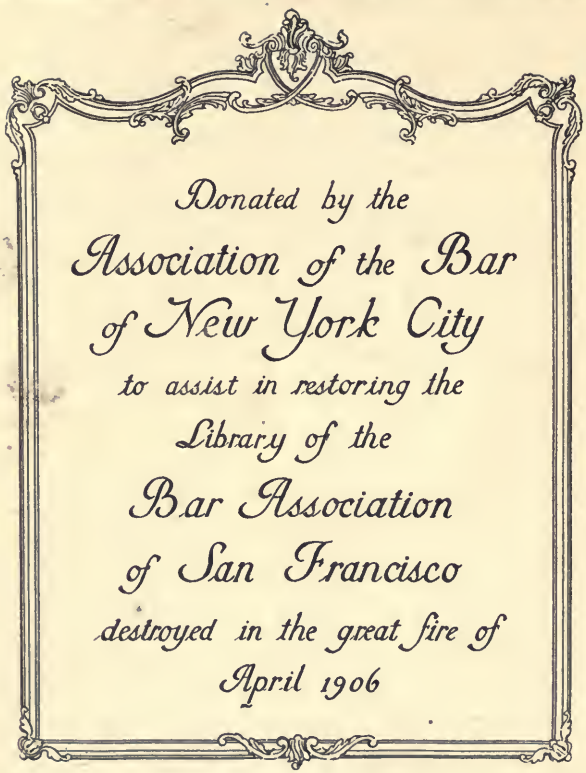
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REPORTS OF CASES

ARGUED AND DETERMINED IN THE

COURT OF COMMON PLEAS

FOR THE

CITY AND COUNTY OF NEW YORK.

By CHARLES P. DALY, LL.D.,

CHIEF JUSTICE OF THE COURT.

VOL. V.

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JUDGES

OF THE

COURT OF COMMON PLEAS,

SINCE ITS REORGANIZATION IN 1821,

WITH THEIR PERIODS OF SERVICE.

John T. Irving	1821—1838
Michael Ulshoeffer	1834—1850
Daniel P. Ingraham	1838—1858
William Inglis	1839—1844
Charles P. Daly	1844 *
Lewis B. Woodruff	1850—1856
John R. Brady	1856—1869
Henry Hilton	1858—1863
Albert Cardozo	1863—1868
Hooper C. Van Vorst	1868—1869
George C. Barrett	1869—1869
Frederick W. Loew	1869—1876
Charles H. Van Brunt	1869 *
Hamilton W. Robinson	1870 *
Richard L. Larremore	1870 *
Joseph F. Daly	1870 *
George M. Van Hoesen	1876 *

* Still on the bench.

JUDGES DURING THE PERIOD EMBRACED IN THIS VOLUME.

Charles P. Daly, Chief Justice.
Frederick W. Loew.
Charles H. Van Brunt.
Hamilton W. Robinson.
Richard L. Larremore.
Joseph F. Daly.

TABLE OF CASES

REPORTED IN THIS VOLUME.

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CASES

ARGUED AND DETERMINED

IN THE

COURT OF COMMON PLEAS,

FOR THE

CITY AND COUNTY OF NEW YORK.

Henry B. Hewett *v.* Willet Bronson.

S., who was a cousin of the plaintiff's wife, died suddenly from an attack of illness in the street, and the plaintiff, after a search, having found S.'s remains in the custody of the pnblic authorities for interment as an unknown person, took charge of them, and by his direction the funeral ceremonies were held at the plaintiff's honse. All the ordinary funeral expenses were paid by the executor, and the present action was brought to recover for the plaintiff's services in searching for his missing friend, in writing the advertisements for the funeral and sending them to the newspapers, in procuring a clergyman to officiate, and for the nse of his honse for the deposit of the coffin for a few hours, the assembling of the monrners and the performance of the funeral service, upon the ground that there was an implied obligation on the part of the executor to pay him for these services and for the use of his house, out of the assets of the deceased.

Held, that the action conld not be maintained; that there was no snch implied obligation, and that such service was gratnitous.

A contract will be implied to pay what a service is reasonably worth, where it is manifest, from the nature of the service or the circnmstances, that it was undertaken with that nnderstanding upon both sides.

And such an obligation will be implied where the service was rendered without a party's knowledge, if it was an act of necessity, for which he was bound to provide, or where it can be assnmed that he necessarily would, had he known of the exigency, required it to have been done, understanding that he was to pay for it.

The services for which such an obligation will be implied are those in which it is obvious that the inducement was the compensation or reward to be received, and in which the party for whom the service was performed had no right to assume that it was to be done for any other consideration, and in this respect services for which an action may be maintained are distinguishable from those which are constantly rendered by one person to another in the common intercourse of life, where pecuniary reward neither enters into the contemplation of those who render or those who receive them, and which are, therefore, gratuitous.

An obligation is implied on the part of an executor or administrator to pay the funeral expenses out of the assets of the deceased, as the burial of the dead is an act of necessity, and the presumption being, in the absence of anything to the contrary, that the deceased wished to be buried in accordance with the usages and customs of society, and meant that the costs and charges thereof should be defrayed out of his estate.

The funeral expenses comprise the outlay or charge incurred for the interment, and the compensation of the person or undertaker, who provides what is necessary and attends to the details of the funeral for hire or reward. All other services for the dead which are not acts of necessity are necessarily gratuitous.

GENERAL TERM, *November*, 1873.

BUCKINGHAM SMITH, a gentleman advanced in life and of feeble health, who resided in Florida, and who had formerly been the diplomatic representative of the United States in Mexico and in Spain, came to the city of New York, and, upon leaving a city railroad car, in the evening, was suddenly seized with some malady, and fell down in the street. He was picked up by a policeman, who, finding he was unable to speak, erroneously supposed him to be intoxicated, and conveyed him to the police station, where he was locked up in the cell for the incarceration of intoxicated persons, and where he died in the course of the night. Deprived of the use of speech, when he was brought to the police office, he attempted to make himself known to the police captain by showing a letter which he had in his pocket with his name upon the envelope, and the captain, assuming it to be his name, made a formal entry in the record of the office: "Buckingham Smith, committed for intoxication." When it was found in the morning that he was dead, his body was taken to Bellevue Hospital, and preparations were made for its interment in the public ground where paupers and unknown persons are buried. A reporter for one of the public

journals came to the police office in the morning for the collection of intelligence, and finding the entry in the record, published as an item of news the commitment of Mr. Smith for intoxication.

The plaintiff was an acquaintance of Mr. Smith, who was a cousin of the plaintiff's wife, and Mr. Smith had been accustomed to stay at his house, and at the time of this occurrence it was his temporary home. He left the plaintiff's house in the morning of January 5th, 1871, after breakfast, and as he did not return at half past five in the afternoon, the plaintiff became alarmed, and went down to a room which Mr. Smith occupied in Thirteenth street, and learned that he had left there at three o'clock that afternoon. The plaintiff then went to different restaurants, but finding no trace of him, returned home. He heard nothing of him the next morning, and says he went in the afternoon with Mr. Williams, the president of the Metropolitan Bank, who was a friend of Mr. Smith, but what he did, if anything, does not appear. The next morning the plaintiff's servant girl called his attention to the account in the newspaper of Mr. Smith's arrest for intoxication, when the plaintiff went to the police station, and learning what had occurred, he went to Bellevue Hospital, and found the body in the dead-house, in a common coffin, ready for interment. The plaintiff gave directions that the body should be brought to his house, from whence he arranged that the funeral should take place. He then wrote the advertisements for the funeral and sent them to the public newspapers, and called a clergyman to officiate at the funeral. The remains were deposited at his house for a few hours only on the day of the funeral, where the friends of the deceased assembled, and where the funeral service was performed by Dr. Bellows. The plaintiff attended the funeral to the vault where the body was deposited temporarily, and he afterwards gave directions to the undertaker to ship the remains to Florida.

The action was brought to recover from the defendant, who is the administrator with the will annexed, $100 for the use of plaintiff's house on the day of the funeral, and $50 for his services in searching for Mr. Smith. The cause was referred to ex-

Judge Clerke, who found that the plaintiff had no cause of action. The plaintiff appealed to the general term.

Peabody & Baker, for the appellant.

Jonathan Edwards, for the respondent.

By the Court.*—Daly, Chief Justice.—This is a most extraordinary demand. The plaintiff has expended nothing. It was conceded, upon the argument, that the executor has paid all the expenses incurred, and what the plaintiff seeks to recover is compensation for searching for the remains of his wife's cousin; for requesting the clergyman to perform the burial service; for writing the advertisements for the funeral, and sending them to the newspapers; and for the use of his house for the deposit of the coffin for a few hours, for the assembling of the mourners and the performance of the burial service, and I suppose for attending the funeral, which I apprehend is what he means when he says that he attended, with the undertaker, to the laying of the remains in the burial vault. Such a demand would have been remarkable had the plaintiff been a stranger to the deceased; but presented by a man whose house the deceased was in the habit of making his temporary home, with whom he had been on terms of personal intimacy for nearly fifteen years, and who was his wife's cousin, it is extraordinary, and to the credit of humanity it may be questioned if such a claim was ever before presented in a court of justice.

The appellant relies upon *Rappelyea* v. *Russell* (1 Daly, 214), in which we held that the public administrator was bound to pay out of the assets in his hands, the bill of an undertaker, who, as an act of necessity, provided for the interment of the intestate in a manner suitable to her rank in life, she having died without friends or relations in this city to undertake this last office for her. But the present is a very different case. The plaintiff is not one whose general business

* Present, Daly, Ch. J., Loew and J. F. Daly, JJ.

it is to attend to the burial of the dead, and provide what is necessary for the funeral and interment conformably to the usages of society. What he did in searching for his friend was a gratuitous service, and what he did in respect to the funeral was not an act of necessity. It was not at all necessary that the body should have been removed to his house for the purpose of the funeral. It could as well have been taken by the undertaker to the church, and buried from there, as is frequently done. The charge for opening a church for such a purpose, it appears from the evidence, is $25, whilst the plaintiff demands $100 for the use of his house. The answer to this preposterous claim is, that the taking of the body to the plaintiff's house, and having the funeral service there, was the plaintiff's own act, and was unnecessary. He testifies that there were a great many people present at his house to attend the ceremonies. If this were the fact, then the funeral service should have been held at the church. Mr. Smith was a prominent man, who had represented the United States in foreign countries, and was distinguished as an eminent scholar and historical writer; and if his death drew together a large concourse of people to attend his funeral, it was much more appropriate for the plaintiff to have provided, in the obituary notice, for their assembling at the church, instead of directing the funeral to take place at his own house.

In the common intercourse of life, services are constantly rendered by one person to another, in which pecuniary reward neither enters into the contemplation of those who render, or those who receive them, and which are therefore gratuitous. This is especially so in sickness and in discharging the last offices to the dead. Such services are performed by relatives, friends, acquaintances, or strangers, as a duty, or from motives of humanity; though with physicians, nurses or undertakers, who pursue their avocations as a calling, it is otherwise; and if this action could be maintained, it would follow that an action might be brought to recover compensation for any of those nameless offices which are rendered in sickness, or in the house of mourning during the time of tribulation and death; or, in fact, any service, of any kind, rendered by one to another, if

it were beneficial and involved personal attention and the loss of time.

In the absence of an express agreement, the law implies an obligation to pay what a service is reasonably worth, when from the nature of it, or the circumstances, it is to be inferred that it was undertaken with that understanding upon both sides.

Chief Justice Marshall, when speaking of implied contracts and the large mass of human transactions that depend upon them, remarks that "in such cases parties are supposed to have made such stipulations which as honest, just and fair men they ought to have made." (*Ogden* v. *Saunders*, 12 Wheat. 341.) But while the law will thus infer the existence of an obligation to pay a just and reasonable compensation for a service, it distinguishes between that gratuitous service which men constantly render to one another, and one where it is obvious that the inducement to render it was the pecuniary compensation or reward to be received, and where the other party has no right to assume that it is to be done for any other consideration.

In *Bartholomew* v. *Jackson* (20 Johns. 28), the plaintiff brought the action to recover for his services in removing the defendant's property to save it from being destroyed by fire, the defendant not being present at the time of the conflagration, and it was held that the action could not be maintained. "If," said Platt, J., "a man humanely bestows his labor and even risks his life, in voluntarily aiding to preserve his neighbor's house from destruction by fire, the law considers the service rendered as *gratuitous*, and it therefore forms no ground of action."

In *Dunbar* v. *Williams* (10 Johns. 249), it was held that a physician could not maintain an action for medical services and attendance upon a slave rendered without the knowledge or request of the master, in a case not demanding instant and immediate assistance; but it was conceded that if the service had been an act of necessity, which did not admit of a previous application to the master, the law would raise an *implied assumpsit;* the master being legally bound to make the requi-

site provision for the slave. In *Bowen* v. *Bowen* (2 Bradf. 336), it was held that a contract would not be implied on the part of the deceased to pay his brother for serving for five years in the deceased's store as a clerk; the deceased having clothed and boarded the claimant, there being nothing to show that the services were performed by the claimant expecting to be paid for them, or that the deceased so understood it, or had reason to believe that he was to be charged for the services. And see also, to the same general effect, *Everts* v. *Adams* (12 Johns. 352); *Moore* v. *Moore* (21 How. Pr. 219–224); *People* v. *Supervisors of Kings* (23 Id. 89); *Raynor* v. *Robinson* (36 Barb. 128); *Green* v. *Roberts* (47 Id. 521).

These cases sufficiently illustrate the rule that an obligation will not be implied to remunerate a party for his services, unless the circumstances are such as to show either that there must have been a mutual understanding to that effect, or if rendered without the party's knowledge, that the service was an act of necessity, for which he was legally bound to provide, or where it may be assumed that, if he had known of the exigency, he would have required such a service to have been performed, with the understanding that he was to pay for it.

An analogous distinction exists where services are rendered to the dead. An obligation is implied on the part of executors or administrators, or as they are called in the law, the personal representatives of the deceased, to pay his funeral expenses. In wills it is very common for a testator, before he makes any devise or bequest, to provide for the payment of his just debts and funeral expenses; but where he does not do it, and in all cases of intestacy, an obligation on the part of the personal representatives will be implied to pay the funeral expenses out of the assets, if there be assets. It will be implied because the interment of the deceased is an act of necessity, and it will be inferred, where nothing appears to the contrary, that he wished to be buried in accordance with the customs and usages of society, and meant that the reasonable cost and charges thereof should be defrayed out of his estate. Where there is an executor, as he has the right to direct in what way the funeral is to be conducted, and who is to attend to it, and

provide what is necessary, the executor must, if accessible, be consulted, and in cases of intestacy, as the interment generally takes place before an administrator is or can be appointed, the administrator takes the assets subject to the payment of the funeral expenses, as a debt or charge necessarily created (*see the cases cited* in *Rappelyea* v. *Russell*, 1 Daly, 218). The funeral expenses embrace the outlay or charge incurred in procuring what is necessary for the interment, and the compensation of the person, generally denominated an undertaker, who attends to all the details of the funeral for hire or reward. Beyond this, all such services are usually and from their nature gratuitous, and such was the character of those for which the plaintiff seeks to recover. The report of the referee and the judgment upon it should therefore be affirmed.

Judgment affirmed.

HERMAN MARKS *v.* THE CONGREGATION DARUCH AMUNO.

Two members of a religious congregation sent a letter to the trustees, stating that they resigned their membership *until* a new reader should be elected: *Held*, that this was not a resignation, but an attempt to create a suspension of their membership until the happening of a certain event, when they should have the right to resume it, and that as there was no provision in the by-laws authorizing such a suspension, that they continued members, and were liable under the by-laws to the payment of dues.

APPEAL by defendants from the Eighth Judicial District Court.

The action was brought against the defendants, who are a religious corporation, to recover the amount of certain scrip issued by the corporation to the plaintiff and his brother, which was then due and payable. The defendants set up by way of counter-claim $121 22 for dues owing by the plaintiff and his brother as members of the congregation under the by-laws. The plaintiff claimed that he and his brother were not, during

the period for which the dues were charged, members of the congregation, and showed that on the 24th of August, 1868, he and his brother sent the following letter to defendants:

"We, the undersigned, hereby resign our membership in the Congregation 'Daruch Amuno' *until* another reader of the said congregation is elected.

"New York, Aug. 24th, 1868.

"(Signed,)

"H. Marks,
"M. Marks."

The congregation, at a stated meeting of the Board of Trustees, refused to accept this resignation, and notified plaintiff and his brother of the fact. Plaintiff and his brother attended a meeting of the congregation, as members, after having forwarded this letter; paid their dues for the quarter beginning September, 1868, and some time between the last week in September and the first week in October, 1868, they voted for a reader of the congregation. According to the by-laws, a member in arrears could not vote, and the congregation would not permit plaintiff and his brother to vote until they had paid their dues. The defendants claimed that plaintiff and his brother were still members of the congregation, and at the commencement of the action they were indebted to the defendants in the amount stated for their dues. It further appeared that notices of the various meetings held by the congregation were regularly sent by the defendant to the plaintiff and his brother, up to the time of commencing this action.

The justice rejected the counter-claim, and gave judgment in favor of the plaintiff for the amount of the scrip.

A. L. Sanger, for appellants.

The plaintiff, at the time of commencing this action, was still a member of the congregation.

1. The alleged resignation is neither certain nor absolute. It must be absolute (*Lewis* v. *Oliver*, 4 Abb. Pr. 121, 124.) It is a conditional, temporary withdrawal, and the condition

seems to have been fulfilled between the last week in September and the first week in October, 1868.

2. There must be an *actual resignation* of a member and its *acceptance* by the congregation (*State* v. *Ancker*, 2 Rich. S. C. Law R. 245, 276; *King* v. *Tidderley*, 1 Siderf. 14; *People ex rel. Hanrahan* v. *The Metropolitan Board of Police*, 26 N. Y. 327, *et seq.*; 1 Black. Com. 484 [Sharswood and notes]; 4 Devereux N. C. 1; Grant on Corporations, 225, 267, 268; Wilcox on Corporations, 238, §§ 609, 611, 612; 26 N. Y. 329.)

3. Resignation rests upon *agreement*, and there must be some act on the part of the congregation to *complete* the resignation. It is necessary that they manifest in some way their *acceptance* of the *offer to resign*. (*People ex rel. Hanrahan* v. *Metropolitan Board of Police*, 26 N. Y. 328; see authorities cited in foregoing section; Angell and Ames on Corporations, § 433.) The right to accept a resignation is a power incident to every corporation (*Rex* v. *Leve*, 2 Ld. Raym. 1304; *Jenning's Case*, 1 Ld. Raym. 563).

3*a*. The resignation to be effective must be accepted (31 N. Y. 107; *Van Ordsall* v. *Harris*, 3 Hill, 247; *Lewis* v. *Oliver*, 4 Abb. Pr. 121).

L. Levy, for respondents.

J. F. Daly, J.—I think the judgment should be reversed, on the ground that the justice should have allowed the counterclaim of the congregation against the plaintiffs for dues, and set it off against his claim on the two notes. The obligation of the plaintiff, under the by-laws, to pay dues was sworn to by the witness Oettinger, and no objection was made that the by-laws were not produced; there was no resignation from the congregation by the plaintiff. The paper he sent as a resignation was intended evidently to be a sort of suspension of membership until the election of a new "reader."

No authority in the by-laws is shown for such a suspension; under that paper the plaintiff and his brother evidently meant to reassume their rights as members upon the happening of the

contingency set forth in it, without being compelled to go through the form of a re-election as members. It was therefore not a resignation. The judgment should be reversed.

VAN BRUNT, J., concurred.

LARREMORE, J., dissented.

Judgment reversed.

SELDEN C. TROWBRIDGE *against* JOHN SCHRIEVER.

Where a barber, whose shop was a place of great resort, had a closet for the safe keeping of the apparel of his customers whilst they were getting shaved, and also a boy in attendance to receive the garment and give the customer a check for its return, *Held*, that the barber was not answerable for the loss of the overcoat of a customer, who, knowing of this regulation, hung his overcoat upon a peg near the door, from which it was taken by some person in leaving the shop.

APPEAL from a judgment of the Sixth Judicial District Court.

The defendant kept a barber's shop, and the plaintiff was one of his customers who had been in the habit of getting shaved in the shop for a considerable period. Upon the occasion which gave rise to this action, he came to the shop to get shaved, and taking off his overcoat, hung it upon a peg in the shop, near the entrance, where other coats were hanging. After he was shaved, he went to get the overcoat, and it was missing. The action was brought to recover the value of the overcoat upon the ground that its loss was owing to the defendant's negligence.

It was shown on the part of the defendant that the shop was one of great resort, and that although there were pegs upon the walls where those who came to get shaved might hang their garments, there was also a closet for keeping them

more securely, and a boy constantly in attendance, who, upon the delivery of a garment to him by a customer, gave the customer a check, a counterpart of which was attached to the garment, which was then hung up in the closet, which was under the charge of the boy. There was also evidence showing that the plaintiff must have known of this arrangement, as he was an old customer, who had been in the habit of getting shaved at the shop for a long period. The justice gave judgment for the plaintiff for $65, the value of the coat, and the defendant appealed to this court.

Barrett & Redfield, for the appellant.

Jones & Nolan, for the respondent.

By the Court.—Daly, Chief Justice.—If the plaintiff had given his overcoat to the boy, it would have been placed securely in the closet, and he would have received a check as a voucher for its identity and safe-keeping. It must be assumed, upon the evidence, that he knew of this regulation, for he was an old customer, who for a long period had been in the habit of going to the shop to get shaved. The shop was a place of great resort, and such a regulation as this was a very proper one, in a large shop to which many people resorted. When the barber had under such circumstances, provided this means for the safe-keeping, of the apparel of his customers, it would be most unjust to hold that he must be answerable for the loss of the clothing of customers who know of the regulation, and yet do not avail themselves of it. In such a case, the loss must be attributed to their negligence, and not to that of the keeper of the shop. It does not alter the case that there were pegs upon the wall, upon which garments could be hung, and that other coats were hung there at the time. It was near the entrance to the furnishing shop, an insecure place, where the coat might be readily stolen by a person departing from the shop. And it was, no doubt, in view of the facility with which clothing might be stolen in a large establishment like this that the proprietor had adopted a method for the greater

security and safe-keeping of the apparel of his customers. As the plaintiff knew of this arrangement for the safe-keeping of the clothing, it was through his own negligence, and not that of the defendant, that he lost his overcoat (*Sanders* v. *Spencer*, Dyer, 266 a; *Calyes' Case*, 8 Co. 33). The judgment should be reversed.

Judgment reversed.

AMBROSE C. KINGSLAND AND ARTHUR GILLENDER *against* GARRETT W. RYCKMAN.

An executor who makes, in his individual capacity, a lease of premises belonging to the estate which he represents, can recover on such lease in his individual capacity.

One of two joint tenants or tenants in common cannot singly make a lease which will bind both.

APPEAL from a judgment entered on the report of a referee.

The action was to recover the last quarter's rent due on a lease of 220 Mercer street, in New York city, for the three years ending May 1st, 1871, at the yearly rent of $1,500.

The answer admitted the facts alleged as the cause of action, but set up as a counter-claim that the plaintiffs had leased the same premises to the defendant for one year, from May 1st, 1871, for the yearly rent of $1,500, but had afterwards refused to comply with their agreement, and had leased the premises to the Fire Department of the city of New York for the same term, at a rental of $2,000.

For this alleged breach of contract the defendant claimed to recover $500.

On the trial, it appeared that the premises in question formed part of the estate of George Lovett, deceased, but that

the plaintiffs had made the lease under which the rent was claimed, without indicating that they did so otherwise than in their individual capacity.

The evidence introduced to sustain the alleged counter-claim is stated in the opinion. The referee rejected the counter-claim, and judgment was entered for the amount of rent due.

Robert W. Andrews, for appellant.

Starr & Ruggles, for respondent.

By the Court.*—Robinson, J.—Whatever may have been, in fact, the representative characters of the plaintiffs when making the lease for three years from May 1st, 1867, upon which suit was brought, they made it in their individual characters, and as such are entitled to recover the rent claimed.

The counter-claim founded upon an alleged parol agreement for the reletting of the premises for another year to defendant, and the alleged subsequent lease thereof to the Fire Department for the same term, and refusal to allow the defendant to enter into possession, is only supported by his testimony that, on his application to the plaintiff Kingsland, in February, 1870, and stating that he would like to have the place for another year at the same rent, Mr. Kingsland said he might have it, and defendant thereupon replied he would take it; that, at that time, the Fire Department was in possession as his subtenants, and the only evidence of refusal to put him in possession is, that subsequently, in March, 1870, a son of the plaintiff Kingsland stated to him, in presence of the defendant, that he had let the premises to the Fire Commissioners for $2,000 a year, and Mr. Kingsland said he was sorry. On this evidence, judgment having been given for the rent in arrear on the original lease, the defendant alleges error in the disallowance of his counter-claim.

The evidence produced wholly failed to show any authority for the reletting of the premises by or on behalf of the plaintiff

* Present, Daly, Ch. J., Robinson and Loew, JJ.

Gillender. No copartnership in the land was shown to exist between him and Mr. Kingsland, and whether their relations were those of joint tenants or tenants in common, the one had no power of alienation of the estate of the other, or to enter into any agreement, warranty of title, or assurance of title or possession for the other (2 Kent Com. 360). Whatever right of action may have existed in the defendant against Mr. Kingsland individually, it could constitute no subject of set-off or counter-claim in this action for the rent due the plaintiffs jointly on the original lease.

The judgment should be affirmed.

Daly, Ch. J., and Loew, J., concurred.

Judgment affirmed.

Andrew Luke *v.* Philip Hake.

Defendant made a verbal agreement for the hiring of premises for one year, and subsequently requested that a written lease should be given to him. A written lease was prepared, which the defendant refused to accept, and refused to take the premises. *Held*, that the parol lease was not rescinded by what occurred subsequent to the making of it, and that the defendant was liable for the rent of the premises.

Appeal by defendant from a judgment of the First Judicial District Court. The facts are fully stated in the opinion.

By the Court.*—Robinson, J.—This action was for one month's rent, due June 1, 1872, for premises 2d floor of No. 15 North William street. Answer, general denial.

Hallenbake, plaintiff's agent, swore positively to the agreement made verbally on the 1st or 5th of April for hiring

* Present, Daly, Ch. J., Robinson and Loew, JJ.

of the premises by defendant for one year, at $850 rent, payable monthly in advance. That defendant, about a week afterward, or about the 15th, requested a written lease. Witness says he told defendant "that there was no use whatever for a written lease. He said he knew that; but wanted it for a particular purpose. He said he had a verbal agreement with another tenant to take this floor off his hands, and he wanted the lease as matter of form, and in case of the man not becoming a tenant he could sue him. The written instrument prepared for execution does not vary the rights of the parties. Some difficulty occurring about the execution and delivery of the written lease, defendant seems for that reason to have attempted to repudiate the agreement. In a previous case on the same facts, for the May rent, we held the justice warranted, on the evidence of this witness, in finding for plaintiff on the consummated parol lease, and that the dispute or difficulty about the subsequently prepared written lease did not affect the original parol contract, or the rights that had attached under it.

No new considerations are presented warranting a different conclusion.

Judgment should be affirmed.

DALY, Ch. J., and LOEW, J., concurred.

Judgment affirmed.

EDWARD R. LOWE *v.* JOHN ROMMELL AND JACOB ROMMELL.

If too many persons are joined as defendants in an action in a District Court, the names of those improperly joined may, under § 173 of the Code of Procedure, be stricken out, and judgment entered against the others.

The cases of *Gates* v. *Ward* (17 Barb. 424), *Webster* v. *Hopkins* (11 How. Pr. 140), *Ackley* v. *Tarbox* (29 Barb. 512), and *Gilmore* v. *Jacobs* (48 Barb. 336), holding that § 173 of the Code of Procedure does not apply to justices' courts, overruled.

Where C. was improperly joined as a defendant with A. and B., and it was separately stipulated by A. and B. that the case might be tried and "judgment entered for the amount proved to be due:" *Held*, that they were thereby precluded from objecting to the dismissal of the complaint as to C., and the entry of a judgment against themselves.

Under § 366 of the Code of Procedure, providing that on appeals from justices' courts, the appellate court shall "give judgment according to the justice of the case, without regard to technical errors and defects which do not affect the merits," where a person has been improperly joined as defendant in the justice's court, and the complaint has been dismissed as to him and judgment entered as to the other defendants, the appellate court will not order the proceedings to be amended by striking out the name of the defendant improperly joined (as is the proper practice in the court below), but will affirm the judgment as entered.

APPEAL from a judgment of a District Court.

The facts are fully stated in the opinion.

BY THE COURT.*—ROBINSON, J.—The defendants John and Jacob Rommell were sued in a District Court, with another defendant, Brown, in an action on an alleged contract, and the three defendants united in a defense, 1st. Of a general denial; and 2d. "That Brown acted as agent only." This latter defense was established, and the justice, instead of striking out his name as a party defendant, gave judgment of dismissal as against him, and rendered judgment for the debt against these defendants. The only error insisted upon on this appeal is, that there being a misjoinder of parties defendant, the com-

* Present, DALY, Ch. J., ROBINSON and LARREMORE, JJ.

plaint ought also to have been dismissed as against these defendants, and for this they rely upon the rule of the common law, that a misjoinder of plaintiffs or defendants is fatal to an action *ex contractu* (Gr. Pr. 94, 95); and they contend that such errror is not avoided or cured by any of the provisions of the Code applicable to the subject.

By sec. 64, sub. 11, applicable to justices' and district courts, "the pleadings may be amended at any time before the trial, during the trial, or *upon appeal*, when by such amendment substantial justice will be promoted." By sec. 173, "the court may, before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding by striking out the name of any party." By § 366, regulating such an appeal to this court, it is enacted, that "upon the hearing of the appeal, the appellate court shall give judgment *according to the justice of the case, without regard to technical errors and defects which do not affect the merits.*"

The appellants have warrant for the position assumed by them, that the rule of the common law, as above stated, prevails as to justices' and district courts, notwithstanding any of the provisions of the Code, and that § 173 is not applicable to proceedings therein, in *Gates* v. *Ward* (17 Barb. 424); *Webster* v. *Hopkins* (11 How. Pr. 140); *Ackley* v. *Tarbox* (29 Barb. 512); *Gilmore* v. *Jacobs*, 48 Barb. 336). The last case, decided in 1867, however, omitted any notice of the case of *Ackley* v. *Tarbox* (*supra*) on appeal to the Court of Appeals (31 N. Y. 564), decided in 1864, wherein it was held that § 173 was applicable to proceedings in justices' courts, and a misjoinder of a plaintiff might be cured by amendment, by striking out his name from the proceedings before or after judgment; that on an appeal in an action originating and tried in a justice's court, an amendment might be made under that section; that it was the duty of the court below, on objection, to have stricken out the name of the unnecessary party, and the court say, "It can now be done, and the judgment stand as it ought."

A like power of amendment was, in June, 1868, adjudged

by this court, in *Lowenstein* v. *Baer* (Daly, Ch. J., delivering the opinion), to belong to the district courts.

Secondly. These respondents, by their separate stipulation, agreed that the case might "be tried and *judgment entered for the amount proven to be due*, without prejudice to the plaintiff, that the amount of the recovery was above the jurisdiction of the court."

Under these considerations, the pleadings are amendable on appeal, if that were necessary; but as the complaint was, on defendants' motion, dismissed as to the defendant Brown, and judgment rendered against the appellants Rommell for the debt it was proven they justly owed, "the justice of the case, without regard to technical errors and defects," demands no amendment, but simply an enforcement of the judgment against the actual debtors. The judgment should be affirmed.

DALY, Ch. J., and LARREMORE, J., concurred.

Judgment affirmed.

BENJAMIN B. TILT *et al. against* THE LA SALLE SILK MANUFACTURING COMPANY.

Defendants signed a contract in duplicate, and left both originals with plaintiffs for their signature. The contract was for the sale of goods by plaintiffs to defendants, deliverable at certain specified periods. The plaintiffs added to the contract a clause materially altering the time for delivery, and then signed it, and retained one original and sent the other to defendants, who retained it without objection, and afterwards accepted and paid for a portion of the goods contracted for, which were delivered after the time specified in the contract, as signed by defendants, but in accordance with the clause added by the plaintiffs.

Held, that these facts were sufficient to show an acquiesence by defendants in

the change in the contract made by plaintiffs, and to bind them to accept the remainder of the goods according to it.

Where a vendee of goods absolutely refuses to accept them according to contract, the vendor must sell them at the earliest practicable period thereafter; but where such refusal is afterwards modified, and the vendee expresses himself as being uncertain whether or not he shall accept them, the vendor is not obliged to sell at once, but may wait a reasonable time to allow the vendee to determine whether he will take them.

Held, in this case, that two months was not an unreasonable delay in such a case, even although the market price of the goods was falling.

Appeal by defendants from a judgment of the general term of the Marine Court, affirming a judgment of that court entered on the decision of a judge thereof, after a trial before him, without a jury.

The action was for breach of contract for refusing to accept and pay for goods agreed to be purchased by the defendants.

The defense was that the plaintiffs had failed to tender the goods within the time called for by the contract, and that the goods tendered were of inferior quality to those agreed to be furnished.

On the trial it appeared that an agreement, of which the material parts were as follows, was drawn up in duplicate by the defendants, and left with the plaintiffs for signature:

"The La Salle Silk Manufacturing Co., of the first part, and Messrs. B. B. Tilt & Son, of the second part, have entered into a compact, in accordance with the understanding and conditions hereinafter embodied and expressed, viz.: The party of the first part agrees to purchase, and does hereby purchase of the party of the second part, three hundred kilos of strictly classical Italian organzine, size 18 to 20 deniers, in quality equal or superior to the bale of 46.85 kilos already purchased of the party of the second part, for which said party of the first part promise to pay sixteen dollars and fifty cents in gold, net cash, per pound, in ten days after receipt of each bale. It is further agreed that the party of the second part shall deliver the first bale between the 15th and 25th of August next, the second bale fifteen days after the first, and the third bale fif-

teen days after the second, and so on until the order is executed, which shall comprise three or more deliveries.

* * * * *

"Made and signed in duplicate,
this 30th day of July, A. D. 1870.
E. A. KINGSBURY, Agent for
La Salle Silk Mfg. Co."

The plaintiffs (composing the firm of B. B. Tilt & Son) wrote underneath the contract as above given the following clause, and signed their firm name below the addition thus:

"*City of New York.*

"We approve of the foregoing contract, with the understanding that we are not to be held responsible for any delay beyond our control in delivering this organzine, and that our inability to deliver it within the time specified in this contract shall not be made a cause or pretext for refusing to accept the organzine upon its arrival by the party of the first part to these presents.

B. B. TILT & SON."

One of these duplicates, with this addition and the signature of the plaintiffs, was then taken to the defendants' office and left with them. The defendants received and retained it without objection. The other duplicate, with the same addition, was retained by the plaintiffs in their own possession. In pursuance of this contract (as the judge at the trial found), the plaintiffs delivered to, and the defendants received and paid for, three bales of organzine, the first bale being delivered to defendants on the 19th of September, 1870; the second bale on the 4th of October, 1870; and the third bale November 3d, 1870. The fourth bale was received by the plaintiffs on December 17th, 1870, and (as the judge at the trial found) conformed substantially to the "size" or quality required by the contract. Defendants were notified thereof, but declined to receive it, claiming that there was no contract, and that it had not come within time. Subsequently, however, negotiations were had between the parties looking to an acceptance of the bale by the defendants, and the plaintiffs did not dispose of it, but retained it (as the judge found) for account of and subject

to the orders of defendants. The plaintiffs, on May 5th, 1871, notified the defendants that such bale would be held subject to the defendants' orders until May 10th, 1871, at 12 M., and at that time would (at a specified place) be sold at public auction, and the plaintiffs would look to the defendants for the difference between the amount realized at such sale and the price fixed by the contract. The defendants continuing to refuse to receive and pay for the bale, it was sold according to the notice. The proceeds of such sale were $1,016 97 less than the contract price of the bale. In order to bring the case within the jurisdiction of the Marine Court, plaintiffs waived the $16 97, and sued for $1,000 damages. The plaintiffs showed affirmatively that they had used all the means in their power to deliver the goods within the time specified for delivery, and had been unable to do so on account of the Franco-Prussian war, which was then going on in Europe. From December 17th, 1870, to May, 1871, the market price of silk was declining.

The plaintiffs had judgment for $1,000, the difference between the contract price and the proceeds of the sale on May 10th (less $16 97 waived by the plaintiffs).

Henry H. Anderson, for appellants.

Samuel J. Crooks, for respondents.

DALY, Chief Justice.—The proposed contract, signed by the defendants' agent, Kingsbury, which provided that each bale should be delivered between certain periods, was left at the plaintiffs' office, but as the war in Europe made the delivery of goods then very uncertain, the plaintiffs were unwilling to bind themselves unconditionally to deliver within the prescribed period, and a qualification of the contract was written beneath the signature of the defendant's agent, providing that the plaintiffs were not to be held responsible in delivering the organzine for any delay beyond their control; that their inability to deliver within the time specified in the contract should not be made a cause or pretext for refusing to accept the organzine upon its arrival, and that, as thus qualified, they

approved of the contract. This qualification, called by the witnesses "the appendix," was added to the duplicate copies of the proposed contract left by the defendant's agent. The plaintiff's name was signed to each copy, one of which was retained by the plaintiff, and the other was delivered by the plaintiff Albert Tilt to Mr. Simpson, the vice-president, at the office of the company, he being the chief managing officer of the defendants. Simpson admitted, when examined, that the defendants had this duplicate in their possession. He says that it was not delivered to him, but to the secretary; but admits that the secretary told him upon the day it was received, that Mr. Tilt had brought the duplicate, and left it at the defendants' office; and it does not appear that any objection was then made by him, or by any of the officers of the company, to this qualification of the proposed contract, but, on the contrary, when the first bale of the organzine arrived, which was within a day or two of the 19th of September, and after the time named in the contract as originally proposed, the defendants accepted and paid for it without objection; a circumstance fully warranting the finding of the judge that the defendants had assented to the modification made by the plaintiffs, and agreed that any inability on the part of the plaintiff to deliver within the time specified should not be made a cause or pretext for refusing to accept the organzine upon its arrival.

Of the correctness of this conclusion there cannot be any doubt upon the evidence, and I think it is equally manifest that there never would have been any question on the part of the defendants respecting this qualification of the provision about deliveries, but for the fact that about the time that the second bale was delivered the price of organzine fell in the market, and continued steadily thereafter to decline.

No one of the bales arrived within the time originally specified. The plaintiffs proved that they telegraphed to Europe for the amount required by the defendants as early as July 23d, and that their inability to deliver more rapidly than they did, grew out of the war, and was a delay over which they had no control.

Simpson, the vice-president, testified that after, or about

the time when the second bale arrived (which was on the 4th of October), and after the defendants had been notified of its arrival, he had a conversation with Albert Tilt, one of the plaintiffs, in which he told him that the company did not consider themselves holden by any contract; that he would buy as the company wanted silk, but that it should not be a precedent for the plaintiffs to claim any contract as existing and binding upon the company, and that he gave as a reason for there being no contract that the time had elapsed. Albert Tilt denied that he had ever had any such conversation with Simpson at the place and time referred to by him, or anywhere else, and, so far as the statement of Simpson was in any way material, it cannot be considered, but must be regarded as disproved, the judge having found for the plaintiffs. Whether, however, this statement was true or not, the defendants accepted and paid for this bale, and nothing further occurred until the third bale arrived, which was on the 3d of November, twenty-three days after the time originally specified. The price of silk had now materially fallen, and as there is some conflict between Simpson's and Albert Tilt's accounts of what occurred when this bale came, we must regard, under the judge's finding, Tilt's statement as the correct one. He says that Simpson came to the plaintiffs' office to see about the third bale, and claimed that there was not any contract—that the "clause," what has been heretofore referred to as the "appendix," vitiated the contract—a view of the effect of that provision which it would seem did not occur to him, or which he did not suggest to the plaintiff until this late period, four months and a half after the date of the contract, when this description of silk, organzine, had fallen in price, and he could purchase it below the contract price in the market. Tilt says that he claimed that the goods did not come in time, and that Tilt told him that it was not the plaintiffs' fault. That Simpson said that he was not obliged to take the bale; that silk was lower; that he could buy it elsewhere for less money; that he was short of money and did not want to buy it with cash; that the company had no funds; that he was not willing to advance funds for them to pay cash; that he could go elsewhere

and buy on time for less money. Tilt told him that he did not want to have any trouble about it, that the defendants ought to take the bale; that it was delivered under the contract, and that finally Simpson said that, without biasing his right to refuse the four bales, he would accept the third bale, if the plaintiff would reduce the amount to currency, with three months' interest, and take the company's note, which Tilt agreed to do. When this was finally settled, and Simpson was about leaving, he sought particularly to impress upon Tilt that, in accepting this third bale and taking it at the contract price, it should not affect the defendants' right to refuse the fourth bale, to which Tilt answered that he did not want then to discuss that; that he would discuss it when the fourth bale came; that he would be willing to submit to arbitration; that he was delivering the third bale under the contract, and, of course, did not want to talk anything about the fourth bale, as it had not arrived.

The fourth bale was received by the plaintiffs on the 17th of December. The defendants were notified of its arrival, and an invoice was sent to them, which was sent back. Tilt then called upon Simpson, who said he would not take it; that there was no contract, and that he was not obliged to take it. Tilt replied that a contract was a contract; that they had worked along under it and delivered three bales, two of which there never was any dispute about; that it was then a late hour to raise an objection, and he offered to leave the matter to arbitration, and did everything that he could to induce him to take the bale; but he declined to do so.

The plaintiffs' course was then to sell the bale on the defendants' account, holding them responsible for the difference between the contract and the market price; but it seems that there was a negotiation between Simpson and Albert Tilt in respect to the purchase of the stock which the latter held in the company, pending which there appears to have some understanding or expectation that Simpson would take the bale; for at some time in the month of February following, after or about the time of the transfer of Tilt's stock to Simpson, he (Simpson) was asked by the plaintiff's employee, Seebass,

when he was "going to take that bale away," and Simpson said he *thought he would take it in a few days*, but he did not know. Whatever therefore may have occurred before, there was at this time an understanding on Simpson's part that he was to take this bale. He did not contradict this statement of the witness Seebass; but testified that Albert Tilt, in January or February, offered to sell the silk to him at the market price, in order to get it out of the way; but that he, Simpson, replied that he was afraid of the quality; that he did not like to buy the silk, as he had trouble in the former bales, in regard to the denier.

The bale therefore appears to have been kept from February with the understanding that Simpson was to send for it, and when the plaintiffs had kept it for what they considered a reasonable length of time, that is from February to May, they sent the defendants a notice that they had and would hold it subject to the defendants' order until the 10th of May, when they would sell it at public auction on the defendants' account, which they did, and Simpson purchased it at the auction sale, selling it afterwards to the company, at an advance upon the price he paid for it.

Upon this state of facts, the judge gave judgment for the plaintiff for the difference between the contract price and the amount which the silk brought at the auction sale.

It is insisted that this was not the correct measure of damages, and that it should have been the difference between the contract price and the market value of the article at the time when the defendants refused to receive it. This is undoubtedly the rule where the vendee absolutely refuses to receive the goods. The vendor cannot in such a case retain them upon a falling market, and when sold, hold the vendee answerable for their subsequent diminution in value. He must either sell them at once or accept as the measure of his damages the difference between the contract price and their market value at the time when the vendee refused to receive them.

This, however, was not such a case. Although Simpson refused to receive the fourth bale when notified of its arrival, it is apparent from the testimony of Seebass that the matter

had been reconsidered, and that in the month of February the plaintiffs were with his assent holding the bale subject to his order. His reply that he thought he would take it away in a few days, but he did not know, was evidence tending to show this, and sufficient to justify the conclusion that that was the understanding at that time. We cannot say, as matter of law, that the plaintiffs were not justified in holding it for two months from that time, or to express it differently, that there was under the circumstances unreasonable delay on their part, in not selling it before the expiration of that period. If Simpson, after this conversation with Seebass in February, had informed them of a final conclusion on his part not to take it, then it would have been otherwise, and it would have been incumbent upon them to sell it for the best price they could obtain at the earliest practicable period thereafter (*Pollen* v. *Le Roy*, 30 N. Y. 549). But there is nothing in the evidence to show that anything occurred between him and the plaintiffs from that time until the 4th of May, when they notified him in effect that if he did not take it before the 10th, they would sell it at auction upon his account, having allowed what they considered a reasonable time for him to determine whether he would finally take it or not.

The defendant attempted, upon the trial, to show that the silk in this bale was not of the weight or quality it purported to be, and several things were relied upon, such as that no assay paper came with the bale; but the attempts utterly failed, for Tilt swore that he made an assay of this fourth bale in the month of January, so that if Simpson "raised a dispute as to an assay paper," the plaintiffs could submit the actual assay. This was a matter with which Tilt was very familiar. He had been all his life in the silk business, and had made hundreds of such tests. He found it to be a good, and, as he testifies, an excellent average of the stuff 18–20 denier silk, which was the article contracted for.

This objection and the others were raised by Simpson after the price of the silk had fallen, and were manifestly resorted to with a view, if possible, of getting rid of an unprofitable contract. If silk, instead of falling in the market, had enhanced

in value between the time of the making of the contract and the delivery, there would not, we apprehend, have been any such questions, but the plaintiffs would have been held to the strict fulfillment of the contract. The defendants wanted the silk; for this bale after its sale by auction was obtained by them. The fact in the case is, as they could at the time of delivery buy the silk at a lower price in the market, they wanted to get rid of this onerous contract if they could.

The judgment should be affirmed.

LARREMORE and J. F. DALY, JJ., concurred.

Judgment affirmed.

HARRIS COHEN *against* BRIDGET O'CONNOR.

Where a principal directs payment to be made to his agent, and payment is made by check payable to the order of the agent, who collects it and converts it to his use, this is nevertheless a good payment to the principal.

A married woman may charge her separate estate without an instrument in writing.

Defendant being a married woman, and owning a lot of ground as her separate estate, agreed with plaintiff for a loan of money to finish certain buildings thereon, and directed plaintiff to pay the money to her husband. Plaintiff paid the money to her husband by a check to the husband's order, and the husband collected it and used it for his own purposes. *Held*, that defendant was liable for the sum thus paid to her husband.

Held, also, that her statements made to plaintiff after the transaction were competent evidence against her.

APPEAL by defendant from a judgment of this court, entered on the verdict of a jury.

The action was against the defendant, a married woman, to recover $250, loaned to her to erect buildings on land owned by

her in her own separate right. The facts are fully stated in the opinion.

Joseph Fettretch, for appellant.

Julius Lipman, for respondent.

ROBINSON, J.—The facts of this case, as necessarily found by the jury upon conflicting proofs, are substantially as follows: In March, 1870, the defendant, a married woman, and owner of a lot in 117th street, applied to plaintiff for a loan of $250, to aid her in finishing a building on the lot, to which he assented, and she said she would send her husband for the money. He accordingly went for it, and plaintiff gave him a check on a bank for the amount payable to his order. He took the check to the bank, indorsed it for deposit, and had it there so deposited to his own credit, and he testifies he applied the proceeds to his own use. Plaintiff testified to the effect that subsequently asking the defendant for the money, she said "she had not got it till she sold her property."

There is no doubt the husband received from plaintiff's depositary the proceeds of the check, although he immediately made a deposit to his own credit, and the circumstance that the amount he thus received upon defendants' account was through plaintiff's order on the bank made it no less a payment of the money to him as her agent. The objection that this was not a direct payment of money to the agent and as requested is equally untenable as if the money had actually been paid by the bank and lost by the agent. So also is the objection that the defendant, being a married woman, could not charge her separate estate for a debt so created except by an instrument in writing. A debt created in the course of her separate business or for the immediate and direct use or benefit of her sole or separate property becomes a charge thereon, without any written instrument creating the charge (*Owen* v. *Cawley*, 36 N. Y. 600; *Ballin* v. *Dillaye*, 37 Id. 37; *Corn Exch. Ins. Co.* v. *Babcock*, 42 Id. 626). In thus dealing in matters concerning her separate property, she assumes the same liability as would attach to any other

person, for the dishonest acts of her agent in appropriating her money to his own use, after it had been received by him upon her authority, and the fact that her agent was her husband, in no way affects the rule (*Owen* v. *Cawley*, 36 N. Y. 600; *Baum* v. *Mullen*, 47 Id. 577).

The objection to the testimony tending to show her subsequent admission that the money had come to her use, and her promise to repay it when she sold her property, was not well taken. When dealing in matters concerning her separate estate, as to which she is liable as a *feme sole*, any testimony was admissible—even her acts and admissions—tending to establish the original transaction as claimed on the part of the plaintiff.

These present the only material considerations arising upon the case, and they call for an affirmance of the judgment.

LARREMORE, J., concurred.

Judgment affirmed.

THOMAS MCSPEDON AND CHARLES W. BAKER *against* JAMES W. BOUTON AND ANOTHER.

The sureties on an undertaking, required by § 334 of the Code of Procedure to render effectual an appeal to the Court of Appeals, are liable for the costs on dismissal of the appeal, as well as where the judgment is affirmed.

The sureties on such an undertaking are not released from liability by their failure to justify after being excepted to.

In an action on an undertaking given on appeal from a judgment brought by the persons recovering the judgment, the fact that one of them had been discharged in bankruptcy before the judgment was obtained, and that his interest had passed to his assignee in bankruptcy, can only be made available by way of abatement for non-joinder, and the objection is waived if not taken by answer.

APPEAL by the defendants from a judgment entered on the decision of a judge of this court, after a trial before him, without a jury.

The action was brought against the defendants, as sureties on an undertaking given under § 334 of the Code, being the undertaking required to render effectual an appeal to the Court of Appeals.

The undertaking was drawn in accordance with the statute which requires that it shall be "to the effect that the appellant will pay all costs and damages which may be awarded against him on the appeal, not exceeding five hundred dollars."

The facts which were relied on as ground of defense are fully stated in the opinion.

C. F. Wetmore, for appellants.

T. D. Sherwood, for respondents.

Robinson, J.—The undertaking upon which this action was brought was given under § 334 of the Code, on appeal to the Court of Appeals from an order, and was conditioned to pay all costs and damages which might be awarded against the appellant on the appeal, not exceeding $500.

The appeal was heard by that court, on argument by the counsel for the respective parties, and dismissed with costs to the respondents, these plaintiffs, which were adjusted at $116 06, for which judgment was rendered February 16th, 1869, and this action was brought to recover the same of the sureties. Pending that appeal, and in 1868, McSpedon, one of the respondents, became a bankrupt, and was discharged from his debts in June, 1868.

On the taking of the appeal on which this undertaking was given, notice was given of exception to the sufficiency of these defendants as sureties, but, after repeated attendances by the respondents, on notice of their justification, and their failure to attend and justify, the proceedings for justification were abandoned without formal order, and the appeal proceeded and was disposed of as above stated. On these facts the judgment should be sustained:

1st. The argument of the appellants is, that such appeal having been *dismissed*, no judgment against the sureties was warranted by the terms of the undertaking. It is founded on the

case of *Drummond* v. *Husson* (14 N. Y. 60), which was on an undertaking given under § 335 of the Code, to pay *on affirmance*, but making no provision for a case of *dismissal*. That in question, given under § 334, fully provides for costs and damages awarded the respondents on the appeal, and such having been adjudged, I can perceive no question as to the right of recovery on that ground.

2d. Although proof was allowed of exception to the sureties on the appeal, and their failure to justify, this constituted no defense (*Decker* v. *Anderson*, 39 Barb. 346). The claim that defendants were thus discharged from their obligations as sureties was not founded on any defense set up in the answer predicated thereon, nor had it any foundation in law (*Decker* v. *Anderson*, *supra*).

3d. The discharge of McSpedon in bankruptcy had no bearing upon the merits of the claim upon the undertaking. On his becoming a bankrupt, the solvent partner and the assignee in bankruptcy became tenants in common of the copartnership assets, and the latter took only an undivided interest therein (*Murray* v. *Murray*, 5 Johns. Ch. 70; *Eyberts* v. *Wood*, 3 Paige, 527; *Mumford* v. *McKay*, 8 Wend. 444). The non-joinder of any assignee of an undivided interest (whose existence, however, is not suggested), was only available as a defense for non-joinder and by way of *abatement*. No such defense was interposed, and the mere fact of McSpedon's discharge in bankruptcy, in 1868, constituted no defense to this action founded on a judgment recovered by both McSpedon and Baker in 1869. If the subsequent judgment was not an estoppel as to any matters growing out of the previous bankruptcy of one of the partners, it is doubtful if there was any occasion for joining any assignee in bankruptcy as a coplaintiff (*Thacher* v. *Shephard*, 2 Chitty, 652). Had that been pleaded, McSpedon might have shown he had become reinstated in his original rights as partner or tenant in common. These considerations cover the whole merits of the appeal, and call for an affirmance of the judgment.

DALY, Ch. J., and J. F. DALY, J., concurred.

Judgment affirmed.

SELAH HILER *against* MARTHA M. HETTERICK, IMPLEADED WITH BENAIAH G. STOKES.

A creditor having obtained judgment against one of two persons, sued as joint debtors, may issue execution on his judgment, and if it is returned unsatisfied, he may commence a creditor's action without proceeding to judgment and execution against the other joint debtor.

In a suit brought under §§ 51, 52 of 1 R. S. 728, to have a resulting trust in favor of creditors declared, the objection that the action is instituted on behalf of the plaintiff alone, and not on behalf of all the creditors of the debtor, is waived if not taken by demurrer or answer, and where no other creditors entitled to such relief are shown to exist, the court will not order the pleadings to be amended, so as to enable any such persons, if existing, to take advantage of the recovery.

It seems that a judgment creditor, after return of execution unsatisfied, may commence in his own name a suit to have land, paid for by his debtor and the title taken in the name of a third person, declared to be held in trust for him, and to have his judgment charged on it, and that the action can be sustained independently of the provisions of 1 R. S. 728, §§ 51, 52.

Where a referee reported that judgment should be entered, appointing a receiver, and ordering a reference to take and state an account, and on his report judgment was entered, (without application to the court), by which a receiver and a referee were nominated to carry out its provisions, *Held*, that the failure to have the receiver and referee nominated by the court was an irregularity, but did not render the judgment void.

In an equity suit a judgment will not be reversed for a technical error in the admission of evidence, where the court is satisfied that no substantial injustice has been done.

APPEAL by the defendant Hetterick from a judgment entered on the report of a referee.

The action was brought against Martha M. Hetterick and Benaiah G. Stokes, for the purpose of having a resulting trust declared to exist in favor of the plaintiff, in regard to certain real estate in the city of New York, which was alleged to have been purchased with the money of the defendant Stokes, and the conveyance made to the defendant Hetterick, at a time when Stokes was indebted to the plaintiff.

On the reference, it appeared that in 1853 a suit was commenced in the Supreme Court by the plaintiff against Henry Stokes and Benaiah G. Stokes, and in 1870 judgment was en-

tered in that suit for $41,951 14 against both defendants. This judgment was opened as to Henry Stokes, and all proceedings against his separate property or the partnership property stayed. Execution was issued against the separate property of Benaiah G. Stokes, and on its return unsatisfied, supplementary proceedings were had, and a receiver appointed of his property.

The defendant Hetterick, who was the only one who appeared or defended in this action, alleged that Benaiah G. Stokes had colluded and conspired with the plaintiff in obtaining the judgment, and in support of this showed that on a trial of the cause before Judge Roosevelt in 1853, a decision was rendered which was favorable to the defendants, and that the suit was not touched again from that time until 1870, when a substitution of attorneys for the defendants was procured by Benaiah G. Stokes; an amended and a supplemental complaint served, and the issues referred by consent, and on the referee's report judgment entered. The referee here found, however, that there was no proof sufficient to establish fraud or collusion on the part of B. G. Stokes, and that the judgment against him was without taint of fraud.

The referee also found that the defendant Benaiah G. Stokes, in 1861, purchased the house and lot No. 10 Lexington avenue, and paid for it $11,000. That, although Stokes paid the entire consideration money, he procured the deed of the property to be made to the defendant Martha M. Hetterick, who was then his kept mistress. That at the time of this conveyance Stokes was indebted to the plaintiff in an amount exceeding the purchase price of the premises, and was largely insolvent.

From these facts the referee derived the conclusions of law that under §§ 51 and 52 of 1 R. S. 728, the title to the premises was vested absolutely in the defendant Hetterick, with, however, a resulting trust in favor of the creditors of Stokes who were such at the time of the payment by him of the consideration, and that the plaintiff, as such a creditor, was entitled under such resulting trust to have the house and lot, and the value of the use and occupation of the same by the defendant

Hetterick, from the date of the conveyance to her to the time at which she might surrender the same under the decree of the court, and also all the rents and profits derived by her from the same, whether by lease, sale, mortgage, or otherwise, applied towards the payment of the plaintiff's judgment against B. G. Stokes. To accomplish this result the referee ordered judgment: 1. That the defendant Hetterick be adjudged to hold the premises in trust for the benefit of the plaintiff. 2. That the premises be sold, and the proceeds applied to the payment of the plaintiff's judgment. 3. That a receiver be appointed to receive a conveyance of the premises from the defendant Hetterick, and also to demand and receive the value of the use and occupation and the rents and profits of the premises. 4. That the defendant Hetterick be perpetually enjoined from disposing of, or interfering with the premises or the rents and profits; and 5. That she execute a conveyance of the premises to the receiver, and pay over to him all profits or income derived by her in any way out of the same, and that it be referred to a referee to take an account of such rents and profits.

Judgment was entered on this report without any application to the court, and in the judgment the receiver and referee were nominated (though they had not been in the referee's report). On the reference to take account of the rents and profits, the referee reported that the same amounted to $22,108 42, and on this report judgment was entered against the defendant Hetterick for that sum.

From both the interlocutory and the final judgment appeals were taken.

Benjamin T. Kissam, for appellant.

J. P. Fitch, for respondent.

Robinson, J.—The finding of the referee upon conflicting proofs, that the house and lot No. 10 Lexington avenue was purchased with the money of Benaiah G. Stokes, and the title taken in the name of the defendant Martha M. Hetterick, his kept mistress, when he was insolvent, and in fraud of the rights

of the plaintiff, his creditor, can scarcely be the subject of question to any one perusing the testimony; but even if any such doubt should exist, the conclusion to which the referee has arrived, after hearing the proofs and with full opportunity of judging of the credit of the witnesses examined before him, will not be disturbed by an appellate court for any supposed preponderance of proof to the contrary of his finding, but only for manifest error.

He also finds that plaintiff was a creditor of Stokes at the time of such transaction, in an amount exceeding the purchase money paid for such property, for which he subsequently recovered a judgment in the Supreme Court, June 28, 1870, for $41,951 14. None of the supposed irregularities in the conduct of that suit, either in the substitution of an attorney for the defendants or in the revival of the action after it had for a long time laid dormant, or any supposed want of good faith in the claim from an adverse decision by Judge Rosevelt in a preliminary stage of the proceeding, lead to any conclusion that the action was not prosecuted in good faith or defended with proper vigor; and far less did they raise any presumption that the suit commenced some eight years before the transaction brought in question and the proofs of loss and damage made as arising from Stokes's failure to comply with the contract on which the action was founded, were false, or simulated, or urged with the mere purpose on the part of the plaintiff to assail the title of the defendant Hetterick to the property in question. Even if the recovery was erroneous, and the action imperfectly defended, there are no grounds for holding that there was any conspiracy between plaintiff and B. G. Stokes to carry on the action with a view to defraud the defendant Hetterick out of any of her just rights. Regarding her and Stokes as *in pari delicto*, so that he could not reclaim what he had squandered upon her, she stands in no position to assail the *bona fides* of the recovery against him through the forms of the law, unless she show the judgment was suffered upon a fictitious debt and in fraud of her interests. I cannot perceive in the circumstances, to which reference is made on her behalf, anything indicating a want of earnest persistence by the

plaintiff in the claims he made in the suit against Stokes, or any such undue concession by the defendant on the trial, that point to a connivance between them to allow or enhance the damages beyond what might properly be claimed and recovered.

The proceedings in the action were somewhat peculiar. The recovery was had against both Benaiah G. and Henry Stokes, and the Supreme Court, for cause shown, set it aside as against Henry, and allowed it to stand as a several judgment against Benaiah G. Upon this separate judgment against him, execution was issued and returned unsatisfied, and it is upon such proceedings that this action, in the nature of a creditor's bill, was instituted, with a single view to assail the title of the defendant Hetterick in the property purchased, as alleged, with the funds of B. G. Stokes. In my opinion, it can be maintained, as well as a creditor's bill founded upon a recovery by judgment and execution thereon returned unsatisfied, assailing the transaction in question as a fraudulent trust, or as a claim by a creditor at large founded on the provisions of sections 51 and 52 of the Revised Statutes, relating to uses and trusts (1 R. S. 728).

To the objection, that the first-mentioned proceeding by way of creditor's bill cannot be sustained, because plaintiff had not exhausted his remedy at law, since the action has not been concluded as against Henry Stokes, it is well answered that all such modes of redress as the statute or practice of a court of equity points out or requires, to wit, the recovery of a judgment and the issuing and return unsatisfied of an execution thereon, had been previously perfected. The existence of the debt as due by Benaiah G. Stokes, upon a claim of anterior date to the transaction in question, was established in the action against him, and also that an execution thereon had proved inoperative, and although there may be other remedies that the plaintiff might pursue at law for his debt against Henry Stokes, or other property than such as was held by Benaiah G. Stokes, or such as had been fraudulently conveyed by him, the remedy at law as against him was exhausted, and the defendant can present no consideration of an equitable nature that should require the plaintiff to proceed against some other per-

sons or funds before resorting to the property of Benaiah G. Stokes that has come into her hands in fraud of the rights of his creditors.

Although the trust created in favor of creditors of a party paying the consideration money of real estate conveyed to another, by the provisions of sections 51 and 52 of the statute "of uses and trusts" (1 R. S. 728), may inure to the benefit of all such creditors, that the action should have been instituted not only on the plaintiff's own behalf, but also on behalf of all other creditors, constitutes no defense. The case alleged and proved was of actual and not mere constructive fraud. No such defense of the absence of any other creditors as necessary parties plaintiffs was presented by answer or demurrer, and therefore "it is to be deemed to have been waived" (Code, §§ 144, 148). Were the case one free from the badge of fraud disclosed, still in the absence of any proof of the existence of any other creditor standing in a like situation to question this transaction, or of any who had taken any action or proceeding for a *pro rata* distribution, the law favors the diligent creditor; and where no proof was offered of the existence of any such other creditors of Benaiah G. Stokes as were entitled to like relief, nor any claim presented on behalf of any of them, the court was not called upon even to exercise the powers conferred by § 122 of the Code, for the addition of other necessary parties, or make any judgment in their behalf. The simple objection, that in order to bring himself within the provisions of sections 51 and 52 (1 R. S. 728), the plaintiff should have amended his complaint so as to have made the action one in behalf of all the creditors of Benaiah G. Stokes, was not tenable, either as a defense to the action or as a valid objection to the judgment rendered in it (*Greene* v. *Breck*, 32 Barb. 73, rev'g 10 Abb. Pr. 42). The defendant Hetterick is in no way the defender or representative of the rights of any such other creditors; and if the court, without notice of any claims by other parties, should erroneously adjudge the appropriation of this property to plaintiff's debt, is he would still find a like protection in that decree, as in the pay-

ment of any other debt to the creditor or his assignee *in invitum* before notice of the claims of third persons.

The referee on the trial was vested with all the powers of the court in rendering judgment and insuring its enforcement, through a subsequent reference to take and state an account and the appointment of a receiver. A judgment settled in conformity to his finding, by which a referee or receiver is nominated to carry out its provisions, is subject to the supervision of the court, and, if entered without such supervision and allowance by the court, would not be void, but merely irregular.

It is further claimed that the defendant Hetterick, by accepting a conveyance of real estate, the consideration money for which was paid by B. G. Stokes, the debtor, could only become an involuntary trustee of a resulting trust, to the extent of the money so advanced by him in the purchase of the property. The sum of $11,000, shown on the part of plaintiff to have been paid by Stokes for that purpose on April 3d, 1861, with simple interest to the date of the report of the referee, would amount only to about $20,700, while the judgment rendered charges the property with the entire debt to plaintiff. The amount thus paid for the property constituted the entire consideration money, and the referee correctly held that the defendant Hetterick, like any other trustee of a fraudulent trust, should receive no benefit therefrom to the prejudice of the creditors, but should be held to an account for all benefits she had received from the property.

This was the sole result of the judgment against her, and it was but in accordance with the facts found against her.

No substantial error was committed by the referee in admitting testimony, and if in any respect it was subject to criticism as irrelevant, considering the nature of this controversy, there is no such error pointed out as could have had any serious effect in perverting the decision of a judge possessed of ordinary judgment and judicial discretion. An examination of the whole case satisfies the conscience of the court that entire justice has been done, and even for technical errors the judgment should not be disturbed (*Lansing* v. *Russell*, 2 N. Y. 563; *Forrest* v. *Forrest*, 25 N. Y. 501). No substantial

injustice appears to have been done, in any respect, in admitting any improper testimony. Those items of proof to which exceptions were taken, were all addressed to the establishment of the *bona fides* of the transaction, and tendered to affect the credibility of the defendant Hetterick through conduct inconsistent with her statements.

I can discover no just ground for reversing the judgment, and am of opinion it should be affirmed, with costs.

DALY, Ch. J., and LARREMORE, J., concurred.

Judgment affirmed.

JOHN N. MORRISON AND OTHERS *against* CHRISTIAN BRAND.

Where A., being indebted to B., made an absolute conveyance of land to him in payment of such debt, and contemporaneously with the execution of the deed B. delivered to A. a written instrument by which he agreed to reconvey the land upon receiving payment of a certain sum within a specified time: *Held*, that the transaction did not create a mortgage, but was a conditional sale, and that B. obtained the fee of the premises subject only to the right of A. to demand a reconveyance on complying with the terms of the agreement.

Held, further, that the fact that the two instruments were recorded together in the records of mortgages did not, as between the parties to it, change the nature of the transaction.

Where plaintiffs had been for fifteen years in possession of land, claiming under an assignment which was, on its face, void as against creditors, but no creditors had ever sought to impeach it, and thirty-three years had elapsed since the execution of the assignment: *Held*, that there was a presumption that the creditors of the assignor had all accepted the assignment, and that plaintiffs had a good title under it, and could compel a purchaser to accept their title.

APPEAL by the defendant from a judgment of this court entered on the report of a referee.

The action was brought to compel the defendant to complete a contract entered into by him for the purchase of land.

As an excuse for his failure to complete his contract to

purchase, the defendant alleged certain defects in the plaintiffs' chain of title to the premises.

This chain of title was as follows: On August 13th, 1839, Thomas Cooke (who was conceded to have had a good title to the premises), joined with his wife in a full covenant deed of them to John Thompson, and on the same day Thompson delivered to Cooke a written agreement, by which he covenanted that on the payment to him by Cooke of $1,200 (which was also the consideration recorded in the deed), and interest, at any time within six months from date, he would reconvey to to him the premises. The deed and agreement to reconvey were recorded together in the books for the recording of mortgages. There was evidence, that at the time of the deed to Thompson, Cooke was indebted to him in the sum of $1,200, and that the conveyance was in payment and settlement of the debt. There was no evidence of any payment or tender by Cooke within six months from the date of the deed.

On October 16th, 1839, Thompson and wife conveyed to Jackson Oakley, for the consideration of $2,800.

On May 28th, 1840, the firm of Oakley & Davies (of which Jackson Oakley was a member), made an assignment for the benefit of creditors of certain property, including these premises. This assignment authorized the assignees to sell on credit, and gave preferences. The assignees conveyed to William P. Morrison, from whom the plaintiffs claimed as heirs at law.

The referee found that the transaction between Cooke and Thompson was a conditional sale of the premises, and that the deed to Thompson was an absolute conveyance, and not a mortgage, and vested in him an absolute estate of inheritance, subject only to the right of Cooke to demand a reconveyance on making payment in accordance with the terms of the agreement. The referee therefore reported, that plaintiffs had a good title, and ordered defendant to complete his purchase.

Benjamin T. Kissam, for appellant.

S. S. Rowland, for respondents.

LARREMORE, J.—The first question to be considered in this case, is the construction to be given to the conveyance executed by Thomas Cooke to John Thompson, dated August 13, 1839, as explained or modified by the contemporaneous agreement between the same parties.

The referee has found that the transaction referred to constituted a conditional sale, and that the condition not having been performed, Thompson acquired an absolute estate in the premises conveyed.

I think this conclusion was fully authorized by the evidence. There is nothing inconsistent in the fact, that Cooke's entire indebtedness to Thompson, was canceled by the deed of August 13, 1839. Cooke's right to repurchase the property was optional, and created no obligation on his part. Nor does it appear from the instruments, or the extrinsic facts, that there was any subsisting indebtedness on the part of Cooke, after the sale was consummated, or any intention by either party to create a security for any purpose.

And this was an essential point in the cases of *Henry* v. *Davis* (7 Johns. Ch. 40), *Peterson* v. *Clark* (15 Johns. 205), *Slee* v. *Manhattan Co.* (1 Paige, 48–56), *Horn* v. *Keteltas* (46 N. Y. 605), *Brown* v. *Dewey* (1 Sand. Ch. 56). "The existence of a debt is the decisive test upon this point" (Story's Equity Juris. § 1018 b, and cases there cited).

Thompson testified that his claim against Cooke was settled by the conveyance of the property, and the referee has accepted his statement as true. The agreement to repurchase did not change the deed into a mortgage, but made the transaction a conditional sale (*Saxton* v. *Hitchcock*, 47 Barb. 220).

2d. The mere fact that said instruments were recorded as a mortgage could not impress that character upon them (*Jackson* v. *Richards*, 6 Cow. 617, 619). The object of the recording act was to protect subsequent purchasers and incumbrancers; but an omission to comply with its provisions in recording a conveyance would not invalidate such conveyance as between the parties, nor would an erroneous recording thereof impair any existing right (*Jackson* v. *Burgott*, 10 Johns. 457; *Same* v. *Phillips*, 9 Cow. 94; *Same* v. *West*, 10 Johns. 466).

No subsequent purchaser or incumbrancer has objected or been prejudiced by said record; and as between Cooke and Thompson, the conveyance of August 13, 1839, was valid; and by reason of the failure to perform the condition to repurchase, vested an absolute title in Thompson to the premises in question.

3d. The assignment by Oakley & Davis for the benefit of creditors (May 28, 1840), conveyed said title to their assignees. It provides for the payment of all their creditors, and is not void by reason of the provision that the surplus, if any, be returned to the assignors (*Wintringham* v. *Lafoy*, 7 Cow. 735; *Van Rossum* v. *Walker*, 11 Barb. 237; *Ely* v. *Cook*, 18 Barb. 612). Nor was the preference made as to the payment of creditors, *per se*, fraudulent and void (*Jacobs* v. *Remsen*, 36 N. Y. 668.)

The authority given to the assignees to sell upon a reasonable credit, as they (might) deem best, was a sufficient ground to invalidate the assignment as against creditors that chose to assail it for that cause. But no creditor has sought to impeach it, and thirty-three years having elapsed since its execution, the presumption of law is in favor of its acceptance by all the creditors, and the payment of their claims, in whole or in part, in accordance with the provisions of the trust. It is the duty of the courts to sustain titles, and when (as in this case) no adverse claim or possession has been shown, but it appears that plaintiffs have been in the continued possession of the premises, and paid taxes and assessments thereon since 1857, and that same have been inclosed during that period, and that a record title exists which no creditor of Oakley has sought to impeach, I think the defendant should not be relieved from his purchase on the grounds stated.

The judgment should be affirmed.

Robinson, J., concurred.

Judgment affirmed.

CHARLES E. QUINCEY *against* JOSEPH F. YOUNG, WILLIAM S. WOODWARD, AND STEPHEN V. WHITE.

Under the Supreme Court Rule 41 (of 1872), by which, on the settlement of a case by him the justice or the referee is required to "*find*" on such other questions of facts as may be required by either party, and be material to the issue, a referee is not bound to make a finding in regard to every fact of which evidence was offered, but only such facts as are necessary to support the judgment.*

Where, therefore, the main issue was, whether the defendants were jointly interested in a certain transaction, and the referee found that they were, *Held*, that defendants could not require him to find specifically on all questions of fact of which they had offered evidence, which facts, if found in their favor, would tend to show they were not jointly interested.

APPEAL by defendants from an order at special term, denying a motion to have the cause sent back to the referee before whom it was tried, and have him find specifically on certain questions of facts raised by the defendants. The action was brought by the plaintiff, as the assignee of Heath & Co., against the defendants, to recover a balance of account due Heath & Co. for commissions, money advanced, &c., during the course of a transaction in which the defendants employed Heath & Co. as their brokers, for the purchase and sale of stocks. The amount was not denied, but it was alleged that the defendants were not jointly interested in the transaction, but that Heath & Co. should look to each for his own share. The case was referred, and after the referee had made his report, the defendants requested him to find specifically on certain questions of fact which they claimed tended to show that the transaction was not for the joint account of the defendants. This he refused to do, and an application was made at special term to compel him to do so, and such application being denied, an appeal was taken to the general term.

* By the rules adopted at the convention of the judges in 1874, the word "*find*, in rule 41, is changed to "*pass*."

L. R. Marsh and *B. F. Blair*, for appellants.

A. F. Smith, for respondent.

LARREMORE, J.—The main issue raised by the pleadings was whether there was a joint liability on the part of the defendants. The referee has decided against them on this point, and the facts upon which such liability is founded, are separately stated in his report. The defendants claim that there should have been a further finding of facts upon the requests made, viz.: the several acts of Heath & Co. in dividing the stock and settling with Woodward & White, and other acts on their part tending to establish a severance of the account—the settlement with Woodward & White, and the individual liability of Young.

Rule 41 of the Supreme Court requires that upon the settlement of the case, the justice or referee shall "find on such other questions of facts as may be required by either party and be material to the issue." To his refusal or neglect to do this, an exception lies which is analogous to that made under the former practice to the rulings of the court after the evidence was closed and before the jury retired. It is a separate and independent privilege, and should be limited, as the rule provides, to such facts as appear to be material to the issues involved and the decision thereon (*Casler* v. *Shipman*, 35 N. Y. 542; *The People* v. *Albany & Susq. R. R.* 57 Barb. 211; *Van Slyke* v. *Hyatt*, 46 N. Y. 265). I do not understand the case of *Casler* v. *Shipman* (35 N. Y. 541), as establishing the theory that an appellant is entitled to have all the facts found, those which are in opposition to, as well as those which support the judgment. It is every material fact necessary to the determination of the issues that is required to be found. In *Priest* v. *Price* (3 Keyes, 222), it does not appear that there were any requests to find.

The facts not found are impliedly negatived, and the referee should not be required to find them in that form (*Sermont* v. *Baetjer*, 49 Barb. 364; *Nelson* v. *Ingersoll*, 27 How. Pr. 1; *Manley* v. *Ins. Co. North America*, 1 Lans. 20). I do not

think the referee should be called upon to make further findings in this case. Having reached the conclusion that the defendants were jointly liable, all the testimony relating to the individual acts of the parties, so far as it sought to establish individual liability on their part, was at variance with and properly excluded from the report. The defendants seek to have almost every fact of which evidence was offered by them, incorporated in the report. Such a course is not in conformity with the practice, and should not be encouraged. I think the order appealed from should be affirmed.

DALY, Ch. J., and J. F. DALY, J., concurred.

Order affirmed.

LAWRENCE L. LEVY *against* JAMES LOCK, IMPLEADED.

The statute for the creation of limited partnerships (1 R. S. 764, as amended by L. 1862, c. 476) does not require that the certificate provided for by the act, should be filed contemporaneously with its execution or with the formation of the partnership, in order to make the partnership a limited one as to those parties whose claims against the partnership accrue after the certificate is actually filed.

Where the certificate was not filed until 28 days after its execution, *Held*, that the partnership was a limited one as to a creditor whose debt accrued subsequent to the filing.

APPEAL by defendant from a judgment of the general term of the Marine Court, reversing a judgment of that court, entered on the decision of a judge thereof, after a trial before him without a jury.

The action was brought to recover the balance due on two promissory notes made by the firm of White, Son & Whitmore, of which it was claimed the defendant Lock was at the time of making the notes a general partner.

Lock defended, claiming that his liability was not that of a general partner, but of a special partner, under the statute (1 R. S. 764, as amended by L. 1862, ch. 476, p. 880).

The facts on which the plaintiff claimed that Lock had failed to bring himself within the provisions of the statute are fully stated in the opinion.

Joseph C. Levi, for appellant.

G. A. Seixas, for respondent.

LARREMORE, J.—On the 15th of March, 1871, the firm of White, Son & Whitmore (of which the defendant claimed to be a special partner) made two promissory notes to the order of plaintiff, at five and seven months, for $644 19 each. Judgment was rendered in the court below against the defendant as a general partner of said firm, and from the reversal of said judgment by the general term of that court this appeal is taken.

The evidence discloses the following facts, to wit: That James M. White, Charles C. White, Stephen O. Whitmore and James Lock (respondent) entered into a copartnership agreement, dated April 25th, 1870, in which it was stated that the partnership thereby formed should commence May 2d, 1870, and continue for two years. That said Lock should contribute $5,000 to the capital thereof as a special partner, which he was thereby declared to be. It was therein further provided and agreed that the usual statutory proceedings should be instituted immediately after the execution of said agreement to secure Lock his rights and immunities as such special or *silent* partner. On May 17th, 1870, the said partners duly executed and acknowledged the certificate required for the formation of a limited partnership, together with the affidavit showing the payment of the special capital, which said certificate and affidavit were duly filed and recorded on the 14th of June, 1870, and publication thereof duly made for the time and in the manner prescribed by the statute.

It does not appear when said firm commenced to do busi-

ness, or that any business of any kind was transacted by it prior to June 14th, 1870.

On this statement of facts the liability of defendant as a general partner of said firm is to be determined.

All that the law requires in the formation of a limited partnership is a substantial compliance with its provisions (*Bowen* v. *Argall*, 24 Wend. 435; *Madison Co. Bank* v. *Gould*, 5 Hill, 309; *Argall* v. *Smith*, 3 Den. 479). The object of the statute is to compel those who claim the benefit of its exemptions to give public notice of the terms of the partnership, that all who deal with it may know the extent of the credit and liability which it assumes.

The statute referred to (1 R. S. [Edm. ed.] 716, 717), as preliminary to the formation of such a partnership, requires that a certificate thereof, with an accompanying affidavit, be filed and recorded in the clerk's office of the county, showing the title of the firm, the names of the partners, the general nature of the business, the amount of capital contributed in cash by the special partner, and the period at which the partnership is to commence and terminate.

The certificate and affidavit filed by the defendant and his copartners on the 14th of June, 1870, and the publication of the terms of the said partnership were each and all of them in conformity with said statute.

That said certificate and affidavit were not filed and recorded on the day of their execution (May 17th, 1870), but twenty-eight days thereafter (June 14th, 1870), could not affect the validity of said partnership as to those who dealt with it *after* the date last named. On *that day*, the special partnership was duly formed, and as to the plaintiff (whose claim accrued nine months thereafter) was as effectually and substantially formed as though the papers had been filed and recorded on the day of their execution.

There is no requirement of the statute that such execution and filing shall be contemporaneous acts. The only disability imposed by it is, that until such record is made, no special partnership is formed.

Nor should the plaintiff be permitted to assail said partner

ship on the ground that it was declared to have commenced at a period prior to the filing of said certificate. His debt, as before stated, was subsequently contracted, and he was in no way prejudiced or misled.

This distinction was recognized in the case of *The Madison Co. Bank* v. *Gould* (5 Hill, 315), where an error occurred in the notice of the partnership, which stated that it was to commence November 16th, instead of October 16th, and Judge Bronson says: "If *this* contract (the one in suit) had been made *before* the time mentioned in said notice for the commencement of the partnership had arrived, the objection would be fatal." In that case it was assumed that the partnership was properly formed, although the judgment was reversed upon other grounds.

The rulings in *Andrews* v. *Schott* (10 Penn. [4 Barr] 47) are not in point. That case decides that the use of the word "Company" in a firm name was in violation of a statute of the State of Pennsylvania, and that the special partner was liable for that reason, and also for the fact that third persons entered the firm as general partners.

The obligation in this case having been incurred after the special partnership was formed, the defendant cannot be charged *in solido*, nor made liable beyond the amount of his capital.

The statute under which said partnership was formed was intended for the mutual protection of the special partner and those dealing with him.

It should be construed in the spirit with which it was framed. To invite capital, it offers the inducement of a limited liability on the part of the investor. And while its provisions should be rigorously invoked and applied in behalf of one who suffers by their violation, a wise discrimination should be exercised in their application to one who seeks to obtain an undue advantage thereby.

The judgment appealed from should be affirmed.

Daly, Ch. J., and Robinson, J., concurred.

Judgment affirmed.

James P. Denny *against* The New York Central and Hudson River Railroad Company.

The regulations of the defendants (a railroad company) required that a passenger's ticket should be indorsed by the conductor if he desired to stop over at a way station, and resume his journey on another train. Plaintiff, a passenger on a through train to New York, desiring to stop over at Little Falls, applied to the conductor of the train on which he was traveling to have his ticket so indorsed, and was told by him that it was not necessary. Plaintiff stopped over at Little Falls, and resumed his journey on another train of the defendants, and, without applying to the conductor of that train to have his ticket indorsed, again stopped over at Amsterdam. On attempting to resume his journey from Amsterdam on another train, the conductor refused to recognize his ticket, because it was not indorsed in accordance with the company's regulations, and ejected him for non-payment of his fare: *Held*, that the privilege granted him by the conductor of the train on which he first embarked, of stopping over at a way station, without having his ticket indorsed as required by the company's regulations, was exhausted by his stopping over at Little Falls, and that, when he again embarked, he became subject to all the company's regulations, and that he could not again stop over at a way station without having his ticket indorsed.

Appeal by defendants from a judgment entered at trial term.

The facts are fully stated in the opinion.

Robinson, J.—By the regulations of this company the conductors of all passenger trains were required to punch a hole in the passenger's ticket, and if the passenger desired to stop over at any way station, the ticket must be indorsed by the conductor in order to entitle him to get upon another train and resume his journey upon the credit of such punched ticket, and it was not good if not so indorsed.

Plaintiff being a passenger on defendants' road, on an eastward bound train to New York, having a through ticket, on approaching Little Falls applied to the conductor to be let off there, and asked him to indorse the ticket. The conductor (as plaintiff testifies) answered, "that was not necessary." Plaintiff got off there, and in about an hour and a half again took

passage on another eastward train, and again without procuring or applying for any indorsement on his ticket by the conductor of that train, got off at Amsterdam. The next day he again took passage on another like train, and being applied to by the conductor of that train, presented his unindorsed ticket, which the conductor for that reason refused to recognize, and on plaintiff's persistent refusal to pay his fare, in accordance with the rules of the company, was put off the train at Hoffman's Ferry for non-payment of fare, no unnecessary force being used in plaintiff's expulsion from the cars; and yet, without proof of any specific damages, plaintiff has recovered $250.

Upon the foregoing facts I am of opinion the motion for a nonsuit or dismissal of the complaint ought to have been granted. The ticket evidencing the contract was for a through passage on the defendants' road from Buffalo to New York. It contained no provision allowing him to make any severance, and to stop over at any one or more way stations, and again resume his journey from station to station at his pleasure as to time and place. The contract was *entire*, and its obligation was for a continuous or *through* passage to New York, and not for stopping over at intermediate stations (*McClure* v. *Phil. Wil. & Balt. R. R. Co.* 34 Md. 532; s. c. 5 Alb. Law J. 13; 6 Am. R. 345; *Beebe* v. *Ayres*, 28 Barb. 275; *State* v. *Overton*, 4 Zab. (N. J.), 435; *C. C. & C. R. R.* v. *Bartram*, 11 Ohio, 457).

The indulgence the defendants allowed in this respect, by their conductors' indorsement of the ticket, was not by force of their original obligation, but a considerate waiver of its prescribed terms, in special cases for the convenience and accommodation of the passenger, and, unless obtained in the manner prescribed by the rules of the company, was of no binding effect upon them. No usage or custom was shown to prevail by which on a through ticket the passenger could stop over at any place he chose, or stay as long as he pleased, or that any general power was vested in any one conductor to waive the rules of the company, and grant any such peculiar privilege controlling the rights and action of the company and of all other conductors on succeeding trains. The permission granted the plaintiff by the first conductor, to stop over at

Little Falls without indorsement, was fully enjoyed, and the necessity for such indorsement entirely obviated in accordance with the terms of the information given the plaintiff by that conductor, but on his there again becoming a passenger *en route* for New York, he resumed his original *status*, with all its rights and obligations, and subject to the existing rules of the company, without regard to what had transpired between him and the first conductor. On again leaving the train at Amsterdam, without having applied for, or obtained from the conductor of that train, an indorsement of his ticket, he departed from the contract to submit himself to the company as a *through* passenger to New York, and relieved the defendants from any further obligation for its further fulfillment. This result can only be obviated by recognizing and adopting the views as presented on the part of the plaintiff, that the general regulations of the company were entirely dispensed with as to the plaintiff on this trip or passage, by the information given him by the conductor of the first train on his leaving it at Little Falls, that the indorsement of the ticket "was not necessary" to enable him to resume his journey on his original ticket. I can perceive no ground, either for giving any such latitudinarian construction to the statement made by that conductor, or, if so accepted, for recognizing his right so to dispense with the provisions of the contract, and pervert it into one allowing the passenger to stop at each and every station on the route, and to remain over as long, and resume his journey from station to station whenever he pleased, for such is necessarily the result of the position assumed by the plaintiff.

As to what transpired between the first conductor and plaintiff, it had no such import or necessary intendment as to grant him a general waiver or dispensation of the rules of the company on his resumption of his journey on another train for New York, but at most insured the continued recognition of his ticket, entitling him to his through passage when next resuming his journey. But were this otherwise, and the conductor held to have assumed the character of a general agent of the company, and to have extended to a passenger only such information as would naturally be asked or sought in regard to

his duty in conforming to the rules of the company, his acts cannot, upon any evidence offered, be construed to affect its rights, except upon the train within his control. No proof was offered of any authority on the part of the conductor of a train to act beyond its immediate control, and, by indorsement of the passenger's through ticket, to allow his stopping at an intermediate station, and resuming his journey upon the terms of his original ticket on a succeeding train. In no other respect can it be suggested within any recognized rule or principle of law, upon the evidence in this case, that he had any power (even if attempted to be assumed) of controlling or affecting the terms of the original *through contract*, or the duty of the conductor on a third train that took up the plaintiff as passenger at Amsterdam, to reject the ticket presented without indorsement of any previous conductor as a warrant for his becoming a passenger without payment of his passage money. In the absence of an act of the company, or any of its authorized agents, conferring upon the plaintiff the right thus to resume his journey at Amsterdam, upon an unindorsed ticket, he was not justified in his claim to be considered a passenger whose passage had been paid, and on refusal to make any such payment, was rightfully put off the train at Hoffman's Ferry.

For this reason the judgment should be reversed, the verdict set aside, and a new trial ordered, with costs to abide the event.

J. F. Daly, J., concurred.

Daly, Ch. J., dissented.

Judgment reversed.

BARTON WRIGHT *against* TIMOTHY O'BRIEN.

Plaintiff employed A., an artist, to copy, in crayon, from a small photograph, a likeness of his child, and on making the contract, made him a payment on account. After the copy had been partially made, plaintiff made an arrangement with A., by which he agreed to pay him a certain sum for the work done, and A. agreed to deliver the picture to B. to be finished. *Held*, that on the making of this latter agreement, the property in the picture passed to plaintiff, and that he could recover the possession of it from a marshal who levied on it under an execution against A. after the agreement was made, and before the payment of the money.

It seems, that the ownership of a picture painted to order, is always in the person giving the order, and that the artist only has a lien on it for the value or price of his services. Per ROBINSON, J.

APPEAL by defendant from a judgment of the general term of the Marine Court affirming a judgment of that court entered after a trial before a judge without a jury.

The action was brought to recover the possession of a crayon portrait which it was alleged the defendant had unlawfully taken and detained.

The defendant acknowledged the taking, but justified in that he was a marshal of the city of New York, and took it by virtue of an execution issued to him against the property of Richard Rogers, to whom the portrait belonged.

On the trial the following facts appeared:

The plaintiff, through his agent, made a contract with an artist named Rogers, to copy in crayon, from a small photograph, a likeness of the plaintiff's deceased child. For this work, when the copy was made, the plaintiff was to pay a specified sum, twenty-five dollars of which was paid by the agent to Rogers, when he was employed. About two months afterwards, when the copy was nearly completed, Rogers sent a note to the agent advising him that he was about to sail for Europe, and asking him to make a further payment. The agent then had an interview with Rogers, when it appeared that there was a misunderstanding as to the amount to be paid,

the agent being under the impression that it was $75, and Rogers claiming that it was $100. Rogers informed him that a Mr. Simms, an artist who was present, would finish the copy upon the payment to him, by the plaintiff, of $20, and Simms thereupon agreed to do so. Rogers then required the agent to pay him $55 more before the picture went into Simms' hands, to which the agent objected, and the interview terminated, leaving the question of the amount to be paid to Rogers, in dispute. Simms took the photograph from which the copy was to be made, with him; but the crayon copy, in the state in which it was, was left with Rogers.

The next day, at about 10 o'clock in the morning, the agent met Rogers, pursuant to an appointment, which was followed by Rogers sending him that day a receipt for $80, upon receiving which the agent paid the person who brought the receipt the $55. This payment was made, according to the evidence, ten minutes before or ten minutes after one o'clock. At fifteen minutes before one o'clock the picture was taken by the defendant, under an execution against Rogers.

The plaintiff had judgment, which was affirmed by the general term of the Marine Court, whereupon this appeal was taken.

Roscoe H. Channing, for appellant.

Arnoux, Ritch & Woodford, for respondent.

Daly, Chief Justice.—The question presented is whether the picture, under the circumstances, was, at the time of its seizure by the defendant, the property of Rogers, and could, as such, be seized and sold under an execution against him.

This was not a contract for the sale and delivery of goods, wares and merchandises, in which both delivery and acceptance are essential to the validity of the contract under the statute of frauds. It was the employment of an artist to copy in crayons, a photograph, for which he was to be paid a specified sum—an agreement for the performance of work and labor, in which almost the sole ingredient was his labor and skill;

the materials, which consisted of the canvass upon which the work was executed and the crayon pencils with which it was done, being unimportant, and merely ancillary to his contract for skill, work and labor (*The Passaic Manuf. Co.* v. *Hoffman*, 3 Daly, 495). It was an article, moreover (a portrait of the plaintiff's child), which could be of little value to any one but the plaintiff himself, and was never intended to be the subject of sale and purchase; it was a kind of property so interwoven with family ties and affections, that it is, under our laws, exempt from levy and sale under execution. It is, however, unnecessary to dwell upon the peculiar nature of the article, as the judgment of the Marine Court can, upon the authority of adjudged cases, be sustained upon a distinct and independent ground.

Where a party orders a thing to be made, such as a vessel or any other article, it does not become his property until is is delivered into his possession, even though he may have paid for it in advance, or furnished a large portion of the materials of which it is constructed; but during its production it is, and after it is finished it continues to be, up to its delivery, the property of the person who produced it, and may be levied upon and sold under an execution against him (*Muckles* v. *Mangles*, 1 Taunt. 318; *Merritt* v. *Johnson*, 7 Johns. 473; *Johnson* v. *Hunt*, 11 Wend. 139; *Andrews* v. *Durant*, 11 N. Y. 35). But, whilst this is the rule, it is equally well settled that it is competent for the parties to agree that the thing to be produced, from the beginning, or at any stage of its production, is to be the property of the person who ordered it, and that where a mutual assent to that effect is shown by unequivocal acts or declarations, the title passes before delivery (*Wood* v. *Russell*, 5 B. & Ald. 942; *Rhode* v. *Thwaits*, 6 Id. 388; *Atkinson* v. *Bell*, 8 Id. 277; *Jackson* v. *Anderson*, 4 Wend. 474; *Whitehouse* v. *Frost*, 12 East, 614; *Kimberly* v. *Patchin*, 19 N. Y. 333; *Olyphant* v. *Baker*, 5 Den. 383, 384; *Andrews* v. *Durant*, 11 N. Y. 42, 45). "It is," said Denio, J., in the last of these cases (*Andrews* v. *Durant*), "no doubt competent for the parties to agree when and upon what conditions the property in the subject of such a contract, shall

vest in the prospective owner," and the question in that case, which was simply one of construction, was whether the parties intended that the property in an unfinished barge, should, when the first payment was made, vest in the persons who ordered it to be built, and should thereafter be at their risk as to casualties. "Such an agreement," said Judge Denio, "would be lawful if made, and the doubt only is whether the parties have so contracted;" the final conclusion of the court being that the contract would not bear that construction.

In the present case, Rogers could not finish the copy, as he was about to sail for Europe. He wrote to that effect to the agent, and wished him to make a payment on it. The agent went to see Rogers, and as he says, made a *specific arrangement* with him, which he declares was this: that the picture was to be delivered to Mr. Simms, an artist in the employ of Mr. Sarony; that Simms was to finish it for $20, to be paid by the plaintiff; that Rogers told Simms, who was present, to take the picture on the condition that the agent would pay him the $20 when it was completed, and that Simms consented to the arrangement between Rogers and the agent. All this then was arranged by the united assent of Rogers, Simms and the plaintiff's agent. A point of difference, however, arose between Rogers and the agent, as to the price which was originally to be paid for the work; Simms claimed $55, and the agent was not willing to pay him more than $30, under the impression that the original price was $75. On the next morning, however, the agent met Rogers, pursuant to an appointment, and the result of that interview, and the understanding and agreement to which they then came, was that Rogers sent a receipt for $80, which embraced the $25 he had at first received, and the $55 which he claimed, and the agent upon receiving the receipt paid the $55. Now I think it is clear upon this state of facts, that it was mutually arranged, that Rogers was to have no further connection with the picture, and that it remained in his possession, after this understanding, simply as bailee (*Whitehouse* v. *Frost*, 12 East, 614), to be delivered to Simms; that if that understanding was not complete, in consequence of the dispute as to the original price, it became so at the interview

on the following morning; a conclusion which the court below were justified in drawing from the fact that Rogers a few hours afterwards sent the agent a receipt for the full amount which he claimed, and the agent took the receipt and gave the person who brought it the $55. In fact, the agent testifies that he had an appointment with Rogers that day at one o'clock, and instead of Rogers met the person by whom he had sent the receipt at that hour. It is from this testimony fairly inferable that he and Rogers had come to a conclusion in respect to the price at the interview that morning, which was at 10 o'clock, nearly three hours before the levy, and that this appointment at one o'clock was for the payment of the $55, which the agent, it would seem, paid without the slightest objection when the person came for it with the receipt. That the $55 was paid a few minutes after the picture was levied upon can make no difference. It was the prior agreement or mutual understanding that operated as a transfer of the property, there being nothing in the evidence to show that that was to depend upon the payment of the $55. It could not become the property of Simms, for he had bestowed no labor upon it, nor had it gone into his possession, and as Rogers had done all that he was to do to it, it remained in his possession after this understanding between the three parties only to be delivered to Simms for the plaintiff's benefit. Under the "special arrangement," as the agent calls it, which was made, there was no question as to Rogers' right to, or the agent's willingness to pay him the difference between the original price and what was thereafter to be paid to Simms. They differed only as to what the price was; and when that difference was settled by the agent's assenting to Rogers' view of the matter, as it may fairly be presumed that he did, upon the following morning, the clear intention from their mutual acts was that Rogers' connection with, right to, or claim to it, was at an end, and that Simms was to finish it for the plaintiff, and that the plaintiff was to pay Simms for what remained to be done to it. In my opinion, the right and title to it was thereafter in the plaintiff, for Rogers claimed no further right to it, except by way of lien for the amount agreed to be due for his work and labor upon the picture, and

Simms had no claim to the property, for he never had the possession of it. It was competent for the plaintiff, if he thought proper to do so, to relieve Rogers from the obligation to finish the picture, as he was about to sail for Europe, and accept an arrangement by which it was to be finished by another, the price which was to be paid for the work being apportioned between Rogers and Simms, in a way that was satisfactory to all parties. The effect of it was to discharge Rogers altogether, and leave the picture in its unfinished state at the plaintiff's risk, if Simms should not finish it, or if any casualty should happen to it, such as its destruction by fire, either before or after it went into Simms' hands to complete it—a risk or contingency which was for the plaintiff's consideration, and with which no one else had anything to do. It was, in fact, an unfinished picture thrown upon the plaintiff's hands by the artist who ought to have completed it, and the plaintiff, even if he saw fit to have it finished by another artist than Simms, could have done so, notwithstanding the arrangement made by his agent; Simms' claim, if he had any, being merely for the breach of an executory contract. In *Muckles* v. *Mangles* (*supra*), where the ship which was ordered to be built had been paid for, was finished, and the person's name who ordered it painted upon the stern, Heath, J., said, in holding that the property had not passed, it being still in the possession of the builder, that "a tradesman often finishes goods which he is making in pursuance of an order given by one person, and sells them to another, and that if the first customer has other goods made for him within the stipulated time, he has no right to complain, and cannot bring trover against the person who bought the goods." Chief Justice Abbot, in referring to this observation afterwards, says, that "Mr. Justice Heath's opinion appears to have been founded upon the notion that the owner was not tied down to deliver that specific barge, but would have been at full liberty to have substituted any other he was building, and the builder had done no act expressing an unequivocal consent that the general property should be vested in the purchaser" (*Woods* v. *Russell*, 5 B. & Ald. 942). But as the builder in *Woods* v. *Russell*, before the ship was completed, signed a cer-

tificate under which the person who ordered the vessel was entitled to register her in his own name, Chief Justice Abbot held that the title passed, and the correctness of the decision upon that ground, is conceded by Parker, J., and is not questioned by Denio, J., in *Andrews* v. *Durant* (*supra*). The acts of Rogers in this case are, in my judgment, quite as unequivocal as an indication of his intention and assent. The evidence is that upon the interview when the special arrangement was made, and they were all present, that he told Simms "to take the picture on the payment of twenty dollars, which the agent would pay him when it was completed," which was an unequivocal expression of his consent then and there that the picture was to go to Simms under the arrangement he had made with the plaintiff's agent. Moreover, the decision respecting the barge, in *Muckle* v. *Mangles* (*supra*) rested upon the recognized habits of tradesmen and the right of the builder to substitute another barge for the one he had built, and it has been several times referred to as supporting the view of the law taken in that case (*Atkinson* v. *Bell*, 8 B. & Cres. 277; *Johnson* v. *Hunt*, 11 Wend. 139). It can have little or no application to an article like the one ordered here, a copy of the likeness of the plaintiff's deceased child, which can scarcely be looked upon as that kind of vendible commodity which a tradesman having ready, disposes of to a customer who wants an article of the kind, and afterwards substitutes another of the like description in fulfillment of the order he has received.

As I have said, the fact that the $55 was not paid until after the picture was seized is immaterial, if there was before that an unequivocal assent, on the part of Rogers, that the property was to pass to the plaintiff; the non-payment of the amount claimed for what he had done, being material only where it appears that the party is to have the property if the money is paid (*Rhode* v. *Thwaits*, 6 B. & Cres. 388; *Olyphant* v. *Baker*, 5 Denio, 379; *Hammond* v. *Anderson*, 1 Bos. & P. N. S. 69).

The judgment should be affirmed.

Robinson, J.—While concurring in the result to which the

learned Chief Justice has arrived, I am of opinion that the title of the plaintiff to the picture in question originated in, and was necessarily established by, the contract made with the artist Rogers, for his employment, to reproduce in crayon the portrait of the plaintiff's child. The agreement was in no respect for the purchase from the artist of any such portrait as a chattel to be produced by him from materials to be furnished by him. The mere canvass and crayons he used were of insignificant and inconsiderable value, and were merely supplied by him as incidental or ancillary to his engagement to furnish the skill and labor necessary to produce the copy of the picture bargained for. The employment of the artist's skill constituted the very essence of the contract. The original, and all copies produced by him therefrom, presumptively belonged to the plaintiff, and such right could not be disputed by the artist whom he had employed for the furtherance of his own views, and for developing his property by enlarging its sphere of interest or usefulness. The contract in no way contemplated that the thing produced should be the subject of sale, as a commodity or article of merchandise; or that any materials used in its production should be the subject of purchase, or of its use in any way not subservient to the plaintiff's views and purposes. Its value consisted mainly "*in pretio affectionis*," of plaintiff for his child, and its ownership and right of use was manifestly intended throughout to be in the plaintiff, subject only to the enforcement of any lien for the work and labor performed, in case he failed in his duty to pay the artist his just compensation.

The law of intendment enters largely, and is to a great extent, controlling upon the question of ownership of personal property, and for the promotion of justice, is subtile in eliciting the true intention of the parties to the transaction—as to fixtures, whether chattels are attached to real estate with a view to its benefit and improvement, or for its temporary enjoyment (*Potter* v. *Cromwell*, 40 N. Y. 287; *Voorhees* v. *McGinnis*, 48 Ib. 278); as to articles produced or manufactured from materials furnished to a considerable extent by the employer (*Merritt* v. *Johnson*, 7 Johns. 473; *Johnson* v. *Hunt*, 11 Wend. 139); and as to whether the contract was one for the sale and

delivery of the article to be produced, or for work and labor (*Lee* v. *Griffin*, 1 Ell. Best & S. 272; *Clay* v. *Yates*, 1 Hurl. & G. 73; *Passaic Manufac. Co.* v. *Hoffmann*, 3 Daly, 495, and cases cited).

There is no ambiguity or room for doubt as to the contract in the present case being one for the employment of the skill and labor of the artist, or that the insignificant amount of materials used by him in or upon the copy portrait formed no basis for a legal claim for goods and merchandise sold or agreed to be sold, any more than that the paper or blank forms on which an attorney prepares a deed should be the subject of such a charge; nor but that such materials as were used were dedicated or appropriated to the production of the picture, and became a mere accessory to the contract of employment; while under the several contracts for the sale and delivery of a chattel to be produced by the vendor, and for work and labor in maturing and producing an article for the employer, separate and distinct remedies are afforded the vendor and employee or workman. Each of such remedies is entire and indivisible, and must be exclusively followed—as to goods agreed to be sold and delivered, the remedy being for the price of the thing sold; and that for work and labor being for the wages agreed to be paid or justly accruing.

The modes of enforcement of such rights and remedies are different in respect to the goods or chattels involved in the transaction—that of the vendor being to rescind and resume ownership, and to recover as damages the difference of market price, or, on notice, to resell the article; while that of the workman or employee exists simply in the enforcement of his lien.

In the former case, no title to the article passes to the vendee until delivery; in the latter, the title is throughout in the employer, subject only to the lien of the workman or laborer.

Under these views, the title to the copy portrait in question was, from the beginning, in the plaintiff, and the judgment should be affirmed.

Loew, J., concurred in the opinion of Daly, Ch. J.

Judgment affirmed.

GEORGE G. MAGOWN AND OTHERS *against* FRANCIS S. SINCLAIR AND ANOTHER.

Defendants being sued as makers of certain bills of exchange, answered that the bills had been paid by the proceeds of certain shipments of corn. On a motion to refer on the ground that the trial would involve the examination of the account of sales of such shipments, it appearing that the gross and net proceeds of the sales was admitted by both parties, and that the only question in dispute was, whether the proceeds of the sales had been received by the agents of the plaintiffs or of the defendants; *Held*, that the trial would not involve the examination of the account of sales, and that a compulsory reference should not be ordered.

The plaintiffs having moved for a reference, on an affidavit stating that the trial would involve the examination of the account of sales of large shipments of corn sold to as many as twelve different persons, the defendants answered in an affidavit setting out the account, and alleging that it was not disputed by either party; *Held*, that the pleadings not putting in issue the amount of the proceeds of the sale, and the plaintiffs not having denied the allegations in the defendants' affidavit, they must be regarded as having admitted the correctness of the account, and that the trial would not involve the examination of the items of it.

The term "examination of a long account," as used in the Revised Statutes and the Code, does not mean the examination of it to ascertain the result or effect of it, but the proof by testimony of the correctness of the items composing it.

The practice of referring causes involving the examination of long accounts traced to its origin, the circumstances under which it came into use in the colony of New York explained and the extent to which it was then and has subsequently been allowed, examined.

A compulsory reference should not be ordered where the trial will require the decision of a difficult question of law, even if it would otherwise be proper.

APPEAL by defendants from an order of this court made at special term directing a compulsory reference. The action was brought against the defendants as makers of three several bills of exchange to recover a balance due.

The answer claimed that the drafts had been paid in full, and alleged that they had been drawn against certain shipments of corn by the defendants, the bills of lading for which had been indorsed over to the plaintiffs as security for the payment of the

drafts, with power to the plaintiffs to sell the corn and apply the proceeds to the payment of the drafts; that before the drafts became due, the plaintiffs had received and sold the corn for more than enough to pay the drafts in full, and that there was in the hands of the plaintiffs a balance due the defendants, for which they demanded judgment as a counter-claim. For a reply to the defendants' counter-claim, the plaintiffs denied that they had sold or received the proceeds of the corn, but alleged that this had been done by the defendants.

On the motion for a reference, the plaintiffs' attorney made an affidavit stating that the trial of the issues would involve the examination of "the accounts of the sale of several large shipments of corn set up in the answer, which sales were made at various times between May 28th and July 9th, 1872, and to at least twelve different persons or firms." Attached to this affidavit was a copy of the account, which included a very large number of items. In opposition to this, the defendants' attorney made an affidavit, stating that there was no dispute between the parties as to the sale of the corn, the gross amount of proceeds, or the amount of expense attending the same, and that the real contest in the case arose from the fact that the corn had been sold and the proceeds received by Campbell & Co., grain brokers, at Liverpool, who had become insolvent before turning over all the proceeds, and that the question was simply whether they were acting as the agents of the plaintiffs or of the defendants, and that, owing to the peculiar facts of the case (which were stated in the affidavit), the question of law involved was a difficult and delicate one.

W. Gleason, for appellants.

E. T. Rice, for respondents.

Daly, Chief Justice.—This is not a case for a reference. To authorize a compulsory reference, the account must not only be a long one, but it must be directly involved. It must be the immediate object of the suit, or the ground of the defense, and not arise collaterally or incidentally. This was held

by the Court of Appeals in *Kain* v. *Delano* (11 Ab. Pr. N. S. 29). The affidavit of the plaintiffs states that the defense set up will involve the examination of a long account, including, among other items, the accounts of the sale of several large shipments of corn, set up in the answer, which sales were made at various times, and to at least twelve different persons or firms. The defendants' affidavit states that the three bills of exchange, upon which the action is brought, were drawn against the proceeds of certain cargoes of corn shipped by the defendants to Liverpool, the defendants delivering to the plaintiffs the bills of lading for the cargoes as security for the payment of the bills, upon the delivery of the bills by the defendants to the plaintiffs; that the cargoes were sold by the plaintiffs or their agents in Liverpool, realizing more than enough to pay the bills of exchange; that the plaintiffs delivered the bills of lading to Campbell & Co., who were grain brokers in Liverpool, and took from them an agreement that they would pay over the proceeds of the several cargoes to the plaintiffs or their correspondents, to an amount sufficient to satisfy the bills; that Campbell & Co. afterwards became insolvent, without having paid over the proceeds to the plaintiffs' correspondent in England; that the principal question, therefore, in the case is, whether Campbell & Co. were the agents of the plaintiffs or the defendants, the determination of which will settle whether the loss is to be borne by the plaintiffs or the defendants; and that there *is no dispute between the parties as to the sale of the grain in Liverpool, the gross amount of the proceeds, and the expenses attending the same*, which last statement is not denied by the plaintiffs, and is, in my judgment, decisive upon the question of reference.

The answer avers that the corn was sold in Liverpool by the plaintiffs, *through their agents* or *brokers*, and states the exact amount in pounds, shillings, and pence that each of the three shipments brought. I do not understand that the fact of the sale of the corn, and the amount which it brought, is at all put in issue by the plaintiffs' reply. By their reply they simply deny that *they* sold it and received the proceeds *through their brokers, agents*, or *otherwise;* and aver that it

was sold and the proceeds received by the defendants *through their agents or brokers at Liverpool;* which I understand as conceding the sale and the amount or proceeds of it. I assume this not only from the inspection of the pleading, but because if the plaintiffs did not so understand the effect of their reply to the counter-claim, but meant, on the contrary, to require the defendants to prove every item in the account of sales, they would certainly, after the defendants' attorney's affidavit that the sale, the gross amount of the proceeds and the expenses, were not in dispute, have made an affidavit contradicting his affidavit in this respect, to show that the items in the account of sales were disputed, or a sufficiently large number of them, to require that there should be a reference. The plaintiffs did aver in their moving affidavit that the trial of the counter-claim would involve the examination of a long account, including the accounts of the sale of several large shipments of corn, &c.; but when this was circumstantially denied by the affidavit of the defendants' attorney, it then became incumbent upon the plaintiffs to show why or how this examination would become necessary, which was the precise point determined in *Kain* v. *Delano*, *supra*. This account of sales did form a part of the case, and may be said to have been involved, as one of the many meanings of that word, is "connected with;" but it was not directly involved, unless it was at issue and had to be proved, and this did not clearly appear from the pleadings or the moving affidavit, which was simply that the examination of a long account was involved. For all that appears in the affidavit, the plaintiffs' attorney may have regarded the account as so involved, because it formed a part of the case which would necessarily be put in, read, and in that respect examined, though neither the items composing it, nor the amount of it, was disputed. This is not what is meant in the language of the statute of 1788, in the Revised Statutes and the Code by the "examination of a long account;" but it is the investigation and proof by testimony of the account, where the whole of it, or a large number of the items are disputed. Where an account is directly involved in the trial, a reference is ordered from the intrinsic difficulty of carrying on such an examination before a

jury, where the testimony in respect to charges and credits may be conflicting, or the inquiry complicated or intricate, making it exceedingly difficult for each of the jurors to keep in his mind every item and the testimony relating to it, so as to enable the jury collectively to find a verdict which shall be accurate and in accordance with the proof. For this reason, such an investigation is sent to a referee, who, in addition to having the witnesses before him, takes their testimony down in writing, and after the evidence is given, has ample time to go over it carefully in respect to every disputed item; to examine and scrutinize accounts that may have been delivered, and letters, receipts, bills, and other papers that have passed between the parties, and in this way to arrive at a conclusion with a degree of care and deliberation that is impossible upon a jury trial.

This is what is meant in the statute by the investigation or examination of a long account, and it is to cases of this description that references should be confined, for the intention is not and never was to take away the trial by jury and institute a reference, except where the investigation before a jury is impracticable, or at least exceedingly difficult and unsatisfactory, as it is where there is a long or complicated account. The practice came into use when New York was a colony under the Dutch, and was continued after the conquest of the colony by the English as a more satisfactory mode of procedure for the investigation of matters of account than upon a trial by a jury. The Dutch, as was the usage in Amsterdam, referred the settlement of all such matters of account to three persons called arbitrators, and like some other Dutch usages or laws, this was continued for many years after New York became an English colony, these three persons being sometimes called arbitrators and sometimes referees (Introduction to E. D. Smith's Reports, XLIV; 2 Rec. of Mayor's Court; Rec. of Mayors, vols. 2 to 7). The Charter of Liberties and Privileges of 1683, however, provided that all trials should be by the verdict of twelve men (Appendix No. II to 2 Rev. Laws of 1813), which virtually abolished this mode of procedure, and there was no way then by which a matter involving an account could be tried at common law, except by an action of account. Baron

Gilbert, writing at a much later period, says that in an action of *indebitatus assumpsit*, "no evidence can be given of an account current, because such an examination would be tedious upon issues, and and therefore upon (in) this case an action of account is provided, wherein there is judgment *quod computet* before a master or auditor, where the whole matters, upon both sides, are examined, stated, and balanced" (Gilbert on Evidence, p. 192; and see also Trials per Pais, p. 401; *Nasworthy* v. *Wyldman*, 1 Mod. 42; *Lincoln* v. *Parr*, 2 Keb. 781; *Scott* v. *Macintosh*, 2 Camp. 238). But the action of account was intricate in its course of procedure, dilatory, expensive, and moreover did not reach all cases of accounts; so that a bill in equity for an accounting was preferable. This action therefore fell into disuse, and the practice arose in England of bringing *indebitatus assumpsit* in place of it, the parties usually consenting where the account was obviously too complicated to be tried by a jury, to refer it as in equity, and finally the usage became so general that it was at last held, disregarding the old cases, that *indebitatus assumpsit* would lie, no matter how numerous the items in the account, the practical effect of which compelled parties to consent to refer where the accounts were long or complicated (*Tomkins* v. *Willsheare*, 5 Taunt. 431; *Arnold* v. *Webb*, Id. note).

In the colony of New York the same result took place at an earlier period. It was found not only that this action would not reach all cases of accounts, but also that the course of procedure in it could not be adapted to a trial by jury, which was obligatory in the colony, as I have said, by the Charter of Liberties and Privileges, for in this ancient action there were two judgments: *first*, that the defendant account, or as it was called, *quod computet*, upon which the court assigned two auditors, who were usually officers of the court, who examined the parties under oath respecting the account, a practice which did not exist in other common law actions, and there might be a new pleading before the auditors of matter in discharge of the defendant's liability, which, if the plaintiff denied, an issue was created, which the auditors certified to the court, by whom a *venire* was awarded to try it, and if that issue was found for the

plaintiff, or if, by the examination before the auditors, any amount was found to be due by the defendant, there was a second judgment, that he pay to the plaintiff the sum found by the auditors to be due (*Godfrey* v. *Saunders*, 3 Wils. 73, 88 to 118; 4 Anne, ch. 16, § 27; Wyche's Practice, 14; Coke Lit. 90, b.; *Williams* v. *Lee*, 1 Mod. 42). Such a procedure as this was wholly inapplicable to the trial of the issues of fact joined in an action by a jury, and as the remedy in equity was then but imperfectly understood in the colony, the action of *assumpsit* was resorted to as a necessity, and matters of account appear to have been tried in that form, before a jury, down to 1768, when the investigation of accounts before juries proved to be so inconvenient and unsatisfactory that a statute was passed in that year establishing our present mode of trial before referees.

No better exposition can be given of what was intended by this enactment than by quoting the preamble of this statute, which shows the nature of the mischief and the remedy that was intended to be applied. It is in these words: "Whereas, instead of the ancient action of account, suits are of late brought in *assumpsit*, whereby the business of unraveling long and intricate actions of accounts, most proper for the deliberation and examination of auditors, is now cast upon jurors, who at the bar are more disadvantageously circumstanced for such services, and this burden upon jurors is greatly increased since the law made for permitting discounts in support of a plea of payment, so that, by change of the law and practice above mentioned, the suits of merchants and others upon long accounts are exposed to erroneous decisions, and jurors perplexed and rendered more liable to attaints, and by the vast time necessarily consumed in such trials other causes are delayed and the general course of justice is greatly obstructed." The statute then provides that if, in a suit in the Supreme Court, it shall appear probable that the trial will require the *examination of a long account* on one side or the other, the court may, without the consent of the parties, at its discretion, refer the cause to referees, who shall be three persons nominated by the court, &c. (2 Van Schaick Laws of New York, pp. 517, 607, 643), which was, in fact, go-

ing back to the old Dutch practice. This act was continued by successive enactments until the American Revolution, and was made applicable to inferior courts, and having expired during the Revolution, its provisions were renewed, almost in the same words, by the act for the amendment of the law passed in 1788 (2 Jones, 2; Varick's Laws of New York, p. 270, § 2), which was continued in the Revised Laws, and afterwards embodied, with some modification, in the Revised Statutes.

I have given this brief account of the way in which references came to be adopted in this State in actions requiring the examination of long accounts, and what they were intended to remedy, because it has hitherto been but imperfectly understood, Judge Denio, in *Van Marter* v. *Hotchkiss* (1 Keyes, 586), where the point was directly involved, not being able to say whether references of this kind existed or not before the adoption of the State Constitution of 1778, and because, of late years, the courts have rather facilitated this mode of trial, instead of strictly confining it to cases where it is indispensably necessary—for it greatly protracts litigation, is dilatory, expensive, and moreover liable to abuses to which a trial by jury is not ordinarily subject.

In the present case, the question to be tried upon the pleadings, as I understand them, is, whether Campbell & Co., who have failed to pay over the proceeds of the sales, were the agents of the plaintiffs or of the defendants. If they were the agents of the plaintiffs, then their accounts of sales, which, it was admitted upon the argument of the appeal, was received by the defendants through the plaintiffs, would be conclusive upon the plaintiffs; and if they were not, but were the agents of the defendants, then it is wholly immaterial in the case what amount the whole of the shipments sold for.

But there is a further reason why a reference in this case should not have been ordered. Neither by the Code, nor by the law as it existed before it, is a party entitled to a reference, even though a long account has to be examined, if the investigation will also require the decision of a difficult question of law. In this case the amount involved is about $20,000, and enough has been disclosed upon this motion to show that the

question whether a loss to that large amount is to fall upon the defendants or upon the plaintiffs is one that may, upon the facts, be very difficult to determine as a question of law. In view, therefore, of the nature of the question and the magnitude of the amount to the defendants, they should not be compelled, because the plaintiffs are willing or wish it, to go before a referee for the decision of such a question; but, on the contrary, where they desire it, ought to have, in the decision of it, the benefit of the knowledge and experience of a judge of the court and the united opinion of the twelve minds that constitute a jury (*Wheeler* v. *Falconer*, 7 Robt. 45; *Goodyear* v. *Brooks*, 4 Id. 682; *Dewey* v. *Field*, 18 How. Pr. 439; *Ives* v. *Vandewater*, 1 Id. 168; *Shaw* v. *Ayres*, 4 Cow. 52; *Lusher* v. *Walton*, 1 Cai. 150; *Law* v. *Hallet*, 3 Id. 82; *Adams* v. *Bayles*, 2 Johns. R. 374; *Salisbury* v. *Scott*, 6 Id. 329; Code, § 291).

There have been conflicting decisions upon the point whether an order directing a reference was appealable. In *Turner* v. *Taylor* (2 Daly, 282), we held that it was, because, if decided erroneously, it took away a substantial right—the right of trial by jury—and the question is now set at rest by the decision of the Court of Appeals, that such an order can be reviewed upon appeal (*Kain* v. *Delano*, 11 Abb. Pr. N. S. 29; *Walsh* v. *Darragh*, 52 N. Y. R. 590).

The order should therefore be reversed.

Loew and Larremore, JJ., concurred.

Order reversed.

ABRAM J. DITTENHOEFFER *against* JOHN D. LEWIS.

In an action to recover for services as an attorney and counsel, in which the performance of all the services (but not their value) was admitted, except as to two separate and distinct items, as to which the statute of limitations was pleaded: *Held,* that the trial of the issues did not require the examination of a long account, so as to allow a compulsory reference to be ordered.

The defendant having in his answer denied the performance of the services, as well as their value, he was allowed on the appeal from the order of reference to stipulate to admit their performance on a trial before a jury, and thereupon the order of reference was reversed.

APPEAL by defendant from an order of this court made at special term, directing (against the defendant's opposition), a reference to hear and decide the issues, on the ground that the trial would require the examination of a long account.

The action was brought to recover $5,000 for the services of the plaintiff as attorney and counsel, and the plaintiff served a bill of particulars, which extended over a period of several years, and included about thirty items.

The defendant answered—1, by denying any indebtedness; 2, by a general averment of payment in full for all services rendered by plaintiff; 3, by setting up the statute of limitations.

The court at special term held that the case came within the rule laid down in *Schermerhorn* v. *Wood* (4 Daly, 158), and therefore granted the motion to refer, but intimated that had the services, value, &c., been admitted, and a receipt or release in full been relied on, that there could be no ground for a reference, until the issues as to payment had been disposed of; but that under the pleadings the motion must be granted.

On the hearing of this appeal, the attorney for the defendant therefore filed a stipulation, that on the trial of the issues before a jury he would admit that the plaintiff performed the services detailed in the bill of particulars, and that such services were rendered at times therein specified, except as to the items "from September 24th, 1864, to February 28th, 1865, $500,"

and the items "from June, 1864, to March, 1865, $375," and as to those items he insisted that they were barred by the statute of limitations.

The item of $500, as set out in the bill of particulars was for "attending A. B. on same matter" (suit of *Hammond* v. *Lewis*), "numerous other attendances on consultations with defendant and other persons in relation to this business, preparing various affidavits and papers in relation to this matter, and finally settling the same—extending over a period of four months, and up to February 28th 1865."

The item of $375, as set out in the bill of particulars was for "numerous attendances and consultations about the case of Anderson and the other case, and about various other parties, letters, &c., a period from the month of June, 1864, to May, 1865."

John A. Foster, for appellant.

Runkle & Englehart, for respondent.

Daly, Chief Justice.—The stipulation filed by the defendant admits that all the services mentioned in the bill of particulars were rendered at the times therein stated, except two items in the bill (of $500 and $375), to which the defense of the statute of limitations is set up. This disposes of the question of the plaintiff's right to a reference. The two items excepted relate each to distinct subject-matters, and do not in themselves constitute an account. They are not even in the bill separated into items, and all that the plaintiff will have to show is what he did under these two heads, and whether what he did in one case was worth $500 and in the other $375. All the other services being admitted, he will merely have to prove their value, which he may do by proving the value of each item or the value of the whole collectively. An account is not involved, because a number of items or distinct facts will have to be proved (*Turner* v. *Taylor*, 2 Daly, 282; *Sharp* v. *The Mayor &c. of New York*, 18 How. Pr. R. 213; *Thomas* v. *Reab*, 6 Wend. 503; *McCullough* v. *Brodie*, 13 How. Pr. 346), and that

is all that there is in this case to constitute an account. The order directing a reference should be reversed.

LARREMORE and LOEW, JJ., concurred.

Order reversed.

RICHARD COUNSEL *against* THE VULTURE MINING COMPANY OF ARIZONA.

Defendants having agreed to pay plaintiff for his services "at the rate of sixty dollars per month in gold *bullion*, valued at sixteen dollars per ounce in gold coin of the United States:" *Held*, that the plaintiff's wages were payable in money, and that he could sue for them without making demand.

The derivation and meaning of the term "bullion," considered and explained.

Where payment is to be made in anything besides money, and it appears, or is necessarily implied from the terms of the contract and the nature of the articles to be received in payment, that it was the intention of the parties that the debtor is to deliver them at his residence, or otherwise when requested by the creditor, then a special request to deliver them must be made to the debtor before suit is brought, but in all other cases no demand is necessary before suit for a debt. *Per* Chief Justice DALY.

APPEAL by defendants from a judgment of this court entered on the decision of a judge after a trial before him without a jury.

The complaint alleged that the plaintiff had worked for the defendants for three years and six months, under a contract with the defendants to pay him "at the rate of sixty dollars per month in gold bullion, valued at $16 per ounce in gold coin of the United States," and that there was a balance due him of $1,417 55 in gold coin of the United States, with interest from July 20th, 1872. No demand of payment was alleged. On the trial the defendants admitted the allegations of the complaint to be true, but insisted that they did not constitute a cause of action. No evidence was offered by the defendants,

and the court ordered judgment for the amount alleged in the complaint to be due.

W. S. Logan, for appellants, argued that the contract of the defendants was to pay the plaintiff in merchandise, and that a demand was necessary before suit brought, and cited *Lobdell* v. *Hopkins*, 5 Cow. 516; Chipman on Contracts, 49; Parsons on Contracts, 5th ed. p. 651; *Smith* v. *Leavenworth*, 1 Root, 209; *Bach* v. *Owen*, 5 Term Rep. 409; *Chandler* v. *Winship*, 6 Mass. 310; *Benner* v. *Executors of Howard*, Taylor's N. C. Rep. 186; *Moore* v. *Hudson River R. R. Co.* 12 Barb. 186; 2 Kent's Com. 505.

Wehle & Rowan, for respondent.

Daly, Chief Justice.—I think that the reason which dispenses with the necessity of a demand before action brought, where the debt is due and is by the contract payable in money, applies in this case. If the payment is to be made in money, it is the duty of the defendant, when the debt is due, to seek the plaintiff, in order to make the payment (*Goodwin* v. *Holbrook*, 4 Wend. 379; 2 Kent's Com. 506). Where a person contracts generally to pay a sum of money, he is liable to the creditor everywhere (*per* Bayley, J., in *Sanderson* v. *Bowes*, 24 East, 500), and consequently a tender or offer to pay before suit brought, with a deposit of the amount due in court, so as to be relieved from the payment of the costs of the suit, is all that is available to the defendant in the action (*Birks* v. *Trippet*, 1 Sand. R. 42, note 2; *Pether* v. *Skelton*, 1 Str. 338; *Whitlock* v. *Squire*, 10 Mod. 81; *Fenton* v. *Gondry*, 13 East, 459).

But if the payment is to be made in specific articles, such as grain, timber, produce, groceries or the like, then a demand may be necessary, for the reason given by Coke, that he who is to perform is not bound to carry the property about, seeking the other party, but it is for the other to go and get it, or to appoint where he will receive it, that it may be delivered to him (Coke Lit. 210 b); and in the same note Coke marks what

he calls the "ducisitic" between money, which in his time meant gold, silver or copper coin, and "things ponderous, or of great weight."

The agreement in the present case was to pay the plaintiff at the rate of sixty dollars per month, in gold bullion, valued at $16 per ounce in gold coin of the United States, and board and lodge him; and the averment is, that under this agreement the plaintiff worked for the defendants for the period of three years and six months, when there was a balance due him of $1,417 45 in gold coin of the United States, with interest on the same from the 20th of July, 1870.

In my judgment, this was an agreement for the payment of money within the meaning of the rule which requires a demand where payment is to be made in specific articles, but dispenses with it when the payment is to be made in money. Contracts for the payment of a debt or obligation in specific articles are of exceptionable occurrence; the cases relating to them are not very numerous; they are chiefly in this country, and were most of them determined at a period when such contracts were more common than they are now.

They are cases in which the specific articles were, either by the express terms of the contract deliverable upon demand, or or where a demand was necessarily implied, the contract being silent both as to the time when, or as to the place where, the articles were to be delivered; or where, from the nature of the specific article or articles and the terms of the contract, it was manifest that the article was to be delivered at the obligor's residence or place of business, as where the agreement is to pay in *farm produce*, which should be demanded of the debtor at his farm before he can be said to be in default, or where, from the bulky or peculiar nature of the article, it is the duty of the obligor to inquire, and of the creditor to inform him, where it is to be delivered (*Smith* v. *Leavenworth*, 1 Root, 209; *Benner* v. *Howard*, Taylor's N. C. R. 186; *Robbins* v. *Luce*, 4 Mass. 474; *Greenwood* v. *Curtis*, 6 Mass. 364; *Thomas* v. *Roosa*, 7 Johns. 461; *Slingerland* v. *Morse*, 8 Id. 472; *Lobdell* v. *Hopkins*, 5 Cow. 516; *Ewing* v. *French*, 1 Blackf. 170; *Bach* v. *Owen*, 5 T. R. 409; *Russell* v. *Ormsbee*, 10 Verm.

274; *Downer* v. *Frizzle*, Id. 541; *Sheldon* v. *Skinner*, 4 Wend. 528; *Goodman* v. *Holbrook*, Id. 377; *Lamb* v. *Lathrop*, 13 Id. 97; *White* v. *Perley*, 3 Shep. 470; *Bean* v. *Simpson*, 4 Id. 49; *Howard* v. *Miner*, 7 Id. 325; Chipman on Contracts for the Payment of Specific Articles, 26, 27, 49; 2 Kent's Com. 505; 2 Parsons on Contracts, 659, note, 5th ed.)

It is somewhat difficult to say what these cases collectively determine; but I think substantially that it amounts to this, that where it appears, or is necessarily implied from the terms of the contract and the nature of the articles that are to be received in payment, that it was the intention of the parties that the debtor is to deliver them at his residence, or otherwise, when requested by the creditor; that a special request to deliver them must be made to the debtor before he can be sued for the non-performance of the contract.

It is argued that such is the case here, the agreement being to pay in bullion, which it is urged is a specific article, bullion being merchandise. But in the same sense coin may be regarded as merchandise; for it is not its coinage which makes it the standard by which other commodities are measured, but its intrinsic value in the markets of the world as a precious metal. The precious metals are adopted as the general medium of exchange, because they have in themselves an intrinsic value, being used for many purposes, are produced in nearly equal quantities, at nearly equal cost, are portable and comparatively indestructible, and they have this value coined or uncoined; for the stamp which the government impresses upon the coin is simply a guaranty of its weight and fineness. Bullion, when the word is used in a financial sense, for it has other meanings (Nares' Glossary, ed. of 1872; Wedgwood's Eng. Etymology), imports uncoined gold and silver, either smelted, refined, or in the condition in which it is used for coining, and has, from the earliest period, been associated with or employed as a term denoting money. It is derived from the French word *billon*, which Savary, in his *Dictionnaire Universal de Commerce*, defines as a term for money, "*Terme de Monnoye*;" and one of the earliest English authorities upon those words that are derived from the French, Cotgrave, in

his French and English Dictionary of 1632, defines *bullion*, "money, *Monnoye de billon.*" Bayley, more than a century afterwards, defines it in his English Dictionary of 1763, "money having *no stamp upon it;* and our own contemporary authority, Webster, says, "the word is often used to denote gold and silver *coined* and *uncoined*, when reckoned by weight and in mass, including especially foreign or uncurrent coin" (Webster's Dict. Unabridged of 1864); and Locke, in his paper on Raising the Value of Money, so employs the word in this passage, "Foreign coin hath no value here for its stamp, and our coin is *bullion* in foreign countries."

In France, "*billon*" is used not only for coin, and for the material before it is coined, but also for the mint or place where the precious metals are sent to be coined (Bescherelle Dictionnaire Universel de la Langue Francais); and bullion was formerly used in this sense in England (Wedgwood's Dictionary of English Etymology, p. 112; 27 Edw. III, st. 2, c. 14; 4 Hen. IV, c. 10). That the words "*billon*" and "*bullion*" should be associated with the idea of coin and used as terms to express it, very naturally follows from their etymology, both being derived from the Latin "*bulla*," the name of the leaden seal which is affixed to the Pope's ordinances or decrees, imparting to them the term by which they are known of Papal Bulls. *Bulla* in the Latin meant any small object rounded by art, such as a boss or stud in a girdle, and was originally the small thin circular plate of gold or other metal, with some insignia or device engraved or stamped upon it, which was worn suspended from the neck by the children of Roman patricians as their distinguishing mark, and afterwards by all Roman children who were of free birth. From this origin it came in time to be used in the Latin for the seal hanging by a band to a legal instrument, or to the executive decrees of sovereigns or other public functionaries, as well as the term for the matrix or die with which a seal was impressed or a coin was stamped (Wedgwood's Dict. Eng. Ety. p. 112; Milman's Hist. of Latin Christianity, Book XII, c. XI; Smith's Greek and Roman Antiquities, *bulla;* Phillip's New World of Words, *bull*; Andrew's Lat. Lex. *bulla*, 2; Johnson's Dictionary, quarto, II ed.

bull; Bailey's Dict. *bull*, *golden bull*, 2d & 20th eds.; Brandes' Dict. vol. 1, p. 331).

It is stated in the defendants' points that the defendants are engaged in mining gold in Arizona, 3,000 miles from this city and 1,100 miles from San Francisco; that money there is scarce, but uncoined gold is plenty; that to enable the defendants to pay their workmen in money, or coin, they would have to send it over this long distance to have it coined and transport it back at great cost and delay, and therefore they pay in bullion; it being obviously the intention of the parties in this agreement that the bullion should be paid at the mines, and that the obligation was upon the plaintiff to go to the mines and demand it. I draw from this statement, however, a different conclusion, which is, that having the material whereof money is made in great abundance, there was no occasion there for coin or bank bills, it being more convenient to use bullion as a circulating medium, and that to do so, its value was fixed in the words of this agreement, "at $16 per ounce *in gold coin of the United States*," which was in effect treating it as money. In other words, that the plaintiff's wages were sixty dollars a month, payable in bullion, it being there the circulating medium, which was in reality making them payable in money.

The judgment should be affirmed.

Larremore and J. F. Daly, JJ., concurred.

Judgment affirmed.

William J. Hardenburgh *against* William Cockroft.

Defendant's witness having testified that while standing at the point A., he had overheard a conversation carried on at the point B., the plaintiff, in order to impeach him, was allowed to ask a witness who had examined the ground, but who was not present at the time the conversation was alleged to have taken place, whether, in his judgment, a conversation carried on at point A. could be heard at point B., but was not allowed to ask the witness in regard to

experiments he had made to determine this fact: *Held*, that there was error, in receiving as material evidence the opinion of a witness who saw and heard nothing of the occurrence, *i. e.*, the alleged conversation, concerning which his testimony was offered; and 2d, in receiving as material evidence an opinion from a witness who was not permitted to state any facts within his knowledge on which his opinion was based.

APPEAL by defendant from a judgment of this court entered on the report of a referee.

The action was brought to recover a balance alleged to be due for work done and materials furnished by the plaintiff for the defendant in building a green house and grapery, and doing other work on defendant's premises.

One of the questions in issue was as to the terms of the contract under which the work was done. The defendant testified to a conversation had by him with the plaintiff, in which the terms of the contract had been agreed upon, and then called one Kemp, his gardener, who testified to having overheard the conversation.

The plaintiff then endeavored to impeach Kemp's testimony, by showing that he could not have overheard the conversation while standing at the place at which he testified he was when he heard it; and for this purpose called several witnesses, who were acquainted with the localities, and asked this question: "In your judgment, could a conversation carried on at the vegetable vaults or root house be heard by a person standing in the locality formerly occupied by the tool house?"

Against the objection of the defendant the question was allowed, and the witnesses testified that, in their opinion, such a conversation could not be overheard. Before asking this question, however, the plaintiff's counsel put to each witness several questions as to experiments made by him, in order to determine the possibility of overhearing a conversation under such circumstances; but, upon the objection of defendant's counsel, the referee refused to allow these questions to be answered.

A. J. Vanderpoel, for appellant.

John E. Burrill, for respondent.

J. F. Daly, J.—There are three classes of cases in which the opinions of witnesses may be given in evidence: First, on questions of skill, science, or trade, where the witnesses are experts; second, on questions of identity, as of persons, handwriting, and the like; and third, on questions concerning the condition and situation of persons, things, or places, where, from the nature of the subject to be investigated, it cannot be described in language so as to enable persons not eye-witnesses to form an accurate judgment in regard to it (*De Witt* v. *Barly*, 17 N. Y. 342; *People* v. *Eastwood*, 14 N. Y. 566; *Trelawney* v. *Coleman*, 2 Stark. 191; *Jameson* v. *Drinkald*, 12 Moore, 148; *Gibson* v. *Gibson*, 9 Yerg. 329; *McKee* v. *Nelson*, 4 Cow. 355).

The questions put to the witnesses Smith and Daniels, as to whether, in their judgment, a conversation carried on in an ordinary tone of voice between two persons, at the vaults on defendant's premises, could be heard by a person standing at the locality formerly occupied by the tool house—not involving any question, 1st, of science, skill, or trade; nor, 2d, of identity—must, if properly allowed by the referee, fall within the third class of cases above mentioned, where opinions may be given in evidence. This class is certainly large and difficult of definition and limitation; but, it seems to me, if extended to the utmost reasonable bounds, cannot cover the questions above referred to. The opinion of the witnesses Smith and Daniels were offered by the plaintiff to show that a conversation alleged to be heard by Kemp, a witness for defendant, could not have been heard by him, if such conversation took place between plaintiff and defendant at the spot he testified it did, and he stood at the time in the place he said he was. Neither Smith nor Daniels were present at the time and place of the alleged conversation. They went to the place afterwards and examined it, and Daniels measured the distance from the vaults to the former locality of the tool house. The referee refused to allow the witnesses to state what experiments they made then and there to test whether a conversation could be heard at one spot, if carried on at the other; but allowed them to give their opinion as to whether such a conversation, if

carried on in an ordinary tone of voice, at the vaults, could be heard at the locality of the tool house. In other words, the witnesses were allowed to give their opinions, but the facts on which the opinions were founded were excluded. Now, the rule is, that if the opinions of witnesses are founded on illegal evidence, they ought not to be listened to; if founded on legal evidence, that evidence ought to be laid before the tribunal, which the law presumes to be at least as capable as the witnesses of drawing from the facts any inferences that justice may require (Best on Ev. § 511, 5th edition). It would seem, therefore, that there was some inconsistency in excluding as improper the facts on which the witnesses Smith and Daniels based their judgment, and yet allowing them to give such judgment in evidence. But it may be said that this was such a case as is contemplated by the opinion in *People* v. *Eastwood* (*supra*), where the fact is better ascertained by the opinion of the witness than by his description of what occurred. Let us, therefore, examine the cases cited as within that rule. In *The People* v. *Eastwood*, a witness was allowed to state whether, in his opinion, the prisoner was *intoxicated* at a certain time. The court say: "It was merely a statement of what the witness saw; that whether a person be drunk or sober is better ascertained by the opinion of persons who saw him, than by a description of his conduct; and that objection would be good, if the opinion were given as to facts not within his own observation." In the present case, the witnesses Smith and Daniels were not present at the alleged conversation between plaintiff and defendant, did not hear the tone in which it was carried on, did not see the postures of the parties, did not pretend to know the direction of the wind, nor the state of the atmosphere; in fact, neither saw nor heard anything of that act which they could describe to the court, and on which they could give an opinion. In *De Witt* v. *Barly* (*supra*), the witness was allowed to give his opinion as to the mental imbecility of a person. The court say that the appearances which indicate imbecility or intoxication cannot be so perfectly described in words as to enable persons not eye-witnesses to judge with accuracy on the subject. The witness in that case *saw the con-*

duct of the person whose imbecility was in question, and, although a person not an expert could not testify as to the derangement of mental powers otherwise vigorous, his opinion may be given in cases of idiocy or imbecility arising from natural decay. In *McKee* v. *Nelson* (*supra*), which was an action for breach of promise, a witness *who had observed plaintiff's conduct and deportment* towards defendant, was allowed to testify whether, in her opinion, plaintiff was sincerely attached to defendant. In *Trelawney* v. *Coleman* (*supra*), which was an action for *crim. con.*, a witness who had observed the parties was allowed to give her opinion as to the degree of affection entertained by the wife for the husband.

And so in cases where the question arises as to the state of an unproducible portion of real evidence, as the appearance of a building, or of a public document which the law will not allow to be brought from its repository, the opinions of witnesses may be given (Best on Ev. § 517, 5th ed.)

In all these cases it will be seen that the witness giving an opinion has seen the very thing, person, or occurrence concerning which the opinion was admitted. In every case the facts on which the opinion was founded were given in evidence, and the opinion was then received *ex necessitate* as the only means of arriving at a just conclusion. The law does not favor the admission of evidence of opinions but from necessity alone, and the witness must state the facts on which he bases it. The court is entitled to both the facts and the opinion—the facts in order to judge of the value of the opinion, and the opinion in order to have under oath the judgment of the eye-witness on the occurrences within his knowledge. In this case the error of the referee consisted in, 1st, receiving as material the opinion of witnesses who saw and heard nothing of the occurrence—*i. e.*, the alleged conversation between plaintiff and defendant, concerning which their testimony was offered; 2d, receiving as material evidence an opinion from witnesses who were not permitted to state any facts within their knowledge on which their opinion was based. He excluded from his consideration the facts, and yet received in evidence the opinion; and yet the value of that opinion could only be determined from the facts.

It was immaterial that the defendant objected to proof of the experiments made by the witnesses, because the case is not analogous to that where the opinion of experts is received after the foundation for the opinion—*i. e.*, the experience and knowledge of the experts is objected to and excluded. The witnesses were not experts, and it was not a question of skill or science. It is a mere naked question whether witnesses not shown to be cognizant of any facts in dispute should be allowed to give an opinion affecting the credibility of testimony previously introduced to prove those facts. In the case of *Renwick* v. *The N. Y. Central R. R. Co.* (1 Transcript Appeals, 47), where a witness, who was a passenger on a train, was called to show that there was an omission of the requisite signal, and who testified that he did not hear any whistle or bell, was asked, "Could you have heard the sound of the whistle or bell if one had been rung?" the court say that the question should be construed as merely asking whether the witness was so situated that he could have heard, and in that view admissible. The question called for an opinion of the witness, but he was present at the time of the occurrence which was the subject of the action, and he testified to his own hearing, and did not offer an opinion as to any other person's sense.

In this case the opinion was received as materially affecting an occurrence which the witnesses neither saw nor heard, and is not within any rule which permits opinions to be given in evidence.

The objection and exception having been duly taken by defendant, the judgment must be reversed and a new trial ordered, costs to abide the event.

Daly, Ch. J., and Loew, J., concurred.

Judgment reversed.

CHARLES DEVLIN *against* SAMUEL N. PIKE AND OTHERS.

In an action for the conversion of certain barrels of whiskey, the plaintiff was allowed to recover as damages the highest market price of the same quality of whiskey between the time of the conversion and the time of the trial:

Held, error, and that as the price had fallen between the time of the conversion and the time of the commencement of the action, the plaintiff should not have been allowed to recover more than the value of the whiskey at the time of the conversion, and interest to the time of trial.

The measure of damages in actions for the breach of an agreement to return or replace property, or to deliver it, where the price has been paid, or for the conversion of it in cases where there is no ground for exemplary damages, considered and stated. *Per* Chief Justice DALY.

It seems that where the plaintiff, with the intention of defrauding the United States Government of the revenue duty, purchased whiskey and caused the indicia of title to be made out in the name of a fictitious person, and delivered them to his agent, to be used in carrying out the scheme of defrauding the Government, and the agent fraudulently induced another person to pretend that he was the person named as the purchaser of the whiskey, and this person having received from the agent the indicia of title, then sold the whiskey to defendants, who purchased it in good faith and for value: *Held*, that plaintiff was estopped from claiming that he was the owner of the whiskey. *Per* Chief Justice DALY.

APPEAL from a judgment of this court entered on the decision of a judge thereof after a trial before him without a jury.

The action was brought to recover the value of five hundred and fifty barrels of whiskey, which the plaintiff alleged he had purchased from the defendants King & Story, and which the defendants Pike & Co. also claimed by purchase from the defendants King & Story while it was stored in the warehouse of the defendant Mullany. The facts are fully stated in the opinion of Chief Justice DALY.

DALY, Chief Justice.—Independent of any other question in this case, a new trial must be granted for error in respect to the measure of damages. The judge found as a conclusion of law that the defendants were liable for the highest price, or market value, which whiskey of the same description attained from the

time of the conversion. In adopting this rule as the measure of damages, the judge simply followed, as he was bound to do, the decision of the Court of Appeals in *Markham* v. *Jaudon*, 41 N. Y. R. 236, in which it was held that the rule of damages in an action for the conversion of railroad stock was the highest market value of the stock *between the conversion of it and the trial.* But this decision has, after a careful examination and review of the authorities, been deliberately overruled by the Court of Appeals in the recent case of *Baker* v. *Drake*, all the judges concurring (53 N. Y. 211).

The whiskey in the present case was purchased by the plaintiff at 40 cents a gallon. It was bought by the defendants S. N. Pike & Co., eleven days after the plaintiff purchased it, at 32 cents, which that firm considered then to be about one cent below the market price; but it appearing that the market price of whiskey of that description had been as high as 77 cents a gallon between the time of conversion and the trial, the judge adopted 77 cents a gallon as the measure of the plaintiff's loss.

The suit was commenced on the 19th of September, 1867, about ten days after the conversion; so that the injury which the plaintiff sustained could then have been repaired by the purchase of an equal quantity of the same kind of whiskey for about half the amount he has recovered in this action. It could have been bought, down to the time of the commencement of the suit, at as low a price, at least, as the plaintiff paid on the 23d of August, which was 40 cents a gallon, the whole amount paid by him upon the purchase being $13,139; whereas, for the conversion of it about two weeks afterwards he received $25,293 27, or, as I have said, nearly double the amount he could have bought a like quantity for when he commenced this suit. The case, therefore, furnishes the same illustration that was used by Rapallo, J., in *Baker* v. *Drake* (*supra*), to show the unreasonableness and injustice of the rule.

It was a serious question in the case of *Baker* v. *Drake*, whether the action was for the conversion of the stock, or for a breach of a special contract; but for the purpose of reviewing the correctness of the rule laid down at the trial, as

the measure of damages, they treated the case as if the action were one brought for the conversion of personal property, remarking that the rule of damages should not depend upon the form of the action; that, in civil actions, the law awards to the party injured a just indemnity for the wrong which has been done him, and no more; whether the action be in contract or in tort, except in those special cases in which punitory damages are allowable. It was, therefore, a direct determination by the Court of Appeals, that in actions for a conversion, the highest price which the article has reached in the market, between the conversion and the trial, is not in all cases the just measure of damages. In this case, as in that, the same kind of property had, after the commencement of the action and before the trial, undergone alternate elevation and depression, so that the reasoning of the court and the determination they made is, I think, entirely applicable in the present case.

In the case before the Court of Appeals (*Baker* v. *Drake*), the defendants had purchased shares of stock for the plaintiff, upon the deposit with them by him of what is known as a margin. They afterwards sold the stock contrary to the terms or understanding upon which they had agreed to carry it, and the plaintiff recovered, as the measure of his damages, the highest price which the stock had reached during a course of successive elevations and depressions, between the time of the sale of it by the defendants and the time of the trial, which made a difference to the amount of $18,000, for which the plaintiff had judgment.

In reversing the judgment and ordering a new trial, the court held: 1. That this was a conjectural loss, founded upon the supposition that the plaintiff would not only have supplied the necessary margin, and caused the stock to be carried through all its fluctuations, until it reached its highest value; but that he would, as "one endowed with the supernatural power of prescience," seize that precise and fortunate moment to sell; thus avoiding the subsequent decline, and realizing the highest profit. 2. That in respect to such a transaction, which was as likely to result in loss as in profit, an inflexible

rule that the highest amount of profit which, up to the time of the trial, might possibly have been obtained under the most favorable circumstances, was to be awarded to the plaintiff, without regard to the probabilities of his realizing such profits or not, was a wide departure from the elementary principles upon which damages are allowed; which is an amount sufficient to indemnify the party injured for the loss that is the natural, reasonable and proximate result of the wrongful act, and which a proper degree of prudence on the part of the plaintiff could not avert. 3. That if he were deprived of the chances of a rise in the price, it was accompanied with the corresponding chances of a decline, and of his not availing himself of the rise at the precise moment. 4. That when informed of the sale of the stock by the defendants, the plaintiff could have notified them to replace it, and if they failed or refused to do so, that his remedy was to do it himself, charging them with the loss, if any; and that the advance in the market price of the stock from the time of the sale, *up to a reasonable time within which to replace it*, would afford the plaintiff complete indemnity.

Much of what is here said is applicable to the present case. From the time of the conversion to the time of the trial, whiskey of the same description fluctuated from 17 to 77 cents a gallon; and awarding the plaintiff the highest price, as the measure of his damages, was assuming what was assumed by the court below, in *Baker* v. *Drake*, that, but for the conversion, the plaintiff would have realized the highest price that the article attained. Whiskey of this description declined steadily for a considerable period from the time of the purchase, by the plaintiff, of the five hundred barrels in controversy, so that there was in this, as in the case in the Court of Appeals, the feature that the purchase might have resulted in loss to the plaintiff, instead of profit; that the probability of the one was as great as that of the other, the assumption that he would have realized the highest value being purely conjectural. For a staple commodity, its fluctuation, during this period, would seem to have been relatively as great as that of the shares of stock in *Baker* v. *Drake*, and was no doubt largely influ-

enced by the taking off of the government tax of $2 a gallon upon this kind of whiskey—an event which occurred eleven months after the plaintiff's purchase. Whether, therefore, the plaintiff, had he been left in the possession of the property, would have gained or lost by his purchase, was a matter of the loosest conjecture, and the possibility that he would have gained was too uncertain to constitute a basis for the computation of damages. It was a bare contingency, and very naturally suggests the question put by Lord Abinger, in *Lee* v. *Miner*, 2 M. & W. 839—how can a verdict be found for contingent damages which might never have occurred?

In *Baker* v. *Drake*, the plaintiff never had had possession of the stock, and had paid but a small sum as a margin towards the purchase of it, the stock being held by the defendants at the plaintiff's risk, subject to the chances of its increasing or diminishing in value. It was, in fact, a stock jobbing speculation, and in that respect differs from the present case, in which the plaintiff has been deprived of property that he bought and paid for. I do not see, however, that that makes any difference in the application of the reasoning of the Court of Appeals.

The present case, in respect to the true measure of damages, more nearly resembles a class of cases, some of which are commented upon by RAPELLO, J., in *Baker* v. *Drake*, where the plaintiff has parted with stock under an agreement to return, or to replace it by other stock, within a specified time; or where the defendant refuses to deliver goods under a contract of sale, where the price has been paid; in which class of cases it has been held that the proper measure of damages at the plaintiff's option, is the value of the property at the breach of agreement, or its value at the time of the trial (*Shephard* v. *Johnson*, 2 East, 211; *McArthur* v. *Ld. Seaworth*, 2 Taunt. 257; *Downs* v. *Bact*, 1 Starkie's N. P. C. 313; *Hamson* v. *Hamson*, 1 C. & P. 412; *Owen* v. *Routh*, 14 Com. Bench, 327; *Forrest* v. *Elwes*, 4 Ves. 492; *Elliot* v. *Hughes*, F. & F. 387; *Barrow* v. *Arnold*, 8 Q. B. 279). Before adverting to the rule laid down in the cases above enumerated, it may be well to remark that they afford no countenance for the propo-

sition that the plaintiff could recover the highest price which the article reached at any intermediate day between the accruing of the cause of action and the trial, "because," says Mr. Mayne, "such a measure involves the assumption that he would have sold out upon that day, which is purely speculative profit" (Mayne on Damages, p. 83). On the contrary, in one of them (*McArthur* v. *Lord Seaforth*, 2 Taunt. 257) the plaintiff insisted that he was entitled to the highest price which the property, certain stock, had reached at any intermediate day between the day stipulated for replacing it and the day of trial; but the court refused so to increase the damages; adverting to the distinction between an advantage that he *would* and one that he *might* have derived; that is, between what was reliable, or certain, and that which was purely speculative and conjectural. And in a subsequent English case (*Startup* v. *Cortuzze*, 2 Cr. Mees. & Rosc. 165), where a portion of the purchase money had been paid, it was held that the plaintiff was not entitled to speculative damages to cover profits which he *might* have made, had the property been delivered.

There are two cases, however, in this State, where the purchase money, or a part of it, had been paid, in which the rule was carried to this unreasonable length (*West* v. *Wentworth*, 3 Cow. 83, and *Clark* v. *Pinney*, 7 Id. 681). These cases are reviewed by RAPELLO, J., in *Baker* v. *Drake*, *&c.*, who, without distinctly overruling them, states that they are questioned by high authority. Judge DUER, in *Suydam* v. *Jenkins* (3 Sandf. 614), after a very careful examination, holds that they were incorrectly decided; and, to the same effect, are the decisions in Connecticut, Massachusetts, Maine, Pennsylvania, Kentucky, Louisiana and the Supreme Court of the United States (see the cases collected in *Suydam* v. *Jenkins*, *supra*, 642, 643).

The reason given where the purchase money has been paid is, that the plaintiff cannot, with the money, go into the market and buy other goods of the like kind, and that, therefore, all fluctuation in price should be at the risk of the vendor who refuses to deliver (per RAPELLO, J., in *Baker* v. *Drake*.) This is undoubtedly so if the plaintiff can prove that he would

have realized a higher price if the goods had been delivered; but it does not follow that he must or would have realized the very highest price which the goods reached at any one time between that period and the day of the trial, and unless that can be assumed, the rule has nothing to support it, but what is conjectural and speculative. "The wrong-doer," in the language of Judge DUER, in *Suydam* v. *Jenkins*, *supra*, "must not be permitted to derive any benefit or advantage from his wrongful act;" and, consequently, if it appear that he afterwards sold the goods at a higher price than their value at the time of the breach of the agreement, or that he is still in possession of them, and they are of increased value, there is then something reliable to act upon, and their increased value in either of these cases may be taken as an exact measure of what the plaintiff has lost by the withholding of the property; but, says the same eminent jurist, "the highest intermediate value, whether the action be trover or assumpsit, ought never to be taken as the measure of damages, unless the evidence justifies the belief, *not that it might*, but that it *would* have been realized by the plaintiff had he retained the possession of the property" (per DUER, J., *Suydam* v. *Jenkins*, *supra*).

The English rule that the plaintiff has in these cases, where he has parted with the property, or paid the price, the option to take the value at the time of the breach of the agreement, or at the time of the trial, is a more reasonable one. He is, of course, entitled to recover the value of the property at the time when it ought to have been delivered to him; for clearly that is, at that time, the measure of his loss. If the article, however, which he has bought and paid for, is a staple commodity, which can readily be replaced by purchase, he may go into the market and buy an equal quantity, and if he has had to pay an increased price, that increase, added to what he has already paid, with interest upon the latter up to that time, is the measure of his loss. But he may not have the means to do this, and being kept out of the property and of his money down to the time of trial, he is entitled to such relief as will place him in *statu quo*, without requiring him to lay out a sum of money which possibly he may not possess (*Owen* v. *Routh*, 14 C. B.

336). For this reason it is a just rule, if the property is of the description ordinarily bought and sold for the purpose of traffic, and the market price of it is higher at the time of the trial than it was at the breach, that the price then, if the plaintiff has commenced his action within a reasonable time, is the proper measure of his indemnity, as it is a sum with which he can go into the market and purchase an equal quantity of property of the same kind;—the loss by the increase falls, as it should, upon the wrong-doer, and the plaintiff gets the increased value; which is in effect the same as if the property had remained in his hands instead of being withheld from him up to that time by the defendant. If the plaintiff has not commenced the action within a reasonable time, then he should be limited to the value at the time of conversion, with interest; but it may be questioned how far the rule of the increased value at the time of trial can be applied in this State, since the decision of the Court of Appeals in *Scott* v. *Rogers* (31 N. Y. 676), which will be hereafter referred to. If the property be of less value at the time of the trial than it was at the time of the breach, the plaintiff, it is true, can then purchase it for less money; but to adopt that diminished value as the measure, would be to give the wrong-doer the benefit of the difference, whilst the plaintiff has, in the meanwhile, been deprived of any opportunity of disposing of the property. Hence the propriety, in all cases, of allowing the plaintiff to recover at least the value at the time of the breach, with interest, as his additional damages.

This is not, like the last cases we have been considering, an action for the breach of an agreement. It is, at least, so far as respects the remedy which is sought in damages, what would formerly have been an action of trover brought where the defendant came innocently into the possession or control of the property, and withheld it from the plaintiff without lawful excuse. It is in effect, however, the same, a wrongful withholding of property which the plaintiff claims he is entitled to have delivered to him, and the rule in respect to the measure of damages, which is adopted in the one, would seem to be equally applicable in the other (*Scott* v. *Rogers*, 31 N. Y. 676; *Suydam* v. *Jenkins*, *supra*; *Baker* v. *Drake*, *supra*). In such an ac-

tion, where there is no ground for vindictive damages; where the question litigated simply is whether the plaintiff or the defendant is entitled to the property; where the plaintiff's recovery is strictly limited to what will be compensatory for the taking or withholding and the deprivation of all use of the property down to the day of trial; the general rule has been the value of the property at the time of the conversion, with interest, as the additional damages. (See the cases collected in *Suydam* v. *Jenkins*, *supra*.) It is not, however, an invariable one, for there may be cases in which the plaintiff should and the defendant should not have the benefit of an increase in the value of the property after the conversion; which may be illustrated by a recent case in this court, where the defendant dispossessed the plaintiff of a young horse, and shortly after the conversion the animal developed an extraordinary rate of speed, by which its value was very largely increased, and in which the plaintiff recovered a sum in damages equal to the increased value of the horse; and other cases might be suggested in which the increased value of the thing after conversion is the true measure.

In the case I have referred to of *Scott* v. *Rogers* (31 N. Y. 676), an agent in Buffalo was instructed by his principal to sell a certain quantity of wheat upon a day fixed, or send it to New York. The agent kept it over and sold it upon the next day, which was held to be a conversion, and the measure of damages adopted at the trial was the highest market price of the wheat between the time of the conversion and a reasonable time within which to bring the action, which, under the circumstances shown, was fixed at four months. The case was twice argued in the Court of Appeals, and the judgment was affirmed. The only opinion given upon the affirmance was delivered by Judge Hogeboom, who said that he considered the question reasonably well settled to allow the plaintiff the highest price between the time of conversion and a reasonable time within which to bring the action; but what adjudications he relied upon for this statement does not appear, for he cites no cases. He further remarks, that some of the cases carry the period up to the time of the trial of a suit commenced within a reasonable

time, and that as between these two periods, the time of the commencement of the suit and the time of trial, the rule is somewhat fluctuating, and he finally states that he thought that the estimate of the value of the property must *in all cases* be a reasonable time after the conversion. Not a single case is referred to throughout the opinion, except *Suydam* v. *Jenkins*, *supra*, which is upon a different point, and whilst just respect is certainly due to the opinion of a judge of the Court of Appeals, I nevertheless feel constrained to say that neither the rule which the learned judge thought must be applied in all cases, nor the reasons adduced in support of it, are to my mind at all satisfactory, whether the rule be regarded as a deduction by him from adjudged cases, or as resting upon the reasons he has given for it. The decision made by the court, which is all that is binding, is to be distinguished from the opinion, and it is simply this, that it is not error in such a case to instruct the jury that they may give the highest market price between the time of the conversion and a reasonable time within which to bring the action, the effect of which I understand to be that the plaintiff is entitled to avail himself of this rule, if it will afford a more substantial indemnity, in all actions for the conversion of merchandise ordinarily bought and sold in the market; not that it is the sole and inflexible rule which is to be applied in all actions for the conversion of personal property. I hesitate, however, to hold that the English rule of the increased value at the time of trial can be applied in this State, at the plaintiff's option, in all cases, in view not only of the decision in *Scott* v. *Rogers*, *supra*, but of the observation of Rapallo, J., in *Baker* v. *Drake supra*, that the plaintiff's remedy in that case was to replace the stock, charging the defendants with the loss, if any, and that the advance in the market price of it from the time of the sale up to a reasonable time within which to replace it, would afford the plaintiff complete indemnity. This observation may, perhaps, have been appropriate solely, and therefore possibly limited, to the circumstances of the particular case, which was simply a stock jobbing speculation; still, a doubt arises when this observation is taken in connection with the previous decision in *Scott* v. *Rogers*, *supra*, and this being

the case, it is more appropriate that we should abstain from deciding this point, and that it should be left to the court of last resort hereafter to settle whether or not the increased value at the time of trial may or may not be taken as the measure where there has been a conversion, or a failure to deliver merchandise of this description.

Leaving this question, therefore, where it is, I think as the result of the adjudged cases that the law in other respects may be stated to be this: That in actions for the breach of an agreement to return or replace property, or to deliver it, where the price has been paid, or for the converting of it, in cases where there is no ground for exemplary damages, the measure of damages is a question of law, the plaintiff's recovery being limited to what will compensate him for the loss sustained; that in all cases he is entitled to recover the value of the property at the time of the breach, or of the conversion, with interest up to the day of trial, as his additional damages; that if the property converted or to be delivered consists of merchandise which is ordinarily bought and sold in the market for the purpose of traffic, the plaintiff is entitled to recover the highest market price which that kind of merchandise may have reached between the time of the breach or conversion and a reasonable time within which to replace it, or to bring the action; that what is a reasonable time depends upon the circumstances of the particular case, and where the facts are undisputed is a question of law; that if the property has been sold by the defendant at a higher price than the plaintiff paid for it, or than its value at the breach or the conversion, the plaintiff may adopt that sum as the measure of his compensation; that if the property has permanently increased in value, that value, as ascertained and proved upon the trial, is the proper measure; that if the property at the time of the trial is of greater value than it was at the time of the breach or conversion, and the defendant is still in possession of it, the plaintiff is entitled to its increased value at the time of trial as the proper measure of his indemnity; and lastly, if the plaintiff can prove not that he *might*, but that he *would* have realized a greater sum for the property than he paid for it, or than its value at the breach or

the conversion, he is entitled to have that sum as the measure of his damage.

Mr. Mayne, in his work on Damages, p. 84, says, in respect to what is the proper measure in the cases we have been considering, that the American cases are hopelessly in conflict. He has not, I think, sufficiently appreciated the intrinsic difficulty of the subject, and that, beyond holding that the plaintiff is entitled to indemnity, it is exceedingly difficult to fix upon rules that will be general in their operation; for what will be a full indemnity to the plaintiff may, to a great degree, depend upon the circumstances of the particular case. I have attempted above to distinguish rules which may be received as having the authority of adjudged cases or the sanction of eminent judges, but it by no means follows that they will meet the exigencies of every case. They recognize a right of option in the plaintiff in the cases stated, and it is more just that he should have it when it affords a more exact measure of indemnity, than that he should be limited, as appears to be the rule in Massachusetts, to the market value at the time of conversion, as the sole and invariable measure.

Giving full effect in the present case to the rule which was applied in *Scott* v. *Rogers*, *supra*, the very highest amount which the plaintiff could recover upon the evidence was what he paid for the whiskey, 40 cents a gallon, with interest from the time of the conversion; for instead of rising, it fell in value between that time and the commencement of the action. The suit was commenced within seven days after the alleged conversion, and as there was no increase in the market value of the whiskey during that time, the plaintiff, if entitled to recover, was necessarily limited to the value at the time of conversion, with interest.

I have given this large amount of attention to this important question of the measure of damages, because as there must be a new trial it is desirable that the judge, who is to try the cause again, should, if the plaintiff is entitled to recover, be able to apply the correct rule as to the measure of damages, but also for the additional reason that questions are constantly arising in this court upon this difficult subject, so as to make it

a matter of much practical importance that the subject should be fully examined, and the law, so far as respects its administration by us, should be ascertained and agreed upon.

We have now to consider the main question discussed in the case; whether the action can be maintained at all. The facts, as either found by the judge or sustained by the evidence, are as follows: The plaintiff, whose business is that of a contractor for the grading and regulation of streets, became interested in a rectifying house. A person named Blish advised him that whiskey could be taken, rectified and made profitable by making it into Bourbon, and Blish having introduced to the plaintiff a person named Clark, who was in the whiskey business, the plaintiff, after several conversations with both of them, requested them to purchase whiskey for him, directing Blish to make the purchase in his (Blish's) name. They accordingly purchased 500 barrels of whiskey for him from the defendants King & Story, making a partial payment, the vendors crediting Blish upon their books with the purchase. Upon the payment of a further installment, Devlin, the plaintiff, was present, and, as he testified, was introduced to King & Story as the purchaser, which both King and Story in their testimony denied. When the last installment of the price was paid, Clark and Blish being both present, the vendors handed Blish the bill, which was made out to him, and he returned it, saying that he did not transfer such orders in his name; and upon being asked what name he wanted the whiskey transferred in, he conferred with Clark, and Clark, with Blish's approbation, directed the vendors to make it deliverable to the order of John Roberts. The orders upon the collector of the revenue, and upon the warehouseman, who had the whiskey in charge, were accordingly indorsed by King & Story, so as to make it deliverable to the order of John Roberts, upon his giving acceptable bonds for the payment of the tax to the government. John Roberts was a fictitious name, there being in fact no such person, the intention being to have the whiskey bonded in the fictitious name, in violation of the law of the United States, which required the whiskey to be bonded in the name of the true owner, and which was part of a scheme,

as will appear more fully hereafter, to defraud the government out of the tax, the price paid for the whiskey being but $13,139, whereas the tax upon it to the government amounted to the very large sum of $60,000.

Blish gave the paper to Clark; all that Blish had to do for the plaintiff being, as he testified, to see that the whiskey was properly gauged; that the prices were correct; and to pay the price, and then, in pursuance of an agreement between Clark and the plaintiff, to give the papers to Clark, who was to obtain the permit of removal and get the bonds for the rerectification of the whiskey, the intention being, as Blish testifies, when it was bonded, to take it to the plaintiff's rectifying house, where it was to be rectified, and being then branded by Blish, as Bourbon whiskey, it was to be returned and sold in bond.

Clark took the papers, on the evening of the day he received them, to the plaintiff. He directed the plaintiff's attention to the name of the fictitious John Roberts, and swears that the plaintiff knew that John Roberts was a fictitious name, showing that the plaintiff was a party to the scheme that was subsequently attempted to be carried out. Clark testified that the understanding with the plaintiff was that he, Clark, was to use the papers then shown to the plaintiff in passing the whiskey in bond to the plaintiff's rectifying house, or some rectifying house; that nothing was said as to how it was to be done; that he did not explain the mode of doing it, nor the necessity of security; that, as he understood, the whole transaction was left by the plaintiff with him, to do as he thought best. Clark, as he says, not having the necessary time, put the papers in the hands of one Ford, a speculator "engaged in various businesses," who, Clark says, "was working with me in this kind of matters," and who having formerly been a clerk in a bonded warehouse, was more familiar than he was with the routine of the business. He says he gave Ford no particular instructions, except to get the whiskey out of bond for the purpose of rerectification. He says: "I put the papers into his hands to effect a certain purpose, and I guess I told him who John Roberts was. I think I told him that he was a fictitious person." He further says that he

told him that the whiskey had been purchased to have it rectified, that it was to be removed to a rectifying house, but did not tell him where; that the bond had to specify where the rectifying establishment was; but that was a matter for Ford "*entirely to find out;*" that the whole thing was left to him, and that he (Clark) did not understand that it was necessary for Ford to go to any particular rectifying house.

Ford testified that Clark spoke to him about this lot of whiskey before it was bought, and that when he received the papers, Clark told him that they were the papers of the lot of whiskey of which he had previously spoken to him; to have the matter arranged as soon as he could; that "if *that lot could be fixed*, he had another lot right away as soon as it was fixed—that is, if the whiskey got out of bond;" that he asked Clark who John Roberts was, and Clark told him he was a myth; to which the witness added that it was understood between Clark and himself, when he and Clark first talked about this lot of whiskey, that fictitious names were to be used; that it was understood at the time when Clark left the papers with him, that the securities were to get $150 each; that his (Ford's) compensation was to be $5 a barrel (which would be $2,500), and that he believed Clark was to have the same. That they talked about what it was to cost to get the whiskey out of bond, and that it was $20 or $30 a barrel, which the party that Clark represented was to pay. This would be $10,000 or $15,000, the tax, as I have said, being $60,000, indicating very clearly that this large sum of money was to be earned in some dishonest way.

A few days after the papers were left with Ford, a rectification bond was prepared, signed in the name of John Roberts and by two sureties. He says he told a man to get a couple of bondsmen; that he did not know who the bondsmen were, or whether they were responsible or not; that he saw them sign the bond, but had forgotten their names; that he handed the papers, with the exception of the order upon the warehouseman, which he kept, to a person to whom he was introduced in a saloon, whose name he had forgotten; that he had the name in his memorandum book, and had tried to "hunt it up two or

three times;" that he did not know whether this man signed the name of John Roberts to the bond; that he did not know whether his name was John Roberts or not; that he did not recollect; and near the close of his examination he said that he thought his name was Luttrell; that when he first talked to Clark about the whiskey, before it was purchased, an arrangement was made that it was to be got out of bond by the payment of "that amount per barrel" (which I suppose refers to the $20 or $30 per barrel previously mentioned by him), and that bondsmen *were to be hired.* He was asked if they were to be what are called *bogus bondsmen*, and his reply was, "I do not know who the bondsmen were; I do not know anything about it." The three witnesses I have referred to, Blish, Clark, and Ford, were all called by the plaintiff, so that the statement above made rests upon evidence derived from the plaintiff's own witnesses.

What was requisite under the laws and the regulations of the United States government to have the whiskey removed in bond, appears by the evidence. It was necessary to have a bond signed by *the owner of the whiskey*, and by sureties. This bond had to be presented to the collector of the tax of the district, and approved by the United States authorities, upon which the collector would give an order upon the warehouseman for the transfer of the whiskey. If it was rectified in bond, it had to be returned to the warehouse within the number of days mentioned in the bond.

Clark says that he heard afterwards that a bond was presented for the withdrawal of a portion of the whiskey, but did not hear of its being rejected. King, however, one of the vendors, after the whiskey had been fraudulently disposed of in the manner hereafter to be detailed, went with the plaintiff, at his request, to the collector, to inform him that the plaintiff was the owner, and the collector said that he was glad to find out an owner; that there had been an application made to him for the removal of a hundred barrels of the whiskey *upon fraudulent bonds*, and that he had a mind to seize the whole of it; to which King says the plaintiff did not make much of a reply.

It is very evident, upon this state of facts, that the plaintiff, acting through the instrumentality of Clark, Ford, and the person supposed to be named Luttrell, was engaged in an attempt to defraud the government out of the $60,000 tax, by getting the whiskey removed upon a fraudulent bond, to which a fictitious name was attached in place of the real owner, together with sureties hired for the occasion, of whom nobody could give any account, and that the attempt was unsuccessful. What followed was the result of the failure of this scheme, and was the retributive consequence of making use necessarily of dishonest instruments to effect a dishonest purpose—consequences which should not fall upon innocent parties, but upon the plaintiff, for whose benefit the scheme was concocted, and by whose instrumentality these agents were set in motion.

Within about a week after the purchase of the whiskey, a person called upon the vendors King & Story, having with him the gauger's certificate and the order upon the collector making the whiskey deliverable to John Roberts. He told Mr. King that he was Mr. Roberts; that he had either lost or mislaid the order upon the warehouseman, and asked if he could give him duplicates. King & Story knew nothing of the fact that John Roberts was a fictitious name. Indeed, King testified that he asked Clark who Roberts was, and that Clark said he thought he was doing business in John street. This Clark, upon being afterwards examined, denied, adding, "I think it was stated that it was an assumed name; that there was no such person existing." But the judge has found that King & Story had, up to this time, no notice or intimation that John Roberts was a fictitious person; which is sufficient upon this point. King replied that he could not give the duplicates without going to Mr. Dows, from whom they bought the whiskey; and King says that, supposing he was doing right, as the person calling had the original papers in his hands, he went with him to Mr. Dows and procured a duplicate order upon the warehouseman. King testified that this was a general custom in the trade in regard to giving duplicate orders upon warehousemen for goods in store, but, under the plaintiff's objection, he was not permitted to show what the

custom was, nor the cases to which it applied; nor that he believed the person calling upon him was John Roberts.

Having in this way obtained a duplicate order upon the warehouseman, and being then in possession of all the necessary papers for a sale and transfer of the whiskey, this person effected a sale of it to the defendants S. N. Pike & Co., through the instrumentality of a Mr. Dreyfous, a member of a firm engaged in the whiskey business. On the 3d of September, seven days after the purchase of this whiskey by the defendant, A. J. Dittenhoeffer, a lawyer of this city and an ex-judge of the Marine Court, introduced a person to a notary named Langbein as John Roberts, who made his acknowledgment before the notary to an order upon the collector for the transfer of the whiskey to the defendants S. N. Pike & Co., the notary certifying that he knew the person appearing before him to be John Roberts, the person named in the instrument of transfer and by whom it was executed, and on the 7th of September following, S. N. Pike & Co., in good faith, upon receiving all the necessary instruments of transfer, purchased the whiskey in the regular course of business for 32 cents a gallon, paying for it $10,511 49.

In two days afterwards, the plaintiff commenced this action against S. N. Pike & Co., the warehouseman Mullany, and King & Story for a conversion of the whiskey, S. N. Pike & Co., and Mullany, having previously refused upon demand to give it up to him. The action was in part for equitable relief, and an injunction was granted enjoining Mullany from delivering it, and S. N. Pike & Co. from selling, assigning, or in any way interfering with it, which injunction was dissolved upon S. N. Pike & Co. giving a bond to be answerable for any damages that might be recovered in the action. This bond having been filed, there is no longer any equitable relief to be given. The question is one of damages, and when that is the only question in the case it should be tried by a jury, unless the defendants waive it (*Bradley* v. *Aldrich*, 40 N. Y. 504; *Barlow* v. *Scott*, 24 Id. 40; *Beck* v. *Allison*, 4 Daly, 423).

Where a party has been deprived of his property by a fraudulent sale of it to another, it is no answer to his claim

that the defendant was an innocent purchaser, in the regular course of business, who paid a full consideration for it, unless the owner, through his negligence or by some inexcusable or wrongful act on his part, has been himself the means of enabling his agent, or, in this case, his instrument, to effect the fraud, by deceiving parties acting with ordinary caution (*Ex parte Swan*, 7 Com. B. 431 to 435; *Swan* v. *The North British Australian Co.* 7 Hurls. & Nor. 632 to 635; *Young* v *Grote*, 4 Bing. 258; 12 J. B. Moore, 484; *Sheffield* v. *Manchester Railw. Co.* 7 M. & W. 574; *Pickard* v. *Sears*, 6 Ad. & E. 469; *The Bank of Ireland* v. *Evans' Charities*, 5 H. of L. C. 389, 483; *Taylor* v. *The Great Indian Peninsular Railw. Co.* 28 Law J. Ch. 285; on appeal, Id. 710; *Carmichael* v. *Beck*, 10 Rich. Law S. C. R. 332; *McNeil* v. *National Bank*, 46 N. Y. 325; *Wooster* v. *Sherwood*, 25 Id. 286; *Crocker* v. *Crocker*, 31 Id. 507; *Bassett* v. *Spofford*, 45 Id. 387; 2 Daly, 432; *Craig* v. *Ward*, 3 Keyes, 387; *Dunning* v. *Roberts*, 35 Barb. 467; *The Western Trans. Co.* v. *Marshall*, 37 Id. 509; *Saltus* v. *Everitt*, 20 Wend. 268, 284; Story on Agency, § 221, 7th ed.; Hilliard on Sales, 48, 3d ed.)

This being the law, the question arises whether this is not such a case. To accomplish a purpose which the parties had in view, the plaintiff left the whole of the matter in the hands of Clark, to do as he thought best. The *indicia* of title to the property was left in his hands, with the plaintiff's approbation, after the plaintiff knew that the power to transfer it, or to enter it in bond, was, in the formal papers, vested in a fictitious name. The vendors were thus led to believe that the title to the whiskey, and the consequent right to transfer it, was in a real person named John Roberts—a state of things which the plaintiff recognized and approved. Baron Wilde held, in *Swan* v. *The North British Australian Co. supra*, that if a man has led others into the belief that a certain state of facts exists, by conduct calculated to have that effect, and they have acted on that belief, to their prejudice, he shall not, as against such persons, show that that state of facts did not exist; and Lord Denman, in *Pickard* v. *Sears*, *supra*, says that the rule of law is clear, that where one, by his words or conduct, *will-*

fully causes another to believe the existence of a certain state of facts, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of facts. We start, therefore, with the proposition, as matter of law, that King & Story had the right to believe, from acts of the plaintiff's agent, which the plaintiff recognized and approved, that the whiskey had been transferred to a real person whose name was John Roberts, and that as between them and the plaintiff they should not be prejudiced by anything they may have done under that conviction, acting in good faith, unless they were guilty of negligence. Now a person comes to them, introducing himself as John Roberts, and, to satisfy them that he is, exhibits to them the papers which they had themselves signed, transferring the whiskey to John Roberts, with the exception of the order upon the warehouseman, which he tells them he has either lost or mislaid, and asks them if they can give him a duplicate. He has in his hands certain papers—the order upon the collector and the gauger's returns—without which, and the giving of acceptable bonds or the payment of the duties, no one could get the whiskey, and has the papers, through the plaintiff's instrumentality, in the prosecution of a dishonest scheme, by agents whom he has set in motion. King evidently supposed that the person introducing himself as John Roberts had received these papers from Clark, to whom King & Story had given them, and such was the fact; for, with Clark and Ford's concurrence, they had passed into his hands intentionally, to be employed for a very different purpose from the use he made of them. He was, in fact, as were all who undertook to carry out the nefarious scheme that was meditated, the plaintiff's agent or instrument. Where the question is, who shall lose by the fraud of an agent—the principal or an innocent third party?—the rule is, that the principal is estopped from denying the authority of the agent where his own negligence or wrongful act has enabled the agent to cheat a person who, in the particular transaction, has acted with ordinary caution (*Taylor* v. *The Great &c. Railw. Co.* 28 Law J. 285; on appeal, 710; *The Bank of Ireland* v. *Evans'*

Charities, 5 H. of L. C. 389, 413). "We may lay it down as a broad, general principle," says Justice Ashurst, in *Lickbarrow* v. *Mason* (2 Term R. 63), "that whenever one of two innocent persons may suffer by the act of a third, he who has enabled such person to occasion the loss must bear it;" and C. J. Erle, in *Ex parte Swan*, *supra*, was of the opinion that throwing the loss from the party who has acted with ordinary caution to the party who has caused the loss by willful imprudence, operates to promote the substantial interests of commerce. The question then is, whether King & Story, in recognizing the person who called upon them as John Roberts, and giving him, upon his request, a duplicate of the order they had signed, acted with a want of ordinary caution. King testified that there was a general custom in the trade, in regard to giving duplicate orders upon warehousemen for goods in store; but he was not permitted to show what the custom was, under the plaintiff's objection that it was immaterial and irrelevant. It was, I think, relevant to the inquiry, whether King acted negligently or not, and in my judgment would have been material if it were the common usage and custom to give duplicates to parties representing that they had lost or mislaid the original, and having in their possession, as evidence of their title, all the other original papers. "Ordinary care is such as is usually exercised in the like circumstances by a majority of the community" (Shearman & Redfield on Negligence, § 20). The Court of Appeals has declared the rule for determining what ordinary care and vigilance demand of a party upon a given state of facts to be simple, practical, and easy of application. "The question is," says Porter, J., "what would a majority of men of common intelligence have done under like circumstances?" (*Ernst* v. *Hudson R. R. R. Co.* 24 How. Pr. 108; 35 N. Y. 26, 27); and if this be the test, it was certainly competent to show that King & Story acted as was the general usage and custom among merchants, if there were any; whereas, upon this point they were precluded from showing anything at all, upon the ground that it was immaterial. It was a case in which, in my judgment, the fullest inquiry should have been allowed as to any general usage prevailing among merchants in the giv-

ing of such duplicates. To hold upon the evidence before the court that there was, upon the part of King & Story, a want of ordinary caution, was to assume that they were bound to ascertain the identity of the person calling; to go to, or require Clark to be brought to them to ascertain if he were John Roberts, and were not warranted in assuming that he was because he had all the other papers except the order upon the warehouseman, which, as a conclusion of law, is, at least, doubtful. It is a question, moreover, whether this was not a case in which the plaintiff, by his own negligence, or wrongful act, co-operated and contributed to the production of the injury of which he complains; for if he had not, for a dishonest purpose, had a formal transfer of the whiskey made to the imaginary John Roberts, and allowed, for the same purpose, all the other papers to get into the hands of the person who called upon King & Story, that person would never have been able to pass himself off upon them as John Roberts, the owner of the whiskey. It is not unreasonable to assume that if he had not had with him all the other papers, and that they believed him to be the John Roberts named in the transfer, they never would have given him a duplicate of the original, which he alleged he had mislaid. The plaintiff's own wrongful act then materially contributed to produce the result of which he complains, and if, but for that act, it would or could not have happened, it may be said to have been a case of co-operating negligence. Shearman & Redfield, in their excellent treatise upon the Law of Negligence, deduce as the general rule upon this subject, from a long array of authorities, that one who is injured by the mere negligence of another, cannot recover at law or in equity, any compensation for his injury, if he, by his own negligence, or willful wrong, contributed to produce the injury of which he complains; so that but for his concurring or co-operating fault, the injury would not have happened to him (ch. 3, § 25); and I confess that I do not see, after having given the matter much reflection, why this is not such a case, where the liability of the defendants King & Story is founded, as it must be, upon their alleged negligence or want of ordinary caution in giving the duplicate order. At all events, the question of negligence, as it

is presented upon the evidence in this case—whether the inquiry relates to the want of ordinary caution on the part of King & Story, or to co-operating negligence on the part of the plaintiff—is one of those doubtful and uncertain questions of negligence which are to be left for their determination to the united judgment of a jury, and not disposed of as questions of law (*Ireland* v. *Plank Road Co.* 3 Kern. 533; *Keller* v. *The N. Y. Central R. R. Co.* 24 How. 272, 273; *Beers* v. *The Housatonic R. R. Co.* 19 Conn. 566; *Bernhardt* v. *Rensselaer &c. R. R. Co.* 32 Barb. 165; *Phil. &c. R. R. Co.* v. *Spencer*, 47 Penn. St. 300; *Munroe* v. *Leach*, 7 Met. 274; *Clayards* v. *Dethick*, 12 Q. B. 439; Shearman & Redfield on Negligence, § 11). If the test of the want of ordinary caution, or the test, as it is more frequently called, of ordinary negligence is, as it has repeatedly been held to be, the omission of that care which men of ordinary prudence would take, under the like circumstances, a jury are quite as competent to apply such a test as a court; for it is one which is wholly derived from personal experience and knowledge, and it may be that a juror, if he is accustomed every day to mix in the active commerce and business of the world, will be able to apply it in the particular case, with more discrimination and practical experience than a judge. It is for this reason that the tendency of the courts, both in this country and in England has, of late years, been to leave these questions of negligence exclusively to the jury, except where the legal conclusion from the facts is irresistible and plain; and as the case must be tried again, and will probably be tried by a jury, that disposition should be made of this question here.

If the conclusion arrived at should be that King and Story were not guilty of negligence in giving a duplicate order under the circumstances, then the conclusion would follow, that the plaintiff was himself responsible for the *indicia* of title having got into the hands of an agent, who was enabled thereby to dispose of the property to the plaintiff's prejudice; and that a sale by the agent, under such circumstances, would vest a solid title in innocent purchasers for value, as S. N. Pike & Co. were (*Wooster* v. *Sherwood*, 25 N. Y. 286; *Crocker* v. *Crocker*,

31 Id. 507; Hilliard on Sales, ch. 4, p. 48, 3d ed.); for in the pithy language of Baron Wilde, in the case already quoted of *Swan* v. *N. B. Australian Co.*: "A man is not permitted to charge the consequences of his own *fault* upon others, and complain of that which he has himself brought about."

A new trial should be granted.

LARREMORE, J.—I concur with Chief Justice DALY, in granting a new trial in this action, on the authority of *Baker* v. *Drake*.

The earlier cases for non-delivery of merchandise have made a marked distinction in the application of the rule of damages, between actions where the purchase price had been paid in advance, and those where it was to be paid on delivery.

This distinction is recognized, but in no sense fully approved as to the measure of damages, in the case last referred to.

The language of Judge RAPALLO, in *Baker* v. *Drake* (53 N. Y. 211), plainly indicates the principle that is hereafter to govern the decision of cases of this character. He says, "the question is, whether or not, under the circumstances of the case, the rule adopted by the court below (following *Markham* v. *Jaudon*) affords the plaintiff more than a just indemnity for the loss sustained. In a case where the loss of probable profits is claimed as an element of damage, if it be *ever allowable* to mulct a defendant for such a conjectural loss, its amount is a question of fact, and a finding in respect to it should be based on some evidence."

And further, in commenting upon the case of *Greening* v. *Wilkinson* (1 C. & P. 625), he says, "It falls short of sanctioning the doctrine that, as a fixed rule, the plaintiff is entitled absolutely to recover the highest price prevailing at any time before the end of the trial, without any evidence showing it was even probable that he would have realized such price."

No such evidence appears in this case, and without it, the spirit and intent of the decision referred to evidently holds that such damages are speculative.

Whether or not the plaintiff would have retained the whiskey until the time it reached the market value of seventy-seven cents, and disposed of it at that opportune moment, is in this case a question of conjecture, and not of proof. That he might have done so does not meet the requirement of the rule above mentioned, or authorize the recovery of damages upon such a possibility.

I am for a reversal of the judgment, and a new trial, with costs to abide the event.

J. F. Daly, J., (dissenting).—In my judgment, the facts warranted a recovery by the plaintiff, and there was no error in the ruling as to damages.

I. The fact that the plaintiff contemplated a fraud upon the government (if such were the fact), by bonding the whiskey in fictitious bonds, or by irresponsible parties, did not authorize any of the parties to whose possession the orders on the collector, the inspector's or gauger's certificate, came, to use those documents for the purpose of defrauding the plaintiff, and converting his property. Nor does such unlawful design of the plaintiff affect his right to recover against the defendants, who have no title. The documents in question having been committed to Ford, for the purpose of bonding the property for redistillation, conferred no authority to sell or dispose of the whiskey otherwise. The plaintiff neither parted with the the property, nor with any *indicia* of title thereto. The duplicate warehouse receipt, the only evidence of title possessed by defendants, was procured by fraud, without plaintiff's knowledge or consent. The documents committed by plaintiff to Ford conferred no title. The case seems to be clearly within the rule in *Saltus* v. *Everett* (20 Wend. 267).

II. We are not justified in holding that there was error in the measure of damages. This is an action for conversion, where the plaintiff was the absolute owner of the property, and had paid the full price for it before the conversion. It is, therefore, to be distinguished from *Baker* v. *Drake* (53 N. Y. 211) and *Markham* v. *Jaudon* (41 N. Y. 235). The Court of Appeals, in the former case, in reasoning upon

the rule, generally did not, and could not in that case lay down a rule for the measure of damages in this, since they distinguish in principle between such cases. We are rather bound to sustain the rule as laid down in *Lobdell* v. *Stowell* (51 N. Y. 70, Commission of Appeals), until the precise point has been passed upon by the Court of Appeals.

The judgment should be affirmed.

Judgment reversed.

JOHN GLASS *against* WILLIAM H. PLACE.

Since the amendment made in 1862 (L. 1862, c. 484, p. 975) to the District Court Act of 1857 (L. 1857, c. 344, p. 707), a plaintiff who is not a resident of the city of New York may sue by long or short summons, and, in case he elect to sue by long summons, need not give security for costs.

The cases of *Hallenback* v. *Gillies* (7 Abb. Pr. 421) and *Dean* v. *Cannon* (1 Daly, 34), holding that a non-resident plaintiff must sue by short summons, and give security, *Held* to have been superseded by the amendment of 1832.

APPEAL from a District Court.

ROBINSON, J.—The error which the defendant alleges occurred on the trial in the District Court, and for which he seeks a reversal of the judgment, was in the refusal of the justice to dismiss the action when it appeared that the plaintiff was a non-resident of the county, the action having been commenced by a long summons. This objection, accompanied by proof that no security for costs had been filed, was held by the general term of this court, in *Hallenbeck* v. *Gillies* (7 Abb. 421), BRADY, J., dissenting; and again, in *Dean* v. *Cannon* (1 Daly, 34), decided in 1860, to be fatal to an action. This was so held in those cases, in view of the imperative language used in the District Court Act of 1857. By sec. 13 of that act it was provided: "The time mentioned in the summons for the appearance of the defendant, and the time of service, must be as follows: Sub. 1. * * when the plaintiff is a non-resident

and gives the security required by the twenty-third section of this act, it (the summons) must be returnable in not less than two, nor more than four days from its date." By subdivision 2. "In all other cases it must be returnable in not more than twelve days from date." Section 23 required a plaintiff not residing in the county, before the issuing of the short summons provided for in sec. 13, to file security for costs. Section 45 in terms required the justice to dismiss the action, with costs, on objection made, when it appeared on the trial that the action was brought "by a plaintiff, a non-resident of the county, without giving the security required by this (that) act." In *Hallenbeck* v. *Gillies* (*supra*), the terms of this 45th section was held to include actions commenced by long as well as those commenced by short summons, where no such security for costs had been filed. Judge HILTON, in the prevailing opinion, says: "It (an action by a non-resident plaintiff), in other words, must be by short summons." As this court was that of last resort in actions commenced in District Courts (unless for cause permission should be given to carry the case to the Court of Appeals), this decision was, in a manner, conclusive as to the powers and proceedings of those courts on this question; and apparently, in view of its operating diversely from the ordinary mode of proceeding in justices' courts throughout the State, the Legislature, in 1862, passed the amendments contained in chapter 484 of the laws of that year. By sec. 20 of which sec. 13 of the Act of 1857, in the matter above quoted, was amended to read as follows: "When the plaintiffs, or either of the plaintiffs, is not a resident of the city, the summons may be returnable as above provided" (in not less than two or more than four days from its date); and by sec. 21 of that act sec. 23 of the act of 1857 was amended, so as to provide that "when the plaintiff does not reside in the city of New York, and has no place of business or stated employment therein, or when the above is true of all the defendants, before the issuing of the short summons," as allowed by sec. 13 of the act of 1857, security for costs must be filed.

These provisions of the act, as thus amended, expressly afford non-resident plaintiffs the right to elect that a short

summons should be issued in their favor, on giving security for costs, and only requires such security in case of such election. At the time of the trial of this action, the only ground for an objection and motion to dismiss, having reference to the question of residence (§ 45), was when the action was brought by a plaintiff not a resident of the county by a short summons, without giving the security required by the act. The act, as amended, required no such security in an action brought by a non-resident upon a long summons, and the objection and motion made by the defendant were wholly untenable and unavailable.

Judgment should be affirmed.

DALY, Ch. J., and LARREMORE, J., concurred.

Judgment affirmed.

LEWIS CHANDLER AND ANOTHER *against* EFFINGHAM B. SUTTON.

Defendant, owner of a house in New York city, received a telegram from his son asking his lowest price for the house. This telegram was sent at the instigation of the plaintiff, who was a real estate broker. Defendant answered, stating the price he would take, but no sale was made to B., the party whom plaintiff had in view as a purchaser, on account of certain incumbrances on the property. Eight months afterwards, B., through another broker, purchased the house, the incumbrances having then been removed: *Held*, that the plaintiff was not entitled to a commission as a broker for effecting the sale of the house.

APPEAL by defendant from a judgment of this court entered on the verdict of a jury.

Action to recover broker's commission on the sale of the house and lot 45 East 34th street, in the city of New York, the plaintiff claiming as assignee of the firm of Abner L. Ely.

Defendant denied the employment of plaintiffs' assignors, as well as the rendering of any services.

Plaintiffs had a verdict for $695 08, and a motion for a new trial was denied.

The facts are fully stated in the opinion.

Boardman & Boardman, for appellant.

Eugene Smith, for respondents.

Robinson, J.—This is one of the various cases growing out of the impudent and persistent claims of brokers in intervening in the sale of real estate of parties who had in no way solicited their interference or encouraged their intermeddling with their affairs, and who seek a recovery, upon mere technical grounds of their agency in the transaction having been in some way recognized, to recover commissions on the transaction. The defendant, owner of a house and lot in this city, being in California in September, 1870, received a telegram from his son in New York, prompted by inquiry by one of the plaintiffs, to name the lowest price he would take for a house he owned in 34th street in this city, and answered it. Such an inquiry necessarily imported that it originated from an adverse party. His offer was not accepted, it being discovered that the property was under lease, and the negotiations ceased. Subsequently, in July, 1871, on the return of the defendant to this city, negotiations between him and the person making such inquiry were renewed through another broker, a Mr. Van Rensselaer, and in consequence thereof he sold the house to the original applicant, a lady, who positively stated that she acquired her knowledge of the property and negotiated for its purchase through other sources than the plaintiffs. The evidence was uncontradicted that defendant acquired his personal knowledge of the purchaser (Mrs. Pond) through other brokers, and not through any agency or interference of the plaintiffs.

No error was committed by the judge on the trial; but the testimony as to the transaction upon which brokerage was claimed so effectually relieved the plaintiff from responsibility and is so overwhelmingly in his favor, that the verdict for the plaintiffs ought not to stand.

Judgment reversed and new trial ordered, with costs to abide the event.

DALY, Chief Justice.—I am disposed to go farther than Judge ROBINSON. In my opinion, the defendant was entitled to a verdict upon the uncontradicted facts in this case. Assuming the plaintiff Burnett's statement to be true, that he first apprised the defendant, through his son, of the fact that Mrs. Pond wished to buy the house, and that the defendant authorized him to sell it for $60,000, agreeing, if he sold it, to pay him the usual commission, Burnett did not sell it, and could not, as there was a lease upon it for five years, and Mrs. Pond would not buy it subject to the lease. Mrs. Pond testified to this expressly, and there is nothing in the case contradicting nor in any way conflicting with her statement. On the contrary, Burnett himself admits that, after the defendant had returned from the West in the fall of 1870, about a month after he (Burnett) had commenced negotiating for the sale of the house, which would be according to his own account, in November, 1870, he called on Stokes, Mrs. Pond's brother-in-law, who told him that she was out of the city, that he had been sick, and that the negotiations had fallen into the hands of Mr. Dodge, and that Dodge would not buy the house with the lease on it. It further appears uncontradicted, that before the defendant's return, on the 28th of September, 1870, his son telegraphed to him in San Francisco, "House declined entirely with lease;" all of which is in accordance with Mrs. Pond's statement that she entirely abandoned the idea of buying the house when apprised of the lease, and that the lady to whom it was leased, and who kept a school there, had an idea of keeping the school for five years.

Burnett never earned any commission, for he did not procure a person who was able and willing to buy upon the terms upon which the defendant was then prepared to sell, which was for $60,000, subject to an existing lease which had five years to run. Upon his first examination in chief, when called as a witness on his own behalf, Burnett says that after his interview with Stokes above mentioned, "the matter rested there, negotiating from time to time and exchanging offers, until they

came to a bargain, and Mrs. Pond purchased the house from the defendant." Whatever he may have intended should have been inferred from this statement, he afterwards admitted that he did nothing thereafter. There was no further negotiating by him; nor offers made to, or by him, nor anything done by him until he learned, more than eight months afterwards, that Mrs. Pond had purchased the house from the defendant, when he promptly stepped in and demanded his commission.

Now, what occurred in the meanwhile, is testified to by four witnesses: Mrs. Pond, her brother-in-law Stokes, the defendant, and his son, and is uncontradicted. The son says that he had one or two interviews with Mr. Stokes, when Stokes being taken sick, he was told that he could see Mr. Dodge, Mr. Stokes' partner, with respect to the matter; that he saw Mr. Dodge; Mr. Dodge wanted the lease removed, and that he told Dodge that he had no authority to remove it, and did not think it could be removed; upon which Dodge, he says, declined the house, and left abruptly; in consequence of which he sent the telegram to his father before referred to, on the 28th of September, 1870. Mrs. Pond had seen the house and examined it in the fall of 1869, before she had ever heard of the broker Burnett, and before he had called upon the defendant's son, or interposed in any way to effect the sale of the house, a fact which he does not presume to deny, and which stands uncontradicted. The house then belonged to a Mr. Brown, and she afterwards learned that the defendant had bought it. Burnett does not testify that she learned it from him, nor does it appear from the testimony how she learned it, except so far as it might be inferred from Burnett's statement that it was he who first informed her brother-in-law Stokes, that the defendant owned the house, which Stokes denied, alleging that he learned it by inquiring at the house, from the lady that occupied it. However this may have been, it is uncontradicted that the negotiation which the defendant set on foot for the sale of the house certainly fell through by reason of an obstacle which could not then be removed, so that as respects Burnett's agency in the matter he accomplished nothing.

The house was sold through the instrumentality of another

broker long afterwards, in the summer of 1871. After the negotiations referred to had come to an end, Mrs. Pond came again to this city, as would seem, in the winter of 1870–1871, and after examining other houses, requested Stokes to make inquiries respecting this one. Stokes sent for another broker, Mr. Van Renssalaer, and through his instrumentality a sale of the house, without the incumbrance of the lease, was effected by Van Renssalaer, in the summer of 1871, for $61,000. Mrs. Pond testified that in resuming negotiations she was influenced by the fact that the lady who had the lease was to leave the house, and because she, Mrs. P., liked it better than any house she had seen. The sale was effected at a greater price, without the incumbrance, a long time afterwards, by another broker; which is, in my opinion, a complete answer to the plaintiff's case. He never procured a purchaser. All, upon his own showing, that he did, was to inform the defendant that Stokes wished to buy the house for Mrs. Pond; but nothing that the defendant or his son did on that information, or that Burnett did, effected any sale. It resulted in ascertaining that there was an obstacle which the defendant could not remove, and the existence of which put an end to all negotiations for a sale. Stokes says that when Mrs. Pond found that there was a lease upon the house she would not touch it at all; so that if the state of things had remained as they were when Burnett, as the broker and agent of the defendant, undertook to sell to Mrs. Pond, no sale could have been effected. That they were changed afterwards, and the obstacle removed, was not owing to anything which Burnett did, or the defendant did, or could do. It was owing to the fact that some eight months afterwards the woman who had the lease, and had kept a school in the house, was to leave it. This entirely changed matters. It led to a new negotiation at Mrs. Pond's instance, and her agent, as he had a right to do, sent for the broker he preferred. He was under no obligation, nor was she, to communicate again with Burnett. He had not been employed either by Stokes or her to negotiate for the purchase of the house. So far as respects the defendant, Burnett came to him or to his son, asking to be employed to sell the property as it then was, for the de-

fendant's price, $60,000, and, being so employed, did not effect the sale. This did not preclude the defendant from employing another broker long afterwards to effect a sale under a different state of facts. The preposterous proposition of Burnett is, that because he was employed to sell the defendant's house, and undertook to sell it to a particular person and could not, that no sale of it could be made to that person thereafter, no matter how changed the facts may have been, without paying him a commission. That he has only to lodge his *caveat* to prevent the owner from selling thereafter to any one to whom he, as broker, tried in vain to sell, unless at the peril of paying to him his full commission. I agree that the judgment should be reversed, and a new trial ordered.

Judgment reversed, and new trial ordered.

The Ontario Bank *against* The New Jersey Steamboat Company.*

Defendants, common carriers, received from a connecting line, certain bales of wool, which the accompanying freight bills designated as being "deliverable at Coenties Slip, advice to be sent to R. Logan, 6 So. William St., N. Y., order, Ontario Bank." Defendants delivered the goods to the R. Logan designated in the freight bills. *Held*, that they had a right to do so, and that they were thereby relieved from liability for the goods, even although the common carrier originally receiving the goods would not have been authorized so to deliver them.

Appeal by plaintiffs from a judgment of this court entered on the decision of a judge at trial term.

The action was against the defendants, as common carriers between Albany and New York, for the non-delivery of 200 bales of wool, of the alleged value of $40,000. The complaint

* The judgment in this case was affirmed in the Court of Appeals on the grounds stated in the opinion of Chief Justice Daly.

alleged that the " wool was, on divers days and times, between the first day of June, 1865, and the first day of August, 1865, shipped with and delivered to the Coburg & Peterborough Railway Company, or to the Great Western Railway Company, at Guelph, in Canada West, duly marked and consigned to the order of the plaintiff for transportation and delivery at New York city, to the plaintiff or its order." It then alleged that the said wool, so duly marked, was delivered on board defendant's steamboats, at Albany, to be carried to New York, and there delivered to the plaintiff, " or such person or corporation as the plaintiff should order or direct," but that the defendant delivered the same to some other person, and neglected and refused to deliver it to the plaintiff. The answer was a general denial. The facts were these: One Oldknow Pooley, a produce merchant, in Guelph, Canada West, shipped to New York about 429 sacks of wool, by the Coburg & Peterborough Railway and the Great Western Railway, and obtained from those companies about 21 carriers' receipts or bills of lading therefor. The sacks were marked R. L., 6 So. Wm. St., N. Y., deliver or deliverable at Coenties Slip, and advise R. Logan, 6 So. Wm. St. R. Logan, or Robert Logan, was a commission merchant, doing business at No. 6 South William street, New York, and was the correspondent of Pooley, and of this the plaintiff was informed.

Pooley drew drafts or bills of exchange at 30 days against the shipments on Robert Logan, which he procured to be discounted by the plaintiff. These drafts were accepted by Logan. They amounted to $34,000 in gold, and were all paid by Logan at their maturity, at the City Bank, New York, except six, amounting to $8,850.

The wool was received by the defendants at Albany from the New York Central Railroad Company for transportation to New York, and was deliverable there according to directions on bills of charges accompanying the same received from that company, as follows: " Order, Ontario Bank, deliverable (or to be delivered) at Coenties Slip, and advise (or advice to be sent to) R. Logan, 6 South William street, N. Y." All the wool was delivered to Robert Logan.

The judge at the trial also found that, prior to the delivery by defendant to said Robert Logan of the wool for which this action was brought, he had accepted drafts drawn on him by said Pooley as aforesaid, held by plaintiffs, to the amount of $8,850 in gold, all of which, with certain (naming them) bills of lading were still held by them; of which said several shipments the first, second, fourth, fifth and sixth were received by the defendants for transportation and delivery as aforesaid, and were by them delivered at the city of New York to said Robert Logan, without other special instruction or order from the plaintiffs than as was contained on the directions on the bills of charges aforesaid, or such as in law grew out of the accustomed mode of previous deliveries of similar shipments.

He also found that all of the deliveries of the previous fifteen of said shipments were made by the defendants to said Logan, with the consent or acquiescence of said plaintiffs and said Pooley.

From these facts he concluded as matter of law:

1st. That said Logan, as acceptor of said drafts or bills of exchange, drawn against or upon the security of the shipments of wool in controversy (and so as aforesaid shown to have been received by defendants for transportation as aforesaid), became and was authorized (in the absence of his insolvency) to require a delivery to him of the bills of lading, or carriers' receipts, of the property against which such drafts were drawn, or for which such bills of lading were held, in order to provide for their payment (citing *Lanfear* v. *Blossm*, 1 La. An. 148; *Little* v. *Blossom*, Ib. 169).

2d. That his authority to do so had been recognized and assented to by plaintiffs in the customary course of dealing with respect to all the previous shipments made under similar circumstances, and defendants had a right to rely upon the authority the plaintiffs had thereby conferred on said Logan therein to take possession of the wool in dispute (citing *Drake* v. *Hawks*, 49 Barb. 201; 2 Pars. on Cont. 49, n. 6; Herm. on Estoppel, 46).

3d. That the direction on these several shipments, to advise R. Logan, was an indication and designation of him as

the proper agent of the parties interested in the goods, to be consulted with and direct as to their delivery at New York.

He therefore dismissed the complaint.

George Wm. Wright and *Wm. Henry Arnoux*, for appellants.

Charles Jones, for respondents.

DALY, Chief Justice.—There was no foundation whatever for this action against the defendants. The defendants in delivering goods received from the Central Railroad Company, were guided by the direction on the bills of charges which accompanied them. The freight bill of the wool contained this direction, "Deliverable at Coenties Slip. Advice to be sent R. Logan, 6 S. William street, N. Y. Order Ontario Bank;" in some of them the words, "order Ontario Bank," being at the beginning instead of at the end of the direction. The sacks of wool were marked  R. L.; the first mark being the initials of the shipper Oldknow Pooley, and the other the initials of Robert Logan, the R. Logan referred to in the directions, and the person to whom the wool was delivered by the defendants in New York. The wool was shipped from Guelph and Peterboro, Canada, against drafts drawn by the shipper upon Robert Logan, who was a commission merchant, doing business at No. 6 South William street, in New York, and was the shipper's correspondent. It was shipped by the Coburg and Peterboro and the Great Western Railways, and received by the defendants in due course of transit from the Central Railroad at Albany. The receipts or bills of lading were discounted by the plaintiffs, a banking institution in Canada West, by which the plaintiffs were authorized to receive payment of the drafts drawn upon Logan against the shipments; the title to the property being in them to the extent of the advances they had made. In some of the bills of lading, given at the time of the shipments by the Great Western and the Coburg and Peterboro railways, of which the plaintiff became the holder for value, the wool is acknowleged to have been re-

ceived, addressed to the order of the Ontario Bank, New York. In others, consigned to the order of the Ontario Bank, Guelph; but all of them contained the direction that the wool was to be left or delivered at Coenties Slip, New York, and that advice was to be sent to "R. Logan, 6 So. Wm. street, N. Y.;" and it was proved that prior drafts drawn by Pooley upon Logan against shipments of wool, as in the present case, were accepted by him, payable to the Ontario Bank, and were collected for the plaintiffs by the City Bank of New York.

The defendants were simply connecting carriers, receiving the wool from the Central Railroad, at Albany, also a connecting carrier, to be delivered at New York, according to the directions accompanying it. It is unnecessary to discuss what was the obligation in respect to delivery arising upon the bills of lading given by the Coburg and Peterboro and the Great Western Railways. If they, in delivering to the connecting carrier, omitted anything respecting the delivery which should have been communicated to him, and by which omission he, without negligence on his part, delivered the wool to the wrong person, the plaintiffs' remedy is against the prior carrier, whose negligence caused the improper delivery. The defendants had nothing to guide them but the directions contained upon the bill of charges and the marks upon the sacks of wool. This was to deliver the wool at Coenties Slip, in New York, and to advise R. Logan, giving his address, which was in the immediate vicinity of the place of delivery. What were they to infer from this? Simply that the place of delivery was Coenties Slip, and that R. Logan was the person who was to receive and take charge of the wool. There was no indication to them of any other consignee or person to whom or to whose order it was to be delivered. There is no evidence in the case even that the plaintiffs sent the bills of lading to the City Bank before the non-payment of the drafts. There is nothing except that about six months after the dishonor of the drafts the City Bank delivered the bills of lading to the plaintiffs' attorney, for the purpose of his making a demand of the wool of the defendants. The probability is, that the drafts were sent by the plaintiff to New York for acceptance; for it appears that

the advances were made by the bank to Pooley at the time of shipment, and that all of the drafts were accepted by Logan, payable in thirty days. It is, therefore, probably the fact that these drafts, as well as the preceding ones which were paid, were sent to the City Bank by the plaintiffs for acceptance and payment.

There is nothing in the evidence showing that the plaintiffs had made any arrangement with any one in New York to receive the wool. It was undoubtedly intended for Logan, who had accepted drafts against its shipment; but there is nothing to show that each shipment, after its arrival, was to be received and kept by any one in New York for thirty days after the acceptance of the draft, to be delivered to Logan only in the event of the drafts being paid. It is sufficient, however, for the decision of this case, that the defendants, as connecting carriers, delivered the wool according to the directions which accompanied it when it was delivered to them for its further transmission to New York.

The judgment should be affirmed.

J. F. Daly, J.—Apart from the right of defendants to deliver the wool in suit to Robert Logan, pursuant to the instructions in the bill of charges, it would seem that Logan was entitled to receive the wool as against the claim of plaintiffs. Logan, as *acceptor* of the drafts drawn by the shipper against the wool, would be, under ordinary circumstances, entitled to the goods, that he might reimburse himself (*Little* v. *Blossom*, 1 La. Ann. 169; *Lanfear* v. *Same*, Id. 148). When the drafts were presented to the plaintiffs for discount, they were already accepted by Logan. The plaintiffs then knew that Logan had accepted them, relying on the shipments for his reimbursement, that the shipments were the consideration for the acceptances, that Logan was the shipper's correspondent in New York, and that several prior drafts of the shipper had been accepted by Logan and discounted by plaintiffs, that such drafts were drawn against prior shipments; and therefore that the regular course of business between the parties was for Pooley to ship wool to New York to be sold by Logan, draw-

ing drafts on the latter against the shipments, which the latter accepted in advance of the sales to be made. With this knowledge plaintiffs discounted the drafts, retaining the original shipping receipts. The plaintiffs were not holders of the receipts in good faith as against Logan, whose acceptances they held, made on the faith of the goods mentioned in the receipts. The equity of Logan, as acceptor, was prior in point of time to that of the plaintiffs, as discounters of the drafts, and fully as great in extent. Under the circumstances of this case, it is no answer to Logan's right to say that he yielded his right to the goods as security for his acceptance, by accepting the drafts before receiving the goods. In the course of his previous dealings with the shipper, Pooley, after accepting the drafts and their discount by the plaintiff, he received the wool, and made sales, and paid the drafts he accepted. He had the right to expect the wool in suit, for which he had accepted, would be delivered to him in the same course of dealing. All these transactions, and the usage they established, plaintiffs knew when they discounted, as has been pointed out, and as the usage made the law for the three parties, Pooley, the plaintiffs and Logan, dealing with knowledge of it, plaintiffs knew that Logan would take the goods, and meet his acceptances with the proceeds of the sales he made. And that this was the understanding of the plaintiffs appears very clearly from this fact, that no other consignee of the wool than Logan was, as appears from the testimony, at any time designated either by Pooley or the plaintiffs. As respects prior shipments, Logan took the wool; and in respect of the wool in suit, the plaintiffs or their agents made no demand of defendants for it until nearly six months after its delivery to Logan. If Logan were not the *consignee* of the wool shipped in the course of all the transactions, it would seem that there was no consignee.

From the above conclusions, based on uncontradicted evidence, I am satisfied that by the usage of all parties, the shipper, the plaintiffs, and Logan, in the transactions in question, and by the assent of plaintiffs, Logan was to receive the wool, as consignee, and the defendants properly delivered it to him.

The judgment should be affirmed for this reason, and for the grounds stated in the opinion of the chief justice.

Loew, J., concurred.

Judgment affirmed.

ANDREW J. CROFUT *against* JOHN BRANDT.*

A sheriff levying on goods under an execution is not entitled to any compensation in addition to his poundage for taking care of and protecting the goods, or in arranging them for sale, and therefore charges for keepers' fees, labor in taking the property, cartage, storage and insurance, and services for making a catalogue of the goods and preparing them for sale cannot be allowed.

On an execution issued from this court on a judgment recovered in the Marine Court, and the transcript filed with the county clerk, the sheriff is entitled to no greater poundage than if the judgment had been recovered in this court.

APPEAL from a retaxation of a sheriff's bill, made at special term. The execution in this case was issued out of this court to the sheriff of New York county, against the property of the defendant, upon a judgment of the Marine Court, which, by virtue of the filing of a transcript in the office of the clerk of the city and county of New York, under the provisions of § 68 of the Code, had become a judgment of this court. The execution was for $989 31, and interest from July 9th, 1872, and on the day following the sheriff levied on sufficient property of the defendant (consisting of straw and other kinds of hats and office furniture, situate at 66 Spring street, in New York city) to satisfy the execution. The goods were at once advertised for sale, but the sale was not commenced until August 16th, when, as it was being proceeded with, it was stopped by an injunction, and whatever deposits were made by purchasers were refunded to them. Under this condition of the case, the

* Affirmed in 58 N. Y. 106.

following bill, for his fees and charges, was presented for taxation by the sheriff:

1. Poundage on an execution of $989 31	$25 98
2. Levy and return	2 69
3. Expenses, keeping and watching property levied on	150 00
4. Labor, taking property, &c	20 00
5. Amounts paid for cartage	110 50
6. Storage and insurance	45 00
7. For services, preparing goods for sale and catalogue on sale, and in refunding deposits on service of injunction	65 00
Total	$419 17

The court, at special term, retaxed the bill, and allowed it as follows:

Poundage on $989 31, and interest to August 16th, $9 91, $997 21:	
On $250 at 2½ per cent	$6 25
On $747 21 at 1½ per cent	9 35
Advertising sale of goods	2 00
Fee, after advertising and before sale	1 00
Receiving and entering execution	50
Travel, one mile	06
Return	13
	$19 29

The opinion by Robinson, J., rendered at special term, is reported in 13 Abb. Pr. N. S. 128.

A. J. Vanderpoel, for appellant.

C. Bainbridge Smith, for respondent.

J. F. Daly, J.—The facts appear in the opinion of the judge at special term, whose order is appealed from. For the reasons stated in that opinion, the order should be affirmed. The authorities cited by the sheriff on the argument before us

do not conflict (except the case of *Smith* v. *Birdsall*, 9 Johns. 328, of which notice is taken below) with the conclusion therein arrived at. In *Gallagher* v. *Egan* (2 Sandf. 744), the plaintiff, in an action for the foreclosure of a mortgage, was allowed to tax, as a disbursement, 37½ cents each for serving notices of object of action. The sheriff served the notices, and the plaintiff, having paid him, desired to tax the disbursement. The court said that the expense was necessarily incurred, and was a reasonable disbursement; that it was unimportant whether the sheriff served them or whether any other person did; that it was not allowed as sheriff's fees, but was given for an unofficial act which could be done by any other person as well, and 37½ cents was allowed, as under the statute that was the fee allowed in the Court of Chancery for the same service.

In the case of *Bright* v. *Supervisors of Chenango* (18 Johns. 243), the county clerk was directed by statute to procure the necessary books for recording deeds, &c., and was also directed by statute to send certain notices to judges and justices of the peace. The statute did not provide for payment. On his application, a mandamus was allowed to the supervisors of Chenango county to allow him his disbursements for the books and notices, because, the books were not for the benefit of the officer, but the public; the tenure of his office was during pleasure, and its emoluments were in most cases moderate, and in some very small; the books became permanent records and the property of the county, and the sending of the notices was for the benefit of the county.

In the *People* (*ex rel. Hilton*) v. *Supervisors of Albany* (12 Wend. 257), the county judge was required to attend at the county clerk's office and witness the drawing of juries for the Common Pleas and Mayor's courts. No compensation was provided by statute. A mandamus was allowed to the supervisors to audit his claim for compensation for such services, because the practice of the court had been to allow public officers compensation for the performance of duties for which no compensation is provided by law; and the legislature knowing such practice (as it was assumed), had made no enact-

ment to the contrary, thus tacitly approving it; and this service had no connection with the judge's judicial duties.

It will be seen that in the two latter cases, the charge was allowed as a public charge against the county for a public service, and not as an allowance to a defendant or party to an action for extra trouble in enforcing process against him, and there is no analogy between them and the case at bar. It will be noticed that in the case of Bright, the tenure and emoluments of office are considered in allowing this claim. If such considerations are to enter into each case, it can hardly be contended that any rule exists for the allowance. In the case first cited (*Gallagher* v. *Egan*), extra allowance was not made to the sheriff but to the plaintiff in the action, and the court expressly declared that it was allowed not as fees to the sheriff, but as a disbursement for a non-official act, which any person might have performed.

In *Smith* v. *Birdsall* (9 Johns. 328), the sheriff, Smith, recovered judgment against Birdsall for $61 68, fees and disbursements for arresting him on an attachment for contempt and taking him to Albany. The court said the charges were reasonable and just, and no more than an indemnity; the defendant was in contempt and liable to the costs and expenses of the attachment; the *habeas corpus* act allowed a mileage for bringing up a prisoner and taking him back if remanded, and that where the law is silent as to charges for particular services, the court, if they allow anything, must allow what is reasonable. If this case might have been considered authority for such charges of the sheriff as those made in the present matter, it cannot be followed in view of the decision in *Hatch* v. *Mann* (15 Wend. 44), and *Downing* v. *Marshall* (37 N. Y. 380). In the latter case, it is said that "persons acting in *autre droit* as executors, administrators, guardians, receivers, &c., are, upon a faithful execution of their trusts, to be indemnified out of the trust property for all expenses necessarily incurred in the faithful performance of their duties." But the sheriff is in no sense here intended a trustee, nor does he act in *autre droit* in taking property of the judgment debtor on execution.

The case of *Hatch* v. *Mann* (*supra*), has been cited in this court at general term (1859, *Dows* v. *McGlynn*, 6 Abb. Pr.

242), as authority for declaring an agreement to pay extra fees to a constable a void agreement, and the Supreme Court at special term (August, 1873, *Fowler* agst. *The Mayor*, &c., DANIELS, J.), has followed the decision of this court in the order appealed from, and disallowed the sheriff's charges for keeper's fees.

In the matter of poundage on the execution, it seems that the sheriff is entitled to no more than upon executions issued upon judgments of this court. This judgment of the Marine Court, the transcript having been filed with the county clerk, is to *be deemed* a judgment of this court (Code, § 68, compare amendment of 1851 with the section as enacted in 1849). The execution having been issued out of this court, is therefore an execution to enforce a judgment of this court, and not of the Marine Court. The fee bill as to poundage on executions *issuing out of the Marine Court* cannot apply, even if any authority were shown for the poundage claimed on such executions. The act of 1824, page 293, under which the charge is made of five cents for every dollar under $50, and two and a half cents for every dollar over $50 for serving executions, relates only to courts held by justices of the peace, and the city and county of New York is expressly excepted from it. The fees allowed by the act of 1813 (chap. 86, R. L. vol. 2), viz., twenty-five cents for serving execution of $2 50 or under, and six cents for every $2 50 thereover, were repealed by the act of 1833, chap. 313, and no other statute that I can find establishes for the Marine Court the fee for serving execution, payable to constable, marshal, or sheriff.

Order appealed from affirmed.

LOEW, J.—This is doubtless a hard case for the sheriff; but there is no authority in law for allowing him such charges and expenses upon the levying of an execution as are claimed by him.

At common law the sheriff was not entitled to charge anything for executing process (Coke Lit. 368 b; *Woodgate* v. *Knatchbull*, 2 T. R. 158; *Dew* v. *Parsons*, 2 Barn. & Ald. 565). The right to exact compensation was first given by statute 23

Hen. VI, c. 9, 10; 29 Eliz. c. 4), and these early statutes gave a certain amount per pound upon the sum collected by the levying of an execution, afterwards called poundage, and in regard to other services in the execution of process, the fees the sheriff might take for the same were specifically fixed, and in respect to others he might take what he and the parties could agree upon (Dalton's Sheriff, c. 119). Coke says, in referring to these and other statutes, that the sheriffs cannot take anything except *where and so far* as these statutes have allowed them (Coke Lit. 368 b).

With us sheriffs' fees have been regulated by statute since colonial times. Our statutes have always allowed poundage upon the levying and satisfaction of an execution, even though the sheriff may not sell the property levied upon (2 R. S. 645; *People* v. *Adams*, 1 Code Rep. N. S. 226; *Bolton* v. *Lawrence*, 9 Wend. 437), together with certain other specific allowances for services connected with executions and other process.

The right of the sheriff to compensation has been recognized in cases which have been regarded as outside of the statutes, some resting upon long established custom, of which instances are given in Dalton's Sheriff, pp. 458, 469, or where the service is not in any suit or process, but for the benefit or use of the county, which are the cases enumerated by Judge Daly. But I know of no case, and apprehend that none can be found, in which it has been held that an expense incurred by the sheriff in taking charge of the property levied upon, or in guarding it, or in arranging it for sale, can be deducted by him from the amount collected upon the execution, or recovered by him in any form, all such expenses, charges and services being embraced in the general allowance made to him upon executions, called poundage.

But, on the contrary, there are cases holding otherwise. Thus, in *Buckle* v. *Bewes* (5 D. & Ry. 495; 3 B. & C. 688), where the sheriff retained out of the proceeds of a sale upon execution the expense he had been put to in keeping the goods pending an injunction in chancery, it was held to be a taking of more than the poundage allowed by the statute of 29 Eliz. c. 4, and that he thereby incurred the penalty of the statute

against extortion. In *Slater* v. *Hames* (7 Mees. & W. 413), the sheriff deducted from the proceeds of a sale upon execution expenses incurred in taking precautions to prevent a rescue of the goods, the expense of removing them for sale, and the auctioneer's commissions, all of which he was ordered by the court to refund, upon the ground that he was only entitled to poundage under the 29th Eliz. c. 4, and such fees as were allowed by the table of fees in 7 Wm. IV, and 1 Vict. c. 55. And see, to the same general effect, *Woodgate* v. *Knatchbull* (*supra*); *Phillips* v. *Canterbury* (11 Mees. & W. 619); *Mathews* v. *Ramsey* (2 Disney (Ohio), 334); *White* v. *Madison* (26 N. Y. 127); *Lynch* v. *Meyer* (3 Daly, 256).

For these reasons, in addition to those given by Judge DALY in his opinion, I agree that the order appealed from should be affirmed.

LARREMORE, J., concurred.

Order affirmed.

STEPHEN H. TURNBULL *against* SARAH A. ROSS, EXECUTRIX, &c.

Where a referee, in an action for services as an attorney, there being contradictory testimony as to whether there had been a settlement and release, reported in favor of the plaintiff, the court at general term reversed the judgment entered on the referee's report, and vacated the order of reference, on the ground that the evidence on the part of the defendant in support of the release was clear, consistent, direct and probable, and that on the part of the plaintiff against it was confused, vacillating, inconsistent and improbable, and because the plaintiff had failed to deny, by way of rebuttal, admissions which the defendant's witnesses testified he had made.

APPEAL by defendant from a judgment of this court entered on the report of a referee.

The action was to recover $6,150 15 for professional services as attorney rendered by the plaintiff to the firm of Ross & Marshal, between February 1st, 1866, and September 20th, 1866.

The defendant Francis A. Ross answered and interposed, 1, a general denial, and 2, alleged that the plaintiff had been paid in full for all services rendered, and had given a release.

On the trial before the referee the plaintiff testified that he had been retained by Ross & Marshal to protect their rights under certain patents owned by them for sewing machine cases. He detailed the nature and amount of those services, and swore that he considered the sum claimed in the complaint as only a reasonable compensation for them, and in this estimate he was supported by the testimony of two other attorneys.

It appeared also that a previous suit had been commenced by the same plaintiff against the same defendants, in which the summons had claimed $630, but before the complaint was served the suit had been settled and discontinued on the payment by Ross, on July 19th, 1867, of $300, for which a receipt was given by the plaintiff, expressing it to be in full settlement "of all claims and demands of every name and nature which I have against them (the defendants) or either of them, all of which are hereby released and forever discharged."

The plaintiff's evidence tended to show: 1, that he had signed this release in ignorance of its contents, and 2, that the former suit did not cover the claim now sued on.

The evidence on both sides in regard to the question of this release is fully stated in the opinion.

The referee reported in favor of the plaintiff for the full amount claimed.

Pending the action Ross died, and the action was revived against the appellant, his executrix.

A. W. Speir, for appellant.

Ira Shafer, for respondent.

Daly, Chief Justice.—This judgment cannot be sustained. The receipt for the $300 given on July 19th, 1867, by the

plaintiff was in full settlement of the action, and of all claims and demands of every name and nature which the plaintiff had against the defendants, or either of them, all of which it was declared, were thereby released and forever discharged. It was drawn by a lawyer, Conable, presented by him to the plaintiff, and signed by the plaintiff, himself a lawyer. The plaintiff's evidence respecting it was equivocal and unsatisfactory, whilst the testimony of Conable was direct, circumstantial and uncontradicted by the plaintiff in its details. When the receipt was first shown to the plaintiff upon the trial, he could not say whether it was his signature. He said it *looked like* his signature. Then that he never executed it; that he never *signed it* when it had a seal on; but that he did give a receipt for the full amount of the suit. Finally conceeding that it was his signature, he said that he signed it in a hurry; that he merely glanced at it, reading part of it, and seeing that it was for $300 in full, and entitled in the action which was to be settled, that he signed it.

The letters of the plaintiff of July 13th and 17th, 1867, to Elliot, state that the plaintiff agrees to accept *so small a sum in settlement of his claim* on condition of being paid at once, and asks if the testator had accepted his offer, and two days after the last of these letters (July 19), the receipt in full and release was signed by the plaintiff. Elliot swore that on the 19th July, 1867, he called at the plaintiff's office and left a message or a note for him, he (Elliot) having been employed by the testator to defend the suit brought against the defendants by the plaintiff for his services, and that the first of these letters of the plaintiff, saying that he had agreed to accept so small a sum, &c., was received in reply to this message or note. These letters were shown to the plaintiff upon the trial, and he admitted that they were signed by him, and upon his doing so he was asked if he then had any doubt that he had subscribed his name to the receipt and release, to which he replied that he had doubt; that he did not think it was in his handwriting. Afterwards he said that he gave two receipts to Conable for the same amount, one that he had prepared before Conable came, and the

other the one brought by Conable, which was admitting that he had signed the receipt and release.

To get rid of the difficulty of this receipt and release, he testified that the $300 was received in full settlement of an action brought by him against the defendants for services rendered by him individually to them *after* the services for which this action was brought. That his claim for subsequent services amounted to about $500, and that he did not include the previous services in the action, because he was in doubt whether to sue the defendants alone for them, or to unite Davis with him as co-plaintiff, because Davis was to share in the profits; that a writing had been drawn up to that effect, but had never been signed either by Davis or himself. That there was a partial understanding between Davis and himself that they were to take hold of the matter (that is, perform the services for the defendants jointly), but that he and Davis did "not entirely" enter upon the performances of them with that understanding. That he was retained in the first instance by the testator, together with Davis, to prosecute *their* infringers, that is, the infringers upon the defendants, and that when the services terminated, the testator repudiated Davis. He was asked if he told the testator, at the time when he was retained by the testator, that Davis was to have half the profits arising from the plaintiff's services, and he answered that he did not think he did, nor did Davis in his presence, to his recollection.

This shallow statement furnishes its own refutation. It admits that Davis and the plaintiff had no joint claim against the testator for the services rendered, and that there was no ground whatever for bringing a suit against the testator to recover $500 for subsequent services, when the plaintiff had a claim against him for $6,150 for previous services, in respect to his right to sue for which there was, upon his own statement, not the slightest doubt.

I forbear to dwell upon the extraordinary valuation put by the referee of $5,000 for the plaintiff's services upon a consultation at a single sitting at Mr. Stoughton's office, when a settlement was effected, each item of the plaintiff's previous services having been separately charged for; as in my judgment

the case is disposed of by the documentary evidence of a settlement of all claims which the plaintiff had against the testator.

I have pointed out the unsatisfactory character of the plaintiff's testimony respecting this receipt. Conable details all the circumstances that occurred at the time when the receipt was signed. He shows that the plaintiff not only knew that the instrument was a release of all his claims against the testator, but that the plaintiff at first offered to give a simple receipt, and that Conable positively refused to take it or to pay him the $300, unless he would execute the release. That he executed it in Conable's presence, who signed it as subscribing witness, and after doing so told the plaintiff that to make a perfect release the instrument should be sealed; that he asked the plaintiff if he had any seals, upon which the plaintiff produced one and the witness put it on the paper in the presence of the plaintiff, and then handed the plaintiff the check for the $300. Conable also testified that when he saw the plaintiff upon this occasion he said to him that he had come in pursuance of an arrangement which his partner Elliot told him he had made with the plaintiff, to settle all the matters for $300, and that the plaintiff replied that he had made that arrangement with Elliot, and was willing to settle upon those terms. That he then asked the plaintiff how they were to know what was being settled, as there was no complaint served; that the testator proposed to have a full settlement of *everything up to that day*, and had authorized the witness to deliver the check of $300 only upon the condition that it was to be a full settlement, and that the plaintiff replied that he understood it so. The witness also asked him what his claims were for, and he said for a large amount of services for the defendants (being the services sued for in this suit); that he thought he could get more upon the trial; but that, in consideration of getting the money that day, he would take $300.

All that there was to conflict with this circumstantial statement was the previous testimony given by the plaintiff, for he did not, after this testimony of Conable, go upon the stand to contradict any of the details of what he said and what Conable said to him. Where a witness, who is himself the plaintiff in

the action, has his attention called to a number of details like this, involving admissions made by him at the time, which are in direct conflict with his previous loose general statement, especially when they are narrated with so much preciseness and particularity as they were in this instance, and does not offer anything in reply, it shakes the integrity of his previous statement, as it warrants the suspicion that he could not, or was unwilling to, go again upon the stand and specifically deny the various circumstances and statements called to his attention by the witness as having occurred at the time when the receipt was signed.

In addition to this, a member of the bar was called by the defendants, who had read the plaintiff's testimony, examined the pleadings and the bill of particulars, and who had been retained by a great many companies and corporations to prosecute infringements, which was the kind of professional service rendered by the plaintiff for the defendants. This was a witness especially qualified to judge of the pecuniary value of the plaintiff's services; certainly much more so than the plaintiff's two witnesses Jackson and Caldwell, who had no knowledge of the services other than as disclosed in the complaint and bill of particulars; and he gave it as his opinion that $250 was a full compensation for all the services charged for by the plaintiff; in other words, that the $300 paid upon the settlement was even more than the value of the services sued for in this action.

We are empowered by the Code to review the facts, upon an appeal from a report of a referee, and in my opinion it would amount to great injustice to allow this report to stand. I think, therefore, that the judgment should be reversed, and and the order of reference vacated.

Loew, J., concurred.

Judgment reversed, and order of reference vacated.

PAUL ZUNG *against* GARDINER G. HOWLAND AND OTHERS.

Where a contract for the carriage of goods by vessel provided that the goods should be taken from alongside by the consignee immediately the vessel was ready to discharge, or otherwise the privilege was reserved to the vessel to land them on the pier at the risk of the consignee, *Held*, that it must be construed to mean that the goods should be at the risk of the consignee after they were safely landed on the pier, and not that the landing should be at his risk.

A clause in a bill of lading, exempting the owners from negligence or default of the pilot, master and mariners, does not exempt them from liability for negligence of stevedores employed by them to unload the vessel.

In an action for negligence in transporting certain cases of glass, it appeared that six cases were damaged to the extent of $80 each, and three cases to the extent of $20 each, and the jury rendered a verdict for $460. On appeal, the court having concluded that the defendants were not liable for the damage to four of the cases, and there being nothing in the evidence to show whether the damage to those cases had been $80 each or $20 each, *Held*, that the judgment could not be modified by reducing it in amount, but must be wholly reversed.

APPEAL by defendants from a judgment of the general term of the Marine Court, affirming a judgment of that court, entered on the verdict of a jury.

The plaintiff, as consignee of 17 cases of glass, shipped to him from London on board the vessel of the defendants, sought to charge them with the damage arising from the breakage of the glass, which breakage he alleged was caused by the negligence of the defendants.

By their answer, the defendants alleged that they had transported the glass upon certain conditions mentioned in the bill of lading given for it, by which it was provided that the defendants should not be answerable for any damage thereto, caused "from perils of the seas and rivers, or from any act, neglect or default whatsoever of the pilot, master or mariners," or for "damage resulting from stowage or contact with other goods, for leakage, breakage (the ship to be free from breakage, from whatsoever cause arising), * * * damage caused by heavy weather or pitching or rolling of the vessel; * * * also

that the goods should be taken from alongside by the consignee immediately the vessel should be ready to discharge, or otherwise the privilege was reserved to the vessel to land them on the pier * * * at the expense of the consignee, and at his risk of fire, loss or injury; * * * also that the ship's responsibility should cease immediately the goods were discharged from the ship's decks." They alleged that they had delivered all the goods in good order, except such portion of them as had been damaged by some of the excepted causes, and that they had been guilty of no negligence.

On the trial, the facts appeared as stated in the opinion, and plaintiff had a verdict for $160.

Geo. W. Wingate, for appellants.

D. S. Riddle, for respondent.

DALY, Chief Justice.—This judgment will have to be reversed. The bill of lading, in the absence of anything showing the contrary, must be taken as expressing the contract which was made with the defendants for the carriage of the merchandise (*Dow* v. *New Jersey Steam Nav. Co.* 11 N. Y. 191; *Moriarty* v. *Harnden's Express Co.* 1 Daly, 230). It contained numerous exemptions on the part of the defendants in the event of loss or injury, among which were exemptions from liability for any damage caused by heavy weather, or the pitching or rolling of the vessel; or resulting from stowage, breakage, or coming in contact with other goods; or for any act, default, or neglect of the pilot, master, or mariners. It also provided that the goods were to be taken from alongside immediately the vessel was ready to discharge; or that otherwise the defendants might land them on the pier at the consignee's expense and risk, as to fire, loss, or injury; which, of course, must be construed as injuries not arising on or whilst putting them on the pier, through the defendant's negligence, where, as in this case, the vessel is unloaded by stevedores, and not by the mariners of the ship; the liability of the carriers continuing until they had discharged their obligation by landing the goods properly on

the pier and had notified the consignee. The bill of lading also provided that the ship's responsibility was to cease immediately when the goods were discharged from the ship's deck, and that after the lighterman, wharfinger, or other party applying for the goods, had "signed for the same," that the ship was to be discharged from all claims under the bill of lading. Immediately after the acknowledgment of the receipt of the seventeen cases of glass, each of which, it appears, was marked "Not upon the flat; handle with great care," there was an entry in writing in these words: "Ship free of breakage, from whatsoever cause arising," which may be assumed to have added nothing to the printed provision in the bill that the defendants were not to be liable for breakage.

It was shown by the portwarden's survey and other testimony, that the cargo had been well stowed, but had shifted; indicating that the vessel had encountered hard weather; the consequences of which were that a large amount of the cargo was damaged in the hold, in which was included at least four of these cases of glass; one of the entries in the port warden's survey being, "four cases of glass, broken by pressure of the cargo stowed in after hold." For the injury done to these four cases the defendants clearly are not liable. It arose from causes specially exempted in the bill of lading, and yet for this loss the plaintiff must have recovered, at least, in part. The plaintiff testified that there were six cases broken entirely and three broken partially. That the glass in the cases broken entirely was worth $480, or $80 a case, and that the other three were damaged about $20 each, or $60 in all; making the entire loss $540. The jury gave a verdict for $460, or $80 less than the plaintiff claimed. Now, even assuming that these three cases partially broken were part of the four stated in the survey to have been broken by the pressure of the cargo in the hold, then one of the cases broken entirely must have been the other case found broken in the hold, and there would only remain five cases that were broken at all, and the whole value of these would be but $400, showing that at least the verdict was for $60 too much. There is no testimony in the case contradicting the statement in the survey; but, on the contrary, tes-

timony confirming it; for Morgan, the storekeeper of the Internal Revenue Department, testified that after some of the cases had been landed, the cooper told him the cases were broken, and that the rest could not be put out; that he then went down and saw it (the glass) broken in the hold; that he ordered the cooper to put it (the cases) together in some shape, so that it (they, the cases) could be landed, and that he thinks he saw from four to six cases that had their tops torn off; that these cases stood nearly upon their edge forward of the hatch; that the cargo had pressed them together and burst the tops, which naturally sprang off the end pieces; that the pressure of the cargo, when it shifted, had been so great, that it burst (pressed) the sides of the boxes together and forced the top pieces out. This testimony was wholly uncontradicted. The plaintiff's carman saw six of the cases coming out from the vessel, most of which, he says, were broken, and the rest he found upon the pier in a damaged condition, with the exception of one case. It does not appear from his testimony that he had been in the hold, or that he had even been upon the deck; so that there is nothing in his evidence in conflict with Morgan's statement, or the statement in the survey, or anything conflicting in any other part with the evidence offered by the defendants.

We cannot reduce the amount of the judgment less the $60, because we cannot assume upon the evidence, nor could the jury, that three of the four cases mentioned in the survey were the three that were each damaged about one-fourth of their value. The plaintiff's whole case rests upon a conclusion of Kiel, the plaintiff's carman, that the glass, as he expressed it, "got broke in the slings, the sides of the boxes being crushed in by the ropes, or from the way the cases were laid upon the pier; because he found, when he came to the pier, some of the cases lying on their flat side, with planks and boxes on the top of them. The boxes," he said, "seemed all right, but the glass was broken inside, and in six of the boxes the bottoms were broken and the tops were off." If it had clearly appeared that the glass was broken by the negligence of the stevedores in landing the cases upon the dock, or from the manner in which they placed them upon the dock, then there might be a

recovery to the extent of the cases so injured; for there is no exemption of liability in the bill of lading for the negligence of stevedores; it extends only to that of the master, the pilot, or the mariners, and such clauses are not to be extended for the exemption of the carrier (*Perkins* v. *N. Y. Central R. R. Co.* 24 N. Y. 206; *The New Jersey Steam Nav. Co.* v. *The Merchants' Bank*, 6 How. U. S. R. 383). But the uncontradicted evidence, that some of the cases were injured and the glass broken in the hold, cannot be ignored. The cooper testified that his attention was called to the glass when it was in the hold by his man, and he was asked, "Was it sound or broken *there?*" And he answered, "Broken; the glass and the cases were broken." Assuming that the plaintiff's carman was right (he having testified that he heard the glass crack in the slings before it was landed), and that the cases were injured and the glass broken in the act of unloading, or from the manner in which the cases were placed upon the dock, still it would be impossible, upon the evidence, to say what number of cases were injured in this way; whether they embraced those that were partially, or those that were totally injured; and it therefore being impossible to distinguish, all that we can do is to reverse the judgment, upon the general ground that the amount recovered is not warranted by the evidence; and we cannot, nor could the jury, upon the evidence before them, distinguish what proportion of the property injured was covered by the exemption in the bill of lading, and what was not. In other words, it does not appear, upon the plaintiff's own showing, what loss he sustained through causes for which the defendants were liable as common carriers, such causes not being embraced in the stipulations exempting them from liability.

The judgment must, therefore, be reversed.

J. F. Daly and Larrmore, JJ., concurred.

Judgment reversed.

LOUIS TANNENBAUM *against* ALEXANDER M. CRISTALAR.

The undertaking executed (under § 187 of the Code of Procedure) by the bail of a defendant taken in custody under an order of arrest, is joint and not several, and in an action against the bail for a breach of the undertaking, they must all be joined as defendants.

The case of *Morange* v. *Mudge* (6 Abb. Pr. 243), laying down a different rule, held to have been erroneously decided.

APPEAL by plaintiff from a judgment of this court entered on the report of a referee.

The action was brought against the defendant, as one of the sureties on an undertaking upon arrest, which was in the following form:

"[*Title of the cause.*]

"The above-named defendant, Solomon Migel, having been arrested by Matthew T. Brennan, the sheriff of the city and county of New York, upon an order to arrest granted by the Hon. Joseph F. Daly, in a certain action commenced in the above-named court by the above-named plaintiff against the above-named defendant;

"We, Solomon Migel, of No. 108 West 47th street, in the city of New York, by occupation merchant, and Alexander M. Cristalar, of No. 318 West 32d street, in the city of New York, by occupation auctioneer merchant, and William A. Godfrey, of No. 33 Barrow street, in the city of New York, by occupation merchant, hereby undertake, in the sum of one thousand dollars, that the above-named defendant, arrested as aforesaid, shall at all times render himself amenable to the process of said court, during the pendency of this action, and to such as may be issued to enforce the judgment therein.

(*Signed*) S. MIGEL,
A. M. CRISTALAR,
WM. A. GODFREY."

The complaint alleged the due execution of this undertaking by the defendant Cristalar, and a failure to perform the condition of it.

The action being against Cristalar alone, he set up a defect of parties defendant, alleging "that the undertaking referred to in said complaint was signed by the said Solomon Migel, William A. Godfrey, and said defendant, as a joint undertaking; that said Solomon Migel and William A. Godfrey are both living, and William A. Godfrey is now resident in the city of New York."

The issues being referred, the referee dismissed the complaint, and ordered judgment for the defendant, on the ground that the undertaking was a joint one, and that the action could not be maintained against Cristalar alone, the other obligors being alive.

A. J. Requier, for appellant.

A. Cardozo, for respondent.

DALY, Chief Justice.—By the undertaking Migel, Cristalar and Godfrey, undertook in the sum of one thousand dollars, that Migel would at all times render himself amenable to the process of the court. Though the obligation was in terms joint, the nature of Migel's obligation was different from that of the other two. His was an absolute engagement to do certain acts, and theirs a contingent one; that is that they would be answerable in the sum of one thousand dollars, if he did not do them. In other words, he was the principal, like one who engages to pay a debt or sum of money, and they were the sureties. As respects him, and them his obligation was several; for although there may be no express words of severance, the several obligation of the principal will be inferred from the subject-matter, where it appears, as in this case, by the instrument itself (*Harris* v. *Gearhart*, 4 Dana (Ky.) 586, 587; *Ernst* v. *Bartle*, 1 Johns. Cas. 319, 327; *Ludlow* v. *McCrea*, 1 Wend. 229, 231; *Slater* v. *McGrow*, 12 Gill and J. 265, 270; 1 Story's Equity Jurisp. §§ 162, 163, 164).

But as between Cristalar and Godfrey, the obligation was joint. It was a joint undertaking on their part, that Migel would do certain acts, for which they bound themselves, not severally, nor jointly and severally, but simply jointly. No

particular form of words is necessary to constitute a covenant of either kind (*Platt on Covenants*, p. 117). The nature of the covenant will be inferred from the intention as expressed, and where the words used are, "We undertake, &c.," without any words of severance, the meaning is, as between Cristalar and Godfrey, that they jointly covenant that Migel shall do certain acts, and it is not the less a joint undertaking on their part, that Migel united with them in the covenant. "If," said Lord Holt in *Robinson* v. *Walker* (7 Term R. 154), "two covenant that they, or one of them, shall do such a thing, it is a joint covenant only," and although the report says, that the other judges thought otherwise, Lord Holt's view seems to have been relied upon by the elementary writers (*Platt on Covenants*, p. 117). The distinction is an important one, because, where the obligation is joint, neither can be sued without the other, and if one die, being a surety only, his estate is absolutely discharged, both at law and in equity, and the survivor remains solely liable (Shephard's Touchstone, p. 180; *Getty* v. *Binsse*, 49 N. Y. 388). It is very clear to my mind, that if either Godfrey or Cristalar had died after entering into this undertaking, both of them being sureties for Migel, and an action had been brought upon the undertaking against the personal representatives of the deceased obligor, that the undertaking on his part would be treated not as a several but a joint undertaking with Cristalar, and that it would be held that his estate was not answerable.

The case of *Morange* v. *Mudge* (6 Abb. Pr. 243), is a special term decision, and in my opinion the decision was erroneous. No authority is cited for it, but a passage in the opinion of Judge T. B. Strong, in *York* v. *Pick*, (14 Barb. 645). What Judge Strong said in this passage is correct, that "where a joint note is given upon a *joint loan of money* or a *joint liability* of any kind, it is to be presumed that it was intended that the note should be *several* as well as joint;" that is, both makers being primarily liable as principals upon the consideration for which the note was given; which is very different from a case where one of the obligors is the party to perform the obligation, or do the act for the performance of

which the others are simply sureties (*Pickersgill* v. *Lahens*, 15 Wall. 146; *United States* v. *Price*, 9 How. 90). The passage referred to was evidently not read in connection with what follows, for Judge STRONG immediately adds: "But where the deceased maker was a mere surety, such a presumption" (that he undertook *severally* as well as jointly), "will not be indulged in." I think therefore that the finding of the referee was correct, there being proof that the co-obligor Godfrey was alive, and that the complaint was properly dismissed.

LOEW, J., concurred.

Judgment affirmed.*

JULIA M. SCHERMERHORN *against* THE METROPOLITAN GAS LIGHT COMPANY.

A gas pipe having by the negligence of the defendant been broken, so that the gas escaped into the plaintiff's cellar, and the plaintiff having discovered that there was a leakage of gas, and having called in a plumber to ascertain where the leak was, and the plumber having in looking for the leak entered the cellar with a lighted candle, whereby an explosion was caused, *Held*, that the plaintiff was not responsible for the plumber's negligence, and could recover from the defendant for the damage caused by the explosion.

APPEAL by defendants from a judgment of the general term of the Marine Court, affirming a judgment of that court entered on the verdict of a jury.

The action was brought against the defendant for its negligence, by which a gas pipe was broken and the gas escaped into the plaintiff's house, where it came into contact with flame and exploded.

The defendant denied having been guilty of any negligence, and alleged that if any injury had been produced, it had been through the negligence of the plaintiff.

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* On a motion for a reargument, heard before ROBINSON, VAN BRUNT and LARREMORE, JJ., a reargument was denied.

On the trial, it appeared that the plaintiff was the owner of the house No. 67 West Fifty-second street in New York city, and that the defendant was a corporation supplying the plaintiff with gas for illuminating purposes, and that the gas was conveyed to plaintiff's house by means of pipes laid under the surface of the street. On the 8th of January, 1872, the pipe connecting the main of the defendant with the pipes in plaintiff's house became broken. The evidence on the part of the plaintiff tended to show that the break had been occasioned by the action of the frost, and that it would not have occurred had the defendant laid the pipe at a proper depth below the surface. The evidence of the defendant tended to show that the pipe was laid at a sufficient depth below the street level, and that the break had not been occasioned by the frost, but through other circumstances, for which the defendant was not liable. The evidence on both sides on this point is fully stated in the opinion.

Through this break in the pipe the gas escaped and penetrated into the plaintiff's house, where it was discovered and a plumber sent for to discover where the leak was. The plumber came, and of his own motion lighted a candle, and with it was proceeding to enter the cellar, when the explosion took place.

At the close of the case, the counsel for the defendant requested the court to charge that if the plumber was guilty of negligence, his negligence was that of the plaintiff; but this the court declined to charge, and an exception was duly taken. The plaintiff had a verdict, on which judgment was entered.

Beardslee & Cole, for appellant.

Ruggles & Felt, for respondent.

Daly, Chief Justice.—The main, though not the proximate cause of the accident, was the escape of gas into the cellar, in consequence of the breaking of the main pipe in the street, and there was sufficient in the evidence to submit the question to the jury whether the breaking of the pipe was owing to the

defendant's negligence. A competent expert gave it as his opinion that the fracture in the pipe through which the gas escaped was caused by the action of frost, and there was nothing in the evidence to raise any serious doubt as to the correctness of his conclusion, or to indicate in my opinion any other equally probable way in which the pipe could have been fractured. This witness, Webster, was a civil engineer who had been engaged in the practice of his profession for fifteen years. He had had an extensive experience in the laying down, alteration, repairing, and taking care of the Croton water pipes in this city, of which he had had for two years and a half the entire charge under the chief engineer. He had laid between two and three hundred miles of such pipes, and was familiar with the action of frost upon the ground of the streets of this city. To watch with a great deal of attention the effect of the cold on the pipes was requisite in the discharge of his duties, and was his only business in the winter season as regards pipes. This, as I have said, very competent witness, testified that the average depth to which frost penetrates in the paved streets of this city is from three to four feet; that the depth to which it may penetrate will depend upon the nature of the soil; that if composed of loose rock it will penetrate very deeply; if the soil is light and sandy it will penetrate quickly; if it has to pass through sand, loam or clay, it will take a longer period to pass down, and that he had known frost to break one of the large mains of the Croton aqueduct laid four feet below the surface, with running water.

It was shown by the defendant's evidence that the general rule of the gas company is to lay their main pipes (to protect them from the frost) three and a half feet below the surface of the street. The pipe, according to the return in the company's books, in this particular instance was laid but two feet ten inches from the surface, and, according to Mr. Schermerhorn's evidence, who took the actual measurement, it was but two feet and seven and three-eighths inches, and there was nothing to show that it could not have been laid deeper; nor could the president of the company give any reason why it was not put down to the customary depth. With the fact that the average

depth to which frost penetrates is from three to four feet; that the general rule of the company is to lay their pipes three and a half feet below the surface, which would be about the average limit of the penetration of frost; that they did not do so in this instance by eight and three-eighths inches, or more than two-thirds of a foot; and as there was evidence that the ground was frozen down to the pipe, a question was fairly raised whether the breaking or fracture of the pipe was not owing to the action of frost, and attributable to the circumstance that the pipe was not laid sufficiently deep beneath the surface.

Mr. Webster testified that he supposed that the cause of the fracture was frost. He said, "I should suppose, from the examination that I made, that the street had been originally filled in, and the freezing had lifted the pipe from the broken rocks and broke it in letting it down." This was his opinion as an expert, and it was strongly corroborated by the testimony; for it was shown by the defendant's witnesses that the earth below the pipe was soft and loose; that there was a weight of heavy stones immediately over the pipe, that came very near the surface, there being above them but three inches of sand and the paving stones; that the break was in the middle of the pipe; that the earth was soft "just where the break" occurred, and that one of the large stones lay in the crack on the top of the pipe, showing that it was not only possible, but highly probable that the accident occurred exactly in the way suggested by Mr. Webster.

Some stress is laid upon the circumstance that the loose and soft earth beneath the pipe was where the sewer connection was made with the house, or, as the defendant's workman expressed it, that the sewer connection came into the cellar about the place where the break was, the break being directly over the sewer connection, and that the ground there was loose and had not been packed. This evidence was given upon the assumption that the sewer connection was made after the gas pipe was laid; but this was not shown and cannot be assumed to have been the fact. This evidence, moreover, was entirely for the consideration of the jury, for these witnesses were contradicted upon a very material point, whether the ground was

frozen down to the pipe. One of them testified that the ground was frozen about two feet two or three inches below the surface, and that the pipe was three feet below the surface, indicating that it was probably beyond the action of the frost. He said that the ground was dug up, but that he did not look at the sewer connection in the cellar of the house, and could not tell in what portion of the cellar the sewer came in. He had undoubtedly his theory of the cause of the breaking of the pipe, and so had his fellow-workman Oldenburgh, who also testified that the ground was frozen but two feet two or three inches deep. That theory evidently was what the defendant's counsel has urged upon this appeal; that in connecting the sewer with the building, the earth was left loose and unpacked immediately around the gas pipe, and that the pressure of the heavy weight of the stones above caused the pipe to break. In other words, that the negligence which was the cause of the breaking of the pipe, was the negligence of those who connected the sewer with the house, and that the frost had nothing whatever to do with the accident.

The main gas pipe was laid in 52d street in 1868, and the foreman of the defendant, who laid it, was examined. He testified that he never piled stones on the top of any of the pipes; that he generally put dirt next to the pipe *when he had it*, and then stone; and that he laid the main in this instance in the same way; that he laid the pipe, but was not in the defendant's service when the street was dug up.

One of the workmen above referred to testified that the ground was frozen "pretty near down to the pipe," but that around the pipe it was not frozen, and the ground was soft. The other was asked if it was frozen down as far as the gas pipe, and he answered that there was an inch and a half or two inches of soft ground, and that the ground around the pipe was loose and soft. Now Mr. Schermerhorn testified that he saw the ground and the condition of the stone around the pipe after these workmen had dug down to it, and that the pipe was *resting on stones* which was a direct contradiction of the statement of these witnesses. It was for the jury therefore to determine whether his or their statement was the more reliable;

and even if their statement had been true, Mr. Webster's theory or conclusion as to the cause of the accident may have been the correct one, that "the freezing had lifted the pipe from the broken rocks and broke it, in letting it down," the force exerted by frost being among the most powerful of physical agents. If the frost would lift the iron pipe, and let it down again, the earth around the pipe might very well in consequence of that movement be disengaged to the limited extent stated by their workman, and present the loose and soft appearance immediately around the pipe described by them. The action of cold and heat is quite adequate to cause just such a movement of an iron tubular body so placed, and to crack or fracture it in the way Mr. Webster supposed the accident occurred, and is in fact a much more probable way of accounting for the accident, than to suppose that it was caused by the gradual pressure of a heavy weight of stone from above, exerted from the time when the connection with the sewer was made, which must have been more than three years before; for the house was finished when the plaintiff purchased it November 17, 1868, and the gas pipe was laid according to the defendant's testimony in May of that year, being three years and eight months before the accident. There was therefore, as I have said, sufficient in the testimony to submit the question to the jury, whether the accident was not the result of the defendant's negligence in not laying its main pipe in this instance the usual depth, to protect it from ordinary action of frost. That point was submitted to the jury who have found against the defendant, and their finding upon that ground cannot be disturbed.

The remaining question is, whether there was co-operating negligence on the part of the plaintiff. I think it very questionable whether a case of negligence was made out on the part of the gas fitter. He had been a gas fitter for seven years, and had served his time to the business. When called in by the plaintiff's husband to ascertain where the gas was leaking, he examined the gas fixtures in the basement, when he said the smell of gas was not strong enough to do any harm with a light, and that he had no reason to suppose then that it was dangerous

to light one. That he was accustomed, when examining to ascertain a leakage of gas, to judge by the smell whether it was safe to light a candle, and ordinarily relied upon his nose when he went where gas was escaping, and did so upon this occasion. Finding, after the examination of the basement, that there was no leak there, he took a lighted candle, it being then about five o'clock in the afternoon, to go into the cellar, where he could not go without a light, to examine the meter, to see if there was any leak there, and the moment he opened the door which led from the basement hall to the cellar, the explosion took place, which caused the injury. He opened the door, says Mr. Schermerhorn, and the explosion took place instantaneously. In *Larmen* v. *The Albany Gas Light Co.* (44 N. Y. 459), the company were notified that a cellar was full of gas, and they sent one of their laborers, who went down into the cellar and lighted a match, which caused the explosion. The company were justly regarded as responsible, as the lighting of a match by their servant in a cellar filled with explosive gas showed a want of ordinary care and prudence, and if their agent was incompetent and ignorant of the explosive nature of gas, it was an act of negligence on the part of the company, after the information they had received, to send such a person without instructing him properly. This is not such a case. To hold that the gas fitter here did not exercise ordinary care and prudence, would be equivalent to holding that he was bound to know that it might be dangerous to open the cellar door with a lighted candle in his hand, for this was all that he did, and I doubt, at least, if the circumstances would warrant such a conclusion as a matter of law. But it is not necessary to determine that question, for the gas fitter was not the plaintiff's servant or agent, so as to make her answerable for an act of negligence by him. The plaintiff's husband, finding a smell of gas pervading the house, sent for the nearest gas fitter, that he might ascertain where the leak was, and if the gas fitter acted negligently in the discharge of his calling, his negligence is not an act for which the plaintiff or her husband ought to be held responsible. The loss and injury which the plaintiff sustained was the result of the negligence of the gas fitter and the gas company, the one

being the proximate and the other the main cause of the explosion, and she was entitled to hold them both responsible for what occurred. It was the gas fitter's negligence that co-operated with the negligence of the defendant in producing the accident; for what the plaintiff, or rather her husband, did—the sending for a gas fitter when he found that the gas was escaping—was not a negligent, but a prudent, act. In *Burrows* v. *The March Gas &c. Co.* (E. L. R. Exch. vol. 5, p. 69), the plaintiff ordered from the gas company a new meter, and after it was fixed, he requested a gas fitter, who was at work on the internal gas fittings in the premises, to tell the company to supply a fresh service pipe from the main to the meter. They did so, but the pipe was defective, having a hole in it. The company had the gas turned on at an earlier hour than usual, with the view of testing the sufficiency of the pipe. Immediately after it was turned on, the gas began to escape into the plaintiff's shop, and a workman of the gas fitter, who was at work in an upper room, upon being informed that the gas was escaping below, went down with a lighted candle in his hand to see whether the gas was escaping from the fittings supplied by his master, and immediately upon his entering the shop, the explosion took place, which caused the injury for which the action was brought against the company. It was held that the workman, whose act was the proximate cause of the explosion, was not the servant of the plaintiff; that the owner of premises is not responsible for the negligence of independent tradesmen whom he employs, or their workmen, so as to make their negligence contributory negligence on his part; that it did not affect the plaintiff's right to recover against the company that theirs and the gas fitter's joint negligence contributed to produce the accident. That if a man sustains an injury from the separate negligence of two persons employed upon his premises to do two separate things, he may maintain an action against both or either; that it was not a case of contributory negligence, and that the company were liable to the plaintiff for the injury he had sustained. This decision appears to me to cover all that there is in the present case upon the question of contributory negligence, and it is sufficient to refer to it, and

to the reasons there given, as a conclusive answer to the claim set up in this appeal, that the present case is one of contributory or co-operating negligence. It is wholly groundless, and the judgment should be affirmed.

Loew and J. F. Daly, JJ., concurred.

Judgment affirmed.*

William M. Gambling and another *against* David L. Haight, Sarah R. Haight, Walter Jones, and others.

In a proceeding to foreclose a mechanic's lien, a contractor having claimed to recover partly for work done under a written contract, and partly for extra work done and materials furnished in consequence of a change in the plans and specifications forming a part of the contract, he discovered, for the first time, on the trial, that after he had signed the contract, the plans and specifications forming a part of it had, without his knowledge, been so materially changed, that he could not determine how much of the work done by him was in accordance with the original contract. *Held,* that it was proper to allow him to file and serve a supplemental pleading setting up the newly discovered facts, and making his claim according to them.

Appeal from an order of the special term, allowing the defendant, Jones, to file a supplemental pleading.

This action was brought by the plaintiffs, as sub-contractors, against the defendants Haight, as owners, and the defendant Jones, as contractor, to foreclose a mechanic's lien, filed against the premises situated on the southeasterly corner of Fifth avenue and Fifteenth street, in the city of New York.

After the plaintiffs had filed their lien, the defendant Jones also filed a lien against the same premises, to secure a balance of $30,000, which he claimed to be due him, on his contract with the defendants Haight. In his original answer, he al-

* A motion for leave to carry the case to the Court of Appeals was afterwards heard before Robinson, Larremore and Van Brunt, JJ., and the motion denied.

leged that the plans and specifications, which formed a part of the contract between himself and the owners, were to a considerable extent altered and departed from, and the work changed. He therefore claimed to recover partly for work done and materials furnished, in pursuance of said contract, and partly for extra work and work done by reason of the changes and alterations in said contract.

During the progress of the trial before Stephen H. Olin, Esq., the referee, to whom the cause had been referred, the original plans and specifications were produced by the defendants Haight, when it was ascertained by Jones that they had been altered, without his knowledge or consent, after he had signed the same. These alterations he claimed were so material that it was impossible for him either to trace the extra and contract work on said building, or to determine what work was contemplated in and by the original contract.

The defendant Jones accordingly made a motion before the referee for leave to amend his pleading in conformity with the above mentioned facts, which motion was denied, on the ground that the proposed amendments would change the cause of action, and that it was therefore not within the power of the court to grant the same. He thereupon applied to the special term of this court for leave to file and serve a supplemental pleading setting up the newly discovered facts.

The motion was granted, and the defendants Haight appealed.

Gray & Davenport, for appellants.

Alexander Thain, for respondent.

Loew, J.—After issue has been joined in an action or proceeding for the foreclosure of a mechanic's lien, the same is to be tried in like manner as any other civil action (Laws of 1863, chap. 500, § 5; *Doughty* v. *Devlin*, 1 E. D. Smith, 625; *Hubbell* v. *Schreyer*, 4 Daly, 367, 368). The provisions of the Code of Procedure are therefore as applicable to such a pro-

ceeding as they are to an ordinary action, except in so far as they may be inconsistent with the lien act.

By section 177 of the code, the court is authorized to permit either party, on motion, to make and file a supplemental pleading alleging facts material to the case, of which he was ignorant when the former pleading was made, or which have arisen since that time. It will thus be seen that before leave to file and serve such a pleading can be given, it must be made to appear:

1st. That the matters set up in the proposed supplemental pleading are in aid of or material to the case; and,

2d. That the party was ignorant of those matters or facts when his former pleading was made; or else that they have occurred since that time. But after these two prerequisites have been complied with, the court should, in the exercise of a sound yet liberal, judicial discretion, allow the supplemental pleading to be filed, on proper terms, whenever it would be in furtherance of justice to do so (*Harrington* v. *Slade*, 22 Barb. 161; *Hoyt* v. *Sheldon*, 4 Abb. Pr. 59). This discretion does not, however, extend to permitting an entirely new and independent cause of action to be incorporated or introduced into the case by a supplemental pleading (*Bostwick* v. *Menck*, 4 Daly, 68).

In the present instance, the defendant Jones, in his supplemental pleading, has set up facts which are material to the case. They do not, as has been argued, constitute a new or different cause of action, but simply vary the relief to which he was entitled, under the original answer or statement of his claim. It is within the province of a supplemental pleading to present such matters to the court (*Bostwick* v. *Menck*, *supra*; *Hasbrouck* v. *Shuster*, 4 Barb. 285); and the affidavits upon which the motion was based, show that they did not come to the knowledge of the defendant Jones until after the trial before the referee had been commenced. The learned judge, at special term, was therefore warranted in granting the application, and the order appealed from should be affirmed.

Daly, Ch. J., and Larremore, J., concurred.

Order affirmed.

SILAS RAWSON AND OTHERS *against* WILLIAM HOLLAND, TREASURER OF THE AMERICAN EXPRESS COMPANY.

The defendants, common carriers, received for transportation goods consigned to A., at "Dryden, Michigan, via Ridgway." The defendants' route extended no farther than Detroit, and the common carrier between that point and Dryden was the Grand Trunk Railroad Company, a company which gave bills of lading for goods only in a peculiar form, containing certain exemptions from liability. On the arrival of the goods at Detroit, the defendants stored the goods, and notified the consignees of that fact, and requested the consignees to give them authority to ship the goods on the forms of the Grand Trunk Railroad Company. The consignees made no reply, and fifteen days afterwards the goods were destroyed by fire in the warehouse where they had been stored. *Held*, that the defendants should have forwarded the goods by the Grand Trunk Railway immediately on their receipt at Detroit; and the goods having been lost through their neglect to forward them, they were liable for the loss.

APPEAL from a judgment of the general term of the Marine Court, affirming a judgment of that court entered on the decision of a judge of that court, after a trial before him without a jury.

The action was against the defendant, as treasurer of the American Express Company, a common carrier, for the loss of goods delivered to them for transportation.

On the trial it appeared that the plaintiffs (composing the firm of Rawson, Bulkly & Co.) had delivered to the American Express Company, a common carrier, of which the defendant was the treasurer, a package of goods directed to "Day & Lathrop, Dryden, Mich., via Ridgway." The defendant's company transported the package to Detroit, Michigan, and then, for the reasons mentioned in the opinion, stored the package in the company's warehouse, where fifteen days afterwards it was destroyed by fire.

At trial term, the judge rendered a decision dismissing the complaint, and the judgment entered thereon was affirmed by the general term of the Marine Court.

D. M. Porter, for appellant.

Beardslee & Cole, for respondent.

DALY, Chief Justice.—I think the error in this case was the assumption by the judge who tried the cause, that if the defendants had delivered the goods to the Grand Trunk Railroad Company, the connecting carrier, receiving from that company a bill of lading, in their usual form, exempting them from liability in the event of injury, or the loss or destruction of the property by specified causes, that the defendants would have taken upon themselves the responsibility of insurers if the goods were lost or injured while in the custody of the Grand Trunk Railway Company, by any of the causes for which that company declared, in their receipt or bill of lading, that they would not be responsible.

When a carrier is instructed by the consignor to send the goods beyond his own route, by a route or carrier named by the consignor, and the carrier, instead of doing so, sends them by another route, and the goods are lost, he is answerable (*Ackley* v. *Kellogg*, 8 Cow. 225; *Jackson* v. *The N. Y. Central R. R. Co.* 33 N. Y. 610); but it by no means follows that a carrier incurs a like responsibility, when his own carriage is completed, by delivering the goods to the connecting carrier for further transportation, because he receives a receipt or bill of lading from that carrier, and the goods are lost by causes for which that carrier declared, in the bill of lading, he would not be responsible.

The judge has found that the Grand Trunk Railroad Company did not require, in the usual course of its business, any bill of lading to be signed by the defendants, nor any special contract to be made, and that no other contract was required to forward the box than such as would have resulted by the delivery of the box and contents, and by receiving a bill of lading of that railroad in terms the same as was required of all others. This was a receipt or bill of lading declaring that the property was received, to be sent by the company subject to the terms and conditions stated upon the other side of the paper, which contained what was entitled "general notices and conditions of carriage," followed by a long list, nineteen in number, of stipulations of exemption from liability in the event of loss or injury, preceded by a general statement that it was

"understood and agreed" that the company were not to be responsible in any of the cases thus specially excepted.

It was held, in *Lamb* v. *The Camden and Amboy R. R. Co.* (46 N. Y. 271), that the carrier to whom goods are delivered, to be carried to the end of his route and then forwarded by him by the usual connecting line of transportation, is not an agent of the owner, with power to bind the owner by any stipulation, in respect to the further carriage of the goods not embraced in his own contract. I understand both the judge who delivered the opinion of the Court of Appeals in that case, GROVER, J., and the judge who dissented, PECKHAM, J., to agree that this is the law; which is affirmatory of the view taken by this court, when the case was before us, and of the authorities then cited in support of it (*Same case*, 2 Daly, 484, 485, 490 to 493). Assuming this, then, to be the law, the Grand Trunk Railroad could not, if the defendants had delivered to them the box for carriage, have created a special contract binding the plaintiffs by stipulations not embraced in the contract made by the plaintiffs with the defendants, by simply delivering such a receipt as the one above stated. The receipt or bill of lading given by the defendants to the plaintiffs, which will be assumed to be the contract entered into by them with the plaintiffs, does contain exemption from liability, and such exemptions are to be regarded as extending to all the connecting carriers, who are assumed to have contracted for the further carriage of the goods, upon the same conditions as the first carrier. But the Grand Trunk Railroad's forms of receipt contain many more stipulations of exemption from liability; and if the defendants had even signed a special contract embracing these additional stipulations, it would not have been binding upon the plaintiffs. Such I understand to be the view expressed by Mr. Justice GROVER, who delivered the opinion concurred in by the majority of the court, in *Lamb* v. *C. & A. R. R. Co.* (46 N. Y. 271, see p. 277); and if the defendants as carriers had no power to enter into such a special contract for the plaintiff, none could be created by the simple delivery to them of such a receipt.

There was, then, no excuse for the defendants' not deliver-

ing the goods to the Grand Trunk Railroad, it being well settled that it is the duty of the carrier, when the goods are transported to the end of his route, to deliver them to the next connecting line or carrier, and that his liability as carrier continues until he has discharged that duty; or where he cannot do so, has divested himself of his common law liability by storing the goods and notifying the consignors, where, as in this case, he knows who the consignor is (*Mills* v. *The Mich. C. R. R. Co.* 45 N. Y. 622; *McDonald* v. *Western R. R. Co.* 34 Id. 97; *Ladue* v. *Griffith*, 25 Id. 364; *Goold* v. *Chapin*, 20 Id. 259; *Williams* v. *Holland*, 22 How. Pr. 137; *Northrup* v. *The Syracuse R. R. Co.* 5 Abb. Pr. N. S. 425; Redfield on Carriers, 222, § 302).

This box, when received by the defendants in this city, was marked, Day & Lathrop, Dryden, Michigan, and was acknowledged in the defendant's bill of lading to have been received from the plaintiffs so marked. The defendant's route extended only to Detroit, Michigan, and Dryden was a point beyond that. From Detroit there were two modes of forwarding; by team or by railroad, to Ridgway, a station on the Grand Trunk Railroad, about forty miles from Detroit, Dryden being twenty-six miles from Ridgway. When the box arrived at Detroit, the defendant did not forward it, because the Grand Trunk Railroad would not receive it except on these forms. No request was made to them to carry the box, nor did the defendants forward it by team. They placed it in the warehouse of the Great Western Railway, and sent a letter to the consignees at Dryden, asking them to sign the form of the Grand Trunk Railroad, inclosing one of the forms in the letter; with a further request that the consignees would give them an order to sign for them, for future lots, releasing them after they (the goods) were out of their possession, and to prevent future delays. They also stated in the letter that they only contracted to carry goods to Detroit, and that the Grand Trunk Railroad forms made them responsible, after the goods were out of their possession.

The consignees did not sign the forms sent to them, nor reply to the letter from the defendants; but on receiving it,

they sent a letter to a Mr. Smith, the agent of the Grand Trunk Railway at Ridgway, inclosing an order for the goods; which they did for the reason that Ridgway was the usual and most convenient point for them for receiving the goods, and they supposed that Smith, the agent there, would, on receiving their letter, "send and get the goods up to his station," so that they could get them with their team. In this way the box was delayed at Detroit, and fifteen days after the defendants sent the letter to the consignees, the goods were consumed in the destruction by fire of the warehouse of the Great Western Railway.

When the defendants received the box from the plaintiffs for carriage, they knew of the regulation established by the Grand Trunk Railway, for they had to change their forms in consequence of it, and the regulation had existed for eight years. If they were unwilling, without special instructions, to deliver the box to the Grand Trunk Railway, under the apprehension of personal responsibility beyond their route, they should have asked for such instructions when they received the box; for even where the circumstances are such as to warrant the presumption on the part of the carrier, that the consignee is the owner of the goods, the consignor, where he is, as was the case here, known to the carrier, is to be treated as the agent of the consignee for the purpose of shipping and consigning the goods (*Nelson* v. *The Hudson River R. R. Co.*, 48 N. Y. 507; *London &c. Railway* v. *Bartlett*, 7 H. & N. 400; *York Co.* v. *Central R. R. Co.*, 3 Wall. 107; *Squire* v. *N. Y. Central R. R. Co.*, 98 Mass. 239). If therefore the defendants would not forward the goods by the Grand Trunk Railroad, which was the connecting railroad line, without special instruction, they should have so advised the consignor, he having authority to make the contract in respect to their transportation, and any contract he had entered into would have been binding upon the consignee (*York Co.* v. *Central R. R. supra*). This according to the recent cases, is the rule where the consignor is not the owner, the property in the goods having entirely passed from him, and vested in the consignee by the delivery to the carrier. But in this case the consignors were the owners.

Day & Lathrop purchased the goods from the plaintiffs, and instructed them to forward them by the Grand Trunk Railway. The plaintiffs delivered them to the defendants without any such instruction, and having brought an action against Day & Lathrop for the price of the goods, the plaintiffs were defeated because they did not ship the goods as Day & Lathrop had directed them to do. Day was examined as a witness upon the present trial, and testified that if the plaintiff had obeyed his instructions, the goods would have gone through by the Grand Trunk Railroad to Ridgway without going to Detroit, and escaped the accident which caused their destruction. Where the buyer orders the goods purchased to be sent by a particular mode of conveyance, and they are delivered to the carrier specified by him, the delivery on the part of the vendor is complete, and the title to the goods passes by the delivery from the consignor to the consignee. But that was not this case, and the plaintiffs, both at the time of the shipment and when the goods were destroyed, were the owners. If the goods were not to be forwarded by the connecting railroad at Detroit without special instructions, the plaintiffs were the persons to be advised of it, when they shipped the goods, and the defendants, in my judgment, did not divest themselves of their responsibilty as carriers, by placing the goods in the warehouse at the railroad depot at Detroit, and notifying the consignees by letter, who were sixty miles from Detroit, that the goods would be sent to them by the Grand Trunk Railroad, if they would sign a form releasing the railroad from liabilities to a greater extent than the exemptions contained in the orginal contract of shipment. If the defendants desired to comply with the wishes of that company, or to avoid embarrassements or difficulties with it, the simpler course, and the more just one to all parties, would have been to have added to their own contract, a stipulation authorizing them to forward by that line, subject to the terms and conditions of the company, so that a consignee, whether the owner of the goods, or acting as the agent of the consignor, in the shipment of them, might exercise the right of determining whether he would send them by the defendants as carriers, subject to such conditions or not.

For these reasons I am of the opinion that the judgment should be reversed.

ROBINSON, J.—I concur in holding the defendants liable for the breach of their duty as forwarders.

LARREMORE, J.—I think the defendants are liable as forwarders, and that the judgment should be reversed.

Judgment reversed.

THE PEOPLE OF THE STATE OF NEW YORK AND EDWARD HOGAN *against* BANKSON T. MORGAN.*

The offices of justices of the peace, District Court justices and police justices of the city of New York are distinct offices, and the latter are not embraced under the title of "justices of the peace" as that term is used in section 18 of Article 6 of the Constitution of this State as amended in 1869, by which it is provided that "the electors of the several towns shall * * * *elect* justices of the peace," and the legislature may, therefore, provide for the *appointment* of such police justices, without violating that provision of the Constitution.

Nor are such police justices county officers.

An act providing for the removal of the then existing police justices in the city of New York, and the appointment of their successors, and regulating the duties of such justices and the details of these courts, embraces but one subject, and this subject is expressed (within the meaning of section 16 of Article 3 of the Constitution of this State, which provides that the subject of a private or local bill "shall be expressed in the title,") by the words "An act to secure better administration in the Police Courts of the city of New York."

APPEAL from a judgment of this court entered on the verdict of a jury, rendered under the direction of the court at trial term.

The object of the action was to test the constitutionality of of L. 1873, c. 538.

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* Affirmed by the Court of Appeals in 58 N. Y. 679.

The complaint alleged that at an election duly held according to the laws of this State, at and in and for the city and county of New York, on the first Tuesday of December, 1869, the said Edward Hogan, plaintiff, had been duly elected by the votes of the electors of said city and county to the office of police justice in and for the first judicial district of said city and county for the term of six years from the first day of January, 1870. That a certificate of his said election had been in due form duly issued to him by the proper officers. That he had duly qualified for such office, and thereafter on the said first day of January, 1870, entered into the possession of said office and upon the performance of the duties thereof, and continued to discharge the same until on the fourth day of November, 1873, the said defendant usurped and intruded into said office, and had ever since unlawfully held and exercised the same, and excluded the said Edward Hogan, plaintiff, therefrom.

The answer alleged that in pursuance of the provisions of chapter 538 of the Laws of 1873, entitled "An act to secure better administration in the Police Courts of the city of New York," the defendant and nine others had been duly appointed police justices of the city of New York on October 23d, 1873, and had duly qualified, and on November 4th, 1873, had entered into the possession of the said offices, and had ever since held the same.

The defendant further denied that he had excluded the plaintiff Edward Hogan from any office; but defendant charged, that at the time when the said ten persons so appointed police justices acquired their powers as such, to wit, on November 4th, 1873, the tenure, salaries, and authority of the plaintiff Edward Hogan, and of eight other persons claiming to have been elected police justices at elections held in the respective judicial districts of the city of New York, did, by the provisions of said act, cease and determine.

On the trial all the facts stated in the answer were shown, and the only point raised by the plaintiff's counsel was, that the act of 1873 was unconstitutional. The court held the act to be constitutional, and directed a verdict for the plaintiff.

W. A. Beach and *Elbridge T. Gerry*, for appellant.

In December, 1869, nine police justices were elected in and for the city and county of New York, to hold office for six years, from January 1, 1870.

By an act of the Legislature, passed May 17, 1873 (L. 1873, p. 884), entitled "An act to secure better administration in the Police Courts of the city of New York," it was declared, that "all provisions of law for the election of police justices in the city of New York are hereby abolished, and all such justices in said city shall hereafter be appointed." The act provides for the appointment of police justices, through nomination of the mayor, and confirmation by the common council; and provides that the powers then appertaining to any police justice shall be vested in the new appointees; and thereupon that "the tenure, salaries, and authority of the police justices theretofore existing in said city, shall cease and determine." The act requires the then existing police justices to deliver to those appointed under it all papers, documents and records pertaining to their office. The appointed justices are given "the like access and possession, in respect of the court houses," that were enjoyed by said existing justices. The act removes the clerks, assistants, stenographers, and attendants of the then existing police courts, and authorizes the new board of police justices to appoint substitutes. It provides for the preparation, and printing annually, of statistical reports of crime in said city, and of "deficiencies in criminal administration, and suggestions of remedies for the same;" and of the amount and kind of business done at each of the police courts; the services performed by each police clerk, and the compensation paid, and various other matters. It requires the board of police to supply attendants upon the police courts from the police force. It prohibits all persons, other than members of the bar of the State, from practicing before said courts, except in their own defense. It provides for the removal of police justices and clerks by the Court of Common Pleas.

By virtue of this act, the elected police justices have been displaced, and their jurisdiction, powers, and places assumed

by others, appointed by the mayor, and confirmed by the common council.

I. The act "to secure better administration in the Police Courts of the city of New York" (L. 1873, ch. 538, p. 844), which provides for the appointment of ten "police justices" in the city of New York, is unconstitutional, in that it, in reality, provides for the appointment of ten justices of the peace in that city, in direct violation of article 6, section 18, of the Constitution of this State, as amended in 1870, which declares that justices of the peace shall be elected in the different cities of this State.

The police justices of the city of New York, existing at the time of the adoption of the Constitution, were and are justices of the peace, within the letter and spirit of said articles and sections.

II. If the preceding proposition be erroneous, the act of 1873 is, nevertheless, repugnant to section 2 of article 10 of the Constitution, and void.

By section 2 of article 10, "all county officers whose election or appointment is not provided for by this Constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors, or other county authorities, as the Legislature shall direct."

If police justices be county officers, they cannot be appointed by the mayor and common council.

These are not "county authorities" within the sense of the Constitution.

The territorial identity of the city and county of New York does not merge the distinctive character of the officers of each. Police justices have been judicially held to be county officers (*The People* v. *Edmonds*, 15 Barb. 529; *Same Case on Appeal*, 19 Barb. 468).

The act of 1857 (L. 1857, vol. 2, p. 761), provides that police justices shall be elected for the *city and county* of New York.

Section 19 of article 6, as it now stands, does not affect this proposition. It makes all "judicial officers" elective or appointive, as the Legislature may direct, except as otherwise

provided. It is to be read in connection with section 2 of article 10. That requires the election or appointment by "county authorities," of all county officers whose election or appointment is not otherwise provided for by the Constitution. That is such a provision for election or appointment as avoids the application of section 19 of article 6.

This question, however, is not to be determined by the phraseology of section 19, as appearing in the amended judiciary article. That did not take effect until 1870 (*Richter* v. *Poppenhusen*, 42 N. Y. 373; *The People* v. *Gardner*, 45 N. Y. 812). Section 2 of article 10 is to be construed in connection with the provisions of the Constitution as originally adopted. No such enactment as now contained in section 19 of article 6 then existed.

On the contrary, section 18 of the original article required all judicial officers of *cities* and *villages* to be elected. It had no application to *county* officers, and as to them left section 2 of article 10 fully operative.

Section 19 of the present sixth article was not intended to qualify the policy declared by section 2 of article 10, either as to county or city officers. The true construction of the section limits the general language of the latter clause to the special subject-matter of the preceding part. It all has relation only to inferior local courts thereafter created. Section 18 evidences the intent of the Legislature to preserve the system of election and appointment as it existed at the time of the adoption of the amended article. Justices of the peace for county and city, and district court justices for the city, were continued elective; and to other judicial city officers it applied the principle of section 2 of article 10.

This section (19) did not take effect until January, 1870 (*Ely* v. *Holton*, 15 N. Y. 596; 42 N. Y. 270; 45 N. Y. 812). It related, therefore, only to inferior local courts, subsequently established, and could not affect those already in existence. The corresponding provision of the Constitution of 1846 (article 6, section 14) contained no direction concerning the election or appointment of these officers. That was regulated by sec-

tion 18 of that Constitution, making all judicial officers of cities elective.

III. The act under consideration is unconstitutional, inasmuch as it shortens the tenure of the police justices, and removes them from office. They were elected in December, 1869, to hold office for six years (L. 1851, p. 957; L. 1852, p. 51). They were in office January 1st, 1870. If justices of the peace they were continued in office for their respective terms by section 25 of the amended sixth article of the Constitution (*People* v. *Gardner*, 45 N. Y. 812; *Same* v. *Bell*, 46 Id. 57).

If this may be done by constitutional amendment, the argument returns, that section 19 of article 6 does not effect that result, in face of section 25 of the same article, and section 2 of article 10. Section 25 continues justices of the peace in office. Section 2 is unaffected by section 19 of amended article 6, leaving these police justices, as county officers, to be elected, or appointed by the board of supervisors, or other "county authorities." The mayor and common council of New York do not fall within that description.

The act is in conflict with the policy of the judiciary article of the Constitution. That looks to the election of officers of this character. It is declared as to justices of the peace and district court justices. If police justices do not technically belong to the former class, their functions as conservators of the peace are the same. Police justices and district court justices, in cities, combine all the powers of justices of the peace in the country. No reason can be given for any distinction in the mode of appointment or election. The obvious purpose of the Constitution was to make them all elective. The first clause of section 18 provides for the election of justices of the peace in the several *towns*. The next, for the election in *cities* of officers carrying the same jurisdiction as country justices of the peace. No discrimination should be made, or was intended to be made. No substantial reason can be given why officers of the same class should be elected in the country and appointed in the city.

IV. The act is also void under section 16 of article of the

Constitution, requiring all local acts to embrace but one subject, to be expressed in the title.

1. This is a local act. "An act is local, within the meaning of the Constitution, which in its subjects relates but to a portion of the people of the State, or to their property; and may not, either in its subject, operation, or immediate and necessary results, affect the people of the State or their property in general" (*People* v. *Supervisors*, 43 N. Y. 130; *Same* v. *Allen*, 42 Id. 378; *Same* v. *O'Brien*, 38 Id. 193; *Same* v. *Hills*, 35 Id. 449; *Huber* v. *The People*, 49 Id. 132; see cases collected, 7 Abb. N. S. 1, note; *Matter of Walker*, 2 Duer, 655).

2. The title of this act does not express its subject. It professes to be "An act to secure better administration in the Police Courts of the city of New York." The eleven first sections have not the slightest allusion to that subject. They do not concern, in any sense, the administration of these courts. They simply remove the present officers and appoint new ones, under the pretext of substituting appointment for election, as to the justices, leaving the subordinates to be appointed as before. The title recognizes and treats the courts as completely organized, and proposes only to regulate their administration, not interfering with their organization. Its subject is the courts, not the justices. Its profession is reform in service, not revolution in office. To be sure, better administration may or may not be attained by changing the incumbents, but that is not the natural signification of the title, nor would it, in that sense, fulfill the object of the constitutional provision. One of its purposes was to notify the people of the true nature of the proposed legislation. That is not secured by this title. No one would imagine that the mode of reaching better administration would be by removing officers, and subverting the elective policy of the State. If that could be done, still, the elective character of these officers had been settled by the current of legislation, and none would suspect that it was to be fundamentally changed, under the pretense of promoting better administration. The latter idea is associated with form, modes

of proceeding, speedy justice—not with appointments and party spoils.

If, as professed in debate, the design was to repudiate the practice of an elective judiciary, in its local application, the title should have expressed it. That subject was of sufficient consequence to attract general observation. It was enough so, in view of the framers of the Constitution, to demand the deliberate consideration of two successive legislatures, followed by the voice of the electors of the State. If this act be maintained, it presents the singular anomaly of an important class of judicial officers, elective in the country and appointable in cities; because it cannot be denied that police justices exert the ancient and more important functions of justices of the peace. Changes thus important and radical should not be accomplished by deception. It was one object of the Constitution, in the respect considered, to prevent this fraud. It has failed, or this act of 1873 must fall.

John K. Porter, *Dorman B. Eaton*, and *James M. Smith* for respondents.

Daly, Chief Justice.—As preliminary to considering the question discussed upon this appeal, it will be necessary to inquire into the history as well as the nature of the office of justice of the peace in this State, as it has existed from the colonial period.

Under the digest or code of laws known as The Duke's Laws of 1664, justices of the peace were commissioned for the various towns in the colony of New York, who, whilst clothed with all the powers of justices of the peace in England, had, under the code above referred to, also a civil jurisdiction.

The province was divided into three ridings, and in each riding there was a Court of Sessions held by the justices of the peace living within the riding. It was a court of both civil and criminal jurisdiction, and also a Court of Probate. It had jurisdiction of all civil actions, and of all criminal offenses except such as were to be tried by the Court of Assize, or for the trial of which a Court of Oyer and Terminer had to be com-

missioned. This court was held by the justices of the peace living within the riding, the oldest justice being the chief presiding officer, and there was in addition the Court of Assize, for the whole province, held once a year by the governor and council and such of the justices of the peace of the different ridings as saw fit to attend it (Historical Sketch of the Judicial Tribunals of New York from 1623 to 1846, N. Y., 1855; 1 E. D. Smith, pp. 23, 24; The Duke's Laws in Coll. of Hist. Society, vol. 1, pp. 305 to 342; Rec. of Wills in N. Y. Surrogate's Office, vol. 1).

In England, the office of justice of the peace was exclusively connected with the administration of the criminal law. The officers known by this designation were originally persons commissioned by the king to act as guardians or conservators of the public peace within certain territorial limits, by the act of 1 Edw. III, c. 16. By subsequent enactments, their powers were enlarged. By the 18 Edw. III, stat. 2, c. 2, two or three of them might be assigned in any county, to hear and determine offenses against the peace, and to inflict punishments according to law, and by the 34 of Edw. III, c. 12, they received the name, by which they were subsequently known, of justices of the peace, a name which distinguished them from other judicial officers having authority before and afterwards to exercise the same powers (Lambard's Eirenarcha, b. 1, c. 3; 9 Dalton's Justice, c. 2; 2 Reeve's Hist. of Eng. Law by Finlayson, pp. 328 to 332).

But justices of the peace in New York have always had, and have still, authority to try civil actions. They exercised this authority from the beginning as members of the Court of Sessions and of the Court of Assize, which was alike a court of original and of appellate jurisdiction. Originally, there was a local town court, held by the constable and overseers of the town, for the trial of civil actions to the value of forty shillings; and by the justice to the value of £5. When the judicial system of the colony was reorganized in 1683, this court was held by persons commissioned by the governor, and when the act of May, 1691, was enacted, creating a Supreme Court and a Court of Common Pleas for the counties, it was enacted

that this local town court should be held by a justice of the peace, together with a freeholder of the town, who were conjointly empowered to try actions of debt or trespass, to the value of forty shillings, without a jury. By the act of Dec. 16, 1723, the assistance of the freeholder was dispensed with, and by the act of the 12th of March, 1772, the jurisdiction of a justice of the peace, in the determination of these small causes, was enlarged to £5. By the act of 1691, the Court of Common Pleas in each county, except the counties of Albany and New York, was held by a judge, commissioned by the governor, together with three justices of the peace; and by the act of 1683, courts of oyer and terminer, when commissioned, were to be held by a judge and four justices of the peace of the county, commissioned for that purpose. At the time of the Revolution, therefore, a justice of the peace had the same powers, as a conservator of the peace, which a justice of the peace in England had, and, as a member of the Court of Sessions of the county, he discharged duties analogous to those of the justices of the Court of Quarter Sessions in England. In addition to this, he held the local town court for the trial of civil actions of the value of £5, and, if commissioned, sat as a member of the Court of Common Pleas and of the Court of Oyer and Terminer for the county (Bradford's Laws of New York for 1694, p. 1; see the same statute in appendix to 2 Paine & Duer's Practice; Acts of 1683 and 1699; 2 Rev. Laws of 1813, Appendix, Nos. 4 and 5; Livingston & Smith's Laws, vol. 1, p. 237; Kent's Notes to Charter of New York City, p. 262).

This judicial organization was never, so far as respects the office of justice of the peace, applied to the city and county of New York. The organization which existed there was from the beginning, and has always been, distinct and different. It was not only different in its origin, but in most of the acts of a general character above referred to declaratory clauses were inserted, that this local organization in New Nork should not be affected by anything therein enacted. When the colony passed into the hands of the English, in 1664, the Dutch municipal court which then existed in the city was retained, its

name being simply changed from the Court of Burgomasters and Schepens to the Mayor's Court and Court of Common Pleas, the mayor taking the place of the two burgomasters, and the aldermen that of the schepens—these municipal officers being, in both countries (Holland and England), substantially the same. This tribunal, under the Dutch, was a municipal council as well as a court of criminal and civil jurisdiction, and it continued to be so under the English until these powers were finally separated (Appendix to 3 Daly's Rep.; *Case of the Brick Estate*, 15 Abb. Pr. 12; Historical Sketch, &c. 1 E. D. Smith, pp. 25, 26, 33; Dongan's Charter of 1686, § 15).

The municipal government of the city was established by Governor Nichols, in 1665, by the appointment of the mayor and of an alderman for each of the five wards into which the city was divided. It was simply the institution of the municipal system of England as it prevailed in the English boroughs and cities, the mayor and the aldermen acquiring by the grant or commission appointing them, as incident to their offices, all the power and authority of justices of the peace (Lambard, &c. 26; Dalton, &c. c. 23); and it was as such, *ex officio*, that they sat as members of the Court of Sessions. Upon the re-establishment of the municipal government by Governor Andros, in 1675, he conferred upon the city government "full power and authority to keep courts, administer justice, and rule and govern the inhabitants according to the laws of the province and the *privileges and practice of the city*" (2 Rec. of Mayor's Court). The mayor and any four of the aldermen were authorized to sit as a Court of Sessions, but they did not organize any separate criminal tribunal, but discharged civil, criminal and municipal business at the same session (Historical Sketch, &c. p. 30). They also sat after this period as members of the Court of Assize, being *ex officio* justices of the peace (Ib. 29). When the charter, known as the Dongan Charter, was granted to the city, in 1686, a separation was made between the legislative and judicial functions, as well as of the civil and criminal jurisdiction of the mayor, the recorder and the aldermen. Three tribunals came into existence, composed of the same officials: 1. The common council, in

which was vested the power to pass laws and ordinances for the government of the city; 2. The Court of Common Pleas, or Mayor's Court, for the trial of civil actions; and the Court of Sessions, for the trial of petty larcenies and other offenses, which was held by either the mayor or the recorder and three or more of the aldermen—the office of recorder having been previously added to the local organization by Governor Dongan in 1683.

It was provided, both by this charter and by the Montgomery Charter of 1730, that the mayor, recorder and aldermen should be *ex officio* justices of the peace within the city's limits, and should, as such, hold General Sessions of the Peace, or what was then in the colony and in England known as the Quarter Sessions, and should also sit in the court of Oyer and Terminer when it was held in the city (Kent's Charter, pp. 25, 30, 33, 116, 118, 291).

By the Montgomery Charter, a court was created in the city for the trial of small causes with or without a jury, where the value did not exceed forty shillings, which was held once every week by the mayor, the recorder, or one of the aldermen. In 1737 the amount was enlarged to five pounds. This was the nature of the local organization, which existed until after the Revolution. The mayor, recorder and aldermen had, as incident to their office, all the powers of justices of the peace. As justices of the peace, they sat in the Court of Sessions and in the Oyer and Terminer; whilst in the exercise of a civil jurisdiction they held the court before referred to for the trial of small causes, and sat as members of the Mayor's Court or Court of Common Pleas. There was not, as in the other counties, and never has been in the city and county of New York, except for a short period of three years, any separate and distinct office known by the title of justice of the peace; but the powers exercised by justices of the peace in other parts of the State have always, as respects the city and county of New York, been vested in other officers as incident to their office, namely, in the chancellor, the justices of the Supreme Court, the mayor, the recorder, the aldermen, and in certain officers subsequently created, distinguished by a specific name, and invested by stat-

ute with a portion of the powers appertaining to justices of the peace in other counties.

The Constitution of 1777 provided that justices of the peace should be commissioned by the governor every three years; and in 1787 an elaborate act was passed (2 Jones & Varick's Laws, p. 9) recognizing their civil powers and regulating their criminal jurisdiction. In this act, the mayors, recorders and aldermen of the cities of Albany and New York are separately distinguished as officers having the authority of and *acting* as justices of the peace; and in the last section of the act it is declared that they shall have the like powers in their respective cities "as the justices of the peace have in their respective counties by virtue of this act." The justices of the peace of the other counties have from that time to the present remained as distinct and separate officers exercising the powers of conservators of the peace within their respective counties, and holding the courts known as and called in the Revised Statutes (vol. 2, p. 225, § 52; Id. p. 7, § 64) "courts of justices of the peace," for the trial of civil actions. The provision of the Revised Statutes defining the civil jurisdiction of the justices of the peace authorized to hold courts in the other counties, and regulating the course of procedure, is entirely distinct and separate from the provisions relating to courts of similar character in New York and other cities. They are grouped under different titles, the one being denominated "courts held by justices of the peace," and the other "special justices' courts in the several cities of this State," the cities referred to being New York, Albany and Hudson, and the provisions relating to the one have no application to the other (2 Rev. Stat. 226; title i, 224; titles iii, v).

This distinction was not created by the Revised Statutes, but, as respects the city and county of New York, had existed, as I have said, before the Revolution, and had continued unchanged when the Revised Statutes were enacted. In 1787 the act was passed long after familiarly known as the ten pound act (2 Jones & Varick's Laws, p. 155), by which justices of the peace were empowered to try civil actions where the sum demanded was of that amount or under, and prescribing the whole

course of procedure in such actions. By the 20th section of this act, the governor was empowered, with the consent of the council of appointment, to appoint so many proper persons in the city and county of New York as they might think necessary to try civil causes under this act, by the "*name of assistant justices*," who, it was declared, should be vested with the same powers, in the city and county of New York, as were by the act vested in justices of the peace in the several counties. After the passage of this act, a doubt arose whether the aldermen could not act under it, being *ex officio* justices of the peace —that is, whether the newly appointed assistant justices were not, in fact, officially justices of the peace, so as to entitle those who were *ex officio* justices of the peace to exercise this jurisdiction. To put an end to that assumption, an act was passed in 1791 (2 Greenl. Laws of N. Y. p. 345) declaring that the power conferred by the previous act was to be exclusively exercised by the assistant justices created by it; and they continued to hold what was known as the "assistant justices' court" until 1797.

It would extend over too large a space to refer to the various enactments that have since been passed in relation to these courts, thereafter successively known as "The Justices' Courts," "The Assistant Justices' Courts," "The Justices' Courts," and the "District Courts," their present appellation. They have during this period been six times remodeled, to say nothing of various other statutes enlarging, diminishing, or affecting their jurisdiction. Mr. Graham, writing of them in 1839, after they had then been remodeled four times, says: "In every instance, so entire has been the departure from the plan previously existing, that the most ingenious mind will find itself baffled in attempting to trace even the slightest resemblances between the form and character with which they have been from time to time invested" (Graham on Jurisdiction, p. 35, note 1). Mr. Graham, after observing that it may, upon a cursory perusal of the statutory enactments, appear that "a great similarity exists between the jurisdiction of these courts and that of justices of the peace, arising as well from the express words of the statute applicable to both of them, as from the fact

that, in the local districts to which they respectively belong, they are designed to form the same relative branches of legal jurisdiction," says that "In their minute organization, however, differences exist which would readily escape the superficial observer, not merely in regard to their general powers, but in respect also to the incidents of their jurisdiction;" and he points out in what these differences consist, one of which will serve for illustration, that the assistant justices have, by the acts of 1807 and of 1813 recreating these specific courts, jurisdiction in actions of account, which justices of the peace never had.

I have remarked that there was in the city of New York, for the short period of three years, offices denominated by the statute "justices of the peace." This took place in 1804. In that year the ten pound act, so far as it related to the city of New York, was repealed, together with three intermediate acts, and the governor was authorized to appoint eight justices of the peace for the city of New York, who were to hold two courts in the city for the trial of civil actions to the value of $50, and who were to have all the powers and privileges of justices of the peace in the keeping of the peace, but were not to sit in the Court of Sessions. It was in fact a city and not a county office, and lacked a very important part of the powers of a justice of the peace, the right to sit in the sessions (3 Web. Laws of N. Y. p. 437). This act was repealed in 1807 (Laws of 1807, p. 154) by an act which empowered the governor to appoint a person for each of the wards of the city of New York, "to be known and distinguished by the name of *assistant* justices of the city of New York," who were empowered to try certain specified civil actions, where the amount did not exceed $25, and generally such actions as were cognizable before justices of the peace. And by the same act the "Justices' Court" was created, consisting of three justices commissioned by the governor, which was the origin of the present Marine Court. It was declared by an act passed in 1818 (Laws of 1818, p. 287), that the assistant justices should have the like jurisdiction and powers as justices of the peace; and by an act passed in 1820 (Laws of 1820, p. 5, § 10), that they should have

and respectively exercise the powers of justices of the peace. This did not, however, give them the powers of justices of the peace in other counties, for they never sat in the sessions, or in any other criminal tribunal of the city or of the county. I presume that the intention of these enactments was to confer upon them the same powers as conservators of the peace, as had been previously conferred by the 54th section of the act of 1807, above referred to, upon the three justices of the justices' court; for I am not aware that they did, or ever claimed to exercise any other. Powers of a like character were conferred when these courts were again remodeled and denominated District Courts in 1857 (Laws of 1857, vol. 1, pp. 727, 728, § 77).

I have already pointed out that when it was claimed that officers who were justices of the peace *ex officio* were entitled to exercise under the ten pound act the powers of the assistant justices, an act was passed giving a legislative construction to the section of the ten pound act creating these assistant justices, by declaring that it should not be competent for the justices of the peace *ex officio* (the aldermen) to exercise any of the powers of the assistant justices. In *Van Lew* v. *King*, 3 Cow. 375, it was held that a provision in an act of 1818, and in an act of 1824 (acts extending the jurisdiction of justices of the peace to $50), which deprived a plaintiff of costs in a court of record, if the action might have been brought before a justice of the peace, by virtue of these acts, did not apply to the city and county of New York, because the first section of the last act of 1824, enumerating the jurisdiction, contained the words, "the city and county of New York excepted," although the provision under construction was contained in the 33d section of the act, and, as was urged with a great deal of force before the Supreme Court, might have been applied independently of the first section; for the assistant justices in the city of New York had, when this provision was enacted, and before it, jurisdiction to the same extent, $50. It has also been held that these courts, both when they were styled "Assistant Justices' Courts" and "District Courts," were not under the code "courts of justices of the peace,"

the language of the code being interpreted in connection with previous and subsisting laws relating exclusively to the city and county of New York (*Boston &c. Mills* v. *Eull*, 35 How. Pr. 298; 6 Abb. Pr. N. S. 319; *Mills* v. *Winslow*, 2 E. D. Smith, 18; *Thompson* v. *Sutphen*, Id. 527; *Jackson* v. *Wheedon*, 1 Id. 141). So far, therefore, as respects the civil jurisdiction exercised by justices of the peace in other counties, it has in this city been exercised as incident to other offices or by officers separately created and designated by another name.

This has also been the case in respect to the criminal branch of the jurisdiction of justices of the peace in other counties. A police office was established in this city in 1793, an organization distinct and different, in the administration of the criminal law, from that which prevails in the counties where there is a justice of the peace. This act (1 Andrews' Laws, 282) authorized the chancellor, the justices of the Supreme Court, the mayor, the recorder, and the alderman, "whenever they should deem the occasion to require it, to be in said office, and do whatever act they should deem requisite as conservators of the peace;" in addition to which it created two justices, to be appointed by the governor, each of whom it declared should be denominated in his commission, a *special justice* for preserving the peace in the said city, who should, within the city, execute "the like authorities which are by law vested in justices of the peace as conservators of the peace," which was but a limited part of the powers vested in a justice of the peace as a criminal magistrate. In 1813, the number of these special criminal justices was increased to three (Davies' Laws, p. 469), and this organization continued until 1848, when an act was passed (Valentine's Laws, p. 583) dividing the city into six districts, for each of which a police justice was created, to be elected by the electors of the district, their election being obligatory by the Constitution of 1846, which act declared that the police justices created by it should have all the powers and perform all the duties of the former special justices. In 1867, two police justices were empowered to hold the Court of Special Sessions, which number was, in 1853, increased to three, and after being reduced to two from certain specified districts, was again, in 1870, in-

creased to three (1 Laws of 1857, p. 890; of 1858, p. 441; of 1865, p. 1132; of 1870, p. 103). In 1860 they were all organized into a board known as "The Board of Police Justices of the city of New York," which board was clothed with certain specific duties in relation to all the police courts and for the better maintenance of morals and order in the city. In 1865, the number was increased to eight, and in 1869 to ten (Laws of 1865, p. 1397; of 1869, p. 854). There have been other enactments respecting these officers, but it is not material to refer to them.

The police justice of the city of New York, as the office existed at the adoption of the amendment of the Constitution in 1869, was an officer exercising a limited criminal jurisdiction, which had been exercised *ex officio*, so far as respects the city and county of New York, from 1664 to 1798, exclusively by the chancellor and the justices of the Supreme Court, and by the mayor, deputy mayor, recorder, and aldermen of the city, and which was after that time conferred upon an officer specially created for the city, and known for fifty years by the title of *special* justice, and afterwards and down to the present time, as police justice; the first presiding over what was known until 1848 as the police office, and after that as the police court. It is an office which has from the time of its creation in 1798, been distinct from and known by a different title than that of the office of justice of the peace, a distinction that was recognized in the Constitution of 1822 (§ 14), which declared that the *special* justices and the *assistant* justices and their clerks, *in the city of New York*, should be appointed by the common council, a distinct and different provision being made for the appointment of justices of the peace. The 7th section of the 4th article provided that the supervisors "*of every county in the State*" and the "judges of the respective county courts" might appoint justices of the peace in a manner therein specified, and that if they failed to agree the governor might appoint. Now, there was then a board of supervisors and a county court for the county of New York, as well as for the other counties; but this provision was never regarded as applying to this county, nor was any such appointment ever made here. In

1826, by an amendment of the Constitution, the justices of the peace in the several towns were elected, but the special and the assistant justices of the city of New York continued to be appointed by the common council of the city until after the adoption of the Constitution of 1846, which made all judicial officers of cities and towns elective (§ 18), and in that Constitution the distinction referred to was recognized, the election of justices of the peace in towns being separately provided for. Indeed, as showing that under that Constitution, the distinction between police justices and justices of the peace in cities was well understood and acted upon by the Legislature, the act of 1848 (Laws of 1848, c. 155,) may be referred to, which provided for the election of *one police justice* and "four justices of the peace" for the *city* of Schenectady.

My attention was called, upon the argument of this appeal, to a letter written by me and printed as an appendix to the 3 Daly R. 347, which was sent to a court in Virginia in answer to the inquiry whether Judge BRADY had authority to take an acknowledgment of a mortgage in this city as a justice of the peace. In this letter I stated that as a judge of the Court of Common Pleas he was *ex officio* a justice of the peace, authorized to do, within the limits of this city and county, anything which a justice of the peace can do. I went into a lengthened historical examination to show that the judges of this court have always had, within the territorial limits of the court, all the power and authority which a justice of the peace had from the earliest institution of that office; and that when a statute of Virginia declared that an instrument might be acknowledged in another State before a justice of the peace, that it was sufficiently acknowledged, if taken before an officer clothed with all the power and authority of a justice of the peace, although known by another name—that is, by an officer holding another office, but who, as incident to that office, may act as a justice of the peace. Whether I was right or wrong in that conclusion I do not see that it has any material bearing upon the inquiry before us, which is, whether the police justice and the justice of the peace are two offices, or the same office.

That they are not the same office, but distinct offices, I

think sufficiently appears by the lengthened investigation I have gone into, and is supported by the decision of the Court of Appeals, in *Sill* v. *The Village of Corning* (15 N. Y. 297), and *Brandon* v. *Avery* (22 N. Y. 469). I shall now briefly refer to some of the points relied upon by the appellants. *First*, it is said, that the police justices and District Court justices combine all the powers of justices of peace in the country. I have, in the previous examination, shown that this is not so. That District Court justices and police justices have powers which justices of the peace in other counties have not, and that justices of the peace have powers which the others have not. *Second.* All that was decided by the Court of Errors in *Clark* v. *The People* (26 Wend. 599), was, that the provision made in the Constitution of 1822, for the appointment of justices of the peace *in towns*, did not preclude the legislature from directing how justices of the peace should be appointed *in cities.* Justices of the peace in cities, constituting a class of officers for whose appointment no constitutional provision existed, except a general one giving the power to the legislature, I fail to see what bearing this decision has upon the question before us, or the passage quoted from the opinion of Senator Ely. It was simply that the provision in the Constitution, declaring that the governor should appoint all judicial officers except justices of the peace, was general and not limited to justices of the peace in towns, which was no doubt correct, for there was then, as is stated in the case, *sixteen* justices of the peace in cities other than the city of New York, for whose appointment the Constitution had made no provision, except the general one before referred to. Neither the case nor their remarks have any bearing upon the question as respects New York, that city having been specifically provided for by the provision in the Constitution already referred to. *Third.* The decision in *The Matter of Walker* (3 Barb. 162), was, that a provision applicable to the justices and clerks of the *Marine Court*, in an act entitled an act in relation to *justices* and police courts in the city of New York, did not render the other parts of the act unconstitutional, even if that provision were not embraced in the title. Judge HURLBURT thought that it was;

that it was embraced by the words "Justices' Court." Whether he was right or not in that conclusion I shall not pause to inquire. The remark was *obiter*, made without any examination of, or at least without any reference to the numerous statutory enactments relating exclusively to this city; and even if it were correct, it would not reach the point involved here. *Fourth.* The observation that if the police justices are not justices of the peace, the evil result would follow, that there has not been since 1848 any lawful Court of Special Sessions, and that all convictions since that period for petty offenses have been irregular, is wholly without foundation. The special sessions is an inferior branch of or subordinate tribunal of the general sessions, which has been in existence for nearly a century and a half, for the trial of misdemeanors and petty offenses, which are tried there without a jury, unless the accused demands one, which court, until 1857, was held by the mayor, the recorder, a judge of the Court of Common Pleas or the city judge, together with two aldermen. The charter adopted in that year took away from the aldermen the right to sit as judges in the criminal courts, and provided that the special sessions should be held by any two police justices of the city, and that the court, *when* so HELD, *should have all the powers and jurisdiction appertaining to it by law.* (Amended Charter of 1857, § 48); and the Legislature had under the Constitution, the power to confer this jurisdiction (*Nelson* v. *The People*, 23 N. Y. 293). The eminent counsel by whom this point was taken, supposes, as he states, that the jurisdiction and powers of the police justices as judges of the special sessions are derived from their character as justices of the peace; but it is evident that his attention has never been called to this provision in the charter of 1857.

In the amendment of the judicial article (Art. VI) of the Constitution, adopted in 1869, it is declared (§ 18) that judicial officers not therein provided for shall be elected or appointed as the Legislature may direct. That the electors of the several towns shall, at the annual town meeting, elect justices of the peace; that justices of the peace and *District Court justices*, shall be elected in the different cities of the State, and that *all other*

judicial officers in cities whose election or appointment is not provided for in the amendment shall be chosen by the electors of cities, or appointed by the local authorities thereof. If there were no justices of the peace in any of the cities of the State, it might be claimed that this provision was intended to embrace officers discharging in cities analogous duties, though known by a different name; but there were, at the time of the framing of this amendment, justices of the peace in other cities of the State, so as to give full effect to this provision without extending it to officers in the city of New York, known by a different name, who perform in part duties which are discharged by justices of the peace in other counties or in other cities.

After the judiciary article was reported to the convention by the judiciary committee, Mr. Murphy proposed an amendment by which justices of the peace and police justices in cities were made elective, which was carried. A few days after, he moved to reconsider his own motion which being carried, he submitted another amendment by which the words "police justices" were stricken out, and the words inserted in their place, "District Court justices"—a change which he said had been made after submitting this amendment to the gentlemen interested in the question in the city of New York, and, as he believed, all others who taken any interest in it; that with their assent he had *modified* the original amendment, and that as *so modified*, he believed it would be acceptable to all. He also stated that he had originally supposed that district justices of the city of New York were justices of the peace, and were included within that denomination, as expressed in the amendment, but that it appeared that they were considered otherwise. He was asked by Judge Verplanck why he moved to strike out the election of police justices by the people of cities, and Mr. Murphy answered that he did so as a *matter of compromise*, in order to save the District Court justices of the city of New York, who were of civil jurisdiction—that is, as I interpret his language, that he meant to substitute District Court justices, who exercised only a civil jurisdiction, for police justices who were criminal magistrates; that the compromise,

which was the result of the conference to which he refers, with gentlemen from New York and others interested in the question, was to provide for the election of the District Court justices of New York, who had been omitted, and to leave the election or appointment of the inferior criminal magistrates in that city, and in other cities, to the Legislature. Judge Verplanck, after this explanation, thought it was unnecessary to agree to any such compromise. He said that the police justices of the city of Buffalo had been elected for many years; that there was no complaint, and that he knew no reason why the election of these officers should be changed and made subject to the appointment of the Legislature. Mr. Murphy replied that "it does not follow that it shall be," to which Judge Comstock added, "It will be left just where it is."

It is claimed, on the argument of this appeal, that these last two observations were equivalent to saying that the police justices were justices of the peace, and as such were included under that title in the amendment. If that were so, then it is difficult to understand what Mr. Murphy meant by a compromise; because if both the police justices and the District Court justices were included in the modified amendment as offered, there was no compromise at all. If such were the understanding, it would have been a very simple thing to have said that the police justices were embraced by the title justices of the peace, when Judge Verplanck put the question, "What becomes of the police justices?" (Debates in Constitutional Convention, vol. 5, pp. 3847, 3848). But the construction of the Constitution is not to depend upon what Mr. Murphy may have said or what Judge Comstock may have thought. They cannot be regarded as representing what was the understanding of the sixty-six members that voted for and the twenty-two that voted against this modified amendment. I was one of that number, and know what my own views were, and I think I remember how Judge Verplanck voted. But it is not in any such way, or by what particular members may have said in debate, that a constitutional provision is to be interpreted. It was the act of many minds, and it is the language by which they have expressed their intention, that is to be looked to.

Where that is unambiguous, a constitutional provision is to be viewed in connection with the state of things existing when it was enacted; and when it refers to a particular office or thing by name, it is to be understood as meaning that office or thing, and not something else or something more. It is to be presumed to have been passed with reference to, and to imply, a knowledge of existing laws; and where there was, when this constitutional amendment was framed, a well known office in nearly every county of the State, which had been known in the colony and the State for two hundred and four years by the specific designation of "justice of the peace," it must be understood that it is that office, and no other, that is meant, when it is specifically referred to by name; and that in a county where there was no such office by name, that it did not mean to include offices there of a different name, because they were created to exercise in part the functions of a justice of the peace. Here there is no ambiguity of language, for a well known office is designated by name; and even where there is ambiguity or doubt, the rule in the construction of constitutions is to hold the provision to mean what the words most aptly and directly express (Story on the Constitution, vol. 1, pp. 340, 342; *Gibbons* v. *Ogden*, 9 Wheat. 188). To declare an act of the Legislature unconstitutional and void is, in the language of Chief Justice Marshall, at all times a question of much delicacy, which ought seldom, if ever, to be done in a doubtful case; that it is not upon slight implication or vague conjecture that the Legislature is to be pronounced to have transcended its powers (*Fletcher* v. *Peck*, 6 Cranch, 128). Its authority is absolute and unlimited, except by the express restrictions of the fundamental law (*Bank of Chenango* v. *Brown*, 26 N. Y. 469); and it must be clear, obvous and plain, beyond any reasonable doubt, that it was restricted from doing what it has done, before its enactment will be declared void (*Cochran* v. *Van Surlary*, 20 Wend. 382, 383; *Clark* v. *The City of Rochester*, 24 Barb. 470; *Wollington* v. *Petitioners*, 19 Pick. 95; *Newell* v. *The People*, 7 N. Y. 9; *The People* v. *Fisher*, 24 Wend. 220; *Ex parte Collum*, 1 Cow. 564). This is a sound and safe rule, and if departed from, by applying

such tests as the spirit, the general intention, &c., constitutions may be made to mean anything that judicial tribunals think proper to declare. It is a rule of construction, settled by numerous adjudications, and in its application is, in my judgment, decisive in this case. If the office of police justice in the city of New York is included in that of justice of the peace, then the office of District Court justice is equally included, for all that is or can be relied upon to warrant that conclusion in respect to the one applies with equal force to the other, and in that view there was no occasion whatever for Mr. Murphy's subsequent modification of his amendment. The conclusion would then have to be, that the reconsideration of his amendment was not required, and that he subsequently offered, and the convention adopted, a provision in respect to District Court justices, which was wholly unnecessary. In my judgment, justices of the peace, District Court justices and police justices of the city of New York are distinct officers, and that the latter are not embraced under the title of justices of the peace in the amendment of the Constitution of 1869.

The remaining objection, that the subject of this act is not embraced in its title, I shall dispose of very briefly. It is entitled "An act to secure better administration in the Police Courts of the city of New York." It has been held that the design of this constitutional provision in respect to local acts was to prevent the uniting of various objects, having no necessary or natural connection with each other, in one bill (*Conner* v. *The Mayor &c. of New York*, 5 N. Y. [1 Seld.] 293), and that it is sufficient that the title describe the object to be accomplished, without specifying the means (*The People* v. *Lawrence*, 36 Barb. 190). This court cannot, nor can any court judicially say, that the object of this act is not to secure better administration in the police courts of this city, or that any one of its provisions in respect to the police justices is not expressed by or embraced within that object. It is only in respect to the police justices that the inquiry is material, for it is well settled that an act may be void in respect to provisions not expressed in its title, and be constitutional in respect to others that are (*The People* v. *Buel*, 46 N. Y. 68, 69). The

appellants chiefly call our attention to the change by which the police justices, instead of being elected in the districts, are thereafter to be appointed by the mayor—a provision which may tend to secure the better administration of these courts; at least no court can say, judicially, that it will not, and unless we can say this, we cannot hold that the subject is not expressed in its title. A provision that all judicial sales in this city thereafter, should be made by the sheriff, is not expressed by the title, "An act in relation to sheriffs' and referees'" fees in this city (*Gaskin* v. *Meek*, 42 N. Y. 187); nor a provision relating to the term of office and the time of electing councilmen in this city, by the title, "An act to enable the board of supervisors to raise money by tax," the expenditure of it, the auditing and payment of unsettled claims, and in relation to action at law against the city (*People* v. *O'Brien*, Id. 193); nor a provision reorganizing a city court by the title, "An act to *make further provision* for the government of the county of New York" (*Huber* v. *The People*, 49 N. Y. 133); the decision in the latter case being put upon the ground that the title clearly indicates merely a revenue act and not any intention to change the character of the government of the city in any way, or to amend the charter. That the words in the title to *make further provision*, indicate only to provide means or supplies. This, I think, was going very far. I do not mean thereby to question the correctness of the decision, but to point to it simply as an extreme case, and if the construction of this provision in the Constitution is to be carried farther by holding that the words to "*secure better* administration in the police courts" does not indicate any intention to change these courts in any particular, or the office of those that are to hold them, it must be left to the court of last resort to put that extreme construction upon the act in connection with the constitutional provision. In the recent case, *Matter of Mayor* (50 N. Y. 504), it was held by Chief Justice Church, in delivering the opinion of the court, that the Constitution does not require that the title of an act should be the most exact expression of the subject; that it is enough if it fairly and reasonably announces it, and if the subject is a single one, and the various parts have respect or relate

to that subject, the Constitution is complied with. The subject in this case is a single one, to secure a better administration in the police courts, and, as I have already stated, we cannot say that a provision substituting an appointment by the mayor, instead of the election of these inferior criminal magistrates in the districts of the city where these courts are situated does not relate to that subject.

Robinson and J. F. Daly, JJ., concurred.

Judgment affirmed.

John Slade *et al. against* David Joseph, Impleaded.

Robert W. Aborn *et al. against* Same.

William C. Langley *et al. against* Same.

William H. Mackintosh *et al. against* Same.

Benjamin A. Farnham *et al. against* Same.

George O. Hovey *et al. against* Same.

A person indicted in this State, and brought here from another State by process of extradition, may be arrested here on civil process issued at the suit of persons who have not connived at or been instrumental in procuring his indictment and extradition.

A person in custody on a criminal charge may, before or after conviction, be served with civil process.

A positive sworn statement by a person as to facts not within his actual knowledge—*e. g.*, the acts of another person not done in his presence—if made without any explanation as to how he became acquainted with the facts, is not entitled to any credit.

APPEAL in first five cases by defendant from order of special term denying motion to vacate order of arrest.

Appeal in sixth case by plaintiffs from order of special term vacating order of arrest.

The facts are stated in the opinion.

Gratz Nathan, for Joseph, appellant in first five cases and respondent in sixth case.

Martin & Smith, for respondents in first five cases and for appellants in sixth case.

ROBINSON, J.—The defendant David Joseph applied to set aside orders of arrest granted against him in these six actions under § 179 of the Code, for fraud by false pretenses in contracting the debts in suit, claiming, first, that the charge of fraud was groundless, and, second, that he had been brought into this State from the State of Ohio where he resided, as a criminal charged with such fraud upon his creditors upon an extradition warrant, after indictment obtained at the instance of his creditors, and with the sole view of subjecting him to the service of orders of arrest in the civil actions commenced against him; that he was accordingly brought to this city and lodged in prison until he was released on bail on or about the 7th day of January, 1870; that in the mean time orders of arrest in these and other actions had been procured and placed in the sheriff's hands for service when he should be released from imprisonment on the criminal proceeding; and that on such release he was immediately arrested at the suit of said George O. Hovey and others plaintiffs (No. 6), and also in two other actions by plaintiffs not parties to this appeal, and taken to jail, where the orders of arrest were subsequently served on him in the other five actions above named. The various creditors upon whose complaints the indictments were procured, were none of them plaintiffs in any of these actions, but the defendant states that the indictments were procured to be found by William S. Dunn "and the creditors *generally* of the said defendants in the city of New York *including the plaintiffs in*

the above entitled actions," but states no facts within his knowledge upon which such a statement is predicated. As appears from his affidavit, he was then in Ohio, and he fails to explain how he is able to state with such positiveness so general a fact in respect to so many other parties and their acts and conduct in the city of New York. If one swear to a fact without actual knowledge "then it is legal false swearing," although what he swears to may prove in fact to be true (Russ. on Crimes, 1753; *Commonwealth* v. *Cornish*, 6 Binn. 249; *Carroll* v. *Charter Oak Ins. Co.* 10 Abb. [U. S.] 175). His statement, unexplained by any suggestion how he could possibly know the facts sworn to, disentitled it to any credit. It is in no way supported by any affirmative evidence beyond mere hearsay, and is contradicted by an affidavit of a member of each of these plaintiffs firms, assuming to speak positively for himself and co-plaintiffs, denying any complicity in the procuring of the indictments or in the extradition proceedings.

It was conceded upon the argument of these appeals that the defendant had not so far produced evidence in contradiction to the charges of fraud, as would warrant a reversal or vacation of the orders of arrest to be made because he had shown himself innocent of the charge, but his discharge from those orders is claimed on the ground of complicity of these several plaintiffs in the extradition proceedings instituted in bad faith, and with a single view of bringing the defendant within the jurisdiction of this court, in order that the orders of arrest should be served on him in civil actions. A perusal of the affidavits on these appeals will fail to show by any satisfactory proof, that any of the plaintiffs in these several actions in any way participated in or connived at the indictment or extradition of the defendant, or did anything beyond availing themselves of his presence in this State after being so brought here at the instance and through the agency of other creditors, to serve process by order of arrest upon him.

I fail to discover from the papers submitted, any legal evidence of deceitful action by those other creditors in procuring defendant's extradition. He has never been discharged from the indictments. He is merely discharged from imprisonment

in the county jail, upon giving bail for his appearance to answer the criminal charges made against him. If predicated upon like conduct as that disclosed in reference to these several plaintiffs (and the papers so indicate), his criminality scarcely admits of a doubt, and upon what consideration he induced some of those creditors to allow and favor his release on bail does not appear. Even if those creditors or any of them, procured his extradition with the deceitful purpose of bringing him here and subjecting him to civil process, no such scheme is justly imputable to any of these plaintiffs, upon any proofs furnished by the appeal papers. It is well settled that a person in custody upon a criminal charge, may before or after conviction, be served with civil process. One under conviction or arrest, under such criminal proceedings, has no immunity beyond what may be claimed by one innocent of crime, or free from such a charge or suspicion (*Davis* v. *Duffie*, 3 Keyes, 605; s. c. 1 Abb. Ct. App. Dec. 486; *Dunham* v. *Drake*, Coxe [N. J.], 315). The exception to this rule exists where the debtor has been brought into this State, by or through the connivance of the creditor, upon the mere pretext of a criminal charge, in order to subject him here to service of civil process by arrest or otherwise. Courts of record, also, will not tolerate service of process on any person who for that purpose has been deceitfully brought within their jurisdiction, they will also protect from arrest "*eundo et redeundo*," not only parties, but also witnesses, who in obedience to its process, or *in furtherance of its proceedings*, appear within its jurisdiction. The defendant establishes no case within any of these exceptions, to the general efficiency of the process of the court by way of order of arrest.

The fact that the order of arrest in the sixth suit brought by Hovey and others, was in the hands of the sheriff, a day or two before the defendant was released from the criminal charge (affidavit for and order of arrest, January 5th, 1870; returned, January 7th, 1870), as has already been stated, furnish no ground for maintaining a charge that they connived at the previous proceedings, under which defendant was brought into the State, in December, 1869. In the five other suits, the

orders of arrest were not procured until the 10th day of January, 1870, three days after his release on bail from the criminal charge.

Under these views, the order denying the motion to vacate the orders of arrest in the first five actions should be affirmed, and that discharging such order of arrest in the Hovey suit (No. 6) should be reversed.

DALY, Ch. J., and LARREMORE, J., concurred.

Order in first five cases affirmed; order in sixth case reversed.

THE MECHANICS' AND TRADERS' BANK *against* ELLIS N. CROW AND JOHN J. RICEMAN, IMPLEADED.

Plaintiff, a banking corporation, discounted for one of its depositors an accommodation note, of which he was the payee, and credited him with the proceeds, a part of which was at once applied to pay a note held by the plaintiff, on which he was liable, and which was at the same time delivered up to him: *Held*, that the plaintiff was a holder of the note for full value.

In such a case, the surrender of the original note and the extension of credit on the substituted security is a present valuable consideration.

An accommodation note delivered to the payee upon his agreement to give the maker a part of the proceeds of the discount thereof and another note as security, is not, by the failure of the payee to fulfill his agreement, rendered invalid in the hands of a holder for full value without notice and before maturity.

A person who, without consideration, indorses a note, in order to enable the payee to get it discounted, is not, as against one who subsequently discounts it without notice, for full value and before maturity, relieved from liability by the failure of the payee to appropriate the proceeds of the discount, as he represented he would.

A lamp-post box provided for the reception of letters by the United States Post Office Department, under the authority of the act of Congress (approved June 8th, 1872), is one of the immediate agencies of the post office for the reception of letters, and constitutes part thereof, and a deposit of a letter therein is a deposit "in the post office," within the meaning of L. 1833, c. 271, § 8, providing for serving notice of protest by mail.

Appeal by defendants from a judgment of this court entered on the verdict of a jury.

The action was brought by the Mechanics' and Traders' National Bank of the City of New York, on a note for $2,500, made by the defendant Crow to Dusenbury & Nelson, and indorsed by the defendant Riceman before its discount by the plaintiff.

The facts on which the defendants Crow and Riceman claimed to escape liability, are stated in the opinion.

Plaintiff obtained a verdict for the full amount of the note and interest, and Crow and Riceman appealed.

Raymond & Coursen, for appellant Crow.

S. B. Logan, for appellant Riceman.

Thomas Allison, for respondent, on the point that the notice of protest had been duly mailed, argued that the lamp-post boxes being established by authority of act of Congress passed June 8th, 1872, and these boxes, and the mail matter deposited in them, being protected by all and the same provisions for their safety that are made for the protection of any other places established for the deposit of mail matter, should be considered as being included in the term "post office;" and cited *United States* v. *Marselis* (2 Blatchf. 108, 118); 1 Pars. on Bills and Notes, 481; 28 Vt. 316; 2 R. I. 407.

Robinson, J.—Defendants are sued as maker and indorser of a promissory note, dated New York, July 16, 1872, for $2,500, payable to the order of and indorsed by Dusenbury & Nelson. The testimony of the defendant Crow was, that this was an exchange note which he gave Dusenbury & Nelson, the payees, on their agreement to give him their note with the indorsement of A. D. Nelson, father of one of that firm, and on their promise to give him $1,800 out of it when discounted. He first testified they had given him the father's note, and then that they had not, and the jury, if the fact were material, had the right to find it upon his first statement.

The defendant Riceman simply states he was an accommodation indorser for Dusenbury & Nelson, and became such on their representation that they owed Crow, the maker, some $1,800, and wanted to pay him, and would have the note discounted at the bank. It was so discounted by plaintiff, August 10, 1872, without notice of any of the special circumstances, and the amount of the discount placed to the credit of the account of Dusenbury & Nelson, and subjected to their control, to be drawn out as they chose. It was so drawn out, $1,672 of it being applied to pay a note of theirs (or Nelson's), or of some third party indorsed by them (or Nelson), which was due, and which was delivered up.

The plaintiffs thus became the *bona fide* holders of the note for full value (*Brown* v. *Leavitt*, 31 N. Y. 114, and cases cited; *Weaver* v. *Barden*, 45 N. Y. 294; *Day* v. *Saunders*, 1 Abb. Ct. App. Dec. 495; s. c. 3 Keyes, 345), even if the defendants had any defense to the note for fraud upon the part of the payees in procuring it. The surrender of the original note, and the extension of credit on the substituted security, constituted them holders for a present valuable consideration (*Cary* v. *White*, 52 N. Y. 138). They, however, had no such defense. As to Crow, he gave the note, as he says, as an exchange on an executory promise that the payees would give in security another note, and from the discount of the one in suit would pay him $1,800. The non-compliance with such promise in no way impaired the rights of the plaintiff who discounted it without notice of any such promise, before it matured, and for its full value (*McSpedon* v. *Troy City Bank*, 33 Barb. 81; s. c. 3 Abb. Ct. App. Dec. 133).

As to Riceman, he was simply an accommodation indorser, without limitation as to the use of the note or interest in the proceeds when discounted, and he has no cause for complaint (*Purchase* v. *Mattison*, 2 Rob. 76, and cases cited).

The notice of demand and non-payment given Riceman through the mail by deposit in a United States lamp-post box, instead of the general post office, postage being prepaid, was a sufficient deposit in the post office. Such post office box was one of the immediate agencies of the post office of this city for the

reception of mailed matter, and constitutes a part thereof (*U. S.* v. *Marselis*, 2 Blatch. C. C. R. 108; 1 Pars. on Bills &c. 481).

The judgment should be affirmed.

DALY, Ch. J., and LARREMORE, J., concurred.

Judgment affirmed.

THE PEOPLE *ex rel.* MARTIN B. BROWN *against* ANDREW H. GREEN, COMPTROLLER OF THE CITY OF NEW YORK.

Under the act of 1870 (1 L. 1870, c. 190, § 6), in regard to the payment of claims against the city of New York—by which it is provided that the finance department of the corporation shall have the like powers and perform the like duties in regard to the fiscal concerns of the board of supervisors as it does in regard to the corporation, and that all moneys drawn from the treasury by authority of the board of supervisors shall be upon vouchers for the expenditure thereof, examined and allowed by the auditor and approved by the comptroller—the power given to the auditor does not authorize him to reject a claim against the county for supplies, which has been duly audited and allowed by the board of supervisors, merely on the ground that the goods furnished were not worth the sum allowed for them by the supervisors, unless the amount is so great as to warrant the conclusion that there must have been corruption or mistake.

He may, however, reject a claim duly allowed by the board of supervisors, if it appear by the vouchers or receipts on file in his office that the claim has already been paid.

The meaning of the terms "voucher" and "audit" defined. Per DALY, Ch. J.

By the common law auditors have no power to pass upon questions of law or fact disputed before them.

APPEAL from an order of this court made at special term, directing a peremptory writ of *mandamus* to issue.

The relator moved for a *mandamus* upon affidavits showing that he was a stationer, and had furnished books, stationery, printed calendars, etc., for the various courts and public offices in the city of New York, and that his bills for the same had been presented to the full board of supervisors, and audited

and allowed by them at the sum of $6,927 02. That at the time of such allowance there existed appropriations of moneys sufficient to pay such amount, and enable the whole of it to be drawn from the county treasury. That vouchers for all such services and supplies had been presented to the finance department, and to Andrew H. Green, the comptroller of the city of New York, and that he had been requested to examine and allow the same at the sums settled by the board of supervisors, but that he had refused to so audit them or to pay the claims. The affidavit also contained a schedule of the claims, with the date and amount of their allowance by the board of supervisors.

In response to these affidavits, there was submitted, on the part of the comptroller, an affidavit made by Abraham L. Earle, stating that he was the auditor of accounts in the finance department of the city of New York; that the claims of the relator had never been examined and allowed by himself or by any of his predecessors in office.

He also stated, in regard to the first item in the relator's schedule (which was "for printing and blanks supplied by deponent to the bureau of elections, $390 10"), that it was for wrapping and delivering blanks furnished for the use of the bureau of elections. That such blanks were furnished pursuant to a contract fixing the prices therefor. That in the relator's bill therefor was included the aforesaid item of $390 for printing and delivery thereof in addition to the contract prices. That thereupon, on settlement and adjustment of said claim, said item was disputed, and the auditor refused to audit the same, contending that the contract price covered the expense of wrapping and delivery, and thereupon the relator's bill for the printing and blanks was adjusted, audited and paid in full after deducting said disallowed item of $390 therefrom, and the relator's claims in that behalf fully settled.

He further stated that the relator's claims included bills mainly for printing furnished to the district attorney, surrogate and Court of Common Pleas, Marine Court and bureau for collection of personal taxes, amounting in the aggregate to the sum of $2,532 89, and that such supplies were worth only $2,499 89, and no more. That said bills were mainly payable from the

appropriation for "printing for executive departments and judiciary," and only the sum of $350 12 was then unexpended to the credit of said appropriation, and there was no other or greater sum in the treasury of the county of New York appropriated or applicable to the payment of said bills.

He further stated, in relation to the item of $1,810 40, for printing done for the board of supervisors, that said printing was justly and reasonably worth only the sum of $1,802 65, at which sum he was ready and willing to audit the same if the relator desired that he should so audit.

He further stated that the relator's claims included sundry bills for stationery, etc., amounting in the aggregate to the sum of $1,628 43; that the articles enumerated in said bills were justly and reasonably worth only the sum of $1,605 75, at which sum he was ready and willing to audit the same if desired by the relator.

The court at special term delivered the following opinion:

Robinson, J.—I concur in the opinion of Judge Joseph F. Daly, in the *People ex rel. Haskell* v. *Green, Comptroller*, that the action of the board of supervisors in auditing and allowing claims against the county for county charges, duly presented and acted upon by that body, is final, and not subject to review by the auditor of accounts, and that his and the comptroller's action is confined to a mere examination and allowance of the proper vouchers, as affording satisfactory evidence of the nature of the claim, its presentation and due verification (as required by L. 1845, chaps. 180, 524, as amended by L. 1847, c. 490, § 2), and the action of this board thereon (6 Lans. 30).

This consideration answers all the objections to the payment of the claim of the relator, except to $2,532 59 for printing, as to which it is asserted but $350 12 remains unexpended of the appropriation out of which it can be paid. As to this, an alternative *mandamus* ought to issue, but as to the other claims, a peremptory writ should be allowed.

E. Delafield Smith, for appellant.

I. The audit, and the allowance of the relator's bill by reso-

lution of the board of supervisors, is not sufficient to authorize payment by the comptroller. (*a*) Chap. 190, § 6, of the Laws of 1870 provides that "the finance department of the mayor, aldermen, and commonalty of the city of New York shall have the like powers and perform the like duties in regard to the fiscal concerns of the board of supervisors, as the said department possesses in regard to the concerns of the said mayor, aldermen, and commonalty of the city of New York," and that "all moneys drawn from the treasury by authority of the board of supervisors, shall be upon vouchers for the expenditure thereof, examined and allowed by the auditor and approved by the comptroller."

The powers and duties of the finance department in relation to the fiscal concerns of the mayor, &c., of the city of New York, which, by the statute, were extended over and made applicable to the fiscal affairs of the county, are defined in article fifth of the charter (L. 1870, c. 137, §§ 33–39).

The provisions of the statute as to adjustment, audit, and payment of bills and accounts are briefly as follows, viz.: 1. The finance department is directed to settle and adjust all claims in favor of or against the corporation, and all accounts in which the corporation is concerned as debtor and creditor. 2. The auditing bureau of the finance department shall audit, revise, and settle all accounts in which the city is concerned as debtor and creditor. 3. Vouchers for money drawn from the treasury shall be examined and allowed by the auditor and approved by the comptroller.

The charter of 1873 (c. 335, §§ 31 & 33) contains substantially the same provisions.

(*b*) It is conceded that, were it not for the provisions of L. 1857, c. 590, and L. 1870, c. 190, the audit and allowance by the board of supervisors of a bill or claim which was a proper and legal county charge, would be final and conclusive, and the county treasurer would be obliged to pay in accordance therewith (*People* v. *Lawrence*, 6 Hill, 244; *People* v. *Supervisors of Dutchess*, 9 Wend. 508). But these statutes introduced an entire change as to the powers of the board of supervisors in relation to the audit and allowance of bills and the payment of

claims against the county. A new check was created, and a new safeguard thrown around the county treasury by the provision that every claim against the county should be adjusted, revised, and settled by the auditor of accounts in the finance department, and should be paid only upon vouchers for the expenditure, examined and allowed by the auditor, and approved by the comptroller. The power to direct payment by the county treasurer of a specific sum, for a liability of the county, was thus taken from the board of supervisors. They might authorize the purchase of supplies needed for county purposes, but the audit and adjustment of the bill therefor, and the examination of the voucher for the expenditure, was committed to the auditor's bureau in the finance department. The resolution of the board of supervisors is necessary to authorize the purchase, but an adjustment and audit by the finance department is necessary to fix the amount of the claim (*People* v. *Flagg*, 15 How. 553; *People* v. *Flagg*, 17 N. Y. 589).

A. Oakey Hall, for respondent, relied on *People ex rel. Kelly* v. *Haws* (12 Abb. Pr. 200–202) and *People ex rel. Haskell* v. *Green* (MSS. opinion by Judge J. F. Daly, of this court, at special term).

Daly, Chief Justice.—As respects the question presented upon this appeal, the provisions of section 6 in the act of 1857 (2 L. 1857, p. 286), and of section 6 in the act of 1870 (1 L. 1870, p. 482), are substantially the same. A construction was given to the provision of section 6, in the act of 1857, by Judge Sutherland, in *The People ex rel. Kelly* v. *Haws* (12 Abb. Pr. 201, 202), which is equally applicable to the provisions in section 6 of the act of 1870. That construction is that it was not the intention of this provision to give the officers of the finance department an absolute supervisory power over the acts of the board of supervisors, in examining, settling, and allowing accounts against the county, which would be equivalent to an absolute veto check over the discretionary power of the board of supervisors. That the provision that all moneys drawn from the treasury upon the *authority* of the

board of supervisors shall be upon *vouchers* to be *examined* and *allowed* by the auditor and approved by the comptroller, means that it is the board of supervisors who are to determine whether the service was performed or the expense incurred.

I agree only in part in this construction, for, in my judgment, to examine, allow and approve a voucher means something more. What is a voucher? The word has several meanings; but, in its ordinary signification, it means a document which serves to vouch the truth of accounts, or to confirm and establish facts of any kind. A merchant's books are the vouchers of the correctness of his accounts, or a receipt is a voucher of a payment, but neither are conclusive. "To vouch" is to aver that a thing is true. "It is," says Crabbe, "to rest the truth of another's statement upon our own responsibility" (Crabbe's Synonymes, p. 441, Am. ed. of 1833). The voucher of the board of supervisors is that the claim or account submitted to them is correct, and should be paid as a valid charge against the county. But it cannot be paid unless the voucher is examined and allowed by the auditor and approved by the comptroller. Now what does this mean? The voucher is necessarily the account or claim, with the attestation, in some form or other, of the board of supervisors, that it is a valid charge against the county. It is presented to the auditor for examination. What is he to examine? Is he simply to ascertain whether the attestation, or other evidence of the action of the board of supervisors, is in the proper form and duly certified by the proper officer? The statute says he is to examine the voucher, and the account or claim is part of the voucher. A certificate of the action of the board of supervisors would be meaningless without the bill or account, for that has to go on file in the comptroller's office as the record evidence of the claim or demand. The examination of the voucher, then, necessarily means the examination of the account or claim, and if, upon looking into the account, the auditor discovers that a mistake has been made in the addition—that the items correctly added up do not amount to the sum claimed and certified to be correct by the board of supervisors, what is the auditor to do? Is he to allow the voucher and hand it over to the comptroller,

and is the comptroller, with the knowledge of that fact, to approve of it? In my judgment, if the auditor, upon examining the account, finds any mistake in it, he is not to allow it, nor is the comptroller to approve of it.

What is an auditor? Originally it meant an officer of the king, whose duty it was, at stated periods of the year, to examine the accounts of inferior officers and certify to their correctness (Blount's Dictionary of 1681; Cotgrove's Dictionary of 1632; Rastall's Termes de la Ley; Defoe's English Dictionary of 1732), and was afterwards used to designate those officers of the Court of Exchequer whose duty, according to Coke, was to take the accounts of the receivers of the king's revenue and "audit and perfect them," without, however, putting in any changes, their office being only to audit the accounts—that is, ascertain their correctness (4 Coke's Inst. 107). The very object of examining and auditing an account is to ascertain whether there are any errors or mistakes in it, and hence the definition of the verb "to audit," which is to examine, settle and adjust accounts—to verify the accuracy of the statement submitted to the auditing officer or body (McElrath's Com. Dict.) "At the present day," says Wedgwood, one of the last writers upon the meaning of English words, "this term is confined to the investigation of accounts, the examination and *allowance* of which is termed the *audit*."

The act of 1857 declares that the finance department shall have the control of all the fiscal concerns of the corporation, and shall adjust and settle all claims and accounts either in favor of or against the city. The county, as contradistinguished from the city—for both embrace exactly the same territory—is a part of the political organization of the State, for which, as in all the other counties, a board of supervisors was created with analogous powers. By the act of 1857, this board was changed and limited to twelve supervisors, elected by the people, the mayor and recorder being excluded. This act further provided that a majority of *all* the members of this new board should be necessary to pass any act, ordinance or resolution appropriating money, and that such act should be presented to the mayor for his approval, who should sign it, or else return it with his ob-

jections, when, after a certain time, it might be reconsidered by the board of supervisors, and if again approved by a majority of all the members, it should take effect. All this was, at that time, essential to a valid appropriation of money, except in the case of levying a special tax; but something more was required before it could be paid. The act declared that the finance department and its *officers* should have the like powers and perform the like duties in regard to the fiscal concerns of the *board of supervisors* as they possessed in regard of the local concerns of the corporation—that is, as already quoted, "to adjust and settle" all claims, &c., which was inserted in the 17th section, immediately preceding the provision for the examination and allowance by the auditor and the approval by the comptroller of vouchers. This was giving to the finance department and its officers the same powers in respect to the fiscal concerns of the county which they already had in regard to the fiscal concerns of the city, and it appears to me to be a plain disregard of this enactment to hold that the auditor and the comptroller, who are officers of the present finance department, have no power to consider any of the items in the bill or claim which forms a part of the voucher, but must allow and approve the voucher, if duly certified as the act of the board of supervisors, although these officers may know that there are items in the account, bill or claim which are erroneous. If this is to be the construction, then what did the Legislature mean by enacting that these officers should have the power and that it should be *their duty* "to adjust and settle" claims against the county? "To adjust" is to set right (Smyth's Synonyms Discriminated, Am. ed. p. 37), and "to settle" is either synonymous with "to adjust," or it means "to pay" (Webster's Dictionary, unabridged ed. of 1864).

I suppose the true construction of the act of 1857 to be, that the authority to appropriate money for the payment of claims against the county was vested exclusively in the board of supervisors; but even when appropriated, that the claim was not to be paid until it was examined and allowed by the auditor, and approved by the comptroller. That there was a supervisory power vested in these officers, which was meant to

be a check upon any hasty, ill advised, and erroneous appropriation by a popular body, constituted like the board of supervisors; and certainly the enormous frauds that were consummated, with the approval and authority of these assumed guardians of the public money after this law was enacted, show that even its provisions were insufficient to protect the county from the corruption and profligacy with which its fiscal affairs were administered by those who had the control of them.

It may be asked, if the auditor will not allow, or the comptroller approve, a claim which is a valid charge against the county and ought to be paid, what is the claimant to do? The answer is, that he has a remedy by mandamus, for the allowance and approval are ministerial duties on the part of the auditor and the comptroller, which they will be required to perform, unless they show, in reply to the writ, that the case is one in which the voucher should not be allowed or approved; for the court may determine whether the act ought or ought not to be performed (Tapping on Mandamus, c. 2 & c. 3, pp. 177, 189).

The affidavit of the auditor sets forth the reasons why he did not allow the voucher, distinguishing the items which he would not allow. For instance, that he would not allow $390 for the wrapping and delivery of the printed blanks for the use of the board of elections, because the wrapping and delivery was included in the contract for the printing; nor $2,532 89 for printing done for certain courts and officers, because the charge was too great by $33—$33 more was charged than it was worth; nor $1,810 40 for printing done for the board of supervisors, because it was worth but $1,802 65; nor $1,628 43 for stationery, because it was worth but $1,605 75; and lastly, that in respect to bills payable from the appropriation for printing for the executive departments and the judiciary, because there was but $350 12 remaining unexpended of that appropriation.

The duty imposed upon the auditor of examining and allowing a voucher does not justify his refusing to allow it, because, in his opinion, certain goods furnished the county, or services

rendered to it, are charged in the account, and allowed by the board of supervisors, for more than the goods and services were worth; unless the overcharge is so gross as to warrant the presumption of corruption, or that it must have been allowed without due examination through error or mistake. This can scarcely be predicated of the three items for printing and stationery, the amount alleged to be in excess of the value in each being relatively small. The first item is $2,532 89, which the auditor claims is $33 more than the printing was worth. The second is $1,810 40, also for printing, in which he claims is $7 75 more than it was worth. The third is $1,605 75 for stationery, which he alleges is $22 68 more than the stationery was worth. He does not specify the particular articles which were overcharged by which he arrives at this sum of $22 68, nor what were the specific charges in the printing by which he arrived at the respective overcharges in each bill, of $7 75 and $33. He does not claim in respect to these three items that there was any express contract by which the price or value could be ascertained or accurately estimated; or show in any way how he arrived at his conclusion that there was an overcharge in the value to the amount specifically stated by him. I do not understand that it forms any part, or ever did, of the duty of an auditor to reduce the value of the goods or of the services charged in an account, by the mere exercise of his arbitrary will. His examination is for the purpose of ascertaining if the bill or account is correct, that any errors or mistakes in it may be rectified. He does not reject the bill or account because he finds errors or mistakes in it; but audits it at its true amount, specifying the errors, and showing by his statement or audit what the correct account is. A bill, account, or claim against the county was not, under the acts of 1857 and 1870, paid by the authority of the auditor or the comptroller, but by the authority of the board of supervisors. As the payment is to be, and can only be by their authority, it was for that body to say whether the price charged for the goods or the value claimed for the services should be allowed or not, and where they have fairly and deliberately done so, the price or the value must be regarded as settled. I mean most dis-

tinctly, however, to say, that where the amount allowed for the service or the goods is so excessive—so notoriously beyond any ordinary standard of value—as to warrant the conclusion that there must have been corruption, the auditor is not to allow the voucher, nor is the comptroller to approve of it; nor would any court compel them to do so. The existence of corruption may be inferred from the amount allowed and the absence of any explanation, and, unfortunately for this city, the instances have been numerous enough to illustrate what I mean. Unless there has been corruption, or enough upon the face of the voucher to warrant the presumption of it, the duty of the auditor is limited to the correction of errors or mistakes, the audit being subject to the approval of the comptroller.

Auditors were never, at common law, or in equity, entitled to pass upon questions of law or fact disputed before them. They stated the accounts between the parties, correcting errors or mistakes; but if any question of fact or of law arose upon the investigation of the accounts, which was disputed, they had to report it for the determination of the tribunal or body by whom they were appointed (*Godfrey* v. *Saunders*, 3 Wils. 94; Buller's Nisi Prius, 128, 5th ed.; 1 Selwyn's Nisi Prius, c. 1; Action of Account, Bacon's Abr. Accompt, F; *Chappelaine* v. *Dechenaux*, 4 Cranch, 306; 5 Binney, 433). In *Field* v. *Holland* (5 Cranch, 20, 21), Chief Justice Marshall held that auditors were agents or officers of the court, who examine the documents, papers or accounts submitted to them. That the order appointing them bears no resemblance to a rule referring a cause to arbitrators. That their duty is simply to report to the court, stating the result of their examination, and does not require them to form any opinion whatever. I cite this, not because the duty of the auditor here is in all respects like that of the auditors formerly appointed in the United States courts, but to show that auditors, whether in the action of account, or in equity, or in the exchequer, or in the United States courts, never decided such questions as to whether the articles or services embraced in the account were of the value charged, or undertook to reduce the amount, because, in their opinion, they were charged at too much, but merely examined the accounts

submitted to them with the accompanying documents and papers, correcting obvious errors and mistakes, and reported to the court what they found the state of the account or accounts to be.

Here the auditor examines the account, not before, but after the action of the body that determines whether the claim is a valid charge, and ought to be paid, and in that examination the same office is performed, the rectification of errors or mistakes, but not the decision of matters which properly belong to the body in whom is vested the authority to order the claim to be paid.

There is nothing in the affidavit of Mr. Earle, the auditor, to warrant the inference that the amounts in the three items referred to were corruptly allowed. As I have said, the alleged excess in each item is small in proportion to the amount, and there is nothing in his affidavit that would entitle the court to say that he was right, upon the ground that these amounts were, or must have been allowed through error or mistake. It was different in respect to the charge for the wrapping and delivery of the printing for the bureau of elections. If it was included in the contract for the printing (and it must be assumed that it was, for the auditor so states, and the fact is not denied), it was clearly a mistake in the board of supervisors to allow it. It appears, moreover, from the auditor's affidavit, that the relator's bill for this item of printing, was adjusted, audited and paid after deducting the $390 for the wrapping and delivery, and that the relator gave a receipt in full, acquiescing in the settlement after the rectification of this error. This claim, however, of $390, is ordered by the mandamus to be paid, which I think was erroneous.

The judge excluded from the peremptory mandamus the claim for $2,532 89, alleged to be payable mainly out of the appropriation for printing for the executive department and judiciary, to the credit of which there remained but $350 unexpended. As he ordered an alternative mandamus to issue in respect to this claim, I do not see what we have to do with it upon this appeal, which is an appeal from the peremptory mandamus.

This leaves, deducting the $390, $4,404 43, which should have been allowed, approved and paid, and the mandamus, modified to this amount, should stand.

J. F. Daly, J.—I cannot agree in all the views expressed in the learned opinion of the Chief Justice, but concur in affirming the order for peremptory mandamus after reducing the amount for which the mandamus issues by the sum of $390. Following the decision of the general term of the Supreme Court in this district, in the late case of *The People ex rel. Brown* v. *Green, Comptroller*, approving the decision of Judge Sutherland in *The People ex rel. Kelly* agst. *Haws* (12 Abb. Pr. 200), and the decision in *The People ex rel. Haskell* v. *Green*, in this court (special term), and disapproving *People* v. *Flagg* (15 How. Pr. 553), I conclude that the duty and powers of the finance department and its officers, under the act (L. of 1870, chap. 190, sec. 6), extends no further than the examination and allowance or disallowance of the vouchers presented to that department for a claim already audited by the board of supervisors. Such power in the county auditor and comptroller extends no further than an inquiry as to whether: 1st. The claim so audited by the supervisors was a valid legal county charge. 2d. Whether the amount at which the claim was audited by the supervisors was in excess of the proofs before the board. 3d. Whether the audit of the board was without the account or items of charge required by the statute.

Where the board of supervisors acts upon a claim which is a legal county charge by allowing a sum to the claimant justified by the proofs before them, and their action has not been fraudulently procured, their audit is final and conclusive (*cases above cited and authorities referred to in them.*)

Loew, J., concurred with Daly, Ch. J.

Order affirmed as modified.

WILLIAM E. TREADWELL *against* MARGARET L. HOFFMAN, IMPLEADED WITH LINDLEY M. HOFFMAN.

A promissory note, made to the order of a married woman by her husband, and by him delivered to her for valne, is her separate estate, and if for a valuable consideration she afterwards indorses it over to a third person, she is liable on the contract of indorsement.

The case of *White* v. *McNett* (33 N. Y. 371), distinguished.

An averment in a complaint against the indorser of a note that the defendant had "due" notice of protest, is not put in issue by a denial that the defendant had "*due* notice" of protest. The denial is bad, as containing a negative pregnant.

Since the act of 1835 (L. 1835, c. 141), the notary's certificate of mailing notice of protest need not state the reputed place of residence of the party notified or the post office nearest thereto.

APPEAL by defendant from a judgment of the general term of the Marine Court, affirming a judgment of that court entered on the decision of a judge thereof, after a trial before him without a jury.

The complaint alleged that "on February 1st, 1871, at the city of New York, the defendant Lindley M. Hoffman, for a good and valnable consideration, made and delivered his certain promissory note, in writing, in the words and figures following, to wit:

'$500. NEW YORK, February 1, 1871.

25 cts. U. S. I. R. Stamp. Canceled.

Nine months after date I promise to pay, to the order of Mrs. Margaret L. Hoffman, five hundred dollars, with interest, for value received.

L. M. HOFFMAN.'

"That thereafter and before the maturity of the said note, the said Margaret L. Hoffman, for a good and valuable consideration, indorsed and delivered said note to the plaintiff, who is now the lawful owner and holder thereof.

"That the said Margaret L. Hoffman is the wife of the said Lindley M. Hoffman, and that at the time of making her said indorsement on said note she had, and still has, a separate es-

tate, and intended to charge her separate estate by her said indorsement.

"That on the 4th day of November, 1871, when the said note became due and payable, the same was duly presented to the defendant L. M. Hoffman for payment, and payment thereof demanded and refused, whereupon the said note was duly protested for non-payment, of all which the defendant Margaret L. Hoffman had due and legal notice."

The defendant Margaret L. Hoffman answered and denied that "due notice of the dishonor" of the note was given her, and also denied that she intended to charge her separate estate by the indorsement of the note.

On the trial the plaintiff put in evidence the note as indorsed, and the notary's certificate of protest, and his certificate that "notice of protest" was "duly served by mail" on "M. L. Hoffman."

No further evidence on either side was offered, and the court gave judgment for the plaintiff for $553 67.

Albert Stickney, for appellant, argued, 1. That there was nothing to show that Mrs. Hoffman had made the payment of the note a charge on her separate estate. 2. There is nothing in the married women's acts giving her the power to make the contract of indorsement, and the indorsement was absolutely void (*Hansel* v. *De Witt*, 63 Barb. 53; *Phillips* v. *Wicks*, 14 Abb. Pr. N. S. 380). 3. Even conceding that the note was Mrs. Hoffman's separate property, yet the act of 1862 only gave a married woman power to enter into contracts in reference to her real estate. The precise point was decided in *White* v. *McNett* (33 N. Y. 371). 4. The proof of notice of protest was insufficient.

Joseph H. Choate, for respondent.

1. Under the pleadings no evidence was required of presentment, non-payment and notice to charge the defendant as indorser. Her answer admits that she had legal notice, and only by way of negative pregnant denies that the legal notice which she received was *due* notice.

The notary's certificate answers the requirements of the statute, if any evidence was necessary, and is sufficient evidence of the protest of the note, and of due and sufficient service of notice of dishonor on the indorser (*Harbeck* v. *Craft*, 4 Duer, 122; *Arnold* v. *Rock River Valley R. R. Co.* 5 Duer, 207; *Burrall* v. *De Groot*, 5 Duer, 379; *Ketchum* v. *Barber*, 4 Hill, 224; Opinion of COWEN, J. p. 236; L. 1835, c. 141, p. 152; Act of April 23d).

2. The note in question, when made and delivered by L. M. Hoffman to Margaret L. Hoffman, became her sole and separate property. The acts of 1860 and 1862 are *enabling*, and *not* disabling acts, and empower a married woman possessed of separate property "to bargain, sell, assign and transfer the same" as if she were unmarried, free from any restriction, either as regards the manner or means by which such disposal is effected (L. 1860, p. 159; L. 1862, c. 172; *Adams* v. *Curtis*, 4 Lans. 164; *Minier* v. *Minier*, 4 Lans. 421).

(*a*) When the defendant acquired the note under the circumstances alleged in the complaint and admitted, it became her sole and separate property, in the sense of section 1 of the act of 1860. (*b*) The right given her by section 2 of that act to bargain, sell, assign and transfer her sole and separate property certainly enabled her to make such a transfer in any way known to the law; a conditional transfer by way of indorsement, or an absolute transfer. If she can make the conditional bargain implied in an indorsement, she must comply with the conditions. It necessarily involves a promise on her part to pay if the maker does not and she has due notice. Or it may well be claimed under the same section that the transfer of the note to the plaintiff was the carrying on business, which the act makes her competent to do. (*c*) Section 7 of the same act expressly makes the defendant subject to suit, in the same manner as if she were sole, in all matters having relation to her sole and separate property, or which may come to her by purchase or gift, which description clearly covers this note, after it had been acquired by her as stated in the complaint. (*d*) This appeal does not raise the question whether her separate estate is charged. She is sued as if a *feme sole*, and judgment went against her as if a

feme sole, and there is nothing in the judgment charging her separate estate (*Corn Exchange Ins. Co.* v. *Babcock*, 42 N. Y. 613; *Hier* v. *Staples*, 51 N. Y. 136; *Foster* v. *Conger*, 61 Barb. 145).

DALY, Chief Justice.—The case which the appellant relies upon for the reversal of this judgment (*White* v. *McNett*, 33 N. Y. 371), is, in a very material feature, distinguishable from the present one. In that case, Mrs. McNett was the owner in her own right of certain real estate, which she sold, taking in part payment of the consideration money certain bonds and mortgages, which she sold and assigned to the plaintiff's testator, with a covenant of guaranty by herself and her husband that the money payable thereby was collectable. She was sued upon this guaranty, and it was held that to maintain the action it was necessary to show that an intention to charge her separate estate was declared in the contract of sale and guaranty, or that *the consideration received upon the sale of the bonds and mortgages was for the direct benefit of her estate*, and as neither of these circumstances was shown, it was held that the action could not be maintained.

It was conceded, however, by the judge who delivered the prevailing opinion, that proof that she had received the money, would, in the absence of anything to the contrary, have been proof of its application to benefit her estate. A presumption arose in that case upon the face of the papers, that she had received the money, as she, together with her husband, executed the instrument assigning the bonds and mortgages, *wherein she acknowledged the receipt of the consideration money.* But this presumption was overcome by her own testimony upon the trial, that none of the money came into her hands, that she did not know what had been done with it, and by proof that the person who negotiated the purchase of the bonds and mortgages dealt exclusively with her husband.

But, in the present case, it is averred in the complaint and not denied in the answer, that Mrs. Hoffman, "*for a good and valuable consideration*," indorsed the note and delivered it to the plaintiff. It was her husband's note, made payable to her

order, and when it is averred that it was indorsed and delivered by her to the plaintiff for a good and valuable consideration, the presumption, in the absence of anything to the contrary, must be that this consideration, whatever it was, was received by her.

It was well settled before the passage of the enabling statutes, that in equity, a married woman having a separate estate was, as to her separate estate, considered as a *feme sole*, and might, in person or by her agent, bind it for the payment of debts contracted for the benefit of it, or for her benefit upon its credit (*North American Coal Co.* v. *Dyett*, 7 Paige, 9; *Gardner* v. *Gardner*, Id. 112; *Curtis* v. *Engel*, 2 Sandf. Ch. 287)—a rule not affected by these statutes, which have enlarged her capacity to acquire and have a separate estate, and facilitated the remedies for and against her, as respects her separate property (*Ballin* v. *Dillaye*, 37 N. Y. 37). Instead of requiring the creditor to resort to a suit in equity to charge the estate of a married woman, they have authorized her to be sued, "in all matters having relation to her sole and separate property, or which might thereafter come to her by descent, devise, bequest, purchase, *or the gift or grant of any person*, in the same manner as if she were sole" (4 Edmonds' General Statutes, p. 517), which, instead of a resort to equity, authorizes a personal judgment against her upon any obligation or debt by which she may bind her separate estate.

The only question in this case is, whether a promissory note, made by her husband to her order and delivered by him to her, can be regarded as her separate estate, so as to authorize her to contract with reference to it—that is, to bind herself for the payment of it by indorsement, where she transfers it to a third person for a good and valuable consideration. The note, as the written obligation of the husband to pay a certain sum of money, for value received, by a certain day, would be personal property in the hands of the person to whom the note was made payable. If it had been received by the wife from a third person, it would belong to her as her separate estate, and being a promise to pay a sum of money for value acknowledged to have been received, she could presumptively maintain an

action upon it against the maker. It has been held, that, so far as the wife has, by the enabling statutes, the capacity to act as a *feme sole*, she may contract with the husband, or the husband with her; and that, as respects her separate property, or contracts or obligations growing out of any trade or business carried on by her, she may sue the husband, or the husband may sue her (*Adams* v. *Curtis*, 4 Lans. 167, and cases there cited; *Minier* v. *Minier*, Id. 421; *Devin* v. *Devin*, 17 How. Pr. 515; *Gage* v. *Dawchy*, 34 N. Y. 293; *Abbey* v. *Deyo*, 44 Id. 345; *Moore* v. *Moore*, 47 Id. 467). A wife may enter into a contract for the purchase of personal property from her husband, which, though void in law, is good in equity, if founded upon a sufficient consideration passing from the wife, and will in equity be enforced against the husband; and the wife may loan money to her husband, for which she will have a claim against him which she can enforce in equity (*Savage* v. *O'Neil*, 44 N. Y. 302, and cases there cited). In this case of *Savage* v. *O'Neil*, the wife, during coverture, loaned money to her husband, which she had received from her mother, and took his notes for it. He afterwards executed a bill of sale to her of the goods in his store, in payment of the notes, and it was held that the bill of sale was good against creditors, and that the wife was the legal owner of the goods transferred by the bill of sale. In *Jaycox* v. *Caldwell*, 51 N. Y. 395, a husband, who was married before the act of 1848, and who had declined to assert his marital rights to the personal property of his wife, borrowed money from her, with the understanding that it would be repaid. It was held that the agreement was founded upon a sufficient consideration; that it imposed an equitable obligation upon the husband, and that his preferring that debt in an assignment for the benefit of creditors was lawful, and did not vitiate the assignment. *Phelkirk* v. *Pluckwell* (2 M. & S. 394) was an action at law upon a promissory note, made by the defendant to the order of a married woman. The action was brought by the husband and wife, and the objection was taken, that as it did not appear upon the face of the note that it was on account of any meritorious consideration moving to the wife, the husband alone ought to sue; but the court held that

the wife was the meritorious cause of the action; that she was the donee of the note; that it was acquired by her, and that the note was a thing that of itself imported a consideration. "Does not a promissory note," said Bayley, J., "import *prima facie* a consideration for the promise to pay, according to the tenor—that is, to the wife—and what is there to show that the wife is not the meritorious cause of action? It was incumbent upon the defendant to show the contrary."

These cases are decisive of the point under consideration. They show that a husband may make a promissory note payable to the order of his wife, and deliver it to her for a consideration received from her; that it imports *prima facie* a consideration passing from the payee to the maker, that is, from him to her; that when delivered to her it becomes, under our statutes, her sole and separate property, and before the enabling statutes would be so regarded in equity; that being her sole and separate property, she may make any contract with reference to it, and that when she does so, she acts and is to be treated as a *feme sole;* that Mrs. Hoffman, by indorsing and delivering the note to the plaintiff, contracted, as she might lawfully do, to pay it in the event of its non-payment by the maker; that, acting in the transfer of it to the plaintiff as a *feme sole*, her indorsement is to be looked upon the same as any other indorsement of commercial paper, and governed by the same rules, as respects her rights and liabilities.

The answer admits that the defendant had legal notice of the protest of the note. She does not traverse that averment in the complaint, for she does not deny that she received notice, but merely that she did not receive *due* notice; in addition to which, it is not necessary, since the act of 1835 (L. of 1833, c. 141), that the notary should specify in his certificate the reputed place of residence of the party notified, or the post office nearest thereto (*Ketchum* v. *Barber*, 4 Hill, 225, 237).

The judgment should be affirmed.

Larremore, J., concurred.

Judgment affirmed.

HENRY FISHER *against* ROBERT SHARPE AND ANOTHER.

Between the original parties to a note, a partial failure of consideration may be set up as a partial defense.

One who takes a negotiable promissory note for an antecedent debt, and gives up no security, nor any legal rights, nor gives any extension of time, is not a holder of the note for value.

When a note is transferred before maturity by the payee to his debtor, on account of the debt, there is no presumption thereby raised that the debt was thereby extinguished, or an extension of time given to pay it.

APPEAL by defendants from a judgment of the Fifth Judicial District Court.

This action was brought on a promissory note for $200, made by the defendants to the order of Pardee & Co., and by them indorsed over to the plaintiff.

It appeared by the evidence that the defendants purchased from the firm of Pardee & Co. the lease, stock and fixtures of a grocery store, and gave the note referred to in part payment of the consideration, which it was agreed that they should pay for the same. Pardee & Co. thereupon transferred it to the plaintiff, in part payment of a pre-existing debt, which they owed him for a part of the same stock sold by them to the defendants. The facts relied on as a defense are stated in the opinion.

The justice rendered judgment in favor of the plaintiff.

Thomas Darlington, for appellants.

John A. Dinkel, for respondent.

LOEW, J.—It is well settled that in an action between the original parties to a promissory note, proof of the entire failure of consideration will be a complete defense; but both the English and American authorities are very conflicting as to whether a partial failure of consideration may be shown for the purpose of reducing the amount sought to be recovered. The better opinion, however, as well as the more recent decisions, appears to be in favor of permitting it to be interposed as

a good defense *pro tanto* (*Sawyer* v. *Chambers*, 44 Barb. 42; *Spalding* v. *Vandercook*, 2 Wend. 431; *Peden* v. *Moore*, 1 Stew & Port. 71).

In the present case, the uncontradicted testimony of the defendant Sharpe shows that a large part of the goods was never delivered at all; that another portion was worthless, and that within a few days after they took possession of the store, they were compelled to remove therefrom and hire another one, at a greatly increased rent, because the landlord refused to consent to the assignment of the lease, unless he was paid $400. This consent it was the duty of Pardee & Co. to obtain before making the assignment (*Roberts* v. *Geis*, 2 Daly, 535). It thus appears that there was a failure of consideration exceeding in amount that of the note in suit. It follows that Pardee & Co. could not have recovered upon it, if the action had been brought by them.

Let us now inquire whether the plaintiff occupies a better position than Pardee & Co., as regard his right to maintain this action. He claims to be a *bona fide* holder for value. If such were the fact, he could undoubtedly recover. But to constitute one a *bona fide* holder of negotiable paper, he must not only have received it before maturity without notice that it is subject to some existing equity, but he must also either have given value for it, or else in consideration thereof, surrendered some subsisting security or parted with a valuable legal right, or incurred some new and distinct legal liability (*Lawrence* v. *Clark*, 36 N. Y. 128; *Traders' Bank of Rochester* v. *Bradner*, 43 Barb. 379). The plaintiff, it appears, has not complied with any one of these prerequisites. He simply received the note in part payment of a precedent debt. This did not make him a *bona fide* holder for value (*Lawrence* v. *Clark*, *supra*; *Bright* v. *Judson*, 47 Barb. 29). Nor did it operate as a discharge of the debt *pro tanto*. To have that effect there must be an express agreement between the parties, that it is to be received for that purpose (*Bright* v. *Judson*, *supra*).

It is, however, urged that the debt from Pardee & Co. to the plaintiff was due, and that the latter, before he received the note in suit, might have taken steps to compel payment there-

of. But by accepting it, his right to enforce payment from Pardee & Co. became suspended until the note, which had nearly a year to run, should mature. It is claimed that a valuable legal right was thus relinquished by the plaintiff, which under the decisions of the Supreme Court in *Burns* v. *Rowland* (40 Barb. 368), and *Traders' Bank of Rochester* v. *Bradner* (*supra*), entitles him to a judgment. It is sufficient to say upon this point that there is not a particle of evidence in the case to show either that the debt from Pardee & Co. to the plaintiff was due at the time the note was transferred to the latter, as was the case in *Burns* v. *Rowland*, or an express agreement not to enforce acquired legal rights, such as was shown in *Traders' Bank of Rochester* v. *Bradner*.

The judgment must therefore be reversed.

J. F. Daly, J., concurred.

Judgment reversed.

James M. Post, as Receiver, &c. *against* Stephen Geoghegan.

Defendant having directed a tradesman, to sell A. any goods he wanted, and he (defendant) would be responsible: *Held*, that taken in connection with the other circumstances of the case, *e. g.*, that defendant gave directions as to where the goods should be sent, &c., these words were sufficient to show that the intention of the parties was that defendant should be primarily liable for the goods.

Appeal by defendant from a judgment of the Eighth Judicial District Court.

This action was brought by the plaintiff, as receiver, &c., to recover the sum of $176 10 from the defendant, the same being a balance alleged to be due from the latter, to the firm of Halpin & O'Callaghan, for goods sold and delivered.

The defendant admitted the correctness of the plaintiff's

claim, as specified in the bill of particulars, with the exception of an item of $110 for a barrel of bourbon and a barrel of pure spirits, which were delivered to one John Connolly, and which he contended he was not liable for. The grounds on which he claimed exemption are stated in the opinion.

The justice rendered judgment in favor of the plaintiff for the full amount claimed.

Malcolm Campbell, for appellant.

Aubrey C. Wilson, for respondent.

Loew, J.—It appears that the defendant called at the place of business of Halpin & O'Callaghan, in company with one Connolly, and after he had introduced him to one of the members of said firm, he requested them "to sell him (Connolly) any goods he wanted, and he (defendant) would be responsible." And the question now arises, whether this promise was an original undertaking, upon which the defendant can be held liable, or whether it was a collateral one, and thus within the statute of frauds.

To constitute an original obligation on the part of one, where the goods are delivered to another, it is requisite that it should appear that the credit was given solely upon the responsibility of the person making the promise, otherwise the undertaking is collateral and void by the statute, unless it be in writing.

This being so, I have entertained considerable doubt as to whether the defendant in this case is chargeable upon his promise. It will be observed, that the words employed were "*sell him*," which would seem to imply a transfer to Connolly for an equivalent in money. But upon reflection, I have come to the conclusion that such a promise may still be deemed an original obligation, if the surrounding circumstances clearly show that one party intended it, and the other acted upon it, as such.

In *Chase* v. *Day* (17 Johns. 113), the defendant said: "If my nephew should call for papers, I will be responsible for the

papers that he shall take." This was held to be an original and absolute contract on the part of the defendant. In *Dixon* v. *Frazee* (1 E. D. Smith, 32), it was said that where the defendant promised that he "would see that the plaintiff was paid," such promise might undoubtedly be regarded as an original undertaking, when so intended by the promisor, and so received and acted upon by the promisee. And in *Allen* v. *Scarff* (1 Hilton, 209), BRADY, J., remarked: "Perhaps if the engagement of the defendant was to see the vendor paid, it might be held sufficient." Although none of these promises was precisely like the one in the case at bar, I nevertheless refer to them, for the purpose of showing how our courts have viewed somewhat similar promises.

The present case is unquestionably a very close one. But I think that the promise, taken in connection with the uncontradicted testimony given on the part of the plaintiff, that the defendant himself directed the liquors, desired by Connolly, to be sent to the latter at Melrose—as well as the other circumstances of the case—was sufficient to warrant the justice in finding that the debt was contracted, primarily and exclusively, on the credit of the defendant.

The judgment should therefore be affirmed with costs.

J. F. DALY, J., concurred.

Judgment affirmed.

ISAAC N. HAIGHT *against* JOSEPH NAYLOR, IMPLEADED.

A draft drawn on A., "agent Co-operative Brush Co.," and accepted by A., "agent Co-operative Brush Co.," does not (in the absence of any other facts) bind the company as acceptor of the draft.

APPEAL by plaintiff from a judgment of this court, entered on the dismissal of the complaint on the trial.

The facts are stated in the opinion.

ROBINSON, J.—The defendant Naylor, was sued as a director of "The Co-operative Brush Company," formed under the general manufacturing act, for an alleged debt of the company, for which it was claimed he was liable under that statute for the failure of the company within twenty days from the first day of January, 1872, to make and publish an annual report of its affairs. He was then a trustee, and the obligation upon which such liability was claimed to exist, was a draft or bill of exchange in these words:

"$600. New York, Dec. 7, 1871.

"Ninety days after date, pay to the order of myself, six hundred dollars, value received, and charge the same to account of (Signed) JAMES F. CLARK.

"N. W. Day, Ag't Co-operative Brush Co., 40 Dey st."

Across the face was written, in the handwriting of said Day, "Accepted. Nicholas W. Day, Agt. Co-operative Brush Co." Plaintiff, early in January, 1872, became the owner of the draft, by purchase, from Mr. Clark, though whether by indorsement or assignment, or at what precise date, is not shown.

The present appeal only presents the exceptions taken on the trial to the refusal of the judge to dismiss the complaint. 1st. Because the acceptance was not that of the company. 2d. Because the plaintiff had no existing debt for which defendant, for such default of the company, was liable; and 3d.

Because one stockholder or his assignee could not sue a co-stockholder.

The complaint was dismissed, the judge stating as the ground therefor, that the draft was not an existing debt (for which the defendant was liable by reason of the alleged default in not making any report of the condition of the affairs of the company), within the meaning of the statute, and to this ruling plaintiff excepted. The dismissal of the complaint was correct, as no cause of action was shown.

The draft was not one made upon or accepted by the corporation, nor for which it was liable. It bears on its face no evidence that the corporation had any connection with it as principals. It was drawn on "N. W. Day, agent of the company," and was accepted by him, "Nicholas W. Day, Agent, &c." His being such agent, and so called, was a mere "*descriptio personæ*." The instrument, on its face, in no way assumes to emanate from the company or to have been given in the course of its dealings. Nicholas W. Day, although its agent, did not act in its name as the principal, nor in any way bind them as such. Without assumption by the agent to bind the principal, he creates no obligation as against him, and this seems well established by the decisions of our courts (*Dean* v. *Roesler*, 1 Hilt. 420; *Moss* v. *Livingston*, 4 N. Y. 208; *De Witt* v. *Walton*, 9 N. Y. 571; *Olcott* v. *Tioga R. R. Co.* 40 Barb. 179; *Pumpelly* v. *Phelps*, 40 N. Y. 59). Nothing appears in the evidence authorizing the assumption that the acceptance of "N. W. Day, agent of the Co-operative Brush Co.," was to be regarded as that of the company. The consideration of the draft was not shown to have been for money advanced or brushes sold to them, nor does the fact proved, that he had paid with the funds of the company others of such drafts, warrant the conclusion that the name adopted was that of the company, or that he was authorized to bind the company by any such acceptance. I think the nonsuit or dismissal of the complaint was properly granted upon this ground of the motion, and that it should be upheld.

I am not prepared to follow the decision in *Nimmons* v. *Hennion* (2 Sweeny, 663), and hold that an obligation of such a

corporation, existing by bond, bill or promissory note outstanding when the annual report of the company is required to be made, but payable at a subsequent date, is not an "existing debt," within the entire scope and meaning of the several clauses of section twelve of the general manufacturing act (Laws, 1848, chap. 40, p. 54), both as one for which a liability *exists* and for which the trustee incurs the penalty for the failure to report. Regarding it unnecessary to the present case to express any opinion upon the point, I am for affirmance upon the ground first stated; that the company was not a party to the draft in question.

DALY, Ch. J., and J. F. DALY, J., concurred.

Judgment affirmed.

MARY SHEA *against* THE SIXTH AVENUE RAILROAD COMPANY.

Where plaintiff, for the purpose of crossing the street, stepped upon the platform of defendant's street car, to pass over the same, and the driver of the car willfully seized and threw her from the car, whereby she was injured: *Held*, the defendant was liable.

APPEAL by plaintiff from a judgment of this court, entered on an order at special term sustaining a demurrer to the complaint.

The material averments of the complaint are stated in the opinion.

O. P. Buel, for appellant, argued that defendants' car was a "vehicle" within 1 R. S. 696, §§ 6, 7.

Waldo Hutchins, for respondent. The complaint shows that the plaintiff was not a passenger, but that while walking upon the public highway she was violently assaulted by a person in the employment of the defendants, and injured. The defendant could only be held liable for such an assault,

when made by its agent upon a passenger, and in that event only when the court can see that it was made in the discharge of his duty as such agent (*Isaacs* v. *Third Ave. R. R. Co.* 47 N. Y. 122; *Whittaker* v. *Eighth Ave. R. R. Co.* 51 N. Y. 295; *Fraser* v. *Freeman*, 43 N. Y. 566).

J. F. Daly, J.—It will not be necessary to examine the question, whether city railroads are embraced within the provision of the statute which makes the owners of certain vehicles for carrying passengers on the public highways liable for the willful acts of the drivers of such vehicles, while driving (1 R. S. 696, sections 6 and 7; *Whittaker* v. *Eighth Ave. R. R. Co.* 51 N. Y. 295; *Isaacs* v. *Third Ave. R. R. Co.* 47 N. Y. 122), in order to decide upon the sufficiency of the complaint. The allegations of the complaint show: "That on or about the 13th day of March, 1873, one of the cars or vehicles of defendant was standing at the corner of Barclay street and Church street, in said city, which said streets are public highways, in such a position as to block up the passage across said Church street; that the plaintiff was desirous of crossing said street, and for that purpose stepped upon the front platform of said car or vehicle, for the purpose of passing over the same; that thereupon the driver of said car or vehicle, who was then the servant and agent and in the employment of the defendant, and engaged in driving such car or vehicle, forcibly, willfully and violently seized the plaintiff and threw her from the said car or vehicle upon the said highway, in consequence of which the plaintiff's leg was wounded, injured, broken and fractured in several places, and the plaintiff was otherwise severely bruised and injured," &c.

From the above averments, it is not clear that defendants are not responsible for the assault of their driver on the plaintiff, since the act may well have been done in the course of his employment. The plaintiff had no right to step upon the platform of the car, in order to pass over it to gain the other side of the street, as she attempted to do. The public can use the street cars only for the purpose of being carried as passengers, on the payment of fare. Any other attempted use, and

any stepping on the car, would be a trespass, and the defendant's servants have the right to prevent it, or to remove from the platforms any person stepping thereon for any purpose, except to ride as a passenger. The conductor has the right to remove passengers for non-payment of fare, or for being disorderly, and to effect such removal by force (*Sandford* v. *Eighth Ave. R. R. Co.* 23 N. Y. 343; *Higgins* v. *Watervliet Turnpike Co.* 46 N. Y. 23), and there is as much right to eject a person who steps upon the platform with no intention of riding as a passenger. That the car blocked up the street crossing is no excuse for the act any more than it would be to walk over the vehicle full of goods of a carrier of goods, or to walk through the defendant's car from the front platform to the back, for greater convenience in making the passage of the street.

If this be so, the act of the driver in ejecting the plaintiff would be lawful, but in view of the charge of the complaint, that he "violently and forcibly seized the plaintiff and threw her from the car," breaking her leg and otherwise severely injuring her, the question arises as whether there was not the exercise of such unnecessary force and violence as renders the defendants responsible. The doctrine that the master is liable for the unusual and unnecessary force and violence used by his servant in cases where the use of force is authorized and within the scope of the servant's employment, is as well settled as that the master is not liable for assaults by his servant outside the line of his duty, and very late cases in the Court of Appeals sustain the doctrine in extreme cases. Thus where a conductor removing a passenger for non-payment of fare, struck the latter a blow in the face, and an action was brought against the railroad company for the assault, the decision of the judge, dismissing the complaint, was reversed, because it should have been left to the jury to say if the act of the conductor was malicious, or only deemed by him necessary to effect the purpose with which he thought himself charged in the proper performance of his duty (*Jackson* v. *Second Avenue R. R. Co.* 47 N. Y. 275). And in that and prior cases, the general doctrine is held that the master is liable for the consequences of the excess of zeal or temper with which the serv-

ant performs the duty with which he is charged (*Higgins* v. *Watervliet Turnpike Co. supra*; *Sanford* v. *Eighth Avenue R. R. Co. supra*, and cases cited).

This case is to be distinguished from *Isaacs* v. *Third Ave. R. R. Co.* (47 N. Y. 122), where the conductor threw a passenger from the platform of the car, as she stood there waiting for the car to stop, in order to alight. In that case no process of reasoning could construe the act of the conductor into any resemblance to an act performed in the scope of employment or under authority. In the present case, we have the plaintiff unlawfully stepping on the platform, and the driver ejecting her. The presumption is, that he was acting under authority and instructions. The demurrer concedes the truth of the allegation, that the driver was "then the servant and agent, and in the employment of defendant, and engaged in driving such car," when he seized the plaintiff and threw her from the car. It would be proper, on the trial, to prove that he was, and it might be done, for instance, in showing a rule of the company (as I have repeatedly seen), forbidding passengers to get on or off the front platform of the car. It will be seen that the complaint does not charge that the act was done maliciously, which would have exonerated defendants, but "willfully," forcibly, and violently. Willfully is here used in the sense of intentionally, and is legally applicable to an act knowingly done by a servant in the discharge of a supposed duty, and does not imply any personal ill will, making the assault the driver's and not the company's. If the allegations in the complaint were proved, it would require these questions to be left to the jury: 1st. Was the act of the driver within the scope of his employment? 2d. If it was lawful, was excessive force used to accomplish it? A dismissal of the complaint would be improper, and a demurrer to the complaint cannot therefore be sustained.

It does not appear that these considerations were presented to the learned judge at special term, who sustained the demurrer, but that the plaintiff relied upon the statute above cited (1 R. S. 696, §§ 6 and 7), and in view of the expression of opinion in the Court of Appeals (47 N. Y. 122), and in the

Commission of Appeals (51 N. Y. 298), that that statute was not applicable to city railroad cars, the judge so held.

DALY, Ch. J., and ROBINSON, J., concurred.

Judgment and order appealed from reversed, and demurrer overruled, with leave to defendants to answer in twenty days on payment of costs.

MOSES J. WICKS *against* FRANK BOWMAN.

Plaintiff agreed to convey to defendant, and defendant agreed to purchase, a lot of land with all the buildings and improvements thereon, and between the time of the signing of the contract, and the time fixed by it for the delivery of the deed, the possession and the payment of the purchase money, the building on the lot (which constituted its chief value) was destroyed by fire: *Held*, that defendant might refuse to complete his contract until the building was rebuilt.

APPEAL by plaintiff from a judgment of this court, entered on an order made at special term, overruling a demurrer to the special matter set up in the defendant's answer.

The complaint alleged, that on May 18th, 1872, the plaintiff was the owner in fee of premises in Brooklyn (describing them by metes and bounds), and that on said day the defendant made an agreement in writing with the plaintiff, whereby the plaintiff agreed to sell and convey, and the defendant agreed to purchase and take the said "lot of land, with all buildings and improvements thereon," for the price of eight thousand dollars, to be paid as follows: $500 on signing the contract; $1,000 by executing a mortgage upon the premises; $4,000 by assuming another mortgage; and $2,500 in cash, on the delivery of the deed; which was to be delivered on the 18th day of June, 1872.

That the said agreement, by its terms, bound the heirs, executors, administrators and assigns of the respective parties

thereto, and at the time of the making of the same, the said defendant paid on account thereof, to the brokers who negotiated the sale, the said five hundred dollars in cash.

That at the time of the making of said agreement, and at all times thereafter, up to the time of the commencement of the suit, the property was vacant and not occupied or used by any one.

The complaint then alleged an offer by the plaintiff to perform his part of the agreement, and a demand on and refusal by the defendant to perform his part of the agreement, and claimed $8,000 damages.

The answer, as a second defense to the action, alleged that at the time of entering into the contract, there was erected and standing upon the land a frame dwelling-house, of the value of $7,000 and upwards, and which was the chief value of the premises mentioned in said contract. That the same was entered into by defendant solely to acquire a residence for himself and family. That on or about the 29th day of May, 1872, this dwelling-house was totally destroyed by fire. That the defendant never had the possession thereof; that at the time of the alleged tender of said deed to this defendant, defendant offered and was ready to complete and perform said contract on his part, provided the plaintiff had erected, or caused to be erected on said lands, a dwelling-house similar to the one so destroyed by fire as aforesaid, which the plaintiff declined and refused to do.

To this second defense the plaintiff demurred for insufficiency, in that it did not state facts sufficient to constitute a defense. The court at special term overruled the demurrer, and the plaintiff appealed.

Ward & Jones and *Whitehead*, for appellant.

I. Upon the execution of a contract for the sale of real estate, the purchaser becomes vested with a title to the land as the owner thereof, and the vendor retains only a trust title, which he holds for the benefit of the vendee, and in which the seller has no right other than a lien for the unpaid portion of the

purchase money (*Swartwout* v. *Burr*, 1 Barb. 499; 2 Story's Eq. Jur. § 1212; Sugden on Vendors, vol. 1, ch. iv, p. 201, Hammond's edition, 1843; *Moore* v. *Burrows*, 34 Barb. 173; Crabb's Law of Real Property, vol. 2, pp. 544, 572, §§ 1760, 1761, 1797). (*a*) The vendee's interest in a contract for the purchase of land is real property, and descends to his heirs (*Hathaway* v. *Payne*, 34 Barb. 173; *Griffith* v. *Beecher*, 10 Barb. 432; *Champion* v. *Brown*, 6 Johns. Ch. R. 398; *Paine* v. *Miller*, 6 Ves. Jr. 349; Gerard's Titles to Real Estate, 152; *Swartwout* v. *Burr*, 1 Barb. 495). The widow of the purchaser is entitled to dower in the lands mentioned in the contract (3 Rev. Stat. 5th ed. §§ 84, 85, p. 199). (*b*) The vendor's interest in a contract for the purchase and sale of lands becomes personal property, and in case of his death pending the consummation of the contract, goes to his executors, and does not descend to his heirs (*Lewis* v. *Smith*, 9 N. Y. 502; *Adams* v. *Green*, 34 Barb. 176; *Hathaway* v. *Payne*, 34 N. Y. 103; *Moore* v. *Burrows*, 34 Barb. 173). (*c*) The vendee may sell or charge the estate before the conveyance is executed (*Seton* v. *Slade*, 7 Ves. 265; *Paine* v. *Miller*, 6 Ves. Jr. 349). (*d*) After contract of sale the vendor cannot charge the estate, either by suffering a judgment or by executing a mortgage (*Swartwout* v. *Burr*, 1 Barb. 495; *Laverty* v. *Moore*, 32 Barb. 347). (*e*) The vendee has an insurable interest in the premises specified in the contract of purchase, and may protect himself by insurance (*McKechnie* v. *Sterling*, 48 Barb. 336, 338; Angell on Insurance, § 66, 2d ed. pp. 116–118; *Wood* v. *N. W. Ins. Co.* 46 N. Y. 425).

II. Upon entering into a contract for the purchase of lands, the vendee becoming at once entitled to any benefit which may accrue by reason of any increase in the value of the premises, must bear the loss which may happen to the property between the time of the execution of the contract and the delivery of the deed (Sugden on Vendors, vol. 1, ch. iv, p. 336, Hammond's ed. 1843; Smith on Real Property, ch. ii, tit. xi, pp. 472, 474; Crabb's Law of Real Preperty, vol. 2, p. 544, § 1761; Fry on Specific Performance, *265; *Morgan* v. *Scott*, 26 Pa. St. R. 51; *Reed* v. *Lukens*, 44 Pa. St. R. 200; *Barker* v. *Smith*, 3 Sneed, 289; *Robertson* v. *Shelton*, 12 Bevan, 260; *Paine* v.

Miller, 6 Ves. Jr. 349 *et seq.*; *McKechnie* v. *Sterling*, 48 Barb. 335; *Mott* v. *Coddington*, 1 Abb. Pr. N. S. 290, 298.

Smith & Woodward, for respondent.

DALY, Chief Justice.—The plaintiff agreed to sell and convey, and the defendant to purchase a lot of land, "with all buildings and improvements thereon," for $8,000. The contract was made on the 18th of May, 1872, and $500 of the purchase money was paid when it was signed. By its terms, the defendant was to assume an existing mortgage upon the premises to the amount of $4,000, to give a mortgage for $1,000, and the residue of the purchase money, $2,500, was to be paid in cash upon the delivery of the deed, on the 18th of June following. There was a frame dwelling-house upon the lot, of the value of $7,000, which was the chief value of the premises, and the plaintiff had a policy of insurance upon the house for $4,000. On the 29th of May, 1872, twenty days before the deed was to be delivered, the dwelling-house, which constituted seven-eighths of the value of the whole property, was destroyed by fire. On the 18th of June following the plaintiff tendered a deed, and demanded payment of the $2,500, and the assumption and execution by the defendant of the mortgages referred to, which the defendant refused to do, unless the plaintiff would rebuild the house. The plaintiff then brought this action to recover damages for the non-performance of the contract. Judge ROBINSON held, upon the trial, that as the defendant was not in possession under the contract, nor entitled by its terms to go into the possession, at the time when the dwelling-house was burned, the loss arising from its destruction did not fall upon him, but upon the vendor, who until the 18th of June, the day fixed for the delivery of the deed and the payment of the residue of the purchase money, was entitled to the possession, and the beneficial enjoyment. That the vendee was not bound to accept the lot without the dwelling-house, which constituted seven-eighths of the value of the premises he had contracted to buy. That the plaintiff did not and could not tender a conveyance of what he

had contracted to sell, the "lot with the buildings thereon." That there was therefore no tender of performance on his part of the contract, which was essential to a breach, and that consequently he had no cause of action.

It is insisted, upon this appeal, that the defendant, as vendee, is to be regarded in equity as the owner from the time of the making of the contract, and that therefore the loss arising from any diminution in the value of the premises, by accident or otherwise, must fall upon him, and not upon the vendor, who simply holds the property thereafter as security for the purchase money.

It is undoubtedly well settled by the English cases, that in contracts for the sale of lands, the vendee, from the time that his right to a conveyance is complete, is considered as the owner of the premises (Sugden on Vendors, by Hammond, vol. 1, c. iv, p. 201; 2 Crabb's Law of Real Property, §§ 1760, 1761, 1797). In the language of Lord Eldon, in *Paine* v. *Miller* (6 Ves. 252), the premises are his to all intents and purposes. They are vendible as his, chargeable as his, capable of being encumbered as his, may be devised as his, may be assets, and would descend to his heir. This was said in a case where the purchaser had expressed himself satisfied with the title, but before the conveyance was prepared the houses were destroyed by fire; but Lord Eldon was of opinion that the vendor's right to a specific performance was not affected by the accident. He illustrated the rule by saying that if, after the buildings were burned down, the land should become more valuable, in consequence of the selection of the locality for some public improvement, it would be no answer to the vendee to say that he should not have it, because it had thereby increased in value. It was said in *McLaren* v. *Hartford Fire Ins. Co.* (5 N. Y. 151), upon the authority of *Ex parte Manning* (2 P. Wms. 410), and *Ex parte Minor* (11 Ves. 559), that after the confirmation of the master's report for a sale of real estate in chancery, and before a conveyance is excuted, the vendee, as equitable owner, is entitled to all the advantages arising from the increased value of the property, and must sustain the loss of its depreciation, and that the general prin-

ciple established by these adjudications is applicable to sales of land with us.

The vendee under a contract for the sale of real property is, for many purposes, to be regarded and treated as the owner from the time that his right to a conveyance is complete, especially where nothing remains but to pay the purchase money, take the conveyance and enter upon the possession. This was the case in *Paine* v. *Miller* (*supra*), before Lord Eldon, where the vendee's solicitor, after a long investigation by him, and after certain trustees had agreed to unite in a conveyance to release certain incumbrances, declared himself to be satisfied with the title. A draft of a conveyance was sent to him, the draft was returned, the deeds were engrossed, and an answer received that the deeds would be ready in two or three days, and on the day after the solicitor declared that he was satisfied, and accepted the title; but before the deeds were executed the buildings upon the land were destroyed by fire. Under such a state of facts, the vendee was treated in equity as the owner, his right and title to the property then being complete. He had the right, before the buildings were destroyed, to a specific performance, and was consequently not excused by the occurrence of the accident from performing himself; and so where a master's report for a sale of real estate in chancery is confirmed, the same result follows, for there is nothing then but to pay the purchase money and take the deed. Questions may arise in equity, in the adjustment of interests growing out of rights to real property, as to who is entitled to benefits or who is to sustain losses pending the negotiations, or intermediate the contract of sale and the time of performance, in which the benefits may be adjudged to or the losses imposed upon either the vendor or the vendee, the vendee being, under certain circumstances, regarded as the owner, and, under other circumstances, as not (see *Spurrier* v. *Hancock*, 4 Ves. 667; *Hartford* v. *Purrier*, 1 Madd. 287; *Ex parte Minor*, 11 Ves. 559, and many other cases).

As the contract contemplates the subsequent conveyance of the property to the vendee, it is right that the equitable interest he acquires by it in the land should, for certain purposes, pos-

sess the characteristics of real estate: that it should descend to heirs, instead of passing as personal property to his executors (*Champion* v. *Brown*, 6 Johns. Ch. 398); that it should be sold by the order of the surrogate as if it were land (3 Rev. Stat. 5th ed. 199, § 78); and that the widow should be entitled to dower in the surplus arising from such a sale (Id. §§ 84, 85).

But although the vendee will be regarded, for many purposes, as the owner, he is not so for all purposes. The legal title is in the vendor (*Wood* v. *N. W. Ins. Co.* 46 N. Y. 425), and there are many rights of an owner which a vendee under a contract of sale cannot exercise. He cannot, unless he has the possession, or is by the terms of the contract entitled to the immediate possession, maintain ejectment; or bring trespass for an unlawful entry upon the land; or trover for converting and carrying away the fixtures (*Tabor* v. *Robinson*, 36 Barb. 486). It is doubtful, moreover, where he has not the actual, or is not entitled to the immediate possession, if he has an insurable interest, for in all the cases that I have been able to find in which it has been held that he had such an interest, he had either the actual, or was entitled to the immediate possession (*McGivney* v. *The Phœnix F. Ins. Co.* 1 Wend. 85; *The Ætna F. Ins. Co.* v. *Tyler*, 16 Id. 385, 396; *Shotwell* v. *The Jefferson Ins. Co.* 5 Bosw. 257; *McKechnie* v. *Sterling*, 48 Barb. 330; *Columbian Ins. Co.* v. *Lawrence*, 1 Pet. U. S. 25; *Hough* v. *The City Fire Ins. Co.* 29 Conn. 10; 1 Phillips on Ins. § 181). Under a contract for the sale of land, by the terms of which the payment of the purchase money and the delivery of the deed are to be concurrent acts at a future day, the vendee's right to a conveyance (applying Lord Eldon's rule) is not complete until that day, and he cannot before that day be regarded as the owner. His position, intermediate the contract and the time of performance, is thus defined by a very able judge (Judge Brown) in *Tabor* v. *Robinson* (36 Barb. 486): "He has an equitable interest in the land and a right to a specific performance of the contract by the execution and delivery of the deed at the time appointed; but there must also be performance and payment on his part at the same time. He is *not the owner of the property purchased until the happening of* these events. The contract may or may not

be performed; but until it is performed on his part he is not vested with the right of property, and could not assert the legal rights or claim the legal remedies which belong to those who own the title. He is entitled to the usual remedies of those who have equitable interests to prevent waste, injury and alienation to others, until the time appointed to execute the contract, and that is all." This was approved in *Smith* v. *McClusky* (45 Barb. 612), which was a case substantially like the one now before us. It was a contract for the purchase of land, payable by installments, but in which there was no stipulation giving the vendees the right to occupy. The installments for three years had been paid, and the vendees were in occupation. They were notified to quit by the vendor, and did so, and afterwards, before the remaining installments were paid, and before possession could be claimed, the building, which constituted the principal value of the premises, was destroyed by fire. This, it was held, operated to discharge the vendees from all liability for the installments thereafter to become due. The circumstance that the vendees were not in possession, and had no right to occupy until the final installment of the purchase money was paid, was relied upon by a very able court for the conclusion that the vendor had not parted with the title *nor the possession* when the disaster occurred, and as the disaster rendered it impossible for him to deliver the substance of what was agreed to be transferred, there was a failure of consideration as to the chief matter of the contract, and that that was a good ground why the contract should not be enforced.

The vice-chancellor, Sir Thomas Plumer, said, in *Hartford* v. *Purrier* (1 Madd. 287), that if a contract for the purchase of land is to be completed at a given period, and the title is finally found to be good, the estate is considered as belonging to the purchaser from the date of the contract, and the money from that time as belonging to the vendor. That if the estate in the interval is improved, or if its value is lessened from any cause, there being no fault on either side, the vendee has the benefit, or sustains the loss. That if there is a loss by fire, after the contract but before its completion, neither party being in fault, the loss falls upon the vendee. This is in conflict with the

cases above referred to, and if it had been said by Sir Thomas Plumer's eminent predecessor Sir William Grant, or by Lord Eldon, I should have hesitated before calling in question its correctness. But Sir Thomas Plumer was not, in the opinion of his cotemporaries, one of those judges whose mere statement of the law carries with it the weight and authority that is accorded to judges of great eminence. Sir Samuel Romilly, one of the ablest equity barristers of his time, says, in his diary: "A worse appointment than that of Plumer to be vice-chancellor could hardly have been made. He knows nothing of the law of real property, and nothing of the doctrines peculiar to courts of equity" (Life of Romilly, vol. 1, pp. 310, 481, 3d Lond. ed.) It was, moreover, not material to the decision of the case before him, which was that the vendee, under a decree for a specific performance, was not entitled to an abatement from the purchase money for the loss of a tenant, who left in consequence of the vendee's own unnecessary act. It was merely *dicta*, and coming from a judge who, after this decision, when he was made master of the rolls, was generally regarded by the profession as not capable of discharging the duties of the office (Id. 481), it does not call for serious consideration.

The doctrine that the vendee is to be treated, in certain cases, as the owner, is founded in the application of the equitable maxim, that what ought to be done is considered in equity as done (2 Crabb's Law of Real Property, §§ 1759, 1760, 1761; 2 Story's Equity Juris. § 1212), a maxim that does not apply where the cotemporaneous acts—the payment of the purchase money, and the delivery of the deed—were to take place upon a day subsequent to the time when the building was destroyed by fire. "The common doctrine of courts of equity," says Story, "is, that where things are agreed to be done, they are to be treated, for many purposes, as if they were actually done." Thus, if the payment of the purchase money and the delivery of the deed did not take place on the 18th of June, 1872, the time fixed by the contract, but took place afterwards, they would, by the application of this doctrine, be deemed in equity to have occurred on that day; and the vendee would on that day, and thenceforth, be regarded as the owner. But they

cannot be deemed to have actually occurred before, for that the parties did not intend; and there is no warrant, therefore, in this maxim, for holding that the vendee did or could, before that day, become the owner.

Where the vendee is let into the actual possession, or has by the contract the immediate right to it, there is a reason for his bearing the loss, if the building is subsequently destroyed by fire, as he has entered upon the beneficial enjoyment of the property (*Ætna F. Ins. Co.* v. *Tyler*, 16 Wend. 396). It may then be likened to the case of a tenant who, after entry, must pay the rent which he has covenanted to pay in the lease, though the building should afterwards burn down; but who is discharged from the payment of it if the building should be destroyed between the time of the signing of the lease and the commencement of the term, because, before entry, he has no estate, and the landlord, by reason of the destruction of the building, cannot deliver possession of the premises in the same condition substantially as they were in when the lease was made (*Wood* v. *Hubbell*, 5 Barb. 601; *Cleves* v. *Willoughby*, 7 Hill, 83; 4 Kent's Com. 96). While, therefore, it may be equitable and just that the vendee should bear the loss where the building is burned down after he enters upon the possession, it is not just nor equitable to impose it upon him whilst the vendor is in possession of the premises.

As it is, moreover, doubtful whether the vendee has any insurable interest without the possession, or the immediate right to it, and there is no doubt that the vendor has (*Wood* v. *The Northwestern Ins. Co.* 46 N. Y. 421), the loss should fall upon him, as he can protect himself fully by insurance.

For these reasons, I am of the opinion that the judgment should be affirmed.

Larremore and J. F. Daly, JJ., concurred.

Judgment affirmed.

Royal Phelps *against* J. H. Racey.*

By a statute of the State, persons were allowed to sell, or have in their possession, game of a certain description in January and February in each year, provided it was killed in the proper season, or in some State where the killing was lawful. The defendant, a dealer in game, had a patented apparatus by which he was enabled to preserve game for a year. Having put up in this apparatus a large quantity of game of this description, killed in this State and in other States when the killing was lawful, he exposed it for sale after the months of January and February: *Held,* that by so doing he violated a provision of the statute, which forbids any person to sell, expose for sale, or have in his possession game of that description between the months of March and October in any year.

The act for the preservation of game (L. 1871, c. 721), is not unconstitutional, as depriving persons of vested rights, so far as it relates to game killed after its passage.

Appeal by both plaintiff and defendant from an order of this court at special term, sustaining a demurrer as to part of the answer, and overruling it as to the remainder.

The action was brought to recover from the defendant a penalty of $2,700, which it was claimed he had incurred by a violation of §§ 7 and 8 of the act for the preservation of game, passed April 26th, 1871 (2 L. 1871, c. 721, p. 1669).

The sections under which the penalty was claimed are as follows:

"§ 7. No person shall kill, or expose for sale, or have in his or her possession after the same has been killed, any quail between the 1st day of January and the 20th day of October, under a penalty of twenty-five dollars for each bird."

"§ 8. No person shall kill or expose for sale, or have in his or her possession after the same is killed, any ruffed grouse, commonly called partridge, or pinnated grouse, commonly called prairie chicken, between the 1st day of January and the 1st day of September, under a penalty of twenty-five dollars for each bird."

It is also provided by § 33 of the same act, that

"Any person may sell, or have in his or her possession,

* On appeal to the Court of Appeals, the judgment of the general term here was affirmed, with leave to the defendant to answer over on payment of costs.

any pinnated grouse, commonly called prairie chicken, ruffed grouse, commonly called partridge, or quail, from the 1st day of January to the 1st day of March, and shall not be liable to any penalty under this act, provided he proves that such birds or game were killed within the period provided by this act, or were killed outside the limits of this State, at some place where the law did not prohibit such killing."

The complaint alleged that plaintiff was "president of the New York Association for the Protection of Game, and the defendant a marketman doing business at Nos. 13, 15 and 17 Centre Market, in the city, county and State of New York, and

"I. That at said place, on the 15th day of March, 1873, the defendant had in his possession and exposed for sale six quail.

"II. That at said place, on the 19th day of March, 1873, the defendant likewise had in his possession, and exposed for sale two pinnated grouse.

"III. That at said place, on the 19th day of March, 1873, the defendant had in his possession one hundred quail.

"IV. That said acts were contrary to the provisions of the 7th and 8th sections of the act for the preservation of game, passed April 26th, 1871."

The defendant, by his answer, admitted the truth of the allegations contained in the first three paragraphs of the complaint, and by way of excuse therefor, alleged in an amended answer that he was, and had been at the time of the complaint, an extensive dealer in game, for the preservation of which he had patented an apparatus by which he was enabled to preserve game killed in one season to the following, even for a period of *twelve months*. That the game which the complaint charged him with having in his possession and exposed for sale was put up by him in said apparatus when the killing of it was not prohibited by law in this State, to wit, in the month of December, 1872, or after receiving it from States where its killing was at the time legal, to wit, from the States of Minnesota and Illinois.

The plaintiff demurred to this answer for insufficiency in not stating facts sufficient to constitute a defense.

The court at special term sustained the demurrer, and or-

dered judgment for the plaintiff on the first and second counts in the complaint, and overruled it as to the third count.

Thomas N. Cuthbert and *Chas. E. Whitehead*, for plaintiff.

John Proffatt, for defendant.

DALY, Chief Justice.—The judge below sustained the demurrer, so far as it applied to the answer put in to the first and second causes of action averred in the complaint; from which decision the defendant has appealed, and overruled the demurrer to the answer so far as it related to the third cause of action in the complaint, from which decision the plaintiff appeals.

I shall first consider the defendant's appeal. The act (2 Laws of 1871, p. 1669, c. 721, § 7) declares that no person shall kill, *expose for sale*, or have in *his* or *her possession*, any quail between the 1st day of January and 20th day of October; or (§ 8) any grouse, commonly called *partridge*, or pinnated grouse, commonly called *prairie chicken*, between the 1st day of January and the 1st day of September. The answer admits that the defendant had in his possession and exposed for sale, on the 15th of March, six quail, and that he had in his possession and exposed for sale, on the 19th of March, two pinnated grouse; which was admitting the cause of action stated in the first two counts; the plain import of the act being, as was held in *Bellows* v. *Elmendorf* (7 Lans. 462), to prevent any evasion, and make all persons liable who had possession of, or exposed such property for sale. It makes no distinction between game killed within or without the limits of this State, except in the case provided for in section 33 (*Phelps* v. *Town and others*, Van Brunt, J., Supreme Court, special term, February, 1873). So far, therefore, as respects this appeal, the judgment below should be affirmed. The assumed unconstitutionality of the law I shall consider under the next head.

In answer to the third cause of action, the defendant admits that he had *in his possession*, on the 19th of March, one hundred quail, and in justification thereof, avers, that he is an extensive dealer in game; that he has patented an apparatus by which he is enabled to preserve game after it has been killed

for the period of a year; that the one hundred quail admitted to have been in his possession on the 19th of March were put up by him in the said apparatus in the month of December, 1872, when the killing of it was not prohibited by law in this State, or after receiving it from States where the killing of it was at the time legal. By the 33d section of the act it is lawful to sell or have in one's possession, quail from the 1st of January to the 1st of March, provided the party proves that it was killed within the period allowed by the act, or killed outside the limits of the State at some place where the law did not prohibit such killing. This right, however, is limited to the first of March, and the defendant admits that he had these one hundred quail in his possession afterwards, that is on the 19th of March. The justification he sets up is that he had them then in his patented apparatus, in which they were placed at a time when the killing of them was lawful. But the statute has made no provision for such a case. It has allowed game, killed before the 1st of January, or in States where the killing of it was at the time lawful, to be sold or kept in possession between the 1st of January and the 1st of March, and that is all. Beyond that, the prohibition is positive, that no person shall have any of the game specified, in his or her possession, and I am wholly at a loss to see upon what ground it can be said that the possession which existed in this case was not the kind of possession which the statute meant. It may be that when the law was enacted, that no such thing was contemplated as that game, killed in the autumn of one year, could be preserved, as in this case, so as to be sold a year afterwards within the permitted period. But we cannot say so as a matter of law, for for all that we know, or for all that appears in this answer, this apparatus may have been known and in use when this law was enacted. In *Bellows* v. *Elmendorf* (*supra*), the skin and carcass of the deer was bought at a sheriff's sale, and sold by the purchaser to the defendant, whose possession was held to be a possession in violation of the act. In that case the animal was killed within the forbidden period, which commenced on the 1st of January. It was killed on the 8th of January, and purchased on the 21st of that month, and for all that appeared,

the defendant may not have known when it was killed. The law allowed persons to have such game in possession, or to expose it for sale for ten days after the 1st of January, or to possess or sell it, if received for sale prior to the 11th of January. The carcass and skin were levied upon on the 14th, and sold by the sheriff, and purchased by the defendant on the 21st of January, and this was held to be a possession on the part of the defendant in violation of the act. The difference between that case and this is that there the game was killed within the prohibited period, and here it is averred that it was not; in connection with which it is sufficient to say that the act under which the present action is brought has made provision for the sale and keeping possession of this particular kind of game after the period when it is allowed to be killed, and that that time had expired when the defendant, as he admits, had the one hundred quail in his possession. The words of the statute are express that no person shall have game of this description in his possession within the prescribed period; a prohibition that may have been, and probably was, designed to take away any inducement to kill these game birds within the prescribed period, as nobody can, after that period commences, lawfully have or keep them in his possession.

The objection raised, that this act is unconstitutional is untenable. It violates no regulation made by Congress in respect to commerce, and deprives no one of property. The act held in *Wynhamer* v. *The People* (13 N. Y. 378) to be unconstitutional, was very different. It authorized the destruction of the property of persons owned by them when the law took effect. Here the quails were acquired, by the defendant's own showing, after the law was in force, and with knowledge of the existence of it, which is a very different case (*Slaughter House Cases*, 16 Wall. 36).

The judgment as to the answer to the two first counts should, in my opinion, be affirmed, and as to the third count, it should be reversed and judgment given for the plaintiff upon that count.

Larremore and J. F. Daly, JJ., concurred.

Ordered accordingly.

ABRAHAM DOWDNEY *against* GEORGE W. MCCOLLOM.

The claimant under a mechanic's lien filed against property in the city of New York, in a proceeding to enforce his lien, was allowed less than the sum claimed by him, and appealed from the judgment in the proceeding. The owner then, upon the refusal of the claimant to receive it, paid the amount of the judgment into court, and applied to have the property released from the lien. *Held*, that as the judgment had been appealed from by the claimant and not by the owner, the lien could not be discharged except by making a deposit with the county clerk, as prescribed by L. 1863, § 10, subd. 2.

APPEAL by plaintiff from an order of the special term of this court, directing the discharge of a mechanic's lien.

On March 20th, 1873, the plaintiff filed a lien against certain buildings belonging to the defendant and situated on the northerly side of Seventy-fourth street and the southerly side of Seventy-fifth street, near Madison avenue, in the city of New York, to secure a claim of $15,212 65, for materials furnished to the defendant, and used in the erection of said buildings.

An action was subsequently commenced in this court to foreclose said lien, and David McAdam, Esq., was appointed referee to hear and determine. On July 17th, 1873, the referee made his report in favor of the plaintiff for the sum of $954 20, and on July 23d, 1873, judgment was entered thereon. From this judgment the plaintiff appealed to the general term of this court, claiming that he should have recovered the full amount secured by his lien.

After the appeal had been taken, the defendant tendered to the plaintiff the amount of the judgment and interest, and as the latter refused to receive the same, he deposited it with the clerk of this court to the credit of this action. He thereupon requested the county clerk to discharge the lien of record, and upon his refusal to comply with the request, he applied to this court for an order directing him so to do.

An order was accordingly made at the special term directing the discharge of the lien upon terms. From this order the plaintiff appealed to the general term.

Alexander Thain, for appellant.

Ashbel Green, for respondent.

LOEW, J.—The tenth section of the mechanic's lien act, relative to the city of New York (Laws of 1863, chap. 500, § 10), specifies the cases and prescribes the manner in which liens may be discharged. The express provision thus made for the discharge of liens in certain cases precludes any implication of a legislative intent that they may be discharged in other cases not mentioned. The maxim *expressio unius est exclusio alterius* applies. I therefore agree with the special term of the Superior Court (*Fettretch* v. *Totten*, 2 Abb. Pr. N. S. 264), that in order to obtain the discharge of a lien, one of the various modes prescribed by the statute must be pursued, and that no lien can be discharged in any other case or in a different manner from that provided by the act in question.

The judgment in the case now under consideration provided that upon its payment the lien should be discharged. Undoubtedly the plaintiff might have accepted the amount in satisfaction thereof, and upon due proof of that fact the lien could have been discharged (sec. 10, subd. 6). But the mere tender to the lienor of the amount of the judgment, and its subsequent payment into court, upon his refusal to receive the same, did not entitle the defendant to a discharge of the lien.

The fourth subdivision of the section referred to (sec. 10, subd. 4), provides for a discharge of the lien, "by a judgment or docket of a judgment exempting such property after ten days, on proof of notice of such judgment, *and that ten days have elapsed, and no appeal has been taken therefrom.*" As by the terms of another section (sec. 7), an appeal may be taken from any judgment or decree within *ten days* after notice of the entry thereof, it is clear to my mind that the Legislature intended that the lien should continue during the pendency of any appeal which might be taken. Of this right to have the lien continue in full force pending the appeal to the appellate tribunal, the lienor cannot be deprived by any order of the

court, unless the same is made in conformity with the provisions of the lien law.

I am aware that in *Van Cleve* v. *Abbatt* (3 Abb. Pr. N. S. 144), it was held by this court at special term, that where a judgment is rendered in favor of the owner, the lien may be discharged of record, notwithstanding an appeal has been taken within the time allowed by the act, unless the proceedings are stayed by order of the court. But while I cheerfully concede that the opinion of the learned judge who rendered that decision is entitled to great weight, I am nevertheless constrained to differ from him in the view he has taken of the law on this point.

In my opinion, full force and effect should, if possible, be given to every part of the act. This can only be done by giving the tenth section the construction I contend for.

But the learned judge who delivered the opinion in *Van Cleve* v. *Abbatt* appears to have been of the opinion that the fourth subdivision of the section in question is in conflict with the seventh and eighth sections. With great respect, I submit that such is not necessarily the case. The seventh section provides for a trial of the issues before the court, either with or without a jury, or before a referee, and allows *any party* aggrieved by any decision ten days after notice of the judgment, within which to appeal from the same, or any part thereof. Now, if the decision be in favor of the owner, he may have judgment for his costs. In that event, he can enforce the same as fully as the lienor could any judgment that he might obtain; and if the latter desires a stay of proceedings, he must appeal and procure such stay from the court, pursuant to section eight, in precisely the same manner as the owner would be compelled to do under similar circumstances.

It will thus be seen, that the only restriction imposed on the owner by the fourth subdivision of the tenth section, in case the decision is in his favor, is in regard to the discharge of the lien; and as to that, I think the judgment itself should provide for the discharge thereof *after ten days*. The language employed is, that the lien may be discharged "by a

judgment or docket of a judgment, exempting such property *after ten days*, etc."

All that the owner is thereafter required to do, in case no appeal is taken, is to furnish proof that he has given notice of the judgment, and that ten days have elapsed, and no appeal has been taken therefrom, and he will be entitled to a discharge of the lien.

If I am correct in these views, it follows that it is unnecessary to make any order in reference to the continuance or discharge of the lien, during the pendency of the appeal, under the authority of section eight, which authorizes a judge of either the appellate court, or the court below, to make an order staying so much of the proceedings, on such terms as to security or otherwise as such court or judge may think proper. Indeed, I am of the opinion that the makers of the law never contemplated that the power conferred upon the court by the general language of that section should extend to and be exercised in respect of the lien itself.

In the present case, the plaintiff appealed from the judgment immediately after the same was entered. The lien could therefore be discharged, against his will, only in one of two ways.

1. By depositing with the county clerk, the amount of the lien and interest, and such additional sum as security for costs, as a judge of the court might order, the same to be held in lieu of the land and building (section 10, subd. 2); or,

2. By appealing from the judgment, furnishing security, and procuring an entry to be made by order of the court, to the effect that the judgment has been secured on appeal (section 10, subd. 5).

As neither of these modes was pursued, the order of the special term directing the lien to be discharged was unauthorized, and must be reversed with costs.

Daly, Ch. J., and Larremore, J., concurred.

Order reversed.

GEORGE M. CHAPMAN *against* ALEXANDER DOUGLAS AND OTHERS.

Plaintiff being in possession of certain personal property, and claiming title to it from a corporation of which a receiver had been appointed, it was levied on as the property of the corporation, under an execution, on a judgment recovered subsequent to the appointment of the receiver: *Held*, that the receiver was the only one who could assert the corporation's interest in the property, and that the obligors on the indemnity bond, given to the sheriff on the seizure of the property under the execution, could not show that the corporation's title had never passed to the plaintiff.

The obligors in an indemnity bond given to a sheriff, conditioned to secure him harmless for levying, &c., on goods which he or they may judge to belong to the debtor, are not liable for the acts of the sheriff in seizing goods conceded to belong to a third person, even though they are contained in a safe claimed to belong to the debtor, and the goods cannot be removed therefrom on account of the safe's being locked.

In such a case the indemnitors are liable only where they have expressly or impliedly authorized or ratified the acts of the sheriff in making the seizure.

APPEAL by defendants from a judgment of this court entered on the verdict of a jury at trial term.

The action was brought against the defendants Douglas, Taylor, and Mathew, for trespassing on the plaintiff's premises and carrying off an iron safe and merchandise.

The defendants, who were the obligors in a bond of indemnity given to John Kelly, sheriff of the city and county of New York, on a seizure of goods by him under an execution in favor of the defendant Douglas against the New York Silk Manufacturing Company, justified the taking of the safe on the ground that it was the property of that company, and that the sheriff had taken it by virtue of the execution in his hands; and as for the merchandise, they alleged that it was in the safe at the time it was seized, and that the safe was locked, and the key in the possession of the plaintiff, who refused to open the safe or take out the goods, although requested to do so; and that thereupon the sheriff was obliged to and did, after giving due

notice to the plaintiff, break open the safe and remove the goods, and tendered them to the plaintiff, who refused to receive them.

On the trial the defendants offered evidence to show that the safe had originally belonged to the New York Silk Manufacturing Company, and that the ownership of it had never been legally transferred to the plaintiff, although it was conceded that it was in his possession at the time of the levy.

In rebuttal, the plaintiff was allowed to show (though he had not replied to the defendants' answer), that previous to the recovery of the judgment by Douglas, a receiver of the property of the New York Silk Manufacturing Company had been appointed by the Supreme Court, in an action brought by a judgment creditor, and that the decree authorizing the appointment of such receiver sequestrated all the stock, property, things in action, money, claims, funds, and effects of the company, and conferred on the receiver all the powers and authority conferred on receivers by 2 R. S. 469, §§ 67, 68; and that the receiver had perfected his appointment by duly filing his bond.

As to the goods in the safe, they were conceded to be the property of the plaintiff, and it was shown that he had refused to unlock the safe or take out the goods, and that he had had notice of the time and place at which it would be forced open, and had failed to attend; but it was not shown, as alleged in the answer, that after the goods had been taken from the safe, they had ever been tendered to the plaintiff.

At the trial, Mr. Justice Robinson gave a written opinion on the question of the defendants' right to justify the seizure of the property under the execution against the New York Silk Manufacturing Company, in which, after stating the facts in regard to the receivership, and the judgment and execution and the seizure of the property, he said: "The acts of the sheriff were authorized by the defendants, who indemnified him, and now assume jurisdiction of his acts, and on the trial have introduced proof tending to show the title in the safe of the New York Silk Manufacturing Company, and that the alleged purchase by plaintiff was unauthorized by that company,

and void under several statutory provisions. To this defense plaintiff, relying on his possessory title, claims, among other matters, that defendant Douglas is an entire stranger to any legal interest in the goods that might be acquired by way of levy under execution, and that any right to contest it exists only in the receiver of the company, to whom he alone is responsible. In this I think he is correct. The defendant Douglas, as execution creditor, could only enforce a levy on property of the New York Silk Manufacturing Company, but certainly not on any in which, by operation of law, the entire title and right of reclamation had been vested in and existed in a receiver holding all such interests in trust for the benefit of the creditors at large. Did any doubt exist as to the common law power of such a receiver to assail the *bona fides* of the transfer under which plaintiff claims, it was removed by the act of 1858, c. 314 (3 R. S. 5th ed. 226). If plaintiff's possessory right could be assailed or impeached by any one, by reason of any defect in the claim or title under which he held the safe from and after April, 1866, it was only by the receiver, who held all the rights of the Silk Company in the property, or to any recovery for its value or detention. On such appointment of the receiver, and vesting in him of all real and personal property of the corporation, no creditor of that company could, by attachment, judgment and execution, or other process, acquire any interest in it in derogation of the absolute title acquired by the receiver, or upon any independent right enforceable against the corporation. Upon these considerations, the defendants acquired, by this attachment judgment and execution, no legal right to levy on the safe in question, whatever defects existed in plaintiff's title. He remained at the time defendants intervened, and at the time this suit was brought, liable therefor alone to the receiver, and whatever judgment defendants might obtain in this action, affirming the right to seizure under the attachment or execution in his favor, it in no way divested that of the receiver to reclaim the property from plaintiff, or to recover from him its value. No such double responsibility as would arise from defendants' right of retention of the safe can exist in the law. The receiver was

alone the person entitled to enforce any such right of reclamation of the property, but in trust for all the creditors of the corporation. The sheriff, acting for defendants only, could take such rights of property in the safe as remained in the New York Silk Company, and as those had all been by law transferred to the receiver, he took nothing, not even the right of contesting plaintiff's *possessory right* to the property. The whole matter sought to be litigated by the answer is one that rested solely in the receiver. Defendant is a stranger, cannot question the title of the possessor of property, although held under claim of ownership that may be unavailable against the receiver, the true owner (2 Greenl. Ev. § 618). Having neither possession nor title in himself, nor authority from the receiver to take possession, the acts of the defendants in interfering with the plaintiff's possessory right were wholly unauthorized."

On the question as to the defendants' liability for the seizure of the goods in the safe, the defendants' counsel requested the court to charge as follows:

"It is not shown that the defendants requested the sheriff to levy upon or remove the goods. The issuing of the execution was not such a request; and the delivery of the indemnity bond was not such a request, inasmuch as by that bond the defendants only undertook to save the sheriff harmless for taking or removing, &c., what might appear to be the property of the company; and the goods did not appear to be, and the defendants did not claim that they were, the property of the company."

And also, "The defendants are not responsible for the goods, unless they requested the sheriff to levy upon, remove, or meddle with such goods, or requested the sheriff to remove the safe, with knowledge that it contained the goods, and there is no evidence of any such request."

The court declined to charge in accordance with either of such requests, and the defendants' counsel duly excepted.

The court directed a verdict for the full value of all the property taken, with interest, and the jury assessed the damages as follows: Value of safe, $400; value of silk, $2,512;

damages assessed for safe, $400, and interest, $168; for silk, $2,512, and interest, $1,055 04.

DALY, Chief Justice.—The defendants to justify the taking of the property, averred that at the time of the levy, it was the property of the New York Silk Manufacturing Company, or that they had an interest in it, which was liable to levy and sale under the attachment and execution. Their whole defense rested upon this averment; for if it were not the property of that corporation at the time of the levy, or if they had not in it then any interest which could be attached or levied upon, the sheriff had no right to take it under an attachment and execution against that company. Everything set up in the answer to justify the taking was impliedly denied, and it being incumbent upon the defendants to establish the ownership or interest of the company in the property levied upon, it was undoubtedly competent for the plaintiff, upon that issue, to show that before the levy had been made, a receiver of the corporation had been appointed, and that all the right and title which it had to its property and effects was at the time of the levy vested in him. The cases of *Savage* v. *Corn Exch. &c. Co.* (4 Bosw. 15), and *Brett* v. *The First Universalist Society of Brooklyn* (63 Barb. 610), which the appellants rely upon, have no application to this case. They merely hold that a defendant cannot avail himself of a defect of parties or of title in a third person, unless he has set it up in the answer by way of defense, which is a very different case from this.

The appointment of a receiver of the company's effects having been shown, and the fact being undisputed, it was a complete answer to the defendants' right to have the safe levied upon and sold to satisfy the execution which they had against the company. If, as the defendants insist, the safe was illegally or fraudulently transferred to the plaintiff, the receiver, who then represented both the corporation and its creditors, could alone maintain an action or take any proceeding to recover it, he being vested by the law with the sole and full authority to do so (*Tulmage* v. *Pell*, 7 N. Y. 328).

The only question then that remains is whether the defendants are answerable for the taking of the contents of the

safe. There would be no doubt of the sheriff's liability, if he had no right to take the safe, and could not take it, as it was locked, without taking the contents. He would be answerable for the entire act. The safe was in the plaintiff's possession upon his premises. The plaintiff had filled it with silk and had locked it. He was under no obligation to unlock it and take out the silk, to enable the sheriff to do what he had no authority to do, take it out of the plaintiff's possession and sell it, to satisfy the execution upon the plaintiff's judgment. If the sheriff had had the right to levy upon the safe, and to enable him to take it had requested the plaintiff to unlock the safe and remove the contents, and the plaintiff would not, a very different question might have arisen; or if the sheriff, after taking away the safe and opening it, had brought back to the plaintiff the contents, the plaintiff would have been bound to have accepted the silk, and its return would have gone so far in the reduction of the damages. He did not however do this. He testified that he notified the plaintiff to be present at the opening of the safe, whilst the plaintiff testified that he never received any such notice; that the sheriff never offered to return the silk to him, nor did any one upon the sheriff's behalf. That he, the plaintiff, never received any intimation from any person as to where the silk was after it was taken away with the safe, and never knew until apprised of it upon the first trial of this cause.

After the safe was opened, the sheriff took out the silk, and took it to an auctioneer's, where he had it packed in a box, which was nailed up, the sheriff putting his name upon it, and the box at the time of this trial had remained at the auctioneer's for nearly six years.

A plaintiff may not unnecessarily enhance his own damage or loss, so as to make the responsibility of one who wrongfully takes property, under the supposition that he has a right to it, greater than it would otherwise be. There was an attempt to show something of this kind by proving the declaration of one of the plaintiff's employees named Pritchard, to the effect that they gathered up everything there was in the place and put it in the safe, when the plaintiff locked it up, and putting the

key in his pocket, said, now let him (the sheriff) touch it, and I will make him sweat for it; but Pritchard was examined as a witness, and testified that the plaintiff simply told him to put the silk in the safe, to lock it up, to see that the door of the factory was safe, and have a care, saying, "and if they touch the safe, I will make him (the sheriff) sweat for it," which puts a very different coloring upon the matter, it being in evidence that the use previously made of the safe by the company was to put away silk in it, and that the plaintiff used it for that purpose before the levy. His testimony was, "we kept such articles (silk in boxes and on spools) in the safe," and that after he bought the safe the silk was put in it and locked up every night.

But though it is very clear that the sheriff would be responsible for taking both the safe and its contents, the question arises whether the defendants, who simply signed a bond of indemnity, are answerable for the sheriff's taking away the plaintiff's property in the safe. All that the sheriff assumed to levy upon was the safe, which had belonged to the defendants in the execution; but there was no pretense that the contents of the safe belonged to them. The sheriff was apprised that the property in it was the plaintiff's property, but he took it because he could not take the safe, it being locked, without also taking the contents. Were the indemnitors answerable for this? It was held in *Davis* v. *Newkirk* (5 Den. 95), that the indemnitors were liable for the sheriff's levying upon and selling a certain quantity of lumber, for the reason that the bond contemplated such a seizure and sale, the engagement in the bond being to save the sheriff harmless for levying upon and selling the lumber under the execution. This it was held was a virtual request to the sheriff to proceed and do what he did. It was regarded as an act done under the direction and with the advice and concurrence of the indemnitors, for which they were as much responsible as the sheriff. "All," said Chief Justice Beardsley, by whom the opinion of the court was delivered, "who direct, request, or advise an act to be done which is wrongful, are themselves wrong-doers and responsible for all damages." This, it was said in *Ford* v. *Wil-*

liams (13 N. Y. 584, 585), was carrying the rule of the liability of those who aid and abet in the commission of a trespass, far enough. "I do not affirm," said Chief Justice Denio, "that that case (*Davis* v. *Newkirk*) was incorrectly decided; for there was force in saying that all the obligors in the bond might be held to have requested the seizure." They in that case certainly did so, for before the sale they gave the sheriff a bond by which they engaged to save him harmless for levying upon and selling the lumber which he afterwards sold upon the execution; in addition to which there was some evidence tending to connect the indemnitors with the sheriff in taking away the lumber.

The bond given by the defendants in the present case, after reciting that certain personal property that appears to belong to the New York Silk Manufacturing Company, is claimed by other parties, engages to save the sheriff harmless for levying, attaching and selling, under and by virtue of the attachment, or of any execution which may be issued in the action, all or any personal property which he or *they* shall or may *judge to belong to the debtor*, as well as for entering upon the premises for the taking of any *such property*. The seizure, which is here contemplated, and for which they engage to be responsible, is of property which he or they shall or may judge to belong to the New York Silk Manufacturing Company, and it was the safe, and not its contents, that the sheriff levied upon and sold as the property of that company. If the defendants knew that the safe could not be taken by the sheriff, without his taking the contents of it also, and they had, with that knowledge, directed him to take it, they would undoubtedly have been liable. But there is nothing in the bond, or in the evidence, from which it can be inferred that they contemplated, meant, or directed that the contents should be taken, if the safe could not be taken without doing so. The value of the safe, as found by the jury, was only $400; whilst the value of the silk contained in it, was $2,512; which with interest, amounted at the time of the trial, to $3,567 04. In other words, what was contained in the safe was worth six times as much as the safe itself, and before the defendants could be held answerable

for this large amount of property, there should, in my opinion, be some evidence to show that they knew before they gave the bond of indemnity, or before the safe was taken, that it was locked, that the plaintiff had the key of it, and would not open it, so as to show that they were apprised that it could not be taken away and sold, without also taking whatever was in it. All that there is in the case is the bond of indemnity, and that the sheriff told Mr. Douglas one of the defendants and indemnitors, that the plaintiff claimed the safe, and demanded a bond of indemnity, which was given, and that some months before this trial, that is several years after the taking, the box was examined at the auctioneer's, at the instance of Douglas, to ascertain the value of the silk contained in it. For all, therefore, that appears in the case, it may have been that Douglas and his co-obligors, would not have been willing, if they had known that the safe was locked, to authorize the sheriff to take it, at the hazard of being answerable for whatever was contained in it. The plaintiffs in an execution, are not answerable for all that a sheriff may do under it, nor are those who indemnify the sheriff. They are responsible only so far as they may have directed or assented to the doing of the acts complained of (*Averill* v. *Williams*, 1 Denio, 501; 4 Id. 295). Thus, as in *Allen* v. *Crary* (10 Wend. 349), where the the plaintiff in the execution pointed out the property to the sheriff, and directed him to levy upon it; or in *Stewart* v. *Wells* (6 Barb. 79), where the plaintiff, after the sheriff had levied upon property, said that the sheriff was going to sell it, and that he, plaintiff, had directed the levy to be made; or *Fonda* v. *Van Horne* (15 Wend. 631), where the plaintiff directed the sheriff to levy on two cows and a calf, and told him that he would indemnify him; or in *Herring* v. *Hoppock* (5 N. Y. 413), where the sheriff having levied upon a safe, which was claimed by a third party, refused to sell it, unless he was indemnified, in which the indemnification was regarded as a ratification of the levy, and the cause of the sale. The bond referred to the property which had been levied upon and claimed —the safe—and therefore the giving of the bond was regarded as a virtual request to the sheriff to go on and sell the safe; or in

Ball v. *Loomis* (29 N. Y. 412), where the plaintiff directed the taking and the sale, and indemnified the sheriff, which I believe embraces nearly, if not all the cases in which this question has arisen in this State.

This objection was distinctly raised at the trial. The defendants, at the close of the case, insisted that it had not been shown that the defendants requested the sheriff to levy or remove the property in the safe; that the issuing of the execution was not such a request; nor the giving of the bond of indemnity, which only undertook to save the sheriff harmless for taking or removing what might appear to be the property of the company, and that the property in the safe did not appear to be, nor did the defendants claim it to be the property of the company; that the defendants were not responsible for the goods unless they requested the sheriff to levy upon, remove, or meddle with them, or requested him to remove the safe with the knowledge that it contained the goods, and that there was no evidence of any such request. They asked that the jury should be so instructed, and as, in my opinion, there was nothing in the case from which it can be inferred that the defendants contemplated, meant, or directed the sheriff to take the safe, no matter what might be in it, if he could not take it otherwise, I think they were entitled to the instruction asked, and that there should be a new trial, unless the plaintiff consents to reduce the verdict to the value of the safe and interest.

Larremore and J. F. Daly, J. J., concurred.

Ordered accordingly.

The People *ex rel.* James Ryan *against* Andrew H. Green, Comptroller of the City of New York.*

The office of deputy clerk of the Court of Special Sessions, in the city of New York, is not incompatible with that of member of the Legislature of this State, and both offices may be held at the same time by the same person.†

Such a deputy clerk does not, by attending at Albany to perform his duties as member of Assembly, and in consequence thereof absenting himself from the city of New York, where his duties as deputy clerk are to be performed, forfeit his right to his salary as deputy clerk during the time of such absence.

The incompatibility of the same person to hold two offices arises at common law, where the one office is subordinate and subject to the supervision or control of the other, and upon the principle that a person cannot be both master and servant, or principal and subordinate. It does not arise, however, from the mere physical inability of the incumbent to be constantly present and engaged in the business of each, or to be ready to perform simultaneously all the duties they respectively require.

Appeal from an order made at the special term of this court, directing a peremptory writ of mandamus to issue.

The relator obtained an order for an alternative writ of mandamus to compel the comptroller of the city of New York to pay him his salary as deputy clerk of the Court of Special Sessions in New York city, for the months of February, March, April, and May, 1873, and on the writ being issued the comptroller made return to it, that subsequently to the appointment of the relator to such office, to wit, in the year 1872, the relator was duly elected a member of the Legislature of the State of New York, and accepted such office, and en-

* On appeal to the Court of Appeals, the order of general term here was reversed, on the ground that it did appear by the relator's affidavits that his claim had ever been audited by the board of supervisors and the auditor of the finance department, and the vouchers therefor examined and approved; but that court concurred in the decision here as to the incompatibility of the two offices held by the relator (see *People ex rel. Ryan* v. *Green*, 58 N. Y. 295).

† By L. 1873, c. 335, § 114, it is now provided that any person holding office under the city government (of New York city), who shall during his term accept a seat in the State Legislature, shall be deemed thereby to have vacated his office.

tered upon the performance of the duties thereof, and was engaged in such performance during the months of February, March, April, and May, 1873. That the duties of said last named office required the presence of said relator during the period last named, in the city of Albany, and rendered it impossible for him to perform the duties of the first named office of deputy clerk, which required his personal presence in the city of New York in order to perform the same. That the said relator was absent from the city of New York during the months of February, March, April, and May, 1873, in attendance upon the Legislature, and did not peform the duties of depnty clerk of the Court of Special Sessions during that time.

The court at special term (J. F. Daly, J., presiding), held the return to be insufficient, for the reasons stated in the following opinion:

"The relator was appointed on May 1, 1870, deputy clerk of the Court of Special Sessions of the Peace for the city and county of New York, pursuant to the act, chapter 383, Laws of 1870, and reappointed as such deputy clerk under the provisions of the act, chapter 373, Laws of 1872. While such deputy clerk, he was, in November, 1872, elected a member of Assembly for the year 1873, and accepted such office, and served as a member of the Legislature of the State, during the months of February, March, April, and May, 1873. The comptroller of the city and county of New York refused to pay him salary as deputy clerk of the Special Sessions during the said months, on the ground that he vacated the office of deputy clerk by accepting that of member of Assembly. No provision is found in the Constitution or in the statute law of this State to that effect, but it is claimed that at common law the two offices are incompatible, and the acceptance of the last vacated the first. The principle is an old and well settled one that no person can hold incompatible offices. According to an early authority, incompatibility as to office is divided into two classes: 'Offices are said to be incompatible and inconsistent, so as to be executed by the same person; 1st. When from the multiplicity of business in them, they cannot be executed with care and ability, or; 2d. When, they being subordinate and

interfering with each other, it induces a presumption they cannot be executed with impartiality and honesty' (4 Inst. 100 Bac. Abr. tit. Office, K).

"Among the multitude of cases reported containing adjudications as to what constitutes incompatibility in offices, illustrations are found of the latter class, and none whatever of the former. Indeed, where the question arose concerning the incumbent of two offices, which bore no relation subordinating one to the other, it has been invariably held that they were not incompatible. The cases of adjudged incompatibility may be briefly stated.

"In *Rex* v. *Pateman* (2 Term R. 777), the defendant held the offices of alderman and town clerk. These were held to be incompatible, because the clerk was a ministerial officer in the court held by the alderman, and because the accounts of the clerk were audited by the alderman.

"In *Verreer* v. *Mayor of Sandwich* (1 Sid. 363; 2 Keb. 92), the defendant was mayor and town clerk, and the offices were declared incompatible, because the former was a judicial, and the latter a ministerial officer in the same court. The clerk might be fined by the court of record held by the mayor.

"In 4 Inst. 310, the cases are citedof a forester, by patent for life, who was made a justice in Eyre for the same forest, and of a warden of the forest made justice in Eyre of the same forest. These were adjudged incompatible, because it was the duty of the justice to judge the acts of the forester and the warden, and therefore both offices should not be held by the same person.

"In *Dyer's Case* (Dyer, 158–6), a justice of the Common Pleas was made justice of the King's Bench, and these offices were said to be incompatible, because the duty of the latter court was to correct the errors of the former.

"In the case of *Blissell* (Note to *Rex* v. *Godwin*, 1 Doug. R. 397), where one attempted to hold the offices of alderman and of chamberlain in the same municipal corporation, it was held that the offices were incompatible, because the aldermen were to audit the chamberlain's accounts, and in holding both, the defendant would have to supervise his own accounts.

"The case of *Millward* v. *Thatcher* (2 Term R. 82), illustrates the same principle, although it is not, strictly speaking, an authority on the point, because the discussion of the question of incompatibility was not necessary to the determination of the case, and was so stated by all the judges, by Ashurst, J., particularly, on whose *dictum* much stress is laid in opposing the claim of the relator in this court. Thatcher was one of twelve jurats or aldermen of the borough of Hastings. Any two of the jurats, with the mayor, might hold the court of record for the borough. Thatcher was elected town clerk, and assumed to hold both offices, although the town clerk was clerk of the court holden by the jurats, and he was thus a judicial and ministerial officer in the same court. He urged that as there were twelve jurats, and any two might hold the court, he would possibly be never called on to sit. Ashurst, J., said that it was not necessary to decide the question of incompatibility, but if it were, he should say that the offices were incompatible, because there might be cases where it would be absolutely necessary for him to act as jurat, as in case of the sickness of all the others; and if there were one possible case in which he might be called on to act, that was an answer to the argument. Butler, J., said that as the charter of the borough provided for a mayor, twenty-four jurats, and a town clerk, the corporation could not reduce the number by consolidating two of the offices. Gross, J., put his decision in favor of the defendant, because the action was brought to test the right to the last office accepted, that of town clerk. Judgment in the case was unanimously given for the defendant Thatcher, the court saying that if the offices were compatible, he was rightfully in the second office; and if they were incompatible, he was also rightfully in the second office, because the acceptance of the last office vacated the first held. This case, in fact, stands as authority on the last point alone, for it definitely settled which office was vacated, if a person accepted two incompatible ones. The principle was first adopted in *Rex* v. *Trelawney* (3 Burr. 1615), that whether the last office were superior or inferior to the first, the first was the one vacated. And this is the rule to this day in England and America. Thus much attention has

been given to the case of *Millward* v. *Thatcher*, because the *dictum* of Ashurst, J., above quoted, to the effect that if an occasion might ever arise where an incumbent of two offices was called on to perform the duties of both at the same time, the offices were incompatible, is, as a general proposition, likely to mislead. In the first place, it was not an enunciation of any principle involved in the decision of the case; and in the next place, the incompatibility of the offices held by Thatcher arose solely from their relation to each other in the same court—one being subordinate and ministerial, and the other judicial. And this view of that case is expressed in a later English case (1830, *Rex* v. *Jones*, 1 Barn. & Ald. 677). Littledale, J., speaking of it and two others, cited above, saying: '*Verrier* v. *Mayor of Sandwich*, *Millward* v. *Thatcher*, and *Rex* v. *Pateman*, are clearly distinguishable from the present case. The offices of mayor, of jurat, and of alderman, in those cases, were judicial, and therefore incompatible with that of town clerk, and in the latter case, the town clerk's accounts were audited by the aldermen.'

"In *Rex* v. *Patterson* (4 B. & Ad. 15), where the defendant, being an alderman and justice of the peace, was appointed county treasurer, it was intimated by the court (1832) that the offices were incompatible, because the treasurer was a ministerial officer under the justices, and had to deliver in his accounts to them.

"In *Rex* v. *Lizzard* (9 B. & C. 421), the defendant was clerk of the borough of Weymouth, and also alderman. The offices were held to be incompatible, because, says Lord Tenterden, the clerk was removable by the aldermen for neglect of duty, and he would have a vote on his own removal; thus filling the incompatible offices of master and servant, and so because he would, as alderman, have a vote on his own salary as clerk. Bayley, J., said he thought two offices were incompatible where the holder cannot in every instance discharge the duties of each; and in the two questions of amotion and salary, the town clerk was not competent to discharge the duty of an alderman.

"The illustration here given by Bayley, J., shows that his

remark does not apply to the *physical* ability of the incumbent to discharge the duties of each office in every instance, but to the impropriety and impolicy of permitting him to do so. Even if a wider application be given to it, it would not, as other cases in England and America show, apply to cases where the incumbent of two offices has a deputy or assistant to perform the duties of one, while he is personally employed in the other. It will be perceived that in all the cases reviewed, the offices declared incompatible are such as bear a special relation to each other, one being subordinate to and interfering with the other, so as, in the language of Coke, to induce the presumption that they cannot be executed with impartiality and honesty.

"And there are no cases of adjudged incompatibility involving any other principle.

"The books, on the other hand, contain many cases where two or more offices, held by the same person, are declared not to be incompatible, but rightfully enjoyed.

"In *Rex* v. *Trelawney* (3 Burr. 1615), the defendant held the offices of steward and capital burgess of the same corporation, and the court refused to oust him, because the offices, by custom, had been held together for a hundred years back. This authority for one incumbent holding two offices, arising from custom or usage, is discussed and recognized in cases referred to below.

"In *Rex* v. *Jones* (1 B. & Ald. 677), the defendant was chosen town clerk of the borough of Cermarthen, and afterwards elected councilman, and held both offices. It was the duty of the town clerk to attend the meetings of the common council, and record their proceedings, and also act as prothonotary of the court of record of the borough.

"The defendant acted as councilman, voting, &c., and immediately afterwards acted as town clerk, recording the proceedings. Lord Tenterden said that the offices were not incompatible, but if the persons filling the offices were in relation of master and servant, they would be. Littledale, J., concurred, because the common council had no power to regulate the fees of the clerk. Taunton, J., said that no particular rule

could be laid down, but every case of incompatibility must depend upon its own particular circumstances. The judges in this case distinguished it from those of *Rex* v. *Pateman*, *Verrier* v. *Mayor of Sandwich*, and *Millward* v. *Thatcher* (*supra*), because in those cases the defendants assumed to hold offices, the duties of which were respectively *judicial* and *ministerial*, and therefore incompatible.

"In the United States the common law doctrine of incompatibility of offices has been fully recognized, but the cases under it show that the mere fact of one incumbent holding two offices does not vacate the first, unless there is an incompatibility arising from the nature of the offices and their relation to each other, or from the necessity of the incumbent performing the duties of both offices at all times in person, and not by deputy.

"In the *State of Missouri* v. *Moore* (48 Mo. 242), the relator was county clerk, and afterwards elected clerk of the Circuit Court. It was held that the offices were not incompatible, although the duties would have to be performed at the same time in different places, because they might be performed by deputy; that if the duties were necessarily personal, the offices would be incompatible, and finally, that as the offices had been held by one person from the earliest history of the State, and the Legislature, while declaring other offices incompatible, were silent as to this, such tacit approval of the practice must have great weight. The case of the *State of Missouri ex rel. Owens* v. *Draper* was cited, but in that case the incompatibility was adjudged under special provisions of the State Constitution and laws of Missouri.

"In *Bryan* v. *Cattell* (15 Iowa, 550), the plaintiff was district attorney of the county, and accepted a commission as captain in the volunteer service of the United States, and absented himself on active duty from his office. It was said by the court that the office of district attorney was not vacated by accepting the other, and that incompatibility of office exists where the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for an incumbent to retain both. It does not necessarily arise where

the incumbent places himself for the time being in a position where it is impossible to discharge the duties of both offices.

"The brief review here given will show the tendency of the cases on the question of incompatibility. Lord Mansfield said in *Rex* v. *Gayer* (1 Burr. 245), that 'the general questions concerning incompatibility of offices are a large field indeed,' and it seems difficult to judge every case by one inflexible rule, or to do more than follow the suggestions of Taunton, J., in (*Rex* v. *Jones*) *supra*, and judge every case by its own particular circumstances. The office of deputy clerk of the Court of Special Sessions is not, as its name might indicate, a subordinate office, whose powers and duties are those delegated by the clerk of that court. The name is a mere distinguishing appellation of an office equal in its functions in all respects to that of clerk of the Court of Special Sessions. The two officers are appointed by the same authority, for the same term, take separate oaths of office, and file separate official bonds; they are wholly independent of each other, as to duties, all those performed by the deputy clerk are such as are to be performed by the clerk, although there are special duties to be performed by the clerk alone.

"If the two officers be present at the same time, there are duties but for one, and in the absence of the deputy clerk the clerk may perform all the duties (L. of 1858, c. 282). The absence of the deputy clerk, therefore, does not impede the performance of the duties of that office by the clerk.

"Nor is it because the relator is called deputy clerk that his duties cannot be performed by an assistant. His powers are not delegated from the clerk, but are derived directly from the statute, and whatever powers the clerk might delegate, the deputy might equally.

"If the clerk accepted the office of member of Assembly, and could answer objections thereto, that all the duties of clerk were performed by the deputy clerk, or such as acted for him, and no inconvenience had ensued or could ensue, the deputy clerk may well urge that in his absence all the duties of their common office were performed by the clerk, and it is not necessary that he should at all times be present in person, there

being a common duty for him and the clerk that can be performed but by one at a time.

"The office of deputy clerk is held for a term of six years, that of a member of Assembly for one year, with a term of service not contemplated to extend beyond a hundred days (Court, 1846, art. 3, § 6), and seldom extending longer than five months, making in the case of the relator but a temporary absence for a short period, compared to his term of office as deputy clerk. That the duties of member of Assembly have to be performed at Albany, does not affect the question in this case, since there is an officer in New York to perform the duties imposed upon the deputy clerk of the Court of Special Sessions, and no more hazard to public interests is occasioned than in the very frequent cases where an assistant or deputy is left to exercise the powers of the principal officer in his absence.

"Neglect of duty by an officer, absence from the place where the duties of his office are to be performed, non-user of powers or abandonment, are not modes of vacating an office in this State, but if unjustifiable, are grounds for removing him from office by the proper authority. The rule in other States appears to be the same. In the case of *Page* v. *Hardin* (8 B. Mon. 648, 666, Kentucky), where the Secretary of State, in violation of an express statute, persistently absented himself from the seat of government, and left the performance of his duties to an assistant, it was held that he had not vacated his office. In the case of *Bernard* v. *City of Hoboken* (3 Dutch. 412), the fact that a local officer of that city left the State of New Jersey, went west, remained away for a considerable time, with some evidence of intention to stay away permanently, was held not to be at law a vacation of his office, but it was left to the jury to say if there were an intention on his part to relinquish or abandon it.

"In this State, the vagueness of the common-law rule has been in a measure limited by statute. A local office becomes vacant if the incumbent ceases to be an inhabitant of the district, county, town or city for which he shall have been chosen or appointed, or within which the duties of his office are re-

quired to be discharged (1 R. S. 122, sec. 34, subd. 4), and no other abandonment or relinquishment is provided for by law. There is, of course, no question of the authority of the proper tribunal to remove a local officer from office for non-performance or neglect of duy, even if such neglect arise from his acceptance of another office compatible with the first, such authority being always reserved for the public good. But the sole question before me now being whether the relator, by accepting the office of member of Assembly, thereupon absolutely vacated his office of deputy clerk of the Special Sessions, upon the ground that the two offices were incompatible, my conclusion is to the contrary.

"1st. Because there necessarily need be no neglect of duties of the office of deputy clerk for the short period that the relator might be required to be absent attending sessions of the Legislature, there being another officer present to perform all those duties.

"2d. The appointment by law of a clerk and deputy clerk, two officers of equal authority, to perform the same duties, one only being needed to perform them at one time, has in contemplation the absence at times of one of such officers, and evidences an *intent* that the personal presence of both is not all times necessary.

"3d. And for the further reason that the custom or usage in this State has been for local officers to hold as well legislative or *quasi* legislative offices, the duties of which are to be performed at the capital of the State. That such custom or usage is to be considered as authority for the practice has been shown above (*Rex* v. *Trelawney*, 1 Burr. 1615; *State of Missouri* v. *Moore*, 48 Mo. 242). Such custom in this State has been attended by a silence on the subject in the statutes which, according to the last case cited, evidences the approval of the Legislature, and must be considered in determining the question. Such usage follows that which has also prevailed in England, local officers there being elected to Parliament and special statutes having been enacted to provide what local officers shall not be eligible to serve in Parliament, all

other persons being eligible (Jacobs' Law Dict. tit. Parliament, 6 B).

"In this State not only have local officers, been elected to both houses of the Legislature, but there is even higher authority in the cases of certain local officers, accepting offices of a legislative character, the duties of which interfered with the performance of their local duties—I allude to the delegates to the several constitutional conventions of this State. In the convention of 1866–7, nearly one-fourth of all the delegates held local city, county or town offices of a judicial, legislative or executive character. The chief justices of the three superior courts in different counties of the State, other judges of the same courts (in one instance the whole bench) surrogates, justices of inferior courts, members of the boards of education, officers of city and county departments of different localities, were all members of that convention.

"In the convention of 1846 many delegates and local officers, and in the convention of 1821 the chancellor, was a delegate. In every case there was necessarily a suspension of the performance of other official duties during the very long sessions of the conventions, which extended over a longer period than a session of the Legislature. The duties of delegate were as multifarious and engrossing as those of members of Assembly, and had to be performed at Albany. There was necessarily loss of service to the public in the non-performance by such delegates of their local duties, especially in the case of judicial and other officers whose powers could not be delegated. If the argument of the respondent is correct, it follows that all these officers vacated their offices when elected to the constitutional conventions, since such offices were far more obnoxious to the charge of incompatibility than those held by the relator Ryan.

"4th. The offices of the relator are not incompatible as having any such relation to each other as suggests that they could not be performed by the same person with honesty and impartiality. This was expressly conceded on the argument. It was also conceded that no inquiry was to be made into the performance by the relator of his local duties, while acting as member

of Assembly (Charter, L. of 1873, chap. 335, sec. 29). But the sole objection to the relator's claim is based on what the counsel for the respondent termed the 'physical incompatibility' of the relator's offices, arising from the assumed fact that the duties of each required his presence in different places at the same time.

"This question was considered by the Supreme Court at special term, on the application of the same relator for the same salary, and the learned justice who presided was of opinion that the offices were incompatible, but as that point had not been suggested nor argued by counsel before him, he gave leave for an alternative mandamus, in order that the relator's counsel might be heard upon it.

"The alternative mandamus has been applied for and issued from this court without objection, and the return made by the comptroller to the writ, raises the question here discussed, counsel having been fully heard upon the objection to the sufficiency of the return. The opinion delivered by the learned justice of the Supreme Court appears to hold that the relator's offices were incompatible, upon the *dictum* of Ashhurst, J., in *Millward* v. *Thatcher*, *supra*, and upon the assumed facts, that if the clerk fell sick, the presence of the deputy would be indispensably necessary to perform their duties in the court; that the statutes contemplated the existence of duties requiring the presence of both clerk and deputy for their effectual performance; that the duties of one office required the relator's presence in Albany, and of the other in New York, while both were to be discharged in person.

"As to the case of *Millward* v. *Thatcher*, the construction placed upon it by the English courts, and the weight it is entitled to, are discussed above. As to the contingency of the clerk falling sick, leaving no one to perform the duties of deputy clerk, it might arise in every case where duties are either personal or delegated, but can hardly, in the latter case, be urged as a reason why the officer and the deputy must always be present to anticipate each other's illness or incapacity to act personally in performance of the duties of the office. No officer could in that case ever absent himself or hold an-

other office, even while he had a deputy. Nothing in the language of the statute seems to me to intend that there are any duties for clerk and deputy to perform jointly, or requiring the presence of both. It would rather seem that the creation of the two offices, to perform duties which the incumbent of either can fulfill, contemplates the contingency of the occasional absence of one of them.

"Finally, no duties can require personal performance in every instance by any officer, when another person is clothed by law with full authority to perform them.

"It is with diffidence and reluctance that a conclusion is here reached differing from the views of the learned justice of the Supreme Court, but it has been my advantage to hear counsel discuss with care and elaboration the particular point in controversy. So far as the propriety of any two offices, compatible or incompatible, being ever held by one person at the same time is concerned (save in possible exceptional cases of extreme importance, where the interests of the State temporarily demand special experience and ability), it is impossible not to see the force of Coke's opinion; that it were better they should not be, as tending to the greater honor and dignity of office and greater benefit to the public. But my views as to the propriety cannot affect the law as I find it, and I must conclude that the relator did not vacate his local office by accepting that of member of the Legislature.

"The return is insufficient, and mandamus must issue."

The court therefore ordered a peremptory writ of mandamus to issue, and from that order the comptroller appealed.

George P. Andrews, for appellant.

Richard O'Gorman, for respondent.

Robinson, J.—The relator was deputy clerk of the Court of Special Sessions of the Peace for the city and county of New York in the fall of 1872, when he was elected a member of the Assembly for the year 1873, and accepted that office, and served in the same for the months of January, February, March and April of that year, and without having otherwise

resigned or been removed from his office of deputy clerk by the board of police justices, by whom he was appointed, and at whose pleasure he held that office (under the provisions of chapter 373 of the Laws of 1872), claims in this proceeding, by mandamus, to compel the comptroller to pay him his salary for those four months. The return of the comptroller alleges that the duties of the office of member of the Assembly required the relator's presence in the city of Albany, and rendered it impossible for him to perform those of the office of deputy clerk, which required his presence in the city of New York in order to perform the same; and that he was absent from the city of New York during those four months, in attendance on the Legislature, and did not perform the duties of deputy clerk during that time. The judge below, upon this return, directed a peremptory writ of mandamus to issue, requiring payment of the salary claimed for that period; and the questions presented on this appeal are, whether the relator, by accepting the office of member of the Assembly, and attending at Albany and there performing its duties, resigned the office of deputy clerk, or whether such absence from the city of New York, where his duties in the latter office were to be performed, disentitled him from claiming the salary attached thereto for the period of his absence at Albany, and non-performance of his official duties in New York.

The affirmative of both propositions is claimed, on the part of the comptroller, as well on the ground of the incompatibility of the offices, and the resignation of that of deputy clerk, by accepting that of member of Assembly, as well as of the omission to perform any of the duties appertaining to that of deputy clerk.

This office of deputy clerk was first created by chapter 282 of the Laws of 1858, in which the police justices were authorized to appoint both a clerk and deputy clerk of the Court of Special Sessions of the Peace; and by it, as well as by subsequent statutes (chap. 283 of 1870 and chap. 373 of 1872), the power of appointment was vested in other officers or board than the clerk, to whom, at common law, it would have appertained. "A deputy is he who exercises the office in another

man's right (Wood's Ins. 203); and "where one office is incident to another, such incident office is regularly grantable by him who hath the principal office" (*Mitton's Case*, 4 Co. 32); and so by statute 1 R. S. 116, § 5. The duties prescribed for such deputy clerk by the act of 1858, chap. 282, § 2, do not substantially vary from those imposed by general law upon any deputy, which are as follows: "In cases not otherwise provided for, each deputy shall possess the power and perform the duties attached by law to the office of the principal, *during a vacancy and during the absence of his principal*" (1 R. S. 117, § 7). Otherwise the deputy is but an employee, to perform clerkly duties, subject to the control of his principal, when present to exercise the duties of the office. This consideration does not, however, reduce him in the presence of his superior to the position of a mere clerk, nor divest him of his continuous character of an "officer," while remaining an incumbent of his position, subject to all claims upon his services, in performance of the duties of his principal, whenever the contingencies provided for by the statute shall occur. The right of an officer to his fees, emoluments or salary is such only as is prescribed by statute; and while he holds the office such right is in no way impaired by his occasional or protracted absence from his post, or neglect of his duties. Such derelictions find their corrections in the power of removal, impeachment and punishment provided by law. The compensations for official services are not fixed upon any mere principle of a "*quantum meruit*," but upon the judgment and consideration of the Legislature as a *just medium*, for the services which the officer may be called upon to perform. These may in some cases be extravagant for the specific services, while in others they may furnish a remuneration that is wholly inadequate. The time and occasion may, from change of circumstances, render the service onerous and oppressive, and the Legislature may also increase the duties to any extent it chooses, yet nothing additional to the statutory reward can be claimed by the officer. He accepts the office "for better or for worse," and whether oppressed with constant and overburdening cares, or enabled from absence of claims upon his services to devote

himself to his own pursuits, his fees, salary or statutory compensation constitutes what he can claim therefor, and is yet to be accorded, although he performs no substantial service or neglects his duties. It is different in the relation of master and servant, or employer and employee, wherein, if extra services are performed, not originally contemplated, additional compensation may be claimed, and for neglect of duty a *recoupment* from the wages agreed upon may be allowed. The fees or salary of office are "*quicquid honorarium*," and accrue from mere possession of the office. If therefore the relator, by accepting and performing the duties of member of Assembly, in no way resigned his office of deputy clerk, his neglect of the duties which the office required did not constitute a vacation of the office, nor deprive him of the right to his accruing salary, unless there was in law such incompatibility in the two that the acceptance of the office of member of Assembly operated as a resignation of that of deputy clerk of a local court. Incompatibility of office exists as well by force of the principles of the common law as of constitutional and statutory provisions. It only arises at common law, when the one office is *subordinate* or subject to the *supervision* or *control* of the other, and upon the principle that *one cannot both be master and servant, or principal and subordinate.* It did not arise from the mere physical inability of the incumbent to be constantly present and engaged in the business of each, or to be ready to perform simultaneously all the duties they respectively required. The learned judge, whose decision is appealed from, has industriously presented an exhaustive review of such cases as have arisen at common law in England and in this country, in which such question of incompatibility of office has arisen or been adjudicated upon, and has eliminated from them the principle above stated. Such are the cases of *Verrier* v. *The Mayor of Sandwich* (Siderfin, 353), where the offices were mayor and clerk in the same court; *Rex* v. *Pateman* (2 T. R. 777), those of alderman and town clerk, in which the aldermen were to audit the accounts of town clerk; *Dyer's Case* (Dyer, 158), of justices of the Court of Common Pleas and judge of the King's Bench, the latter being required by law to review and correct

errors in the decisions of the former; *Bissell's Case* (note to *Rex* v. *Goodwin*, 1 Doug. 397), of alderman and chamberlain, where also the aldermen were required to audit the accounts of chamberlain; *Millward* v. *Thatcher* (2 T. R. 82), of judge and clerk of the same court; *Rex* v. *Patterson* (4 B. & Ad. 9), of justice of the peace and county treasurer, required to render his accounts to the justices for audit; *Rex* v. *Lizzard* (9 B. & C. 421), of alderman and clerk removable by the aldermen, who also might vote upon his salary, in all which cases such incompatibility was held to exist; while, on the contrary, in *Rex* v. *Trelawney* (3 Burr. 1615) of those of capital burgess and steward, "a higher office" in the same corporation, "by usage both having been in the same person;" in *Rex* v. *Jones* (1 B. & Ald. 667), of councilman and town clerk, who was to attend the meetings of the councilmen and record their proceedings, the offices were held compatible. So, also, in our State courts, in *Howland* v. *Luce* (16 I. R.), the offices of clerk and collector of the same school district; in *Missouri* v. *Lush* (48 Mo. 242), of county clerk and clerk of the Circuit Court, performance of the duties of which required attendance in different places, but each might be performed by deputy; in *Bryan* v. *Cattell* (15 Iowa, 550), of district attorney and captain in the volunteer service of the United States, requiring absence from the county, were also held not to be incompatible. These afford a review of such as are decided on common law principles. There are others arising out of constitutional or statute provisions (2 Va. Cas. 523; 3 J. J. Marsh. 401; 21 Ind. 516).

The Constitution of our own State (Art. 3, § 7) prohibits any member of the Legislature *receiving* any civil appointment within this State or to the Senate of the United States, or from the Governor, Governor and Senate, or from the Legislature, during the term for which he shall have been elected. And Article 3 (§ 8) also prohibits any person, being a member of Congress, or holding any judicial or military office under the United States, from holding a seat in the Legislature; and if any person shall, after his election to the Legislature, be elected a member of Congress, or appointed to any office, civil or military, under the Government of the United States, his accept-

ance thereof shall vacate his seat. There are various statutes, relating as well to members of the Legislature as to other offices, inhibiting the holding or exercising the two (1 R. S. 103; Ib. 109, §§ 26, 27; Ib. 111, § 30; Ib. 112, § 48; Ib. 116, § 2; L. 1853, c. 80, and others), but none otherwise affecting those under consideration.

The provisions of our Constitution and laws, above referred to, affecting the office of a member of Assembly, are to a great extent in harmony with the acts of Parliament relating to members of that body. The statute 12 Wm. III, c. 2, prohibited any member who had any office or place of profit under the king or pension from the crown from serving as a member of Parliament; this was repealed by 4 Anne, c. 8; but 6 Anne, c. 7, § 25, enacted that no member of Parliament should hold any office in the government and sit in the house at the same time by virtue of his former election, "for by acceptance of an office his election is void;" but he might be elected again on a new writ sued out, and sit in the house. By 1 Geo. I, c. 56, no person having a pension from the crown *for years* could be elected a member; and by 15 Geo. II, c. 22, various officers of state were rendered incapable of being members. None of the judges who were assistants to the House of Lords in the decision of questions of law were eligible, but persons holding places in other courts were (Jac. Law Dic. "Parliament;" Cun. Law Dic. "Parliament;" 1 Bl. Com. 175).

A sheriff for another shire might sit in Parliament (Jac. Law Dic. *supra*), as was well maintained in the case of Lord Coke, who was nominated by Charles I to the office of sheriff of Buckinghamshire, under the idea that he would thereby, from the incompatibility of the offices, be precluded from election to Parliament. He, however, was elected from Norfolk, and although he faithfully executed the duties as sheriff, his right to his seat in Parliament was successfully maintained (4 Ld. Camp. Lives of the Chief Justices, 332–3; 2 Cobb Par. Hist. 41, 44).

The common and statutory laws of Great Britain existing in 1775 were adopted in our first Constitution of 1777 (1 R. S. 32), so far as applicable to the state and condition of our country. A subsequent change was entirely within the scope of

subsequent laws or constitutional provisions. Such as have been considered in no way prohibited one holding the office of deputy clerk of a local court from being also a member of the Legislature. The Constitution of 1846, in the provisions above referred to, considered the relations of a member to other offices, and while prohibiting his *acceptance* of other offices, it in no way provided against the holding of such a local office of which the member was previously an incumbent. Its provisions were directed against his acceptance of other offices after he became a member, and with a view to prevent the improper and corrupt influence which the hope or promise of such appointments might exert upon his conduct as a legislator. The novel condition of our own country, in its settlement and development, has occasioned the necessity for the holding of several offices by the same person, when he was deemed by the electors or appointing power capable and worthy of performing their various duties. An instance, not improbable, is stated in a recent publication as occurring in Florida, of the same person having united in himself the multifarious offices of "senator, county commissioner, member of board of instruction, deputy marshal, deputy sheriff, county clerk, treasurer of school funds, senior councilman, and acting mayor" (Harp. Mo. Mag. No. 257, April, 1874). The incongruity of such duties has not, however, been regarded as an incompatibility of offices, except where such incompatibility exists under some strict rule of the common law, or is created by the Constitution or laws, and necessarily arises from their construction as to the duties imposed upon the respective offices. Otherwise, whatever evils have arisen or could arise from any individual holding a multiplicity of offices have found their remedy or correction in the discretion or judgment of the electors or appointing power. When such various honors are thrust or conferred upon the same person, and he accepts them, he takes them subject to all their duties, and becomes entitled to all the benefits legally to be derived from their possession. By the ordinary rule of construction, embodied in the maxim "*Expressio unius est exclusio alterius*," the peculiar prohibitions of the Constitution and provisions of the Revised Statutes against a member of the Legis-

lature *accepting* other specified offices should (especially where not otherwise controlled by common law) be deemed an affirmation of his right to hold others not so prohibited, and to leave his enjoyment of such offices to the discretion and responsibility of the electors or appointing power, or those authorized to effect his removal, and by whose indulgence he may be permitted to retain office, without impeachment for neglect of his duties.

The power of the Legislature, of which the relator was a member, to pass laws affecting his local office did not create any incompatibility of office. All citizens, in office or otherwise, are equally subject to the action of that body; and whatever may be the personal interest of the legislator in the subject of legislation, he is not (aside from matters of delicacy or personal honor) precluded from taking part in its deliberations or acting upon the subject. In the present case, the judge from whose decision this appeal is taken has instanced the attendance of numerous judges and officials, including the chancellor, as delegates in the conventions that framed the Constitutions of 1821 and 1846, acting and deliberating on the very existence of the offices they held, their own powers, and all other incidents of their offices, without imputation of incompatibility, and far less of any legal or moral impropriety.

Such high expositions of the practice and law upon this subject can scarcely leave a doubt that the office of the relator as a member of the Assembly was in law *compatible* with that of deputy clerk; that his temporary absence from the city at Albany, during the session of the Legislature, did not in itself constitute a resignation of his local position; that for any neglect of duty his removal could only have been effected by the action of the board of police justices, at whose will and pleasure he held the office; and that, in the absence of their action, he continued to hold his office of deputy clerk, with all its emoluments.

Upon these considerations, I am for affirmance of the order awarding a peremptory *mandamus*, with costs.

Daly, Ch. J., and Larremore, J., concurred.

Order affirmed.

THOMAS SWEENY *against* THE MAYOR, ALDERMEN AND COMMONALTY OF THE CITY OF NEW YORK.*

An attendant on the Court of Common Pleas for the city and county of New York, appointed under the act of 1853 (L. 1853, c. 529), who performs the duties in connection with that court which formerly devolved on the regularly appointed constables or marshals, such as attending the court during its sittings, preserving order, taking charge of juries during their deliberations, taking into custody persons committed by the court until they are transferred to the custody of the sheriff, and who takes the constitutional oath of office, and is sworn when taking charge of a jury, is an officer of the city and county of New York within L. 1870, c. 382, § 3, by which the board of supervisors were prohibited from increasing the salary of any officer then in office.

APPEAL by defendant from a judgment of this court entered on the verdict of a jury at trial term.

The complaint alleged that under the provisions of L. 1853, c. 529, the plaintiff was appointed by the Court of Common Pleas, on February 18th, 1868, an attendant on said court, and that thereupon he entered upon the performance of his duties as such attendant, and continued to perform the same up to November 1st, 1873; that by a resolution of the board of supervisors of the county of New York, duly passed on May 26th, 1870, and approved by the mayor on May 27th, 1870, and to take effect from the first day of June, 1870, the compensation to be paid to the plaintiff as such attendant was at the rate of $1,500 per annum; that, notwithstanding the passage and adoption of this resolution, he was paid at the rate of $1,200 only per annum (the rate fixed by said board on December 20th, 1866), and continued to receive payment at that rate up to July 19th, 1872; that the balance of salary due him for the period from June 1st, 1870, to July 15th, 1872 (computing his salary at the rate of $1,500 per annum) was $639 55, which sum he claimed to recover.

The answer alleged that by L. 1870, c. 382, § 3, which took effect on April 20th, 1870, it was provided that the board of

* Judgment of the general term here affirmed by the Court of Appeals in 58 N. Y. 625.

supervisors of the city and county of New York should not increase the salary of any officer then in office, and that the plaintiff was an officer then in office in said city and county, and that the resolution increasing his salary was therefore wholly void and invalid.

The answer also alleged that the plaintiff had released the defendant from all further claim for salary for the period named.

At the trial the court held that the resolution of the board of supervisors was not invalid, and submitted the question of the release to the jury, who found for the plaintiff.

E. Delafield Smith, for appellant.

Elliot Sandford, for respondent.

J. F. Daly, J.—The plaintiff is a public officer, and the position he holds as an attendant or officer of the Court of Common Pleas is a public office (*People ex rel. Henry* v. *Nostrand*, 46 N. Y. 381). He performs the public duty of attending the court during its sittings, preserving order, taking charge of juries during their deliberations, and taking into custody persons committed by the court until they are transferred to the custody of the sheriff. In this court, at least, he takes the constitutional oath of office, and is sworn when taking charge of a jury. He receives a special appointment to the position, is one of a prescribed and limited number of such functionaries (Act of 1872, ch. 438), receives a fixed remuneration in the shape of a yearly salary, now fixed by the common council (Act of 1872, ch. 438) and formerly by the board of supervisors (Act of 1853, ch. 528), to which he is entitled until removed; he holds his place during the pleasure of the appointing power, and is removable only by direct notice (*Jarvis* v. *The Mayor*, 2 N. Y. Leg. Obs. 396). The fact that in different statutes he is called "attendant" (Act of 1870, ch. 382, § 9; Code, § 28), or "assistant" (Act of 1870, ch. 582), or "officer," does not affect the question; it is to be decided with reference to the character of his duties. He comes within the definition of officer cited in the case of *The People ex rel. Henry* v. *Nostrand*

(46 N. Y. 381), and approved therein. His duties are inseparably connected with the administration of justice, in the conduct of the business of the court when open to the public for the trial of causes. Such duties have never been performed except by officers. Formerly they devolved upon the regularly appointed constables or marshals, of whom a sufficient number were to be summoned by the sheriff to attend the sittings of the court (2 R. S. 289, § 83). At common law the sheriff, in his ministerial capacity, is the immediate officer of all courts of record, to execute their writs and process, and enforce obedience to their orders. It is his ordinary duty to provide attending officers while they are in session, to preserve order, execute the orders, and aid in the performance of the duties of the court; and in case of his neglect or refusal to do so, such courts have the incidental power to appoint such officers, for otherwise they could not hold a court (Com. Dig. Courts, P. 4; Bac. Ab. Courts, E; *State* v. *Trall*, 2 Const. R. [S. C.] 766; *State* v. *Monk*, 3 Ala. 215).

By the Code it became the duty of the supervisors to provide attendants for the courts, and if they failed to do so, the sheriff was obliged to, upon the order of the court (Code, § 28). By a subsequent act, the courts in the city of New York were empowered to appoint such officers (Act of 1853, ch. 528). This was among the powers confirmed by the Constitution (Const. art. 6, § 12, Amendment of 1869). A removal of such power was attempted in 1870 (L. of 1870, ch. 382, § 9), but two years later a statute was passed by the Legislature, reposing the power of appointing their own attendants in the several courts in the city of New York, where it has remained for so many years, and where, considering the nature of the duties to be performed by such officers, and their connection with the administration of justice, it properly belongs (Act of 1872, ch. 438). These attendants, so appointed and superseding the constables and marshals, possess all the powers of the latter while attending the sittings of the court—no more and no less. The case of the plaintiff is to be distinguished from that of Sullivan (*Sullivan* v. *The Mayor*), who was the janitor of one of the district courts in this city. Sullivan's duties were to take

charge of the rooms where the court was held, and keep them and the court property safely. He had no more to do with the administration of justice in the court than the maker of fires or sweeper of the floors.

The plaintiff was appointed an attendant in this court prior to the year 1870, and has held the office ever since his appointment. His salary was fixed by the board of supervisors, on December 20th, 1866, at $1,200. He has been paid at that rate ever since. He claims, however, salary at the rate of $1,500 per annum from June 1st, 1870, by authority of a resolution of the board of supervisors of that date fixing the salary of such attendants at $1,500 per annum—an increase of $300 per year. This action is brought to recover such increase from June 1st, 1870, when the supervisors fixed the salary at $1,500, to July 15th, 1872. Payment of the increase is resisted by the corporation, because the supervisors were prohibited by law from making such increase. It appears that the statute of April 26th, 1870 (L. 1870, c. 382, § 3), enacted as follows: "The supervisors are prohibited from creating any new office or department, or increasing the salaries of those now in office." The act in which this provision is found is the annual tax levy act for the county. A similar provision in a similar act passed in 1869 was held by the Court of Appeals to be constitutional (*Sullivan* v. *The Mayor*, 53 N. Y. 652, overruling a decision to the contrary contained in the opinion in same case in this court reported in 45 How. Pr. 152); and this provision is equally within the single scope and purpose of the local act in which it is contained. Such restriction on the powers of the board of supervisors of this county left them no authority to make the increase attempted by their subsequent resolution of June 1st, 1870, because that provision of law was applicable to persons in office, as this plaintiff was, at the time it took effect. It is said that the office held by plaintiff was not intended to be included in the prohibition of the 3d section of said act, because in the 9th section of the same act it was enacted that attendants on the courts should be appointed by the comptroller and their compensation fixed by him. This only shows that the supervisors had no authority after that act to fix his salary at any

sum. At all events, the only authority for the increase was the resolution of the board; and whether that resolution to increase was in respect of a salary they had or had not a right to fix, it was equally in violation of an express prohibitory statute.

The judgment must be reversed, and judgment absolute entered for defendants.

DALY, Ch. J., and ROBINSON, J., concurred.

Judgment reversed, and judgment absolute ordered for defendants.

THOMAS KEATING *against* EDWARD SERRELL.

Notwithstanding the justice of a District Court in the city of New York is by the statute (L. 1857, c. 344, § 47) required, upon the trial of an issue of fact before him, to render judgment within eight days from the time the same is submitted to him for that purpose, yet as this statutory provision is for the benefit of the parties, it may be waived by them, and they may, by stipulation, authorize the justice to render judgment after the expiration of the time limited by the statute.

Where by such a stipulation made by the parties the time within which the justice may render judgment is expressly fixed, and the last day for rendering judgment falls on Sunday, the justice may lawfully render judgment on the day following. Nor will the fact that the time fixed by the stipulation is the same as that fixed by the statute (eight days) prevent this result, although, *it seems*, that if there is no stipulation, and the justice acts under the statute, he must, if the last day falls on Sunday, render judgment on the day previous.

Where a judgment of a District Court appears on its face to be have been rendered on Sunday, and on appeal it is attacked as irregular on this ground, the justice may in his return show that it was actually rendered on Monday, and dated on Sunday by mistake.

APPEAL from a judgment of the First District Court, rendered after a trial upon an issue of fact, tried before the justice without a jury.

The action was brought to recover $200, being a balance

alleged to be due to the plaintiff from the defendant, on a loan of $500, which the former claimed he made to the latter.

The return of the justice stated that the trial took place, and the case was closed on the 7th day of February, 1873, and that thereupon the same was submitted to him for his decision and determination. It further appeared by his return, that on the 10th day of February, a stipulation signed by the counsel for the respective parties was filed with the justice, whereby it was agreed that the cause should be regarded as submitted to the justice on the 15th day of February, and that he should have eight days thereafter to render his decision therein. On the 24th day of February, the justice rendered judgment in favor of the plaintiff, but by mistake he dated it as of the 23d, which was Sunday.

The defendant appealed to this court.

Strong & Shepard, for appellant.

R. H. Hope, for respondent.

Loew, J.—As the evidence in reference to whom the loan was made was conflicting, the justice was warranted in finding that it was made by the plaintiff to the defendant, and not, as claimed by the latter, to Churchill, and afterwards by Churchill to the defendant.

It therefore becomes necessary to consider three questions of law:

1st. Can the parties to an action by stipulation, extend the time within which the justice may lawfully render his decision?

2d. If so, and the last day falls on Sunday, can judgment be legally given on Monday? and

3d. Is a judgment which was rendered on Monday, but which purports to have been given on Sunday, valid?

The 47th section of the district court act directs that the justice shall render judgment within eight days from the time the cause is submitted to him for that purpose (L. 1857, c. 344, § 47). This limitation as to the time within which the justice may render his decision, was designed by the Legislature for the benefit of the parties and the preservation of their

rights. But while it is the undoubted right of the parties to have the judgment rendered within the time prescribed by the statute, they may nevertheless waive that right (*Barnes* v. *Badger*, 41 Barb. 98). It follows that the parties can by stipulation enlarge the time for rendering judgment, and if the same be given within the stipulated time, it will be valid.

Now, where the period for doing an act is prescribed by a statute, and the last day falls on Sunday, it must be done on the preceding day. Accordingly where the last day within which the district court act authorizes the justice to give judgment, falls on Sunday, he must render the same on Saturday (*Bissell* v. *Bissell*, 11 Barb. 96). But the rule of law in regard to performing a contract or fulfilling an agreement is otherwise. In such a case, if the last day fixed for the performance of the act should happen to be Sunday, it may be performed on the following day (*Campbell* v. *The International Life Ins. Soc.* 4 Bosw. 319). And it makes no difference that the time fixed by agreement for doing the act happens to be the same as that laid down by the statute (*Broome* v. *Wellington*, 1 Sand. 666). In the case at bar, the justice acted under the stipulation, and as the time mentioned therein expired on Sunday, he was justified in rendering judgment on the next following day.

The only other question has reference to the date of the judgment, from which it would appear to have been rendered on Sunday. If this were so, it would be void. At the common law, no judicial act could be performed on Sunday (*Story* v. *Elliot*, 8 Cow. 27). And the Revised Statutes prohibit the opening of any court and the transacting of any judicial proceedings on that day, except for the purpose of receiving a verdict or discharging a jury (2 R. S. 275, § 7). The only valid judgment that the justice could therefore render on Sunday would be on the verdict of a jury, given on that day, inasmuch as the district court act directs that where the trial is by jury, the judgment must be entered immediately after the finding of the verdict (L. of 1857, chap. 344, § 42). In the present case, however, it appears from the return of the justice that he did not render the judgment on Sunday, but on Monday, and that by mistake he dated it as of the preceding day, which was

Sunday. This mistake did not render the judgment void. The justice may show when it was actually rendered, and that the date it bears was made by mistake (*Borland* v. *Stewart*, 4 Wend. 568; *Jennings* v. *Carter*, 2 Id. 446). In fact, although he could not alter or change his judgment by correcting a mistake in it, after the time to which he was limited in rendering the same (*Dauchy* v. *Brown*, 41 Barb. 555); he could, nevertheless, before the filing of a transcript in the county clerk's office, by which it becomes a judgment of this court, have corrected the clerical error referred to, so that the date of the judgment would conform to the day on which it was in reality rendered (*Christopher* v. *Van Liew*, 57 Barb. 17).

The judgment should be affirmed, with costs.

Daly, Chief Justice.—I agree with Judge Loew that the obvious intent of the statutory provision, requiring judgment to be rendered within a certain number of days after the trial, was for the advantage of the parties. It was not intended to be essential to the jurisdiction of the court; for that is acquired, as to the person and the subject-matter, by the service of the summons and the appearance of the parties. It is a provision to secure dispatch in these courts, where the amount in litigation is small; where the questions arising are not usually of the gravity and importance of those that are litigated in the higher courts, and where the claimants are largely of a class to whom the immediate recovery of their small claims is of very great importance, depending as most of them do, upon the fruits of their daily labor for support. If we may, as I think we can, having the authority of adjudged cases in support of it (*Barnes* v. *Badger*, 41 Barb. 101; *Fiero* v. *Reynolds*, 20 Id. 275; *Embury* v. *Connor*, 3 N. Y. 511), put this construction upon this statutory provision in relation to these courts, then it was competent for the parties to waive it, and to agree that the judgment, instead of being rendered within the statutory time, might be rendered within a fixed time beyond that. If we are justified in this conclusion, then the construction of the time, where the last day falls upon Sunday, must be that which prevails in agreements—*i. e.*, that when

the last day, or day of performance, falls upon Sunday, it is not, for the purpose of carrying the agreement into effect, a day in the law, and the party has, in consequence, the whole of the following Monday within which to perform it (*Avery* v. *Stewart*, 2 Conn. 69; *Salter* v. *Burt*, 20 Wend. 205). A different rule prevails in the construction of statutory time, the reason for which, as was said by the court, in *Broome* v. *Wellington* (1 Sandf. 664), is not very obvious. The only reason given is the statement of the court, in *Ex parte Dodge* (7 Cow. 147), that "Sunday has in no case, *we believe*, been excepted in the computation of statute time;" and that of Baron Park, in *Rowberry* v. *Morgan* (9 Exch. 9), that when the statute says a certain number of days, it means that number of days. In Pennsylvania, on the contrary, the rule that prevails in agreements is applied to statutory time; and that the English courts are not very well satisfied with what was held in *Rowberry* v. *Moryan* (*supra*), and two subsequent cases, appears by the decision in *Hughes* v. *Griffiths* (13 Com. B. N. S. 323), that when the last day named in a statute falls upon Sunday, and the act is to be done by the court and not by the party, it may be done on the following Monday, which is applicable to the state of facts in this case.

J. F. Daly, J., concurred.

Judgment affirmed.

MICHAEL CURLEY *against* THEODORE E. TOMLINSON.

This court has adopted, in regard to reargruments, the same rule as laid down in the Court of Appeals, in *Mount* v. *Mitchell* (32 N. Y. 702).*

This court will reverse the judgment of a District Court justice, even though he committed no error of law, and although the evidence as to the facts was conflicting before him, when the court is satisfied that justice has not been done.

MOTION for a reargument of an appeal from a District Court.

The plaintiff had obtained judgment in a District Court, and, on appeal to this court, the judgment was reversed on the facts.

The respondent then moved for a reargument, on the grounds that the case had been submitted by him, and not argued orally, and that the court had not properly understood the facts.

H. Brewster, for motion.

Charles Jones, opposed.

DALY, Chief Justice.—We have adopted, since the decision of *Mount* v. *Mitchell* (32 N. Y. 702), the same practice as the Court of Appeals in respect to motions for reargument, and have uniformly acted upon it since that decision was promulgated. Indeed, some such distinction had become indispensable; for parties against whom decisions are rendered are rarely satisfied, and generally hopeful that if they had another oppor-

* The rule laid down in *Mount* v. *Mitchell* is as follows: "Motions for reargument shall be on printed papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court; or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the court was not drawn, through the neglect or inadvertence of counsel" (*Mount* v. *Mitchell*, 32 N. Y. 702).

tunity it would produce a different result. A considerable part of our business each term was the hearing of applications of this kind, and whilst there were occasionally instances, especially where we had affirmed or reversed on the argument, where something had been overlooked, or not fully brought before us, the great multitude of cases were merely repetitions of the former argument maintained, with increased persistency, without any new views or any different result being produced. Indeed, they had so increased and amounted to such a useless consumption of the time of a general term, so heavily burdened with appellate business as ours, that we were seriously considering how we could limit applications of this kind, when the rule of the Court of Appeals was promulgated, since which time we have applied that test to all motions for a reargument. This case does not come within it. The evidence in the case was reviewed and considered in the opinion delivered. and no question decisive of the case has been pointed out that has been overlooked. We reversed this judgment upon very full deliberation—it being, in our opinion, a peculiar case in which the ends of justice would be promoted by reversing and leaving the plaintiff, if so advised, to try the question again. It is very rarely that we disturb a finding upon a question of fact, but we had a united and very strong impression in this case that justice had not been done. The motion for a reargument should be denied.

Robinson and Larremore, JJ., concurred.

Motion denied.

JAMES M. TAYLOR *against* WRIGHT GILLIES AND ANOTHER.*

The words "gold medal," in their ordinary and received acceptation, indicate that the article to the name of which they are prefixed or affixed, has received such a medal at some fair or place of public competition, and the manufacturer of any article which has obtained such a prize may use these words in connection with the name of the article manufactured by him, to indicate the public esteem in which it is held. These words are not, therefore, the subject of a trade-mark.

A manufacturer of an article which has never obtained any gold medal, is not entitled to be protected in the exclusive use of the words "gold medal" as a trade-mark in connection with the name of such article. The use of the words in such connection are a fraud on the public, and where these words are printed conspicuously on the labels of the packages containing the article, the fraud is none the less because there is also on the label, but disconnected from the words used as a trade-mark, and in very fine print, a statement that the article is called "gold medal" on account of certain good qualities which it is claimed to possess.

APPEAL by plaintiff from a judgment dismissing the complaint entered on the decision of a judge of this court, after a trial before him at special term. The action was brought to perpetually restrain the defendants (who composed the firm of Wright Gillies & Co.) from using the words "gold medal" to describe the saleratus put up and sold by them, the plaintiff claiming that he was entitled to the exclusive use of the words "gold medal" to describe the saleratus manufactured and put up by him.

The judge at special term dismissed the complaint on the ground that the words "gold medal" were not the subject of a trade-mark, and also on the ground that as it appeared that the plaintiff's saleratus had never received the prize of a gold medal, that it was an imposition on the public for him to describe his saleratus by those words, and that he was not, therefore, entitled to any protection.

From the judgment of dismissal the plaintiff appealed to the general term.

De Witt C. Brown, for appellant.

Stephen P. Brague, for respondents.

* On appeal to the Court of Appeals, the judgment entered on the decision of the general term here was affirmed.

J. F. Daly, J.—The plaintiff sought in this action to obtain an injunction against defendants restraining them from the use of the words or designation, "Gold Medal Saleratus," on the ground that it was plaintiff's trade-mark for saleratus manufactured and sold by him. The relief demanded was refused by this court at special term, and this appeal is taken from the judgment entered upon that decision. The court held that the words "gold medal" were not the subject of trade-mark because they were "common terms and not mere fanciful expressions, nor do they in any way indicate any such exclusive ownership or origin in the plaintiff or others using them in connection with articles of merchandise;" and also on the ground that the name indicated that a gold medal had been awarded as a prize for the saleratus, and if no such medal had been awarded to plaintiff the term would be an imposition on the public, partaking of the character of a false representation; and it was not asserted that any such medal had ever been awarded.

The judgment below seems to be correct. The term "gold medal" certainly implies that a medal has been awarded the manufacturer of the goods for the saleratus. If they do not mean that, the words have no signification. But such meaning is plain and common, producing a direct, sensible impression of excellence and approval by authority of some kind. They are not fanciful, having no meaning except as the designation of these particular goods. They may be used with every known manufactured article which has ever been put in competition with rival manufactures for a prize, and obtained it. Whenever seen or heard, they impress the sense with the idea of such a prize having been obtained. Unless it be shown that a gold medal has been awarded for the goods, the name is a false representation. It does not alter the case, that the label on the packages of "gold medal saleratus" sold by the plaintiff, contains in fine print, the statement that it is "a most meritorious article which from the purity and perfection of its manufacture has been denominated gold medal saleratus," because the representation is made by the prominence of the name "gold medal saleratus," and is not lessened

in effect by a statement (not by any means intended to destroy the effect of that representation) printed on the label in very fine type, and wholly disconnected with the title or trade-mark, which stands alone.

The chief objection to the claim of proprietorship by plaintiff in the words "gold medal" as applied to saleratus, is that it cannot be *exclusive*, which should be the characteristic of all trade-marks. As has been seen, the words may be applied to any article which has received the prize of a gold medal, and also to any kind of saleratus which has received such an award of merit. The prize is intended to distinguish and single out the manufacturer and his goods which have been so approved. It may become in respect of saleratus, a title which a dozen persons in as many places have the right to use in by virtue of medals received. Had the plaintiff and defendant both received gold medals for saleratus, would the plaintiff, because he received his first and gave his goods the name, be entitled to the exclusive use of the words? Clearly not, because the mark of excellence he once received has become the right of another who has the same right to vaunt the high character of his manufactures. It may be said, however, that the defendant has shown no gold medal. But it is equally apparent that plaintiff has none, as his label above quoted shows, and if no injunction would issue where both have medals, should it be granted where neither have, and where both are equally impostures?

The judgment should be affirmed (*Batty* v. *Hill*, Am. Trade-mark Cases, 537; *Candee* v. *Candee*, 54 Ill. 439; *Fetridge* v. *Wells*, 4 Abb. Pr. 144–156; Brown on Trade-mark, §133; *Flavell* v. *Harrison*, 19 Eng. C. L. & Eq. 15).

Daly, Ch. J., and Larremore, J., concurred.

Judgment affirmed.

In the Matter of Ann Eliza Owens, an Idiot.

The mother of an alleged idiot applied to have her declared *non compos mentis*, and this having been done, she made application to have a committee of the person and estate of the idiot appointed, and upon her consent the clerk of this court was appointed such committee. A sister of the idiot then applied to have the order appointing the committee vacated, on the ground that she had not had notice of the proceedings. *Held*, that the proceedings were regular without notice to her, and that as there was no personal objection to the committee, he would not be removed, especially as the court was satisfied, on an examination of all the proceedings, that they were in good faith and for the benefit of the idiot.

Appeal from an order of this court, made at special term.

One Francis Owens dying in 1868, by his will gave all his property (in which was included certain real estate) to his wife, Ann Owens, for her life, and on her death three-quarters thereof to his daughter Ann Eliza Owens, and the remaining one-quarter to his daughter Sarah Ann Owens.

In May, 1873, Ann Owens applied to have her daughter Ann Eliza declared an idiot, and on a commission duly issued for that purpose she was so declared. Of this application no notice was given to Sarah Ann Owens, who was then the wife of William J. Suttie.

Ann Owens then applied to have a committee of the person and estate of the idiot appointed, and filed a consent that Nathaniel Jarvis, Jr., the clerk of this court, might be appointed such committee, and he was thereupon appointed. No notice of this application was given to Mrs. Suttie, the idiot's sister

The committee then made application to this court to be allowed to sell certain real estate in which the idiot, under the will of Francis Owens, her father, had a remainder, subject to a life estate in her mother, and a reference as to the propriety of the sale was ordered. The idiot's sister, Mrs. Suttie, then moved, at special term, to have the appointment of Mr. Jarvis as committee set aside, on the ground that all the proceedings were irregular, having been without notice to her, and alleging that the object of the proceedings was to have the idiot's real

estate sold in the interest of the life tenant. The court denied the motion to vacate the appointment of the committee, vacated the order of reference as to the sale of the real estate, with leave to the committee to apply again on notice to the idiot's sister.

From so much of the order as denied the motion to vacate the order appointing the committee, Mrs. Suttie appealed.

Coles Morris and *Michael H. Cardozo*, for appellant.

The appointment of a stranger as the committee of the estate and person of an idiot, without the request of the relatives and next of kin of the idiot, and without a reference, and without notice to persons prospectively interested in the estate, is irregular, and unauthorized by the practice of the courts having jurisdiction of such matters (*Lamoree's Case*, 11 Abb. Pr. 274; *Ex parte Le Heup*, 18 Ves. 221; Van Santvoord's Eq. Prac. vol. 2, p. 368; *Re Meux*, 2 Coo. t. Cott, 106, 107, J. V.; Phillips on Lunacy, 274; Shelford on Lunacy, Law Library, 84). The heir, or a person having an interest in the estate, or a relative of the person of unsound mind, is generally preferred to a stranger in such committeeship (Phillips on Lunacy, 278–281, and authorities there cited; Shelford on Lunacy, 2 Law Library, 88; Stock on *Non compos mentis*, 25 Law Library, 71). A female is always preferred as the committee of the person of an insane unmarried female (Phillips on Lunacy, 279; *Ex parte Ludlow*, 2 P. Wms. 638). The wishes of the person *non compos mentis* always have weight; even unfounded prejudices are not disregarded (Phillips on Lunacy, 279, and cases there cited). The old rule which excluded, as a matter of course, the next of kin from the office of the committee of the person, whenever such next of kin was also heir to the idiot's estate, has long been exploded, as being unsuited to any but the most barbarous times (*Dormer's Case*, 2 P. Wms. 263; *Ex parte Ludlow*, Id. 638; *Ex parte Cockayne*, 7 Ves. 591; *Matter of Livingston*, 1 Johns. Ch. 436). The "next heir," even when the old rule did prevail, was given the preference as committee of the estate of the idiot, it

being clearly his interest, by good management, to keep the estate in good condition, accountable always to the proper court (Black. Com. vol. 1, p. 305). The real estate of the late Francis Owens, upon the death of Ann Eliza Owens, the idiot, will descend in fee to Sarah Ann Suttie, the sister of said idiot, subject only to the life estate of their mother, Ann Owens (1 R. S. 751, § 6).

E. J. Pattison and *Charles M. Marsh*, for respondent.

DALY, Chief Justice.—This is an appeal from an order denying a motion to vacate an order appointing Nathaniel Jarvis, Jr., the committee of the estate of the idiot, upon the ground that the idiot's sister, Sarah A. Suttie, who is a tenant in common with the idiot of real estate under the will of their father, had no notice of the proceeding by which Mr. Jarvis, upon the consent of the idiot's mother, was appointed committee of the person and estate, or of the proceedings by which Ann Eliza Owens was found to be an idiot.

It is not denied but that she is an idiot, nor is the finding of the inquisition by which she was so declared questioned. It is insisted, however, that it was irregular to appoint a stranger the committee of her person and estate without notice to the sister, who is a tenant in common with her in the reversionary estate, and who, in the event of the idiot's death, would, if surviving, be her heir.

I know of no authority, and none has been referred to, holding that it is irregular to appoint a stranger the committee of the person and estate of an idiot or lunatic without notifying those who, as next of kin, will succeed the idiot or lunatic as heir. Judge Brown held very properly in *Lamoree's Case* (11 Abb. Pr. 274) that an order appointing a stranger the committee of a lunatic, where the next of kin did not assent or unite in the petition, was improvidently granted. But that is not this case. The mother of the idiot, who is her next of kin, instituted the proceedings by which her daughter was declared *non compos mentis*. It was upon her petition that the proceedings were founded, and it was at her request and upon her

written consent that the court appointed Mr. Jarvis the committee. Judge Brown says that if the next of kin do not assent or unite in the petition, there should be an order of reference of which they should have notice, that they may have an opportunity to propose themselves as the committee, in all of which I fully concur; but here the next of kin—the mother—did assent. I also recognize the propriety, to prevent abuses, of notifying those relatives who may succeed as next of kin of the proceedings, that they may have the opportunity of proposing themselves as the committee; for, although it is not a matter of course to commit the guardianship of the estate of an idiot or lunatic to those who are presumptively entitled to it upon the idiot or lunatic's death (*Matter of Taylor*, 9 Paige, 611), they may, under certain circumstances, be regarded as the proper persons to whom to commit the custody of the estate, as those who are most likely to protect it from injury or loss. If we had nothing before us upon this appeal but the fact of the appointment of a stranger, without notice to the sister, who, if she survive her mother and the idiot, will inherit the whole of the estate, I should, in view of the possibility of abuse, hesitate to affirm the order; but, looking at all the facts which were before the judge and are before us upon this appeal, I think he did right in denying the motion.

F. Owens, by his will, left all his property, real and personal, to his wife, the mother of the idiot and of her sister, during her (the wife's) natural life, and upon her death, he directed that it should be divided between his two daughters, three-quarters of the whole to the idiot, and the remaining one-quarter to her sister, Mrs. Suttie. The idiot is now twenty-four years of age. She has been entirely helpless from her birth, and the mother has at her own expense continuously taken care of this helpless creature from her infancy. The sister, Mrs. Suttie, has no property except the household furniture given her by her mother and the interest before referred to in her father's estate after the death of her mother, and her husband is a man of small means, depending upon his labor as a jeweler for support. She is also a person physically weak, at all times in bad health, from time to time requiring the care of her

mother, and has not sufficient strength to take the necessary care and charge of her sister, who requires *constant personal care and attention.* It is, in view of these circumstances and of the event, as the mother states, that she may herself be taken away by death, that she sought by this proceeding to provide that her helpless offspring might be left in the care of a competent and fit person, who would conscientiously look after her interest, comfort and welfare, and it was in this view and with this assurance that she petitioned this court for the appointment of a committee, and filed her written consent that the clerk of the court, Mr. Jarvis, might be appointed. No objection is taken as to the propriety or fitness of the selection of Mr. Jarvis. Any objection to him personally was disclaimed upon the argument, the objection being to the appointment of any stranger in preference to the sister, or without notice to her of the proceeding. There being no objection to Mr. Jarvis personally, her motion to vacate the order appointing him, it must be assumed, was made with the intention of proposing herself to the court as the proper person to be appointed the committee of her sister's person and estate.

She says, in her affidavit, that her mother kept all the proceedings in the matter secret from her, and that she had no knowledge of the inquisition or of any of the proceedings anterior to the appointment of Mr. Jarvis; that the proceedings are not for the interest of her sister; but that her mother is confederating with others to procure a sale of a portion of her and her sister's estate, at a sum much less than the real value of it, with the object of dividing up the proceeds of the sale in such a manner as to secure to her mother a larger interest than she would otherwise have under the will.

The mother's affidavit is a complete and satisfactory answer to this charge. A considerable portion of it has been already stated, in addition to which it appears by it that her husband left by his will two houses, one in Eighty-first street, where she and Mrs. Suttie reside, and one in Wooster street. That the rent of the Wooster street house is $1,000 per annum, nearly one-half of which is consumed in the payment of taxes and other expenses; that the building is dilapidated and nearly

worthless, and is used by the tenant for a carpenter shop, whilst the lot could be sold for $23,000, which explains the heavy tax upon premises yielding, in consequence of the dilapidated building that is upon them, so small an income; that the rents derived from that and such portions of the house in Eighty-first street as can be rented, are all that she has, and that it is with difficulty that she can support herself and her idiot child; that both of these houses were bought with her own money, the savings of many years of hard labor and a very trifling assistance from her husband, and that when purchased the title was, upon her suggestion, taken in her husband's name, and that she does desire that a portion of the real estate should be sold, believing it to be for the common interest of all parties, which is certainly true in respect to the Wooster street lot, which if sold for its alleged value, would yield a fund, the income of which, properly invested, would be nearly double the amount of what is now derived from the premises. These facts need no comment. They show that what the mother has done and wishes to have done is founded in an intelligent view of the circumstances and the due care in the future of her invalid child.

So far from seeing in the circumstances any reason why this order should be set aside, that this daughter might be made the committee of the person and estate of her idiot sister, they show that she would be an unfit person to be intrusted with the charge either of the person or of the estate. I had occasion in the *Matter of Bomanjee Byramjee Colah*, 3 Daly, 529, to examine very carefully the nature of the peculiar jurisdiction exercised in the appointment of a committee to take charge of the person and estate of a lunatic, and pointed out, upon the authorities there quoted, that care has always been taken not to intrust the custody of the person or estate to those who may be pecunarily benefited by the lunatic's death, or whose interest it is to keep his property from diminishing, unless the court is satisfied that it would be to his advantage that those who stand in the relation to him of blood and natural affection should have the custody and care of him, and that as respects his estate, the governing principle in its management

is his interest, and not that of those who may have eventual rights of succession (*Eunice Salisbury's Case*, 3 Johns. Ch. 347). Acting upon this rule, it would not, in my judgment, be for the idiot's interest that the sister should be the committee of the person or of the estate. So far as respects the care of the person, Mr. Jarvis, as was said in *Justice Dormer's Case* (2 P. Wms. 263), is but a nominal person, as the idiot will, as long as her mother lives, be in the charge of the parent who has hitherto supported and taken care of her; and as respects the property, it cannot be disposed of without the concurrence of the court, and as the order below has provided that the sister shall have notice of all further proceedings, she will have the opportunity of appearing before the court and objecting to anything proposed to be done, which may affect injuriously her own or the idiot's interest in the property. No good that we can see would be promoted by disturbing the present state of things. The only object could be to transfer the custody of the idiot from her mother to that of her sister, and as respects the estate, to intrust the sister with the care and management of it, neither of which would be, in my opinion, to the benefit of the idiot. At least nothing has been disclosed that shows that it would be for her interest. The order should therefore be affirmed.

Loew, and J. F. Daly, JJ., concurred.

Judgment affirmed.

ADELINE PLATT *against* FRANK PLATT.

An absolute divorce, on the ground of adultery of the husband, will not be granted to a wife merely on proof that the husband was in the habit of visiting a house of prostitution, and on one occasion went with one of the inmates into her sleeping apartment, it not appearing that he was ever alone in a room with any of the inmates, or with the door shut.

The testimony of servants in a house of prostitution is no better than that of prostitutes, and unless corroborated, is not sufficient to establish adultery.

APPEAL by defendant from a judgment of absolute divorce. The plaintiff obtained an absolute divorce from the defendant, and the defendant appealed, on the ground that the evidence was not sufficient to justify the court in convicting the defendant of adultery.

Henry E. Davies, for appellant.

John E. Parsons, for respondent.

VAN BRUNT, J.—The only evidence offered upon the part of the plaintiff in support of the charge of adultery was the evidence of Katie Green and Margaret Brown, two women who had been for a series of years servants in a house of ill fame, kept by a Mrs. Chadwick, at 187 Lexington avenue. Their present residence and occupation is not given.

Katie Green says that she has seen the defendant there more than once occasionally, she thinks three or four times a week. She can't say positively how often. She could not say that she ever saw defendant go into Ella's room (Ella being the person with whom the adultery is alleged to have been committed). She did not know that the defendant ever spent a night in the house, although she knew of his being there late some nights when she went to bed. Upon the direct examination she testified that she had seen defendant in Ella's room; that Miss Ella used to call him up into her room; she thought it was in the morning, and they were alone in the room when she saw them; that she was coming up and down stairs when

she saw them, and that he remained in the room about an hour. Upon cross-examination the witness said: "I never saw Mr. Platt in Ella's room more than once; I have seen him come out of the room when I was going up or down stairs; I could not fix the time; I think it was a week before I took the kitchen work. Margaret Brown, the other witness, testified as follows: "I know Mr. Platt, now present; I have seen him at Mrs. Chadwick's, in Lexington avenue; I have not seen him very often, for I had not much to do up stairs; I can't say how often he used to call; I have seen him going up the first flight of stairs, but never followed him up to see where he was going." Upon cross-examination she says: "I happened to be in the hall when I saw Mr. Platt, and Mrs. Chadwick came out, and called Ella; I can't say if it is the first time I saw him; the only time I saw him was in the hall on the occasion spoken of above."

It is, of course, well established that it is not necessary to prove the direct fact of adultery, but such circumstances must be proven that the fact may be fairly inferred from them. As for example, if a married man visits a house of ill fame and shuts himself in a room with a common prostitute, it must be inferred, in the absence of proof to the contrary, that he does this with the intent of committing adultery, and as the opportunity and the undoubted consent of another party concur with his own intent, the offense must be presumed to be committed (Bishop on Marriage and Divorce, § 626). It will be observed that the foundation of the presumption is the intent and opportunity to gratify that intent, and unless both are combined, no such presumption is to be indulged in. The foundation of this rule is, that when two persons desire to do a thing, and they have the opportunity to gratify their desires, universal experience shows that they will embrace the opportunity. In this case, even if the evidence of the plaintiff's witnesses is to be received as true, it does not come up to this standard. There is not the slightest particle of evidence that the defendant was ever shut up with Ella in her or any other room. The witness Green says that she never saw defendant in Ella's room but once, and that was while she was going up or down stairs, and further

she says that she saw him come out of her room, but whether Ella was in the room at the time or not, we do not know. This is the only evidence to show that the defendant ever had the opportunity to commit adultery in that house, and it seems to us that it is entirely insufficient. There is no evidence whatever to show that the defendant was ever alone with Ella in any room with the door shut. It is true that the witness Green, upon her direct examination, says that he remained in Ella's room about an hour, but her cross-examination shows that she knew nothing whatever upon the subject.

But beyond this, it is the well settled rule that the uncorroborated testimony of loose women is entirely insufficient to establish adultery, and although it was claimed upon the argument that there was no evidence of bad character as to these two women, yet the fact that they have lived in a house of prostitution for years as servants, would seem to indicate that they did not occupy any higher position in the social scale than the women whom they served, and it can never be believed that they are better entitled to credit than the other inmates of the house. The testimony of these women is entirely unsupported, except by the admission of the defendant, that he was in that house once, and it is met by the flat denial of the defendant as to any act of adultery. Even without that denial, it seems to us that the court could not grant a divorce upon such testimony. We do not think that the defendant was bound to call Ella and Mrs. Chadwick; he was not called upon to imperil his case by a resort to such evidence. It was as much the duty of the plaintiffs to call them as the defendants. There is no case to be found where a conviction for adultery has been sustained upon such meagre evidence as this. The judgment must be reversed; but as it is upon the ground that it is against the evidence, it must be upon payment of costs.

Daly, Ch. J., and Robinson, J., concurred.

Judgment reversed.

JOHN D. PRALL *against* THE MUTUAL PROTECTION LIFE ASSURANCE SOCIETY.

Mere possession by the assignee of the assured of a life policy, which recites on its face that it is to take effect only when countersigned by A. B., and which is not so countersigned, is no evidence that the policy was ever delivered to the assured.

In such case, the fact that A. B. is described as the "general agent at ———" (the name of the place being left blank), does not show that the company in tended to waive the countersigning, or intended that the policy should take effect without it.

APPEAL by plaintiff from a judgment of this court dismissing the complaint, entered by direction of the court at trial term.

The action was brought by the plaintiff as assignee of Wesley E. Shader, on a life insurance policy on Shader's life.

The defense (among other things) was that the policy had never been delivered to Shader, and that the consideration for the issuing of the policy had never been paid.

On the trial the plaintiff produced in court a policy on Shader's life, duly executed by the defendant, which recited that it was made in consideration of $12 56, "duly paid by Wesley E. Shader." It was also recited in the body of the policy, that it was issued and accepted "upon the express conditions and agreements contained upon the back hereof." One of these conditions was that the policy, although delivered, should not take effect or be in force until the first premium was actually paid, and that no officer or agent of the society had power or authority to deliver the policy until such actual payment, nor to waive the actual payment of the premium on the delivery of the policy.

It was also recited in the body of the policy that it was to take effect "only when countersigned by B. G. Bloss, general agent at ———." The policy was not countersigned by B. G. Bloss, and on that ground the defendant objected to its being received in evidence. The objection was sustained, and plaintiff

excepted. Various other evidence was then offered to show that the premium on the policy had been paid, and the policy assigned to the plaintiff, and at the close of the evidence the court ruled that no payment of the premium and no contract by the company had been shown, and dismissed the complaint.

Plaintiff appealed to this court.

Abram Wakeman, for appellant.

Robert Sewell, for respondent.

Daly, Chief Justice.—The possession of the policy by the assured affords, in the absence of anything to the contrary, a presumption that it was delivered as evidence of a concluded contract. But the plaintiff was met by the difficulty in this case, that the last clause in the instrument produced by him, declared that "the policy was to take effect only when countersigned by B. G. Bloss, general agent at ———," the place being left blank, and there can be no presumption of a concluded contract from the possession, where the instrument has not been countersigned in the manner provided for. This condition may, of course, be waived, and if it had been shown that the premium had been received and the policy delivered by the company, without having this indorsement put upon it, it would be regarded as waived (*Sheldon* v. *Atlantic Mutual Ins. Co.* (26 N. Y. 460). No such presumption, however, arises merely from the fact that the assured has possession of the policy, for the reservation made in respect to this last act, the countersigning, may be, on the part of the company, to protect themselves from the effect of the policy getting in the possession of the assured without the payment of the premium. It is insisted that it must be presumed in this case to have been waived, because the blank is not filled up with the name of the place where B. G. Bloss was the general agent of the company. But this omission is not sufficient to warrant such a presumption. Proof of the payment of the premium would suffice; but not only was no such proof offered on the part of the plaintiff, but the plaintiff, who sues as the assignee of Shader, the assured, testified that

after receiving an intimation that Shader had been shot, he went to the office of the company to pay the second quarterly premium, and was then informed by Bloss, the general agent, that the first one had not been paid, and that he told Bloss that he would pay it, but does not testify that he did so. In his complaint the plaintiff avers that the premium, which was the consideration of the contract, had been paid, which the defendants in their answer deny. All that the plaintiff relied upon as proof of the payment of the premium was the possession of the policy and the acknowledgment in it that the consideration had been duly paid. But as the policy was not to take effect until it was countersigned, no effect could be given to acknowledgments contained in an instrument not yet complete. The policy, moreover, contained a further condition that it should not take effect, even if delivered, or be in force, until the premium was actually paid; coupled with the declaration, that no officer or agent of the company had power or authority to deliver the policy until such actual payment. Under these circumstances the possession of a policy that had not been countersigned according to its conditions created no presumption at all either as to the payment of the premium or as to its having gone into effect as a contract. There was other evidence tending to show that the premium had never been paid; but not a particle of evidence, except the possession, to establish that it had been.

The plaintiff offered to show that Shader was appointed general agent of the company on the 20th of December, 1870, which was previous to the date of the policy, which evidence, under the defendant's objection, was excluded. If the plaintiff had followed this up by showing, or offering to show, that at or about the time of the date of the policy, which was the 3d of January, 1871, fourteen days after the alleged appointment of Shader to the office of general agent, that anything was then due, or was accruing to him from the company for services rendered, it might have been sufficient to warrant a submission to the jury of the question whether the policy was not delivered to him with the understanding that the amount of the premium would be charged against him and deducted from what might thereafter be coming to him for services rendered, which might

be regarded as equivalent to a payment, as well as a delivery, waiving the formality of the countersigning of the policy. But nothing of this kind was offered to be shown, but the plaintiff rested his whole case simply upon the possession of an instrument which, upon its face, declared that it was not to go into effect until it was signed by a certain officer, who never signed it; which, in my opinion, was not sufficient to entitle the plaintiff to recover. The judgment should, therefore, be affirmed.

Robinson and Larremore, JJ., concurred.

Judgment affirmed.

Leopold Kaiser and another *against* Henry A. Richardson.

A surety on an attachment bond, conditioned to produce the attached goods to satisfy any judgment that may be recovered in the action, is released from his obligations under the bond, if, within four months from the levying of the attachment, a petition in bankruptcy is filed against the defendants therein, under which they are thereafter adjudged bankrupt, and an assignee appointed for them.

In such a case, by the provisions of the bankrupt act (Rev. St. of U. S. § 5044), the attachment is dissolved, and the title in the attached goods passes to the assignee in bankruptcy, and the obligation of the receiptor for the goods on the attachment is discharged.

Appeal by defendant from a judgment of the general term of the Marine Court, affirming a judgment of that court entered on the decision of a judge after a trial before him, without a jury.

The plaintiffs in this action having in a former suit against Harlem & Co. obtained an attachment under the Stilwell act (L. 1831, c. 300), certain personal property belonging to Harlem & Co. was, on March 5th, 1870, levied on, and the defend-

ant had then entered into a joint and several bond, together with Harlem & Co., conditioned to produce the attached goods to satisfy any execution that might be issued upon any judgment obtained in the action, and the goods were thereupon released from the levy. Judgment was recovered in the action against Harlem & Co., on May 16th, 1870, and the goods levied on not having been produced, according to the condition of the bond, the plaintiffs in the action took an assignment of the bond from the sheriff, and brought this action against the defendant here, the surety in it.

The defense was, that on May 11th, 1870 (within four months from the levying of the attachment), a petition to have Harlem & Co. declared bankrupts was duly filed in the United States District Court for the Southern District of New York, and that on said petition they were, on June 17th, 1870, adjudicated bankrupt, and on August 14th, 1870, an assignee of their property duly appointed, and an assignment duly executed to him. On the trial, the plaintiffs had judgment, which was affirmed by the general term of the Marine Court, and the defendant appealed to this court.

John M. Robertson, for appellants.

Peter Cook, for respondent.

DALY, Chief Justice.—The question discussed upon this appeal is, whether, after the levy on the goods of a debtor under attachment, a receiptor is released from his obligation to produce the property towards the satisfaction of the judgment subsequently recovered, by reason of the debtor's having been declared a bankrupt under the United States bankrupt act of 1867, and an assignee of the estate appointed therein, within four months after the granting of the attachment in the State court.

The lien created by the levy under the attachmant would have been preserved under the bankrupt act of 1841 (*Peck* v. *Jenness*, 7 How. U. S. 612; *Clark* v. *Riel*, 3 McLean, 494; *In re Reed*, 3 N. Y. Leg. Obs. 262; *Davenport* v. *Tilton*, 10 Met.

320). But the bankrupt act of 1867, whilst saving other existing liens, declares that upon an appointment of an assignee, by operation of law, all the property of the bankrupt shall vest in the assignee, "although the same is then attached on mesne process, as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings."

It has been held that attachments issued by State courts within four months before the commencement of the proceedings in bankruptcy are dissolved by the appointment of an assignee (*Ex parte Ellis*, 1 Bank. Reg. 154; *Pennington* v. *Lowenstein*, 6 Id. 157; *In re Brand*, 3 Id. 685; s. c. 2 Am. L. T. Bank. 66; *Miller* v. *O'Brien*, 9 Blatchf. 270).

In *Miller* v. *O'Brien*, *supra*, it was held that the sheriff who, by an attachment, had levied on the property of a debtor before proceedings in bankruptcy, but within four months, and had sold the same on execution in the same action, and paid the proceeds to the judgment creditor before notice of the proceedings in bankruptcy, was yet liable to the assignee for the proceeds realized on the sale.

It is evident that the obligation of the defendant in this action was not one for the payment of the debt in consideration of a release of the levy of the attachment, but was in terms to produce the property of the debtor attached, to satisfy any execution which might be issued, or any judgment that might be recovered, and stood as a mere equivalent or substitute for the property; and whatever occurred, which in law exonerated the debtor or his surety from the debt or the subjection of his property to its payment, equally released the receiptor as surety. The obligation of the bond in suit, for the production of the property towards the satisfaction of any execution to be issued, or any judgment to be recovered in the action, was superseded by a law controlling both creditor and surety, which made the act unlawful. Although the contingency which occurred, subjecting the property to the operation of the bankrupt act, and rendering the condition inoperative, was not incorporated in the contract, and perhaps not anticipated, it was yet one liable to arise under a controlling stat-

ute, and consequently tacitly understood as lying at the foundation of every such obligation.

The undertaking of the defendant has become superseded by the proceedings in bankruptcy, which had transferred the title to the property to the assignee in that proceeding, and its performance having thus become illegal, judgment should have been given for the defendant. The judgment, therefore, should be reversed.

LARREMORE and J. F. DALY, JJ., concurred.

Judgment reversed.

AARON S. BLACK *against* JAMES M. RYDER, SAMUEL D. COZZENS, AND JAMES D. MOWRY.

Plaintiff sold defendant certain stock, and took in payment therefor his note, payable in four months, for $2,800, with the condition that the stock should not be delivered until the note was paid, and immediately thereafter loaned the defendant $2,600, and took the stock as collateral, the purchase of the stock having been a condition of the loan. *Held*, that from these facts the jury might infer that the $2,800 note was usurious.

Where the facts in regard to an alleged usurious transaction do not directly show usury, but are such that the jury could infer that they were intended as a cover for usury, it is competent to ask the lender whether he intended to take usury.

APPEAL by defendants from a judgment of this court, entered on the verdict of a jury.

The action was on a promissory note for $2,800, dated New York, January 12th, 1867, payable four months after date, to the order of S. D. Cozzens, at No. 2 Murray street, made by the defendant Ryder, and indorsed by the defendants Cozzens and Mowry.

The defense was that the note was usurious; that interest on it had been reserved at the rate of 21½ per cent. per annum, $2,600 only having been advanced on it, and $200 having been reserved as interest on that sum for four months.

The facts shown to support the defense are stated in the opinion.

Plaintiff had a verdict, and defendants appealed to the general term.

T. C. Campbell, for appellants.

George Owen, for respondent.

J. F. Daly, J.—No usurious agreement was proved on the trial. It was not shown that the plaintiff exacted or agreed to take more than seven per cent. for the loan or forbearance of any money. It was not shown that any money was agreed to be or was advanced on the note in suit. The plaintiff's version of the transaction by which be became the holder of the note was not contradicted by any other witness, and was supported by the writings introduced in the case. The person who acted as agent for defendants in transferring the note to plaintiff was not put on the stand, and no other person could testify as to the agreement upon which plaintiff got the note except the plaintiff himself. He swore that he received the note on a sale to the maker, Cozzens, through Livingston, of twenty-eight shares of the stock of the American Umbrella Frame Co., at $100 per share, the note being for $2,800; that a week afterwards he made Cozzens, through Livingston, a loan of $2,600 on the stock, retaining the stock as collateral; that when he sold the stock for the note he knew he was going to make a loan on the stock; that when Livingston applied first for a loan, he, plaintiff, told him he couldn't make a loan unless Cozzens purchased the twenty-eight shares of stock; that the stock was not to be delivered until the note was paid.

Although there was no direct usurious agreement in this transaction, the defendants were entitled to have the jury pass upon the question whether the whole transaction was not a de-

vice to cover up a usurious loan upon the note. The jury were to infer or deduce from the undisputed facts what the real intention of the parties and true object of the transaction were. The acts of the plaintiff and Livingston were, however, as consistent with a legal as with an illegal intent, and the jury found, as they might, that the transfer of the note to plaintiff was untainted with usury.

Exception was taken by defendants to the admission by the learned judge on the trial of the plaintiff's evidence as to his *intent* in the transactions. There being no evidence of a direct or express agreement for usury, and the acts of the plaintiff depending for their illegal effect upon the intention of the parties, it was proper to allow him to testify as to his intention. The jury were, of course, bound to look into the acts themselves for such intention, but his declaration that he did not intend by these transactions, if equivocal in their nature, to take usury, was properly allowed to go to the jury for what it was worth (*Cortland Co.* v. *Herkimer Co.* 44 N. Y. 22). The case is to be distinguished from those in which a usurious agreement is distinctly proved, and no testimony of the usurer as to his intention can alter the illegal effect of his acts (*Fiedler* v. *Darrin*, 50 N. Y. 437).

Exception was also taken by defendants to the charge of the judge on the subject of intention. The charge "that there must be a positive intention on the part of both parties to the transaction to do what the law forbade, to constitute a usurious agreement," was, of course, given to the jury with reference to this particular case, wherein there being no express agreement to take usury, the legality of the transaction *depended* on the intent. The charge "that the plaintiff must have corruptly exacted and the defendants corruptly agreed to pay more than seven per cent. to constitute usury," was proper when taken in connection with the explanation immediately made by the judge that the word "corrupt" is a word usually employed to characterize usury, which is an agreement to take that which the law forbids, a larger amount than seven per cent. per annum for the loan or forbearance of money. The jury could not have been misled by this instruction. Upon the whole charge the case was fairly submitted, and the first proposition laid down by the

court to the jury, "that if the jury believe that the note in question was given to the plaintiff as a consideration for the sale of twenty-eight shares of the stock of the American Umbrella Frame Co., it is a good and valid note," was not excepted to, and fairly presented the main question in controversy.

The defendant Mowry's objections to the demand and notice of non-payment are not well taken. He lived out of the State, but occasionally came to this city, and when he did he transacted any business he had to transact at the office of defendant Ryder in this city; made that office his headquarters when he came to town during the year 1866; used to go there and write, but had no desk there, and paid no rent; notice, in the usual form, of demand and non-payment of the note, and that the holders would look to the indorsers for payment, was deposited in the post office of this city, addressed to him at New York city, in due time, on May 15th, 1867; on the 16th Mowry was at defendant Cozzens' office in this city, and was called upon by plaintiff with the protested note, and admitted he had notice that it had not been paid. The notice to him was sufficient (L. 1857, c. 416, § 3). The note, being an inland bill, was properly presented for payment and payment demanded by the notary's clerk, and the notices of protest, demand, &c., with the notary's name printed at the bottom, were properly mailed to each indorser at the city of New York, by the same clerk. The clerk is to be regarded as authorized by the holder to do all these acts, because as clerk of the notary of the bank where the note was deposited for collection, he called for and got the note from the bank for the purpose, in the performance of his regular daily duty (*Cole* v. *Jessup*, 10 N. Y. 96; *Gawtry* v. *Doane*, 51 N. Y. 84).

The declarations of Livingston to Mowry were properly excluded, because it clearly appeared from the evidence that he was not the plaintiff's agent, but defendants'; and for that reason the writings subscribed by him were properly admitted.

The judgment should be affirmed.

Robinson and Larremore, JJ., concurred.

Judgment affirmed.

EDWARD L. FIELD, ADMINISTRATOR &c., *against* JOSHUA M. VAN COTT, IMPLEADED.

When application is made to a surrogate for a grant of administration, and upon such application the person proposing himself as administrator, in order to obtain a grant of letters, gives a bond with sureties conditioned for the due administration of the estate, and administration is thereupon granted to him, neither the principal in the bond nor his sureties can afterwards show in a suit on the bond that the surrogate did not have jurisdiction to grant administration or to take the bond.

So held in an action against the sureties on an administrator's bond taken by the surrogate of the county of New York, which recited that the deceased was an inhabitant of that county, and in which the defendants offered to show that the deceased was an inhabitant of the county of Queens, and that the surrogate of New York county had no jurisdiction to grant administration.

Since the act of 1870 (L. 1870, p. 826, c. 359), a decree of the surrogate of the county of New York cannot be attacked collaterally for error in awarding to a creditor more than his proper share in the distribution of an estate.

The rule of the common law, that on a joint and several bond, all the obligors, or any one of them, might be joined, but not two out of three, is now changed by § 120 of the code, allowing persons severally liable upon the same obligation or instrument to be all or any of them included in the same action.

In an action against two of three obligors on a bond which the complaint alleges to have been jointly executed, but which is at the trial proved without objection to be joint and several, and a verdict rendered thereon, the court will, on appeal, allow the complaint to be amended to conform to the proof.

EXCEPTIONS ordered to be heard in the first instance at general term.

The action was brought by Edward L. Field, as surviving administrator of Julia F. Brailesford, deceased, against Joshua M. Van Cott and Eli H. Reed, upon a joint and several bond, in the penalty of $12,000, executed by Thomas G. Van Cott, principal, and Joshua M. Van Cott and Eli H. Reed, sureties, the condition being that Thomas G. Van Cott should faithfully execute the trust reposed in him, as administrator with the will annexed of Gabriel Van Cott, late of the city of New York, deceased, and obey all orders of the surrogate of

the county of New York, touching the administration of the estate committed to him.

The complaint, after alleging the joint execution of the bond, set forth the issuing of the letters of administration to Thomas G. Van Cott, his receipt, and conversion of the assets of the estate, amounting to $17,390 74; his final accounting before the surrogate; the decree of the surrogate, made Feb. 23d, 1871, that he pay to plaintiff the sum of $2,002 64; the neglect of said administrator to pay the same; the filing of the transcript of the decree; the issuing of execution thereon against Thomas G. Van Cott; its return unsatisfied, and the assignment of the bond in question to the plaintiff for prosecution.

The defendant, Joshua M. Van Cott, interposed, by his answer, two grounds of defense, to wit:

(1) That the said Gabriel Van Cott "was immediately preceding, and at the time of his death, an inhabitant of the county of Queens, in the State of New York, and was not then an inhabitant of the county of New York, and that jurisdiction to grant letters of administration upon his goods pertained and belonged to the surrogate of the county of Queens, and not to the surrogate of the county of New York; and that the surrogate of the county of New York had not jurisdiction to take the said bond, or to grant or issue the said supposed letters of administration, or to entertain the said supposed proceedings, or to make the said supposed decrees or orders alleged in the said complaint, and that the same were and are void in law and of no effect."

(2) That the said Thomas G. Van Cott was living and an inhabitant of the State of New York at the time of the commencement of the action, and was a necessary party as defendant in the action.

At the trial the court held that Thomas G. Van Cott was not a necessary party to the action, and refused to admit any evidence to show that Gabriel Van Cott at the time of his decease was not an inhabitant of the county of New York.

The court directed a verdict for the plaintiffs for the amount claimed and interest, amounting to $2,283 01, and

directed the exceptions to be heard in the first instance at the general term.

D. D. Field, for plaintiff.

E. W. Stoughton, for defendant.

Robinson, J.—This action was brought against the defendants as sureties on an administration bond, given by Thomas G. Van Cott, in November, 1867, upon the granting to him, by the surrogate of the city and county of New York, of letters of administration upon the estate of Gabriel Van Cott, deceased; and the alleged breach of the condition was his neglect or refusal to pay, according to the subsequent decree of the surrogate (made on the 24th of February, 1871), out of the assets that had come into his hands, a debt adjudged to be due the plaintiff, payable from the estate of the intestate, sufficient assets for that purpose being disclosed. The defense offered on the trial, in contradiction to the recital in the bond, and against the *prima facie* evidence furnished by the letters of administration and decree of the 24th of February, 1871, was, "that at the time of the decease of Gabriel Van Cott (the intestate), and immediately preceding such decease, he was not an inhabitant of the county of New York, but was an inhabitant of the county of Queens, settled there for the purpose of living there."

This defense was overruled under exception, and such ruling is the main subject of consideration on this appeal.

The offer of such a defense was rejected upon the ground of *estoppel*, upon the consideration that the application for and granting of the letters of administration were upon assumption of the jurisdiction of the surrogate of the city and county of New York; and the bond being tendered to enable the principal to acquire the office of administrator and possession of the property of the intestate, and having effected that object, both principal and sureties were concluded from questioning the authority of the surrogate to grant such letters, or the liability of the sureties for the acts of the principal in the execution of his duties as such administrator, or the order made by

the surrogate fixing his liability. The following authorities of the courts of our State support the ruling of the judge on the trial: *The People* v. *Falconer* (2 Sand. S. C. 81); *Caldwell* v. *Colgate* (7 Barb. 256); *The People* v. *Norton* (9 N. Y. 178); *The Supervisors of Rensselaer* v. *Bates* (17 N. Y. 245); *Fay* v. *Ames* (44 Barb. 327); *Fake* v. *Whipple* (39 Barb. 339; s. c. 39 N. Y. 394); *Coleman* v. *Bean* (3 Keyes, N. Y. 94); *The Cumberland Coal Co.* v. *Hoffman Steam Coal Co.* (39 Barb. 19).

In *The People* v. *Norton* (*supra*), the action was brought upon a bond given by a trustee, substituted by the Court of Chancery upon proceedings by petition without bill of complaint, in a case claimed to have been within the jurisdiction of the court, under the provisions of the statute allowing such substitution upon a summary application, which however was denied, and such want of jurisdiction was presented as a defense to the bond. The Court of Appeals, however, held that as the substituted trustee had got possession of the trust estate under color of such proceeding, he and his surety upon such voluntary bond for the faithful administration of the trust estate were precluded from questioning the authority under which he assumed to have acted. So in *The Supervisors of Rensselaer* v. *Bates*, in the same court (*supra*), the defendant had become surety that his principal should faithfully discharge the duties of the office of treasurer of the board of supervisors, an office not within the province of the board to create; yet he was held liable on such voluntary bond for moneys received by his principal in such assumed capacity as treasurer of the board, although collected under resolutions which that body could not lawfully pass; and that case decided that both principal and surety were "precluded from questioning the power of the board as principals to confer upon him the authority (as treasurer) under which he acted."

In *The People* v. *Falconer* (*supra*), in the Superior Court, Justice Sandford, in a similar case to the present one, says: "It would be strange, indeed, if the sureties in an administration bond, after enabling their principal to possess himself of the personal estate by its execution, should be permitted to avoid its obligations upon the plea that the officer granting the

letters and receiving the bond had no jurisdiction of the subject-matter. The execution of the bond precludes both principal and sureties from gainsaying the surrogate's jurisdiction in any proceeding for the assets which the appointment and bond have enabled the principal to receive."

The distinction is plain between such cases as the present and those arising upon proceedings *in invitum* against a party, where he is compelled to give a bond or other obligation to procure the release of his person or estate from process or other claims sought to be enforced against him under proceedings void for want of jurisdiction in the officer who assumes to exercise it, and where the power under which a *wrong* is attempted to be enforced only originates in such void jurisdiction. The voluntary presentation of such a bond as that sued on in this case, for the purpose of acquiring rights not previously possessed by the party offering it, brings the case within the principle of both legal and equitable *estoppel*, by which a party is precluded in a court of justice from denying his own acts and admissions, where they were designed to influence the conduct of another, and did so influence it, and when such denial would operate to the injury of the latter (*Dezell* v. *Odell*, 3 Hill, 215; Herm. on Estop. §§ 320, 321), or has bound himself by a written instrument for the fidelity or good conduct of another in a private trust or public duty, for acts done in that capacity (Herm. on Estop. §§ 250, 251). The authorities of our own courts fully sustain the liability of the defendants as sureties upon the bond in suit for the assets that came into the hands of the principal, the administrator, without right of question as to the jurisdiction of the surrogate by whom he was appointed to office.

The decree of the surrogate, made on the 23d of February, 1871, directing the payment to the plaintiff, by the administrator, of the amount for which (with interest) the recovery has been had, cannot be attacked collaterally (L. 1870, § 826, c. 359), upon the allegation that the plaintiff was awarded more than his just proportion of the assets that came into the hands of the administrator. Any error in that respect was only the subject of appeal from the surrogate's decree.

The defense of non-joinder of Thomas G. Van Cott, the administrator, upon allegation that he was a joint contractor in the bond in suit, was disposed of by a production of the bond, which, as to the obligor, was joint and several. The suit was against the sureties only, and against only two out of the three obligors; and the motion to dismiss the complaint was on the ground "that two out of three joint and several parties to the bond of the administrator had been sued, and not one or three." Such was the rule of the common law, but that has been altered by the code (§ 120), allowing "persons severally liable upon the same obligation or instrument to be all or *any* of them included in the same action, at the option of the plaintiff" (*Carman* v. *Plass*, 23 N. Y. 286; *Brainard* v. *Jones*, 11 How. Pr. 569); but as the allegation in the complaint was solely of a joint obligation, and the proof made without objection was of one *joint and several*, the plaintiff should be permitted to amend his complaint conformably to the proofs, by inserting the words "jointly and severally" after "bound themselves."

Judgment should be entered on the verdict for plaintiff.

Daly, Ch. J., and Larremore, J., concurred.

Ordered accordingly.

William P. Buckmaster *against* The Consumers' Ice Company.

A purchaser of stock in a manufacturing corporation, may maintain an equitable action against the company, to compel it to transfer the stock to him on the books of the company, if an ordinary action for damages would not afford him adequate relief.

A corporation organized under the general manufacturing act may, by agreement with a stockholder, acquire a valid lien on the stock held by him to secure his obligations to the company, so that the stock cannot be transferred by him until such obligations are paid.

An agreement for the purchase of ice, to be delivered in the future, at a price which shall afford the party delivering it a net profit not to exceed one dollar per ton, is void for uncertainty.

Appeal by plaintiff from a judgment of this court at special term dismissing the complaint.

The action was brought to compel the defendant to transfer on its books certain shares of its stock to the plaintiff. The facts are stated in the opinion. After a trial at special term, the complaint was dismissed. The plaintiff appealed to the general term.

Robinson, J.—Antecedently to the incorporation of the defendants under the general manufacturing act, and in February, 1870, some fifty different individuals and firms, including one Alexander Hudnut, agreed together to subscribe to the stock of such a company, to be incorporated under that act, and each agreed to take a certain number of shares of stock in the company, said Hudnut agreeing to take two shares out of 1,013 subscribed for. They also agreed between themselves, that they would each purchase from the company all ice they might severally require in their business, which the company might be able from time to supply, at a net profit not to exceed one dollar per ton, and that the stock so subscribed for should not be transferable, unless the holder should have fully complied with all of such obligations. The company was subsequently incorporated with a capital of $250,000, divided into 2,500 shares of $100 each, and a certificate of two of such shares issued by the company to Hudnut, dated May 4th, 1871, which contained the provision, "Said stock shall not be transferred, unless the holder thereof shall have fully complied with all the conditions and obligations he entered into when he subscribed for the same, and he shall be at the time of said transfer free from all debt or debts due said company."

The two shares of stock were sold by said Hudnut to plaintiff prior to July 3d, 1871, who on that day caused the certificate, with a power of attorney indorsed, authorizing him to make a transfer thereof on the books of the company, to be presented to the company, and demanded such transfer thereof to be made to him, which they refused, and he brings this action to enforce such transfer.

No question is raised, as to the power or duty of the court to compel such transfer, from want of any averment in the complaint of any special reason why the plaintiff should not be left to his action for damages, and the pleadings fully disclose from the circumstances of the case that it is one for equitable cognizance (*White* v. *Schuyler*, 1 Abb. Pr. N. S. 300; s. c. 31 How. Pr. 38). The complications in the title presented by the answer show that the value of the free stock would be thereby greatly diminished, and made difficult of any certain or precise estimate.

The defense relied on in the action and presented by the evidence is that the company had become able to supply its stockholders with the ice they might require in their business, upon the terms stated in the agreement, but that although Hudnut used ice in his business, he did not purchase any of the defendants. For his failure to do so, the learned judge on the trial held the stock untransferable and dismissed the complaint.

In this I think he erred. Whatever may be the objection to any company incorporated under the general manufacturing act imposing, even with consent of the stockholders, restrictions upon the transferability of its shares of stock or of forfeiture to the company, it cannot be doubted that it may, by agreement with the stockholder, acquire a valid lien upon a pledge of the stock of the company owned by him for the purpose of securing his debts or obligations to it.

This lien or pledge was all that was attempted to be effected by the provision in the stock certificate issued to Hudnut. While the stipulations contained in the preliminary agreement were, prior to the formation of the corporation, only enforceable as between the parties to it, the company, by its issue of stock certificates adopting the stipulations intended for its benefit, and making them obligatory upon the stockholder to whom it was issued, necessarily assumed by implication a corresponding obligation to do and perform that which was stated as a consideration for the acts expressly undertaken by the other party, to wit, to sell and deliver the ice required in his business upon the terms stated (*Pordage* v. *Cote*, 1 Sand. 319; *Justice*

v. *Lang*, 52 N. Y. 329). If regarded, as it must be, as a contract for the sale and purchase of such ice as Hudnut required in his business, the pleadings neither alleged, nor did the proofs establish, any such breach of the contract as conferred on the company any right to the recovery of damages. No tender or offer was ever made to him of any ice. The notice given him in February, that they would be ready, "about the first of April," to deliver ice, was a mere general notice, having no reference to any particular demand or tender under the requisitions of the contract, nor is there a suggestion that any loss was sustained from any deficiency in the market price obtainable through ordinary sales, and that which he had agreed to pay. There was therefore no debt shown to be due from him to the company, when he sold the stock to the plaintiff. Nor was there any subsisting or continuing obligation from his agreement to purchase from the company all ice he required in his business. This terminated with his transfer of the stock. The contract between the company and Hudnut only subsisted while the company subsisted and were able to supply him with ice, and also while he continued a stockholder. Its benefits and disadvantages were personal to each while their relations as corporation and stockholder continued. When those ceased, the lien of the company upon the stock (there being no debt or duty owing by Hudnut to the company), and their authority over and right to interfere with the transfer to plaintiff ceased. By the provisions of the contract under consideration, the company was to supply the stockholder with ice upon the terms suggested, and being between parties standing in that relation, the profit intended was not the advance upon the cost of the *particular* article delivered, but had relation to and was to be predicated upon the cost to the company of producing, maintaining and delivering its whole supply, and assuming, for the sake of argument, that it was the intention of the parties to insure a continuance of the obligation of the stockholder to make his purchase of ice from the company so long as he carried on business requiring the use of that article, there was yet wanting too many elements of certainty to admit of its enforcement. The price at which the ice was to be supplied and paid for was

wholly indefinite and incapable of exact calculation. It was declared that it was to be delivered at a price that was to afford the company a *net profit not to exceed one dollar per ton*. Such designated profit was not "one dollar," nor "not less than one dollar per ton," but was to be anywhere from nothing to one dollar in the extreme. How any intermediate amount of profit could be fixed otherwise than by future agreement, it is impossible to conjecture, and if it was to be by future agreement, the contract was not legally binding on either party, as neither could be compelled to *agree* with the other.

Another element in such price was also indeterminate, and that was the cost to the company, upon which any such *net profit* could be predicated.

Considering the ever recurring risks, losses and expenses of the company in conducting such an extensive business as the producing and supply of ice to its numerous customers, the precise cost to the company of each quantity of ice supplied day by day to Hudnut, and for which payment was required by the contract to be made on delivery, must have been necessarily a matter incapable of exact ascertainment. A *cy pres* principle of a merely approximate estimate could at most be adopted, and this finds no recognition in any rule of certainty, upon which legal contracts are founded and can alone exist.

Being of the opinion that the stipulation annexed to the certificate for the purchase of ice, at a profit not exceeding one dollar per ton, was void for uncertainty, and that the defendants have no lien or right of interference with the transfer of the stock in question, I am of the opinion the judgment should be reversed, and judgment absolute for plaintiff, requiring a transfer of the stock on the books of the company, as prayed for, with costs.

J. F. Daly, and Larremore, JJ., concurred.

Ordered accordingly.

LEOPOLD ROSENFIELD *et al. against* JUSTUS PALMER.

A judgment of the Supreme Court, from which an appeal had been taken, and an undertaking to stay execution duly given, was affirmed by that court at general term and an order of affirmance entered, and before the judgment roll on affirmance was made up or a judgment for costs of affirmance entered, an execution on the original judgment was issued. *Held*, that the execution, if irregular, was not void, and until it was set aside was a protection for acts done under it.

APPEAL by the plaintiffs from a judgment of the general term of the Marine Court, reversing a judgment of that court in their favor. The action was for trespass. Defendant justified under an execution against the plaintiffs. The facts are stated in the opinion.

Townsend, Levinger & Waldheimer, for appellants.

Justus Palmer, respondent in person.

J. F. DALY, J.—On March 25, 1871, the defendant herein, Justus Palmer, recovered a judgment against the plaintiffs herein in the Supreme Court for the sum of $772 46. An appeal was taken from said judgment to the general term of the Supreme Court, and it is alleged that all proceedings on said judgment were stayed by filing the proper undertaking. The said judgment was affirmed by the general term, and an order of affirmance made and entered. Before any judgment roll was made up on said affirmance, and before any judgment for costs of appeal was entered, the defendant herein, plaintiff in said original judgment, issued execution thereon, and collected the amount of the judgment of March 25th, 1871, with interest and sheriff's fees. This action is brought against him by the judgment debtors as for trespass, upon the ground that the stay of proceedings on their appeal was in full force at the time the execution was issued. They recovered judgment in the Marine Court against him for $1,038 90 damages and costs. On appeal to the general term of the Marine Court, that judgment was reversed on the ground—1st. That the execution

was properly issued, because an order of affirmance by the general term of the Supreme Court had been made and entered before the execution was issued, and it was not necessary in order to terminate the stay that, in addition to entering such order, a judgment roll should be made up and filed. 2d. Also, because if it were necessary to make up a judgment roll and file it, the issuing of execution before that was done, but after the order of affirmance was made and entered, was an irregularity only, rendering the execution not void, but voidable merely, and as no motion had been made to set the execution aside, it was full protection to the plaintiff therein.

Without passing upon the questions whether the proceedings were stayed in the first place by the undertaking and the justification of sureties thereunder, and whether the stay ended with the making and entering of the order of the general term affirming the judgment, I am of opinion that this judgment of reversal by the general term of the Marine Court must be affirmed on the last ground stated in the opinion of that court, read on the argument before us.

There was a valid judgment of the Supreme Court in favor of Palmer for $772 46 on March 25th, 1871, and an actual affirmance of such judgment in his favor by the general term of that court on July 1st, 1871. If it were necessary to make up a judgment roll embodying the case and order of affirmance, in order to perfect a judgment of affirmance, it was a matter of form only, non-compliance with which makes the execution voidable only. It is necessary to perfect such a judgment in order to take an appeal therefrom to the Court of Appeals (*McMahon* v. *Harrison*, 5 How. Pr. 360); but I can find no decision that such a step is necessary in order to terminate the stay of execution on the original judgment, which stay continues only to the time the judgment is affirmed. The entry of an order of the general term affirming the judgment is all the attorney for the respondent is bound to do, it being the duty of the clerk to make up the judgment roll, and this can be compelled by either party who desires to appeal (Code, § 281; 2 Sandf. R. 641; 22 How. Pr. R. 437; 5 Bosw. 686).

In *Bowman* v. *Tallman* (3 Robt. 634), it was said that an

execution issued before such judgment of affirmance was perfected was irregular, but a motion to set aside an execution in that action, issued after the oral announcement of affirmance by the general term and entry on the clerk's minutes, but before the entry of a formal order of affirmance was denied, because although the issuing of execution was irregular, the party aggrieved did not make his motion promptly, but suffered several months to elapse before applying to the court to set the execution aside. Such a decision could not have been made if the court had been of opinion that the execution was absolutely void. Voidable process is that which the party aggrieved may or may not elect to avoid at his option (1 Cow. 736–739). Delay in making the motion to set it aside may be regarded as evidence of his election.

It is probable that if a motion had been made in the Supreme Court to set aside the execution issued by this defendant Palmer, it would have been granted, but the plaintiffs had their option to make it or not, and they did not. The execution was valid until set aside and a full protection to all persons issuing it or acting under it (1 Cow. 736; *Hall* v. *Munger*, 5 Lans. 109; *Blanchard* v. *Goss*, 2 N. H. 494; *Landt* v. *Hilts*, 19 Barb. 283; 2 Abb. Pr. [N. S.] 354; *Reynolds* v. *Corp*, 3 Caines, 271). The defendant was therefore not liable as a trespasser for issuing an execution which was valid until set aside, and which had never been set aside.

The judgment of the general term of the Marine Court should be affirmed.

Daly, Ch. J., and Loew, J., concurred.

Judgment affirmed.

GEORGE ABHAM *et al. against* ROBERT BOYD *et al.*

Where a proceeding to foreclose a mechanic's lien in the city of New York is commenced by any claimant, and a prior or subsequent lienor is made a party and duly appears, he has thereafter a right to carry through the proceeding for his own benefit, and if the claimant instituting the proceedings allows his lien to expire, or in any way becomes disentitled to continue the proceedings, any other lienor who has appeared in the proceedings may continue them for the enforcement of his own lien.

Where a prior or subsequent lienor is made a party to the proceeding and served with a notice to appear, the court acquires jurisdiction to enforce his lien, and if he does not file a statement of his claim within the time prescribed by the statute, the court may excuse his neglect and allow him further time to do so.

APPEAL from an order of this court made at special term ordering a reference in a proceeding to enforce a mechanic's lien, and also from an order denying a reargument of the motion to refer.

The facts are stated in the opinion.

James W. Culver, for appellant.

Pinckney & Spink, for respondent.

DALY, Chief Justice.—Abham & Scueletas, having filed a notice of lien against a building of which the defendant Boyd is the owner, instituted proceedings to foreclose their lien, by serving the formal notice upon the owner Boyd and upon the defendant Stone, who had a lien upon the building, which was prior to theirs.

On the day named in the notice of foreclosure, both Boyd and Stone appeared, and the usual order was made by the judge that Abham & Scueletas file their complaint as in an ordinary action, and that the owner Boyd and the defendant Stone serve their answers. Boyd served an answer denying that Ward, the person with whom Abham & Scueletas had contracted, had any claim against him or against the building, and Stone served an

answer setting up that he had a lien upon the building, which was prior to the plaintiffs', for work and materials supplied towards the erection of the building, under a contract made with Ward, and asking for a sale of the interest of Boyd as owner, and that out of the proceeds of the sale that he (Stone) should be paid the amount of his lien.

The plaintiffs Abham & Scueletas appear to have been satisfied with Boyd's answer to their complaint, for they took no further steps in the matter, but suffered the year to expire without obtaining any order for the continuance or redocketing of their lien, by which omission, whether intentional or otherwise, their lien was at an end.

Stone served his answer upon the attorney of Abham & Scueletas. It was not an answer which created any issue between him and the plaintiffs, but was simply a statement of his claim, under the fifth section of the act of 1863, and which, by the provisions of that section, should have been filed in court, or with the clerk (L. 1863, c. 500, §§ 4, 5). This he omitted to do, and in consequence of this omission, the owner Boyd, having heard nothing of his answer, supposed that the whole proceeding was at an end, after Abham & Scueletas had failed to continue their lien within the year.

This answer, which was in effect the setting up of a claim arising under another lien, and asking that the defendant Boyd's interest in the building might be sold to satisfy it, should have been filed, because, by the provisions of the act, any person interested has five days after it is filed to make objections to it. The act declares that each and every person or persons who have filed liens shall be parties to and have notice of the proceeding, and when such a party is brought in, he becomes, if he intends to have his particular lien enforced, an actor, and must thereupon file his claim, that the owner or any other person interested may take issue upon it, if he wishes to contest it. It will not suffice to serve it in the form of an answer upon the party who instituted the proceedings. He may have no interest in it, and whether he has or not, it is not a notice to the owner, or other parties who may have an interest, and may wish to contest the claim. This, as I have said, Stone omitted to do, but

he continued his lien regularly from year to year, in the mode required by the law, and about four years after the service of his answer, when Abham & Scueletas' lien had expired, and all proceedings on their part had been abandoned, he gave notice to the owner Boyd of a motion to refer the issues in the action to a referee. This motion was irregular, for no opportunity had been given to the owner to take issue upon the claim, or any other party, except Abham & Scueletas, and they put in no objections to it. The defendant Boyd took the objection that Stone had never filed his claim; but the judge granted the motion to refer, providing, however, in the order that Stone should first serve his statement or claim upon Boyd's attorney, and that Boyd should have twenty days thereafter to serve an answer to it.

In this order Boyd at first acquiesced, for he served an answer to Stone's statement or claim, setting up, substantially, the same defense to it as he had set up to the claim of Abham & Scueletas. He afterwards, however, applied for a reargument of the motion, which the judge denied, and this appeal is brought as well from that decision as from the order granting the reference.

No appeal will lie from the refusal of the judge to order a reargument. It was simply a matter resting in his discretion, and whatever right of appeal the defendant Boyd has, is limited to a review of the order granting the reference.

The objections taken to it are that Stone had never become a party to the proceeding, not having filed his claim within the time fixed by statute, and that when the order for a reference was made, the whole proceeding was at an end, by the failure of Abham & Scueletas to continue their lien.

The failure of Abham & Scueletas to continue their lien, could not affect other parties who had filed liens, and had been made parties to the proceedings. On the contrary, the statute plainly contemplates that their rights are to be administered in the proceeding which has been commenced, and to which they have been made parties. When they are notified of the proceeding to foreclose, it is not necessary for them to institute a distinct proceeding for the foreclosure of their own lien; and

if they did, it would either be dismissed or consolidated with the proceeding already pending (*Gratz* v. *Rosenbergh*, 6 Abb. Pr. [N. S.] 428). In that proceeding they are, when they file their claim, in respect to the protection and prosecution of it, in the position of complainants, and have all the rights which they would have if the proceeding had been instituted for the foreclosure of their particular lien. This being the case, they cannot be affected by the omission of the party who instituted the proceeding to have his lien continued. They are entitled to go on in the prosecution and enforcement of their own claim, and if the owner or any other person has filed objections to it, to have the issue thereby created tried in some one of the modes provided by the statute. Of course they must see to it that their lien is continued; for if they neglect to obtain an order for the continuation and redocketing of it, from year to year, their lien will be gone (*Stone* v. *Smith*, 3 Daly, 213; *Poerschke* v. *Kedenburg*, 6 Abb. Pr. [N. S.] 172). If they have, however, continued their lien, and the validity of their claim is admitted, or established by a trial, they are entitled to have it enforced out of any fund that may be due by the owner to the contractor, if the fund will suffice, after the payment of prior incumbrances, if there be any, and it is wholly immaterial to them whether other parties suffer their liens to expire by the failure to renew them or not, for they are independent actors in respect to their own claim, and have nothing to do with the claim of the party who instituted the proceeding, or any other parties who may have filed claims, except so far as they may affect their own, by being prior in point of time; or unless they see fit to contest them by a formal statement of objections to them. The ground, therefore, taken upon this appeal, that the whole proceedings came to an end and ceased to have any vitality after Abham & Scueletas failed to continue their lien, so that none of the parties can thereafter avail themselves of proceedings instituted by Abham & Scueletas, or occupy any better position than they do, is untenable. It would be a most unreasonable construction of the statute to hold that after others have been made parties to the proceeding, and filed their claims, and have possibly been put to great expense and

the loss of time in litigating them, that everything is to go for naught, if the owner sees fit to discharge the lien of the party who initiated the proceedings by paying it; or that party abandons his lien because he thinks he cannot sustain it, and for that reason, or through neglect, does not get an order to continue it.

The statute declares that the persons who are made parties shall file their claim within ten days after service upon them of notice of the proceeding. The court acquires jurisdiction by the service of the notice to foreclose by the party who institutes the proceeding, and has then all the powers given to the court named in the notice for the adjustment of the rights of all parties. The proceeding is then in the nature of a civil action brought for the foreclosure of a lien, in which all the equitable powers exist and all the equitable remedies may be applied, which are incident to such actions. This is obvious from various passages in the statutes, and indeed, without so construing the proceeding, it would be impossible to administer the remedy (*Hubbel* v. *Schreyer*, 4 Daly, 362; *Doughty* v. *Devlin*, 1 E. D. Smith, 629). We have never regarded the provision in the statute, that persons made parties shall file their claims within ten days from the time of the service of notice upon them, as precluding the court from allowing them further time, if necessary. Indeed, we long ago established the rule that when the parties appeared pursuant to the notice to foreclose, that the party who instituted the proceeding, should have ten days to serve his complaint, and the other parties ten days thereafter to put in their answers. This was found to be indispensable for the ordinary conduct of the action and the creation of the issues which the court might have to try. In fact, in this court, where a very large number of these cases are constantly pending, it is a very rare circumstance for the parties to come prepared upon the return day of the notice to file and serve a statement of their claims, and the practice is almost universal to enter an order upon that day that the party who instituted the proceeding file and serve his complaint in ten or twenty days, and that all the other parties have twenty days after the service of it to file and serve their answers if they

mean to contest it; or if they do not, a specific statement of their claim, which is regarded, in effect, as a complaint, upon which the owner, or any party interested, may take issue by putting in an answer to it within the same length of time (Guernsey on Mechanics' Liens, p. 76, § 409). This is upon the assumption that having acquired jurisdiction by the service of the notice citing the parties to appear in this court, which in that respect has all the effect of the service of a summons (*Maltby* v. *Greene*, 1 Keyes, 548, 552; *Schaettler* v. *Gardiner*, 47 N. Y. 404; *Reynolds* v. *Hamil*, 1 Code R. [N. S.] 230), we have all the power that we would have in any action to do what, in the judgment of the court, is necessary or proper in the furtherance of justice. We have, therefore, never doubted our power to relieve a party from his default who had neglected to appear on the day named in the notice; our impression being that, after the service of that notice upon him, his remedy for the enforcement of his lien was in that proceeding, and that he would be concluded, as respects its enforcement, by the judgment rendered in it (*Carroll* v. *Caughlin*, 7 Abb. Pr. [N. S.] 71). If Stone, therefore, had failed to appear at all, he might have applied to the court to be relieved from his default, and would have been relieved, if it was in furtherance of justice. This was, in effect, what Judge Robinson, at special term, did. To enable him to dispose of the whole matter at once, he provided for a reference, first allowing Stone to file the statement of his claim and serve a copy of it upon Boyd's attorney, and giving Boyd twenty days thereafter to serve his answer to it. This was giving Stone relief, it is true, after a long lapse of time. It would seem, however, from the affidavit of his attorney, that he had several times notified the plaintiff's attorney to move in the matter, and the judge appears to have been satisfied with that or whatever other excuse he may have offered. At all events, it was the exercise of a discretion which will not be inquired into and cannot be reviewed upon appeal. The order should be affirmed.

J. F. Daly and Loew, JJ., concurred.

Order affirmed.

Charles E. Quincey *against* Joseph F. Young, William S. Woodward, and Stephen V. White.*

A judgment in an action tried before a referee will not be reversed on account of the erroneous admission of evidence, if the referee was not influenced by such evidence, and in order to determine this question, the court on appeal will examine the opinion of the referee giving his reasons for his decision.

In an action to charge several persons as joint partners in a stock speculation, in which plaintiffs were employed as brokers, and in which the defense was that each of the defendants was, by special agreement, liable for his own share only: *Held*, that it was competent for the plaintiffs to show that one of the defendants had a separate individual stock account with them.

Where, from the whole evidence, the appellate court can see that a referee was justified in finding as he did on a disputed question of fact, the judgment entered on his report will not be reversed, although it appears by his opinion that his deductions from particular circumstances may have been erroneous.

Notwithstanding the power given to the court by § 268 of the Code of Procedure, to review questions of fact on appeal from a judgment rendered after a trial before a referee, the appellate court will not consider the weight of the evidence as if it were a new question, and where there is a direct conflict of positive testimony on a material point, will refuse to disturb the finding of the referee as to the facts.

Appeal by defendants from a judgment of this court entered on the report of a referee.

The action was brought to recover for moneys advanced, brokers' commissions, &c., due the plaintiff under the following facts as found by the referee:

In April, 1870, Young and Woodward employed the firm of Heath & Co., composed of William Heath and the plaintiff, to buy and sell for their account the stock of the Philadelphia and Reading Railroad Company, the commission to be one-thirty-second of one per cent. on the par value. Heath & Co. bought and

* On appeal to the Court of Appeals, the judgment of the general term here was modified by disallowing the recovery for the $5,380, claimed to have been paid to White, but in all other respects the judgment was affirmed (decision rendered December 14th, 1875).

sold said stock during April and up to May 17th, on account of Young and Woodward. On May 17th these two agreed with defendant White that he should take part in the speculation, and the brokers were authorized to transfer 40,141 shares then on hand to the new account at the rate of $52 per share, charging up their commissions on the transfers. The brokers rendered accounts from time to time, which were approved by defendants. On July 6, 1870, 30,300 shares, owned by defendant Young individually, were transferred to the joint account at $53 62½ per share, and Heath & Co., by agreement, charged the joint account with their commissions upon the transfer.

On July 14, 1870, the defendants instructed Heath & Co. to make up the joint account and divide the stock into three equal parts, in order that each might take and pay for his share. While this was being done, Young announced his inability to pay for his share. Woodward and White took up and paid for their shares of the stock, and requested Heath & Co. to "carry" the share of Young, promising that, should the stock fall below ninety-five per cent., they would take it off their hands. This was agreed to. It was afterward discovered that 11,200 shares of Young's stock, which went to make up the 30,300 shares above referred to, was in the hands of other brokers; his account was therefore, with his consent, charged with that number at $53 62½ per share. Up to July 23, 1870, Heath & Co. sold parts of the stock they were carrying, under direction of Woodward and White, and credited the proceeds to the joint account. Upon that date, the stock having fallen below 95 per cent., they required the defendants Woodward and White to take it off their hands as agreed, and pay the balance due on account, who offered to take the stock then on hand at $47 50 per share, if that would end their liability, but refused to do otherwise. Heath & Co., upon notice to them, then sold out the stock at the Stock Exchange, and the larger part of it was bought in by defendants. On July 27th, 1870, Heath & Company rendered an account, by which it appeared that defendants were indebted to them on the joint account in the sum of $104,138 39. Defendants ap-

proved the account, but asserted that they were not jointly liable thereon. Heath & Co. subsequently paid out $294 for brokers' commissions on account of the joint account of the defendants. Heath & Co. also claimed to have paid the defendant White $5,380 for money loaned by him to the joint account.

Heath & Co. assigned their claim to the plaintiff, who brought this action.

The defense was that, by a special agreement made with Heath & Co., the defendants were only liable individually each for his own proportion; that Heath & Co. had agreed to look to each for his own share; and in support of this they endeavored to show, 1. That such was the original agreement, and 2. That on July 15th, 1870, there had been an accord and satisfaction as to all past transactions, and an agreement for separate liability for the future.

On the trial the plaintiff Quincey was introduced as a witness on his own behalf, and upon his examination in chief was asked, "What would be the effect of the transfer of the 30,300 shares to the joint account?" A general objection to this question, interposed on behalf of all the defendants, was overruled by the referee, and the defendants severally excepted. The witness answered, "It would have been to the benefit of the pool account." Upon his second redirect examination, this question was put to him: "You have stated, in answer to defendants' counsel, that Mr. Young had a private account with your house, and that that private account was opened about the time the Woodward and Young joint account was closed, and that the margin put up for that account was Young's proportion of the profit on that joint account transaction; now I ask you, whether at the same time, any private account with your house was opened for Woodward?" To this question the defendants objected on the grounds that it was irrelevant, and that it was not in rebuttal of anything which had been called out by them. These objections were overruled, and the defendants severally duly excepted. The witness answered, "Yes, sir." He was then asked, "And did Woodward put up any margin on that private account, and if so, what was

it?" and answered "None." "Were these two private accounts of Woodward and Young running while this joint account of Young, Woodward and White was running?" Answer. "Yes, sir." To both of these questions the same objections were taken as to the first; there was the same ruling, and the defendants duly severally excepted.

After the defendants had rested, Quincey was recalled, and testified as follows: "*Q.* Did you, on the 15th, know of, or at any time assent to, an arrangement that Heath & Co. should stand in the shoes of Young, bearing his losses, and taking his profits?" "*A.* No, sir." "*Q.* Did you hear that any such claim was made, until some days after July 15th?" "*A.* No, sir." "*Q.* On what day, according to your best recollection, did you first hear that any such claim was made, that such an arrangement had been entered into?" "*A.* I think it was the day before the stock was sold out under the rule, at the board." To each of these questions the defendants objected as immaterial and irrelevant. The objection was overruled and defendants excepted.

The evidence relied on to establish the defense, and that to refute it is fully discussed in the opinion.

The referee reported in favor of the plaintiff for $121,157 51, the full amount claimed, and from the judgment entered on his report the defendants separately appealed.

John H. Bird, for appellant Young.

Luther R. Marsh, for appellant Woodward.

B. F. Blair, for appellant White.

Augustus F. Smith, for respondent.

J. F. Daly, J.—There was no error committed by the referee in admitting or rejecting evidence which would warrant a reversal of this judgment. We are referred by appellants to the exceptions taken by them to the referee's rulings, at folios 571, 649–51, and 1264–67 of the case.

As to the first: The evidence was not material, and did not influence or affect in any respect the judgment or decision of the referee, so far as appears from his opinion, and that opinion may be referred to to ascertain whether it did or did not, since the defendants rely on it to show on what ground he really did decide the case. The *question*, "What would be the effect of the transfer of the 30,000 shares to the joint account?" which was objected to, did not necessarily call for an *opinion* of the witness, although he gave an opinion in his answer to it. It might and could require simply a statement as to the state of the account of the defendants after such transfer, and involve merely a calculation which anybody could make. The answer, which contained the opinion objected to on this appeal, was suffered by defendants to stand without any motion to strike it out.

As to the second exception, it may also be said that the evidence objected to did not influence the decision of the referee, if his opinion be taken into account. But apart from that, I am of opinion that it was proper. So far as it was not in rebuttal, but rather a part of plaintiff's case, it was in the discretion of the referee to allow it in that stage of the trial. So far as the relevancy of the testimony goes, I think it was properly allowed, since it was competent to show (in support of plaintiff's claim, that the account in suit was a joint one of Young, Woodward and White, and not several as to each) that Woodward had at the same time, a separate individual account with plaintiff's house. The same fact had been proved as to defendant Young.

As to the third exception, the questions were proper. They were intended to draw out the fact that the plaintiff at the time of making the agreement of July 15th, alleged by defendants, knew nothing of such an arrangement. The defendant White swore that the plaintff was present at the interview at which the alleged agreement was made, and was consulted by Heath, his partner. This evidence was proper to show that Quincey heard nothing from the defendant or his partner, on that subject.

There is nothing in the claim made on this appeal by de-

fendants, that the referee, 1st. Erred in assuming that evidence was before him which had not in fact been given, and allowed the supposed evidence to influence his decision; and that, 2d. The referee overlooked and excluded from his consideration important evidence introduced on the part of the defendants, to warrant a reversal of this judgment. The errors complained of may be considered in the order they are treated in the second and third points of the appellants, and the several subdivisions of those points.

Second point, sub. 1. There was evidence that the plaintiffs were brokers and not speculators, sufficient to warrant the referee's remark to that effect.

Sub. 2. There was evidence that when Heath & Co. asked for margin, their request was acceeded to; for Woodward says that he told Quincey when he asked for margin, that "he must look to Young for his share and to me for mine," and this was an *assent* to the demand, although it is true the margin was never given.

Sub. 3. There was evidence that Quincey denied the existence of any agreement for limited liability, so far as he knew anything about the agreements with defendants, as appears by his direct examination, where he testifies to what Heath told him in presence of defendant Young, and by his cross-examination, and it cannot be said that his attitude in this controversy was other than a most positive denial of any such agreement for limited liability.

Sub. 4. There was evidence that both Heath and Quincey denied the making of the alleged agreement of July 15th, since Heath certainly did deny it, and Quincey denied any knowledge whatever of such agreement on his part, and the language of the referee, that "both Heath and Quincey denied the making of this agreement, and if their version of the transaction is to be believed, nothing was said or done by them upon the settlement in question which can have the effect of discharging the liability of Woodward and White," must be taken as referring, so far as Quincey is concerned, to his denial of taking any part in making, or of any knowledge of any such agreement.

Sub. 5. There is evidence that at the time spoken of by the

referee in his opinion, that Heath was acting under legal advice, as the referee stated.

Under the appellant's third point: *Sub.* 1. There is nothing in the remark of the referee in his opinion, speaking of the making of the alleged agreement of July 15th, that, "Young is silent on the subject," to warrant the conclusion that he overlooked Young's testimony as to what Heath told him of the occurrences on that morning. The referee refers merely to the fact, which was not disputed, that although Young was present in the room when the alleged agreement was made, he did not hear anything that was said, and not to the testimony of Young as to what was subsequently told him by Heath. The latter evidence he evidently refers to and disposes of for what, in his judgment, it was worth, by the lines of his opinion which follow the remark above quoted: "In fact, his (Young's) state of mind on that eventful day was such as to render him incapable of participating in what took place, or of *recollecting* with any distinctness what had occurred." There would be no necessity for questioning Young's recollection if the referee had not in view the testimony of Young as to what was said on that day.

Sub. 2. The fact that the referee in his opinion states that the defendant White "says nothing as to any allusion being made on this occasion (interview of July 16th) by Heath to the alleged original agreement for limited liability," does not present the shadow of reason for reversing this judgment. It is the fact that White did testify that Heath admitted such original agreement at that meeting of July 16th; Woodward testified to the same effect, and the referee gave full consideration to Woodward's testimony as to what was then admitted. But the referee disbelieved both Woodward and White's testimony as to what the original agreement was, and how can it be said that further testimony of White to admissions of Heath would or could affect a decision founded on the broad disbelief of White's truthfulness? The testimony of White as to Heath's admissions is no stronger, is not as strong, in fact, as the testimony of White concerning the acts and statements of the parties when the original agreement was made. But there is conclusive evidence that the referee's decision was not affected by

even overlooking this testimony of White or of Young as to Heath's admissions. In the concluding portion of his opinion he states that the admission, whatever it was, is not sufficient to establish an undertaking which, in his opinion, had not been previously made, thus giving full effect to all the evidence given by defendants as to the alleged declarations and admissions of Heath on the 15th and 16th of July. Admissions are the weakest of all evidence, and testimony of admissions should be closely scanned. The admission may have been made, and yet be contrary to the fact. The referee's opinion clearly shows that his belief as to the original agreement between the parties, a belief settled after hearing their evidence on the point, was not shaken by any evidence of subsequent admissions, and he gives his reasons for it.

We are next asked to reverse this judgment on the facts, as clearly against the weight of evidence. Upon a careful perusal of the testimony in the cause, aided by the very well prepared points of the appellant's counsel, I am unable to discover any ground of fact whatever for reversing the decision of the referee. Two simple questions of fact were tried in this case: 1st. Was the original agreement between Heath & Co. and the defendants for several and limited, or for joint liability of the latter; 2d. Was there a severance of liability of defendants by agreement between them and Heath & Co., a new contract, and accord and satisfaction on July 15th.

On these questions a large amount of evidence was produced, extending in the printed case to more than 1,200 folios. There were only eleven witnesses examined, the transactions in dispute depending largely on verbal agreements between Heath, the plaintiff's partner, and defendants Young, Woodward and White, few other persons being present. There was a direct and irreconcilable conflict in the statements of Heath and the defendants on all material points. The evidence on which the referee found the facts supporting his judgment was conflicting. That is conceded. It is claimed, however, by appellants, that the version of the transactions by defendants' witnesses is corroborated by other circumstances, and a preponderance of proof in favor of defendants is established. This

must be examined. In most instances Heath is contradicted by Young, by Woodward, by White, or by a majority of them, and sometimes by them and Marvin. But if the referee chose to credit Heath's positive statement in preference to the positive statement of all the others together, this court would not disturb his finding sooner than the finding of a jury. The familiar observations as to the better opportunities of the tribunal which found the facts to judge of the credibility of the witnesses, and of the want of such opportunities in the appellate court need not be repeated here. We have no right to conclude that because the story of one witness appears on paper to be more succinct, straightforward and fluent than another, it embodies the truth of the matters in dispute, as opposed to the statement of another witness which is marked by inaccuracies, or even inconsistencies. No tribunal will or can arrive at the truth from such statements, except the one which hears and sees the witnesses. Should we reverse a judgment because the one party told a fairer and more consistent story than the other, we could do no more than remit the trial again to a tribunal (be it referee or jury) which would again have the right to discredit that story if opposed by a positive statement to the contrary. So much, then, for the criticism of appellants on the comparative straightforwardness of the testimony of Heath, White, Woodward, Young and Marvin. I find that the plaintiff's witness, Heath, is as positive as the defendant Woodward on the question of the occurrences of July 15th; and, as to the latter's testimony as to the original agreement, his statements when not educed by leading questions, were that Heath "assented" to the arrangement, "there was an understanding," and that he gave "the substance" of what was said, and justified the referee's remark as to what Woodward could *positively* swear to. The witness could not in any case "remember the words" that were used. As to corroboration of the statements of defendants, much stress is laid by appellants on Marvin's testimony as corroborative of defendant Woodward on the subject of admissions by Heath on July 16th. Mr. Marvin made a memorandum of the conversation shortly after it occurred, and this writing was put in evidence as proof of a higher na-

ture than the mere recollection of the witnesses. But the paper bore evidence of being manufactured, for it put into the mouth of defendant Woodward words that could not have been uttered by Woodward, viz: that the original agreement was that the parties to the account were to be liable each for *one-third* as his share. Now, as there were but *two* parties to the original account (Young and Woodward, White came in afterwards), the shares could not have been thirds. This is admitted by appellants to be a mistake of Marvin's. It not only justified the referee in rejecting all his testimony, but it cast suspicion on the whole case it was produced to support.

Again, as to corroboration of defendants, that there was no interview on July 21st, as sworn to by Heath. An account of that date was produced by plaintiff, and was the subject of that interview. Appellants say that if Heath had sworn he gave it personally to Woodward, it would tend to confirm his testimony, but they say that Heath only swears that he *sent* that paper by a messenger to Woodward. But there is positive testimony by Heath that he took that account to Woodward at the office of Marvin Bros., and showed it to him on July 21st.

As to the corroboration of either side by the acts of the parties after July 15th, and subsequent to the alleged accord and satisfaction, the proof is not stronger in corroboration of one side than the other. The referee discusses very fully the evidence on this point. He had before him the several accounts rendered after that date by Heath & Co., as well those in which it appeared that there might be an acquiescence in an arrangement to sever the account as those to the contrary. He had the writing signed by Young, of date July 15th, 1870, and the letter of Young of the same date. He gives all these acts due weight, and puts a construction upon them which he lawfully might in making those deductions or inferences which the tribunal that tries the fact may draw from undisputed evidence. That another construction may be put upon them, or that they may lead to other inferences or deductions as well, can be no ground for reversing the judgment. There is not in the whole case any controlling evidence which requires a judg-

ment for defendants. The searching and most elaborate argument of defendants addressed to this court on the facts, is as proper here no doubt as it was before the referee, and I have for my part so treated it, endeavoring to find whether on the evidence the facts were other than as found by him. I cannot say they were. That I might have arrived at a conclusion differing from his would be no ground for reversing this judgment. That the court on this appeal might arrive at such a conclusion, would not justify a reversal. The parties tried the fact before a tribunal to which they were satisfied to submit the questions in dispute, and unless we should find the evidence on which that tribunal arrived at its judgment insufficient to sustain its decision, the judgment should not be disturbed.

I am in favor of affirmance.

Daly, Chief Justice.—After a careful examination of the voluminous testimony in this case, I am of the opinion that the conclusion of the referee cannot be disturbed. The question in the case was a question of fact. It was whether the agreement between Young and Woodward on the one part, to which White subsequently became a party, and William Heath & Co. on the other, was originally, that Woodward and Young were each to be liable only for his portion of the losses which might be incurred, neither of them being answerable for the losses of the other; for if this were not the distinct understanding, they were liable jointly. Whether there was such an agreement or not depended upon the testimony of Woodward and Young, and upon the testimony of White, so far as respects certain admissions alleged to have been made by Heath after White became a party to the contract. Heath testified that he never made the admissions sworn to by White, and as between him and Heath there was conflict upon this point. The agreement was made by Woodward and Young with William Heath & Co., and Heath and Quincey explicitly denied the making of any such special agreement, and the whole of the testimony given by them, whether oral or documentary, was to the effect that the agreement was one of joint liability. As between the parties, therefore, by whom the agreement was made, there was

a direct conflict; Woodward and Young testifying, and Heath and Quincey denying, that the agreement was of the special character above stated. So far, moreover, as the testimony of Woodward corroborated the statement of White, respecting the admissions alleged to have been subsequently made by Heath, Woodward's testimony upon the point was met by the positive denial of Heath that he had ever made such admissions. The whole case turned upon the question whether Heath and Quincey, who composed the firm of William Heath & Co., were to be believed, or the defendants Woodward, Young and White. It was a question of the relative credibility of these respective witnesses, in which we, as an appellate tribunal, have not the advantage which the referee had, who saw the witnesses and heard them testify.

It may be that the rule which justly limits the review of the finding of a jury upon a question of fact, where the evidence has been conflicting, is not to be applied to the same extent to the finding of facts by referees upon conflicting evidence, inasmuch as the code has specifically provided for the review of questions of fact, where the trial is by the court or by referees; probably for the reason that more weight is to be given to the united conclusion of the twelve men who compose a jury, where the evidence has been conflicting, than is to be given, under like circumstances, to a finding by a single judge, or by referees, a tribunal never composed of more than three persons, and which may and generally does, as in this case, consist of but one.

But whether this is so or not, the tribunal before whom witnesses are examined, where, as in this case, they directly contradict each other—the one positively swearing to a certain state of facts, and the other as positively denying that they occurred—is more competent to decide which of the two is to be believed, than an appellate tribunal can possibly be. All that the appellate tribunal has before it is what the witnesses said; but this is not all of which the mind takes cognizance, in deciding upon the credibility of witnesses. The look of a witness, the tones of his voice, and his whole manner upon the stand, have often more effect upon those who have to

pass upon the value of his testimony than what he says, the way in which he gives his evidence frequently affording the highest assurance of truthfulness, or of the want of it. It is, therefore, a very delicate thing for a court of review, where the evidence was conflicting, to assume that the finding was erroneous, and there must be a great deal more than there is in this case, to justify the setting aside the conclusion of a referee upon that ground.

As respects the nature of the original agreement, the defendant Young was met by his deliberate statement in writing that the shares were carried for the account of Woodward Young and White, and that Woodward and White had, with his consent, assumed the management of the *joint interests of the three.* He undertook upon his examination to avoid the effect of this written acknowledgment of the joint liability by declaring that he signed it at Heath's request, who told him that he, Heath, had been advised by his counsel that if, during the operation, they should get rid of all the stock, and it should afterwards advance, that Young might come and claim his portion of it, which I do not see that Heath controverted. The referee however held Young to his written statement; from which we must infer that he was not satisfied with the explanation by which Young sought to avoid the effect of it, and we cannot say that the referee erred in so doing.

As respects Woodward, it is impossible to read his testimony, especially his cross-examination, and hold that the referee ought to have given more weight to his evidence than he did. This being the position of the two witnesses who made the agreement with Heath & Co., the case was narrowed down to the conflict between White and Heath, in respect to the admission alleged to have been afterwards made by Heath, and to some other evidence, which will be referred to, upon that point.

A deliberate admission of the terms of a verbal agreement by a party to it, is very satisfactory evidence, where there is no doubt of the fact of the admission. But where the making of the admission is denied—where the party averred to have made it swears distinctly and positively that he never made it—

the testimony relied upon to establish the admission ought to be of a very satisfactory kind, and in some degree supported by other circumstances, as it is a species of evidence that admits only of assertion and denial on the part of those who were present when the admission was alleged to have been made. It has been called a dangerous kind of evidence, from the facility with which it can be fabricated, and weak evidence under any circumstances when it is controverted; because it rests wholly upon a witness's recollection of what was said, who may not reproduce the exact language used, and who may have misinterpreted or misunderstood what the other meant.

The referee having reason, upon the grounds already stated, to doubt the credibility of Woodward and Young, he had the right to attach no weight to their testimony upon this point, and having before him the positive statement of White, that such an admission was made, and the equally positive denial of Heath, that it was not made, the referee had to believe one or the other. White testified that in a conversation at Marvin's, Woodward said to Heath, "I had a distinct understanding with you, that you should look to Young for his share," and that Heath said that was so when the account was opened, but it had not been renewed after White came into the concern. Heath's attention, upon his re-examination, was specifically called to this testimony, and he swore expressly that this alleged conversation never occurred. It is not a statement of a want of recollection, but an unqualified denial, so that one of these two parties must have sworn to what was untrue.

Marvin, in whose presence White testified this alleged admission was made, was examined, and when first interrogated, had no recollection of any such conversation. A written memorandum in the witness's handwriting, of what was said at this interview, was then put into his hand, and he testified that whatever was stated in the memorandum was said. After he had read the paper, he was asked to look at the part relating to Heath's admission, and after having done so, to state whether, thus refreshed, he could then recollect that what was there written was stated at the time, and his answer was "No, I don't remember;" after which the further question was put,

"Well, it must have been said at the time, or you would not have written it down there?" and he answered "Yes." If this paper had been written by the witness on the 16th, the day when the interview occurred, it would have been entitled to great weight, but it was written nearly two weeks afterwards, and some days after the selling out of the stock, and after Young had become insolvent, and was written at the request of White. It was a memorandum in three distinct parts, each part being subscribed by the witness. The portion containing the alleged admission was added after the first (which was a long statement), had been subscribed by the witness. All that this second part contained was this admission. Marvin first said, that he remembered writing the first part, and said it was all that he remembered at the time when he signed it. He was asked if he remembered writing the second and third parts, which were upon another page, and he answered that he did not remember the circumstances; that all that he knew was that he saw that they were in his handwriting, and that that was all that he remembered, and finally he said that he did not remember writing any portion of the memorandum; that the whole thing of the writing of the paper produced had passed entirely out of his memory. After which he was asked, "You have no memory of writing that paper?" and he replied, "I have now, but I had not before I saw the paper." All that there was therefore in the evidence was, that when the paper was produced, he remembered the general fact of writing it, which was apparent, as it was in the witness's handwriting. It derived no support from the witness's recollection. He could not say whether the three parts were written at the same time or not. The most material part, the account of the alleged admission of Heath, is in the form of an addendum to the main memorandum, and neither the language, nor the nature of the admission is the same as the admission testified to by White. It is that Woodward said to Heath, "You will remember that in your office I said, Mr. Heath, in this account, each party is only responsible for his share of the account, viz, *one third*, and that you so understood it at the time; that Heath assented to this, and said, yes, it was so." This is not the admission

sworn to by White, and by Woodward. In White's testimony it is this: "Woodward says to him (Heath), Well, but Heath, we agreed with you. I had a distinct understanding with you, that you should look to Young, and I had no means of knowing what Young was doing, or how much he was worth, or anything about it, and the distinct understanding was that you should look to him," and that Heath replied that that was so when *the account was opened*, but it had not been *renewed* after White came into the concern; upon which White said, that he had done no harm by coming in; that by doing so, he had simply enabled Woodward to take one third, instead of one half. Here the reference by Woodward is to the original understanding in respect to the liability of Woodward and Young to Heath & Co., and contains no such statement as that in the written memorandum of Marvin, that Woodward said, You will remember, Mr. Heath, that I said in your office, each party is only responsible for his share of the account, *one third*"—the admission in the writing referring to a one-third liability of Young, Woodward and White respectively, and the admission sworn to by White, referring to the nature of the liability of Young and Woodward when the agreement was made, before White, in the language of the witness, "came into the concern;" and yet both profess to relate to the same conversation on the 16th of July, and to the same admission. Woodward's testimony is even more explicit. He says, what was talked over on that occasion was the agreement *originally* made as to the non-responsibility for the other shares, which he says that Heath, on the occasion, did not dispute, but acknowledged. There is not only this material discrepancy in the written and the oral account of the same alleged admission; but there is the circumstance that this written memorandum, by its date, was made by Marvin at the request of White, after the speculation had proved disastrous, and after Young had become insolvent, and when it was of most material importance to White whether he was jointly liable to Heath & Co. for the whole loss, or only for one third of it. It professed, moreover, to be a written record by the witness of a conversation he had heard twelve days before he wrote it down, and of which he had no recollection whatever

when he was examined, being oblivious of nearly everything, except that the paper was in his handwriting. The referee considered this written statement of Marvin very carefully. As a paper prepared *post litem motam*, he treated it as a statement to be subjected to severe scrutiny, without necessarily involving any imputation of intentional falsehood on the part of Marvin. He took into consideration Marvin's intimacy with Woodward and White; that he would necessarily become acquainted with their view of the case; that the turning point in the controversy was whether they were liable in *solido*, and may have been unconsciously influenced by these circumstances.

The appellants insist that there was no evidence of any such intimacy, and no foundation for inferring that Marvin, when he wrote the statement, was acquainted with White and Woodward's view of the case, which is simply preposterous. The very putting down the matter in writing at White's request, after the speculation had proved disastrous and the dispute arose, was of itself enough to warrant such an inference. The very fact of getting such a paper signed was enough. The referee attached weight to the fact that no explanation had been given of what he called "the patent inconsistency" between the written and the oral account of the admission, and that the paper was not written until twelve days after the conversation it professed to record. In view of these considerations, he thought that this written statement was not of any value in sustaining the position of the defendants, and he came to the conclusion that the statement of Heath, explained by the circumstances, justified the inference that he never made the admission alleged; whilst, at the same time, his language may have been of so indefinite a character as to have led White, in the ardor of establishing a fact of such vital importance to himself, to suppose that the admission was as broad and unqualified as he then thought it to be. This was a charitable attempt to reconcile both statements, which, perhaps, the case scarcely admits of, as there was a detailed statement of a certain conversation sworn to by White, and an explicit denial on the part of Heath that any such conversation ever occurred. The conclusion arrived at shows that the referee must have believed the

one and not the other. What can an appellate court do in such a case? They cannot say that the referee was wrong. My own impression is, from reading the evidence, that either White or Heath testified upon this point to what was untrue. If they did, who is to decide between them? It must necessarily be the referee, who had the opportunity of seeing and hearing each of them give their testimony.

The referee was certainly justified in attaching no weight to the corroborating testimony on this point of Woodward. The answers of this witness to a number of questions, upon his cross-examination, relating to his own acts in these transactions, exhibited a want of memory which was in remarkable contrast to his precise and accurate recollection of matters asked upon the direct, which went to establish his own and the other defendant's defense. He seemed to remember all that bore in his own favor with sufficient particularity; but his memory was vague and unsatisfactory in respect to nearly everything else. His answers from fols. 1040 to 1045 may be cited as an illustration of this peculiarity in his evidence; whilst his refusal to answer the number of questions put to him in respect to acts, which, if true, seriously damaged his moral character, placed him in a position that entitled him to very little consideration where his evidence was in conflict with that of others. There is nothing, in my experience, that a witness is more prompt to reply to, answer, and explain, where he is entirely able to do so, than questions relating to acts affecting his moral character; and where a witness meets every such inquiry with the response, "I decline to answer," he cannot expect tribunals to give any moral weight to what he says, where he is contradicted by other witnesses to whom no such tests as to their integrity and truthfulness have been applied. Assuming, as we must for the reasons given, that the referee had the right to discredit both the evidence of Woodward and the written statement of Marvin upon this point, the question is reduced to the direct conflict between White and Heath, in which the referee must be regarded as discrediting the statement of the one, and believing that of the other. He found the fact that no such admission was made;

and upon what ground can we say that that finding was erroneous?

One of the grounds upon which we are asked to set aside the report is, that the referee, 1, assumed the existence of evidence that had not been given; and, 2, overlooked and excluded from his consideration important evidence of the defendants. Judge DALY has fully considered this objection, and shown by reference to the testimony, that the appellants are mistaken in respect to many particulars upon which they relied, and as respects matters upon which they were correct, that they were not of the slightest importance. I have read the evidence from beginning to end, and have gone over the referee's long opinion, in connection with the minute and and elaborate commentary upon it, made by the appellants, and considering the voluminous nature of the testimony, I think, upon the whole, that it was fairly and comprehensively considered. It is complained that the referee has not taken into account any of the acts of Heath & Co. from the 15th to the 19th of July, in dividing the stock into thirds, and delivering to each his several third, and that he refused to find this fact. Assuming that he should have so found, such a delivery to each of his proportional part, as between themselves, may have been entirely consistent with their collective liability to Heath & Co., as their brokers. It did not necessarily tend to prove that Heath's statement of the original agreement was untrue. It does not follow, that because the referee does not refer to it in his opinion, that he overlooked it. He probably attached no weight to it; and are we to say that he should have done so, and from that circumstance have believed White, Woodward, and Young, and disbelieved Heath and Quincey? Again, it is certainly true that some of the statements made by Heath do not seem to agree with others; and the referee himself seems to have regarded some things established which Heath denied. But it is not in this way that a finding upon a general question of fact is to be tested upon conflicting evidence. It is the conclusion which the mind forms in respect to the facts in controversy that is to govern, and it must be plain and obvious, upon the whole evidence, that the finding was wrong, to justify setting it aside. It may be, upon a re-

view of the whole evidence, that the reasons given, or the deductions drawn from particular facts, may be wrong, and yet that the general conclusion was right. Indeed, in judicial experience, such instances do occur, and it is a more familiar experience that courts of review often put their affirmance of a judgment upon a different ground than that which was relied upon by the court that gave the judgment. It is upon the referee's opinion chiefly that the appellants urge us to reverse his decision, whereas we can look only at the whole evidence, and the general conclusion that he came to upon it. And where the case turns, as this does, upon a direct conflict between the parties in interest—Woodward, White, and Young swearing that there was a special agreement; and Heath and Quincey that there was not; that the agreement was that which the law creates from the nature of the transaction, where three parties combine to speculate in stocks, and another party acts as their broker in the speculation—we must hold that the question of relative credibility is not for us, and that the referee has necessarily settled, by the conclusion he arrived at upon the whole evidence, that he believed, in respect to the matter which was in conflict, the statement of Heath and Quincey, and did not believe that of Woodward, Young, and White. The strength of this case lies in the circumstance that the law would imply, from the nature of the transaction, a joint liability, unless a special agreement was made to the contrary. The burden was consequently upon the defendants to establish that the liability was limited, and not general. This they undertook to do, but failed to convince the referee that there was a contract of this exceptional description; and there is no view that we could present of this evidence from which we could reason, legally and logically, that he was undoubtedly wrong in coming to that conclusion. I, therefore, agree that the judgment must be affirmed.

Loew, J.—I have carefully perused the evidence in this case, and agree with my brethren that, for the reasons stated in the opinions delivered by them, the judgment should be affirmed.

Judgment affirmed.

WILLIAM C. LENNON *et al. against* THE MAYOR &c. OF N. Y.

The act of 1872 (L. 1872, c. 580, § 7), providing that certain assessments in the city of New York should not be vacated for any irregularity in publishing notices, &c., did not have the effect of confirming sales theretofore made, for non-payment of assessments which were invalid on account of such irregularities.

In the exercise of its powers in regard to taxation, it was competent for the Legislature to confirm such irregular assessments, and make them valid liens from the time of the passage of the act of 1872.

Where the statute (L. 1871, c. 381, § 4) makes the leases given in the sale of such lands presumptive evidence of the regularity of the sale and all proceedings prior thereto, such a lease, although in fact invalid for irregularity in the prior proceedings, is an apparent cloud on the title to the land which it purports to lease, and the owner of the land may maintain a suit in equity to set it aside, if already executed, or to enjoin the execution, if that is not already done.

APPEAL by both plaintiffs and defendants from a judgment of this court entered on an order made at special term on a demurrer to the complaint. The action was brought by William C. Lennon and W. G. Annan as executors and trustees of the estate of Stacey Pitcher, against the mayor, aldermen and commonalty of the city of New York.

The complaint alleged that an ordinance was adopted by the common council of the city of New York, on December 31st, 1864, directing proceedings to be taken by the corporation counsel, under the act of April 9th, 1813, and the subsequent acts, relative to opening and extending streets in said city, for the purpose of opening and extending Church street from Fulton to Morris streets. That the said ordinance was not published and advertised previously, according to the charter of 1857. That proceedings were taken under the ordinance to open and extend said street, and the work was done and assessments therefor were made and duly entered and confirmed, December 30th, 1867, and plaintiffs' property, among others, was so assessed. That on September 20th, 1871, said property was sold for non-payment of said assessment, pursuant to the act of April 8th, 1871, and that the clerk of arrears was about to execute and deliver leases to the purchasers under said sale.

The relief demanded by plaintiffs was an injunction restraining the corporation from taking any further proceedings to collect such assessment, and that the assessment be declared null and void and be canceled.

Defendant demurred to the complaint on the grounds, (1) That the court had no jurisdiction of the subject of the action; and (2) That the complaint did not state facts sufficient to constitute a cause of action. On the argument of the demurrer, the court, at special term (ROBINSON, J.), overruled it for the reasons stated in the following opinion, delivered by it in a precisely similar case in which Edward Mathews was plaintiff:

"The complaint establishes (the facts stated, with all legal inferences therefrom, being admitted by the demurrer) that the corporation and others, defendants, its officers, under and in pursuance of the act of April 9th, 1813, relating to the opening and extending of streets, and its amendments, and of the act of 1871 relating to the collection of taxes, assessments and Croton water rents, have assumed to extend Church street, from Fulton to Morris street, and to cause the property of the plaintiff to be assessed for the benefit of such extension; that such assessments have become apparent liens thereon, and in September, 1871, the defendants sold, or assumed to sell, the same, for such unpaid assessments, for a long term of years, and threaten to execute leases to the purchasers, against which a permanent injunction is asked by the complaint.

"Certain irregularities are alleged to have been committed by the corporation in matters required by law towards the initiating of such proceeding, to wit, that the original resolution of the board of aldermen authorizing such extension, after having been adopted by that board on the 27th day of December, 1864, was, on the same day, sent to the board of councilmen, and by that board adopted, and approved of by the mayor without its having been first published in all the newspapers employed by the corporation, for at least two days, as required by the charter of the city, passed in 1857 (L. 1857, c. 446, § 7), the omission of which was (*In re Douglass*, 46 N. Y. 42) held by the Court of Appeals to render the proceeding wholly void.

"The act of 1871 (L. 1871, c. 381), which went into effect prior to the assessment sale in question, by section 4 gave the lease, that was authorized to be executed in pursuance thereof, the effect of presumptive evidence that the sale, and all proceedings prior thereto, 'from and including the assessments on said lands and tenements (sold) for taxes or assessments or Croton water rents * * were regular and according to the provisions of the statute in such case made and provided.' The effect of such a lease would be to constitute such an apparent cloud on the title, requiring proof of extrinsic facts to dissipate and remove it, as calls for the intervention of a court of equity (*Scott* v. *Onderdonk*, 14 N. Y. 9; *Heywood* v. *The City of Buffalo*, Id. 534; *Ward* v. *Dewey*, 16 Id. 519; *Hatch* v. *City of Buffalo*, 38 Id. 276; *Allen* v. *Same*, 39 Id. 386; *Crooke* v. *Andrews*, 40 Id. 547).

"The Legislature has, however, by the act of 1872 (L. 1872, c. 580), entitled 'An act relating to certain local improvements in the city of New York,' attempted to remove objections arising from such defects in the proceedings imposing such assessments, and in section 7 enacts (so far as is material to this question) as follows: '§ 7. No assessment heretofore made or imposed, or which shall hereafter be made or imposed, for any local improvement or other public work in said city already completed, or now being made or performed, shall hereafter be vacated or set aside for, or by reason of, any omission to advertise or irregularity in advertising any ordinance, resolution, notice or other proceeding relating to or authorizing the improvement or work for which assessments shall have been made or imposed, * * except in cases in which fraud shall be shown, * * *and all assessments for any such improvement or other public work shall be valid and binding, notwithstanding any such omission, irregularity, defect in authority or technicality.*' This enactment attempts, by original action under the exercise of the legislative power of taxation, to make valid assessments that were wholly inoperative and void.

"The Legislature can ordinarily alter and change laws, without injury to existing interests, because they affect future

interests, and to construe them otherwise would be to concede to it judicial powers to pass judgment on their own acts, and give them, by legislative *dicta*, a retroactive effect (Smith's Com. on Con. 291–297; Potter's Dwarris on Statutes, 163, 167). While courts are jealous of any infringement by that body upon the constitutional rights of the citizen, or of any attempt to control or interfere with judicial powers, they still accord full recognition to such legislative enactments as are within the sphere of its power by way of *taxation.*

"The distribution of the expense of public improvements upon particular persons, localities or property, rests peculiarly within its province, and is not the subject of judicial control. The power to tax implies the power to apportion the tax in such manner as the Legislature may see fit, where there is no constitutional restraint (*People ex rel. Griffing* v. *The Mayor &c. of Brooklyn*, 4 N. Y. 419; *Guilford* v. *Supervisors of Chenango*, 13 Id. 143; *Brewster* v. *City of Syracuse* 19 Id. 116).

"In matters of a purely public character, it may, by subsequent legislation, cure any evils and defects arising from an irregular execution of powers previously conferred, but I doubt its power with respect to a tax or assessment laid on persons or property in a manner that is void from defects in the mode of its imposition, to do more than rehabilitate or re-establish it, as of the date when the confirmatory act goes into effect.

"Without so deciding, but, on the contrary, conceding that the act of 1872 cured the defects in the imposition of the assessment upon plaintiff's property, it gave no validity to sales that had been previously made under void assessments. Had it attempted to give effect to a sale (*in invitum*) of plaintiff's property to a purchaser that was void when made, it would have been in derogation of art. I, § 6 of the State Constitution, which provides that "no person shall be deprived of his property without due process of law."

"A mere legislative enactment is not due process of law, and cannot operate to divest rights of property which had been previously unaffected by any proceeding legally impairing

them, but proceedings imposing a valid tax or assessment, and providing for the future sale of the property assessed for non-payment is such (*Striker* v. *Kelly*, 7 Hill, 9; *People ex rel. Griffing* v. *The Mayor, &c. of Brooklyn*, 4 N. Y. 419).

"A demurrer, while admitting the facts stated in the pleading to which it is interposed, can only be sustained where no relief can be granted upon the case presented. Under that disclosed by the complaint, the sale of plaintiff's property under a void assessment divested him of no rights, and being void and unaided by the act of 1872, the intended execution of leases would, under the act of 1871, create a cloud on his title, which ought to be restrained by injunction. Relief to that extent is due to the case stated in the complaint, and this, without consideration of the constitutionality of the act of 1872, or to what further extent it may, if valid, operate in confirming the assessment.

"What further relief may be granted, will be more appropriately considered on future discussion upon application for judgment upon the present complaint, if no answer is interposed, or if it is, on the trial of the entire merits.

"The demurrer is overruled, and judgment given for plaintiff, unless defendants answer in twenty days, on the usual terms (payment of costs of the demurrer)."

Judgment was entered on the demurrer declaring the *sale* of the plaintiff's property invalid, and directing the clerk of arrears to enter a memorandum of the judgment vacating the sale on the record in his office, and the defendant and its officers, the comptroller and clerk of arrears were perpetually enjoined from executing or delivering any lease of the lands pursuant to the terms of the sale. The other relief as to the vacating the assessment and declaring it void, was denied. From the judgment both plaintiff and defendant appealed.

T. F. Neville, for plaintiff.

E. Delafield Smith, for defendant.

J. F. Daly, J. [after stating the facts of the case].—For the reasons stated in the opinion of the learned justice at special term who heard the cause, I am satisfied that this court has equitable cognizance of this action; also that the ordinance of the common council was invalid, on account of the failure to advertise it prior to its final passage, as required by the charter of 1857; that the assessment imposed upon the plaintiff's lots was invalid for that reason, and that the sale thereunder was unauthorized and void; but that the act of 1872 (L. 1872, c. 580, § 7) had the effect of making the assessment a valid one and a lien upon the property so assessed on and after the date of the passage of such act; yet that this confirmatory act could not make valid the *sale* which took place when no valid assessment existed. The assessment depending for its validity wholly upon the exercise of the supreme legislative power (the Constitution containing no restriction upon such power in respect of this particular subject), there was no authority for a sale until the act of 1872 (L. 1872, c. 580) was passed, because there was no valid imposition of the tax until that act went into operation, and no lien on plaintiff's property had been then created (see authorities cited in opinion at special term, 7 Hill, 9; 4 Comst. 419; also *Burch* v. *Newbury*, 10 N. Y. 374). The judgment restraining the execution of a lease and declaring the sale void was therefore proper. But there was no power to declare the assessment invalid, it having been made valid by the act above quoted, from and after the date of that act; and the relief as to that matter was properly refused.

The judgment should be affirmed.

Daly, Ch. J., and Loew, J., concurred.

Judgment affirmed.

AUSTIN G. DAY *against* HARRIET A. STONE, INDIVIDUALLY AND AS ADMINISTRATRIX OF ISRAEL STONE, DECEASED.

A complaint, seeking an accounting from the administratrix of the plaintiff's deceased agent, and asking for judgment for the amount found due plaintiff on the accounting, and to recover certain bonds, stocks, &c., and particular moneys taken possession of by the administratrix, states but one cause of action, and if the administratrix claims a personal interest in any of the property, she may be made a defendant in her individual capacity.

APPEAL by defendant from an order overruling a demurrer to the complaint for misjoinder of causes of action and of parties.

The facts are stated in the opinion.

J. F. DALY, J.—There is but one cause of action stated in the complaint; it is against the administratrix of the plaintiff's deceased agent, and it is brought to obtain an accounting, to obtain certain stock, books and papers, the property of plaintiff, to recover the amount found due plaintiff on the accounting, and the sum of $12,188 15, money of plaintiff, deposited by the deceased in his bank, and which with the above property and other moneys have been taken by the administratrix. She is made a defendant individually because she claims some interest in the subject-matter of the action—*i. e.*, claims to have acted individually in taking possession of certain of the property, and as this action is equitable in its nature, it is proper that her rights and claims should be settled in it. This complaint is less open to criticism than that in *Christy* v. *Libby* (5 Abb. Pr. [N. S.] 192), sustained by the general term of this court on appeal from an order overruling a demurrer to it. The particular point discussed on the argument in this case is not treated in the opinion of that general term, but one of the grounds of demurrer there was that two causes of action had been improperly joined—one against the defendant as collector for an accounting, and the other against him individually for neglect and mismanagement of the estate of which he was collector. The case at bar differs from *McMahon* v. *Allen* (1

Hilt. 103); *Warth* v. *Radde* (18 Abb. Pr. 396), and *Wiltsie* v. *Beardsley* (Hill & D. Supp. 386), because there are not two causes of action set forth in the complaint. Any bill in equity might be the subject of demurrer where several claimants to a fund are joined as defendants to obtain judicial determination of their rights, if the demurrer here could be maintained.

The order appealed from should be affirmed.

DALY, Ch. J. and LOEW, J., concurred.

The order should be affirmed.

RICHARD T. WILSON *et al. against* WILLIAM O'DAY AND HENRY D. OSTERMOOR, IMPLEADED WITH CYRUS OLMSTEAD.

In an action against several persons for conversion a statement made by one of them, which is not a part of the *res gestæ*, is not admissible as evidence against the others, unless *prima facie* evidence of a conspiracy between all of them has been introduced.

A warehouseman having changed his books so as to show that certain goods were received by him on a different day from that on which his books originally showed that they had been received: *Held*, that the possession by the party storing the goods of the warehouseman's receipts corresponding with the entries in the warehouseman's books as altered was no evidence that the party storing the goods was a party to, or knew of the alterations in the books.

APPEAL by defendants from a judgment of this court entered on the verdict of a jury, and also from an order denying a motion for a new trial.

The action was for the conversion of 164 bales of cotton.

Plaintiff had a verdict for $17,639 86, and a motion for a new trial was denied.

Defendants appealed to this court.

Beebe, Donohue & Cooke, for appellants.

Brown, Hall & Vanderpool, for respondents.

Robinson, J.—Plaintiffs, between December 17th, 1869, and January 31st, 1870, had on store with the defendant Olmstead, a warehouseman, in his warehouses No. 500 to 510 Washington street, in the city of New York, a quantity of cotton amounting to upwards of 900 bales, which was to a considerable extent injured by a fire that occurred January 1st, 1870. They claim in this action that just prior to such fire, the defendants had converted to their own use some 164 bales of this cotton. To maintain such charge, they called as witnesses on their behalf the several defendants, who however severally asserted that the transactions brought in question, relating to two several parcels of cotton sold by O'Day to Ostermoor, to wit, 111 bales on the 15th and 16th of January, 1870, and 53 bales delivered the day before the fire, as evidenced by certain verified bills of O'Day and checks of Ostermoor given in payment, were *bona fide*, and related to other cotton than any belonging to plaintiffs. Plaintiffs' cotton had its distinctive marks upon the bagging on each bale, and none of the 164 bales of cotton with which defendants are seriously sought to be charged, has been attempted to be identified with any of the bales of cotton that belonged to plaintiffs, from any similarity of marks upon the bale, or any other recognizable mark of distinction, except as to one bale said to have been found at a warehouse, No. 40 West street, and to have been there examined and identified, and it is upon claim to such identification alone that the charge of conversion of the whole 164 bales is based. Of the 101 bales of cotton sold by O'Day to Ostermoor, on the 15th and 16th of January, a city weigher, named Diegan, who weighed it for Ostermoor, testifies 73 were marked "O. D." or "W. O. D.," and those were the only two marks upon them "except what was marked by Leveridge's (a purchaser of a portion of this lot) receiver or sampler, which was 'Tom' and 'Cat,' according to the grades." O'Day, it is shown, had been a large purchaser of cotton which was marked "O. D." or W. O. D.," that being his distinctive marks. After the fire, and about the 25th of March, the weigher Diegan, in company with the fire marshal, went to the warehouse No. 40 West street, where Leveridge had stored the

cotton he had bought (part of the 111 bales), to examine a bale of cotton there. He was asked: "*Q.* Was it in the 111 lot? *A.* I thought it was as near as I could judge; there was part of the marks cut off; I thought it was my weight, and I find it compared with the weight that was in my book; I thought as near as possible it was one of those bales." On cross-examination he was asked: "*Q.* What did you see on the bale? *A.* That is there in my deposition (not read). *Q.* Can you remember anything independent of that? *A.* No; without it was either 'Tom' or 'Cat.' *Q.* Any other mark upon it? *A.* That I don't remember; there was nothing peculiar about the bale, the bale itself. *Q.* Did you observe anything peculiar about the quality of the cotton? *A.* I don't know the grade of cotton at all. *Q.* You don't identify it by anything but 'Tom' or Cat?' *A.* I will not swear 'Tom' or 'Cat' was on that bale at all, because neither was on it, there were only parts of either one. *Q.* Can you tell what parts? *A.* I can't tell; it was the first or last letter of either. There was only one letter of the three. It was either the first or last letter. That would be C, T or M. I don't remember which of these letters. It was a capital letter such as samplers put on bales. * * I don't remember I saw 'O. D.' or 'W. O. D.'" *Redirect.* "What were the marks you say you thought were your weigh marks? *A.* Figures; we always put the weight on bales. All weighers generally do. I don't remember what the figures were." This establishes no identity between the bale of cotton thus described and that testified to by the plaintiff Johnson, which he saw at No. 40 West street. He was asked "What marks did you see on the bale at 40 West street? *A.* I saw 'R. B. C., O. D. X.' in a circle, and there was a number on it, but I am not positive what it was. I had an idea of what it was, but am not positive. I think it was 185."

This in no respect identifies any such bale as that referred to by Diegan, nor with any cotton of plaintiffs described in their warehouse receipts for cotton stored with Olmstead, nor with the marks on the five bales shipped to them from Georgia by W. C. Lanier, marked "J. H. C.," and numbered 181 to 185. Mr. Holstein, however, testifies he identified a bale of cotton

he examined, in company with Mr. Johnson, as one of five he had marked at West Point, Georgia, for C. W. Winter, by the (X) and the number 185 he had put on it. Mr. Lanier testifies his firm bought from C. W. Winter, and early in the winter shipped to plaintiffs, five bales marked "(X) J. H. C.," and numbered 181 to 185 inclusive. No bale so marked "(X)" or "185" is indicated on the warehouse receipts held by plaintiffs. A porter from the store 40 West street, called by plaintiffs, testifies that all the cotton received from Leveridge & Co. was marked "Tom" and "Cat." John Connor, a witness originally called by plaintiffs, and the only witness that examined all this cotton, swore positively "there was *no other* mark on the cotton Ostermoor bought of O'Day except 'O. D.' or 'W. O. D.'" The slender thread upon which rests the attempted identification of this single bale of cotton examined by Holstein through his marks (X) 185, is so broken and disjointed, that it furnishes no connected link to charge the defendants O'Day and Ostermoor, and particularly the latter, with having ever had anything to do with it. That connecting link, if it existed, fails, from any such knowledge or recollection of Diegan, as identifies the bale examined by Holstein with any he weighed for Ostermoor. To found a claim of such a magnitude, and so serious in its imputations upon the credibility and character of all the defendants, and nearly all the witnesses having any knowledge of the transaction, upon testimony so uncertain as the *thoughts* of so uncertain and forgetful a witness as Diegan, or upon mere presumptions, as against the POSITIVE statements of witnesses called by the plaintiffs, and presented by them as credible, seems most unreasonable. In my opinion, there was lacking any legal evidence upon which defendants could be charged with any or (if at all), with more than one bale of cotton. Giving full effect to the claim that the bale examined by Holstein did belong to plaintiffs, it in no way justified the recovery that has been had for the other 163 bales, not one of which is pretended to have been identified as plaintiffs' property. But other errors occurred on the trial, which require a reversal of the judgment: 1st. The action being one for conversion against all the defendants, and without any pretense

that any conspiracy had been established or any circumstances adduced in evidence giving color to such a charge, plaintiffs were allowed to give evidence of an admission by the defendant Olmstead, against the objection of his codefendants, which virtually disposed of the whole case, since from it might be deduced every fact tending to charge his codefendants with the property in dispute; it was to the effect that he was receiving no goods on store from any one but the plaintiffs, and established, *prima facie*, that the goods in question, of which the defendants O'Day and Ostermoor had subsequently come into possession, belonged to plaintiffs. The objection was made, on the part of O'Day and Ostermoor, that it was hearsay and irrelevant, and as not affecting those defendants, but on the assurance of plaintiffs' counsel that he would introduce further evidence connecting O'Day and Ostermoor with it, and making it competent against all the defendants, the court overruled the objection, and the counsel for those defendants excepted. The testimony objected to was then given; and in allowing it at that stage of the proofs, the court erred. This admission was at most a mere statement or narrative of past occurrences, and was not made during the pendency of the alleged fraudulent transactions, and with a view to further their objects. It was an admission, operating against these defendants, of the statement made by an alleged coconspirator, without the conspiracy having been previously established by any *prima facie* evidence. The matter admitted constituted no part of the *res gestæ*, but was of a past fact, and made to an entire stranger to the transaction. The objection, under these circumstances, was well taken (1 Greenl. Ev. § 111; 3 Id. § 92; *Cuyler* v. *McCartney*, 33 Barb. 165; s. c. 40 N. Y. 221; *Peck* v. *Yorks*, 47 Barb. 131; *Bennett* v. *McGuire*, 58 Barb. 637). Olmstead was a competent witness to prove any such fact; he was called on behalf of the plaintiffs, and examined to such matters as they chose to elicit from him. His oath, and not his admissions, should alone have been resorted to.

2d. After the complaint had been dismissed, as against the defendant Olmstead, for want of evidence of any cause of action against him, and a like motion on behalf of the others had been denied, he was called as a witness on the part of the

plaintiffs, and produced his ledger. It showed entries of receipts on storage of cotton from O'Day, of upwards of 200 bales in the fall of 1868, and of 219 in the fall of 1869, and he then stated it had been posted from *the order book* and contained a true statement of the cotton of O'Day, that was in the storehouse in the beginning of January, 1870. The counsel for defendants O'Day and Ostermoor then produced warehouse receipts signed by Olmstead, and acknowledging the receipt of 219 bales of cotton in November and December, 1869, at dates and in amounts corresponding with the entries in the ledger. Plaintiffs then offered, and were permitted, against the objection and exception of defendants, to prove that such account in the ledger had been altered since its examination after the fire, by substituting *November* for "January" and *December* for "February," and instead of an entry under date of December 30, 1869, that when examined it was "March 3," 1870. Although the plaintiffs introduced the ledger in evidence, when it was appealed to by the defendants, to verify their warehouse receipts, it was legitimate for them at least to destroy any prestige or weight of credit the receipts derived from that source by showing they did not correspond originally, but only through the recent alteration of the book. But in showing this absence of original conformity and the alterations made by some one in the ledger account, the circumstance (although betokening some irregularity and a possible fraudulent intent on the part of the person making the alteration) did not justify the conclusion to which the judge arrived as to its legal effect and bearing. It must be borne in mind that the entire integrity of the transaction in which these defendants were concerned, the regular deposit by O'Day of the cotton in Olmstead's warehouse, its sale and delivery in good faith to Ostermoor, and his payment of the full price had been proved by the various persons the plaintiffs had themselves called as witnesses, and the entire lack of identification of any of the cotton, except possibly as to one bale, the utmost shown by such alteration was only ground of mere vague suspicion of any fraud on the part of Olmstead and O'Day. The order book from which this ledger had been posted was not produced, and these

defendants were not shown to have been in any respect parties to this alteration, and yet the judge charged the jury that "if any fraud was committed by Olmstead, by the alteration of these books, that fraud is brought home to O'Day by the production of the warehouse receipts." No such legal consequences could naturally result or be deduced from O'Day's possession of the original warehouse receipts, nor any legal conclusion that the fraud, if any, of Olmstead was brought home to O'Day, because as altered, the entries correspond with the receipts. The alteration may have been accounted for in many ways without O'Day having any connection with it. It was at most a mere item of evidence tending to confirm other proof of fraud. It may have been a mere correction made by Olmstead from his order book, or if he was guilty of any fraud (but of what possible it is difficult to conceive, unless he had substituted plaintiffs' cotton for O'Day's), his guilt in no way became *necessarily* imputable to O'Day. For the error in the denial of a motion for a new trial, for want of any evidence that could legally charge these defendants with the 164 bales of cotton claimed, as well as in the erroneous rulings by the learned judge on the trial above referred to, the order denying a new trial and the judgment should be reversed, and a new trial ordered, with costs to abide the event.

LARREMORE, J., concurred.

Ordered accordingly.

JAMES BATHGATE, AS ADMINISTRATOR, *et al. against* JOHN B. HASKIN *et al.*

The statute of limitations commences to run against an attorney's claim for services as soon as he has performed the immediate service for which he is retained.

An attorney was employed in 1852 to defend an action, which shortly thereafter was abandoned by both sides, and nothing was done in it until 1862, when, without any instructions from his client, he caused the suit to be dismissed for want of prosecution. *Held*, that the attorney's claim for compensation accrued when the suit was abandoned in 1852, and that the statute of limitations began to run against it from that time.

In computing the amount due on a bond and mortgage, the accrued interest cannot be added to the principal due at the time of a payment not equal to the interest, and the whole balance remaining after deducting such payment used as the principal on which to compute the future interest.

APPEAL by defendants from a judgment of foreclosure and sale, entered on the decision of a judge of this court after a trial at special term.

The action was brought to foreclose a mortgage on real estate made by the defendant John B. Haskin, to secure payment of a bond for $2,500, made by Haskin and Wm. H. Wilkins, and on which a balance was alleged to be due.

The defense was that this balance had been paid partly in money and partly in legal services rendered to the plaintiffs by the defendant Haskin, under an agreement that the amount due Haskin for such services should be so credited.

On the trial the facts appeared as stated in the opinion, and the court refused to allow any of the defenses or offsets contained in the answer.

The plaintiffs had judgment of foreclosure and sale, and the defendants appealed.

Abel Crook, for appellants.

Van Voorhis & Stephens, for respondents.

J. F. Daly, J.—I. The defendant's claim of a credit of $305, as a payment on account of the bond and mortgage, is supported by the testimony of defendant Haskin alone, to which is opposed the unequivocal denial of the plaintiff Charles Bathgate. The defense of payment being an affirmative one, the burden was on defendant to prove it, and there being no preponderance of proof in his favor, the judge was right in disallowing that sum as a credit.

II. The defendant's claim for professional services in respect of the Westchester lands was properly disallowed, such services having been rendered prior to the year 1853, and the claim having accrued more than thirteen years prior to the commencement of this action.

III. For the same reason the defendant's claims for legal services in the litigations were properly disallowed. The statute of limitations commences to run against an attorney's claim for services from the time he could have commenced an action upon it (*Adams* v. *Fort Plain Bank*, 23 How. Pr. R. 62; s. c. 36 N. Y. 255, 264). The services here were rendered prior to 1853, the last service being the argument of the motion to change the place of trial of the suit commenced by the New York and New Haven R. R. Co. against the Bathgates. Mr. Haskin then advised Mr. Bathgate that he had better drop the suit, as it would cost him more to litigate that case with that company in years than the money he would get. Mr. Bathgate thought well of the advice, and never heard any more of it. This was about the time the motion to change the venue was going on, and when Bathgate wished to commence an action against the company, and the conversation related as well to the suit pending as to the suit proposed. After that Mr. Bathgate heard no more of the action. But ten years afterwards, in the year 1862, Mr. Haskin, without consulting his clients, and without any further authority, made a motion to dismiss the action for want of prosecution. He claims continuing authority in the original retainer, and urges that the service rendered in making that motion takes the claim out of the statute. But if he had no authority to make it, it did not. The consent of the client to "drop" the litigation, upon the

suggestion of the attorney, in view of the expense of further litigation, expressly negatives any assumption of continuing authority to move in the matter. For what professional services he had rendered up to that time the attorney could have sued, for he had the right to immediate compensation, and his client could not urge that any further services remained to be performed in his behalf. After that conversation it required further authority from the client to involve him in further expense in the action. No subsequent authority is pretended. It is urged by defendant that the expression "dropping" the suit could not apply to that in which the railroad company was plaintiff and the Bathgates defendants, because defendants cannot abandon an action brought against them. It is shown by the proof that it did apply to that action, and its meaning was plainly this, that the defendants would take no further steps in it, if the plaintiffs did nothing. What authority was there, then, for the attorney of defendants ten years afterwards to bring the cause before the court, even on a motion to dismiss for want of prosecution? Such a step was, in fact, in contravention of the clients' instructions, implied in their consent to drop it on the attorney's suggestion. But let us suppose that, just before making the motion to dismiss in 1862, Mr. Haskin had commenced suit for these services rendered ten years before? There would then have been nothing to take them out of the statute. The making the motion afterwards could not revive them.

IV. There is no ground for the claim that the accounts of defendant Haskin for these legal services were to run against his debt to the plaintiffs on the bond and mortgage. There is no proof whatever that the services were rendered on account of that debt. Payments of interest on the bond were made during the rendition of those services, and long after. There was no arrangement to offset the claims, or to credit the services on the mortgage debt. Even if the conversation in folios 145 and 146 amounted to that, it took place eight or nine years after the services were rendered and the claim for them accrued, and was insufficient to take them out of the statute.

V. The claim by defendant of a credit of $175, as of Feb-

ruary 24th, 1860, appears to have been allowed by the court as of July 25th, 1860.

VI. The amount found due to plaintiffs by the court, at special term, is $4,565 69. This has been reduced by stipulation, pursuant to an order of the court, at special term, made on a motion for a new trial, to $4,232 55.

A still further reduction must be made, owing to error in computing the interest, the balance of interest to September 25th, 1865, having been taken to augment the principal on which interest was afterwards calculated. This is contrary to the authorities (7 Barb. 452; 9 Paige, 461; 3 Cow. 86; 6 Johns. Ch. 313). If plaintiff stipulate to allow the amount of the error, $266 76, the judgment will be affirmed, and the amount due plaintiffs at date of decree, found at $3,965 79. If the stipulation be not made, the judgment will have to be reversed for that error.

Daly, Ch. J., and Loew, J., concurred.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK *against* PETER J. HICKEY AND ANOTHER.

SAME *against* DAVID O'BRIEN AND ANOTHER.

SAME *against* THOMAS C. FIELDS AND OTHERS.

SAME *against* MONAGHAN AND ANOTHER.

SAME *against* MILLER AND ANOTHER.

SAME *against* WILLIAM J. FLORENCE AND ANOTHER.

SAME *against* MICHAEL J. QUIGG AND ANOTHER.

In the city and county of New York judgment against the surety on a recognizance to appear for trial under a criminal indictment, may be entered by filing with the county clerk the recognizance, and a copy of the order of the court forfeiting it.

Such a judgment is one entered on "due process of law," and is not an infringement on the constitutional right of trial by jury, under the Constitution of the United States or of this State.

The act of 1855 (L. 1855, c. 202) did not change the method of proceeding in such cases in the city and county of New York, but only gave to the people a remedy on the recognizance by action of debt in addition.

The act of 1861 (L. 1861, c. 333), in regard to entering judgment on forfeited recognizances, is not a private or local act, and it is, therefore, not requisite that its subject should be expressed in the title.

A clause added to the recognizance, by which the principal and surety consent that judgment may be entered against them by filing with the county clerk the recognizance, and a copy of the order of the court forfeiting it, is mere surplusage, and has no effect on the validity of the recognizance.

APPEALS from orders of this court denying motions to vacate judgments in the above-entitled actions.

The judgments had been entered on forfeited recognizances, and the judgment rolls in all the cases were substantially as

follows: (The consent to the entry of judgment annexed to the recognizance was contained, however, in only two of the rolls).

(*Recognizance.*)

"STATE OF NEW YORK,
City and County of New York, } ss.:

Be it remembered, that on the twenty-fifth day of June, in the year of our Lord 1873, John J. Walsh, principal, of No. 324 Fifth street, in the city of New York, and Peter J. Hickey, surety, of No. 167 East 33d street, in said city, personally came before the undersigned, justice of the Supreme Court of the State of New York, and acknowledged themselves to owe to the people of the State of New York, that is to say, the said John J. Walsh, principal, in the sum of one thousand dollars, and the said Peter J. Hickey, surety, in the sum of one thousand dollars, separately, of good and lawful money of the United States of America, to be levied and made of their respective goods and chattels, lands, and tenements, to the use of said people, if default shall be made in the condition following, viz.:

Whereas, the said John J. Walsh was, on the sixteenth day of June, 1873, duly indicted in the Court of Oyer and Terminer in and for the city and county of New York, for the offense of conspiracy:

Now, therefore, the condition of this recognizance is such, that if the above-named John J. Walsh, principal, shall personally appear at the present term of the Court of Oyer and Terminer, held in and for said city and county of New York, to answer to said indictment against him, and abide the order of the said court thereon, and also, in like manner, personally appear at any subsequent term of said court, to which the proceedings in the premises may be continued, or to any court where said indictment may be sent for trial, if not previously surrendered or discharged, and so from term to term until the final decree, sentence, or order of the court thereon, and abide such final sentence, order, or decree of the court thereon, and

not depart without leave, then this recognizance to be void, otherwise to be and abide in full force, power, and virtue.

JOHN J. WALSH,
Principal.
PETER J. HICKEY,
Surety.

Taken and acknowledged before me, the day and year first aforesaid.

NOAH DAVIS,
J. S. C.

And we, the undersigned, principal and surety in the annexed recognizance, do hereby stipulate, agree, and consent, that in case said recognizance shall be forfeited, that a copy of the order of the court forfeiting the same, together with this recognizance, be filed in the office of the clerk of the city and county of New York, and that judgment may be entered for the several sums set forth in said recognizance, and that execution issue forthwith thereon according to law.

Witness,
CHAS. E. MARSAC.

JOHN J. WALSH,
Principal.
PETER J. HICKEY,
Surety.

Endorsed.

Filed 25th day of June, 1873.

Bond approved as to form and sufficiency.

HENRY C. ALLEN,
For Dist. Attorney.

(*Order of forfeiture*).

At a Court of Oyer and Terminer, holden in and for the city and county of New York, at the City Hall of the said city, on Monday, the 22d day of December, in the year of our Lord one thousand eight hundred and seventy-three.

The People of the State of New York v. Hickey.

Present—The Honorable CHARLES DANIELS,
Justice of the Supreme Court of the State of New York.
Justice of the Oyer and Terminer.

THE PEOPLE OF THE STATE OF NEW YORK
vs.
JOHN J. WALSH.

On Indictment for Conspiracy.

The defendant not appearing, and Peter J. Hickey, his surety, not bringing him forth to answer to this indictment, pursuant to the condition of their recognizance, on motion of the district attorney, it is ordered by the court that the said recognizance be and the same is hereby forfeited. And it is further ordered that the said recognizance, together with a certified copy of this order, be filed in the office of the clerk of the city and county of New York, and that judgment be entered thereon, according to law, against the said John J. Walsh, the defendant above named, and the said Peter J. Hickey, his surety, for the several sums set forth in the said recognizance.

A true extract from the minutes."

J. SPARKS, *Clerk.*

Endorsed.

Filed 24th day of December, 1873.

Two hours and thirty minutes."

An application was made to the court at special term to set aside these judgments, on the ground that they were void. The motion was denied, and this appeal was taken.

John C. Shaw, for appellants.

I. These judgments are judgments of the Court of Common Pleas, and this court has ample power and authority to set them aside (L. 1844, c. 315, § 8; L. 1845, c. 229; L. 1854, c. 198; *People* v. *Gildersleeve*, 10 Barb. 44; *People* v. *Lott*, 21 Id. 130; *People* v. *Petry*, 2 Hilt. 523; see also History and Jurisdiction of the Court of Common Pleas, by Chief Justice

Daly, 1 E. D. Smith's R.) II. The provisions of the Laws of 1844 are repealed by implication by sec. 29, art. 2, title 6, chap. 8, part 3, of the Revised Statutes (Edm. ed. p. 507, vol. 2), which provides as follows: "Whenever any recognizance to the people of this State shall be forfeited, the district attorney of the county in which such recognizance was taken shall prosecute the same by action of debt for the penalty thereof, and the proceedings and pleadings therein shall be the same in all respects as in personal actions for the recovery of any debt." III. Section 471 of the code declares that the code shall not apply to the foregoing section of the Revised Statutes as to forfeited recognizances, but by L. 1855, c. 202, p. 305, it is enacted as follows: Sec. 1. That all the provisions of the code are to apply to all recognizances forfeited in any Court of General Sessions and of Oyer and Terminer. Sec. 2. All laws or parts of laws or provisions of statutes in anywise conflicting with such application of the provisions of the code to said forfeited recognizances, are repealed. IV. The second section of this act clearly repeals the act of 1844 by its very terms, and the judgment entered herein is absolutely void, except it is saved by the act of 1861 (L. 1861, c. 333). V. The act of April 25, 1861, declaring section 8 of the act of 1844 to be in force, is equivalent to a re-enactment of that act as of April 25, 1861. Section 8 of the act of 1844 is clearly unconstitutional; it is in violation of sec. 16 of art. 3 of the Constitution, which declares that "no private or local bill shall embrace more than one subject, and that shall be expressed in the title." The act of 1844 is clearly a local act in all its parts, and also clearly embraces more than one subject. The title of the act does not indicate any intent to provide for the entry of judgments on forfeited recognizances (*Huber* v. *People*, 44 How. Pr. 375). VI. The act of 1861 is also clearly unconstitutional, as being in violation of the same section (*People* v. *Supervisors of Chautauqua Co.* 43 N. Y. 10, 13, 22, 23; *Glaskin* v. *Meek*, 42 N. Y. 196). VII. The act is in contravention of the fifteenth amendment of the Constitution of the United States, which provides, "nor shall any State deprive any person of life, liberty, or property, without due process of law" (Amendments to United States Constitution,

adopted June 16, 1866, art. 14, § 1). (*a*) The original article (art. 5) of the Amendments formerly read exactly as our present State Constitution does, and it was accordingly held that this was only a limitation upon laws of the United States, but the amendment now limits the States, irrespective of their own State Constitutions. (*b*) What then is due process of law? Due process of law means, in short, trial by jury (*Deer* v. *Hoboken*, 18 How. 272; *Matter of Jones*, 30 Id. 446; *Taylor* v. *Porter*, 4 Hill, 140; *People* v. *Haws*, 37 Barb. 440; *Van Horne* v. *Dorrance*, 2 Dall. 304; *Embury* v. *Connor*, 3 N. Y. 511; *Wynhamer* v. *People*, 13 N. Y. 378). So far as the United States Constitution is concerned, it contains its own interpretation of due process of law. (1) In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved (art. 7, of the amendments). (2) The common law alluded to is the common law of England (*United States* v. *Wenson*, 1 Dall. 20). (3) The term "suits at common law includes all legal proceedings, whatever may be the peculiar form they assume or object they have in view, which are not of equity or admiralty jurisdiction" (*Parsons* v. *Bedford*, 3 Pet. 434; *La Vengeance*, 3 Dall. 297; *Webster* v. *Reed*, 11 How. [U. S.] 437). (*c*) All the cases in this State which appear to hold that due process at law does not necessarily import a jury trial were all decided under the peculiar phraseology of sec. 2, art. 1, of the State Constitution, "that trial by jury in all cases in which it has heretofore been used, shall remain inviolate forever," which has been held to modify the meaning of "due process of law in particular cases." However correctly these cases may be decided, they do not apply to the United States Constitution, and "due process of law," in that Constitution, is not so limited by any such phraseology in that instrument, and the Fifteenth Amendment operates upon the States themselves. The case of 10 Barb. p. 35, cited by the district attorney, places the constitutionality of the act of 1844 under the peculiar phraseology of art. 1, sec. 2, above quoted, and the act, as we have seen, was not, at the time of that decision, in contravention of the same provision in the United States Constitu-

tion, as that was limited to laws of the United States, but the present article covers laws of the States. VIII. The recognizances are void because they were not taken in the manner provided by law. They require the accused to appear at the *present* instead of the next term of the court (*People* v. *Mack*, 1 Park. Cr. Rep. 567). (*a*) In the recognizances executed by Hickey, the offense for which the prisoner was indicted is declared to be conspiracy, and all the orders forfeiting the recognizances declare the crime to be conspiracy. This was only a misdemeanor by statute (2 R. S. p. 714, § 7, Edmund's ed.), the punishment for which is imprisonment in a county jail not exceeding one year (2 R. S. p. 719, § 40). (*b*) When the offense is not punishable by death or imprisonment in a State prison, the recognizance *must be* taken for the appearance of the accused at the *next* court having cognizance of the offense, to be held in the county where the offense is alleged to have been committed (2 R. S. p. 731, § 8). (*c*) Witnesses can only be recognized to appear at the *next* term of the court as well as the prisoner. It would be absurd to require the witnesses to appear at one term and the prisoner at another (2 R. S. p. 732, § 21). IX. The recognizances are also void as being taken *colore officii*. (*a*) Annexed to each of the recognizances in the *Walsh & O'Brien* case, there is what purports to be a consent that judgment might be entered on the same (if forfeited) in the manner provided by § 8 of the act of 1844 (*supra*). If this forms any part of the recognizance, the whole is void. (*b*) The Revised Statutes (2 R. S. p. 296, § 59) expressly provides "that no sheriff or other officer shall take any bond, obligation, or security, by virtue of his office, in any other case or manner than such as are provided by law. *Any such bond, obligation or security, taken otherwise than as herein directed, shall be void.*" (*c*) The district attorney had no more right to exact from the accused this stipulation as a condition of accepting the recognizances, or as part of the same, than he had to exact that a judgment should be then and there entered for the amount of the bonds. All he could lawfully do was to take such a recognizance as the law directed; and if anything else was done, the law presumes it was done under *duress*, and

this renders the recognizance void as to the surety as well as the principal (*People* v. *Mack*, 1 Park. Cr. Rep. 567). X. The recognizances are also void because they were not filed immediately with the clerk of the county in which the indictments were found, as required by law (2 R. S. p. 753, § 58).

It sufficiently appears from the affidavits of the sureties and the orders of forfeiture, that the recognizances were not filed until the entry of judgment.

Benjamin K. Phelps, District Attorney, for the people, respondents.

In determining the regularity of the mode in which these judgments were entered, it will be of service to look at the practice in the matter of recognizances as it has prevailed from time to time in this State, and the course of legislation upon the subject. Under the laws of 1813 (1 R. L. of 1813, p. 400), the clerks of the various courts of record delivered to the Court of Exchequer, presided over by one of the puisne judges of the Supreme Court, on the first day of October term in each year, an account and estreat of all recognizances forfeited prior to the month of September in that year, and the Court of Exchequer *issued execution, founded on the return*, against the body, lands, etc., of the defendant. Thus upon the mere filing of the account of the recognizance in the Court of Exchequer, it became a judgment of that court, upon which execution issued, subject to the power of that court, in its discretion for good cause, to remit it. The Revised Statutes in 1830 altered this practice (2 R. S. 362, § 21, 2 Edm. ed. 374), and declared a recognizance to be only an evidence of debt, and that when forfeited it should be prosecuted for the people by the district attorney in an action of debt, and that when it was to be estreated, the estreat should be made by the entry of an order directing it to be prosecuted (2 R. S. 485, §§ 29, 30, 31). The power to remit the forfeiture, or discharge it upon terms, was given, with certain restrictions, to the Court of Common Pleas of the county in which the recognizance was taken (Id. 486, §§ 37, 38, 2 Edm. ed. 485). By an act of May 6, 1839 (4 Edm. Stat.

652), these provisions were especially made applicable to the courts of the city and county of New York, and apparently in order to prevent the district attorney prosecuting worthless recognizances for the sake of his costs, it was provided that he need not prosecute, unless by express order of the General Sessions or the Oyer and Terminer, and that he should not have costs except in suits prosecuted pursuant to such order. The law remained thus until 1844, when a new police system was formed for this city. It had then been found that the method of prosecution by action of debt entailed upon the people in this already great community, heavy burdens in the way of costs incurred in actions in which nothing was collected from the defendants, notwithstanding the restrictions of the act of 1839. To obviate this, the *old* method of summary judgments was restored, so far as related to recognizances taken in criminal cases in this city. The act of 1844 (L. 1844, c. 315, art. 4, § 8), "An act for the establishment and regulation of the police of the city of New York," provides: "All cognizances given to answer a charge preferred, or for good behavior, or to appear and testify in all cases cognizable before courts of criminal jurisdiction, on being forfeited, shall be filed by the district attorney, together with a certified copy of the order of the court forfeiting the same, in the office of the clerk of the said city and county, and thereupon the said clerk shall docket the same in the book kept by him for docketing of judgments, transcripts whereof are filed with him as such clerk, as if the same was a transcript of a judgment record for the amount of the penalty; and the recognizance and the certified copy of the order forfeiting the recognizance shall be the judgment record; such judgment shall in good faith be a lien on the real estate of the persons entering into such recognizance, from the time of filing said recognizance and copy order, and docketing the same as in this section directed; an execution may be issued to collect the amount of said recognizance, in the same form as upon a judgment recovered in the Court of Common Pleas of said city and county in an action of debt, in favor of the people against the persons entering into such cognizance." At the next session of the Legislature (L. 1845, p. 250), it was enacted that these

judgments should be subject to the jurisdiction and control of the Court of Common Pleas for the city and county of New York, in the same manner as if such judgments had been actually docketed in that court. The Code of Procedure did not affect the methods of enforcing recognizances, being excluded from applying thereto by the terms of section 471. In 1855, all the provisions of the Code of Procedure were made to apply to all recognizances forfeited in any Court of General Sessions, or of Oyer and Terminer, in any of the counties in this State, and the second section of the act declared that "all laws or parts of laws or provisions of statutes in any wise conflicting with such applications of the provisions of the Code of Procedure to the said forfeited recognizances are hereby repealed" (L. 1855, c. 202, 4 Edm. Stat. 599). In 1861, the Legislature passed an act entitled "An act in relation to fines, recognizances, and forfeitures" (L. 1861, c. 333, 4 Edm. Stat. 653). The first section of this act provides that no fine imposed by any court for a criminal offense shall be remitted, except in compliance with certain conditions therein prescribed. The second section provides that all recognizances shall be filed in the office of the court at which the party is recognized to appear, within ten days after the same is taken. The third section declares, as follows: "The eighth section of the fourth article of an act entitled 'An act for the establishment and regulation of the police of the city of New York,' passed May seventh, eighteen hundred and forty-five, is hereby declared to be in force, and shall be applicable to the city and county of New York." The uninterrupted practice ever since that day has been precisely what it is in the cases at bar, and in strict accordance with the provisions of the law of 1844.

Robinson, J.—These are appeals from orders denying motions to vacate judgments entered upon forfeited recognizances in criminal cases, in pursuance of the provisions of L. 1844, c. 315, § 8, such judgments being made by L. 1845, c. 229, the subjects of the jurisdiction and control of this court, in the same manner as if actually docketed therein. This complete supervision of such judgments has been affirmed by the Supreme

Court, when an appellate court, in *The People* v. *Gildersleeve* (10 Barb. 44), and since in *The People* v. *Lott* (21 Barb. 130), and has since been constantly exercised.

Such a recognizance is an instrument peculiar to the common law, and is given as security for the appearance of persons charged with crimes. It consists of an acknowledgment of debt to the people in a sum fixed for bail, and is intended to be made a matter of record, whereon, when duly filed and enrolled, judgment and execution may be had (*People* v. *Kane*, 4 Den. 535, and cases cited; *The People* v. *Gildersleeve*, and *Same* v. *Lott*, *supra*).

Although of such high character, it partook of the nature of a bond and warrant of attorney in civil cases, and being the act of the party executing it, giving authority for such entry of final judgment thereon, it constituted due process of law, and infringed upon no right of trial by jury, which (as might be done in civil cases) was waived (*Murray's Lessees* v. *Hoboken Land and Imp. Co.* 18 How. [U. S.] 272; Const. 1846, art. 1, § 2; *Embury* v. *Connor*, 3 N. Y. 511: 2 Abb. Dig. [U. S.] 108, § 29, and cases cited). Previous to 1818, such proceeding was had in a court styled a Court of Exchequer (1 R. L. [1813] 400), whose powers were by act of 1818 (L. 1818, c. 283, § 8) transferred to the Court of Common Pleas of the several counties.

By the Revised Statutes (2 R. S. 362, § 21) such instruments were, as to the other counties, deposed from their high prerogative, as conferred by the common law, and made mere instruments of evidence of debt, to be prosecuted by the district attorney (2 R. S. 480, §§ 1, 29, 31); but this county was excepted from such general legislation, and the proceedings for the collection of fines and recognizances then in force were continued (2 R. S. 487, § 43). This was by *scire facias* for obtaining execution on the judgment, or an action of debt upon the recognizance.

By the subsequent act of 1839 (L. 1839, c. 343), the proceeding by action in debt, under the provisions of the Revised Statutes, was made applicable to this county, except that the district attorney was only to be entitled to costs when prosecuting by order of the court (L. 1839, c. 343, p. 317). The act of 1844

(L. 1844, c. 315, § 8), however, restored the proceedings on forfeited recognizances in this county to their common law office, with the right of entry of judgment thereon upon filing such recognizance with the clerk of the city and county of New York, with a certified copy of the order for its estreat, and also of execution, without *scire facias*, against the real and personal property of the persons entering into such cognizance (L. 1844, c. 315, p. 476). No alteration in the mode of giving effect to such instrument is claimed to have occurred until the amendment to section 471 of the Code of Procedure (which previously had wholly excepted proceedings on recognizances from its operation) by chapter 202 of the Laws of 1855 (L. 1855, p. 305), by which it was enacted as follows: "§ 1. All the provisions of the Code of Procedure are hereby applied to all recognizances forfeited in any Court of General Sessions of the Peace of Oyer and Terminer in any of the counties of this State." By section 2 all laws or parts of laws conflicting with such application of the provisions of the Code of Procedure to such forfeited recognizances were repealed; and by section 3 it was provided that in no case should any fees or costs upon proceedings upon forfeited recognizances be chargeable upon this city or county by the officer prosecuting the same. A review of these several provisions of law does not relieve from doubt the question, whether the summary mode of enforcing such recognizances by filing the same and a certified copy of the order estreating it, and thereby effecting a judgment with immediate right of execution, which appertained to this county, in addition to the prosecution of the recognizance as a mere evidence of debt, was intended to be abrogated by the act of 1855. The Revised Statutes (2 R. S. 480, §§ 1, 31) had used imperative language that such recognizances forfeited in other counties *should* be sued in an ordinary action of debt. The Code of 1849 (§ 471) excepted all former modes of proceeding on such instruments from its operation; the act of 1855 uses no such imperative terms, but may be construed as applicable to all suits brought by original process in any such actions to recover the debt due by the recognizance. Being but a remedial statute, it cannot, upon well recognized rules of construction, be

held, except by express terms, or by *necessary* implication from such as are used, as inhibiting or abolishing such other remedies or modes of procedure upon forfeited recognizances as were known to the common law, and it is rather to be held as affording a cumulative remedy. Justice Spencer, in *Wheaton* v. *Hibbard* (20 Johns. 293), says: "Now, the principle is, that where a party has a remedy at common law for a wrong, and a statute be passed giving a further remedy, *without a negative of the common law remedy*, express or necessarily implied, he may, notwithstanding the statute, have his action at common law." To the same effect are *Almy* v. *Harris* (5 Johns. 175); *Wetmore* v. *Tracy* (14 Wend. 255); *Stafford* v. *Ingersol* (3 Hill, 38); *Turnpike Co.* v. *The People* (9 Barb. 161).

It is a fundamental rule of construction that all acts altering or impairing the common law rights of parties are to be strictly construed, especially such as abridge the rights of the people to any remedy to be afforded them in their own courts. I am therefore of the opinion that a construction of the provisions of the act of 1855 found complete solution or satisfaction in their application to all suits upon forfeited recognizances to be brought, as well on those estreated in this as in the other counties of the State, as a substitute for the common law action of debt; and that while by this enactment such recognizances *when sued upon* were to be prosecuted in the mode prescribed by the Code, the common law mode of procedure upon forfeited recognizances by direct enrolment and entry of judgment thereon, by virtue of such quality attached to them at common law, was not, as respects this county, abrogated or interfered with. But were this otherwise, the provisions of the subsequent act of 1861 (L. 1861, c. 333), declaring that the before mentioned section 8 of the act of 1844 was still in force and should be applicable to the city and county of New York, if necessarily an act of original legislation, and void as one of judicial legislation, was not obnoxious to any constitutional objection. It is claimed it was in violation of the provisions of article 3, section 16, of the Constitution, declaring that "no private or local bill shall embrace more than one subject, and that shall be expressed in the title." The title of this is, "An act in relation to fines, recognizances

and forfeitures;" and the first section prescribes and limits the mode for the remission or reduction of fines; the second requires the filing of every recognizance, with the complaint in question, the affidavits and other papers upon which it is founded, within ten days after it is taken; and the third section is to the effect above stated.

I am unable to discover in this act of 1861 any evasion of the provisions of the Constitution. The title does not express any local subject, but has reference to the general administration of justice relating to the matter of fines, recognizances and forfeitures, in which all persons are interested, and affecting all coming within the range of the operation of the act. It has general application upon those subjects to the whole State, and the third section, applicable to this county, is but the special expression of the will of the Legislature, within the general subject embraced in the title. The exclusion of one or more counties from the operation of the general act, or the making of particular provisions on a general subject, in reference to one or more counties or localities, is clearly within the legislative powers, and not obnoxious to constitutional objection (*Matter of Walker*, 1 Edm. 574; *Conner* v. *The Mayor &c. of New York*, 5 N. Y. 286; *Williams* v. *The People*, 24 Ib. 405; *Matter of Mayor*, 50 N. Y. 504).

In this view of the law applicable to the cases under examination, the clause contained in the recognizances in two of them, consenting to the entry of judgment thereon, in the manner provided in the act of 1844, was but an expression as to the legal effect of the instrument, and was mere surplusage. The maxim, "*utile per inutile non vitiatur*," applies (*People* v. *Millis*, 5 Barb. 511).

In my opinion, the several orders in these cases should be affirmed, with costs.

Larremore and Van Brunt, JJ., concurred.

Orders affirmed.

THOMAS REGAN *against* JOHN G. GERDES.

Defendant, having a lease of premises, a part of which he sublet, rented a part of them, on Oct. 14th, to the plaintiff, under the agreement that the plaintiff, on Nov. 1st, should take a lease of the whole premises from the owner. Subsequently it was agreed as being "equal" to the former arrangement, that the plaintiff should take a lease from Oct. 1st, and pay the rent from that day, and the defendant should pay the plaintiff rent for the premises he had occupied up to Oct. 14th. *Held*, that under this agreement the defendant was bound to pay to the plaintiff the October rent he had collected before the agreement was made.

APPEAL from a judgment of this court, entered on the report of a referee.

The action was for money had and received to the use of the plaintiff.

The answer was a general denial. The facts of the case were that on Oct. 14th, 1871, the defendant was the lessee of premises in the city of New York, a part of which he used for the purposes of a business there carried on by him, another part for dwelling purposes for himself, and the remainder he rented to various tenants. On that day (Oct. 14th) he agreed to sell to the plaintiff his store (including stock, &c.) and his lease, on the following terms, to wit, that the plaintiff should pay $2,000, and also pay to the defendant half a month's rent of the store premises (up to Nov. 1st) and go into possession at once, and on Nov. 1st should take a lease of all the premises from the owner. On the same day the plaintiff took possession under this agreement.

By the terms of the defendant's lease, the rent was payable by him at the end of the month, but he collected the rent from his subtenants monthly in advance, and on Oct. 14, when the plaintiff went into possession, he had collected the rent for the parts of the premises which were not occupied by him, and it was therefore agreed that he should pay to the landlord the rent for the whole premises for October, and that plaintiff should pay to the defendant half a month's rent for the store premises,

as above stated. A few days after the plaintiff went into possession, the defendant suggested to the plaintiff, as an agreement "equal" to the former one, that the plaintiff should take from the owner a lease of the whole premises from Oct. 1st, and pay the rent from that time, and that the defendant would then pay the plaintiff half a month's rent of the store premises and a whole month's rent of the apartments he occupied. To this the plaintiff agreed, and took a lease and paid the rent accordingly, and then demanded of the defendant payment of the amount of October rent, $231, that he had collected from his subtenants. This the defendant refused to pay, and this action was brought to recover the same.

The cause was referred, and the referee reported in favor of the plaintiff, and the defendant appealed.

J. F. Daly, J.—The account given by defendant and his witness, of the agreement between himself and plaintiff, is flatly contradicted by the memorandum of the agreement reduced to writing, signed by defendant. That was the first agreement between the parties spoken of by plaintiff. By it the plaintiff was to pay the defendant half a month's rent of the store and come under full months' rent for the premises, on November 1st, to the landlord. In view of the knowledge of all parties, that the defendant had then in his hands the rent of the subtenants for the whole month of October, which he had collected, and was to receive in addition thereto the rent of the store for the balance of October, from the plaintiff, it was clearly the intention that defendant was to pay the landlord Wettyen the full rent for that month.

The subsequent alteration of this agreement between the parties, was in two points only, viz., that the plaintiff was to take the lease from October 1st, instead of November 1st, and was to receive from defendant half a month's rent of the store and a month's rent of the premises in the building occupied by defendant, instead of paying half a month's rent of the store to defendant. This was upon the defendant's suggestion that it would be equal to the arrangement first made—"equal to him paying me for half a month and making the lease from

first November." It would not be equal, if plaintiff were to pay the landlord the October rent, as defendant claims he should. But the language evidences unmistakably the intent of the parties to make the last arrangement "equal" to the former, and this intent can only be carried into effect by construing the agreement of the parties, as finally made, to mean: that plaintiff was to become responsible to the landlord, under the new lease, for the whole month of October; and that defendant was to pay plaintiff, not only rent for his own occupation of the premises, but also the rent from the subtenants, which he had already collected for that month. Where the intent of the parties is plain, it will be carried into effect, even if the words used in making the agreement fail to express every part of it. No other construction could be given to the language of the parties which would not be grossly inequitable to the plaintiff, and which would not give to defendant by the last arrangement an advantage that he disclaimed when he stated that it was to be "equal" to the first one.

The plaintiff had a right to demand and receive from the defendant, the rents for October, collected from the subtenants, and the recovery being for that sum, the judgment must be affirmed.

Daly, Ch. J., and Loew, J., concurred.

Judgment affirmed.

AUGUST STERN *et al. against* PHILIP NUSSBAUM.

A discharge in bankruptcy is a good defense to an action for a debt provable in bankruptcy incurred previous to the filing of the petition, even as against a creditor who is not named as such in the schedules, and who had no notice of the proceeding.

In order to revive a debt barred by a discharge in bankruptcy, the new promise to pay should be distinct, unambiguous and certain, and a mere promise by a person discharged in bankruptcy to pay "as soon as he got through with that squaring up," it not being shown what the "squaring up" was, is not sufficient.

APPEAL from a judgment.

The facts are stated in the opinion.

A. J. Perry, for appellant.

Jacob A. Gross, for respondent.

LARREMORE, J.—The plaintiffs sued to recover a balance of account, $240 13, for goods sold during 1865 and 1868. The defendant filed his petition for a discharge in bankruptcy April 15th, 1868, in pursuance of the act of Congress passed March 2d, 1867, and his application was finally granted September 16th, 1868.

The plaintiffs do not appear as creditors in said proceedings, and had no notice thereof. The discharge in bankruptcy was a good defense to all liabilities incurred by defendant prior to April 15th, 1868. Such a discharge cannot be impeached in a collateral proceeding, but a creditor whose rights are affected thereby, must resort to the remedy provided by the 34th section of said act (*Ocean National Bank* v. *Olcott*, 46 N. Y. 12). Nor was any subsequent promise to pay the debt so discharged legally established. The only evidence upon this point is found at folio 45 of the case, where one of the plaintiffs testified as follows: "I once asked him (defendant) for money, and he told me he had been discharged in bankruptcy and would give me some money as soon as he got

through with that squaring up. *I don't know what that referred to.*" A new promise, to revive such a debt, should be distinct, unambiguous and certain.

It surely cannot be urged that the testimony in the case meets the requirements of the law in this respect. The most that can be said of it is that defendant's declaration (at fol. 45) was intended as an acknowledgment of his subsequent indebtedness to the plaintiffs, incurred in September and November, 1868, and after the filing of his petition in bankruptcy.

To the amount of such subsequent indebtedness and interest, $53 57, the judgment herein should be reduced and affirmed for that amount.

Robinson, J., concurred.

Ordered accordingly.

Henry S. Fearing *et al. against* Robert Irwin *et al.*

It seems that where a case is agreed upon and submitted without action, under § 372 of the Code of Procedure, the court have no power to decide as to the existence of any of the facts admitted to exist by the case submitted, and cannot against the will of one of the parties strike out an admission of fact therein contained.

Even if such a power exists in the court, it will not be exercised where the admission has not been made under any mutual misconception or mistake, nor procured by fraud.

Motion to amend a case agreed upon and submitted in a controversy without action, by striking out an admission contained in it.

The question submitted to the court for its decision was, whether Apthorp's lane and Bloomingdale road, in the city of New York, had been duly closed according to law, and whether the plaintiffs, as abutting owners, acquired the fee simple to the

middle of the road. By the case as agreed on, it was admitted that when the road was so closed, the plaintiffs would become such owners, and the deed under which the plaintiffs claimed was also set out. This court, at general term, held that under the deed set out in the case, the plaintiffs would not, on the closing of the road, become such owners; but that as such right of ownership in them was admitted, the presumption was that they claimed under other sources of title, as well as under the deed, and that the admission was conclusive.

The court, therefore, having concluded that the road had been closed, adjudged the title to the center to be in the plaintiffs (reported in 4 Daly, 385; affirmed in 55 N. Y. 486).

This motion was made to strike out the admission as to the ownership on the closing of the road.

*Per curiam.**—We consider it exceedingly doubtful whether the court has any power to grant such an application as this. Our jurisdiction is founded upon a case containing facts which the parties have agreed upon, and submitted without action; and what we are asked to do is to amend the case by striking out a part of it against the will of the plaintiffs. But whether we have any such power or not, this is not a case where there has been any fraud, or any mutual misconception or mistake. The motion is, therefore, denied.

* Present—Daly, Ch. J., and Robinson and J. F. Daly, JJ.

ENOS RICHARDSON *against* ADAM KROPF AND JOHN MOSER.

Where an appeal from a judgment is taken to the general term, and the judgment is there reversed, but, on appeal to the Court of Appeals, the judgment of the general term is reversed, and that of the trial term affirmed, the sureties on the undertaking, given under §§ 334 and 335 of the Code of Procedure, on appeal to the general term, are liable in the same manner as if the judgment had been affirmed by the general term.

The fact that the undertaking recites that the parties, feeling aggrieved, "intend to appeal to the general term," does not limit the liability of the sureties to the result of the appeal to the general term alone.

The case of *Wilkins* v. *Earle* (46 N. Y. 358) distinguished.

APPEAL by defendants from a judgment of this court, entered on the decision of a judge of this court, after a trial before him, without a jury.

The facts are stated in the opinion.

John C. Laug, for appellants.

Geo. W. Parsons, for respondent.

ROBINSON, J.—This is an action against sureties on an undertaking, given on an appeal from a judgment of the Superior Court to the general term, wherein, after a recital of the intention of the defeated party "to appeal to the general term of said Superior Court," the undertaking contained the obligation of the sureties prescribed by sections 334 and 335 of the Code. The judgment was reversed by the general term, but on appeal to the Court of Appeals, such judgment of the general term was reversed, and the original judgment affirmed; and such judgment of the Court of Appeals was, by order of the Superior Court, made the judgment of that court.

The only question raised on the argument, viz.: Whether the judgment of reversal by the general term satisfied and discharged the obligation of the sureties on the undertaking? has been settled adversely to the present appellants by the Court of Appeals, in the cases of *Robinson* v. *Plimpton* [1862]

(25 N. Y. 484), and *Gardner* v. *Barney* [1863] (24 How. Pr. 467), affirmed in that court (see 25 How. 599; 4 Abb. N. S. 251).

The appellants, however, claim that the undertaking only recited an intended appeal to the general term, and that such restricted recital necessarily intended a limitation to the result of an appeal to that tribunal.

It is undoubted that sureties may limit their obligation, and if such restricted liability is accepted without objection, although it does not give the full security afforded by an undertaking in the form prescribed by the Code, yet none other can be enforced. The obligatory portion of this undertaking was, however, in the general form prescribed by the Code, and while the recital was precisely what the appellant intended, it was also descriptive of such an appeal as the law, in that state of the case, alone permitted. None other than such appeal was taken by the principal, and the erroneous judgment he succeeded in obtaining at the general term imposed upon the other party the necessity of resorting to the Court of Appeals for its correction; but being thus corrected, it stood as a judgment consequent upon that appeal, and resulting therefrom.

It is claimed that the cases in the Court of Appeals, above cited, have been in effect overruled by the subsequent case of *Wilkins* v. *Earle* (46 N. Y. 358), and that it holds, that the subsequent judgment entered upon the *remittitur* is the judgment of that court, and not of the court below, in which it is entered.

I am unable to perceive any such result from that decision, or that any such point arose, or was necessarily decided. It simply asserts the stringent power of that court over the court below to require a strict compliance with its mandate, and the execution of its judgment by the court to which it is sent; but it in no way holds that when the court below has so ordered and adjudged, its judgment because so *entered by enforcement* becomes any the less its own final judgment upon the original appeal.

The judgment should be affirmed.

J. F. Daly, J., concurred.

Judgment affirmed.

LUCIEN T. WHEELER *et al. against* PATRICK MCCABE.

Where an appeal to the general term is dismissed for a failure to serve the printed case and exceptions required by Rule 50 of the Supreme Court, the sureties on the undertaking on appeal given under §§ 334 and 335 of the Code of Procedure, are liable to the same extent as if the judgment had been affirmed.

Where the appeal is dismissed in this manner an action can be commenced on the undertaking without waiting until ten days after service of notice on the adverse party of the entry of the order dismissing it, such as is required by § 348 of the Code of Procedure when the judgment is affirmed.

APPEAL from the general term of the Marine Court.

The facts are stated in the opinion.

ROBINSON, J.—This is an appeal from a judgment recovered in the Marine Court against the defendant, upon an undertaking given on an appeal from a judgment (rendered by a single judge against the defendant McCabe) to the general term.

As required by the act of 1853 (L. 1853, c. 617), that appeal was taken in the same manner and with like effect as appeals to the general term of the Supreme Court from a single judge, and upon like security as required by sections 334 and 335 of the code (*Robert* v. *Donnell*, 31 N. Y. 446). As in that case it was intended to stay proceedings on execution, the undertaking was, among other things, "to the effect that if the judgment appealed from, or any part thereof, be affirmed, or *the appeal be dismissed, the appellant will pay the amount directed to be paid by the judgment*, or the part of such amount as to which the judgment shall be affirmed, if it be affirmed only in part," &c.

The appeal so taken was dismissed, with costs, for failure to serve the printed case and exceptions required by the 50th rule of the Supreme Court. This dismissal was ordered on the 28th of October, 1872, unless the appellant, within fifteen days from service of a copy of such order, should serve copies of the printed case and exceptions, in which case the argument was to

be put over to the November general term. At that term it was ordered and adjudged that the appellant had not complied with the permission afforded him, and leave to argue the appeal was denied him.

There can be no question but that this was an effectual dismissal of the appeal within the terms of the undertaking (*Oeters* v. *Groupe*, 15 Abb. Pr. 263). While such dismissal of an appeal for defects or *laches* in the appellant's proceeding does not operate as a bar to another appeal if the time limited therefor has not elapsed, it is a mode of procedure well known in our system of practice, and operates as a final disposition of the action taken and rights of the appellant on such appeal (*Sun Mut. Ins. Co.* v. *Dwight*, 1 Hilt. 50; *Bates* v. *Voorhees*, 20 N. Y. 525; *Genter* v. *Fields*, 1 Keyes, 483; *Maltby* v. *Greene*, 1 Keyes, 548; *Harper* v. *Hall*, 1 Daly, 498). Such dismissal occurred within the terms of the undertaking by operative orders of the general term of the Marine Court.

A further objection to this recovery is raised for want of the ten days' notice before suit brought upon such an undertaking, required by section 348 of the code, of "the entry of the order or judgment affirming the judgment appealed from." Such provision does not operate in this case, as the judgment was not affirmed, but the appeal was simply dismissed. The right of future appeal still existed until thirty days after notice of the judgment or order to the adverse party had elapsed (Code, § 331; *Fry* v. *Bennett*, 16 How. Pr. 402; affi'd in Ct. of Appeals, 26 How. 599). Such rights growing out of affirmance of the judgment and dismissal of the appeal being so essentially different, no such notice was required in the present case before suit brought.

The judgment should be affirmed.

Larremore and Van Brunt, JJ., concurred.

Judgment affirmed.

WILLIAM L. TROXELL *against* JOHN C. HAYNES.

Plaintiff obtained a preliminary injunction, which was on the return of the order to show cause accompanying it dissolved, and on a trial of the case on the merits the complaint was dismissed, and costs and extra allowance granted to the defendants, which was paid. On a reference under § 222 of the Code of Proceedure to ascertain the damages suffered by the defendants by reason of the injunction;

Held, That the defendant's expenses for counsel fees in procuring the dissolution of the injunction should be allowed as damages, without deducting therefrom the amount of costs and allowance granted in the trial on the merits.

The case of *Andrews* v. *The Glenville Woollen Company* (50 N. Y. 128) distinguished.

APPEAL from an order. The facts are stated in the opinion.

ROBINSON, J.—The object of this action was to enjoin the defendants in the use of an unpatented secret of trade, and this proceeding brings in review on appeal a decision made upon the rights of the defendants to enforce an undertaking in the sum of $500, given on the granting of a preliminary injunction. There were five defendants, and on the hearing upon the return of the order to show cause why the injunction should not be continued, that preliminary injunction was dissolved as to four of the defendants and retained as to the defendant Haynes. An expense of five hundred dollars was incurred by all of the defendants for counsel fees on that motion, but by reason of the retention of the injunction against Haynes, the damages of defendants on that motion have, upon a reference had under section 222 of the Code, been assessed at $400. Upon a subsequent trial on the merits, the complaint was dismissed as to all the defendants, and they recovered for costs $347 94, which included an extra allowance of $250. These costs have been paid, and the defendant and his sureties claim, and the judge from whose decision this appeal was taken has decided that such costs and allowance were to be deducted from the $400 assessed as defendant's damages under the undertaking.

As to the defendant Haynes, the motion to dissolve the injunction was denied, and it was continued until final judgment. Under these circumstances the respondents claim that such trial was necessary to determine the right to the preliminary injunction as to him, and that the taxed costs, including such extra allowance awarded the defendants "in a difficult or extraordinary case after defense interposed or trial had" (Code, § 309), were an indemnity to defendants (Code, § 303), that was to be considered *pro tanto* as allowance for "damages sustained by reason of the injunction." No proof was offered or finding made by the referee that such extra allowance was in any way awarded in consideration of any services of counsel on the trial, or upon any employment or effort having special reference to the removal of the injunction, nor do I find any warrant in any of the authorities cited for holding that the general taxable costs arising in this action, including the extra allowance, and awarded by way of "indemnity for the expenses of this action" (Code, § 303), should be applicable, or considered with reference to such special damages as were occasioned by the issuing of the injunction. The language of the courts is uniformly to the contrary, and that none of the *general costs* of the action constitute any part of such damages (*Coates* v. *Coates*, 1 Duer, 664; *Childs* v. *Lyons*, 3 Robt. 704; *Strong* v. *De Forest*, 15 Abb. Pr. 427; *Town of Guilford* v. *Cornell*, 4 Ib. 220; *Hovey* v. *Rubber Tip Pencil Co.* 50 N. Y. 333; *Disbrow* v. *Garcia*, 52 N. Y. 654). The case of *Andrews* v. *The Glenville Woollen Co.* (50 N. Y. 128) is an exceptional one, where the original motion to dissolve the injunction "was not denied on the merits, nor for irregularity in making the motion, but because the court in its discretion thought it more advisable *to defer the inquiry into the merits until the final hearing.*" In the present case, the continuance of the injunction as against Haynes in no way appears to have been ordered upon any such exceptional grounds, or that the hearing on the merits was at all deferred, or the motion decided otherwise than on the merits as they were then made to appear to the judge. The subsequent trial was then, as well as to him as to the other defendants, an ordinary trial necessary for the disposal of the merits of the con-

troversy. In such case no counsel fees or costs of the trial are allowable as damages sustained by reason of the injunction, as is held in *Hovey* v. *Rubber Tip Pencil Co.*, *Disbrow* v. *Garcia*, and other cases above cited.

I am therefore of the opinion that the allowance by the judge of the taxable costs and extra allowance made on final judgment (and already paid) as part of the damages contemplated by the provisions of the undertaking, was error, and that the damages reported by the referee are not to be in any respect, for any of the causes stated, diminished or reduced.

The order should, in this respect, be reversed, and an order made confirming the referee's report, but I concur in the judge's opinion that no final judgment should be entered upon the report, but leave should be given to prosecute the same.

Larremore, J., concurred.

Ordered accordingly.

The Board of Commissioners of Pilots *against* Philip Dick, Master of the Propeller Relief.

Under the act establishing regulations for the port of New York (L. 1857, c. 671), a District Court in the city of New York cannot acquire jurisdiction to render judgment against the master of a vessel for a penalty imposed by the act merely by attachment of the vessel, and without personal service of process on the master.

Appeal from the First District Court.

The facts are as follows: On the 19th day of August, 1873, the defendant was master of the propeller Relief, and permitted to be thrown into the waters of the North river, on said day, a large quantity of ashes, and this action was brought to recover a penalty of fifty dollars imposed by an "act to establish regulations for the port of New York," passed

April 16th, 1857. Upon an affidavit of the above facts, the justice of the District Court in the city of New York for the First Judicial District issued an attachment in this action against the propeller Relief.

This attachment was served by attaching the said propeller. No summons was ever served or issued. Upon the return of this attachment, the counsel made the objection that the court had not acquired jurisdiction.

1st. Because it was an action for a maritime tort, of which the United States District Court has exclusive jurisdiction.

2d. Because no sufficient process had been issued.

The justice thereupon rendered judgment for the defendant, and from that judgment this appeal was taken.

George W. Blunt, for appellants.

Beebe, Wilcox & Hobbs, for respondent.

Van Brunt, J.—The statute under which this claim is made is as follows: "It shall not be lawful to throw, or cause to be thrown into the waters of the port of New York, &c., &c., any cinders or ashes from any steamboat under the penalty of fifty dollars for each and every offense, to be recoverable by the commissioners hereinafter named; and for such penalty, the steamboat from which such cinders or ashes were thrown, its master and owner shall be liable."

The eighteenth section provides that "all the fines and penalties incurred under this act shall be recoverable by and in the name of the said commissioners. In all cases where the fines and penalties prescribed by this act are made liens upon property, they shall be enforced by attachments issued by the court where the proceedings for the recovery of such fines and penalties shall be pending, to the officers to whom executions of such courts are issued, and shall be enforced and discharged in like manner as attachments against property of non-resident debtors."

This court has decided that an action may be maintained against the master of a steamboat for the penalty mentioned in

the above act (*Board of Commissioners of Pilots* v. *Frost*, 4 Daly, 353); but how an action *in rem* can be maintained has not been pointed out. It is true that the act says that where the penalty is made a lien upon property, it may be enforced by attachment, &c., which attachment shall be enforced and discharged in like manner as attachments against property of non-resident debtors; but it is to be observed that these proceedings are to be governed by the practice of the court from which it issues in respect to attachments against the property of non-resident debtors.

It is not pretended that the requirements of the District Court act in respect to attachments have been complied with in this case, and without such a compliance I am wholly unable to see how jurisdiction can be acquired. There is another fatal objection to this action. This is an action against Philip Dick, master of the propeller Relief, to recover this penalty, and an attachment is issued, not against his property, but against the propeller Relief. Where the court gets the authority to issue such an attachment I have not been able to discover.

If the penalty could be enforced *in rem* in a State tribunal, it must be as an action against the vessel, as it is clear that no attachment can issue in an action against an individual except against the property of the defendant. In disposing of this case it is entirely unnecessary to determine the question as to the exclusive jurisdiction of the United States courts, and that question is not passed upon.

The judgment must be affirmed.

Robinson and Larremore, JJ., concurred.

Judgment affirmed.

Edward C. Berg *against* The Narragansett Steamship Company.

A common carrier is not, in the absence of a special contract, liable for loss of goods beyond his own route, although he receives them marked for a particular destination.

Such a special contract may, however, be shown by the recitals in the receipt for the goods, and the manner in which the way list is made up, and also from the fact that a through freight is charged, and that the connecting carriers have a contract with each other by which to carry freight through for a single price to be divided between them.

Appeal from a judgment of the general term of the Marine Court, affirming a judgment of that court entered on the verdict of a jury.

The action was against the defendant as a common carrier, for loss of the plaintiff's trunk.

On the trial the defendant's counsel offered to show that the company sent goods only upon bills of lading excluding passenger baggage; that the checks brought by expressmen (such as the one set out in the opinion) were countersigned, and that the person delivering the goods then went to the office and took a bill of lading by which the company was responsible only for the delivery of the goods to the Old Colony Railroad. This evidence was excluded.

The court charged the jury that, for the purposes of the action, the Narragansett Steamship Company was a line through to Boston, the same as if their vessels went to Boston, although they formed a line with the Old Colony Railroad, and that they were bound to take the trunk to Boston.

The other facts are stated in the opinion.

The plaintiff had a verdict for $434 50, and the judgment thereon was affirmed by the general term of the Marine Court.

Defendant appealed to this court.

Thomas G. Shearman, for appellant.

Browne & Rabe, for respondent.

LARREMORE, J.—The defendant is a common carrier between New York and Fall River. Plaintiff's trunk was delivered to an agent of the defendant at New York, and the following receipt issued therefor:

"NEW YORK, July 17th, 1872.

"Received from Schroder's express, in good order, on board the boat *for Boston*, the following packages:

"Marked Edw. C. Berg,

"Care Chas. S. Pitman,

"Boston, Mass.

"One (1) trunk. "J. B. J."

The trunk was carried from New York to Fall River, and there delivered to the Old Colony Railroad Co., but failed to reach its destination as per receipt directed and expressed. The question raised on this appeal is, the extent of defendant's liability on said receipt.

In *Foy* v. *The Troy & Boston R. R. Co.* (24 Barb. 382), it was held, that where property is received by a carrier for transportation, addressed to a person beyond the route of such carrier, in the absence of proof, an agreement will be inferred on his part to deliver the property as directed.

The contrary view is maintained in *Wright* v. *Boughton* (22 Barb. 561), where it is held that a copy of an address upon a delivery receipt was mere matter of description, and not an agreement.

But the rule is now settled, that a common carrier is not liable for loss of goods beyond his own route, although he receives them marked for a particular destination (*Root* v. *Great Western R. R. Co.* 45 N. Y. 524; *Van Santvoord* v. *St. John*, 6 Hill, 158; *Dillon* v. *N. Y. & Erie R. R. Co.* 1 Hilt. 231; *Kiender* v. *Woolcott*, 1 Hilt. 223).

Did the defendant then agree to deliver plaintiff's trunk as indicated in the receipt?

It was delivered to John B. Jacobson, defendant's agent in New York, whose initials are subscribed to said receipt, and who gave no notice or intimation at the time that defendant's route terminated at Fall River, nor was that fact in any way brought to plaintiff's knowledge prior to his loss.

The testimony shows that there was a contract between defendant and the Old Colony R. R. Co. for the transportation of freight from New York to Boston, and that the rates therefor were apportioned and divided between the two companies. Besides the defendant's "way bill" (Plaintiff's Ex. No. 2) designated the same route expressed in the receipt. It is headed "Narragansett Steamship Company, Way Bill of Merchandise, New York to *Boston* per Steamer Bristol, July 17th, 1872." Then follows a list of the consignees with the description and destination of the goods received for transportation, including plaintiff's trunk, and the *through* freight for the *entire* route is specified and charged.

Upon all the evidence offered, the question of defendant's liability was properly submitted to the jury, and the offer to show, not a *general* commercial usage, but the *defendant's* usage with respect to their bills of lading, to vary or modify a special agreement, was properly excluded.

The judgment should be affirmed.

Robinson and Van Brunt, JJ., concurred.

Judgment affirmed.

August Shimmel *against* The Erie Railway Company.

Plaintiff was employed by the vice-president of the defendant, a railroad corporation, to operate an electric light used for the purpose of illuminating the defendant's advertisements and for examining baggage at night, and the fact that he was so engaged in the defendant's service was a notorious one; and it also appeared that bills for services rendered by other persons had been paid on vouchers certified by the vice-president: *Held*, that these facts were sufficient to warrant a jury in finding that the vice-president had authority to employ the plaintiff for the company.

Appeal from a judgment of this court entered by direction of the court at trial term, dismissing the complaint.

The facts are stated in the opinion.

A. A. Redfield (*T. G. Shearman* with him), for the appellant, as to the power of the defendant's vice-president to employ plaintiff, cited *Olcott* v. *Tioga R. R. Co.* (27 N. Y. 546, 558); *Bank of U. S.* v. *Dandridge* (12 Wheat. 64); *Bridenbecker* v. *Lowell* (32 Barb. 9); *Perkins* v. *Washington Ins. Co.* (4 Cow. 645, 659, 661); *Hoyt* v. *Thompson* (19 N. Y. 208, 219); Angell & Ames on Corp. 3d ed. 269; 8th ed. §§ 283, 284; *Beers* v. *Phœnix Glass Co.* (14 Barb. 358); *Smith* v. *Hull Glass Co.* (11 C. B. 897); *Allen* v. *Citizens' Steam Navigation Co.* (22 Cal. 28); *Lohman* v. *N. Y. & Erie R. R. Co.* (2 Sandf. 39); *Marine Bank* v. *Clements* (31 N. Y. 33; aff'g s. c. 6 Bosw. 166); *Farmers' & Mechanics' Bank* v. *Butchers' & Drovers' Bank* (14 N. Y. 623); *Bank of Lyons* v. *Demmon* (Hill & D. Supp. 398); *Nicholas* v. *Oliver* (36 N. H. 218); *Goodwin* v. *Union Screw Co.* (34 N. H. 378).

Jos. Larocque, for respondent.

Larremore, J.—The plaintiff, who was employed by the defendant as superintendent of the voucher and pay roll department, for which he was paid a stated salary, on the 12th of October, 1869, was employed by the vice-president of defendant to superintend and manage an electric advertising light, on the corner of Broadway and 23d street, in defendant's building or office. The claim made is for extra services from 6 P. M. until midnight, and for which he was employed, and his compensation therefor was fixed at $100 per month. There is no allegation that the services were not performed or that the same were not for the benefit of the defendant.

Whether or not such services were included in plaintiff's duties as superintendent of the voucher and pay roll department, was, under his testimony in explanation of the vouchers and receipts offered in evidence, a question of fact for the jury.

The nonsuit was granted on the ground that Fisk, the vice-president of the defendant, had no authority to make said contract, and that defendant is not bound thereby. This, I think, was error. Fisk was a general officer of the Erie Railway Co. He certified vouchers for services performed for it, which were

accepted and paid. The electric light was used to examine baggage arriving at night on defendant's line, and to illuminate their signs and advertisements on adjoining buildings. This fact was notorious.

There was evidence enough of the acceptance by the company of plaintiff's extra and special services to put the defendant to proof, and the judgment of nonsuit should be reversed, and a new trial ordered, with costs to abide the event.

Robinson, J., concurred.

Ordered accordingly.

Elijah J. De Ronde *et al. against* Charles Olmsted *et al.*

A written instrument conveying an interest in property—*e. g.* a lease—takes effect from the time of its delivery to the grantee, and not from the date on which it purports to have been executed.

In order to sustain a judgment against a person sought to be charged as owner in a proceeding to enforce a mechanic's lien, there must be evidence to show that at the time the contract for the work was made, he was the owner within the meaning of that word as used in the mechanics' lien act.

Appeal from a judgment of this court entered on the report of a referee in a proceeding to enforce a mechanic's lien.

The facts are stated in the opinion.

Francis Tillou, for appellant Olmsted.

C. P. Hoffman, for respondents De Ronde and Jones.

G. W. Van Hosen, for respondents McManus and Murray.

LARREMORE, J.—The plaintiffs were copartners in business, as carpenters and builders, and allege that between Nov. 4, 1870, and March 7, 1871, at the request of the defendant, Charles Olmsted, and in pursuance of an agreement to that effect, they performed labor and furnished materials in altering and repairing the building and premises No. 335 Spring street, in the city of New York, of which said defendant was then the owner, and for which he was indebted to them on March 7, 1871, in the sum of $1,640, and for which, on the 4th day of April, 1871, they duly filed in the proper office, notice of a lien in pursuance of the statute.

Plaintiffs then demand judgment directing a sale of all the right, title and interest of said defendant in said premises at the time when said lien was filed, or which he has since acquired, and also a personal judgment for any deficiency that may arise on such sale.

The defendant denies that any agreement was ever made with him, and avers that the labor and materials referred to were furnished under a contract therefor, between said plaintiffs and one Cyrus Olmsted, and on his sole credit, and for which they have been paid on account by said Cyrus, the sum of $2,371 63, and which they have failed fully to perform, according to the terms thereof.

The defendants McManus and Murray were subsequent lienors, and filed notices of their respective liens, April 4th and 11th, 1871, and to which the same defense was interposed as in the case of the plaintiffs.

The defendant Hazard was made a party on account of an assignment of a leasehold interest of said premises to him, but said assignment was not recorded until after said liens were filed.

Judgment was rendered against the defendant, as prayed for, in favor of each of the lienors, for the amount of their respective claims, from which the defendant appeals. Hazard has not appealed, and is concluded by the judgment.

In order to charge the defendant or his leasehold interest with the claims in question, it must be affirmatively shown that the liens were acquired in pursuance of some contract

made or ratified by said defendant as the owner of said premises, or by his duly authorized agent (L. 1863, c. 500, § 1).

The evidence fails to establish this fact. The contracts in dispute were all entered into with Cyrus Olmsted and payments made thereon by him, which were received and accepted by the several claimants.

He was in actual possession and occupation of the premises at the time, and continued therein until March, 1871, when most of the work and materials for which this action is brought, had been furnished.

That Cyrus acted as the agent of Charles, was positively denied by each, nor could such inference be drawn from the facts proved.

Charles Olmsted had no interest in the leasehold which could be made the subject of a lien, until the delivery to and acceptance by him, on or about March 1, 1871, of the lease thereof, from Silas Olmsted. The instrument took effect from the time of its delivery, and not from its date (*Jackson* v. *Schoonmaker*, 2 Johns. 230; *Same* v. *Bard*, 4 Id. 231; *Same* v. *Phipps*, 12 Id. 418), and particularly where, as in this case, there was direct proof as to the time of the delivery (*Ellery* v. *Metcalf*, 1 Denio, 323; *Harris* v. *Norton*, 16 Barb. 264; *Costigan* v. *Gould*, 5 Denio, 290).

Whatever suspicion may attach to the circumstances surrounding the negotiation for the new lease and the surrender of the old one, the uncontradicted and unimpeached testimony of the defendant and his son Cyrus, upon this point, must control the decision.

There being no evidence to sustain the findings of the referee, as to defendant's ownership and liability at the time said contracts with the claimants were made, the judgment entered thereon should be set aside (*Draper* v. *Stouvenel*, 38 N. Y. 219; *Fellows* v. *Northrop*, 39 Id. 117; *Mason* v. *Lord*, 40 Id. 476; *Sheldon* v. *Sheldon*, 13 Johns. 220).

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

Robinson, J., concurred.

Ordered accordingly.

MARY D. SMITH *against* JAMES E. COOLEY.

Where arbitrators had rendered an award fixing the value of a building, and it appeared that one of the arbitrators had, before his appointment and in view of it, at the instance of the party afterwards proposing him, examined the building and formed an opinion as to its value: *Held*, that this was sufficient evidence of partiality in the arbitrator to warrant a court of equity in setting aside the award.

Where arbitrators awarded $15,000 as the value of a building, which it appeared from the evidence was not worth more than $6,000: *Held*, that this fact alone showed that the award was influenced by partiality, prejudice, or mistake of facts, and was sufficient to justify the court in setting it aside.

Where a lease provided that in case the lessee should take down and remove the buildings then on the land, or any part thereof, and erect upon said land in place thereof a substantial building, that at the expiration of his lease he should be paid by his lessor the value of such building so erected by him: *Held*, that the lessee could not claim payment for improvements made to the building already on the land, although the nature and style of the building was wholly changed; and

The lease having also provided that the lessee should retain possession of the premises until the amount due him for the building erected by him should be paid or tendered to him: *Held*, that he could not be held liable for the value of the use and occupation of the premises from the time of the expiration of his lease, up to the time of the final decree in a suit brought to determine what amount ought to be paid to him, it being decided in that suit that he was entitled to the payment of a certain amount.

APPEAL from a judgment of this court, entered on the decision of a judge at special term.

The action was brought to set aside an award made by arbitrators, and to determine the rights of the parties under a certain lease.

The facts of the case were as follows:

On the 4th of February, 1851, the plaintiff's ancestor leased to defendant's assignor the lot of land (now) 8 Park place, in the city of New York, 25 × 75 feet, for twenty-one years, from May 1, 1851. The lease provided that the lessee might take down and remove from said lot "the buildings now standing thereon, or such part thereof as he shall elect, and erect upon said land, in place thereof, a good and substantial building." * * "The materials of the old building in such case to belong to the party of the second part." There was also a

covenant for renewal by the lessor, at five per cent. upon the value of the lot, "considering the same as an unincumbered vacant lot," said value to be fixed by arbitration; or in case a renewal is not granted, to pay the lessee "the value of the building so to be erected by him," said value to be fixed by arbitration; "and at the end of the term" * * "the said building so to be erected by the party of the second part as aforesaid, shall be valued and paid for in manner and form as aforesaid; and the party of the second part" * * "shall not be compelled to surrender the premises until such payment shall be made or tendered."

When the lease was made, there was upon the land a three-story brick dwelling-house, with a basement and an attic story, with a peaked or gable roof and dormer windows, which building was twenty-five feet in width in front and rear, and fifty feet in depth. There was also another brick building in the rear, attached to the main front building and used therewith, which was known as the tea-room, two stories in height, and about twelve feet wide by twenty or twenty-five feet deep.

The main or front building was not torn down or removed from the lot, nor any building erected in place thereof; but soon after the execution of the lease the tenant made the following alterations thereto: The front of the first story and basement was taken out, and instead thereof iron columns and store doors were inserted; the stairs and partitions in the several stories were torn down; the floors of the first and basement stories were lowered, so as to bring the first story floor about a foot above the front sidewalk; the first story floor was relaid, and new stairs made to the different stories; the rear wall of each of the stories was removed; also the peaked and gable roof was removed or raised, so as to make a flat roof, and by adding to or raising the front and side walls, two stories were constructed instead of the attic story, so that the building became a five-story building, instead of one of three stories and an attic; the tea-room was torn down and removed, and in place thereof there was constructed, on the rear of the lot, a five-story building, twenty-five feet in width and twenty-five feet in depth, attached to the old front building previously de-

scribed, without wall or partition between, but the floors of each story united on the same level, and were made continuous throughout; and such old altered building and the new structure last described constituted the building on the lot when this action was brought.

The first term of the lease expired May 1, 1872. On the 30th September, 1871, the plaintiff having declined to renew the lease, the parties entered into a submission to arbitration, in which, among other things, was recited the fact that differences had arisen as to whether the party of the first part was liable under said lease, "for the value of the whole, and if not of the whole, then of what part of the building now standing upon said premises, and also as to the value of the same, and as to the true construction of said lease in that behalf, therefore they submit and refer it to John W. Mersereau and Jesse W. Powers, as arbitrators, to hear, determine, and decide what is the value of such building, as the said party of the first part is liable to pay for to the party of the second part, pursuant to said lease." Abraham Demarest was chosen umpire. The arbitrators disagreed. Mersereau and the umpire decided that plaintiff must pay the value of the whole building, and that said value was $15,000. Plaintiff did not pay the award, and made no tender to defendant; and defendant, whose lease expired on May 1st, 1872, took no steps to rent the building after that date, nor until 1873.

In October, 1871, plaintiff commenced this action to set aside the award, on the ground of misconduct, partiality, and corruption on the part of the arbitrator Mersereau.

The plaintiff, by her complaint, also asked that the value of the said building, which she was bound to pay for, should be ascertained, and that upon the payment of the same, she should be let into possession of the premises.

Upon the trial, the Court at special term (Robinson, J.) delivered the following opinion:

"Accepting it as evidence upon which the plaintiff may rely, the testimony of the witness Mersereau, the arbitrator chosen on the part of the defendant, discloses such ground of misconduct

in his selection (aside from any question of mistake or partiality in the award) as vitiates it, and calls for a judgment declaring it null and void. By this testimony it appears that no concurrent action was taken by the arbitrators, or umpire, prior to October 5th, 1871, when the umpire was chosen, in view of any disagreement between the arbitrators. The defendant, in anticipation of Mr. Mersereau being selected as arbitrator on his part, procured Mr. Mersereau to accompany him to the building to be valued three or four times during the month of September, and there, in his company, to make measurements and examinations for the purposes of the arbitration. Of the conversations that there occurred between them, Mr. Mersereau is only able to state the defendant said: 'This is the building I want you to estimate.' This was said so that in case he should be appointed—in case defendant should name him—he wanted him (Mersereau) to be at the building to see what value he would put upon it. Being asked if he had formed his opinion before he went there with Mr. Powers, his co-arbitrator, he answered, 'I suppose I had;' and he believes he had previously come to a conclusion, in his own mind, on the subject of the value of the building, at $15,000, though he says he had not communicated it to the defendant. No notice of any such previous examinations or estimates was given the plaintiff. Mr. Mersereau says defendant had told him he preferred a renewal of the lease, and he told Mr. Powers that. This could have been with but one object, to influence a renewal by suggestion of such an award as might compel it. On the arbitration, this arbitrator devoted no other attention to the material considerations which occupied his associates. He says: 'having previously had the measurements of the building, and having previously gone over it and thoroughly examined it in all its parts, I did not then make them over again when I went through the building with Mr. Powers, and with him and Mr. Demarest.'

"Had this arbitrator been a person expected to be called as a juror upon the merits of this controversy, and in anticipation of his being called and sworn, had been so approached by one of the parties, and on three or four different occasions accompa-

nied him to make examinations in reference to the matters in dispute, and had come to a conclusion in his own mind in respect to them, it could not be contended that the verdict could be upheld (Gr. and Wat. on New Trials, 48; *Cottle* v. *Cottle*, 6 Greenl. 140; *Perkins* v. *Knight*, 2 N. H. 474; *Knight* v. *Inhab. Freeport*, 13 Mass. 218). And far less could an award of arbitrators where the action of one of them had been influenced by like considerations. An arbitrator embodies the functions of both judge and juror, as well others of a more delicate and arbitrary character, not subject to like control.

"The courts are disposed to regard the action of such a tribunal of the parties' own choice, as possessing such force and sanction that it ought only to be disturbed for very grave reasons, and consequently in the selection of an arbitrator, and in the conduct of the parties pending the submission, the courts look with extreme jealousy upon anything tending to impugn their entire fairness. The arbitrator might relieve himself from any such imputation, if previous to the arbitration he had communicated to the other party what had transpired, and the extent of any impressions made on him upon the subject, and could fairly state that he was as yet open to conviction. Such ingenuousness would have relieved the award from any ground of impeachment for partiality or misconduct.

"In *Jenkins* v. *Liston* (3 Gratt. [Va.] 535), where in the absence of one of the parties, the arbitrator received from the other a paper used as evidence, the award was set aside, and the court say: 'It has always been an object of great concern with the court to keep the administration of justice free, not only from partiality, but from suspicion thereof. It is due to all parties, whether asserting or defending their rights, in courts of record or before domestic tribunals of their own choice, that they should hear and know everything alleged or proved in opposition to the rights claimed. If, however, evidence on behalf of one party may be secretly heard, his adversary is deprived of the right to explain or disprove what is alleged to his prejudice; * * 'The law in its jealousy will not permit an inquiry into the effect of the evidence so received; it tends to partiality and corruption, and nothing less than a complete vacation of the award will satisfy the law.'

"In *Conrad* v. *Massasoit Ins. Co.* (4 Allen, 20), the same principle is asserted. Two of the three arbitrators selected had, previous to the submission, at the request of the agent of one of the parties, proceeded to and examined the injured property, and appraised the loss thereto from fire, and 'substantially arrived at a conclusion as to the amount of the loss, and about what amount they had agreed upon.' This they communicated to the other arbitrator, and told him he also had better do so, which he did, alone. They met and made up their result. The court set aside the award; and say, 'The facts show that two of the referees were not *impartial men*, but had in effect prejudged, by an *ex parte* examination of the property, the very question which was submitted to them by the parties.'

"In the present case there is no particular reason to impute improper motives. Probably the defendant offered and the arbitrator received the evidence, and in fact acted in making such valuation as was expected of him when selected as an arbitrator, in ignorance of the improprieties of his conduct. The award cannot, and ought not, for these reasons, to be sustained; but,

"*Secondly*, the evidence shows that the actual value of the old and dilapidated building covering the entire premises did not exceed $4,000.

"To construct one entirely new, upon the particular estimates presented, would have cost from $8,870 to $13,710; and the building in its present condition, was shown not to have been as valuable as one entirely new by about sixty per cent.; and upon no consideration of the testimony can the value of the entire building be held to exceed $6,000.

"The exorbitancy of an award of $9,000 beyond that sum, in itself, presents ground for equitable interference; and it may be reasonably inferred from such discrepancy, that it was influenced by partiality, prejudice, or mistake of facts (Sedg. on Dam. 601), and for such reasons a court of equity may vacate the award (*Williams* v. *Craig*, 1 Dall. 318; *Hurst* v. *Hurst*, 1 Wash. Cir. Ct. 56; *Van Cortlandt* v. *Underhill*, 17 Johns. R.

405; *Rand* v. *Redington*, 13 N. H. 72; *Tracy* v. *Herrick*, 25 N. H. 381; 2 Story Eq. Jur. §§ 14, 51; 2 Morse on Arb. 539).

"*Thirdly*, the award being vacated, the parties are remitted to their original *status*, and it becomes necessary to examine as to their rights under the lease, without regard to that decision.

"The provisions of the lease, under which the defendant claims compensation for the entire building on the lot, were to the effect that the lessee was at liberty, at his own expense, 'to tear down and remove from the lot *the buildings* standing thereon, *or such part thereof as he should elect*,' and erect upon such land in place thereof a good and substantial building; in which case the materials of the old building were to belong to him, and in case of non-renewal the lessor was to pay him the value of *the building so to be erected;* such value to be ascertained by one or more persons to be agreed upon; and, in case they could not agree, then by arbitrators to be appointed, one by each party, and the two so chosen to choose an umpire between them, whose award was to be conclusive as to the value of such building. Without such provision for the payment for improvements or erections upon the land, such erections as the tenant had placed there, and such as remained thereon at the expiration of the lease, belonged to the landlord.

"In the present case, the tenant must rely on the strict obligations imposed by the lease for any right to demand compensation for his erections.

"Within its terms, the tenant did not, during the term, '*tear down and remove from the lot*' *the front building*, or any part of it. He merely made the improvements and alterations to it, specified in my findings of fact; and, however much they enhanced the value of that portion of the property, no claim can be made against the landlord therefor (see *Pike* v. *Butler*, 4 N. Y. 360).

"As to the tea-room, in the rear, it was *torn down and removed*. It constituted a part of the buildings standing on the lot at the date of the lease; and the erection in place thereof of the building or structure 25 × 25, and five stories high, was, within the contemplation of the covenants, 'a building,' for which the tenant was entitled to be paid its value at the end of

the lease. The proofs do not enable me to make any assessment of the value of this building separately from the front building. A reference must be had for that purpose, on which allowance must be made to the plaintiff for any use and occupancy of the premises by the defendant since the termination of the lease, and the respective rights of the parties in these particulars adjusted. The question of costs is reserved."

Upon this decision an order was entered directing a reference to ascertain the value of the building or addition erected in the rear of the main building, in the place of the tea-room, which had been torn down and removed. The referee was also ordered to ascertain the value of the use and occupation of the premises from May 1st, 1872 (the date of the expiration of the lease), to the date of his report, and to state the account between the plaintiff and the defendant, charging the plaintiff with the value of the rear building, and charging the defendant with the value of the use and occupation of the whole premises from May 1st, 1872. On May 5th, 1873, the referee made his report, by which he found the value of the addition in the rear to be $2,603, and the value of the use and occupation of the whole premises from May 1st, 1872, to May 5th, 1873, to be $3,547 94, and that on stating the account between the plaintiff and the defendant, he found a balance in favor of the plaintiff to amount of $994 49. Judgment was entered confirming the report of the referee, and directing the defendant to pay to the plaintiff $994 49 and the costs of the action, and to deliver possession of the premises.

From this judgment the defendant appealed.

Livingston K. Miller, for appellant, argued. The award will not be set aside for an error in judgment in the arbitrators (Caldwell on Arbitration, 373, 374, 384; *Knox* v. *Symmonds*, 1 Vesey, Jr. 369; *Morgan* v. *Mather*, 2 Id. 21; *Goodman* v. *Sayres*, 2 Jacob & Walker, 249; *Van Cortlandt* v. *Underhill*, 17 Johns. R. 408, 411, 415, 420; Story's Eq. vol. 2, §§ 1451, 1454, 1455, referring to *Chase* v. *Westmore*, 13 East, 358). None of the objections assigned are causes of reversal or modification of the award, either at common law or under

the statute (*Emmet* v. *Hoyt*, 17 Wend. 410; *Smith* v. *Cutler*, 10 Wend. 589.) "*Misconduct and misbehavior* imply an intent to do wrong" (*Viele* v. *Troy & Bost. R. R. Co.* 21 Barb. 382; see pp. 395–6, and p. 394; *Dater* v. *Wellington*, 1 Hill, 319; *Butler* v. *The Mayor*, Id. 489; *Perkins* v. *Giles*, 53 Barb. 342; *Morewood* v. *Jewett*, 2 Robt. 496; *Ott* v. *Schroeppel*, 5 N. Y. 482; *Turnbull* v. *Martin*, 37 How. Pr. 20; *Perkins* v. *Giles*, 50 N. Y. 228; *Wood* v. *Auburn &c. R. R. Co.* 8 N. Y. 160).

Augustus F. Smith, for respondent.

Larremore, J.—The right of a court of equity to set aside an award for corruption, partiality, or palpable mistake of law or fact, is well settled (2 R. S. 544, § 22; *Herrick* v. *Blair*, 1 Johns. Ch. 101; *Underhill* v. *Van Cortlandt*, 2 Johns Cas. 365; *Perkins* v. *Giles*, 50 N. Y. 232; *Burnside* v. *Whitney*, 21 N. Y. 148; *Perkins* v. *Giles*, 53 Barb. 342). The learned judge who tried this cause has found as a question of fact, that the arbitrators who made the award in question were, and each of them was, guilty of want of care, misjudgment, and partiality in making the same. Mersereau, in anticipation of his selection as an arbitrator, examined the premises in dispute, in company with the defendant, and admits that he had formed an opinion upon the subject without any notice to or conference with his co-arbitrator. From this fact alone evident partiality might be inferred.

The learned judge has also found as a question of fact that the award was excessive and exorbitant, and that the parties who united in it were guilty of misjudgment and partiality on this ground.

These conclusions, based as they are upon evidence, must be regarded as final, in the absence of any gross error of either law or fact.

The award being thus impeached and set aside for sufficient cause, the parties to it are relegated to their original rights under the lease of the premises in question (*Rathbone* v. *Warren*, 10 Johns. 586; *Miller* v. *McCan*, 7 Paige, 451; *Kershaw* v. *Thompson*, 4 Johns. Ch. 609; *Frost* v. *Myrick*, 1 Barb. 362).

The issues raised by the pleadings fully presented all matters of difference which might arise under said lease, and conferred upon the court below jurisdiction to adjudicate thereon.

The parties being thus before the court in the precise attitude of suitors, between whom no proceedings under an arbitration and award existed, the first question to be considered is the construction of that covenant of said lease which provides that the lessee therein named may, at his own cost, *take down and remove from the lot of land* in said lease described, the building now (then) standing thereon, or such part thereof as he should elect, and erect *in place thereof* a good and substantial building, &c.; the materials of the old building in such a case to belong to said lessee. The terms "take down and remove," "and erect upon said land in place thereof," evidently refer to a complete destruction and removal of said building, or some part thereof, from its foundation. No provision is made for any alterations or improvements in the original structure, or payment therefor, whatever their cost or character (*Pike* v. *Butler*, 4 N. Y. 360). A further covenant in said lease provides that the value of the building so to be erected on said lands shall be ascertained, &c. I think the conclusion of the court below upon this point was correct, and that the defendant was only entitled to the value of the building erected on the rear of said lot. Such value has been found, upon conflicting evidence, to be the sum of $2,603, and must be accepted, for the purposes of this appeal, as correct.

I fail to recognize, however, the right of the plaintiff to reduce said amount by a credit of $3,547 94, and have judgment for the excess.

The sum last named was adjudged to be a reasonable allowance for the use and occupation of said premises for one year. The lease expired May 1, 1872, and from that time until May 5th, 1873, the said amount of rent was claimed and allowed. By the terms of said lease the defendant was not to be compelled to surrender possession of the premises until the payments for which it provided were made or tendered. During the year for which rent was allowed, the defendant, so far as the evidence shows, had a mere naked possession of the premises, for the

purpose of security only. He was liable at any moment to be called upon to surrender such possession upon payment or tender. It does not appear that any such tender was made, or that the defendant desired or received any pecuniary benefit from said premises during the year in question. The ruling upon this point, charging the defendant with the said sum of $3,547 94, was in my judgment erroneous, and for this reason a new trial should be ordered.

J. F. Daly, J.—I concur with Judge Larremore. In respect of the allowance made to plaintiff of the rent or value of the premises in question from the time of the expiration of the lease, and which seems to have been allowed as a set-off or as a counter-claim against the defendant's recovery for the value of the erections upon the land, I am of opinion that it should not have been made: 1st. Because, as pointed out by Judge Larremore, the lease expressly provided that the lessee should not be compelled to surrender the premises until tender of the value of such erections; and 2d, because it was unauthorized by the pleadings. The complaint alleged no damage to plaintiff, on account of the improper conduct of defendant in the arbitration proceedings and the delay that has ensued; nor did it allege to be due, nor demand any rent, nor any allowance for use and occupation; nor did it even allege that defendant remained in occupation of the premises, but simply asked to have the award set aside, the value of the erections ascertained, and that plaintiff upon payment thereof be let into possession. The judgment must be *secundum allegata et probata* (*Wright* v. *Delafield*, 25 N. Y. 266).

New trial ordered.

FREDERIC DE BARY *et al. against* D. A. STANLEY.

A party to an action, on his examination before trial as a witness on behalf of the adverse party, under §§ 390 and 391 of the Code of Procedure, cannot be compelled to produce his books and papers for inspection.

The mode of obtaining an inspection of the books and papers of an adverse party is provided for by 2 R. S. 199, § 21, and Rules 18, 19, 20, 22 of the Supreme Court, and the mode of obtaining an inspection and copy of a particular paper is provided for by § 388 of the Code of Procedure.

APPEAL from an order made at special term.

The plaintiffs, in an action for the infringement of a trade mark, and for an accounting for the damage to plaintiffs, obtained an order from a judge of this court for the examination of the defendant D. A. Stanley before trial, as a witness on the part of the plaintiffs, under § 391 of the Code of Procedure. Upon this order a *subpœna duces tecum* in the ordinary form was issued commanding the defendant to appear before one of the justices of this court for examination, and to produce there certain books of account. The defendant Stanley appeared by counsel, and objected to the right of the plaintiffs to compel the production of his books and papers by such process. The judge at special term, on the authority of *Bonesteel* v. *Lynde* (8 How. Pr. 226), and *People* v. *Dyckman* (24 How. Pr. 222), overruled the objection and ordered him to produce his books.

From that order this appeal was taken.

Wm. H. Arnoux, for appellant, cited *Hauseman* v. *Sterling* (61 Barb. 347), and *Woods* v. *De Figaniere* (16 Abb. Pr. 1).

W. L. Flagg, for respondents.

*Per Curiam.**—The mode of obtaining an inspection of

* Present—DALY, Ch. J., and J. F. DALY, J.

an adversary's books and papers is pointed out by the Revised Statutes (R. S. part 3, ch. 1, tit. 3), and the rules of the Supreme Court (Rules 18, 19, 20, 22).

The mode of obtaining an inspection and copy of a particular paper is pointed out by sec. 388 of the Code of Procedure. The examination of a party before trial under sections 390 and 391 of the Code and Rule 21 is wholly distinct from the foregoing remedies, and does not include any more than it supersedes them. The case of *Bonesteel* v. *Lynde* (8 How. Pr. 226), does not sustain the order, for that was a *subpœna duces tecum* served upon a party upon the trial.

In the case of *People* v. *Dyckman* (24 How. Pr. 222), the point was not directly involved, and the case was subsequently overruled. The better authority is contained in *Hauseman* v. *Sterling* (61 Barb. 347), and *Woods* v. *De Figaniere* (16 Abb. Pr. 1).

Order reversed.

AUKE DOOPER *against* PETER NOELKE.

A conveyance of land was made upon certain trusts which were in part void, and the trustees under the power to sell given them by the deed, reconveyed to their grantor by a deed expressed to be made for a consideration of $10,000, but in which all the beneficiaries under the trusts did not join. *Held*, that the acknowledgment of the receipt of the consideration in the deed of reconveyance was *prima facie* evidence that it had been paid, and that the deed vested in the grantee named in it a clear title, freed from all the trusts created by the deed to the trustees.

APPEAL by defendant from a judgment of this court, entered on the decision of a judge at special term.

The action was brought against the defendant for breach of an executory contract to convey a plot of land situated on the southeast corner of Delancey and Essex streets, in the city of New York.

The defendant claimed that he had tendered a deed of the premises, which the plaintiff had refused to accept.

On the trial it appeared that the plaintiff had refused to accept the defendant's title, for a supposed defect therein arising as follows:

A portion of the premises in question in 1838 formed part of a plot of land owned in fee simple by one William Slamm, who, on June 9th, 1838, united with his wife in a deed intended to provide for his seven children (four daughters and three sons) then living. This deed conveyed, subject to certain provisions for his wife, one undivided seventh part of the premises to each one of the daughters in fee, and also conveyed one undivided seventh part each to three sets of trustees, one for each of his three sons.

The trustees were empowered *to let, lease, sell, partition or convey* the premises; and the conveyance to them was upon trusts out of the rents to pay taxes, repairs, &c., and apply so much of the rents as they might think proper to the support (in case of Levi D. Slamm) of the wife and children he then had, and such as he might hereafter have, and (in case of William and Joseph Slamm) to the support of themselves and any wife, family and children they might thereafter have, and during the lives of his sons to invest the residue of rents in improvements on the premises, in bonds and mortgages, in purchase of real estate, or otherwise to *provide for accumulations*, and on the death (of each son) to divide all that should remain of said undivided seventh and *accumulations* thereof to the persons who would be entitled to inherit real estate.

Subsequently the trustees and Levi D. and Joseph Slamm (with the other son, the daughters and sons-in-law of William Slamm, beneficiaries under the trust deed), united in a reconveyance to him, dated February 6th, 1840, of the whole property that had been conveyed on trust, in which, however, the children and remaindermen interested in the shares conveyed in trust for the benefit of Levi D. and Joseph Slamm during their lives did not join.

This latter deed recited the trust deed and the agreement of the grantors for the expressed consideration of $10,000 to reconvey the whole estate.

On July 6th, 1840, William Slamm and wife conveyed to

his children the whole premises in fee simple, and from them the defendant claimed.

On the trial the court (Robinson, J.) held that by the reconveyance to William Slamm in 1840 the title in fee was vested in him, and that defendant, claiming under the subsequent conveyances, had a good title. Plaintiff appealed.

William C. Barrett (*John L. Hill* with him) for appellant.

R. H. Bowne for respondent.

Daly, Chief Justice.—The deed executed by William Slamm and wife on the 9th of June, 1838, conveyed one undivided seventh of the premises to each one of his four daughters in fee, subject to certain provisions in respect to the wife, and in respect to himself, in one of the four sevenths. The remaining three undivided sevenths were by the deed conveyed in trust, one for each of his three sons.

The trusts created in respect to the remaining three sevenths were void, so far as they provided for the accumulation of rents and profits of the real estate, which can be accumulated only for the benefit of one or more minors then in being, and which must terminate at the expiration of their minority (1 Rev. Stat. 726, §§ 37, 38), whilst here the accumulations were directed to be made for the lives of beneficiaries named, and for the support, maintenance and education of children not then in being. It was doubtless this defective feature in the trust which led to what afterwards took place.

As respects these three-sevenths, the trustees were given by the deed full power to partition and sell that undivided portion of the real estate, and full power to sell any portion of the seventh parts to raise the money to execute the trust as respects the grantors William Slamm and Mary his wife. It is claimed by the appellant that there was a power to sell only the life estate in trust. There is no such reservation in the deed, nor anything from which it could be inferred that that only was what the grantors intended by the power given to sell. The trustees having this power to sell one portion of the real estate,

and the residue of it by the deed having been conveyed to the daughters in fee, it was competent for the trustees and the four daughters and their husbands to unite, as they all did, in a reconveyance of the whole to William Slamm. The case, to which the appellant has called our attention, of *Wright* v. *Miller* (8 N. Y. 10), is a case where the trustee fraudulently combined with the grantor and the husband, whom she had afterwards married, to extinguish the trust she had created for the benefit of children that might be born of the marriage, and all that was held in that case was that children born of the marriage might maintain a suit in equity, under such circumstances, to have the property restored and reinvested in trust for their benefit, they having the reversionary interest in the trust, which could not be defeated by a possession and control of the property obtained through the wrongful and fraudulent act of the husband, acting in combination with the grantor and her trustee. I see nothing in this decision which has any application here. There is no pretense that there was any fraud practiced by anybody in this case. The property here afterwards went to the children of William Slamm and of his wife Mary, and was partitioned among them.

The deed executed by the trustees and the beneficiaries under the former deed acknowledges the receipt of the purchase money, which, uncontradicted, is sufficient evidence of its payment (*Wood* v. *Chapin*, 13 N. Y. 509; *Jackson* v. *McChesney*, 7 Cow. 360; *Webster* v. *Van Steenbergh*, 46 Barb. 211). The plaintiff was offered a good title, and the judgment should be affirmed.

Larremore and J. F. Daly, JJ., concurred.

Judgment affirmed.

THE ELTING WOOLEN COMPANY *against* JOHN T. MARTIN.

Under an agreement for the manufacture and delivery of goods by the plaintiff, by which 40,000 yards of flannel were to be furnished each month, the plaintiff during the first month furnished only 25,000 yards: *Held*, that this was such a breach of the contract as entitled the defendant to rescind it, and refuse to receive any more goods, notwithstanding the plaintiff had offered to supply the deficiency by goods bought in the market, and had been excused by the defendant from doing so.

APPEAL from a judgment of this court entered by direction of the court at trial term, dismissing the complaint.

The action was brought to recover damages for the breach of a written agreement dated March 9th, 1875, by the terms of which The Elting Woolen Company agreed to deliver at the store of John T. Martin "two hundred and thirty thousand yards wool dyed indigo blue blouse flannels, to weigh not less than five and a quarter ounces per yard, and twenty-eight inches wide, full government standard goods, to be satisfactory to the said Martin as per two samples submitted. The first delivery is to be made on or before the 24th day of March, and not less than forty thousand yards are to be delivered each month thereafter until the contract is completed. And it is further agreed that the entire product of the company's mill from the 24th day of March is to be delivered upon this contract until the entire quantity is completed. It is agreed by the party of the second part that in consideration of the fulfillment of the above stipulations that the party of the first part shall be paid for each and every yard ninety-five cents, payable ninety days from date of delivery. The goods shall be examined within fifteen days from delivery. If The Elting Woolen Company fail to deliver the said goods up to contract, the said Martin has the right to purchase them on their account."

On the trial it appeared that during the first month for the performance of the contract (viz., from March 24th to April 24th), the plaintiff had tendered to the defendant only, 24,985½

yards of the goods called for by the contract, and that of those a large portion had been rejected by the defendant as not being up to the contract.

The failure of the plaintiff to deliver 40,000 yards during the first month was attempted to be excused by showing that on April 14th the agent of the plaintiff stated to the defendant that the plaintiff was likely to be short in that month's delivery, and was prepared to furnish the deficiency by buying goods in the market and delivering them to him, or would give him the privilege of buying the goods himself, by which he could save money (the market price of the goods being then less than the contract price). To this the defendant replied that he would furnish the deficiency himself.

At the end of the first month, defendant claimed that the plaintiff had failed to perform its part of the contract, and therefore elected to rescind it, and refused to receive any more goods.

On the trial the complaint was dismissed.

The plaintiff appealed.

Augustus F. Smith, for appellant.

A. J. Vanderpoel, for respondent.

Robinson, J.—The written contract upon which this action is brought was plainly one for the purchase by the defendant of 230,000 yards of flannel of a specified kind and quality, to be manufactured by the plaintiff (*Passaic Manufacturing Co. v. Hoffman*, 3 Daly, 495), and was not of such a mixed character, that if they failed thereafter to manufacture the goods called for by the contract, *they* might go into the market and procure others of a similar kind and quality to supply the deficiency. It suggested no such mere sale and purchase, but related to goods which plaintiff thus agreed to deliver the defendant out of the future products of their mill, to wit, "from the date of the contract at the rate of not less than 40,000 yards per month," until the entire quantity contracted for should be completed; and it provided that the entire product of

the mill from the 24th of March (the contract was dated the 9th) was to be delivered under the contract, until the entire quantity was completed; and if the mill or manufactory was destroyed by fire or otherwise, before the completion of the contract, the contract, as to the balance of the goods not delivered, was to be void. It also provided that if the plaintiff failed to deliver the goods "up to contract," defendant had the right to purchase them on their account.

Plaintiff's mill had a capacity of easily producing from 40,000 to 50,000 yards of flannel weekly, but instead of immediately proceeding to manufacture any flannel of the character called for by the contract, they retained the poor warps in their looms until the first of April. They made and tendered but 24,985½ yards during the first month (ending April 24th, 1865), but these was rejected by the defendant as inferior to the requirements of the contract. Without regard to the merits of the controversy with reference to the quality of the goods then tendered, the omission of the plaintiff to produce or offer the balance of 15,000 yards required to be delivered prior to the 24th of April, is attempted to be excused by an alleged substituted agreement on the 10th of April, when, as claimed in complaint made by defendant as to the character of the goods tendered, the plaintiff's agent stated to him that they were prepared to furnish any deficiency in that month's delivery, as they had ascertained the goods could be obtained, but would give him the privilege of supplying himself, and he could save money by it, as the market price was less by ten cents per yard than he had agreed to pay; and that defendant said he would furnish the deficiency himself. On the 21st of April plaintiff tendered eleven other bales (containing 6,336 yards) which were also rejected without examination. Under these circumstances, the defendant, at the end of the first month (April 24th), refused to receive any more of the goods, and repudiated further performance of the contract, and, in my opinion, he was justified in so doing. The plaintiff plainly failed to comply with its prescribed terms, in neglecting to manufacture these particular goods for defendant, and deliver him such manufactured goods during the first month to the

extent of 40,000 yards. It rested in the option of the defendant, in case of their failure to comply with their contract, to go into the market and purchase such goods on their account, and by tendering him the election to do so, as they alleged was done on the 10th of April, they neither offered nor conceded to him any privilege which he did not already possess under the very terms of the agreement, so that even if he assented to their proposal, nothing was thereby yielded or conceded on their part which constituted a consideration for any modification of the contract. The right to go into the market and buy such goods on account of plaintiff, in case of breach of the contract by non-delivery of the article contracted for, was fully secured to him by the precise terms of the contract, and to do so, and buy on his own private account, was a right he possessed unabridged by any provision of the agreement in question.

Under these views, I am of the opinion the defendant was fully justified by the plaintiff's default in refusing any further obligation to the contract, and that the complaint was properly dismissed.

Judgment should be affirmed.

Larremore, J., concurred.

Judgment affirmed.

Frederic A. Yenni *against* The Ocean National Bank of the City of New York.

The defendant made advances to one S. on a pretended warehouse receipt for goods which were in reality held and owned by him, and the goods were subsequently levied on under an execution against S. After the levy had been made, the defendant, in ignorance of the fact that the warehouse receipt was fraudulent, and that the levy had been made, authorized S. to sell the goods and turn over the proceeds to it. S. accordingly sold the goods to the plaintiffs, who were the purchasers in good faith, and they, on learning of the levy, applied to the defendant's president, who, being still ignorant that the warehouse receipt was fraudulent, informed them that S. had authority from the defendant to sell the goods, and that they had a good title to them as against the sheriff under the levy. The plaintiffs thereupon commenced a suit against the sheriff, in which they were defeated. S. applied the proceeds of the sale to his own use, but the amount advanced to him by the defendant on the warehouse receipt was subsequently repaid: *Held*, that the defendant was not liable to the plaintiffs as an undisclosed principal for the failure of title to the goods, nor for the costs of the suit brought against the sheriff.

Appeal from a judgment of this court entered on the decision of a judge thereof after a trial before him without a jury.

The action was brought against the defendant to charge it as the undisclosed principal on a sale of goods by the Sterling Oil Works to the plaintiffs' firm of Yenni & Gregory, the title to the said goods having failed. The judge found, as matters of fact, that previous to December 15th, 1866, Edward S. Stokes had been for some time the owner and manager of a manufacturing establishment situate at Greenpoint, Kings County, in the State of New York, called "The Sterling Oil Works," and acted as such owner and manager. That on December 15th, 1866, he applied to defendants, and obtained a loan from them of $5,000 on his own note, upon the pledge, as collateral security therefor, of a paper purporting to be a warehouse receipt, in these words: "Sterling Oil Works, Greenpoint, Brooklyn, December 6th, 1866. Received on storage for account of Edward S. Stokes, six hundred barrels of petroleum, crude and refined, contained in tanks, and seven hundred

barrels to hold the same, deliverable on his order, on payment of the charges named thereon, in accordance with the marginal note hereto. (Signed) William H. Chapman, Superintendent. (Endorsed) Edward S. Stokes."

That said Chapman was the mere agent or employee of said Stokes, and no such property as that specified in said receipt had ever been warehoused or placed on storage in charge of any third person, nor was there any corporation or other parties than said Edward S. Stokes engaged in business under the said name of The Sterling Oil Works, but such was the name which said Stokes used in carrying on the business of dealing in and refining petroleum oil at said works on his own account. That he had previously made an ostensible transfer of the said Sterling Oil Works to his mother, but as before, continued to control and transact the business thereof; and such transfer was made in anticipation of the recovery of judgments against him, and with intent to hinder and delay his creditors.

That prior to said 15th day of December, 1866, the defendant had frequent dealings with said Stokes, in loaning him money on collateral security of papers purporting to be warehouse receipts of The Sterling Oil Works, and under faith of the same being *bona fide* warehouse receipts of some third party for petroleum oil, or property actually held by such third party on storage for him, and without knowledge that The Sterling Oil Works was a name under which he carried on business. That the aforesaid paper purporting to be a warehouse receipt, upon which the aforesaid loan of $5,000 was procured by said Stokes from the defendant, was false and fraudulent, and made or procured to be made by him, with intent to defraud the defendants in procuring such loan from them, and they were so deceived and defrauded, and induced to make such loan on the faith of said pretended warehouse receipt, as the genuine warehouse receipt of some third party having on store said 600 barrels of petroleum and 700 barrels on store for him, as was purported by the terms of said receipt, and were deceived and defrauded into making said loan to him, on the faith of the genuineness of said paper, as an actual and *bona fide*

warehouse receipt. That at the time of the making of the aforesaid loan of $5,000 by the defendant to said Stokes, there was in said Sterling Oil Works a quantity of about 600 barrels of petroleum in bulk or in tanks, owned or controlled by said Edward S. Stokes, also a quantity of empty barrels. That subsequently, and on or about the 22d day of December, 1866, the sheriff of the county of Kings, by virtue of two executions issued on said judgments recovered against said Stokes by the Oneida County Bank, levied on all the said oil and barrels in said works, as his property. That at the time of the making of said loan by the defendant to said Edward S. Stokes, on his representation that he might find favorable opportunity for the sale of said petroleum oil, David R. Martin, the president of defendant's bank, stated to him he might do so, accounting for the proceeds to defendant, and subsequently said Stokes, through a broker, contracted with the plaintiffs for the sale of 150 barrels of said petroleum oil by memorandum of sale dated January 8, 1867, and stating that there had been "sold for account of Sterling Oil Works, to Messrs. Yenni & Gregory, Maiden Lane, one hundred and fifty barrels of refined petroleum. Terms cash, on delivery of gauger's return and lighter's receipt for the oil." Which memorandum was signed "Sterling Oil Works, E. S. Stokes, agent; R. H. Little, broker."

That on the 14th day of January, 1867, under and in pursuance of said memorandum or contract of sale, one hundred and sixty-six (instead of 150) barrels of petroleum oil were delivered the plaintiffs by said Stokes, and plaintiffs thereupon paid said Stokes by check, designating him as agent, the sum of $\$3,296\frac{70}{100}$ therefor, and he applied the same to his own use. That at the time of said purchase, and until after such payment, plaintiffs had not been informed or notified of any actual or assumed agency of said Stokes, for or on behalf of the defendants in the sale of said petroleum to them, nor had they in the making of such purchase, or payment of the agreed price, any intimation that the defendants were undisclosed principals therein, or any ground for relying upon them in that capacity or relation. That subsequently, and on or about the 16th day of January, 1867, the sheriff of the county of Kings, by virtue

of the aforesaid levy upon said petroleum and barrels, made under said executions issued to him in December previous, on said judgments of the Oneida County Bank, seized and took away from the possession of the plaintiffs one hundred and twenty-three barrels of said petroleum, so as aforesaid sold and delivered them by said Edward S. Stokes. That shortly after such seizure, the plaintiffs applied to said David R. Martin, president of defendant's bank, at the bank, in relation to such transaction, who thereupon stated to them that their title to said petroleum oil was good; that the bank had advanced the money on the oil upon said warehouse receipt; that he had given Stokes authority to sell the oil, and that the sheriff of Kings had no right to seize it; and being yet ignorant of the deceit practiced on them by said Stokes, made and delivered the paper writing as follows: "Ocean National Bank, of the City of New York. January —, 1867. E. S. Stokes: Dear Sir,—You may dispose of the 166 bbls. of oil and empty casks you have reported sold for our ac., and will send ac. sales and check for amount to me. Yours, &c., D. R. Martin, Pres'd't," but refused to aid in the bringing of a suit by plaintiffs, by giving the necessary bonds to replevin the property. That on the fourth of February following, plaintiffs commenced an action in the Supreme Court, of claim and delivery of possession, of which defendant had notice, for the recovery against said sheriff, as possessor of said 123 barrels of petroleum, which was defended by said sheriff, and resulted in a judgment in favor of said sheriff, against said plaintiffs for the value thereof, and costs, the sum of $2,487 $\frac{71}{100}$, which, on appeal to the general term, was affirmed for the sum of $3,221 $\frac{79}{100}$, and again on further appeal to the Court of Appeals, was again affirmed by that court, and the plaintiffs, by reason of the failure of the title to the said 123 barrels of oil so sold them as aforesaid, sustained damages, including costs of defending said action, and the interest to the day of trial, in the sum of $4,774 $\frac{62}{100}$.

That the amount of the loan of $5,000, so as aforesaid made by the defendant to said Edward S. Stokes, upon the security of said warehouse receipt, was repaid them as follows, to wit: $2,500 on the 31st day of January, 1867, by a discount of a

note of his mother, and the balance on the eighteenth day of March, 1867, when said warehouse receipt was returned to him.

The judge (Robinson, J.) concluded as matter of law:

First. That the authority verbally given by the defendants to Edward S. Stokes, on the making to him of the loan of $5,000, to sell the petroleum oil referred to in said paper purporting to be a warehouse receipt, constituted but a waiver or relaxation by the pledgees to the pledgor of their rights of lien, and that he might deal therewith as owner, subject only to an accounting to them for the proceeds to the extent of their lien.

Second. That in the sale made by said Stokes to plaintiffs in the name of The Sterling Oil Works, he, and not the defendants, was the principal in the transaction, and the defendants were not the vendors to plaintiffs of said oil.

Third. That by the acts of the defendants aforesaid, they in no way, either by representation or otherwise, made themselves the undisclosed or actual principals in the aforesaid sale of said petroleum to plaintiffs, nor are the plaintiffs entitled to any recourse to them for any of their aforesaid losses.

Judgment was accordingly ordered for the defendants, and plaintiffs appealed.

Joshua M. Van Cott (*Edwin A. Doolittle* with him), for appellants.

F. N. Bangs, for respondent.

Daly, Chief Justice.—The finding of facts excepted to: 1. That Chapman was the agent and employee of Stokes. 2. That The Sterling Oil Works was simply a name used by Stokes, that no other person but Stokes carried on the business under that name, and that no such property as that specified in the receipt had ever been warehoused or placed on storage in charge of any third person—*that is*, that it was in charge of Stokes himself, being in charge of his superintendent Chapman. 3. That he had previously made a transfer of the business to his mother, with the intent to hinder and delay his creditors. 4. That the

warehouse receipt was fraudulent, and made by him with an intent to deceive the defendants in procuring the loan, and that they made the loan on the faith of its being a genuine receipt of some third party having the quantity of oil and barrels on store for him, as the terms of the receipt purported. 5. That the defendants, ignorant of the fraud practiced upon them, made and delivered the written order of the president of the bank, authorizing Stokes to sell. 6. That Stokes applied the money received by him from the plaintiffs to his own use, are all fully sustained by the evidence, and our judgment will proceed upon the conclusion that the facts of the case are as found by the judge.

I am unable to see how upon the facts found by the judge, the bank can be held answerable for the loss which the plaintiffs incurred by the purchase of the property from Stokes. The complaint in substance, avers that the bank through their agents and servants, claimed to be the owner and holder of the property; that they offered it for sale through their authorized agents for and on their behalf, as their property; that the plaintiffs, *relying upon such representation and statements*, purchased it; that upon Stokes producing the gauger's return and the lighterman's receipt, the plaintiffs, for the purpose of ascertaining the true owner of the property and the authority of Stokes to sell it, demanded the evidence of his authority; upon which he stated that the oil was the property of the bank; that he acted as its authorized agent, and that he delivered to the plaintiffs an instrument signed by the president of the bank, authorizing him to sell it for the bank, upon which the plaintiffs paid him the purchase money and received the property.

The complaint then avers that the property having been taken from them by the sheriff, as property which had been levied upon by him previously to the sale of it to the plaintiffs, under an execution upon a judgment recovered against Stokes, they notified the defendants of what had occurred, and requested them to defend and protect the plaintiffs' title; that the defendants then asserted that they were at the time of the sale, the *bona fide* owners and holders of the property, and that the plaintiffs had acquired a valid title to it, by the sale of it to

them ; that they, the defendants, required the plaintiffs to assert and maintain their title to it in law, and that the plaintiffs, at the *special instance and request of the defendants*, brought an action of replevin against the sheriff for wrongfully taking it, in which action a verdict was rendered in favor of the sheriff. That the plaintiffs thereupon requested the defendants to pay the damages they had sustained by reason of the failure of the title, which the defendants refused, and the plaintiffs then at the instance of the defendants, upon the defendants' belief *and at their request*, appealed to the Court of Appeals where the judgment of the court below was affirmed, and the plaintiffs were compelled to pay the judgment and the costs of the appeal.

The plaintiffs failed to prove this state of facts. They did not show that the oil was offered for sale to them as the property of the defendants, and that they purchased it relying upon any such representation or statement; but, on the contrary, the written memorandum of sale shows that it was sold to them on account of the Sterling Oil Works, and that the memorandum was signed by Stokes with the affix of *agent;* that is, agent of the Sterling Oil Works—the Sterling Oil Works being, in fact, Stokes himself. And they did not prove that the action of replevin was brought at the defendants' request, or that the appeal to the Court of Appeals was upon the defendants' behalf, and at their request.

It may be assumed that the bank acquired any title which Stokes had to the property, by the indorsement to them of the petitioners' warehouse receipt. That both he and Chapman would be estopped as against the bank from setting up that the receipt was fictitious, and not based upon a real transaction, and that this estoppel would be equally effectual against all claimants under Stokes, upon a title subsequently acquired. That although it was not—as the Court of Appeals held when this transaction was before them, upon the appeal from the judgment—a warehouse receipt within the meaning of our statute, it was an instrument, the indorsement of which with an intention to transfer the property, would by the law merchant transfer it independent of the statute. That as between Stokes

and the bank, it was a mortgage, which was void as against Stokes' creditors, as there had been no immediate delivery of the property under it, or change of possession, and the mortgage had never been filed. All this, I say, may be assumed; but it in no way helps the plaintiffs' case.

In the very able argument of this case on the part of the appellants, it was claimed that the bank put in motion the agencies which resulted in the sale to the plaintiffs, and the loss of the money which they paid for the oil. This was not the fact. The bank, under the impression that they held a regular warehouse receipt, authorized Stokes to sell the oil, upon his informing them that it was declining in value in the market. But he did not assume to act under this authority. He could have done all that he did if no such authority had been given. He sold it, not as the property of the defendants, but as purporting to be the property of the Sterling Oil Works, and delivered it himself, the pretended warehouseman Chapman being his superintendent and servant. When he made the sale, he knew what the defendants did not, that the property was then levied upon under an execution against him. With this knowledge, he went to the works, carried it away, and delivered it to the plaintiffs, receiving from them the purchase money, part of which he gave to his mother, the pretended owner of the oil works, and the residue he applied to his own use. He testified that he told the broker, when he employed him, that he had authority *from the bank* to sell the oil; but this statement is inconsistent with the written memorandum of the sale, and is in conflict with the testimony of the broker, who says, that he did not tell him until the oil was sold, upon whose account he sold it. There is no finding by the judge upon this point; but we must assume, so far as that may be necessary in support of his judgment, that he relied upon the memorandum and the testimony of the broker. Stokes, in fact, perpetrated a fraud upon the plaintiffs, by selling and delivering to them property to which he knew that neither he nor the defendants had then any claim, it having been levied upon by the sheriff, as he had previously perpetrated a fraud

upon the defendants, by borrowing $5,000 of them upon the security of a fictitious warehouse receipt.

The president of the bank testified that it was his impression that he gave Stokes a verbal authority to sell, when the bank loaned him the $5,000, which was on the 10th of December. The sale by Stokes to the plaintiffs was on the 8th of January following. The giving of this verbal authority in no way affected the sale made to the plaintiffs. They were in no way influenced or misled by it in making the purchase, and as respects them or the broker, Stokes, as I have already said, could have done all that he did without any such authority. After the sale was made, Stokes procured from the president a written authority. The precise time when he procured it does not appear. The instrument is simply dated January, 1867. All that the president could say was that he gave Stokes a verbal authority when the $5,000 was loaned to him, and that he came subsequently and the president gave him a written order. Stokes testified that he got the written authority after the oil was sold; that he did not know whether he got it before the plaintiffs gave him their check or not. And in answer to a direct inquiry, said that he did not recollect whether or not he got it after the sheriff of Kings county had gone to the plaintiffs and claimed the property. That the plaintiffs up to that time knew nothing about this written authority appears by the testimony of one of them, Willard Gregory, who says that he did not know who Stokes was acting as agent for when the sheriff came and took the property from them, and that he did not receive or see the written authority until after that seizure; so that, up to this time, the plaintiffs knew nothing of any interest which the defendants had in the oil, or of the authority given by them to Stokes to sell it. There was nothing in that circumstance, therefore, that induced or led to the purchase.

I think it very plainly appears when and why this written authority was obtained. There is first the suspicious circumstance that the date is given generally in January, the day of the month being omitted. Stokes was asked if anything was said at the time the order was given about omitting the day,

and he answered, "Not a word;" but when afterwards asked if it was not unusual for men of business to give orders without dating them, he replied that he thought that something was said about putting January, because the oil had been sold a day or two previous. It appears by the complaint, that the sheriff of Kings county took the oil from the plaintiffs on the 17th of January, nine days after the plaintiffs bought it. Now Stokes had previously testified that when he applied for the written authority, he told the president that he was sorry the *way things was;* that some of the oil had been taken out of the works; that he had intended the proceeds to go to him, but *they had gone to another channel;* that he was *sorry about it*, but that his mother would pay the deficiency, and that the president told him if he would do that, it would be satisfactory, to which he answered that he would sell *the oil* and *account* for it, and that the president replied, "All right; do so." Now by his own showing, he had then sold the oil, and the written authority in fact, so states. He told the president that some of the oil had been taken from the works. This was true. He had taken 168 barrels himself, and delivered them to the plaintiffs. He also told the president that he had intended the proceeds (that is, of what had been taken away) to go to him, but they had gone to another channel. What was this other channel? Evidently the taking of the 168 barrels by the sheriff from the persons to whom he had sold them, the plaintiffs, showing very plainly, to my mind, that it was after this event that he went for the written authority. There was a reason for it then, at least in his mind, which did not exist before. It had been sold to the plaintiffs, and as he had a verbal authority from the president, he had nothing to do but to go to the bank and give him the check he had received from the plaintiffs upon the sale of it, which he did not do, but divided the purchase money between himself and his mother. But the sale had proved abortive. The sheriff had followed the property and recaptured it. Willard Gregory, one of the plaintiffs, says that when the oil was seized, he went immediately to the broker, found out where Stokes' office was, went there and found Stokes at his lawyer's. It was after this that the written

authority was produced and given to the plaintiffs, for Willard Gregory swears they received it *immediately* after the seizure by the sheriff, and that his impression was that he first saw it in their lawyers' office, Van Cott, Winslow & Van Cott.

The president of the bank, in the various interviews between him, the plaintiffs and their lawyers, did not request the plaintiffs to bring the replevin suit, or to appeal to the Court of Appeals. When Willard and George Gregory called at the bank, after the seizure, they saw the secretary, and told him of what had occurred. He told them that the bank had advanced money on the oil, and had a warehouse receipt for security, and that he did not see how the sheriff could hold it. They then saw the president. He made the same reply in substance as the secretary, saying, in addition, that the plaintiffs' title to the oil was good, that he had directed Stokes to sell it, and gave him authority to do so. They asked him what he thought they had better do, and he replied that their title was good, and that they had better defend it. At another interview he referred to the receipt, and said that if that was not a good warehouse receipt, there could not be one; that they were doing business in that way every day; that if they could not be protected on that, that it was time the bank should know it. When called upon in respect to the appeal to the Court of Appeals, he was told that the case was decided against the plaintiffs, and the plaintiffs said that they thought he ought to relieve them from the suit and furnish sureties to carry the case to the Court of Appeals, to which his answer was that they had got a good title to the goods, and that he would not do anything about it.

There was nothing in this evidence, and it is all that there is, showing that the bank authorized or requested the plaintiffs to bring the replevin suit or the subsequent appeal. What the president said was said in ignorance of the fact that that warehouse receipt was fictitious. He supposed that the bank held a regular warehouse receipt, duly indorsed; and under that impression, stated that the title of the plaintiff was good, as the bank had given Stokes authority to sell. In this he was mistaken; but the mischief was then done. The plaintiffs had

bought the property, paid for it, and the sheriff had then taken it out of their possession. The president's mistaken confidence in the validity of the bank's title may have induced the plaintiffs to bring the action of replevin, but that is no ground for holding the bank answerable for the loss which the plaintiffs sustained by purchasing and paying for the goods. Nor does it affect the question that Stokes' mother afterwards paid the $5,000 to the bank which Stokes had borrowed. That the bank has escaped from loss is no reason why they should make good the plaintiffs' loss, both parties being equally innocent.

This is not the case of a principal who is liable for the frauds of his agent, acting within the scope of his authority, for that liability is founded upon the principal's holding out his agent as fit to be trusted, and who thereby, in effect, warrants his fidelity and good conduct (Story on Agency, 7th ed. §§ 127 and note, 443, and 445; 4 Bac. Abm. Master and Servant, K); but here the defendants did not hold out Stokes to the plaintiffs as their agent, nor did the plaintiffs purchase the property with any such understanding or impression. Nor can the defendants be brought within the rule which charges an undisclosed principal upon a contract made by the agent in his own name. That rule is founded upon the justice of holding the undisclosed principal responsible, although the agent made the contract in his own name, or generally as agent, without specifying his principal, because the contract was made by the principal's direction and for his benefit. But that rule is never enforced for the advantage of a third party, if it would work injustice to the principal. As the third party contracted with the agent in his own name, or generally as an agent, without any knowledge of the principal, he has no right to look to the principal, if the principal, without any default upon his part, would then be prejudiced by being made personally liable. The rule is subject to the correlative rights existing, as between the principal and his agent, and will not be enforced against the principal where it would be inequitable and unjust to do so (*Thompson* v. *Davenport*, 9 Barn. & Cres. 78; 1 Bell's Com. § 418, 4th ed.; Smith on Mercantile Law, 126, 127, 3d ed.; Story on Agency, § 449, 7th ed.)

Such is the case here. All the right which the defendants ever had to this property was such as Stokes conferred by indorsing to them the fictitious warehouse receipt, and they had none whatever when Stokes sold it to the plaintiffs, it having then been levied upon by the sheriff. The levy was made on the 22d of December, and the sale to the plaintiffs on the 8th of January following by Stokes, was evidently to evade and defeat the levy; a circumstance of which the defendant was ignorant. That Stokes did not then make the sale for the defendant's benefit appears in the fact that he made it as the assumed agent of The Sterling Oil Works, of which he was the proprietor and not the agent, and from the disposition which he made of the proceeds. To hold the defendant, therefore, answerable for the loss which the plaintiffs sustained in buying from Stokes, as the assumed agent of The Sterling Oil Works, a quantity of oil to which neither he nor the defendant had then any claim or title, a fact of which the defendant was ignorant, would be unjust, and which the plaintiffs have no right to insist upon to the defendant's prejudice, where Stokes did not assume to act by virtue of the oral authority they gave him to sell, but where he sold it, and the plaintiffs bought it of him, as the supposed agent of The Sterling Oil Works. The defendant gave him authority to sell; but between the time when that authority was given and the sale, a circumstance occurred which divested the defendant of any right or claim to the property; a circumstance of which they were ignorant, but of which Stokes had knowledge. It was not a sale, therefore, made by their authority, for it cannot be assumed that they authorized him to sell it after it had been levied upon (*Southern* v. *How*, Cro. Jac. 469, 470. *See the third proposition, which the court adopted*). If the defendant had held out Stokes to the plaintiffs as their agent, it might have been otherwise; but they cannot be held answerable, under such circumstances, as the undisclosed principals. The judgment should be affirmed.

J. F. Daly and Loew, JJ., concurred

Judgment affirmed.

JACOB DUNN *against* CORNELIUS M. MESEROLE *et al.*

A motion to dismiss the complaint, under § 274 of the Code of Procedure, for neglect to serve the other defendants having been denied: *Held*, that the order denying this motion was a bar to a new motion to dismiss the complaint, for the same reason, made a year afterwards, no leave to renew the motion having been obtained.

APPEAL by plaintiff from an order of this court made at special term.

The action was brought against the defendant Meserole and five others to recover damages for breach of a contract in failing to take and pay for certain coaches ordered to be built for them by the plaintiff.

The defendant Meserole alone was served and appeared, and on February 18th, 1873, made a motion at special term to dismiss the complaint for the neglect of the plaintiff to serve the summons on the other defendants, five months having elapsed since the commencement of the action. This motion was denied, and no further proceedings to bring in the other defendants having been made, the defendant Meserole, on March 9th, 1874, again made a motion to dismiss the complaint for neglect to serve the other defendants. This motion was granted, and from the order granting it the plaintiff appealed.

Geo. A. Black, for appellant.

Chas. M. Da Costa (*Wellesley W. Gage* with him), for respondent.

J. F. DALY, J.—The order appealed from should be reversed. A similar motion on behalf of defendant Meserole had been made at special term, and denied on February 18th, 1873. The same facts were before the court on both applications, and the first decision thereon, without leave to renew, was a bar to the subsequent motion (4 Sand. 438; 6 How. 321).

The fact that a year had elapsed between the two motions, and therefore plaintiff had neglected, for that additional period, to serve the other defendants, was not new nor different matter, warranting a new motion without leave. The ground of the first motion was, 1st. That plaintiff had neglected to serve the other defendants, although five months had elapsed since the suit was commenced, and they might have been served, but plaintiff has made no effort to do so; 2d. That the defendants not served were necessary parties to a complete determination of the matters in controversy and the protection of defendant's rights; 3d. That the plaintiff's avowed purpose was to collect the whole of his claim from defendant Meserole alone. These facts were not disputed, and upon them and on the pleadings and proceedings in the cause, showing that the action was upon contract against the six defendants named in the summons as joint debtors, and that only one of them, viz. Meserole, had been served with the summons, the court denied defendants' motion to dismiss the complaint (Code of Procedure, § 274, sub. 4). This decision in effect determined that, although plaintiff had served but one of the joint debtors, and intended to proceed against that one and no other, he had the right to do so, and the court would not interfere with his practice (Code of Procedure, § 136, sub. 1). No lapse of time after that decision, nor subsequent failure to serve the other defendants could alter the effect of the decision that Meserole had no right to complain if he were proceeded against alone, and that it was not so much a question of unreasonable neglect to serve other defendants (although that question was necessarily involved in the decision), as of plaintiff's absolute right, under section 136 of the Code, to proceed against one joint debtor only, unless the court should otherwise direct.

The second application to the special term was therefore an attempt to obtain a review by one judge of the decision of another upon the same facts, and was improper (leave not having been obtained) and should have been denied. The injury complained of by defendant Meserole does not exist. It would not help him to contribution from his codefendants to have them served in this action. Whether they were brought before

this court or not by plaintiff to obtain contribution, he would have to bring a separate suit against them in any event, and this action would not settle their rights as against each other. The point as to multiplicity of actions is, therefore, not well taken. The joint property of all defendants can be reached in this action, although only Meserole be served (Code of Procedure, § 136, sub. 1), and if the other defendants have defenses they may voluntarily appear (9 Abb. 175).

Loew and Larremore, JJ., concurred.

Order reversed.

Morris Altman *against* Benjamin Altman *et al.*

Plaintiff and defendant, having been partners in business, and having by mutual agreement dissolved, the defendants, by a written stipulation, agreed to pay the plaintiff for his interest in the good will of the business, such sum as it should be decided to be reasonably worth, by arbitrators to be appointed by the parties. Under this agreement arbitrators were appointed, who were unable to come to any decision on the question submitted to them. *Held*, that plaintiff could not maintain an action to have the value of his interest determined and paid to him, and that in the absence of bad faith on the part of the defendants, the rendering of an award by the arbitrators was a condition precedent to the plaintiff's right of action.

Appeal from a judgment of this court entered on the report of a referee. The facts were as follows:

The plaintiff and the defendants had been partners in business in the city of New York, but differences had arisen between them, and, on March 15th, 1872, there was pending between them an action for a dissolution of the partnership and an accounting. On that day (March 15th), for the purpose of settling their differences and ending the suit, they entered into an agreement which, after making provision for the other matters in dispute between them, provided that the de-

fendants should pay to the plaintiff, for his interest in the good will of the business, until the expiration of their then lease, such sum as the same should be decided to be reasonably worth, by three disinterested persons, or a majority of them, one of whom should be chosen for that purpose by this plaintiff, one by these defendants, the two so chosen to select the third, and the decision of any two to be final; certain other questions were also submitted to these persons to be so chosen, and it was provided that such sum as they should determine ought to be paid to the plaintiff, should be paid to him in the joint and several notes of the defendants at eighteen and twenty-four months.

In conformity with the provisions of this agreement, both plaintiff and defendants nominated a person to act as arbitrator on their respective behalfs. The two arbitrators thus appointed, met on several occasions to consider the subject submitted to them for arbitration, but failed to agree either in the choice of an arbitrator or the amount of the award.

The plaintiff thereupon commenced this action, and claimed that the failure of the arbitrators to agree was caused by the interference of the defendants, and asked that the agreement might be specifically enforced, and the value of the plaintiff's interest in the good will of the business be ascertained and paid to him.

There was no evidence to show that the defendants had in any way influenced the conduct of the arbitrators, and the referee dismissed the complaint.

Plaintiff appealed.

John L. Hill, for appellant.

John Hubbell, for respondent.

DALY, Chief Justice.—The agreement was one coming under that class of cases pointed out and distinguished by Judge ALLEN in *The President &c. of the Delaware &c.* v. *The Pennsylvania Coal Co.* (50 N. Y. 266), as cases in which the agree-

ment which creates the liability and gives the right, qualifies it by providing that before a right of action shall accrue, certain facts shall be determined, or amounts and values ascertained, which is made a condition precedent, by express terms, or by implication. When that is the case, the courts give full effect to the condition, and the party who would enforce the agreement must show that he has done all, upon his part, that could be done to carry it into effect (*The United States* v. *Robeson*, 9 Peters, 319).

In *Scott* v. *Avery* (5 H. of Lords' Cases, 811; 8 Exch. 417), the judges who delivered opinions went farther than this, or at least some of them, by holding that no action lies at all until the award is made; that that is part of the cause of action; that the promise is to pay only what may be awarded; that it is competent to agree that a sum of money shall be paid upon such a contingency or in such an event, and that there can be no right of action until an award is made. This appears to have been followed in the subsequent cases of *Brauenstein* v. *The Accidental Death Ins. Co.* (1 Best & Smith, 782), and *Tredman* v. *Holman* (1 Hurls. & Colt. 72). But it was not necessary, in either of these cases, to go this length. In *Scott* v. *Avery*, the plaintiff declined to accept the sum ascertained by the committee. In *Brauenstein* v. *The Accidental Death Ins. Co.*, the defendants averred that they had always been ready to arbitrate; but that there had been no arbitration; and in *Tredman* v. *Holman*, the plaintiff refused to arbitrate. Nor was it necessary to go so far in the case in the Court of Appeals, for though in that case arbitrators were appointed, they never had a meeting; the matter in dispute had never been submitted to them. Nor is it necessary in the case now before us. All that was shown in this case was that each party had appointed an arbitrator; that they had met and could not agree upon a third one; the contract making provision for an arbitration by three arbitrators, each party selecting one, and the two so selected appointing the third. To the three so selected the matter was to be referred, and the decision of any two of them was to be final.

It does not follow that because the two arbitrators selected

could not agree upon a third that an arbitration was impossible. If they could not agree, it was for the plaintiff, before resorting to this action, to propose to the defendant the selection of two others in place of those who could not agree upon a third. If the defendant had then refused to do so, or if the plaintiff could show that the disagreement was brought about by the defendant's instrumentality for the purpose of preventing an award, or anything from which it appeared that he was acting in bad faith, or interposing obstacles so that no award might be had, then the position of the plaintiff would be very different. As the defendant is the one who is to pay such further sum as the good will of the business is decided by the arbitrators to be reasonably worth, the law would not allow him to evade it by preventing the making of any award. If, through his acts and bad faith, or from any other cause, an arbitration has become impossible, I am not prepared to say that the plaintiff would not have a right of action. But that is not this case. The arbitration and award is a condition precedent to the plaintiff's right of action, and he cannot maintain it unless he shows that he has done all in his power, and that it is on his part impossible to carry the arbitration into effect. The judgment therefore of the referee should be affirmed.

Loew and J. F. Daly, JJ., concurred.

Judgment affirmed.

ISAAC HOCHSTER *against* MYER BARUCH.

The agent of a foreign principal is personally bound upon contracts made by him for his principal.

Defendant offered to plaintiff, in case he would not put in a defense in a certain suit, to pay his lawyer's fees, but on the next day, and before the plaintiff's time to put in his defense had expired, notified the plaintiff that he withdrew his offer. Plaintiff did not put in a defense in the suit, and sued defendant for his lawyer's fees: *Held*, that as plaintiff had not, before receiving the notice of withdrawal, accepted the defendant's offer, and bound himself not to put in a defense, and might have put it in afterwards, that he could not recover.

APPEAL from judgment of justice of Fourth District Court in favor of plaintiff for $85.

The facts are stated in the opinion.

J. F. DALY, J.—The judgment should be reversed. The evidence shows that defendant agreed to pay the expenses, not as agent of Rothschild, but as principal. Even if he made the agreement as agent of Rothschild, yet, having no authority to make it, he would be liable, upon the principle that one who assumes to contract in the capacity of agent without having competent authority to do so becomes himself personally bound (7 Wend. 315; 1 Denio, 402). He had no authority, and says so himself. And still further, if, as the testimony would indicate, Rothschild lived in Germany, the defendant would be liable upon the cases holding that the agent of a foreign principal is personally bound upon contracts made for the principal (Story on Agency, § 268, notes and cases cited). The action therefore was properly brought against defendant personally. But the evidence does not satisfy me that the minds of the parties ever met so as to produce an agreement upon which this action could be maintained, nor that plaintiff was led by the vague promise proved to abandon his claim or lose any advantage he might otherwise have enforced. Both parties swear substantially to these facts: That defendant, as agent of Rothschild, was

foreclosing a mortgage in this city for the latter; that plaintiff, as a party defendant in the foreclosure suit, was about to put in an answer setting up a claim against Rothschild; that defendant promised him if he would not put in such answer he would pay the expenses of this plaintiff's lawyer, if they were not too much; that they went to the lawyer's office, but he was not in; that they saw a Mr. McCullogh, but could not ascertain what the expenses were, and agreed to meet there again next day to ascertain what the expenses were; that defendant did not go there next day, but sent there instead to this plaintiff a letter saying he had no authority from Rothschild to make any payment whatever; that the plaintiff had at least one day's time after that letter was sent to put in his answer setting up his claim, but he did not. He afterwards paid his lawyer $85, and the justice below gave him judgment for that sum. Where was the agreement between the parties? At best, there was but an offer by defendant to pay the expenses "if they were not too much." They endeavored to ascertain how much they were, but could not on that day, and defendant refused afterwards to do anything further. Had plaintiff, on the faith of this offer, between the time of the agreement to go next day to the lawyer's office and the sending of the letter, lost the opportunity of enforcing his claim, it is possible he might recover the amount of a reasonable fee for the lawyer's services in drawing the answer. But this was not the case. He had time enough to put in his answer after defendant's refusal to make an arrangement. When the offer was made him by defendant he had given no consideration for it, neither by withdrawing his answer nor agreeing to do so. It appears, from the conduct of the parties, that nothing was settled between them, but that an "arrangement" was yet to be made when the amount of costs was ascertained; that they had in fact proceeded no further than to negotiate as to an agreement, but made none.

Judgment should be reversed, with costs, and plaintiff left to a new action if he have other testimony to offer in support of his claim.

Daly, Ch. J., and Loew, J., concurred.

Judgment reversed.

ALICE DRAYTON *against* JACOB REID AND SETH O. CROSBY.

A person engaged as a theatrical performer may be lawfully discharged for being guilty of indecent and immoral conduct, so gross as to cause the other members of the company to refuse to associate with her, and so open as to become matter of public scandal, even although she fully performs all her theatrical duties.

Several witnesses having testified to particular acts of indecent conduct on the part of the plaintiff, and the plaintiff having only denied that she had ever done any act inconsistent with the faithful performance of her contract: *Held*, that this was not a denial of the particular acts charged.

APPEAL from a judgment of this court entered on the report of a referee to hear and determine.

The action was brought by the plaintiff to recover from the defendants the sum of $780 for an alleged violation of agreement between the plaintiff and the defendants, dated February 14th, 1872, in which agreement the plaintiff engaged as a "song" and "dance" performer with the defendants, for a season of about thirty weeks, commencing on or about April 1st, 1872, and ending on or about November 1st, 1872, to perform with Forepaugh's Menagerie, in any part of the United States or Canada, at a salary of thirty dollars per week.

The defense was that the defendants had been obliged to discharge her on account of her improper conduct (the facts in regard to which are stated in the opinion).

The referee found that the plaintiff had performed her part of the contract, and had been discharged without cause, and ordered judgment in her favor.

Defendants appealed.

Chas. W. Brooke, for appellant.

Benjamin F. Russell, for respondent.

DALY, Chief Justice.—Where a cause is tried by a referee, we may at general term, review his findings upon questions of facts, and it is impossible to peruse the evidence in this case and uphold his finding. There was little but a general denial by the plaintiff of a number of facts elicited by the testimony of six witnesses, showing lewd and indecent acts on the part of the plaintiff; that she quarrelled with the other members of the troupe; that she was addicted to cursing and swearing, and, in short, that her conduct was so demoralizing, that several of the other female performers left the hotel on her account, and refused to go on the stage if she did; that they declared that if she was allowed to remain, they would not; that the landlord of a hotel where the troupe stopped, complained to the proprietor of the circus, of her immoral conduct with one of the troupe; that she had illicit intercourse with a married man, one of the performers, at La Grange, Indiana, and at Steubenville, Ohio, which was publicly talked about by the hotel keeper and by members of the troupe; that the employees complained of having to associate with such a character; that the proprietor of the circus, in consequence of her conduct, its effects upon the troupe and upon his own reputation with the public, complained to the defendants who had engaged her for the side show, telling them that he would not have such a person about his establishment, nor allow her to enter the ring any more, and he insisted upon her dismissal; with which request the defendants complied. She was discharged, and afterwards taken back by the defendants at the intercession of two persons, under the assurance that she would do better, but had again to be discharged for quarrelling in the dressing room.

All this the referee appears to have ignored, finding generally as a fact that she had fully performed all the conditions of her agreement in every particular, and, as conclusions of law, that she in no wise violated her agreement, and that the defendants had no legal cause to discharge her. If he did this upon the ground that it was immaterial how indecent, immoral and outrageous her conduct may have been, as long as she was ready and willing to perform in the ring, it cannot be sustained. In the management of such an establishment, there

must be some government; and where all mix together in the intercourse incident to their calling, there must be the restraint at least which common decency imposes. The plaintiff acted under no such restraint, but in the presence of members of the troupe committed acts too gross and disgusting to be described. It would be intolerable if the defendants were required to keep such a person in their troupe in consequence of their contract. By the contract she expressly engaged "to conform to the rules and regulations of the company," and it was a reasonable regulation to require that she should be orderly and decent whilst mingling professionally with the members of the troupe. She would not, even when taken back again, conduct herself properly, and the defendants had the right to discharge her.

If, on the other hand, the referee decided to believe her and discredit all the other witnesses, then the objection to his finding is that her denial did not reach all the particular facts sworn to by these witnesses. Some of them she denied specifically, but beyond that her denial was: "I never did any act, in public or private, inconsistent with the faithful performance of the contract," which on her part may have been matter of opinion. The report should be set aside, and the judgment reversed.

J. F. Daly, J., concurred.

Judgment reversed.

HORATIO N. SLATER *et al. against* JOHN W. MERSEREAU.

Defendant being a contractor engaged in the erection of a building, put on the roof without making any provision for carrying off the water that would necessarily fall on it in the event of a rain storm. A rain storm, such as was usual at that time of the year, took place, and the rain falling from the roof, uniting with that coming from the street, flooded the adjoining premises and injured a stock of goods there. *Held*, that defendant was liable for the damage to the goods.

APPEAL from a judgment of this court entered on the report of a referee to hear and determine.

The action was brought to recover damages for the alleged negligence of the defendant, by which the plaintiffs' premises were overflowed with water.

The facts, as found by the referee, were as follows: The plaintiffs were dry goods merchants, and occupied the basement of Nos. 115 and 117 Franklin street, in New York city. The adjoining premises were owned by Daniel Appleton & Co., who, on April 8th, 1868, made a contract with the defendant to erect a new building thereon. The defendant then made sub-contracts with Moore & Bryant to do the mason work, with certain other parties to do the plumbing work, &c., and reserved the carpenter's work for himself. After the roof of the building was on, and before it was entirely completed, a rain storm took place, and the plaintiffs' premises flooded and their stock of goods injured under the circumstances described in the opinion. The referee reported in favor of the plaintiffs.

Defendant appealed.

Henderson & Fennell, for appellant.

F. H. Churchill, for respondents.

DALY, Chief Justice.—I think the evidence justifies the conclusion at which the referee arrived. 1. That the injury arose from the water which came from the roof and the street

into the cellar. 2. That the flowing of the water from the roof into the cellar was owing to the defendant's negligence in completing the roof before the necessary connection was made to carry off the water from it to the sewer, without putting up some temporary structure to carry the water off; and 3. That it being impossible to distinguish in what proportion the water that came from the roof, and that which came from the street, contributed to produce the damage, the defendant was answerable as a joint tort-feasor.

The failure to make the connection between the leader and the sewer in time for the completion of the roof was attributable to the masons Moore & Bryant, for it was in evidence that one of the plumbers spoke to the foreman of the masons two weeks before it was done, and urged him to do it; that it might have been done in four days, and certainly in ten, and that the foreman said that he could not get at it until the dirt was taken out of the cellar. But the defendant's foreman was aware that the cutting was not done, for he was in every part of the building, and yet the defendant went on, completing the roof without making any provision for the carrying off of the water which, in the event of rain, would necessarily flow from it into the cellar. Thompson, an expert, engaged for thirty years in the erection of buildings, says that water should never be allowed to get into a building; that when there is any difficulty in forming a connection between the leader from the roof and the sewer, it was his practice "to put up a temporary second-hand leader to take the water down through the building to the place where it runs away;" and Badouine, a man of a good deal of experience in the erection of buildings, who, as owner or superintendent, has erected a number in this city for the past twenty years, said that water could be taken from the roof of a building by a temporary wooden leader running through the building to the front and throwing the water into the street, and that he saw no difficulty about having the leader in this case completed at the time the roof was completed. This was sufficient to show that it was through the defendant's negligence that the water from the roof flowed into the cellar, and as that, uniting with the water that flowed in from the street, caused the injury, the defendant is responsible; for those

whose united negligence is the direct cause of a single injury, are each answerable for the consequences, although they may have acted independently of each other (Shearman & Redfield on Negligence, 558, and the cases there cited).

There is nothing in the evidence to warrant the assumption in the defendant's points, that the rain storm which caused the damage, was of an unusual character. A rain gauge kept in the vicinity, showed that the fall did not exceed two inches, and in other parts of the city it was half an inch less. Four days after there was another rain storm, when the fall was much greater, in some parts of the city nearly four inches, and yet it produced no damage in the same premises, for the reason that the connection between the leader and the sewer was then completed, showing that if the connection had been made, or if there had been some temporary means to carry off the water on the night of the 20th, that the defendant would have had no share in producing the injury. It may be the water from the street would have flowed in upon that evening sufficiently to injure the plaintiffs' goods, even if the water from the roof had been carried off into the street. But that is a matter upon which we cannot speculate. The negligence of the plaintiff co-operated with the negligence of Moore & Bryant in producing the volume of water which filled the cellar and caused the injury, and both or either of them may be sued for the damage.

The measure of damages adopted by the referee appears to be justified by the evidence. He gave them as their damages the expense they had been put to in restoring the goods, which he found to be less than the difference between their market value in their sound and in their unsound condition. It is suggested in the plaintiffs' points that the referee adopted the computation made by the plaintiffs' counsel, and which was submitted to the other side. If there was any error in the computation, the amount may be reduced by a subsequent application to the general term; but so far as I can make out from the testimony of Scudder, it appears to be correct.

Robinson and Larremore, JJ., concurred.

Judgment affirmed.

PHINEAS H. KINGSLAND *against* THE MAYOR, &C., OF THE CITY OF NEW YORK.

Under the charter of the city of New York (L. 1870, c. 137, § 101), providing that no expense should be incurred by any of the departments, boards, or officers of the city government, unless an appropriation had been previously made covering such expense, *Held*, that where an appropriation is made for a specific purpose, and the proper department incurs liabilities to an amount sufficient to exhaust the appropriation, the department has no further power to make contracts binding on the city, for that purpose.

EXCEPTIONS ordered to be heard in the first instance at the general term. The facts are fully stated in the opinion.

J. F. DALY, J.—The learned judge at special term, before whom this action was tried, ordered a verdict for plaintiff for the full amount claimed, $11,763 55; but in view of the grave questions of law involved, ordered the exceptions to be heard in the first instance at general term, judgment meanwhile to be suspended. The exceptions were argued at a previous general term, but the court was divided. The same points are now presented. The action is brought by plaintiff as assignee of the claims of a number of persons employed to clean the markets in the city of New York in the months of October, November and December, 1870. The plaintiff put in evidence three pay-rolls, one for each of said months, containing the name of each employee and the wages due him, with a certificate of Thomas Dunlap, collector of city revenue, attached, to the effect that the services were actually performed, and by due authority; also that the compensation specified is in accordance with law, and the ordinances of the common council. These pay-rolls were produced from the records of the Department of Finance. They were all credited by the auditor of accounts in that department. To each pay-roll when produced a paper was attached, not signed by any person, but filled up in the form of a warrant for the payment of the amount of these pay-rolls to the plaintiff as assignee. No proof was offered to show when

the persons named in the pay-rolls were employed, and we have nothing on that point except the evidence of the pay-rolls themselves that the work was performed continuously from October 1, 1870, to December 31, 1870. The employment appears to have been of the former date, and the question in the case is whether there was any authority of law on that or the subsequent dates for such employment. The charter (L. 1870, c. 137, § 101) in force at the time provided that no expense should be incurred by any of the departments, boards, or officers of the city government, unless an appropriation had been previously made covering such expense. An appropriation of $30,000 for cleaning markets had been made in 1870, but it had been all expended (except a small balance of $513 48) before October 1, 1870. This latter balance was paid out by August 31, 1871, but on what accounts does not appear. The ground taken by plaintiff is, that as an appropriation of $30,000 had been made before his assignors were employed, the law was satisfied, and the municipal officers had power to incur this expense, whether such appropriation was exhausted or not. This, I think, cannot be sustained. The restriction in the charter was a limitation on the power of the city government to incur expense (*Donovan* v. *The Mayor*, 33 N. Y. 293); and this limitation would be of no avail if the appropriation of a specific sum gave them authority to incur limitless expenses under that head, providing each item of expense was, by itself, smaller than the whole appropriation. No such construction of the statute is reasonable. The intent of the law makers is plainly to limit expenditures. The next ground taken by plaintiff is that as a balance of $513 48 remained unexpended to the credit of the appropriation when the plaintiff's assignors were employed, and as the employment of each person involved, for the whole three months, an aggregate sum less than such balance, then the employment of each person by itself was lawful. This is but to state the first proposition in another form. It is to say that if the appropriation were originally $30,000, the city officials might make contracts at one time to expend ten times that amount, providing each contract involved an expenditure which did not exceed the appropriation. The consequences of

such a construction of a plain enactment need not be enlarged upon.

But it is urged that the duty cast upon persons contracting with the city, of ascertaining not only whether an appropriation had been previously made, but also whether contracts or liabilities had been incurred sufficient to absorb it, is too onerous, and was no part of the intention of the Legislature; that if the city officials violate the charter, they, and not the innocent laborers and contractors, should suffer; that it would be well nigh impossible for the latter to protect themselves by ascertaining what other liabilities, besides their own, had been incurred before rendering service to the corporation.

The answer to all that is: that limitations on the power of municipal officers are not to be disregarded on account of the hardship to the individuals. If they were, the hardship would have to be borne by the community generally, for whose protection these limitations are imposed; that all persons dealing with the officers of the city have notice of these limitations of power, and need not furnish time, labor nor material, if there be doubt as to the authority of the department which offers to employ them; that the injured individuals who have relied on the authority of the municipal officers, and have been misled by the latter as to the fact of previous liabilities incurred, and who have no notice of their want of power, are not wholly remediless, but, it would seem, have the right to resort to the agent's individual responsibility when they fail to hold the principal; the agents of the corporation, assuming to act for the corporation, but without authority, being doubtless, under well-known rules of law, personally liable as principals for a debt thus incurred to a person whom they have willfully deceived as to material matters of fact affecting their authority, and nothing would sooner tend to enforce a strict performance of duty by public officers than the enforcing plain provisions of law against claimants when they resort to the city treasury for payment, and leaving them to enforce against the public officials who have exceeded their powers such remedies as they may be entitled to upon showing their own diligence in as-

certaining the power of the officers and any concealment of fact or like deception by the latter (Story on Ag. 264, 7th ed.)

The balance of $513 48 in the treasury, when these contracts of employment were made, cannot be applied to the payment of the plaintiff's claim, because it does not appear that it was not properly paid out upon contracts made before those in suit; all presumptions and intendments being in favor of the proper discharge of official duty, until the contrary is shown. My view, as to the right of recovery against the city, where contracts in excess of any specific appropriation are made, is that the person whose contract is prior in time to the others is entitled to payment if it be within the sum appropriated, and this even though the whole appropriation had been afterwards improperly expended by the department, the sole question in the case being one of power to make the contract, and this rule would afford ample protection to all contractors who can bring themselves within it.

If the plaintiff's assignors were employed before the appropriation was, in effect, exhausted by prior liabilities, the plaintiff would be entitled to recover, and, as the case is not conclusive on that point, the verdict should be set aside and a new trial ordered, costs to abide event.

Daly, Ch. J., and Larremore, J., concurred.

Ordered accordingly.

ANDREAS SCHMIDT *against* MARTIN GUNTHER, PRESIDENT OF THE UNTERSTETZUNG VEREIN UNION, JOHN SCHEDLER, SECRETARY, AND ANTON SAUR, TREASURER.

Quære, whether under the statute (L. 1849, c. 258, as amended by L. 1851, c. 455, and L. 1853, c. 153), a member of an unincorporated association can maintain an action at law against it, by suing the president or treasurer as such.

Under the statute (L. 1849, c. 258, as amended by L. 1851, c. 455, and L. 1853, c. 153), allowing an action against an unincorporated association, composed of not less than seven persons, to be brought against the president *or* treasurer, an action against the president, secretary and treasurer is improperly brought.

This court, on appeal from a District Court, will as a general rule refuse to amend the proceedings so as to conform them to the proof, where the defect was pointed out by objection taken on the trial, and the party in fault then neglected to apply to the court to amend the proceedings.

APPEAL from a judgment of a District Court.

The facts are fully stated in the opinion.

DALY, Chief Justice.—This judgment will have to be reversed. It was brought to recover $70, to which the plaintiff claimed to be entitled from an unincorporated association of individuals, due to him as a member of the association in weekly payments of $5 a week, for fourteen weeks during which he was sick. The plaintiff has not sued the members of the association, nor could he in an action at law, unless the right to do so was given by the conditions of the agreement under which the parties were united into a body (*Habicht* v. *Pemberton*, 4 Sandf. 658; *White* v. *Brownell*, 2 Daly, 356, 358; *McMahon* v. *Rauhr*, 3 Id. 116; *same case on appeal*, 47 N. Y. Rep. 71). He may have a remedy against the individual members of the association in equity, but no such remedy could be applied in the present action, as the district Justices' Courts have no jurisdiction in equity.

The only way in which an action at law could formerly be brought against an unincorporated association, was by an action against them as individuals, brought by a plaintiff who had a

claim against them as a body, and who was not a member of the organization. If a member of the body, he could not maintain such an action; for it was well settled, that it was an answer to such an action, that the plaintiff was legally interested in each side of the question (1 Chitty on Pleading, 45, 6th Am. ed.) The statute has provided that such an association may be sued in the name of the president or treasurer for the time being (L. 1849, c. 258). It is not necessary to inquire whether, under this statute, a member of such an association may bring an action against it by suing the president or treasurer as such. The plaintiff has not brought such an action. He has sued the president, treasurer and *secretary*, and judgment is rendered against all these defendants for $99. There is no provision in the statute for suing the secretary, and if any effect is to be given to the judgment against him, it must be as an individual. It may be that he would not be able to protect himself, by invoking the record to show that he had been sued as secretary, and he certainly had the right to object, as was done below, that the action could not be maintained in its present form. If the action is brought under the statute, it should be brought in the mode provided by the statute; that is against the president *or* the treasurer. We might, if the objection had not been taken below, have upon appeal amended the proceeding so as to conform it to the proof (*Bate* v. *Graham*, 2 Kern. 242; *Thompson* v. *Kessel*, 30 N. Y. Rep. 390). But as a general rule, we have refused to do so where the objection was taken upon the trial, and the party being then advised of the defect, had the opportunity, but neglected to apply to the court to amend the proceeding, the justice having ample power to allow it (2 Rev. Stat. 429, § 1). So far as allowing such an amendment moreover appeals to our discretion, there is the additional reason, that it is very doubtful if justice has been done. The association after paying the plaintiff for six weeks, caused an investigation to be made as to the cause of the plaintiff's injury. They appointed a committee to investigate; the committee did so, and reported that the plaintiff's injury was caused by his own misconduct; whereupon a special meeting of the society was called, and a

resolution was passed, that the plaintiff's sickness was brought about by negligence, and that he should not be paid. It was sworn to that the plaintiff was injured in a brawl, which he had provoked by his own misconduct; although whether he was the party in fault in the quarrel, was a point upon which there was conflict. The justice excluded evidence of what was done by the committee, as well as the minutes of the proceedings of the special meeting. Without pausing to inquire whether he was right or not in this ruling, I think it is better that the judgment should reversed for the error first above stated, that the cause may be tried over again.

Loew and J. F. Daly, JJ., concurred.

Judgment reversed.

Cynthia Bronk, as Administratrix, &c., *against* The New York and New Haven Railroad Company.

The deceased and another person who was driving, while riding on a wagon and about to cross a railroad track, neglected to took up or down the track, although if either of them had done so, they could have seen the approaching train in time to avoid it. *Held*, that this was such contributive negligence on the part of the deceased as prevented a recovery against the railroad company for a collision with the approaching train.

Appeal from a judgment of this court entered on the verdict of a jury.

The action was to recover damages for the defendant's negligence by which the death of the plaintiff's intestate was caused.

The defense was, that the negligence of the deceased had contributed to the accident.

On the trial it appeared that the deceased, while in a wagon

crossing the defendant's track in New York city, had been run into by the defendant's locomotive, and killed.

The facts relied on to show contributive negligence are fully stated in the opinion.

Plaintiff had a verdict, and defendant appealed.

Calvin G. Childs, for appellant.

Wheeler H. Peckham, for respondent.

Daly, Chief Justice.—The motion for a nonsuit at the close of the testimony should have been granted. It was a plain case of contributory negligence. If either Brown or the intestate had looked up the railroad before Brown drove upon the track, the approaching locomotive could have been seen and the collision avoided. That Brown did not look to the right or the left as he approached the track, abundantly appears from his own evidence. He says, "almost the same moment I saw it (the engine), it struck me;" and Bronk, the intestate, when they were within ten feet of the track, was seen, by the plaintiff's witness Paulding, looking back in the direction of the arsenal, which, it would seem, Bronk continued to do until the collision; for Paulding further testifies that they were just going across the track, one (Bronk) looking behind, and the other (Brown) driving his horse the same as any ordinary man would do.

The train passed through a cut from 73d to 66th street, and the collision occurred at the junction of 64th street and the Fourth avenue. The plaintiff's witness De Monet, who was standing at the corner of 64th street and the Fourth avenue, on the west side of the avenue, heard the rumbling of the wheels of the engine two or three minutes before the collision, and, looking up, he saw the locomotive, which was then about half way through the cut, or about four blocks off. The witness was on the same side of the avenue as the wagon, and those in the wagon, if they had looked, had a better opportunity for seeing than he had, as they were more elevated. The defendant proved that a person standing on the northwest

corner of 64th street and the Fourth avenue, could see up the avenue and through the cut, to 68th street. That 200 feet from the avenue, in approaching the track from the Fifth avenue side through 64th street, a person could see up the avenue nearly to 67th street, or 650 feet, and at 100 feet, to 68th street. There were no houses then on the north side of 64th street, between the Fourth and Madison avenues, nor any obstruction, except a small shanty, about 12 or 14 feet high, between 64th and 66th streets, on the west side of the Fourth avenue, the side from whence the wagon was approaching; and the witness testified that the shanty even would be no obstruction, as he thought the smoke stack of the engine could be seen above it. The defendants also proved by a surveyor, who examined the ground afterwards and made a map of it, that from points 100 and 150 feet from the place of the accident, he could see up the track 780 feet, and at a point 65 feet from the accident, he could see nearly to the tunnel, or 1,000 feet. He also testified that, after passing the shanty, there was nothing to obstruct the view from a point 223 feet from the place of the accident, and a point 650 feet up the railroad.

It is abundantly shown, by this and other testimony, that if either Brown or Bronk had looked up the road, as they ought to have done before attempting to cross it, the approaching engine could have been seen and the collision avoided. There was, on the part of both of them, a want of ordinary care. Bronk was not free from all responsibility because Brown was driving. Brown testified that Bronk was a very careful man and a driver himself, and yet, whilst approaching and in the act of crossing a railroad, he had his head turned around and was looking back in the direction of the arsenal which they had just passed. His inattention was, even to Brown, remarkable; for Brown testifies: "It was most singular to me that my friend did not see it; he never spoke to me; he never said to me, 'take care, look out,' or nothing."

If it is in the power of a party, by the exercise of ordinary care, to avoid an accident, the law holds him to the exercise of it. The intestate was seated in the wagon alongside of the

driver as they were approaching and were about to cross a railroad. His opportunity for seeing any danger which threatened from an approaching locomotive was equal to that of the driver. If anything, it was greater, for the driver had charge of the horse, and the intestate had nothing to do but to use his eyes as they approached what is always a place of peril, a railroad track. The ordinary sense of self-preservation should lead any any man similarly situated to look at such a moment to see that no locomotive was approaching; instead of which he had his head turned away from the road and was looking back, blindly leaving everything to the driver, who as blindly drove upon the track and came in collision with the locomotive, which he could have avoided by the exercise of the most ordinary care. It was an act of mutual negligence, for Bronk was in a position in which he could have given warning of the approaching danger and avoided it, if he had acted with the ordinary prudence to be expected from a man in a wagon which was approaching and about to cross a railroad.

The case is distinguishable from that of a passenger in a railroad car, whose position is one in which he can do nothing to avert the act which may be contributory negligence on the part of those who have the control and management of the locomotive. Such are the cases of *Chapman* v. *N. H. R. R.* (19 N. Y. 351); *Colegrove* v. *N. Y. & Harlem R. R. Co.* (20 Id. 492); *Webster* v. *Hudson River R. R.* (38 Id. 260). But it is a case in no way distinguishable in principle from *McCall* v. *N. Y. Central R. R.* (54 N. Y. 642); *Allen* v. *B. & A. R. R.* (105 Mass. 77); *Carlisle* v. *Sheldon* (38 Verm. 447); and *Beck* v. *East River Ferry* (6 Robt. 87), in which it was held that the plaintiff was not entitled to recover. The judgment should therefore be reversed.

J. F. Daly, J., concurred.

Judgment reversed.

FEODORE MIERSON *against* THE MAYOR, &C., OF THE CITY OF NEW YORK.

Plaintiff being the publisher of a weekly newspaper called The Weekly New Yorker Journal, and also of a daily newspaper called The New Yorker Journal, his weekly newspaper was designated under L. 1871, c. 574, § 1, as one of nine weekly papers in which city advertisements should be published. Plaintiff published the advertisements in his daily newspaper: *Held*, that such publication was unauthorized, and that plaintiff could not recover therefor.

APPEAL by plaintiff from a judgment of this court entered on the report of a referee to hear and determine.

The action was brought to recover payment for publishing city advertisements in The New Yorker Journal.

The defense was that the publication was unauthorized.

The facts on which the authority to publish was claimed are stated in the opinion.

Benjamin F. Russell, for appellant.

James W. Husted, for respondent.

DALY, Chief Justice.—The act of 1871 (L. 1871, c. 574, § 1), authorizes the mayor and comptroller to designate nine *daily* and nine *weekly* newspapers in the city of New York, in which the advertisements required by law shall be published, and declares that no publication of advertisments shall be legal except in the papers so designated, and that no money thereafter shall be paid from the city treasury for advertising, except to the newspapers so selected.

The mayor and comptroller designated as one of these papers, the *Wochenblatt des New Yorker Journal* (the Weekly New Yorker Journal), which is the name of a weekly German newspaper published by the plaintiff. The plaintiff also publishes a daily newspaper called The New Yorker Journal, and the advertisements for the publication of which this action is brought, were published by the plaintiff in this daily newspaper.

There was no authority for the publication of the advertisements in this daily journal, and no recovery can be had for doing so. The journal "selected" or "designated" by the mayor and comptroller, was the *Weekly* New Yorker Journal. It was one of the nine weekly journals, which they were empowered to, and did designate. The plaintiff urges that these advertisements were notices of assessments which had to be inserted for ten successive times before a certain date, which could not be done in the weekly, and that therefore they had to be published in the daily, to meet the requirements of the statute; but that would not authorize their publication in a newspaper that had never been designated at all. It is also claimed, that they are one and the same; that the one is merely a weekly edition of the daily, and what was published in the daily went into the weekly, to a great extent, and that they are printed from the same type. But that they are distinct papers, and that one, the weekly, is not an edition of the other, appears in the facts sworn to, that most of the advertisements go into the daily, and *some* into the weekly; that a good many take the daily, that do not subscribe to the weekly; that a subscription to the one does not entitle the subscriber to the other, that advertisements in each have to be separately paid for, etc. All this shows that they are two distinct journals. A publication therefore ten times in the New Yorker Journal a daily paper, was not a publication in the Weekly New Yorker Journal. The statute of 1871 has provided for publication in nine weekly journals, and this Weekly New Yorker Journal was one of them. The plaintiff testified that that was the only designation he had under the law of 1871, and the advertisements therefore should have been published in that, and not in the daily Journal, which had not been designated at all. The judgment entered on the report of the referee should be affirmed.

Loew and J. F. Daly, JJ., concurred.

Judgment affirmed.

D. W. C. Baxter *et al. against* Joseph D. West.

Where plaintiffs consigned to A. a large quantity of forges for sale, allowed him to place their name over the door of the store where he kept the forges for sale, and paid the first two months' rent of such store: *Held*, that these facts were sufficient to justify the owner of the store in dealing with A. as being authorized to bind the plaintiffs for the further rent of the premises, and that he was not bound by a private agreement between the plaintiffs and A. that after the first two months A. should pay the rent.

The consent of the owner of the premises to their use is necessary to establish the relation of landlord and tenant, and where the owner objects to the use of the premises, he cannot afterwards maintain an action for rent.

Appeal from a judgment.

The facts appear in the opinion.

Daly, Chief Justice.—I do not think that we would be justified in disturbing this judgment upon the assumption that the plaintiffs were entitled to recover anything. There is conflict upon the material point, whether Rhodes was or was not informed by the plaintiffs of their special arrangement with Zahn, when the agreement was made between Rhodes, Zahn and West for the extinguishment of Rhodes' indebtedness for rent to the defendant, upon Rhodes' agreement that the rent due to him by Zahn, might be paid by Zahn to the defendant. Rhodes, when finally called, testified that he thought that Forbes may have said something about such an arrangement after Zahn had been in occupation of the premises six or seven months and "just before he left." He explicitly denied that he had any previous knowledge of it, and so far as this question of fact was involved, it was a question for the judge, who must be assumed to have found upon the point in favor of the defendant.

Assuming then that Rhodes knew nothing of the special arrangement existing between Zahn and the plaintiffs, these facts appear: That Zahn hired a certain part of the premises occupied by Rhodes, as a place for carrying on the sale of the

plaintiffs' forges, representing to Rhodes that he had authority from the plaintiffs to hire the premises for them for that purpose; that the plaintiffs' name was placed over the door, and that the plaintiffs knew it, as one of them was in the habit of going there frequently; that it was the only place in the city where the plaintiffs' forges were sold, justifying Zahn's statement to Rhodes and the defendant, that he was the sole agent of the plaintiffs for the sale of their forges in this city; that rent of the premises had been paid by drafts drawn by Zahn on the plaintiffs, and delivered by Zahn to Rhodes, Forbes, one of the plaintiffs, admitting that they had paid the rent for the first two months, debiting the amount on Zahn's account; that Rhodes had been informed by a letter from the plaintiffs, that all their business in this city was to be transacted through their agent Zahn. These circumstances were sufficient to warrant Rhodes in assuming that Zahn's statement to him, that he was authorized to hire the premises for the plaintiffs, and that they were responsible for the rent, was true. The defendant was Rhodes' landlord. He owed the defendant $75, and $75 was due to him for the rent of the premises where the sale of the defendant's forges was carried on. The defendant, instead of receiving his rent from Rhodes, consented that that rent might be paid by Zahn, the plaintiffs' agent, by the delivery to the defendant of one of the plaintiffs' forges, Rhodes releasing Zahn from the payment of the same amount of rent to him, and the defendant, upon receiving the forge, releasing Rhodes from the rent he owed the defendant. This arrangement was made with the understanding on the part of the defendant and Rhodes, that the premises were hired for the plaintiffs by Zahn, as their agent for the transaction of their business in the city of New York, and I think there was sufficient to warrant the conclusion that the plaintiffs by their acts, had led the defendant and Rhodes to believe that Zahn had authority to do so. They suffered him to place their name over the door "Portable Forge Company," indicating to the world at large that that was their place of business in the city of New York; they paid drafts drawn upon them by Zahn for the rent, and informed Rhodes by letter that all their business

in New York was to be transacted through Zahn, and that he was their only agent there. This was holding him out as their general agent for the transaction of their business in this city, and indicating, as incident to that business, the right on his part, as their agent, to hire premises where the forges they were constantly sending on from Philadelphia, might be exhibited for sale, and their business here carried on. This was especially so when they paid the drafts drawn upon them for the rent, without any knowledge on the part of Rhodes that there was a special agreement between them and Zahn that they were to pay it only for the first two months. Where an authority is given to an agent to receive consignments in a distant city, of bulky articles like their forges, for sale, which must be received and kept in some place where they can be exhibited and sold, the right on the part of the agent to hire suitable premises where they can be so received and kept, will be implied as incident to the authority, for such an authority carries with it as an incident, all the powers which are requisite to effectuate and carry it out (Story on Agency, §§ 97, 106, and cases there cited).

Here the agent, empowered by the plaintiffs' own admission to receive consignments of their portable forges for sale in this city, and to transact all their business here, represented when he hired the premises that they would be responsible for the rent; that their goods were to be consigned to him, and that he was to act as their sole or general agent in this city. Rhodes let the premises upon this representation, believing it to be true, and what subsequently took place, before the defendant accepted a forge in payment of the rent assumed to be due by the plaintiffs to Rhodes, and the rent due by Rhodes to the defendant, was of a character to confirm both Rhodes and the defendant, in the belief of the truth of what Zahn said, such as the consignment by the plaintiffs of a large quantity of forges; the putting up of their name over the door; the payment by them of the first two quarters' rent; their statement that all the business in New York was to be transacted through Zahn, their only agent in New York; and the fact that Forbes, one of the principals, came frequently to the place of business, and neces-

sarily knew that the name of his company was over the door. The defendant was thereby induced to take the forge in payment of the rent due to him by Rhodes, and release Rhodes, he and Rhodes acting innocently. The plaintiffs having by their acts enabled Zahn to do this, and though frequently in New York, they never having advised Rhodes of the special arrangement between themselves and Zahn, should bear the loss arising from the acts of an agent clothed with such general powers; they never, though having abundant opportunity to do so, having given any notice to the landlord of the limitation of his powers; that though their name was over the door, he and not they, by a special agreement which they had made with him, was to pay the rent. It is stated in the appellants' points that the sign over the door was "The Portable Forge Company, *Henry Zahn, Agent;*" but there is no evidence in the case that the sign contained the words, "Henry Zahn, Agent." The proof is that the sign was "The Portable Forge Company," and Zahn's testimony in addition is, "The sign was the sign of the company, *not my* sign."

But I do not see how, upon the evidence, the recovery of the $100 upon an implied contract for use and occupation, can be sustained. The premises hired by Zahn consisted of a part of the defendant's store, and as it was occasionally insufficient to hold all the forges that came, he was in the habit at times of extending them over that part of the store occupied by the defendant. If the defendant had recognized his or the company's right to do so, there might be sufficient to imply a contract for use and occupation of this additional space in the defendant's store. To warrant an implied contract, however, for use and occupation, the relation of landlord and tenant must exist, and as incident to that relation, the right, indicated by the landlord's acquiescence, of the tenant to occupy for the period for which rent is claimed (Taylor on Landlord and Tenant, §§ 173, 636, 642, and cases there cited; *Bancroft* v. *Wardwell*, 13 Johns. 489). This was not the case here. There is nothing to show that the defendant as landlord recognized Zahn's or the company's right to place their forges over the part of the store which he occupied. It is in evidence that nothing was said

between Zahn and the defendant about the occupation of the additional space, and that the defendant did not make any claim for it; but, on the contrary, as Zahn testified, he sometimes found fault with him for occupying the space alongside, and *made him move the forges.* When the landlord disclaims any such relation as that of landlord and tenant, by finding fault with the party who encroaches upon his premises, and removing the property that the party placed there, he cannot recover upon an implied contract, because his assent cannot in that case be implied (*Greton* v. *Smith*, 33 N. Y. Rep. 245; *Featherstonhaugh* v. *Bradshaw*, 1 Wend. 134). The law will imply a contract to pay rent from the mere fact of occupation, if the circumstances warrant the conclusion that the relation of landlord and tenant existed, and where the relation exists, the action for use and occupation may be maintained, although there was no actual occupation, if it appears that the power to occupy and enjoy was given by the landlord to the tenant, for so far as the landlord is concerned, he has, in that case, performed (*Izon* v. *Gutore*, 5 Bing. 501; *Hall* v. *The Western Transportation Co.* 33 N. Y. 285). But such is not this case. There was no agreement and no recognition by the landlord of the right to occupy; but, on the contrary, a disclaimer of it. It was a mere intrusion, and afforded no foundation for implying the existence of a contract. The judgment should be reduced to a simple judgment for the defendant, without costs to either party, as each has succeeded upon this appeal in part.

Loew and J. F. Daly, JJ., concurred.

Ordered accordingly.

In the Matter of George W. Niles.

An attorney, on being convicted of a crime punishable by imprisonment in the State prison, thereby under the statute (1 R. S. 122, § 34, subd. 3, 5; and 2 R. S. 701) forfeits his office and loses his right to practice, without an order of the Supreme Court removing him.

One George W. Niles, who had served a term in the State prison, having assumed to act as an attorney and counsellor of this court, in several cases before it, and this fact having been brought to the notice of the court, it directed him to appear before it and state by what authority he did so. On January 13th, 1875, Niles having appeared before the general term (at which were present, Daly, Ch. J., Robinson and J. F. Daly, JJ.), the following proceedings took place.

Daly, Chief Justice.—We are satisfied, upon the evidence before us, that Niles was removed by the Supreme Court, from the office of attorney and counsellor, on the 3d of February, 1851. The evidence of it is, that after Niles' conviction for the offense for which he was sentenced to the State prison, an order of the general term of the Supreme Court, together with a copy of his conviction, was served upon him, requiring him to show cause, at the next general term of the court, why he should not be removed; and that that motion was made and granted, appears by the affidavit of Henry Bertholf, who was then crier of the court, who swears that he was present in the court when N. B. Blunt, the district attorney, made the motion for the removal of Niles, and that it was granted. The fact further appears by the New York Herald of February 4th, 1851, which gives a detailed account of what occurred in the general term on the previous day (Feb. 3d), Chief Justice Edmonds and Justices Edwards and King presiding, upon the hearing and granting of the motion removing Niles. In the New York Daily Tribune of February 5th, 1851, it is stated, that on the previous Monday (Feb. 3d), Niles was removed from the roll

of attorneys and counsellors of the Supreme Court; that the motion was made by the district attorney, and that nobody appeared to oppose.

The papers upon which the motion was made are on file; but no order granting the motion can be found. After this long lapse of time, twenty-four years, the draft order, if one were made, may have been lost, destroyed or abstracted; of the entry of it I shall hereafter speak; but of the fact that the motion was made and granted, there can be no reasonable doubt. It is further corroborated by the fact that like motions were made in this and in the Superior Court and granted, as appears by the records of both courts.

In June, 1857, a motion was made in the Supreme Court, that the order removing him be set aside as irregular and void, upon the ground that no charge had been served upon him, and that being in the State prison when the motion was made, he was unable to be heard in his defense. It was founded upon an affidavit of Niles, in which he avers that he was informed and *believed* that an order had been made and entered at a general term of the court on the 3d of February, 1851, depriving him of his right to practice as an attorney and counsellor. The motion was denied, the court holding that he had been duly served with a copy of the charges against him, and with the order to show cause; that he had had an opportunity of being heard in his defense; and that his removal from office was in all respects regular.

On the 30th of December, 1859, another application was made; the matter was referred to a referee, and on the 23d February, 1863, a formal order was entered, declaring that the court declined to take any further action in the matter.

In February, 1870, Niles assumed to act as an attorney, and brought a suit in the Supreme Court. A motion was made to set aside the summons upon the ground that he was not an attorney, which motion Judge INGRAHAM denied, upon the ground that the papers were not complete, because they did not contain the order of the general term removing Niles. Judge INGRAHAM, as appears from his opinion, thought the motion was not made by the defendant in that action in good faith, as

he had no copy of that order in his papers. An appeal was taken to the general term, Judges BARNARD and CARDOZO presiding, and Judge INGRAHAM'S decision was affirmed.

This decision neither declared that Niles had not been removed, nor was it a formal readmission of him as an attorney. It merely affirmed the decision denying the motion to set aside the summons for irregularity, as the papers did not contain the requisite proof of Niles' removal—*i. e.*, a copy of the order removing him. That order, or an authenticated copy of it, was the official and best evidence of the fact; and as that was not produced, nor its non-production accounted for, the conclusion appears to have been that the moving papers were defective for the want of proper evidence of Niles' removal. That was the ground assigned by Judge INGRAHAM in his opinion; and as his decision was affirmed by Judges BARNARD and CARDOZO, without delivering any written opinion, it may be assumed that that was the ground also of affirmance.

There is no such question before us. The order would necessarily have been entered in the minutes of the court. but we have the certificate of the clerk of the court that he has caused a search to be made for the rough, as well as for the regularily engrossed, minutes of that year, 1851, and that neither can be found; the explanation of which probably is that three years afterwards, on the 19th of January, 1854, the building in which the Supreme Court was then held was entirely destroyed by fire, a fire by which, as appears by the proof before us, a great many of the records of the court were destroyed. This sufficiently accounts for the non-production of the order of the court removing Niles. If the books in which the minutes of the general term of February 3d, 1851, were kept, were in existence, the order, I doubt not, would be found duly entered; but the probability is, as I have suggested, that they were destroyed in the fire. It was, as I suppose, the circumstance of the discovery of the destruction of the record evidence which emboldened Niles, in 1870, sixteen years after his release from the State prison, to commence practicing again as an attorney and counsellor in all the courts, upon the assumption that he had never been removed.

The order notifying him to show cause was served upon him on the 8th day of January, 1851. On the 13th of that month he was sentenced to the State prison, and on the 3d of February following, the motion for his removal was made and granted in the general term. He had five days at least before his sentence, to procure counsel to appear for him upon the motion if he wished to be represented upon it, which it is evident he did not, for the obvious reason that he had nothing to say in opposition to it. He had been tried and convicted of most flagrant acts in his professional character as an attorney, the punishment for which was imposed by his subsequent sentence to the State prison for two years and six months. That he was in the State prison and all his civil rights suspended when the motion was heard and granted, is a point to which we attach no weight. The suspension of his civil rights did not give him any immunity from proceedings against him, nor suspend the rights of others (*Davis* v. *Duffie*, 1 Abbott's & Court of Appeals Decisions, 486; affi'g. 8 Bosw. 619).

A professional opinion of Judge Bosworth, that Niles is entitled to practice as an attorney and counsellor of the Supreme Court, has been submitted to us. The judge was of the opinion that if an order had been made by the general term in February, 1851, removing Niles, it would have been valid, as the papers served upon him presented facts which authorized his removal, and that the court were competent to make such an order; but he thought, upon the facts stated to him, that the inference must be that no such order was made. He had not before him all the evidence that we have. In the inquiry before us, the non-production of the order is accounted for, and we have the sworn statement of the crier of the court that he was present when the motion was made, and heard the decision pronounced—a statement so fully sustained by other evidence as to leave no room for doubt.

By the act of 1862 (L. 1862, c. 484, p. 970) it is a misdemeanor punishable by fine and imprisonment, for a judge knowingly to allow any person to practice in the courts of this city who has not been regularly admitted to practice. It may be that Niles is not within the letter of the statute, having been regularly

admitted; but, if it be an offense to suffer a person to practice who has not been admitted, how much graver, within the meaning of this statute, would be the offense, in a moral point of view, if he were to allow a man to practice who was stripped of his office upon his being convicted and sent to the State prison for extorting money from persons, by threatening as attorney to bring actions or prosecutions against them for alleged acts affecting their morals, and who, although entirely innocent, complied with his demands rather than endure the exposure and scandal incident to the public vindication of them.

Our conclusion is that Niles was deprived of his office of attorney and counsellor of the Supreme Court by a proceeding in all respects regular and valid, that he has not been readmitted, and that he is not entitled to practice in this or in any other court in this State.

Robinson, J.—While concurring entirely in the views expressed by the Chief Justice, mine are still more radical. Niles, being an attorney of the Supreme Court, was convicted of obtaining goods under false pretenses, and sentenced to State prison for an infamous crime, and there worked out his sentence. His conviction has never been reversed. Under these circumstances I am of the opinion—without consideration of any action of the Supreme Court to remove him, which, nevertheless, seems to have been effectual—that he is not qualified to practice as an attorney and counsellor in this State; and for these reasons:

Attorneys and counsellors are by the statutes enumerated among the class of public officers known as judicial (1 R. S. 98; *Merritt* v. *Lambert*, 10 Paige, 356), and subject to removal or suspension. Their tenure is for life (1 R. S. 109, § 23; *Wallis* v. *Loubat*, 2 Den. 607). They may be so removed or suspended by the courts in which they shall be appointed, for deceit, malpractice, or misdemeanor, on charges preferred and opportunity given for defense (1 R. S. 109, §§ 23, 24). But every office becomes vacant on the removal of the incumbent, or his conviction of an infamous crime (1 R S. 122, § 34, sub. 3, 5).

While obtaining goods under false pretenses has been held not to be a felony (*Fassett* v. *Smith*, 23 N. Y. 252), an infamous crime is one punishable with death, or by imprisonment in a State's prison (2 R. S. 702, § 31).

A sentence of imprisonment for any term less than life, suspends all the civil rights of the person so sentenced and forfeits all public offices [and all private trusts, authority or power during the term of such imprisonment (2 R. S, 701, § 19)]. This latter limitation during the term of such imprisonment can have no reference to an office *forfeited*, but applies to private trusts, &c. To hold that a judge of this court, elected for fourteen years, and sentenced to prison for two or three years, might, on the expiration of his sentence, again resume the judicial functions of his office would be preposterous. The sentence forfeited Niles' office, and a proper construction of the provision would, at most, restore his capacity after the term of his sentence had expired to be again elected or appointed.

By such conviction his office as attorney and counsel became vacant (1 R. S. 122), and his sentence forfeited it (2 R. S. 701). A pardon by the governor only would have restored his competency to testify (2 R. S. 701, § 23), or his capacity thereafter to be elected or appointed to some office or trust, but could by no retroaction restore him to any office he had either vacated or forfeited.

The order of the Superior Court, Jan. 18th, 1851, was granted on mere production of the conviction and sentence.

Having thus ceased to hold such office of attorney and counsel, he cannot be allowed to practice without readmission by the Supreme Court, which is not pretended.

Chief Justice Daly.—Judge Daly and myself also record our concurrence in the views taken in the opinion of Judge Robinson. We give it as the united opinion of the court, on all the grounds stated, that he was properly removed—that, in other words, he ceased to be an attorney under operation of the statute, upon his conviction and his going to State prison. But we are satisfied, even if he had not been removed, that he could not practice. The statute declares that any one guilty of an

infamous crime, shall forfeit his office, if he is sent to the State prison. In the cases in which Mr. Niles has appeared here—

Mr. G. W. Niles (interrupting).—Will your honor take them on submission?

Chief Justice Daly.—Yes, under the circumstances, we will take them on submission.

Mr. Niles here handed up the papers relating to the cases in which he appeared, and the proceedings terminated.*

* After the hearing in this matter, on January 13th, 1875, the court received an affidavit of A. Oakey Hall, Esq., in which Mr. Hall deposed, that he was present at the General Term of the Supreme Court, on the 3d of February, 1851, on the return day of the order requiring Niles to show cause why he should not be removed, when the subject was called up, and that he heard the court pronounce the judgment disbarring Niles, that he (Hall) was then the assistant of the district attorney, N. B. Blunt; that he assisted Mr. Blunt in drawing the order disbarring Niles; that he had the most distinct recollection of seeing the order handed by Mr. Blunt to the judges, and of seeing it immediately afterwards in the hands of the clerk of the term, for docketing; that this being the first proceeding of the kind he had ever seen, or been connected with, he took the most particular notice of all the above details.

Notice was served on Mr. Niles on January 14, of the receipt of this affidavit; of the facts it contained; that he was at liberty to inspect it in the clerk's office, and that if he had anything to say respecting it, the court would hear him at any time before the adjournment of the court, on the 15th of January, and after that time the affidavit would be filed as one of the papers on which the final order would be made.

Mr. Niles not having appeared throughout January 15th, nor any one on his behalf, an order was made that the affidavit of Mr. Hall should be placed on file as one of the papers on which the final order was to be entered. On January 18th, a final order was entered in the following form:

[*Title of the Proceeding.*]

George W. Niles having appeared in this court, and having assumed to act as an attorney and counsel in several cases before the court, the court directed him to state by what authority he acted as an attorney and counsellor, and if he had been readmitted as such. On reading the certificate of his conviction, on the trial of indictment for obtaining money by false pretenses, in the Court of General Sessions of the Peace, held in the city of New York, on the 30th day of December, 1850; and the service of an order of the Supreme Court of the State of New York, of the First Judicial District, upon the said Niles, to show cause why he should not be removed from practicing as an attorney, solicitor and counsellor in any of the courts of this State, on the 7th day of January, 1851; also the affidavit of H. Bertholf, crier of the Superior Court, showing that he was removed by the

CORNELIUS P. SCHERMERHORN *against* CLARK B. WHEELER.

The payment or performance of an entirely adverse judgment is not a waiver or forfeiture of any right to prosecute an appeal from such judgment.

So held in an appeal from a District Court where the judgment appealed from was affirmed, and the appellant then paid the judgment and the costs of appeal, and applied for and obtained a reargument.

MOTION to dismiss an appeal from the 8th Judicial District Court.

The motion to dismiss the appeal was made on an affidavit setting up the following facts:

Plaintiff recovered a judgment against the defendant in the 8th Judicial District Court of New York city, on Novem-

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said court; and the order of the Supreme Court, dated December 30th, 1859, referring it to Hon. Wm. Mitchell, to inquire as to the moral character of said Niles, and to report whether in his opinion the rule removing him should be vacated; and the communication to the said court, by the said Wm. Mitchell, dated Sept. 28th, 1860, concerning the same; and on reading the affidavits, orders and motion papers in the action wherein George V. House was plaintiff, against John W. Porter, defendant, and the orders of the court made thereon; and the orders of the general term of the Supreme Court, dated Sept. 16th, 1857, denying the motion to restore his name to the roll of attorneys, &c.; and the affidavits and orders made and granted by the court in the action between Thos. Butler, plaintiff, against Wm. Lee, defendant, with the notes of testimony taken before Thos. W. Clarke, referee appointed by this court March 20th, 1874, and the report of the said referee, not yet filed nor acted upon; and the affidavit of B. W. Buchanan, the certificate of the county clerk, dated January 11th, 1875; and on recording and filing the affidavit of said Niles, dated January 13th, 1875, and this court having heard the said Niles, in reference to his right to appear as attorney and counsellor in this court; and on reading and filing the affidavit of A. Oakey Hall, Esq., dated the 15th January, 1875:

It is ordered and adjudged, that said George W. Niles, on the 3d day of February, 1851, was removed by the general term of the Supreme Court of the First Judicial District, from his office as attorney and counsellor of this State, and that since the conviction and sentence of the said Niles, his office as attorney and counsellor became vacant, and was forfeited by him; that he has not been readmitted; and that he has no right to appear as an attorney and counsellor at law in this court, or in any court of this State.

ber 13th, 1873. Defendant appealed to this court, and the appeal was heard at the general term in May, 1874, and the judgment affirmed. The defendant then went voluntarily to the plaintiff and paid the judgment, and took from the plaintiff a satisfaction piece of the judgment, and also paid the costs of the appeal. Defendant then applied to the general term for a reargument of the appeal, and in November, 1874, such a reargument was ordered.

Plaintiff now claimed that, by voluntarily paying the judgment, the defendant had forfeited his right to further prosecute his appeal.

C. P. Schermerhorn, for the motion.

C. B. Wheeler, opposed.

Robinson, J.—The voluntary payment or performance of the terms of a judgment is ordinarily no waiver of an appeal therefrom (*Champion* v. *Plymouth Cong. Soc.* 42 Barb. 441; *Clowes* v. *Dickenson*, 8 Cow. 328; *Higbie* v. *Westlake*, 14 N. Y. 281; *Benkard* v. *Babcock*, 2 Robt. 135; *Armes* v. *Chappel*, 28 Ind. 469; *Dickensheck* v. *Kaufman*, 29 Ib. 154). It is only where the judgment, from parts of which an appeal is taken, is such that it must be wholly reversed if the parts appealed from are erroneous, and where the other parts favorable to the appellant have been enforced, that an appeal cannot be sustained, or generally in cases where the appellant has accepted or availed himself of such benefits thereunder as are inconsistent with the reversal sought, that he is precluded through compliance with or acceptance of the terms of the judgment from maintaining his appeal (*Bennett* v. *Van Syckel*, 18 N. Y. 481; *Knapp* v. *Brown*, 45 N. Y. 207). The payment or performance of an entirely adverse judgment is but a present submission to the decision sought to be reversed. The provision of the code relating to this appeal (§ 369), contemplates that such *payment* may have been made, and instead of giving any countenance to the idea that it should interfere with the right of appeal, by § 330, generally applicable to all

appeals, express provision is made for a restitution of all rights lost by the erroneous judgment, and including cases where satisfaction has been entered of record before the appeal (*Sheridan* v. *Mann*, 5 How. Pr. 201).

The motion should be denied, with $10 costs.

LARREMORE, J., concurred.

Motion denied.

JOHN W. BOWNE *against* JAMES O'BRIEN, SHERIFF, &c.

Quære, whether the act of 1871 (L. 1871, c. 733, § 2) requiring actions against sheriffs to be brought within one year from the time when the cause of action accrued, is prospective or retrospective.

An action against a sheriff by a purchaser, on an execution sale which was afterwards set aside for irregularity, to recover back the money paid, is an action for the non-payment of money collected upon an execution, within the act of 1871 (2 L. 1871, c. 733, § 2), excepting such actions from the operation of that statute requiring actions against sheriffs to be brought within one year from the time the cause of action accrued.

In such an action the sheriff cannot be allowed to retain the expenses of the sale.

APPEAL by defendant, from a judgment. The facts fully appear in the opinion.

A. Oakey Hall, for appellant.

H. Brewster, for respondent.

DALY, Chief Justice.—I do not deem it material to pass upon the question whether the statute of 1871, requiring actions against a sheriff to be brought within one year, is prospective and not retrospective (2 L. 1871, c. 733, § 2, p. 1694), as

I am of the opinion that this case comes within the exception provided for by the statute. The statute declares that the limitation imposed shall not include the non-payment of money collected by a sheriff upon an execution. The sheriff, under an execution, sold certain real estate to the plaintiff, for $1,300, and the plaintiff, upon the sale, paid into the sheriff's hands $620. The plaintiff afterwards refused to complete the purchase, upon the ground that the sale was irregular; upon which the sheriff sold the property again, and it was bought by Mr. McAdam for the same amount. The first sale was afterwards set aside by this court as irregular, and sheriff, having failed to pay the money back to the plaintiff, this action is brought to recover it. No reason is given upon the defendant's points, why this was not upon the sheriff's part, "the non-payment of money collected upon an execution," and I apprehend none can be given. It was certainly collected by the sheriff upon an execution levied upon property which the sheriff sold to satisfy the execution. If the sale had been regular, it would have been payable to the plaintiff on the execution; but proving to be irregular, it was payable to the purchaser from whom it was received. The failure to pay it in either case, is the non-payment of money collected upon execution.

Nor is any reason given why the sheriff should be allowed to deduct from the amount the expenses of the sale. The plaintiff has nothing to do with the expenses of the sale. All that he undertook was to pay the purchase money, upon the assumption that the sale was valid and would convey a good title to the property. It did not; the sale was irregular and has been set aside. The expense of it must be borne by those who directed it, and not by the plaintiff. He is entitled to have his money back, and has nothing to do with the irregular proceeding, and is not answerable for the cost of it. The judgment should be affirmed.

Loew and J. F. Daly, JJ., concurred.

Judgment affirmed.

JOHN H. GOSSLER *et al. against* JOHN D. SCHEPELER *et al.*

The right of stoppage *in transitu* may be exercised not only by the vendor of the goods, but also by a person who pays the price of the goods for the vendee and takes from the vendee an assignment of the bill of lading as security for his advances.

Defendants obtained credit with plaintiffs "for" or "against" a cargo of iron purchased from a third party. Plaintiffs paid the price of the iron, and received the bill of lading therefor to the order of the shippers, and by them indorsed in blank, as security for the payment of their advances. Plaintiffs sent the bill of lading to defendants, who received it, but who became insolvent before they received the goods or had negotiated the bill of lading. *Held*, that plaintiffs could retake the goods and compel the defendants to deliver up to them the bill of lading.

APPEAL by plaintiffs from a judgment of this court dismissing the complaint entered on the report of a referee to hear and determine.

The facts are fully stated in the opinion.

Augustus F. Smith, for appellants.

T. C. T. Buckly (*S. P. Nash* with him), for respondents.

ROBINSON, J.—From some time in the year 1862 until in April, 1869, the plaintiffs were bankers in Hamburg, and the several defendants, composing the firm of Schepeler & Co., were engaged in the mercantile business in New York. During that period these firms had business transactions together, involving large amounts and of a varied character. On the 25th of February, 1869, Schepeler & Co., at New York, wrote plaintiffs, at Hamburg, that their firm, through John D. Schepeler, one of their members, then in Antwerp, might have occasion to open a credit with plaintiffs, for their account, for a shipment of iron to New York, and added, "the bills of lading for same, we expect, will be handed to us by you."

The receipt of this letter was acknowledged by plaintiffs'

reply of March 12th, 1869, in which they state: "We have to acknowledge receipt of your favor of the 25th February, from which we observe that your Mr. J. D. Schepeler, now in Antwerp, may have occasion to open with us, for your account, a credit for shipment of iron to your place, forwarding bill of lading to us; so far he has not applied for it."

Before Schepeler & Co. could have received this answer, they, under date of March 17th, 1869, telegraphed plaintiffs: "If agreeable grant J. D. Schepeler credit hundred thousand marcs, three months, against iron shipment, wire." On the same day they wrote the plaintiffs, in the German language, referring to their first letter of credit, and stating: "We request you, if convenient, to give Mr. J. D. Schepeler, of Antwerp, a three months' credit for our account, of marcs banco 100,000, for (or, as otherwise translated, 'against') iron shipment from Wales therefor (or, as otherwise translated, 'thereagainst'); Mr. J. D. Schepeler will hand you bills of lading." On receipt of the telegram, on the 18th of March, plaintiffs informed Schepeler & Co. they would grant such credit, and on the same day wrote to J. D. Schepeler, at Antwerp, advising him of the receipt of this telegram and their reply to it, and stated that they had placed at his disposal 100,000 marcs banco, to be used in three months' drafts by remittance of bill of lading of a shipment of iron to New York. This credit was used in the payment of a shipment of railroad iron purchased by Schepeler & Co., of the Ebbervale Steel, Iron and Coal Company, in Wales, which that company, on the 29th of March, shipped on board the ship J. S. De Wolf, at Newport, Wales, on bills of lading to their own order, by which it was agreed the vessel was to proceed to Hampton Roads, Va., for orders to proceed to Norfolk or New York, as Schepeler & Co. might direct. The vessel had been chartered by Schepeler & Co. for that voyage, but this fact does not appear to have been communicated to plaintiffs. The shipment so made was paid for by plaintiffs, not immediately to the vendors, but indirectly, on being furnished with the bill of lading indorsed in blank by the shippers. They immediately thereafter, by letter of April 13th, 1869, advised Schepeler & Co. as follows: "Mr. C. H.

Schepeler handed us the inclosed bill of lading, indorsed in blank, for 7,940 rails, equal to 1,404 tons 1 hundred weight 3 quarters and 23 pounds, shipped per the J. S. De Wolf, Captain Davenham, from Newport to Hampton Roads for orders, which is at your service and in conformity with the credit opened in favor of Mr. J. D. Schepeler, and by him transmitted to Mr. C. H. Schepeler; we have accepted the drafts of the latter. Marco banco 113.450,8 due 9th July to the debit of your account." This letter and the inclosed bill of lading were received by Schepeler & Co., on or prior to April 30th, 1869, when they acknowledged the credit, and stated they would use the bill of lading. They never did make any use of it, but on the 17th of May following they suspended payment, and having become bankrupts, the defendant Von Sachs, has been appointed their assignee in bankruptcy. Immediately on their failure, a demand was made on behalf of plaintiff, for a return of the bill of lading and cargo of iron, which being refused, proceedings were instituted by the plaintiffs by way of reclamation of the goods and their stoppage *in transitu*.

No other question than their right in this respect is presented. In the adverse judgment from which this appeal is taken, the referee who tried the cause found as matter of fact, that by the letters and telegrams through which the agreement between the parties arose and was consummated, "plaintiffs were to have a lien on said iron and on the bill of lading therefor, for any advance or advances made by them under and in pursuance of said credit," and this finding, on this appeal, is to be assumed to be correct.

Vested with such lien upon the bill of lading and the iron it represented, for the amount they had advanced in payment of the purchase money and towards perfecting the interest of Schepeler & Co. in the property, the question is presented whether upon the insolvency of that firm, the plaintiffs, through such right of lien, continued while such goods were in transit to their debtors, to possess the legal authority to resume the possession which they previously had, but had temporarily relinquished for the purpose of such transit.

The question is in no respect controlled or influenced by

the fact that Schepeler & Co. had chartered the De Wolf for that voyage. No absolute delivery of the iron had been made to them on board the vessel as its owners or charterers, but in all the dealings between the parties, the only dominion or control they had acquired over the iron was through the bill of lading in its agreed and representative character of an obligation on the part of the owner of the vessel as carrier, to convey and deliver the property according to its terms (*Turner* v. *Trustees Liverpool Docks*, 6 Exch. 543; *Scholman* v. *Lancaster & York R.*, L. R. 2 Ch. App. 332; Benj. on Sales [2d ed.] 699 to 702), and defendants were estopped from alleging that the shipment was made otherwise than as per the bill of lading, or to claim that the delivery had been made *absolutely* to them on board their own vessel, nothing to that effect having been suggested in the transaction with the plaintiffs.

The right of stoppage *in transitu* is one highly favored in the law, and has been extended to *quasi* vendors or persons standing in a similar position to vendors. It is founded upon the plain reason of justice and equity, that one man's property should not be applied to the payment of another man's debt (Benj. on Sales [2d ed.] 689; 2 Kent, 542). In *De Aquila* v. *Lambert* (Ambl. 399), the consignor, at the request of the consignee, bought and paid for the goods, and, on making the shipment, drew bills of exchange for the money paid. Upon the insolvency of the consignee while the goods were in transit, the right of stoppage *in transitu* by the consignor was maintained by Lord Nottingham, making reference to the cases of *Wiseman* v. *Vandepool* (2 Vern. 203), and *ex parte Wilkinson*, (in chancery, not reported), who held that in such case, the consignor was to be substantially considered as a merchant selling the goods to the consignee. So in *Feise* v. *Wray* (3 East, 93), the right was sustained in behalf of a mere factor or purchasing agent, not only as to his advances but also as to his commissions. To the same effect in *Snee* v. *Baxter* (1 Atk. 285), sustained and recognized by numerous other cases (see Benj. on Sales [2d ed.], 690, and cases cited in note 7); also, in this court in *Franchisin* v. *Henriques* (6 Abb. N. S. 251). The Court of Appeals, in *Muller* v. *Ponder* (MSS., decided during the last

year [1874]); also assert the principle that a party in any way interested by way of lien or special interest in personal property consigned to his debtor *on faith of his solvency*, has, upon his insolvency occurring while the goods are in transit, the right to their reclamation or stoppage *in transitu* for the protection of such lien or interest. To that extent he is a *quasi* vendor entitled to use all lawful means in preventing his property or interests being sacrificed towards the payment of another person's debts, and especially so where the adverse claim is made not by a *bona fide* purchaser but by others assigned.

I am also unable to discover any lack of efficiency in any of the proceedings taken by or on behalf of the plaintiffs to assert and enforce such rights. It does not lay with the defendants to impute to such agencies as the plaintiffs adopted, any want of authority from them when the proceedings taken on their behalf have been fully ratified. The respective rights of the parties in the property have been duly presented and made the subject of adjudication upon the merits. The whole has been sold and the proceeds brought into court for adjudication between them. In my opinion the plaintiffs plainly presented a case as proven, established their lien or interest to the extent of their advances, and their right to reclaim the goods *in transitu*. The decision of the referee to the contrary should be reversed, and a new trial ordered, with costs to abide the event.

Van Brunt and Larremore, JJ., concurred.

Ordered accordingly.

EPHRAIM D. BROWN *against* THE MAYOR, &C., OF THE CITY OF NEW YORK.

The judgment record, in summary proceedings to recover the possession of leased premises, is conclusive between the parties to it, not only as to the right of the landlord to the possession of the premises, but also as to the amount of rent due.

A summary proceeding to recover possession of leased premises is not an action or special proceeding within the meaning of L. 1860, c. 379, § 1, which provides that certain courts (not including Justices' Courts) shall have exclusive jurisdiction of all actions and special procedings in which the mayor, aldermen and commonalty of the city of New York is a party defendant.

APPEAL by defendant from a judgment of this court, entered on the verdict of a jury under the direction of the court. The facts are fully stated in the opinion.

E. Delafield Smith, for appellant.

Thomas J. McKee, for respondent.

ROBINSON, J.—Defendants in this action were sued for rent of premises, alleged to have been let to them by plaintiff's assignor, by lease dated March 17th, 1870, of premises in the city of New York, for five years from March 1st, 1870, at the annual rent of $3,000, payable quarterly, on the first days of June, September, December and March. The complaint alleges the lease, entry and occupation of the premises until May 1st, 1873, the assignment of the lease to plaintiff in February, 1871, and the non-payment of the rent accruing from June 1st, 1871, to March 1st, 1873, amounting to $5,250, for which, with interest on the several installments as they became due, judgment was demanded. These allegations were denied by the answer, and the only proof to sustain them, offered on the trial, was a record of summary proceedings instituted by the plaintiff, before William J. Kane, a justice of the Eighth Judicial District of this city, against these defendants as tenants, and the board of

police commissioners of said city, as under-tenants, under the provisions of the Revised Statutes (2 R. S. 513, sections 28 to 43), relating to "summary proceedings to recover possession of land," by landlords against tenants. It appeared therefrom that said proceedings were initiated by the plaintiff on the 7th day of March, 1873, upon such an affidavit as is required by section 28 (as amended by the act of 1851), alleging substantially the same facts as to the lease, use and occupation under it, the assignment of the lease to plaintiff, and non-payment of rent subsequently accruing and becoming due on March 1st, 1873, for the previous seven quarters, as stated in the complaint, and the holding over of the premises by defendants as tenants, and the board of police commissioners of said city as under-tenants, without permission of the plaintiff as landlord, after non-payment of the rent as above demanded. Upon presentation of this affidavit by the plaintiff to the justice, a summons in due form was issued by the latter, directed to these defendants and said board of police commissioners, returnable on the eleventh day of the same month, which was served by the marshal upon William T. Havemeyer, the mayor of said city, and Thomas J. Barr, secretary of said board of police, on the eighth day of March, 1873. On the return day, plaintiff appeared and demanded the rent or possession of the premises for non-payment thereof. These defendants did not appear, but the board of police commissioners did, and requested an adjournment of the proceedings to the 13th of March, which by consent of the plaintiff was granted. On the latter day, no cause being shown to the contrary, the justice rendered judgment in favor of the landlord, and that he have possession of the premises for non-payment of rent; and thereupon he issued his warrant, which after reciting the said application and proceedings, and that these defendants had not shown any cause why they should not remove from said premises, said justice by said warrant directed the marshal to remove all persons therefrom, and put said plaintiff in full possession thereof. The warrant was returned by the marshal, duly executed, on the 21st day of March, 1873.

If the justice acquired jurisdiction of this proceeding, as

against the corporation, this judgment has the force of a final adjudication, as well as to the tenancy, as to the amount of rent then due, although given in such summary proceeding (*White* v. *Coatsworth*, 6 N. Y. 137; *Kelsey* v. *Ward*, 38 N. Y. 83; *Yonkers & N. Y. Fire Ins. Co.* v. *Bishop*, 1 Daly, 451); and it made no difference that it was by default (*Powers* v. *Witty*, 42 How. Pr. 352). The reason why such judgment is not only conclusive as to the alleged tenancy, but as to the amount of rent in arrear, is explained in the opinions of this court in *Powers* v. *Witty* (*supra*). The only additional objection suggested on this appeal against the validity of that proceeding is founded on the provisions of chapter 379 of the Laws of 1860, entitled "An act relating to actions, legal proceedings and claims against the mayor, aldermen and commonalty of the city of New York," which in the first section enacts, that the Supreme Court of the First Judicial District, the Court of Common Pleas, and the Superior Court of said city, should have exclusive jurisdiction of all actions and special proceedings, wherein the said mayor, aldermen and commonalty thereof are made a party defendant. The second section requires, that before any action or special proceeding shall be prosecuted or maintained against the corporation, it shall be made to appear by the complaint or moving papers, that an adjustment or payment of the claim upon which they are founded shall have been twice presented in writing to the comptroller, after an intervening lapse of twenty days from each occasion on which it has been neglected or refused. Section three authorizes the comptroller to administer oaths on examining such claims. Section four requires that all process and papers for the commencement of actions and *legal proceedings* against the corporation, shall be served either on the mayor, comptroller, or corporation counsel. Section five requires that no execution shall be issued against the property of the corporation until ten days' notice in writing to the comptroller.

This act furnishes no ground of exemption of the defendants from proceeding had against them, under the provisions of the general law relating to summary proceeding for the recovery by a landlord of the possession of premises withheld by his tenant

for the non-payment of rent, where they have become such tenants. Although the proceeding instituted by the plaintiff before the District Judge was a "legal proceeding," within the meaning of the fourth section of this act, it was not such an action or special proceeding as was referred to in the first section. That it was not a civil action, within the meaning of the code, was held in *The People* v. *Hamilton* (39 N. Y. 107), and cases cited. Nor was it any such special proceeding referred to in the act, as was required to be brought in some of the courts named in the first section, as none of them had jurisdiction of any such proceeding. By section 3 of article VIII of the Constitution of 1846, all corporations were made "subject to be sued in all courts in like cases as natural persons." Where the Code of Procedure relating to "the practice, pleading, and proceedings of *the courts of this State*," divides such civil proceedings into actions and special proceedings, it has no reference to such mere statutory proceedings; they are not brought within the operation of any of its provisions, but remain as before the subject of review by writ of *certiorari*. After they thus become the subject of cognizance by any court, they constitute, within the meaning of the code, a "special proceeding." It is in this aspect that any force or effect could be given to the first section of the act of 1860, restricting and limiting the jurisdiction of those courts to proceedings against the corporation, of which they had cognizance; and it follows from these views, that in summary proceedings by landlord against tenant, under the provisions of the Revised Statutes, the defendants being shown to have accepted the relation of a tenant, became subject to its incidents and liabilities; to removal for non-payment of rent, and to all the consequences of such a judgment of removal as attached to a similar judgment "against a natural person."

DALY, Ch. J., and LARREMORE, J., concurred.

Judgment affirmed.

Douglas Taylor *against* The Mayor, &c., of the City of New York.

The act of 1870 (L. 1870, c. 539, § 17), fixing the salary of the commissioner of jurors of the county of New York, "at the same rate as the salary paid to the city judge," limits the salary of such commissioner to the rate of salary paid to the city judge at the time of the passage of the act, and it is not increased by a subsequent increase in the salary of the city judge.

Appeal by plaintiff from a judgment of this court entered on an order made at special term, overruling plaintiff's demurrer to the first defense set forth in the defendant's answer.

The complaint alleged, in substance, that the plaintiff between July 1st, 1871, and April 1st, 1874, was commissioner of jurors of the county of New York, and entitled to a salary of $15,000 per annum, and that there was a balance due him of $21,500, on account of such salary.

The answer, for a first defense, alleged that by L. 1870, c. 539, § 17 (passed May 2d, 1870), the salary of the plaintiff was fixed at the same rate as the salary paid to the city judge, and that the salary then paid to the city judge was $10,000 per annum; that on June 24th, 1873, the board of estimate and apportionment, being thereunto authorized by L. 1873, c. 335, § 97, adopted a resolution, whereby the salary of the plaintiff was fixed at the sum of $5,000 per annum, from and after July 1st, 1873. That the salary of the plaintiff at those rates had been paid to him.

To this portion of the answer the plaintiff demurred.

The court at special term overruled the demurrer, and from the judgment entered on this order, the plaintiff appealed.

A. Oakey Hall, for appellant, argued that by L. 1870, c. 539, § 17, providing that "the salary of the commissioner of jurors shall be at the same rate as the salary paid to the city judge," the plaintiff was entitled to the same salary as should be paid to the city judge from time to time, and was not restricted to the amount of the salary of the city judge, at the time of the passage of the act of 1870. That if the statute is ambiguous,

the construction most favorable to the officer should be given (*United States* v. *Morse*, 3 Story, 91; Dwarris on Statutes, ed. 1873, 213). The salary of the city judge under L. 1872, p. 908, c. 367, § 3, is $15,000 per annum.

E. Delafield Smith, for respondent.

J. F. Daly, J.—This appeal presents the question whether the plaintiff, as commissioner of jurors of the county of New York, is entitled to an annual salary equal to that paid to the city judge of New York at the time of the passage of the act of 1870 (L. 1870, c. 539, § 17), which was $10,000, or to an annual salary equal to the subsequently increased salary paid to the city judge, and fixed after the passage of that act, which increased salary is $15,000.

The act above referred to provides (section 17) that "the salary of the commissioner of jurors shall be at the same rate as the salary paid to the city judge of the said city, and the same shall be paid quarterly by the comptroller of the said city."

When that act was passed the city judge received $10,000 per annum, pursuant to a resolution of the board of supervisors of the county of New York, approved December 28, 1869, whereby the salary of the city judge was "made equal to the salary of the judges of the Superior and Common Pleas Courts," who then received $10,000 per annum. The salaries of the last named judges were increased, by the resolution of the board of supervisors, in 1870, after the passage of the act above referred to (L. 1870, c. 539), and the city judge was paid at the increased rate; that resolution was confirmed by the Legislature in 1871 (c. 573), and the payments to the city judge were confirmed by the Legislature in 1872 (L. 1872, c. 367).

After the act of 1870, there was no legislation affecting the salary of the commissioner of jurors, and there was no resolution of the supervisors referring to such salary. His right to more than $10,000 per annum depends upon whether the subsequent resolution of the board of supervisors of 1870, increasing the salaries of the judges of the Superior and Common

Pleas Courts, had the effect of increasing the salary of the city judge; and if it did, whether the increase of the latter effected an increase of the salary of the commissioner of jurors.

Assuming that the salary of the city judge was thus increased after the act of 1870, and legally fixed at more than $10,000 per annum, I am of opinion that such increase did not affect the salary of the plaintiff; in other words, that the compensation of the commissioner of jurors was not intended by the Legislature to be dependent upon that of the city judge. If it were so intended, there should be some reason for it in a connection or resemblance between the duties of the two officers, or upon some ground apparent upon close examination. Where there is a common duty for two officers, as in the case of members of the same board, officer and deputy, and the like, a provision that the members of the board should receive the same pay as the president of the board, or that the deputy should receive the same salary as the officer, there would be little doubt that equality of compensation was intended, whether the compensation was thereafter increased or diminished; but where no reason appears for fixing as a standard for one officer's salary, the salary received by another, except the disinclination of the law-makers (often apparent in the legislation of the past few years) to name the exact sum in the act; where one officer is judge of a court, and the other is head of a county bureau or department; where the duties of one are judicial, and of the other ministerial; where the connection between the office of commissioner of jurors and the city judge is the same as the former's connection with every other judge and court of record in the county; no ground exists for saying that equality of compensation was the object of the act in question.

To hold, moreover, as the plaintiff urges, would be unjust to him, were the salary of the city judge to be diminished for reasons which could not make a reduction of the plaintiff's salary proper; or were he to be subject to all the consequences of legislation affecting the city judge's office.

Suppose the office of city judge were abolished, would the salary of the commissioner of jurors cease? The office of city

judge might be abolished without affecting the office of commissioner of jurors, or diminishing his duties. Upon what reasons would then rest the argument that the commissioner of jurors should receive no salary whatever? And what ground is there now for urging that the increasing or diminishing of one salary is to affect the other?

Without the express declaration of the Legislature, I do not feel justified in holding that if the compensation of the city judge were to be reduced, or if he were deprived of all compensation, or if his office were abolished, the commissioner of jurors' salary would be likewise reduced or entirely taken away, because there is no possible reason for such a conclusion; and so I cannot assent to the converse of such a proposition, and hold that every increase of the salary of the city judge, made at the pleasure of the board of supervisors, effects a corresponding increase in the salary of the commissioner of jurors. The language of the act of 1870, above referred to, is not such an express declaration. To make it so, the enactment should have provided for the payment to the commissioner of jurors at the same rate as the salary paid "from time to time" to the city judge, or the salary "as fixed from time to time," and paid to the city judge. The language of the act as it stands, that the salary "shall be at the same rate as the salary paid to the city judge," clearly indicates that the salary of the commissioner of jurors should thereafter be at the same rate as the salary paid (*at the time of the passage of the act*) to the city judge.

The judgment should be affirmed.

Daly, Ch. J., and Loew, J., concurred.

Judgment affirmed.

ROBERT GLENDENING *et al. against* THOMAS CANARY and MICHAEL NORTON, *Impleaded.*

An indorser of a note payable at a bank was informed by the holders, that the note had not been presented for payment on the day it fell due: *Held,* That this was notice to him that it had not been presented *at the bank.*

Held, also, that the indorser, on such notice having been given to him, having answered, "You hold the note two or three days, and I will make it all right at the bank," that this was sufficient to warrant the submission to the jury of the question, whether the indorser intended those words as an absolute promise to pay the note.

A new trial, on the ground of surprise, will not be granted, when the facts by which the party claims to have been surprised were fully brought out on the trial, and he then neglected to take any steps to have a postponment of the trial.

APPEAL from a judgment of this court, entered on the verdict of a jury, and also from an order denying a new trial on the ground of surprise.

The action was against the defendants, as indorsers of a promissory note, and their ground of defense was, that the note had not been duly demanded, and notice of the demand and refusal to pay given to them. On the trial, it appeared that the note had not been presented for payment on the day it became due, but had afterwards been presented, and payment refused, and evidence was given on the part of the plaintiff, that subsequently the defendants, with the full knowledge of all these facts, had promised to pay the note.

The evidence on this point is fully stated in the opinion.

Plaintiffs had a verdict, and a motion for a new trial on the ground of surprise (the facts in regard to which are stated in the opinion) was denied.

Defendants appealed.

Tremaine & Tyler, for appellants.

Wm. Gallaher, for respondents.

Robinson, J.—The action being against these defendants as indorsers of a promissory note, due February, 1871, and payable at the Tenth National Bank, which was not presented for payment when it became due, it became incumbent on the plaintiffs to fully maintain and prove the subsequent alleged promise of the defendants to pay the note, and also that such promise was made with full knowledge of the laches of the holders. The testimony adduced on the part of the plaintiffs, which the jury have credited, was sufficient to establish such promise after full knowledge or notice expressly given. A witness, Anderson, testified on behalf of the plaintiffs, that on the 4th day of February, 1871, he gave on behalf of the plaintiffs, notice to the defendant Norton, that by an oversight the note had not been presented when it was due, and requested him to pay the note; that Mr. Norton then said, "It is all right; you hold the note two or three days, and I will make it all right at the bank."

There was testimony also by a witness named Keen, taken on commission, to show that two days afterwards (on February 6th, 1871), he called on plaintiffs' behalf on the defendant Canary, and after a full statement of such promise to Anderson, after notice of the want of demand, he conceded the fact, but refused to pay, stating defendants had altered their minds. This note being payable at the Tenth National Bank, defendants' counsel contend that the notice that the note had not been presented when it was due, was insufficient to apprise defendants that it had not been presented *at the bank*. Such a proposition cannot be maintained: the notice that *it had not been presented* was of an entire want of any presentation, and could not have been expressed in more explicit or compresive terms. No such point was made upon the trial, nor any exception taken which would warrant any reversal for error in this respect. It is also claimed that the promise expressed or inferrible from the words "You hold the note two or three days, and I will make it all right at the bank," was not a promise to pay the note. It is difficult to conceive how, if plaintiffs would hold on for two or three days, as they did, the matter could be *made all right* in any other way than

by the payment of the note, and in the absence of any suggestions as to any other mode of arrangement to make it *all right*, the court might well have charged in express terms that such a promise was one to pay the note. But the defendants received the indulgence or benefit of a submission to the jury, of the question whether, under the circumstances detailed, in connection with the other language used between the parties engaged in the conversation, the expression was an absolute promise to pay. No error or prejudice to the defendants could have resulted from such submission to the jury of the question of intent. These are the only material considerations presented by any of the exceptions taken on the trial. A motion was however made for a new trial, upon the ground of surprise on the trial, arising, as is alleged in the moving papers, from defendants' counsel being misled by a statement in a deposition of the witness Keen, taken on commission before trial, who, as is claimed by defendants, testified to the acknowledgment by the defendant Canary, to the promise above referred to, on the first presentation of the note, as having been made by him, and not by the defendant Norton. The particulars of that testimony, to which defendants on the motion made reference, were that the witness stated that, on presenting the note to Canary on the 6th of February, 1871, he said to Canary, "In accordance with *your* promise to Mr. Anderson on the 4th instant, to pay this note at bank, I called at the Tenth National Bank for payment, which was refused. Will you pay this note, Mr. Canary?" He replied, "No; *I* have changed *my* mind and don't intend to pay it." I then said, "Mr. Canary, *you* told Mr. Anderson that *you* would pay this note," &c. "*You* said," &c. "*You* knew at the time *you* promised Mr. Anderson," &c. I said, "*You* knew that before you promised. Mr. Anderson showed *you* the note and protest, and told *you* they neglected to present it at the proper time; and *you* then promised to pay the note, with full knowledge of these facts. Mr. Canary then said, *That is all very true*, but we have changed our mind about it, and now refuse to pay. I said, Then you acknowledge, *you* told Mr. Anderson you would pay the note after he informed you of their neglect

to present and protest it at maturity?" Mr. Canary said, "Yes," &c. That relying on and expecting from these statements that the case to be presented on the part of the plaintiffs was to be upon the alleged original promise made by *Canary* to Anderson, they took no precaution to get the contradictory evidence of the defendant Norton, as to any such promise being made by him, which they could and otherwise would have obtained. And Mr. Norton makes an affidavit wholly contradicting the statements of the witness Anderson as to any such occurrence. It is not intimated that on the trial, the defendants indicated any expression of surprise in being met by the statement of Anderson, that the original promise was made by the defendant Norton, or for that reason made any motion to the court for a withdrawal of a juror, or adjournment of the trial. The court on the trial of civil cases, upon being satisfied that any real ground of surprise exists; such as the unexpected absence of witnessess who had been in attendance, or that have been kept out of the way; the sickness of a juror, party or counsel; or any other accident occasioned by substantial misapprehension or disappointment, which would render its further progress unjust or unfair to either party, may, in the exercise of a sound discretion, direct the withdrawal of a juror or discharge of the jury, and postpone the trial (*The People* v. *Olcott*, 2 Johns. Cas. 307; *People* v. *N. Y. Com. Pleas*, 8 Cow. 127; *People* v. *Ellis*, 15 Wend. 371; *Powell* v. *Sonnett*, 3 Bing. [in Exch.] 381; s. c. [H. L.] Bligh, N. S. 352). In *The United States* v. *Perez* (9 Wheat. 580), the court say: "The law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, and the ends of justice would otherwise be defeated." "And the security which the public have for the faithful, sound and conscientious exercise of this discretion rests in this, as in other cases, upon the responsibility of the judges under their oath of office."

Instead of availing themselves of any representation to the court of any such alleged surprise, or appealing to its discretion

to postpone the trial, so as to enable them to relieve themselves from the consequences, they proceeded with the trial, and chose to abide the verdict of the jury upon the relative credibility of the plaintiffs' witness Keen and the defendant Canary, both as to Norton's *alibi* on the 4th and the occurrence of the 6th of February. Keen's testimony, if credited, as against Canary's denials, warranted the jury in finding the verdict in favor of the plaintiffs, irrespective of any submission to them of any conflict of evidence that might be raised by any discrepancy in the proofs were the testimony of Mr. Norton produced on a retrial. And it is evident, as the judge below held on the motion for a new trial on the ground of surprise, that Norton's proposed testimony would be merely cumulative, and furnishes no ground for a new trial, when the verdict was fully supported by other evidence accepted as credible by the jury.

For these reasons, the judgment therein should be approved, and the order denying a new trial should be affirmed, with costs.

LARREMORE and LOEW, JJ., concurred.

Ordered accordingly.

JOSEPH MCGRAW *against* WILLIAM R. MORGAN and WILLIAM C. DICKEL.

The complaint in an action on an undertaking given on appeal to the Court of Appeals, to secure the payment of the costs and damages awarded on appeal, and also of the judgment appealed from, alleged the recovery of the original judgment, and its non-payment, and the recovery of a judgment for costs on affirmance by the general term, and its non-payment, and the affirmance of the judgment in the Court of Appeals, with costs, and that those were unpaid, and then alleged the execution of the undertaking and set it out at length, and alleged that none of said damages and costs had been paid: *Held*, that this was a sufficient allegation of the execution and breach of condition of the undertaking, and that none of the several judgments mentioned had been paid.

APPEAL by defendants from a judgment of this court. The facts are fully stated in the opinion.

Godfrey & Jordan, for appellant.

A. J. Perry, for respondent.

ROBINSON, J.—The obligation in suit was an undertaking executed by the defendants under sections 334, 335 and 340 of the Code, for the purposes of an appeal taken by Marie Alice Godfrey to the Court of Appeals from a judgment of this court, and, as required by those sections, securing payment by the appellant of all costs and damages that might be awarded against the appellant on the appeal (not exceeding $500), and also the judgment appealed from, if affirmed, or the part thereof as to which it should be affirmed, if affirmed only in part, and all damages that should be awarded against the appellant on the appeal.

The complaint, after alleging, firstly, the recovery of the original judgment against the appellant for damages and costs to the amount of $701 31, and also that it was "altogether unpaid;" secondly, set out the judgment for costs on the appeal to the general term of this court on affirmance at $89 91, which it also alleged was "altogether unpaid;" thirdly, the affirmance of the judgment of this court on the appeal to the Court of Appeals, with costs allowed, amounting to $120 61, which it alleged were also "altogether unpaid;" and, fourthly, the execution of the undertaking in suit (setting the same forth at length) for the purposes of the appeal to the Court of Appeals, it, fifthly, alleges for breach that the appellant had not paid any of *said damages and costs*, and demands judgment for the aggregate of the several recoveries and interest.

The answer, as to the first paragraph, does not deny the recovery of the original judgment for damages and costs, or its non-payment, but alleges it was void on account of Mrs. Godfrey's infancy; nor does it deny the recovery of the judgment for costs awarded upon the appeal to the general term, or upon the affirmance on the appeal to the Court of Appeals, with award of costs to the amount stated in the second and third

paragraphs, but alleges that both these judgments for costs were paid.

Under the undertaking authorized by section 334 of the code, the only *damages* contemplated are such as are specially awarded by that court, under the provisions of section 307, sec. 6, of the code—"for the delay;" and there is no suggestion in the pleadings of any such award having been made by that court for that cause.

The damages referred to in the complaint therefore could only have reference to such as had been previously mentioned, and the allegation that the appellant had not paid any of "said damages and costs," could only be understood as referring to such as had been previously mentioned, especial reference to which had been made as having been recovered by the plaintiff, and as remaining unpaid by the appellant, whose obligation to pay the same had been guaranteed by the defendants.

Such being the pleadings, on the trial, after proof of the recovery of the several judgments in this court, including that on *remittitur* from the Court of Appeals, and of the undertaking, as alleged, a payment, as on account, of $500 was admitted, and judgment was given for the balance of the amount claimed in the prayer of the complaint.

After the proof was closed, the defendants' counsel moved to exclude all evidence of the indebtedness alleged in the complaint, except the judgment for $120 60, costs in the Court of Appeals, and claimed that the plaintiff could not recover under the complaint the full amount demanded, to wit, $976 91. The court denied the motion, to which defendants excepted, and directed the jury to find a verdict for the sum of $495 64, the balance proved to be due on these several judgments, after crediting the $500 paid thereon; and to this defendants' counsel excepted.

The point taken and urged on this appeal is quite technical. It is that the only breach alleged is the non-payment by Mrs. Godfrey of the sum of $120 61, recovered by the award of costs made by the Court of Appeals; and that no breach of the condition of the undertaking is alleged, except by the non-payment of such damages and costs as were awarded by that court.

No one can read the complaint without apprehending and being given fully to understand that the original judgment was for *damages and costs*, that the second, on appeal in the general term, was for *costs*, and that the final one was only "for *costs;*" that said Marie Godfrey had not paid any of the said "damages and costs," but had wholly neglected and refused to do so—contrary to the condition of the undertaking; and that judgment was asked for the aggregate of these several judgments for damages and costs and interest.

The rule of pleading established by the Code of 1848, § 120, for a complaint was, that it should contain "a statement of the facts constituting the cause of action in ordinary and concise language, without repetition, *and in such manner as to enable a person of common understanding to know what is intended;*" and although the part underscored has since been stricken out (Code, Amendment 1851, § 140), this was done either because it was regarded as surplusage, or, at most, as requiring a more precise degree of plainness and perspicuity than was necessary as to any one educated in the law, or acquainted with the ordinary use of professional language. A pleading is sufficient when it contains such a statement of facts as enables the court to perceive, without regard to the particular language used, or the order or manner of its expression, that a cause of action exists, and that there is the appropriate prayer for the relief to which the plaintiff is justly entitled. The complaint in this case fulfilled all these conditions, and the objections to this recovery were not only technical, but untenable. They were not founded on any of the matters of defense in the answer, specially setting up *infancy and payment*, to the several items of plaintiff's claim. If any consideration could be given to them from consideration of form in pleading, the court, in furtherance of justice, and in accordance with the case alleged and proved, would allow the amendment to the complaint, by inserting before the words "damages and costs," in the fifth subdivision or paragraph, the words "any or either of the aforesaid judgments for costs, &c."

The judgment should be affirmed.

DALY, Ch. J., and LARREMORE, J., concurred.

Judgment affirmed.

JOHN TAYLOR *et al. against* JAMES S. JACKSON *et al.*
(*Two cases.*)

In an action against the makers of a promissory note, the defense was interposed that the note was a mere accommodation note, and that when the plaintiffs discounted it for the payee they exacted a usurious rate of interest, and that the note was therefore void: *Held*, that under this answer the defendants could not show that the note was void on account of their having taken usury from the payee on an exchange of the note in suit for one made by him to their order.

The defense of usury is available only to the borrower or his legal representatives; and where notes are exchanged in such a way that the maker of one of the notes receives usury, he cannot set this up as a defense to an action on the note made by him.

APPEALS from judgments of the general term of the Marine Court affirming judgments of that court entered on the verdict of a jury by order of the court.

These were two actions which, by stipulation, were tried together, and the two appeals were heard together.

The facts are fully stated in the opinion.

James Clark, for appellants.

Francis Byrne, for respondents in first case.

W. T. Butler, for respondents in second case.

ROBINSON, J.—The appellants were sued as makers of the promissory notes in suit, payable to the order of one Albert C. Bloss, which he transferred to one N. W. Bloss, who transferred them to the plaintiffs for full value paid him. They answered, setting up the defense of usury, alleging that the defendants were mere accommodation makers for the benefit of Bloss, and that the notes were transferred by him to plaintiffs on a usurious consideration. This defense was not established by the proofs. In the purchase of the notes the consideration paid was part cash and the balance a credit given on a claim against Bloss. The precise date of the agreement does not appear; but

while interest for the whole period the notes had to run (except the days of grace) was deducted, it was not proven affirmatively, nor does it appear, that this transaction did not occur within the three days, and far less that there was any corrupt agreement for usury, or anything but a mistake in the calculations made to the prejudice of Bloss in stating the discount. While the usury alleged in the answer was unproved, defendants seek further to maintain as a defense that the agreement on which these notes were made and issued was usurious. On making these notes they received the notes of Albert C. Bloss in exchange, exacting in the notes which they received from Bloss an additional sum of twenty-five dollars on each note, and requiring them to be payable at shorter periods than their own. No such usury as that transaction might indicate was set up in the answer; and the allegation that the notes in suit were accommodation notes was wholly disproved, as the defendants fully conceded that they had received the notes of A. C. Bloss in exchange. It is, however, contended that, as the testimony showed the notes they received for those in suit were void as between them and A. C. Bloss, and not enforceable against the latter for the usury they exacted, that circumstance rendered these notes equally void in the hands of the plaintiffs, the purchasers. No such defense is set up in the answer. The allegation predicated upon their being mere accommodation makers was wholly disproved. The right to assert the defense now first presented on this argument was wholly personal to A. C. Bloss, the person aggrieved. It has been well established in this State that no party can take advantage of his own wrong, nor can one guilty of exacting usury set up his own turpitude as a defense to such obligation as he thereupon entered into or incurred (*Lafarge* v. *Herter*, 4 Barb. 346; s. c. 9 N. Y. 241; *Billington* v. *Wagoner*, 33 N. Y. 31; *Williams* v. *Tilt*, 36 N. Y. 319). The defense of usury is personal to the borrower, who complains of the injury, or those standing as his legal representatives (*Williams* v. *Tilt*, *supra*; *Ohio & Miss. R. R. Co.* v. *Kasson*, 37 N. Y. 224). Upon these considerations, the defense last attempted to be sustained upon the fact incidentally elicited on the trial, that on the exchange of notes first referred

to the defendants exacted such usury as might afford a defense to the notes they received, and now first urged, without having been presented to the consideration of the court on the trial, or by any pleading, so as to afford the plaintiffs opportunity to meet it, is plainly one in its very nature unavailable in law or equity, and the decision of the judge upon the trial was unexceptionally correct. The judgment appealed from should be affirmed.

LARREMORE, J., concurred.

Judgment affirmed.

SILAS WILLIAMS *against* EDWIN L. GODKIN *et al.*

In a newspaper article describing the means by which the stock of a worthless silver mine was by a fraudulent scheme sold for a large sum, the plaintiff was stated to have been employed to prepare the mine by plastering and engrafting silver ore on the limestone rock, while armed men guarded the entrance to the mine, and it was also stated that the defendant was an expert in preparing a mine in this way, and that his services in this regard were as valuable as those of the person through whose influence and standing the stock of the company was sold: *Held*, on demurrer, that the article, without the aid of any extraneous matter, charged the plaintiff with having knowingly aided in a swindling enterprise, and was libelous.

APPEAL from an order of this court overruling a demurrer to the complaint.

The action was for libel, and the complaint alleged that the defendants were the publishers of "The Nation," a newspaper published in New York city, and that the plaintiff had been for several years engaged in the business of overseeing or superintending silver mines, and especially of the Emma Silver Mining Company; that on December 18th, 1873, the defend-

ants published in their paper an article entitled "The True History of a Great Mining Enterprise," in which were contained the following false and defamatory words:

"Mr. Silas Williams, it seems, is admitted by Mr. Park, to be about the best man, in his acquaintance, to prepare a mine, and Mr. Williams was sent for. In the month of September the number of men working on the mine" (meaning the Emma Silver Mine referred to in said article) "was reduced from a hundred to a dozen. No one was allowed to go into the mine without a written order, and armed men were stationed as guards at the entrances, while Mr. Silas Williams occupied himself in plastering and engrafting silver ore on to the lime-stone rock. The mine was now nearly worked out. There were 1,500 tons of ore raised and on hand, and the value of the mine was, in Mr. Park's opinion, at that time expressed to be about $250,000. The details of the preparation being arranged, Mr. Park and Senator Stewart sailed for England. Professor Silliman, of Yale College, had been through the mine, had seen the plastered walls, and made a very interesting and instructive report, for which he is said to have been promised $5,000, and a second sum of $4,500, if the sale in England was accomplished.

"The scene changes now to England, where we find Mr. Park and Senator Stewart, armed with Professor Silliman's report, trying, at first without success, to float their scheme. * * *

"But Mr. Park was a man of genius, and it occurred to him that, if the new English company were headed by General Schenck, the American minister in London, it would probably acquire a reputation at once. General Schenck having little or no money, it was arranged that money should be provided for him, and that he should thus enter the company as a *bona fide* investor. This was no less important than the preparation of the mine by Mr. Silas Williams. * * *

"Mr. Park received £500,000 in cash, settled with Albert Grant (an English speculator, as expert in rigging the market as Mr. Silas Williams had shown himself in preparing, plastering, and engrafting) for £100,000, and a further prospective sum of £60,000 or £70,000 more, which he seems to have got

afterwards, while with Mr. James E. Lyon, entitled to one-eighth of the purchase, less $1,500,000, a compromise was effected by which he got $30,000 for his whole claim, Mr. Park very kindly letting him know that a peculiar arrangement had been entered into by which the whole of the London shares were locked up and inaccessible in the hands of Mr. Grant for nine months or more, and that before the expiration of that period, in all human probability, the 'game would be played out' and the mine 'bust up.'"

That by reason of this publication, the plaintiff had been injured, &c.

The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

The demurrer was overruled by the court at special term, and the defendants appealed.

James C. Carter, for the appellant, argued that the words were not in themselves actionable; that there was no charge that plaintiff had plastered or engrafted ore on the limestone rock with the view of deceiving purchasers, or with knowledge that those by whose direction it was done intended thereby to deceive purchasers, and that the court could not say that there was anything objectionable in preparing, plastering or engrafting a mine; that the complaint could only be sustained on the ground that the article published charged the plaintiff with being engaged in a *conspiracy* to defraud, and there was no charge of any such conspiracy (citing *O'Connell* v. *Mansfield*, 9 Irish Law Reports, 179).

E. L. Fancher, for respondent.

Daly, Chief Justice.—What was published in the article respecting the plaintiff is upon its face libelous, without any innuendo to point or give effect to it. It is to be understood by the court in the sense in which the world generally would understand it, giving to the words their ordinary meaning, and in understanding what was meant and is conveyed by

the publication respecting the plaintiff, the scope and meaning of the whole article is to be considered (*More* v. *Bennett*, 48 N. Y. 476; *Cooper* v. *Greeley*, 1 Denio, 361; *Crosswell* v. *Weed*, 25 Wend. 621; *Harvey* v. *French*, 2 M. & Selw. 591.)

If the necessary effect of what was stated, respecting the plaintiff, is to injure his reputation and lower him in the esteem and opinion of the community, it is libelous (*State* v. *Insdell*, 5 Harring. [Del.] 475; *Dexter* v. *Spear*, 4 Mason, 115; *Sanderson* v. *Caldwell*, 45 N. Y. 402; *Weed* v. *Foster*, 11 Barb. 204; 1 Hilliard on Torts, c. VII, § 13; Addison on Torts, 767, 768.)

The article is entitled, "The True History of a Great Mining Enterprise," and the history given in the article is that the Emma Silver Mine was nearly worked out, that there were 1,500 tons of ore raised, and on hand, and that the value of the mine, in the opinion of one Park, was $250,000. That Park admitted that the plaintiff, was the best man of his acquaintance, *to prepare a mine*, and that the plaintiff was sent for. That the number of men working on the mine, was reduced from one hundred to about a dozen, and that in the month of September, no one was allowed to go into the mine without a written order, and that armed men were stationed as guards at the entrance, *whilst the plaintiff occupied himself in plastering and engrafting silver ore on to the lime-stone rock.* That the *details* of *the preparation* being *arranged*, Park and Senator Stewart sailed for England. That Professor Silliman, of Yale College, had been through the mine, seen the plastered walls, and made an instructive and interesting report. That armed with this report, Park and Stewart tried at first, without success, to float their scheme. That it occurred to Park that if the English company were headed by Gen. Schenck, the American minister, the company would acquire reputation at once; that he having little or no money, it was arranged that money should be provided for him, and that he should enter the company as a *bona fide* investor. That this was no less important than *the preparation of the mine by the plaintiff.* That Park received half a million of pounds sterling in cash, and for £100,000, and a further prospective sum of

$60,000 or $70,000, which he seems to have got afterwards, that Park settled with Albert Grant, an English speculator, as expert in rigging the English market, as the plaintiff had shown himself in preparing, plastering and engrafting. The remainder of the article relates to a compromise effected by Park with one Lyon, after letting Lyon know that a peculiar arrangement had been entered into, by which the whole of the London shares were locked up, and inaccesible in the hands of Grant, for nine months or more, before the expiration of which period, in all probability, the game would be played out, &c.

It is, in substance, an account of a fraudulent scheme, by which a silver mine was sold in England for over half a million pounds sterling, more than ten times its actual value; which was accomplished by having it prepared by the plaintiff in the manner above stated; by getting, after it was so prepared, a report of a professor of a college respecting it; and by furnishing the American minister in London with money to become a *bona fide* investor, and placing him at the head of the company in England to give it reputation.

The plaintiff is represented as one of the most efficient agents in the consummation of this scheme. He is described as preparing the mine by plastering and engrafting silver ore on limestone rock, whilst armed men guarded the entrance, and as being the best man known to one of the chief actors in the scheme, to prepare a mine in this way. What he did is referred to as equal in importance, to the putting of the American minister at the head of the company, and he is further characterized as being as *expert* in preparing, plastering and engrafting, as the English speculator, with whom Park settled, was in "rigging the market."

In my judgment such a statement is injurious to the reputation of the plaintiff, and assuming it to be untrue, the necessary effect of it is defamatory.

I have looked into the case upon which the defendant's counsel relies (*O'Connell* v. *Mansfield*, 9 Irish Law Reports, 179). In that case all the judges agreed that the publication was highly defamatory, but the question was whether it went

so far as to charge the plaintiff with the crime of conspiracy; three of the judges being of opinion that it did, and six that it did not. The point was important, because the defendant had put in a plea of justification, averring the truth of everything but a conspiracy, and if that crime was imputed in the defamatory matter, the justification had not gone far enough. The majority of the court held that what was published respecting the plaintiff did not amount to charging him with having been guilty of a conspiracy, that being a distinct criminal offense, and that the justification therefore was a full and complete answer to the action.

So in this case, it may be that what was printed respecting the plaintiff did not charge him with a conspiracy, which is a corrupt agreement by two or more to do by concerted action an unlawful thing, which would, if done by one alone, be indictable as a criminal offense, or which is by its nature and by reason of the combination, meant to injure the public or some particular individual (2 Bishop on Criminal Law, §§ 172, 176). Whether what was published respecting the plaintiff did, or did not impute to him the criminal offense of conspiracy, might be as doubtful and embarrassing a question as the one discussed and passed upon in the case cited; but there can be no reasonable doubt, I think, that what was said respecting the plaintiff, independent of that question, was in its nature defamatory.

The order overruling the demurrer must therefore be affirmed.

Larremore, J., concurred.

Order affirmed.

PETER E. TALLMAN *against* ETHAN WHITNEY.

In an action for deceit, where an order of arrest has been obtained on proof of the same facts as those alleged in the complaint, the order will not be vacated unless it is clear that on the trial the plaintiff must fail in his proof of the facts charged in his complaint.

In an action for deceit by defendant, in procuring plaintiff to purchase land from him upon representations that he had a good title and that no one else made any claim to it, the defendant moved to vacate the order of arrest on affidavits by which he admitted the representations and claimed that he had a good title. The evidence as to whether defendant's title was good was conflicting, but as it appeared that there was another claimant to the land, and that defendant had been aware of this fact but had not disclosed it to the plaintiff, the court held that it should be left to a jury to decide whether the representations were made with intent to deceive, and refused to vacate the order of arrest.

APPEAL from an order denying a motion to vacate an order of arrest granted on the verified complaint.

The action was brought to recover damages for deceit, and the plaintiff alleged that on October 27th, 1870, he was the owner of land in New Jersey, worth $3,000, and on that day gave a deed of it to defendant in exchange for a deed by defendant and wife, of certain lands in Missouri, which said deed contained a covenant by the defendant that at the time of the delivery of the deed he was lawfully seized of a good, absolute and indefeasible estate of inheritance in fee simple in the said premises, and had good right, full power and lawful authority to convey the same; that he was induced to make this exchange by the representations of the defendant that he had a good and perfect title to the said premises, and that no one else had any interest therein or made any claim thereto, and that they were free and clear from all encumbrances except the last year's taxes; that those representations were relied on by plaintiff when making the exchange, and were believed by him to be true; that they were in fact false and fraudulent when made; that the defendant then had no title to the property, and knew that he had none.

The defendant moved to vacate the order of arrest on his own affidavit, in which he did not deny that he had made the representations charged, but alleged that they were true, and that he had a good title to the Missouri lands, which he had purchased February 1st, 1870, for a valuable consideration, from one John Wood. He also produced the affidavit of Wood, who deposed that he (Wood) had purchased the lands in 1867 from one Case, and had caused the title to the land to be examined, and had found it to be perfect, except that it was encumbered by said taxes, and that on February 1st, 1870, he had deeded it to defendant for a valuable consideration.

The affidavit of one Van Derzee was also produced, who deposed that he had examined the records in Missouri as to the title of Wood, and believed that it was good.

In opposition to this the plaintiff produced the affidavit of one Cushing, who deposed that he was the the deputy clerk of Stone county, Missouri, in which the lands were situated. That the title of Wood and Whitney was founded on what was known as the "Old Spanish Grant," which had never been recognized by the United States Government, and according to the expressed opinion of the ablest lawyers in Missouri, was worthless, and in that part of the county was regarded as a fraud. That in 1866, the land in question had been donated by the United States Government to the Atlantic and Pacific Railroad Company. That in the spring of 1870, defendant was in Stone county, and was told by Cushing that his title to the lands was worthless.

On these affidavits and the pleadings, the court at special term denied the motion to vacate the order of arrest.

Defendant appealed.

Richard Marvin, for appellant.

Walsh, Halbert & Eckerson, for respondent.

Larremore, J.—The covenant of seizin contained in defendant's deed created such an obligation on his part as to render him liable, for fraud or misrepresentation therein, to action and arrest.

Where, as in this case, the cause of action and the ground of arrest are identical, a bare denial of the facts constituting the alleged fraud, will not authorize a discharge of the arrest, unless it is evident that the action cannot be sustained (*Ely* v. *Mumford*, 47 Barb. 629; *Stuyvesant* v. *Bowran*, 3 Abb. Pr. N. S. 270; *Royal Ins. Co.* v. *Noble*, 5 Abb. Pr. N. S. 54).

The defendant has not denied the representations, but on the contrary avers their truth.

As to mere matters of opinion, he should not be made responsible, but for a voluntary misstatement of any material fact upon which the plaintiff relied, and by which he was misled, the defendant should be held liable.

It is admitted that he represented to plaintiff that no one else had any interest in the property; yet Cushing's affidavit shows that defendant previously knew of the claim of the Atlantic and Pacific R. R. Co., which fact he failed to disclose. Had he done so, plaintiff might have declined to purchase a litigation with the land.

Fraud consisting as well in the suppression of truth, as in the assertion of falsehood, it should be left for a jury to decide whether the representations in question were made with intent to deceive.

The order appealed from should be affirmed.

Daly, Ch. J., and J. F. Daly, J., concurred.

Order affirmed.

PETER BAXTER *against* JOHN MCDONALD AND WIFE.

In an action for the conversion of money claimed to have been stolen from plaintiff by his son, and subsequently to have come into defendant's possession, the only evidence in support of plaintiff's case was that of his son, a child of nine years, who had stolen the money, and who on his examination contradicted himself in many material points, and who was directly contradicted by the defendant's witnesses: *Held*, That the judgment entered on the verdict in favor of plaintiff should be reversed.

APPEAL from a judgment entered on the verdict of a jury. The facts are stated in the opinion.

LARREMORE, J.—The judgment rendered in this case is not sustained by competent or reliable evidence. The only witness who testified to the conversion of plaintiff's money was his own son, a child of nine years, who contradicts himself on so many material points as to render his testimony unworthy of credit. He was also privy to and aided in the abstraction of the money in the first instance. The testimony of the defendant's witnesses was so positive and consistent, that but one conclusion could be derived therefrom.

The judgment in this case is clearly against the weight of evidence, and should be reversed with costs.

ROBINSON, J.—Although it must be a very extreme case in which this court, on appeal, would interfere with the verdict of a jury upon questions of fact properly submitted, this case is one in which there should be a reversal of the verdict, because it is not sustained by any positive or unimpeached testimony. Plaintiff's case rests wholly upon the testimony of Peter Baxter, his infant son, of the age of nine years, who, it is claimed, with his younger brother, stole the father's money, which, it is alleged, came into the defendants' hands under claim that it had been stolen, by the boys, from them. The amount plaintiff claims he lost, was but $75. The amount re-

covered by defendants from these boys, under claim that it was part of the sum of $100 stolen by them from under a hearth rug in defendants' premises, where temporarily deposited by Mrs. McDonald, for safe keeping, was $80. The boy Peter was, confessedly, *particeps criminis* in the theft of the money in question. He contradicted himself, first swearing he never was in defendants' front room, from which the money was stolen, until the occasion when the female defendant (Mrs. McDonald) brought him in there after the alleged theft, and never knew his younger brother to go in there; and yet he subsequently testified substantially to being present there with his brother *when they stole defendants' money.* If the boy had not thus confessed to the stealing of the money from defendants, the case was one in which there was so great preponderance of testimony in defendants' favor, that, considering the other irreconcilable fact that the amount recovered from the boy was $80, when plaintiff only lost $75, it would have presented such overwhelming evidence of the injustice of the verdict that it ought, for that reason, to have been set aside and the judgment reversed.

The judgment should be reversed.

Daly, Ch. J., concurred.

Judgment reversed.

COSMORE G. BRUCE *against* J. B. BURR AND G. M. HYDE.

Defendants, in consideration of the delivery to them of the note of a third party, agreed to sell and deliver to plaintiff, goods of certain specified kinds, the amount of each kind to be thereafter selected by the plaintiff, the whole to equal in value the face of the note. After a portion of the goods had been delivered, and before the balance had been selected or set apart from the defendants' general stock, the note fell due and was not paid, and defendants then learned, for the first time, that at the time it was delivered to them the maker of the note was insolvent. *Held*, that as to the goods not yet delivered, the contract was executory, and that the consideration of the contract having failed, they might refuse to deliver any more goods.

APPEAL by defendants from a judgment of this court, entered on the report of a referee to hear and determine.

The facts are stated in the opinion.

S. E. Church, for appellants.

Geo. W. Van Slyck, for respondent.

LARREMORE, J.—On April 7th, 1871, the defendants agreed with the plaintiff, under the name and style of the American Book Company, to sell and deliver to him certain books or publications, to the amount of $2,975 50, in such manner and at such times as required by plaintiff, and for the prices in said contract provided. In payment therefor the plaintiff tendered the note of a third party, representing the same to be good, and that he would guarantee it would be paid at maturity, which note was received and accepted by the defendants. Prior to the maturity of the note some of the goods ordered by the plaintiff, in pursuance of said contract, were delivered by the defendants according to the terms thereof. The note was not paid when due, and defendants then discovered that the maker thereof was insolvent at the time of its delivery to them. They thereupon refused to deliver any more books under said contract; and for the alleged breach thereof this

action was brought, and from the judgment rendered therein against them this appeal was taken.

There is one point in this case which, in my judgment, summarily disposes of this appeal.

The contract between the parties called for the sale and delivery of books or publications when ordered. They had not been selected and separated as a distinct lot, but were to be published by or of the publications of the defendants, and issued in various styles of binding, &c., as ordered and indicated by the plaintiff.

It must be inferred from the evidence that both parties believed said note to be good; but the referee, in his report, finds, as a question of fact, that it was not good, nor was the maker thereof responsible at the time of its delivery to the defendants.

It is difficult to distinguish this case in principle from *Benedict* v. *Field* (16 N. Y. 595) and *Roberts* v. *Fisher* (43 N. Y. 159), and cases there cited.

The contract, though executed as to the goods already delivered, was executory as to the goods thereafter to be ordered. The consideration of said contract had entirely failed, and the defendants, already at a loss on this account, had a right to protect themselves against any further damage.

I incline to a liberal construction of the theory laid down by the Court of Appeals, in *Roberts* v. *Fisher*, that "upon broad principles of justice, it would seem that a man should not be allowed to pay a debt with worthless paper, though both parties supposed it to be good."

The judgment appealed from should be reversed, and a new trial ordered, with costs to abide event.

Daly, Ch. J., and Robinson, J., concurred.

Ordered accordingly.

ORVILLE G. BENNETT *against* EDWARD KIDDER.

Plaintiff, a real estate broker, being employed by B., a person desirous of purchasing a residence, to find for him such a place as he desired, introduced him to defendant, who had a place to sell, and informed defendant that if B. purchased the property, defendant would have to pay plaintiff the usual commission. Defendant had negotiations with B. in regard to the sale of the property, but failed to come to an agreement as to the terms, and defendant then sold the property to his brother, who, eleven days thereafter, sold it to B. *Held*, that in the absence of any evidence to show that the sale by defendant to his brother, and the subsequent conveyance by him to B., was done to defraud plaintiff of his commissions, he could not recover them from defendant.

It seems that plaintiff, having been employed by B., any agreement made by plaintiff with defendant for commissions, was void as a fraud upon B., in the absence of proof that B. was apprised of such agreement, and assented thereto. *Per* ROBINSON, J.

APPEAL from a judgment of this court entered on the verdict of a jury.

The action was brought to recover broker's commissions on a sale of real estate.

The facts are fully stated in the opinion of ROBINSON, J.

The plaintiff had a verdict, and the defendant appealed.

B. E. McCafferty, for appellant.

Cephas Brainerd, for respondent.

ROBINSON, J.—This action was brought to recover brokerage upon a sale of real estate alleged to have been effected, through plaintiff and his copartner (Klennan), real estate brokers, upon the employment of them by the defendant, all of which was at issue. The testimony of Klennan, in support of the claim, was, that Mr. Batchelor, the purchaser of the property, applied to the plaintiff to try and find for him some suitable residence outside of this city, and in consequence of that request they advertised for places and submitted numbers

of them to him. He advised them of a Mr. Westbrook living near the property for the sale of which the brokerage is claimed, to whom they applied and he submitted to them the property in question. They submitted it to Mr. Batchelor, who, on the 9th of March, 1869, accompanied the witness Klennan to Ridgewood, N. J., where they met defendant and Mr. Westbrook by appointment. Mr. Batchelor got into a wagon with Westbrook, and Klennan into one with the defendant, to visit the premises. Klennan testifies that while on the way to the property he distinctly told the defendant that if Batchelor became the purchaser, he (defendant) would be indebted to plaintiff's firm for the regular commission of 2 per cent.; that defendant told him the property stood him in $14,000, and he wanted to get that out of it, "net;" that he wanted plaintiffs to get their commission above that, but he (the witness) declined, and wanted it distinctly understood whatever the property was sold for to Mr. Batchelor, plaintiff expected a full commission of 2½ per cent. He subsequently stated the price to Mr. Batchelor to be $16,000. No such sale was effected by plaintiff's firm, or either of them, to Mr. Batchelor. Defendant repeatedly applied to them to know what progress was made in the matter, and nothing having been done, nor any offer made by Mr. Batchelor, he agreed with his brother, Frederick Kidder, to sell him the property for $14,000, which sale was consummated by a conveyance on the 20th of March, 1869. The latter soon afterwards (assisted by defendant) renewed negotiations with Mr. Batchelor, and sold and conveyed him the property by deed, dated March 31, 1869, for $14,250, and it is upon this transaction the plaintiff claims the brokerage as accrued, and has recovered therefor. There is no allegation in the complaint nor finding by the referee, that the conveyance made by defendant to his brother, was executed with any purpose of defeating plaintiff's claim to the commission, through any preconcerted scheme to avoid its payment.

The complaint is founded upon an alleged sale of defendant's property effected by plaintiff and his partner, as brokers. This alleged cause of action was not maintained by the proofs. Fraud is not to be presumed nor lightly inferred from slight

or inconclusive circumstances. When relied upon as a substantial ground of recovery, it must be distinctly alleged, and a case stated constituting a cause of action upon such premises. There was no suggestion in the complaint of any such evasion of defendant's obligations; and the proofs, on the contrary, disclosed nothing but entire good faith on his part, in making the previous conveyance to his brother. No offer or proposals had then been made by Mr. Batchelor, which defendant could be supposed to be entertaining or coyishly weighing with intent to avoid paying commissions. The *bona fides* of the conveyance made to his brother before the renewed negotiations for the sale, by the latter, to Mr. Batchelor, was affirmatively established. The defendant further offered to prove, by way of showing that it was not a sham sale, that he retained no interest in the property; but upon plaintiff's objection, this was excluded under exception. Under the case which plaintiff presented, founded alone on the want of good faith in that conveyance, error was clearly committed in the exclusion of this testimony. The entire good faith of the defendant in the absence of any affirmative evidence to the contrary, was shown by his sincerely expressed regrets when applied to for a renewal of the negotiations, *that he had unfortunately sold the property to his brother;* and there was not a scintilla of evidence tending to show that he had not, after ineffectual efforts to sell the property for $14,000 net, made the sale to his brother for that sum, in entire good faith. The case also shows that Mr. Westbrook was the person acting in the transaction as defendant's broker or agent. Beyond this, it clearly appears that plaintiff, and Klennan, his partner, were originally retained, and throughout were, or ought to have been, the brokers for Mr. Batchelor, to effect the purchase of defendant's property from him. It is affirmatively shown that Mr. Klennan, one of plaintiffs' firm, after being so employed, and when the parties were brought together, stated privately to defendant that commissions would be exacted from him if the sale to Batchelor should be effected, and that this was (as he testifies, but is contradicted by defendant) *understood.* Upon such evidence a recovery has been obtained by the plaintiff.

It is wholly incompetent to establish the right asserted. Plaintiff and partner, as brokers, were employed by Batchelor, the purchaser; Klennan (the partner) discloses his gross perversion of his duty to his employer in the alleged agreement, when he and defendant were together in the wagon on the way to the premises, when his employer was proceeding to examine the premises. He was then advised that defendant only asked $14,000, "net," as the price of the property. He says he then exacted from defendant an agreement to pay him two and a half per cent. on the amount for which the property should be sold to Batchelor, his employer, and that defendant so agreed. Although the net price asked was but $14,000, he yet stated it to Mr. Batchelor to be $16,000, and this could only have been done with a view of obtaining all realized by defendant over that sum to his own benefit, or at least to secure commissions on the larger amount. In either view, he was cheating some one in order obtain some advantage that neither law or justice permitted. That he betrayed the interest of Mr. Batchelor, his employer, is manifest from his own testimony, and his alleged private contract with the defendant was manifestly void as a fraud upon his employer.

This judgment, rendered in favor of the plaintiff for the commission on the sale made by Frederick Kidder to Mr. Batchelor, cannot be sustained.

1st. Because that sale proved was not the one for which commission is claimed by the complaint.

2d. No such sale was made by the defendant, nor is the action upon any "*case*" of fraud in the device of conveying the property to Frederick Kidder, and making a sale already substantially *effected* by plaintiff's firm, with the object of defeating the claim to commissions.

3d. The sale proven was by a subsequent purchaser, without impeachment of its being in defendant's interest, as proof of the absence of defendant's interest was excluded on plaintiff's objection.

4th. No fraud being alleged, or proven, or found by the referee, no such commissions as were claimed could be recovered for the sale made by Frederick Kidder to Mr. Batchelor.

5th. Plaintiff's firm having been employed by the latter, any agreement with the defendant for commissions, was void as a fraud upon him, in the absence of any proof that he was apprised thereof and assented thereto.

For these considerations, the judgment should be reversed, and a new trial ordered in the Marine Court, with costs to abide the event.

Larremore, J.—There was some evidence to sustain the finding of the jury as to an employment by the defendant of plaintiff's firm. Batchelor applied to them for information, merely as any other person might apply to a broker supposed to have property for sale.

In the absence of any special agreement to that effect, Batchelor was under no legal obligation to pay said firm for finding such a place as he might purchase. Nor is it shown or pretended that any such claim against him was ever made or existed.

The fact that said firm used the necessary means to procure such property as was required, and upon the sale of which by them to Batchelor commissions would be earned, established no other or different relation between them than that of broker and purchaser.

If the property in question had been in plaintiff's hands for sale when Batchelor first applied to them, their agency for its owner would have been unquestioned. That such agency was subseqnently established does not in the least affect their right of recovery. This right has been settled by the jury upon conflicting evidence, and is not, upon the exceptions taken, a subject of review.

The more serious question, however, is presented by the fact of defendant's sale of the premises to his brother, who subsequently conveyed the same to Batchelor.

There is no presumption of law that said sale (as shown to have been made) was fraudulent as to plaintiff. If he sought to assail it on that ground, he should have alleged and proved the facts from which such a conclusion could be drawn. This

he has failed to do, and for this reason the judgment should be reversed, and a new trial ordered, with costs to abide the event.

DALY, Ch. J., concurred with ROBINSON, J.

Judgment reversed.

JOHN O'GORMAN *against* HENRY KAMAK *et al.*

The court has power to allow the "case" made for the purpose of appeal to be amended, even after argument and decision in the appellate court.

In an equity case, issues of fact had been framed and submitted to a jury, and the jury, under the instructions of the court, having found in the negative on two of the issues, did not make any findings on the other issues submitted to them, and the court set aside these findings, and ordered a new trial, on the ground that they were against the weight of evidence. An appeal was taken from the order granting a new trial, and the "case" made for this appeal did not contain the judge's charge, or the issues on which the jury did not pass. The court, at general term, reversed the order for a new trial, because the instructions to the jury, and all the issues presented to them, not being in the case, the error in their finding was not apparent. *Held*, that it was proper after the decision of the court, at general term, to allow the case to be amended by inserting in it the judge's charge, and the issues not passed upon by the jury.

APPEAL from an order of this court made at special term, allowing the defendants to amend the case, on appeal, after argument and decision at the general term.

The action was brought upon the equity side of this court, to set aside and have canceled of record a deed of land which, on its face, purported to have been made from the plaintiff to the defendant Kamak, and which had been recorded as such. The plaintiff claimed that he had no knowledge of ever having executed the deed, and that, if he had ever done so, it had been without consideration, and upon the fraudulent procurement of the defendant Kamak, while he (plaintiff) was insane with *delirium tremens*.

The action coming on to be tried before the court, without a jury, it appeared that there were questions of fact as to whether the deed was a forgery, and whether the plaintiff was insane at the time of its alleged execution, and the court declined to try those questions of fact, and directed them to be submitted to a jury.

On the trial before the jury, the court submitted to them eleven issues of fact; the first being, in substance, Did the plaintiff execute and deliver to the defendant Kamak the deed mentioned in the pleadings? and the ninth, Did the plaintiff reacknowledge that deed on January 20th, 1869?

The other issues were upon the questions, whether at the time of such alleged execution and reacknowledgment, the plaintiff was or was not insane, whether there was any consideration for the deed from plaintiff to Kamak, &c. In charging the jury, the court instructed them that if they found in the negative on the first and ninth issues, it would not be necessary for them to consider the other questions of fact.

The jury found in the negative on the first and ninth issues, and made no findings on the other issues.

On a motion made for a new trial, on the ground that the findings of the jury were against the evidence, a new trial was ordered, and the findings of the jury set aside.

From that order an appeal was taken, and the "case" made for the purposes of the appeal did not contain the judge's charge on the issues of fact not passed upon by the jury.

The court, at general term, reversed the order for a new trial, because, on the record before them, it did not appear but that they had passed on all the issues in the case, and had intended to find that the plaintiff was insane at the time of the alleged execution and reacknowledgment of the deed.

The defendants then obtained from the court, at special term, permission to amend the case, by inserting in it the judge's charge and all the issues of fact submitted to the jury.

From the order allowing such amendment the plaintiff appealed.

Justus Palmer, for appellant.

S. C. Conable, for respondents.

J. F. Daly, J.—The power of the court to amend the case after argument and decision at general term undoubtedly exists, and should be exercised in a proper case.

In *Fish* v. *Wood* (2 Abb. Pr. 419, Genl. T. Com. Pleas, 1856), this court refused to grant an order sending the case back to the referee for resettlement, so as to state the facts found by him on the evidence, and for a finding upon a particular issue, the court saying that after argument and decision of an appeal, the party should not be allowed to have the whole proceedings set aside, in order to enable him to make a new case; that there might be cases where an error had occurred by misstatement, but that case was not such a one.

In *Catlin* v. *Cole* (19 How. Pr. 82, Supreme Court, 1860), the court refused to allow an order referring back the case to the referee, to amend and settle or resettle the case, so as to present the questions before the Court of Appeals, in a different form from that in which they came before the general term; but the court say that where an exception to a decision or to some separate proposition in the judge's charge is accidentally omitted in the bill of exceptions, and not discovered until the action has been removed to the Court of Appeals, the amendment should be granted.

In *Smith* v. *Grant* (17 How. Pr. 382, Supreme Ct. 1859), it was held to be too late after the cause was in the Court of Appeals to move for a resettlement of the case by the referee, so as to present the questions of fact found.

In *Beach* v. *Raymond* (1 Hilt. 201, Com. Pleas, 1856), this court refused to allow the unsuccessful party, after decision at general term, for the purpose of appealing to the Court of Appeals, to insert exceptions not appearing in the case upon which the appeal in this court was heard and decided, because that would present to the appellate court questions which had not been determined by this court.

On the other hand, in *Livingston* v. *Miller* (7 How. Pr. 219, Court of Appeals, 1852), the Court of Appeals stayed the argument of an appeal, until appellant should apply to the general term of the court below, to have the bill of exceptions

resettled by the insertion of exceptions duly taken at the trial, and passed upon by the general term.

In *Whitbeck* v. *Waine* (8 How. Pr. 433, Supreme Court, 1853), it was held that the Supreme Court had full power to allow a resettlement of the bill of exceptions (an error having been committed in turning the case into a bill of exceptions), even though the cause was then in the Court of Appeals.

But the Court of Appeals, in *Fitch* v. *Livingston* (7 How. Pr. 410, 1853), held that after argument and decision in the Court of Appeals, they would not set aside the judgment and stay proceedings, so as to enable the appellant to apply to the court below to alter the statement of the exceptions taken at the trial.

None of these cases deny the power of the court at general term to open its judgment and permit a reargument upon an amended case; nor of the court at special term, after decision of the general term, to permit an amendment of the case upon which to base an application for reargument at the appellate branch of the court, where the amendment asked for is the insertion of matter omitted from the case through error or excusable oversight.

In the present case, after argument and decision at the general term, the respondent procured from the special term an order allowing his case on appeal to be amended, by inserting the charge of the judge and the specific questions of fact submitted to the jury, for the purpose of applying to the general term for a reargument of the appeal.

The matter omitted from the case was intentionally omitted by the respondent, and was struck out by order of the judge who settled the case, on his motion, when proposed among the amendments to the case originally served; but the view taken by the general term upon the argument of the appeal of the questions involved, rendered it vitally necessary to the respondent to have the charge embodying the instructions to the jury, and all the questions of fact submitted to them in the case. The amendment should be allowed in furtherance of justice for the reasons: that the jury failed to find upon the principal issues in the case; that a new trial was ordered by the

judge who tried the cause for that reason; that the general term reversed the order granting a new trial, because the instructions to the jury and the issues not passed upon, not being in the case, and the two findings of the jury being equivocal in their wording, the error was not apparent on the record; and a reargument should be had at general term on the amended case, for if the decision of the general term were to stand, the respondent would be deprived of any finding by a jury on the principal issue in the case.

The order of the special term should be modified so as to impose, as terms of amendment, the payment of costs of argument already had in general term, in addition to the other terms imposed, and affirmed as to the residue of the order appealed from.

Robinson and Larremore, JJ., concurred.

Ordered accordingly.

Byron Sherman *et al. against* The Hudson River Railroad Company.

Goods were shipped at Cairo, Illinois, by the Illinois Central Railroad, *via* Chicago, consigned to the plaintiff, "Byron Sherman, No. 41 Warren street, New York," and were received from the intermediate railroad company by the defendants, common carriers between East Albany and New York, with directions to deliver them to "Ryan Sherman, N. Y." Defendants transported the goods to New York, and warehoused them, and made no effort to notify the nominal consignee, otherwise than by mailing a letter to "Ryan & Sherman, N. Y.," and although notified by plaintiff of his ownership in the goods, and of the marks on it, and the route by which it had been shipped, as means to identify it, made no efforts to discover whether they had his goods in their possession: *Held*, That they were liable to plaintiff for the damage he had suffered by their delay in delivering the goods.

Appeal from a judgment of this court, entered on the report of a referee to hear and determine.

The action was brought against the defendants, as common carriers, to recover damages for their negligence in delaying to deliver to the plaintiffs goods consigned to them.

The facts are fully stated in the opinion.

Plaintiffs had judgment, and defendants appealed.

F. Loomis, for appellants.

Henry D. Beman, for respondents.

Robinson, J.—Defendants being common carriers between East Albany and New York, on the 12th of December, 1864, received at the former place, from a previous carrier, for transportation to New York, thirteen bales of cotton belonging to the plaintiffs, marked F. B., in a diamond or oblong, with notice that it came by way of the Illinois Central Railroad Company, by way of Chicago and Buffalo, and with directions for delivery to "Ryan Sherman, N. Y.," which they carried to New York, where it arrived on the 13th, and in the absence of any immediate claimant, they warehoused it on the 22d of that month. The only efforts made to notify the nominal consignee, was to mail a notice of the arrival of the cotton in the city post office, directed to "Ryan and Sherman," New York, and no one applying, it was also warehoused in the name of that firm. The cotton had been originally shipped at Cairo, Illinois, by the Illinois Central Railroad, *via* Chicago, consigned to the plaintiff, "Byron Sherman, No. 41 Warren street, New York," and by some error of previous carriers, the address of the consignee had been changed to "Ryan Sherman," and his place of business, "No. 41 Warren st., N. Y.," omitted. The plaintiff, Byron Sherman, after allowing a reasonable time for the transmission of the cotton to New York, at various times during the month of December, and also in January, applied at defendants' general freight office in New York, and showed the persons in charge of the freight business his original receipt, on the Illinois Central Railroad, dated at Cairo, for the 13 bales marked F. B., in a diamond or oblong, and made repeated inquiries for the cotton, but could get no infor-

mation respecting it from the defendants' agents. Although fully apprised of plaintiff's ownership of this cotton, then either in their charge or in the warehouse where they had stored it, the defendants' agents seem to have treated these applications with an entire indifference and inattention that was entirely inexcusable, unless they had acquitted themselves of all responsibility by warehousing the property after reasonable and unavailing efforts to discover the consignee.

The referee, upon the evidence adduced before him, has found to the contrary, and in my opinion could not have properly come to any other. Although in the transmission of this property in its long transit from Cairo, through various lines of common carriers, the address had been changed to "Ryan Sherman, N. Y.," they made no effort to find any such individual, and treated the repeated applications made by the plaintiff, who at the same time furnished the means of complete identification of the property, with inattention and neglect. Under these circumstances, the exercise of that reasonable care and diligence required from a common carrier in finding and notifying the consignee (*Fisk* v. *Newton*, 1 Den. 47; *Whitbeck* v. *Holland*, 45 N. Y. 17) was clearly wanting.

The circumstance that some previous carrier had altered the name of the consignee from "Byron Sherman" to "Ryan Sherman," does not detract from the force of this conclusion upon any ground of contributive negligence on the part of any one acting with powers of agency from the plaintiffs, or with independent authority or capacity to thus affect their rights. The intermediate carrier negligently making such change of name was responsible for all the consequences of his error; but the defendants are independently liable to the plaintiffs, under the proofs and facts established before the reference, for their own exclusive remissness of duty in failing to make any inquiry as to "Ryan Sherman," or giving any notice to any one answering to that name, and in wholly disregarding the early and repeated applications made by the plaintiffs for their property, then in defendants' possession or control (as the warehousing of it under the unknown and suppositious firm name of "Ryan and Sherman," was no appropriation of it

even to Ryan Sherman), with full evidence and means tendered for its identification as the plaintiffs' property. Taking into consideration the entire facts, there is no occasion for speculating to what extent the defendants would have been liable, had their entire conduct and all questions of diligence been based upon reliance on the fact represented to them that "Ryan Sherman" was the consignee, and they had fuly discharged their duty as carriers, by reasonable efforts to find and notify him. The judgment should be affirmed.

DALY, Ch. J., and LARREMORE, J., concurred.

Judgment affirmed.

FREDERICK S. WINSTON *et al. against* EDWARD KILPATRICK, IMPLEADED WITH THE EAST SIDE ASSOCIATION, *et al.**

Under the act creating the East Side Association (L. 1868, c. 762), which provides (§ 5) all shares of the building stock shall, from the date thereof, be a lien on the real and personal estate of the corporation, the mere payment of the subscription for shares, without their being actually issued, does not, as to subsequent incumbrancers, create a lien on the property of the company.

Nor does the fact that the subsequent incumbrancers were aware of the payment of the subscriptions vary the case.

APPEAL from a judgment of this court. The action was brought to foreclose a mortgage on land in New York city, given by the East Side Association to Frederick S. Winston and Thomas Rutter, as trustees for the holders of fifty $1,000 bonds, made by the said association.

The defendant Edward Kilpatrick defended, claiming that he had a lien on the land prior to that of the plaintiff's mortgage.

* The judgment of the general term here was affirmed in the Court of Appeals, January, 18th, 1876.

The action was referred to a referee to take evidence and report as to the priority of the liens, and by his report he found the facts to be as follows:

The East Side Association was a corporation created by L. 1868, c. 762 (passed May 9th, 1868), and by § 4 of the act it was provided that the association should have a building stock of $100,000, to be divided into shares of $25 each, to be applied to the purchase of a site and the erection thereon of a suitable building to be devoted to the objects of the association; and by § 5 of the act, it was provided that the president, secretary and treasurer of the said association might immediately after the passage of the act, open books and take subscriptions and receive money for the said building stock, and might issue to subscribers the necessary certificates of shares, which (so the act provided) should be signed by the president and secretary, and countersigned by the treasurer; and all shares so issued should from the date thereof, be a lien and charge upon the real and personal estate of the corporation until canceled as thereafter provided.

On January 12th, 1869, while the association had no money to buy a site for its proposed building, the defendant Kilpatrick, and nineteen others, contributed $1,000 each toward the purchase of the land described in the complaint. Thomas Rutter (who was one of the plaintiffs) was appointed by them to take charge of the money, take in his own name a contract for the property, and if necessary, to take a deed of the land in his own name, and convey the land to the association when it should become able to pay for it. On January 9th, 1869, defendant Kilpatrick paid the money to Rutter, and took his individual receipt therefor, expressing the purpose for which the money was to be used. The land was subsequently conveyed directly to the association, which on or prior to March 30th, 1871, made the mortgage to plaintiffs. Subsequently to the delivery of the mortgage to plaintiffs, there was delivered to the defendant Kilpatrick, a certificate signed by the treasurer of the company only, stating that Edward Kilpatrick (the defendant) would be entitled to forty shares of the building stock of the corporation when issued. This instrument was dated

so as to correspond with the date of the payment of the money by Kilpatrick to Rutter, but was not delivered until May 30th, 1872.

Defendant Kilpatrick claimed that under § 5 of the act of 1868 (above stated), he had a lien on the land for the $1,000 contributed by him, which lien was prior to that of the mortgage in suit.

The referee reported that the lien of the defendant Kilpatrick, if any, was subsequent to that of the mortgage, and his report was duly confirmed by the court at special term, and judgment entered in accordance therewith.

Defendant Kilpatrick appealed.

Jos. Fettretch, for appellant.

Townsend Wandell, for respondent.

*Per Curiam.**—The mortgage in question was given as security for money loaned and to be expended in the improvement of the premises therein described. It constituted a valid and subsisting lien thereon, as against all subsequent purchasers and incumbrancers. Prior to the execution and delivery of said mortgage, Kilpatrick's interest in the land was inchoate.

The lien sought to be acquired by him was purely statutory, and until the certificate of shares had been duly issued to him, in pursuance of § 5 of the act of May 9th, 1868 (L. 1868, c. 762), no lien could attach in his favor upon the lands of the association.

It is admitted that no such certificate was issued before the delivery of said mortgage.

There was no notice within the recording act of the existence of said alleged lien, and no actual notice thereof could be inferred from the mere payment of the subscriptions, to the prejudice of the respective bondholders for whom plaintiffs acted as trustees.

For these reasons, we think the judgment should be affirmed.

Judgment affirmed.

* Present, DALY, Ch. J., LARREMORE and J. F. DALY, JJ.

THE PEOPLE OF THE STATE OF NEW YORK *against* THOMAS COMAN AND MORGAN JONES.

Where a prisoner who had forfeited his recognizance, and was afterwards surrendered by his bail, entered into a new recognizance for his appearance: *Held*, that the judgment upon the former recognizance could not be discharged until the prisoner appeared and took his trial, and was either convicted or acquitted; unless a compliance with the condition of the new recognizance became impossible by the act of God, or of the law, or of the obligee.

The nature and history of the jurisdiction by which certain courts have authority to discharge a judgment entered upon a forfeited recognizance, or the recognizance when estreated, explained.

THE defendant Jones entered into a recognizance for the appearance of the defendant Coman, who was indicted for a criminal offense. Coman failing to appear on the day of trial, the recognizance was forfeited, and by the statute of 1844 (L. 1844, c. 315, art. IV, § 8), became a judgment to be enforced in this court. Coman afterwards surrendered himself, and with the assent of the district attorney entered into a new recognizance to appear and answer to the charge, and the district attorney gave a certificate that he believed that the people were then in as good condition to prosecute Coman upon the indictment, as they were upon the day when the recognizance was forfeited, and that therefore he gave his assent to the discharge of the judgment against Jones. The judgment being a lien upon Jones' real estate, Jones now applied to this court to have the judgment discharged, or if not, that a certain portion of his real estate which he wished to convey might be released from the operation of the judgment.

Sydney H. Stuart, for the application.

*Per Curiam.**—A practice has arisen during the past year, in which all the judges of the court have participated, of dis-

* Present DALY, Ch. J., and ROBINSON, LOEW, LARREMORE and J. F. DALY, JJ.

charging judgments upon recognizances, on applications to discharge them, to which the district attorney has consented, upon proof that the accused has either been surrendered by the bail, or has surrendered himself and entered into a new recognizance, approved by the district attorney, that he would thereafter appear to be tried upon the indictment, and submit to the final judgment, sentence or order of the court. The question has arisen whether this practice is correct; and after a careful examination of the question, we are all of opinion upon the authorities that it is not.

The rule to be deduced from the authorities is, that the accused having once failed to appear, the judgment on the forfeiture of his recognizance will not be remitted upon his recaption or surrender, until after he has been tried, and either convicted or acquitted. The recognizance of bail is not designed as a satisfaction of the offense, when it is forfeited; and therefore the accused is not discharged, even though the bail upon the forfeiture of the recognizance pays the full amount of the penalty, but the principal continues amenable to the law whenever he can be taken (Petersdorf on Bail, 516). By the common law, the recognizance attached to the lands and property of the bail, when it had been estreated into the exchequer; but with us, by statute, when the principal fails to appear, it is forfeited, and becomes a judgment, which is a lien upon the defendant's real estate. When the recognizance was thus estreated or forfeited, it could not be discharged, unless the principal appeared and took his trial, and was either convicted or acquitted, or unless a compliance with the condition became impossible by the act of God, or of the law or of the obligee (*Rex* v. *Spencer*, 1 Wils. 315; *Rex* v. *Grote*, 3 Dow. P. C. 955; *Rex* v. *Lyon*, 3 Burr. 1461; *King* v. *Finmore*, 8 T. R. 409; *Rex* v. *Stancher*, 3 Price, 261; Coke Lit. 206 a; Vin. Abr. Recognizance, E; 1 Price's Treatise on the Court of Exchequer, B. I, ch. 13). The rule is that stated in *The King* v. *Tomb* (10 Mod. 278): "If recognizances are estreated into the exchequer because not punctually complied with, yet, if the party appear and take his trial at the next session, he may compound for a very small matter in the Court of Exchequer,

because the effect, though not the exact form, of the recognizance is complied with; and in *Rex* v. *Spencer* (*supra*), the point, even where the principal had been tried and acquitted, was whether the recognizance could be discharged until the acquittal had been entered upon record, which the court at first doubted, but afterwards, upon further consideration, they discharged the recognizance, being satisfied of the fact that the principal had been tried and acquitted.

A Court of Exchequer was established in the colony of New York as early as 1686, with the same general jurisdiction as the Court of Exchequer in England, in respect to the king's revenue and the enforcement and remitting of fines, which was composed of the governor and council, or of so many as the governor and council might commission and appoint (Council Minutes, V, 144; III Col. Doc. 390, 499; VI Col. Doc. 215; VII Col. Doc. 827).

The court was afterwards held by the chief justice and the second and third justices of the Supreme Court, probably under authority conferred by their commissions, as the court in 1733, like the Court of Exchequer in England, exercised also jurisdiction in equity (N. Y. Hist. Coll. 355; Pamphlets in the N. Y. Historical Society, Series C, No. 2; 1 E. D. Smith's Rep. Historical Introduction, lv, lvi, lvii).

On the 31st of July, 1744, an act of the general assembly was passed which, in its effect, was regarded as permanently establishing the court (Journal of the General Assembly, vol. 2, p. 27; VI Col. Doc. 215). The court was in existence in 1766, ten years before the Revolution, but had practically fallen into disuse, as no provision was made for the payment of its officers, the court being unpopular, both with the legislature and the people (VII Col. Doc. 827). The lords of trade instructed Governor Moore to report to them his opinion respecting it, which he did, declaring that the court was necessary in the colony, and recommending that it should hold four quarterly sessions thereafter, which the lords agreed to take into consideration; but nothing further appears to have been done, probably from the troubles incident to the breaking out of the Revolution.

By the act of February 9th, 1786 (1 Greenleaf's Laws, p. 200), a Court of Exchequer was created, held by the junior justice of the Supreme Court, at every term, as a distinct court, with a clerk and seal, which exercised the same general powers as the English Court of Exchequer, for enforcing or remitting fines and forfeitures. In the words of the statute, it was, among other things, authorized "upon good cause shown, to remit any such forfeitures, or part thereof, and to discharge such recognizance according to equity and justice," which act, with some modification, was re-enacted in the Revised Laws of 1801 (c. 135); and of 1813 (c. 90, and c. 104, § 1); and by the act of 1818 (c. 283), the Courts of Common Pleas of the several counties had conferred upon them "the like power relative to the collection and remission of fines and forfeited recognizance," which had been by law "for that purpose vested in the Court of Exchequer," and this was confirmed by the Revised Statutes (vol. 1, p. 486, § 37).

When the Courts of Common Pleas were abolished by the Constitution of 1846, this court was specially excepted from the operation of the Constitution (art. XIV, sec. 12), and retained this, with the rest of its jurisdiction; and this special jurisdiction was re-affirmed by the act of 1854 (c. 198, p. 464, § 6).

The former Court of Exchequer, and this court after succeeding to its powers in the exercise of this jurisdiction, have exercised it according to the practice settled by adjudged cases in the English Court of Exchequer; and if it had not, the propriety of the practice—as the court must act "according to equity and justice"—is obvious. It followed the practice of that court, not to discharge upon a surrender, until the principal went to trial, and was either convicted or acquitted (*People* v. *Petry*, 2 Hilt. 523). There never was, except where it was indispensable—as in cases like *The Schuylkill Nav. Co.* v. *Farr* (4 Watts & Serg. 362)—any such practice as substituting a new recognizance for one estreated and forfeited until the present district attorney introduced it, by acquiescing in such applications and giving his certificate or opinion that, as far as he is informed, the people have lost no rights by reason of the failure of the bail to produce the

principal; and that he believes them to be in as good a position to prosecute the principal upon the indictments as they were the day that the recognizance was forfeited; and that therefore he gives his assent to the discharge of the judgment on the recognizance. It appears that the recognizance in this case was forfeited in December, 1873; that in October, 1874, Coman surrendered himself, and that a new recognizance was then, with the district attorney's assent, taken for his further appearance, and that he has not yet been tried. In *Rex* v. *Stancher* (3 Price, 261), the principal, after the forfeiture of the recognizance, was committed to prison; and yet the Court of Exchequer refused to remit the forfeiture, although the prosecution was, with reference to the district attorney's reasons, in a better situation to secure the principal's appearing and being tried for the offense, than it would have been by the acceptance of another recognizance for his appearance.

The giving of a new recognizance does not put the people in as good a position as they were before the forfeiture, for the accused having failed to appear and stand his trial is in default; and the consequence of that default is, that the judgment is rendered against the bail, which is a lien upon his lands. If the judgment is discharged, upon the giving of a new recognizance, the accused may fail to appear again, and another judgment have to be entered, which may not be a security upon land; for the bail, if he be the same, may have then parted with his lands, or if he be another person, he may not have any. It is a security, therefore, for due vigilance on the part of the bail, that his land is bound and may be applied upon the judgment, if he does not secure the appearance of his principal, and the law clothes him with extraordinary powers for that purpose. The practice of the English courts, as will appear from the cases cited, is to withhold the enforcement of the forfeiture over one or several terms, until a trial can be had.

The application must be denied.

NOTE.—After this decision the court established the following rule: "RULE XXII. All applications to this court to remit fines and forfeited recognizances, and to correct or discharge the dockets of liens and judgment entered upon

recognizances, shall be made at the general term. The applications shall be upon affidavits and upon a notice of eight days to the district attorneys, and may be made returnable on any day of term during the sitting of the court. Pending such applications, a stay of proceedings upon any such judgment may be applied for at special term.

The People of the State of New York *against* Dennis Haggerty and James Haggerty.

A judgment against a surety, entered on a forfeited recognizance, will not be vacated on the ground that it was forfeited in violation of a verbal stipulation made by the district attorney or one of his assistants, with the counsel for the prisoner, to postpone the trial or to give him notice of it. Such stipulations will be enforced only when in writing, entered as orders or subscribed by the district attorney or his assistant.

Application to discharge a judgment entered on a forfeited recognizance.

The application was made on affidavits showing that the recognizance had been forfeited in violation of an oral promise made to the prisoner's counsel by the assistant district attorney to adjourn the trial, and that in reliance upon this promise the prisoner had not been in attendance in court when his case was called.

J. F. Daly, J.—Under the rule adopted by this court in *The People* v. *Coman* (*ante*, p. 52), and sanctioned by the authorities, the prisoner should stand his trial for the offense for which he was indicted, and be either convicted or acquitted before an application on the part of his surety to discharge the judgment entered upon the forfeited recognizance will be entertained. So far as the present application is based upon facts going to show that the prisoner's counsel was misled by an oral promise of the assistant district attorney to adjourn his trial, I am not disposed to make a precedent which opens the door for so many abuses. It was the duty of counsel to attend the court and have the case properly adjourned, or to have obtained the written consent of the district attorney, or his assistant, for such adjourn-

ment. In civil cases the rules provide that no private agreement or consent between parties or their attorneys in respect to the proceedings in a cause shall be binding, unless the same shall be reduced to the form of an order by consent, and entered; or unless the evidence thereof shall be in writing subscribed by the attorney or counsel of the party against whom it is alleged (Rules of Supreme Court, No. 16). No less strict a practice should be pursued in criminal cases, especially in this city, where the business of the district attorney's office is very great, and is divided among several assistants.

I am, therefore, in favor of denying the application, with leave to renew (when the prisoner has been tried) upon proper and sufficient proofs.

DALY, Ch. J., and ROBINSON, J., concurred.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK *against* —— CAREY AND —— MARSTERS.

A judgment entered on a forfeited recognizance will not be discharged on proof that the prisoner was subsequently surrendered by his bail and a *nolle prosequi* entered, or that he was acquitted on trial, unless it also appears that the prosecution has not been deprived of proofs by the delay.

The court will not accept as evidence on this point the certificate of the district attorney that the prosecution has not suffered by the delay.

The court will require as evidence of this fact proof that the prosecutor, or the witnesses for the people, had notice of the subsequent arraignment and proceedings in court when the *nolle prosequi* was entered, or the prisoner acquitted, and a copy of the evidence upon which the indictment was found should be produced to the court, and the principal witnesses for the people, or the complainant, should be examined as to whether they were subpœnaed to appear in court when the prisoner was arraigned.

APPLICATION to discharge a judgment entered on a forfeited application.

J. F. DALY, J.—Where it is attempted to be shown that the people have not suffered by the delay intervening between the failure of the prisoner to appear when called for trial, and his subsequent surrender by his bail, it should be made to appear to the court that the prosecutor or the witnesses for the people had notice of the subsequent arraignment and proceedings in court when the *nolle prosequi* was entered, or the prisoner acquitted for want of proof. A copy of the evidence upon which the indictment was found should be produced to the court and the principal witness or witnesses for the people, or the complainant at least, should be examined as to whether they or he were subpœnaed to appear in court when the prisoner was arraigned.

The certificate of the district attorney that the prosecution has not suffered by the delay was disregarded in the case of *The People* v. *Coman* (*ante*, p. 527). It is at best the expression of an opinion, and this court, in the exercise of the important and delicate functions conferred by statute will require proof of the facts.

The application on the proofs furnished should be denied.

DALY, Ch. J., and LOEW, J., concurred.

Ordered accordingly.

HARMON D. HULL *et al. against* VIRGIL L'EPLATINIER.

Under the power given by 2 R. S. 534, § 1, subd. 8, to courts of record to punish by fine and imprisonment any misconduct by which the rights or remedies of a party in a cause may be defeated, prejudiced, &c., "in all other cases where attachments and proceedings for contempts have been usually adopted and practiced in courts of record," the court may, on motion, punish by fine and imprisonment a person not a party to the suit for conspiring with a party to it, or with other persons, to put in incompetent and worthless sureties on appeal.

For the purpose of fixing the amount of the fine to be imposed sufficient to indemnify the party for his actual loss or injury (under 2 R. S. 538, § 521), the court may, in such a case, take the amount of the judgment recovered against the surety in the undertaking as the amount of the party's actual loss and injury.

Appeal from an order of this court made at special term.

An application was made at special term to punish one James Lee for contempt, and the court there (J. F. Daly, J.) delivered the following opinion, in which the facts are fully stated:

"In an action brought by Emeline Lee against Harmon D. Hull and Anna C. Hull, the defendants obtained a judgment against the plaintiff for $197 costs, on April 7, 1873, in this court. An appeal was taken by Emeline Lee, the plaintiff, from that judgment, and an undertaking given. Virgil L'Eplatinier, Jr., was one of the sureties in the undertaking. The sureties were excepted to, and upon justification L'Eplatinier swore that he was an importer of Swiss balsam at 147½ Franklin street; that he was a householder in the city, and was worth one thousand dollars over all his debts and liabilities. It now appears that L'Eplatinier, at the time he executed the undertaking and made the oath on his justification, was under the age of 21 years; that he was not an importer, but a sign painter; and that he lived with his father. Action was brought, and judgment recovered against him on the undertaking for $325 90, and execution issued, which was returned *nulla bona*.

"The evidence before me on this application satisfies me that L'Eplatinier and James Lee united in the scheme to offer a worthless surety on the undertaking, and for that purpose deceived the attorney for the appellant, as well as the respondent and the court, in representing the surety to be of full age, to be an importer, a householder and a sufficient surety. James Lee is the husband of the appellant Emeline Lee; he took entire charge for his wife of the litigation, and procured the sureties on the appeal. The letter written by James Lee to the father of the surety, instructing him to 'put your folks on the guard as to how to answer any one that might inquire as to your son being an importer, &c.,' is not consistent with his innocence of the imposition that had been practiced, but indicates a guilty knowledge of it. The elder L'Eplatinier was the agent of James Lee to collect rents, &c., and was acting confidentially for him in several matters, and the relations between them confirm the statements in L'Eplatinier's deposition as to the con-

versations in which Lee was informed of the truth as to the surety's age, business, &c. James Lee, therefore, knowingly caused the undertaking to be given and the justification by the surety in which the false statements were made. Lee went with the surety to the office of the appellant's attorney to have the undertaking executed, and went to the court with the attorney and the surety to justify.

"While it may be doubtful, if James Lee, who was not a party to the suit in which the undertaking was given, can be punished under the provisions of the second subdivision of section 1, of title 3 (2 R. S. 534), providing for the punishment of "parties to suits for putting in fictitious bail or sureties," he is liable to punishment, even as a stranger to the action, under the general provisions of the eighth subdivision of the same section and title of the Revised Statutes. The statute provides that every court of record shall have power to punish by fine and imprisonment, any misconduct by which the rights or remedies of a party in a cause may be defeated, impaired, impeded or prejudiced, in 'in all other cases where attachments and proceedings as for contempts have been usually adopted and practiced in courts of record, to enforce the civil remedies of any party to a suit in such court, or to protect the rights of any such party' (2 R. S. 534, 535).

"Perjury has always been held a great contempt of court (*Stockham* v. *French*, 1 Bing. 365). If the plaintiff in the cause or his attorney can be connected with the false swearing of the bail, the court will punish them and has the power to do so (*A'Becket* v. ———, 5 Taunt. 775). And where two people put in bail in feigned names, and could not be prosecuted for personating bail under the statute (21 Jac. 1, c. 20), because there were no such persons, the bail and the attorney were both punished for the contempt (*Anonymous*, 1 Strange, 384). Any person who adopts any means to prevent the course of justice will be liable to punishment for contempt (13 Mees. & Welsby, 593). And strangers, as well as parties to suits, are liable to punishment for contempt, for using force or fraud to pervert the course of justice (*Smith* v. *Bond*, 2 D. & L. 460; see also 9 Jur. 20; and 14 L. J. Exch. 114). No plainer case

of an attempt to pervert or to defeat the course of justice can be shown than that of the agent of a party to a suit who procures a surety to make a false affidavit in justification, or who knowingly procures an utterly insufficient surety, and represents him or causes him to represent himself to the court as sufficient, and induces him to make a false oath to the same end. It is a great abuse, and directly tends to impair and prejudice the rights and remedies of the adversary in the litigation.

"Such a case is made out, in my judgment, against James Lee, and I therefore direct that he pay to the plaintiffs or their attorney, as fine, a sum equal to the amount of the judgment against the sureties on the undertaking, together with the expenses of this proceeding, and that he be imprisoned until the fine be paid, such imprisonment not to exceed sixty days (2 R. S. 538, §§ 20, 21, 25)."

From the order entered in accordance with this decision, an appeal was taken to the general term.

DALY, Chief Justice.—The statute confers upon every court of record the power to punish by fine and imprisonment any misconduct by which the rights and remedies of the party in a cause, or matter depending in such court, may be defeated, impaired, impeded, or prejudiced, in all cases where attachments and proceedings for contempts have been usually adopted and practiced in courts of record to protect the rights of any party to a suit (2 Rev. Stat. 534, § 1, subd. 8).

The act of which Lee was guilty was misconduct of this description, and it is that species of misconduct where attachments in proceedings as for contempts have, in the language of the statute, been usually adopted and practiced in courts of record to protect the rights of a party to a suit (*Anon.* 1 Strange, 384; *Smith* v. *Bond*, 13 Mees. & Wells.)

Lee, in a suit in which his wife was the plaintiff, in which judgment had been given against her, and from which she had appealed, knowingly procured a minor to become surety in the undertaking upon the appeal, who, with Lee's knowledge,

made an affidavit, stating that he was a householder, an importer of Swiss goods, at No. 147½ Franklin street; that he was worth over $1,000 above his debts and liabilities, and that his property consisted of imported goods, and of stock in business, and fixtures in trade; when the fact was that he was not an importor, but a sign painter, at 170 West Broadway; not a householder, but a minor, living with his father at 147½ Franklin street, where they kept house together, but paid no rent, his father being the agent for the owner of the house, and who received the use of the premises as a part of his compensation as such agent. It also appeared upon the motion that Lee told the father of the minor who became the surety that he, Lee, did not want to give a good bail at the time in the suit, and that nothing could be done to his son, as he was an infant; and that Lee wanted the father to make an affidavit in contradiction to the one he had made in the proceeding.

It also appeared, further, that before the young man became surety that his father told Lee that he was only 19 years of age; to which Lee replied, "That makes no difference; it is only a matter of form; your son will do." That when the young man himself went to the lawyer's office to become bail, he stated when he was born, showing he was only 19 years of age; that the lawyer said, "That won't do, Mr. Lee," and that Lee said to the young man, "Are you not 24? well you could pass for 24," upon which the young man went with Lee and the lawyer to the court room.

And as evidence of Lee's interest in the suit brought in his wife's name, it appeared by an affidavit that he told the person who made the affidavit that he was doing business in his wife's name, in order to protect his property from his creditors.

Upon the appeal, judgment was given against the appellant; an action was brought upon the undertaking, and judgment recovered for $325 94, the amount recoverable in accordance with the condition of the undertaking, and an execution was issued, which was returned *nulla bona*. For this misconduct and contempt the judge below, after a full hearing, upon notice to Lee, who appeared with his counsel and opposed the motion, imposed a fine upon him equal to the judgment against the

sureties on the undertaking, together with the expenses of the motion or proceeding, and ordered that he be imprisoned until the fine was paid, the imprisonment not to exceed 60 days. This, in my opinion, the judge had the power to do, and the amount which he imposed was the proper measure of the loss and injury which the defendant may be assumed to have sustained by having this incompetent and worthless surety imposed upon the court and the party by means of a false statement under oath as to the qualifications and sufficiency of the surety; which Lee, to enable his wife to bring an appeal from the judgment rendered against her, was instrumental in bringing about; in accomplishing which, as is evident from what appeared upon the motion, he was the principal and chief agent.

If the defendant had had what he was entitled to, a responsible surety upon the appeal, it would have been a security for the amount of the undertaking. This he lost by the fraudulent acts and misconduct of Lee, and the false swearing of the minor, whom he procured to become a surety, and the amount of the judgment upon the undertaking was therefore a proper measure of the defendant's loss and injury, it appearing, by the issuing and return of an execution, that nothing could be collected from either of the sureties upon the judgment.

It does not follow that because the surety might be indicted for perury in the making of such an affidavit, or that Lee might be indicted for what he did, that the court have not the power, under the provision referred to in the Revised Statutes, to punish Lee for his misconduct by imposing upon him a fine sufficient to indemnify the defendant in the action for the loss and injury which Lee was chiefly instrumental in producing.

The order should be modified, however, by reducing the amount of the fine, by $29 84, as that amount was collected upon the execution issued upon the judgment for the defendant in the suit brought in the name of Mrs. Lee; and in all other respects the order should be affirmed.

Loew and Larremore, JJ., concurred.

Ordered accordingly.

MICHAEL GROSS *et al. against* JOHN T. DALY AND THE WINDSOR HOTEL COMPANY, IMPLEADED.

Under the mechanics' lien act for the City of New York (L. 1863, c. 500), the lien attaches upon the filing of the notice, notwithstanding the owner has theretofore fraudulently assigned all his interest in the premises; and in a proceeding to foreclose the lien, the fraudulent transferee may be made a party, and the validity of his title adjudicated.

The case of *The Mechanics' &c. Bank* v. *Dakin* (51 N. Y. 519) distinguished, and *Meehan* v. *Williams* (2 Daly, 367) followed and reaffirmed.

APPEAL from two orders of the special term overruling demurrers.

The action was brought to foreclose a mechanic's lien on premises known as the Windsor Hotel property, situated on Fifth avenue, between 46th and 47th streets, in the city of New York.

The complaint, among other things, alleged that the plaintiffs, in pursuance of an agreement made by them with the defendant John T. Daly, who at the time was the owner of the leasehold premises in question, furnished materials and did work on said buildings, amounting in the aggregate to $39,025 41; that, on the 23d day of October, 1873, when the lien was filed, there was due to the plaintiffs an unpaid balance of $7,423 61, which Daly refused to pay; that, on the 27th day of September, 1873, the said John T. Daly made a pretended conveyance of the said premises to The Windsor Hotel Company (composed of himself, his brother, Wm. H. Daly, and his son, Thomas Daly), for the pretended consideration of $850,000; that, at the same time of said conveyance, the said John T. Daly was, and still remained insolvent and unable to pay his debts; that the consideration aforesaid consisted merely of the stock of the corporation, which was entirely worthless, and had no market or other value; and that the said conveyance was fraudulent and void, and was made with the intent and for the purpose of hindering, delaying and defrauding the plaintiffs and other creditors of the said John T. Daly.

The plaintiffs accordingly demanded that the said conveyance from John T. Daly to The Windsor Hotel Co. be declared and adjudged fraudulent and void, and set aside; that the plaintiffs' lien be enforced and foreclosed; that the rights of all the parties to the action be determined, and that the said leasehold premises be sold, etc.

The defendants, John T. Daly and The Windsor Hotel Co., interposed separate demurrers, on the ground that an action to foreclose a mechanic's lien was improperly united with an action to set aside a fraudulent conveyance, and also on the ground that the complaint did not state facts sufficient to constitute a cause of action.

The demurrers were overruled at the special term, and the defendants appealed.

William R. Martin, for appellant Daly.

James B. Kissick, for appellant The Windsor Hotel Company.

Charles Jones, for respondent.

DALY, Chief Justice.—The conflicting decisions of the Commission, in *Mechanics' &c. Bank* v. *Dakin* (51 N. Y. 519), and of the Court of Appeals in *Thurber* v. *Blanck* (50 N. Y. 80), are embarrassing; the Commission holding that when a suit is commenced by attachment, and a judgment is recovered, the plaintiff, after issuing execution, and before its return, may maintain an equitable action to set aside a fraudulent assignment of a bond and mortgage, so that they may be applied to the payment of the judgment; and the Court of Appeals, holding that the equitable action in such a case cannot be brought until the remedy at law is exhausted, that is, until the execution issued upon the judgment is returned unsatisfied. The Commission held that by the service of the attachment a lien was acquired upon the bond and mortgage, which could be enforced after judgment, and to which the fraudulent assignment was no impediment; whilst the Court

of Appeals held that no lien could be acquired by the attachment upon a bond and mortgage, the legal title to which was in a third person; that in the case of *choses in action* and *debts*, the lien is constructive, and cannot operate through an intermediate or inchoate legal title; that in such a case no debt at law is owing to the defendant, and there is nothing for the attachment to operate upon; that it can only be created upon legal rights, and not mere equitable interest; that *debts* and *choses in action* are legal assets under the attachment law only when the process acts directly upon the legal title, and that when they are so situated as to require the equitable exercise of the power of the court to place them in that condition, they are to be regarded as equitable assets only, and that to allow the equitable action upon the issue of an execution and before its return, in such a case, would be in direct conflict with the rule, that a creditor has no standing in court to reach equitable assets, until his remedy at law is exhausted.

This decision of the Court of Appeals is not in conflict with the cases in which it has been held that the equitable action may be brought after the issuing of execution and before its return, to set aside a fraudulent transfer of goods and chattels, or of real estate, which can be levied upon under the execution when the fraudulent impediment is removed (*McElwain* v. *Willis*, 9 Wend. 561; *Ileye* v. *Bolles*, 2 Daly, 231; *McCullough* v. *Colby*, 5 Bosw. 477; *North American Fire Ins. Co.* v. *Graham*, 5 Sandf. 200; *Falconer* v. *Freeman*, 4 Sandf. Ch. Pr. 565; *Greenleaf* v. *Mumford*, 30 How. 30), nor the cases which have held that where the sheriff takes property subject to seizure upon attachment, but which has been fraudulently transferred, the plaintiff is not, after the the service of the attachment, a mere creditor at large, but a creditor who has a *specific* lien upon the goods attached, and that the sheriff, as his bailee, has a like lien and the right to show, in defense of an action for the taking of the property, that the title of the party claiming it is fraudulent as against the attaching creditor (*Rinchey* v. *Stryker*, 28 N. Y. 45; Id. 31 N. Y. 140; 26 How. Pr. 75; *Van Heusen* v. *Radcliff*, 17 N. Y. 580; *Noble* v. *Holmes*, 5 Hill, 194; *Van Etten* v. *Hurst*, 6

Hill, 311). Indeed, the latter class of cases are especially excepted in the opinion of the Court of Appeals, which is carefully limited to equitable assets not capable of seizure under an attachment or execution, and the legal title to which has been transferred fraudulently or otherwise, and is in harmony with a previous decision of the Court of Appeals in *Lawrence* v. *The Bank of the Republic* (35 N. Y. 320), in which it was held that no lien is acquired by the service of the attachment upon the proceeds of property fraudulently assigned by the debtor, when the property had been sold by the assignee and its identity gone.

So far as these conflicting decisions affect the question before us in the present case, I think we must follow that of the Court of Appeals. The decision of the Commission, it is true, has the weight of an unanimous decision of the whole court, whilst in the Court of Appeals the judges were divided, three concurring with the chief justice, and three dissenting, that is, practically, four judges in the Commission decided one way, and four judges in the Court of Appeals exactly the reverse. But the question was argued in the Court of Appeals four months before the argument of the case in the Commission, and was decided in the Court of Appeals a month after the argument in the Commission; and when the decision was afterwards made in the Commission, it was apparently without any knowledge that the question had already been decided by the Court of Appeals, as no reference is made to the contrary decision of that court in the opinion delivered in the Commission. The Court of Appeals, moreover, is the permanent court, and may hereafter, if its decision was erroneous, review it, should the question arise again; whereas the Commission is a temporary body, whose duration is limited and will expire within the present year.

The point before us is, whether a party who had filed a notice of a mechanic's lien upon the land and building in this city known as the Windsor Hotel, in the mode required by the statute, is entitled, in a proceeding brought in this court to enforce the lien, to the equitable aid of the court to set aside a conveyance of the property made before the notice was

filed, upon the ground that the conveyance was fraudulent and void as against creditors. The question was raised by demurrer, which was overruled by the judge below, for the reason that the point had been decided by this court in *Meehan* v. *Williams* (2 Daly, 367), a decision, we are now asked to reconsider in consequence of the decision of the Court of Appeals before referred to, as to the nature and effect of the lien created by the service of an attachment.

I do not see that the decision, that the lien acquired by the service of an attachment does not extend to equitable assets, the legal title to which, though fraudulently obtained, was vested in a third person when the attachment was obtained, affects the questions whether, under the lien law, the court has the equitable power to set aside a fraudulent conveyance of the land and building, which is an impediment to the enforcement of the lien. I shall however re-examine the question, as it is an important one, the solution of which involves an investigation of much intricacy and difficulty.

The act of 1863 declares that the notice to enforce the lien shall be served upon all who have filed notices of liens, and also upon the owner and upon *incumbrancers.* Here is an express provision that incumbrancers may be made parties, and a fraudulent grantee, in whom the legal title to the premises has been vested by a fraudulent transfer on the part of the owner, is an incumbrancer. While operative as between the parties, it is an incumbrance as to creditors, which may be set aside in equity, because, being void as to them, as it is an impediment to their right to have his claim satisfied.

The act of 1863, also provides that the court may determine the rights of all who, under the act, may be made parties, and that such judgment, or decree may be rendered as to the rights and *equities* of the several parties among themselves, and as against any owner, as shall be just (L. 1863, c. 500, §§ 2, 5, 7).

The Revised Statutes declare (2 Rev. Stat. 137, § 1), that every conveyance of any estate or interest in lands, made with intent to hinder, delay or defraud creditors or other persons of their lawful suits, damages, debts or demands, shall,

as against the persons so hindered, delayed or defrauded, be void. The statute does not say judgment creditors; but so far as respects the equitable power of the court to set aside such a fraudulent conveyance as an impediment to the creditor's legal right to have his debt satisfied, it has been uniformly interpreted as meaning judgment creditors; or in the language of Judge DENIO, in the case first below cited, creditors clothed with their judgments and executions, or *such other titles* as the law has provided for the collection of debts (*Van Heusen* v. *Radcliff*, 17 N. Y. 584; *McElwain* v. *Willis*, 9 Wend. 561). It is in fact, in this respect, only declaratory of the law as it previously existed, for the rule was well established before the Revised Statutes, that a court of equity would not aid creditors at large in the collection of their debts, but would interpose only when they had obtained a lien by the recovery of a judgment, and had exhausted their legal remedy under the judgment, either by the issuing and return of an execution *nulla bona*, or the issuing of an execution, where the equitable aid of the court was asked to set aside a fraudulent conveyance of land by the judgment debtor, which was an impediment to the judgment creditor's obtaining a satisfaction of his judgment by the sale of the land under the execution, to which he was entitled, if the sheriff could find no goods or chattels wherewith to satisfy the execution (*Brinckerhoff* v. *Brown*, 4 Johns. Ch. 671; *McElwain* v. *Willis*, 9 Wend. 561, 565, 567; *Heye* v. *Bolles*, 2 Daly, 235).

Judge Bronson, in *Noble* v. *Holmes* (5 Hill, 194), after declaring that a fraudulent sale could not, under the provision in the Revised Statutes above referred to, be impeached by a creditor at large, added: "It must be by a creditor having a judgment and execution, *or some other process which authorized a seizure of the goods*," and this latter qualification, as well as that of Judge Denio, "such other titles as the law has provided for the collection of debts," were approved as a proper qualification and statement of the rule, by Judge Balcom, who delivered the opinion of the Court of Appeals in *Rinchey* v. *Stryker* (28 N. Y. 45), a case which, in my judgment, has an important bearing upon the question under consideration, in

which none of the judges dissented, and the construction given to the law in which has been recognized and approved by Chief Justice Church in *Thurber* v. *Blanck* (50 N. Y. 86), as I have already stated.

It was held in the case of *Rinchey* v. *Stryker*, that a creditor who had obtained an attachment, under which the sheriff seized property which the debtor had disposed of with intent to defraud his creditors, was not to be deemed a creditor at large, but a creditor having a *specific* lien upon the property attached. That in an action brought against the sheriff for the taking of the property, the sheriff might show in his defense, that the title of the person claiming the property, was fraudulent and void as against the attaching creditor, having been acquired by an assignment made with an intent to hinder, delay and defraud creditors. That this defense was available, even before the plaintiff in the action in which the attachment was obtained *had established his debt by the recovery of a judgment;* but that the plaintiff in the action for the taking of the property might defeat the attaching creditor on either of two grounds: 1st, that he had a good title to the property when it was attached; 2d, that there was no debt to justify the issuing of the attachment, and that where he relied upon the latter ground, the defendant would have to prove the existence of the debt, if it had not then been established by the recovery of a judgment, or if the judgment were recovered after the parties were at issue, the judgment might be given in evidence upon the trial to prove the debt; and lastly, that there was no objection to the two issues being tried in the same action—that is, the existence of the debt and the allegation that the title on which the plaintiff relied was fraudulent and void as against the attaching creditor.

A specific lien is one that attaches to certain property, or to some particular piece of property, as contradistinguished from a *general* lien, such as a factor has for his general balance (Cross on Lien, pp. 13, 15, 246). The lien of the mechanic or material-man, given by the statute, is of the former kind, as it attaches to a particular piece of property—the building and the lot upon which it stands, and is a security, that whatever

interest the owner who made the contract for the work had in the lot and building at the time when the notice was filed which creates the lien, may be sold to satisfy the claim, if the claim is afterwards established by the recovery of a judgment. This is a *specific* lien; quite as much so as that which an attaching creditor has in property seized under an attachment, which property the debtor has disposed of to defraud his creditors. In that case, the fraudulent conveyance vests the legal title in the vendee, because it is valid as between vendor and vendee, and is void only as to the vendor's creditors. The creditor's right to take it under process, or by any other proceeding which authorizes the seizure of it as the debtor's property, is therefore recognized, because he has the right to impeach the validity of the transfer upon the ground of fraud, and he takes it subject to the obligation of establishing the fraud, if either he or the officer is sued for taking it; and if he fails to do so, either he, if it was done with his assent, or the officer, or both, are answerable in damages for the wrongful taking, the same as any other trespasser. In the one case, if the fraudulent conveyance is no bar to the creditor's seizing the property under the attachment, so in the other, it should be no bar to the creditor's filing the notice by which he obtains the lien; the statute having given him that mode of collecting his debt out of the property towards the erection of a structure upon which he furnished labor or supplied materials.

The plaintiffs in the present suit are creditors of John T. Daly, with whom, when he was lessee of the land, in 1871, they contracted to perform certain work and labor, and furnish materials for the building erected upon it, to the amount of $39,025 41, upon which payments were made by him to the amount of $31,601 80, leaving $7,423 61, due by Daly to the plaintiffs, when they filed their notice of lien, on the 23d of October, 1873. On the 27th of September, 1873, or about a month before the plaintiffs filed the notice of their lien, Daly conveyed the lease and leasehold premises to a corporation which had been formed under the general incorporating act, by the title of the Windsor Hotel Company; which conveyance, it is alleged, was fraudulent as having been made with an

intent to hinder, delay and defraud the plaintiffs and the other creditors of Daly. The plaintiffs are creditors who contracted directly with the owner by whom the building was erected upon the premises, and if, as I have said, a creditor has the right to attach property which his debtor has disposed of for the purpose of defrauding him and other creditors, a creditor similarily situated should certainly have the right to impose the lien which the statute has created for his benefit. Both rights—the right to an attachment and the right to a lien—are given by statute, and if the conveyance is as to the creditor void, by reason of the fraud, then the right to the lien is in no way impaired, and may be imposed by filing the notice required by the statute. The mechanic's lien law, enacted in this and other States, is founded upon a principle extensively pervading the civil law, the equitable spirit of which recognizes a proprietary interest in those who bestow labor or furnish materials towards the improvement of the property of another. It has been applied extensively by courts of equity in cases of joint purchasers, joint tenants, and in cases of the possession of land under defective titles, or of tenancy, where there was no joint interest, nor any agreement, express or implied, authorizing the making of repairs or improvements. Courts of equity have, where the party making repairs or improvements has acted *bona fide* and innocently, and they are a substantial benefit to the land, treated the expenditure as a charge for which the party making it has a lien upon the land, which they have enforced by compelling the opposite party to allow it upon an accounting in equity, or where he came into court for equitable relief (*Hibbert* v. *Cook*, 1 Sim. & Stu. 552; *Robinson* v. *Bedley*, 6 Madd. 2; *Bright* v. *Boyd*, 1 Story, 478); and Judge Story was of the opinion that even a bill might be sustained to grant active relief to a *bona fide* possessor of land under a defective title, who, whilst in possession, made permanent meliorations and improvements enhancing the value of the land; such a claim, in his opinion, being founded in the clearest natural equity (2 Story's Eq. Jur. § 1237 and note). The same principle pervades the common law, and "has been," to use the language of Mr. Cross (p. 24), "at all times

favored by the courts as consonant with every principle of equity and justice." The common law courts upheld the right of a party to retain property in his possession, the value of which had been increased by his labor, or which he had carried, stored and protected, until the claim for his services were satisfied; which was all that he could do however, for he could not sell the property to satisfy the lien, unless by express agreement (*Jones* v. *Pearle*, Str. R. 556). But where the labor or the materials went to the erection of a structure upon, or the improvement of land in the possession of another, there could be no detention, as there was no possession, nor any way apparent to the courts in which the equitable right could be charged as an incumbrance upon the land, until the enactment of statutes which supplied by their provisions the necessary machinery; and as these statutes are not in derogation of the common law, but in aid and advancement of a principle extensively recognized and applied under it, they should be liberally and beneficially construed. Viewed in this light, it would be, in my judgment, an unwarrantable construction of the lien law, to hold that an owner of land with whom a contract was made for the erection of a building upon it, can wholly deprive the contractor of the lien contemplated by the statute, by a fraudulent conveyance of the property, made with intent to cut off the right of lien and to defraud creditors generally. It was held in *Schaps* v. *Reilly* (50 N. Y. 61), that a mortgage upon real estate, executed to raise money thereon, without any delivery, or the payment of any consideration therefor by the mortgagee, which was assigned to an assignee who in good faith paid the full consideration therefor, and which was duly recorded, would not defeat a mechanic's lien filed after the execution of the mortgage, but before the delivery of it to the assignee for value; although, as between the mortgagor and the assignee, the mortgage was valid. If such be the effect of the execution of a mortgage void for the want of consideration and delivery the like effect would much more follow where a conveyance is void as to the creditor filing the notice of his lien.

If I am right in the conclusion, that such a conveyance,

being void as to creditors, could not operate to prevent the plaintiffs, who were creditors, from filing their notice of lien, and from its having the effect given by the statute to the filing of such a notice, then the validity of the conveyance, as respects the plaintiffs, would necessarily come in question in the proceedings instituted to enforce the lien, because to entitle the plaintiffs to enforce it, it would be indispensable for them to show that the conveyance, as to them, was fraudulent and void. If the property has been conveyed *bona fide* to a third party, the filing afterwards of a notice of a lien can have no effect, because there is nothing to which a lien can attach (*Quimby* v. *Sloan*, 2 E. D. Smith, 613; *Ernst* v. *Reed*, 49 Barb. 367; Laws of N. Y. for 1866, c. 752; Guernsey on Liens, and the cases there cited, §§ 89, 90). Among the things therefore which a party must allege and prove in the proceeding to enforce the lien, is that the owner who made the contract under which the work was performed, or the materials were furnished, had some interest in the property at the time when the notice of the lien was filed (see *Bailey* v. *Johnson* 1 Daly, 61, and the numerous cases cited in Guernsey on Liens, § 80); for if he had not—if he had then parted with all his interest—there would be nothing, as I have said, to which a lien could attach—nothing against which it could be enforced. The plaintiffs, after serving their notice to enforce their lien, could not move a step, unless they could allege and prove that Daly had some right, title and interest in the property; and being met by the fact that he had (before they filed their notice), conveyed all the interest he had in it to the Windsor Hotel Company, their proceeding must fail, unless, being creditors, they can impeach the validity of that transfer, and show that as to them it was fraudulent and void. Why should they not be allowed to do so in this proceeding, which they have brought in a court clothed with equitable jurisdiction, and when the act allows incumbrancers to be made parties, and declares that the court may make such judgment or decree, in respect to the rights and *equities* of all the parties between themselves, as may be just? Long ago, under the act of 1851, which contained no such provisions, we held in *Doughty* v.

Devlin (1 E. D. Smith, 625), that in administering the statute, the court acts as a court of equity, and may adapt its judgment or decree to the special circumstances of the case; the statute itself being ostensibly founded in equity; and in *Sullivan* v. *Decker* (1 E. D. Smith, 699), Judge Woodruff and myself held, Judge Ingraham dissenting, that we had necessarily, under that act, the power to make previous incumbrancers parties, although there was not then, as there is now, any express provision in the statute allowing them to be made parties—a construction which the Legislature confirmed by a dsitinct recognition of the power in the subsequent act of 1855. Nor must the lienor, in the enforcement of the lien, wait until the owner has set up as a defense, that he has parted with all his interest. He may never appear. It may not be his interest to do so. The proceeding cannot affect him, if he has parted *bona fide* with his interest; and if he has parted with it fraudulently, he may be equally indifferent, as the proceeding cannot affect the fraudulent vendee, unless he can be made a party. As the lienor, on the contrary, must show affirmatively, if he seeks to enforce the lien, that the owner who made the contract under which the labor was performed, or the materials were furnished, had an interest in the premises when the notice was filed, and knowing the fact that he has parted with it fraudulently, the lienor has the right, when he initiates the proceeding to foreclose his lien, to make the fraudulent vendee a party; as he must set up the fraud, to enable him to establish that the conveyance was void as to him, and that the grantor had an interest when the notice was filed, to which the lien attached, and which may be decreed to be sold to satisfy the lienor's claim.

There may possibly be some difficulty in the Marine and Justices' courts, as those courts have no general jurisdiction in equity, but no embarrassment need arise under the statute from that cause; for it is not obligatory in any case to go into those courts for the enforcement of the lien. The statute simply provides (§ 4), that where the aggregate of liens is less than $500, the proceeding to enforce may be brought in any court in this city; but if they exceed that amount, it must be brought in a court of record; so that any lien, no matter how

small the amount, may be enforced in one of the courts of record in the city, having equitable jurisdiction.

Nor is the equitable right to have the fraudulent conveyance set aside, to be deferred until the lienor has established his claim by the recovery of a judgment in the proceeding, which would necessitate the bringing of another equitable action afterwards, to enable him to set aside the incumbrance, so as to reach and sell, in the lien proceeding, all the right, title and interest of the fraudulent grantor in the premises. The Court of Appeals have held, as has been shown in *Rinchey* v. *Stryker*, *supra*, that where property conveyed to defraud creditors is seized upon attachment, the attaching creditor's claim may be proved, and the fraudulent transfer established, in the same action; so, in the equitable action or proceeding brought to foreclose the lien, the claim may be proved, and the fraud established; for the court may (§ 7), "order any question" (to be) "tried by a jury, or refer the whole matter to a referee to examine and pass upon the rights of the respective parties." The pleadings, said Judge Woodruff in *Doughty* v. *Devlin* (1 E. D. Smith, 625), may be so framed as to present any *issue* which the parties may desire to raise respecting the matters in controversy; it being plain that the Legislature intended that the proceedings should in all respects assume the form of an ordinary civil action and be governed by the same rules as other civil actions, brought for the enforcement of *similar rights;* an intention much more apparent in the act of 1863 than it was in the statute of 1851, to which he referred.

Liens, which are a *charge* upon real estate, are enforced in equity, and the facts and circumstances may be shown in the action or proceeding in equity which constitute and make them a charge upon the estate (*Herbert* v. *Cooke*, 1 Sim. & Stu. 552; *Bradley* v. *Bosley*, 1 Barb. Ch. 152, 153). A creditor at large has no such lien, until he has recovered a judgment, nor then in equity until he has exhausted all his legal remedies. Indeed, strictly speaking, he has no lien at all by the judgment, unless it is given by statute, or arises under some proceeding authorized by statute (*Neale* v. *The Duke of*

Marlborough, 3 My. & Craig, 416, 417. Our Revised Statutes provide (vol. 2, p. 389, § 3), that judgments of courts of record "shall *bind* and *be a charge*" upon the lands, &c., of the person against whom the judgment was rendered, and judgments of inferior courts are embraced by subsequent statutes. The rule therefore, which prevails in equity, that a creditor cannot have a fraudulent conveyance by his debtor set aside, until the creditor has recovered a judgment and exhausted his legal remedy, is founded in the fact that he has no lien nor anything which in equity is a charge upon the legal or equitable estate or property of his debtor. Chancellor Kent, in *Brinckerhoff* v. *Brown* (4 Johns. Ch. 671), carefully examined, after a review of the previous authorities, the grounds upon which this jurisdiction is exercised, and rests it upon the fact that the creditor has a judgment *which is a lien upon real estate*, and which gives him a *legal preference*, or *lien*, upon chattels, so as to entitle him, after he has exhausted his legal remedy, to the equitable aid of the court. This rule therefore, that a judgment must be recovered, and all legal remedies exhausted, does not apply under the mechanic's lien law; for the mechanic, by filing his notice, acquires a lien, which is a charge upon the building and the ground upon which it stands, to the extent of all the right, title and interest which the contracting owner then has in the premises, and which, as a security for the collection of the mechanic's claim, is as effectual as the lien of a judgment. In enforcing the lien, there is no such requirement as first exhausting all legal remedies before equitable aid can be afforded. It is in itself, an equitable proceeding, or rather action, for it is so denominated in the act of 1863, to foreclose a lien created by the operation of the statute, and made by it a charge upon the land and building; and if this charge, or lien, cannot be enforced, and the owner's interest reached, in consequence of a fraudulent transfer of it by him, then the equitable aid of the court is, in such an action, incident to the right to have the lien enforced. Everything appears to have been done in the act of 1863, to clothe the court with the most ample powers, for after providing that incumbrancers may be made parties, it declares (§§ 5, 7), that

the court is to proceed without regard to matters of form; that the proceedings, whilst in progress, are to be amendable at all times without costs; that every party is at liberty to take proof for or against any claim; that if the parties notified object or insist on any claim, the court may take the proofs and determine the *equities of the parties*, and that (§ 5), judgment is to be rendered *according to the equity* and justice of the claims of the respective parties. If the lienor is to have judgment according to the *equity* of his claim, then a judgment in equity would be that a fraudulent conveyance which obstructs the enforcement of the claim as a lien, be set aside. Two propositions are very plain to my mind: (1) That a fraudulent conveyance of the premises by the owner, which is void as to his creditors, does not prevent a mechanic who has contracted with the owner, and is thereby one of his creditors, from imposing a lien by filing the requisite notice; and, (2) That a court having equitable jurisdiction, in which the proceeding is brought to foreclose such a lien, may, where the fraudulent grantee has been made a party, inquire into the fraud, and if it is established, decree that the conveyance was void as to the complainant; that it in no way affected his right to create a lien upon the interest which the owner had in the premises at the time of the conveyance, and at the time of the filing of the notice; and that the complainant having established his claim against the owner, the right, title and interest of the owner should be sold to satisfy it; which decree or judgment (§ 7), would be binding and conclusive alike upon the owner and the fraudulent grantee. I have thus at great length, in view of the importance and difficulty of the question, re-examined our decision in *Meehan* v. *Williams* (*supra*), and am satisfied that it is correct.

Loew, J.—The learned judge whose orders we are now reviewing followed the decision of the general term of this court in the case of *Meehan* v. *Williams* (2 Daly, 367). It was there held that in an action to foreclose a mechanic's lien, under the act of 1863 (L. 1863, c. 500), the plaintiff may impeach the validity of what purports to be an absolute conveyance of

the owner's interest in the premises on which the lien is claimed, made during the progress of the work and before the notice of lien is filed. This doctrine we are now asked to review in the light of the more recent decision of the Court of Appeals in *Thurber* v. *Blanck* (50 N. Y. 80). In the last mentioned case, it was held, by a divided court, that under the attachment laws no lien could be created upon a bond and mortgage, which, it was claimed, had been fraudulently assigned by the debtor; that such a lien will not attach to mere equitable assets or interests, and can only be acquired upon the legal rights of parties, and that, as the title to the bond and mortgage was in a third party, there was nothing for the attachment to act upon, until the intermediate legal title was removed by an action in equity. I find, however, that the Commission of Appeals, in *M. & T. Bank* v. *Dakin* (51 N. Y. 519), which was a case on all fours with the one just referred to, unanimously came to a directly opposite conclusion on the same question. It is, therefore, rather difficult to determine what the law really is on this point.

But whatever rule may finally obtain in reference to acquiring liens under the attachment laws, it seems to me that, under the lien laws relative to this city, a valid lien may be created, notwithstanding a fraudulent conveyance may have been made before the filing of the notice of lien. The act of 1863, as originally passed by the Legislature, contained a provision to the effect that no sale, transfer or incumbrance, made at any time after the commencement of the work or furnishing of material, should impair or affect a lien acquired under said act (§ 1). This provision the law-makers subsequently repealed, by enacting that a party who may become entitled to a lien, in pursuance of the aforesaid act, shall have such lien for the full and fair value of the labor performed or materials furnished by him upon the building and lot of land upon which the same shall stand, "to the extent of all the right, title and interest which the owner shall have therein, at the time of filing the notice of lien, * * * and to no greater extent" (L. 1866, c. 752, § 1). It will be observed that a lien can thus be created by a compliance with the lien law, to the extent of *all the right, title and interest* of the owner in the

premises. So that, although the owner may now, after the commencement of the work or furnishing of materials, in good faith convey, mortgage or otherwise incumber his property, free from any lien the notice of which was not previously filed, yet if he has any *right*, *title* or *interest* whatever in the premises, at the time of filing the notice, the lien will attach to and take effect upon it. And I am of the opinion that the court can, in an action like the present, inquire into the *bona fides* of a conveyance, and that it may, in a proper case, declare the same fraudulent and void, and set the same aside, if necessary to a proper enforcement of the lien.

To hold otherwise would virtually nullify the lien law in very many cases, and thus defeat the manifest intention of the Legislature in passing the act. Because, all an owner would have to do to evade the law, would be to make a mere formal transfer of his interest in the property to a third party, just prior to the finishing of the work and the anticipated filing of the lien notice. The claimant would then be compelled to pursue the ordinary remedy provided for the collection of debts; and if, after perfecting judgment and exhausting his remedy at law, under the execution, he could reach the equitable interest of the owner in the property at all, it would have to be either in an action brought by a receiver (Code of Pro. § 299), or else by a suit in equity, such as an action in the nature of a creditor's bill.

Now I am persuaded that the Legislature, in passing the lien law, intended to provide a speedy and effectual mode by which contractors, sub-contractors and material-men might obtain satisfaction of their respective claims or demands in one action or proceeding. To accomplish this object, they have declared that the proceeding to enforce or foreclose the lien is to be instituted by a notice requiring the parties to appear in court within a comparatively short space of time after the service thereof; that all, prior as well as subsequent, lienors in respect to the same property shall be made parties; that each claimant shall file a brief statement of his claim, to which any party interested may, within five days thereafter, state his objections; that the issue thus formed is to be tried as in ordi-

nary actions, but in a summary manner, and that judgment *in personam* as well as *in rem* may be rendered (§§ 4, 5, 7, 9; *Barton* v. *Herman*, 3 Daly, 320). Moreover, in order that full and complete justice may be done to all persons in any wise interested in the premises, it is further provided that the notice to foreclose the lien is to be served not only on the owner, but also on any incumbrancer (§ 5); and whether the parties appear and plead, or neglect to appear and object to or insist on any claim, the court is authorized and required to take the proofs and afford such relief, and render such judgment or decree as to the rights and equities of the respective parties, among themselves and as against any owner, as justice and equity may require (§§ 2, 5, 7).

It is true, a valid lien must be created before a party is entitled to a judgment in any form in such an action (*Donnelly* v. *Libby*, 1 Sweeny, 259; *Barton* v. *Herman*, *supra*, 325). But it does not necessarily follow that a lienor has not acquired a valid lien merely because the owner has ostensibly transferred all his interest in the property, by what on its face purports to be an absolute conveyance. If the transaction was a fraudulent one, the parties to it will not be permitted to take advantage of their own wrong, and thus by fraud deprive a *bona fide* lienor of his rights under the statute. If all the requirements of the lien act have been complied with, the lien will—as already intimated—take effect upon whatever right, title and interest the owner has in the property; and it may become a question for the court to determine, on the trial, whether or not the owner had any, and if so what, interest in the premises upon which a lien could be created.

I agree with the learned chief justice who delivered the opinion in *Meehan* v. *Williams* (*supra*), that the term "*incumbrancer*," as used in the fifth section of the act, is comprehensive enough to include an alleged fraudulent grantee. He may, therefore, be made a party to such an action or proceeding, and his rights can be as carefully considered and as fully protected therein as in any other action.

It follows from what has been said, that the court, in an action like the present, is invested with all the requisite power

and authority—if warranted by the evidence—to adjudge a conveyance fraudulent and void as against a lienor; that two causes of action are not improperly united in the complaint in this action; and that the orders appealed from should be affirmed, with costs.

LARREMORE, J., concurred.

Ordered accordingly.

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