in the complaint. It is suggested that inasmuch as payment is always an affirmative defense which must be pleaded in order to be available, it necessarily follows that non-payment need not be alleged. This does not follow. The reason why non-payment must be pleaded is clearly set forth in the opinion in Lent v. New York & Massachusetts R. Co. (130 N. Y. 504).

Judgment reversed and demurrer sustained.

MEINHARDT v. EXCELSIOR BREWING CO.
98 App. Div. 308.

Woodward, J.: The judgment appealed from was rendered upon the following agreed statement of facts:

"The plaintiff and his wife were jointly the proprietors of a liquor business, which was furnished with beer by defendant. Defendant refused to deliver any more beer to the place, unless security for payment of bills was given. In consequence thereof, on July 24th, 1902, plaintiff paid to defendant the sum of one hundred dollars, taken out of the business as security for payment of beer bills. The defendant at that time believed plaintiff to be sole owner of the business, and plaintiff did not inform it that he and his wife owned jointly the one hundred dollars deposit fund, as well as the business. The defendant delivered to plaintiff a receipt for the sum, which is on file with the papers in this action, marked Plaintiff's Exhibit 2. Nothing is due to defendant for beer, which is chargeable against the sum deposited. The money was demanded by plaintiff from defendant on December 11th, 1902, but was not returned to him, and is still in defendant's possession. Plaintiff's wife is now a resident of the City of New York."

The receipt, "Plaintiff's Exhibit 2," referred to in the statement of facts, is as follows:

"New York, July 24, 1902.

"Received from Henry Meinhardt one hundred dollars as guarantee for beer.

"100.00/100. THE EXCELSIOR BREWING CO."

Judgment was rendered dismissing the complaint, on the ground that there was a defect of parties plaintiff, in that the action was not brought by both the plaintiff and his wife; and from that judgment the plaintiff appeals to this court.

Section 449 of the Code of Civil Procedure provides: "Every action must be prosecuted in the name of the real party in interest, except that * * * a trustee of an express trust * * * may sue without joining with him the person for whose benefit the action is prosecuted. A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust, within the meaning of this section."

It is admitted that the plaintiff and his wife were partners in the business from which the fund was taken, and were jointly the owners of that fund at the time it was deposited with the defendant. The "real party in interest" was, therefore, the partnership, and the action should have been brought by both the plaintiff and his wife, as partners, unless the contractual relations of the plaintiff and the defendant are within one of the exceptions mentioned in section 449 of the Code of Civil Procedure.

It is contended on the part of the plaintiff that he was the trustee of an express trust in respect to the fund sought to be recovered, in that the defendant's contract to return the fund was made with him and in his name for the benefit of the partnership, and this contention seems to find ample support when the literal wording of section 449 of the Code of Civil Procedure is applied to the transaction between the parties.

The part of section 449 of the Code of Civil Procedure relating to trustees of express trusts is substantially the same as sections 111 and 113 of the Code of Procedure. In contrasting that part of those sections, it was said in *Considerant* v. *Brisbane* (22 N. Y. 389): "It is intended, manifestly, to embrace, not only formal trusts, declared by deed *inter partes,* but all cases in which a person, acting in behalf of a third party, enters into a written, express contract with another, either in his individual name, without description, or in his own name, expressly in trust for,

or on behalf of, or for the benefit of, another, by whatever form of expression such trust may be declared. It includes not only a person with whom, but one in whose name a contract is made for the benefit of another."

The receipt given by the defendant to the plaintiff plainly indicates the agreement between the parties that the fund would be returned by the defendant when it no longer had a right to hold it "as guarantee for beer." This was a contract both "with" the plaintiff and in his name for the benefit of the partnership.

The plaintiff deposited the fund with the defendant as agent and representative of the partnership, doing the business in his own name and not disclosing his representative capacity to the defendant. As between the plaintiff and defendant, the defendant's liability was to the plaintiff, and the contract with the defendant was the plaintiff's contract. (Weed v. Hamburg-Bremen Fire Ins. Co., 133 N. Y. 394.) Payment of a judgment recovered by the plaintiff would fully protect the defendant from the claims of third persons, and this is the test whether the plaintiff is the real party in interest. (St. James Co. v. Security Trust and Life Ins. Co., 82 App. Div. 242.) The case of Secor v. Keller (4 Duer, 416) has not been overlooked. This case, decided in the New York Superior Court, holds that even a dormant partner is a necessary party plaintiff, where the transaction constituting the subject-matter of the action was with and in the name of an ostensible partner. This case has not been cited as an authority in later cases, and its soundness has been questioned by text writers. It is not controlling here, and is not in harmony with the weight of authority.

Judgment reversed and new trial ordered.

In Greenfield v. Mass. Mut. Life Ins. Co., 47 N. Y. 430, defendant undertook to pay the assured, his executors and administrators, the sum of $3,000, ninety days after due notice and proof of death of the assured, $2,000 of said sum being for the express benefit of Jane, his wife, and $1,000 for Agnes, his mother. Held, that the action was properly brought by Jane Greenfield, the wife, in her representative capacity as administratrix of the assured, she being the trustee of an express trust under the terms of the policy.

4. Necessity of Joining All Persons to be Affected.

OSTERHOUDT v. BD. OF SUPERVISORS.
98 N. Y. 239.

APPEAL from a judgment of the General Term of the Supreme Court, third department, May, 1882, affirming a judgment, rendered upon the report of a referee, in favor of the plaintiffs.

ANDREWS, J. There is a defect of parties fatal to the judgment. The action was brought under the provisions of chapter 161 of the Laws of 1872, as amended by chapter 526 of the Laws of 1879, by the plaintiffs, as tax payers of the town of Kingston, against the board of supervisors of Ulster county and the town auditors of the town, to vacate certain audits of town accounts, made by the board of town auditors at its annual meeting in November, 1879, in favor of a large number of individuals, amounting in the aggregate to the sum of $17,120.09, and to restrain the board of supervisors from levying upon the town a tax for their payment, on the ground that such audits were "illegal, inequitable, unjust, false and fraudulent." The judgment grants the relief demanded in the complaint, and vacates the audits and restrains the supervisors from levying a tax for their payment.

The individuals in whose favor the audits were made were not made parties in the first instance, nor were they brought in at any stage of the action. The only defendants are the board of supervisors and the town auditors. The question of defect of parties was not raised by demurrer or answer. The point, however, was taken at the commencement of the trial and was overruled. The defendants, by omitting to take the objection by demurrer or answer, are

"deemed to have waived it." (Code of Civ. Pro., § 499.) But the rule which prevailed in courts of equity, that the court would not proceed to a decree until all necessary parties were before the court, has been preserved by the Code. Section 452 provides: "The court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in." Construing sections 452 and 499 together, their meaning is that a defendant, by omitting to take the objection that there is a defect of parties by demurrer or answer, waives on his part any objection to the granting of relief on that ground, but when the granting of relief against him would prejudice the rights of others, and their rights cannot be saved by the judgment and the controversy cannot be completely determined without their presence, the court must direct them to be made parties before proceeding to judgment. When a defendant is sued alone upon a joint contract, if he omits to set up the non-joinder of his co-contractor by demurrer or answer, judgment may pass against him alone, because judgment against one joint-contractor will not prejudice the other, but may relieve him from liability. The other branch of the rule would be illustrated by an equitable action brought for the cancellation of a mortgage, executed to two persons as mortgagees, in which only one of the mortgagees was made defendant. The court could not proceed to a decree for the plaintiff without the presence of the other mortgagee. The distinction is between those who are necessary parties and those who are proper parties merely. When persons who are necessary parties are not joined, the court will not proceed until they are brought in. It will not render a fruitless judgment, nor will it undertake to decide a single right in

the absence of persons who are entitled to be heard in respect to it, and who may be prejudiced by the decision. It was the practice in chancery to permit the objection for defect of parties to be taken by demurrer or answer, or at the hearing. (Story's Eq. Pl., § 75; Van Epps v. Van Deusen, 4 Paige, 64.) Under the Code the court is bound to take the objection when a proper case is presented.

It seems very plain that the persons in whose favor the audits were made were necessary parties. The judgment vacates the audits and restrains their collection in the usual course. They are necessarily prejudiced. Indeed they are parties primarily interested. They are deprived of the benefit of the adjudication of the board of audit, and if they should undertake to compel the board of supervisors to levy a tax for the payment of the claims, they would be met by the judgment in this case vacating the audits and restraining the collection. Their rights, and such rights as the defendants have, depend upon a single controversy, whether the claims were legal charges against the town and were legally audited by the town board. Neither the town auditors, nor the board of supervisors, represented the claimants in any legal sense. Their interests are not identical, and the doctrine of virtual representation is not applicable. The enumeration in the act of 1872, of "the officers, agents, commissioners, or other persons acting for or in behalf of any county, town, or municipal corporation," as the persons against whom an action may be brought, does not dispense with the necessity of joining all other persons who will be directly affected by the judgment and are necessary parties to the complete determination of the controversy.

The action is, we think, fatally defective on this ground, and, without passing upon the merits, the judgment should be reversed, without costs in this court.

BAUER v. DEWEY.
166 N. Y. 402.

APPEAL from an order of the Appellate Division of the Supreme Court in the first judicial department, made December 7, 1900, affirming an order of Special Term granting an application of John H. Delack to intervene, and directing the plaintiff to make him a party defendant and to serve a supplemental summons and complaint.

The action was brought by the plaintiff as assignee of a claim of C. H. Diamond to recover twenty-five hundred dollars, the amount agreed upon between the defendant and Diamond as compensation for the latter's service as a real estate broker. Soon after the commencement of the action J. H. Delack made a motion to intervene, alleging in his affidavit that he was entitled to one-half of the commissions owing by the defendant for such services. He also set out in his moving affidavits that he had made a memorandum by which he agreed to accept two hundred and twenty dollars for his interest in the claim, but that such agreement was induced by false and fraudulent representations upon the part of Diamond as to the amount of the commission to be paid by the defendant, and that under the agreement between himself and Diamond he was to have one-half of the commissions as against Dewey, amounting to the sum of twelve hundred and fifty dollars. He further alleged that the transfer of the claim against the defendant was by assignment first to Diamond's wife and by her to the plaintiff; that the purpose of such assignment was to cheat and defeat Delack in the collection of his share of such commissions, and that it was fraudulent and void.

Diamond made an affidavit, which was read in opposition to the motion, denying any fraud or false representations, and also denying that Delack was entitled to any portion

of the commissions except the sum of one hundred and ten dollars, and that that amount was paid in full satisfaction of any claim he had in that behalf.

Upon these papers the Special Term granted an order permitting Delack to intervene, directing that he should be brought in as a party defendant and that a supplemental summons and complaint should be served upon him. That order was appealed from and affirmed by the Appellate Division by a divided court.

Subsequently a motion was made to allow an appeal to this court, which was granted and the following questions were certified: "1. Has the Supreme Court power to compel the plaintiff, in an action in which a money judgment only is sought, and in which the title to specific property is not involved, to bring in as a defendant a third party on his own application, and to order a supplemental summons and complaint served upon him? 2. Has Delack, the petitioner herein, such an interest in the subject of this action as entitles him, on his own application, to be brought in as a party defendant by the proper amendment, under the provisions of section 452 of the Code of Civil Procedure?"

MARTIN, J. The last question certified is not a question of law which this court can determine. There is a conflict in the affidavits as to the facts relating to the transaction out of which the debt of the defendant arose. Whether Delack had any interest in it was a question of fact to be determined by the Special Term upon the affidavits submitted. With that we cannot deal.

The only question before this court is whether, under section 452 of the Code of Civil Procedure, the Supreme Court had authority to compel the plaintiff to bring in as a defendant a third party upon his own application where only a money judgment is sought and no specific property is involved. The provision of the Code relied upon is as

follows: "And where a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment."

The purpose of this action was to recover a debt of the defendant to the plaintiff. The title to no real, specific or tangible personal property was involved. The claim of Delack was that by virtue of an agreement between himself and the plaintiff's assignor, he was entitled to one-half of the defendant's debt. Under these circumstances can it be said that Delack was so far interested in the subject of this action as to entitle him to be made a party upon his own application? If the principles stated in the opinion in Chapman v. Forbes (123 N. Y. 532) are still the law, that case is conclusive authority against the construction adopted by the courts below. It is, however, insisted that the doctrine of that case, so far as it relates to the question here presented, has been overruled, or at least modified to an extent which renders it inapplicable by the cases of Rosenberg v. Salomon (144 N. Y. 92) and Hilton Bridge Construction Co. v. N. Y. C. & H. R. R. R. Co. (145 N. Y. 390, 396). In the Rosenberg case the title to specific personal property was involved, which the plaintiff brought replevin to recover. The action was against the sheriff who had taken the property by virtue of an execution. It was there held that the judgment debtors had such an interest in the property as to authorize the court to allow them to come in and defend. The Hilton Bridge Company case was to foreclose a mechanic's lien, and it was held that it was an action in equity, and, consequently, under the doctrine of the Chapman case, section 452 conferred upon the court authority to bring in a third person upon his own application.

While it must be admitted that there were statements in the opinions in these cases which, if given full effect, might perhaps be regarded as a modification of the decision in the Chapman case, still, when we consider only the questions decided in those cases, they are not in conflict with the doctrine of that case. Moreover, it is evident that the court had no intention of overruling or modifying it, or to hold otherwise than that in an action at law, where the plaintiff seeks a money judgment only, he cannot be compelled to bring in parties other than those he has chosen. This case very well illustrates the effect of permitting parties to intervene in such actions. If Delack were permitted to become a party to the action, other issues than those involved between the plaintiff and the defendant would be presented. Instead of its being an action merely to determine whether the defendant was indebted to the plaintiff, and if so, the amount, it would be transformed into an action involving not only that issue, but the fraud of the plaintiff's assignor and in effect constitute an action to set aside a receipt or paper signed by Delack. We are of the opinion that section 452 furnishes no authority for such an order.

The order should be reversed, with costs; the first question certified answered in the negative, and the second, not being a question of law, should not be answered.

McCABE v. GOODFELLOW.
133 N. Y. 89.

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made July 7, 1891, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

This action was brought to recover for services alleged to have been rendered by plaintiff, as attorney for the Law

and Order League of the town of Kirkland, of which defendant was treasurer.

MAYNARD, J. This action must be upheld, if at all, under section 1919 of the Code of Civil Procedure, which provides that an action may be maintained against the president or treasurer of an unincorporated association consisting of seven or more persons, upon any cause of action for which the plaintiff might maintain such an action against all the associates by reason of their liability therefor, either jointly or severally. Under the subsequent sections of the Code (1921, 1922), the judgment recovered does not bind the property of the officer, and the execution issued must require the sheriff to satisfy it out of any personal property belonging to the association or owned jointly or in common by all the members thereof, but must omit any direction respecting real property.

Where such an action has been brought, another action for the same cause shall not be brought against the members of the association until the return unsatisfied, wholly or in part, of an execution upon a judgment against the officer. The plaintiff, however, is not bound to sue the officer, for section 1923 provides that he may, in the first instance, bring his action against all the members of the association. It will thus be seen that the right to maintain the action against the officer is conferred upon the plaintiff for his convenience and in order that he may more speedily reach the personal property of the association for the satisfaction of any judgment which he may recover. But the plaintiff cannot, in any case, maintain such an action against the officer, unless the debt, which he seeks to recover, is one upon which he could maintain an action against all the associates by reason of their liability therefor, either jointly or severally. This, therefore, is the test to be applied in the present case. The plaintiff must allege and prove, and

the court must find that all the members of the association were liable, either jointly or severally, to pay the plaintiff the amount of his claim, or the judgment in this action cannot stand.

The defendant was the treasurer of a Law and Order League, an association organized in and for the town of Kirkland, Oneida county, in December, 1886. It eventually consisted of two hundred and seventy members, of whom the plaintiff was one. It was formed pursuant to a resolution adopted at a public meeting of citizens, which declared that they voluntarily associated themselves together for the purpose of forming such a league, the object of which should be to give their personal and united influence, and, if need be, their material aid to assist the town and village officers in enforcing the excise and corporate laws. A constitution was at the same time adopted, to which each member subscribed his name, which stated that the object of the league should be to unite, as far as possible, all the orderly and law-abiding citizens of the town in giving moral support and aid in all proper ways to the village and town officers while in the discharge of their official duties, and to see that they were faithful in enforcing all village and town laws, and especially those intended to regulate the traffic in intoxicating drinks; and that the members of the league should consist, first, of all the members of the special or central committee composed of three persons appointed by each church and temperance society in the town and three members appointed by the league itself and, second, of all other persons willing to pledge themselves individually by signing the constitution, that they will give personal or material aid when needed to make effective the object of the league. * * *

The plaintiff, who is an attorney, sues for services rendered, as he alleges, in the prosecution of actions for penalties and in other legal proceedings brought and instituted

by the association and under an employment by them. The referee has found that the league, through its officers, duly authorized agents and committees, retained him to perform these services and to bring these actions, and that his services were of the value of $1,850, including necessary disbursements; that he has received on account thereof $175, leaving $1,680 due and payable, for which judgment is ordered. * * *

Granting that the members of the league had knowledge of the plaintiff's employment by their president, or by the general or executive committee and of the rendition of these services and ratified and approved of his retainer, it does not follow that they became personally obligated to pay them.

The record, we think, very clearly shows that they had no reason to suppose that the committee so employed the plaintiff upon their individual credit. On the contrary it fairly appears that they expected that his compensation, as well as the other expenses incurred by the officers and committees, were to be met by the funds voluntarily contributed for that purpose and placed at the disposal of the committees and that they did not intend there should be any debts contracted in excess of those funds.

The plaintiff, as a member of the organization, must have so understood it. His conversations with the president and the letters put in evidence upon the subject, all refer to the moneys subscribed or contributed, as affording the means out of which he was to be paid. Having, therefore, failed to establish the liability of his associates for the debt, upon which he brought his suit, the plaintiff was not entitled to recover.

Judgment reversed.

A member of a joint stock association may maintain an action against the treasurer of the association in his representative capacity. Saltsman v. Schults, 14 Hun, 256. In Burtis v. Cleveland, 61 Hun, 98, plaintiff in-

dividually and as executrix of Elizabeth Cleveland was permitted to bring an action for the foreclosure of a mortgage in which plaintiff as administratrix of James G. Cleveland, the deceased mortgagor, was a party defendant, on the ground that though a person cannot sue himself at common law, in equity this technicality does not stand in the way of justice, and the court will see to it that the accident of plaintiff's several capacites in no way sacrifices justice.

Schnaier v. Schmidt, 13 N. Y. Supp. 728, aff'd 128 N. Y. 683, was an action by one firm against another firm. Schmidt was a member of both firms and having refused to join as plaintiff it was held that the action might be maintained by the other partners as plaintiffs by naming Schmidt as a defendant only and alleging the facts of his common membership and refusal to join as plaintiff.

GITTLEMAN v. FELTMAN.

191 N. Y. 205.

APPEAL, by permission, from an order of the Appellate Division of the Supreme Court in the second judicial department, entered November 26, 1907, which affirmed an order of Special Term granting a motion for leave to amend the summons and complaint by bringing in an additional party defendant.

HAIGHT, J. This action was originally brought against Charles L. and Alfred Feltman, to recover damages for a personal injury, alleged to have been received by reason of the negligence of the defendants. The order appealed from permitted the plaintiff to bring in as an additional defendant the Surf Amusement Company, a corporation, which it is claimed was a joint tort feasor with the other defendants, and with them liable for the damages sustained by the plaintiff. It is the contention of the appellants that the court had no power to make such an order in an action of this character. The Appellate Divisions of the state appear to be in conflict upon the question. (Heffern v. Hunt, 8 App. Div. 585; Schun v. Brooklyn H. R. R. Co., 82 App. Div. 560; Goldstein v. Shapiro, 85 App. Div. 83; Horan v. Bruning, 116 App. Div. 482; Haskell v. Moran, 118 App. Div. 810.)

The provisions of the Code of Civil Procedure bearing upon the question are as follows:

Section 452. "The court may determine the controversy, as between the parties before it, where it can do so without prejudice to the rights of others, or by saving their rights; but where a complete determination of the controversy cannot be had without the presence of other parties, the court must direct them to be brought in. And where a person, not a party to the action, has an interest in the subject thereof, or in real property, the title to which may in any manner be affected by the judgment, or in real property for injury to which the complaint demands relief, and makes application to the court to be made a party, it must direct him to be brought in by the proper amendment."

Section 723. "The court may, upon the trial or at any other stage of the action, before or after judgment, in furtherance of justice, and on such terms as it deems just, amend any process, pleading, or other proceeding, by *adding* or *striking out* the name of a person as a party, or by correcting a mistake in the name of a party, or a mistake in any other respect, or by inserting an allegation material to the case," etc.

The rule of the common law that a statute in derogation of the common law must be strictly construed does not apply to the provisions of the Code of Civil Procedure. (§ 3345.) We are, therefore, called upon to give to the provisions referred to a fair and reasonable construction in accordance with the evident intent of the legislature. Undoubtedly the first subdivision of section 452, as originally enacted in section 122 of the Code of Procedure, had reference and pertained to equity actions; but when the legislature subsequently added the second subdivision to the section permitting a person, not a party, who has an interest in the subject of the action, or in real property, the title to which may be affected by the judgment, to make application

to be made a party and to be brought in by a proper amendment, it evidently intended, at least so far as that subdivision of the section was concerned, to apply to actions at law as well as in equity. This was expressly held in Rosenberg v. Salomon (144 N. Y. 92), but inasmuch as this provision of the Code pertains to the application of persons to be brought in and made parties to the action, it does not apply to the case which we have under consideration. We must, therefore, look to the provisions of section 723 for the purpose of determining the rights of the parties in this case. It will be observed that the provisions are very broad and cover precisely the question presented. The court may at any stage of the action, in furtherance of justice, on such terms as it deems just, amend any process or pleading by *adding* or *striking out* the name of a person as a party. There is nothing in the provisions of this section that we are able to discover, from a careful reading of its provisions, which indicates any legislative intent that its provisions should be limited to equity actions. It is rather apparent that they pertain to all actions, whether at law or in equity, in which such an amendment would be in the "furtherance of justice." It is quite true that an order should not be made permitting the striking out of a sole party and the substituting of another party in his place, for the effect would be to terminate the original action and bring a new one. (N. Y. State M. Milk Pan Assn. v. Remington Agr. Works, 89 N. Y. 22.) But in cases where an action may properly be brought against two or more defendants, who were claimed to be jointly liable, or jointly and severally liable upon the claim of the plaintiff, whether it be upon a contract or a tort, we see no reason why the provisions of the Code referred to do not apply to such a case, or why such persons in a proper case may not, in the discretion of the court, be brought in and made parties to the action upon such terms as it deems just. Of course, a

person should not be permitted to be brought in as a party defendant, who has no connection with the other defendants, with reference to the matter in controversy, for that would but render the complaint demurrable. The true test, doubtless, is as to whether the person could have been joined as a party at the commencement of the action, and whether the plaintiff has given a satisfactory excuse for his failure so to do. The only exception that now occurs to us is, in cases where the rights of the parties have changed after the bringing of the action by subsequent transactions, in which case the provisions of the Code with reference to supplemental amendments and pleadings would apply.

The questions certified in this case are:

First. "Should the motion of the plaintiff to bring in the Surf Amusement Company as a party defendant herein have been granted?"

Second. "Has the Supreme Court, upon the motion of the plaintiff, in an action to recover damages for personal injuries resulting from negligence, the *power* to bring in as defendant a party not named as a defendant at the time of the commencement of the action, against the objections of the defendants originally named and of the proposed new defendant?"

The granting of a motion of this character rests in the sound discretion of the court. It may grant, in the furtherance of justice, on such terms as it deems just. The jurisdiction of this court is limited to the review of questions of law, and it, therefore, cannot review the discretion of the Special Term or Appellate Division. We, therefore, have no power to answer the first question certified. The second question, however, is as to the power of the Supreme Court to grant the motion, which calls for an interpretation of the provisions of the Code referred to. With reference to this question we have the power to determine the same, and we think that it should be answered in the affirmative, and the order appealed from affirmed, with costs.

5. Persons Liable on Same Written Instrument. Code Civ. Proc., §§ 454–5.

CARMAN v. PLASS.
23 N. Y. 286.

The action was commenced in the City Court of Brooklyn, where the plaintiff complained against the defendant, Plass, as the lessee for years of certain premises, claiming to recover $116.66, being arrears of rent due and payable March 1, 1859. The lease was averred to be by indenture between the plaintiff, of the first part, the defendant Plass, of the second part, and the defendant Mix, of the third part, executed under the respective hands and seals of the parties, whereby Plass convenanted to pay the rent required; and it was alleged that the defendant Mix, by the same indenture, did, "in consideration of the premises, and of the sum of one dollar, guarantee unto the plaintiff the payment of the aforesaid rent and the faithful performance of the covenants in the said lease contained." The complaint further set forth that Plass had made default in the payment of rent, and that the plaintiff had notified Mix thereof, and that both defendants had failed to comply, etc. There was a general demand of judgment against both defendants.

The defendants demurred, on the ground that no cause of action against the defendants jointly was set forth in the complaint.

The City Court gave judgment in favor of the defendants; but it was reversed on appeal at a general term of the Supreme Court, and judgment was rendered in favor of the plaintiff. The defendants appealed to this court.

DENIO, J. This case comes precisely within the language of section 120 of the Code of Procedure, which provides that

"persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all, or any of them, be included in the same action, at the option of the plaintiff." I see no reason to doubt that it is likewise within the meaning and intention of the enactment. It relates expressly to several, and not to joint liabilities. The latter did not require the aid of a special provision; for a plurality of joint contractors always could be, and generally were required to be, sued together; and provision was made in the act concerning joint debtors, for omitting to serve process on all, if the creditor should so elect. But, though this were otherwise, the provision in question relates, in terms, to cases where a plurality of persons contract several obligations in the same instrument. That was the case here. It may be said that the cause of action is not, in this case, precisely the same against both the defendants. The lessee engaged to pay the rent unconditionally, and the surety was under no obligation until the principal had made default. But, after such default, each of them was liable for the same precise amount absolutely. They were, therefore, within the language which speaks of persons severally liable upon the same instrument. If this were otherwise doubtful, the reference to suits upon bills of exchange and promissory notes makes it entirely certain that the present case was one of those in the contemplation of the authors of the section. The parties to such paper are included in the provision. The indorsee of a bill or note, and the drawer of an accepted bill, are only liable contingently, and after being charged upon a default of the maker or acceptor. They were included in the scope of the enactment, because, though, in a general sense, parties to the paper on which their names are placed, they are not parties to the obligation, or instrument, in the same strict sense as the surety in the case under consideration. No doubt, a pretty radical

innovation upon the common-law system of pleading was made when, by the act of 1832 (p. 489, § 1), the several obligations of parties to a bill or note were allowed to be enforced in a single action. But this had become familiar law when the Code was written, and it seems then to have been considered that the principle might be usefully extended to cases like the present; and the section referred to appears to me to have been framed for that purpose. I am not able to entertain any doubt respecting the correctness of the judgment of the Supreme Court. In the cases from 11 Howard's Practice Reports, 218, and from 10 Barbour, 638, to which we have been referred, the separate undertaking of the surety was contained in a different instrument, and it was held that he could not be joined as a defendant in an action against the principal. It was assumed by the court that, in a case like the present, where both parties were bound by the same instrument, the statute would apply.

Judgment affirmed.

On an insurance policy wherein several underwriters become liable severally for the full amount section 454 allows them to be joined as defendants (Isear v. Daynes, 1 App. Div. 557) but where they are bound "each one for his own part only of the whole amount herein assured" they become severally liable each for his own part only and they are not all liable upon the "same written instrument" but only upon similar causes of action (Straus v. Hoadley, 23 App. Div. 360).

6. Poor Persons. Code Civ. Pro., § 458–67.

FEIER v. THIRD AVE. R. CO.
9 App. Div. 607.

Appeal by the plaintiff, Augusta Feier, an infant, by Harry Levy, her guardian *ad litem,* from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York

on the 16th day of April, 1896, denying her motion for leave to sue as a poor person.

The petition upon which the application was made was as follows:

"I. That she is an infant over the age of fourteen years, to wit, nineteen years of age.

"II. That she appears by Harry Levy, her guardian *ad litem* herein.

"III. That the parents of your petitioner reside in Europe, and that your petitioner is employed as a domestic by the said Harry Levy, her guardian *ad litem,* and that he is not related to her.

"IV. That this action was commenced on or about the 24th day of February, 1896, by the service of a summons on the defendant. That thereafter the said defendant appeared herein by Messrs. Hoadly, Lauterbach & Johnson, its attorneys and the complaint herein was served on said defendant's attorneys on or about March 10, 1896, and defendant's answer was served on the plaintiff's attorneys on or about March 20, 1896. The said action was brought by your petitioner to recover the sum of $5,000, because of the injuries received by the plaintiff by reason of the negligence of the defendant and his servants, said negligence consisting in the defendant's careless and negligent management of one of its cars, thereby causing this plaintiff to sustain severe injuries, and perhaps permanently incapacitate her, and that said injuries were caused without any negligence on the part of this plaintiff.

"V. That the plaintiff is nineteen years of age, and is not worth the sum of $100, besides wearing apparel, and the subject-matter of this action; that, in fact, your petitioner has no means whatever.

"VI. That your petitioner is informed by her counsel, Messrs. Wahle & Stone, and verily believes, that a motion has been made herein to compel your petitioner's guardian

ad litem to file security for costs, and said motion is returnable in this court on or about the 14th day of April, 1896.

"VII. That your petitioner's guardian, Harry Levy, is in the cigar business, and, as already stated, is not related to her, and while deponent believes that he is a competent person and has the best interest of your petitioner at heart, your petitioner sees no method of compensating him, in the event that she should not succeed in this action; and in view of the fact that she works for the said Harry Levy as a domestic at a salary of $15 per month, your petitioner will be unable to furnish the security demanded, and will be unable to conduct this action if any bond is required from her guardian, in accordance with the motion which has been made herein."

BARRETT, J. The plaintiff's papers are in strict accordance with the provisions of sections 458 and 459 of the Code of Civil Procedure. She could say no more to invoke judicial action than she has said in these papers. No more could well be said.

The defendant filed no affidavits in opposition. If, therefore, her motion was properly denied, it is difficult to conceive of a case where an infant pauper may avail herself of the law which was expressly enacted for the benefit of her class. Prior to the amendment of 1891 there was a conflict of judicial opinion with regard to the right of infant paupers to sue as poor persons. In some cases it was held that where an infant sues by guardian *ad litem,* security for costs being a statutory right, the court had no power to destroy it by allowing the guardian to sue as a poor person. These cases were subsequently overruled. But it was to settle these and all other questions upon the subject, that the amendment of 1891 was enacted. That amendment consisted of the insertion in section 458 of the words "whether an adult or infant," and of the provision in section 459,

that where the applicant is an infant under the age of fourteen years, the petition must be verified by his *guardian appointed in the action.*

Now, as an infant, whether under or over fourteen years of age, cannot apply until a guardian *ad litem* is appointed (Matter of Byrne, 1 Edw. Ch. 41; Glasberg v. Dry Dock, E. B. & B. R. R. Co., 12 Civ. Proc. Rep. 50, per Patterson, J.), and as such guardian *ad litem* must, under the General Rules of Practice, be a competent and responsible person, the statute is practically abrogated if the competency and responsibility of the guardian constitute a complete answer to the application.

The infant here says, without a word of denial, that she has no means whatever; that she has a good cause of action against the defendant; and that she is a hired domestic in her guardian's service. What was the court's answer? It was this — though you are an infant pauper you shall not have the benefit of the statute because you have a responsible guardian. This responsible guardian you had to secure before you commenced your action. Having secured him you are no longer within the statute, or rather it is no abuse of discretion to deny your petition. This reasoning seems to be practically to nullify the amendment and to leave infant paupers in quite as unfortunate a position as they were in before the Legislature sought to help them.

The order appealed from should be reversed, with ten dollars costs and disbursements of the appeal, and the motion for leave to sue in *forma pauperis* granted.

MAX WEINSTEIN, an Infant, by SAMUEL WEINSTEIN, his Guardian Ad Litem, Respondent, v. MOE FRANK, Defendant, and NICHOLAS SCHNEPP, Appellant.

56 App. Div. 275.

Appeal by the defendant, Nicholas Schnepp, from an order of the Supreme Court, made at the New York Special

Term and entered in the office of the clerk of the county of New York on the 11th day of October, 1900, vacating an order which required the plaintiff to give security for costs, and granting leave to the plaintiff to sue as a poor person.

Per Curiam: It does not seem that a proper case was made out for granting an order for leave to sue as a poor person. The granting of the order is discretionary, and is intended to permit persons to bring suit who would be without remedy if they were to be compelled to pay the ordinary disbursements of an action because on account of poverty they would be unable to meet the same. It is not every person who does not own $100 of property that is entitled to the order, but only those who otherwise would be unable to prosecute their action. If the rule which has obtained in the granting of the order to sue as a poor person in this action was followed, then every infant would be entitled, as a matter of right, to the order. In order to entitle the party to this order it must appear that the petitioner is so situated that he will be unable to present his case to the court unless the order is granted. This is evident from the fact that the court is required to assign an attorney and counsel to prosecute the action, who must act without compensation. The recovery of the infant cannot be charged with any of the expenses of the action or its prosecution. This provison seems to have been thought a safeguard against the prosecution of speculative claims under the shelter of these orders. In order to make this provision effective it should also be made to appear that the guardian of the infant or the poor person is fully aware of the condition of the order as to compensation, and that nothing is to be paid as compensation to attorney or counsel; that all such services are to be rendered gratuitously.

Furthermore, the papers upon which the order was granted are deficient in not showing to the court that the

petitioner had a good cause of action. Mere advice of counsel, although a certificate of counsel to that effect is required, is entirely insufficient for the purpose. The court must, among other things, be satisfied that the applicant has a *good* cause of action. The court can only be satisfied of this fact when the applicant sets forth facts upon which it may base its satisfaction. The mere opinion of an attorney is no evidence upon which the court can arrive at a conclusion.

The order appealed from, so far as it allows the plaintiff to sue as a poor person, should be reversed, without costs, and the motion denied.

Downs v. Farley, 18 Abb. N. C. 464.

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7. Infant Parties. §§ 468–77, 1218, 1283, 1290–1, 1535, 1744, Gen. Rule 49, 50 and 51.

RIMA v. R. I. WORKS.
120 N. Y. 433.

APPEAL from the judgment of the General Term of the Supreme Court in the fourth judicial department, entered upon an order made January 10, 1888, which affirmed a judgment in favor of plaintiff entered upon a verdict, and also affirmed two orders, one denying a motion for a new trial and the other appointing a special guardian of the plaintiff.

This was an action to recover damages for personal injuries sustained by the plaintiff through the alleged negligence of the defendant.

VANN, J. The trial of this action was commenced on the 23d of September, 1886, and during its progress it appeared by the cross-examination of the plaintiff that he was

an infant, and that he would not be twenty-one years of age until the third of the following month. The defendant was ignorant of this fact on the 16th of June, 1886, when the action was commenced, and did not hear of it until two days before the commencement of the trial. At the close of the evidence a motion was made for a nonsuit upon the ground, among others, that the plaintiff, although under age, was prosecuting the action without a guardian *ad litem,* whereupon an application was made to the court for the appointment of a guardian *nunc pro tunc.* The application was granted, and before the case was submitted to the jury, an order was entered in the minutes of the court, which, after reciting the substance of the affidavit upon which it was founded, appointed a guardian *ad litem* "for said infant plaintiff for the purposes of this action," and provided "that all pleadings herein be amended accordingly." It was further directed that the order "be and hereby is entered as of a date previous to the service of the summons herein." The defendant insists that the court had no power to make said order and that the motion to nonsuit should have been granted. The question is also raised by a direct appeal from the order as made.

The Code of Civil Procedure provides that where an infant has a right of action, he is entitled to maintain an action thereon; that the same shall not be deferred or delayed on account of his infancy, but that before a summons is issued in his name, a competent and responsible person, who shall be responsible for the costs, must be appointed to appear as his guardian for the purpose of the action. (§§ 468, 469.) The corresponding section of the Code of Procedure provided that "when an infant is a party he must appear by guardian." (§ 115.) These sections had their origin in the Revised Statutes, which declared that when an infant had a right of action to recover real property or the possession thereof, or to recover any debt

or damages, he should be entitled to maintain a suit thereon, and that the same should not be deferred or delayed on account of such infant not being of full age, but required that a competent and responsible person should be "appointed to appear as next friend for such infant" before any process should be issued in his name. (2 R. S. (3d ed.) 542, §§ 1, 2.) Thus it appears that for many years a statute, mandatory in form, has required the appointment of a guardian or next friend before process could be issued in the name of an infant plaintiff. The decisions, under these statutes, have held, almost without exception, that the omission to appoint a special representative of the infant was an irregularity only, and that it did not affect the jurisdiction of the court. Thus, in Fellows v. Niver (18 Wend. 563, 564), which arose while the Revised Statutes were in force, the court said: "It is a question of regularity merely, not, as defendant's counsel supposes, a question of jurisdiction."

In Rutter v. Puckhofer (9 Bosw. 638), decided under the Code of Procedure, it was declared that "the learned judge who granted the motion erred in deciding that this was a jurisdictional question. The court had jurisdiction of the parties and of the subject of the action, and the omission, therefore, to procure the appointment of a guardian was an irregularity, which might be cured or waived." * * *

We think that it should now be regarded as settled that the failure to appoint a guardian *ad litem* for an infant plaintiff affects the regularity of procedure, but not the jurisdiction of the court. This seems to have been the theory of the legislature in enacting title one of chapter eight of the Code of Civil Procedure, entitled "Mistakes, omissions, defects and irregularities." This article provides that where a verdict has been rendered, the judgment shall not be stayed, impaired or affected by reason of "the appearance, by attorney, of an infant party," if the verdict

or judgment is in his favor, and confers ample power upon courts of record to afford relief against irregularities of every nature, unless it should be contrary to the right and justice of the matter or should alter the issue between the parties. (Code Civ. Pro., §§ 721–725.)

The order complained of was, therefore, within the sound discretion of the court, and we think that, under the circumstances, the power conferred by the statute was discreetly exercised.

Judgment and orders affirmed.

But see Ingersoll v. Mangam, p. 29, *supra*. Though an action may be brought for an infant by his general guardian, it is the theory of the Code and the general practice to bring the action in the name of the infant by his guardian ad litem. See Van Zandt v. Grant, 175 N. Y. 150.

WILEMAN v. MET. ST. R. CO.

80 App. Div. 53.

McLaughlin, J. There is no dispute as to the facts involved in this appeal. They are, so far as the same are material, as follows: The plaintiff, through her guardian *ad litem,* brought this action to recover damages for personal injuries alleged to have been sustained through the negligence of the defendant. She recovered a judgment for a substantial amount, which was affirmed on appeal to this court. Thereafter, the guardian *ad litem,* through her attorney, asked the defendant to pay the amount of the judgment which it was ready and offered to do, provided the guardian *ad litem* would file the security required by section 474 of the Code of Civil Procedure, and rule 41 of the General Rules of Practice. This the attorney refused to do, notwithstanding he admitted no such security had been filed, and he immediately issued an execution upon the judgment to the sheriff of New York county. The defend-

ant thereupon made a motion to vacate and set aside the execution, or for leave to pay the money into court. The motion was denied, and from that order defendant appeals.

I am of the opinion that this order should be reversed. Section 474 of the Code of Civil Procedure provides that "except in a case where it is otherwise specially prescribed by law, a guardian appointed for an infant, as prescribed in this article, shall not be permitted to receive money or property of the infant, * * * until he has given sufficient security approved by a judge of the court, or a county judge, to account for and apply the same under the direction of the court." And to the same effect is rule 51 of the General Rules of Practice.

Here, it is conceded that the guardian *ad litem* had not given the security required by law, and that fact was known to the defendant when it was asked to pay the judgment. She was not, therefore, authorized to receive the amount of, or to satisfy the judgment, and a payment of it would not have protected the defendant. (Wuesthoff v. Germania Life Ins. Co., 107 N. Y. 580; Clambacher v. Neuman, 28 Abb. N. C. 156.) An attorney has no more authority or power than his client. Here, the guardian *ad litem* being prohibited from receiving the amount of the judgment, her attorney was also prohibited from receiving it, and this seems to be conceded. Both of them being unauthorized to receive the amount of the judgment, it seems to me to necessarily follow, under the provision of the Code referred to, that neither of them could take a single step towards enforcing the collection of the judgment, either by execution or otherwise, until the security had been given as provided in that section. The power to act at all in this respect depended upon the security given. This was a necessary prerequisite to the exercise of any power whatever.

Order reversed and motion granted.

PARISH v. PARISH.
175 N. Y. 181.

APPEAL from an order of the Appellate Division which reversed an order of Special Term denying the application of the purchaser at a partition sale to be relieved from his purchase.

CULLEN, J. The order of the Appellate Division is appealable to this court. This has been so held in three recent cases. (Holme v. Stewart, 155 N. Y. 695; Kingsland v. Fuller, 157 N. Y. 507; Merges v. Ringler, 158 N. Y. 701.) An application to compel a purchaser to take title and that of a purchaser to be relieved from his bid are regarded as special proceedings. When the applications involve questions of fact or the exercise of discretion, the determination of such questions cannot be reviewed here; but when they present solely questions of law their examination is open to this court; * * *

In the case before us the application was made in an action for a partition of certain real property which came to the parties through the will of their ancestor, Daniel Parish. A number of the defendants were infants. Guardians *ad litem* were appointed for these infants either on their application or on that of their parents, in no instance on the application of the plaintiff. An interlocutory judgment was rendered declaring the interest and title of the parties and directing a sale of the premises. The sale was had at which the respondent became the purchaser and final judgment was entered in the action confirming the sale. The respondent raised two objections to the title, on the strength of which he asked to be relieved from his purchase. First, that certain of the guardians *ad litem* were appointed in violation of rule 49 of the Supreme Court, which provides that "no person shall be appointed guardian *ad litem*" who is "connected in business with the attorney or counsel of the adverse party." * * *

It appears by the opinion rendered that the first was the ground on which the decision of the court below proceeded. It may be assumed that as to certain of the guardians, the affidavits show that their appointments were made in violation of the rule, and it may also be conceded that the proper interpretation of those rules should largely rest in the judgment of that court by which they were formulated. Hence, had the court below on a direct application to vacate the orders appointing those guardians, or on an appeal from those orders, set the appointments aside, we should in no way have interfered with their determination. But the question presented on this application is of an entirely different character. It is how far the title of a purchaser is affected by the erroneous action of the trial court in misinterpreting or failing to comply with the rules of the court in the appointment of a guardian *ad litem* where the proceedings on their face appear to be entirely regular. Doubtless it was the duty of the trial court to appoint as guardian for each of the infants a person competent to protect his interests and not connected with the attorney or counsel for the adverse party. But who was to determine these facts and qualifications? Plainly, the court to whom the application was made. The order of the court appointing the guardians *ad litem* recites that it satisfactorily appears to the court that the person appointed had no interest adverse to that of the infant defendants and that he was not in business with the attorney or counsel for the plaintiffs or any adverse party. If the court erred in this determination it did not deprive the court of jurisdiction or render the judgment voidable, but, like any other error, was to be corrected only by direct attack, that is to say, by appeal or by motion to set the order aside. The parties are also concluded by the final judgment which confirmed the sale. Two recent decisions of this court we think are decisive of the question that has been discussed. In Corbin v. Baker (167 N. Y. 128) a trustee became the purchaser at a partition

sale. It was held that the final judgment confirming the sale precluded the title of the purchaser from being subsequently impeached on the ground of his fiduciary relations to the infant parties. In Sproule v. Davies (171 N. Y. 277) the judgment, in violation of the statute prescribing that such sale should be made by the sheriff of the county, directed the execution of a foreclosure sale by a referee therein named. It was held that this irregularity did not affect the title of the purchaser and he was required to complete his purchase.

The order of the Appellate Division should be reversed and that of the Special Term affirmed.

BYRNES v. BYRNES.

109 App. Div. 535.

McLaughlin, J. The parties hereto were married in 1902, and this action was brought to procure a judgment of separation.

The answer set up a counterclaim and asked for the same relief as that demanded in the complaint. The issues were sent to a referee to hear and determine, who, after a trial, had found in favor of the defendant and upon his report, on the 13th of November, 1903, a final judgment of separation was entered. At the time the judgment was entered the plaintiff was under twenty-one years of age, and a guardian *ad litem* had not been appointed for her in the action. Upon this ground, on the 14th of April, 1905, by an order to show cause, she moved to vacate the judgment. The motion was granted and defendant has appealed.

The material facts upon which the plaintiff based her motion to have the judgment vacated were not denied, viz., that she was born on the 5th of January, 1883; that the judgment was entered November 13, 1903; that she did not become twenty-one years of age until the 5th of January, 1904, and that the motion to vacate was made April 14, 1905.

The appellant contends that the failure to have a guardian *ad litem* appointed was, at most, an irregularity, and, therefore, inasmuch as the respondent did not move within one year after she became twenty-one years of age, the judgment could not, under section 1282 of the Code of Civil Procedure, be set aside.

I am of the opinion that it was more than an irregularity. It was an "error in fact not arising upon the trial" (Maynard v. Downer, 13 Wend. 575; Camp v. Bennett, 16 id. 48; Arnold v. Sandford, 14 Johns. 417; Peck v. Coler, 20 Hun, 534), and, therefore, under sections 1283 and 1290 of the Code of Civil Procedure, a motion to vacate the judgment could be made at any time within two years from the date of its entry.

Sections 1290 and 1291 of the Code of Civil Procedure provide that if the person against whom the judgment is rendered is within the age of twenty-one years at the time of its entry, the time of such disability is not counted as a part of the time limited for the commencement of the proceeding for relief, except that such disability can in no case extend the time beyond five years or more than one year after such disability ceases. Relief from judgments taken against minors for errors of fact not arising upon the trial must be applied for within one year after the minor reaches his majority, provided the two year's limitation has then expired. (Matter of Tilden, 98 N. Y. 434, 443.)

Here the motion to vacate the judgment was made within two years from the time of its entry, and within the time prescribed in the sections of the Code cited. This being so, there was nothing for the court to do but grant the motion. The application is only to vacate the judgment, and, therefore, we do not decide the effect of vacating the judgment or the infancy of the plaintiff upon the other proceedings had in the action.

Order affirmed.

CHAPTER III.

PLEADING.

1. Complaint. Code Civ. Pro., §§ 22, 478–481, 519–520, 530–536, 1207, 1775. Gen. Rule 19.

STEVENS v. THE MAYOR.
84 N. Y. 296.

DANFORTH, J. The names of actions no longer exist, but we retain in fact the action at law and the suit in equity. The pleader need not declare that his complaint is in either; it is only necessary that it should contain facts constituting a cause of action, and if these facts are such as at the common law his client would have been entitled to judgment, he will, under the Code, obtain it. If on the other hand they establish a title to some equitable interposition or aid from the court, it will be given by judgment in the same manner as it would formerly have been granted by decree. So the complaint may be framed with a double aspect (Wheelock v. Lee, 74 N. Y. 500); but in every case the judgment sought must be warranted by the facts stated. For as was said in Dobson v. Pearce (12 N. Y. 156), "the question is, ought the plaintiff to recover," or as in Crary v. Goodman (Id. 266), "whether according to the whole law of the land applicable to the case the plaintiff makes out the right which he seeks to establish?" It is only when he fails in doing this that he can be treated as one making a false clamor. But, notwithstanding the liberality of the law which permits this construction, the plaintiff can have no relief that is not "consistent with the case made by his

complaint and embraced within the issue." (Code, § 275.) He must, therefore, establish his allegations, and if they warrant legal relief only, he cannot have equitable relief upon the evidence. He must bring his case within the allegations as well as within the proof. And, notwithstanding the very learned and extended arguments advanced upon this appeal, we think the case must be decided upon the application of these rules. First, it is quite evident that the plaintiff at the outset, and before commencing his action, conceived himself entitled to damages and nothing else. For in compliance with the statute in that respect he gave notice of his claim to the Comptroller and demanded "payment of the sum of $200,000 as damages for the fraudulent obtaining and using of the deed or release," mentioned in the complaint. This being refused and action commenced, the allegations in the complaint are to the same effect. They describe the property conveyed by the deed and characterizing the application for it as fraudulent, declare that at that time the defendant was informed the property belonged to Miner; that he was ignorant thereof, and that the defendant fraudulently and with intent to deceive and defraud the plaintiff out of his aforesaid property fraudulently kept concealed from the plaintiff "the fact of the opening of Seventy-eighth street, and also the fact of the closing of" a certain other street (both material to his title); that at the same time it falsely informed and represented to him that he had some slight claim to the said street, but that it was a mere equitable claim and of no value; that misled, deceived and induced by such fraudulent concealment, and such false and fraudulent statements and misrepresentations as to the said property, his interest therein and the value thereof, and believing the same to be true and relying thereon, and without consideration, he executed and delivered to the defendant the said deed or release; that his interest so conveyed was worth $200,000, and for that sum judgment is demanded. If these allega-

tions were admitted to be true, or the defendant failed to answer, the plaintiff would be entitled to recover, and the only proceedings consequent on such admission would be an assessment of damages. But so far from that, the defendant answered and by denial took issue upon the averments. For the trial of the issues so formed a jury was the appropriate tribunal, and we find that it was resorted to. Except by consent of both parties it must have been again sought; but such consent was given and we have now before us the proceedings upon a trial before a referee. His decision is to be treated like the verdict of a jury, and upon every issue he has found in favor of the defendant. He finds there was no fraud practiced, no fraudulent contrivance or concealment, no fraudulent intent on the part of the defendant or its agents. Besides this, actual good faith is established.

The whole assumed cause of action is, therefore, taken away. Indeed it is shown to have had no existence. * * * In view of the appellant's position, that the case presented matters of equitable cognizance, it may be not improper to state that it seems to us far from clear that the circumstances are such as to require the strictness of the common law to be abated, or that upon pleadings, however framed, the plaintiff could recover. There was actual possession of the land by other parties, and as it now seems, equities affecting the conscience of the intestate, if they did not the title, and these circumstances may have led to that prompt and almost eager compliance with the defendant's application, which is now relied upon as the result of fraud or imbecility. But without regard to such considerations and upon the ground before stated, we think that the appeal is not sustained, and that the judgment should be affirmed.

Bush v. Prosser, 11 N. Y. 351. From opinion: "Two objects of reference were made prominent in the changes made in the forms of pleading by the Code. One was the introduction of verity into the pleadings, by providing, in effect, that parties, in their allegations, should have the same regard to truth that prevails between members of society, in

their daily communications with each other: that they should not, willingly, and certainly not, by compulsion, spread a falsehood upon the record; that a defendant should not be driven, or permitted even, falsely to allege a full defense, to the end that he might prove a partial defense. Another was, that the pleadings should inform the court and the adverse party of the facts alleged in support or defense of the action, and to which evidence was to be given; and hence common counts, general issues and all fictitious pleadings, were abolished. One alleged objection to the old forms of pleading was, that the record did not necessarily disclose the true questions of fact at issue, and which were to be tried."

LINDEN v. HEPBURN.

3 SANDF. 668.

This case came before the court on two appeals taken by the defendants, one from an order at chambers granting a motion for an injunction, the other from a judgment at the Special Term overruling a demurrer to the complaint.

The complaint made the following case. James H. Roosevelt leased to A. and F. Roux, the houses and lots, 478 and 480 Broadway, in the city of New York, for eight years from May 1, 1845. The lease provided, that if the rent should be unpaid, or default be made in any of the lessee's covenants, the lessor might re-enter. The lease was declared to be on the express condition, that the premises were to be occupied and used only as a dwelling and cabinet-maker's shop and warerooms, except that the basements on Broadway might be let to trades not noisy, but not for billiards, tenpins, etc.; that no persons, furniture, etc., should be placed or go on the roofs of the Broadway houses; that no projecting signs should be put up, nor any awnings or posts; and that no alteration should be made in the buildings without the lessor's written consent.

In March, 1848, A. and F. Roux transferred the lease to the plaintiffs, who in the same month demised to the defendant West, for five years from May 1, 1848, the whole of 480 Broadway, except the front basement and a room adjoining it, subject to all the covenants and conditions con-

tained in the original lease. West covenanted to observe and fulfill the same, and his lease contained a provision that the plaintiffs might re-enter if any default should be made in any of the covenants therein contained. The rent was payable by West to the plaintiff. West entered, and is in possession of part of the tenement so underlet and Hepburn and Wills are in possession of the residue, under West.

West and the other defendants, have broken the covenants of the lease and conditions in all the four particulars before mentioned. They are using the premises for the retailing of liquors, etc., have kept furniture on the roof, put up projecting signs, and made unauthorized alterations in the buildings. By reason of which the lease to West has become forfeited, and the plaintiffs are entitled to re-enter.

The complaint prayed for judgment to that effect, and that the defendants might be removed from the premises and the plaintiffs put in possession. And that the defendants might be enjoined from using the premises in the manner complained of, and from violating the covenants and conditions in Roosevelt's lease.

The plaintiffs moved for an injunction, which was granted, after argument, so far as to restrain several of the inhibited uses of the premises. The defendants demurred to the complaint, and the court, at Special Term, overruled the demurrer.

By the Court. SANDFORD, J. The only ground presented by the demurrer which required any serious consideration, is that no right of entry exists in the plaintiffs; that the lease executed by them to West, operated as an assignment of the original lease, *pro tanto,* and there being no reversionary interest in the plaintiffs, they cannot recover.

Whatever the effect of this lease might be, as between West and the original lessor of the demised premises, we have no doubt that as between West and the plaintiffs, it is to be regarded as a sublease, and not as an assignment of the original term. The right to re-enter was reserved to

the plaintiffs, and this suffices to enable them to enter for breach of the conditions, although there be no reversion remaining in them. (Doe ex dem. Freeman v. Bateman, 2 B. & Al. 168.) And see Kearney v. Post, 1 Sandf. 105; affd. on appeal, 2 Comst. 394. The judgment for the plaintiffs on the demurrer, must be affirmed, with costs.

On the appeal from the order granting the injunction, a different question arises. The complaint, after setting forth the violations of covenants and conditions for which the plaintiffs seek to recover, prays for a judgment of forfeiture of the term of years, that the defendants be for that cause dispossessed, and that the plaintiff be put into possession of the premises. It then prays for an injunction, to restrain the defendants from making alterations in the buildings, and from using them for retailing liquors and in other modes prohibited by the covenants in the lease.

The forfeiture and re-entry prayed, are the relief heretofore granted in the action of ejectment brought for the recovery of demised premises. The injunction asked, is purely equitable relief, heretofore given in a chancery suit, and in conformity to the principles of equity. The ejectment brought to effect a re-entry for breaches of the condition in a lease, has always been regarded in the law as a hard action, one *strictissimi juris;* and the English chancery reports abound in cases in which the courts of equity have been importuned to relieve tenants against the forfeitures claimed in such actions. A proceeding like that before us, would never have been thought of under the system of remedies in force prior to the Code of Procedure. Equity abhors forfeitures, and always relieves against them when possible to do so; and no man would have ventured, under that system, to ask her for one of her most benign remedies, while in the same breath he demanded from her a vigorous forfeiture of his opponent's estate in the subject of the controversy.

Does the Code of Procedure make any change in this respect? Can a plaintiff, under the Code, ask for equitable relief, and in the same suit, demand a forfeiture? We are clear, that the Code has not altered the rule. It has abolished the distinction between legal and equitable remedies; but it has not changed the inherent difference between legal and equitable relief. Under the Code, the proper relief, whether legal or equitable, will be administered in the same form of proceeding. In some cases, alternative relief may be prayed, and relief be granted, in one or the other form, in which cases an action at law was necessary before to attain the one form, and a bill in equity to reach the other. A suit for specific performance is one of that description. But we think inconsistent relief can be no more asked now than it could be under the old system. A vendor cannot now exhibit a complaint, demanding payment of an instalment of purchase-money in arrear, and also a forfeiture of the contract of sale and restoration of possession; even if the contract expressly provided for such payment and forfeiture.

There can be no better illustration of our meaning than this very case. The forfeiture of the term, is a relief totally inconsistent with any equitable remedy. The lessor may pursue his remedy for a re-entry and possession; or he may proceed for an injunction and damages, leaving the tenant in possession. He has an undoubted option to do either. He cannot do both at once.

"He that seeks equity, must do equity," is a maxim which lies at the foundation of equity jurisprudence; and it is not at all affected by any change of remedies. We imagine that a much broader effect has been claimed for the violation of the distinction between legal and equitable remedies, than was ever intended by the Legislature. The first section of the Code, shows what was intended by the word *remedies*. It is limited to actions and special proceedings,

and the declared object of the preamble to the Code, is, simply to abolish the distinction between legal and equitable actions. There is no ground for supposing that there was any design to abolish the distinction between the modes of relief known to the law as legal and equitable, or to substitute the one for the other, in any case. Those modes of relief, the judgment or the decree, to which a party upon a certain state of facts, was entitled, were fixed by the law of the land. No inference or deduction from a statute, nothing short of a positive enactment by the Legislature could change them. The Code contains no such enactment, and we repeat that we do not perceive in it any countenance for an inference or deduction to that effect.

The chapter of the Code relative to injunctions, in our judgment, does not affect the question. It substitutes an order for the writ heretofore used, and it defines the cases in which it may be granted, the latter being the same substantially as were established in our court of chancery. It does not profess to create a new remedy. On the contrary it recognizes the injunction as an existing provisional remedy, provides the order in place of the writ, and regulates the mode of granting it. Its character as a mode of equitable relief is not at all altered or impaired.

Our conclusion is, that the plaintiffs had no right to an injunction, while they demanded a forfeiture of the lease. As the case made by the complaint would entitle them to an injunction if their relief had been limited to that remedy together with damages, we will permit the injunction to stand, on their stipulating not to take judgment for a forfeiture or delivery of possession of the premises. And they may amend their complaint so as to ask for damages.

Unless they thus stipulate, the order for the injunction must be reversed.

ROSS v. MATHER.
51 N. Y. 108.

APPEAL from judgment of the General Term of the Supreme Court in the seventh judicial district, in favor of plaintiff, entered upon an order denying motion for a new trial, and directing judgment upon verdict.

The action was brought to recover damages upon sale of a horse.

The summons in this case stated that the plaintiff would apply to the court for the relief demanded in the complaint.

The complaint alleged in substance the sale of a horse by the defendant to the plaintiff, which was lame in one hind leg; that on the sale the defendant warranted, and falsely and fraudulently represented, that the lameness resulted from an injury to his foot; that it was in his foot, and nowhere else; when his foot grew out that he would be well, and that he had only been lame for two weeks; that the plaintiff, relying upon this warranty and representations, and believing them to be true, purchased and paid for the horse. It was further alleged that at the time of this warranty, and false and fraudulent representations, the horse was not lame in his foot, but in his gambrel joint, which had been for more than two weeks badly diseased, and from which his lameness originated, which the plaintiff, at the time of the sale and of making such warranty and representations, well knew; that the horse was of little value; and that by means of the premises the defendant falsely and fraudulently deceived him in the sale of the horse to the damage of $500; and he demanded judgment for $500 and costs.

The answer admitted the sale of the horse and the payment of the price, and denied all the other allegations of the complaint.

On the trial the plaintiff stated that he expected to prove a warranty only; that he did not expect to prove any false

or fraudulent representations, or that the defendant intended to deceive or did knowingly or fraudulently deceive the plaintiff, and that he should only claim to recover damages for a breach of the contract of warranty.

The defendant then moved that the plaintiff be nonsuited, on the ground that the cause of action stated in the complaint is for fraud and deceit, and not for breach of a contract of warranty. The judge denied this motion and the defendant excepted. A cause of action upon a warranty was then proven, but no evidence was given tending to prove fraud or any intention to deceive. The defendant then renewed his motion for a nonsuit upon the grounds before stated, which was denied, and he excepted. Exceptions were ordered to be heard at first instance at General Term.

Hunt, C. The complaint contains all the elements of a complaint for a fraud. It must be held to be such unless the distinction between the two forms of action is at an end. While it contains all that is necessary to authorize a recovery upon a contract, it contains much more. These additional allegations are so important and are stated in a manner so logical and orderly, that they determine the character of the action. In addition to what is necessary to sustain an action upon contract, the complaint alleges: 1. That the defendant "fraudulently represented" that the lameness arose from an injury to his foot, and was temporary only. 2. That the plaintiff relied upon the warranty not only, but upon said representations, and believing them to be true, made the purchase. 3. That at the time of the warranty not only, but of the false and fraudulent representations, the horse was lame in his gambrel joint and not in his foot. 4. That at the time of making the false and fraudulent representations, the defendant well knew that the lameness was not in the hind foot, but was in the gambrel joint, which had been diseased for more than two

weeks, which was also well known to the defendant. 5. That by means of the premises, the defendant falsely and fraudulently deceived the plaintiff in the sale of the horse, to his damage of $500.

No allegations could have been inserted which would have more clearly constituted a case of fraud. That there was a warranty as well as representations, or that both are alleged to have existed, does not alter the case. Fraud may be based upon a warranty or upon representations, or upon both together. They may exist severally or together, and either or both may be the subject of fraud, and of an action for damages for fraud.

If the plaintiff had been able to establish a fraud in the sale, I cannot doubt that he would have been permitted to prove it under this complaint. I do not see upon what ground an objection could have been made to it. So if the allegations of the complaint had been positively stated and had been verified, an order to hold to bail must have been granted upon an application made to the proper office. (Code, §§ 179, 188.)

I do not find any authorities in the courts of this State, which sustain the position that this complaint may be considered as an action for a breach of warranty. None of the cases cited by the respondent's counsel are to that effect.

In Moore v. Noble (53 Barb. 425), the complaint alleged that the defendant falsely and fraudulently represented the horse to be of a certain value and guaranteed him to be sound and free from disease. The court held it to be an action for a fraud, and that to entitle the plaintiff to recover he must prove the *scienter*. (See also Marshall v. Gray, 57 Barb. 414; McGovern v. Payn, 32 id. 83.)

Walter v. Bennett (16 N. Y. 250) and Belknap v. Sealey (14 id. 147) are hardly authorities on the question of whether the complaint in this action is in tort or assumpsit.

They are authorities on the proposition that where the complaint is for a tort, the plaintiff establishing a case in assumpsit merely cannot recover.

The precedent in 2 Chitty's Pleading (679, 8th Am. ed., from 6th Lond. ed.) and the case of Williamson v. Allison (2 East, 446), are chiefly relied on by the respondent. The precedent cited in Chitty, which is for "a false warranty of a horse," does not sustain the claim. It omits the important allegation that the seller well knew the representation to be untrue. The precedent also at page 279, "on a warranty of a horse to be sound," omits the same allegation. Both of these precedents contain the allegation used in all the old forms of assumpsit, that the defendant not regarding his promise, fraudulently intending to injure the plaintiff, craftily and subtly deceived the plaintiff.

The case of Williamson v. Allison is nearer to the point. The court hold that where all the allegations are made which are necessary to sustain an action in tort, if a warranty is also alleged, the tort may be disregarded and a recovery had in assumpsit. Dowdny v. Mortimer, cited in the same authority, held that the *scienter* must be proved, and in that case no express warranty was alleged. In my opinion, this case is not in accordance with the authorities and practice of this State, and should not prevail.

The view of this pleading which I have taken is in accordance with our improved system of pleading, abolishing all prior forms and requiring the party to make a "statement of the facts constituting the cause of action." (Code, 142.) In the present case the plaintiff made a statement of facts which did not constitute his cause of action. The Code never intended that a party who had failed in the performance of a contract merely, should be sued for a fraud, or that a party who had committed a fraud should be sued for a breach of contract, unless the fraud was intended to be waived. The two causes of action are entirely distinct, and

there can be no recovery as for a breach of contract, where a fraud is the basis of the complaint. See authorities (*supra*). Connaughty v. Nichols (42 N. Y. 83) is the only authority cited to the contrary, and it does not sustain that position.

The judgment should therefore be reversed and new trial granted, costs to abide event.

For example of a bad complaint intermingling allegations appropriate to three causes of action see Ross v. Pizer, 132 App. Div. 696.

SCHOFIELD v. WHITELEGGE.
49 N. Y. 259.

APPEAL from judgment of the General Term of the Superior Court in the city of New York, affirming a judgment in favor of defendant entered upon the decision of the court at circuit dismissing plaintiff's complaint, and also affirming an order denying a motion for a new trial. The action was for the recovery of personal property. The complaint alleged that defendant had become possessed and wrongfully detained from plaintiff a piano of the value of $400, and demanded a return thereof, etc. The answer denied the possession of any property belonging to plaintiff, and denied the wrongful detention and plaintiff's ownership of the piano. Upon the trial, before the case was opened, defendant moved for a dismissal of the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, which motion was granted.

FOLGER, J. The complaint in this action does not in terms, show any right or title in the plaintiff upon which the former action of replevin would lie. That action could be maintained only by one who had the general or a special property in the thing taken or detained. That property must have been averred in the declaration, or it would not have sufficed the plaintiff's purpose. The chapter of the Code of Procedure, of "The Claim and Delivery of Per-

sonal Property," was intended to supply the provisional relief which was theretofore obtained in the action of replevin. (See Commissioner's Report p. 169.) There was no intention to change the requisites to maintain the action. There was no change made. Indeed the Code as reported expressly required an affidavit from the plaintiff, where a delivery was to be made, that he was the owner of the property, or lawfully entitled to the possession thereof by virtue of a special property therein.

Nor is it less necessary now than then, for the plaintiff to aver the facts which constitute his cause of action. He must allege the facts, and not the evidence; he must allege facts, and not conclusions of law. The plaintiff here alleges that the defendant wrongfully detains from him the chattel in question. If indeed that be true, then it must be that the plaintiff has a general or special property in the chattel, and the right of immediate possession. But unless he has that general or special property and right of immediate possession, it cannot be true that it is wrongfully detained from him. The last, the wrongful detention, grows from the first, the property and the right of possession. The last is the conclusion. The first is the fact, upon which that conclusion is based. It is the fact which in pleading must be alleged. Where facts are stated in a pleading which militate with a conclusion of law therein stated, the statement of facts will prevail. And is not the statement of a conclusion of law, without a fact averred to sustain it, an immaterial statement?

The plaintiff says that the defendant wrongfully detains from him the piano. The fact involved in that statement is that he detains it. Granted then, that he detains it. Why is it wrongful? Because the plaintiff is the owner by general or special right of property, and entitled to the immediate possession. But these are the facts which are to be shown. They have not been averred. How then can they be shown?

The plaintiff claims, however, that the averment in the answer denying detention, and denying ownership in the plaintiff, puts in issue those facts, and that the defect in the complaint is cured by that averment. He cites Bate v. Graham (11 N. Y. 237). But there the allegation in the answer was the affirmation of the very fact which it was objected, the complaint should have averred. There the omission from the complaint was of an allegation that the defendant maintained that a certain assignment of an insolvent debtor was not fraudulent. The answer of the defendant made the very averment which was omitted from the complaint; and the omission of which was the ground of the defendant's objection to the complaint. The court well held that the complaint might have been amended; for both parties at the trial were maintaining the same fact. Here, however, the parties do not seek to maintain the same fact; and that which the answer avers is the direct opposition of that which the plaintiff must establish to recover. Would the plaintiff take the averment of the answer into his complaint as a part of its allegation? Then he would allege that he is not the owner of the property, and that the defendant has not detained it from him. And then his complaint would show him without cause of action.

The same considerations are applicable to the lack of the averment of a demand and refusal; if the plaintiff's case is to depend upon a wrongful detention, without a wrongful taking in the first instance.

The case of Levin v. Russell (42 N. Y. 251) is cited by appellant. There are two facts which make it inapplicable here. There was in it no motion to dismiss the complaint for its insufficiency; and proof was made at the trial without objection of facts making a cause of action. Again: The complaint did allege that the property was that of the plaintiff. This does not appear in the report of the case in 42 N. Y. 251; and from the statement there one would think

that the complaint was without an allegation of the plaintiff's ownership. On referring to the printed case, as it is found in the series of bound volumes of cases in this court in the State Library, the averment reads thus: "The following goods and chattels *of the plaintiff*." This is in exact accordance with the precedent for a declaration in replevin.

The judgment should be affirmed, with costs to the respondent.

See Code, §§ 1720, 1721, for requirements as to pleading in replevin.

SHERIDAN v. JACKSON.
72 N. Y. 170.

EARL, J. On the trial of this action, after plaintiff had opened his case, the court dismissed the complaint on the ground that it did not state facts sufficient to constitute a cause of action. He did not ask for leave to amend his complaint, but he excepted to the decision and appealed to the General Term, and then to this court, insisting all the time that his complaint was sufficient. Under such circumstances the complaint must be treated here as if it had been demurred to, and the sole question to be considered here is whether it sufficiently states a cause of action?

It alleges that plaintiff "was, on the 19th day of November, 1856, entitled to the possession of, and the rents, issues and profits thereof, and has been since and still is entitled to the same," of seventy-five lots of land in the city of Brooklyn, describing them; that on or about the 26th day of January, 1870, an action was begun in the Supreme Court between the defendants Jackson as plaintiffs and the other defendants, excepting Cameron, as defendants, and that the parties to that action claimed as between each other some interest in these premises or the rents or profits thereof; that afterwards in that action defendant Cameron was appointed receiver of the rents, issues and profits of the said

premises; that subsequently rents and profits amounting to a large sum arising from the said premises came into his hands, and that plaintiff had demanded from him the rents and profits so received by him, and had been refused; and then the plaintiff demanded relief, that the defendant Cameron account for all moneys received by him in the action in which he was appointed receiver; that he be restrained from "paying over to any person or persons, or making any disposition of the said moneys," so received, or afterwards to be received by him; "that he be required to pay the said moneys into court," or to the plaintiff, or to a receiver to be appointed in the action; that such order be made as is just; that a judgment and decree be made adjudging and requiring the said moneys to be paid to the plaintiff. No relief or judgment was demanded against any of the defendants but the receiver Cameron.

The complaint does not allege any facts showing that the plaintiff was entitled to the rents and profits. It does not allege that he owned or ever possessed the premises, or that he owned the rents. The allegation that he was entitled to the possession of the land and to the rents and profits, is a mere allegation of a conclusion of law. The facts should have been alleged from which such a conclusion of law could have been drawn. (Pattison v. Adams, 7 Hill, 126; Scofield v. Whitelegge, 49 N. Y. 259.)

There is a further defect. The complaint does not show any right in the plaintiff to intervene in the litigation between the defendants. There is no allegation that any of the parties to that action claimed anything therein in hostility to him, or showing that he could in any way be damaged by that litigation, or bound by anything done or adjudicated therein. What right had he then to come into court and seek to take or control the moneys which they, in a litigation between themselves, had placed in the hands of a receiver to be disposed of in that action?

There is, therefore, abundant reason for holding that the complaint did not state facts sufficient to constitute a cause of action.

For particular phrases held to be conclusions of law and, therefore, bad as pleadings, see Bliss' Ann. Code, § 481.

VAN LEUVEN v. LYKE.
1 N. Y. 515.

JEWETT, C. J. It is alleged in the plaintiff's declaration "that on the 27th day of November, 1844, at &c. the defendants were the owners of a certain sow and pigs, which sow and pigs, to wit, on the day and year aforesaid, to wit, at the place aforesaid, bit, damaged and mutilated and mangled a certain cow and calf of the plaintiff, so that said cow and calf both died, to the plaintiff's damage $50." To which the defendants pleaded for general issue. There was evidence given on the trial, sufficient to warrant the jury in finding that the plaintiff's cow and calf were destroyed by the defendants' sow and pigs in the manner set forth in the declaration, upon the land of the plaintiff, where the sow and pigs were at the time of committing the said injury. But there is no allegation in the declaration, or evidence given on the trial, that swine possess natural propensities which lead them, instinctively, to attack or destroy animals in the condition of the plaintiff's cow and calf. Nor is there any allegation or evidence that the defendants previously knew or had notice that their swine were accustomed to do such or similar mischief, or that the swine broke and entered the plaintiff's close and there committed the mischief complained of.

It is a well settled principle that in all cases where an action of trespass or case is brought for mischief done to the person or personal property of another by animals *mansuetae naturae,* such as horses, oxen, cows, sheep, swine,

and the like, the owner must be shown to have had notice of their viciousness before he can be charged, because such animals are not by nature fierce or dangerous, and such notice must be alleged in the declaration; but as to animals *ferae naturae,* such as lions, tigers, and the like, the person who keeps them is liable for any damage they may do *without notice,* on the ground that by nature such animals are *fierce and dangerous.* But this rule does not apply where the michief is done by such animals while committing a trespass upon the close of another.

The common law holds a man answerable not only for his own trespass, but also for that of his domestic animals; and as it is the natural and notorious propensity of many of such animals, such as horses, oxen, sheep, swine, and the like, to rove, the owner is bound at his peril to confine them on his own land, and if they escape and commit a trespass on the lands of another, unless through defect of fences which the latter ought to repair, the owner is liable to an action of trespass *quare clausum fregit,* though he had no notice in fact of such propensity. (3 Bl. Com. 211; 1 Chit. Pl. 70.) And where the owner of such animals does not confine them on his own land, and they escape and commit a trespass on the lands of another, without the fault of the latter, the law deems the owner himself a trespasser for having permitted his animals to break into the enclosure of the former under such circumstances. And in declaring against the defendant in an action for such trespass, it is competent for the plaintiff to allege the breaking and entering his close by such animals of the defendant, and there committing particular mischief or injury to the person or property of the plaintiff, and, upon proof of the allegation, to recover as well for the damage for the unlawful entry as for the other injuries so alleged, by way of aggravation of the trespass, without alleging or proving that the defendant had notice that his animals had been accustomed to do such

or similar mischief. The breaking and entering the close in such action is the substantive allegation, and the rest is laid as a matter of aggravation only.

But in the case under consideration, there is no allegation, charging the defendants' swine with doing any act for which the law holds the defendants accountable to the plaintiff without alleging and proving a *scienter*. Had the plaintiff stated in his declaration such ground of liability, or had charged that the swine broke and entered his close and there committed the mischief complained of, and sustained his declaration by evidence, I am of opinion that he would have been entitled to recover all the damages thus sustained; but as he has not stated in his declaration either ground of liability, the defendants ought not to be deemed to have waived the objection by not making it specifically before the justice. I think the judgment should be affirmed.

THAYER v. GILE.

42 Hun, 268.

The complaint states, in substance, that on and after October 1, 1885, the plaintiff was a tenant in common with the defendant in some forty or fifty tons of hay, which were then in the possession of plaintiff in the buildings on defendant's farm; that the defendant subsequently fed up and used up some portion of said hay; that on or about March 17, 1886, plaintiff asked for a division and for the one-half of the remaining portion of said hay, and the "defendant refused to make such division, and refused the possession of any portion of said hay to plaintiff, and then and there claimed that the plaintiff had no interest in said hay, and that he, defendant, was the entire and absolute owner of said hay, and otherwise converted the same to his own use to the damage of plaintiff in the sum of three hundred dol-

lars." The defendant demurred to the complaint on the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendant.

LANDON, J. This complaint is very crudely drawn. It is redundant in statement of immaterial matters, and it lacks definiteness and certainty with respect to material matters. Nevertheless, it states in substance: that on the 17th of March, 1886, the plaintiff, as tenant in common with the defendant, was in possession of a quantity of hay (what was remaining of forty tons), which the defendant then wholly converted to his own use, to plaintiff's damage, etc.

How large a quantity, what share the plaintiff owned, and its value, are left uncertain. Still, since the defendant converted it all, he converted the plaintiff's share, and thus injure her to the extent of its value. There is an immaterial allegation of a demand of one-half, but that is not an allegation that the plaintiff owned one-half; also of a division, but the plaintiff could take her own share without demand of the defendant.

The material allegation is, the defendant's conversion. It is still good pleading to state facts according to their legal effect, unless the pleader so narrates the facts as to show that he has mistaken their legal effect, which is not quite the case here. Thus, it was not necessary for the plaintiff to allege the details from which her tenancy in common, or possession, or the conversion by the defendant would follow as their legal effect. These details are rather in the nature of the evidence, to be adduced upon the trial to support these three allegations.

A complaint must contain a plain and concise statement of the facts. No statement can be plainer or more concise than the statement that the defendant converted the plaintiff's hay. If the plaintiff gave a narrative of all the acts performed by the defendant in order to accomplish this conversion, it might be far from plain whether any con-

version was in fact accomplished. The details of the transaction may very much obscure the fact of conversion.

Since the share of the plaintiff is not stated, it may be, that in order to establish conversion, the plaintiff will have to prove the loss, sale or destruction of the entire hay. (Lobdell v. Stowell, 51 N. Y. 70; Osborn v. Schenk, 83 id. 201; Dear v. Reed, 37 Hun, 594.) By using the word "converted" the plaintiff has concisely condensed in a single word the notice to the defendant that whatever it may be necessary to prove she intends to prove it.

It is objected that the allegation of conversion is a conclusion of law and not of fact. Ordinarily, the narration of a transaction, whether by stating all the details of it or by stating these details according to their legal effect, is the narration of a fact. A statement of a conclusion of law is usually a statement of the right or liability flowing from certain facts.

Thus, A lent B a dollar is the fact, B owes A a dollar is the law. A converted B's hay is a fact; B's liability to A, the law. But from a given state of facts the law will pronounce that A converted B's hay. Is the statement of the conversion, therefore, the statement of a conclusion of law? It is rather the statement of a fact, ascertained by the rules of law. From the facts given, the law presumes the fact required, but the presumption is only a rule of evidence, and, by the application of that rule, the fact required is determined. The rule of evidence, by which the fact is sought is found, is not the fact itself. The rule is the instrument or help through which the fact sought is discovered. If the rule is called a conclusion of law, then by means of the conclusion of law, the conclusion of fact is established.

Judgment reversed, with costs of appeal and of court below. The defendant may have usual leave to answer.

ROGERS v. THE CITY OF MILWAUKEE.
13 Wis. 682.

By the Court, Paine, J. This action was brought to restrain the execution of certain tax deeds upon certificates of sales of the plaintiff's lands for taxes. The defendant demurred to the complaint as not stating facts sufficient to constitute a cause of action, and the demurrer was sustained, from which order this appeal was taken.

It is undoubtedly true that a large part of the complaint is not good pleading. The plaintiff relied on an absence of preliminary proceedings, essential to the validity of the tax sales. But instead of averring either of his own knowledge or upon information and belief that such proceedings were not had, he only averred that he had searched in the proper offices for the evidence that they were had, and failed to find it. The only issue that could be made upon such allegations would be whether he had searched and found the evidence or not, which would be entirely immaterial.

But while such was the character of a large part of the complaint, we think that there was one defect averred with sufficient directness to save the complaint from being demurrable. It avers that the street commissioners were bound by law to give reasonable and timely notice, in order that the owners and occupants of lots on said street might do said work, and the plaintiff, on information and belief, denies that any such notice was given, etc. The giving of such notice was undoubtedly essential to the validity of the contracts on which the certificates were issued, and therefore to the validity of the sales. And the want of such notice is positively alleged on information and belief. This seems to us sufficient to make out a cause of action, and the order sustaining the demurrer must be reversed, with costs, and the cause remanded for further proceedings.

COOK v. WARREN.
88 N. Y. 37.

The complaint alleged "that the defendant Thomas D. Hammond, on the 8th day of December, in the year 1877, at Mayville, N. Y., made his promissory note in writing, dated that day, whereby, by the name of T. D. Hammond, six months after date, for value received, he promised to pay to W. P. Whiteside, or order, six hundred dollars at the banking office of Gifford & Co., with interest, and that the same was duly indorsed by the said defendants Whiteside and Warren, and that said Hammond then and there delivered the same to the said plaintiff. That when the said note became due, the same was duly presented at said banking office, the place where the same was made payable, for payment, and payment thereof then and there duly demanded, which was refused; whereupon the said note was then and there duly protested for nonpayment; of all of which the said Hammond had due notice."

The demurrer was upon the ground that the complaint did not state facts sufficient to constitute a cause of action against the indorsers.

FINCH, J. We do not think this demurrer was frivolous. To justify an order which so determines, or a judgment founded upon such decision, the demurrer must be not merely without adequate reason, but so clearly and plainly without foundation that the defect appears upon mere inspection, and indicates that its interposition was in bad faith. If any argument is required to show that the demurrer is bad it is not frivolous. In this case the argument has not even satisfied us that the demurrer was not good. The complaint was on a promissory note, of which Hammond was maker, and Whiteside and Warren were indorsers. The complaint alleges the making of the note, the indorsement thereof, and its delivery by the maker to the

plaintiff, its due presentation for payment, demand and refusal thereof, and then adds, "Whereupon the said note was then and there duly protested for nonpayment; of all of which the said Hammond had notice." Here there was not only no express averment that notice of protest for nonpayment was given to the indorsers, but the averment that such notice was given to the maker tends to exclude the idea of an intention to aver a notice given also to the indorsers. It is claimed that the allegation that the note was "duly protested for nonpayment," was itself a sufficient allegation of notice to the indorsers. The only authority for this doctrine, as applied to a pleading, appears to be a decision at General Term (Woodbury v. Sackrider, 2 Abb. Pr. 402) which was itself founded upon Coddington v. Davis, decided in this court. (1 Comst. 186.) The question in the latter case was not one of pleading, but upon the construction of a letter waiving protest. Reading the letter in the light of the surrounding circumstances, it was very proper to give broad and popular signification to its terms. Upon the same principle it is easy also to say that a statement in the notice sent, that the note had been protested for nonpayment, was sufficient to include payment duly demanded and refused, since such protest implies the previous demand and refusal. But these cases do not settle the rule of pleading, nor directly support the doctrine advanced in the single case which is brought to our notice, and which holds a pleading like this sufficient. That case, resting upon no pertinent authority, must be tested by sound principles applicable to the question. Thus tested, it is not easily justified. We ought not to encourage loose or ambiguous pleading. The complaint is required to state, plainly and concisely, the facts constituting a cause of action. The pleader may not aver a legal conclusion as an equivalent for the group of separate facts from which it is an inference. The allegations should be such, and so stated, as to permit

a distinct traverse and evolve a definite issue. Although pleadings are to be construed liberally, that does not necessarily mean that they shall be held to say what they do not, nor that words which have a fixed legal meaning, settled by the common law or by statute, shall be enlarged or modified by an inaccurate popular use. Such use is apt to be shifting and variable; adequate for ordinary purposes, but not so stable or precise as to safely crowd out and take the place of legal definitions which furnish a more accurate and unvarying standard. These suggestions all tend toward a conclusion that this demurrer was well taken, and the complaint defective as alleged. By the common law, and by statutory definition, a protest is one thing, and notice of it to the indorsers is quite another; and a note may be protested without notice of such protest being given to the indorsers. The one act does not necessarily assume or imply the other. Where the same word has different meanings, one the result of judicial or statutory definition, and the other founded simply upon an inaccurate popular use, the latter can only be adopted in construing a pleading where it plainly appears from other averments or the whole tenor of the paper that such was the sense in which it was employed. It is not intended to deny or question the doctrine of Allen v. Patterson (7 N. Y. 476), that under the liberal rule construction established by the Code, a word capable of two different meanings should have a reasonable construction, and be so construed as rather to support than defeat the pleading. That is true as a general rule where the use of the word in dispute is purely ambiguous, but where it has a fixed legal meaning, and other parts of the complaint indicate that it is used in that sense, and there is nothing from which an intention to use it in a different or popular sense can be fairly implied, there is no such ambiguity as requires an arbitrary choice of meanings to support the pleading, and the sense plainly intended must prevail. Where a contrary

rule would end it might be difficult to foresee. It would introduce doubt and ambiguity in the room of certainty and precision, and make a pleading lose its utility as a means of accurately evolving an issue to be tried. It is plain that the pleader in the present case did not himself understand that his averment of due protest covered all the facts necessary to fix the indorsers, for he alleged every one of those facts, separately and in detail, except the last. The indorsement of the note, its maturity and due presentment, the demand of payment and refusal, the protest for nonpayment, and the unnecessary allegation of service of notice of nonpayment on the maker, were all stated; everything in fact except the one remaining circumstance of notice to the indorsers.

It is better to adhere to definite and fixed standards in pleading, and as far as possible to encourage so much of system and accuracy as is consistent with the liberal rule of the Code; and thus to require such a plain statement of the facts as will be unambiguous, present issues clearly, enable them to be distinctly and plainly traversed, and avoid legal conclusions as a substitute for a whole group of issuable facts. We think it is the better opinion in this case that the complaint was insufficient, and the demurrer well taken.

At common law a man was presumed to have made the most favorable statements possible for himself and any ambiguity was construed against the pleader. This is the rule under the Code as to matters of substance unless taking the least favorable construction would make the pleading entirely insufficient. See Clark v. Dillon, 97 N. Y. 370.

In construing a pleading neither the summons nor the verification may be resorted to. See Nickerson v. Canton Marble Co., 35 App. Div. 111. A verified pleading must be so construed as to render all its parts harmonious. Pyle v. Harrington, 4 Abb. Pr. 425.

HUNT v. DUTCHER.

13 How. Pr. 538.

Demurrer. Action upon a justice's judgment.

The complaint states the recovery of the judgment as follows: That the plaintiffs, in the month of May, 1850, commenced an action in a justice's court against the defendant, before Ichabod Thurston, Esq., who was a justice of the peace, and had full authority and jurisdiction over both the person of the defendant and the subject-matter of the action, to try the same, and that such proceedings were thereupon had that on the 4th of May, in said year 1850, judgment was entered in said action by said justice in favor of the plaintiffs, and against the said defendant for the sum of $43.60 damages, $1.12 costs, and that said judgment still remains in full force and effect — not reversed or annulled, or set aside; neither has the same been paid or satisfied, and demanded judgment for the amount of the judgment and interest.

To this complaint the defendant demurs: for that it does not state facts sufficient to constitute a cause of action, and specifies also:

1. That there is no allegation of fact in said complaint of personal service of process on the defendant, or other fact showing that the justice ever acquired jurisdiction of the person of the defendant.

2. That there is no allegation that the justice acquired jurisdiction of the subject-matter of the said action, or that the judgment had been or was *duly given or made.*

E. Darwin Smith, Justice. A justice's court is a court of special and limited jurisdiction.

In pleading the judgment of such a court, it is necessary at common law to show that the court had jurisdiction of the subject-matter and of the person of the defendant. (3 Com. 193; Turner v. Roby, 7 Hill, 37.)

The complaint in this case does not show that the justice had either jurisdiction of the person or subject-matter, except by way of mere allegation, which is clearly insufficient. It does not show what the cause of action was, that the court may see that it was within the jurisdiction of the justice, and does not show either the service of process upon the defendant, or that he appeared before the justice.

The demurrer is clearly well taken, unless the Code helps the plaintiff out of the difficulty.

Section 161 of the Code* is as follows: "In pleading a judgment, or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading shall be bound to establish, on the trial, the facts conferring jurisdiction."

The plaintiff has not used the language of this section. He says, in the complaint, that such proceedings were had before the justice that "judgment was *entered in said* action." This is clearly not equivalent to the words that such judgment has been or was "*duly given* or *made.*"

It may not be necessary, and probably is not, to use in the pleading the precise language of the statute, but words to the same effect and substance must be used. (7 Barb. 84.) To say that a judgment is *entered,* is merely to allege the single fact of the entry of the judgment, without including an averment that it was properly or lawfully done. All this is embraced in the language of the Code, that the judgment was "*duly given or made.*" The word *entered,* or *perfected,* may be equivalent to the word *made,* or *given;* but the word *duly* is most essential. It can hardly be dispensed with and satisfy the terms of the statute. I can imagine no single word that will supply its place. The

* Code Civ. Proc., § 532.

allegation that the judgment was *entered,* would be proved by simple evidence of the actual rendition of a judgment. But the allegation that the judgment was "*duly given,* or *made,*" could only be proved by establishing, on the trial, the facts conferring jurisdiction upon the justice, and showing that the judgment was, in all respects, lawfully and regularly obtained, or rendered.

The statute gives a short and simple form of pleading a judgment; and it is safest, if not indispensable, that the statute language be adopted and used when the party seeks to avail himself of this provision of the Code, instead of following the common-law forms in such cases.

The demurrer is well taken, and judgment must be given for the defendant thereon, with leave to the plaintiff to amend, on payment of costs.

Held in Halstead v. Black, 17 Abb. Pr. 227, to apply to foreign judgments.

CLEMENS v. AMERICAN FIRE INS. CO.

70 App. Div. 435.

Williams, J. * * *

The action was brought upon a policy of insurance to recover for the loss of household furniture destroyed by fire. The demurrer was upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The particular points made were: *First.* That there was no sufficient allegation of the rendering of proofs of loss to the defendant pursuant to the terms of the policy. *Second.* That there was no allegation that sixty days had elapsed after the proofs of loss were received by the defendant before the action was commenced. These were conditions precedent to a right to recover in the action.

There was no specific allegation as to rendering proofs of loss, except that the plaintiff filed a complete inventory

of the property destroyed and injured, with the quantity and cost of each article and the amount claimed thereon, which inventory ever since had been and still was in the possession of the defendant.

The policy, a copy of which was annexed to the complaint, specified in detail what the proofs of loss should contain, and the inventory alleged failed very materially to comply with the provision of the policy. It failed to furnish anything like the amount of information required by the specifications as to the proofs of loss. If it had been alleged that this inventory was rendered *as* the proofs of loss, and that it had been received and retained by the defendant without objection and that the defendant had required no further or other proofs of loss to be furnished, it might have been sufficient; but the allegation of the complaint fell far short of this. It was manifestly insufficient as a specific allegation of performance of this condition precedent to the right to recover. Nor was this defect cured by the general allegation under section 533, Code of Civil Procedure, which provides: "In pleading the performance of a condition precedent in a contract, it is not necessary to state the facts constituting performance; but the party may state generally that he or the person whom he represents, *duly* performed all the conditions on his part. If that allegation is controverted, he must, on the trial, establish performance."

The word *duly* was omitted from the complaint, and there was, therefore, a failure to comply with the section quoted, and plaintiff was entitled to no benefit thereunder.

The word *duly* in this, and other like provisions of the Code, has been held to be one of substance and not of form merely. * * *

There was no allegation in the complaint that sixty days had elapsed since the proofs of loss were received by the defendant before the action was commenced. Such an al-

legation was necessary. (Porter v. Kingsbury, 5 Hun, 598; 71 N. Y. 588; Reining v. City of Buffalo, 102 id. 312.)

In the first case it was held that a complaint in an action upon an undertaking upon appeal given pursuant to section 348 of the old Code, which failed to allege service of notice on the adverse party of the entry of the order or judgment affirming the judgment appealed from, ten days before the commencement of the action, was defective; that the notice was a condition precedent to the commencement of the action, and in the absence of the allegation the complaint did not state a cause of action. The Code prohibited the commencement of the action until ten days after the service of the notice.

In the other case it was held necessary to allege in the complaint, in an action against the city for a tort, the presentation of the claim to the common council and the expiration of forty days thereafter, before the commencement of the action; that the provision of the charter requiring such presentation of claim and prohibiting the bringing of the action until forty days had elapsed created a condition precedent. The court there said, in referring to Porter v. Kingsbury: "There the act required to be performed, constituted no part of the cause of action, but was provided, as in this case, to shield the parties liable from cost and trouble, in case of their willingness to pay the claim without suit after notice given. It is immaterial whether a condition be imposed in the statute giving a right of action, or be provided by contract, or exists by force of some principle of common or statute law, the complaint must, by the settled rules of pleading, state every fact essential to the cause of action, as well as those necessary to give the court jurisdiction to entertain the particular proceeding."

In the case we are considering it was specifically provided by the policy that the loss should not become payable until sixty days after proofs of loss were received by the

company, and that no suit should be sustainable upon any claim until after full compliance with all requirements in the policy.

The rule laid down in the case cited is applicable to this case.

The views here expressed lead to the conclusion that the judgment should be affirmed, with costs.

NOTE.— "It is quite well established that where a specific act is to be done by the plaintiff, or any number of acts by way of condition precedent, he must show in pleading precisely what he has done by way of performing them. 1 Chit. Pl. 278, ed. of 1838. Id. 282. If a deed is to be given, or money to be paid, or services to be performed, he must either aver in so many words, that the deed has been given, the payment made, or work done; or that each by name was tendered and refused, with such circumstances as are material in point of law to raise the corresponding obligation. * * * This enables the court to see whether the defendants be in fault; and presents matter on which he can take a definite issue. The allegation of performing everything, or offering to perform everything, involves in itself many possible acts of performance, and invites an issue on all of them. It cannot be seen on what the parties go down to trial." Glover v. Tuck, 24 Wend. 160.

TOOKER v. ARNOUX.

76 N. Y. 397.

The facts alleged in the complaint were as follows: "First.— That on or about the 25th day of July, 1872, at the city of New York, James Watson made and delivered to the plaintiff for value his certain draft or order, in the words and figures following:

"NEW YORK, *July* 25, 1872.

"*William Henry Arnoux:*

"DEAR SIR.— Please pay to William T. Tooker the sum of five hundred and fifty-six (556) dollars, out of the money to be realized from the sale of the houses on the north side of 46th Street, city of New York, and known as Nos. 305, 307 and 309 East 46th Street.

13 "JAMES WATSON."

"Second.—That thereafter, and on or about said day, the plaintiff presented said draft or order to said Arnoux, who thereupon for value duly accepted the same.

"Third.—That on the 6th day of August, 1872, said Arnoux paid on account thereof one hundred dollars, and there is now due on said draft or order, from the defendant, the sum of four hundred and fifty-six dollars, with interest from said 25th day of July, 1872."

And a judgment was asked for that amount.

The answer admitted the acceptance of the order, the payment of $100, but denied that there was any money realized from the sale of the houses, or that there was due plaintiff the sum claimed.

At the beginning of the trial, defendant's counsel moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The motion was denied, and said counsel duly excepted. Plaintiff offered evidence of the sale of the houses specified in the order. This was objected to by defendant's counsel on the ground that this was not averred in the complaint. No application was made for the amendment of the complaint.

The court directed a verdict for plaintiff, which was rendered accordingly.

Rapallo, J. At the opening of the trial the defendant moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The motion was denied and exception taken. The reason assigned was that the defendant should have demurred.

This position is in conflict with section 148 of the Code and with many decisions of this court. If the complaint was bad in substance the objection was available on the trial and the motion to dismiss should have been granted. (Schofield v. Whitelegge, 49 N. Y. 259; Coffin v. Reynolds, 37 id. 640; Emery v. Pease, 20 id. 62.)

We think the complaint was clearly bad. The sale of the houses mentioned in the order and the receipt of money from such sale were conditions precedent to the defendant's liability on his acceptance, and those facts should have been averred. In the absence of such averments no indebtedness on his part to the plaintiff appeared. (Munger v. Shannon, 61 N. Y. 251, 260.)

The denial in the answer of the receipt of any such moneys did not supplement the complaint in this respect. In Bate v. Graham (11 N. Y. 237), the answer contained an affirmative allegation of the fact which the complaint should have averred, but in Schofield v. Whitelegge, as in the present case the answer contained a denial of the essential fact, and it was held that such denial did not cure the defect in the complaint.

The complaint in the present case cannot be sustained by virtue of section 162 of the Code,* which provided that in an action upon an instrument for the payment of money only, it should be sufficient to set forth a copy of the instrument and allege the amount due thereon. It was decided by this court in Conkling v. Gandall (1 Keyes, 231), that section 162 was not applicable where the liability of the defendant was conditional, and depended upon facts outside of the instrument; that in such case the facts must be averred.

The objection to the complaint was not waived upon the trial. The defendant not only took the objection of the insufficiency of the complaint before any evidence was taken, but when the plaintiff offered evidence of the fact that the houses had been sold, he objected to such evidence on the ground that the fact had not been alleged in pleading.

We see no ground upon which this case can be distinguished from the numerous cases in which it has been de-

* Code Civ. Proc., § 534. A mortgage, a check or an insurance policy cannot be pleaded in the short form provided by this section. Judd v. Smith, 3 Hun, 190.

cided that a party may upon the trial lawfully demand a dismissal of the complaint on the ground that it does not state facts sufficient to constitute a cause of action.

The court below, at General Term, conceded that if the trial judge had granted the motion to dismiss it would have been bound to sustain his action. The necessary consequence of this concession is that in denying the motion the trial judge erred. It was not a question of discretion, but of legal right, whether the complaint should be dismissed, and if it would not have been error to grant the motion, it was error to deny it. It is true that an amendment of the complaint might have been allowed in the court below, but no amendment was made or asked for, and the objection to the complaint having been taken in due season and overruled, the correctness of the ruling must be tested by the complaint as it stood, and not as it might have been changed by amendment.

The judgment must be reversed and a new trial ordered, costs to abide the event.

DIAS v. SHORT.

16 How. Pr. 322.

By the Court. Emott, J. If the words uttered by the defendant, imputed to the plaintiff feloniously receiving stolen goods, with a guilty knowledge of the theft, they are actionable *per se*. Whether they did so, was a proper question for the jury under proper instructions, and upon a suitable state of pleadings. I see no objection to the instructions on this point given in the court below. The main question is, whether the complaint was so defective as not to state any cause of action in the uttering these words? The rule is, that words are to be taken in the sense in which they are generally used, and would be naturally understood. When the words require a knowledge of extrinsic facts,

either to show their meaning or their applicability to the plaintiff, the rule formerly was, that all such facts must be both averred in pleading and proved. The only change made by the Code in this respect, is to dispense with such averments of extrinsic facts, showing the applicability of the slander to the plaintiff. It is still necessary as it formerly was, to aver and prove any facts necessary to explain the meaning of the word used. It is also necessary, of course, to allege that the words were spoken of and concerning the plaintiff.

In the case at bar the complaint contains a colloquium, alleging that the slanderous words were spoken of the plaintiff, and there cannot be said to be any extrinsic facts which if proved would aid in understanding or explaining the words. The most which can be contended for the defendant is, that the words stated in the complaint and proved by the witnesses, do not distinctly imply a charge of receiving goods *knowing them to be stolen,* so that the complaint merely stating their publication concerning the plaintiff, in the language of Baron Alexander, in Hall v. Blandy (1 Younge & Jer. 488), might spread one entire and distinctly slanderous charge on the record. Obviously, however, all that was needed to make this complaint full and perfect, even to such a requirement, was an innuendo stating the meaning of these words to be a charge of guilty reception of stolen property. If the objection had been taken by demurrer, perhaps it might have been fatal; but I think when such an objection is first taken at the trial, and then the question of the meaning of the words is fairly left to the jury, and they find them slanderous, we ought not after the verdict to interfere. This strikes me as being very clear, because the innuendo for which the objection calls, if it had been in its proper place in the complaint, would not have required or admitted any evidence to sustain it.

Where the objection taken at the trial is for the want of a material averment, which the plaintiff must prove in order to sustain his action, unless the judge permits an amendment on the spot, the objection is as fatal as it would be on demurrer. But it is well settled in our courts, that the meaning of the words used by the defendant cannot be proved by the opinions of witnesses, or their statement as to how they understood them. Although the meaning of the words and their application are questions for the jury on the evidence, yet it must be upon proper evidence, that is, upon proof of facts only. The words alleged here, are not cant or slang phrases, or words used in a sense peculiar to any class of people, and, therefore, requiring an averment of their cant meaning, or the sense in which any classes of persons used them. There was nothing, therefore, in which this complaint is deficient, which would have permitted any additional evidence, and there was no evidence admitted on the trial, which required any additional statements in the complaint to justify it. A judgment should not be reversed under such circumstances, after a verdict, for the want of a merely formal averment in the pleading. The verdict aids the defect, even if the want of such averment would have been good cause of demurrer.

Justification is a complete defense; mitigation is a partial defense and must be so pleaded. §§ 508, 535.

BLANK v. HARTSHORN.
37 HUN, 101.

APPEAL from an order of the Steuben Special Term, requiring the plaintiff to elect on which of the three counts in the complaint he will proceed to trial, etc.

SMITH, P. J. The first count alleges that from about 1st of May, 1884, to 1st January, 1885, the plaintiff pastured, fed and took care of, and furnished hay and other

feed for, fifty-two head of cattle belonging to the defendants, at the defendants' request, and that such pasturing, etc., was reasonably worth $600. The second count alleges that the plaintiff pastured a like number of cattle belonging to the defendants, under a special agreement made between the plaintiff and the defendants about 1st May, 1884, by the terms of which the defendants agreed to take said cattle to the city of New York and sell them on or before 1st October, 1884, and after deducting the purchase-price of the cattle and the cost of transportation, to pay the plaintiff two-fifths of the remainder of the proceeds of the sale. The third count alleges a like agreement made between the defendants and one Peters, and that Peters had assigned his cause of action thereunder to the plaintiff.

The order appealed from requires the plaintiff to elect on which count he will go to trial, and to amend his complaint accordingly, and upon failure to elect, orders the complaint to be stricken out.

Except in one particular, hereinafter mentioned, the three counts relate to the same transaction. On that ground the respondents' counsel contends that the pleading violates the mandate of the Code, that the complaint must contain "a plain and concise statement of the facts constituting each cause of action, without unnecessary repetition." (Section 481, subd. 2.) But there may be more than one cause of action arising out of the same transaction, and if the several causes of action are such as may be united under section 484, their joinder does not necessarily vitiate the complaint. Where it can be seen that the statement of each cause of action is probably needful in order to prevent a failure of justice, in consequence of a variance between the pleading and proof, we think such statement, provided it be plain and concise, should not be regarded as "unnecessary repetition" within the meaning of the Code. Thus, in an action for labor and services alleged to have been per-

formed under a special contract at an agreed price, if it appears that, from the circumstances of the case, it is doubtful whether the alleged contract can be satisfactorily established, we think the spirit of the Code does not prevent the adding of a count for the same labor and services upon a *quantum meruit*. In the present case the first count is of that nature and it embraces a period from the 1st of October, 1884, to 1st of January, 1885, not covered by the special agreement as set out in the other two counts. Upon these grounds we think the first and second counts may be permitted to stand.

As to the necessity of the third count the plaintiff, in his affidavit used on the motion, avers that the farm on which he pastured the cattle was rented by Peters for the plaintiff's use; that the contract with the defendants set out in the complaint was first negotiated and talked over by Peters and the defendants when the plaintiff was not present, and that it will probably be a question on the trial whether the plaintiff can claim under the contract, as the undisclosed principal of Peters, or as his assignee. In these circumstances we think the third count also should be allowed to stand to enable the plaintiff to present the several lines of proof upon which he relies.

By this disposition of the matter the defendants cannot be harmed, except in being deprived of the opportunity of nonsuiting the plaintiff for a variance in proof, or of driving him to a motion for leave to amend. A special object of the Code is to remove all such meshes and pitfalls from the path of litigants. The defendants may interpose as many defenses as they have to each cause of action, in the same manner and with the same effect as if such cause of action stood alone.

These views are in harmony with the cases of Longprey v. Yates (31 Hun, 432), decided in the old fourth department, and the authorities there cited. In Velie v. Insurance

Company (65 How. Pr. 1), Westbrook, J., speaking of the different grounds of recovery presented by the two counts in that case, said: "If either or both are tried, the proof upon each ground of recovery stated may be close and conflicting. A jury of twelve men may be divided in opinion as to which one is established, while all may unite, some for one reason and some for another, in the conclusion that the plaintiff is entitled to recover." And the Court of Appeals has held in a recent case, that "it is not necessary that a jury in order to find a verdict, should concur in a single view of the transaction disclosed by the evidence; if the conclusion may be justified upon either of two interpretations of the evidence, the verdict cannot be impeached by showing that part of the jury proceeded upon one interpretation and a part upon the other. (Murray v. Ins. Co., 96 N. Y. 614.)

We think the order should be reversed and motion denied, with $10 costs and disbursements.

SECOR v. STURGIS.
16 N. Y. 548.

The business of ship carpenters was carried on in one part of a building, under the direction of two of the partners in a firm, and the business of ship chandlers in another part of the same building, under the direction of the third partner. Separate books of account were kept by different clerks in the two branches of business, and the partners confined themselves respectively to the management of one of the branches, without personally taking part in the other. Work was done and materials furnished from the carpentry branch in the repairing and equipping a brig, upon the order of her captain, to the amount of $139, and immediately thereafter goods and articles of ship-chandlery were

furnished to the same brig, and on the order of the same captain, at different times through a period of a month, amounting to $521.

The firm brought an action in the United States District Court for the collection of the former amount and recovered a judgment which the owner of the brig paid. The firm also attached the brig in a separate action on the claim of $521. The owners of the brig gave the bond in suit to procure the release of the vessel and as a defense to the action upon the bond pleaded the prior judgment in bar. Plaintiffs had judgment below.

STRONG, J. It is not controverted that the account, the amount of which is sought to be recovered in this action, was due to the plaintiffs, and a lien on the vessel, at the time of the application for the attachment, and also at the time of the execution of the bond on which this action is founded; but it is insisted that the said account, and the account for which judgment was recovered in the District Court of the United States, together, constituted a single cause of action, and that the judgment for part of it is a bar to a recovery in this action for the residue. The answer does not, in express terms, allege that the cause of action in the suit in the District Court was the same as that in the present suit, but it was treated in the reply as containing substantially that allegation, and must, therefore, be so regarded by the court. It was essential, in order to present the question raised, that the identity of the cause of action in the different suits should, in some form, be averred in the answer. (3 Chit. Pl. 928, 929; Philips v. Berick, 16 Johns. 137, 140.)

The principle is settled beyond dispute that a judgment concludes the rights of the parties in respect to the cause of action stated in the pleadings on which it is rendered, whether the suit embraces the whole or only part of the demand constituting the cause of action. It results from

this principle, and the rule is fully established, that an entire claim, arising either upon a contract or from a wrong, cannot be divided, and made the subject of several suits; and if several suits be brought for different parts of such a claim, the pendency of the first may be pleaded in abatement of the others, and a judgment upon the merits in either will be available as a bar in the other suits. (Farrington v. Payne, 15 Johns. 432; Smith v. Jones, Id. 229; Philips v. Berick, 16 id. 137; Miller v. Covert, 1 Wend. 487; Guernsey v. Carver, 8 id. 492; Stevens v. Lockwood, 13 id. 644; Colvin v. Corwin, 15 id. 557; Bendernagle v. Cocks, 19 id. 207, and cases there cited.) But it is entire claims only which cannot be divided within this rule, those which are single and indivisible in their nature. The cause of action in the different suits must be the same. The rule does not prevent, nor is there any principle which precludes, the prosecution of several actions upon several causes of action. The holder of several promissory notes may maintain an action on each; a party upon whose person or property successive distinct trespasses have been committed may bring a separate suit for every trespass; and all demands, of whatever nature, arising out of separate and distinct transactions, may be sued upon separately. It makes no difference that the causes of action might be united in a single suit; the right of the party in whose favor they exist to separate suits is not affected by that circumstance, except that in proper cases, for the prevention of vexation and oppression, the court will enforce a consolidation of the actions.

It is not, as will be seen by the cases, always easy to determine whether separate items of claim constitute a single or separate cause of action: and this difficulty, connected with neglect, in some instances, of proper attention to the principle of the rule under consideration, has led to some loose expressions and confusion in the books on this subject. Farrington v. Payne was a plain case of an indivisible cause

of action. A bed and bed quilts were taken at the same time and by the same act, and a recovery in trover for the quilts was held to be a bar to a recovery in trover for the bed. In Smith v. Jones, actions were brought for goods sold and delivered, the plaintiff, in one, claiming to recover for one barrel of potatoes, and in the other for two barrels of the same article, all sold at the same time. The court held that the demand could not be divided into separate suits. This was also a plain case of one cause of action. Miller v. Covert, in which the same rule was applied, was a case of a sale of hay, under a contract, delivered in parcels. The demand was held to be entire and indivisible.

In Guernsey v. Carver, the plaintiff declared on a book account consisting of items of merchandise delivered between the 20th of July and the 27th of August, 1828, amounting to $2.35. The defendant pleaded a former suit for the same identical cause and causes of action. It was proved in the Common Pleas that the plaintiff had an account against the defendant, consisting of twenty different articles of merchandise, delivered on fourteen different days between the 4th of June and the 27th of August, 1828, amounting to between $5 and $6; that he commenced a suit against the defendant, and exhibited an account of items delivered between the 1st of June and the 19th of July, 1828, amounting to $2.74; that the defendant pleaded a tender in such suit, and obtained judgment for costs. The plaintiff then sued for the balance of such account, viz., for items delivered between the twentieth of July and the twenty-seventh of August. The Common Pleas decided that on a running account, where no special contract was made at the commencement of the account, and where items have been delivered on such account at different times, without any intermediate agreement, each separate delivery formed a separate and distinct cause of action, and that separate suits might be maintained on each separate delivery; and the plaintiff recovered judgment. On appeal to the Su-

preme Court the judgment was reversed. The court, by Nelson, J., after stating that it was settled in that court that if a plaintiff bring an action for part only of an entire and indivisible demand, the judgment in that action is a conclusive bar to a subsequent suit for another part of the same demand, says: "This case comes within the reason and spirit of that principle. The whole account being due when the first suit was brought, it should be viewed in the light of an entire demand, incapable of division, for the purpose of prosecution. The law abhors a multiplicity of suits. According to the doctrine of the court below, a suit might be sustained, after the whole became due, on each separate item delivered, and if any division of the account is allowable it must no doubt be carried to that extent. Such a doctrine would encourage intolerable oppression upon debtors, and be a just reproach upon the law. The only just and safe rule is to compel the plaintiff, on an account like the present, to include the whole of it due in a single suit." The reasoning of the learned justice would make every account consisting of different items, the whole of which is due, an entire demand incapable of division for the purpose of prosecution irrespective of every other consideration. It excludes the idea that it is necessary the claims should have arisen out of a single transaction, or be connected together by contract. This, in my opinion, is carrying the doctrine in question far beyond its just limits. Stevens v. Lockwood was a case similar to the last, and decided upon similar views. These cases may have been rightly decided, but I cannot assent to all the reasons given for the decisions.

In Colvin v. Corwin, two suits were brought for lottery tickets sold the defendant. On the trial of the first the defendant admitted he had bought the tickets alleged to have been sold to him, and judgment was rendered for the plaintiff. The judgment was set up as a bar in the second suit, and on the trial it appeared that the tickets

claimed in the suits were delivered to the defendant by two different agents of the plaintiff, at different offices occupied by them, at different times, and it was held by the Supreme Court that the previous judgment was a bar to a recovery. It is manifest that this decision rests on no sound principle, and is not law. A plainer case of distinct independent causes of action could hardly be presented.

Bendernagle v. Cocks was an action for breaches of certain covenants contained in an indenture of lease. A plea in abatement was interposed of an action pending upon the same lease for the alleged breach by the defendant of covenants therein. It is stated in the reporter's note that all the causes of action had accrued at the time of the bringing of the first action. The plaintiff replied that the covenants, for the breach of which the first suit was brought, were other, distinct and different from the covenants for the breach of which the second suit was brought. The defendant demurred, and the Common Pleas overruled the demurrer, but the Supreme Court reversed the judgment. Cowen, J., who delivered the opinion of the court, reviews and comments upon many of the cases, after which he makes the following observations: "I admit that the rule does not extend to several and distinct trespasses or other wrongs, nor, as we have seen, to distinct contracts. 'It goes against several actions for the same wrong, and against several actions on the same contract. All damages accruing from a single wrong, though at different times, make but one cause of action, and all debts or demands already due by the same contract make one entire cause of action. Each comes under the familiar rule that if a party will sue and recover for a portion, he shall be barred of the residue. Proof of that fact would sustain the common issue presented in Bagot v. Williams, that the plaintiff had before impleaded the defendant, and recovered for the same identical cause of action," etc.

The true distinction between demands or rights of ac-

tion which are single and entire, and those which are several and distinct is, that the former immediately arise out of one and the same act or contract, and the latter out of different acts or contracts. Perhaps as simple and safe a test as the subject admits of, by which to determine whether a case belongs to one class or the other, is by inquiring whether it rests upon one or several acts or agreements. In the case of torts, each trespass, or conversion, or fraud, gives a right of action, and but a single one, however numerous the items of wrong or damage may be; in respect to contracts, express or implied, each contract affords one and only one cause of action. The case of a contract containing several stipulations to be performed at different times is no exception; although an action may be maintained upon each stipulation as it is broken, before the time for the performance of the others, the ground of action is the stipulation which is in the nature of a several contract. Where there is an account for goods sold, or labor performed, where money has been lent to or paid for the use of a party at different times, or several items of claim spring in any way from contract, whether one only or separate rights of action exist, will, in each case, depend upon whether the case is covered by one or by separate contracts. The several items may have their origin in one contract, as on an agreement to sell and deliver goods, or perform work, or advance money; and usually, in the case of a running account, it may be fairly implied that it is in pursuance of an agreement that an account may be opened and continued, either for a definite period or at the pleasure of one or both of the parties. But there must be either an express contract, or the circumstances must be such as to raise an implied contract, embracing all the items, to make them, where they arise at different times, a single or entire demand or cause of action.

Applying this test to the present case, it is very clear that the two accounts did not constitute an entire claim, but,

on the contrary, that they were several and formed two several causes of action. The business of the plaintiffs consisted of two branches, which were designed to be and were kept entirely distinct, in each of which one of the accounts was made, and an arrangement was entered into under which one of the accounts arose anterior to the opening of the other account. Here was no express contract connecting the two accounts; and the facts, instead of warranting the presumption of such a contract, show that separate agreements only, one in regard to each account, were intended.

* * * * * * * * *

Judgment affirmed.

See also Goldberg v. Eastern Brewing Co., 136 App. Div. 692. In Perry v. Dickson, 85 N. Y. 345, plaintiff having been wrongfully discharged recovered damages therefor in a Justice's Court. In a subsequent action to recover wages due at the time of his discharge it was held that the former action was not a bar to the action for wages. Where tenant from year to year held over several years, held, in Kennedy v. City of New York (196 N. Y. 19), that each year a new contract arose and the landlord might bring a separate action for each year's accrued rent.

RODERMUND v. CLARK.
46 N. Y. 354.

Conversion. Clark & Ward being joint owners of a vessel, Clark sold the entire vessel to Malcolm. Ward forbade the sale and took possession of the vessel. Malcolm sued to recover possession and the vessel was seized by the sheriff. Ward gave a counter-bond and the vessel was redelivered to him. Afterward Malcolm, claiming the vessel, libelled her as owner in the United States District Court, obtained a judgment in that proceeding by default, and the marshal delivered the vessel to him. Ward then assigned to plaintiff all his interest in the vessel and all causes of action against Clark for selling her. Plaintiff then brought this action and recovered in the court below.

FOLGER, J. It must be taken as one of the facts in this case, that there was an absolute sale, of one equal undivided half of the sloop, by the defendant to John W. Ward, and that Ward became the unconditional owner of that one-half. The referee has so found, and there is testimony to sustain the finding.

When then, the defendant sold the whole of the sloop to Malcolm, ignoring the rights in her of Ward, his act authorized Ward to sue for a conversion of the property, and this, although the sloop was not put beyond the reach of Ward. (21 Wend. 72.)

Ward then had two courses, either of which he might pursue. He could sue the defendant for the conversion, or he could assert his right of possession, by keeping a permanent possession, or regaining possession if it was interrupted. (Id.) The effectually taking of either of these two courses, precluded him from taking the other.

If he actually insisted on keeping the possession of the vessel, and refusing to recognize the sale by the defendant, he could not sue the defendant for the conversion. There does not seem to be any doubt that he did so insist. At the time of the sale by the defendant to Malcolm, the sloop was fast in the ice, and in the actual possession as much of one tenant in common as of the other. As soon as she was free from the ice, Ward took actual possession of her, and continued it until legal proceedings were taken by Malcolm, for the delivery of the sloop to him. Ward still insisted upon the ownership of an interest in the sloop, and upon retaining the possession of her, by requiring a return of the possession of her to him by the sheriff. It is not perceived, how Malcolm could have obtained the possession of the sloop to the exclusion of Ward, if the last named had persisted in his defense to that action, and so had retained the possession, the right to which he had asserted. The defendant could pass to Malcolm no greater right in her

than he had himself, and that was to an equal undivided half. So far Ward had elected his course and had succeeded in it, and the proceedings of Malcolm had been ineffectual to dispossess him. Ward had taken his position. He had chosen to assert, and to act upon the assertion, that the defendant had no right to sell the whole of the sloop, and that his attempt to do so had not divested, and should not divest, the interest of Ward in her.

In our judgment he had then gone so far, as that he could not afterward entirely change his position, and that neither he nor the plaintiff, his assignee, recognizing the act of the defendant as having worked the destruction of his half of the sloop, could yield to the claim of Malcolm, asserted in the action in the United States court, submit to the seizure in the behalf of Malcolm of the vessel in that action, and then have a right of action against the defendant for the conversion.

The mode Ward had first chosen had, until then, been effectual to preserve to him his property and the possession of it. And when that was interfered with by Malcolm, in his suit in the United States court, it was the duty of Ward and the plaintiff not to abandon the property, but to persist in a defense of his right.

Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts. The remedies are not concurrent, and the choice between them being once made, the right to follow the other is forever gone. (Morris v. Rexford, 18 N. Y. 552.) Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies. * * *

Judgment reversed.

See also Conrow v. Little, 115 N. Y. 387. At common law a mortgagee holding a bond and mortgage had to elect between the remedy at law on the bond and the remedy in equity on the mortgage. But see Code, §§ 1628–1630.

BARKLEY v. WILLIAMS.

30 Misc. 687.

Demurrer.

Hiscock, J. Defendants' demurrer is upon the ground that plaintiff has united in his complaint two causes of action which cannot be so united, viz.: One cause of action upon contract and another one based upon section 71, Code, for wilful misconduct by the defendants as attorneys in the prosecution of an action.

Plaintiff seeks to recover damages for the alleged shortcomings of defendants in prosecuting an action for him. Two causes of action are not separately stated in his complaint. It is perfectly well settled, however, that the failure to so state them does not prevent demurrer upon the grounds here urged if in fact two causes of action are set forth and improperly united.

No question has been made by plaintiff upon the argument but that two causes of action are alleged. I think none could well be. There is no dispute but that one of these is based upon section 71, Code, already referred to, and which in substance amongst other things provides that an attorney who wilfully delays his client's cause with a view to his gain shall forfeit treble damages. A dispute arises whether the other cause of action is upon contract for the failure of defendants to properly conduct the action. This view is urged by defendants. Plaintiff's counsel, upon the other hand, insists that it is in tort for the negligent and improper conduct of defendants. Inasmuch as the determination of this question may have some bearing upon the disposition of the main issue I will consider it briefly.

This cause of action which is stated first alleges a distinct and affirmative agreement and undertaking upon the part of the defendants to commence, prosecute and conduct

the action in question in a proper, skillful, etc., manner. It then alleges that they acted in a negligent, unskillful and improper manner. The word "negligent" may not have been an especially appropriate word for the pleader to use, but there can be no doubt that the clause last quoted was intended by him to set forth a breach of the contract just before alleged. Thus we have plaintiff basing this cause of action upon a specific express agreement and contract. He does not for the basis of his complaint rely upon any implied contract even, or upon those obligations and duties which the law imposed upon defendants when they were retained as attorneys. There seems to me no doubt but that he states a cause of action on contract instead of for negligence and tort. Tort "denotes an injury inflicted otherwise than by a mere breach of contract," and negligence is the inadvertent failure to use ordinary care in observing or performing a noncontractual duty implied by law. Am. & Eng. Ency. of Law (1st ed.).

If I am right in the foregoing conclusion we have plaintiff attempting to gather into one complaint a cause of action upon contract and another one to recover a statutory forfeiture or penalty.

An examination of section 484, providing what causes of action may be united in one complaint (in view of the definition given of the terms "personal injuries" and "injuries to personal property" occurring in that section, by Code, section 3343, subdivisions 9 and 10) makes it clear that these two causes of action can be united, if at all, only under subdivision 9 of said section 484.

That subdivision allows the joinder of two causes of action brought to recover "Upon claims arising out of the same transaction, or transactions connected with the same subject of action," provided it appears upon the face of the complaint that they do both belong to such subdivision and are consistent with each other.

It does not appear upon the face of the complaint that the two claims made by plaintiff arose out of the same transaction. One claim arose out of the alleged wilful delay by defendants, and the other out of their alleged improper and unskillful conduct. The transaction made up of the acts constituting wilful misconduct would not necessarily be the same as that constituting negligence or unskillfulness. In fact, it naturally would not be, and the complaint contains no allegation that it was the same. This attempted union of causes of action must, therefore, seek support upon the theory that they arise out of "transactions connected with the same subject of action."

The courts have so many times criticized the uncertainty of the language just quoted and labored to define its meaning, that it is probably not desirable that I should at length attempt to do either. N. Y. & N. H. R. R. Co. v. Schuyler, 17 N. Y. 592, 604.

A text writer who has considered the subject most carefully and analytically concludes that this last provision was not intended to apply to actions at law at all, but only to those in equity. Pom. Code (3d ed.), § 475.

It is at least established beyond much doubt that its construction and application are to be largely measured by expediency and the circumstances of each case rather than by any inflexible rule. Wiles v. Suydam, 64 N. Y. 173, 177.

I am impressed that it should not be so interpreted as to allow plaintiff to unite in one complaint the causes of action which he has sought to. Their nature is essentially and entirely different, and this is so even though the first one should be regarded, as urged by plaintiff's counsel, to be for negligence instead of upon contract. One is based upon a statute; the other upon a failure to discharge a legal obligation. One seeks to recover a statutory penalty or forfeiture; the other mere damages. The line of proof which would sustain one would not establish the other.

They are inconsistent and in that respect conflict with the requirements of the Code. One implies and alleges wilful, intentional commission of acts for which when established a triple liability is imposed here and a criminal liability elsewhere. Penal Code, § 148.

The other cause of action is based upon and legally charges an inadvertent omission to meet an express contract or discharge an implied duty. Definition of negligence, Am. & Eng. Ency. of Law.

The methods by which judgment upon one cause of action could be enforced would be different from those applicable to the other cause of action, if I am correct that it is upon contract. It would be utterly impracticable to try them together. While for wilful delay plaintiff would be entitled to treble damages, it would be the duty of the jury to find only single damages, leaving the same so found to be increased by the court. Code, § 1184.

Assuming that a verdict should be found for plaintiff, how is any one, plaintiff, defendants, or court, to know whether it is for damages arising from a breach of duty, express or implied, to be enforced by an ordinary judgment and execution, or for a tort criminal in its nature, to be multiplied by three and enforced if necessary by a body execution.

Without further discussion of this point it seems to me that the demurrer should be sustained both upon reason and upon the authorities. Wiles v. Suydam, *supra;* Sweet v. Ingerson, 12 How. Pr. 331; Anderson v. Hill, 53 Barb. 238, 246.

The main contention of plaintiff's counsel upon this argument could not be considered because the demurrer did not specifically refer to such element. It is true that under section 490 defendants were compelled to specifically point out the defects relied upon. But I think they have sufficiently done this. The demurrer states in substance that

plaintiff has united a cause of action for breach of contract and one for treble damages under section 71; that this appears upon the face of the complaint, and that such union is improper. Section 484 prescribed the test by which to decide whether plaintiff's practice has been proper or improper. Defendants are entitled to show, I think, in support of their claim that the causes of action cannot be united under that section, *first,* because they do not both come within any one subdivision, and *secondly,* because they are inconsistent. Referring to the causes of action and charging that the attempt to unite them was improper, I do not think it was necessary for the defendants to further say that it was improper because they did not both come within any one class, and because they were inconsistent.

The demurrer is sustained.

If A assaults B and at the same instant slanders him, B cannot join the causes of action under subdivision 9 of section 484. Defendant may either demur or move to compel plaintiff to separately state and number such causes of action. See Paul v. Ford, 117 App. Div. 151. For cases where causes of action have been properly joined under this subdivision, see 1 Rumsey's Prac. (2d ed.) 411–414.

DREXEL v. HOLLANDER.

112 App. Div. 25.

McLaughlin, J. The defendants appeal from an interlocutory judgment overruling their demurrer to the complaint upon the ground that the causes of action alleged are inconsistent and have been improperly joined.

The material facts alleged, and admitted by the demurrer, are that a written contract was entered into between the parties by which the defendants agreed to sell, and the plaintiff to purchase, an automobile for $8,500 — $5,500 to be paid in cash and the balance by the delivery to the defendants of the second-hand automobile at a valuation of $3,000; that the plaintiff performed on his part by paying

the amount of cash stipulated and delivering the old automobile; that thereafter the defendants were unable to deliver the new automobile, and the contract, by mutual arrangement, was rescinded, and defendants returned to the plaintiff the $5,500 cash paid by him, but neglected and refused to return the old automobile.

The first cause of action set out in the complaint sets forth the transaction between the parties, the rescission of the agreement, a demand for the return of the old automobile and the defendants' refusal, and that they "wrongfully converted the same to their own use" to plaintiff's damage of $3,000. In the second cause of action substantially the same facts are pleaded, except as to the demand of the old machine, defendants' refusal to return and its wrongful conversion, and alleges an agreement by the defendants, in consideration of the cancellation of the original contract, to return to the plaintiff the purchase-money paid, viz., $8,500, no part of which had been repaid except the sum of $5,500, and judgment is demanded for the balance.

The appellants contend that the two causes of action pleaded are inconsistent, and are, therefore, improperly joined. Whether or not this contention be sound depends upon the construction to be put upon section 484 of the Code of Civil Procedure. The first cause of action being in tort and the second on contract, they do not fall within either of the first eight subdivisions of this section and cannot be joined under those subdivisions. If properly joined it is because they come within the provisions of subdivision 9 of the section, which provides that causes of action may be united if they arise "upon claims arising out of the same transaction, or transactions connected with the same subject of action and not included within one of the foregoing subdivisions of this section." The section, however, further provides as follows: "But it must appear, upon the face of the complaint, that all the causes of action so

united belong to one of the foregoing subdivisions of this section; that they are consistent with each other."

It may be assumed, as contended in the opinion of Mr. Justice Ingraham, that the facts pleaded show the two causes of action arise out of the same transaction, but are they "consistent with each other"? To this inquiry it seems to me there can be but one answer. The first cause of action proceeds upon the theory that the title to the automobile was in the plaintiff, and that the defendants wrongfully deprived him of it by converting the same to their own use. The second cause of action proceeds upon the theory that the title to the automobile was, by agreement, in the defendants.

The causes of action are not only inconsistent, but contradictory. The proof to establish one would destroy the other. For conversion plaintiff would have to prove that at the time the conversion took place he either had the title or was entitled, by reason of a special property therein, to possession. To recover under the second cause of action plaintiff would have to prove a breach of contract; that the title to the automobile was in defendants, they having purchased it from him at the agreed price of $3,000. The measure of damage in one case would be the value of the automobile at the time the conversion took place, which might be more or less than $3,000, while in the other case the measure of damage would be the amount which the defendants agreed to pay or apply on the purchase-price of the new machine.

It is difficult to see how these two causes of action could be tried together, unless the court received evidence first as to one and then as to the other, and if such trial were had it is equally, if not more, difficult to imagine how the trial court could properly submit the subject to the jury. The truth is, the nature of the two actions is essentially different. The facts to establish the liability are unlike;

the measure of damage is different, and the defense is different.

For these reasons we think that the interlocutory judgment should be reversed, with costs, and the demurrer sustained, with costs, with leave to the plaintiff to amend on payment of costs in this court and in the court below.

A cause of action for libel cannot be joined with one for slander. Nor may different persons speaking the same defamatory words be joined as defendants in one action in slander.

Where plaintiff suffers personal injuries and damage to property by the same negligent act of defendant two causes of action arise which may be joined. McInerney v. Main, 82 App. Div. 543.

A cause of action held by or against defendant individually cannot be joined with one by or against him in a representative capacity. Wiles v. Suydam, 64 N. Y. 173.

2. Demurrer. Code Civ. Proc., §§ 487–499, 520, 964.

MARIE v. GARRISON.

83 N. Y. 14.

ANDREWS, J. * * *

A demurrer to a complaint for insufficiency can only be sustained when it appears that, admitting all the facts alleged, it presents no cause of action whatever. It is not sufficient that the facts are imperfectly or informally averred, or that the pleading lacks definiteness and precision, or that the material facts are only argumentatively averred. The complaint on demurrer is deemed to allege what can be implied from the allegations therein, by reasonable and fair intendment, and facts impliedly averred are traversable in the same manner as though directly averred. * * * The remedy for indefiniteness is not by demurrer, but by motion. (Code, § 546; Seeley v. Engell, 13 N. Y. 542.) "Indefiniteness," says Chitty, "is in general only matter of form." (1 Chitty's Pl. 717.) The rule

by which, under the Code the sufficiency of a complaint is to be determined is stated by Denio, J., in Zabriskie v. Smith (13 N. Y. 330). He says: "It is sufficient that the requisite allegations can be fairly gathered from all the averments in the complaint, though the statement of them may be argumentative, and the complaint deficient in technical language."

A demurrer is in legal effect "a declaration that the party will go no further because his adversary has shown nothing against him." Webb v. Vanderbilt, 39 N. Y. Super. 4. Even after a demurrer has been overruled it is a conclusive admission of all the material facts in the pleading demurred to for all the purposes of the action until it is withdrawn by consent or order. Nat. Con. Co. v. Hudson R. W. P. Co., 110 App. Div. 133.

But a demurrer does not admit the construction put upon a contract or statute by the pleading demurred to, nor the correctness of inferences drawn from facts admitted or alleged, nor conclusions of law, nor immaterial allegations, but only the truth of such facts as were properly stated therein. See Bogardus v. N. Y. Life Ins. Co., 101 N. Y. p. 336, where the contract alleged in the complaint was held to be admitted by a demurrer, but not plaintiff's construction of the contract, although that was also alleged in the complaint; and Angel v. Van Schaick, 30 St. Rep. 714, where the answer set up a statute of Pennsylvania and then construed it and a demurrer was held to admit the statute but not defendant's construction of it.

The demurrer does not admit what the court can judicially notice to be untrue. It admits liquidated damages, but not unliquidated damages.

MOORE v. CHARLES E. MONELL CO. ET AL.
27 MISC. 235.

DEMURRER by defendants to the complaint.

TRUAX, J. The complaint alleges that the defendants executed the agreement annexed to the complaint. That agreement contains a provision to the effect that the defendant corporation will make a note, payable on demand to the order of plaintiffs' intestate, for the sum of $14,471.17, with interest, and that after having been indorsed by the party of the second part it will deliver it to

the party of the first part, the plaintiffs' intestate, and that the party of the second part will indorse the said note so made as aforesaid, and will deliver the same to the said party of the first part. The complaint further shows that pursuant to said agreement the defendant corporation duly executed and delivered their promissory note in writing and sets forth in full a copy of said note with the words, "endorsed, Charles E. Monell." Perhaps this is not a very artistic way of alleging that said note was indorsed by said Monell, but I am of the opinion that the allegation that the note was so indorsed is in effect contained in the complaint.

"To sustain a demurrer to a complaint," the Court of Appeals said, in Marie v. Garrison (83 N. Y. 14), "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." I am, therefore, of the opinion that, by virtue of section 114 of the act in relation to negotiable instruments (Laws of 1897, chap. 612), the defendant Monnell became liable to the payee as indorser.

The demurrer interposed is joint in form, by both the defendants. It is well settled that if a complaint states a cause of action against either defendant, such a demurrer must be overruled.

The defendant Monell, however, contends that the complaint shows that the note set forth in it is *ultra vires* as against the defendant corporation, and that, therefore, he is not liable as an indorser. If the making of the note is an act which the corporation had no power to do, still such act was not in itself illegal, and having been authorized by all the stockholders of the corporation it becomes a valid act of the corporation and binding upon it. Kent v. Quick Silver Mining Co., 78 N. Y. 186.

"A bank," says the Court of Appeals, in the case last cited, "has no authority from the State to engage in benevolent enterprises; and a subscription, though formally made, for a charitable object would be out of its powers; but it would not be otherwise an illegal act; yet if every stockholder did expressly assent to such an application of the corporate funds, though it would still be in one sense *ultra vires,* no wrong would be done, no public interest harmed; and no stockholder could object, or claim that there was an infringement of his rights, and have redress or protection. Such an act, though beyond the power given by the charter, unless expressly prohibited, if confirmed by the stockholders could not be avoided by any of them to the harm of third persons."

It seems to me that these words are peculiarly applicable to this case.

Demurrer overruled.

PEOPLE v. BANKER.

8 How. Pr. 258.

From opinion of Harris, J., page 261.

"But the defendant claims the right to have the complaint also examined, and if that shall be found defective, to have judgment in his favor upon the demurrer. * * * It was expressly declared by the 148th section [Code of Pro.] that all objections to the complaint which had not been taken by demurrer or answer, except only those which involved the jurisdiction of the court, and the sufficiency of the cause of action, should be deemed to have been waived by the defendant. Of course, the objections so waived could not be made available upon the demurrer to the answer. If therefore it is allowable to attack the complaint at all, it is

only to show that the court has not jurisdiction of the action, or that it states no cause of action."

Baxter v. McDonnell, 154 N. Y. 436; Henriques v. Yale, 28 App. Div. 354.

Demurrer must be to the whole of a *cause of action* or defense. Holmes v. Northern Pacific R. Co., 65 App. Div. 49.

If to a *complaint* containing separate causes of action it will be overruled if any one of the causes of action is sufficient. Hale v. Omaha Nat. Bk., 49 N. Y. 626. So to an answer containing separate defenses.

SECOR v. PENDLETON.

47 HUN, 281.

APPEAL from an interlocutory judgment sustaining a demurrer to plaintiff's complaint.

* * * * * * * * *

DANIELS, J. The demurrer was served to the plaintiff's complaint upon two grounds, the first being the objection that there was a defect of parties plaintiff in the action, and the other that the complaint did not state facts sufficient to constitute a cause of action. The second objection was directed in part to the insufficiency of the averment that the plaintiff had been appointed administrator of the estate of the intestate by any tribunal having authority to make the appointment in this State. What the complaint alleged upon this subject was that "letters of administration were duly issued and granted unto plaintiff, who is in fact alone entitled to the possession of and has sole power as administrator, etc., to collect the assets and liquidate the business affairs of said firms." It was not stated in the complaint that the intestate died leaving property in this State, or that letters of administration had been issued upon his estate by any surrogate having that authority within this State. But the right of the plaintiff to maintain the action

was left to rest wholly upon the allegation that letters had been duly issued and granted to him. To maintain the sufficiency of this allegation, reference has been made to section 532 of the Code of Civil Procedure. But this section can be attended with no such effect. For to bring the allegation within its provision that the judgment or decree relied upon was duly rendered or given, it should be made to appear that it was done in a proceeding before some court or judicial tribunal. As much as that is required, to maintain the force and effect of letters of administration, by section 2591 of the same Code. * * *

It was an essential fact upon which the right of the plaintiff to maintain the action depended, and it should have been averred to disclose and maintain that right.

But it will not result from this defect in the statement of the plaintiff's authority to sue, as the representative of this estate, that the judgment can be sustained, for the demurrer was not framed in such a form as to take advantage of it. It was not a deficiency in the statement of the cause of action, but it was a failure on the part of the plaintiff to show that he had legal capacity to sue; and the demurrer, to be effectual, should have been in that form according to subdivision 2 of section 495 of the Code of Civil Procedure. As it was framed it did not disclose the existence of any legal capacity on the part of the plaintiff to maintain the action. In Sheldon v. Hoy (11 How. 11) the objection was raised by the statement in the demurrer that it did not appear that the plaintiff was the administrator of the goods, chattels and credits of the deceased intestate, which, though not in the language of the Code, was substantially an assertion of the objection that the plaintiff was without legal capacity to sue. * * *

But in Hafner, etc., Company v. Grumme* it was considered and held by Mr. Justice Bradley that a demurrer to the complaint, as failing to state facts sufficient to constitute

*10 Civ. Pro. 176.

a cause of action, will not raise this objection under this other section of the Code.

The complaint, together with the agreement annexed to and forming a part of it, did disclose a cause of action in favor of the plaintiff as administrator. * * *

By failing to present the objection, by the demurrer, that the plaintiff had not the legal capacity to recover the demand, the objection has been waived. (Code of Civil Procedure, § 499.) And that waiver will permit the plaintiff, as administrator, to maintain this action, notwithstanding the defective averment of his appointment to act as such. * * * * * * *

Judgment reversed.

The absence of the allegation required by § 1775 is not a demurrable defect. But see Gen. Corpn. Law, § 15, and Welsbach Co. v. Norwich Gas & El. Co., 96 App. Div. 52.

DE PUY v. STRONG.

37 N. Y. 372.

The complaint averred that the plaintiffs were the owners of certain undivided interests in the lands in question, and that the defendants had trespassed thereon. The defendants demurred, on the ground of the nonjoinder of the other tenants in common. The demurrer, however, was overruled, with leave to answer, upon terms. The defendants then put in an answer, insisting, among other things, upon the nonjoinder of necessary parties plaintiff.

At the first trial of the cause, the plaintiffs had a verdict for $30 damages; but the judgment was reversed at general term and a new trial awarded, on the ground that tenants in common could not sever in an action of trespass for an injury to the lands held by them in common. And on a second trial, the plaintiffs were nonsuited on the same ground.

The judgment of nonsuit was sustained at general term, and a motion for a new trial denied; whereupon the plaintiffs appealed to this court.

FULLERTON, J. (after stating the case). It must be conceded that, before the Code, the rule in this State was that tenants in common must join in actions to recover for injuries to the realty. (Austin v. Hall, 13 Johns. 286; Low v. Mumford, 14 id. 426; Decker v. Livingston, 15 id. 479; Hill v. Gibbs, 5 Hill 56 note.) This rule has not been altered by the Code. The only change it has made is in the mode of taking advantage of a defect of parties. Under the old system, the only remedy was by plea in abatement, and if that were not interposed, a tenant in common could still recover. The defendant could show on the trial that there were others interested in the claim, not by way of bar, but to limit the plaintiff's recovery to his aliquot part of the damages sustained. Now, the defendant may have his remedy by demurrer, if the defect appear on the face of the complaint, or by answer, if it does not.

The only question in this case, as I view it, is whether, when the defect of parties appears on the face of the complaint, the defendant can omit to demur, and take advantage of it by answer, and this point seems to be well settled by authority. (Denison v. Denison, 9 How. Pr. 247; Osgood v. Whittlesey, 10 Abb. Pr. 134; Ingraham v. Baldwin, 12 Barb. 18; Baggott v. Boulger, 2 Duer 169; Zabriskie v. Smith, 13 N. Y. 336.) In this last case, Judge Denio, in discussing the question, remarks: "A dilatory defense, which a plea in abatement is considered to be, is not favored, but he that is entitled to avail himself of it, must interpose it promptly, according to the established forms. Here the facts were fully disclosed by the complaint, and the defendant *could have demurred.* The authority to object by way of answer is, in terms, limited to cases where the fact does not appear in the prior

pleading. When, therefore, the last section (§ 148), which I have quoted, declares, that if the objection is not taken by demurrer or answer, it shall be considered as waived, it means, that if it be not taken by demurrer, when that mode is proper, or by answer, in cases where that is the appropriate method, it is waived. This construction will give full effect to all the language, and will, besides, compel the defendant to take his ground with the promptness inculcated by the rule of pleading to which I have referred." This question was again considered in this court, in Merritt v. Walsh (32 N. Y. 690), and Zabriskie v. Smith was there cited as settling the rule. The question is, therefore, no longer open for consideration. Where a demurrer can be interposed, for a defect of parties, the defendant is confined to that remedy alone, and it is only where evidence is necessary to make the defect apparent, that an answer to that point is permitted.

The complaint in this action distinctly alleges that each of the plaintiffs is the owner in fee of a specified fractional part of the lands on which the trespasses were committed, the sum of which parts is much less than the whole of the lands; thereby admitting that there were other parties jointly interested with the plaintiffs in the claim sought to be recovered, and thus bringing the case directly within the rule established. The defendants were, therefore, right, in the first instance, in interposing a demurrer to the complaint, and when it was overruled, they should have corrected the error by an appeal. Having omitted to do so, they have acquiesced in the judgment, and are concluded by it. If the merits of that decision were before us in this controversy, we should correct the error, but they are not, and the case stands precisely as if no demurrer had ever been interposed. That being so, and holding that the question could not be raised by answer, the plaintiffs were at liberty to recover their aliquot proportion of the damage

proved on the trial. The judgment of the General and Special Terms should be reversed, and a new trial granted, costs to abide the event.

But see Osterhoudt v. Supervisors, 98 N. Y. 239, 243. Under the Code the court is bound to take the objection, even on appeal, when a proper case is presented. City Eq. Co. v. Elm Park Realty Co., 135 App. Div. 856.

SEAMANS v. BARENTSEN.
180 N. Y. 333.

CULLEN, Ch. J. Plaintiff declared on an oral contract made in the latter part of March, 1900, whereby the defendant for a term of one year commencing on the 1st day of April, 1900, agreed to purchase the milk produced on the plaintiff's farm at a specified price, and claimed to recover damages for breach of said agreement. The defendant answered making a general denial and pleading specially the Statute of Frauds. When the case was brought on for trial the defendant moved for judgment on the pleadings on the ground that the agreement declared upon was void under the Statute of Frauds. The motion was denied and an exception duly taken. When evidence was offered to prove the contract the defendant again objected that a contract not to be performed within a year must be established by written proof. Over defendant's objection and exception the evidence was admitted. The case was submitted to the jury on the disputed questions of fact, and a verdict rendered for the plaintiff. The judgment entered on that verdict was affirmed by the Appellate Division, and an appeal taken from such affirmance to this court.

The judgment below cannot be sustained. The contract on which the plaintiff has recovered was unquestionably void under the Statute of Frauds. Its invalidity not only appeared on the face of the complaint, but was expressly pleaded in the defendant's answer. The motion for judgment on the pleadings and the objection to the admission

of the plaintiff's testimony sufficiently raised the question of the invalidity of the contract. The learned Appellate Division seems to have affirmed the judgment of the Trial Term on the ground that as the invalidity of the contract appeared on the face of the complaint the defendant's objection to it could be taken by demurrer only, and was waived by the answer. This position is untenable.

Section 488 of the Code of Civil Procedure specifies eight different causes of demurrer. It is entirely clear that the objection to the complaint in this action falls within the eighth clause, to wit: "That the complaint does not state facts sufficient to constitute a cause of action." This the learned counsel for the respondent conceded on the argument. By section 498 of the Code, when any grounds of demurrer do not appear on the face of the complaint, the objection may be taken by answer. By section 499 an objection taken neither by demurrer nor answer is deemed to have been waived, except the objection that the complaint does not state facts sufficient to constitute a cause of action. The objection taken by the appellant at the opening of the trial was, therefore, taken in due time, and his motion for judgment on the pleadings should have been granted, for by pleading the Statute of Frauds in his answer his condition could not be worse than if he had not set it up at all.

The learned court below justified its disposition of the case by our decision in Crane v. Powell (139 N. Y. 379). There it was held that a complaint not showing whether the contract declared on was oral or written, the Statute of Frauds to be available to defendant must be pleaded. That decision does not touch the point presented by this appeal. There is, however, to be found in the opinion this sentence: "When the defect in the plaintiff's cause of action appears on the face of the complaint, the defense must be interposed by demurrer." "Must" in the opin-

ion should be "may." Whether the text as it appears in the reports is a typographical error, a mistake of the copyist or a slip of the learned judge writing the opinion, is immaterial. If the last be the fact, it was merely *obiter*, for the point was not in any way involved in the case, and we could not decide away the express provision of the Code.

From opinion of Cullen, J., in Brauer v. Oceanic Steam Navigation Co., 178 N. Y. 339, 343:

"* * * We think the alleged agreement which was not to be performed within the term of one year was void under the Statute of Frauds. It is urged that the defendant is not in a position to raise this objection, the statute not having been pleaded. Ever since the decision in Crane v. Powell (139 N. Y. 379) the law has been settled in this state, whatever uncertainty there may have been on the subject before, that to avail himself of the defense of the Statute of Frauds the defendant must in a proper case plead the statute. It is to be borne in mind, however, that in the case now before us the plaintiff declared on a written contract and 'the statute concerns oral contracts only; written contracts, of whatever nature, are untouched by its provisions.' (Browne on Frauds, § 344a.) It is difficult to see how the defendant could plead that a written contract was not reduced to writing nor any note or memorandum thereof made in writing. If it be possible for such a plea to be true, it can be true only in the sense that it charges that the written contract was not made at all. This, however, the defendant has sufficiently pleaded, for it has specifically denied the allegation of the complaint that a written contract was executed. Proof by the plaintiff of an oral contract instead of a written contract did not constitute any such variance as required the court on the trial to dismiss the complaint. It did not change the cause of action, and if necessary the court could have amended the complaint to conform to the facts proved. But the extension of such a favor to the plaintiff could not in any respect deprive the defendant of its rights. Therefore, when the oral contract was proved either in lieu or in support of the written one declared on in the complaint, the defendant could properly raise the objection of the statute by a motion to dismiss or for the direction of a verdict."

PIERSON v. McCURDY.
61 How. Pr. 134.

Lawrence, J. I am of the opinion that the demurrer interposed by the defendant cannot be sustained. The demurrer is upon three grounds: First. That there is a defect of parties defendant. Second. That two causes of action have been improperly united, to wit, a cause of action as for a conspiracy by the defendant, and a cause of action on contract by the defendant to account as trustee. Third. That the complaint does not state facts sufficient to constitute a cause of action.

As to the last ground of demurrer, the defendant 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. And 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. This has been so often held that it seems hardly necessary to cite authorities. * * *

Without reciting in detail the allegation in the complaint in his case, I deem it sufficient to say that it appears to me that enough facts are stated to show that the plaintiff is entitled to some relief against the defendant. It is alleged in substance that, knowing that the stock of the company in which he was a trustee was greatly impaired and depreciated in value, he became a party to a transaction by which he knowingly and illegally received the trust funds of the Mutual Protection Company in payment for that stock, and that with such knowledge he disbursed the money thus received to himself and others in payment for such stock. That he also received $25,000 for his services in

acting in the capacity of stakeholder of the moneys and stock pending the consummation of the agreement between the parties, and also paid to the president of the Widows and Orphans' Company $10,000, in pursuance of the agreement alleged in the complaint. In other words, the facts stated in the complaint, in my opinion, show a fraudulent conspiracy or scheme on the part of the defendant and the others referred to in the complaint to obtain the trust moneys of the Mutual Protection Company by means of a sale to the latter which he knew to be illegal. * * *

He was bound to know under the law of the State that the Mutual Protective Company was prohibited from investing its funds in the stock of the Widows and Orphans' Company, the market value of that stock being far below par. And I agree with the counsel for the plaintiff that the extravagant price paid for the stock, independently of all other considerations, raises a presumption of fraud which would be alone sufficient to sustain the complaint.

It follows, therefore, that the demurrer on the ground that the complaint does not state facts sufficient to constitute a cause of action must be overruled.

Is there a defect of parties defendant for the reason that the others who are alleged to have been engaged in a scheme in pursuance of which the defendant received and disbursed the moneys mentioned in the complaint are not made parties defendant in this action? I think not. If my theory of the complaint is sound, the parties who joined with the defendant in the alleged fraud were joint *tort feasors* with the defendant, and severally as well as jointly liable to the plaintiff as the receiver of the Mutual Protection Company, and it is at the option of the plaintiff to sue any one, all, or such number of the *tort feasors* as he may choose. * * *

Nor does the fact that equitable relief is demanded by the plaintiff affect the question as to parties. As already

stated, the nature of the relief demanded does not affect the plaintiff's right to maintain this action, if in any conceivable point of view a cause of action against the defendant is disclosed by the facts set forth in the complaint. Besides, the rule in this respect as to wrongdoers is the same in equity as at law. * * *

The objection that two causes of action have been improperly united I do not regard as well founded. But one cause of action is stated in the complaint, to wit, the alleged acts or scheme to which the defendant was a party, and by means of which he knowingly and illegally became possessed of the trust property of the Mutual Protection Company. The moneys came to him impressed with the trust for which they had been set apart, and he is sought to be held liable for his illegal diversion of them from the purposes of that trust, and for his unlawful appropriation of them to his own use and to the use of others.

The demurrer to the complaint is overruled and leave given to the defendant to answer over upon payment of costs.

Code, § 488.

Subd. 1. Refers to persons or corporations not amenable to the court, not to irregularity in service of process. Ogdensburg, etc., R. Co. v. Vermont, etc., R. Co., 16 Abb. N. S. 249.

Subd. 2. Applies to cases where the court has no authority to decide the kind of controversy that plaintiff brings, Dodge v. Colby, 108 N. Y. 445; and where the complaint in an inferior court does not disclose a fact essential to give the court jurisdiction, *e. g.*, in a county court where the complaint does not allege that defendant resides in the county. Gilbert v. York, 111 N. Y. 544.

Subd. 3. See Secor v. Pendleton, *supra*. But where complaint does not disclose the fact that plaintiff sues in a representative capacity, a demurrer will not raise the objection. See also Irving Nat. Bank v. Corbett, 10 Abb. N. C. 85.

Subd. 4. The other action must be pending in the court of this State. Oneida Co. Bank v. Bonney, 101 N. Y. 173.

Subd. 5. Berney v. Drexel, 33 Hun, 419, where one of the plaintiffs did not, so far as it appeared by the complaint, have any interest in the cause of action. N. Y. & N. H. R. Co. v. Schuyler, 17 N. Y. 592.

Subd. 6. *e. g.* Failure to join all the partners in an action on a partnership liability, or all the parties to a joint contract in an action thereon, where it appears that demurrant is prejudiced by the nonjoinder. Bauer v. Platt, 72 Hun, 326, 332. The demurrer must identify the persons improperly omitted. Anderton v. Wolf, 41 Hun, 571.

Subd. 7. See section 484, and O'Connor v. Virginia P. & P. Co., 184 N. Y. 46, where a demurrer on this ground was permitted and sustained after a motion to compel plaintiff to separately state and number his two causes of action, had been denied at Special Term upon the ground that there was but one cause of action.

Subd. 8. See § 1207. "The preponderance of authority seems to be to the effect that on a demurrer for insufficiency the inquiry is whether plaintiff would be entitled to a judgment for any relief by default. Accordingly, it is held that where a pleading is framed as an action at law, and there is no prayer for any form of equitable relief, if the complaint fails to state a good cause of action at law, it is demurrable, even though the facts would afford ground for equitable relief; and it is likewise held that where all the allegations of the complaint are for equitable relief, and equitable relief only is demanded, if a good cause of action in equity be not alleged, the complaint is demurrable, even though the facts stated show that the plaintiff has a cause of action at law. (Cody v. First Nat. Bank, 63 App. Div. 199; Swart v. Boughton, 35 Hun, 281; Kelly v. Downing, 42 N. Y. 71);" Black v. Vanderbilt, 70 App. Div. 24.

WEEKS v. O'BRIEN.
141 N. Y. 200.

Per Curiam. The complaint was dismissed on the ground that it contained no averment that the architect unreasonably withheld his certificate of the completion of the building. The complaint was defective in this respect. By the true construction of the building contract the procuring by the plaintiff of the certificate of the architect that the building had been completed, was a condition precedent to his right to recover under the contract the last installment of $6,158, for which this action is brought. To meet this condition and to show a right of action it should have been averred in the complaint, either generally or specially, that the conditions precedent had been performed, or if the plaintiff relied upon a matter excusing him from procuring the

certificate, the facts should have been stated. The complaint neither averred that the certificate had been procured nor that it was unreasonably withheld. A copy of the contract containing the provision as to the architect's certificate was annexed to the complaint. The action was upon the contract and the complainant alleged performance by the plaintiff and that the building had been substantially completed according to its terms. The contract made the architect's certificate the evidence of that fact, and the plaintiff could not recover upon an allegation of performance, upon proving that the building had in fact been completed, without procuring the architect's certificate, or showing that it had been unreasonably refused, or that the defendant had waived its production.

A defendant is authorized to raise the objection that the complaint does not state facts sufficient to constitute a cause of action on the trial, although the objection has not been taken either by demurrer or answer. (Code, § 499.) At the conclusion of the plaintiff's evidence the defendant's counsel moved to dismiss the complaint on the ground that under the contract the certificate of the architect was a condition precedent. The counsel for the plaintiff asked to go to the jury upon the question of unreasonable refusal of the architect to give the certificate. The court in answer said that there is no such issue, and referred to the fact that there was no allegation upon the subject in the complaint. The complaint set out the contract, its performance by the plaintiff, the amount unpaid, and demanded judgment therefor. The answer denied the complaint and set up as a counterclaim in substance that the plaintiff had not completed the building, but after he had commenced the work abandoned it before completion, and that the defendant, after giving due notice to the plaintiff, proceeded under the fourth section of the contract to complete the building according to the specifications, and did complete it, at a cost

of $2,904.58, and also that the defendant had sustained damages by reason of delay, in a sum stated, and these several sums he demanded should be allowed as a set-off or counterclaim against the demand of the plaintiff.

On the trial the plaintiff proved the contract and proceeded to give evidence in detail of what he had done under it. It was claimed by the defendant that the plaintiff had not complied with the contract in several respects, but the principal ground of objection was that the plaintiff had not complied with the contract in respect to the floor of the basement. The plaintiff insisted that he had complied with the contract in that respect, and proof was given as to a demand upon the architect for a certificate, which was refused.

It is claimed that no question having been raised until the conclusion of the plaintiff's evidence as to the sufficiency of the complaint upon the point of the architect's certificate, and the trial having proceeded upon the issue whether the work had been actually completed, without objection, it was then too late to raise the question of the sufficiency of the complaint in that respect. The court might very well have permitted an amendment, but no application to amend was made, and we think it was not too late to raise the objection at the conclusion of the plaintiff's case. At least it was in the discretion of the court to entertain it at that stage of the trial.

A decision upon a demurrer may now be obtained by either party by moving for judgment on the pleadings. §§ 547, 976.

3. ANSWER.

a. Denials and Defenses. Code Civ. Pro., §§ 500, 507–508, 522, 538, 1776–8.

CLARK v. DILLON.
97 N. Y. 371.

APPEAL from judgment of the General Term of the Court of Common Pleas in and for the city and county of New York, entered upon an order made June 5, 1882, which affirmed a judgment in favor of plaintiff, entered upon a verdict.

This action was brought to recover damages for alleged negligence.

The complaint alleged in substance that defendants caused an excavation to be made in a public street in the city of New York, and left the same uncovered without any protection or guard; that, in consequence, plaintiff's wife, while passing along said street in the night-time, without any fault or negligence on her part, fell into the pit so excavated and was injured. The answer was as follows:

"The defendants answer the complaint herein as follows:

"I. That the alleged injuries charged in said complaint, as having resulted to Letitia A. Clark, therein named, were brought about, caused and contributed to by the said Letitia A. Clark.

"II. That prior to the commencement of this action the said Letitia A. Clark commenced an action in this court against these defendants to recover the sum of $50,000 for alleged injuries resulting to her from the accident referred to in the complaint, pending which action the plaintiff promised and agreed to and with these defendants, that if

these defendants would compromise and settle said claim and suit of said Letitia A. Clark that he, the plaintiff, would waive any claim he might have against these defendants, growing out of the said accident, whereupon and in pursuance of said promise and agreement on the part of the plaintiff and before the commencement of this action, to-wit: On or about the first day of June, 1877, these defendants compromised and settled said claim of said Letitia A. Clark, and laid out and expended large sums of money in procuring said settlement and compromise.

"III. They admit the copartnership of the defendants with Milton A. Clyde, and the subsequent death of said Clyde, and they deny each and every other allegation in said complaint contained, not hereinbefore specifically admitted, qualified or denied."

RUGER, Ch. J. A defendant desiring to controvert the allegations of a complaint may do so either by a general or specific denial. An omission to do this in one form or the other is equivalent to an admission of the truth of the facts alleged and not controverted. Such denials are not required to be of any particular form or to be couched in any special phraseology, but they must be expressed in language that conveys to the mind of the reader a clear understanding of the facts they are intended to put in issue. It was formerly the settled rule to construe doubtful pleadings most strongly against the pleader, but this rule has been so far modified by the Code as now to require them to be liberally construed with a view to substantial justice between the parties. This modification has, however, been held to extend only to matters of form and not to apply to the fundamental requisites of a cause of action. (Spear v. Downing, 34 Barb. 522; Cruger v. Hudson R. R. R. Co., 12 N. Y. 190; Bunge v. Koop, 48 id. 225.) A construction of doubtful or uncertain allegations in a pleading, which enables a party by thus pleading to throw upon his adversary the hazard of

correctly interpreting their meaning, is no more allowable now than formerly; and when a pleading is susceptible of two meanings, that shall be taken which is most unfavorable to the pleader. (Bates v. Rosekrans, 23 How. Pr. 98.)

It is in the nature of things that a party who is required to frame his issues for the information of his adversary, and the court, must be responsible for any failure to express his meaning clearly and unmistakably. While it is competent for a party to move to make the pleadings of his adversary more definite and certain, yet, inasmuch as it is the primary duty of the party pleading to present a clear and unequivocal statement of his allegations, the onus of having them made so cannot be cast upon his adversary by his own fault in failing to perform his duty.

It is objected in this case on the part of the appellant, that there is no proof that the defendants created the excavation which was the cause of the injury sued for, or that the place where the same occurred was a public street.

At the Circuit, as also at the General Term, this objection was disposed of upon the ground that the facts necessary to make out the cause of action in the respect mentioned, were admitted by the answer.

No question is made but that the complaint states a good cause of action against the defendant, in respect to the cause of the injury complained of; and the inquiry now is, whether the facts stated in the complaint have been sufficiently denied by the answer to put the plaintiff to their proof.

That pleading contained three defenses separately stated, the first of which substantially alleged that the injuries charged in the complaint were caused, brought about and contributed to by the injured party.

Second. That before the commencement of this action the defendants fully settled and compromised the said claim with the plaintiff.

Third. A denial of each and every other allegation in said complaint contained not hereinbefore specifically "admitted, *qualified* or denied."

The first defense in the answer undoubtedly constitutes a qualification of every fact stated in the complaint with reference to the manner in which the accident occurred, and in effect affirms the truth of all the facts alleged, except that of want of contributory negligence, and alleges that the action is unsustainable by reason of such negligence.

The second contains facts formerly known as being a plea of confession and avoidance and is predicated upon the assumption of the truth of the facts stated in the complaint, but seeks to avoid them by a defense arising out of the subsequent conduct of the parties; and the third was intended as a general denial of such facts in the complaint as had not been before specifically admitted, qualified or denied. The first defense put in issue the question of contributory negligence, and imposed upon the plaintiff the burden of proving that the accident occurred without negligence on the part of the person injured, and that was the only fact put in issue by that defense, the other allegations being impliedly admitted. The fact alleged, however, constituted a good defense to the entire cause of action, and if made out by proof must have resulted in a verdict for the defendants. A good defense to the cause of action stated in the complaint was also alleged in the second count of the answer; and in respect to both of these counts the answer was sufficient in matter and form to preclude a successful demurrer or motion to strike them out as frivolous.

The question arises over the effect to be ascribed to the alleged general denial. It was said in the case of Calhoun v. Hallen (25 Hun, 155), that an answer denying each and every allegation set forth in the complaint, except as herein "admitted, qualified or explained," contains an authorized form of denial, and should not be stricken out as frivolous.

This form of answer has sometimes been criticised as throwing upon the opposite party the necessity of first determining the legal question as to how far the facts stated, may properly be said to qualify or explain others, before the pleader can know what facts are admitted or denied by the pleading. Without, however, attempting to determine whether an answer denying only such facts as are not admitted, qualified or denied by previous allegations in the answer, under the rule established by the Code requiring facts in plain and concise language alone to be stated, is good pleading or not, it is sufficient to say in this case that the material allegations of the complaint are expressly excepted by the terms in which it is expressed from the operation of the general denial pleaded.

The allegation by the defendant that the injuries described in the complaint did not occur in the manner and form therein alleged, but impliedly did occur in another manner which was described in a way to exempt the defendant from liability therefor, was a most important and essential qualification of all of the facts alleged in the complaint.

It cannot be reasonably said that the fact that the party injured contributed to his own injury is not a qualification of the allegation in the complaint that the defendants' conduct in digging a pit in a public highway and leaving it unguarded was the sole cause of the injury. The allegations which are denied by this answer are those only which are not qualified by its previous statements. Of what fact stated in the complaint can it be legally said that they are not qualified by this answer?

The allegation in the complaint that the injury occurred without the fault or negligence of the plaintiff, is substantially denied by the first count of the answer which affirmatively alleges the reverse of this to be true — but while this allegation constitutes a denial of that fact, it also operates

as a qualification of every other fact going to make out the cause of action. The test which has frequently been applied to discover the true meaning of a pleading will clearly illustrate the effect of this attempted denial. Suppose the defendants were indicted for perjury, upon the ground that they had verified an answer which falsely denied that the defendants were the creators of the excavation which caused the injury in question, could any clause in this answer be pointed out which proved such a denial? It certainly cannot be successfully claimed that a clause which expressly excepted from its operation all allegations in the complaint, qualified by previous statements in the answer, was intended to deny such allegations as were qualified. We think that such an indictment could not be sustained upon the pleading in this case.

* * * * * * * *

Judgment affirmed.

See Griffin v. L. I. R. R. Co., 101 N. Y. 348, holding sufficient an answer which denied "each and every allegation of the complaint not hereinbefore admitted or controverted," where the pleadings showed clearly which allegations were intended to be denied thereby. The proper remedy against an answer that does not plainly point out the allegations of the complaint to which the denials are directed is a motion to have the answer made more definite and certain. Thompson v. Wittkop, 184 N. Y. 117; Lyth v. Green, 21 App. Div. 300. Denial by reference to the *folios* of the complaint is bad. (Same case.) So is a denial of "each and every *material* allegation" of the complaint. Mattison v. Smith, 1 Robt. 706. Defendant "says he denies," held good. Jones v. Ludlum, 74 N. Y. 61. Designating the allegations denied by reference to the paragraphs of the complaint is the usual practice. Curran v. Arp, 141 App. Div. 659; Electrical Acc. Co., 194 N. Y. 473.

Though not expressly provided for in the Code it was decided in Bennett v. Leeds Mfg. Co., 110 N. Y. 150, that sections 500, 524 and 526 when read together permit a general or specific denial to be upon information and belief.

WEST v. AMERICAN EXCHANGE BANK.
44 BARB. 175.

APPEAL from a judgment entered at the circuit on a trial before the court without a jury. The complaint alleged that the plaintiff, on the 29th day of May, 1861, was the owner of a certain promissory note; that on that day he employed the defendant to collect the same; and that the defendant did collect it, but had failed to pay over the proceeds, although often requested to do so. The answer denied none of these allegations, but set up new matter, viz: that the defendant was collecting agent in the city of New York for the Medina Bank, and as such received and held the note in question until its maturity, when the proceeds were received by it as such agent. And that afterwards, and before the 1st of July, 1861, it paid the same to the said Medina Bank.

The court found the following facts: That on the 29th day of May, 1861, the plaintiff was the owner of a note made by one West, and payable in the city of New York, for $535, to mature on the 1st and 4th of June. That on the day first named, he deposited the note for collection, in the Medina Bank, Orleans county, indorsed in blank. That, at this time, the Medina Bank was indebted to the defendant, for over drafts, to an amount largely exceeding the amount of said note. That on the day named and being so indebted, the Medina Bank forwarded the note to the defendant, with directions "To collect said note, and credit said Medina Bank with the proceeds." That on the 4th day of June the note was collected, and the proceeds credited in the books of the American Exchange Bank to the account of the Medina Bank, which account then showed the indebtedness of the latter bank to the defendant to be $3,273.37. That the Medina Bank failed and suspended business, on the evening of the 4th of June, 1861, and on the 7th the defendant was notified of said failure. That after the 29th

day of May the defendant continued to pay the drafts of the Medina Bank. That the defendant, at the time of receiving the note, from the Medina Bank, and until the time of collecting and crediting the proceeds thereof, as above stated, had no notice or knowledge that the note belonged to the plaintiff, or that the same was not the property of the Medina Bank, and the proceeds thereof were credited by the defendant to the Medina Bank in good faith, in the ordinary course of business between them. That prior to the said 29th day of May, 1861, it had been agreed between the president of the Medina Bank and the defendant that all paper sent for collection by said Medina Bank should be held by the defendant as collateral security for any balance of account owing by the latter to the defendant. That on or about the 1st day of March, 1863, the plaintiff demanded the proceeds of said note, of the defendant, and the latter refused to pay the same to him.

And the judge found as a conclusion of law, that the defendant was not indebted to the plaintiff for the proceeds of said note, and that he was entitled to judgment dismissing the complaint, with costs. From this judgment the plaintiff appealed.

By the Court, JAMES C. SMITH, J. * * *

The defendants also contend that the plaintiff cannot maintain this action, for the reason that their bank was the agent of the Medina Bank in respect to the collection of the note, and owed no duty to the plaintiff. But the pleadings admit the reverse of this to be the fact. The complaint expressly alleges that "the plaintiff employed the defendant to collect the note; which the defendant undertook to do;" and this allegation is not denied by the answer. The most that can be claimed by the defendants is that the answer contains a version of the transaction which is in some respects inconsistent with the allegation in the complaint; but that does not amount to a denial. (Wood v. Whiting, 21 Barb. 190.) It has been said that an allegation

which, if uncontroverted, is to be taken as true, should be direct and positive; one which at most merely implies an inference that such is or will be claimed to be the fact should not be construed as a material allegation. (Per Bosworth, J. Oechs v. Cook, 3 Duer 161.) The correctness of these observations when applied to an affirmative allegation, or an allegation of new matter, cannot be questioned. The like remarks are equally applicable to an allegation in an answer by which it is attempted to deny a material allegation in a complaint, or, in other words, "to join issue." A denial may be general or specific, at the option of the pleader, but in either case it must be direct and unequivocal. If it merely *implies* that the allegation is controverted, or justifies an *inference* that such is or will be claimed to be its effect, it will not be construed as a denial. Tested by this rule, the answer before us does not deny the allegation referred to, contained in the complaint, and that allegation being uncontroverted is to be taken as true, for the purpose of the action. This being the requirement of the statute, (Code, § 168*) the fact thus admitted by the pleadings cannot be contradicted or varied by evidence; and as the judgment of the court below is contrary to such fact, it is erroneous.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

* Code Civ. Proc., § 522.

Fleischam v. Stern, 90 N. Y. 110. In Emery v. Baltz (94 N. Y. 408), which was an action against a surety on the bond based upon an alleged failure of Hack to account for money collected by him for plaintiff, the answer was in these words, viz.: "The defendants aver that they have no knowledge or information sufficient to form a belief as to whether or not said Hack was at the time of the commencement of this action indebted to the said plaintiff in the sum mentioned in the complaint, or in any other sum, and therefore deny the same." Held, "This was merely a denial of a legal conclusion, and put in issue no fact alleged."

For an affirmative allegation in an answer which is equivalent to a denial of an inconsistent allegation in the complaint, see Cilley v. Preferred Acci. Ins. Co., 109 App. Div. 394, aff'd 187 N. Y. 517.

KIRSCHBAUM v. ESCHMANN.
205 N. Y. 127.

WERNER, J. The question presented on this appeal is whether the defendant's answer raises any issues which the defendant has the right to have submitted to the jury. At Trial Term the plaintiffs moved for judgment upon the pleadings and their motion was granted. The defendant asked to go to the jury upon the issues which he claimed were raised by his answer, and this motion was denied. Upon the exceptions taken to these rulings the defendant took an appeal to the Appellate Division, where the decision of the Trial Term was affirmed. Concretely stated, the question is whether the answer, either in its denials or affirmative allegations, raises any issues or presents any defenses to the plaintiff's complaint.

* * * * * * * *

The plaintiffs' first criticism of the answer is based upon its opening declaration. It begins as follows: "The defendant * * * for an answer to the amended complaint herein *states:* 1. That the defendant herein denies that he has any knowledge or information sufficient to form a belief as to the allegations contained in paragraph '1' of the amended complaint herein." The point of the criticism is that the defendant, instead of denying, "states that he denies," and it is argued that this form of pleading is not authorized. * * * The question is not new, and it was formerly the subject of much controversy, but the practice was finally settled by this court in Jones v. Ludlum (74 N. Y. 61). In that case it was held that in a reply to a counterclaim the plaintiff's allegation "he says he denies," &c., was the equivalent of an allegation that "he denies." There is no distinction between that case and the case at bar. * * * It may be stretching even the liberal construction enjoined by the Code to hold that either form

represents good pleading, but the question is decided and further discussion would be profitless.

The second objection to the answer is based on the form of the denials "of knowledge or information sufficient to form a belief." It is to be observed that these denials of knowledge, &c., are not addressed to any specific allegation of any of the paragraphs of the complaint, nor to each and every allegation thereof, but "to *the* allegations contained" in such and such paragraph. None of these paragraphs in the complaint has less than two allegations of fact, and one contains as many as ten. Some of these allegations in the complaint relate to matters of which the defendant must have such personal knowledge that he could not honestly deny knowledge or information sufficient to form a belief. Others refer to matters of which he may be presumed to have knowledge and then there may be others as to which he can truthfully plead ignorance. This answer ignores all these distinctions. We think this is not good pleading. * * * The answer should be so definite and certain in its allegations that the pleaders' adversary should not be left in doubt as to what is admitted, what is denied, and what is covered by denials of knowledge or information sufficient to form a belief. Under the form of denial employed by the defendant it would be difficult, if not impossible, to convict him of perjury if it should transpire that some of his denials of knowledge, &c., were false, for he could meet the charge by saying that his denials referred only to matters of which he had in fact no knowledge or information. The illustration can be made more plain by taking a closer view of some parts of the answer. The defendant has denied, for instance, knowledge or information sufficient to form a belief as to the averments of the complaint charging that pursuant to the underwriting agreement the defendant received certain shares of common stock which he accepted and retained, and that a notice

was served upon him demanding payment, which the defendant refused to make. This seems to be a matter of which the defendant must have had knowledge, and with reference to which we think he could not honestly deny knowledge or information sufficient to form a belief. Then there are other matters, such as the execution and the contents of the agreements upon which the defendant is sought to be held liable, and the organization and existence of the United Educational Company. Some of these things are at least presumptively within the knowledge of the defendant, and if that should prove to be so he could not stand upon denials of knowledge or information sufficient to form a belief. Then finally there are such matters as the death of the plaintiffs' testator, the appointment and qualification of the plaintiffs as executors, &c., of which the defendant may be utterly ignorant, and as to which he may deny knowledge or information so as to put the plaintiffs to their proofs. Thus the whole discussion may be summarized in the statement that the defendant's answer is clearly bad in part and presumptively bad in other parts, and technically within the rules of good pleading in a few particulars. The courts below evidently concluded that these latter features of the answer were so few and unimportant that no real and substantial issues were presented.

Although this disposition of the case may seem to work no injustice between these parties, it sanctions a practice which we think is wrong as regards denials of knowledge or information of matters which are only presumptively within the knowledge of the pleader, or of any other matter which, although imperfectly, indefinitely or inartificially pleaded so as to be insufficient in form, may be corrected under the order of the court, upon a motion to have the pleading made more definite and certain, or to strike out parts thereof as false or sham. It is clearly proper, for instance, to grant judgment upon the pleadings when the only

denials in an answer are denials of knowledge or information sufficient to form a belief with respect to matters which are unmistakably within the knowledge of the defendant who interposes such an answer. In such a case it is of no practical importance whether there is a motion before trial to strike out the answer as sham, or frivolous, or whether a motion is made at the trial for judgment on the pleadings, because the result in either case will be the same. The recent case of Dahlstrom v. Gemunder (198 N. Y. 449, 454) is an excellent illustration of the rule that judgment may be given upon the pleadings where a denial of knowledge or information is palpably untrue. There the action was upon an alleged breach of warranty. One of the defenses was to the effect that a prior litigation for the same cause had resulted in a judgment which had been paid and satisfied. To this plea in bar the plaintiff was required to serve a reply, and his reply was that he had no knowledge or information sufficient to form a belief as to the payment and satisfaction of the judgment. This was held not to be a sufficient or honest denial. "It is quite incredible," said Judge Hiscock in that case, "that plaintiff should have had no knowledge concerning the termination of his lawsuit, and equally inconceivable that after the lapse of two years he should neither have received nor sought information on this subject. * * * Under such circumstances it was not permitted to him to make a bald and unexplained denial of any knowledge or information." This form of denial, in short, is never permissible to traverse an allegation of a fact which must be within the personal knowledge of the person who is called upon to admit or deny, and when it is used in such circumstances it may be stricken out on motion as sham, or it may be disregarded at the trial (Pomeroy's Remedies, &c., sec. 641).

We think a *different rule* applies, however, *where this form of denial is used to meet allegations of fact which are*

only presumptively within the knowledge of the person making the denial; or where the defect in the pleading is such that the court may, upon proper terms and conditions, permit it to be changed or amended. In such cases it is obviously the correct practice for the party who attacks the pleading to make the proper motion before the trial, as the attacked pleader then has the opportunity to establish his good faith, if he can, and to prove that he cannot honestly go further than to deny knowledge or information, or make his pleading more definite and certain than it is. A single familiar instance will serve to illustrate this point. When an action is brought against a corporation or copartnership the complaint usually charges many things which are presumptively within the knowledge of the officers or the partners, and yet their own knowledge may have been derived wholly from their agents, employees or from third persons under circumstances which render it impossible to make a positive averment. In such case the person who verifies an answer that is challenged should have an opportunity to meet the presumption of knowledge which the law raises against him, and this can only be done on a motion before trial where the pleader can defend his pleading with affidavits showing the circumstances which justify its lack of greater certainty and definiteness.

This is the practice approved in Thompson v. Wittkop (184 N. Y. 117), where it was held that although a denial of all the allegations contained in specified folios of a complaint, "*except as hereinafter admitted*" is not good pleading, yet the denials should not be treated as a nullity so as to deprive the defendant of his right to trial or to amend; and that in such a case the proper remedy is by a motion to have the answer made more specific and certain. So in the case at bar, the defendant has presented denials of knowledge or information which are bad in form because

they are neither general nor specific, and which relate to matters only presumptively within the pleader's knowledge. As to these the judgment should not be sustained for the reason that the plaintiff should make his motion before trial.

Judgment reversed.

STEINBACK v. DIEPENBROCK.
52 App. Div. 437.

Ingraham, J. The action was brought to recover upon an undertaking given on an appeal to the Court of Appeals, a copy of which is annexed to the complaint, the complaint alleging the facts necessary to entitle the plaintiff to recover. The defendant interposed an answer which admits all of the allegations of the complaint, except the 3d and 4th paragraphs thereof. As to such paragraphs it contains the following allegations: "Second. He has no information sufficient to form a belief as to the allegations contained in the Third and Fourth paragraphs of the complaint." This allegation is insufficient to put at issue any allegation of the complaint. By section 500 of the Code of Civil Procedure it is provided that the answer must contain "A general or specific denial of each material allegation of the complaint controverted by the defendant or of any knowledge or information thereof sufficient to form a belief." This allegation in the answer does not comply with this section of the Code. There is no statement as to the defendant's knowledge, and the allegation is, therefore, not sufficient to put at issue the allegations of the complaint referred to.

* * * * * * * *

In Hidden v. Godfrey, 88 App. Div. 496, "Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs I, II," etc., was held sufficient, the court saying: "We think, however, that the weight of authority as well as reason, is in favor of

requiring not a literal but a reasonably strict compliance with the terms of this section of the Code." But see Jurgens v. Wichmann, 124 App. Div. 531.

This form of denial is frivolous where the allegation involves a personal transaction with defendant or matters of public record. Preston v. Cunes, 140 App. Div. 144; City of New York v. Matthews, 180 N. Y. 41, 47.

BAKER v. BAILEY.

16 Barb. 54.

This was an appeal by the defendant from a judgment rendered against him at a special term, upon the verdict of a jury. The action was brought by the plaintiffs, as administrators of Ashbel S. Baker, deceased, to recover damages of the defendant for causing the death of their intestate by a wrongful assault upon him. The verdict was for $500. The substance of the pleadings, and of the material facts, is set forth in the opinion of the court.

By the Court, Gridley, J. The first exception on which the defendant relies arises out of the exclusion of certain testimony offered by the defendant, on the trial. After the plaintiff had given evidence tending to show that the defendant committed the injury which resulted in the death of the deceased, the counsel of the defendant offered to prove that some other person than Bailey committed the injury in question. This evidence was excluded by the court, as inadmissible under the answer.

A brief reference to the pleadings may aid us in determining whether this ruling was right. The complaint averred that *on or about the 18th day of December,* 1849, at the town of Marcellus in the county of Onondaga, the defendant wrongfully made an assault on the said Ashbel S. Baker, and with great force and violence seized him, &c., &c., by means of which he became sick, and died *on the 25th day of December,* 1849, *by reason of the injuries* inflicted on him by the defendant. The defendant in his answer denied

"that *on or about the* 18*th day of December,* 1849, at the town of Marcellus, *or at any other place,* he wrongfully made an assault," &c., &c. "or, that *on or about the* 25*th day of December,* 1849, the said Ashbel died of the injuries so inflicted upon him by the defendant." Now this is a clear case of a *negative pregnant.* Time and place are immaterial; (Gould's Pl. p. 318, s. 25; p. 321, s. 32;) and the plaintiff could have proved the commission of the injury on any other day than that stated in the complaint. The defendant has denied that he made the assault, and that the deceased died of the injury committed, on the *particular days stated in the complaint;* leaving the answer pregnant with the affirmative admission that he made the assault, and that the deceased died thereof, on *other days* than those mentioned in the complaint. Such is the legal construction of the pleading. The pleader says that he did not make an assault on the deceased, *on the day mentioned in the complaint,* and the legal construction of this pleading is, that he *did,* on *some other day.* (See Gould's Pl. 320, s. 30.) As a general rule no issue can be joined on a negative pregnant, because the *affirmative* implication, to which it is open, destroys the effect of the denial or traverse. Thus if the defendant plead in bar a release, made *since the date of the writ,* and the plaintiff replies *non est factum* since the date of the writ, the replication is a negative pregnant. For it *admits,* by implication, *a release made before the writ,* and which is as effectual a bar to the action *as one made afterwards.* There were two ways in which the defendant might have pleaded, if he had desired to put in issue the fact of his doing the act. He might have negatived *any other assault, on a different day,* as he did the place, by saying he did not assault the deceased on that day *or any other;* or he might have denied the assault *in modo et forma,* which does not put time in issue. (Gould's Pl. 318, s. 25.) Now an issue involving a negative pregnant is aided after verdict.

But by the common law, the plaintiff having recovered here the verdict would be final; but if the defendant had recovered there would have been a new trial, on the ground that the merits had not been tried. (See Gould's Pl. 322, s. 34.) But the question presented here is whether the proof offered was *admissible* under the pleadings, within the principles of the code of procedure. By section 149 of that instrument it is provided that "in respect to each allegation of the complaint controverted by the defendant the answer shall contain a general or specific denial thereof; or a denial thereof according to his information and belief; or any knowledge thereof, sufficient to form a belief." And by section 168 it is enacted "that every material allegation of the complaint, not specifically controverted by the answer, &c. shall for the purposes of the action be taken as true." Now it has been shown that the legal construction of the answer is, a denial *that the act was done* or that the death occurred, *on the day charged;* but *an admission, by implication,* that the act was done on some other day; and that the death occurred on some other day than that charged in the complaint. And the rule as to admitting evidence must be such as would have been applied if the pleading had admitted in terms that the defendant seized the deceased and inflicted injuries on him of which he died; but that this was all done *on another day* than that charged in the complaint. It is very plain that under these pleadings no evidence can be admitted that the act was done by *another,* when it is admitted on the record that he did it himself.

* * * * * * * *

Objection to a negative pregnant is waived unless raised before trial by motion to make more definite and certain (Armstrong v. Danahy, 75 Hun, 405), or for judgment on the pleadings on the ground that the answer is frivolous. Stone v. Auerbach, 133 App. Div. 75.

FIELD v. KNAPP.
108 N. Y. 87.

EARL, J. This action was brought to recover against the defendant the sum of $8,000 and upwards on an account stated. The plaintiff does not in her complaint allege any dealings between her and the defendant, or that any account in fact existed between her and him; but she simply alleges, in the most meagre way, that an account was stated between her and him, and that upon such statement a balance of $8,206.29 was found to be due to her. The answer is a general denial. The case was tried before a referee, and in his report he does not find that there had ever been any dealings between the plaintiff and the defendant, but he simply finds as alleged in the complaint that an account was stated between her and him, and that the balance claimed was found to be due to her. Upon the trial of the action the plaintiff made no direct proof of any actual dealings between her and the defendant, or that she ever had any transactions with him, or that she at any time paid him any money. She presented an account which was headed as follows: "Mrs. F. L. Field. In account with R. M. Knapp, 76 Broad street," and upon that account the balance claimed by her appeared to be due. It does not appear how that account came into her possession, nor, if sent to her, why it was sent to her. A witness called by her testified that she placed the account in his hands; that he took it to the defendant and requested him to pay the balance; that the defendant acknowledged it to be correct, but stated that he could not pay it then and requested him to tell plaintiff's husband to come and see him and he would try and fix it up some way with him; that he would pay it as soon as he could. This witness further testified that he called upon the defendant a second time and asked him for the balance due upon the account, and that he again ac-

knowledged that the account was correct, and stated that he would give a check in settlement of it, provided the plaintiff would deduct from the balance appearing to be due upon the account, as presented, the amount due to the defendant upon accounts standing in the names of C. C. Field and John R. Field, the former being her husband's brother and the latter being her son. This evidence was sufficient *prima facie* to establish the plaintiff's allegation of an account stated. She accepted the account and agreed to it as correct, and when it was presented to the defendant the evidence tended to show that he agreed to pay it; and thus it could be inferred that he acknowledged that the balance appearing to be due upon the account was correct. The account itself furnished *prima facie* evidence of speculative dealings between the plaintiff and defendant out of which the account grew.

The defendant was called as a witness on his own behalf and substantially denied the facts testified to by the plaintiff's witness. He further testified that he never had any business transactions with the plaintiff; that he was not indebted to her in any sum whatever; that he did not know in whose handwriting the account produced by her was; that an account was kept on his books in the plaintiff's name which was opened at the request of C. H. Field, her husband, who stated at the time that he did not wish his own name on the books, as he did not want his partner to know anything about it; that his dealings and transactions which entered into the account were mostly with the plaintiff's husband, and once in a while with her son; that he never received any instruction from her as to any of the transactions; that her husband, when he opened the account, told him to put down his name as F. L. Field, and two other accounts were opened by him, one in his brother's name and one in his son's name; that he stated he would be responsible for all the accounts; that he, defendant, never

paid any money to the plaintiff; that he did not know at the time the account was opened, who F. L. Field was and did not learn that it was the plaintiff until nearly the close of the business entered in the account; that her husband said when he opened the account that if there was any loss on the accounts standing in the names of F. L. Field, J. R. Field or C. C. Field, he would be responsible for it. He was then asked these questions: "State whether or not you ever received any money from F. L. Field direct?" A. "No, sir." Q. "State what conversation, if any, you had with Mr. Charles H. Field as to paying any accounts or transactions in the name of F. L. Field?" This question was objected to. * * *

* * * Thereafter the defendant was, as a witness, asked by his counsel * * * the following questions, which were excluded under plaintiff's objections: * * * Q. "State whether Mr. Field told you that the business was his and the transactions were to be for him; that he was to furnish the money and receive the profits, but he wanted it in the name of F. L. Field, in order that he might be able to say to his partner that his name was not upon your books?" * * *

All of these questions seem to have been excluded upon the theory that they were inadmissible under the answer. But under his general denial, the defendant had the right to give any evidence which would show that there was actually no account between him and the plaintiff, and that he had no dealings at any time with her, because if there were no accounts, and no dealings between them, then there was nothing upon which an account could be stated; and he had the right to give any evidence tending to show that no account had been stated. It was competent for the defendant to show that, although this account stood upon his books in the name of the plaintiff, it was actually the account of her husband, and that her name on the books

represented him; that all the dealings were with him; that the defendant incurred no responsibility whatever to the plaintiff, and that his actual indebtedness was to her husband for the balance due upon the three accounts, which really constituted but one account. * * *

Judgment reversed.

Under a general denial defendant may controvert by evidence everything which the plaintiff is bound to prove in the first instance to make out his cause of action. Milbank v. Jones, 141 N. Y. 340. In an action on contract, a different contract (Miller v. Ins. Co., 1 Abb. N. C., and note), or urge that the contract is void as against public policy, where plaintiff's proof discloses the facts showing it. Auerbach v. Curie, 119 App. Div. 175. In conversion for wrongful detention, title in a third person. Griffin v. L. I. R. R. Co., 101 N. Y. 348. In an action for goods sold and delivered, that a third party was the purchaser. Newton v. Lee, 139 N. Y. 332, 336. In negligence, that the act of a third party caused the damage (Roemer v. Striker, 142 N. Y. 134) or that plaintiff was not free from contributory negligence (Durst v. Brooklyn H. R. Co., 33 Misc. 124) except where the action is brought under the Employers' Liability Act (§ 202-a). Assumption of the risk by plaintiff must be pleaded by defendant, Scheyer v. Quinn, 77 App. Div. 624, and proved by him, Dowd v. N. Y., O. & W. R. R. Co., 170 N. Y. 459. In Durst v. Brooklyn H. R. Co. (*supra*), a demurrer to a separate defense consisting solely of the allegation of contributory negligence was sustained.

CONKLING v. WEATHERWAX.
181 N. Y. 258.

CULLEN, Ch. J. * * *

I dissent, however, from the doctrine that the burden of proof rested upon the plaintiff to establish the non-payment of an obligation for the payment of money. While it is necessary that the complaint should allege the breach of such an obligation, to wit, a failure to pay the money owing thereon (Lent v. N. Y. & Mass. Ry. Co., 130 N. Y. 504; Krower v. Reynolds, 99 N. Y. 245, 249), it seems the settled law of the state that, except where the complaint declares generally on an indebtedness, a general denial does not put

in issue the allegation of non-payment, but to admit proof of payment the defendant must plead payment. (McKyring v. Bull, 16 N. Y. 297; Quin v. Lloyd, 41 N. Y. 349.) It may be that the fact that payment must be affirmatively pleaded does not conclusively establish that the burden of proof is necessarily upon the defendant to establish his plea, though the general rule is that the issue is to be proved by the party who asserts the affirmative. (1 Phillips on Ev. (Cowen and Hill) sec. 810.) I frankly concede that it is somewhat illogical that the plaintiff should be obliged to allege non-payment and yet the defendant be required to affirmatively prove payment, but it is equally illogical to require the plaintiff to prove non-payment when a general denial does not put that allegation in issue, and the defendant is required to plead payment. I shall, therefore, refrain from attempting to deduce the answer to the question, on which party the burden of proof rests, from any rule as to pleading as such answer would be necessarily illogical. I shall confine myself to the decisions of the courts of this state on the exact point on which party the burden rests. In an action on a contract for the payment of money, where the issue was payment, I have never known the jury to be instructed other than that the burden of proof was on the party alleging payment to prove that fact, and I think such has been the almost universal view taken by the courts. In fact, the doctrine has been so generally accepted that usually it has been assumed without discussion. In McKyring v. Bull (*supra*) Judge Selden said that payment, like a release, accord and satisfaction, arbitration, etc., was new matter constituting a defense, thus classifying payment with a release, as to the proof of which, unquestionably, the burden rests on the party pleading it. Lerche v. Brasher (104 N. Y. 157) was an action against an administrator to recover for services rendered to the deceased in his lifetime. On the trial the plaintiff

was permitted to testify that he had not been paid for his services by the deceased. It was held that the admission of this testimony was erroneous as the plaintiff was incompetent to testify to a personal transaction with the deceased, but it was further held to be harmless as the plaintiff was not required to prove the negative, and that payment was an affirmative defense the burden of establishing which rested upon the defendant, in support of which no evidence had been given. This seems the only case in this court in exact point. The decisions, however, in the lower courts are numerous. In Claflin v. New York Standard Watch Co. (7 Misc. Rep. 668), which was an action on a promissory note, defense payment, it was held by the General Term of the late Court of Common Pleas of the city of New York that the defendant was properly allowed to open and close the case because payment was an affirmative defense, the burden of proving which rested upon it. In this connection there may be noted the case of Mead v. Shea (92 N. Y. 122). The first cause of action was on two promissory notes, to which the defendant pleaded payment; the second for goods sold, to which the defendant pleaded a general denial. When the evidence was closed the trial court held that the cause of action for goods sold was not sufficiently established to warrant its submission to the jury, and the case went to the jury on the issue of payment of the notes. Prior to the close of the testimony the counsel for the defendant asked the court to rule that it had the affirmative of the issue, which the court denied. On appeal it was contended that the refusal of the trial court to award the defendant the closing address to the jury was error. This court overruled the claim, holding that the defendant's application should have been made at the close of the case; that when it was made there was an issue of fact on which the plaintiff held the affirmative, and, therefore, the defendant's request was properly denied. It

was undoubtedly assumed by the court that payment was an affirmative defense or otherwise it would have been entirely unnecessary to discuss and determine the proper time at which the defendant's application should have been made. * * * In Wellington v. Continental C. & I. Company (52 Hun, 408) the action was brought by a creditor against stockholders of an insolvent corporation to enforce their liability for unpaid subscriptions to stock under section 282 of the Laws of 1854 (General Railroad Act). It was held that in such an action it was necessary for the creditor to prove that the stockholder was in default, but said Judge Bockes, writing for the third department: "If this were an action by the Boston, Hoosac Tunnel and Western Railroad against Ames to recover his unpaid subscriptions, of course it would be for Ames to prove payment as a defense, and not for the company to prove non-payment as a ground of action." Many other cases might be cited. It will be seen that in none of these case is there any citation of authority for the proposition that payment must be affirmatively proved. It is assumed as settled law. Against this uniform current of authority there can be cited but a single case which is exactly in point; that is Cochran v. Reich (91 Hun, 440). Before dealing with it I will refer to the other cases cited by my associate. Witherhead v. Allen (4 Abb. Ct. App. Decisions, 628) arose on demurrer and involved merely a question of pleading. It was an action brought against the members of a joint-stock company after judgment and return of execution unsatisfied against the president of the company. It was held that the complaint must state a good cause of action against the members of the company on the original claim in the same manner as in the suit brought against the officer of the company, and, therefore, that a failure to pay for the goods sold must be alleged. This is simply the rule of pleading declared in the Krower and Lent cases. Knapp v. Roche

(94 N. Y. 329) was an action against the officers of an insolvent savings bank for negligence and misconduct in making improper loans of the funds of the bank. It was held incumbent upon the plaintiff to prove that those loans had not been repaid. The case had no bearing on the principle under discussion. The loans created no obligation on the part of the defendants to repay the same; their liability arose from the fact that they should not have made the loans, and, of course, that liability was limited to the loss occasioned by their action. If the defendants had admitted their liability to the bank or its receiver and pleaded that they had paid the amount of such liability then the case would be in point. Krower v. Reynolds (*supra*) was an action brought on a deficiency judgment recovered against the defendant in New Jersey, on his assumption of a mortgage on certain real estate there situated. The defendant admitted the bond and mortgage and the deed containing his covenant to assume payment of the same, and denied the remaining allegations of the complaint. On the trial the plaintiffs proved their appointment as executors of the deceased mortgagee without proving the New Jersey judgment. A motion for a nonsuit was denied and judgment given against the defendant. On appeal it was sought to sustain this recovery on the theory that the cause of action was made out by the defendant's admission of his covenant to pay the mortgage. This court held that the action was on the New Jersey judgment, not on the covenant saying that the complaint failed to state a good cause of action on the covenant because it did not allege any breach of the same. The case simply goes to the question of pleading. Lent v. N. Y. & Massachusetts Railway Company (*supra*) is also an authority on the question of pleading. It arose on a demurrer to the complaint which alleged an award to the plaintiff in condemnation proceedings, but failed to allege non-payment of the award. There was nothing de-

cided in the case that deals with the question now before us, and its sole application arises out of a single sentence excerpted from the opinion without reference to the general context. The distinguished judge who there wrote for the court said: "But no reason is apparent how it can justify the omission from the complaint of a fact material to the plaintiff's cause of action, and essential to be proved to entitle the plaintiff to a judgment." The statement that it was necessary to prove non-payment to entitle him to judgment was wholly *obiter,* for there was no question of the kind in the case. On this excerpt is based the decision of the General Term of the Supreme Court in Cochran v. Reich, already alluded to. To that decision must be accorded the merit of logic and entire consistency. The action was to recover for the breach of a covenant to pay rent reserved in the lease. The complaint alleged default in such payments. The answer was a general denial. On the trial the plaintiff introduced no evidence of non-payment and, no evidence of payment having been given by the defendant, recovered judgment. The learned trial court, while conceding that the plaintiff's contention was not without "comfort" to be found in the opinions in the Lent and McKyring cases, held, first, that as it was necessary to allege non-payment a general denial put that in issue; and, second, that it was necessary to prove what it was necessary to allege. However logical this decision may be it plainly conflicts with the settled law of this state, that payment, when the plaintiff declares on a specific obligation, must be pleaded, for that was expressly held in the McKyring case, and Judge Brown in the Lent case concedes the binding authority of the earlier decision. From this review of the cases there appears to be no confusion in the law of this state on the question before us, save that raised by Cochran v. Reich which was expressly retracted by the Appellate Division of the first department in Hicks-

Alixanian v. Walton (14 App. Div. 199), the learned judge who wrote the opinion in the earlier case concurring in the decision in the later one. Nor is the rule different in an action in equity. Coulter v. Bower (11 Daly, 203) is also merely an authority on the question of pleading. The complaint for the foreclosure of mortgage was held bad on demurrer for failure to allege a breach of its conditions. Davies v. N. Y. Concert Company (41 Hun, 492) was likewise an action to foreclose a mortgage. That mortgage, however, was given by a corporation and contained special provisions not found in ordinary mortgages given by individuals, though not uncommon in those given by corporations. As pointed out by Judge Daniels, writing for the General Term of the first department, it was not every default in the payment of the coupons or bonds secured by that mortgage that authorized a foreclosure. How far that case is aside from any question now before us appears from the fact that the complaint, which was held insufficient, expressly alleged "and that said coupons were not paid at maturity, nor was any of them paid, or any part thereof." I may also suggest that if the *obiter dictum* in the Lent case is to be considered an authority it is at least neutralized by the very recent declaration of this court in Heilbronn v. Herzog (165 N. Y. 98). The action was to recover the price of goods sold and delivered; the defense that the sale was on credit which had not expired. It was held that the defense was an affirmative one entitling the defendant to the opening and closing of the case, and Judge Werner, writing for the court, said: "Like the defense of payment, it must not only be pleaded, but proved." I am not certain that this declaration was *obiter,* but conceding it to be such there is a fair set-off, *obiter* against *obiter.*

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The suggestion is made in the Encyclopaedia of Pleading and Practice (Vol. 16, p. 179) that the true rule is

" that the plaintiff should prove not non-payment generally, but non-payment when due or at maturity, or in other words a breach of the contract called on," leaving it to the defendant to allege his new matter, payment after the breach, and this suggestion seems to meet with the approval of my associate. I cannot find any authority for such a rule. The text writer refers to Douglass v. Central Land Company (12 W. Va. 508) in support of his suggestion. I find nothing in the case to sustain it. The case itself principally involved the question of pleading and the court held that a plea of payment should conclude " to the country." In the discussion of the opinion the court enunciates substantially four propositions: 1, that the complaint must allege non-payment; 2, that the defendant must affirmatively plead payment; 3, that though it is necessary for the plaintiff to allege non-payment and that allegation is put in issue by the defendant's plea of payment, it is not necessary for the plaintiff to prove that which it is necessary to allege, to wit, non-payment, but, 4, the burden is upon the defendant to prove payment. From this it would appear that the law in West Virginia presents the same paradox that is found in the law in this state. I imagine, however, that the paradox is not confined to either that state or our own, but exists to a greater or less degree in most jurisdictions which follow the common law. A legal paradox is not to be commended and if we were about to develop a new system of jurisprudence, should be carefully avoided. It does not, however, necessarily create a confusion in the law if courts will only stand by their decisions. This is especially true where the questions involved relate merely to pleadings or procedure and not to substantial rights. In the present discussion the only question of substantial right is that as to the party on whom lies the burden of proof. The question of pleading is of very slight importance. It is of little consequence how it is settled provided it stays

settled. If there is to be any attempt to make the law on the question of pleading and proof of payment consistent (which at this late day I think unwise), pleading should be subordinated to proof, not proof to pleading. It may also be suggested that the existing rule as to pleading and proving payment is not anomalous in the law of evidence. In an action to recover a penalty for selling liquor without a license it is necessary to allege the want of a license but it is not necessary to prove it. On the contrary, the defendant must prove his license if he has one. (Potter v. Deyo, 19 Wend. 361.) The same rule prevails in most of the states, even in criminal prosecutions for that offense. (See cases cited in note, Bishop on Statutory Crimes, § 1052.)

LINTON v. THE UNEXCELLED FIREWORKS CO.
124 N. Y. 533.

VANN, J. Upon the trial of this action the plaintiff read in evidence the contract in question, which provided for his employment by the defendant until December 31, 1889, proved that he was discharged February 6, 1889, while engaged in the performance thereof, showed that after due effort he could not obtain other employment, and rested. Thereupon the defendant introduced evidence tending to support the twelve specifications of misconduct and unfaithful service on the part of the plaintiff set forth in its answer, and in addition thereto offered to show other acts of misconduct and unfaithful service on his part not alleged in the answer. Exceptions to the ruling of the court excluding this evidence, upon the ground that the facts had not been pleaded, present the main question arising upon this appeal. No effort was made to amend the answer, but the defendant rested, so far as the point under consideration is concerned, upon the strength of its exceptions.

The defendant insists that this evidence was competent under its denial of the averment by the plaintiff that the defendant broke the contract, and, without right or cause, discharged him.

The plaintiff did not wait until the expiration of the period for which he was hired and seek to recover under the contract the wages therein agreed upon, but he commenced this action within a few days after his discharge to recover the damages caused thereby. It was necessary for him to aver and prove that he was discharged before his term of service, as provided by the contract, had expired, but it was not necessary that he should, specifically or in express terms, aver or prove that he was discharged without cause, as a discharge before the determination of the stipulated period was *prima facie* a violation of the agreement.

The law will not assume that a servant has been derelict in duty from the fact that his employer discharged him, but upon proof under proper allegations that he was discharged while engaged in the performance of the contract and before his term of service had expired, the burden is cast upon the employer of proving, and hence of alleging, facts in justification of the dismissal. Such a defense confesses the contract and the discharge, but avoids the cause of action by showing new matter which, by the command of the statute, must be pleaded. (Code Civ. Proc., § 500; Code Proc., § 149; McKyring v. Bull, 16 N. Y. 297.) Any other rule, as was said by this court in the case cited, would "lead to surprises upon the trial, or to an unnecessary extent of preparation." A general or a specific denial controverts only "material" allegations or such facts as the plaintiff would be compelled to prove to establish his cause of action. (Griffin v. Long I. R. R. Co., 101 N. Y. 348, 354; Fox v. Turner, 17 N. Y. St. Rep. 666.) It does not put at

issue immaterial averments, because the Code does not require that they should be denied. (§ 500.) The language of the statute is that the answer "must contain a * * * denial of each material allegation of the complaint controverted by the defendant," etc. That the plaintiff was discharged before the contract had expired was material. That he was discharged without cause was immaterial, so far as the complaint was concerned, because a recovery could be had without proving it. It was sufficient for the plaintiff to allege a violation of the contract by the defendant. His effort to anticipate and deny any possible defense to his cause of action was surplusage.

Moreover, the main object of a pleading is to notify the adverse party of the facts relied upon by the pleader to constitute a cause of action or a defense. The improvement sought to be effected by the system of pleading provided by the Code was to enable each party to know precisely what he would be required to prove upon the trial. Accordingly, no pleading should be so framed as to mislead or deceive the adverse party by furnishing him only a part of the facts relied upon. Yet this would result from the construction of the pleadings in this action contended for by the defendant, because the effect of a denial that the discharge was without cause, in connection with twelve affirmative specifications of good cause for the discharge, would naturally induce the belief that the acts or omissions so specified were all that the plaintiff would be called upon to meet. It was a fair inference that evidence as to other derelictions was not embraced by the answer and could not be received.

The defendant could not show, as it tried to, acts of gross immorality on the part of the plaintiff, without suggesting them in the answer, although many other wrongful acts of less importance were alleged with great fullness

and precision. A party who has, either intentionally or otherwise, led his adversary to believe that certain enumerated acts only would be proved, will not be permitted to prove other acts of which no notice was given.

In a case recently decided by this court, the complaint averred the performance of all the conditions precedent contained in a contract. The answer denied all allegations not thereby admitted and affirmatively alleged that the plaintiff had not performed all the conditions precedent, and enumerated certain things which, as it specifically alleged, showed that the conditions had not all been performed. The court held that, although the denial, "if left by itself, might have made an issue as to each condition precedent in the contract," still the issue was "confined to the particular breaches of condition specifically referred to." (Reed v. Hayt, 19 J. & S. 121, 128, affirmed on the opinion of the General Term in 109 N. Y. 659.) That case goes farther than is necessary in the decision of the case in hand, because there the averment that the conditions precedent had all been complied with was a substantive part of the complaint, whereas, here, as we have seen, the allegation that the discharge was without cause, was not essential to a recovery by the plaintiff.

We think that the new matter that the defendant sought to prove in confession and avoidance of the contract and the discharge was properly excluded by the trial court upon the ground that it had not been alleged in the answer.

WENDLING v. PIERCE.

27 App. Div. 517.

Adams, J. The plaintiff, a real estate broker, brings this action to recover the amount claimed to be due him by reason of his employment by the defendant to negotiate

the exchange of his farm of about 400 acres for certain real estate in the city of Buffalo.

The answer of the defendant denies any employment of or indebtedness to the plaintiff. It then admits the execution of the contract for the exchange of the property referred to in the complaint and alleges that the defendant was induced to enter into the same by reasons of the false statements and representations made by the plaintiff as the agent or representative of one Harmon Frost, the other party to the contract, and that when he, the defendant, discovered the fraud which had been practiced upon him he refused to complete the exchange and so notified both the plaintiff and Frost.

The allegations respecting the representations made by the plaintiff were regarded as irrelevant by the Special Term, and it is from the order striking them from the answer that this appeal is brought. The theory upon which this order was granted was that the allegations of the defendant's answer were inconsistent with each other, as possibly they were; but we do not understand that consistency is any longer required of a defendant in pleading several separate and distinct defenses.

The former Code of Procedure (§ 150) permitted a defendant to set forth in his answer as many defenses and counterclaims as he might have; and under this system of pleading it was repeatedly held that defenses which were utterly inconsistent with each other might be properly united in the same pleading as, by way of illustration, a denial of speaking the words, and an allegation that the words spoken were true, in an action of slander (Buhler v. Wentworth, 17 Barb. 649), or a denial and a justification of the taking in an action of replevin. (Hackley v. Ogmun, 10 How. Pr. 44.)

When the present Code of Civil Procedure was enacted in 1876 an attempt was made to impose a limit upon a de-

fendant's right to plead separate and distinct defenses by requiring that "they must not be inconsistent with each other." (Laws of 1876, chap. 448, § 507.) But, in 1879 (chap. 542), the words above quoted were stricken from the section, so that now, as formerly, a defendant, without any restriction, may set forth in his answer "as many defences or counterclaims, or both, as he has" (Code Civ. Proc., § 507); and it matters not whether they are consistent or inconsistent with each other. (Bruce v. Burr, 67 N. Y. 237; Goodwin v. Wertheimer, 99 id. 149; Societa Italiana v. Sulzer, 138 id. 468.)

A defendant is sometimes required to elect upon which of two inconsistent defenses he will rely, but this is done only where, from the very nature of the case, it is impossible for him to avail himself of both. (Breunich v. Weselman, 100 N. Y. 609; Hollenbeck v. Clow, 9 How. Pr. 289.)

* * * * * * * * *

Reversed.

THOMPSON v. HALBERT.

109 N. Y. 329.

FINCH, J. This action was brought to recover damages for the conversion by the defendants of two notes and the mortgages which secured them. The first cause of action pleaded respects a note and mortgage upon land in Kansas, dated in 1871, and, as an answer to that, the defendants alleged in their seventh defense, that by the laws of that state in which the maker of the note resided and the land was located, the note and mortgage were barred by the Statute of Limitations, and that no action could now be maintained thereon. To this answer the plaintiff demurred, on the ground that it was insufficient in law on the face thereof. The demurrer was sustained by the Special Term,

but that decision was reversed by the General Term on appeal.

We are of the opinion that the reversal was erroneous. The facts stated in the answer were not pleaded as a partial defense or in mitigation of damages. Where that is attempted the Code explicitly requires that the answer shall so state, and give notice that the facts relied upon are intended as a partial defense. (§ 508.) Where no such statement is made the plaintiff has the right to assume, and the court must assume, that the new matter alleged is pleaded as a complete defense, and if demurred to must be tested as such. (Matthews v. Beach, 5 Sandf. 256; s. c., 8 N. Y. 173.) Applying that test the answer is insufficient. It merely affects the amount of damages to be recovered, by tending to reduce the value of the securities converted. It confesses but does not avoid. It admits the cause of action and questions only its extent and amount, and is not a bar to a recovery. It is bad, therefore, as a defense, and the Special Term was right in so holding. It is not denied that the facts alleged, if admissible at all, may, nevertheless, be put in evidence for the purpose of affecting or reducing the value of the securities. (Booth v. Powers, 56 N. Y. 22.) So far as the question of pleading is concerned they are admissible under the denials of the answer. The plaintiff must prove the value of the articles converted as the basis of his recovery, and what he may prove the defendants, denying, may disprove. The plaintiff averred the value of the note to be $300 and the accrued interest at twelve per cent. The defendants deny that allegation, and aver that the same had no value, and also deny the alleged conversion. While the allegations of value and no value may perhaps not make a technical issue, because needless, yet, under the denial of the answer which puts in issue plaintiff's whole cause of action, the defendants have a right to prove any facts which affect the value

of the securities, and possibly to an amount which would reduce the recovery to merely nominal damages, and so as a question of pleading, and although the seventh defense be stricken out, may prove the law of Kansas and show the difficulty and uncertainty of collection. (Knapp v. Roche, 94 N. Y. 333.) So much the plaintiff concedes. Precisely what useful purpose was served by interposing this demurrer it is, therefore, difficult to see, but the question is raised and must be correctly decided.

The argument of the General Term appears to be that the facts pleaded might induce the jury to find that the securities converted were absolutely valueless, and so the defense become a complete one. It would be more correct to say that the damages would become merely nominal, although the conversion would remain and the wrong itself be undefended. An answer does not bar a cause of action and so constitute a defense when it affects merely the measure of damages.

The judgment of the General Term should be reversed, and that of the Special Term affirmed, with costs, but with leave to the defendants, upon payment of the costs of the demurrer, to plead anew or amend within twenty days after entry and notice of this judgment.

Code § 536 — is held not to have changed the rule at common law which permitted defendant to prove under a general denial any facts which tend to reduce or diminish the actual damages that plaintiff claims to have sustained, but to apply only to cases where punitive or exemplary damages are authorized. Wandell v. Edwards, 25 Hun, 498.

b. Counterclaims. Code Civ. Proc., §§ 501–506, 509, 512, 1770.

PIERSON v. SAFFORD.

30 HUN, 521.

APPEAL by Homer Weston, the defendants' attorney, from an order of the Onondaga Special Term denying his motion to set aside the settlement made by the parties, and the order of discontinuance herein, and for leave to continue the action to judgment for the purpose of perfecting his own rights herein.

SMITH, P. J. On reading the appeal book, we are satisfied with the conclusion of the learned judge at Special Term that the defendant John D. Safford is solvent and able pecuniarly to respond to the appellant for whatever compensation he may be entitled to as the attorney of the defendants in this action, and also that the settlement complained of was not made collusively or with intent to defraud the appellant. The settlement was made before judgment.

Such being the facts, the appellant has no footing which gives him a right to set aside the settlement and continue the action for the purpose of collecting his costs, unless the case is within the provisions of the Code which give an attorney a lien upon the cause of action before judgment. Those provisions are contained in section 66 of the Code of Civil Procedure, as amended in 1879, and are as follows: "From the commencement of an action or the service of an answer containing a counter-claim, the attorney who appears for a party has 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 whosesoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment."

The question arises whether the appellant's clients have a counterclaim in this action to which his lien as an attorney can attach. The action is ejectment. The plaintiff, in his complaint, demands judgment for the possession of the premises described therein and damages for withholding the same. Section 1531 of the Code of Civil Procedure provides that in an action of ejectment, "where permanent improvements have been made in good faith by the defendant, or those under whom he claims, while holding under color of title adversely to the plaintiff, the value thereof must be allowed to the defendant in reduction of the damages of the plaintiff, but not beyond the amount of those damages." Under that section, one of the defendants has set up in her answer what the pleader has termed a "counter-claim to the damages demanded" in the complaint, consisting of taxes paid and improvements and repairs made on the premises, to be set off in extinguishment or reduction of any claim for damages which the plaintiff may recover in the action.

We think the answer does not present a counterclaim, within the meaning of section 66, to which the lien of the attorney can attach. A cause of action is essential to constitute a counterclaim as defined by the Code. (Sec. 501.) Here is no cause of action and no claim which is or can be the subject of affirmative relief. The claim set up is only available to meet or reduce any claim for damages which the plaintiff may recover, and if the plaintiff makes no claim for damages at the trial, or establishes none, the claim set up by the defendant goes for naught. In no event can there be an affirmative recovery by the defendant, and consequently there is nothing involved in the action

upon which the defendant's attorney can have a lien for costs.

The order should be affirmed, with $10 dollars costs and disbursements.

For remedies of an attorney under section 66 (now Judiciary Law, § 475), see Fischer-Hansen v. Brooklyn H. R. Co., 173 N. Y. 492. The section has been held not to apply to an action in the Municipal Courts. People ex rel. Jaffe v. Fitzpatrick, 71 N. Y. Supp. 191.

For helpful discussion of the nature of a counterclaim, read Vassar v. Livingston, 13 N. Y. 257.

A counterclaim must tend to defeat or diminish the recovery of plaintiff. In an action brought to restrain defendant from using an alleged trade-name on the ground that plaintiff had acquired a right to the exclusive use of it, defendant may as a counterclaim allege that he is the owner of the trade-name and ask that plaintiff be restrained from using it. G. & H. Mfg. Co. v. Hall, 61 N. Y. 226.

MAYO v. DAVIDGE.

8 St. Rep. 844.

Appeal from an interlocutory judgment sustaining plaintiff's demurrer to a counterclaim interposed by the defendants.

Barnard, P. J. The complaint is one for the foreclosure of a mortgage made by Sallie M. Davidge and her husband for $2,000. A judgment for a deficiency is asked against both the wife and the husband, and the loan, so far as disclosed by the complaint, was made to them jointly.

They answer, and, among other defenses, aver a loan made by the husband to the plaintiff, a balance due thereon, an assignment of that balance to Longuemon and a reassignment of the same by him to the defendants Davidge and husband.

The answer does not contain an averment that the assignment was made or that the defendants above named obtained the title thereto before the commencement of this action.

A demurrer was interposed to the counterclaim thus pleaded.

By section 501 of the Code the character of a counterclaim is established. In any action on contract "any other cause of action on contract existing at the commencement of the action."

By section 495 it is made a cause for demurrer to a counterclaim that it is not of the character specified in section 501.

It is, therefore, essential to a counterclaim that it exist in the hands of the defendants who set it up at the time of the commencement of the action.

The rights of the parties become fixed according to the facts which existed when the plaintiff commenced his action.

This is in accordance with the rules of pleading as they have always existed.

It is never proper for a party defendant to buy a defense or a counterclaim after he is sued.

Insolvency was never a reason why the rule of pleading should vary. All parties are under the same rules of pleading. It cannot be assumed that the wife, under the allegations of the complaint, is not liable for the deficiency, and that the husband is alone liable so as to prevent the counterclaim on behalf [of] the husband.

The husband does not own the same; his former title passed from him and the reassignment was taken to the wife and husband.

Their right to set it up does not exist because it was acquired after suit brought.

Judgment affirmed, with costs.

In Rice v. O'Connor, 10 Abb. Pr. 362, a demurrer to a counterclaim was sustained because the answer alleged "that plaintiff *is* indebted to defendants," etc., instead of "that before and at the time of the commencement of this suit plaintiff *was and still is* indebted to defendants," etc.

CARPENTER v. MANHATTAN L. I. CO.

93 N. Y. 552.

EARL, J. The action was brought to recover against the defendant for the wrongful conversion, on the 23d day of January, 1879, of a quantity of cord wood. The answer admitted the possession of the wood by the plaintiff, and that the defendant took the same, but denied that the plaintiff owned the wood; and then for a counterclaim, it was alleged that on the 28th day of September, 1871, one Markham, then the owner in fee of the land mentioned in the complaint, executed to the defendant a bond, and a mortgage as collateral thereto on the land, to secure the payment to the defendant of the sum of $45,000, with interest; that thereafter, on default of payment of the sum thus secured, the defendant foreclosed the mortgage and became the purchaser at the foreclosure sale, for a sum which left a deficiency of over $17,000, for which judgment was entered against Markham, who was then, and for three years had been, to the knowledge of the plaintiff, wholly insolvent; that the land was, to the knowledge of the plaintiff, insufficient security for the amount of the bond and mortgage, and he being a second mortgagee with such knowledge, and in possession of the land, between November 7, 1877, and January 23, 1879, wrongfully, fraudulently and with intent to cheat and defraud the defendant, and with the intent to reduce its security and deprive it of such security, cut or caused to be cut from the land the wood mentioned in the complaint, thereby wasting the land, and lessening and reducing defendant's security to its damage $500.

Upon the trial, after the plaintiff had proved his title to the wood, its quantity and value, and the conversion thereof by the defendant, and had rested his case, the defendant then offered to prove the facts alleged in the answer by way of counterclaim, and the plaintiff objected to such proof

and the court sustained the objection. From the judgment entered in favor of the plaintiff, the defendant appealed to the General Term, and there the judgment was reversed, and then the plaintiff appealed to this court.

It is admitted by the plaintiff, as claimed on the part of the defendant, that the facts alleged in the answer show a cause of action against the plaintiff. But the plaintiff's claim is, and so it was held at the trial term, that the cause of action did not arise out of the transaction set forth in the complaint, and was not connected with the subject of the action, and hence was not a proper counterclaim under section 501 of the Code.

The transaction set forth in the complaint was the conversion of the wood, and hence it cannot be said that the counterclaim arose out of that transaction. But, was it not connected with the subject of the action? The word "connected" may have a broad signification. The connection may be slight or intimate, remote or near, and where the line shall be drawn it may be difficult sometimes to determine.

The counterclaim must have such a relation to, and connection with, the subject of the action, that it will be just and equitable that the controversy between the parties as to the matters alleged in the complaint and in the counterclaim should be settled in one action by one litigation; and that the claim of the one should be offset against, or applied upon, the claim of the other. Here it is sufficiently accurate to say that the subject of the action was the wood wrongfully taken by the defendant, and the counterclaim was for damages sustained by the defendant, in the wrongful impairment of its security, by the severance of the same wood from the land, and thus diminishing the value of the land by the value of the wood. In such case it is certainly just that the defendant should counterclaim its damages for the severance of the wood against the plaintiff's claim for the conversion thereof. In the forum of conscience, the

plaintiff was under obligation to restore the wood to the defendant as a portion of its security for its claim against the mortgagor. Thus it can with great propriety be said that defendant's claim had some connection with the subject of the action.

The order of General Term should be affirmed, and judgment absolute ordered against the plaintiff, with costs.

In an action for goods sold and delivered a counterclaim for fraud in the sale was sustained in Siebrecht v. Siegel-Cooper Co., 38 App. Div. 549. In tort for fraudulent representations on the sale of a horse, defendant (vendor) may counterclaim for the balance of the purchase-price. Vadervort v. Mink, 113 App. Div. 601.

As to what constitutes a transaction, see Pomeroy on Code Remedies, §§ 367, 774, and Sheehan v. Pierce, 70 Hun, 22.

As to "the subject of the action," see Pomeroy on Code Remedies, § 775, and Cooper v. Kipp, 52 App. Div. 250, which holds that in an action to replevin a wagon, the value of repairs made thereto by defendant at the request of plaintiff constitutes a valid counterclaim.

MICHIGAN SAVINGS BANK v. MILLAR.

110 App. Div. 670 (aff'd 186 N. Y. 606).

Motion by the defendants, George W. Millar and another, for a new trial upon a case containing exceptions, ordered to be heard at the Appellate Division in the first instance after a trial at the New York Trial Term.

McLaughlin, J. The appeal in this case comes before the court on a motion for a new trial upon exceptions ordered to be heard in the first instance.

There is no dispute as to the material facts involved. On or about the 9th of April, 1904, the Detroit Sulphite Fibre Company sold and delivered to the defendants goods at the agreed price of $2,064.01 on a credit of two months. On the 11th of April, 1904, the fibre company borrowed from the plaintiff $1,548 and gave therefor its collateral promissory notes payable on demand, which contained the

following statement: "Having deposited with the Michigan Savings Bank of Detroit as collateral security, personal property as stated below, we hereby authorize the sale of said personal property at public or private sale, and with or without notice, on the non-performance of this promise, and we do hereby sell, assign, transfer and set over to the Michigan Savings Bank the account as herein below described. Account and draft. George W. Millar & Co. New York, N. Y., April 9. $2,064.01." At the same time it delivered to the plaintiff a draft drawn by it on the defendants for $2,064.01, dated April 9, 1904, payable two months after date. Also statement of the account on which was written the following:

"This account has been assigned to the Michigan Savings Bank, Detroit, Michigan.

"DETROIT SULPHITE FIBRE CO.,
"A. G. LINDSAY, *Treasurer.*"

The draft, at maturity, was presented and payment demanded, which was refused, and thereupon the plaintiff, as the assignee of the sulphite company, brought this action to recover the amount of the assigned claim.

The answer admitted that at the time stated the sulphite company sold and delivered to the defendants the goods referred to in the complaint, for which they agreed to pay the price there stated, and denied its other material allegations. The answer also set up several affirmative defenses, but no evidence was offered to support any of them except one, which the proof did establish, to the effect that on or about the 25th of January, 1904, for a valuable consideration, the sulphite company made and delivered to the defendants its certain promissory note in writing whereby three months after that date it promised and agreed to pay to the defendants the sum of $2,500 at the First National Bank of Detroit, Mich.

At the conclusion of the trial both parties moved for the direction of a verdict. The defendants' motion was denied and plaintiff's granted, to which the defendants took an exception. This and other exceptions taken were, as already said, ordered to be here heard in the first instance.

The real question presented is whether the defendants had a right to offset as against plaintiff's claim the note for $2,500 of the sulphite company, and its determination depends upon the construction to be put upon section 1909* of the Code of Civil Procedure, which provides that where a claim or demand can be transferred the transfer thereof passes an interest which the transferee may enforce by an action or special proceeding or interpose as a defense or counterclaim in his own name, as the transferor might have done, "subject to any defence or counterclaim existing against the transferor, before notice of the transfer, or against the transferee."

The plaintiff acquired its claim by assignment on the 11th of April, 1904. The note which defendants sought to offset against such claim did not fall due until the twenty-eighth of that month, and, therefore, on the day when the assignment was made it was not a claim then "existing," inasmuch as it could not have been enforced. The words of the Code, "subject to any defence or counterclaim existing against the transferor," have reference to the time when the claim or demand is assigned or transferred. If the note had then been due and could have been then enforced the defendants could have offset the same, even though they did not own it at that time but had acquired it subsequently and before notice of the assignment was given. The words "before notice of the transfer" do not mean that a claim may be offset if it were acquired after the assignment and before notice of it, unless such claim were due at the time

* Now Pers. Prop. Law, § 41.

of the assignment or transfer. (Fera v. Wickham, 135 N. Y. 223; Martin v. Kunzmuller, 37 id. 396; Hamilton v. Piza, 6 App. Div. 598.)

This is the general rule, and the section of the Code referred to is but an expression of it, that claims or demands sought to be set off must not only be mutual to the extent that they are owing by each to the other, but they must be due and payable, and, therefore, a claim not due cannot be set off against one which may be thereafter enforced. (De Camp v. Thomson, 159 N. Y. 444.)

The view thus expressed as to the construction of section 1909 of the Code of Civil Procedure is strengthened when that section is read in connection with section 502, which relates to counterclaims, and provides, in subdivision 1, that if the action is founded upon a contract which has been assigned by the party thereto, other than a negotiable promissory note or bill of exchange, a demand existing against the party thereto or an assignee of the contract at the time of the assignment thereof, and belonging to the defendant in good faith before notice of the assignment, must be allowed as a counterclaim to the amount of the plaintiff's demand if it might have been so allowed against the party or the assignee while the contract belonged to him.

"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." Taylor v. Mayor, 82 N. Y. 17.

"If an assignee of a claim desires to protect himself against the purchase by the debtor of claims against the assignor, he has only to give notice of the assignment to the debtor. If he neglects to do this, then it is reasonable to permit the debtor to purchase in good faith any valid claim against his original creditor and to use it as a counterclaim when sued." From opinion, Faulknor v. Swart, 55 Hun, 261, 264.

HOPKINS v. LANE.
87 N. Y. 501.

EARL, J. This action was brought to recover on a promissory note given in part payment of cheese sold by the plaintiffs to the defendant Daniel W. Lane and to Darius W. Benjamin and Quincy Matthewson. The cheese was delivered and each of the purchasers gave a note for his share of the purchase-money. This note was given by Daniel W. for his share, and was signed by Victory L. Lane as surety for him. The defendants in their answer set up a counterclaim for breach of warranty and fraud in the sale of the cheese. One of the grounds upon which the defendants were defeated as to the alleged counterclaim at the trial was that they could not avail themseves of it, as it belonged to the three purchasers jointly. The answer alleged that the sale of the cheese was to the three as joint purchasers, and that allegation was sustained by the proof. There was no proof showing that there was a separate contract with each purchaser or a separate warranty to, or fraud perpetrated upon, each purchaser. For the convenience of the purchasers, and with the consent of the sellers, the cheese was paid for by the separate notes properly secured of the purchasers, and after the notes were thus given there remained no joint obligation to pay for the cheese, simply because it had been paid for. Payment in this mode, however, did not affect the contract of purchase or the relation between the parties growing out of the joint purchase. Any claim, therefore, for damages, growing out of the breach of warranty or the fraud, belonged to the three purchasers jointly and could not be used by one of them as a counterclaim. One of them could not have separately sued the plaintiffs to recover such damages, and hence one of them separately cannot set up such damages as a counterclaim under section 150 of the Code of Procedure. As there was

no defense to this note, except by way of counterclaim, Daniel W. Lane was obliged to pay it, and the claim for damages on account of the breach of warranty and the fraud could be enforced only by an action in the name of all the purchasers against the sellers. If, however, any one of the purchasers refused to join as plaintiff in such an action, he could be made a defendant. We are, therefore, of opinion that the judgment should be affirmed, with costs.

"While, as a general principle, courts of equity follow the rules of law in enforcing set-offs, they exercise an original jurisdiction over the subject, and in cases of peculiar equity and under special circumstances will enforce a set-off in cases not within the letter of the statute. (2 Story's Eq. Jur., § 1437.)" Bathgate v. Haskin, 59 N. Y. 533, 537.

ATWATER v. SPADER.

12 St. Rep. 506.

Dykman, J. This is an action upon an undertaking executed by Margaret G. Spader and J. Vanderbilt Spader for the procurement of an order of arrest in a civil action brought by John A. McCaul against William H. Gale, for the recovery of money received by him in a fiduciary capacity.

The order of arrest was obtained, but when the cause came on for trial the complaint was dismissed and the defendant had judgment for the costs of the action.

The defense to the action is this: Prior to the institution of the action of McCaul against Gale, Gale was indebted to the defendant J. Vanderbilt Spader for money loaned to him individually, and also for money loaned to him and Louis Spader.

The claim for money loaned to Gale and Spader was assigned to the defendant Margaret G. Spader, and she sets it up as a counterclaim in this action. The defendant, J. Vanderbilt Spader sets up the individual indebtedness of

Gale as a counterclaim, and there is more than sufficient due upon each of these claims to extinguish any amount the plaintiff can claim in this action. All these facts are undisputed, and the sole question involved has reference to the applicability of the counterclaim to the extinguishment of the plaintiff's claim upon the undertaking.

The undertaking upon which this action is brought is joint and several, and a separate judgment might be recovered in favor of the plaintiff against either one of the defendants, and the counterclaim interposed represents a cause of action against the person whom the plaintiff represents existing at the time of the commencement of this action.

The requirements for the allowance of a counterclaim are prescribed by section 501 of the Code of Civil Procedure, and they are all satisfied and fulfilled by the facts of this case. The allowance of the counterclaim against the assignee of the undertaking was justified by section 502 of the Code, and justice has been obtained.

The judgment should be affirmed, with costs.

In an action upon contract brought by one member of a partnership, defendant may not counterclaim a claim against the firm, unless the insolvency of the firm furnishes ground for the interposition of equity. Spafford v. Rowan, 124 N. Y. 108.

THOMPSON v. WHITMARSH.

100 N. Y. 35.

APPEAL from a judgment entered upon an order of the General Term, third department, made January 23, 1883, affirming a judgment entered upon report of referee in favor of the plaintiff for $1,271.94, interests and costs.

The action was brought to recover certain money delivered, and the purchase price of certain chattels sold by

plaintiff to defendant, which plaintiff held as executrix of Charles Thompson, deceased.

The defendant sought to counterclaim an indebtedness due from Charles Thompson to him.

FINCH, J. It is not denied in this case that, irrespective of sections 449 and 1814 of the Code, and before its enactment, an executor or administrator, seeking to enforce a contract made by himself and not by the decedent, could sue in his own name; and that in such action a demand against the decedent belonging to the defendant could not be used as a counterclaim to diminish or extinguish the recovery. It is insisted, however, that the effect of these sections is to change the law, and compel the executor or administrator to sue in his representative capacity where his recovery will be assets, and is for the benefit of the estate. Under section 449 every action must be brought by the real party in interest, and where the recovery is wholly for the benefit of the estate, it is said such real party in interest is the executor or administrator, and not the individual who happens to be charged with the trust duties. And this contention is claimed to be strengthened by the language of section 1814, that "an action or special proceeding, hereafter commenced by an executor or administrator, upon a cause of action belonging to him in his representative capacity * * * must be brought by * * * him in his representative capacity." Here the plaintiff is executrix, and sold, upon credit, property of the estate to the defendant, who holds an unpaid note of the decedent. The estate is insolvent, and if the defendant can use his demand as a counterclaim, he alone of all the creditors can secure a preference out of the assets, and be paid in full at the expense of others equally entitled to payment. The result would overturn the whole system of distribution to creditors, and compel executors and administrators never to

sell on credit at public auction where creditors of the deceased could buy, or in some unexplained way exclude them from the list of purchasers. No such construction of the Code is permissible. Where an executor or aministrator sells on credit the property of the estate and sues to recover the debt, he, as an individual, is the real party in interest, for the contract is made with him, and the promise to pay runs to him, and he is personally accountable for the assets which he has sold. For the same reason the debt does not belong to him in his representative capacity within the intent and meaning of the section of the Code referred to. That phrase relates to debts which belonged to the testator or intestate, and came to the executor or administrator through his representation of the deceased rather than as the result of his own action.

The effect of the section, and the change produced by it, is upon the class of cases in which the action could have been maintained in either form; as where, upon a contract made with the testator, the cause of action accrued after his death; or where, upon a debt or obligation due to the deceased, the executor or administrator has taken a new security or evidence of debt. In these cases, before the Code, the action might be in the individual or representative name, but now must be in the latter. Upon new contracts made by the executor or administrator, and never existing in favor of the decedent, but growing out of the contracts and dealing of the former alone, the action is properly brought in the name of the individual, and a debt against the decedent cannot be made the subject of a counterclaim. It must be paid in the ordinary course of administration, and can gain no preference, as it is entitled to none.

Judgment affirmed.

In an action by an executor against a bank for a deposit the bank cannot counterclaim a note given by testator, but not due at his death. Jordan v. Shoe & L. Bank, 74 N. Y. 467.

4. Reply. Code Civ. Pro., §§ 514–517.

From opinion of BARRETT, J., in McCrea v. Hopper, 35 App. Div. 572, 576:

"The defendant Hopper's answer, setting up his mortgage and asking an affirmative judgment of foreclosure therein, was an undoubted counterclaim. There is not a word in the paragraphs of the answer numbered 1 to 11 inclusive which is even suggestive of a defense to the plaintiff's mortgage. Every word therein contained was appropriate solely to an original complaint in an action by Hopper for the foreclosure of his mortgage. And these paragraphs were followed by the usual demand of judgment for the foreclosure of a mortgage. It is plain that, although not specially denominated a counterclaim in the answer — though in fact pleaded as a further and separate answer and defense — these allegations constituted a counterclaim. The case of Metropolitan Trust Co. v. Tonawanda, etc., R. R. Co. (18 Abb. N. C. 368) is a direct authority upon this point. The facts there were quite similar, and Bradley, J., in holding that these averments of the answer constituted a counterclaim, said that there was no force in the objection that the answer did not, in express terms, define as a counterclaim the matter set up as such, inasmuch as it distinctly appeared "by the relief demanded that it was intended as a counterclaim." So in Bates v. Rosekrans (37 N. Y. 412) Hunt, J., said that "no particular form of words is necessary to make a pleading a counterclaim, and if the party had in any reasonable language intimated that he intended to make a personal claim in his own favor against the plaintiff, it would have been sufficient."

"It is the settled law in this state that for a defendant to preclude a plaintiff from contesting a counterclaim because of a failure to serve a

reply, the counterclaim must be distinctly named as such in the answer. (Acer v. Hotchkiss, 97 N. Y. 395; Equitable Life Assurance Society v. Cuyler, 75 id. 511.)" Cullen, Ch. J., in Amer. Guild v. Damon, 186 N. Y. 364.

GUINSBURG v. JOSEPH.

141 App. Div. 472.

Scott, J. Appeal from order denying motion to compel plaintiff to reply to separate defenses.

The allegations of the complaint are that prior to December, 1902, defendant had acquired a considerable block of mining stock, in which plaintiff also acquired an interest; that both parties were anxious to dispose of the stock; that it was agreed that both parties should try to sell the stock, it being a condition, however, that plaintiff should be permitted by defendant to make an agreement to indemnify and hold harmless any proposed purchaser against any loss by reason of such purchase; that it was further agreed that if plaintiff should be called upon to pay back to any purchaser, by reason of said contracts of indemnity, any money paid by said purchasers the defendant would repay to plaintiff the amount so paid back; that plaintiff sold stock to the amount of $3,750; that the stock afterwards became worthless and plaintiff was required to repay said amount which he now seeks to recover from defendant. The defendant, in addition to a general denial, pleads a counterclaim, and in three separate defenses pleads the Statute of Frauds. The plaintiff has replied to the counterclaim, and the purpose of the present motion is to compel him to reply to the apparently complete defenses based upon the Statute of Frauds. The motion is authorized by section 516 of the Code of Civil Procedure and the tendency at the present day is to grant such motions with some liberality both to narrow the issues and to prevent surprise at the trial. The Statute of Frauds is something

more than a mere rule of evidence. It is a substantial defense upon which, in a proper case, a complaint may be dismissed. (Seamans v. Barentsen, 180 N. Y. 333.) The contract stated in the complaint appears to be one which the statute requires to be in writing, but it is not stated whether it is in writing or not. Under these circumstances we think that the plaintiff should be required to show how he expects to meet the plea of the statute. The defendant says that when the reply has been served he expects to move for judgment upon the pleadings. It is not apparent how he can do that so long as his counterclaim remains undisposed of. (Emanuel v. Walter, 138 App. Div. 818.) But whether he can so move or not is immaterial. For the other reasons above stated we are of opinion that the motion should have been granted.

While plaintiff may set up new matter in avoidance of the defense or counterclaim to which the reply is directed, he cannot set up an additional cause of action against defendant (Cohn v. Husson, 66 How. Pr. 150), unless by moving for leave to serve an amended complaint. Fett v. Greenstein, 46 Misc. 574.

In Frank Brewing Co. v. Hammersen (22 App. Div. 475), in an action to recover for money paid out by plaintiff at defendant's request defendant set up a counterclaim arising out of the contract. Plaintiff in reply set up a claim for damages arising out of false representations by defendant, inducing the payment of the money. The reply was stricken out as inconsistent with the complaint.

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5. Verification. Code Civ. Proc., §§ 513, 523–529, 980, 1213, 1670, 1757, 1776, 1938, 2026.

HIGH ROCK KNITTING CO. v. BRONNER.

18 Misc. 627.

Hiscock, J. The judgment complained of was entered as upon a default and this default was based upon a return of defendant's answer otherwise served in time upon the ground that it was not verified. Its lack of a verification is

not disputed, but it is insisted by defendants that it was proper for them to serve an unverified answer because the purported verification of the complaint was defective, and, therefore, null. It is also urged that plaintiff's attorney did not return the answer with due diligence, assuming that it was defective in point of verification.

Upon all of the affidavits submitted I think that the answer was returned with proper diligence, if a return was proper, and this leads to a consideration of the defects alleged by defendants in the verification of plaintiff's complaint. These defects are, first, that plaintiff being a domestic corporation, it was necessary that its verification should be made by one of its officers and that it should not be made by its attorney, as was attempted. Second, that if the attorney could make it, the verification in form did not comply with the requirements of the Code in setting forth the "grounds of his belief," the allegations of the complaint being based upon information and belief. I will consider these objections in the order stated.

As appears by the verification of the complaint the plaintiff was a domestic corporation transacting its business in Columbia county, where its officers resided, none of them being within the county of Onondaga, wherein plaintiff's attorneys resided and had their office, and it is urged in behalf of plaintiff that it was, therefore, proper for its attorney to make the verification within the provisions of subdivision 3, section 525, Code, allowing a verfication to be made under proper circumstances by the attorney "where the party is not within the county where the attorney resides." It is urged by the defendant in turn that that language is not applicable to a corporation; that a corporation is not limited in the extent of its existence, and, therefore, cannot be said not to be within a certain county. This contention, however, does not seem to me to be well founded, but that a corporation for the purposes of this section is

deemed to be where its principal place of business, its office and its officers are located.

I am not aware that there has been any contention over such construction as applied to that provision of the Code which requires ordinarily an action to be tried in that county in which one of the parties resided at the commencement thereof, and which has been deemed to be properly complied with in the case of a corporation by laying the place of trial where its principal office and business were located. It is further urged, however, that section 525 of the Code expressly, or at least by strong implication, excludes the idea and possibility of a verification of a pleading by a domestic corporation by its attorney in a case like this, and attention is called to the language of that section, which provides that "the verification must be made by the affidavit of the party * * * except as follows: (1) Where the party is a domestic corporation the verification must be made by an officer thereof. * * * (3) Where the party is a foreign corporation * * * the verification may be made by the agent or the attorney," etc.

Again, however, I do not agree with the contentions of the defendant that this language prevents a verification by an attorney under proper circumstances. The section, in the first instance, had provided that a verification must be made by a party. A corporation as a party could not make a verification, and, therefore, the first provision quoted above was incorporated, providing that the verification in such a case must be made by an officer, but the intent of such provision was to provide the manner and way in which the verification in behalf of a corporation should be made in order to give it force and effect as a *party's* verification, and, as it seems to me, was not intended to override or exclude the effects of the subsequent clauses in the section referred to, which provided for a verification by agents or attorneys in behalf of a party. Where the verification is

made by a corporation through one of its officers as above provided it stands the same as a party's verification and it is not necessary for the verification to comply with certain requirements necessary in the case of a verification by an agent or attorney.

So in the case of the second provision above quoted expressly allowing a verification in behalf of a foreign corporation to be made by the attorney, I think a better construction is obtained by holding that that provision was designed to unquestionably secure the right to such a corporation to verify by attorney where, on account of location of an office within the county where its attorney resided, or some other contingency, there might be doubt otherwise about its right to make such verification, than by holding, as claimed by defendants' attorney, that said clause was meant to expressly exclude a domestic corporation from a right to such verification.

In the absence of a very clear expression of intention upon the part of the legislature to exclude a corporation from the right to verify through an attorney under the circumstances existing in this case, the court should hesitate to place upon the section of the Code under review the construction contended for by defendants. Such a construction without any apparent good reason would involve an unjust discrimination between parties litigant. It is difficult to see why a domestic corporation whose office and officers were in a distant part of the state should be refused the same right to verify by an attorney which would concededly belong to a natural person being a party and residing in the same place.

The alleged defect in the form of verification of plaintiff's complaint rests in its asserted failure to comply with section 526 of the Code requiring a person making a verification other than the party to set forth in the affidavit "the

grounds of his belief as to all matters not stated upon his knowledge."

The affidavit of verification, after concededly complying with the other necessary requirements, contains this language upon the point under consideration: "And this deponent's knowledge is derived from information received from the letters of plaintiff now in deponent's possession, and also from the admissions of defendant to this deponent on the 29th day of October, 1896, that he was owing the full amount as claimed in the complaint and that it would be due as therein stated on the 30th day of October, 1896."

While this language is not in the form usually employed, and while it may be subject to the criticism of inaptness, I am inclined to think after consideration that under fairly liberal rules of construction it should be held to be a sufficient compliance with the statute. While the latter requires an attorney making a verification as in this case to state the grounds of his belief, it does not prescribe any particular phraseology or form in which it shall be done, and does not require that he shall label or preface his statement thereof with the recital in express words that they are his sources of belief. The object of the statute is that the court should be enabled to see from the affidavit of verification the authority and foundation upon which an attorney making a complaint in behalf of his client is acting, and the spirit of it is complied with when this result is accomplished. In this case all of the allegations of the complaint are made upon information and belief and none of them upon personal knowledge. There is, therefore, no opportunity for confusion in deciding to which class of allegations the clause now under review applies, or for saying that the use of the word "knowledge" limits its application to allegations in the complaint upon personal knowledge. On the other hand we have all of the allegations of the complaint made upon information and belief, that is,

upon belief based upon information. Then follows the clause complained of, in which are stated the sources of knowledge or information upon which the attorney acted. They are very convincing and form a very trustworthy basis upon which to act. Part of them would constitute legal evidence upon which to prove the claim in question. While they are stated to be the sources of knowledge and information it is evident that they were the foundation of belief upon which the complaint was verified.

* * * * * * * * * *

Motion to vacate judgment denied, with $10 costs.

Meton v. Isham Wagon Co., 15 Civ. Proc. 259, held that a verification by the general manager of a domestic corporation was not a compliance with section 525, subdivision 1.

DUPARQUET v. FAIRCHILD.

49 HUN, 471.

APPEAL from a judgment of the Albany County Court, recovered on January 21, 1888, reversing a judgment recovered by the plaintiffs in the City Court of Albany on November 7, 1887.

In this action, brought in the City Court of Albany to recover for goods sold and delivered by the plaintiffs, as copartners, the defendant was, on November 1, 1887, served with a summons and complaint, verified by the plaintiffs' attorney, who stated in the verification "that he resides in the city and county of Albany, and that he is the attorney for the plaintiffs in the above entitled action; and that the foregoing complaint is true of his knowledge, except as to those matters stated to be alleged upon information and belief, and that as to those matters he believes it to be true. Deponent further says that the reason this affidavit or verification is not made by said plaintiffs is that neither of them are, or reside, within the county of

Albany, which is the county where deponent resides. Deponent further says that his information, as to all matters stated upon information and belief, is derived from the admissions of the defendant to this deponent, and from letters received from said plaintiffs concerning the matters set forth in said complaint."

On the return day named in the summons, the defendant having failed to appear, the City Court rendered a judgment in favor of plaintiffs and against the defendant for damages and costs, $122.29.

The court at General Term said: "A plaintiff may allege all his complaint on information and belief, and then may verify it. In that case there is really no fact positively sworn to. This shows that the verification of a complaint (simply as a complaint), is quite different from affidavits upon which orders of arrest and the like can be granted. In the latter there must be positive statement of facts from which the court can form its opinion. But in the case of a complaint no action can be had against the defendant until he has been served with a copy, and has had an opportunity to answer. And when he answers he does not answer any matters stated in the verification, but only the allegations of the complaint itself. Now, in this case the plaintiffs' attorney has stated his belief in those parts of the complaint which are alleged on information and belief. He has stated that his information came from letters of the plaintiff and conversations with the defendant. Such letters and conversations are, therefore, the grounds of his belief. For he says his belief rests on information, and he gives the source of his information. Nor has it ever been thought necessary to specify in detail the information. It would be a useless labor for the attorney in such a case to give a copy of the letters or a full narration of the conversations. The defendant cannot suffer. He has only to deny the complaint if it be untrue. If it is true, then he should

make no denial. The verification only requires him to verify his answer. If he cannot do this, he ought not to defend. We are of opinion that the verification of the complaint, though not quite formal, was practically sufficient.

"The judgment of the County Court is reversed and that of the City Court affirmed, with costs."

ANDERSON v. DOTY.

33 HUN, 238.

APPEAL from an order made at the Monroe Special Term, denying the defendant's motion to require the plaintiff to accept an unverified answer.

The complaint is duly verified and alleges that the defendant owns and keeps a bawdy-house, which is used as a resort for lewd men and women for lewd purposes, and a disorderly house and a nuisance, on Exchange street, in the city of Rochester, in the vicinity of three dwelling houses owned by the plaintiff, and prays that the defendant may be enjoined and restrained from permitting the house to be used as a nuisance.

The defendant served an unverified answer, denying all allegations in the complaint, except the ownership of the house complained of.

The plaintiff served notice that he should treat the answer as a nullity, for want of verification; the defendant made a motion that the plaintiff should be required to accept the answer.

The motion was denied by the Special Term, and from such order the defendant appeals.

BARKER, J. The complaint charges the defendant with doing an unlawful act, which in law constitutes a nuisance and is a crime for which the defendant may be indicted and

punished. The defendant was privileged to omit a verification of her answer, by virtue of section 523 of the Code of Civil Procedure, for the reason that she could not be compelled to testify as a witness concerning the allegation contained in the complaint, that she maintained a house of ill-fame. As this appears on the face of the complaint, it was unnecessary for the defendant to serve with her answer an affidavit stating the reason why she claimed the right to serve an unverified answer. (Blaisdell v. Raymond, 5 Abb. 144; S. C., 6 id. 148; Wheeler v. Dixon, 14 How. 151; Lynch v. Todd, 13 id. 548.)

The case of Roache v. Kivlin (25 Hun, 150) is not in point, for the reason that the complaint did not charge the defendant with any act which constituted a crime. In that case the alleged cause of action was for a criminal conversation with the plaintiff's wife, and the defendant insisted that if he was required to testify concerning the same it would disgrace him. The court held that it could not be assumed, without proof in some form, that the defendant could not testify as to some of the matters alleged in the complaint without its having a tendency injurious to his character. A witness is never excused from answering a question for the reason that his answer would tend to disgrace him, unless it is made to appear to the court that such would be its effect. Therefore, in such a case, if a party claims the right to serve an unverified answer to a verified complaint, it should be accompanied by an affidavit by which it will be made to appear that his admission of any material fact in the complaint would tend to bring him into disgrace.

The order appealed from is reversed, with $10 costs and disbursements, and the plaintiff required to accept the defendant's unverified answer.

ROGERS v. DECKER.
131 N. Y. 490.

FINCH, J. This action was brought to enforce the liability of the defendant as trustee of a club incorporated under the Law of 1865 (chap. 368). Section 7 of that act provides that such trustees shall be liable "for all debts due from said company or corporation contracted while they are trustees, provided said debts are payable within one year from the time they shall have been contracted, and provided a suit for the collection of the same shall be brought within one year after the debt shall become due and payable." The complaint contained appropriate allegations to establish the defendant's liability under that statute, and was duly verified. The defendant served an unverified answer which his adversary refused to accept. The defendant thereupon moved for an order requiring the plaintiff to accept the answer and the Special Term granted the motion upon the ground that the action was penal in its character, and upon the authority of Hall v. Siegel (7 Lans. 206), affirmed in this court without an opinion (53 N. Y. 607). If that is the true nature of the action, the unverified answer was sufficient and should have been accepted. (Code of Civ. Pro., §§ 523, 837.) On appeal to the General Term the order was reversed, that court holding that the action was not penal in its nature, and refusing to follow in that respect the case cited.

The opinion of the General Term shows very clearly the analogy between such a cause of action as was here pleaded, and that arising under the usual corporate acts which make the stockholders liable for debts of the company until the capital has been fully paid in. It shows that in such case the liability is not so much created by the statute as retained and preserved under the corporate form; that but for the latter the stockholders would have been liable as

partners, and the statute continued that primary and original liability until the requisites of a corporate exemption were fully supplied. (Corning v. McCullough, 1 N. Y. 47.) The opinion further distinguishes, as was done in Wiles v. Suydam (64 N. Y. 173), between such a cause of action and one founded upon a statutory provision which makes officers liable for failure to file a report or for its falsity, in which case we have held that the liability is a penalty imposed by the statute for disobedience to its commands. (Gadsden v. Woodward, 103 N. Y. 244.) In one case the original and primary liability of the members of the association which would have existed but for the incorporation is, as to some of them, retained and perpetuated, notwithstanding the incorporation; in the other that primary liability has been lost and destroyed by force of the completed incorporation, but is created anew by the statute in the form of a penalty for specific acts of disobedience. Under the statute of 1865 no new liability is created; a primary and original obligation is continued and retained. Nothing is required or forbidden to be done as the basis of a penalty for disobedience, but the corporate form is not permitted to destroy the associate liability.

* * * * * * * * * *

Order affirmed.

As a demurrer states no fact, it is never verified. The verification of the answer of an infant, through his guardian *ad litem,* is unnecessary for the guardian *ad litem* cannot admit any allegation of the complaint so as to excuse proof thereof.

The privilege given to defendant by section 523 does not extend to new matter of that character if set up by the privileged party, Fredericks v. Taylor, 52 N. Y. 596, where to a verified complaint for money loaned defendant served an unverified answer setting up facts showing that the loan was part of an unlawful transaction between plaintiff and defendant. The answer was stricken out.

Defendant sued for libel need not verify the answer, even though a corporation. Goff v. Star Printing Co., 20 Abb. N. C. 211.

6. General Provisions. Code Civ. Proc., §§ 479–480, 520–1, 537–547, 781–783, 796, 798, 1778. Rules 2, 11, 19, 22–25.

THE N. Y. LIFE INS. & TR. CO. AS TRUSTEE v. CUTHBERT ET AL.
87 HUN, 339.

APPEAL by the defendants, Cordelia D. Chauvet and another, from an order of the Supreme Court, made at the New York Special Term and entered in the office of the clerk of the county of New York on the 25th day of April, 1895, granting the motion of the defendant Margaret S. Ives to strike out certain portions of the answer of said defendants.

This action was brought by the plaintiff as trustee under the last will and testament of Francis W. Lasak, deceased, for a judicial settlement of its accounts.

The plaintiff was named as trustee in the last will and testament of said decedent, and acted as such until such last will and testament was declared by the court to be void.

The defendants Cordelia D. Chauvet and Albert L. Chauvet answered the complaint and caused their answer to be served upon the attorney for the defendant Margaret S. Ives. In their answer they set up their claims to the property in the hands of the plaintiff, and in addition thereto they made a counterclaim against the defendant Margaret S. Ives for $180,000 under an alleged agreement. The defendant Ives moved to strike out from the answer of the defendants Chauvet the portions thereof relating to the counterclaim against her, which motion was granted by the Special Term.

FOLLETT, J. The fund which the plaintiff holds as trustee and for the distribution of which this action is brought, did not arise out of the agreement executed June 16, 1892,

but from the rents of real estate received before the will of Francis W. Lasak was set aside. Undoubtedly any of the defendants may allege that he or she is entitled to all or some share of the apparent interest of a co-defendant in the fund by reason of having acquired title thereto or a lien thereon by agreement. But that is not what the appellants seeks to do. They set up in their answer that, by a contract dated June 16, 1892, Margaret S. Ives, a co-defendant, agreed to pay them $180,000 in consideration of their having assigned to her their interest in the estate. This is an independent cause of action, having no relation to the fund which the plaintiff holds in its hands. Had the fund in the suit arisen out of the contracts of June sixteenth, a different question would have been presented.

Section 521 of the Code of Civil Procedure does not authorize defendants to litigate as between themselves independent cross-demands not connected with the cause of action set forth in the complaint. (Smith v. Hilton, 50 Hun, 236.)

The order should be affirmed.

The section is not limited to equity actions (Derham v. Lee, 47 Super. 174), but as to courts of equity it is merely declaratory of their inherent power. Lansing v. Hadsall, 26 Hun, 619.

STATE BANK OF SYRACUSE v. GILL.
23 HUN, 406.

APPEAL from an order of the Herkimer Special Term, denying a motion to change the place of trial.

The defendant, Andrew Gill, stated in his affidavit among other things, "that he has fully and fairly stated the case herein, and all the facts and circumstances relating thereto, to his counsel, Robert Sewell, Esq., who resides at No. 68

West Forty-fifth street, in the city of New York, and has disclosed all the facts which he expects to prove by each of the witnesses hereinafter named, and that he and the defendant, Adelaide C. Gill, and each of them, have a good and valid defense to the whole of the plaintiff's claim as set forth in said complaint upon the merits thereof, as he and she are advised by their said counsel, and as he and she each of them verily believes."

An affidavit was also made by Robert Sewell, Esq., to the effect "that he is an attorney and counselor at law; that he resides at 68 West Forty-fifth street, in the city of New York, and that the defendant, Adelaide C. Gill, has fully stated to this deponent all the facts respecting this case, and her defense therein; that he has been retained by her as her counsel, and that he has advised her upon the statement of facts aforesaid, and upon his own knowledge of the case, that she had a valid defense upon the merits to the whole of the plaintiff's claims herein as he verily believes."

SMITH, J. There is no sufficient affidavit of merits in this case. The affidavit of the defendant, Andrew W. Gill, alleges that each of the defendants "has a good and valid defense to the whole of the plaintiff's *claim as set forth in said complaint* upon the merits *thereof,*" etc. The affidavit made by Mr. Sewell, purporting to be in behalf of the defendant, Mrs. Gill, she being absent from the State, alleges that she has a "valid defense upon the merits to the whole of plaintiff's *claim herein,*" etc. Neither of these is a compliance with what the rule and practice require, to wit: that the defendants have "a good and substantial defense on the merits in this cause," etc. (See form of affidavit of merits in note to Brittan v. Peabody, 4 Hill, 66.) In Meech v. Calkins (4 Hill, 534), which was an

action of debt on bond, an affidavit that the defendant has "a good and substantial defense to *the bond,*" etc., was held defective in not stating a defense *on the merits.* In Durant v. Cook (1 How. Pr. 45) the affidavit stated that the defendants have "a good and substantial defense upon the merits in the above entitled cause *to the promissory note* on which the action is brought," etc. Held, bad. So in Howe v. Hasbrouck (1 How. Pr. 67), the averment being that the defendant has "a good, valid and sufficient defense upon the merits in the above entitled cause *to the plaintiff's declaration* filed in this suit," etc. Also in Mason v. Moore (2 How. Pr. 70), where the affidavit stated that the defendants have "a good and substantial defense upon the merits to the plaintiff's *demand* on the *promissory note* on which this action is brought," etc. Rule 24 applies only to the case of an affidavit made to obtain an order extending a defendant's time to answer or demur; and the last clause of section 980 of the Code of Civil Procedure, makes a verified answer equivalent to an affidavit only for the purpose of preventing an inquest. Each of the affidavits in this case is also defective in not stating that the counsel, whose advice is sworn to, is the counsel of the defendant *in this action.* * * *

The order is to be affirmed, with costs.

For practice on opening default in pleading, see Maguire v. Maguire, 75 App. Div. 534.

TUSKA v. HELLER, HIRSH & CO.
140 App. Div. 323.

McLaughlin, J. After the complaint in this action had been served upon the respondent its time to answer was extended by stipulation for a period exceeding twenty days. Before the time to answer as extended by the stipulation

had expired it obtained an order to show cause why certain allegations of the complaint should not be stricken out, and which order also contained a provision "that the time for the defendant Heller, Hirsh & Company to answer or demur to the complaint herein be extended to and including ten days after the service of a copy of the order entered upon this motion and notice of entry thereof upon its attorneys." The plaintiff thereupon obtained an order to show cause why the extension of time to answer or demur should not be vacated and stricken from the order obtained by the respondent on the ground that such extension was obtained without notice in violation of rule 24 of the General Rules of Practice. The motion was denied, and this appeal is from the order denying the motion.

The motion should have been granted. The time for the respondent to answer or demur had already been extended more than twenty days by stipulation, and rule 24 provides that when that has been done "no further time shall be granted by order except upon two days' notice to the adverse party of the application for such order." No notice was given, the order being obtained *ex parte*. The General Rules of Practice have the force and effect of the Statutes (Matter of Moore, 108 N. Y. 280; Boyer v. Boyer, 129 App. Div. 647), and are "binding upon all the courts in this State and all the judges and justices thereof, except the court for the trial of impeachments and the Court of Appeals." (Judiciary Law, (Consol. Laws, chap. 30; Laws of 1909, chap. 35), § 94.) The extension contained in the order to show cause was expressly forbidden by rule 24, and the appellant was, therefore, entitled as a matter of right to have it stricken therefrom.

* * * * * * * * *

Order reversed.

WAYLAND v. TYSEN.
45 N. Y. 281.

APPEAL from an order of the General Term of the Supreme Court in the second judicial district, affirming an order of the Special Term, striking out an answer as sham, and ordering judgment for the plaintiff.

The answer was as follows:

SUPREME COURT.

CHARLES C. WAYLAND and JAMES K. AYMAR *against* DAVID J. TYSEN.	Answer of the Defendant to the complaint of the Plaintiffs in this case.

The defendant, David J. Tysen, denies each and every allegation in the complaint of the above plaintiffs in this cause contained.

BRADLEY & NELSON,
Def't's Atty's,
173 Broadway, New York.

STATE OF NEW YORK,
City and County of New York, } *ss.:*

David J. Tysen, being duly sworn, doth depose and say that he is the defendant in the above entitled cause, that he has read the foregoing answer, and that the same is true of his own knowledge, except as to the matters stated on information and belief, and as to those matters he believes it to be true.

DAVID J. TYSEN.

Sworn this 11th day of June,
1870, before me,
CHARLES NETTLETON,
Notary Public, for N. Y. County.

The motion to strike out this answer as sham was based upon the affidavits of the plaintiffs and others strongly tending to show its falsity.

GROVER, J. The order is appealable to this court, and must be reviewed in the same manner as it was required to be by the General Term, upon the appeal taken to that court by the defendant. (Code, § 11, subd. 4.) The entire answer of the defendant was struck out. It was a general denial of the complaint. It was verified by the defendant before service in the manner required by the Code when the complaint is verified. The motion to strike it out was made upon affidavits tending to show its falsity, and the court arriving at this conclusion, made the order striking it out as sham. The Code (§ 152) provides that sham and irrelevant answers and defences may be stricken out on motion, and upon such terms as the court may in their discretion impose. This answer is the equivalent of and substitute for the general issue under the common-law system of pleading. It gives to the defendant the same right to require the plaintiff to establish by proof all the material facts necessary to show his right to a recovery as was given by that plea. Under the common-law system the general issue could not be struck out as sham, although shown by affidavits to be false. (Broome Co. Bank v. Lewis, 18 Wend. 565.) This was not upon the ground that a false plea was not sham. That was always so regarded, but upon the ground that a party making a demand against another through legal proceedings was required to show his right by common-law evidence, and that *ex parte* affidavits were not such evidence. The court, under the system, exercised the power of striking out pleas setting up affirmative defences as sham when shown by affidavits to be false, but not where the party verified such plea by affidavits. (Stewart v. Hotchkiss, 2 Cow. 634.) It has been claimed, and the claim somewhat sanctioned by the Supreme Court, that

these rules have been changed by section 152 of the Code. That by this all distinctions in striking out answers between such as merely deny the allegations of the complaint either generally or specifically, and those setting up affirmative defences, have been abolished. * * * The section in question simply confers power upon the court to strike out sham and irrelevant answers and defences. This power the court, as we have been, possessed and exercised under the pre-existing laws. For reasons deemed satisfactory it was not extended to the general issue. When this was interposed as a defence the party had a right to a trial by jury. This right is secured to him by section 2, article 1 of the Constitution. This right could not be taken away by simply changing the name from that of general issue to that of general denial. We have seen that the latter is the substitute for and the equivalent of the former, so far as to require proof by the plaintiff of all the material facts showing his right of recovery. This is an argument tending to show that the Legislature, in the passage of the section in question, only intended to sanction the existing practice, and not to confer any new power upon the court. Under the construction claimed, there is nothing to prevent the trial of this or any other issue upon affidavits. The moving party has only to satisfy the court by a preponderance of evidence of this character of the falsity of the plea, and it may be struck out, although specifically verified by the party interposing it, notwithstanding such party may insist upon his right to a trial, when he can have the privilege of cross-examining the affidavits, and having their credibility passed upon by a jury. I think that by the true construction of the section, the power of the court to strike out pleadings was not extended beyond what it was under the pre-existing law. That we have seen extended only to such affirmative defences as were not verified by the oath of the defendant or other equivalent evidence.

It may be said that a motion to strike out a pleading is not the trial of an issue joined thereby. This is literally true, but in substance the difference is scarcely perceptible. It calls for a determination whether the pleading be true or false; and if found false and struck out, the defendant is as effectively deprived of any benefit therefrom, as if found false upon a verdict, although he can derive no benefit from a failure to find it false, for the plaintiff will still be entitled to a trial of the issue. It will thus be seen that all the plaintiff hazards by the motion is the costs, while the defendant is precluded by an adverse result. It may be said that the power claimed will only be exercised in clear cases, where it is manifest that the desire of the defendant is only for delay, and that he is practising a fraud for this purpose by putting a falsehood upon the record. Concede the construction of the section claimed by the respondent, as we must to sustain the order, and its exercise cannot be confined to this class of cases. The judgment of the court must be exercised upon the affidavits, and if satisfied of the falsity of the pleading, although sustained by opposing affidavits, it becomes a duty so to decide by granting the motion. It is in the power of the plaintiff, in every case, as was done in this, to preclude the defendant from interposing either a general denial or a denial of specific facts by verifying his complaint. Thus he can prevent such answer, unless from the affidavit of the defendant it shall appear that it was interposed in good faith. The Code, it is true, allows the defendant to deny any knowledge or information sufficient to form a belief, and thus put the fact in issue. If he verifies this, what right has the plaintiff to strike out his answer by producing affidavits showing the truth of such facts of which the defendant was ignorant at the time of putting in his answer. Such affidavits fail entirely to show that the answer was put in in bad faith or that it was false; and yet this is the very class of cases

where the court will be most frequently called upon to strike out the answer. If the defendant commits perjury in verifying the answer, as he must have done in this case, if he knew the allegations of the complaint were true, he ought to be prosecuted therefor. If plaintiffs, who complain of injury from delay by the fraudulent interposition of false answers, would perform the duty incumbent upon every good citizen, to prosecute those known to be guilty of perjury, they would effectually stop such an abuse. I am satisfied that the intention of the Legislature in enacting the section of the Code under consideration, was not to confer any new power upon the court, but to give legislative sanction to that exercised under the existing law. The order appealed from must be reversed, and an order entered denying the motion; but as the practice under which it was made had the sanction of some reported cases in the Supreme Court, it should be without costs to either party.

Where any material allegation of the complaint is denied by the answer, such answer cannot be stricken out as sham. Howe v. Elwell, 57 App. Div. 357. Even though there be allegations in an affirmative defense which conflict with the denial. Schlesinger v. Wise, 106 App. Div. 587.

Neither a demurrer (Kain v. Dickel, 46 How. Pr. 208) nor a counterclaim can be stricken out as sham. Baum's Castorine Co. v. Thomas, 92 Hun, 1. An affirmative defense, even if verified, may be so stricken out if it clearly appears to be false, and in First Nat. Bank v. Slattery (4 App. Div. 421), an order was sustained which struck out a portion of defendant's verified answer as sham and directed judgment for plaintiff upon the remainder as frivolous.

ROCHKIND v. PERLMAN.

123 App. Div. 808.

Appeal by the defendants, Max J. Perlman and another, from a judgment of the Supreme Court in favor of the plaintiffs, entered in the office of the clerk of the county of Kings on the 4th day of June, 1907, pursuant to an order

entered in said clerk's office on the 4th day of June, 1907, granting the plaintiffs' motion for judgment upon the ground that the answer interposed by the appellants was frivolous and sham, and also from the said order upon which the judgment appealed from was entered.

GAYNOR, J. 1. The notice of motion was for judgment on the answer as "frivolous and sham." This was indiscriminate and inaccurate, for the words are not synonymous, or even like in meaning, and motion for judgment may be made only on a frivolous answer. The remedy prescribed for a sham defence is a motion to strike it out. A denial can never be treated as sham, but may be frivolous.

There is no defence, *i. e.*, affirmative defence, as it is sometimes called, pleaded in this answer, but only denials, and denials which are sufficient in form may not be struck out as frivolous, and no denial may be considered or struck out as sham (Wayland v. Tysen, 45 N. Y. 281; Meurer v. Brinkman, 25 Misc. Rep. 12). Judgment may be had on a denial on motion, only when upon its face it is frivolous, *i. e.*, not a denial, and on a defence, only when upon its face it is frivolous, *i. e.*, not a defence. No affidavit can be used on such a motion (Code Civ. Proc., § 537); and defences only, not denials, may be struck out as sham, which means false, which has to be shown by affidavit (§ 538). This latter section, that "A sham answer or a sham defence may be stricken out," is no longer strictly accurate since the decision in Wayland v. Tysen (*supra*) in 1871 that denials may not be struck out as sham, and must be applied as if it only read that "a sham defence" may be struck out. It may seem strange that it has not been amended in the intervening years.

2. As this answer consists of denials only, it could not be treated as sham, as that word applies to defences only, as we have seen. But Mr. Justice Kelly correctly decided

that the denials are frivolous, and ordered judgment thereon for the plaintiffs. * * *

Affirmed.

For other examples of frivolous answers, see Fales v. Hicks, 12 How Pr. 153; Martin v. Kanouse, 2 Abb. Pr. 327; People v. Dispensary, 7 Lans. 304; frivolous demurrer, Kirkbride v. Wilgus, 37 Misc. 519. The motion for judgment on the pleadings upon this ground is only available when the pleading, as a whole, is frivolous; the court has no power to order judgment upon a part of an answer as frivolous. Strong v. Sproul, 53 N. Y. 497.

KAVANAUGH v. COMMONWEALTH TRUST CO.
181 N. Y. 121.

APPEAL by permission from an order of the Appellate Division of the Supreme Court, which affirmed an order striking out certain allegations of the complaint.

CULLEN, Ch. J. The complaint alleges that the plaintiff was a stockholder in the Commonwealth Trust Company (formerly the Trust Company of the Republic) owning a hundred shares of the capital stock thereof; that he purchased said stock on April 2, 1892, for the sum of $16,600 which the stock at that time was worth; that the respondent and the other individual defendants were the directors of said company; that said defendants so negligently failed to discharge their duties as directors that large losses were sustained by the company through the illegal and wrongful acts of its executive officers, and its assets wasted; that thereby the value of the plaintiff's stock was reduced to $30 a share, by reason of which he suffered damage to the amount of $13,600. Judgment is demanded that the loss sustained by the trust company by reason of the wrongful acts and negligence of the defendants be ascertained and the said defendants be directed to pay said sum to the defendant, the trust company. The Special Term struck out the statement of the amount paid by the plaintiff for his

stock and the further statement that the value of said stock had been reduced whereby the plaintiff lost the sum above mentioned.

Motions under section 545 of the Code of Civil Procedure to strike from a pleading irrelevant matter are in one direction addressed in no small degree to the discretion of the court of original jurisdiction; that is to say, the Supreme Court, if it should be of opinion that the matter complained of could in no way prejudice the adverse party, might well refuse to strike it out, although the court deemed the allegations irrelevant and unnecessary. That discretion, however, has been exercised in the courts below, and the sole question before us is whether the allegations, which by the orders appealed from have been stricken from the complaint, were in any view relevant or material to the cause of action declared on. We think they were not relevant. The loss of the corporate funds, resulting from the misconduct of the individual defendants, primarily gave a cause of action to the corporation, not to its stockholders, and no stockholder could maintain an action for the loss he had individually suffered in the depreciation of the value of the share stock held by him. (Niles v. N. Y. Central & H. R. R. Co., 176 N. Y. 119.) As said by Judge Vann in Flynn v. Brooklyn City R. R. Co. (158 N. Y. 493), "The right of action, however, belongs to the corporation, and should be brought by it as plaintiff, but when it will not bring the suit itself, an aggrieved stockholder, after due demand and refusal or unreasonable neglect to proceed, may bring it in his own name upon making the corporation a party defendant." The action must be brought not only on behalf of the plaintiff, but also on behalf of all the other stockholders of the company, and that is the form of the action before us. It is quite plain that the complaint in such an action should set forth but two things: *First*, the cause of action in favor of the corporation, which should

be stated in exactly the same manner and with the same detail of facts as would be proper in case the corporation itself had brought the action; *second,* the facts which entitle the plaintiff to maintain the action in place of the corporation, that he is a stockholder therein, and that the corporation itself has either refused or unreasonably failed to bring the action. Ordinarily no other allegations are necessary or material. If the corporation were suing its negligent directors it would be necessary for it to allege and prove what moneys or assets had been lost or wasted, and the recovery would be for the amount of such loss. Proof of the market value of the share stock, whether it appreciated or depreciated, would be inadmissible. If the directors or officers of the corporation, by their illegal or wrongful acts, had occasioned a loss to the corporation, it would be neither defense nor mitigation that despite such wrongful acts the market value of the share stock of the corporation had been greatly enhanced. Nor, on the other hand, would depreciation in market value tend to establish the amount of the loss or damage that the corporation had suffered by the wrong of the directors. * * *

The order appealed from should be affirmed, with costs, and the question, "were the clauses in the complaint stricken out by the order properly stricken out as redundant or irrelevant," should be answered in the affirmative.

HILTON v. CARR.
40 App. Div. 490.

Appeal by plaintiff from an order denying his motion to strike out as scandalous, impertinent, immaterial and irrelevant certain allegations in the answer.

Rumsey, J. The action was for slander, the allegation being substantially that slanderous words were spoken to

the plaintiff at his residence on the 2d of November, 1898. After a general denial, and for a second defense by way of mitigation, the defendant alleged in substance that the plaintiff one Sylvia Gerrish employed the defendant's son to render certain services upon a building in which they resided; that the defendant had assisted his son in performing the work and had rendered a bill, which the plaintiff promised to pay but never had paid; that on the day when the alleged slanderous words were spoken, the defendant went to the plaintiff's residence to receive payment of the bill; that while he was there an altercation ensued in which both parties lost their tempers and used harsh language toward each other, and that it was under the provocation excited by the language of the plaintiff that the defendant used the words set out in the complaint. As a preliminary to this partial defense, the defendant alleges "that on and for a long time prior to November 2, 1898, the plaintiff has resided in Sedgwick avenue, in the borough of the Bronx, in the city of New York, with one Lillian J. Rollins, otherwise known as Sylvia Gerrish, said Sylvia Gerrish being commonly (known) as and called the wife of the plaintiff, although plaintiff at all said times had a true and lawful wife, who long ago had separated from him, and who has long been supported by plaintiff's father; that plaintiff's household in said Sedgwick avenue consists of himself and said Sylvia Gerrish, together with the mother and brother of said Sylvia Gerrish, who reside there with them." The substantial facts constituting the alleged mitigation are set up after this preamble, and the plaintiff has moved to strike out the words quoted above, upon the ground that they are irrelevant and scandalous. This motion was denied, and from that denial an appeal is taken.

The thing which constitutes a mitigation in this answer is the fact that the words were spoken in the heat of passion and in reply to words uttered by the plaintiff. These facts

might be sufficient to mitigate to some extent the damages suffered by the plaintiff because of the speaking of the alleged slanderous words, if the jury saw fit to accept them for that purpose. But mitigation arises purely on account of the fact that, at the time of speaking the words, the defendant was angry, and his anger was caused by what was said to him by the plaintiff himself. Proof of these facts involves evidence as to what took place at the time the words were spoken, and to that extent, undoubtedly, the allegations of this answer are competent and material. Mitigation, however, arises only from what was said at the time; and the relations of the plaintiff to other persons, whether existing at that time or in existence before, are not of the slightest materiality, except so far as such relations may have given rise to the speaking of the words which are complained of. It is quite clear from the allegations of this complaint that the relations of the plaintiff with the persons who lived in the house with him had nothing whatever to do with the altercation which took place between these parties at the time when the defendant went there to get his pay for the work that he had done. When the defendant undertakes to prove these facts in mitigation, he will be confined to what occurred at that time, and he will not be at liberty to give any testimony as to relations of the plaintiff which might throw discredit upon him, whether they existed at that time or not, unless the proof of such relations is material to show the occasion for the speaking of the words complained of. It is very clear that these relations were not at all connected with this altercation, and for that reason the defendant would not be permitted to prove them. Nor can they be proved for the purpose of discrediting the character of the plaintiff. The rule is well settled that specific acts cannot be proved to show the bad character of any person where that is attacked. (Greenl. Ev. § 55.) In no aspect of the case, therefore, can the words

quoted be material to the defense. Not only are they irrelevant, but, containing as they do a specific charge that the plaintiff was living in adultery, they are scandalous. When allegations which contain charges of a criminal nature against a party, or which are necessarily prejudicial to his character and reputation, are irrelevant, the party against whom the charges are made is always considered to be aggrieved by them, and the court will strike them out upon his motion. (Somers v. Torrey, 5 Paige, 54; Carpenter v. West, 5 How. Pr. 53.) The plaintiff was, therefore, entitled to have these allegations removed from the record, and his motion should have been granted.

Order reversed and motion granted.

The motion may be made on behalf of "any person aggrieved," though not a party to the action. Wehle v. Loewy, 2 Misc. 345. For a discussion of the practice on such motions, see Hughes v. Chicago, etc., R. Co., 13 J. & S. 114. The provision for the striking out of irrelevant matter does not contemplate the striking out of an entire cause of action or of an entire defense for stating insufficient facts to constitute a cause of action or defense, but only the striking out of irrelevant matter stated in a good cause of action or defense. Noval v. Haug, 48 Misc. 198.

POST v. BLAZEWITZ.

13 App. Div. 124.

Appeal by the plaintiff, William Post, from an order of the City Court of Yonkers, entered in the office of the clerk of said court on the 5th day of December, 1896, requiring the plaintiff to make his complaint more definite and certain.

Willard Bartlett, J. This action was brought to recover $112.50 for the use and occupation of certain premises in the city of Yonkers.

The complaint alleged that between July 1, 1893, and February 1, 1896, the defendant "occupied certain premises in the city of Yonkers, owned by the plaintiff, under

and in pursuance of an agreement made between said plaintiff and said defendant, whereby said defendant agreed to pay therefor the sum of $313, but has paid no part thereof, except the sum of $200.50."

This allegation was in some respects plainly so indefinite or uncertain that the precise meaning or application thereof was not apparent. (Code Civ. Proc., § 546.) A motion to make it more definite and certain might, therefore, properly have been entertained and granted if such application had been seasonably made. In an action for use and occupation, a complaint which refers to the property alleged to have been occupied only as " certain premises " is not sufficiently definite and certain. (Gustaveson v. Otis, 57 N. Y. St. Repr. 797.) The complaint in such an action as this should also show the rate at which the rent is claimed or the period of time during which the rent is alleged to be in arrears. (Waters v. Clark, 22 How. Pr. 104.)

But notwithstanding the indefinite character of the principal allegation in this complaint, the defendant had lost his right to the remedy provided by section 546 of the Code of Civil Procedure. By virtue of a stipulation between the attorneys for the respective parties, an order had been duly entered in the action setting aside a final judgment upon demurrer which had previously been entered therein, declaring that the action should be considered in all respects as though no demurrer had been interposed, and as though there had been no proceedings other than the service of the summons and complaint, and providing that defendant should have ten days from the entry of the order within which to answer the complaint. This extension of time, without the reservation of any right to make a motion in respect to the complaint, was fatal to the application to have the complaint made more definite and certain. (Brooks v. Hanchett, 36 Hun, 70.) In the case cited the

defendant had procured extensions of time to answer or demur both by stipulation of the plaintiff and the order of the county judge, in neither of which did he reserve the right to move to correct the complaint. The General Term in the fifth department unanimously held that this was a waiver of all objections to the complaint and a bar to a motion to make it more definite and certain. * * *

Order reversed and motion denied.

This is the remedy where the complaint is not sufficiently defective to warrant a demurrer, Olcott v. Carroll, 39 N. Y. 436; where defendant is uncertain which of two causes of action is intended to be pleaded, Hale v. Omaha Nat. Bank, 49 N. Y. 626; and where defective denials render uncertain the precise allegations admitted or denied. Greenfield v. Mass. Mut. L. Ins. Co., 47 N. Y. 430, 470.

Where it is uncertain whether this motion or the motion for a bill of particulars is the proper remedy, the party may ask in one motion for either the one or the other order in the alternative. Singer v. Weber, 44 App. Div. 134. The notice of motion must point out the precise allegations deemed indefinite or uncertain or of which particulars are sought. The order should require the party to serve an amended pleading within a specified period amended so as to show the specific facts claimed to exist and should direct that in default thereof the objectionable allegations be stricken out. Cooper v. Fiske, 44 App. Div. 531.

For table of remedies against defective pleadings, see Nichols on New York Prac. § 941.

BALL v. THE EVENING POST.

38 Hun, 11.

Appeal from an order requiring the defendant to serve a bill of the particulars of its answer.

Smith, P. J. This is an action of libel. The plaintiff is a clergyman. The action is founded on certain articles alleged to have been published in the defendant's newspapers, "The Evening Post" and "The Nation," during the presidential campaign of 1884, charging the plaintiff with several different acts derogatory to his character, and among other things, with having invented, published

and circulated certain false and scandalous statements of, and concerning, Grover Ceveland, then a candidate for the presidency.

The answer contains a general denial and sets up various matters in justification, and also in mitigation. Among other things, it alleges that on or about 21st July, 1884, and from time to time thereafter, the plaintiff "and certain other false-minded persons," confederating together, wickedly and maliciously caused to be published of, and concerning, the said Grover Cleveland, "divers false scurrilous, vile and scandalous stories and charges," etc.; that the said charges were so vile and disgraceful that they could not be published in the reputable newspapers of the country, but were circulated by the procurement and aid of the plaintiff in "disreputable sheets" and through the mails inclosed to "ladies and others," etc.; and that among other publications so made by the plaintiff was a letter to the "Boston Journal," wherein the plaintiff maliciously reiterated such charges and vouched for their truth.

* * * * * * * * *

The order appealed from requires the defendant to give the following particulars:

(1.) The names of the "evil minded persons" with whom the plaintiff is charged to have confederated for the purpose of publishing false and scandalous stories respecting Mr. Cleveland, and the times and places of said alleged confederating, and the particulars of each of the alleged improper acts referred to in that connection.

(2.) The particulars of such "false, vile and scandalous stories and charges," specifying the dates when and the places where each of the same were published, how published, and the contents of each publication.

(3.) The particulars as to the "disreputable sheets" referred to in the answer, the times when and the places where the said sheets were published, and circulated, and

the names of said sheets with dates and copies of each of said publications.

(4.) The particulars as to the persons "ladies and others," to whom the answer alleges that the "disreputable sheets" therein mentioned were mailed, and the names and residences of such persons.

(5.) The particulars as to the letters or publications ascribed to the plaintiff in said answer, when and where each of the same was published, the name or names of any newspapers or other publications in which they appeared, with dates thereof, with copies of each of said letters, articles, charges and publications. * * * *

No question was made upon the argument before us as to the power of the court to order a bill of particulars of the claim of either party, in a proper case, in an action of libel. The power probably existed at common law, to the extent above stated, and it seems to have been recognized and affirmed by the last clause of section 158 of the Code of Procedure and of section 531 of the new Code, as construed by the Court of Appeals in the cases of Tilton v. Beecher (59 N. Y. 176) and Dwight v. Life Ins. Co. (84 id. 493). True, neither of those cases was an action of libel, and in the case of Orvis v. Dana (1 Abb. N. C. 268) it was said that there is no precedent in this State for a bill of particulars in a libel suit, and it was there held by the Court of Common Pleas of the city of New York that the power to require particulars from a defendant setting up a justification ought not to be exercised in actions of libel. The decision seems to have been put upon the ground that the plaintiff does not need such remedy, inasmuch as if the answer in justification is not sufficiently particular the plaintiff can move to make it more definite and certain, or he can lie by and object at the trial to the admission of evidence under it. But the first of the remedies suggested

is available only where a denial or allegation is so indefinite or uncertain that its precise meaning or application is not apparent. (Code of Civ. Proc., § 546.) The order under review was not made on the ground that the answer is defective in that respect. A pleading may be free from indefiniteness and uncertainty, and yet so general as that the opposite party cannot prepare to meet it at the trial for the want of more particular statements. The common counts in assumpsit are familiar instances of pleadings of that nature. The appropriate remedy, therefore, for a lack of particularity in a pleading is an application to the court to order particulars to be furnished. And for obvious reasons it is better that such remedy be resorted to before the cause comes on for trial, in order to secure a more deliberate consideration of the questions involved than can be given at the circuit. With great respect for the learned court by which Orvis v. Dana was decided, we are not prepared to assent to the conclusion above stated, which was reached in that case, and are of the opinion that a defendant in an action of libel, pleading a justification, should be required, in a proper case, to furnish particulars.

We thus reach the question whether in this case the power has been unduly exercised. There are numerous reported cases relating to the scope and nature of a bill of particulars. Without referring to them in detail, I think it may be laid down, as the result of the adjudications on the subject, that the only proper office of a bill of particulars is to give information of the specific proposition for which the pleader contends, in respect to any material and issuable fact in the case, but not to disclose the evidence relied upon to establish any such proposition. * * * To constitute a good answer, in justification, in an action of libel, it is not enough to allege that the alleged libelous matter complained of is true. At common law it is necessary to state the particular facts which evince the truth of the imputa-

tion upon the plaintiff's character, whether the imputation is of general or specific nature. And as Chitty states the rule, it is necessary, although the bill contains a general imputation upon the plaintiff's character, that the plea should state specific facts, showing in what particular instances and in what exact manner he has misconducted himself. (Chitty Pl. 494–5.) It was held in Wachter v. Quenzer (29 N. Y. 547), that the substance of that rule was not abolished by the Code. But that rule requires only a statement of the necessary facts, and not of the evidence of those facts. The rule is the same in respect to pleading mitigating circumstances, since only such as are pleaded can be proved. (Old Code, § 165; Willover v. Hill, 72 N. Y. 36; New Code, § 536, and Throop's note to same.)

Tested by the rules above stated, the order appealed from, in our judgment, properly requires particulars of the alleged "false, vile and scandalous stories and charges" referred to in the second clause of the order. It is not enough for the pleader thus to characterize the "stories and charges," but they should be set out, in order that the plaintiff may be apprised what he is to meet, and to that end the dates and places and manner of their publication, with the contents of each publication, should be stated. Besides, the publications should be set out, to enable the court to judge of their character, since upon their character depends the sufficiency of the justification. For like reasons we affirm the fifth clause of the order respecting the letters or publications ascribed to the plaintiff, and the several particulars specified in said clause. So, also, the sixth clause is affirmed, which requires particulars of the names and residences of the persons, political parties and candidates for office from whom the plaintiffs is alleged in the answer to have received or solicited subscriptions or sums of money, and other particulars specified in that clause. All these matters, we conceive, are embraced by the rule

above stated as to what an answer in justification should contain.

But the first clause of the order which requires a statement of the names of the "evil-minded persons" with whom the plaintiff is charged to have confederated for the purpose of publishing false stories, etc., calls for matters which, if not immaterial, are mere evidence. The material fact in that connection is the publication by the plaintiff of scandalous matter, and it is immaterial whether in causing such publication he acted alone or with confederates, and if in the latter mode, the giving of the names of the confederates would be a mere disclosure of the evidence relied upon to prove the material allegation. So, the "disreputable sheets" and the particulars connected therewith referred to in the third clause, are but the means of effecting the publication, which is the material and issuable fact alleged in the part of the answer there referred to. The like remark is applicable to the fourth clause, by which the defendant is required to state particulars, including names and places of residence, of the "persons, ladies and others," to whom the said "disreputable sheets" were alleged to have been sent. That requirement relates simply to the *method* of publication, and possibly to the *extent* of it, which, however, is immaterial for the purpose of a defense. The requirement in the seventh clause that the defendant state the particulars therein specified respecting the "sources" and "credible persons" from whom he claims to have ascertained the falsity of the pliantiff's charges, etc., calls for mere evidence in respect to a matter not relating to the plaintiff's conduct.

The result is that so much of the order as relates to the first, third, fourth and seventh portion of the answer therein referred to should be reversed, and in all other respects the order is affirmed.

See also Taylor v. Security Mut. L. Ins. Co., 73 App. Div. 319.

HIGENBOTAM v. GREEN.

25 Hun, 214.

Dykman, J. This action is for conspiracy and false imprisonment, in causing the incarceration of the plaintiff in a mad-house in the State of New Jersey.

The defendants set up in their answer, among other defenses, that application in pursuance of law was made to one of the judges of the State of New Jersey by the wife of the plaintiff alleging his insanity, and that the judge thereupon called on the defendants, who are physicians, as witnesses in the investigation of such alleged insanity. That in obedience to such summons, as required by law, they attended before the judge as witnesses and were examined by him respecting the mental condition of the plaintiff and gave certificates that in their opinion the plaintiff was then an insane man. They then aver that such was their opinion as physicians, and that such opinion was formed from their personal acquaintance with the plaintiff, from their professional examination and knowledge of the plaintiff's health and mental condition, from frequent observation of plaintiff's actions, conduct and habits, and from information as to such actions, conduct and habits from members of plaintiff's family and others, which they believe to be true.

On motion of the plaintiff an order was made at Special Term requiring the defendants to furnish to the plaintiff a bill of particulars of the "plaintiff's actions, conduct and habits" upon which the opinions of the defendants respecting the sanity or mental condition of the plaintiff mentioned in their answer were respectively based, formed or founded, and that such bills of particulars specify the time and place, when and where, the actions of the plaintiff so referred to occurred, and that such bills of particulars also

specify what such actions were, and when and where the observations referred to in the answers were made, and what was observed.

It was further ordered that on the trial the defendants be precluded from giving evidence of any matter respecting the plaintiff's "actions, conduct or habits" beyond that which they specified in the bill so ordered.

This last paragraph is sufficient for the condemnation of the whole order. By it they are required to furnish particulars of the "actions, conduct and habits" upon which their opinions were based at the time they were given and precluded from giving evidence beyond that which they so specify. Conduct of the plaintiff there may have been theretofore, proving beyond doubt the visitation of insanity, but if it had not come then to the understanding of the defendants, under this order, they are deprived of its use and benefit on the trial. We, however, place our decision on broader ground.

The office of a bill of particulars is to amplify a pleading and indicate specifically the claim set up, while its effect is to restrict the proofs and limit the demand. It is neither given nor required for the purpose of disclosing to an adverse party the case relied upon, nor the proof to substantiate the same. Its entire scope and nature is to furnish information to an opponent, and to the court, of the specific proposition for which the party contends.

There is jurisdiction and power in the court to order such particulars, to be exercised in its discretion in a proper case. Usually the power is exerted in actions on contract involving accounts, but it may be used in all cases. It rests in discretion, however, and in this case its exercise was not in the line of wisdom.

The portion of the answer complained of fully apprises the plaintiff of the claim of the defendants in that behalf. They say that, in obedience to legal requirement, they at-

tended before a lawful tribunal, in which the mental condition of the plaintiff was under judicial inquiry, and there gave their honest opinion that he was laboring under a visitation of insanity, and that such opinion was founded in part on personal observation of the actions, conduct and habits of the plaintiff. This apprises the plaintiff that the defendants rely upon these facts for their justification and will make proof of them on the trial, and that is all he can require in a pleading. In this case it is all that is necessary. The plaintiff cannot be misled or surprised, as nothing is left uncertain or indefinite. To require more would be to ask for a disclosure of the proof intended to be adduced on the trial.

Nothing in the cases of Tilton v. Beecher (59 N. Y. 176) and Dwight v. Germania Insurance Co. (23 Alb. L. J. 354) is antagonistic to these views. The first case decided that there was power in the courts to order particulars in all cases. The last case was an action on a life policy of insurance, and the company, in the answer, set up that the deceased had bronchitis and spitting of blood, and the court ordered a bill of the particular times and places at which the deceased had these ailments. Certainly this order receives no approbation from these cases.

Here we have two physicians charged with conspiracy and perjury to confine the plaintiff in an asylum for the insane, which they deny. Then they set up in justification of their action that they are respectable physicians and gave their opinions upon evidence which produced honest conviction upon their minds that the plaintiff was insane, and they state the facts presented which was proof to them.

This is sufficient for a pleading, and the discretion of the court was improperly exercised in making the order appealed from.

The order should be reversed.

GODDARD v. PARDEE MEDICINE CO.

52 HUN, 85.

BARTLETT, J. The plaintiff brings this action as the assignee of the Chicago Newspaper Union, and alleges that the defendant entered into a contract with that organization, which is set out in full in the complaint. This contract provides for the insertion of an advertisement for the Pardee Medicine Company every week for the period of one year, in a number of newspapers which are referred to as contained in a weekly list. There are also provisions to the effect that the papers in which the advertisements are published are to be regularly mailed to the advertiser, and that payment at the rate of $8 for fifty-two insertions is to be made "at the end of each three months after papers are received, checked and verified." The plaintiff further alleges that the Chicago Newspaper Union performed all the conditions of the contract upon its part, and published the advertisement of the defendant for the time specified in the contract, in 4,027 papers in the list which has been mentioned; and he sues to recover the value of the advertising at the price agreed upon between the parties.

The answer assumes to set up four defenses. First, the defendant admits the making of the contract, but denies any knowledge or information sufficient to form a belief as to any other allegation in the complaint. For a second defense, the defendant alleges that the Chicago Newspaper Union has no legal existence, and no capacity to assign its alleged claim to the plaintiff. In the third place, the defendant avers that it ordered the advertisements provided for in the contract to be discontinued after thirteen insertions thereof had been made, and that said contract was thereby canceled and annulled.

The fourth defense, which is the most important so far

as this motion is concerned, is in the following words: "For a fourth and further answer and defense herein, the defendant alleges, upon information and belief that the advertisements of the defendant were not published pursuant to said contract. That the said contract was not performed, and that the papers therein mentioned were not received, checked and verified as therein provided."

The plaintiff moved for a bill of particulars of this fourth defense, on the ground that neither he or the managers of the Chicago Newspaper Union could tell in what particulars the defendant intended to maintain that the advertisement was not published in accordance with the contract, or what papers therein mentioned were not received, checked and verified in accordance with the agreement. The court at Special Term ordered that such particulars should be furnished, and the defendant has appealed.

The fourth defense in the answer is not affirmative in its character. It really amounts to nothing more than a denial of the plaintiff's alleged cause of action. It adds no strength to the answer and could be wholly stricken out without detriment to the rights of the defendant. Considering it, therefore, with reference to its legal effect, which is simply that of a denial, it cannot properly be regarded as setting up any such claim as to render it proper to require a bill of particulars. The plaintiff counts upon the contract, and is bound to prove a performance thereof before he can recover in the action. He must show that the advertisement of the defendant has been published during the period covered by the contract, and in all the papers in which it was required to be published by the terms of the agreement, however large the number. Such proof is essential to make out the plaintiff's case, and he cannot avoid the obligation to furnish it, because the defendant has put its denial of due performance in a somewhat more specific form than was necessary. As in the case of Ben-

nett v. Wardell (43 Hun, 452), no bill of particulars of the claim should be ordered to be furnished, inasmuch as no claim is set up, but there is merely an assertion that the adverse party has no claim. In this view there is nothing inconsistent with the case of Dwight v. Germania Life Insurance Company (84 N. Y. 493), in which it was held that the claim of a defendant, in regard to which a bill of particulars might be ordered, was "whatever is set up by him as a reason why the action may not be maintained against him," or, "that ground of fact which he alleges in his answer as the reason why judgment should not go against him," or, again, "the position he takes in his pleading, based upon the facts he sets up and the law applied thereto, why he should go without day." None of these definitions includes a mere denial or a statement of fact, which amounts only to such a denial and which comprises nothing more than what the defendant could have shown if he had contended himself with a simple denial in form.

We think the order for a bill of particulars should be reversed.

GROSS v. CLARK.
87 N. Y. 272.

Earl, J. After the plaintiffs served their complaint in this action, the defendant obtained an order at a Special Term of the Supreme Court, upon notice to the plaintiffs, requiring them to serve a bill of particulars upon him within ten days thereafter, and extending his time to answer till ten days after such service. They not having served the bill of particulars as required, he thereafter obtained an order at Special Term, requiring them to show cause why the complaint should not be stricken out.

Upon hearing the order to show cause, the court ordered the complaint to be stricken out and dismissed, unless the

plaintiffs, within ten days, obeyed the first order of the court, requiring the service of the bill of particulars. They still persisting in their refusal to serve the bill of particulars, a final order was made, after hearing both parties, striking out and dismissing the complaint, with costs. From that order they appealed to the General Term, and from affirmance there, to this court.

The plaintiffs contend that the court had no power to strike out their complaint as a penalty for not obeying its order requiring them to serve a bill of particulars. Upon the argument before us, their counsel argued several questions of practice relating to the service of papers and other matters; but those questions were finally disposed of in the court below, and are not before us on this appeal.

The Code of Civil Procedure (§ 531) provides as follows: "It is not necessary for a party to set forth in a pleading the items of an account therein alleged; but in that case he must deliver to the adverse party, within ten days after a written demand thereof, a copy of the account, etc. If he fails so to do, he is precluded from giving evidence of the account. The court, or a judge authorized to make an order in the action, may direct the party to deliver a further account where the one delivered is defective. 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." Under this section, the plaintiffs claim that the only penalty which could properly have been visited upon them for not serving the bill of particulars as ordered, was to preclude them, upon the trial, from giving evidence of the claim, or claims, alleged in their complaint. But it is clear that the earlier portions of the section refer exclusively to actions upon an account, and for a failure, upon a proper demand, to deliver a copy of the account, the party is precluded from giving evidence of the account upon the trial. The last sentence in the section empowers the court to

direct a bill of the particulars of the claim of the plaintiff to be delivered to the defendant in any action; and when the order of the court in such a case is disobeyed, no penalty is prescribed. It is not the just inference that the lawmakers intended that the only penalty which the court could impose for disobeying its order was the same which would follow upon the refusal of a party to comply with the request of an adverse party for a copy of an account.

It is frequently important that a defendant should have a bill of particulars of the plaintiff's claim before he answers, and the ends of justice require that the court should have power to enforce the delivery of such a bill. It would frequently be embarrassing for a party to wait until the trial before he could have it determined whether he was entitled to have a bill of particulars, or whether the bill served was sufficient. Before the Code, it was undisputed law that the court could strike out the declaration, and dismiss the action, if an order requiring the service of a bill of particulars was not obeyed.

The power to enforce obedience to its order in that way was one of the inherent and common-law powers of the court, necessary and proper in the exercise of its jurisdiction, and it has not been taken away or superseded by any provisions of the Code. If a party, upon the request of the adverse party, refuses to furnish a copy of "the account" alleged in his pleading, he may be precluded from giving evidence of such "account" upon the trial. If he refuses to obey the order of the court requiring him to furnish a copy of his accounts, or a bill of particulars of his claim, the court may, as a penalty, stay his proceedings until he complies with its order, or may, in advance, order that his proof be excluded, or it may strike out his complaint. All these are usual and appropriate remedies to accomplish the ends of justice.

It would seem, also, that the action of the court below could be justified under section 822 of the Code, which provides that when the plaintiff unreasonably neglects to proceed in the action against the defendant, the court may, in its discretion, upon the application of the defendant, dismiss the complaint and render judgment accordingly. The service of the bill of particulars was a proceeding in the action which the court required the plaintiffs to take; and till they took such proceeding, the action could not move on. Hence, it may well be held that there was unreasonable neglect to proceed in the action within the meaning of the section cited, and that the complaint was properly dismissed for that reason.

The order should be affirmed, with costs.

It is improper to provide in the order for a bill of particulars a penalty for failure to obey the order. Prym v. Peck & Mack Co., 136 App. Div. 566. The remedy is by motion after default. If the bill served does not comply with the order the remedy is to move for a further bill, or else to return the bill, stating the defect, and move for an order precluding the party from giving evidence as to the allegations involved (Reader v. Haggin, 114 App. Div. 112), or inflicting other penalties as in the principal case.

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7. Amended and Supplemental Pleadings. Code Civ. Pro., §§ 542–4.

CLIFTON v. BROWN.
27 Hun, 231.

Brady, P. J. It appears that on the 11th of January, 1882, a demurrer to the complaint was served upon the plaintiff's attorney. On the following day he served a notice of trial of the issue of law for the first Monday in February. The defendant's attorney served a similar notice. On the twenty-sixth of January the plaintiff's attorney served an amended complaint, which was returned on the next day, upon the ground that the right to serve

the same had been waived by the service of notice of trial. The defendant thereupon moved to strike out the complaint. His motion was denied, and hence this appeal.

By section 542 of the Code of Civil Procedure it is provided that within twenty days after the pleading, or the answer or demurrer thereto is served, or at any time before the period for answering it expires, the pleading may be once amended by the party, of course, without costs, and without prejudice to the proceedings already had. But if it be made to appear to the court that the pleading was amended for the purpose of delay, and that the adverse party will thereby lose the benefit of a term for which the case is or may be noticed, the amended pleading may be stricken out, or the pleading may be restored to its original form and such terms imposed as the court deems just. This section is similar to section 172 of the former Code.

* * * * * * * * *

In Washburn v. Herrick (4 How. Pr. 15), to which reference is made in the case of Cusson v. Whalon (5 How. 302), it is said if the plaintiff notices a cause for trial before the defendant's time to amend expires, he does so at his peril; and, as said in the case of Cusson v. Whalon, Mr. Justice Gridley set aside the judgment where the defendant demurred to the complaint, noticed it for argument, and took judgment by default within twenty days after service of the demurrer, and before service of the amended complaint, which was allowed to be put in within that period, although he admitted that both sides had the right to notice the cause.

This case, although relied upon by the appellant herein, is substantially a recognition of the proposition that noticing the cause for argument, prior to the expiration of the time allowed to amend, is to be regarded as an act done at the peril of the party serving the notice.

In the case of Ostrander v. Conkey (20 Hun, 421), it was declared where, after issue had been joined in an

action, and the same had been regularly noticed for trial at circuit by the defendant, the plaintiff, in good faith, and within the time allowed by law, served an amended complaint, that the issue theretofore joined and noticed for trial was destroyed; but that where the amended pleading was served in bad faith, the remedy of the party aggrieved was by motion to strike it out. And it must be noted that in this case there is no charge of bad faith, and no charge that the amended complaint was interposed for the purpose of delay. This case just cited was a General Term adjudication, and the doctrine laid down in Washburn v. Herrick was recognized and approved, viz., that where the party notices his cause for trial within the time allowed to his adversary to amend he does so at his peril.

Section 542 of the Code of Civil Procedure, to which reference has been made, contemplates the rulings which have been made by these cases, viz., that the party may amend within the time allowed by law, and that his plea must stand unless it be made to appear that it was amended for the purpose of delay, and that the adverse party would lose the benefit of a term for which the cause was or may be noticed. * * *

It seems to be very clear that the right to amend existed under section 542 of the Code of Civil Procedure, and that the service of notice of argument was not a waiver of that right.

That section provides for a case in which notice of trial has been served, and the only penalty imposed is that the amended pleading shall be stricken out, if interposed for the purpose of delay.

For these reasons the order should be affirmed.

But a party cannot substitute a demurrer for an answer nor an answer for a demurrer, except by leave of the court. Cashman v. Reynolds, 123 N. Y. 138. For manner of service of amended complaint where defendant has not appeared by attorney, see Durham v. Chapin, 13 App. Div. 94.

DEYO v. MORSS.
144 N. Y. 216.

A stipulation was entered into between the parties to this action by the terms of which plaintiff was authorized to serve an amended or supplemental complaint or either and defendant was given thirty days within which to demur or answer.

This motion was made on the ground that the so-called amended complaint served was not an amended complaint, but an abandonment of the original cause of action and the substitution of a new one.

ANDREWS, Ch. J. The stipulation authorized the plaintiff's attorney to serve an amended or supplemental complaint, reserving to the defendants the right to make such motion in relation thereto as they should be advised, and it authorized the defendants to serve an amended or supplemental answer. Before the stipulation was made both parties contemplated making an application to the court for permission to serve amended pleadings. The plain object of the stipulation was to enable the parties, without notice, to do what the court upon application might authorize to be done. The plaintiff's attorney thereupon served an amended complaint, setting out a cause of action based on the statute, art. 2, title 3, chapter 15, of the Civil Code, against the defendants as devisees, to recover the proceeds of real estate devised to them, situated in the state of Pennsylvania, which they had conveyed. The action was brought by the plaintiff as creditor of the decedent, in behalf of himself and all others similarly situated. The cause of action set out in the original complaint was based upon the theory that the defendants had fraudulently conspired to defeat the claims of creditors by means of a sale and conveyance of the real estate devised and the complaint asked that the conveyance be set aside or in the

alternative that the defendants account for the proceeds received by them on the sale, and for the appointment of a receiver. The causes of action in the two complaints were distinct. The original complaint was based on fraud, and the amended complaint on the statute, and in such an action the element of fraud has no place. The General Term reversed the order of the Special Term, which denied a motion in behalf of the defendants to strike out the amended complaint, made on the ground that it set up a new and different cause of action from that in the original complaint. The ground of the reversal seems to have been based on the view that the power of the court to authorize an amendment of a complaint before trial, does not extend to an amendment which changes the cause of action.

We think the settled practice is opposed to the rule declared by the General Term. Whether an amendment of a pleading shall be allowed in such a case is, in general, a matter of discretion in the court. The General Term has the right to review the exercise of such discretion by the Special Term, and its order made in the exercise of this power of review could not be reviewed here. But the stipulation, by its true construction, authorized such amendment as the court had power to grant, and the case, therefore, depends on the power of the Special Term to authorize an amendment before trial of a complaint, so as to permit a substitution of a different cause of action from that originally alleged. We think this question was, in principle, determined in the case of Brown v. Leigh (49 N. Y. 78), where it was held that, under section 172 of the former Code, which permitted a pleading to be once amended by a party, of course and without costs, an amendment of a complaint which changed the cause of action and substituted another cause of action belonging to a different class was authorized. The power of amendment given to the court by section 723 of the present Code is entitled at least

to as liberal a construction as the power granted to the party to amend as of right under section 172 of the former Code. The power of the court to grant or deny the relief, or to impose such terms as justice may seem to require, is an adequate protection against an oppressive exercise of the power. To deprive the court of this power would, in many cases, result in injustice and encourage litigation. The present case is an illustration. The causes of action were legally distinct, but the purpose of both complaints was to compel the application of the decedent's property to the payment of his debts, and whether the result was reached by treating the conveyance by the defendants as fraudulent, or by compelling them to account for the proceeds of the property, as provided under the statute, does not affect the substantial purpose of the action. The amended complaint relieved the defendants from the imputation of fraud, and in that respect might be deemed more favorable to them. If they could have defeated the action in its original form this was no just reason why they should not, by amendment of the complaint, be put in a position where the real controversy as between the creditors and themselves may be tried and adjudicated.

The order of the General Term should be reversed and that of the Special Term affirmed, with costs in both courts.

HATCH v. CENTRAL NAT. BANK.
78 N. Y. 487.

APPEAL from order of General Term of the Supreme Court, in the first judicial department, modifying and affirming as modified an order of Special Term.

The Special Term order, granted on plaintiffs' motion, directed that a judgment herein in favor of plaintiffs be opened and the record thereof canceled, and that plaintiffs be allowed to serve an amended complaint, setting up an

additional cause of action, on condition that plaintiff refund and repay the amount of said judgment, which had been paid and satisfied by defendant; with certain other conditions and provisions. The order of General Term modified this order by adding another condition, in substance, that plaintiff give a bond conditioned, that if defendant be obliged to pay the claims set up by the amendment and is defeated in an action brought by it to collect of its principals, then that plaintiffs refund, etc.

The summons asked for a recovery of $8,000 and interest. The original complaint alleged, in substance, that plaintiffs, on September 28, 1867, purchased of defendant what purported to be four United States treasury notes of $1,000 each, which were counterfeits. Plaintiffs obtained judgment for the amount paid, with interest, August 5, 1876, which judgment was paid August seventh. The amendment allowed was to add a count setting forth the purchase of four other similar counterfeit notes on September 25, 1867, which it was claimed were omitted from the original complaint through mistake. The order granting the motion was made February 5, 1879.

DANFORTH, J. The plaintiffs recovered judgment, and it was satisfied. They sought by motion to vacate the judgment, and amend the complaint by adding new causes of action. Leave was granted upon terms. So far as the causes of action were stated in the complaint they were merged in the judgment; the judgment was paid and satisfied. There was no longer a judgment, and the parties were out of court. It is urged by the appellant's counsel that the court had no power to allow the amendment, and the plaintiffs' counsel contends that it was a matter within its discretion. It was going a great way to grant the relief sought; but the application was not without merit, and was one which under a long series of authorities the court

had power to grant. If so the order is not appealable. * * * In the case of Minthorne (19 Johns. Rep. 244), after judgment and satisfaction both were opened to allow an amendment by adding to the recovery. It was made necessary by the omissions of the clerk in assessing the damages. So in Crookes v. Maxwell (6 Blatchf. 468), the court on motion of the plaintiff made in 1867, opened a judgment recovered in 1862, and then paid and satisfied of record, in order to permit errors in the assessment of damages to be corrected, and this was done, although after the judgment of 1862, a new suit had been commenced for the recovery of the sums so omitted, and the plaintiff defeated because of the Statute of Limitations.

In Deane v. O'Brien (13 Abb. Pr. 11), the plaintiff was allowed to amend by enlarging his cause of action, although he thus avoided the Statute of Limitations, and "it might affect third parties." These (and there are many other) cases show the power of the court over its own judgments, and its habit to exercise it in aid of justice. It is an inherent power and not limited in matters of substance by the sections of the Code (section 174 of old Code, section 724 of the new Code), and others referred to by the learned counsel for the appellant, while section 723 seems to authorize its exercise in furtherance of justice.

In the case before us the summons claimed an amount corresponding to the sum of all the notes while the complaint was for part only. The suit was commenced when the summons was served, and therefore no question arises here as to the Statute of Limitations; but even if it did, the precedents are numerous where amendments have been allowed so as to prevent its operation. Balcom v. Woodruff (7 Barb. 13), where after nonsuit an amendment was allowed *nunc pro tunc,* and in New York Ice Co. v. Northwestern Ins. Co. (23 N. Y. 357), the judgment was amended by giving leave to serve a new complaint, in place of dis-

missal without prejudice. The order in this case may go a little further, but it is in the same direction.

The appeal should therefore be dismissed, but without costs.

See Davis v. N. Y., L. E. & W. R. Co., 110 N. Y. 646; Eighmie v. Taylor, 39 Hun 366.

HOROWITZ v. GOODMAN.

112 App. Div. 13.

Appeal from an order granting leave to plaintiff to serve a so-called "amended and supplemental complaint."

Ingraham, J. This action was commenced in June, 1905. In the original complaint the plaintiff alleges that she is the lessee of certain premises belonging to the defendant, and that the defendant had caused a portion of the leased premises to be cut away for the purpose of constructing water closets and shafts, and threatens to further cut away the ceiling and floors of the leased premises and to construct such water closets and shafts without the authority and consent of the plaintiff; and the plaintiff demands that the defendant be restrained from constructing and maintaining said water closets and shafts and from breaking the ceiling and floor of the plaintiff's store, and from in any way trespassing upon or interfering with the said store of the plaintiff. The lease was annexed to the original complaint.

The plaintiff made a motion for a temporary injunction, which was denied. The answer was served and the case was put upon the calendar for trial. Subsequently the plaintiff moved for leave to serve an amended and supplemental complaint upon an affidavit alleging that after the action was commenced the defendant had wrongfully entered upon the plaintiff's premises and wrongfully constructed said shaft and water closet in said premises; that

during the commission of such act certain personal property of the ~~defendant~~ PLAINTIFF in the store was damaged; that the defendant had thus completed subsequent to the commencement of the action the wrongful acts threatened prior to the commencement of the action and alleged in the complaint herein, and has so damaged the personal property of the plaintiff in the course of his wrongful acts of trespass; that in order to prove said acts so committed by the defendant subsequent to the commencement of the action it is necessary that a supplemental and amended complaint be served herein, the commission of said acts subsequent to the commencement of the action necessitating an amendment of the complaint herein, as deponent is advised by her counsel and verily believes. Annexed to this was the proposed pleading, which was intended to take the place of the original complaint. The Code of Civil Procedure recognizes no such pleading as an "amended and supplemental complaint." Section 478 of the Code provides that "The first pleading on the part of the plaintiff, is the complaint;" and section 481 provides that the complaint must contain: "1. The title of the action, specifying the name of the court in which it is brought; if it is brought in the Supreme Court, the name of the county, which the plaintiff designates as the place of trial, and the names of all the parties to the action, plaintiff and defendant. 2. A plain and concise statement of the facts constituting each cause of action without unnecessary repetition. 3. A demand of the judgment to which the plaintiff supposes himself entitled." Sections 542 and 543 of the Code allow an amendment to a pleading of course. By section 546 the court may require indefinite or uncertain allegations to be made definite and certain by amendment; and sections 539 and 540 provide for an amendment where there is a variance between an allegation in a pleading and the proof. Section 723 of the Code authorizes the court, upon the trial, or at any other

stage of the action, to amend any process, pleading or other proceeding, by inserting an allegation material to the case, or, where the amendment does not change substantially the claim or defense, by conforming the pleading or other proceedings to the facts proved; and further power in relation to amendments is given by section 724 of the Code. This power in relation to an amendment to the original complaint relates to the insertion of an allegation of fact existing at the time of the commencement of the action, and thus amendments to a complaint are authorized to allow the insertion of allegations of fact existing when the action was commenced and upon which the action is to be maintained. Provision is then made by section 544 of the Code for what is called "supplemental pleadings." That section provides that "Upon the application of either party, the court may, and, in a proper case, must upon such terms as are just, permit him to make a supplemental complaint, answer or reply, alleging material facts which occurred after his former pleading, or of which he was ignorant when it was made. * * * The party may apply for leave to make a supplemental pleading, either in addition to, or in place of, the former pleading." The facts which may be alleged by way of a supplemental pleading are "material facts which occurred after his former pleading, or of which he was ignorant when it was made." Just what is meant by the provision that this supplemental pleading may take the place of the former pleading is not clear, but it has been uniformly held that "the plaintiff could not, by a supplemental complaint, change the action in its entire scope and purpose by bringing in and substituting a new controversy, and a new and independent cause of action springing out of a transaction occurring since the commencement of the action between the defendants, with which the plaintiff had no connection." (Prouty v. Lake Shore & Mich. So. R. R. Co., 85 N. Y. 275, and cases there

cited.) It would seem that under these provisions of the Code the complaint in the action must consist of facts in existence at the time of the commencement of the action and upon which the plaintiff bases his right to relief. It may be amended by the court so as to include facts then existing and which are material to the plaintiff's cause of action. As to material facts which occurred after the service of the complaint, or of which the plaintiff was ignorant when his complaint was made, the plaintiff may allege such facts by way of supplemental complaint, and such a supplemental complaint may be served in place of the original complaint, in which case it would entirely supersede it. The plaintiff in this case has attempted to unite in one complaint called an "amended and supplemental complaint" facts alleged in the original complaint and which occurred prior to the service of his original complaint and the facts which have occurred after the service of the original complaint and which she seeks to set up by way of supplemental pleading. I think this practice improper and that it should not be allowed. It is in substance commencing a new action to recover upon facts alleged after the commencement of this action and would introduce an element of uncertainty and confusion. The original complaint in this action was one in equity and demanded a judgment enjoining the defendant from proceeding to make certain changes in the premises which had been leased to the defendant under orders of the tenement house commission. The new pleading proposed by the plaintiff as an "amended and supplemental complaint," alleges all the facts set up in the original complaint, and also other facts not in the original complaint which happened before the commencement of the action, and further alleges that subsequent to the commencement of the action, the defendant entered upon the leased premises, constructed the appliances required by the tenement house commission, ejected the plaintiff from

certain portions of the leased premises and caused the plaintiff substantial damage, and the relief that the plaintiff now demands is that the defendant be compelled to remove such appliances so placed upon the leased premises and that the plaintiff have judgment against the defendant for the sum of $15,000.

I think the plaintiff should have been granted leave to serve a supplemental complaint setting up the acts of the defendant after the service of the former pleadings in carrying out the acts which, when the former pleadings were served, were threatened, and stating the damages occasioned thereby and asking to recover in this action such damages. Upon the trial the facts would then have been presented to the court under the original complaint, upon which the right of the plaintiff to maintain the action would depend, and the relief to which the plaintiff would be entitled would depend upon the facts alleged in the original and supplemental complaints, but if the plaintiff had no right to maintain the action as one in equity the cause of action could not be bolstered up by the facts alleged after the commencement of the action. If upon the trial it appeared that the plaintiff at the time it was commenced was authorized to maintain it as an action in equity, the court would have power to retain the action and to grant the plaintiff such relief as she was entitled to, although, in consequence of the wrongful acts of the defendant after the commencement of the action, equitable relief would not give the plaintiff full relief, but it was irregular to attempt to set up by way in one complaint facts which occurred before and after the commencement of the action and attempt thereby to sustain a new cause of action against the defendant.

For this reason I think this "amended and supplemental complaint" should not have been allowed, and that the order appealed from should be reversed, with $10 costs

and disbursements, and the motion for leave to serve this pleading denied, with $10 costs, without prejudice to a motion to be made by the plaintiff for leave to serve a proper supplemental complaint.

In Holly v. Graf (29 Hun, 443), the answer set up unexpired credit as a defense in an action for goods sold. Held, plaintiff could not set up in a supplemental complaint expiration of the term of credit after action commenced. But in Corbin v. Knapp (5 Hun, 197), further publication of a libel after action commenced was allowed to be alleged by supplemental complaint as an aggravation of the original wrong. Devolution of interest *pendente lite* is properly alleged by supplemental complaint or amended answer, for the complaint speaks from the commencement of the action but the answer only from its service. But, Galm v. Sullivan (117 App. Div. 236), Laughlin, J. "This is an action to recover damages for personal injuries alleged to have been sustained by the plaintiff through the negligence of the defendant. After the defendant answered and noticed the case for trial, and placed it upon the calendar, the plaintiff settled his claim with the defendant and executed a release of his cause of action. The defendant thereafter and within the time within which he was authorized to amend his answer as of course, and without leave of the court, served an alleged amended answer, setting up the release as a defense. It is manifest that this defense, arising after the original answer was served, could only be interposed by leave of the court and in the form of a supplemental answer. (Code Civ. Proc., § 544.)

"It follows that the order should be reversed."

CHAPTER IV.

STATUTE OF LIMITATIONS.

1. Nature.

CAMPBELL v. HOLT.
115 U. S. 620.

In holding that the repeal of a statute of limitation of actions on personal debts does not, as applied to a debtor, the right of action against whom is already barred, deprive him of his property in violation of the Fourteenth Amendment of the Constitution of the United States, the court said, speaking by Mr. Justice Miller:

The action is based on contract. It is for hire of the negroes used by the father, and for the money received for the land of his daughter, sold by him. The allegation is of indebtedness on this account, and the plea is that the action is barred by the statute of limitations. It is not a suit to recover possession of real or personal property, but to recover for the violation of an implied contract to pay money. The distinction is clear, and, in the view we take of the case, important.

By the long and undisturbed possession of tangible property, real or personal, one may acquire a title to it, or ownership, superior in law to that of another, who may be able to prove an antecedent and, at one time, paramount title. This superior or antecedent title has been lost by the laches of the person holding it, in failing within a reasonable time to assert it effectively; as, by resuming the possession to which he was entitled, or asserting his right by suit in the

proper court. What the primary owner has lost by his laches, the other party has gained by continued possession, without question of his right. This is the foundation of the doctrine of *prescription,* a doctrine which, in the English law, is mainly applied to incorporeal hereditaments, but which, in the Roman law, and the codes founded on it, is applied to property of all kinds.

Mr. Angell, in his work on Limitations of Actions, says that the word limitation is used in reference to "the time which is prescribed by the authority of the law (*auctoritate legis,* 1 Co. Litt. 113) during which a title may be acquired to property by virtue of a simple adverse possession and enjoyment, or the time at the end of which no action at law or suit in equity can be maintained;" and in the Roman law it is called *Praescriptio.*

"Prescription, therefore (he says), is of two kinds — that is, it is either an instrument for the acquisition of property, or an instrument of an exemption only from the servitude of judicial process." Angell on Limitations, §§ 1, 2.

Possession has always been a means of acquiring title to property. It was the earliest mode recognized by mankind of the *appropriation* of anything tangible by one person to his own use, to the exclusion of others, and legislators and publicists have always acknowledged its efficacy in confirming or creating title.

The English and American statutes of limitation have in many cases the same effect, and, if there is any conflict of decisions on the subject, the weight of authority is in favor of the proposition that, where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title — a title superior to that of the latter, whose neglect to avail himself

of his legal rights has lost him his title. This doctrine has been repeatedly asserted in this court. *Leffingwell v. Warren,* 2 Black, 599; *Croxall v. Shererd,* 5 Wall. 268, 289; *Dickerson v. Colgrove,* 100 U. S. 578, 583; *Bicknell v. Comstock,* 113 U. S. 149, 152. It is the doctrine of the English courts, and has been often asserted in the highest courts of the States of the Union.

It may, therefore, very well be held that, in an action to recover real or personal property, where the question is as to the removal of the bar of the statute of limitations by a legislative act passed after the bar has become perfect, such act deprives the party of his property without due process of law. The reason is, that, by the law in existence before the repealing act, the property had become the defendant's. Both the legal title and the real ownership had become vested in him, and to give the act the effect of transferring this title to plaintiff, would be to deprive him of his property without due process of law.

But we are of opinion that to remove the bar which the statute of limitations enables a debtor to interpose to prevent the payment of his debt stands on very different ground.

A case aptly illustrating this difference in the effect of the statute of limitations is found in *Smart v. Baugh,* 3 J. J. Marsh. 364, in which the opinion was delivered by Chief Justice Robertson, whose reputation as a jurist entitles his views to the highest consideration. The action was detinue for a slave, and the defendant having proved his undisturbed possession of the slave for a period of time which would bar the action, but having failed to plead the statute of limitations, the question was whether he could avail himself of the lapse of time. "The plea (said the court) is *non detinet* in the present tense, and under this plea anything which will show a better right in the defendant than in the plaintiff may be admitted as competent evidence.

The plea puts in issue the plaintiff's right. Five years uninterrupted adverse possession of a slave not only bars the remedy of the claimant out of possession, but vests the absolute legal right in the possessor. Therefore, proof of such possession may show that the claimant has no right to the slave and cannot recover. Consequently it would seem to result from the reason of the case, that the adverse possession may be proved under the general issue." Answering the objection that in assumpsit and other actions the statute to be available must be pleaded, and by analogy should be pleaded in that case, he says: "The same reason does not apply to assumpsit, because the statute of limitations does not destroy the right in *foro conscientiae* to the benefit of assumpsit, but only bars the remedy if the defendant chooses to rely on the bar. *Time does not pay the debt, but time may vest the right of property.*" Again he says: "This is perfectly true in detinue for a slave, because, in such a case, the lapse of time has divested the plaintiff of his right of property, and vested it in the defendant. . . . But it is not so in debt, because the statute of limitations does not destroy nor pay the debt." "This (he says) has been abundantly established by authority. . . . A debt barred by time is a sufficient consideration for a new assumpsit. The statute of limitations only disqualifies the plaintiff to recover a debt by suit if the defendant rely on time in his plea. It is a personal privilege, accorded by law for reasons of public expediency; and the privilege can only be asserted by plea."

The distinction between the effect of statutes of limitation in vesting rights to real and personal property, and its operation as a defence to contracts, is well stated in *Jones v. Jones,* 18 Ala. 248. See also Langdell's Equity Pleading, §§ 118 *et seq.*

We are aware that there are to be found, in the opinions of courts of the States of the Union, expressions of the

idea that the lapse of time required to bar the action extinguishes the right, and that this is the principle on which the statutes of limitation of actions rest.

But it will be found that many of these are in cases where the suits are for the recovery of specific real or personal property, and where the proposition was true, because the right of the plaintiff in the property was extinguished and had become vested in the defendant. In others, the Constitution of the State forbade retrospective legislation. That the proposition is sound, that, in regard to debt or assumpsit on contract, the remedy alone is gone and not the obligation, is obvious from a class of cases which have never been disputed.

1. It is uniformly conceded, that the debt is a sufficient consideration for a new promise to pay, made after the bar has become perfect.

2. It has been held, in all the English courts, that, though the right of action may be barred in the country where the defendant resides or has resided, and where the contract was made, so that the bar in that jurisdiction is complete, it is no defence, if he can be found, to a suit in another country. * * *

There are numerous cases where a contract incapable of enforcement for want of a remedy, or because there is some obstruction to the remedy, can be so aided by legislation as to become the proper ground of a valid action; as in the case of a physician practising without license, who was forbidden to compel payment for his service by suit. The statute being repealed which made this prohibition, he recovered in the court a judgment for the value of his services on the ground that the first statute only affected the remedy. Hewitt v. Wilcox, 1 Met. (Mass.) 154. Of like character is the effect of a repeal of the laws against usury, in enabling parties to recover on contracts in which the law forbade such recovery before the repeal. *Wood v.*

Kennedy, 19 Ind. 68; *Welch v. Wadsworth,* 30 Conn. 149; *Butler v. Palmer,* 1 Hill, 324; *Hampton v. Commonwealth,* 19 Penn. St. 329; *Baugher v. Nelson,* 9 Gill. 304.

In all this class of cases the ground taken is, that there exists a contract, but, by reason of no remedy having been provided for its enforcement, or the remedy ordinarily applicable to that class having, for reasons of public policy been forbidden or withheld, the legislature, by providing a remedy where none exists, or removing the statutory obstruction to the use of the remedy, enables the party to enforce the contract, otherwise unobjectionable.

Such is the precise case before us. The implied obligation of defendant's intestate to pay his child for the use of her property remains. It was a valid contract, implied by the law before the statute began to run in 1866. Its nature and character were not changed by the lapse of two years, though the statute made that a valid defence to a suit on it. But this defence, a purely arbitrary creation of the law, fell with the repeal of the law on which it depended.

It is much insisted that this right to defence is a vested right, and a right of property which is protected by the provisions of the Fourteenth Amendment.

It is to be observed that the word vested right is nowhere used in the Constitution, neither in the original instrument nor in any of the amendments to it.

We understand very well what is meant by a vested right to real estate, to personal property, or to incorporeal hereditaments. But when we get beyond this, although vested rights may exist, they are better described by some more exact term, as the phrase itself is not one found in the language of the Constitution.

We certainly do not understand that a right to defeat a just debt by the statute of limitations is a vested right, so as to be beyond legislative power in a proper case. The statutes of limitation, as often asserted and especially by

this court, are founded in public needs and public policy — are arbitrary enactments by the law-making power. *Tioga Railroad v. Blossburg and Corning Railroad,* 20 Wall. 137, 150. And other statutes, shortening the period or making it longer, which is necessary to its operation, have always been held to be within the legislative power until the bar is complete. The right does not enter into or become a part of the contract. No man promises to pay money with any view to being released from that obligation by lapse of time. It violates no right of his, therefore, when the legislature says, time shall be no bar, though such was the law when the contract was made. The authorities we have cited, especially in this court, show that no right is destroyed when the law restores a remedy which had been lost.

HULBERT v. CLARK.
128 N. Y. 295.

APPEAL from judgment of the General Term of the Supreme Court in the fifth judicial department, entered upon an order made October 23, 1890, which modified, and affirmed as modified, a judgment in favor of plaintiffs entered upon the report of a referee.

This action was commenced in July, 1887, to foreclose a mortgage executed and delivered by the defendants to Reuben D. Hulbert, the plaintiffs' intestate, on the 8th day of March, 1867.

The mortgage, as stated therein, was given to secure the payment of eight promissory notes of $500 each held by Hulbert, all bearing the same date as the mortgage, and maturing at different times within nine months from their date. It was provided that the mortgage should become void if the notes, principal and interest should be paid at maturity, but that in case of default in the payment of the notes or any part thereof, it should be lawful for the mort-

gagee to sell the mortgaged premises in the manner prescribed by law, and out of the moneys received upon such sale to retain the amount then due and unpaid upon such notes, and to pay the balance, if any, to the mortgagor William B. Clark. There was no covenant to pay the notes or the mortgage. The answer alleged payment of the notes, a set-off and the six years' Statute of Limitations.

The action was referred and tried before the referee. He found that two of the notes had not been paid, and that there was due theron over and above the set-offs allowed by him the sum of $1,310.09; and he decided that the mortgage was a subsisting security for that sum, and ordered judgment of foreclosure.

EARL, J. The sole question for our determination is whether the mortgage continued to be a subsisting lien and could be foreclosed after an action at law upon the notes was barred by the Statute of Limitations. This is an interesting question which has given rise to considerable discussion in the courts of this country and England. We do not, however, deem it difficult of solution.

The Statute of Limitations does not after the prescribed period destroy, discharge or pay the debt, but it simply bars a remedy thereon. The debt and the obligation to pay the same remain, and the arbitrary bar of the statute alone stands in the way of the creditor seeking to compel payment. The legislature could repeal the Statute of Limitations and then the payment of a debt upon which the right of action was barred at the time of the repeal, could be enforced by action, and the constitutional rights of the debtor are not invaded by such legislation. It was so held in Campbell v. Holt (115 U. S. 620). It was held in Johnson v. Albany & Susquehanna R. R. Co. (54 N. Y. 416), that the Statute of Limitations acts only upon the remedy; that it does not impair the obligation of a contract or pay a debt

or produce a presumption of payment, but that it is merely a statutory bar to a recovery; and so it was held in Quantock v. England (5 Burr. 2628), and so it has ever since been held in the English courts.

These notes were, therefore, not paid, and so the referee found. The condition of the mortgage has, therefore, not been complied with. The notes being valid in their inception the only answer to the foreclosure of the mortgage is payment.

The mortgage was given to secure payment of the notes, and until they are paid the mortgage is a subsisting security and can be foreclosed. The mortgage being under seal can be foreclosed by action at any time within twenty years. (Code, § 381.) It is only an action *upon* the notes that is barred after six years. (Code, § 382.)

It is a general rule recognized in this country and in England that when the security for a debt is a lien on property, personal or real, the lien is not impaired because the remedy at law for the recovery of the debt is barred.

The subject has several times been under consideration in the courts of this state. In Jackson v. Sackett (7 Wend. 94), ejectment was brought on a mortgage executed as collateral security for the payment of a sum of money secured to be paid by a note. The note had been past due more than twenty years when the action was commenced. Upon the trial it was the contention of defendant's counsel that from the lapse of time the note must be presumed to have been paid, and on that ground the court nonsuited the plaintiff. The Supreme Court upon review held that the evidence as to payment ought to have been submitted to the jury, and nothing else was decided. It was, in fact, held that payment of the note was the only defense to the action, but the judge writing the opinion expressed what must now be conceded to be erroneous views as to the presumption of payment furnished by the Statute of Limitations. He appeared to

be of opinion that after six years there was a statutory presumption of payment, not a presumption of law, but a presumption of fact from which, with other evidence, the jury might infer payment. In Heyer v. Pruyn (7 Paige, 465), the chancellor said that the intimation of an opinion by Justice Sutherland in Jackson v. Sackett, "that a mortgage to secure a simple contract debt was presumed to be paid in six years because the Statute of Limitations might at the expiration of that time be pleaded to a suit on the note, certainly cannot be law." The case of Pratt v. Huggins (29 Barb. 277) is quite like this. That was an action to foreclose a mortgage given to secure the payment of $250, for which the mortgagee at the same time took the mortgagor's promissory note. The note and mortgage were dated February 5, 1835, and were payable February 1, 1836. The action was commenced September 6, 1855. Upon the trial the defendant claimed that the plaintiff could not maintain the action because an action upon the note was barred by the Statute of Limitations, and so the trial judge held and gave judgment for the defendant. The plaintiff appealed to the General Term, and there, after much discussion and consideration the judgment was reversed, the court holding that a debt secured by a sealed mortgage and an unsealed note may be enforced by a foreclosure of the mortgage after the expiration of six, but before the expiration of twenty years from the time when the debt became due; that the lapse of six years is not conclusive evidence that the mortgage has been paid, and that the provision of the Statute of Limitations making the lapse of six years a bar in such a case, is in terms confined to an action upon the note, and does not operate to defeat a remedy on the mortgage. Then, as here, there was no covenant to pay in the mortgage, and the mortgage was collateral to the note. In Mayor, etc. v. Colgate (12 N. Y. 140), it was held that the lien of an assessment which was to be regarded in effect

as a mortgage, could be enforced after the Statute of Limitations would have barred a common-law action against the person liable to pay the same for the recovery thereof. In Morey v. Farmers' Loan and Trust Co. (14 N. Y. 302), an action by the vendee for specific performance of a contract under seal to convey land, on payment of the purchase-money, it was held that the presumption arising from the lapse of twenty years after the money became due was not sufficient evidence of payment to entitle the plaintiff to the relief demanded. To the same effect is Lawrence v. Bull in the same volume at page 477. In Borst v. Corey (15 N. Y. 505), it was held that an action to enforce the equitable lien for the purchase-money of land, was barred by the lapse of six years after the debt accrued. The reasoning by which the result was reached in that case is not altogether satisfactory, and yet that decision is not in conflict with the views we now entertain. The judge there writing the opinion said: "The equitable lien (for the purchase-money) is neither created nor evidenced by deed, but arises by operation of law, and is of no higher nature than the debt which it secures." He distinguished that case from one like this as follows: "It has, however, been held that when a mortgage was given to secure the payment of a simple contract debt, the statute limiting the time for commencing actions for the recovery of such debt was no bar to an action to enforce the mortgage," and he cited among other cases Heyer v. Pruyn. He said further: "There is a material distinction between a mortgage and the equitable lien for the purchase-price of land given by law, and also between an action to foreclose a mortgage and one to enforce a lien. The action to foreclose a mortgage is brought upon an instrument under seal, which acknowledges the existence of the debt to secure which the mortgage is given; and by reason of the seal the debt is not presumed to have been paid until the expiration of twenty years after it became due and

payable." In Johnson v. Albany & Susquehanna R. R. Co. (supra), the action was to compel defendant to issue its certificate for stock subscribed for after an action to compel the subscriber to pay for the stock had been defeated on the ground that the action was barred by the Statute of Limitations; and it was held that the plaintiff, notwithstanding the statutory bar, could recover only upon proof of actual payment. In Lewis v. Hawkins (23 Wall. 119), Mr. Justice Swayne, writing the opinion, recognizes the rule above stated as follows: "That the remedy upon the bond, note or simple contract for the purchase-money is barred in cases like this, in no wise affects the right to proceed in equity against the land." Hardin v. Boyd (118 U. S. 756) was a bill in equity to set aside a conveyance of the purchase-money, and to make it a lien on the lands; and it was held that, although the debt for unpaid purchase-money was barred by limitation under the local law, the lien therefor on the land was not barred. * * *

We could go much further in these citations. But we have gone far enough to show that the rule applicable to a case like this is, both upon principle and abundant authority, as we have above stated it. There are cases in some of the states of this country which lay down a different rule. But those cases generally depend upon some local statutes, or are to be found in states where it is held that the Statute of Limitations not only bars the remedy but destroys and annihilates the debt by the presumption that it has been paid or discharged.

Judgment affirmed.

2. In Equitable Actions.

BUTLER v. JOHNSON.

111 N. Y. 204.

From Opinion of PECKHAM, J.

"After the death of the testator, and when the payment of the legacies became due, the legatee had several remedies to obtain such payment. She could have asked the surrogate to decree payment of them to her by the executrix, and payment could have been enforced if there were assets, and in this respect the real estate must under the will be regarded as assets. (2 R. S. 90, § 45; id. 116, § 18.) She could also, after the expiration of eighteen months, have cited the executrix to account before the surrogate, and an accounting could have been enforced. (2 R. S. 92, § 52 *et seq.*) She could also have proceeded by action for a simple accounting or for payment of the legacies, or she could have included in such action a prayer for relief that if there were not enough personal property to pay the legacies, the executrix should be compelled to exercise the power of sale of the real estate given her by the will, and with the proceeds pay such legacies. The six years statute applied to all these remedies, for they were of a legal nature, excepting the last. If there had been no other remedy than such last-mentioned one, it is plain the ten years statute would apply. The claim is made, upon the part of the plaintiff, that the subject-matter of such a suit, the cause of action, is the recovery of payment of the legacy, and that all these various modes of obtaining payment thereof are simply different remedies to attain the same object, and that when such is the case, and the two courts under the old system of law and equity had concurrent jurisdiction over the subject-matter or cause of action, and the remedy at law was as effectual as the equitable one, the legal stat-

ute of limitations applied to the remedy in equity and if the cause of action were barred at law, it was equally so in equity. This was the rule in the days before the adoption of the Code, and plaintiffs claim that it still exists. All the relief obtainable by action, in the nature of a suit in equity by the legatee herein, could have been obtained by an action of a purely legal nature during six years. The proceedings before the surrogate were entirely adequate to obtain payment of the legacies. Under the will the real estate would be treated as assets for the purpose of selling it to pay the legacies. The rule of limitation, that equity follows the law, in cases of concurrent jurisdiction of the two courts, was not brought into being by the Revised Statutes. In *Hovender v. Lord Annesley* (2 Sch. & Lef. 607), Lord Chancellor Redesdale stated: "But it is said that courts of equity are not within the statutes of limitation. This is true in one respect. They are not within the words of the statutes, because the words apply to particular legal remedies. But they are within the spirit and meaning of the statutes and have been always so considered. I think it is a mistake in point of language to say that courts of equity act merely by *analogy* to the statutes. They act in *obedience* to them; the statute of limitations applying itself to certain legal remedies for recovering the possession of lands, for the recovery of debts, etc., and equity which in all cases follows the law, acts on legal titles and legal demands, according to matters of conscience which arise and which do not admit of the ordinary legal remedies. Nevertheless, in thus administering justice according to the means afforded by a court of equity, it follows the law. * * * I think, therefore, courts of equity are bound to yield obedience to the statute of limitations upon all legal titles and legal demands, and cannot act contrary to the spirit of its provisions. I think the statute must be taken virtually to include courts of equity, for when the legislature by statute limited the

proceedings by law in certain cases, and provided no express limitation for proceedings in equity, it must be taken to have contemplated that equity followed the law, and, therefore, it must be taken to have virtually enacted, in the same cases, a limitation for courts of equity also."

Chancellor Kent said, in commenting upon the language of the court in the above case, that it meant that if the party had a legal title and a legal right of action, and, instead of proceeding at law, resorted to equity — instead of bringing his action of account or detinue or case for money had and received at law, he files his bill for an account, the same period of time that would bar him at law would bar him in equity. (*Kane v. Bloodgood,* 7 Johns. Ch. 89.)

When the same subject-matter of the demand in equity can also be made the subject of an action at law, the rule of analogy applies with all its force. (*Kane v. Bloodgood, supra.*)

In *Murray* v. *Coster* (29 Johns. 575, 585) the same rule was announced by the Court of Errors.

The Revised Statutes (2 R. S. 301, art. 6, §§ 49–51) enacted the same rule, and, in cases of concurrent jurisdiction, the legal limitation was applied. The revisers, in their notes to these sections, stated that no new rule was intended, but the sections adopted the language of the Court of Errors in the case of *Murray v. Coster* (supra). In truth, the Revised Statutes simply enacted the then existing law on that subject. The Code of 1848 (Laws of 1848, 511, § 66) repealed the provisions of the Revised Statutes as to limitations upon the time for the commencement of actions other than for those relating to real property, and substituted provisions of its own on that subject. Provision being made in other sections for many cases, it was enacted by section 77 of that Code that "an action for relief, not hereinbefore provided for, must be commenced within ten years after the cause of action shall have accrued."

The claim is now made that, by this repeal of the Revised Statutes upon the subject of the limitation of actions and by the adoption of affirmative provisions on that subject by the Code, the old rule under discussion has been abolished and does not now exist; that it was repealed in terms and has not been re-enacted. * * *

We think that in causes of action which, before the adoption of the Code the two courts had concurrent jurisdiction over, or, in other words, where the subject of the action was the same in both courts, and the remedy only was different, such actions are included in and provided for by the sections preceding the above-mentioned seventy-seventh section, and hence are not included in that section as within the ten years statute. The simple repeal of those sections of the Revised Statutes relating to the commencement of actions would not have made any alteration in the law applicable to these causes of action, over which the two courts had theretofore had concurrent jurisdiction, for, as we have seen, the law was the same before their enactment. We must look further and see if the Code has provided any rule on this subject which is at war with the law as it stood before it was adopted. We do not think it has. Those sections which precede the seventy-seventh, wherein the time for the commencement of actions of what would theretofore have been called a legal nature, is prescribed, must be taken to include causes of action over which courts of equity had theretofore had concurrent jurisdiction with courts of law, because, as was said by Lord Redesdale, in the case of *Hovenden v. Annesley* (supra), the legislature must be taken to have contemplated the rule then existing, that equity followed the law in such cases, and to have virtually enacted for them the same limitation. This would leave the seventy-seventh section to apply to all cases over which equity had theretofore had sole jurisdiction, where no other rule had been specifically provided for one or more of such cases.

When the legislature prescribed, for instance, six years in which to commence an action upon a liability or obligation, express or implied, we think it meant to include in such description an action which might formerly have been prosecuted in either court, upon or by reason of such obligation, and where the remedy would have been adequate in either, and if the form of the remedy chosen were such as would formerly have been cognizable in chancery, yet the limitation applicable to the remedy at law would apply. There can be no sense in enlarging the time by a mere change of the form of the remedy sought, where the subject matter of the action is precisely the same, and the remedy in either was adequate.

This holding retains the application of the statute to a number of cases which, before the adoption of the Code, had been limited to six years, and where no good reason can be suggested for lengthening such time to ten years."

The above case also holds that an executor or administrator is bound to set up the bar of the statute and will not be allowed in his accounting any sum paid upon a debt which, at the time of its payment by him, was barred by such statute.

It has been held that in cases where a court of equity has exclusive jurisdiction it might deny relief because of unreasonable delay though ten years have not elapsed; but "whether the equitable doctrine of *laches*, as distinguished from the Statute of Limitations, now exists in this state, is open to serious doubt" (Cox v. Stokes, 156 N. Y. 491, 511).

EXKORN v. EXKORN.

1 App. Div. 124.

Barrett, J. The action was brought to reform a referee's deed by inserting the plaintiff's name as co-grantee with the defendant. No fraud is alleged, and the case rests solely upon an allegation of mistake. The deed was delivered in July, 1877, and the action was commenced in August, 1894. The defendant pleads the ten-year Statute

of Limitations. The plaintiff acknowledges that this would be fatal but for the fact that he did not discover the mistake until October, 1884. But the running of the statute did not depend upon the discovery of the mistake. That was the general rule in equity before the Code. The decisions of courts of equity then placed mistake upon the same footing in this regard with fraud. Under the Code, however, the rule as to discovery of the facts upon which the action is based is limited to actions for fraud, and all other cases are excluded from its operation. As was said by Allen, J., in Oakes v. Howell (27 How. Pr. 145, at p. 151): "From the absolute obligation of the present statute upon the courts, and its clear application to every case that can arise, and to every form of action, by every principle of statutory construction the cases of mistake and accidents are excluded from the exceptions in favor of actions for relief from fraud." This case has been repeatedly cited with approval, and was followed in Hoyt v. Putnam (39 Hun, 402, 406) and Sprague v. Cochran (70 id. 513). We think the rule is sound. The court cannot read the discovery provision into section 388 of the Code of Civil Procedure. The Legislature in this connection acted advisedly and deliberately both with regard to inclusions and exclusions. Had it been so intended, it would have been as easy and simple to provide for the discovery of facts constituting mistake as of facts constituting fraud. The Legislature has not done so, and consequently the cause of action here accrued upon delivery of the deed.

MILLS v. MILLS.

115 N. Y. 80.

In 1864 Theodore G. Mills conveyed several parcels of land to defendant, Hiram P. Mills, upon a written agreement that Hiram was to sell the lands and out of the pro-

ceeds reimburse himself for all expenses incurred, and for debts due or to become due him from Theodore and pay the surplus over to Theodore. After the death of Theodore his administratrix commenced this action in 1881 for an accounting for all moneys received by defendant from the sale of said lands, and recovered judgment. Defendant appealed.

EARL, J. The sole question for our determination is whether the plaintiff's cause of action was barred by the statute of limitations, and we are of opinion that it clearly was. The absolute title to the lands was vested in the defendant, evidently with the intention that he might sell them and reimburse himself and pay over any surplus to his brother. Long before his brother's death, he had sold all the lands, and received more than sufficient for his reimbursement. After the sale of the lands, he ceased to be mortgagee. He must be deemed to have sold the lands for the satisfaction of his mortgage, and it was satisfied. So far as he received the proceeds of the sales they were applicable, and must be deemed to have been applied for his reimbursement. After he had been fully reimbursed, the proceeds of the lands which came to his hands were received by him to and for the use of his brother, and it was his duty at once to pay over such surplus proceeds to his brother, and upon his failure so to do, he was liable without any demand to suit for their recovery.

The six years statute of limitations is applicable to such a case. (Code, § 382.) When money is received by one to and for the use of another, under such circumstances that it is his duty at once to pay it over, then an action for money had and received may be brought to recover it without any demand; and in such a case the statute of limitations begins to run from the day of the receipt of the money. (Stacy v. Graham, 14 N. Y. 492; Matter of Cole, 34 Hun 320; Compton

v. Elliott, 16 J. & S. 211; Diefenthaler v. Mayor, etc., 111 N. Y. 331.)

The defendant must always have known the amount of his loans and advances to his brother, and it was his duty to keep an account of his expenditures on account of the property transferred to him and hence he could tell when he had been fully reimbursed and the time came when he received moneys to and for the use of his brother under the obligation to make payment of them to him. Even if an accounting was necessary to determine the amount due from him to his brother, the account could be taken in an action at law as well as in an action in equity; and in whatever form the action was commenced the legal rule of limitations would be applicable. (Rundle v. Allison, 34 N. Y. 180; Carr v. Thompson, 87 id. 160; In the Matter of the Accounting of Neilley, 95 id. 382.)

All the relief asked for in the complaint is an accounting and a judgment for a sum of money, and no other relief was needed or possible upon the facts established. This was in no sense an action to redeem, as there was no mortgage and nothing to redeem. (Morriss v. Budlong, 78 N. Y. 543.) When the lands were sold, the mortgage being satisfied, the lien thereof did not attach to the moneys, but the defendant became a debtor for the surplus. He cannot, therefore, be treated as a mortgagee in possession, and the cases of Miner v. Beekman (50 N. Y. 337) and Hubbell v. Moulson (53 id. 225) are not applicable.

It is said, however, that the defendant was in some sense a trustee of the moneys received by him, and hence that the statute of limitations could not begin to run in his favor until he repudiated the trust. But the defendant was not a trustee in the sense contended for. He had received money belonging to another and became a debtor for the same, and he is in no other sense a trustee than every one is who receives money to and for the use of another. There

was no actual express trust as to these moneys created by the act of the parties. It is certainly not true that every mortgagee is a trustee of an express trust, and the relation of trustee and beneficiary does not exist between mortgagor and mortgagee. If the defendant was in any sense a trustee of the moneys received by him, it was simply an implied trust which the law would raise for the purposes of justice; and as to the liability growing out of such a trust the ordinary rules of limitations apply. (Kane v. Bloodgood, 7 Johns. Ch. 90; Lammer v. Stoddard, 103 N. Y. 672.)

Section 410 of the Code has no application to this case, because if we are right in what has already been said, no demand was necessary to entitle the plaintiff to maintain this action. * * *

We, therefore, see no way to avoid the conclusion that the plaintiff's cause of action was barred by the statute of limitations, and the judgment should be reversed and a new trial granted, with costs to abide event.

As against a trustee of an actual, express, subsisting trust, the statute does not begin to run against the beneficiary until the trustee has openly, to the knowledge of the beneficiary, renounced, disclaimed or repudiated the trust or the trust has come to an end and the trustee has no longer a right to hold the fund or property as such, but is bound to pay it over or transfer it discharged from the trust. But in the case of a trustee *ex maleficio* or by implication or construction of law the statute begins to run from the time the wrong was committed, by which the party became chargeable by implication. (Lammer v. Stoddard, 103 N. Y. 672; Gilmore v. Ham, 142 N. Y. 1, 10). The cause of action of a retiring partner against the liquidating partner does not accrue, nor the statute begin to run, until the lapse of a reasonable time after dissolution in which to liquidate the affairs of the copartnership. Gilmore v. Ham, *supra*.

HOOVER v. HUBBARD.

202 N. Y. 289.

APPEAL from a judgment of the Appellate Division of the Supreme Court in the fourth judicial department, entered

July 10, 1909, affirming a judgment in favor of plaintiff entered upon a verdict directed by the court.

CHASE, J. On March 1, 1895, the defendants borrowed of Charles Genter six hundred dollars for which they gave to him a promissory note, of which the following is a copy:

"$600.00 Theresa, March 1, 1895.

"For value received, we jointly and severally promise to pay Charles Genter, or bearer, six hundred dollars one year after date, at five per cent. interest.

"ELMER E. HUBBARD,
"HENRY H. HUBBARD."

The defendant Elmer E. Hubbard paid the interest on said note annually for eleven years. He also paid thereon $300 on account of principal. Prior to the commencement of this action the plaintiff became the owner and holder of said note and on April 28, 1908, this action was commenced thereon. The appellant, Henry H. Hubbard, answered the complaint, in which he alleged: "*First.* That prior to the commencement of this action he fully satisfied and discharged any and all claims and indebtedness in said complaint set forth by payment in full. *Second.* That the cause of action set forth in said complaint did not accrue nor did any part thereof accrue at any time within six years next preceding the commencement of this action."

It affirmatively appears that the appellant never made any payments upon said note. It is claimed by the respondent that some of the payments made by the defendant Elmer E. Hubbard were in the presence of the appellant.

It was held by this court in McMullen v. Rafferty (89 N. Y. 456) that: "It is the settled law of this state that payments made by one joint contractor cannot save from the Statute of Limitations a claim against another joint contractor, and that payments made by the principal debtor

cannot save from the statute a claim against the surety; and it makes no difference that the payments were made with the knowledge of the other party liable for the same debt. To make payments effective against a party to save a claim from the statute, they must have been made by him, or for him by his authorized agent. One joint contractor may make payments as agent for all the contractors, or the principal debtor may make payments for and in the name of his surety as his agent, or payments may thus be made in the name of all the joint contractors, or of the surety without previous authority, but be subsequently ratified, and in all such cases the running of the statute may be prevented. (First National Bank of Utica v. Ballou, 49 N. Y. 155.) But in all cases to make the payments effective they must by previous authorization or subsequent ratification be the payments of the party sought to be affected by them." (p. 459.)

It does not appear that the appellant authorized the defendant, Elmer E., to make any payment upon such note.

Unless a payment by one of two joint and several debtors prevents the running of the Statute of Limitations as to all, there is no evidence on which to sustain the judgment as against the appellant. There has been a controversy in some jurisdictions as to the legal consequences of a payment made upon an indebtedness by one of two or more joint debtors, so far as it affects the running of the Statute of Limitations against the debtors other than the person making the payment. In Shoemaker v. Benedict (11 N. Y. 176), referring to payments made by one of several makers of a promissory note before the Statute of Limitations had barred an action thereon, it was said that " Before the decision of Van Keuren v. Parmelee (2 Comstock, 523), it would have been considered very well settled upon authority that such payments did operate to prevent the statute of limitations from attaching to the demand." (p. 181.)

It was, however, by Shoemaker v. Benedict (supra) clearly settled in this state that a payment made by one of the joint and several makers of a promissory note either before or after an action upon it is barred by the Statute of Limitations and within six years before suit brought does not affect the defense of the statute as to the others. * * *

It is also claimed by the respondent that the appellant is precluded from claiming the Statute of Limitations as a bar to this action by reason of the first paragraph of his answer, in which he alleges the full satisfaction and discharge of the indebtedness.

The record shows that the appellant was mistaken in his allegation that the indebtedness was fully satisfied and discharged. If we accept the pleading as an admission, it does not appear thereby independently of the evidence received upon the trial or by the record as an entirety, that the appellant satisfied and discharged the indebtedness or made any payments thereon at a time within six years prior to the commencement of the action.

The judgment should be reversed and a new trial granted, with costs to abide the event.

This defense should be pleaded in the manner shown in the principal case (Code, § 413). For answers held insufficient see Budd v. Walker, 29 Hun, 344; Eno v. Diefendorf, 102 N. Y. 720; Schrieber v. Goldsmith, 39 Misc. 381, 384.

Earl, J., in Crow v. Gleason, 141 N. Y. 489, 493:

"In order to make a money payment a part payment within the statute, the burden is upon the creditor to show that it was a payment of a portion of the admitted debt, and that it was paid to and accepted by him as such, accompanied by circumstances amounting to an absolute and unqualified acknowledgment by the debtor of more being due, from which a promise may be inferred to pay the remainder. Part payment of a debt is not of itself conclusive to take the case out of the statute. In order to have that

effect it must not only appear that the payment was made on account of a debt, but also on account of the debt for which action is brought, and that the payment was made as a part of a larger indebtedness, and under such circumstances as warrant a jury in finding an implied promise to pay the balance. If it be doubtful whether the payment was a part payment of an existing debt, more being admitted to be due, or whether the payment was intended by the party to satisfy the whole of the demand against him, the payment cannot operate as an admission of a debt so as to extend the period of limitation. If there be a mere naked payment of money without anything to show on what account, or for what reason the money was paid, the payment will be of no avail under the statute. The payment must be made under such circumstances as to show a recognition of a larger debt remaining unpaid."

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4. Disabilities.

MESSINGER v. FOSTER,
115 App. Div. 689.

SUBMISSION of a controversy upon an agreed statement of facts, pursuant to section 1279 of the Code of Civil Procedure.

The plaintiff asks for specific performance of a contract by the defendant with her to purchase a lot of land in the city of Mount Vernon, Westchester county, N. Y. The defendant claims that the title is not marketable.

John C. Ferguson being the owner of the land executed with his wife a mortgage thereon to John C. Remsen in 1852 for $1,200. The mortgagee began an action to foreclose the mortgage in the Westchester County Court in

1854, as appears by an entry by the county clerk in the appropriate book in his office of the filing of the summons, complaint and *lis pendens* on November 27, 1854. (Nothing concerning the said action is extant in the said office excepting the said entry.) There is no subsequent entry, and neither the said papers nor any other papers in the said action, are to be found in the said office. (Nevertheless the sheriff of the said county conveyed the said land to the said mortgagee by a deed dated March 20, 1855, which recites the said action, judgment therein, due sale thereunder by the sheriff appointed by the judgment for that purpose, etc. The said sheriff's grantee conveyed by warranty deed in 1865 to Margaret I. Smith, and she thereupon entered into the actual possession of the land, fenced it round about, cultivated it, lived in the dwelling thereon, and continued in such possession until February 8, 1889, when she conveyed it to Joseph A. Smith, who entered and continued in such possession until March 15, 1902, when he conveyed it to Charles Messinger, who entered and continued in possession until April 20, 1904, when he conveyed it to his wife, the plaintiff, since which time she and he have continued such possession. A continuous adverse possession under the said conveyances from April 29, 1865, to the present time is admitted. It is not known whether the said mortgagor be dead or alive, or, if dead, whether he died before or after such adverse possession began, or who his heirs are.

GAYNOR, J.: 1. The adverse possession from which the plaintiff claims title began April 29th, 1865, at the latest, which is over 41 years ago. The adverse title is therefore made out, whether the alleged fee owner against whom and his heirs such possession ran, died after or before that time. If he died after, then the cause of action had accrued during his life, and his heirs, whether infants or adults, were limited to the time limited to their ancestor to bring ejectment, viz., 20 years from the time the cause of action accrued to

him. Where an adverse possession begins to run in the lifetime of the ancestor and the land descends to an infant, the latter may bring ejectment only during the period limited to the ancestor. Such disability does not extend the time; and the same is true of all the disabilities (*Peck v. Randall,* 1 Johns. 165; *Jackson v. Moore,* 13 id. 513; *Demarest v. Wynkoop,* 3 Johns. Ch. 129, 136 et seq.; *Bradstreet v. Clarke,* 12 Wend. 602, 636). And if the said fee owner died before the adverse possession began, leaving infant heirs, the case is not changed. If a right of action in ejectment accrue to an infant immediately after his birth (which is the extreme case), the time limited to begin the action is the 21 years of infancy plus 10 years (Code Civ. Proc., § 375); and the infant heirs of an infant are limited to the period limited to their infant ancestor, but not to be extended more than ten years after his death (Id. § 375). Disability cannot be added to disability. If that were permitted a right might travel through minorities for an indefinite time — for two centuries, Lord Eldon said (*Demarest v. Wynkoop, supra,* p. 139).

2. Aside from the question of adverse possession, the entry was at least that of a mortgagee made peaceably and lawfully, for the mortgagee's warranty deed assigned the mortgage, at least; and therefore the possession was that of a mortgagee in possession, in which case the same limitation of a suit to redeem obtains as in the case of an action in ejectment, viz., 20 years (§ 379), with a possible addition of only one year in the case of infancy (§ 396); and after such suit is barred the title is in the mortgagee or his grantees or successors in possession.

3. There remain only the improbable disabilities of insanity and imprisonment. If either existed when the adverse entry was made it, or the 10 years additional given after it ceased, might exist yet in respect of an action of ejectment (§ 375), for manslaughter in the first degree was

then punishable by imprisonment for any number of years not less than seven, in the discretion of the court. But it could not still exist in respect of the action to redeem, for there the 20 years' period of limitation cannot be extended for more than five years by insanity or imprisonment.

The plaintiff is entitled to judgment.

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5. Absence and Nonresidence of Defendant.

CONN. TRUST & S. D. CO. v. WEAD,
172 N. Y. 497.

APPEAL from a judgment entered upon an order affirming a judgment dismissing the complaint as to defendant Leslie C. Wead, and reversing a judgment against defendant Charles K. Wead entered on a verdict directed by the court and granting a new trial.

CULLEN, J. The action was brought in April, 1900, against the two defendants as indorsers of a promissory note which matured February 14th, 1890. Both defendants pleaded the Statute of Limitations. The defendant Charles K. Wead was a resident of the state at the time the cause of action accrued and remained such until the commencement of the action. The plaintiff sought to avoid the bar of the statute by proof of the receipt of the following letter:

"251 Patent Office,
"Washington, D. C., Dec. 27, '97.

"Conn. Trust & S. D. Co.
"Hartford, Conn.

"Mr. M. H. Whaples, Pt.:

"Dear Sir.—Several years ago when the Hartford Dynamic Co. went into insolvency you held a partly paid note

of the company indorsed by me and L. C. Wead. I am not yet able to take up the note, and have no definite prospect of being able to do so for a long time to come; but if you are disposed to name some small sum that you will take for the note I shall be glad if I can do so in justice to other interests to buy it.

"Very truly yours,
"CHARLES K. WEAD."

The learned trial court held that this letter was a sufficient acknowledgment or promise within section 395 of the Code of Civil Procedure and directed a verdict for the plaintiff against this defendant. The Appellate Division by a divided court held the letter insufficient for the purpose and ordered a new trial. From that order the plaintiff has appealed to this court, giving the necessary stipulation.

We agree with the view of the majority of the Appellate Division. At the time the defendant wrote the letter to the plaintiff the claim was outlawed by the lapse of time. "The rule with us is, that to revive a demand thus barred, there must be an express promise to pay, either absolute or conditional, or an acknowledgment of the debt as subsisting, made under such circumstances that such a promise may be fairly implied." (Wakeman v. Sherman, 9 N. Y. 85.) "It seems to be the general doctrine that the writing, in order to constitute an acknowledgment, must recognize an existing debt, and that it should contain nothing inconsistent with an intention on the part of the debtor to pay it." (Manchester v. Braedner, 107 N. Y. 346.) Tested by these rules the letter plainly contains no promise to pay the note, nor does it seem to us to be the acknowledgment of an existing debt. At most it is an admission that at one time there existed a liability from the defendant to the plaintiff. But this liability was then barred by the lapse of time. There is no promise to pay the claim, but on the contrary an as-

sertion that the writer was not then able to take up the note, and that he had no prospect of being able to do so. He then made a qualified offer to buy the note if the holder was willing to sell it for some small sum, and he, the debtor, could do so in justice to other interests. A comparison of the letter in this case with that found in Tebo v. Robinson (100 N. Y. 27) will show how far the instrument now before us falls short of the one on which the action in the case cited was brought. Yet there it was held that the promise of the defendant was conditional.

The question presented by the nonresidence of the defendant Leslie C. Wead is not free from doubt. In April, 1890, he left Malone in this state and took up his residence in Massachusets, where he has since resided. During this time he made a number of brief visits either to the city of New York or to his former residence. The statutory provisions as to the exceptions from the bar of the statute caused by non-residence or departure from the state have been the subject of a number of alterations, at times in substance, and at other times merely in form. Section 401 of the Code of Civil Procedure before the amendment in 1888 read: "If, when the cause of action accrues against a person, he is without the state, the action may be commenced within the time limited therefor, after his return into the state. If, after a cause of action has accrued against a person, he departs from and resides without the state, or remains continuously absent therefrom for the space of one year or more, the time of his absence is not a part of the time limited for the commencement of the action. But this section does not apply, while a designation, made as prescribed in section 430, or in subdivision 2 of section 432, of this act, remains in force." In 1888, however, the section was changed so that it thereafter read "departs from and resides without the state *and* remains continuously absent therefrom," instead of "or remains

continuously absent therefrom." After this amendment it was held by this court in Hart v. Kip (148 N. Y. 306) that to effect a suspension of the statute there must be both residence without the state and the party must be continuously absent therefrom for one year or more. So it was decided that the statute ran in favor of a defendant who was absent from the state for more than a year but continued to be a resident. But that decision does not dispose of the present case. It does not determine the interpretation to be given to the term " absence." It must be borne in mind that before the amendment of the section this provision dealt with two different cases, one that of a defendant who might become a non-resident, the other a defendant, who remaining a resident might absent himself from the state for more than a year. When the section prescribed that the time of the defendant's " absence " should not be part of the time limited for the commencement of the action, such absence included two different conditions, physical absence in the case of a resident, and residence without the state in the case of a non-resident. Under a number of cases decided, it is true, not under the present Code, but under earlier statutory enactments of similar character, it was clearly settled by authority that to set the statute running in the case of an absent debtor his return to the state must be " so public, and under such circumstances, as to give the creditor an opportunity, by the use of ordinary diligence and due means, of arresting the debtor " (Fowler v. Hunt, 10 Johns. 464), and that successive absences could be accumulated and the aggregate deducted from the statutory period. (Burroughs v. Bloomer, 5 Denio, 532; Ford v. Babcock, 2 Sandf. S. C. R. 518; Cole v. Jessup, 10 N. Y. 96.) Burroughs v. Bloomer went further and it was there held: " The expressions ' and reside out of the state ' and ' the time of his absence ' have the same meaning; they are correlative expressions. So that while the defendant in this

case resided out of it, he was absent from the state, and accordingly, until he again became a resident of the state, the suspension of the operation of the statute continued." The case was cited with approval in Cole v. Jessup (supra), but as authority for other propositions than the one which I have excerpted from the opinion. The doctrine quoted, however, was followed by the Supreme Court in the case of McCord v. Woodhull (27 How. Pr. 54) and Bassett v. Bassett (55 Barb. 505). In each of these cases the defendant was a resident of New Jersey doing business in the city of New York and attending there on secular days. It was held that the statute did not run in his favor. I have found no subsequent case holding a contrary rule. The question came before this court in Bennett v. Cook (43 N. Y. 537), which was also the case of a resident of New Jersey doing business in the city of New York and present there during business hours. It was not, however, determined, for the court said that on no theory could the the plaintiff claim a presence in the state of more than ten hours out of the twenty-four, the aggregation of which would fall far short of the period requisite to bar the claim. Engel v. Fisher (102 N. Y. 400) does not bear on the question. There the defendant continuously resided within the state, though under a fictitious name. It seems, therefore, that at the time of the amendment of 1888, non-residence was absence within the meaning of the statute. The change of the statute by eliminating from the exception the case of a resident of the state does not require or justify giving a different construction to the term "absence" when applied to a non-resident from that which was formerly attributed to it. By the substitution of the word "and" for "or" it became thereafter necessary to bring a non-resident within the exception of the statute that he should be continuously absent for a year or more, that is to say,

a non-residence for less than a year continuously would be insufficient for the purpose. But it did not alter the rule that non-residence is absence, and that casual visits to the state do not destroy the continuity of the absence. In Bassett v. Bassett (supra) it was said: "The object of the exception is to give the plaintiff the whole of six years' residence within the state to commence his action. He is not obliged to follow the debtor into another state; nor is he called upon to watch him and ascertain whether he comes into the state for a temporary purpose, so long as his residence is elsewhere." We think this statement is still correct. Whether the statute runs in favor of a non-resident defendant with a place of business in this state and daily present there during business hours it is unnecessary to determine, but we hold that the casual temporary visits of a non-resident to this state do not break the continuity of his absence under the section of the Code so as to entitle him to the benefit of the statute. The difference between the status of an absent resident and that of a non-resident and the ability of a creditor to pursue them is marked. The former, owing allegiance to the state and subject to its laws, can be reached by its process, even though it be not personally served upon him (Hunt v. Hunt, 72 N. Y. 217), while the state has no power to render a personal judgment against a non-resident unless he be served with process within the state, and by the Code (sec. 1217) no judgment of any kind can be entered against a non-resident served by publication unless the plaintiff has succeeded in attaching property.

The order of the Appellate Division granting a new trial to the defendant Charles K. Wead should be affirmed and judgment absolute rendered for that defendant, under the plaintiff's stipulation, with costs. The judgments of the Appellate Division and of the Trial Term in favor of the

defendant Leslie C. Wead should be reversed and a new trial granted, costs to abide the event.

In 1896 section 401 was again amended by striking out the provision requiring *residence* outside the state.

A foreign corporation may plead the statute of limitations of this state if it has strictly complied with subdivision 2 of section 432. Wehrenberg v. N. Y., N. H. & H. R. Co., 124 App. Div. 205. It may plead the statute of its own state subject to the provisions of section 390. It may, also, take advantage of the limitation contained in section 1902 because that is more than a mere limitation and amounts to a condition precedent inhering in the cause of action created by that section. See Pernisi v. Jno. Schmalz's Sons, 142 App. Div. 53; Londriggan v. N. Y. & N. H. R. Co., 12 Abb. N. C. 273.

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6. Mutual Account.

GREEN v. DISBROW,
79 N. Y. 1.

EARL, J. This action was commenced June 23, 1869, to recover upon a store account for goods claimed to have been furnished by the plaintiff to defendant's son, Jonathan Disbrow, at the request of the defendant and upon his credit.

We think there was sufficient evidence to justify the finding of the referee that the goods were furnished upon the sole credit of the defendant and upon his promise to pay for them. The only defense, therefore, to be considered here is the Statute of Limitations.

The account commenced on the 6th day of November, 1855, and continued to November 11, 1863; and during that time the defendant caused to be delivered to the plaintiff, by his son, certain small quantities of butter and eggs at different times to be credited upon the account, and the balance of the account, as adjusted by the referee is $745.55. All the items of plaintiff's account accrued before June 23,

1863, except items amounting in all to the sum of $104.29; and the last item of credit in the account is for eggs delivered to the plaintiff August 20, 1862.

The referee decided that there existed between the parties a mutual, open and current account, in which there were reciprocal demands, and hence that no part of the account was barred by the statute. The claim of the defendant is that the butter and eggs were delivered to and received by the plaintiff as payment upon the account, and hence that this is not a case of reciprocal demands, within the meaning of the statute; or in other words, that the defendant never had a right of action against the plaintiff for the butter and eggs, and hence that there were not reciprocal demands, within the meaning of the statute.

There was sufficient proof to justify the referee in finding that the butter and eggs belonged to the defendant and were delivered at his request. The evidence is that he directed his son and his wife to take the butter and eggs to the plaintiff and have them applied upon the account; and they took them to the plaintiff and he received them, and without any particular direction or agreement with him, he at once credited them in his account. No other account was kept of them except that kept by him. That this is a mutual, open and current account of reciprocal demands, within the meaning of the statute, I can entertain no doubt.

By the common law there was no stated or fixed time as to the bringing of personal actions. The time for the commencement of such actions was first regulated in England by the statute chapter 16 of 21, James I. But from the operation of that statute were excepted "such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants." It was held that the exception in that statute applied only to the action of account or to an action on the case for not accounting, and, after considerable vacillation in the decisions, that accounts

within the exception were not barred even if there were no items on either side of the account within six years. (*Robinson v. Alexander*, 8 Bligh (N. S.), 352; *Inglis v. Haigh*, 8 Mees. & Welsb., 770.) It was also held that the exception in the statute extended only to accounts concerning the trade of merchandise between merchant and merchant and not to other accounts. Other accounts were held to be within the statute, and the cause of action upon them was held to accrue from the last item of credit therein. In Catling v. Skoulding (6 T. R., 189), Lord Kenyon, speaking of a case not within the exception in the statute, said: "I take it to have been clearly settled, as long as I have any memory of the practice of the courts, that every new item and credit in an account given by one party to the other is an admission of there being some unsettled account between them, the amount of which is afterwards to be ascertained; and any act which the jury may consider as an acknowledgment of its being an open account is sufficient to take the case out of the statute." It was only mutual, open and current accounts that could come within the exception of the statute as to merchants' accounts; and in the case of accounts not concerning the trade of merchandise, to escape the bar of the statute there must have been in the account an item of credit within six years.

The statute of James, with slight verbal alterations, became the law of this State, and the exception as to merchants' accounts continued until the adoption of the Revised Statutes (see the "act for the limitation of criminal prosecutions and of actions at law," passed April 8, 1801). And it was early held that the law as enacted in this State should receive the same construction as the statute of James had received in England: (Ramchander v. Hammond, 2 J. R. 200). * * *

The law as contained in the Revised Statutes remained in force until the Code, by which (section 95) it was pro-

vided as follows: "In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action shall be deemed to have accrued from the time of the last item proved in the account on either side."

The change in the phraseology was again, it is believed, not intended to work any change in the law. So say the codifiers, in a note to that section, in their original report to the Legislature. The only material change are the words "where there have been reciprocal demands between the parties," and these words they say were introduced "to obviate the obscurity in which the existing statute has been involved by loose expressions on the part of the courts, and to confine it to what is undoubtedly its true construction." And in the same note they speak of the accounts contemplated by this section as "mutual, open and reciprocal accounts," and say that the object of the provision, as contained in the Revised Statutes, as construed by the courts, was "to require that the accounts should be reciprocal in order to found a presumption in favor of items beyond six years;" and they further say that "to put an end, if possible, to all doubt on the subject, the most explicit language is used in the section proposed." * * *

It will thus be seen that the phrase "reciprocal demands" is not new in the Code, and that it really means no more than was before meant by mutual accounts. It was introduced simply to settle definitely that there must be an account of mutual dealings,—not an account of items only upon one side, or an account of items upon one side upon which there had been simply payments not within six years upon the other side. It was intended to settle forever such questions as were raised in the cases of *Kimball v. Brown,* (7 Wend. 322); *Edmondstone v. Thomson* (15 id. 554), and *Hallock v. Losee* (1 Sand. Sup. Ct. R., 220).

A payment generally upon an account within six years will take the whole account out of the statute, and it may be that it would make no difference whether the payment was in money or goods. But where goods are delivered by a debtor to his creditor who has an account against him, it will not be presumed that they were delivered in payment. Before they can be held to have been so delivered, there must be proof that it was so intended, and that both parties so understood it. An account of items upon one side and payments merely upon the other, is not a mutual account. The payments do not, in such case, enter into the account. They are at once applied and reduce the account. Such was the case of Warren v. Sweeney (4 Nevada, 101), to which our attention has been called. There an article of personal property was delivered by a debtor to his creditor, who had an account against him, expressly as payment.

Where there are mutual accounts between two persons, it is always the understanding that the account upon one side shall off-set that upon the other, and in law the debt due from the one to the other is only the balance left after the application in reduction of the accounts on the opposite side. In any form of action the recovery can only be for the balance. The very theory upon which this statute is based is that the credits are mutual, and that the account is permitted to run with the view of ultimate adjustment by a settlement and payment of the balance; and this theory is recognized in the statute, as it mentions an action "brought to recover a balance due" upon an account. The action need not be in form to recover such balance, if such be its purpose or legal effect: (*Penniman* v. *Rotch*, 3 Metcf., 216.) In *Angell on Limitations*, 136, it is said: "Mutual accounts are made up of matters of set-off. There must be a mutual credit founded on a subsisting debt on the other side, or an express or an implied agreement for a set-off of mutual debts. A natural equity arises when there is an existing

debt on one side which constitutes a ground of credit on the other; or where there is an express or implied understanding, that mutual debts shall be a satisfaction or set-off *pro tanto* between the parties." In *Abbott v. Keith* (11 Vt. 525), Redfield, J., said: "In ordinary cases of mutual dealings no obligation is created in regard to each particular item, but only for the balance. And it is the constantly varying balance which is the debt." In *Hodge* v. *Manley* (25 Vt., 210), it is said: "It has uniformly been held that distinct and different items of charge, in an open and mutual account, do not constitute separate claims; but that the claim or debt is found in the balance of the account; and that it is the balance only that constitutes the claim of the party to whom it is due." And in *Trueman* v. *Fenton*, 1 Smith's Lead. Cases (H. & W's. Notes), 966, it is said: "When men deal with an express or implied agreement that what each sells or delivers shall, instead of giving rise to a demand payable at once, stand as a payment or off-set for what has been or may be received from the other, their liability will be limited to and depend upon the balance as finally disclosed, and the statute will not begin to run until the date of the last item."

Here the goods delivered on behalf of the defendant were delivered in the way contemplated by these authorities. It was plainly understood that they were to enter into the account between the parties, to be adjusted when plaintiff's account should be settled. It is quite absurd and unnatural to suppose that the defendant intended that these small items should be treated and considered technically as payments upon plaintiff's account. That would have been contrary to the ordinary and usual way of dealing in such cases. His direction was that they be taken to the plaintiff to be applied upon his account. Applied how? By a credit in the ordinary way customary in such cases. The plaintiff was to credit them on the opposite side of his account, so

that in any future settlement between the parties, the defendant could have the benefit of them. In legal effect they were sold to the plaintiff, the price of them to be credited on the account. It is true that the defendant could not have sued and recovered against the plaintiff for these items. But that was so simply because the plaintiff did not owe him anything. But suppose the defendant had in the same way delivered goods to the plaintiff, until the balance was in his favor. Would it then be denied that he could have sued and recovered against the plaintiff? It has never been decided that in order to make an account of mutual or reciprocal demands, each party must have, as claimed by the learned counsel for the appellant, a cause of action against the other for his side of the account. There is but one cause of action in such case, and that is for the balance. But were it not for the account on the opposite side, each party would have a cause of action for the items of his account.

In *Chambers* v. *Marks* (25 Penn. St., 296), Judge Black using language which might be applied to this case, said: "This was a suit for a balance on book account. The plaintiff's book showed several credits within six years, and it was proved, moreover, that the items of credit were delivered on account and credited agreeably to the defendant's request. The parties must settle as if the statute of limitations had never been passed." In *Norton v. Larco* (30 Cal., 126), the defendant being indebted to the plaintiffs on account, delivered to them an article of personal property, for which they gave him credit at a valuation agreed on; and it was held that thereby the account between the parties became a mutual open and current account of reciprocal demands. * * *

Judgment affirmed.

TABULAR STATEMENT OF SECTIONS OF THE CODE TO BE STUDIED IN CONNECTION WITH THE CASES IN THIS VOLUME.

STATUTE OF LIMITATIONS.

I. For the Recovery of Real Property.
- A. Forty years, §§ 362–3.
- B. Twenty years, §§ 365–7, 1596.
  - 1. Adverse possession.
    - a. Presumption of title, in absence of, § 368.
    - b. Under written instrument, §§ 369–70.
    - c. Not under written instrument, §§ 371–2.
    - d. Between landlord and tenant, § 373.
  - 2. Effect of descent cast, § 374.
- C. One year, § 1499.
- D. Effect of certain disabilities, §§ 375, 408–9.

II. Other Actions.
- A. Twenty years.
  - 1. Satisfaction of judgment presumed, §§ 376–8.
  - 2. Action to redeem from mortgage, § 379.
  - 3. Upon instruments under seal, § 381.
- B. Ten years, § 388.
- C. Seven years, § 445.
- D. Six years, § 382.
- E. Five years, §§ 1752, 1758.
- F. Three years, §§ 383, 394.
- G. Two years, §§ 384, 387, 1499, 1902.
- H. One year, §§ 385, 387, 1499.
- I. Effect of certain disabilities, §§ 396, 408–9.

III. General Provisions.
- A. Commencement of action, §§ 398, 784.
  - 1. Attempt to commence action, effect of.
    - a. In a court of record, § 399.
    - b. In a court not of record, § 400.
- B. In actions against nonresidents, §§ 390, 390-a, 401.
- C. Where expected defendant departs from the state, § 401.
- D. Where expected defendant dies outside the state, § 391.
- E. Where expected defendant dies within the state, § 403.
- F. Where expected plaintiff dies, § 402.

III. General Provisions — Continued.
G. Bank notes, etc., § 393.
H. New promise, what sufficient as, § 395.
I. Effect of war, § 404.
J. Effect of reversal of former judgment, § 405.
K. Effect of stay by injunction, § 406.
L. When statute begins to run.
1. Against principal for misconduct of agent, § 407.
2. Where demand necessary, § 410.
3. Generally, § 415.
M. Effect of submission to arbitration, § 411.
N. Effect of discontinuance after answer, § 412.
O. How statute pleaded, § 413.

COMMENCEMENT OF AN ACTION.

I. Summons, § 416.
A. Requisites and form, §§ 417–8.
B. Notices that may be indorsed on or served with summons.
1. In certain actions in contract, §§ 419–20.
2. Notice of no personal claim, § 423.
3. In actions for a penalty where complaint not served with summons, § 1897.
4. In matrimonial actions where complaint not served with summons, § 1774.
C. By whom served, § 425.
D. Manner of service.
1. Personally within the state.
a. Upon infant under 14 years old, § 426, subd. 1; § 427.
b. Upon incompetent person, § 426, subd. 2.
c. Upon sheriff in certain cases, § 426, subd. 3; § 427.
d. Discretion of court in cases of lunacy, § 429.
e. Upon adult defendant under no disability, § 426, subd. 4.
f. Upon person designated, § 430.
g. Upon domestic corporation, § 431.
h. Upon foreign corporation, § 432.
2. Substituted service.
a. When allowed, § 435.
b. Contents of affidavit, § 435.
c. Contents of order, § 436.
d. Manner of service, § 436.
e. When and how service completed, § 437.
f. Effect of substituted service, §§ 437, 1216–7.

I. SUMMONS, § 416 — Continued.
D. Manner of service — Continued.
3. By publication or personally out of the state.
a. When allowed, § 438.
b. Papers and proof required, § 439.
c. Order, by whom made: contents, § 440.
d. Filing papers, § 442.
e. When publication must begin or summons be served without the state, § 441.
f. Notice to be published with summons, § 442.
g. When service complete, § 441.
h. How service proved, § 444.
i. Effect of summons so served, §§ 1216–7.
j. When defendant will be let in to defend, § 445.
4. Penalty, for neglect to serve, in certain cases, § 821.
5. Penalty, for neglect to file papers, § 824.

II. APPEARANCE.
A. How effected.
1. By serving notice of appearance, § 421.
a. Form and contents, § 421.
b. Effect of, § 422.
2. By serving copy of answer, § 421.
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B. When defendant may appear, §§ 421, 422.
C. Effect of general appearance, § 424.
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E. Unauthorized appearance, effect of.

III. PARTIES TO AN ACTION.
A. Who may be made parties, §§ 446–7.
B. Who must be made parties, § 448.
1. When necessary plaintiff refused to join as plaintiff, § 448.
C. When one may sue or defend for the benefit of all, § 448.
D. Real party in interest, §§ 449, 756.
E. Married woman appears alone, §§ 450, 1206.
F. Where defendant's name is unknown, § 438, subd. 1; § 451.
G. Bringing in necessary parties, § 452.
1. When supplemental summons necessary, § 453.
H. Parties severally liable.
1. On the same written instrument, § 454.
2. Joinder does not affect rights of, § 455.
3. Procedure against parties severally liable, §§ 456, 1204–5.
I. Procedure against parties jointly liable, §§ 1204, 1932–5.
J. Unincorporated association, §§ 1919–21.

III. Parties to an Action — Continued.

K. Poor persons.

1. Who may sue as poor person, § 458.
2. Who may defend as poor person, § 463.
3. Contents of petition, §§ 459, 464.
4. Attorney to be assigned, §§ 460, 465.
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5. Not liable for costs or fees, § 461.
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7. May not prosecute but may defend an appeal, § 466.

L. Infant parties.

1. Guardian ad litem for infant plaintiff.
   a. When and who appointed, § 469.
   b. Papers on application, §§ 470, 472.
   c. Liable for costs, § 469.
2. Guardian ad litem for infant defendant.
   a. How appointed, §§ 471–2.
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3. When security required, § 474; nature of, § 475, rule 51.

PLEADINGS.

I. Complaint, § 478.

A. When, how and on whom served, §§ 419, 479, 798.

1. Time to serve supplemental, not to be extended, § 784.
2. Consequence of failure to serve, § 480.
3. When to be filed, §§ 442, 824.

B. Form and contents, §§ 481, 520.

1. Causes of action to be separately stated, § 483.
2. What causes may be joined, § 484.

II. Demurrer.

A. To complaint (§ 487), or part thereof, § 492.

1. Grounds of, § 488.
   a. Must specify objections: how, § 490.
2. When such objections to be taken by answer, § 498.
3. When objections waived by not demurring, § 499.

B. To answer, § 494.

1. When answer contains counterclaim.
   a. Grounds of, § 495.
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C. To reply, § 493.

III. Answer.
- A. Denials, §§ 500, 522.
  - 1. Absolute.
  - 2. On information and belief.
  - 3. Of knowledge or information sufficient to form a belief thereof.
- B. Separate defences, § 507.
- C. Partial defences, § 508.
- D. Dilatory defences, § 513.
- E. Admitting part of plaintiff's claim to be just, § 511.
- F. Counterclaim, §§ 500–1.
  - 1. Against assignee.
    - a. Of contract, § 502, subd. 1.
    - b. Of negotiable paper, § 502, subd. 2.
  - 2. Against trustee, § 502, subd. 3.
  - 3. By administrator, § 505.
  - 4. Against administrator, § 506.
  - 5. Judgment where counterclaim interposed, §§ 503–4, 509, 512.
- G. When, how and on whom served, §§ 422, 521.

IV. Reply.
- A. When necessary.
  - 1. When counterclaim interposed, § 514.
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- B. Effect of failure to reply, § 515.
- C. Contents, §§ 413, 514, 517, 522.

V. General Provisions as to Pleadings.
- A. Form, §§ 22, 520.
- B. Liberally construed, § 519.
- C. Verification.
  - 1. When necessary, §§ 513, 523, 531, 1670, 1776, 1938.
  - 2. When unnecessary, §§ 523, 529, 1757.
  - 3. Form, §§ 524, 526, 527.
  - 4. By whom made, § 525.
  - 5. Failure of, or defect in verification, § 528.
  - 6. Effect of, §§ 523, 980, 1213.
- D. Manner of pleading certain facts.
  - 1. Private statute, § 530.
  - 2. Account, § 531.
  - 3. Judgment, § 532.
  - 4. Condition in contract, § 533.
  - 5. Instrument for the payment of money only, § 534.
  - 6. In libel and slander, § 535.
  - 7. Mitigating circumstances, § 536.
- E. Frivolous pleadings, how disposed of, § 537.

V. General Provisions as to Pleadings — Continued.
F. Sham pleadings, how disposed of, § 538.
G. Variances.
1. Immaterial, §§ 539–40.
2. Material, § 539.
3. Failure of proof, § 541.
H. Amended pleadings.
1. Amendments of course, § 542.
a. Service of, §§ 543, 798.
2. By leave of court, § 723.
3. Effect of, § 543.
I. Supplemental pleadings, § 544.
J. Irrelevant, redundant or scandalous matter, § 545.
K. Indefiniteness, § 546.
L. Motion for judgment upon pleadings, § 547.
M. Bill of particulars, § 531, last sentence.
N. Motion to compel filing of pleading, § 824.

FORMS.

1. Summons.

SUPREME COURT — COUNTY OF NEW YORK.

JOHN DOE,
Plaintiff,
against
RICHARD ROE,
Defendant.

Summons.

To the above named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear, or answer, Judgment will be taken against you by default for the relief demanded in the complaint.

WILLIAM BLACKSTONE,

Dated, NEW YORK, *October* 1, 1898. *Plaintiff's Attorney.*

Post-Office Address and Office, No. 154 Wall Street. New York City.

2. Summons with Notice.

SUPREME COURT — COUNTY OF NEW YORK.

JOHN SMITH,
Plaintiff,
against
RICHARD JONES,
Defendant.

Summons.—With Notice.

To the above named Defendant:

YOU ARE HEREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service,

and in case of your failure to appear, or answer, Judgment will be taken against you by default for the relief demanded in the complaint.

WILLIAM BLACKSTONE,

Dated, NEW YORK, *October* 1, 1898. *Plaintiff's Attorney.*

Post-Office Address and Office, No. 154 Wall Street, New York City.

Notice.— Take notice, that upon your default to appear or answer the above Summons, Judgment will be taken against you for the sum of *one hundred dollars,* with interest from July 1, 1898, and with costs of this action. WILLIAM BLACKSTONE,

Plaintiff's Attorney.

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3. Affidavit for Service of Summons by Publication.

SUPREME COURT — COUNTY OF KINGS.

JOSEPH BROWN
against
HENRY HAWKINS AND OTHERS.

County of Kings, ss.:

JOHN MARSHALL, being duly sworn, says that he is attorney for the plaintiff in the above entitled action, which is brought to foreclose a mortgage upon real property, situated in the Borough of Brooklyn, in the County of Kings, described in the complaint herein. That the title to the said mortgaged premises is vested in the children of James Hawkins, the mortgagor, who died seized of said premises prior to the commencement of this action, intestate, leaving said children as his heirs at law. That one of said children is the defendant Elizabeth Hawkins, who is an infant under the age of fourteen years and resides with her uncle, James Hawkins, at 7 Rue Scribe, in the City of Paris, France, where she now is.

That deponent is informed by the defendant, Henry Hawkins, who is an elder brother of said Elizabeth Hawkins, that she went to reside with her said uncle in Paris, more than a year since, and that she is in attendance at a school in that city, and does not intend to return to the United States for many years. That deponent has corresponded with said James Hawkins recently, and that in answer to deponent's inquiries, in a letter dated September 30, 1898, and since received by deponent, the said James Hawkins writes that the said Elizabeth Hawkins was still residing in his family and under his charge, and would not return to the United States for many years, nor did he intend to visit this country for a long time to come.

That by reason of these facts the plaintiff has been and will be unable with due diligence to make personal service of the summons herein upon the said defendant Elizabeth Hawkins.

That no other application for this order has been made.

JOHN MARSHALL.

Sworn to before me
October 15th, 1898.

CHARLES B. MARTIN,
Notary Public, Kings Co.

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4. Order for Service of Summons by Publication.

SUPREME COURT — COUNTY OF KINGS.

JOSEPH BROWN
against
HENRY HAWKINS AND OTHERS.

It appearing to my satisfaction by the verified complaint herein that a sufficient cause of action exists against the defendant to be served, and by the affidavit of John Marshall that the defendant, Elizabeth Hawkins, is an infant under the age of fourteen years, and does not reside in this State, but resides with her uncle, James Hawkins, at 7 Rue Scribe, in the City of Paris, France, and that the plaintiff has been and will be unable, with due diligence to make personal service of the summons upon the said infant defendant; and that this is an action to foreclose a mortgage upon real property situated in this State,

I do order and direct that service of the summons herein upon the defendant, Elizabeth Hawkins, and upon James Hawkins, the person with whom she resides, be made by publication thereof in two newspapers published in the Borough of Brooklyn, namely Brooklyn Union and Brooklyn Eagle, which I hereby designate as most likely to give notice to the said defendant, for once a week for six successive weeks, which time I deem to be reasonable; or at the option of the plaintiff by service of a summons and of a copy of the complaint and order without the State upon the said defendant personally, and upon the said James Hawkins, the person with whom she resides, personally.

I further order and direct that on or before the day of the first publication, the plaintiff deposit in the Post-Office in the Borough of Brooklyn, sets of copies of the summons, complaint, and this order, each contained in a securely closed post-paid wrapper and directed as follows:

One to
ELIZABETH HAWKINS, 7 RUE SCRIBE, PARIS, FRANCE.
One to
JAMES HAWKINS, 7 RUE SCRIBE, PARIS, FRANCE.
Dated, BROOKLYN, N. Y., *October* 29, 1898.

WILLARD BARTLETT,
Justice Supreme Court.

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5. Affidavit of Service of Summons.

SUPREME COURT — COUNTY OF NEW YORK.

JOHN SMITH
against
RICHARD JONES.

City and County of New York, ss.:

EDWARD GRAY, being duly sworn, says that he is nineteen years of age; that on the 2nd day of October, 1898, at No. 1 Fifth Avenue, in the Borough of Manhattan, City of New York, he served the annexed summons upon Richard Jones, the defendant herein, by delivering a copy to him personally and leaving the same with him.

Deponent further says that he knew the person so served to be the same person described in said summons as the defendant in this action.

EDWARD GRAY.

Sworn to before me
October 2d, 1898.
JAMES CLARK,
Notary Public, New York Co.

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6. Affidavit of Service of Summons in Action for Divorce.

SUPREME COURT — COUNTY OF NEW YORK.

PAULINE LARSEN,
Plaintiff,
against
OLUF LARSEN,
Defendant.

City and County of New York, ss.:

CHRISTIAN PETERSEN, being duly sworn, says: I am over 21 years old. On the 1st day of October, 1910, at 300 East 18th street in the Borough

of Manhattan I served the summons herein upon Oluf Larsen, the defendant herein, by delivering a copy to him personally and leaving the same with him. That the copy summons so delivered had legibly and distinctly written upon the face thereof the words "Action for Divorce." I am a brother of the plaintiff herein and have known the defendant herein personally for more than four years and I know the person so served to be the husband of my said sister and the same person described in the summons as defendant herein.

CHRISTIAN PETERSEN.

Sworn to before me
October 1st, 1910.
B. Z. BEE,
Commissioner of Deeds for New York City.

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7. Notice of Appearance with Demand.

SUPREME COURT — COUNTY OF NEW YORK.

JOHN SMITH,
Plaintiff,
against
RICHARD JONES,
Defendant.

Take notice that I am retained by and appear for the defendant, RICHARD JONES, in the above entitled action, and demand service of a copy of the complaint and of all other papers herein on me at my office, No. 170 Nassau Street, in the Borough of Manhattan and City of New York.

Dated, NEW YORK, *October 21st*, 1898.

JAMES KENT,
Defendant's Attorney.

Office and Post-Office Address 170 Nassau St. (Borough of Manhattan), New York City.

To WILLIAM BLACKSTONE, ESQ.,
Plaintiff's Attorney,
154 Wall Street, New York City.

8. Papers on Application for Appointment of Guardian Ad Litem.

SUPREME COURT — COUNTY OF NEW YORK.

In the Matter of the Petition of JAMES ANDERSON for the Appointment of a Guardian ad litem for ROBERT ANDERSON, an infant. } *Petition.*

To the Supreme Court of the State of New York:

The Petition of JAMES ANDERSON respectfully shows:

That your petitioner is the father of Robert Anderson, who is an infant of the age of twelve years and resides with your petitioner at No. 559 West 57th Street in the Borough of Manhattan.

That on the 3d day of June, 1898, the said infant suffered serious personal injuries by being knocked down and run over by one of the cars of the Metropolitan Street Railway Company, in the said Borough of Manhattan, and that as your petitioner is informed and believes such injuries were caused by the negligence of the employees of said Company; and that as your petitioner is advised and believes said infant has a right of action against said company for his damages caused by said injuries.

That said infant has no general guardian.

That JAMES KENT, Esq., Counsellor at Law, of the City of New York, is a competent and responsible person and in all respects, as your petitioner believes, qualified to act as Guardian ad litem for said infant in an action against said company, to recover damages for said injuries.

Wherefore your petitioner prays that an order be entered appointing JAMES KENT, Esq., Guardian for said infant for the purposes of said action.

Dated, NEW YORK, *October* 1, 1898. JAMES ANDERSON.

JOHN MARSHALL,
Attorney for Petitioner.

City and County of New York, ss.:

JAMES ANDERSON being duly sworn says that he is the petitioner above named; that he has read the foregoing petition and knows the contents thereof, and that the same are true of his own knowledge.

JAMES ANDERSON.

Sworn to before me
October 1, 1898.
JAMES GRAY,
Notary Public, N. Y. County.

CONSENT.

I, JAMES KENT, hereby consent to my appointment as Guardian ad litem for Robert Anderson in an action to be brought in his behalf against the Metropolitan Street Railway Company. JAMES KENT.

Dated *October* 1, 1898.

City and County of New York, ss.:

On this first day of October, 1898, before me personally came James Kent, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged to me that he executed the same.

JAMES GRAY,
Notary Public, New York County.

SUPREME COURT — COUNTY OF NEW YORK.

In the Matter of the Petition of JAMES ANDERSON for the appointment of a Guardian ad litem for ROBERT ANDERSON, an infant.

Affidavit of Proposed Guardian ad litem.

City and County of New York, ss.:

JAMES KENT being duly sworn says that he resides in the Borough of Manhattan, in said City, and is an attorney and counsellor of this Court.

That deponent is fully competent to understand and protect the rights of Robert Anderson, the infant above named, and has no interest adverse to that of said infant, and is not connected in business with the attorney for the Metropolitan Street Railway Company.

That he is of sufficient ability to answer to the said infant for any damages which may be sustained by his negligence or misconduct in the prosecution of an action against the said company, and is worth over Three Thousand Dollars over and above all his debts and liabilities, and exclusive of property exempt by law from levy and sale under an execution. JAMES KENT.

Sworn to before me
October 1, 1898.
JAMES GRAY,
Notary Public, New York Co.

At a Special Term of the Supreme Court, held at the Court House, in the Borough of Manhattan, on the 3d day of October, 1898.

Present HON. ROGER A. PRYOR, *Justice.*

In the Matter of the Petition of JAMES ANDERSON for the appointment of a Guardian ad litem for ROBERT ANDERSON, an infant. } *Order.*

On reading and filing the petition of James Anderson, verified October 1, 1898, and the consent duly acknowledged of James Kent, and the affidavit of James Kent, verified October 1, 1898, and on motion of John Marshall, attorney for the petitioner,

It is Ordered, that James Kent, Esq., Counsellor at Law, be, and he hereby is, appointed Guardian, ad litem, for Robert Anderson, in an action to be brought in his behalf against the Metropolitan Street Railway Company.

Enter,

R. A. P.,

J. S. C.

9. Complaint: Goods Sold and Delivered.

SUPREME COURT — COUNTY OF NEW YORK.

JOHN SMITH
against
RICHARD JONES.

JOHN SMITH, the plaintiff in the above entitled action, complains of the defendant and alleges that heretofore and on or about the first day of July, 1898, he sold and delivered to the defendant goods, wares and merchandise of the value of one hundred dollars, no part of which has been paid, for which sum with interest thereon from July 1st, 1898, and the costs of this action, the plaintiff demands judgment against the defendant.

WILLIAM BLACKSTONE,
Plaintiff's Attorney.
154 Wall St., New York City.

County of New York, ss.:

JOHN SMITH being duly sworn says that he is the plaintiff in the above entitled action, that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except

as to the matters therein stated to be alleged upon information and belief and as to those matters he believes it to be true.

JOHN SMITH.

Sworn to before me, this 9th
day of November, 1898.
PHILIP JASPER,
Notary Public, Kings Co.
Certificate filed in New York County.

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10. Complaint: For Work Done and Materials Furnished.

SUPREME COURT — NEW YORK COUNTY.

MARK ASHTON,
Plaintiff,
v.
GEORGE SHERWOOD,
Defendant.

Plaintiff above named by his attorney, John Halifax, complains of defendant and alleges:

I. That the defendant is indebted to the plaintiff in the sum of $1,429.54 for work, labor and services, done and performed for the defendant at his special instance and request, at the city of Buffalo, by the plaintiff and his servants and agents, at divers times between the 8th day of March, 1852, and the commencement of this action, in and about quarrying, dressing, preparing, delivering, putting together and erecting certain building stones in and about defendant's dwelling on Main street, in said city of Buffalo.

II. That said work, labor and services were reasonably worth the sum of $1,479.54 (and defendant promised to pay the same therefor).

III. That defendant has not paid the plaintiff said sum nor any part thereof.

For a second cause of action against defendant, plaintiff says:

IV. That the defendant is indebted to him in the sum of $38.04 for certain dressed building stones, before the commencement of this action sold and delivered by the plaintiff to the defendant, at the city of Buffalo, at defendant's special instance and request.

V. That said building stones were reasonably worth the said sum of $38.04, (and that defendant promised to pay said sum therefor.)

VI. That defendant has not paid plaintiff said sum nor any part thereof, but has wholly neglected and refused so to do.

Wherefore plaintiff demands judgment against defendant for the sum of $1,517.63, besides the costs of this action.

JOHN HALIFAX,
Attorney for Plaintiff,
200 Broadway, New York, N. Y.

See Farron v. Sherwood, 17 N. Y. 227.

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11. Complaint: Executory Contract of Sale.

SUPREME COURT — COUNTY OF KINGS.

JOHN DOE,
Plaintiff,
against
RICHARD ROE,
Defendant.

JOHN DOE, the plaintiff in the above entitled action, by William Blackstone his attorney, complains of the defendant and alleges,

FIRST:— That heretofore and on or about the first day of August, 1898, the plaintiff made a certain agreement in writing with Richard Roe, the defendant in this action, whereby the plaintiff agreed to sell to said defendant, and in consideration thereof the said defendant agreed to buy from the plaintiff a certain bay horse, the property of the plaintiff, and to pay therefor the sum of one hundred dollars on the 10th day of August, 1898.

SECOND:— That on said last named date the plaintiff offered to deliver the said horse to the defendant, but that defendant refused to accept the same or to pay the said sum of money. That plaintiff is ready to deliver said horse to the defendant pursuant to said contract.

Wherefore the plaintiff demands judgment against the defendant for the sum of one hundred dollars with interest thereon from August 10th, 1898, besides the costs of this action.

WILLIAM BLACKSTONE,
Plaintiff's Attorney,
154 Wall Street, New York City.

(Verification.)

12. Complaint: Account Stated.

MUNICIPAL COURT OF THE CITY OF NEW YORK — BOROUGH OF MANHATTAN, THIRD DISTRICT.

JANE DOE, as Administratrix of John Doe, deceased, Plaintiff,
v.
JULIUS CAESAR, Defendant.

Plaintiff complains of defendant and shows:

I. That on or about April 1, 1910, John Doe died in the county of New York, where he then resided, and that thereafter on April 20, 1910, plaintiff was duly appointed administratrix of the estate of said deceased by the Surrogates' Court of the County of New York.

II. That on or about June 21, 1910, an account was stated between plaintiff and defendant a copy whereof is hereto annexed and marked "Schedule A," and made a part hereof.

III. That on such accounting defendant was found to be indebted to plaintiff, as administratrix of said John Doe, deceased, in the sum of $330.

IV. That defendant then and there promised to pay plaintiff said sum but no part thereof has been paid.

Wherefore plaintiff demands judgment against defendant for $330 with interest thereon from June 21, 1910, and costs.

JOHN DOE, JR.,
Attorney for Plaintiff,
1 Fifth Avenue, Borough of Manhattan, New York City.

SCHEDULE A.

NEW YORK, *June* 21, 1910.

JULIUS CAESAR,
TO ESTATE OF JOHN DOE, JANE DOE, ADMX., Dr.

July 1, 1909.	50 Tons furnace coal @ $6.50		$325
Nov. 12, 1909.	70 " " " @ $6.50		455
Jan. 15, 1910.	80 " " " @ $7.00		560
	Total		$1340
Cr.			
Sept. 1, 1909.		$250	
Dec. 15, 1909.		160	
Feb. 1, 1910.		600	1010
	Balance		$330

13. Complaint: Breach of Warranty (or Fraud and Deceit).

COUNTY COURT OF KINGS COUNTY.

IDA LINDSAY,
Plaintiff,
v.
JOHN MULQUEEN,
Defendant.

Plaintiff herein respectfully shows to this court:

First. That defendant resides in Kings County.

Second. That at the Borough of Brooklyn in said county on or about the 3rd day of March, 1910, the defendant offered to sell the plaintiff for sixty-six dollars to be paid to him by plaintiff 66 yards of carpet, which said carpet defendant warranted (and fraudulently represented) to be a first-class imported English body Brussels carpet and made of all wool.

Third. That the plaintiff, relying on said warranty (and representations and believing the same to be true, was induced thereby to purchase, and) did purchase the same from defendant and paid him therefor the said sum of sixty-six dollars.

Fourth. That in fact said carpet so sold as aforesaid was not a first-class imported English body Brussels carpet made of all wool, as by defendant warranted and represeuted, but the same was a mixed texture known as jute and was a greatly inferior article, and said carpet was utterly worthless.

(Fifth. Upon information and belief that defendant then and there knew that said representations were false and made the same with intent to deceive plaintiff to her damage.)

Wherefore plaintiff demands judgment against defendant in the sum of sixty-six dollars and costs.

MASON AND BLACK,
Attorneys for Plaintiff,
200 Fulton Street, Brooklyn, N. Y.

See Lindsay v. Mulqueen, 26 Hun 485.

14. Complaint: By Indorsee of Promissory Note v. Maker and Prior Indorser.

CITY COURT OF THE CITY OF NEW YORK.

AUGUST BURRALL,
Plaintiff,
v.
MARK DEGROOT, JOSEPH CARPENTER, GEORGE R. JAQUES AND FRANK PATON,
Defendants.

Plaintiff, complaining of the defendants, alleges:

I. Upon information and belief that heretofore, (for value received,) the defendant Frank Paton made his promissory note in writing, dated Brooklyn, July 10, 1854, whereby, four months after date thereof, he promised to pay to the order of defendants, Joseph Carpenter and George R. Jaques, under their firm name of Carpenter and Jaques, one thousand dollars.

II. Upon information and belief that thereafter and before the maturity of said note said firm of Carpenter and Jaques, and the defendant Mark DeGroot, severally indorsed said note, in blank, and the same was delivered to plaintiff who now holds and owns the same.

III. That at the maturity thereof the said note was presented to the maker thereof for payment and payment thereof refused, whereupon said note was duly protested for non-payment, of all of which the defendants Carpenter, Jaques and DeGroot had due notice.

IV. That said note remains due and unpaid.

Wherefore plaintiff demands judgment against the defendants for the sum of one thousand dollars, with interest from November 13, 1854, besides protest fees and costs.

NATHAN PRINCE,
Attorney for Plaintiff,
30 Broad Street, New York, N. Y.

City and County of New York, ss.:

Nathan Prince being duly sworn says that he is attorney for the plaintiff in the above entitled action which is brought to recover upon a promissory note which is in deponent's possession. That he has read the foregoing complaint and knows the contents thereof and that the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true. That the sources of deponent's information and the grounds of his

belief as to the matters alleged upon information and belief are interviews with defendant George R. Jaques and a letter from Joseph Paton to plaintiff in which said Paton admitted making the note but refused to pay the same. NATHAN PRINCE.

Sworn to before me December 20, 1854.

IRA LANE,
Notary Public New York Co.

Adapted from Burrall v. DeGroot, 5 Duer 379.

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15. Complaint: Specific Performance.

SUPREME COURT — NEW YORK COUNTY

JOHN LAND AND JAMES SEE, CO-PARTNERS,
Plaintiffs,
v.
MORRIS JAYNE,
Defendant.

Plaintiffs complain of the defendant and allege:

I. That at all times herein mentioned plaintiffs were and still are co-partners carrying on the business of buying and selling real estate under the firm name of "Land & See."

II. Upon information and belief that on June 10, 1912, defendant was and still is the owner in fee simple of the following described premises in the Borough of Manhattan, County of New York. (*Description of premises as in a deed.*)

III. That on said day defendant entered into an agreement with plaintiffs under their firm name of Land & See wherein and whereby defendant agreed to sell and convey to plaintiffs and plaintiffs agreed to buy of defendant the above described premises free from all incumbrances for the sum of $50,000 which sum plaintiffs agreed to pay therefor in the manner following:

$5,000.00 was paid by plaintiff to defendant upon the signing of said contract.

$10,000.00 in cash upon the delivery of the deed as therein provided.

$35,000.00 by plaintiffs executing and delivering to the defendant a purchase money bond and mortgage upon said premises for said sum with interest at the rate of five per centum, which bond and mortgage were to contain the usual insurance, tax, assessment and receiver clauses, and were

to be prepared by the attorney for the defendant at the expense of plaintiffs; said deed to be delivered by defendant and payment so made by plaintiffs at the office of the Lawyers Title Insurance & Trust Co., at 160 Broadway, in the Borough of Manhattan, on the 1st day of July, 1912, at eleven o'clock in the forenoon.

IV. That plaintiffs have always been and still are ready and willing to perform said agreement upon their part, and are ready and willing to pay the remainder of said purchase money and to execute and deliver said bond and mortgage upon delivery to them of a deed conveying to them a good and marketable title of said premises, free from all incumbrances.

V. That on said first day of July, 1912, at said place and hour plaintiffs duly tendered to the defendant the balance of said purchase money, and offered to execute and deliver said bond and mortgage upon receiving from defendant a conveyance of said premises free from all incumbrances; but that defendant refused to execute and deliver said deed and has entirely neglected and failed to perform said agreement on his part.

VI. That since the making of said agreement plaintiffs have discovered that there is a deficiency in the quantity of said land agreed to be conveyed as aforesaid, in that instead of having a width of twenty-five (25) feet at the rear of said premises, said premises are only twenty (20) feet wide at the rear, and that the remainder of said premises heretofore described herein is covered by an encroaching building which has stood upon said land for more than thirty years.

VII. That plaintiffs have necessarily expended in searching the title of said premises and procuring a survey thereof, the sum of $250, and in attorney's fees for legal services in and about the transaction above set forth, the sum of $100.

WHEREFORE, plaintiffs demand judgment;

That the defendant specifically perform said agreement and deliver to plaintiffs a good and sufficient deed conveying to them said premises free of all incumbrances upon payment by plaintiffs of the remainder of said purchase money and the execution and delivery by them of said bond and mortgage, and that a just deduction from said purchase price be made by reason of said encroachments upon said premises.

That if defendant cannot convey said premises to plaintiffs free from all incumbrances in the manner and form stated in said agreement, defendant be adjudged to pay to the plaintiffs the sum of $5,350, being plaintiffs' payment upon the signing of said agreement and the costs and expenses of searching said premises and of plaintiffs' attorney's fees as above set forth; and that plaintiff have such other and further relief as may be just.

COKE & LITTLETON,
Attorneys for Plaintiffs,
10 Wall Street, New York City.

16. Complaint: Divorce.

SUPREME COURT — NEW YORK COUNTY.

PAULINE LARSEN,
Plaintiff,
v.
OLUF LARSEN,
Defendant.

The plaintiff above named by her attorney complains of the defendant and alleges:

FIRST: That plaintiff was married to the defendant at Grace Church, in the Borough of Manhattan, on the 24th day of March, 1907.

SECOND: That plaintiff and defendant then were and still are residents of the State of New York.

THIRD: That the only issue of said marriage is a daughter, Cora, now four years of age.

FOURTH: Upon information and belief that during the week following July 4, 1909, in the house of John Doe, at Linden, in the State of New Jersey, the defendant committed adultery with Jane Doe.

FIFTH: That said adultery was committed without the consent, connivance, privity, or procurement of the plaintiff. That five years have not elapsed since the discovery by plaintiff of the commission of said adultery. That plaintiff has not forgiven defendant for the same, nor co-habited with defendant since the discovery by plaintiff of said adultery.

SIXTH: That no divorce has ever been granted to defendant against plaintiff by any court of this or any other state, or foreign country.

WHEREFORE, plaintiff demands judgment against the defendant, that said marriage between plaintiff and defendant be dissolved, that the custody of said Cora Larsen be awarded to plaintiff, that plaintiff be permitted to resume her maiden name, and that suitable provision be made out of the property of said defendant for the support and maintenance of plaintiff and her said daughter.

JAMES ROE,
Attorney for Plaintiff,
100 Broadway, New York City.

17. Complaint: Separation.

SUPREME COURT — NEW YORK COUNTY.

ROSA ROE,
Plaintiff,
v.
RICHARD ROE,
Defendant.

Plaintiff complaining of defendant alleges:

I. That plaintiff was married to defendant at the City Hall in the Borough of Manhattan, City of New York, by Alderman Abraham Itzkowitz on the 1st day of April, 1910.

II. That plaintiff then resided and still resides in the City of New York.

III. That on or about March 26, 1912, defendant brutally beat this plaintiff about the head and face; that continuously from said date to May 16, 1912, defendant treated plaintiff in a cruel, inhuman and brutal manner, in that he almost daily cursed and applied abusive epithets to her, and threatened to beat her and repeatedly ordered plaintiff to leave his house, that during said period his entire course of conduct toward plaintiff was so brutal as to undermine her health; that ever since May 16, 1912, defendant has absented himself from his home and has failed to furnish plaintiff with the necessaries of life.

WHEREFORE, plaintiff demands judgment of separation from the bed and board of defendant, for suitable provision for plaintiff's support out of the property and income of defendant and for such other and further relief as may be just.

JOHN MARSHALL,
Attorney for Plaintiff,
10 Wall Street, New York City.

See Itzkowitz v. Itzkowitz, 33 App. Div. 244.

18. Complaint: Conversion.

SUPREME COURT — NIAGARA COUNTY.

ROBERT GORDON,
Plaintiff,
v.
LEWIS H. HOSTETTER,
Defendant.

Plaintiff complains of the defendant and says:

That between the month of September, 1860, and the month of January, 1861, defendant wrongfully took and converted to his own use, certain money, the property of the plaintiff, consisting of bank bills and gold and silver coin, of the amount and value of ninety dollars, to the plaintiff's damage $100, for which sum plaintiff demands judgment.

SILAS MARSH,
Attorney for Plaintiff,
Ransomville, N. Y.

Follows Gordon v. Hostetter, 37 N. Y. 99.

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19. Complaint: Replevin, Wrongful Detention.

SUPREME COURT — QUEENS COUNTY.

JOHN CHAPIN,
Plaintiff,
v.
MERCHANTS' NATIONAL BANK,
Defendant.

Plaintiff complaining of defendant alleges:

I. Upon information and belief that at all times hereinafter mentioned defendant was and is a domestic corporation organized under the laws of the United States and engaged in carrying on the business of banking at Whitehall, in the State of New York.

II. That on the 3rd of October, 1878, the plaintiff was, and that he still is, the owner of two certain certificates of the capital stock of defendant corporation, to wit: one of 50 shares of the par value of $100 each issued

to plaintiff by defendant and dated October 3rd, 1878, and numbered 126; and one for 25 shares of the par value of $100 each issued to plaintiff by defendant, dated the same day and numbered 127.

III. That while plaintiff was such owner, and on or about that day, said certificates came into the custody and possession of defendant.

IV. That the defendant, though often requested by plaintiff to return the same, has refused so to do, and on the contrary has converted the same to its own use, to plaintiff's damage $15,000.

Wherefore plaintiff demands judgment against defendant for the possession of said certificates of stock, or in case possession thereof cannot be delivered to plaintiff for the sum of $12,500, the value of said certificates, together with the sum of $2,500 damages for said detention, with costs of this action.

ROLAND AND SQUIRES,
Attorneys for Plaintiff,
Whitehall, N. Y.

See Code § 1721. Chapin v. Merchants' Nat. Bk., 31 Hun 529; Rogers v. Conde, 67 App. Div. 130.

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20. Complaint: Nuisance.

SUPREME COURT — DELAWARE COUNTY.

MARGARET BROWN,
Plaintiff,
v.
PORT JERVIS GAS CO.,
Defendant.

Plaintiff complains of defendant and alleges:

I. Upon information and belief that at all the times hereinafter mentioned defendant was and still is a domestic corporation.

II. That for more than five years prior to the commencement of this action defendant has been and still is engaged in the manufacture of gas in large quantities upon premises at 122 Pearl street, in the city of Port Jervis, adjoining the premises of plaintiff hereinafter mentioned, and that defendant is the owner of said premises.

III. That plaintiff owns and occupies as a residence for himself and family a house and lot at number 120 Pearl street in said city and has owned said premises and has resided there at all the times mentioned herein.

IV. That about the year 1880 defendant erected a new tank for the purpose of its gas-works on its said premises, the southern side of which stands within forty feet of plaintiff's premises. That about the year 1880 plaintiff

began and ever since has and still does manufacture gas at said works from naphtha, and that said tank was and still is used to store said naphtha for the purposes aforesaid. That naphtha is an offensive, noxious, unhealthy and sickening mineral substance destructive to the health and comfort of those required to be and remain in close proximity to it. That by reason of the erection and use of said tank and said works and the manufacture therein and thereby of gas from naphtha, the defendant has since 1880 and still does maintain a nuisance injurious to the comfort and enjoyment of plaintiff and injurious to the rental value of said premises.

Wherefore plaintiff demands judgment that defendant be forever enjoined and restrained from storing naphtha or manufacturing gas from naphtha upon said premises or permitting the same, and that plaintiff recover of defendant $5000 damages and costs of this action, and have such other and further relief as may be just.

JOHN W. PENN,
Attorney for Plaintiff,
12 Main Street, Port Jervis, N. Y.

See Bohan v. Port Jervis Gas-Light Co., 122 N. Y. 18.

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21. Complaint: Assault and Battery.

CITY COURT OF THE CITY OF NEW YORK.

MARGARET MARSH,
Plaintiff,
v.
MANSFIELD HUBBARD,
Defendant.

Plaintiff complains of the defendant and alleges:

I. That on or about September 26, 1894, at the City of New York, the defendant violently assaulted the plaintiff, and struck, beat and pushed her violently against, upon and into a chair thereby injuring and bruising her about her arms, limbs and body; that he shook his fist in her face, and cursed and swore at her and threatened to kill her if she did not sign her name to a paper writing, which he then and there produced and which contained false and untrue statements; that defendant then and there did, by threat, violence, force and duress, and by putting plaintiff in fear of her life, compel her to sign her name to and upon said paper.

II. That by reason of the foregoing, plaintiff was and ever since said date has been incapacitated in a great degree for the performance of her duties and business and has suffered and still suffers great bodily and

mental pain as well as a severe shock to her nervous system; that she has thereby been put to great expense for medicine and medical treatment and has suffered great mental anguish and distress, all to her damage of $5000.

WHEREFORE, plaintiff demands judgment against the defendant for $5000 and costs.

JAMES WALTON,
Attorney for Plaintiff,
Brewster, N. Y.

22. Complaint: Slander.

COUNTY COURT OF KINGS COUNTY.

ANTONINO DIMARCO,
Plaintiff,
v.
GIUSEPPE ARTALE AND GIOVANNI ZANOLINI,
Defendants.

Plaintiff complaining of the defendants alleges:

1. That defendants reside in the County of Kings.

II. That on or about the 3rd day of December, 1908, at No. 152 Johnson Avenue, in the Borough of Brooklyn, County of Kings, the defendants and each of them, in the presence and hearing of one Giovanni Buongirno and divers other persons, all of whom understood the Italian language, maliciously spoke of and concerning plaintiff and to plaintiff the following false and defamatory words in the Italian language: 'Tu sei ladro, co hai rubato Lire ottocento.'

III. That said words meant and were understood to mean by the persons then present and hearing the same: "You are a thief, you have stolen from us 800 Lire."

IV. That said words were false and defamatory, and that by reason of the speaking of such words by the defendants as aforesaid, plaintiff was greatly injured in his reputation, has ever since suffered infamy and disgrace by reason thereof, and has suffered and will continue to suffer great mental anguish and distress, all to his damage of $2000.

WHEREFORE, plaintiff demands judgment against the defendants for $2000 and costs.

CATELLO LORENZO,
Attorney for Plaintiff,
44 Court Street, Brooklyn, N. Y.

Suggested by Di Blasi v. Artale, 133 App. Div. 153.

23. Demurrer. (See Form 22.)

COUNTY COURT OF KINGS COUNTY.

ANTONINO DIMARCO,
Plaintiff,
v.
GIUSEPPE ARTALE AND GIOVANNI ZANOLINI,
Defendants.

The defendants above named, and each of them, demur to the complaint herein on the ground that causes of action have been improperly united in that the plaintiff has joined in one action several and distinct causes of action against each defendant alleged to have spoken the slanderous words mentioned in the complaint herein.

TOMASO TACCHINO,
Attorney for Defendant,
390 Fulton Street, Brooklyn, N. Y.

Overruled in Di Blasi v. Artale, 133 App. Div. 153.

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24. Demurrer.

SUPREME COURT — COUNTY OF NEW YORK.

JOHN SMITH,
Plaintiff,
against
RICHARD JONES,
Defendant.

The defendant, RICHARD JONES, demurs to the complaint of the plaintiff in the above entitled action, and specifies as the ground of such demurrer.

That such complaint does not state facts sufficient to constitute a cause of action.

JAMES KENT,
Defendant's Attorney,
170 Nassau Street, New York City. (Borough of Manhattan.)

25. Answer. (See Form No. 11.)

SUPREME COURT — COUNTY OF NEW YORK.

JOHN DOE,
Plaintiff,
against
RICHARD ROE,
Defendant.

RICHARD ROE, the defendant in the above entitled action, appearing therein by James Kent, his attorney, answers the complaint therein as follows:

For a First Defense:—Upon information and belief the defendant denies each and every allegation in said complaint contained excepting the allegation that the defendant refused to accept a horse tendered by the plaintiff on the 10th day of August, 1898, or to pay any sum therefor.

For a Second Defense:— That at the time of making the supposed contract alleged in the complaint the defendant was under the age of twenty-one years, to wit of the age of between nineteen and twenty years.

For a Third Defense, and by way of Counter Claim:— That heretofore and on or about June 1st, 1898, the plaintiff made, executed and delivered to the defendant his certain promissory note, in the words and figures following:

"NEW YORK, *June 1st*, 1898.

"On demand I promise to pay to the order of Richard Roe the sum of one hundred and fifty dollars, value received.

"JOHN DOE."

That no part of said sum has been paid.

That there is due the defendant from the plaintiff upon said note the sum of one hundred and fifty dollars, which he claims.

Wherefore the defendant demands judgment dismissing said complaint, and for the sum of one hundred and fifty dollars with interest thereon from June 1st. 1898, besides the costs of this action against the plaintiff.

JAMES KENT,
Defendant's Attorney,
170 Nassau Street, New York City.

(Verification.)

26. Reply. (See Form No. 25.)

SUPREME COURT — COUNTY OF NEW YORK.

JOHN DOE,
Plaintiff,
against
RICHARD ROE,
Defendant.

JOHN DOE, the plaintiff in the above entitled action, by William Blackstone his attorney, for reply to the third defense and counter claim contained in the answer of the defendant herein, alleges, upon information and belief,

That the plaintiff made, executed and delivered the promissory note set forth in said counter claim for the amount of the purchase price of a quantity of hay which the defendant agreed to furnish and deliver to the plaintiff on or before July 1st, 1898, and that such note was so made, executed and delivered as payment in advance for such hay, and for no other purpose.

That the defendant has failed to deliver any part of the hay for which such payment was made.

Wherefore the plaintiff demands judgment as demanded in the complaint.

WILLIAM BLACKSTONE,
Plaintiff's Attorney.
154 Wall St., New York City.

City and County of New York, ss.:

WILLIAM BLACKSTONE, being duly sworn, says that he is the attorney for the plaintiff in the above entitled action; that he has read the foregoing reply and knows the contents thereof, and that the same is true of his knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

That the grounds of deponent's belief as to all matters not stated upon his knowledge are communications from and statements by the plaintiff and his clerks and agents to deponent, and that the reason why this verification is not made by the plaintiff is that he is at present absent from the County of New York, wherein deponent resides.

WILLIAM BLACKSTONE.

Sworn to before me,
November 30th, 1898.
JAMES CLARK,
Notary Public, New York Co.

28. Papers on Application for Extension of Time to Answer.

SUPREME COURT — COUNTY OF NEW YORK.

ROBERT AMES
against
ALBERT BOYD.

Affidavit of Merits.

City and County of New York, ss.:

ALBERT BOYD, being duly sworn, says that he is the defendant in the above entitled action, and that he has fully and fairly stated the case in the above action, to John Marshall his counsel in this action, who resides at 1 East 125th Street, in the said City of New York and that he has a good and substantial defense upon the merits thereof as he is advised by said counsel, after such statement made as aforesaid, and verily believes it to be true.

ALBERT BOYD.

Sworn to before me, this
29th day of September, 1898.
JOHN A. BROWN,
Notary Public, New York Co.

SUPREME COURT — COUNTY OF NEW YORK.

ROBERT AMES
against
ALBERT BOYD.

Affidavit.

County of New York, ss.:

JOHN MARSHALL, being duly sworn, says that he is the attorney for the defendant in this action which was commenced by the service of the summons and complaint therein on said defendant on the 10th day of September instant.

That defendant's time to answer or demur to said complaint or otherwise move respecting the same, will expire on September 30th instant, and that no extension of time therefor either by stipulation or order has been granted.

That the cause of action set forth in the complaint is for an alleged breach of warranty with respect to certain goods sold and delivered by the defendant to the plaintiff, and the relief demanded is judgment in

favor of the plaintiff and against the defendant for Five Hundred Dollars with interest.

That deponent has until this day, since the service of said papers, been absent from the country on his vacation, and has not yet had the opportunity to sufficiently investigate the facts in order properly to prepare the answer of the defendant, and requires an extension of time for twenty days for that purpose.

That no other application for this order has been made.

JOHN MARSHALL.

Sworn to before me
September 29th, 1898.
JOHN A. BROWN,
Notary Public, New York Co.

SUPREME COURT — COUNTY OF NEW YORK.

ROBERT AMES,
Plaintiff,
against
ALBERT BOYD,
Defendant.

Order Extending Time to Answer.

Upon the annexed affidavits:

Ordered that the time of the defendant in this action to answer or demur to the complaint herein or otherwise move respecting the same, be extended twenty days from date.

Dated September 29th, 1898.

JOSEPH DALY,
J. S. C.

29. Order of Discontinuance on Consent.

At a Special Term of the Supreme Court, held at the Court House, in the Borough of Manhattan and County of New York, on the 15th day of October, 1898.

Present, HON. WILLIAM N. COHEN, *Justice.*

WILLIAM JOHNSON
against
ANDREW MILLS.

This action having been settled between the parties, now upon reading and filing the annexed consent and on motion of Joseph Story, plaintiff's attorney,

It is ordered that this action be discontinued without costs to either party as against the other. Enter,

W. N. C.,
J. S. C.

We consent to the entry of the above order.

JOSEPH STORY,
Plaintiff's Attorney.

JAMES RUTLEDGE,
Defendant's Attorney.

The forms numbered 1, 2, 3, 4, 5, 7, 9, 11, 24, 25, 26, 28 and 29 were prepared by the late Professor George A. Miller.

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