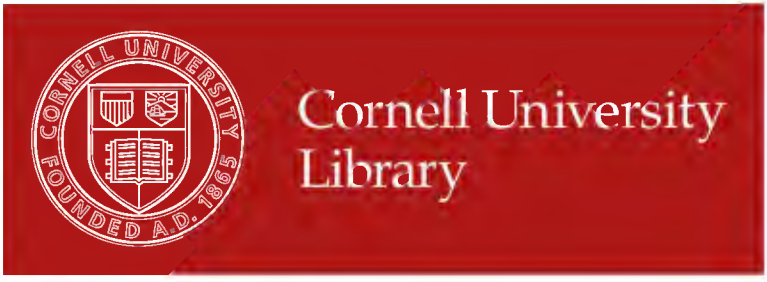

PROCEEDINGS

IN

THE SENATE

ON THE

INVESTIGATION OF THE CHARGES PREFERRED AGAINST

JOHN H. McCUNN,

A JUSTICE OF THE SUPERIOR COURT OF THE CITY OF NEW YORK,

IN PURSUANCE OF A MESSAGE FROM HIS EXCELLENCY THE GOVERNOR, TRANSMITTING THE CHARGES AND RECOMMENDING HIS REMOVAL.

ALBANY:
WEED, PARSONS AND COMPANY, PRINTERS.
1874.

JOURNAL OF THE SENATE.

STATE OF NEW YORK:

IN SENATE,
ALBANY, *May* 14, 1872.

The Senate met pursuant to a proclamation of his excellency the Governor, in the words following:

BY JOHN T. HOFFMAN, GOVERNOR.

Proclamation.

Pursuant to authority vested in me by the Constitution, I do hereby convene the Senate in extra session, at the Capitol, in the city of Albany, immediately after the adjournment *sine die* of the present session of the Legislature, for consideration of, and action upon, charges of misconduct, presented, and to be presented, against certain judicial officers, and for the transaction of such other business as I may find necessary to bring before it.

[L. S.] Done at the Capitol, at Albany this 14th day of May, in the year 1872.

JOHN T. HOFFMAN.

By the Governor.

JNO. D. VAN BUREN, *Private Secretary.*

In the absence of the Lieutenant-Governor, Hon. WILLIAM B. WOODIN, president, *pro tem.*, of the Senate, took the chair at 6:05 o'clock.

The CLERK called the roll, and the following senators answered to their names:

Messrs. Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Harrower, Lewis, Lowery, McGowan, Madden, Murphy, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin—22.

A message from the Governor was received and read as follows:

STATE OF NEW YORK:

EXECUTIVE CHAMBER,
ALBANY, *May* 14, 1872.

To the Senate:

The Assembly having sent to me the following resolution:

"*Resolved*, That the charges and testimony taken in connection therewith, reported to this House by the judiciary committee, be transmitted to his excellency the Governor, with the request on the part of this House that it be recommended to the Senate to take proceedings for the removal of said John H. McCunn from his office of justice of the Superior Court of the city of New York."

I respectfully transmit herewith printed copy of the charges and specifications so referred to me, alleging official misconduct on the part of the said John H. McCunn, and of the testimony taken by the judiciary committee of the Assembly in the case.

I recommend that you inquire into the truth and sufficiency of charges so made, and if the same shall be established, that the said John H. McCunn be then removed from office.

JOHN T. HOFFMAN.

IN SENATE, *May* 14, 1872.

Resolved, That the foregoing message be referred to the committee on judiciary.

Mr. J. WOOD, from the committee on the judiciary, presented the following report:

The judiciary committee, to whom was referred the message of his excellency the Governor, recommending the removal from office of John H. McCunn, one of the judges of the Superior Court of the city of New York, report that they recommend that the committee be empowered to cause to be served on the accused, personally, a copy of the charges made against him, transmitted by the Governor to the Senate, with a notification that the accused be required to appear before the committee, on a day to be named in the notification, and then and there to settle and agree upon the issues to be tried, and to receive and serve a written list of the witnesses to be examined, and to determine the time and manner in which the investigation shall proceed.

The committee, therefore, propose the following resolution:

Resolved, That the recommendations of the committee on the

judiciary be adopted, and that the committee be instructed to proceed accordingly.

JAMES WOOD,
Chairman.

A copy notification served on Justice John H. McCunn, pursuant to the recommendation of the judiciary committee:

To JOHN H. MCCUNN, *one of the Justices of the Superior Court of the City of New York.*

SIR—You will take notice that herewith is handed you a copy of the complaint and charges made against you, with the depositions on which the same are founded, and which are transmitted by his excellency, the Governor of this State, to the Senate, with the recommendation for your removal from the office of justice of the Superior Court of the city of New York, in the charges here sustained by proof before the Senate.

You will further take notice that, in pursuance of authority conferred by the Senate, you are required to appear before the judiciary committee of the Senate, on Wednesday, the 22d day of May, inst., at 7 o'clock, P. M., then and there to determine the manner in which the investigation of the charges made against you shall be prosecuted, and to settle and agree upon the issues to be tried, to secure and summon another lot of witnesses, and to determine the time and manner of which the investigation shall proceed.

JAMES WOOD,
Chairman Judiciary Committee of the Senate.

SENATE CHAMBER, *May* 15, 1872.

Mr. MURPHY moved that a committee of three be appointed to prepare and report to the Senate rules for its guidance in the pending proceedings.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

The PRESIDENT appointed as such committee, Messrs. Murphy, D. P. Wood and Robertson.

Mr. BENEDICT moved that when the Senate adjourn, it adjourn to meet on Wednesday next at 4 o'clock, P. M.

Mr. MURPHY moved to amend by substituting Wednesday next immediately after the adjournment of the court of impeachment.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

The PRESIDENT then put the question whether the Senate would agree to said motion as amended, and it was determined in the affirmative.

ALBANY, *May* 22, 1872.

The Senate met pursuant to adjournment.

On motion of Mr. BOWEN, the Senate adjourned until to-morrow, at 10 o'clock, A. M.

ALBANY, THURSDAY, *May* 23, 1872.

Senate met pursuant to adjournment.

The CLERK called the roll and the following members answered to their names:

Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lord, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Wagner, Weismann, Winslow, D. P. Wood, J. Wood — 26.

Mr. MURPHY, from committee on rules, reported the following:

To the Senate:

The committee on rules respectfully report the following for the consideration of the Senate:

RULES OF THE SENATE, WHILE SITTING AS A COURT ON THE TRIAL OF JUDGES RECOMMENDED FOR REMOVAL BY THE GOVERNOR.

I. The Senate shall, unless otherwise ordered, meet in the Senate chamber, daily, at 9 A. M., and continue in session until 2 P. M., at which hour a recess shall be had until 4 o'clock, P. M., when it shall meet again and continue in session until 7 o'clock, P. M., when it shall adjourn. But this rule may be changed by the Senate, without previous notice, at any time, and the Senate may take a recess or adjourn at a different hour.

II. At his first meeting, the charges against the accused and his answer thereto, as agreed to before the judiciary committee, shall be read by the Clerk. The accused shall be called, and if he appear, shall be assigned a place within the bar with such counsel as he shall select to aid him in his defense. The counsel for the prosecution shall also have a place assigned them within the bar.

III. The prosecution and the accused shall alike be entitled to the process of the Senate to compel the attendance of witnesses, signed by the Clerk and sealed with the seal of the Senate and tested in the name of the Lieutenant-Governor and the President of the Senate, and may be in the form following:

The People of the State of New York, by the grace of God free and independent:

To ——— ———,

Greeting:—You and each of you are hereby commanded and required that, laying aside all other business, you be and appear in your own proper persons, before our Senate, at the Senate chamber, in the Capitol, in the city of Albany, on the — day of ———, A. D. 187—, at —— o'clock, –. M. of that day, to be examined as witnesses and to testify the truth and give evidence in our behalf (or on behalf of the defendant hereinafter named) concerning certain charges then and there to be tried and determined before our Senate, of our said State, which have been made against ——— ———, judge ———, of ——— county, and upon which our Governor of our said State has recommended to our Senate aforesaid that the said ——— ——— be removed from his said office of ———. And hereof fail not at your peril.

Witness, Hon. ——— ———, Lieutenant-Governor of the State of New York, and the President of the Senate thereof, this —— day of ———, A. D. 187—.

Attest: ——— ———,
Clerk of the Senate.

And such subpœna may be served and returned in the manner usual in courts of record of this State.

IV. All motions made by senators or by the counsel for the prosecution, or for the accused, shall be addressed to the President of the Senate, and if he shall require they shall be reduced to writing and read at the desk of the Clerk; and the decision thereof and of all points and objection raised by the counsel, shall be had after a hearing of counsel, if they desire it, and by the vote of the Senate, which, when demanded by any senator, shall be taken by ayes and nays; and the motions, points or objections shall be entered upon the records of the Senate, together with the decision thereon. The decision thereof shall be had without debate, unless a senator shall desire debate, when on motion to that end, if it shall be adopted by the Senate, the chamber shall be cleared of all but privileged persons, and discussion shall be had in private; and the decision arrived at shall be publicly announced by the President of the Senate.

V. Each witness shall be, as he is called, sworn or affirmed by the Clerk, in substantially the following form:

You do solemnly swear (*or affirm*) that the evidence which you shall give upon this hearing upon certain charges preferred against ——— ———, and upon which his removal from that office has been recommended by the Governor, shall be the truth and nothing but the truth, so help you God. (*Or this you affirm.*)

All the rules legal and usual in courts of record of this State, in regard to the introduction of evidence and the examination and cross-examination of witnesses, must be observed.

VI. If a member of the Senate shall be called as a witness, he shall be sworn or affirmed and give his testimony standing in his place.

VII. The final vote of the Senate upon the charges preferred shall be taken by the President of the Senate, who, upon each one of the charges as it shall be separately read by the Clerk, shall, with its number, propose to each senator in the order in which his name stands upon the division list, the question: "Senator, how say you, is the first (*or second, or whatever*) item of the charges preferred against the accused proven?" Each senator, when so questioned, shall rise in his place and answer "Proven," or "Not proven;" and when the division list of the Senate shall have been gone through with upon each charge, the result upon each charge shall be announced and shall be entered upon the records of the Senate. If a majority shall agree on the finding "and proven" upon any one or more of the items of said charges, the President shall, in the same manner, put, and the senators shall, in the same manner, answer the further question: "Shall ——————— be removed from his office of ——————— for the cause stated in the item (*or items*) of the charges preferred against him which you have found proven?" And the final judgment of the Senate shall be certified to the Governor by the President and Clerk of the Senate.

VIII. The stenographer of the Senate, with such assistants as he shall deem necessary, shall take the oral testimony, and the President of the Senate shall procure the same to be printed for the use of the Senate and counsel, at the opening of the Senate on the day after any part of such printed report shall be brought in; any member of the Senate or either of the counsel may move to amend the same in any particular, to be then stated in writing. The stenographer and his assistants shall be first sworn faithfully to perform their duties as such.

IX. The Clerk shall keep a book of records of the proceedings,

orders and judgments of the Senate, and the ayes and nays upon every question in that way decided.

X. The President of the Senate shall direct all necessary preparations for the Senate chamber, and all forms of proceedings not provided for in these rules and not otherwise ordered.

Mr. MURPHY offered the following:

Resolved, That the following officers and employees of the Senate be and are hereby designated to attend this extra session of the Senate, viz.: The Clerk, assistant clerk and journal clerk, the sergeant-at-arms, the assistant sergeant-at-arms, the librarian, the President's messenger, the door-keeper, the Clerk's bank messenger and two pages, to be designated by the Clerk.

The PRESIDENT put the question whether the Senate would agree to said resolution, and it was determined in the affirmative.

Mr. D. P. WOOD moved that the Senate take a recess until 4 o'clock, P. M.

Mr. WINSLOW moved to amend by striking out "4 o'clock" and inserting "3 o'clock."

The PRESIDENT put the question whether the Senate would agree to said motion to amend, and it was determined in the negative.

The PRESIDENT then put the question whether the Senate would agree to the original motion, and it was determined in the affirmative.

FOUR O'CLOCK, P. M.

Court again met.

Present — Hon. ALLEN C. BEACH, President, and a quorum of members, as follows:

Messrs. Allen, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Johnson, McGowan, Murphy, Robertson, Wagner, Winslow, D. P. Wood, J. Wood — 16.

Mr. J. WOOD presented the following:

To the Senate:

The judiciary committee, to whom was referred the message of the Governor, recommending the removal from his office of John H. McCunn, one of the justices of the Superior Court of the city of New York, do report that they have been attended by said official in person and with his counsel; that a copy of the charges against the said official, transmitted by the Governor to the Senate, have been served on him and he has served and filed his answer thereto; that the said charges, with the evidence which accompanied

the same, are hereto attached; that the said John H. McCunn elects to be tried on the charges against him before the Senate rather than before its committee, and that the taking of the testimony and all other proceedings be had before the Senate. Your committee, therefore, submits the following resolution:

Resolved, That the committee on the judiciary be discharged from the further consideration of the matter, and that the same be submitted to the Senate for its action.

JAMES WOOD,

Dated *May* 23, 1872. *Chairman.*

The PRESIDENT put the question whether the Senate would agree to said report, and it was determined in the affirmative.

Mr. LEWIS moved that the Senate chamber be cleared, and the Senate go into private session for consultation.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

Mr. J. WOOD moved that when the Senate adjourn, it adjourn until the 18th day of June next, at 4 o'clock, P. M.

Mr. MADDEN moved to amend by striking out "18th day of June," and inserting "15th day of August."

The PRESIDENT put the question whether the Senate would agree to said amendment, and it was determined in the negative.

Mr. BOWEN moved to amend by substituting "the 16th day of September."

The PRESIDENT put the question whether the Senate would agree to said amendment, and it was determined in the negative.

The question on the original motion was then determined in the affirmative.

Mr. MURPHY moved that the matter of Judge McCunn be taken up at the session of the Senate to be held on the 18th day of June, at 4 o'clock, P. M., and that Judge McCunn, the counsel, and counsel for prosecution, be notified.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

The doors were then opened and the Senate adjourned until the 18th day of June next, at 4 o'clock, P. M.

ALBANY, TUESDAY, *June* 18, 1872.

Senate met pursuant to adjournment.

The CLERK called the roll, when the following Senators were found to be present:

Messrs. Adams, Allen, Baker, Benedict, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lowery, Murphy, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin — 24.

The CLERK announced the following appointment of pages for the extra session of the Senate: James O'Neil, Joseph McMahon.

Mr. J. WOOD moved to take from the table the report of the committee on rules, as follows:

RULES OF THE SENATE, WHILE SITTING AS A COURT ON THE TRIAL OF JUDGES RECOMMENDED FOR REMOVAL BY THE GOVERNOR.

I. The Senate shall, unless otherwise ordered, meet in the Senate chamber daily at 9 A. M., and continue in session until 2 P. M., at which hour a recess shall be had until 4 o'clock, P. M., when it shall meet again and continue in session until 7 o'clock, P. M., when it shall adjourn. But this rule may be changed by the Senate without previous notice at any time, and the Senate may take a recess or adjourn at a different hour.

II. At its first meeting, the charges against the accused and his answer thereto, as agreed to before the judiciary committee, shall be read by the Clerk. The accused shall be called, and if he appear, shall be assigned a place within the bar with such counsel as he shall select to aid him in his defense. The counsel for the prosecution shall also have a place assigned them within the bar.

III. The prosecution and the accused shall alike be entitled to the process of the Senate to compel the attendance of witnesses, signed by the Clerk and sealed with the seal of the Senate and tested in the name of the Lieutenant-Governor and the President of the Senate, and may be in the form following:

The People of the State of New York, by the grace of God free and independent:

To ————,

Greeting: — You and each of you are hereby commanded and required that, laying aside all other business, you be and appear in your own proper persons, before our Senate, at the Senate chamber, in the Capitol, in the city of Albany, on the — day of ———, A. D. 187—, at —— o'clock — M. of that day, to be examined as witnesses and testify to the truth and give evidence in our behalf (or on behalf of the defendant hereinafter named) concerning certain charges then and there to be tried and determined before our Senate of our said State, which have been made against ————, judge ——— of ——— county, and upon which our Governor of

our said State has recommended to our Senate aforesaid that the said ——— ——— be removed from his said office of ———. And hereof fail not at your peril.

Witness, Hon. ——— ———, Lieutenant-Governor of the State of New York, and the President of the Senate thereof, this —— day of ———, A. D. 187—.

Attest: ——— ———,
Clerk of the Senate.

And such subpœna may be served and returned in the manner usual in courts of record of this State.

IV. All motions made by senators or by the counsel for the prosecution, or for the accused, shall be addressed to the President of the Senate, and, if he shall require, they shall be reduced to writing and read at the desk of the Clerk; and the decision thereof and of all points and objection raised by the counsel shall be had after a hearing of counsel, if they desire it, and by the vote of the Senate, which, when demanded by any senator, shall be taken by ayes and nays; and the motions, points or objections shall be entered upon the records of the Senate, together with the decision thereon. The decision thereof shall be had without debate, unless a senator shall desire debate, when, on motion to that end, if it shall be adopted by the Senate, the chamber shall be cleared of all but privileged persons, and discussion shall be had in private; and the decision arrived at shall be publicly announced by the President of the Senate.

V. Each witness shall be, as he is called, sworn or affirmed by the Clerk, in substantially the following form:

"You do solemnly swear (*or affirm*) that the evidence which you shall give upon this hearing upon certain charges preferred against ——— ———, and upon which his removal from that office has been recommended by the Governor, shall be the truth and nothing but the truth, so help you God. (*Or this you affirm.*)"

All the rules legal and usual in courts of record of this State, in regard to the introduction of evidence and the examination and cross-examination of witnesses, must be observed.

VI. If a member of the Senate shall be called as a witness, he shall be sworn or affirmed and give his testimony standing in his place.

VII. The final vote of the Senate upon the charges preferred shall be taken by the President of the Senate, who, upon each one of the charges as it shall be separately read by the Clerk, shall, with

its number, propose to each senator in the order in which his name stands upon the division list, the question: "Senator, how say you, is the first (*or second, or whatever*) item of the charges preferred against the accused proven?" Each senator, when so questioned, shall rise in his place and answer "Proven," or "Not Proven;" and when the division list of the Senate shall have been gone through with upon each charge, the result upon each charge shall be announced and shall be entered upon the records of the Senate. If a majority shall agree upon the finding "and proven" upon any one or more of the items of said charges, the President shall, in the same manner, put, and the senators shall, in the same manner, answer the further question: "Shall ———— ———— be removed from his office of ———— for the cause stated in the item (*or items*) of the charges preferred against him which you have found proven?" And the final judgment of the Senate shall be certified to the Governor, by the President and Clerk of the Senate.

VIII. The stenographer of the Senate, with such assistants as he shall deem necessary, shall take the oral testimony, and the President of the Senate shall procure the same to be printed for the use of the Senate and counsel, at the opening of the Senate on the day after any part of such printed report shall be brought in; any member of the Senate or either of the counsel may move to amend the same in any particular, to be then stated in writing. The stenographer and his assistants shall be first sworn faithfully to perform their duties as such.

IX. The Clerk shall keep a book of records of the proceedings, orders and judgments of the Senate, and the ayes and nays upon every question in that way decided.

X. The President of the Senate shall direct all necessary preparations for the Senate chamber, and all forms of proceedings not provided for in these rules and not otherwise ordered.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

Mr. ADAMS moved to amend the same by striking out all after the words "Rules of the Senate," and insert the words "for the consideration of, and action upon, charges of misconduct presented and to be presented against certain judicial officers."

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

Mr. BENEDICT moved to amend by striking out the word

"accused" wherever it occurs in Rule second, and insert in lieu thereof the word "officer."

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the negative.

Mr. PALMER called for a division of the question, and moved that each rule be taken up and considered separately.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

The PRESIDENT put the question whether the Senate would agree upon the adoption of Rules 1, 2, 3, 4, 5 and 6, and it was determined in the affirmative.

The PRESIDENT stated the question to be upon the adoption of Rule 7, when

Mr. BENEDICT moved that the word "judgment" in the first line of Rule 7 be stricken out, and the word "vote" be inserted in lieu thereof.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

The PRESIDENT then put the question whether the Senate would agree to said motion, as amended, and it was determined in the affirmative.

The PRESIDENT then put the question whether the Senate would agree upon the adoption of Rules 7, 8, 9 and 10, and it was determined in the affirmative.

Mr. J. WOOD moved that the Senate now proceed to the consideration of the case of John H. McCunn.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

By direction of the President, the CLERK proceeded to read the charges against the said accused, as follows:

CHARGE FIRST.

That said John H. McCunn, at divers times between the 17th day of November, 1869, and the 1st day of July, 1870, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as a justice of said court, in an action then pending in said court, wherein Abraham B. Clark was plaintiff, and Abraham Binninger was defendant, in this: That said John H. McCunn continually, while said action was pending in said court of which he was a justice, acted as counsel of the plaintiff in said action, and in sundry actions growing out of it, wherein the

said plaintiff was plaintiff, and in relation to the matters therein involved, not being himself a party to the actions or to either of them. That he so acted as counsel in and about sundry and various motions then pending, or, with his advice, about to be brought before him as such justice aforesaid. That said John H. McCunn conspired with Daniel H. Hanrahan, James F. Morgan, and other persons unknown, to pervert and obstruct justice, and the due administration of the laws in regard to said action; and falsely to maintain said actions before mentioned, and thereby to deprive the parties thereto of their property without due process of law. That, in order to effect the object of said conspiracy, the said John H. McCunn, at his own private residence, a few minutes after midnight on the 18th and on the 19th day of November, 1869, illegally granted an *ex parte* order, in said action, whereby he summarily appointed said Hanrahan receiver of, and ordered him to sell the partnership property (amounting to many thousands of dollars in value) of said plaintiff and defendant, without requiring any security in any due or legal form, or in any sufficient amount from said Hanrahan, though well knowing him to be a man without pecuniary responsibility, of bad habits, and utterly unfit for such a trust. That said John H. McCunn thereafter gave written and verbal directions to certain deputy sheriffs of the city and county of New York, that they should take possession of said partnership property; and conspired with, instigated and procured them to do so, without any process or authority known to the laws of the State of New York, but falsely representing themselves to be acting therein as deputy sheriffs, under directions of the sheriff, and with process from said Superior Court. That said John H. McCunn, as said justice, thereafter, in said action, made an order allowing to the sheriff of the city and county of New York fees to a large amount, exceeding four thousand dollars, which said justices ordered should be paid to said sheriff by the receiver out of the said partnership property, no process ever having been issued to said sheriff in the action, and no legal or lawful services having ever been performed by him therein. That said John H. McCunn, in a proceeding in said action brought before himself, by his own advice and direction, wrongfully and illegally caused one John S. Beecher to be arrested and brought before him, said justice, and deprived of his liberty without any process whatever, and without any charge against said Beecher which would warrant said arrest. That said John H. McCunn, as said justice, in said action, when an order had been regularly, for good cause, and duly, made therein on the

30th March, 1870, by Hon. Samuel Jones, justice of said court (who was then holding the special term of said court, when an application for such an order should, according to the rules and practice of said court, be made), staying and enjoining the sale of said partnership property, illegally and corruptly granted an order, purporting to modify said order of Hon. Samuel Jones, justice, but really annulling and vacating it, and thereby directed said sale to proceed in disobedience of said order of injunction. That said John H. McCunn granted said last-mentioned order without notice to any of the parties to said action, without just cause, upon no other papers than those on which the order it vacated had been granted, and contrary to law. That, by another order granted in said action, said John H. McCunn enjoined and prevented John S. Beecher and Paul J. Armour, assignees in bankruptcy of said Clark and Binninger, duly appointed by the United States District Court for the southern district of New York, from performing their duties as such assignees, never having been served with summons or process in said action.

That all acts, orders and proceedings, and others in said action, were done, made and had by said John H. McCunn, as justice aforesaid, with the intent and effect to accomplish the objects of said conspiracy. And, in consequence thereof, said plaintiff and defendant and their just creditors suffered damage, and were wrongfully and illegally deprived of their property, to an amount exceeding $200,000.

CHARGE SECOND.

The said John H. McCunn, at divers times between the 17th day of January, 1870, and the 1st day of January, 1872, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as such justice, in this: That in an action pending in said court, wherein one Albert B. Corey was plaintiff, and Walter B. Long was defendant, the said John H. McCunn illegally, corruptly, and with the intent and effect of thereby enabling one James M. Gano, who was a brother-in-law of said justice, to make to himself large gains and profits, did, on the 18th day of January, 1870, conspire with said Gano and other persons unknown, to injure and defraud the defendant and others of their property and just rights by making and entering an *ex parte* summary order, falsely purporting to be an order of said Superior Court, appointing said James M. Gano receiver of all the partnership property (of many thousands of dollars in value) of

said Corey and Long, though no appointment of a receiver by said justice had been applied for, and though the only application in the action theretofore made to said justice was for a mere judge's order, returnable before the court, to show cause why a receiver should not, on the return day of the order, be appointed by the court after hearing the parties. That said justice so appointed said Gano such receiver without requiring any security to be given by him, though said justice well knew said Gano to be a man without pecuniary responsibility and unfit for such trust, and dependent upon said justice for support for himself and family. That the only bond even purporting to be given by said Gano, as such receiver, for the faithful performance of his duties, was executed by the obligors, and was approved by said justice before the said receiver was appointed, to wit, on the 17th day of January, 1870. That said John H. McCunn, as a justice as aforesaid, illegally, and without jurisdiction, granted orders for the payment of a fee to the counsel for the plaintiff in said action, and of other fees to persons unknown by said receiver, out of the fund in his custody, and such fees were thereupon so paid by such receiver to persons unknown. That all said acts of said justice were wrongful, illegal and corrupt, and were done with the intent and effect thereby to deprive the plaintiff and defendant in said action, and their creditors, of their property, without due process of law, contrary to the laws of the State of New York.

CHARGE THIRD.

That said John H. McCunn, at divers times between the 10th day of December, 1869, and the 1st day of January, 1871, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as justice aforesaid, in this: That, in an action pending in said court, wherein Anna M. Elliott was plaintiff, and Mary P. Butler was defendant, the said plaintiff, being then a tenant of said John H. McCunn, hiring from him the premises No. 54 West Twenty-fourth street, in the city of New York, sought to recover, by proceedings before said justice, the rent alleged to be due for said premises from the defendant Butler, as sub-tenant to the plaintiff Elliott. That, in and by the complaint in said action, it appeared that the said plaintiff was dependent on the rents to be received from the said defendant for said premises to make the payment of the rents due from the said plaintiff to said John H. McCunn, her superior landlord. That said John H. McCunn, being a justice as aforesaid, and being so interested in the

result of said action, well knowing all the facts of the case, made and entered, on the 10th day of December, 1869, an *ex parte* order, falsely purporting to be an order of the court, whereby he summarily appointed James M. Gano, who was a brother-in-law of said John H. McCunn, and the agent of said John H. McCunn, for the collection of the rents of said premises, receiver, to collect, receive and hold all money due or to become due from the boarders of said defendant, on said premises No. 54 West Twenty-fourth street. That said order was made and entered by said justice illegally, without jurisdiction, and with the corrupt intent, and with the effect thereby to enable said Gano to receive the moneys due to said defendant, and deprive said defendant of the same without due process of law, and to thereby secure the said moneys to the said John H. McCunn himself, through his said agent, and in pursuance of a conspiracy made and entered into by said John H. McCunn, said Gano and other persons unknown, to deprive said defendant of her property and illegally obtain possession of the same; in all of which said John H. McCunn thereby succeeded to his own personal profit and gain, and to the great injury of both the plaintiff and defendant.

CHARGE FOURTH.

That the said John H. McCunn, at divers times between the 20th day of February, 1870, and the 25th day of March, 1870, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as justice as aforesaid, in an action then pending in said court, wherein Edward W. Brandon was plaintiff, and Jerome Buck and William Butler Duncan and other members of the firm of Duncan, Sherman & Company, and others, were defendants, in this: That the said John H. McCunn, as a justice as aforesaid, in said action did, on or about the 21st day of February, 1870, make and enter an order falsely purporting to be an order of the court, summarily appointing Daniel H. Hanrahan receiver of a fund of $12,000, more or less, then in the hands of said Duncan, Sherman & Company, as bankers, on deposit. That by the papers on which said order was granted, it clearly appeared that there was no fund or property in the hands of said Duncan, Sherman & Company in which the plaintiff had any interest, legal or equitable. That said order was so made and entered gratuitously, not upon motion of the plaintiffs or of any of the defendants in said action, in opposition to the wishes of them all, and without notice to any of them. That, though the said justice then well knew said

Hanrahan to be a man without pecuniary responsibility and unfit for such trust, no legal or sufficient security was exacted from him for the faithful performance of his duties as such receiver. That said action was immediately and on or about the 23d day of February, 1870, discontinued, without costs, by an order of the court, duly entered, upon the consent of all the parties, and the said order appointing said receiver was thereupon vacated, and set aside by an order of the court, upon such consent. That, thereafter, on the 21st day of March, 1870, said John H. McCunn, as a justice as aforesaid, gratuitously and without notice to any of the parties in interest, and well knowing the premises, nevertheless made and entered a further order, falsely purporting to be an order of the court, summarily appointing one Joseph Meeks receiver in the same action, of the same money, and directing said firm of Duncan, Sherman & Company to pay said money to said receiver. That said orders were granted by said John H. McCunn corruptly, and without any jurisdiction or authority to grant them, and with the corrupt intent and with the effect thereby to wrongfully oppress and harass the members of said firm of Duncan, Sherman & Company and other defendants, and to put them to great and unnecessary expense, and to deprive them of their property without due process of law, contrary to the laws of the State of New York, and with the intent thereby to enable said receivers and their respective counsel to secure large gains and profits to themselves, illegally.

CHARGE FIFTH.

That said John H. McCunn, at divers times between the 20th day of June, 1869, and tho 1st day of January, 1872, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his said office, in an action pending in said Superior Court, wherein John O'Mahony was plaintiff and August Belmont and others were defendants, and in certain other actions connected therewith, in this: That said John H. McCunn, as a justice as aforesaid, wrongfully and illegally made and entered an order in said action, on the 16th day of July, 1869, whereby he appointed Thomas J. Barr receiver of certain moneys, amounting to $16,000, more or less, in gold coin of the United States, and ordered, directed and required the defendants, August Belmont and Ernst Lucke, to pay over to said receiver an amount, in current moneys, equivalent to said sum in gold. That it clearly appeared to said justice, by the papers then before him, that there

was no fund whatever in the hands of the defendants, or of either of them, to which the plaintiff had any claim. That said John H. McCunn, as said justice, on or about the 18th day of July, 1869, illegally ordered and compelled one of said defendants, said Ernst Lucke, to pay said sum of money to said receiver. That he so compelled said payment by threats of illegal imprisonment. That said justice so compelled such payment, well knowing that he had no power to issue any warrant or other process for the imprisonment of said Lucke in the premises. That said justice granted said order, appointing said receiver, of his own motion, and not on the motion of any party to the action, and against the wishes and express stipulations, in writing, of the respective counsel for both the plaintiff and the defendants, and with the corrupt intent and with the effect thereby to enable said Barr to make for himself large gains and profits thereby, and with the corrupt intent and with the effect to thereby deprive the said defendants of their property without due process of law. That the said John H. McCunn, as a justice as aforesaid, thereafter, with the corrupt intent and with the effect aforesaid, made and entered divers illegal orders in the premises, well knowing that they were illegal. That all such orders were so had and made in collusion and conspiracy with said receiver and other persons unknown, with the intent and effect to thereby wrongfully oppress and harass said defendants, Belmont and Lucke, and to put them to unnecessary expense, and to make illegal gains to said receiver and other persons, who had no claim whatever to the moneys to which said actions related.

CHARGE SIXTH.

That said John H. McCunn, in the months of July and August, 1869, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office of a justice of said court in an action then pending in said court, wherein Norbury Hicks was plaintiff and P. W. Bishop was defendant, in this: That he, the said John H. McCunn, on or about the 30th of July, 1869, did, in said action, grant an order directing and compelling the sheriff of the city and county of New York to arrest said defendant Hicks, and hold him to bail in the sum of $40,000. That it clearly appeared by the papers then before said justice, and on which said order of arrest was granted, that the plaintiff had no cause of action against the defendant. That thereafter a motion was made and heard before said John H. McCunn, as such justice, to vacate the said order of arrest, or reduce the

amount of said bail, upon affidavits and papers that showed conclusively that the court had no discretion to refuse the application on the merits. That said motion was denied by said justice, nevertheless. That said John H. McCunn granted said order of arrest, and denied said motion to vacate the same, corrnptly, and with the intent and effect thereby illegally and wrongfully to deprive the said defendant of his liberty; and fixed the amount of his bail to an excessive and exorbitant amount, with the wrongful and corrupt intent, and with the effect aforesaid, contrary to the Constitution and laws of the State of New York, and in pursuance of a conspiracy in the premises by said justice, entered into and carried out with said plaintiff and other persons unknown.

CHARGE SEVENTH.

That said John H. McCunn, on the 9th day of July, 1869, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as a justice as aforesaid, in this: That, in an action then pending in said court, wherein Edward Van Ness was plaintiff and Henry Leeds and others were defendants, an order had been made and entered by said court, upon consent of all the parties, referring the issues therein to Thomas H. Edsall, Esq., as sole referee to hear and determine, and the hearings before said referee had proceeded, all the parties had appeared before the referee, the plaintiff had rested his case and large expenses had been incurred therein. That, on a motion thereafter brought on before said justice by one of the defendants, for an order vacating and setting aside the said order of reference, and restoring the cause to the calendar, to be tried at a regular term of the court in due course, upon the grounds and allegations that the consent to the reference of said moving defendant was insufficient, and that the action was not, under the statute, referable without consent of all the parties, an order was made and entered by said justice, granting the motion on said grounds made, but arbitrarily and illegally referring the issues to William M. Tweed, Jr., as sole referee to hear and determine, and summarily appointing one Thomas J. Barr receiver of the fund and property concerning which the litigation had arisen. The said order, so made and entered by said justice, was not drawn or submitted by or for either of the parties to the action, or the attorney or counsel of either of them. That no reference to said Tweed, or to any person other than said Edsall, as referee, had ever been

applied for by either of the parties. That neither of the parties had applied for the appointment of a receiver of the fund and property in question, which were then in the hands of the firm of "Leeds & Miner," where all the parties desired, and had so expressed themselves, that it should remain, pending judgment in the action, and with regard to which firm it was not alleged or pretended that the fund and property were in any danger of injury, waste or loss while in their custody. That said order was so made and entered by said justice illegally, without jurisdiction, and with the corrupt intent, and with the effect, thereby to enable said Barr to receive and take possession of said fund and property to his own use, and to wrongfully oppress and harass the members of said firm of "Leeds & Miner," and said other parties to the action, put them to great and unnecessary expense, and deprive them of their property without due process of law, contrary to the laws of the State of New York, pursuant to a conspiracy between said justice and said Barr, Tweed, and others unknown, and with the intent and effect thereby to enable said Barr, receiver, and said Tweed, referee, and their respective counsel, to secure large gains and profits to themselves illegally, to the personal advantage of said justice.

CHARGE EIGHTH.

That the said John H. McCunn, a justice as aforesaid, by his said and manifold other wrongful and illegal and corrupt acts, has repeatedly oppressed and harassed citizens of the State of New York, and deprived them of their liberty and property without any or due process of law, but to his own personal gain and advantage, pecuniary and other, and has thereby brought the administration of justice into contempt, and caused deep-seated and general distrust and fear in regard to proceedings in the courts of this State.

The respondent, by his counsel, submitted the following as his answer thereto:

To the Honorable the Senate of the State of New York:

The respondent, John H. McCunn, for answer to the proceedings taken and charges made against him as a justice of the Superior Court of the city of New York, now pending before your honorable body, not waiving any right to him pertaining to object, by motion or otherwise, as he may be advised by counsel, or any or all of the proceedings upon which said charges are based, or to the regularity

of any or all proceedings in reference thereto had previous to the service of the same on him, or to the said charges, or either of them, as to their manner, form or sufficiency in law, says:

First. That he is one of the justices of the said Superior Court of the city of New York, and was duly elected to the said office at a general election held in and for the city and county of New York, in the month of November, 1869, for the term of six years, to commence on the 1st day of January, 1870; that on or about the 1st day of January, he duly took and filed the oath of office provided by law as such justice of said court; and that, on the said 1st day of January, 1870, he entered upon the duties of his said office as such justice, and has from thence hitherto continued to hold and occupy the said office and to perform the duties thereof.

Second. And the said respondent, further answering, claims and insists that this honorable body has no jurisdiction to hear, act upon or determine the charges, or any or either of them, preferred against him, or to remove the said John H. McCunn, or to advise his removal, from said office, for the reason that the Governor of the State of New York has not recommended his removal by the Senate, and no investigation whatever has been had by the Governor into the said charges preferred against this respondent, and no judicial determination has been arrived at by the Governor whereon he could base a recommendation that said respondent be removed.

Third. And the said respondent, in further answer to the said charges and each and every of them, while he does not admit any or either of the allegations therein contained, or waive, or intend to waive, his right to deny the same and each and every of them, says, that he insists that any, each, and all of the acts and matters in the said charges, and each of them alleged, if they shall be by proper and competent proof, in the judgment of your honorable body, shown to have occurred, or to have been committed by him, will be shown to have occurred before his election to the said office for the term for which he now holds the same, and before he took the oath of office as aforesaid, as such justice, and entered upon the performance of the duties of said office, for the said term, and he avers and insists that for the reasons aforesaid, your honorable body has no jurisdiction to try him upon the said charges or either of them, or to remove him or advise his removal from the said office, for, or on account of, or by reason of any, either or all of the acts and matters alleged and complained of in the said several charges, or any or either of them, and especially as to any and all acts and

charges alleged to have taken place prior to the said 1st day of January, 1870.

Fourth. And for a further and separate answer to the said charges, and each and every of them, the said respondent insists and avers that the said several matters therein alleged do not, nor does any or either of them, constitute an offense or cause for which this respondent is liable to removal, or for which your honorable body, under the Constitution of the State of New York, are empowered to remove him from the said office, or to advise his removal therefrom.

Fifth. And for a further and separate answer to the said charges, and each of them, this respondent says he denies each and every of the said charges, and each and every allegation in the said several charges contained.

JOHN H. McCUNN
H. R. SELDEN,
A. C. DAVIS,
N. C. MOAK,
JOHN E. DEVLIN,
DANIEL R. LYDDY,
Of Counsel.

The PRESIDENT directed the Clerk to call the name of the respondent, John H. McCunn, who appeared in person and by his counsel, A. C. Davis, N. C. Moak, Daniel R. Lyddy, W. S. Hevenor and James F. Morgan, Esquires.

The following counsel appeared on behalf of the prosecution: Messrs. Joshua M. Van Cott, John E. Parsons, Albert Stickney and Burton N. Harrison.

Mr. DAVIS, of counsel for the respondent, asked that time be granted the respondent to prepare for the hearing of the case, on account of the absence of Hon. H. R. Selden and John E. Devlin, of counsel for respondent.

Mr. D. P. WOOD moved that the request be not granted, and that the trial of Judge McCunn be proceeded with to-morrow morning at 10 o'clock.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

On motion of Mr. D. P. WOOD, the Senate adjourned until to-morrow morning at 10 o'clock.

ALBANY, WEDNESDAY, *June* 19, 1872.

Senate met pursuant to adjournment.

The CLERK called the roll, when the following senators were found to be present:

Messrs. Adams, Allen, Baker, Benedict, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lord, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin — 26.

Mr. D. P. Wood moved that the Senate do now proceed to the trial of the case of John H. McCunn.

Mr. Murphy moved to amend as follows: That the further consideration of the preliminary questions of jurisdiction in the case of Judge McCunn be deferred until next Tuesday, June 25.

The President put the question whether the Senate would agree to said amendment of Mr. Murphy, and it was determined in the negative.

Affirmative — Messrs. Dickinson, Johnson, Lewis, Lord, Murphy, J. Wood — 6.

Negative — Messrs. Adams, Allen, Baker, Benedict, Chatfield, Cock, Foster, Graham, Harrower, Lowery, McGowan, Madden, Palmer, Perry, Robertson, Wagner, Weismann, Winslow, D. P. Wood, Woodin — 20.

The President then put the question whether the Senate would agree to said motion of Mr. D. P. Wood, and it was determined in the affirmative.

Mr. D. P. Wood moved that the stenographer in attendance be sworn.

The President put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

Mr. J. Wood moved that Rule 8 be amended by striking out the words "any such printed report shall be brought in" and inserting the words "on the day after such testimony and proceeding shall have been had."

The President put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

The counsel for the respondent, John H. McCunn, then objected to any further proceedings by the Senate, and moved to dismiss the proceedings herein on the ground that no recommendation, by the Governor, for the removal of the respondent has been made, nor has the Governor acted upon or considered the question whether or not sufficient cause for the removal of the respondent existed. And the respondent, protesting that there is no truth in the alleged charges, respectfully objects to any further proceedings herein by the Senate.

Mr. Moak was heard in support of, and Mr. Van Cott in opposition to the motion.

The hour of 2 o'clock having arrived, the Senate took a recess until 4 o'clock P. M.

FOUR O'CLOCK, P. M.

The Senate again met.

Messrs. DAVIS and PECKHAM continued the argument in support of the motion of counsel for respondent.

The arguments having been concluded,

Mr. MADDEN moved that the chamber be cleared, for consultation.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

Mr. WOODIN offered the following:

Resolved, That the motion made by the counsel for the respondent be and the same is hereby denied.

The PRESIDENT put the question whether the Senate would agree to said resolution, and it was determined in the affirmative.

Affirmative — Adams, Allen, Baker, Benedict, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Weismann, Winslow, D. P. Wood, J. Wood, Woodin — 22.

Negative — Messrs. Johnson, Lewis — 2.

Mr. LEWIS moved that the following, as an additional rule of the Senate in the present proceedings, be adopted:

Rule 11. In the discussion of interlocutory motions and objections before the Senate, the party having the affirmative may be heard in person or by counsel, and the opposite party may then be heard either in person or by counsel, and then the party having the affirmative may, in like manner, be heard in reply; no other discussion shall be had, and not exceeding thirty minutes shall be occupied in any one address.

Mr. J. WOOD moved to refer said motion to the committee on rules.

The PRESIDENT put the question whether the Senate would agree to said motion of Mr. J. WOOD, and it was determined in the affirmative.

Mr. JOHNSON offered the following:

Resolved, That a committee of three be appointed to take the testimony in the case of charges against John H. McCunn.

On motion of Mr. PALMER, said resolution was laid upon the table.

The doors having been opened, the PRESIDENT announced that the motion of the counsel for the respondent was denied.

Mr. JOHNSON offered the following:

Resolved, That a committee of five be appointed to take the testimony in the case of charges against John H. McCunn, a judge of the Superior Court of the city and county of New York.

Resolved, That a copy of the testimony so taken be furnished each senator, so soon as the testimony is taken complete and printed.

Resolved, That the Senate meet at the Capitol to hear the argument of counsel, and determine and decide upon the charges so preferred, at such time as shall be determined by the Senate.

Mr. BENEDICT moved that the resolutions be laid upon the table.

The PRESIDENT put the question whether the Senate would agree to said motion to lay on the table, and it was determined in the affirmative.

On motion of Mr. J. WOOD, the Senate adjourned until to-morrow morning at 10 o'clock.

ALBANY, THURSDAY, *June* 20, 1872.

The Senate met pursuant to adjournment.

The CLERK called the roll, when the following senators were found to be present.

Messrs. Adams, Allen, Baker, Benedict, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lord, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin—27.

Mr. MURPHY, from the committee on rules, reported the following additional rule:

Rule 11. In the discussion of interlocutory motions and objections before the Senate, the party having the affirmative may be heard by one counsel; the opposite party may then be heard by one counsel, and the party having the affirmative may in like manner be heard in reply, and not exceeding twenty minutes shall be occupied by each, unless by permission of the Senate.

The PRESIDENT put the question whether the Senate would agree to said rule, and it was determined in the affirmative.

The counsel for the prosecution moved that Mr. Justice McCunn be now heard in his defense upon the recommendation of the Governor, and upon the charges and testimony by the Governor transmitted to the Senate with said recommendation.

Mr. JOHN E. PARSONS, of counsel for prosecution, was heard

in support of the motion, and Mr. MOAK, of counsel for the respondent, in opposition.

Mr. BENEDICT moved that the chamber be cleared for private consultation.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the negative.

Mr. PERRY renewed the motion to clear the chamber for consultation.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

Mr. D. P. WOOD offered the following:

WHEREAS, The Senate holding that it has the right and power to accept the evidence transmitted by the Governor, accompanying the charges in this case, as evidence before the Senate, and to act on the same subject to the right secured by the Constitution to the accused to be heard by counsel or by explanatory, rebutting or contradictory evidence to the fullest extent necessary to possess the Senate with all the information requisite and proper to secure a correct determination of the charges of it, to the end that nothing shall be done in the case that might in any way unnecessarily embarrass the accused in prosecuting his defense; therefore be it

Resolved, That the motion of the prosecution be and is hereby denied, and that the evidence in the case be taken or moved upon both sides by the Senate.

Mr. MURPHY moved to strike out the preamble, and amend the resolution so as to read as follows:

"*Resolved*, That the motion of the counsel for the prosecution be, and the same is hereby denied."

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

Affirmative—Messrs. Adams, Allen, Baker, Cock, Dickinson, Graham, Harrower, Johnson, Lewis, Lord, McGowan, Murphy, Palmer, Perry, Robertson, Tiemann, Weismann, Wood, Woodin—19.

Negative—Messrs. Benedict, Chatfield, Lowery, Madden, Wagner, Winslow, Wood—7.

The PRESIDENT put the question whether the Senate would agree to the resolution as amended, and it was determined in the affirmative.

The doors being opened, the PRESIDENT announced the foregoing result.

Mr. JOHNSON moved to take from the table the following resolutions:

Resolved, That a committee of five be appointed to take the testimony in the case of charges against John H. McCunn, a judge of the Superior Court of the city of New York.

Resolved, That a copy of the testimony so taken be furnished each senator, so soon as the testimony is taken complete and printed.

Resolved, That the Senate meet at the Capitol to hear the argument of counsel, and determine and decide upon the charges so preferred, at such time as shall be determined by the Senate.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the negative.

Mr. ALLEN offered the following:

Resolved, That all motions introduced by senators, or the counsel engaged, the subject-matter of which may give rise to debate, should be reduced to writing, and no argument shall be entered upon until such resolution or motion shall have been read by the Clerk and entered upon the journal.

The PRESIDENT put the question whether the Senate would agree to said resolution, and it was determined in the affirmative.

Mr. BENEDICT moved that the Senate do now proceed with the trial of John H. McCunn.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

Mr. HARRISON, of counsel, opened the case on the part of the prosecution;

Before the conclusion of which, the hour of 2 o'clock having arrived, the Senate took a recess until 4 o'clock P. M.

FOUR O'CLOCK, P. M.

Senate again met.

SPENCER C. ROGERS was sworn by the President as assistant stenographer.

Mr. HARRISON concluded his opening address in behalf of the prosecution.

Mr. BENEDICT moved that when the Senate adjourns to-day it adjourn to meet on Tuesday next, at 10 o'clock, A. M.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

Mr. MADDEN moved that the Senate hold an executive session at 6 o'clock and 45 minutes, P. M.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

Mr. D. P. WOOD offered the following:

Resolved, That the Comptroller of the State be requested to make provision for the payment of the necessary expenses attending the investigations, now pending before the Senate in extra session, in the cases of John H. McCunn, justice of the Superior Court of the city of New York; George M. Curtis, one of the justices of the Marine Court of the city of New York; and of Horace G. Prindle, county judge of Chenango county.

The PRESIDENT put the question whether the Senate would agree to said resolution, and it was determined in the affirmative.

Mr. PARSONS, of counsel for the prosecution, moved that the Senate make some provision for compelling the attendance of defaulting witnesses who have been duly subpœnaed.

Mr. J. WOOD offered the following:

Resolved, That on filing due proof of the service of a subpœna issued in this proceeding on the witnesses whose names have been called by the Clerk, and who did not respond and have not attended in pursuance of the mandate of such subpœna, an order be entered directing the issuing of an attachment against said witnesses, respectively, for contempt of the process of the Senate, and that an attachment be forthwith issued against said witnesses in the usual form of attachments against defaulting witnesses in courts of record of this State, as provided in the Revised Statutes, which attachments shall be returnable on Tuesday morning next, at 10 o'clock, A. M.

The PRESIDENT put the question whether the Senate would agree to said resolution, and it was determined in the affirmative.

THOS. E. BOESE was called and sworn for the prosecution.

Mr. DAVIS, of counsel for respondent, moved that the cross-examination of Mr. Boese be deferred until Tuesday next.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

On motion of Mr. ROBERTSON, the Senate went into executive session, and after some time spent therein the doors were opened, and the Senate adjourned.

ALBANY, TUESDAY, *June* 25, 1872.

The Senate met pursuant to adjournment.

The CLERK called the roll, when the following senators were found to be present:

Messrs. Baker, Benedict, Bowen, Cock, Dickinson, Graham, Harrower, Palmer, Perry, Robertson, Tiemann, D. P. Wood, J. Wood — 13.

No quorum being present,

On motion of Mr. D. P. Wood, the Senate took a recess until 4 o'clock, P. M.

FOUR O'CLOCK, P. M.

The Senate again met.

The CLERK called the roll, when the following senators were found to be present:

Messrs. Allen, Baker, Benedict, Bowen, Cock, Dickinson, Foster, Graham, Harrower, Lewis, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Tiemann, Wagner, D. P. Wood, J. Wood — 21.

Mr. D. P. WOOD offered the following:

Resolved, That the assistant postmaster be added to the list of officers of the Senate, heretofore designated to attend this extra session, to serve during such extra session as an additional assistant to the sergeant-at-arms.

The PRESIDENT put the question whether the Senate would agree to said resolution, and it was determined in the affirmative.

CHARLES G. TINSLEY was sworn as assistant stenographer.

THOMAS E. BOESE, witness for prosecution, cross-examined by respondent.

Witnesses sworn on the part of the prosecution: Melville B. Clark, Joel O. Stevens, Mansfield Compton.

The hour of 7 o'clock, P. M., having arrived,

Mr. D. P. WOOD moved that the session be extended indefinitely.

The PRESIDENT put the question whether the Senete would agree to said motion, and it was determined in the affirmative.

Examination of witnesses on the part of the prosecution continued.

Mr. TIEMANN moved that the Senate take a recess until 8 o'clock, P. M.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

EIGHT O'CLOCK, P. M.

The Senate again met.

Mr. D. P. WOOD offered the following:

Resolved, That the Comptroller be requested to pay, upon the

certificate of the presiding officer of the Senate, witnesses attending in the proceedings pending before the Senate upon charges against John H. McCunn, one of the justices of the Superior Court of the city of New York; George M. Curtis, one of the justices of the Marine Court of the city of New York, and Horace G. Prindle, county judge of the county of Chenango, the same fees and mileage as are allowed witnesses in courts of record.

The PRESIDENT put the question whether the Senate would agree to said resolution, and it was determined in the affirmative.

Mr. PERRY moved to reconsider the vote by which said resolution was passed.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

Mr. MADDEN moved to amend by striking out the words, "the same fees and mileage as are allowed witnesses in courts of record," and inserting in lieu thereof the words, "the sum of three dollars per day for each day's attendance, and five cents per mile for each mile traveled in going to and returning from the place of trial, on the most usual route."

The PRESIDENT put the question whether the Senate would agree to said amendment, and it was determined in the affirmative.

The PRESIDENT then put the question on the resolution as amended, and it was determined in the affirmative.

On motion of Mr. ALLEN, the Senate adjourned until to-morrow morning at 9 o'clock.

ALBANY, WEDNESDAY, *June* 26, 1872.

Senate met pursuant to adjournment.

The CLERK called the roll, when the following senators were found to be present:

Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Lewis, Lowery, McGowan, Madden, Murphy Palmer, Perry, Robertson, Tiemann, Wagner, D. P. Wood, J. Wood — 22.

Mr. D. P. WOOD moved that the Senate go into executive session for consultation.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

Mr. D. P. WOOD moved to reconsider the vote by which the following resolution was adopted, to wit:

Resolved, That the Comptroller be requested to pay, upon the certificate of the presiding officer of the Senate, witnesses attending on the proceedings pending before the Senate, upon charges against John H. McCunn, one of the justices of the Superior Court of the city of New York; George M. Curtis, one of the justices of the Marine Court of the city of New York, and Horace G. Prindle, county judge of the county of Chenango, the sum of three dollars per day for each day's attendance, and five cents per mile for each mile traveled going to and returning from the place of trial, on the most usual route.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

Mr. ALLEN moved to amend as follows: Strike out all after the word "Chenango," and insert the following: "the same fees and mileage as are allowed witnesses in courts of record."

The PRESIDENT put the question whether the Senate would agree to said motion to amend, and it was determined in the affirmative, as follows:

Affirmative — Messrs. Adams, Allen, Baker, Benedict, Chatfield, Cock, Dickinson, Foster, Graham, Lewis, Lowery, McGowan, Palmer, Perry, Robertson, Wagner, D. P. Wood — 17.

Negative — Messrs. Bowen, Madden, Murphy, Tiemann — 4.

The doors being opened, the PRESIDENT announced the foregoing result.

Mr. SELDEN, of counsel for respondent, moved that the letter of Mr. Hanrahan, produced in evidence, be stricken from the record.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the negative.

Witnesses sworn on behalf of the prosecution: George E. Hickey, Thos. E. Boese (recalled), George N. Titus, Francis N. Bangs, John S. Beecher, Abraham Binninger, Joseph A. Hoffmire.

Mr. MADDEN moved that when the Senate take a recess at 2 o'clock, it meet again for executive session at 3:45 o'clock, P. M.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

On motion of Mr. PERRY, the Senate took a recess until 4 o'clock, P. M.

FOUR O'CLOCK, P. M.

The Senate again met.

Witness sworn on behalf of the prosecution: James F. Morgan.

The PRESIDENT presented the following communication:

ALBANY, *June* 26, 1872.

To the Honorable the Senate of the State of New York:

I inclose you herewith a letter just placed in my hands by my counsel, who have been conducting, in my behalf, the investigation now going on before your honorable body. It is impossible for me to disregard the advice of these gentlemen, so distinguished at the bar for ability and integrity. I therefore feel it my duty to yield to the advice of my counsel, and leave it to your honorable body to take such action in the premises as you may deem advisable.

Very respectfully,

JOHN H. McCUNN.

ALBANY, *June* 26, 1872.

Hon. JOHN H. McCUNN:

Dear Sir. — The proceedings before the Senate of this State upon charges brought against you and communicated to it by the Governor, have reached a point where, as your counsel, we consider it our duty to make the following communications to you:

Before undertaking your defense we were entirely satisfied of your innocence of intentional wrong in the transactions on which were based the charges against you; and we have thus far seen nothing to induce a change of the opinion with which we entered upon the investigation.

Our examination of that part of the Constitution upon which the proceedings against you are assumed to be based, viz.: "All judicial officers, except those mentioned in this section (judges of the Court of Appeals, and justices of the Supreme Court), and except justices of the peace and judges and justices of inferior courts not of record, may be removed by the Senate on the recommendation of the Governor, if two-thirds of all the members elected to the Senate concur therein," has led to the conclusion, in which we are supported, as we believe, by the actions and opinions of two former Governors, acting under the same or similar constitutional provisions, that an unqualified recommendation by the Governor, of your removal was necessary to confer jurisdiction upon the Senate. This recommendation the Governor has not, in your case, made, and we are of opinion, therefore, that the proceedings before the Senate are not warranted by the Constitution.

The determination of the Senate to investigate charges for acts alleged to have been done by you prior to the time of your election, under which you now hold your office, involves of necessity a mere review of the propriety of your election by the people, a power which, we believe, is not conferred upon the Senate. If it can be done in one case it can be done in all cases of the election of officers coming within the provisions of the Constitution which we have quoted, without reference to the conduct of the officers after their election.

Notwithstanding these convictions we were willing to aid you as far as our assistance could be of service; and the Senate having determined that "all the rules, legal and usual in courts of record in this State, in regard to the introduction of evidence and the examination and cross-examination of witnesses," should be observed, we hoped not only that the investigation might lead the Senate to the conclusion that you ought not to be removed from office, but that nothing for which you were not properly and legally responsible would be admitted in evidence, to operate elsewhere than before the Senate to your prejudice. We beg leave, however, to state, without intending any reflection upon the Senate, or upon the gentlemen conducting the proceedings against you, that our views in regard to the admissibility of much of the evidence produced against you differ so widely from the ruling on the subject that we are disposed to question the propriety of our continuing longer in the position we have occupied, and to doubt whether our doing so would be of any essential service either in your defense, or in excluding from the record of the proceedings against you of what we deem irrelevant and improper evidence. We, therefore, with your approbation, are disposed (and we would advise you to that course) to leave it to the senators, unimpeded by you or by us in your behalf, to make such disposition of the charges against you as in their judgment or their power and duty shall seem just and right.

If their judgment should be against you, which we earnestly desire may not be the case, the jurisdictional question to which we have alluded will, as we believe, be open to review by another tribunal, if it should be your choice to present them there.

Very truly yours,

H. R. SELDEN.
JOHN E. DEVLIN.
A. C. DAVIS.
N. C. MOAK.
W. S. HEVENOR.
DANIEL R. LYDDY.

Mr. CHATFIELD moved that the hour of adjournment be indefinitely postponed.

Mr. PERRY moved, as an amendment, that the Senate adjourn until to-morrow morning at 9 o'clock.

Mr. PALMER moved, as an amendment to the amendment, that the Senate take a recess until 8 o'clock this evening.

Pending which questions, the hour of 7 o'clock having arrived, the Senate adjourned until to-morrow morning at 9 o'clock.

ALBANY, THURSDAY, *June* 27, 1872.

The Senate met pursuant to adjournment.

The CLERK called the roll, when the following members were found to be present:

Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Lewis, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, D. P. Wood, J. Wood—24.

The case of John H. McCunn was then proceeded with.

The following witnesses were sworn in behalf of the prosecution: George N. Bangs, Edward Van Ness, Joseph Larocque, James F. Morgan, James M. Gano, William Van Wyck, Lewis H. G. Erbhardt, Hiram E. Tallmadge.

Mr. PARSONS, of counsel, announced that the testimony on the part of the prosecution was closed.

Mr. STICKNEY ask leave to offer in evidence the following:

SUPREME COURT — OF THE CITY OF NEW YORK.

NORBURY HICKS, *Plaintiff*,
agst.
P. W. BISHOP, *Defendant*.

To the Sheriff of the City and County of New York:

It having been made to appear to me by affidavit, that Norbury Hicks, the plaintiff, has a sufficient cause of action against P. W. Bishop, the defendant, it being one of the class of cases mentioned in section 179 of the Code of Procedure, you are required forthwith to arrest P. H. Bishop, the defendant in this action, for the cause aforesaid, and hold him to bail in the sum of $40,000, and to

return this order of Charles L. Halberstadt, Esq., plaintiff's attorney, at his office, 202 Broadway, on the 29th day of August, 1869.

(Signed) J. H. McCUNN, *Justice.*

CHAS. L. HALBERSTADT, *Plaintiff's Attorney.*
Dated NEW YORK, *July* 3, 1869.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

Mr. PERRY moved to reconsider the vote.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

Mr. D. P. WOOD moved that the prosecution be allowed to furnish the original order and put it in evidence, or that the charge (6) be withdrawn.

Mr. ALLEN submitted as an amendment, that the evidence read in reference to the order be stricken out.

The PRESIDENT put the question whether the Senate would agree to said motion of Mr. Allen, and it was determined in the affirmative.

Mr. D. P. WOOD moved that the chamber be cleared for private consultation.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

Mr. ALLEN moved that the counsel for the prosecution, if so desired by them, have liberty to briefly review the testimony taken bearing on the charges against Judge McCunn.

Mr. BENEDICT moved to amend by adding thereto, "and that the Senate proceed to vote upon the charges on Tuesday next."

Mr. BOWEN moved to lay the whole subject upon the table.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the negative.

The hour of 2 o'clock having arrived,

Mr. MADDEN moved that the session be extended indefinitely.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

The PRESIDENT put the question whether the Senate would agree to the amendment offered by Mr. Benedict, and it was determined in the affirmative.

The PRESIDENT then put the question whether the Senate would agree to the resolution of Mr Allen, as amended, and it was determined in the affirmative.

Mr. MADDEN moved that the Senate take a recess until 4 o'clock.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the negative.

Mr. ALLEN moved that when the Senate adjourn it adjourns to meet to-morrow morning at 9 o'clock.

The PRESIDENT put the question whether the Senate would agree to said motion and it was determined in the affirmative.

The doors were then opened, the result of the deliberations announced, and the Senate adjourned until to-morrow morning at 9 o'clock, A. M.

ALBANY, WEDNESDAY, *July* 2, 1872.

The Senate met pursuant to adjournment.

The CLERK called the roll, when the following senators were found to be present:

Messrs. Adams, Allen, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lord, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin—27.

Mr. PARSONS, of counsel in case of John H. McCunn, proceeded to sum up the case on the part of the prosecution; at the conclusion of which,

Mr. LEWIS moved that the chamber be cleared for private consultation.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was decided in the affirmative.

On motion of Mr. PERRY, the CLERK called the roll, when the following senators were found to be present:

Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lord, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin—28.

Mr. CHATFIELD moved that the roll be called and the question be taken upon the charges immediately after the opening of the doors.

Mr. ALLEN moved as an amendment that the vote upon the charges be taken in private session.

The PRESIDENT put the question whether the Senate would agree to said motion to amend, and it was determined in the negative.

Affirmative—Messrs. Allen, Foster, Graham, Harrower, Johnson, Lord, McGowan, Robertson, J. Wood, Woodin — 10.

Negative—Messrs. Adams, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Lewis, Lowery, Madden, Murphy, Palmer, Perry, Tiemann, Wagner, Weismann, Winslow, D. P. Wood—18.

The PRESIDENT then put the question on the original motion, and it was determined in the affirmative.

The doors were opened, and in pursuance of the seventh rule, the CLERK read the first charge preferred against the accused, as follows:

CHARGE FIRST.

That said John H. McCunn, at divers times between the 17th day of November, 1869, and the 1st day of July, 1870, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as a justice of said court, in an action then pending in said court, wherein Abraham B. Clarke was plaintiff, and Abraham Binninger was defendant, in this: That said John H. McCunn continually, while said action was pending in said court of which he was a justice, acted as counsel of the plaintiff in said action, and in sundry actions growing out of it, wherein the said plaintiff was plaintiff, and in relation to the matters therein involved, not being himself a party to the actions or to either of them. That he so acted as counsel in and about sundry and various motions then pending, or, with his advice, about to be brought before him as such justice aforesaid. That said John H. McCunn conspired with Daniel H. Hanrahan, James F. Morgan, and other persons unknown, to pervert and obstruct justice and the due administration of the laws in regard to said action; and falsely to maintain said actions before mentioned, and thereby to deprive the parties thereto of their property without due process of law. That, in order to effect the object of said conspiracy, the said John McCunn, at his own private residence, a few minutes after midnight on the 18th, and on the 19th day of November, 1869, illegally granted an *ex parte* order in said action, whereby he summarily appointed said Hanrahan receiver of, and ordered him to sell the partnership property (amounting to many thousands of dollars in value) of said plaintiff and defendant, without requiring any security in any due or legal form, or in any sufficient amount from said Hanrahan, though well knowing him to be a man without pecuniary responsibility, of bad habits, and utterly unfit for such a trust. That said John H. McCunn thereafter gave written and verbal directions to certain deputy sheriffs of the city and county of New York, that they should take possession of said partnership property; and conspired

with, instigated and procured them to do so, without any process or authority known to the laws of the State of New York, but falsely representing themselves to be acting therein as deputy sheriffs, under directions of the sheriff, and with process from said Superior Court. That said John H. McCunn, as said justice, thereafter, in said action, made an order allowing to the sheriff of the city and county of New York fees to a large amount, exceeding $4,000, which said justice ordered should be paid to said sheriff by the receiver out of the said partnership property, no process ever having been issued to said sheriff in the action, and no legal or lawful services having ever been performed by him therein. That said John H. McCunn, in a proceeding in said action brought before himself, by his own advice and direction, wrongfully and illegally caused one John S. Beecher to be arrested and brought before him, said justice, and deprived of his liberty, without any process whatever, and without any charge against said Beecher which would warrant said arrest. That said John H. McCunn, as said justice, in said action, when an order had been regularly, for good cause and duly made therein on the 30th March, 1870, by Hon. Samuel Jones, a justice of said court (who was then holding the special term of said court, where an application for such an order should, according to the rules and practices of said court, be made), staying and enjoining the sale of said partnership property, illegally and corruptly granted an order, purporting to modify said order of Hon. Samuel Jones, justice, but really annulling and vacating it, and thereby directed said sale to proceed in disobedience of said order of injunction. The said John H. McCunn granted said last-mentioned order without notice to any of the parties to said action, without just cause, upon no other papers than those on which the order it vacated had been granted, and contrary to law. That, by another order granted in said action, said John H. McCunn enjoined and prevented John S. Beecher and Paul J. Armour, assignees in bankruptcy of said Clark & Binninger, duly appointed by the United States District Court for the southern district of New York, from performing their duties as such assignees. That he granted such order without any authority and contrary to law, no facts being in evidence before him on which said order could be granted, and said assignees never having been served with summons or process in said action.

That all such acts, orders and proceedings, and others in said action, were done, made and had by said John H. McCunn, as jus-

tice aforesaid, with the intent and effect to accomplish the objects of said conspiracy. And, in consequence thereof, said plaintiff and defendant and their just creditors suffered damage, and were wrongfully and illegally deprived of their property, to an amount exceeding $200,000.

The PRESIDENT then proposed to each senator the question: "Senator, how say you; is the first item of the charges preferred against the accused proven?" with the following result:

Affirmative — Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin — 27.

Negative — None.

When the name of Mr. Lord was called, he asked to be excused from voting.

The PRESIDENT put the question on excusing Mr. Lord, and it was determined in the affirmative.

The CLERK then read the second charge preferred against the accused, as follows:

CHARGE SECOND.

That said John H. McCunn, at divers times between the 17th day of January, 1870, and the 1st day of January, 1872, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as such justice, in this: That in an action pending in said court, wherein one Albert B. Corey was plaintiff, and Walter B. Long was defendant, the said John H. McCunn illegally, corruptly, and with the intent and effect of thereby enabling one James M. Gano, who was a brother-in-law of said justice, to make to himself large gains and profits, did, on the 18th day of January, 1870, conspire with said Gano and other persons unknown, to injure and defraud the defendant and others of their property and just rights by making and entering an *ex parte* summary order, falsely purporting to be an order of the said Superior Court, appointing said James M. Gano receiver of all the partnership property (of many thousands of dollars in value) of said Corey and Long — though no appointment of a receiver by said justice had been applied for, and though the only application in the action theretofore made to said justice was for a mere judge's order, returnable before the court, to show cause why a receiver

should not, on the return day of the order, be appointed by the court after hearing the parties. That said justice so appointed said Gano such receiver without requiring any security to be given by him, though said justice well knew said Gano to be a man without pecuniary responsibility and unfit for such trust, and dependent upon said justice for support for himself and family. That the only bond ever purporting to be given by said Gano as such receiver for the faithful performance of his duties, was executed by the obligors, and was approved by said justice before the said receiver was appointed, to wit, on the 17th day of January, 1870. That said John H. McCunn, as a justice as aforesaid, illegally, and without jurisdiction, granted orders for the payment of a fee to the counsel for the plaintiff in said action, and of other fees to persons unknown by said receiver, out of the fund in his custody, and such fees were thereupon so paid by such receiver to persons unknown. That all said acts of said justice were wrongful, illegal and corrupt, and were done with the intent and effect thereby to deprive the plaintiff and defendant in said action, and their creditors, of their property, without due process of law, contrary to the laws of the State of New York.

The PRESIDENT then proposed to each senator the question: "Senator, how say you; is the second item of the charges preferred against the accused proven?" with the following result:

Affirmative — Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Tiemann, Wagner, Weissman, Winslow, D. P. Wood, J. Wood, Woodin — 27.

When the name of Mr. Lord was called he asked to be excused from voting.

The PRESIDENT put the question on excusing Mr. Lord, and it was determined in the affirmative.

The CLERK then read the third charge, as follows:

CHARGE THIRD.

That said John H. McCunn, at divers times between the 10th day of December, 1869, and the 1st day of January, 1871, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as justice as aforesaid, in this: That, in an action pending in said court, wherein Anna M. Elliot was plaintiff, and Mary P. Butler was defendant, the said

plaintiff, being then a tenant of said John H. McCunn, hiring from him the premises No. 54 West Twenty-fourth street, in the city of New York, sought to recover, by proceedings before said justice, the rent alleged to be due for said premises from the defendant Butler as sub-tenant to the plaintiff Elliott. That, in and by the complaint in said action, it appeared that the said plaintiff was dependent on the rents to be received from the said defendant for said premises to make the payment of the rents due from the said plaintiff to said John H. McCunn, her superior landlord. That said John H. McCunn, being a justice aforesaid, and being so interested in the result of said action, well knowing all the facts of the case, made and entered, on the 10th day of December, 1869, an *ex parte* order, falsely purporting to be an order of the court, whereby he summarily appointed James M. Gano, who was a brother-in-law of said John H. McCunn, and the agent of said John H. McCunn for the collection of the rents of said premises, receiver, to collect, receive and hold all money due or to become due from the boarders of said defendant, on said premises No. 54 West Twenty-fourth street. That said order was made and entered by said justice illegally, without jurisdiction and with the corrupt intent, and with the effect thereby to enable said Gano to receive the moneys due to said defendant, and deprive said defendant of the same without due process of law, and to thereby secure the said moneys to the said John H. McCunn himself, through his said agent, and in pursuance of a conspiracy made and entered into by said John H. McCunn, said Gano and other persons unknown, to deprive said defendant of her property and illegally obtain possession of the same; in all of which said John H. McCunn thereby succeeded, to his own personal profit and gain, and to the great injury of both the plaintiff and defendant.

The PRESIDENT then proposed to each senator the question: "Senator, how say you, is the third item of the charges preferred against the accused proven?" with the following result:

Affirmative — Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin — 27.

When the name of Mr. Lord was called, he asked to be excused from voting.

The PRESIDENT put the question on excusing Mr. Lord, and it was determined in the affirmative.

The CLERK then read the fourth charge, as follows:

CHARGE FOURTH.

That the said John H. McCunn, at divers times between the 20th day of February, 1870, and the 25th day of March, 1870, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as justice as aforesaid, in an action then pending in said court, wherein Edwin W. Brandon was plaintiff, and Jerome Buck and William Butler Duncan and other members of the firm of Duncan, Sherman & Company, and others, were defendants, in this: That the said John H. McCunn, as a justice as aforesaid, in said action did, on or about the 21st day of February, 1870, make and enter an order falsely purporting to be an order of the court, summarily appointing Daniel H. Hanrahan receiver of a fund of $12,000, more or less, then in the hands of said Duncan, Sherman & Company, as bankers, on deposit. That by the papers on which said order was granted, it clearly appeared that there was no fund or property in the hands of said Duncan, Sherman & Company in which the plaintiff had any interest, legal or equitable. That said order was so made and entered gratuitously, not upon motion of the plaintiff or of any of the defendants in said action, in opposition to the wishes of them all, and without notice to any of them. That, though the said justice then well knew said Hanrahan to be a man without pecuniary responsibility and unfit for such trust, no legal or sufficient security was exacted from him for the faithful performance of his duties as such receiver. That said action was immediately and on or about the 23d day of February, 1870, discontinued, without costs, by an order of the court, duly entered, upon the consent of all the parties, and the said order appointing said receiver was thereupon vacated and set aside by an order of the court, upon such consent. That thereafter, on the 21st day of March, 1870, said John H. McCunn, as a justice as aforesaid, gratuitously and without notice to any of the parties in interest, and well knowing the premises, nevertheless made and entered a further order, falsely purporting to be an order of the court, summarily appointing one Joseph Meeks receiver in the same action of the same money, and directing said firm of Duncan, Sherman & Company to pay said money to said receiver. That said orders were granted by said John H. McCunn corruptly and without any jurisdiction or authority to grant them, and with the corrupt intent and with the effect thereby to wrongfully oppress and harass the members of said firm of Duncan, Sherman

& Company and the other defendants, and to put them to great and unnecessary expense, and to deprive them of their property without due process of law, contrary to the laws of the State of New York, and with the intent thereby to enable said receivers and their respective counsel to secure large gains and profits to themselves illegally.

The PRESIDENT then proposed to each senator the question: "Senator, how say you, is the fourth item of the charges preferred against the accused proven?" with the following result:

Affirmative—Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin—27.

When the name of Mr. Lord was called, he asked to be excused from voting.

The PRESIDENT put the question on excusing Mr. Lord, and it was determined in the affirmative.

The CLERK then read the fifth charge.

CHARGE FIFTH.

The said John H. McCunn, at divers times between the 20th day of June, 1869, and the 1st day of January, 1872, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in said office, in an action pending in said Superior Court, wherein John O'Mahony was plaintiff, and August Belmont and others were defendants, and in certain other actions connected therewith, in this: That said John H. McCunn, as a justice as aforesaid, wrongfully and illegally made and entered an order in said action, on the 16th day of July, 1869, whereby he appointed Thomas J. Barr receiver of certain moneys, amounting to $16,000, more or less, in gold coin of the United States, and ordered, directed and required the defendants, August Belmont and Ernst Lucke, to pay over to said receiver an amount in current moneys, equivalent to said sum in gold. That it clearly appeared to said justice, by the papers then before him, that there was no fund or property in the hands of either of the defendants, whereof a receiver could be lawfully appointed, and that there was no fund whatever in the hands of the defendants, or of either of them, to which the plaintiff had any claim. That said John H. McCunn, as said justice, on or about the 18th day of July, 1869, illegally ordered and compelled one of the said defendants, Ernst Lucke, to

pay said sum of money to said receiver. That he so compelled said payment by threats of illegal imprisonment. That said justice so compelled such payment, knowing that he had no power to issue any warrant or other process for the imprisonment of said Lucke in the premises. That said justice granted said order, appointing said receiver, of his own motion, and not on the motion of any party to the action, and against the wishes and express stipulations, in writing, of the respective counsel for both the plaintiff and the defendants, and with the corrupt intent, and with the effect thereby to enable said Barr to make for himself large gains and profits thereby, and with the corrupt intent, and with the effect to thereby deprive the said defendants of their property without due process of law. That the said John H. McCunn, as a justice as aforesaid, thereafter with the corrupt intent, and with the effect aforesaid, made and entered divers illegal orders in the premises, well knowing that they were illegal. That all such orders and proceedings were so had and made in collusion and conspiracy with said receiver and other persons unknown, with the intent and effect to thereby wrongfully oppress and harass said defendants, Belmont and Lucke, and to put them to unnecessary expense, and to make illegal gains to said receiver and other persons, who had no claim whatever to the moneys to which said actions related.

The PRESIDENT then proposed to each senator the question: "Senator, how say you, is the fifth item of the charges preferred against the accused proven?" with the following result:

Affirmative — Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin — 27.

When the name of Mr. Lord was called, he asked to be excused from voting.

The PRESIDENT put the question on excusing Mr. Lord, and it was determined in the affirmative.

The CLERK then read the sixth charge, as follows:

CHARGE SIXTH.

That said John H. McCunn, in the months of July and August, 1869, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office of a justice of said court, in an action then pending in said court

wherein Northbury Hicks was plaintiff and P. W. Bishop was defendant, in this: That he, the said John H. McCunn, on or about the 30th of July, 1869, did, in said action, grant an order directing and compelling the sheriff of the city and county of New York to arrest said defendant Hicks, and hold him to bail in the sum of $40,000. That it clearly appeared by the papers then before said justice, and on which said order of arrest was granted, that the plaintiff had no cause of action against the defendant. That thereafter a motion was made and heard before said John H. McCunn, as such justice, to vacate the said order of arrest, or reduce the amount of said bail, upon affidavits and papers that showed conclusively that the court had no discretion to refuse the application on the merits. That said motion was denied by said justice, nevertheless. That said John H. McCunn granted said order of arrest, and denied said motion to vacate the same, corruptly, and with the intent and effect thereby illegally and wrongfully to deprive the said defendant of his liberty; and fixed the amount of his bail at an excessive and exorbitant amount, with the wrongful and corrupt intent, and with the effect aforesaid, contrary to the Constitution and laws of the State of New York, and in pursuance of a conspiracy in the premises by said justice, entered into and carried out with said plaintiff and other persons unknown.

The PRESIDENT then proposed to each senator the question: "Senator, how say you, is the sixth item of the charges preferred against the accused proven?" with the following result:

Affirmative—Messrs. Benedict, Johnson, Madden, Tiemann—4.

Negative—Messrs. Adams, Allen, Baker, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Lewis, Lowery, McGowan, Murphy, Palmer, Perry, Robertson, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin—23.

When the name of Mr. Lord was called, he asked to be excused from voting.

The PRESIDENT put the question on excusing Mr. Lord, and it was determined in the affirmative.

The CLERK then read the seventh charge, as follows:

CHARGE SEVENTH.

That said John H. McCunn, on the 9th day of July, 1869, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as a justice as aforesaid, in this: That, in an action then pending in said court, wherein

Edward Van Ness was plaintiff and Henry Leeds and others were defendants, an order had been made and entered by said court, upon consent of all the parties, referring the issues therein to Thomas H. Edsall, Esq., as sole referee to hear and determine, and the hearings before said referee had proceeded, all the parties had appeared before the referee, the plaintiff had rested his case and large expenses had been incurred therein. That, on a motion thereafter brought on before said justice, by one of the defendants, for an order vacating and setting aside the said order of reference, and restoring the cause to the calendar, to be tried at a regular term of the court in due course, upon the grounds and allegations that the consent to the reference of said moving defendant was insufficient, and that the action was not, under the statute, referable without consent of all the parties, an order was made and entered by said justice, granting the motion on said grounds made, but arbitrarily and illegally referring the issues to William M. Tweed, Jr., as sole referee to hear and determine, and summarily appointed one Thomas J. Barr receiver of the fund and property concerning which the litigation had arisen. That said order, so made and entered by said justice, was not drawn or submitted by or for either of the parties to the action, or the attorney or counsel of either of them. That no reference to said Tweed, or to any person other than said Edsall, as referee, had ever been applied for by either of the parties. That neither of the parties had applied for the appointment of a receiver of the fund and property in question, which were then in the hands of the firm of "Leeds & Miner," where all the parties desired, and had so expressed themselves, that it should remain, pending judgment in the action, and with regard to which firm it was not alleged or pretended that the fund and property were in any danger of injury, waste or loss, while in their custody. That said order was so made and entered by said justice illegally, without jurisdiction, and with the corrupt intent, and with the effect, thereby to enable said Barr to receive and take possession of said fund and property to his own use, and to wrongfully oppress and harass the members of said firm of "Leeds & Miner," and said other parties to the action, put them to great and unnecessary expense, and deprive them of their property without due process of law, contrary to the laws of the State of New York, pursuant to a conspiracy between said justice and said Barr, Tweed and others unknown, and with the intent and effect thereby to enable said Barr, receiver, and said Tweed, referee, and their respective counsel, to

secure large gains and profits to themselves illegally, to the personal advantage of said justice.

The PRESIDENT then proposed to each senator the question, "Senator, how say you, is the seventh item of the charges preferred against the accused proven?" with the following result:

Affirmative—Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin — 27.

When the name of Mr. Lord was called, he asked to be excused from voting.

The PRESIDENT put the question on excusing Mr. Lord, and it was determined in the affirmative.

The CLERK then read the eighth charge, as follows:

CHARGE EIGHTH.

That the said John H. McCunn, a justice as aforesaid, by his said and manifold other wrongful and illegal and corrupt acts, has repeatedly oppressed and harassed citizens of the State of New York, and deprived them of their liberty and property without any or due process of law, but to his own personal gain and advantage, pecuniary and other, and has thereby brought the administration of justice into contempt, and caused deep-seated and general distrust and fear in regard to proceedings in the courts of this State.

The PRESIDENT then proposed to each senator the question: "Senator, how say you, is the eighth item of the charge preferred against the accused proven?" with the following result:

Affirmative—Messrs. Adams, Allen, Baker, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lowery, McGowan, Madden, Murphy, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin—24.

Negative—Messrs. Benedict, Bowen, Palmer—3.

When the name of Mr. Lord was called, he asked to be excused from voting.

The PRESIDENT put the question on excusing Mr. Lord, and it was determined in the affirmative.

The PRESIDENT then put the question: "Shall John H. McCunn be removed from his office of justice of the Superior Court of the city of New York, for the cause stated in the charges preferred against him, which you have found proven?" which each senator as

his name was called by the Clerk, rose in his place and responded as follows:

Affirmative—Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lord, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin—28.

STATE OF NEW YORK.

IN SENATE,

May 14, 1872.

PROCEEDINGS

ON THE HEARING OF THE DEFENSE OF JOHN H. McCUNN, A JUSTICE OF THE SUPERIOR COURT OF THE CITY OF NEW YORK, TO CHARGES SUBMITTED TO THE SENATE BY THE GOVERNOR, WITH A RECOMMENDATION FOR THE REMOVAL FROM OFFICE OF THE SAID JUSTICE OF THE SUPERIOR COURT OF THE CITY OF NEW YORK.

SENATE CHAMBER,
ALBANY, *May* 14, 1872.

The Senate convened at (6) six o'clock, P. M., the Hon. William B. Woodin, President *pro tem.* of the Senate, in the chair.

The CLERK, Charles R. Dayton, Esq., proceeded to read the proclamation of his excellency the Governor, under which the Senate had convened, in words as follows:

Proclamation.

Pursuant to authority vested in me by the Constitution, I do hereby convene the Senate in extra session, at the Capitol, in the city of Albany, immediately after the adjournment *sine die* of the present session of the Legislature, for consideration of and action upon charges of misconduct, presented and to be presented against certain judicial officers, and for the transaction of such other business as I may find necessary to bring before it.

[L. S.] Done at the Capitol, at Albany, this 14th day of May, in the year 1872.

JOHN T. HOFFMAN.

By the Governor.

JNO. D. VAN BUREN, *Private Secretary.*

The CLERK called the roll, and the following senators answered to their names:

Messrs. Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Harrower, Lewis, Lowery, McGowan, Madden, Murphy, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, Woodin — 22.

The PRESIDENT announced a quorum present.

A message from the Governor was received and read, as follows:

STATE OF NEW YORK, EXECUTIVE CHAMBER,
ALBANY, *May* 14, 1872.

To the Senate:

The Assembly having sent to me the following resolution:

"*Resolved*, That the charges and testimony taken in connection therewith, reported to this House by the judiciary committee, be transmitted to his excellency the Governor, with the request on the part of this House that it be recommended to the Senate to take proceedings for the removal of said John H. McCunn from his office of justice of the Superior Court of the city of New York."

I respectfully transmit herewith printed copy of the charges and specifications so referred to me, alleging official misconduct on the part of the said John H. McCunn, and of the testimony taken by the judiciary committee of the Assembly in the case.

I recommend that you inquire into the truth and sufficiency of charges so made, and if the same shall be established, that the said John H. McCunn be then removed from office.

JOHN T. HOFFMAN.

Mr. J. WOOD moved that the message be referred to the committee of the judiciary.

The PRESIDENT put the question and it was decided in the affirmative.

Mr. J. WOOD, from the committee on the judiciary, presented the following report:

The judiciary committee, to whom was referred the message of his excellency the Governor, recommending the removal from office of John H. McCunn, one of the judges of the Superior Court of the city of New York, report:

That they recommend that the committee be empowered to cause to be served on the accused, personally, a copy of the charges made against him, transmitted by the Governor to the Senate, with a notification that the accused be required to appear before the committee, on a day to be named in the notification, and then and there to

settle and agree upon the issues to be tried, and to receive and serve a written list of the witnesses to be examined, and to determine the time and manner in which the investigation shall proceed.

The committee, therefore, propose the following resolution:

Resolved, That the recommendations of the committee on the judiciary be adopted, and that the committee be instructed to proceed accordingly.

JAMES WOOD, *Chairman.*

Mr. MURPHY moved that a committee of three be appointed to prepare and report to the Senate rules for its guidance in the pending proceedings.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

The PRESIDENT appointed as such committee, Messrs. Murphy, D. P. Wood and Robertson.

Mr. BENEDICT moved that when the Senate adjourn, it adjourn to meet on Wednesday next at 4 P. M.

Mr. MURPHY moved to amend by substituting Wednesday next, immediately after the adjournment of the court of impeachment.

The PRESIDENT put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

The PRESIDENT then put the question whether the Senate would agree to said motion as amended, and it was determined in the affirmative.

ALBANY, *May* 22, 1872.

The Senate met pursuant to adjournment.

On motion of Mr. BOWEN, the Senate adjourned until to-morrow at 10 o'clock, A. M.

ALBANY, THURSDAY, *May* 23, 1872.

Senate met pursuant to adjournment.

The CLERK called the roll, and the following members answered to their names:

Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lord,

Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Wagner, Weismann, Winslow, D. P. Wood, J. Wood — 26.

Mr. MURPHY, from committee on rules, reported the following:

To the Senate:

The committee on rules respectfully report the following for the consideration of the Senate:

RULES OF THE SENATE, WHILE SITTING AS A COURT ON THE TRIAL OF JUDGES, RECOMMENDED FOR REMOVAL BY THE GOVERNOR.

I. The Senate shall, unless otherwise ordered, meet in the Senate chamber daily at 9 A. M., and continue in session until 2 P. M., at which hour a recess shall be had until 4 o'clock, P. M., when it shall meet again and continue in session until 7 o'clock, P. M., when it shall adjourn. But this rule may be changed by the Senate, without previous notice, at any time, and the Senate may take a recess or adjourn at a different hour.

II. At its first meeting, the charges against the accused and his answer thereto, as agreed to before the judiciary committee, shall be read by the Clerk. The accused shall be called, and if he appear, shall be assigned a place within the bar with such counsel as he shall select to aid him in his defense. The counsel for the prosecution shall also have a place assigned them within the bar.

III. The prosecution and the accused shall alike be entitled to the process of the Senate to compel the attendance of witnesses, signed by the Clerk and sealed with the seal of the Senate and tested in the name of the Lieutenant-Governor and the President of the Senate, and may be in the form following:

The People of the State of New York, by the grace of God free and independent:

To ——— ———,

Greeting: — You and each of you are hereby commanded and required that, laying aside all other business, you be and appear in your own proper persons, before our Senate, at the Senate chamber, in the Capitol, in the city of Albany, on the — day of ———, A. D. 187—, at —— o'clock, – M. of that day, to be examined as witnesses and to testify the truth and give evidence in our behalf (or on behalf of the defendant hereinafter named) concerning certain charges then and there to be tried and determined before our Senate, of our said State, which have been made against ——— ———, judge ——— of ——— county, and upon which our Gov-

ernor of our said State has recommended to our Senate aforesaid that the said ——— ——— be removed from his said office of ———. And hereof fail not at your peril.

Witness, Hon. ——— ———, Lieutenant-Governor of the State of New York, and the President of the Senate thereof, this —— day of ———, A.D. 187—.

Attest: ——— ———,

Clerk of the Senate.

And such subpœna may be served and returned in the manner usual in courts of record of this State.

IV. All motions made by senators or by the counsel for the prosecution, or for the accused, shall be addressed to the president of the Senate, and if he shall require they shall be reduced to writing and read at the desk of the Clerk; and the decision thereof and of all points and objections raised by the counsel, shall be had after a hearing of counsel, if they desire it, and by the vote of the Senate, which, when demanded by any senator, shall be taken by ayes and nays; and the motions, points or objections shall be entered upon the records of the Senate, together with the decision thereon. The decision thereof shall be had without debate, unless a senator shall desire debate, when on motion to that end, if it shall be adopted by the Senate, the chamber shall be cleared of all but privileged persons, and discussion shall be had in private; and the decision arrived at shall be publicly announced by the President of the Senate.

V. Each witness shall be, as he is called, sworn or affirmed by the Clerk, in substantially the following form:

You do solemnly swear (*or affirm*) that the evidence which you shall give upon this hearing upon certain charges preferred against ——— ———, and upon which his removal from that office has been recommended by the Governor, shall be the truth and nothing but the truth, so help you God. (*Or this you affirm.*)

All the rules legal and usual in courts of record of this State, in regard to the introduction of evidence and the examination and cross-examination of witnesses, must be observed.

VI. If a member of the Senate shall be called as a witness he shall be sworn or affirmed and give his testimony standing in his place.

VII. The final vote of the Senate upon the charges preferred shall be taken by the President of the Senate, who, upon each one of the charges as it shall be separately read by the Clerk, shall, with its number, propose to each senator, in the order in which his name stands upon the division list, the question: "Senator, how say you,

is the first (*or second, or whatever*) item of the charges preferred against the accused proven?" Each senator, when so questioned, shall rise in his place and answer "Proven," or "Not proven;" and when the division list of the Senate shall have been gone through with upon each charge, the result upon each charge shall be announced and shall be entered upon the records of the Senate. If a majority shall agree on the finding "and proven" upon any one or more of the items of said charges, the President shall, in the same manner, put, and the senators shall, in the same manner, answer the further question: "Shall ———————— be removed from his office of ———————— for the cause stated in the item (*or items*) of the charges preferred against him which you have found proven?" And the final judgment of the Senate shall be certified to the Governor by the President and Clerk of the Senate.

VIII. The stenographer of the Senate, with such assistants as he shall deem necessary, shall take the oral testimony, and the President of the Senate shall procure the same to be printed for the use of the Senate and counsel, at the opening of the Senate on the day after any part of such printed report shall be brought in; any member of the Senate or either of the counsel may move to amend the same in any particular, to be then stated in writing. The stenographer and his assistants shall be first sworn faithfully to perform their duties as such.

IX. The Clerk shall keep a book of records of the proceedings, orders and judgments of the Senate, and the ayes and nays upon every question in that way decided.

X. The President of the Senate shall direct all necessary preparations for the Senate chamber, and all forms of proceedings not provided for in these rules and not otherwise ordered.

Mr. J. Wood moved that the report of the committee on rules be laid on the table.

The President put the question and it was decided in the affirmative.

Mr. Murphy offered the following:

Resolved, That the following officers and employees of the Senate be and are hereby designated to attend the extra session of the Senate, viz: The Clerk, assistant clerk, and journal clerk, the sergeant-at-arms, the assistant sergeant-at-arms, the librarian, the President's messenger, the door-keeper, the Clerk's bank messenger and two pages, to be designated by the Clerk.

The President put the question whether the Senate would agree to said resolution, and it was determined in the affirmative.

Mr. J. Wood presented the following:

To the Senate:

The judiciary committee, to whom was referred the message of the Governor recommending the removal from his office, of John H. McCunn, one of the justices of the Superior Court of the city of New York, do report that they have been attended by said official in person and with his counsel; that a copy of the charges against the said official, transmitted by the Governor to the Senate, have been served on him and he has served and filed his answer thereto; that the said charges, with the evidence which accompanied the same, are hereto attached: that the said John H. McCunn elects to be tried on the charges against him before the Senate rather than before its committee, and that the taking of the testimony, and all other proceedings, be had before the Senate. Your committee, therefore, submits the following resolution:

Resolved, That the committee on the judiciary be discharged from the further consideration of the matter, and that the same be submitted to the Senate for its action.

JAMES WOOD,
Chairman.

Dated *May* 23, 1872.

The President put the question whether the Senate would agree to said report, and it was determined in the affirmative.

Mr. Murphy moved that the matter of Judge McCunn be taken up at the session of the Senate to be held on the 18th day of June, at 4 o'clock, P. M., and that Judge McCunn, the counsel, and counsel for prosecution, be notified.

The President put the question whether the Senate would agree to said motion, and it was determined in the affirmative.

The doors were then opened and the Senate adjourned until the 18th day of June next, at 4 o'clock, P. M.

Albany, *June* 18, 1872.

Senate met pursuant to adjournment.

The Clerk called the roll, when the following senators were found to be present.

Messrs. Adams, Allen, Baker, Benedict, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lowery, Murphy, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin — 24.

The CLERK announced the following appointment of pages for the extra session of the Senate: James O'Neill, Joseph McMahon.

Mr. J. WOOD moved that the report of the committee on rules be taken from the table. (Agreed to.)

Mr. BENEDICT said: I move that the heading of the rules reading "rules of the Senate, while sitting as a court on the trial of judges, recommended for removal by the Governor," be amended by striking out all after the word "Senate," so that it shall simply read "rules of the Senate." I am quite clear that we do not sit as a court, but simply as the Senate. We are not judges now, although we are judges in the court of impeachment, but we are simply to investigate the charges presented, and vote upon their being substantiated by ayes and nays. We are simply the Senate, called together in special session by the Governor; and, as the Constitution says the person so charged shall be furnished with a copy of the charges and have an opportunity of being heard, we are to give him a hearing, and do that as the Senate.

Mr. J. WOODS—I will submit to the gentleman from the fifth (Mr. Benedict) whether this is not a trial, and whether the Governor has not submitted to us to try whether the complaints submitted to him are true. In the Smith case the witnesses were called and examined for the purpose of determining whether the charges were true, and that examination was a trial and not a hearing. A hearing is merely listening to the arguments of counsel as to whether the trial shall proceed, and not the examination of witnesses.

Mr. BENEDICT—I regard this question as one of very great importance to the parties, and my objection to the rules as they now stand is, they give to this thing the character of a criminal trial, which would be very unjust to the parties concerned. He is not brought before us as a criminal or to be tried, and it is not a trial in any sense. The Constitution says he shall have an opportunity of being heard, and this is the opportunity. Now, the mode of appearing is subject to the control of the Senate, and we may take the depositions and hear the whole case as the Senate may please, but it is an injustice to the party to call him the accused party to be put on trial, when the vote really is, whether he shall not turn out and give some one else his place. The moment you make it a crime, you do what has never been done before, and shut out a good many witnesses. The question for us to decide is, whether we shall remove him or not; and I protest against giving it the appearance of a trial, and saying whether he shall be acquitted or convicted. In a court of impeachment it will be different, because we there sit

as judges; and the Constitution says the accused shall either be acquitted or convicted. Again, if you do so in this case you do an injustice to the executive power, and the party brought before it. Instead of saying "accused," therefore, I would say "officer." Why should you not do so? I would also strike out the words "in his defense" in the second rule, as it is not a defense in a technical sense. Then you say "the prosecution should have a seat within the bar," but there is no prosecution at all. I would call him "officer charged," for it is somewhat of an assumption to call it a crime, as a man can be turned out of office without being charged with a crime.

Mr. ADAMS moved that the heading be amended so as to read "rules of the Senate for the consideration of certain charges against judicial officers, recommended for removal by the Governor."

Mr. J. WOOD — Mr. President: The Governor does not recommend his removal. He sent the case here for trial by examination of witnesses. He says substantially the sufficiency of those charges shall be tried by the Senate and not by the Governor. The final decision is to be made by you and not by me. In the "Smith case" I find the words there used, "tried by the Senate." We are to sit here as a court and examine and take testimony and adjudicate; that makes a court without reference to what name you call it. We are to adjudicate upon these charges, that is, if the Governor is correct in this case. This message, with the accompanying papers, was sent to the judiciary committee to recommend such action as they saw fit. In looking at the precedents we find the case of a county judge that had been before the Senate in the case of the county judge of Oneida county, and that was referred to the judiciary committee and that judiciary committee reported, as the judiciary committee of the present Senate reported, that they had no knowledge of any precendents or proceedings in such a case, it being, as the committee is advised, entirely novel. That report was adopted in 1866, and, under that, issues were settled, and he was tried before the Senate the same as he would if he had been impeached, except that the Assembly and the Court of Appeals took no part in it. When this matter was submitted to the judiciary committee they found this precedent, and they reported to the Senate that they recommended that the proceedings in the case of Judge Smith shall be the precedent in this case, and that report was unanimously adopted. In this case Judge Prindle was summoned before the committee for the purpose of settling the issues. He submitted his demurrer and that demurrer has been argued. In the action heretofore taken in the Senate, it seems to me we have established the

mode of proceeding, and that these rules are in substance a transcript of the rules adopted by the Senate in '66; if the Senate is to adopt some new method, the sooner we do it the better.

Mr. BENEDICT—Mr. President: Senators seem to have misapprehended my views in this matter, somewhat. I do not deny that it may be right and expedient that we should go on; I suppose we are to go on and hear witnesses in all these cases; hear what the party is to show by his witnesses, and witnesses may be called on the other side. The question now is, whether under our rules it is a fit thing to say that the party is the accused and that he has a trial; and what the learned senator from the thirtieth district (James Wood) says, in regard to the Governor, does not, it seems to me, affect the case at all. The Governor cannot confer any powers upon the Senate; he cannot make us a court; he has no more power over us than a king of England; it is the Constitution that says what we are, and what we are to do, instead of the Governor. The Governor issues his proclamation in the first place, and his message in regard to this matter is eminently fit and proper; he does not mean to say the judge shall have a trial, but he says it shall belong to the Senate, or not, to investigate.

Mr. J. WOOD — That is a trial, is it not?

Mr. BENEDICT — No, sir; you are to investigate charges, not to try the man. We will decide whether we will remove him or not; it is not the trial of the man at all; that is an entirely different thing from trying a man. Suppose you try him for a thing that he might be indicted for; can he set that up as a trial for defense? Certainly not. The Constitution never dreamed of such a thing as setting this up as a trial. An impeachment is a trial and the party cannot be tried again after impeachment, except for that clause that says that he may be tried again, and there is no such language in regard to this.

Mr. WOODIN—Mr. President: Suppose one of the charges or accusations made against the judge do amount to a misdemeanor; if the charges be sustained and he be removed, would he be liable for indictment for misdemeanor, if the statute has not run against him?

Mr. BENEDICT — I think he would; the reason that is so is, that this is not a trial; it is simply an investigation of the truth of the charges the Governor has sent up; the question submitted to us is, did he do such a thing? not is he guilty of such an offense; we do not punish him at all; removing a man from an office that he has no right to, as against the law and as against the public, is not a punishment; how many men are turned out of office every year at

Washington? We do not turn them out here as often as they do in Washington; they are turned out at Washington by the thousands every year. A great many of them have a hearing; a hearing before the President and before the Senate, just as these parties are entitled to a hearing here; I do not propose to change it, so far as the hearing is concerned, but to allow the parties to call the witnesses to prove or disprove the charges, but not to try the judge or any other man. It is not any part of our function; and no man who reads the Constitution, it seems to me, attentively or thoughtfully, believes that there is a trial of the judge here; I simply desire to modify the rules so that we shall not get into a way of conducting these things, that a subsequent Senate may disapprove of; I fully approve of the message of the Governor, and I think there is nothing in that that in the slightest degree militates against my view of the subject.

The rules were then adopted as follows:

RULES OF THE SENATE FOR THE CONSIDERATION OF AND ACTION UPON CHARGES OF MISCONDUCT PRESENTED, AND TO BE PRESENTED, AGAINST CERTAIN JUDICIAL OFFICERS.

I. The Senate shall, unless otherwise ordered, meet in the Senate chamber daily at 9 A. M., and continue in session until 2, P. M., at which hour a recess shall be had until 4 o'clock, P. M., when it shall meet again and continue in session until 7 o'clock P. M., when it shall adjourn. But this rule may be changed by the Senate, without previous notice, at any time, and the Senate may take a recess or adjourn at a different hour.

II. At its first meeting, the charges against the accused and his answer thereto, as agreed to before the judiciary committee, shall be read by the Clerk. The accused shall be called, and if he appear, shall be assigned a place within the bar with such counsel as he shall select to aid him in his defense. The counsel for the prosecution shall also have a place assigned them within the bar.

III. The prosecution and the accused shall alike be entitled to the process of the Senate to compel the attendance of witnesses, signed by the Clerk and sealed with the seal of the Senate, and tested in the name of the Lieutenant-Governor and the President of the Senate, and may be in the form following:

The People of the State of New York, by the grace of God, free and independent:

To ——— ———,

Greeting:—You and each of you are hereby commanded and required that, laying aside all other business, you be and appear in

your own proper persons, before our Senate, at the Senate Chamber, in the Capitol, in the city of Albany, on the — day of ———, A. D. 187—, at —— o'clock — M. of that day, to be examined as witnesses, and to testify the truth and give evidence in our behalf (or on behalf of the defendant hereinafter named) concerning certain charges then and there to be tried and determined before our Senate, of our said State, which have been made against ——— ———, judge ———, of ——— county, and upon which our Governor of our said State has recommended to our Senate aforesaid that the said —— ——— be removed from his said office of ———. And hereof fail not at your peril.

Witness, Hon. ——— ———, Lieutenant-Governor of the State of New York, and the President of the Senate thereof, this —— day of ———, A. D., 187—.

Attest. ——— ———,
Clerk of the Senate.

And such subpœna may be served and returned in the manner usual in courts of record of this State.

IV. All motions made by senators or by the counsel for the prosecution, or for the accused, shall be addressed to the President of the Senate, and, if he shall require, they shall be reduced to writing and read at the desk of the Clerk; and the decision thereof and of all points and objection raised by the counsel shall be had after a hearing of counsel, if they desire it, and by the vote of the Senate, which, when demanded by any senator, shall be taken by ayes and nays; and the motions, points or objections shall be entered upon the records of the Senate, together with the decision thereon. The decision thereof shall be had without debate, unless a senator shall desire debate, when, on motion to that end, if it shall be adopted by the Senate, the chamber shall be cleared of all but privileged persons, and discussion shall be had in private; and the decision arrived at shall be publicly announced by the President of the Senate.

V. Each witness shall be, as he is called, sworn or affirmed by the Clerk, in substantially the following form:

You do solemnly swear (*or affirm*) that the evidence which you shall give upon this hearing upon certain charges preferred against ——— ———, and upon which his removal from that office has been recommended by the Governor, shall be the truth and nothing but the truth, so help you God. (*Or this you affirm.*)

All the rules legal and usual in courts of record of this State, in

regard to the introduction of evidence and the examination and cross-examination of witnesses, must be observed.

VI. If a member of the Senate shall be called as a witness, he shall be sworn or affirmed and give his testimony standing in his place.

VII. The final vote of the Senate upon the charges preferred shall be taken by the President of the Senate, who, upon each one of the charges as it shall be separately read by the Clerk, shall, with its number, propose to each senator in the order in which his name stands upon the division list, the question: "Senator, how say you, is the first (*or second, or whatever*) item of the charges preferred against the accused proven?" Each senator, when so questioned, shall rise in his place and answer "Proven," or "Not Proven;" and when the division list of the Senate shall have been gone through with upon each charge, the result upon each charge shall be announced and shall be entered upon the records of the Senate. If a majority shall agree upon the finding "and proven" upon any one or more of the items of said charges, the President shall, in the same manner, put, and the senators shall, in the same manner, answer the further question: "Shall ———— ———— be removed from his office of ———— for the cause stated in the item (or items) of the charges preferred against him which you have found proven?" And the final judgment of the Senate shall be certified to the Governor, by the President and Clerk of the Senate.

VIII. The stenographer of the Senate, with such assistants as he shall deem necessary, shall take the oral testimony, and the President of the Senate shall procure the same to be printed for the use of the Senate and counsel, at the opening of the Senate on the day after any part of such printed report shall be brought in; any member of the Senate or either of the counsel may move to amend the same in any particular, to be then stated in writing. The stenographer and his assistants shall be first sworn faithfully to perform their duties as such.

IX. The Clerk shall keep a book of records of the proceedings, orders and judgments of the Senate, and the ayes and nays upon every question in that way decided.

X. The President of the Senate shall direct all necessary preparations for the Senate chamber, and all forms of proceedings not provided for in these rules and not otherwise ordered.

XI. In the discussion of interlocutory motions and objections before the Senate, the party having the affirmative may be heard by

one counsel, the opposite party may then be heard by one counsel, and the party having the affirmative may in like manner be heard in reply, and not exceeding twenty minutes shall be occupied by each unless by permission of the Senate.

The CLERK then read the charges against Judge McCunn as follows:

CHARGES OF MAL AND CORRUPT CONDUCT IN OFFICE AGAINST HONORABLE JOHN H. McCUNN, A JUSTICE OF THE SUPERIOR COURT OF THE CITY OF NEW YORK.

CHARGE FIRST.

That said John H. McCunn, at divers times between the 17th day of November, 1869, and the 1st day of July, 1870, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as a justice of said court, in an action then pending in said court, wherein Abraham B. Clarke was plaintiff, and Abraham Binninger was defendant, in this: That said John H. McCunn continually, while said action was pending in said court of which he was a justice, acted as counsel of the plaintiff in said action, and in sundry actions growing out of it, wherein the said plaintiff was plaintiff, and in relation to the matters therein involved, not being himself a party to the actions or to either of them. That he so acted as counsel in and about sundry and various motions then pending, or, with his advice, about to be brought before him as such justice aforesaid. That said John H. McCunn conspired with Daniel H. Hanrahan, James F. Morgan, and other persons unknown, to pervert and obstruct justice, and the due administration of the laws in regard to said action; and falsely to maintain said actions before mentioned, and thereby to deprive the parties thereto of their property without due process of law. That, in order to effect the object of said conspiracy, the said John H. McCunn, at his own private residence, a few minutes after midnight on the 18th and on the 19th day of November, 1869, illegally granted an *ex parte* order, in said action, whereby he summarily appointed said Hanrahan receiver of, and ordered him to sell the partnership property (amounting to many thousands of dollars in value) of said plaintiff and defendant, without requiring any security in any due or legal form, or in any sufficient amount from said Hanrahan, though well knowing him to be a man without pecuniary responsibility, of bad habits, and utterly unfit for such a trust. That said John H. McCunn thereafter gave written and verbal directions to certain deputy sheriffs of the city and county of New York, that they should

take possession of said partnership property; and conspired with, instigated and procured them to do so, without any process or authority known to the laws of the State of New York, but falsely representing themselves to be acting therein as deputy sheriffs, under directions of the sheriff, and with process from said Superior Court. That said John H. McCunn, as said justice, thereafter, in said action, made an order allowing to the sheriff of the city and county of New York fees to a large amount, exceeding four thousand dollars, which said justice ordered should be paid to said sheriff by the receiver out of the said partnership property, no process ever having been issued to said sheriff in the action, and no legal or lawful services having ever been performed by him therein. That said John H. McCunn, in a proceeding in said action brought before himself, by his own advice and direction, wrongfully and illegally caused one John S. Beecher to be arrested and brought before him, said justice, and deprived of his liberty without any process whatever, and without any charge against said Beecher which would warrant said arrest. That said John H. McCunn, as said justice, in said action, when an order had been regularly, for good cause, and duly, made therein on the 30th March, 1870, by Hon. Samuel Jones, a justice of said court (who was then holding the special term of said court, where an application for such an order should, according to the rules and practice of said court, be made), staying and enjoining the sale of said partnership property, illegally and corruptly granted an order, purporting to modify said order of Hon. Samuel Jones, justice, but really annulling and vacating it, and thereby directed said sale to proceed in disobedience of said order of injunction. That said John H. McCunn granted said last-mentioned order without notice to any of the parties to said action, without just cause, upon no other papers than those on which the order it vacated had been granted, and contrary to law. That, by another order granted in said action, said John H. McCunn enjoined and prevented John S. Beecher and Paul J. Armour, assignees in bankruptcy of said Clarke and Binninger, duly appointed by the United States District Court for the southern district of New York, from performing their duties as such assignees. That he granted such order without any authority and contrary to law, no facts being in evidence before him on which said order could be granted, and said assignees never having been served with summons or process in said action.

That all such acts,orders and proceedings, and others in said action, were done, made and had by said John H. McCunn, as justice aforesaid, with the intent and effect to accomplish the objects of said con-

spiracy. And, in consequence thereof, said plaintiff and defendant and their just creditors suffered damage, and were wrongfully and illegally deprived of their property, to an amount exceeding $200,000.

CHARGE SECOND.

That said John H. McCunn, at divers times between the 17th day of January, 1870, and the 1st day of January, 1872, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as such justice, in this: That in an action pending in said court, wherein one Albert B. Corey was plaintiff, and Walter B. Long was defendant, the said John H. McCunn illegally, corruptly, and with the intent and effect of thereby enabling one James M. Gano, who was a brother-in-law of said justice, to make to himself large gains and profits, did, on the 18th day of January, 1870, conspire with said Gano and other persons unknown, to injure and defraud the defendant and others of their property and just rights by making and entering an *ex parte* summary order, falsely purporting to be an order of the said Superior Court, appointing said James M. Gano receiver of all the partnership property (of many thousands of dollars in value) of said Corey and Long, though no appointment of a receiver by said justice had been applied for, and though the only application in the action theretofore made to said justice was for a mere judge's order, returnable before the court, to show cause why a receiver should not, on the return day of the order, be appointed by the court after hearing the parties. That said justice so appointed said Gano such receiver without requiring any security to be given by him, though said justice well knew said Gano to be a man without pecuniary responsibility and unfit for such trust, and dependent upon said justice for support for himself and family. That the only bond even purporting to be given by said Gano, as such receiver, for the faithful performance of his duties, was executed by the obligors, and was approved by said justice before the said receiver was appointed, to wit, on the 17th day of January, 1870. That said John H. McCunn, as a justice as aforesaid, illegally, and without jurisdiction, granted orders for the payment of a fee to the counsel for the plaintiff in said action, and of other fees to persons unknown by said receiver, out of the fund in his custody, and such fees were thereupon so paid by such receiver to persons unknown. That all said acts of said justice were wrongful, illegal and corrupt, and were done with the intent and effect thereby to deprive the plaintiff and

defendant in said action, and their creditors, of their property, without due process of law, contrary to the laws of the State of New York.

CHARGE THIRD.

That said John H. McCunn, at divers times between the 10th day of December, 1869, and the 1st day of January, 1871, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as justice as aforesaid, in this: That, in an action pending in said court, wherein Anna M. Elliott was plaintiff, and Mary P. Butler was defendant, the said plaintiff, being then a tenant of said John H. McCunn, hiring from him the premises No. 54 West Twenty-fourth street, in the city of New York, sought to recover, by proceedings before said justice, the rent alleged to be due for said premises from the defendant Butler, as sub-tenant to the plaintiff Elliott. That, in and by the complaint in said action, it appeared that the said plaintiff was dependent on the rents to be received from the said defendant for said premises to make the payment of the rents due from the said plaintiff to said John H. McCunn, her superior landlord. That said John H. McCunn, being a justice as aforesaid, and being so interested in the result of said action, well knowing all the facts of the case, made and entered, on the 10th day of December, 1869, an *ex parte* order, falsely purporting to be an order of the court, whereby he summarily appointed James M. Gano, who was a brother-in-law of said John H. McCunn, and the agent of said John H. McCunn, for the collection of the rents of said premises, receiver, to collect, receive and hold all money due or to become due from the boarders of said defendant, on said premises No. 54 West Twenty-fourth street. That said order was made and entered by said justice illegally, without jurisdiction, and with the corrupt intent, and with the effect thereby to enable said Gano to receive the moneys due to said defendant, and deprive said defendant of the same without due process of law, and to thereby secure the said moneys to the said John H. McCunn himself, through his said agent, and in pursuance of a conspiracy made and entered into by said John H. McCunn, said Gano and other persons unknown, to deprive said defendant of her property and illegally obtain possession of the same; in all of which said John H. McCunn thereby succeeded to his own personal profit and gain, and to the great injury of both the plaintiff and defendant.

CHARGE FOURTH.

That the said John H. McCunn, at divers times between the 20th day of February, 1870, and the 25th day of March, 1870, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as justice as aforesaid, in an action then pending in said court, wherein Edward W. Brandon was plaintiff, and Jerome Buck and William Butler Duncan and other members of the firm of Duncan, Sherman & Company, and others, were defendants, in this: That the said John H. McCunn, as a justice as aforesaid, in said action did, on or about the 21st day of February, 1870, make and enter an order falsely purporting to be an order of the court, summarily appointing Daniel H. Hanrahan receiver of a fund of $12,000, more or less, then in the hands of said Duncan, Sherman & Company, as bankers, on deposit. That, by the papers on which said order was granted, it clearly appeared that there was no fund or property in the hands of said Duncan, Sherman & Company in which the plaintiff had any interest, legal or equitable. That said order was so made and entered gratuitously, not upon motion of the plaintiff or of any of the defendants in said action, in opposition to the wishes of them all, and without notice to any of them. That, though the said justice then well knew said Hanrahan to be a man without pecuniary responsibility and unfit for such trust, no legal or sufficient security was exacted from him for the faithful performance of his duties as such receiver. That said action was immediately and on or about the 23d day of February, 1870, discontinued, without costs, by an order of the court, duly entered, upon the consent of all the parties, and the said order appointing said receiver was thereupon vacated, and set aside by an order of the court, upon such consent. That, thereafter, on the 21st day of March, 1870, said John H. McCunn, as a justice as aforesaid, gratuitously and without notice to any of the parties in interest, and well knowing the premises, nevertheless made and entered a further order, falsely purporting to be an order of the court, summarily appointing one Joseph Meeks receiver in the same action, of the same money, and directing said firm of Duncan, Sherman & Company to pay said money to said receiver. That said orders were granted by said John H. McCunn corruptly, and without any jurisdiction or authority to grant them, and with the corrupt intent and with the effect thereby to wrongfully oppress and harass the members of said firm of Duncan, Sherman & Company and the other defendants, and to put them to great and unnecessary

expense, and to deprive them of their property without due process of law, contrary to the laws of the State of New York, and with the intent thereby to enable said receivers and their respective counsel to secure large gains and profits to themselves, illegally.

CHARGE FIFTH.

That said John H. McCunn, at divers times between the 20th day of June, 1869, and the 1st day of January, 1872, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his said office, in an action pending in said Superior Court, wherein John O'Mahony was plaintiff and August Belmont and others were defendants, and in certain other actions connected therewith, in this: That said John H. McCunn, as a justice as aforesaid, wrongfully and illegally made and entered an order in said action, on the 16th day of July, 1869, whereby he appointed Thomas J. Barr receiver of certain moneys, amounting to $16,000, more or less, in gold coin of the United States, and ordered, directed and required the defendants, August Belmont and Ernest Lucke, to pay over to said receiver an amount, in current moneys, equivalent to said sum in gold. That it clearly appeared to said justice, by the papers then before him, that there was no fund or property in the hands of either of the defendants, whereof a receiver could be lawfully appointed, and there was no fund whatever in the hands of the defendants, or of either of them, to which the plaintiff had any claim. That said John H. McCunn, as said justice, on or about the 18th day of July, 1869, illegally ordered and compelled one of said defendants, said Ernest Lucke, to pay said sum of money to said receiver. That he so compelled said payment by threats of illegal imprisonment. That said justice so compelled such payment, well knowing that he had no power to issue any warrant or other process for the imprisonment of said Lucke in the premises. That said justice granted said order, appointing said receiver, of his own motion, and not on the motion of any party to the action, and against the wishes and express stipulations, in writing, of the respective counsel for both the plaintiff and the defendants, and with the corrupt intent and with the effect thereby to enable said Barr to make for himself large gains and profits thereby, and with the corrupt intent and with the effect to thereby deprive the said defendants of their property without due process of law. That the said John H. McCunn, as a justice as aforesaid, thereafter, with the corrupt intent and with the effect aforesaid, made and entered divers illegal orders in the prem-

ises, well knowing that they were illegal. That all such orders and proceedings were so had and made in collusion and conspiracy with said receiver and other persons unknown, with the intent and effect to thereby wrongfully oppress and harass said defendants, Belmont and Lucke, and to put them to unnecessary expense, and to make illegal gains to said receiver and other persons, who had no claim whatever to the moneys to which said actions related.

Charge Sixth.

That said John H. McCunn, in the months of July and August, 1869, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office of a justice of said court in an action then pending in said court, wherein Norbury Hicks was plaintiff and P. W. Bishop was defendant, in this: That he, the said John H. McCunn, on or about the 30th of July, 1869, did, in said action, grant an order directing and compelling the sheriff of the city and county of New York to arrest said defendant Hicks, and hold him to bail in the sum of $40,000. That it clearly appeared by the papers then before said justice, and on which said order of arrest was granted, that the plaintiff had no cause of action against the defendant. That thereafter a motion was made and heard before said John H. McCunn, as such justice, to vacate the said order of arrest, or reduce the amount of said bail, upon affidavits and papers that showed conclusively that the court had no discretion to refuse the application on the merits. That said motion was denied by said justice, nevertheless. That said John H. McCunn granted said order of arrest, and denied said motion to vacate the same, corruptly, and with the intent and effect thereby illegally and wrongfully to deprive the said defendant of his liberty; and fixed the amount of his bail at an excessive and exorbitant amount, with the wrongful and corrupt intent, and with the effect aforesaid, contrary to the Constitution and laws of the State of New York, and in pursuance of a conspiracy in the premises by said justice, entered into and carried out with said plaintiff and other persons unknown.

Charge Seventh.

That said John H. McCunn, on the 9th day of July, 1869, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as a justice aforesaid, in this: That, in an action then pending in said court, wherein

Edward Van Ness was plaintiff and Henry Leeds and others were defendants, an order had been made and entered by said court, upon consent of all the parties, referring the issues therein to Thomas H. Edsall, Esq., as sole referee to hear and determine, and the hearings before said referee had proceeded, all the parties had appeared before the referee, the plaintiff had rested his case and large expenses had been incurred therein. That, on a motion thereafter brought on before said justice by one of the defendants, for an order vacating and setting aside the said order of reference, and restoring the cause to the calendar, to be tried at a regular term of the court in due course, upon the grounds and allegations that the consent to the reference of said moving defendant was insufficient, and that the action was not, under the statute, referable without consent of all the parties, an order was made and entered by said justice, granting the motion on said grounds made, but arbitrarily and illegally referring the issues to William M. Tweed, Jr., as sole referee to hear and determine, and summarily appointing one Thomas J. Barr receiver of the fund and property concerning which the litigation had arisen. That said order, so made and entered by said justice, was not drawn or submitted by or for either of the parties to the action, or the attorney or counsel of either of them. That no reference to said Tweed, or to any person other than said Edsall, as referee, had ever been applied for by either of the parties. That neither of the parties had applied for the appointment of a receiver of the fund and property in question, which were then in the hands of the firm of "Leeds & Miner," where all the parties desired, and had so expressed themselves, that it should remain, pending judgment in the action, and with regard to which firm it was not alleged or pretended that the fund and property were in any danger of injury, waste or loss while in their custody. That said order was so made and entered by said justice illegally, without jurisdiction, and with the corrupt intent, and with the effect, thereby to enable said Barr to receive and take possession of said fund and property to his own use, and to wrongfully oppress and harass the members of said firm of "Leeds & Miner," and said other parties to the action, put them to great and unnecessary expense, and deprive them of their property without due process of law, contrary to the laws of the State of New York, pursuant to a conspiracy between said justice and said Barr, Tweed, and others unknown, and with the intent and effect thereby to enable said Barr, receiver, and said Tweed, referee, and their respective counsel, to secure large gains

and profits to themselves illegally, to the personal advantage of said justice.

CHARGE EIGHTH.

That the said John H. McCunn, a justice as aforesaid, by his said and manifold other wrongful and illegal and corrupt acts, has repeatedly oppressed and harassed citizens of the State of New York, and deprived them of their liberty and property without any or due process of law, but to his own personal gain and advantage, pecuniary and other, and has thereby brought the administration of justice into contempt, and caused deep-seated and general distrust and fear in regard to proceedings in the courts of this State.

Dated NEW YORK, *March* 18, 1872.

JOSHUA M. VAN COTT,
JOHN E. PARSONS,
ALBERT STICKNEY,
Committee of the Bar Association.

The CLERK then read the answer of the respondent, as follows:

IN THE SENATE OF THE STATE OF NEW YORK.

IN THE MATTER OF THE CHARGES AGAINST JOHN H. MCCUNN, A JUSTICE OF THE SUPERIOR COURT OF THE CITY OF NEW YORK.

To the Honorable the Senate of the State of New York:

The respondent, John H. McCunn, for answer to the charges against him as a justice of the Superior Court of the city of New York, now pending before your honorable body, not waiving any right to him pertaining to object by motion or otherwise, as he may be advised by counsel, to any or all the proceedings upon which said charges are based, or to the regularity of any or all proceedings in reference thereto, had previous to the service of the same on him, or to the said charges, or either of them, as to their manner, form or sufficiency in law, says:

First. That he is one of the justices of the said Superior Court of the city of New York, and was elected to the said office at a general election held in and for the State, city and county of New York, in the month of November, 1869, for the term of six years, to commence on the 1st day of January, 1870; that, on or about the 1st day of

January, 1870, he duly took and filed the oath of office provided by law, as such justice of the said court, and that on the said 1st day of January, 1870, he entered upon the duties of his office as such justice, and has from thence hitherto continued to hold and occupy the said office and to perform the duties thereof; and the said respondent, in further answer to the said charges and each and every of them, while he does not admit any or either of the allegations therein contained, or waive or intend to waive his right to deny the same, and each and every of them, says, that he insists that any, each and all of the acts and matters in the said charges, and each of them alleged, if they shall be, by proper and competent proof, in the judgment of your honorable body, shown to have occurred, or to have been committed by him, will be shown to have occurred before his election to the said office for the term for which he now holds the same, and before he took the oath of office as aforesaid, as such justice, and entered upon the performance of the duties of the said office for the said term; and he further avers and insists, that for the reasons aforesaid, your honorable body has no jurisdiction to try him upon the said charges, or either of them, or to remove him or advise his removal from the said office, for, or on account, or by reason of any, either, or all of the acts and matter alleged and complained of in the said several charges, or any or either of them.

Second. And for a further and separate answer to the said charges, and each and every of them, the said respondent insists and avers that the said several matters therein alleged do not, nor does any or either of them, constitute an offense for which this respondent is liable to removal, or for which your honorable body, under the Constitution of the State of New York, are empowered to remove him from the said office.

Third. And for further and separate answer to the said charges, and each of them, the respondent says he denies each and every of the said charges, and each and every allegation in the said several charges contained.

ALBANY, *May* 23, 1872.

JOHN H. McCUNN, by
A. C. DAVIS, *of Counsel.*

Mr. DAVIS — I would suggest, Mr. President, that it was understood at the former meeting of the Senate, that we should have leave to amend our answer, and we desire, with the leave of the Senate, to interpose an amended answer.

The PRESIDENT — Is the amended answer prepared?

Mr. Davis — It is, sir.

The Clerk then read the amended answer, as follows:

To the Honorable the Senate of the State of New York:

The respondent, John H. McCunn, for answer to the proceedings taken and charges made against him as a justice of the Superior Court of the city of New York, now pending before your honorable body, not waiving any right to him pertaining, to object by motion or otherwise, as he may be advised by counsel, to any or all the proceedings upon which said charges are based, or to the regularity of any or all proceedings in reference thereto, had previous to the service of the same on him, or to the said charges or either of them, as to their manner, form or sufficiency in law, says:

First. That he is one of the justices of the said Superior Court of the city of New York, and was duly elected to the said office at a general election held in and for the city and county of New York, in the month of November, 1869, for the term of six years, to commence on the first day of January, 1870; that, on or about the first day of January, 1870, he duly took and filed the oath of office provided by law as such justice of said court; and that, on the said first day of January, 1870, he entered upon the duties of his office as such justice, and has from thence hitherto continued to hold and occupy the said office, and to perform the duties thereof.

Second. And the said respondent, further answering, claims and insists that this honorable body has no jurisdiction to hear, act upon, or determine the charges, or any, or either of them preferred against him, or to remove him the said John H. McCunn, or to advise his removal from said office, for the reason that the Governor of the State of New York has not recommended his removal by the Senate, and no investigation whatever has been had by the Governor into the said charges preferred against this respondent, and no judicial determination has been arrived at by the Governor whereon he could base a recommendation, that said respondent be removed.

Third. And the said respondent, in further answer to the said charges and each and every of them, while he does not admit any or either of the allegations therein contained, or waive, or intend to waive, his rights to deny the same, and each and every of them, says that he insists that any, each and all of the acts and matters in the said charges and each of them alleged, if they shall be by proper and competent proof in the judgment of your honorable body shown to have occurred, or to have been committed by him, will be shown to have occurred before his election to the said office for the term

for which he now holds the same, and before he took the oath of office as aforesaid, as such justice, and entered upon the performance of the duties of said office for the said term; and he avers and insists that for the reasons aforesaid, your honorable body has no jurisdiction to try him upon the said charges, or either of them, or to remove him, or advise his removal from the said office, for or on account of or by reason of any, either or all of the acts and matters alleged and complained of in the said several charges, or any or either of them, and especially as to any and all acts and charges alleged to have taken place prior to the said first day of January, 1870.

Fourth. And for a further and separate answer to the said charges, and each and every of them, the said respondent insists and avers that the said several matters therein alleged do not, nor does any or either of them, constitute an offense or cause for which this respondent is liable to removal, or which your honorable body, under the Constitution of the State of New York, are empowered to remove him from the said office, or to advise his removal therefrom.

Fifth. And for a further and separate answer to the said charges and each of them, this respondent says he denies each and every of the said charges, and each and every allegation in the said several charges contained.

JOHN H. McCUNN,
H. R. SELDEN,
A. C. DAVIS,
N. C. MOAK,
JOHN E. DEVLIN,
DANIEL R. LYDDY,
Counsel.

The PRESIDENT — The Clerk will call John H. McCunn.

Judge McCunn appeared in person and by the following counsel: Messrs A. C. Davis, N. C. Moak, Daniel R. Lyddy and W. S. Hevenor.

The following appeared as counsel for the State: Joshua M. Van Cott, John E. Parsons, Albert Stickney and Burton N. Harrison.

Mr. VAN COTT—Mr. President: It was ordered that witnesses be called to substantiate the charges, by direction of the chairman of the Senate judiciary committee; the process was returnable at 10 o'clock, A. M., to-morrow, at which time the witnesses will be in attendance and we will be ready to proceed in the case.

The PRESIDENT—The Chair will suggest to the counsel of the prosecution that this seems to be an issue of law. I would inquire whether that will be disposed of preliminarily.

Mr. DAVIS — Mr. President: On behalf of Judge McCunn, I wish

to state that but two of his counsel are here to-day. Judge Selden of Rochester is unable to be here; Mr. Devlin is engaged in the trial of the case of Stanton v. Butler, which has proceeded for some time, and which seems to be running on indefinitely; a very important case; and I have a letter from Judge Selden, in which he states his inability to be present, just at the present time. He can be present very soon; he has a case at Batavia, awaiting trial. The counsel of Judge McCunn had supposed that, in the natural order, the case of Judge Prindle would be tried before the case of Judge McCunn. That the same points which are raised in Judge McCunn's case were raised in Judge Prindle's case; and our position had been that if the demurrer was overruled in this case, that the Prindle case would go to trial. We have one or two other points raised in the case of Judge McCunn, which we consider questions of very grave importance; questions that go to the very basis of this investigation, and we are exceedingly reluctant to attempt the argument of those questions, without the presence of Judge Selden and Mr. Devlin. We are not anxious for any postponement for any considerable length of time, but just long enough that Judge McCunn may have the benefit of their great learning in this matter, upon these preliminary questions. We therefore ask the Senate, Mr. President, to postpone the hearing of this case for such length of time as may be necessary to have the assistance, on the part of Judge McCunn, of Judge Selden and Mr. Devlin.

Mr. VAN COTT — Mr. President: This is a question in which the public have a great interest. We do not wish to interpose any unreasonable objection to any reasonable claim made on the other side for time. We are here at great inconvenience, and we have files from the records of the courts of New York that cannot be kept from the files, without serious inconvenience to the court and to the suitors. On our part, the application which was made on the other side, is opposed, and we have made our arrangements with reference to them, upon the expectation of meeting the engagement and performing it promptly. Nevertheless, we shall submit ourselves to the direction of the court, of course.

Mr. DAVIS — Mr. President: I suggest that these witnesses can all be reached by telegram this afternoon, in season to prevent them from coming here, and thus inconveniencing them, and it will be a great hardship to Judge McCunn, under the circumstances, to be deprived of the able assistance of Judge Selden and Mr. Devlin, especially in arguing the preliminary questions.

Mr. Murphy — Mr. President: When this matter was before the Judiciary Committee, it was distinctly stated by Judge McCunn and

his counsel, that they were ready to submit the case upon the printed matter that was before the Assembly. During the interval that has taken place since our last meeting, one of the counsel for the prosecution has stated to me the fact, that they were willing, on their part, to submit the case upon the printed testimony taken before the Assembly. I want to know what would be the course of the Senate in the matter. I stated to him that it was the right of Judge McCunn to have this testimony taken over again before the Senate, if he thought proper; but from intimations I have received from both sides, it has left an impression upon my mind, that they were willing to have the testimony that has already been taken once, and reduced to writing and printed, read here as evidence upon the trial of these charges. If that be so, then all difficulty vanishes in regard to this proposed adjournment; if it be understood, on the adjournment, that this testimony can be read, and these witnesses need not be called. I refer to it, to know if such be the disposition on both sides.

Mr. MOAK — Mr. President: I was here at the former meeting of the Senate at the time the demurrer in Judge Prindle's case was argued; I remained in the ante-room an hour or two after the Senate went into secret session, and was compelled to leave before the Senate adjourned. I understood then, that the case of Judge Prindle would be first taken up, and this is the first time that I have heard an intimation that the case of Judge McCunn would be now moved for trial; I saw what appeared in the newspapers, and that was all; that it was determined until to-day with the case of Judge Prindle. On examining this printed case, I, of course, am unable to say what was suggested by counsel at the time when this answer was put in, for I was not present. I find that this testimony, instead of being taken under the ordinary rules of law, which would apply to the taking of such testimony, it is interspersed with all sorts of suppositions of witnesses, called inferences, that would be entirely illegal, and the committee even went so far, in one case, as to call a gentleman as a witness, and ask their own witness whether he had not made a statement in going down on the cars in the city of New York to a certain place, and then the committee called a witness to dispute him.

Mr. MURPHY—Mr. President: I do not propose to make an argument in this matter. I am asking whether they are willing to abide by that printed evidence. I do not want any reasons assigned.

Mr. MOAK—Mr. President: I was giving that as a reason why I advised Judge McCunn, if that testimony was to be introduced it

would prejudice his case by getting extraneous matters before the Senate. If we desire, of course, the testimony must be taken orally.

Mr. J. Wood—Mr. President: The question of whether Judge McCunn's case should be taken up, was discussed in the Senate previous to our last adjournment. The Senate passed a resolution, directing it to be served upon the counsel of Judge McCunn, that his trial would be taken up at this hearing. With that view, I, as chairman of the Judiciary Committee, supposing the trial would proceed, caused subpœnas to be issued, and the witnesses subpœnaed. I had heard of this offer to take the testimony as it was taken before the Judiciary Committee of the Assembly, and I called upon the counsel of Judge McCunn, and he informed me that he should advise Judge McCunn that the better way would be, to have the testimony taken over again. I supposed that had been agreed upon, and hence I advised them that subpœnas would be furnished them by the Clerk if they desired to examine witnesses.

Mr. Van Cott—Mr. President: We are entirely willing to proceed with the case upon the printed testimony, subject to any objection to that evidence. I think the criticism will be found to be pretty small criticism, when examined in connection with the evidence. I suggest here, that I hope it will not be regarded as a settled question by the Senate, that this printed evidence is not perfectly competent evidence for this inquiry. I think I am prepared to convince any senator open to conviction, that that body of evidence is perfectly competent here, and such as the Senate may say, may be acted upon, unless it is repelled by evidence adduced from the other side.

Mr. D. P. Wood—Mr. President: For the purpose of bringing this matter before us to a determination, I move the trial of Judge McCunn be proceeded with to-morrow morning at ten o'clock. Whilst I am ready at all times to grant all reasonable adjournments for the accommodation of counsel and all parties that can in reason be asked, I fail to view the application made to-day, in good faith, why this case should be postponed. It appears it was set down for trial at the last meeting of the Senate, and it was understood by the counsel for the prosecution, that the trial was to go on and the witnesses should be subpœnaed for the prosecution, and I understand from the counsel, they are to be here to-morrow morning. Counsel upon the other side, could not have anticipated their case would not be reached, and that the Senate could not be expected to take it up, because they knew that the decision, whatever it might be upon the demurrer in Judge Prindle's case, placed that case out of the way of

their case, and leave theirs first upon the calendar; for, if the demurrer had not been overruled then, that disposed of the case. The overruling of the demurrer, the counsel, of course, understood, allowed the judge either to put in his plea and time to prepare for trial, or else judgment was to be entered against him upon the demurrer; in either case it left the calendar clear for Judge McCunn's case. Counsel of the Judge must bear in mind that here are some twenty-eight or thirty men who have left their business to come here, at a great sacrifice to themselves, to dispose of this case, and they cannot, I submit, be asked to make any greater or any unnecessary sacrifice, such as is proposed, to meet the convenience of counsel, one or two men employed upon some other case in which they have been engaged as counsel. The State is full of counsel ready to sit down and try this case. I submit we ought not to be asked (the Senate of the State of New York) to postpone this case and come back here again simply to serve the convenience of one or two men, and for that reason I am in favor of proceeding with the case to-morrow morning. I do not understand the counsel of the Judge as raising a question of law, except as it may arise during the progress of the trial. I understand that to be the position that they have placed themselves in, and, therefore, we commence with the trial, and, for aught we know or think, their counsel may be here prepared to meet those questions whenever they shall be reached.

Mr. D. P. Wood's motion was carried.

The Senate then adjourned until to-morrow morning at 10 o'clock.

SECOND DAY'S PROCEEDINGS.

ALBANY, *June* 19, 1872.

The court met pursuant to adjournment, and proceedings were resumed.

Messrs. Davis, Moak and Peckham, appeared for the respondent.

Mr. JOHNSON — Mr. President: It seems to me, if it would be agreeable to the prosecution and the defendant to save the time of the Senate, it would be exceedingly appropriate and proper if a committee were appointed by this body to take the testimony, and that committee might visit the locality. It would be a great saving of time to the Senate if that committee would take that testimony. The testimony could be given to each senator, and the argument might be heard before the Senate, and it would also save expense. If agreeable to the parties interested, I hope this case might take

that direction, and therefore, I would move an amendment to the motion from the senator from the twenty second (Mr. D. P. Wood), that a committee of three from the Senate be appointed to take the testimony in this case. I will not make the motion, unless agreeable to both the prosecution and defense, and, if agreeable, I would like to hear from both the prosecutor and respondent, whether such a course would be agreeable to them.

Mr. Woodin — Mr. President: It is my purpose to ask of the Senate indefinite leave of absence, and desire to state the circumstances under which I am placed. I expect, of course, to be here at the opening of the proceedings, and at the conclusion of the trial. I expect to avail myself of such means as the Senate may place in my power, to acquaint myself with the evidence that may be taken before the Senate, and to take part in the final judgment or disposition of the matter. Senators very well know that it is an impossibility for me to be present during the trial of this case, and I trust that no proceeding may be had to compel my attendance during the trial. That counsel may know, as well as the Senate, I may state that my family are very much indisposed, and it is very improper that I should be away from home. I ought to be there this hour. I can read the testimony, and I expect to be quite as well able to take part in the final disposition of the case, as I should have been could I have been present and listened to the entire trial.

Mr. Murphy — Mr. President: I would like to inquire of counsel whether they conceive it necessary that the senators voting upon the charges must be present during the whole investigation?

Mr. Peckham — Mr. President: I don't know that it is absolutely and legally necessary that every senator who assumes to vote on the final disposition of the case should have been present during the time when the testimony was taken; but while the testimony is being taken, it seems to me that it is highly proper and right that all the senators who are to assume to vote upon the question should have been present during the taking of that testimony in order that they may have the benefit of the oral examination thus had, and see the general demeanor of the witnesses, and have all the means of testing the truth of the witnesses thus upon the stand, that nothing short of a personal examination can give. I do not know that it is legally necessary where a senator assumes to vote upon the question that he should have been present during the whole of the examination, but I think it extremely appropriate and right that he should be, and it is certain that he would be more fitted to discharge the high duty of voting upon the questions that will come before him after he has

seen the witnesses and heard all the testimony, than he could possibly be by perusing the written or printed evidence laid before him.

Mr. WOODIN — Mr. President: Before the Senate shall adjourn, I shall make application to the Senate for an indefinite leave of absence. I desire to remark that it was proper for either of the accused judges to have elected to have had this testimony taken before a committee, and not before the whole Senate, and the whole Senate would have been called upon to act upon that testimony.

Mr. JOHNSON — Mr. President: If, as it would now seem, that the testimony in each one of these cases of the accused judges is to be taken orally before the Senate, it is evident that the entire term of the Senate must be taken up until the first of next January. It seems to me to be too much to expect this body, elected as a Senate, whose ordinary duties extend scarcely beyond one hundred days, that the private business of senators should be engrossed in attending the sittings of this Senate in this investigation, when business of so much importance is requiring their attention in their respective localities; as for me, I can only say that it is literally impossible for me to remain here during the entire summer, and I was in hopes a committee would be agreed upon by which this testimony could be taken and reported to the Senate, and the argument listened to, and we could have been prepared to act and vote upon it, as in our judgment, seem to be right. But, while I shall make it my business to attend at the opening of the cases, and, if possible, at the consummation of the final closing of each case, as for remaining here during the entire season, it is simply impossible. I cannot do it; my business has been neglected during the session, somewhat protracted, which required my attention, and how other senators may be circumstanced, I have no means of knowing. I hope no action submitted by the counsel for the prosecution, will be taken by the Senate, which, I believe, the senators will, with a very great degree of unanimity, attend and acquaint themselves with the testimony as published and will be on hand at the final conclusion of the cases; I do not expect that the Senate will be here in a body, to attend the taking of this oral testimony during the entire summer; the case of Judge McCunn is important, containing a great many charges involving the examination of a number of witnesses, and it will necessarily take a considerable length of time; the case of Judge Prindle with fifty-four charges, must necessarily take a long time, and should not be hurriedly gone over. Our duty to the accused should prompt the Senate to deliberate calmly upon each one of the charges, and to give to the accused every opportunity of exonerating himself, and we must take

a considerable length of time; and then the case of Judge Curtis, sent by the Governor to us yesterday, is equally important, requiring the attendance of a large number of witnesses, and a very considerable length of time, and I do not see how it is impossible, to say nothing of the impeachment case, but that the entire season, from now until January, must be consumed in the investigation of these cases.

Mr. MURPHY — Mr. President: We had a distinct statement from one of the gentlemen representing the prosecution in the Prindle case, that, in his opinion, the actual presence of senators, during the taking of testimony, was not necessary; there has been no response from any other quarter, and from the silence —

Mr. VAN COTT — We are quite ready to respond.

Mr. MURPHY — I was going to say, there being no response from any other quarter, and the seeming acquiescence in the views taken by the counsel, I suppose it may be taken as granted, that in view of the position of the counsel on both sides in both cases it is not actually necessary that the senators should be constantly present during these trials. Mr. President, it has been my fortune to be present during two trials before a Senate, one forming a component part of the court of impeachment, and another in the capacity in which we are now assembled here, and therefore have had some experience in regard to them. I know that they are necessarily dilatory in their proceedings. I have not the least expectation, if we proceed to take the testimony in these cases orally, that we can get through with either of them under several weeks for each. It is utterly impossible to do it from the nature of the case; from the number of the counsel employed; the magnitude of the question, and the numerous other facts. I have never shrunk from the performance of an official duty. I will not now; but I appear here to-day quite an invalid. I have been under surgical attention for the last six weeks, daily, and should be home. I had intended to ask to be excused, but I will not. I will attend here as often as I can, and will be here at the final judgment. I give this notice to all parties.

Mr. MOAK — Mr. President: We do not consider the inquiry was addressed to the counsel in the McCunn case. But I, on the authority of Judge McCunn, will make this suggestion. Of course I deem it of great importance that those who should pass upon the case, should see the witnesses and the manner of their giving their testimony. In view of the suggestion made by various senators, this idea occurs to me: It is quite probable that, during the taking

the testimony the attendance of senators might be so small for a great portion of the time, that practically it might amount to the same thing as the taking the testimony before a committee. We had intended in this case of McCunn's to raise a preliminary question and ask its decision before the taking the testimony. It has been suggested by senators here, and I think a resolution has been passed that the taking of the testimony in the Prindle case be commenced a week from to-day. We are willing to do this, and I would suggest it to counsel upon the opposite side, to postpone the examination and discussion of that question and its decision until the meeting of the Senate on that occasion, so that Judge Selden, who is now absent, may be present; and if that decision shall be made against us, and the Senate should hold the examination of the case must be had, that the trial must go on, we think it is quite likely that, so far as the attendance of senators is concerned, justice might be done us, and we are willing that a committee of three or five (which ever the Senate may desire; of course we should prefer as many as possible of them should be lawyers) may be appointed to take the evidence in the city of New York, if that will accommodate the senators, if the Senate think that is a proper disposition of the case, and will give us until next week to examine the question and have a decision at that time. The discussion can be had at the meeting for the trial of Judge Prindle's case, and we will discuss the question and have it disposed of; and if against us, we are willing that the testimony shall be taken in the city of New York. I understand from a reading of the printed case, which has been submitted to the Senate, or sent to the Senate by the Governor, that a considerable portion of the proceedings in the case are matters of record in the Clerk's office. I can see, very readily, from the preliminary examination which I have made in this case, that it may be impossible to get them here without great trouble. Taking into consideration all the circumstances of the case, it has been suggested by Judge McCunn, and my associates concur in it, that perhaps that will be as fair a disposition of the case as could be made; and we ask a careful consideration of the case. The proposition suggests that we should postpone the examination, or discussion and decision of the preliminary question, for a week, and if we are right in that, that would end the trial. It is not proposed that we shall go on and take the testimony now. If that question is decided against us, all the testimony will be taken in the city of New York.

Mr. MADDEN — I would like to inquire what the question before the Senate is, if any?

The PRESIDENT — There is no question formally before the Senate.

Mr. D. P. WOOD — Mr. President: I move that we proceed with the business at hand, the trial of Judge McCunn.

Mr. JOHNSON — Mr. President: While there was no question, perhaps, before the Senate, perhaps at that time, it seems to me it was very wisely considered, for the purpose of expediting these trials, avoiding the necessity of attendance of senators during the entire deliberation. If the Senate are to meet a week from to-day to commence the proceeding in the case of Judge Prindle; and, as alleged by the counsel of Judge McCunn, that they would be ready at that time with their counsel to argue a legal proposition, and if the decision of the Senate was adverse to them, that then they would be quite willing to take the testimony in New York. It seems to me that would be an advantageous step in advance, and I think it well worthy of our consideration, and I hope that suggestion may meet the approval of senators, provided it meets the approval of the prosecution in that case, and therefore I would move, as an amendment (perhaps my motion should be to reconsider), but I make the suggestion to the Senate, that, in view of the possibility of getting rid of the necessity of keeping us here three or four weeks, and whether it would be wise to accept the suggestion of Judge McCunn, hearing the legal argument; and upon that decision, if adverse, a committee might be appointed to take testimony. I think it is well worthy of the attention of the Senate.

Mr. VAN COTT — If we are called upon, we do not hesitate to express our views and our preference. We do not see any reason, if there is a preliminary question in this case, why it should not be heard now, and the disposition the Senate is to make of the case made now. If that question is argued now and disposed of, then the other question may be disposed of, as to whether the Senate will proceed with the hearing of the testimony, or will send the case to a committee. We have a very decided opinion upon the subject of the evidence which we have never been able to present, and which I hope for an early opportunity to present; and it seems to me if we are right, it obviates much of the difficulty arising on the question of time. Our view is, that the Senate is sitting as a branch of the executive, and that it is acting upon information, as the executive always acts upon information satisfactory to its own conscience, and that the hearing provided for by the Constitution is a hearing of the parties sought to be removed. That the case is already before this branch of the executive, the Senate, upon the evidence on which it was before the Governor; upon which it

is perfectly competent for the Senate to act, except that the Constitution requires that parties sought to be removed shall be heard, and if the party has any evidence to offer it is permissible to offer it. If the party has any argument to make, such argument shall be entertained. This opinion, which I have merely suggested, rests upon a careful scrutiny of all the Constitutions of the State, and all our experience during our existence as a State. The varying provisions in the Constitution and the course of procedure is such, as I think it demonstrates, that this application to the discretion of the executive to remove an official is a mere application to its discretion, and that it exercises that discretion as it exercises all its discretion in legislative as well as in executive business upon information deemed by itself to be sufficient, and satisfying its conscience. I trust I may be pardoned for saying, in a very few words, that the body of the evidence now before the Senate, sent by the Governor, has all the attributes of judicial proof; that it was taken by a body competent to administer oaths; that the testimony was all taken on oath; that it was all taken in the presence of the party affected by it; that it was taken with an opportunity to him to cross-examine witness, and that it was taken with the protection of rebutting testimony; that there is not a single circumstance of judicial proof lacking in the evidence that is now before the Senate. I address a body of lawyers, and I say there is not the absence of one element of judicial proof in this case. The witnesses were cross-examined, and it is such a body of evidence, that anybody acting upon a responsibility such as attaches to the action in this case as would always be deemed *prima facie* proof, sufficient proof until rebutted; and we are prepared when the moment comes to send to the Senate, the evidence sent here by the Governor, and ask the Senate to receive it, and then, I apprehend that the rebutting proof will fall within a very short limit. It ought to be seen right here what is involved in the suggestion on the other side. If we come here a week from to-day, Judge Prindle's case is to be heard, and it will take a week or two, and we are then carried to about the time the Court of Impeachment is to convene in another place, and, of course, the time of the Senate is pre-occupied by the sitting of the Court of Impeachment, running indefinitely through the summer. How long that trial may last, no one knows; but the effect of the motion is to throw this case entirely over. We cannot fail to see that on our side, and we wish to avoid it. We see no reason why the testimony should not be taken before a committee, if this body of the testimony is to be taken again. We have no doubt it is competent for the Senate to act upon the testimony taken

before all, or some of the members, or taken in some other judicial form. It is suggested by my associate, that frequently these cases are brought before the Governor, on evidence, when the matter is all *ex parte*, and it would be competent for the Senate, as it is for the Governor, to act upon that. The Senate might, in its discretion, very well say: "We won't act upon that, we will require something further;" but this evidence is entirely different from that upon which the Senate has ordinarily acted in such cases.

Mr. BENEDICT—Mr. President: I never heard these charges and had not the slightest idea of what they were until I heard them read yesterday in the case of Judge McCunn; but I find here a body of testimony and I desire to know from either side how we shall stand any differently after we have gone through a committee from what we now do. Here we have the testimony taken already before a committee. It is child's play to say that testimony which happens to be taken in another room here should not be acted upon by us, but that we should appoint another committee to go to New York and take it. It seems to me that the gentlemen upon both sides might agree that this book of testimony should be put in as it stands, subject to any criticism, modification or rebuttal by the same or other witnesses before the Senate or committee, subject to any objection. Then we shall have before us just what we shall have after we have gone on, as has been suggested, until next January, and have the testimony taken by the committee when they find it convenient to sit after the hot weather has gone by and it suits their convenience. I think the Senate has the right to say that this testimony shall proceed. It is the very thing that is sent to us as the proof of the charges taken in the presence of the parties. Judge Prindle's case is entirely different; there was no testimony sent to us at all in the Prindle case; they have got to have their case heard. This case has been heard for six weeks more or less in another room in this Capitol, or in the city of New York, as the case may have been, and what is the testimony? It will be like this, as I might say to a lawyer if I had a deposition taken in a case *de bene esse*, and the question would be whether we should not go and take the deposition over again. There is no injustice in taking the testimony as it stands, subject to the limitation I have suggested, and the privileges I have suggested, that either party may call the same witnesses to rebut, explain, extenuate, to do any thing they please, but not to repeat testimony taken simply for the purpose of repetition, and then we shall have cut off a great burden of time in this case, and shall have saved this Senate from the necessity, as has been well suggested

by the senator from the twenty-sixth, from sitting till New Year's day, and then go into the next Senate. We are in the dog days before we get into it, and before we get through with it we shall be in December. Is it expedient or proper for the Senate to take such a course as that? I think it is not. We have the right to say that testimony shall be received. It comes from the Governor. They may go and extend the calling of witnesses for any explanation or rebuttal, or any correction of the testimony, and put in new testimony if they please, and we can try the case in one-twentieth part of the time with just as ample justice to the accused as though we dragged along the whole summer.

Mr. MURPHY — Mr. President: It is perhaps a little out of order in this discussion, yet after all it may save us a great deal of time and trouble. I rise to repel the position taken by the senator from the fifth (Mr. Benedict), and to express my dissent also from the position assumed by the prosecution in the case of McCunn; it is undoubtedly competent for the party, if I may use the remarks of counsel upon the two sides, to agree to accept this testimony, on the hearing of this case by the Senate. I do not see any impropriety in their doing it. There may be, as stated by counsel of Judge McCunn, irrelevant matter introduced here, which should be stricken out, and I should think, by a conference between the counsel upon the two sides, they might purge this book of all such matter, and then the testimony might be put before the Senate. That is a matter, I conceive, of agreement between them, of consent, and not within the power of the Senate to impose upon them. What is this paper? It is testimony, which purports to have been taken before the judiciary committee of the Assembly, for a specific purpose; for an entirely different proceeding from that which is being had here; it was taken before the committee of the Assembly, for the purpose of sending charges of impeachment to the Court of Impeachment, or another tribunal. We are sitting here as a distinct tribunal, under another provision of the Constitution, and under other powers, and there is no more connection between the two courts, if I may use the phrase, with due deference to my friend from the fifth (Mr. Benedict), than there is between any other two courts in the State. We are here to-day for the purpose of trying these charges presented to the Governor, under a distinct provision of the Constitution. We get our jurisdiction in this matter, by the recommendation of the Governor. After that, the Governor's connection ceased, and in that respect, I wish to dissent from the position taken by the honorable counsel here, that we are merely advisory to the Governor.

No! We are sitting here in the highest capacity known to the government, a tribunal to determine whether this man shall or shall not continue in his office as a judge of one of our courts. We have now complete and perfect jurisdiction of this matter. What may have transpired before the Governor or elsewhere, we have nothing to do with. We are to take this matter up for ourselves, and determine for ourselves upon testimony which shall be properly presented to us, either before the Senate, or upon the consent of the two parties. We are not a mere board of reference to determine the matter. Perhaps I am traveling a little out of the record, but I do not think the Governor here, nor did he in the Smith case, present the question as it should have been presented. I think it is the duty of the Governor to inquire into the charges and convince himself whether they are or are not true, and upon being convinced, then to recommend to us. But that has not been the course. He has chosen to recommend us to remove this man in case we find the charge true. We propose to do so. We have got to do that in a proper way, by the taking of testimony ourselves, originally, or, if the parties consent, to the taking of this testimony, or any other course that may be agreed to in the determination of this matter. I think the proposition made here by the defendant is a very reasonable one. It appears that they have selected eminent counsel to argue particular questions in this case, who are unable to attend. They wish to have the benefit of their learning, and they propose to relieve us, as a Senate, from the labor, if we only give them time to have such counsel here, and to have the testimony taken before a committee. I would rather they would modify the proposition, and wish they would take this testimony, or such testimony as they may deem necessary to be introduced.

Mr. Moak — Mr. President: In answer to the senator, I may make this suggestion in regard to this testimony. It is true, as a matter of form, this testimony was taken in Judge McCunn's presence, and it is equally true that on an examination before a justice of the peace for the purpose of determining whether they shall hold the alleged criminal for trial, or for indictment by the grand jury, that the statutes require that he shall be present; but it is true, also, that so far as the taking of this testimony was concerned, Judge McCunn practically had no counsel, considering the proceeding as a mere fishing expedition, for the purpose of getting at testimony to see whether charges would actually be presented to the Assembly; and these charges that were drawn up and presented by the Bar Association, were just as much extrajudicial as if they had not been presented at

all; because if he was impeached, the charges should be presented by the Assembly to the Senate, and it was in consequence of the view which Judge McCunn took of this proceeding, that even the witnesses who were called, and whose examination this book will show were examined very limitedly, and the whole was substantially allowed to go by default, and there is so much in this case — and I say it without deference, and without desiring to take any time of the Senate, because these preliminary proceedings are sometimes the most important in the case — it is because of this that Judge McCunn asks that this testimony be again taken. We are willing it shall be taken before a committee. No man can read the insinuations of a newspaper, however unfounded, without their making some impression upon his mind, and it is because we desire to avoid the necessity of discussing the propriety or impropriety of portions of this testimony; it is because we desire—and we shall ask when this case is heard, that it be decided by the Senate upon the evidence which is competent, entirely irrespective of any insinuations, or any thing of the kind that we shall ask—that this testimony be again taken; and although it may take some of the time of the Senate, although it may be a matter of some consequence to the senators how much time may be taken, it is a matter of some consequence to Judge McCunn. It involves to a certain extent his reputation; an imputation which may follow him through life, and as one of his counsel I should feel to have illy discharged my duty if I consented that any thing I regarded as improper and immaterial should be admitted. When we get before the committee we may consent that certain portions of it may be read; but to make a wholesale agreement that this testimony, or portions of the testimony, that the Senate, after discussion, might rule as incompetent, I do not feel competent, as Judge McCunn's counsel, to consent to any such thing.

Mr. D. P. Wood — Mr. President: I cannot exactly agree with my learned friend, the senator from the third (Mr. Murphy) in the view he has taken in relation to the obligations of the Senate in this proceeding, or the rights of the defendant. It appears perfectly plain to me that we may proceed to act as a Senate upon the evidence presented before us, sent to us by the Governor; the evidence presented to him, whatever that evidence is, so far as that side of the question is concerned, giving only to the defendant the rights which the Constitution secured to him, by a full hearing, not only by argument, but by rebutting testimony. Now, sir, I take it the senator from the third (Mr. Murphy) will not dispute the proposition that these complaints may be made to the Governor on affidavits, and

they furnished here. The Governor may act upon those affidavits, and recommend the Senate to remove, but the Constitution provides that the Senate shall not remove without serving the party with the charges and giving him an opportunity of being heard. Being heard for what? Being heard in rebutting the testimony brought before him in the executive chamber, whatever it is, whether the report of the committee or the affidavits. Of course, if the defendant comes with rebutting testimony, if it is claimed on the other side that that testimony varied the case and made it necessary to put in new evidence, or supplemental evidence, that they would appeal to the Senate for permission, and it would be granted. But I do not understand that it is the duty of the Senate, nor that any man can demand of the Senate, to commence *de novo* in this proceeding, and take testimony all over that has once been taken. I apprehend it makes very little difference whether that testimony was taken before the judiciary committee of the House, or before the judiciary committee of the Senate. Suffice it to say, it was done by a competent committee to administer oaths and to compel the attendance of witnesses. That is the form in which this testimony was taken. If it had been taken by the committee of the Senate, I take it the senator from the third (Mr. Murphy) would not dispute it would be competent testimony for the Governor to act upon and for this Senate to act upon. I take it is just as competent testimony taken before a House committee, provided it is the testimony presented to the Governor, and the testimony upon which he presents the case to the Senate. Now, sir, if I am correct in this is it not necessary that we should go over this testimony *de novo* unless the Senate, in their discretion, shall see fit to order, and the parties to be affected by it shall ask it. If the judges complained of ask to have this testimony taken *de novo*, I do not know but I would subject myself to the inconvenience and labor of granting their request. I am inclined to think I would, for I am disposed to give them the utmost latitude; to give them every opportunity of defense that they can reasonably ask for. When I accepted the office of senator I accepted it with all that was to attend it. I admit as things have turned we have all of us drawn an elephant—a large one. We had no anticipation that we had taken upon ourselves a year's continuous duty; a thing unprecedented in the past, and unexpected by anybody; but as things have turned we find ourselves here with these various complaints which under the Constitution we are to meet. I am prepared to meet them at whatever personal sacrifice and inconvenience, and I expect and hope that every senator will meet those

duties in the same way, and will not be absent except in cases such as have been stated to us to-day, which may arise and will arise where it is physically impossible for some one or two senators to attend at all the meetings of the association; and in a case of that kind, of course they could not be expected to attend; but I take it that every senator who can will attend every court that testimony is being taken, to the end that he may have all the benefits of seeing the witnesses as well as hearing what is testified to. In regard to taking the testimony by a committee, of course, if a majority of the Senate shall decide that they will be so greatly inconvenienced in sitting here to hear the testimony as to feel justified in adopting that course, I shall submit to it; but for one, from what experience I have had in the trial of causes, I do not feel that I can discharge my duty satisfactorily to myself, and certainly entirely satisfactory to all the parties concerned, as well by reading the testimony as hearing it from the lips of the witness, whose action, whose countenance, and whose very soul I can reach when he is giving his testimony. Sir, as I said before, I will take the course of reading the testimony, and attempting to decide upon it if the Senate shall so decide, but I do not think the Senate will gain any thing by that course. Such has not been my experience. I have found the labor of arriving at a conclusion upon testimony taken where I did not see the witnesses, and hear the testimony developed than I have where I have seen the witness and heard the testimony through. I find it takes more time in the first instance than in the last, and I am not as well satisfied with the result. Sir, it appears to me, counsel upon both sides might agree upon the testimony that has been taken, that part of it which is unobjected to, and questions to which no legal or proper objection can be interposed. The motion of the senator from the fifth (Mr. Benedict), secures to the defendant and the prosecution every right, and to the Senate all the convenience of the saving of the time that has been consumed in taking that testimony that has to be repeated if we have to go back over the whole subject-matter. That appears to me to be a compromise. Under my idea, I should consider it a concession, because I should rather see the witnesses and hear the testimony taken. If this is referred, it will be referred to a judiciary committee. I came here to do my duty as a senator, and a senator upon every committee that I am placed upon. If it shall be sent to a committee upon which I am placed, I shall discharge that duty without hesitation.

Mr. Woodin — Mr. President: May I ask of the senator a question?

Mr. D. P. Wood — Certainly.

Mr. Woodin — Mr. President: I desire to ask the senator, supposing the Senate should order against the consent of the counsel that the testimony in this book should be received as evidence in the case, and it should result in the removal of the officer against whom accusations are made, and it should turn out that material testimouy or evidence which was within this book and was false, I ask whether in the senator's judgment an indictment for perjury would lie in this proceeding.

Mr. D. P. Wood — Mr. President: I have no doubt but that it would. The perjury would date from the date of the evidence. The evidence was taken before a committee before whom to testify falsely, was perjury by the statute, and the perjury would date from the giving of the testimony, and not from the use of it.

Mr. Woodin—Mr. President: The testimony was in a proceeding before the Governor, which was another distinct and separate proceeding. It may have been false there, but if it had ended there and no further proceeding were had, I ask if an indictment in that case would lie for false swearing?

Mr. D. P. Wood — Mr. President: I understand the question to by hypothetical: "If the testimony was taken before the Governor."

Mr. Woodin — No, sir.

Mr. D. P. Wood — This was not taken before the Governor. I suppose if this testimony was in the form of affidavits, as is usually the case, and as I think was the case in Judge Smith's trial, at least in nearly all of the cases, and I do not know but in every case that was ever presented to the Governor for removal, is upon affidavit, and I never heard it suspected before or intimated that false swearing upon an affidavit of that kind, if taken before a competent officer to administer oaths, would be perjury whether used before the Governor and then transmitted to the Senateor used before the Governor and ending there. We have taken an order of the Senate to proceed with this case this morning. All the questions of law in the case can be raised at any time in the case. They are raised in the answer. They are not in the demurrer. That question is already decided by the judgment of this Senate in another case. They are raised in the case in a manner that they can be taken advantage of at any stage of the proceedings. We can proceed with the testimony and the counsel for the accused can have the advantage of their counsel to argue those questions at any time when they may see fit. We can save the time of the Senate in taking the testimony.

Of course, I have no objection to listening to another argument upon the same points we decided yesterday, if the counsel, in their good judgment and discretion, should think they can add any thing to the force of the argument presented upon the questions decided. I am ready to hear any thing and every thing the accused wish to offer in the way of testimony or argument, patiently, but I desire to proceed and save the time of the Senate, and not waste it in adjournments, for when we have adjourned from one week to another, we gain nothing by adjourning a week. A week is not time enough for us to attend to our private business.

Mr. Woodin—Mr. President: I understand there is another preliminary question raised by the counsel for the defense, and that is upon the form of presenting this case to the Senate. That is taken by the answer. I don't know why we cannot proceed with the hearing of that, and then take action whether the Senate will order the testimony to be taken before a committee or before the Senate.

Mr. Davis—Mr. President: We have been endeavoring to have this delay, for the purpose of securing the services of Judge Selden, in the argument. This point in the case is peculiarly his point, and we had been willing to submit to the taking of this evidence by a committee against our wish in the matter. We much preferred to have the entire testimony taken before a full Senate, in order that the senators might see the witnesses, and view all the surroundings; but, for the sake of presenting that preliminary question in the manner we desired to present it, we were willing to save the Senate the burden of sitting here all summer. It occurred to us a good deal might be saved both to the prosecution and the defense, inasmuch as the witnesses are mostly in New York, and if it should be the pleasure of the committee to sit there they could do so. There is no wish for delay on the part of Judge McCunn. Judge Selden was compelled to go away; we wanted him, and now very much want him, to argue the preliminary question; and the moment that is decided, Judge McCunn will be ready every day, (excepting such unforeseen contingencies as we cannot provide against,) until all the evidence in the case is taken. We would prefer to get that question before the Senate in advance of the evidence, because, if Judge Selden's opinion should prevail in the matter, there would be nothing more for the Senate to do.

Mr. Palmer—Mr. President: I would like to ask the counsel if he has any objection to stating what that question is?

Mr. DAVIS — The question relates to the manner in which the case has been brought before the Senate.

Mr. D. P. WOOD — Mr. President: In regard to the manner in which the Governor presents it?

Mr. DAVIS — That is the idea; that the Governor has not taken the steps made necessary by the Constitution in order to give this honorable body jurisdiction of the case. It is purely a jurisdictional question.

Mr. D. P. WOOD — Mr. President: It is a question that may be raised at any time during the trial.

Mr. DAVIS — Mr. President: I agree with the Senator in that regard.

Mr. LEWIS — Mr. President: The counsel for the defense propose to raise the question, whether the Senate has jurisdiction in the matter. If there is any thing in that matter, we should hear it, and decide it before we sit here for a month to take testimony, because if we sit here a week or a month and take testimony, and that question should be then argued, and the Senate should decide that it had not jurisdiction, we should not only lose our time, but would make an exhibition of the matter, that would be rather unpleasant for us to contemplate. It seems to me, then, practically, the only question before us, at this time, is, whether the Senate will reverse their decision of yesterday, and give counsel for the defense the time asked for by them, to prepare themselves to present this question to the Senate; because there cannot be any two opinions upon the subject, whether it should be presented now or presented at a subsequent time. It should be now presented to us, or should be presented to us prior to our taking any testimony. The question is, whether we will adjourn a few days, in order to allow them to avail themselves of the services of eminent counsel they have employed to assist them.

Mr. MADDEN — Mr. President: It strikes me, that if we are to take the Constitution as it reads, and apply to it a few rules of common sense, and throw aside the technicalities of the court, we should make the matter much more clear. I take it, that in the case of almost all officers appointed, there is some power of removal; a few only by impeachment. In all executive departments the charge is made against the person, and they may be removed. The Constitution gives us absolute power of removal under certain circumstances. In regard to the question of recommendation by the Governor, I shall not express any opinion at present. The Constitution says: "No removal shall be made by virtue of this section,

unless the cause thereof be entered on the journals, not unless the party complained of shall have been served with a copy of the complaint against him, and shall have had an opportunity of being heard in his defense." And how heard? Is it absolutely necessary that thirty-two senators shall be present? We can hear by a full Senate, by two-thirds of the Senate, by one-half of the Senate, or through a committee of the Senate, in my judgment. Certain parties are charged with committing certain offenses connected with the office which they hold. The Constitution says, the Senate may remove. How are we to satisfy ourselves? In any way. In this case, the testimony has been taken by a committee of the Senate; it is sent to the Governor, and he sends it to us; and whether he has done his whole duty is another question. We are to give this party an opportunity of being heard, either by thirty-two or sixteen senators, or by three, five, or seven upon a committee. These officers, though removed by our action, can be re-elected. When a person is brought up to be impeached, where his character is destroyed forever, and where he is disqualified, in that case he should be heard as before an ordinary court of justice; and we sit here, to some extent, as an executive, to make removals of those who have been unfaithful to their duty. I should like to see this divested of all these legal technicalities, and all these attempts at delay. I think the jurisdictional questions should be decided first, and after that we should take the testimony in such a way as we deem right and proper. I think all this discussion about testimony, if the other question should be raised, should be decided first; that is all there is in the case. We simply sit here, as it were, appointed by the Governor, if you please, upon his recommendation, to hear certain charges, and decide and hear them in such a way as we deem fit. I hope the lawyers in this body will try and divest their minds of the idea that we are acting as a judicial body, and not as an executive body, to remove for certain causes.

Mr. J. Wood—Mr. President: Every question discussed so far before the Senate, in regard to this case, was raised and elaborately discussed in the arguments published in the Smith case. The question as to what should have been the action of the Governor, was discussed, and as to what was the duty of the Senate, under his recommendation, if he gave it; what was the cause for removal, and upon what the Senate could act. It was referred to the judiciary committee, for the purpose of recommending to the Senate, in that case, what course to pursue. The judiciary committee stated, it being a novel proceeding, that, in its judgment, the Senate

could proceed in taking the testimony before a committee, or that the testimony could be taken before the Senate; but there was no pretense that the Senate should act upon the papers which were submitted by the Governor as the testimony upon which they were to remove. But they said the manner of proceeding in the taking of the testimony should be left to the accused, as the party most interested in it; and in that case, Smith, as McCunn, in this case, elected to have the testimony taken orally, and all the proceedings had before the Senate. When the first case came up before the Senate this year (the Prindle case) the Senate solemnly resolved that they would adopt the Smith case as the precedent, and that they would follow that, for the purpose of avoiding, as I suppose, the argument and examination of the case again, and then we would have a precedent solemnly adopted by the Senate, and to go along and discharge our duty under it.

Mr. BENEDICT — Did the Senate take any such action as that?

Mr. J. WOOD — Certainly. The judiciary committee recommended that we proceed in the same way as in the Smith case, and that resolution was adopted by the Senate. I mean as to the form of proceeding. The case of Judge McCunn is novel in every respect from any other case that ever came up. In the first place, proceedings are instituted in the Assembly, for the purpose of inquiring whether he ought to be impeached and tried by the Court of Impeachment for mal-administration, or such conduct as would warrant his removal. Under the proceedings of the Senate the judiciary committee were authorized to examine and to see whether it was a case where an impeachment should be had; and they took the testimony, and it was discussed before them. What did they do? A thing unheard of before. Instead of acting upon it themselves, they sent it to the Governor, without any authority whatever, so that they stand as the impeachers of Judge McCunn before the Governor, instead of before the court, for the trial of impeachment. This testimony was laid before the Governor, and it seems from his message that he sent to us that he did not examine it, except to see that it was a *prima facie* case made out. Not even that, because the same day it went before the Governor he transmitted to this body, with the recommendation, that if the charges contained, with the testimony, were true, that Judge McCunn be removed. We have this case, in which we are to determine the solemn question, of whether Judge McCunn conducted himself so that he ought to be removed. The Governor has not stated the evidence is sufficient; he has allowed the other party to be heard

before him. He has sent it to us for the very purpose that if it was a proceeding to remove a sheriff, he would send it to the county judge to take the testimony and return it to him for his action. Here we take the testimony and decide. What testimony shall we take? Of course it is competent for the parties to agree that the testimony already taken shall be the testimony upon which we shall decide. It seems to me the accused should have the right to say whether we shall act upon this testimony or upon the testimony which he shall compel the prosecutors to produce here that will warrant his removal. What misconduct should warrant his removal? Should it be any thing short of an impeachable offense? They are questions discussed in the Smith case and will probably be discussed in every case that may come up. My friend from the tenth (Mr. Madden) thinks that the lawyers are setting up some technical objections or some technical proceedings for the purpose of delay. I know lawyers are charged in that way sometimes when they are prosecuting or defending men charged with crime; and my learned friend will find that the rules which have been laid down by lawyers are the only safe rules by which an investigation of fact for judicial determination can be arrived at. Where a man's reputation is involved, it seems to me he should have the benefit of all those questions. The learned senator says that we are not to punish anybody. I submit to him if it is not a very severe punishment when you charge a judicial officer with so conducting himself that he ought to be removed, and if the Senate or Governor or anybody else shall decide those charges to be true and remove him, is not that a punishment? It is a punishment severer than death.

Mr. MADDEN — Mr. President: I stated, not punishment in the ordinary way, by disqualification. Of course it is. A man's own conscience should punish him if he is guilty.

Mr. J. WOOD — In a trial by the court for impeachment, we do not necessarily disqualify. It seems to me when you have agreed upon the course we shall adopt in these cases, when we have the precedent already established by the Senate, it should be the course we should pursue; and it seems to me there is no occasion for any long argument in regard to the preliminary proceeding.

Mr. MOAK — Mr. President: The Smith case was not like this, for the reason, the senator from the third (Mr. Murphy) will recollect, that the Governor sent a message to the Senate, in which he recommended removal, and stated, we must take the evidence as true, and that, in his judgment it established his guilt, and stated that unless he should disprove it he should be removed. That was

taken from the files of the Senate by somebody, and taken down to the executive chamber, and those words were stricken out. When it came back to the Senate a motion was made on behalf of Judge Smith to dismiss the proceedings, on the ground that the Senate had no jurisdiction. The Governor was then put on trial. The then Lieutenant-Governor (Alvord), and the private secretary of Governor Fenton, and a clerk of the Senate were sworn, and the Senate finally resolved that the alteration was without any authority whatever, and, therefore, the recommendation must stand as originally presented to the Senate, and, therefore, there was a recommendation of the Governor for removal, I refer to pages 130 and 131 of the Smith trial, and the Senate will, upon examining that case, find that the paper as it was originally sent was then read, and that was the paper upon which Judge Smith was tried; so that the point which was decided in the Smith case is entirely different from this case.

Mr. MURPHY — Mr. President: The real question I think we have before us, is, whether we will adopt the suggestion made by the counsel for Judge McCunn, and that is, to assign a day for the argument of this preliminary question, which concerns the jurisdiction of the Senate to try this case, and then refer the taking of the testimony, in case we should decide to proceed by a committee. I am rather surprised, sir, at the remarks made by the honorable senator from the twenty-seventh (D. P. Wood); he has been very strenuous that we should take this testimony which was had before the Assembly, and which comes to us from the Governor, as it is; as a part of the testimony before us. He considers it testimony and proper testimony here.

Mr. D. P. WOOD — Mr. President: May I correct the senator?

Mr. MURPHY — Certainly.

Mr. D. P. WOOD — Mr. President: The senator misquotes me when he says I am very strenuous, that we must take the testimony as it is before us. I simply said it was competent for the Senate to change it. I am not strenuous at all. I should much prefer to have the witnesses before us.

Mr. MURPHY — I accept the explanation, when it is proposed to take this testimony, as I think it can be only taken; the only legal way. He finds it extremely hard for him to read and understand it. He thinks that would be very objectionable. Senators cannot consider testimony which is had before a committee of their own body, under their own rules, within there own jurisdiction, but they may read the testimony which has been sent here informally by the

Governor. I take it we are to be governed in this matter by the constitution and by the established practice of this court. Where a question has been properly presented to us as a Senate, I take it it will be a rule for our guidance. If there is any doubtful proposition (I mean doubtful under the constitution) it has been duly considered here and determined, and that is to govern us in the future, else we will be all at sea. The constitution is explicit: "All judicial officers, except those mentioned in this section, and except justices of the peace, and judges and justices of inferior courts not of record, may be removed by the Senate on the recommendation of the Governor; but no removal shall be made by virtue of this section unless the cause thereof be entered on the journals, nor unless the party complained of shall have been served with a copy of the complaint against him, and shall have an opportunity of being heard in his defense." In order to obtain jurisdiction of this case, we must have the recommendation from the Governor. I do not propose to discuss the question of whether there has been or not a recommendation by the Governor. There is no provision that the Governor shall send us the testimony or affidavits. He is merely to send us the charges. He has to satisfy himself as to those charges, whether or not he will make the recommendation for us to remove. The grounds upon which he may do it—the motives that may actuate him—we have nothing to do with. He has discharged his duty when he has sent us his recommendation for removal, and the grounds upon which he makes the recommendation. The charges must come from him, and cannot come from any other source. The charges are presented to us as a tribunal, free from all prejudice, free from all bias or knowledge of the case, its supposed, and we try them as they come from the Governor. How are we to try them unless we take the testimony for ourselves? How are we to be justified in taking affidavits or testimony before any committee of the Assembly not connected with this investigation? Could not that testimony have been improperly taken? May it not have been improperly introduced? May it not have been, as alleged here, *ex parte?* Is that the way of giving a party an opportunity of being heard? We must take that testimony *de novo*, if it is to be the same testimony, or whatever is the testimony, and give the accused the opportunity of examining the witnesses, and testing that testimony before us in our presence, either as a body or by proxy, if with the consent of the party through the committee. We do not give the party the opportunity of being heard in regard to the charges, unless we give him a full opportunity of hearing all the

testimony and having an opportunity of a cross-examination. You may say you may object to such portions of it, and contradict it if you please; in my judgment that is not a way to try a case. The Senate had this question fully before them in the Smith case, and the judiciary committee reported in that case, as they have here, that it was the right of the accused to have the case heard before the full Senate; but as it was this matter, they might consent if they chose to have it heard before a committee. That was the proposition established in the Smith case by the Senate, adopted in both of these cases. Therefore I conceive, according to the Constitution, and of the precedent and the Constitution adopted here, the accused here have the right, are to be made before the full Senate, or they waive that right and have the testimony before a committee appointed by the Senate for that purpose; but it is their right; it concerned them personally, and they must be free to act in the matter. I would like to save an all-summer's sitting in these cases; I do not feel myself equal to the task, and yet, perhaps I should be here. If we can avoid this long sitting by taking a vacation of one week, as I understand the counsel upon the part of Judge McCunn distinctly to propose, it appears to me we have a right to suit our own convenience, when we do not imperil the interests of the community, and I am in favor of the motion that we shall adjourn this case until a week from to-day, for the purpose of hearing this preliminary question argued and disposed of. I move that, but I am willing to hear the counsel on the other side, if they desire to hear any thing.

Mr. PECKHAM — Mr. President: As one of the associate counsel of Judge McCunn, I desire to say in his behalf that we have no desire to interpose any more technical delays to the charges preferred in this case. But we do desire that these charges shall be heard upon evidence which is proper and legal. We deny the assertion made by the honorable counsel for the prosecution in this case, that the evidence taken heretofore is or can be adjudged in any sense legal evidence to the accused here upon his defense, in any form or in any manner. The Bar Association of the city of New York made certain charges; they had the right, the same as any other body or man, to make a charge against the judge, and that charge was made in the Assembly, preferred to the Assembly, and the Assembly, for its own information entirely, sent it to the judiciary committee, and that committee went to the city of New York and had an examination in regard to these charges. Here, in the first place, we state that there was, upon the part of the accused, no legal right to appear before that committee, and no legal right whatever to cross-examine

the witnesses there; that whatever was done upon that occasion, or before that committee, was done from the mere grace of the committee itself in allowing them one moment, or whatever time was necessary in their judgment, and in their judgment alone, the accused to examine or cross-examine any evidence whatever, and that is, as I understand it, the truth in this case. With no right whatever to examine any witness before that committee, with no right whatever to appear before that committee, with no right whatever to examine any witness, he was allowed, *ex gracia*, to come before the committee, and simply and solely to put a question that he might deem proper as a mere act of grace. Under such circumstances senators can readily see that a man would not feel himself at liberty, or certainly he would not have that same desire to examine or cross-examine the witnesses to that end, or with that directness, vigor and force that he would if it were a proceeding he was then taking part in as an accused party that was to report upon his case one way or the other. There were few cross-examinations made upon the part of Judge McCunn, as I understand it, and they were all of very small account. The judge says that he has no desire, as I have said before, to put in technical defenses or any technical delay in the way. He is ready and, in all probability, will agree when any committee may be appointed, that it shall be appointed by the Senate to take this testimony *de novo;* I say we can, upon all probability, agree upon a large amount of the testimony already taken, and agree that that shall stand as the testimony before the Senate, with the power and proviso that we are to have the liberty to examine or cross-examine one way or the other, as to us shall seem right or proper, but we do not wish to take the testimony that has been taken before that committee and have this Senate pass upon it, and say it will take that testimony, as if it were taken before them now, and then call upon us for a defense, asking us at the same time to bring forward those witnesses who are not half cross-examined.

Mr. Woodin—Mr. President: I do not wish to interfere with any course counsel may see fit to adopt. The precise question the Senate is to consider is whether they will at present order the hearing and disposition of their preliminary to-day; and if counsel wish to be heard upon that, we shall be pleased to hear them.

Mr. Peckham—Mr. President: That is exactly the question; but the debate has taken rather a desultory manner, and I thought it proper that the Senate should have the views of counsel of the accused upon these different points. As I understand it, the single

question is now, whether the Senate will adjourn for one week, and then allow the preliminary question to be argued, and if decided adversely to the claims of the accused, that then we consent that the testimony shall be taken before a committee of this Senate, and heard in the city of New York; and upon the testimony having been thus taken, the Senate shall act as if the whole testimony was taken before them; and it seems to me, under these circumstances, it is something that will add to the dispatch of this case, and will give the Senate and members an opportunity of escaping, and, what is, of course, very unusual, and what all are reluctant to undergo, a very long and tedious summer session upon these questions of fact. And if then this question should be decided adversely to the defense, we can go on and have that testimony taken before a committee; but if it should, on the other hand, be decided in favor of the accused, then the whole time of this Senate has been wasted up to the time when that decision has been reached; and that decision, it seems to me, can be arrived at earlier, by giving that week delay, if the Senate decide the argument well founded.

Mr. BENEDICT—Mr. President: If we put over the hearing of the preliminary question until next week, we shall not be a step further forward than we are this moment. We made a mistake a month ago or less, that we did not decide Judge Prindle's demurrer on the spot. We should have saved time and should have been hearing him to-day and his facts; and now, if we wait until next week and hear that preliminary question argued, which will take a couple of days to argue, without any doubt, with all the counsel, and for what purpose? That we may hear Judge Selden! Judge Selden is an exceedingly sensible, able and honest man, and I like to hear him argue always; but I do not mean to say that he is the only man who can argue the question before the Senate, and I do not mean to say that the counsel for Judge McCunn are not able to present that question to-day. Two weeks ago these gentlemen knew this question was to arise. They are quite as able to present it as Judge Selden, for whom I have the very highest respect; but he will not argue it any better than they will (if it is argued), this morning. We shall be so far, then, ahead, and we will see what is to come on to-morrow. I should like to go home to-day as much as any member of the Senate, but I am exceedingly reluctant to postpone these things, and by and by they will go over, and we shall accomplish nothing. I propose that the Senate hear this preliminary question argued this morning, and then we shall know what it is; and then both of these parties will have some forecast of the future in regard to their cases, and not be jumping

all the time in the dark. I was one of the men who recommended the putting over of Judge Prindle's case, but I made a great mistake. It ought to have been decided then. I don't want to put this case over. When we have heard this argument, how many will say, "put this over until after the impeachment trial," and then the political canvass will be on hand, and then Judge Prindle may want to address some political body, and it will drift along, and we will accomplish nothing.

Mr. PALMER — Mr. President; It has been said that we will have an opportunity to try our patience this summer. I submit we have had the first lesson this morning; and, for my part, although the discussion may have been necessary, I have heard about enough of it. We come here from all parts of the State to decide these questions and go on with the cases now. It has been with some trouble and difficulty that we have reached here, and I do not propose to go home again and come back next week, although I would like to gratify the counsel for the accused. When we leave here to-day, if we do so, we ought to known about what we are going to do. I think we should decide it, whether we should go on with this case of Judge McCunn. We can just as well open the case and stay here two or three days this week; and we have made arrangements to be away two or three days, I presume, and we can hear the argument on the subject, and we can go as far as we can with this case to-day, and we may find we can leave out certain portions to the committee, and we certainly will be making some progress. I, therefore, call for the motion of the senator from the third (Mr. Murphy), and I trust that motion will be voted down.

The PRESIDENT — The question is upon the amendment, moved by the senator from the third (Mr. Murphy), to postpone further consideration of the case of Judge McCunn until Tuesday next.

Mr. JOHNSON — Mr. President: I believe this question this morning, upon this preliminary question before the Senate, will not prolong the time in which this investigation will be made, but rather have a tendency to shorten it, and, therefore, I think it is important. The questions, in all their bearings, should be discussed, however valuable will be the time. It seems to me the proposition before the Senate is simply this. Judge McCunn is called upon to answer the charges preferred against him; in reply to that, he says there is an important legal proposition which he wishes to submit to this body before entering upon his defense in giving testimony. That case, in all of its bearings, has been submitted to counsel most eminent; to a gentleman learned in the law, and who is prepared to make the argument upon

that proposition. And he asks this delay that that argument, which must necessarily precede the taking of the testimony, be made; and for that reason he asks a delay of one week, which will not necessarily involve the reassembling of the Senate for that purpose, it being already designated for the hearing of another case. I ask if that will be an unreasonable action, upon the part of the Senate, to give him that time; and I venture to say the simplest proposition, the simplest constitutional question which may be submitted to this body, you could not find a counsel, however eminent, in the city of Albany, who could prepare, or would agree to undertake to make a constitutional argument before this body, where that argument is to pass into history and to pass as a portion of the record of this trial, without exhaustive research, and without time to prepare for the argument. Possibly it is the duty of the Senate, without regard to the position these parties occupy. I believe that justice should be held with an even scale and an even beam, with these parties asking that. I believe it is reasonable, and I believe it is the usual practice where interests, very much inferior in their consequences and results than this, are depending; where not only the moral character, the status and effect it produces upon that individual, is to attach to him forever. Therefore, I believe in "making haste slowly in this instance; and then, too, if that legal question is decided adversely, then he agrees to accept the committee to take the testimony, which will obviate the necessity of the continuing of the Senate in taking that oral testimony, as I understand; and as the senator from the twenty-second (Mr. D. P. Wood) has declared his preference to hear his testimony, I hope he may be added to that committee, so that we can have the advantage of his legal learning and his experience in the investigation of causes, the offenses; that we have the benefit of his experience and legal knowledge; therefore, I do hope that not only the case will be postponed until that time, but I hope, in the meantime, that the counsel of Judge Prindle, in conference with his colleagues in charge of that case, will finally conclude that it is better that the testimony in that case should be taken by a committee.

Mr. D. P. Wood — Mr. President: Last evening, when we adopted the resolution to proceed with the McCunn case this morning at 10 o'clock, this question, I supposed, of the application or the suggestion, was made by a counsel for the judge, that they were not willing to proceed, for the reason that they required and desired the presence of Judge Selden here, to argue this preliminary question. That having been decided deliberately, after consideration of the

question and the arguments, that they have had sufficient time to prepare, and that the Senate of the State, laying aside all of its business, coming here from all parts of the State, twenty-eight or thirty men, their convenience was somewhat to be considered, and that they were not likely to be asked to go home and come here again, to consult the convenience of one or two counsel, when the State is so full of eminent counsel, able to meet and handle this question; and when, as we have seen here already, the judge himself is fully prepared now, with counsel, eminent and competent, to meet this question. This is not a new question; the senator from the twenty-sixth (Mr. Johnson) says, it is a grave question, and one which should be considered well and decided carefully. If this application was addressed to the court instead of the Senate, what would be the reply? They would say that precise, identical question was fully argued — elaborately argued in the Smith case, and was decided after an elaborate argument by some of the ablest counsel in the State. I would not take that position, although I would say this case is and has been argued in that case, and fully decided; yet, in the Senate, I would depart from the strict rules of a court of law; and if counsel think they can add any thing to the argument presented on that trial, I would listen to them patiently; but I would not consider it of sufficient importance, or that their interests were so far imperiled, by being forced to argument to-day, without having had two weeks' notice that they must meet it to-day, as to grant them an adjournment, and go home and waste another week and fortnight, and come back here to hear that argument. It appears to me it is asking too much. Not only argued and decided full in the Smith case, but incidentally in the Prindle case, which we disposed of yesterday. Let us proceed, under the order taken last night, with this argument, and save the precious time of the Senate. If the senators will look into the record of the Smith trial, and of all the impeachment trials that have taken place before the Senate and Court of Appeals, forming the Court of Impeachment, they will find the greater portion of the time of the court has been occupied just as we are occupying it to-day. Not in taking testimony, or proceeding to ascertain the facts in the case, but in listening to arguments upon preliminary, extraneous and collateral questions. Let us avoid that. We have too much of the business of the Senate on hand, during the dog days of this year, to spend unnecessary time upon argument, which certainly does not require that we should adjourn and go to all parts of the State, and come back here to listen to it. I do hope that the action taken by the

Senate last night will be adhered to, and that we shall proceed with the case. When we adjourned two weeks ago to consider the Prindle case, it was understood that the case of Judge McCunn would be taken up now, and it was fully understood by them what their position would be. They were good lawyers. They knew if the demurrer was overruled, that brought their case immediately upon the calendar before the Senate, and they are not taken by surprise. They knew we intended to go on with the case, and that was really the first business in hand.

Unless we do begin, we certainly shall be until the first of January next before we get through. If we fritter away the whole season in adjournments, for the purpose of allowing counsel to be heard upon preliminary questions, we shall not have any time this year to listen to questions of fact. In relation to the remark that dropped from the senator from the third (Mr. Murphy), and misquoting my position in relation to this testimony, I will say a word. I did not say that I insisted on or desired to have the testimony that was taken before the House committee, treated as the testimony in this case. I was simply commenting on the constitutional provision, that I thought it was in the power of the Senate to treat that as evidence before them, and to take it as *prima facie* evidence upon which we were to act, giving to the defendant full power to meet it in any shape, and to recall the same witnesses, and examine them *in extenso* and *de novo* upon the part of the defendant, as a part of their hearing within the words of the Constitution, and its true meaning and import. There is nothing in the Constitution, or in the laws of this State, that requires us to disregard the *prima facie* evidence that is brought before us. The Governor may have recommended the Senate to remove one of these officers upon affidavit presented to him, if he saw fit. Then when it came before us, within the language of the Constitution, we are compelled to give the defendant a hearing; and what is a hearing? It is, of course, to hear all the testimony he may offer, and all the arguments he may adduce to show why he should not be removed. There is nothing in the law or Constitution which provides and declares that we shall enter upon the testimony *de novo;* but, as I said before, I would do even that, if the counsel for the defense ask it. I would subject myself to that inconvenience, if the counsel for the defense asked it; but I simply stated that I hoped that the counsel for the defense and the prosecution could agree upon a large portion of that testimony, and relieve us from taking it over again, although, as I said, I would prefer to have it taken over, so I might hear the witnesses.

Mr. Woodin — Mr. President: I submit one or two observations which I had intended to submit in consultation with my associates. My idea is that it is our duty to hear and decide — investigate. If a stranger were to come into this Senate, and look upon this scene and hear what was said, and see who takes part in it, he would at once conclude that these gentlemen in the front (the counsel) were the court, and that the senators were the counsel. I apprehend the counsel in fact employed in this case would enter upon the argument of these questions, at this period of time, under some embarrassment. Having heard from quite a number of senators their views expressed in a qualified manner, they would hardly expect to appeal to their judgment and their reason for a verdict or judgment adverse to what they had said. I hope if there is to be any more talk upon this question that we shall listen to the counsel. If I am mistaken as to whom the counsel are, my remarks are out of order. I hope we shall hear the counsel who are here present, on both sides of these questions, and then, if the senators desire to air themselves, we will have a private consultation, and go through with the airing.

Mr. Madden — Mr. President: I think the point of the senator from the twenty-fifth (Mr. Woodin), is quite well taken. At the same time, I think it is entirely competent for the Senate to decide whether they will adjourn one week or not. I admit, that, as to the remarks upon important matters, we had better have the counsel first, and then decide in regard to obtaining the facts in the case; and we have a right to do it in the way we deem best, without regard to counsel. The senator from Brooklyn can read the testimony in Brooklyn.

Mr. Murphy — Mr. President: I expect to be here, and if I am not I wish to have an excuse for my absence.

Mr. Madden — I believe he said he would be here, at judgment. That is not the question. The question now is, shall we adjourn one week or not in the McCunn case. I would ask the chair the question.

The President — The question is upon the amendment of the senator from the third (Mr. Murphy), that the case of Judge McCunn be postponed till next Tuesday. That is an amendment to the motion from the senator from the twenty-second (Mr. D. P. Wood), that we proceed at once to the consideration of the case.

Mr. Madden — I am opposed to adjournment.

Mr. Lewis — I arise to a point of order. The debate is in violation of the fourteenth rule we have adopted, which provides that the decisions of these questions shall be had without debate, unless a

senator shall desire a debate; and if, on motion to that end, that shall be adopted by the Senate, the chamber shall be cleared for consultation.

Mr. MADDEN—The point is well taken.

The PRESIDENT—The chair is obliged to the senator from the tenth for deciding it.

Mr. VAN COTT—Mr. President: The position of the counsel upon the other side of the chamber is somewhat anomalous. We are here aiding, as we suppose, the Senate in an investigation. The position is very awkward, to enter into a discussion with the senators themselves with the questions that are in dispute. It is rather embarrassing for us to contest what senators say and what senators may wish to do upon the questions submitted. I understand the question now pending is upon the amendment to adjourn the hearing of this case until Tuesday. I understand the question to be predicated upon an intimation that Judge McCunn will consent that the testimony taken in the case shall be taken by a committee of the Senate, provided the objection taken to the jurisdiction of the Senate is not sustained. I have heard intimations at different stages of the investigation about what Judge McCunn and his counsel would do in certain events. There have been very unfortunate misunderstandings here between parties and counsel, as to what would be done in certain events; and if the Senate adjourns for a week upon an understanding of that kind, I hope the understanding will be put in such a shape that it will take effect; because if that motion prevails, and if the counsel who have appeared here to assist the Senate in the prosecution of this inquiry shall come here next Tuesday, they will come without witnesses, and without the expectation of proceeding further in the investigations before the Senate, to be heard only upon the questions taken as to the jurisdiction of the Senate. And as we have some responsibility in bringing witnesses here one hundred and fifty miles in midsummer, eager to leave town with their families, some of whom are sick, and whose families are sick, the position we occupy is one of responsibility and difficulty in procuring the attendance of witnesses, and we wish to be distinctly informed by the Senate now, by its action, whether we are to be responsible for the production of witnesses required in the prosecution before the Senate. We owe, we suppose, a duty to the public. I know this is a matter of great public expectation, and I know that those who have ventured to pursue this investigation against a judge of a court in which they are obliged

to practice as counsel, have taken upon themselves very serious responsibilities, and very serious hazards for themselves and for their clients; and, in addition to that, the responsibility of producing, on the call of the Senate, evidence to substantiate these charges. We have responded to the call. We have, in midsummer, taken this responsibility upon ourselves. We are here and ready to proceed. We want to know whether we are to proceed. We want it distinctly settled that if the Senate adjourns it adjourns upon the understanding that the Senate is not further to proceed here; I mean in the taking of testimony, but is to proceed before a committee of the Senate, in the city of New York.

Mr. MOAK — Mr. President: I desire to be expressly understood that if we are granted this adjournment we will consent to the taking of testimony in New York or elsewhere, by a committee of three or four, which the Senate may appoint, and, of course, be heard finally before the Senate.

Mr. VAN COTT — Mr. President: I wish further to submit this suggestion, that if the Senate shall adjourn until next Tuesday to hear the arguments upon the jurisdictional question that we may have discussed, the further question whether it is competent for the Senate to act upon the evidence received from the Governor, so much of the testimony need not be taken over again on the part of the prosecution. It will leave the defendant to adduce such evidence on his part as he may deem material in the exercise of his constitutional right to be heard in answer to the charges. I do not mean to say a word upon that question here. I think it rather unfortunate that it was brought into discussion this morning, though it seemed inevitable in the situation of the question before the Senate; but after all the discussion, I am prepared to demonstrate to the Senate an authority that this is competent evidence, and that the Senate might, upon the refusal of the judge to adduce evidence (to be heard by evidence adduced on his part), proceed to remove him from office. I shall not discuss that question, but I hope the objection to the question of jurisdiction, if overruled, now or upon the adjournment, that that question will then be disposed of as another preliminary question to the investigation, before a committee of the Senate. Of course, we are very anxious, and know the difficulty of getting witnesses, who are going out of town, some abroad and some over other sections of the country, to keep them in town, where we can get their testimony; and knowing the difficulty we have had in procuring the attendance of witnesses, we are very anxious to go on; but it is a question for the convenience of senators, and a sense of

justice to the accused, and we do not wish to be considered as strenuously pressing the question.

Mr. D. P. Wood — Mr. President: I desire to ask the counsel a question, whether you have your witnesses now here on the part of the people?

Mr. Van Cott — We have witnesses enough to occupy the day, and I trust a part of to-morrow; and we sent down subpœnas last night for additional witnesses to be subpœnaed, to appear here to-morrow.

Mr. Peckham — Mr. President: We wish to say, on the part of Judge McCunn, if this adjournment be granted for one week, we shall be entirely prepared to discuss the question that Judge Selden is unable to take part in, and also to discuss the other question which the gentleman says he will not now discuss, as to the propriety of the admissibility of the evidence taken before the committee of the Assembly, being properly in evidence here. Those two questions we shall then be prepared to discuss; and then as has been said, if the decision shall be adverse to us, we will be ready to go on before the committee of the Senate, and have the testimony taken in the city of New York, and the final end, of course, had before the full Senate; and in addition to that, as far as regards the witnesses on the part of prosecution, where subpœna had been sent down, a telegram would reach them in time to prevent their coming up to-day or for to-morrow, and the witnesses that are here will probably take up the day (certainly cannot be very many in number), and it seems to me not only the convenience of the Senate, but the time of the Senate would be materially saved by granting this adjournment of one week.

Mr. Murphy—The motion I recollect is until Tuesday next.

Mr. Lewis—I withdraw my motion to go into secret session.

The amendment was lost.

The motion of the senator from the twenty-second (Mr. D. P. Wood) was carried.

The President—The Chair now desires to ask the counsel for Judge McCunn if they desire now to raise any more preliminary questions?

Mr. Moak—The second answer which the defendant has interposed here, is this: "And the said respondent further answering, claims and insists that this honorable body has no jurisdiction to hear." It is fit and proper that the discussion of this question, which is a constitutional question, and which involves, certainly, grave rights so far as the respondent here is concerned, and, so far

as the establishment of a precedent for the future is concerned, should be discussed by more eminent counsel than myself; and yet, the duty is thrown upon me, and I propose to meet it as best I may. The discussion of questions of this character is not a mere idle ceremony; and the arrival at a correct conclusion upon them, involves not only the rights of the citizens, but it involves the rights of the people. The people have established a Constitution, and they have a right that that Constitution shall be observed, and shall be observed in its minutest particular. This question involves not simply the rights of John H. McCunn; it involves not simply the establishment of a precedent here, but it involves a question of whether a fundamental law, which has been passed upon by the electors of this State, if it means what we say it does, shall be observed, or whether its observation may be dispensed with. It has been suggested by senators here, and, of course, I assume without examination, that this question was decided in the case of Judge Smith, in this State. With all deference, I beg leave to suggest that the question which we now present, was not in the case of Judge Smith. By referring to that case the senators will find on page 1, the proclamation, as it is called in this trial of Judge Smith, of the Governor, which was sent to the Senate, and is entered upon the records. Upon the journal of the Senate originally, it read in this wise:

"STATE OF NEW YORK:

"EXECUTIVE DEPARTMENT,
"ALBANY, *April* 21, 1866.

"WHEREAS, The Senate of the State of New York, by resolution, bearing date on the 23d of March, 1866, requested me to call the Senate together in extra session at the Capitol, on the 2d of June following, for the purpose of proceeding to the trial of the charges against the county judge of Oneida county, now, therefore, I, Reuben E. Fenton, Governor of the State of New York, by virtue of the authority conferred by section 4, article 4 of the Constitution of said State, do order and proclaim that the Senate of the State of New York do convene in extra session at the Senate Chamber in the city of Albany, on the 2d of June, 1866, at 11 o'clock in the forenoon, for the purpose of proceeding to the trial of the charges against the county judge of Oneida county," etc.

By referring to the proceedings of the Senate, in this case, it will be found that the defendant in that case interposed a special plea that this document was not the document which had been sent to

this Senate by the Governor of the State. He alleged in his special plea, that a document was sent by the Governor, by his private secretary, to the Senate; that it was submitted to the Senate; was announced by the President; and that after that time it had been taken from the possession of the Senate to the executive chamber, and changes had been made in that document, and he objected to the Senate trying the questions, because it was not the paper upon which the Senate was asked to act by the Governor, and upon which it was convened; and evidence was taken, as the proceedings will show, by which it was permitted to the respondent in that case (George W. Smith) to prove, if he could, that that was not the document which had emanated from the executive chamber, and which had been submitted to the Senate. In accordance with that evidence the private secretary of Governor Fenton, Mr. G. S. Hastings, was called, and four or five other witnesses were called, as the proceedings will show. Commencing at page 50 of these proceedings, the first witness called for the respondent was George S. Hastings. He was examined by the respondent, and cross-examined by Mr. Sedgwick, the counsel for the prosecution. James Terwilliger, who was then the Clerk of the Senate, was sworn (page 55). Thomas G. Alvord, who was then the Lieutenant-Governor, was sworn, on page 56; and the Senate finally adjourned, the counsel for the prosecution, Mr. Sedgwick, saying that they might give further evidence, or they might not. On the ensuing day, his excellency, the Governor of the State, appeared in the Senate chamber here, as shown by these proceedings, and was himself sworn as a witness, and gave testimony, in which he himself said that this document, at the time it was sent to the Senate, was not in the form in which it was entered on the roll. The original document was produced, and erasures and interlineations were made; and it was claimed by the respondent that this alteration amounted to a forgery, and, consequently, that the Senate had no jurisdiction of the proceedings.

On pages 13 and 14 the following appears:

"Mr. GIBSON offered the following resolution:

"*Resolved*, That the document entered upon the journal of the Senate on the 14th of February, 1866, as a message from his excellency the Governor, in relation to the removal of George W. Smith, county judge of Oneida county, be amended by inserting the word 'as,' which was stricken out thereof; by restoring the phrase 'I must assume that the charges presented to me, and duly verified, are true;' expunging the words written on erasure, as follows: 'he shall, upon

a full and fair investigation, be convicted of the charges made against him,' and inserting in the place thereof the words as follows: 'upon trial, he shall fail to disprove the charges which are made against him.'"

That resolution was adopted. It was decided that the original message which was sent to the Senate by the Governor and entered upon the record, was the charges and the proclamation upon which the Senate should act.

Let us see what further occurred. At pages 130 and 131 of this trial will be found the document as originally sent to the Senate, and the document upon which George W. Smith was tried, and this occurs in regard to it. "By Mr. Shaffer. We now call for the reading of the original message as read from the Clerk's desk on the 14th February last. By the President. The Clerk will read the message." (The Clerk proceeded to read the message.) That was the document upon which George W. Smith was tried; whether it complied with the law or the Constitution is not the question here, I think. And that question was not finally passed upon, because it was assumed that the burden of proving the affirmative of the case when it came to the Senate, rested upon the prosecution. Some of the senators in that case said they thought the Governor had gone too far when he said the respondent should be called upon to disprove the charges, or he should be removed; but he said, substantially, "I must assume that these charges presented to me, duly verified, are true. I do assume they are true. I recommend his removal, and recommend that you investigate the case." That was the case of Judge Smith. There the Governor did assume to, and did pass upon that question of whether the party was guilty or not of the charges. He says he assumes they are true. He recommends his removal, and upon that he was tried, and the practice of the Senate, which in that case required the prosecutors to call their witnesses and swear them before the Senate and prove their case. The case showed that the Senate did not adopt the theory of the executive of the State at the time that the respondent was called upon to prove his innocence before a court or before a tribunal, to pass upon the case before his guilt was established. That being so, the case of Judge Smith, in my estimation, and I think every senator should examine this case, and I ask him to examine it, before assuming the same question is in that case that is in this, and you will say that the question of whether the Governor must pass upon the probable question of the guilt or innocence of the charges, must be first determined by the executive. And now let us see what the Constitution of our

State requires. This question of whether one man should hold an office or not, perhaps so far as he is concerned, may not be a very important one, except so far as it involves his reputation, perhaps through life, but the question of whether a man who is chosen by electors of the district, or by the electors of the State, shall be unseated, and their action nullified, is a question in which every elector has a vital interest, and whenever that right is invaded, one of the rights which they have attempted to guarantee to themselves in the Constitution, which is so carefully framed, is frittered away. Section 2, article 6, of our Constitution, I refer to.

"A justice of the Supreme Court may be removed by concurrent resolution of both houses of the Legislature, if two-thirds of all the members elected to the Assembly and a majority of all the members elected to the Senate concur therein."

Let us see what is the theory upon which this Constitution proceeds in the removal of an officer like that in the case which we now have under consideration, and it is fair to reason by analogy; a gentleman who would be put on trial for assault and battery, where the punishment might not exceed a fine of six cents, by this Constitution, is guarantied that before he shall be put on trial, his case, if he elects to have it, shall be presented to the grand jury of the county. He shall be indicted. The charges shall be specifically made by a grand jury, and then he shall have a fair trial before a petit jury. My theory of this provision of the Constitution is this (and I shall show the senators before I get through, that that has been reviewed by the Supreme Court of this State, in an able opinion written by Judge Bronson, concurred in by Judges Nelson and Cowen), that before a man could be put on trial, and deprived of an office in, which he has an interest, in which the electors who have elected him have an interest, he shall first be indicted, not perhaps in an offensive sense, not perhaps in the sense of being charged with a crime; but that somebody, acting under an official oath as a grand juror, when the case is presented to him, shall say, whether upon sufficient evidence, is not the question, but that he shall say "I have examined this case and I believe there is probable cause to ask his removal. I do ask his removal; and I ask the Senate, the body designated by the Constitution, to investigate this case, and, if established, to remove him." Let us see why this should not be so, because there is common sense in every thing, in law, or should be, and in the Constitution. Is the Governor a mere conduit through which the Senate may be reached? Is it true that if I desire a law to be passed, under which I may go through my neighbor's lot with

a private way, that I may approach the bar of the Senate and ask a senator to present my petition, and to pass a law? Is it true that, in the most important law which can be passed by the Senate, I may approach the Senate and ask that it be investigated as a private individual; and when I make a charge against a judicial officer that I must come to the Governor and merely go through the form of asking him to come here as my representative? This Constitution was not designed for any such purpose. It was designed that when charges were made against an executive officer; and if every charge that was made was investigated the Senate would certainly be busy, because no party was ever defeated yet, that, in the heat and excitement of the defeat, he did not imagine there was corruption — is it true that all he has got to do (and I care not, although I have the utmost respect for this Bar Association, whether it is an association of individuals or a single individual) is simply to come to the Governor and say, I ask this investigation, and the Governor sends in a basket of affidavits to the Senate and say I ask you to investigate it?

What would any gentleman in this Senate, who is a lawyer, think of a grand jury that should take the evidence and have it all written out by their clerk, and instead of saying we find a true bill in this case, and indict this man for burglary, would say to the petit jury and to the court, "Here is the evidence; we cannot say whether this man is probably guilty or not, to be put to trial on the charge; here is the evidence, you investigate it, and if you find he is guilty convict him." Can that be tolerated for a moment? Perhaps it does very little good to elaborate these things, because analogy and every man's common sense will see how that is. Let us see what the theory of the Constitution is. As I understand it (and I think every man who studies will understand), it is not every charge of a judicial officer that may be examined by the Senate, because the Senate might be kept very busy; but a man comes to the Governor of the State, acting under his official oath, charged with the duty of protecting every individual in the State, in his life and liberty, and in a fair and honest administration of justice. He comes to him as a public officer, charged with the duty, and, in certain cases, exercising the duty of removal without the concurrences of the Senate at all. To illustrate, take the case that was recently investigated here, with which some senators are familiar; the superintendent of the poor of the county of Rensselaer, charged with no very onerous duty. Charges were made against him, and the Governor investigated it. The Revised Statutes is careful to provide, that where an officer has been elected by the people, that the Governor can't

remove him without hearing him, and it provides how the testimony shall be taken. It provides that the Governor may appoint a competent person to take the testimony, and may designate the district attorney of the county to appear on behalf of the people, and take it and give to the accused the right to appear and cross-examine the witness. If an officer was unimportant, and this is so of all officers, then a coroner cannot be removed, nor a sheriff. There is a class of officers, and these may confuse unless they are examined. There is a class of officers, like health officers, or I believe surveyors of the port of New York, and various other officers, who may be removed by the Governor without a hearing, because he appoints them, or the Senate and he. He appoints them, and the Senate concur. That is the class of officers he may remove without any hearing; but whenever it comes to an elective officer, who is chosen by the people, and occupies his position through the suffrages of the people, the law has been very careful to provide that the Governor shall not remove him at his arbitrary will, but after a full and fair hearing. That is the difference. Under the Constitution of 1821, the Governor appointed, substantially, all the officers, with the concurrence of the Senate; and, under that, it was held, however arbitrary the Governor's removal might be, or unjust, there was no remedy. Why? He was made the officer charged with the duty and responsibility of doing it, and there was no court that could investigate the fairness of his proceedings; but in an elective officer the rule is entirely different, and so it was under the Constitution. If I have sufficiently shown — and I will not spend much time, because several of the senators are lawyers — if I have sufficiently shown that this Constitution guaranties the right to a man, before he shall be put on trial, that the Governor shall investigate the charges, that he shall set out, either himself or through the procurement of somebody else, the charges which he believes the evidence in that case establishes, and ask that the Senate then try him, or give the party a hearing on them; and if he finds them to be true, that he then removes them; then I have gone one step in these proceedings, and I think this case of Judge Smith's is not at all in the way; not a particle. In the case of Judge Prindle, the Governor seems to have proceeded upon that theory, and he says (and it is true, I believe, as a matter of fact), that in that case he heard both parties, and heard them by counsel. He says, in his message to the Senate (I refer to page 26 of the argument in the Prindle case):

"It would seem, therefore, to be the duty of the Governor, if a

prima facie case be made out before him, to send it to you for adjudication," clearly showing that, in that case, he had heard the counsel; and, I think, somewhere in it, he recites the fact that he has heard counsel. He says: "The charges in this case are presented by respectable citizens, and substantially indorsed by the county board of supervisors," etc. He says, in this proclamation, that the charges, in his estimation, make out a *prima facie* case; or, in other words, that, acting as a judicial officer, upon the evidence which has been submitted to him, as such, no matter whether it is *ex parte*, or taken after an examination, that is not material; but that he thinks a *prima facie* case is made out, and that the Senate should investigate. Let us see what the Governor does in this case; and, I believe, as a matter of fact, the records of the Assembly and Senate, of course, of which this body will take judicial notice, show that these charges were sent to the Governor, I believe, in the afternoon of the last day of the session of the Legislature, by the Assembly; and that in the same afternoon they were sent here by the Governor, showing no examination of the voluminous testimony could have been made; nor is there any pretended in the message the Governor sent to the Senate. I read the message of the Governor in this case:

"STATE OF NEW YORK,
"EXECUTIVE CHAMBER, ALBANY, *May* 14, 1872.

"*To the Senate:*

"The Assembly having sent to me the following resolution:

"*Resolved*, That the charges and testimony taken in connection therewith, reported to this House by the judiciary committee, be transmitted to His Excellency, the Governor, with the request, on the part of this House, that it be recommended to the Senate to take proceedings for the removal of said John H. McCunn from his office of justice of the Superior Court of New York city."

There is not an allegation in this message, from beginning to end, that the Governor has ever looked inside of that testimony. There is not a pretense, from beginning to end, of this document, that the Governor ever opened it; but the Assembly, believing that there was not (and it is fair to assume they believed it) sufficient evidence which would justify an impeachment, they exercised the same rights which any private citizen would have a right to exercise, and they sent the matter to the Governor. They said to the Governor, by their resolution: "We recommend that you investigate this. The Constitution has confided this duty to you,

and has guaranteed to every man who holds an office your examination and your action in the premises. We don't think there is sufficient cause for impeachment, and we send it to you for your action, and do with it as you please." The Governor, instead of discharging that duty, says to the Senate: "I send it to you, and you do as you please about it." To illustrate this case, a little practical illustration: Suppose, if the Senate please, what we cannot anticipate now, that the Senate, after the examination of this case, should say, by their vote, that we will remove Judge McCunn. Suppose the Governor, acting upon that resolution, should appoint a successor, and that successor, in going into the Superior Court, should find Judge McCunn, upon the bench, and Judge McCunn should say I claim the right to exercise the office of justice of the Superior Court. If, gentlemen, he commence through the Attorney-General proceedings *quo warranto*, and he should assume to say that he was the real justice of the Superior Court, and that McCunn had no right to intrude into the office, what must he establish in order to make his case? Every lawyer who will consider the method of proceeding will see he must prove, first, that the Governor recommended his removal; that is one thing he must prove; and, secondly, that the Senate, on the recommendation of the Governor that he be removed after a fair hearing, adjudicated that he should be removed. Suppose he should attempt to prove it, and he brings into court as the first piece of evidence this document, signed by the Governor; Judge McCunn's counsel says "we object to that; that is not a recommendation that Judge McCunn be removed from office; the Governor nowhere recommends that; he did not say 'I think he ought to be removed.' He did not recommend his removal, but he says to the Senate, 'I recommend that you investigate, and if you find the charges established, then that you remove; that I recommend it; I don't throw my official responsibility into the scale at all, I leave it entirely to you;" and what court, called upon to act according to the practice of law, and to administer justice under the Constitution of the State, could hold for an instant that the document showed that the Governor had acted upon this matter, or that he had made any recommendation for removal? If they could, then they could go farther than any case yet has gone either by the Senate or any court. We are not entirely without authority on this point. The statutes of our State have provided, and I refer to Edmonds' Statutes, and still provide as follows: I read from page 113 of Edmonds' Statutes, section 41, first volume, 123 of the marginal paging of the statute: "All officers appointed by the Governor with the consent

of the Senate, except the chancellor, the justices of the Supreme Court and the circuit judges, may be removed by the Senate on the recommendation of the Governor. This statute of course is not applicable so far as it has been changed by the Constitution. It was adjudicated in the 9th of Howard's Practice Reports, to apply to all officers, except so far as the Constitution changed it. Senators will bear in mind that here there is no provision for a hearing by the party. Why? Because the Governor appoints with the consent of the Senate. This section of the statute came under consideration of the Supreme Court of this State in the case of the *People* v. *Cadracue*, in the 2d of Hill, 93, and that case arose in this way: Under the then existing Constitution of our State the Governor had a right to appoint justices of the peace and inferior judicial officers in cities; the Governor appointed a justice of the peace in the city of Hudson, and the old officer said precisely as Judge McCunn might say in this case, if this Senate should remove him, "I never was legally removed, and hence I claim a right to still execute the duties of the office." The Attorney-General, entertaining the same view which my friends on the other side entertain in this, says, "Your argument is not good for any thing; you have not been removed;" and he brought *à quo warranto*, and the defendant in that case set up the fact that he was legally the officer, and the relator or the Attorney-General set up, on behalf of the relator, that he had been removed, but he did not say on the recommendation of the Governor. Now let us see what the replication was: "That, on the 2d of March, 1846, the Governor duly nominated and, with the consent of the Senate, appointed Spencer Whiting," etc. The commission is signed by William H. Seward, Governor. An elaborate opinion (several questions being discussed) was delivered by Judge Cowen and Judge Bronson, and they all hold, Judge Nelson, who was then the other judge of the Supreme Court, concurring with Judge Bronson, that the replication was defective, because the recommendation and action of the Governor, that the particular act be done was just as much necessary in order to create a vacancy in the office or removal as the action of the Senate. The case states that Judge Nelson concurred in the opinion of Judge Bronson, and Cowen substantially concurred in that; for on one of the pages he discusses it and arrives at the same conclusion. If I understand this case rightly we have an adjudication by Judges Bronson, Nelson and Cowen, certainly three judges of the court not inferior to any now in existence, and by that I mean no disrespect to our present courts, in which all of them say that when even a statute,

which is the creature of the Legislature, prescribes a certain measure for the removal of an officer, to wit, a recommendation by the Governor, and the action of the Senate on the recommendation, that both must concur before the officer is legally removed; and I would refer the senators, although perhaps it is not very important except as a matter of argument and for examination, to the case entitled *The application of Henry E. Barker*, in the 9th of Howard's Practice Reports, page 417, where the question is considered, as to the power of removal and appointment to office, by the Governor, during the recess of the Senate, of certain officers; and then he says that the Constitution has not changed the statute upon this subject as it existed at the time of the adoption of the Constitution of 1846, pointing out in that case between the action of the Governor — the arbitrary action of the Governor — which is necessarily somewhat arbitrary in a case where he has the appointing power, and in a case where the officer holds his office by virtue of election, and is removable only pursuant to some provision of law, and not upon the mere arbitrary action of the Governor. Now, I do not desire to discuss this question at any very great length, until the views of the counsel on the other side are heard. It strikes me, that by the Constitution itself, by the decision of the Supreme Court, where the statute used precisely the same language, except that it did not provide that the party should not be removed until after a hearing, that two acts must concur, and the action of the Governor, acting judicially, considering the case; and, perhaps, it is not necessary to determine now whether it must be upon *ex parte* testimony or otherwise; but the Governor must say, by his action, "this case has sufficient magnitude, in my judgment, to require the removal of this officer, and I recommend it, and ask you, the Senate of the State, to examine the case; and if, after doing so, you concur with me in my view of the case, then remove him." But the Governor did not say anywhere in this message — he does not even intimate — that he has an idea that this officer ought to be removed; and as this is a question of jurisdiction, it can be raised now or at any time. It can be raised, even after the action of the Senate, on a *quo warranto;* and I have shown that the case of Judge Smith is not decisive of this, and that the question we now raise was not in that case, and could not have been.

Mr. Van Cott — There is no dispute between the learned counsel and myself as to the character in which the Senate acts in a case of this character. It acts as a part of the executive department of the

government. The Governor and the Senate, acting together, constitute the complete executive in appointing to office in cases where appointment to office is devolved by the Constitution or the laws upon the Governor and Senate. They act in the same character in removals from office where their conjoint action to removal from office is required by the Constitution or laws and these proceedings. The steps taken by these two branches of the executive are taken, of course, in the order of time. There is a certain chronology in the order of proceeding; the Governor and Senate, not sitting together and acting simultaneously, but acting separately to a common end. They act in the order prescribed by the Constitution. Now, if the Governor were to send a nomination to the Senate (the Constitution being expressed that the Governor shall nominate and the Senate confirm, or the appointment shall be made in a nomination of the Governor, with the consent of the Senate); if the Governor, exercising this point of the executive function, should send a message to the Senate, and say, "not I nominate A. B. as judge of the Supreme Court, but I nominate A. B. as judge of the Supreme Court;" if the Senate, upon inquiry, is satisfied as to the fitness of A. B. to be judge of the Supreme Court, and the Senate (exercising its functions as a part of the executive upon a nomination in that form, upon an inquiry instituted by itself) should confirm the nomination, would any one doubt that the nomination, confirmation and appointment had been made in a competent manner under the Constitution? Now, what is the criticism upon this recommendation of the Governor? It is the purest verbal criticism, such as we are not accustomed to in high courts, which look at the substance of things, and not upon the mere quibble of words. What is the objection? The Governor being appealed to, in a competent manner, with charges against a judge of a high court, examines certain evidence, and sends to the Senate the charges and the evidence, and says to the Senate, "if these charges are found to be substantiated, I recommend the removal of the person named." What is the objection to the message? What does the Constitution say? The Constitution says, "that all judicial officers, except, etc., may be removed by the Senate on the recommendation of the Governor." We are dealing with the Constitution and not with the Code. If with the Code, you might have a book of forms without a formal recommendation prescribed; but there is a single word used by the Constitution, "the Senate may act on the recommendation of the Governor." In what way shall the Governor put his recommendation? How may he qualify it? What words may he use and yet perform the constitutional duty or recommenda-

tion to the Senate? What does the Constitution further say? The Constitution says, "that the charges thus communicated, upon which the Senate shall act, having been communicated to the party charged, and he having an opportunity to be heard in his defense, the Senate may then exercise its functions and remove." You take this provision as a whole: That the Governor may recommend the removal, and that the Senate may then remove, in compliance with the recommendation, if certain things happen. If the party charged is served with a copy of the charges, if he is heard or has an opportunity to be heard in answer to them, and if after the service of the charges, and the answer or the opportunity to answer on the part of the accused is had, if the Senate shall then be of the opinion that the charges are sustained, the Senate shall remove, on the recommendation of the Governor. Suppose the Governor, instead of adopting the formula that he has adopted, had sent the name of the judge to the Senate with a recommendation that they should serve the charges; should give him an opportunity to be heard; should hear him, and should come to a conclusion upon the truth of the charges; and then, if the charges, were, in the judgment of the Senate, established, that the Senate should remove him, I ask if there would not then have been a liberal conformity with the requirement of the Constitution? Is it not mere child's play to say that this action of the Senate, being contingent upon certain other things prescribed by the Constitution; that the executive, acting under an oath of office — acting under high responsibilities of office, instead of making a recommendation with reference to the actual Constitution, and to what is actually required to be done under the Constitution to make the action effective and consummate, instead of having reference to that and inviting the action of the Senate with reference to its constitutional obligations that the Governor was bound to recommend the Senate, in absolute terms, to remove the judge? Does it mean that? Does it mean that the Governor was bound, no matter whether the charges were true or false — no matter whether the charges were served or not — no matter whether the accused had his defense before the Senate — his opportunity to be heard or not, that the Governor was absolutely and unconditionally to request the Senate to remove Judge McCunn? The Constitution don't mean that. The Constitution means a removal subject to all the objections which attach to the action of the Senate and the act of removal. The Governor, therefore, instead of looking at the mere letter of the Constitution, the words that recommend removal, looks to the substantial requirement of the Constitution;

looks at all that has to be done before the removal can take place; and he says: No, I don't absolutely recommend a removal; I do not, in disregard of these constitutional provisions, unqualifiedly recommend a removal; I recommend you to remove Judge McCunn in conformity to the Constitution. That is, I recommend you, after you have served the charges and after you have given him the opportunity to be heard, and after you have concluded the charges are substantiated, to remove Judge McCunn. What difference does it make, as to the compliance with the Constitution, whether the Governor has followed the dry literalness of the Constitution, which do not convey its substantial purpose, instead of doing what he don't mean to do, and what the Constitution did not mean that he should do — make an absolute and unconditional recommendation of removal? He proceeded according to the spirit of the Constitution and recommended the Senate to do what the Constitution required that the Senate should do. He recommended not absolutely, but with an "if." Now the letter of the Constitution don't express the whole purpose of the Constitution; it don't mean the Governor shall recommend the removal absolutely. It means the recommendation shall be with this "if," which the framers put into the Constitution itself; and the whole criticism upon the recommendation of the Governor is that he has regarded the spirit of the Constitution and put the "if," in his message; not remove absolutely, which I do not mean, but remove "if," which I do mean; and he adapts the "if" of the Constitution. These charges, which are deemed sufficient as charges, supported by this evidence, I send to the Senate; and if, after pursuing the course prescribed by the Constitution, in the judgment of the Senate, after hearing the other party, after hearing this evidence explained; if in the judgment of the Senate, the accused is guilty of the charges, then I recommend his removal; and that is just what the Constitution intended should be recommended. Here is a mere inversion of another order that may be pursued. I find in the Constitution of Louisiana and Pennsylvania, and Massachusetts, the order of the action of the two branches of the executive is changed. In Pennsylvania, the Governor removes upon the evidence of the two Houses. In Louisiana, the Governor removes upon the evidence of the Houses. In Massachusetts, the same order of proceeding is observed. Suppose this proceeding had been invested here; that these charges had been made to the Senate; that the evidence had been adduced to the Senate, and in the judgment of the Senate the charges had been sufficient and the evidence *prima facie*, to make out a case, and the Senate had then, upon an invested pro-

cedure, sent this case to the Governor, and said we recommend you, if you have any duty of further inquiry here, or any duty to judge upon the sufficiency of this evidence; we recommend you, if you deem the case to be made out which has been presented to us, upon which we made our recommendation; we recommend you to remove this judge; you would have had the same case in this substance but with a different formula, and that is all. It is not the case of the judgment of two branches of the executive upon an identical state of facts upon one record. The Governor adhering now to the spirit of the Constitution, and looking at that as controlling; the Governor upon the case that is made to him, presents to the Senate a case for removal, subject to the provisions of the Constitution; those provisos being, if upon the further inquiry which is opened by the Constitution to the accused. If, in the judgment of the Senate, the constitutional case shall be made out, and the Governor having regard to the two records, and the further inquiry, says, I send you these charges, and the evidence, and I look to the further requirements of the sixth article of the Constitution. If, after the charges have been presented to the party, and after he has been heard, or had his opportunity to be heard, you shall adjudge that the charges are established, I recommend you to remove him. Now you might of course have found an authoritative exposition of the Constitution which seemed to violate this letter and its spirit, and if the authority of the Senate in a previous case establishing a different Constitution, requiring a different practice under this section, had been produced, I should have bowed to this authority, or if a judgment of any of the higher courts of the State had been produced, I should have bowed to this authority. But, until you come to an authority asking you to depart from the spirit of the Constitution, to these plain substantive requirements, and to follow the mere cold and narrow form and letter, instead of the spirit, I hold myself at liberty to follow the substantive requirements of the Constitution, instead of the imperfect letter. I do not contradict the letter; the spirit is in harmony with the letter, but it is an expansion of the letter; it is a removal, with the Constitutional "if's" instead of a removal recommended without the "if" expressed which if the Governor would be bound to imply, and which the Senate would understand just as well if it hadn't been expressed, as if it had been expressed. Would the Senate, if that message had come with the bare words of the Constitution "I recommend this removal," would they have understood it to mean any thing more than that the Senate should proceed in the constitutional way, and hear the evidence,

and determine the question? That shows the sense of the Constitution — the substantial thing that we are after. The Governor has used no more words than you would have interpolated in his message by a reasonable and just implication. You would not have regarded it as an arbitrary message of the Governor to remove this person without a hearing. But a message that you should proceed according to the Constitution and hear him and remove him after the "if" had been disposed of by your commission. I ask what there is in the way of precedent? We have the case of Judge Smith, and several comments are made in connection with that case. A part of the argument of my learned friend has been this: It must appear to the Senate that the Governor has considered the case, and has exercised his judgment, and has exercised that final judgment on his part which the Constitution requires of the Governor before the Senate can get jurisdiction of the case. That is to say, he must say: "I have had evidence; I have deemed the evidence sufficient to convict the accused; I have convicted him; that is my judgment, that he is guilty;" and when the case has reached that point, and the record shows the executive judgment has reached that point, that then the Senate may, through his message, acquire jurisdiction. What becomes of his precedent? You produce the record in the case of Judge Smith, and the Governor told the Senate precisely the reverse of that. I have presumed to leave the entire case for your consideration, without any preliminary examination on my part, with a view of forming correct conclusions as to the guilt of the party charged with malversation in office, or leaving his defense, believing this proceeding is wholly within your jurisdiction. "I recommend George W. Smith be removed from his office, if, in the judgment of the Senate, upon a trial, he shall fail to disprove the charge made against him." So that the precedent expressly contradicts the argument and the position of the counsel.

If appears affirmatively that the Governor had not tried the case, but only said, here is a body of evidence sufficient to put me upon the duty of forwarding the case to the Senate, and sufficient to put the Senate upon the exercise of its constitutional function to inquire into this abuse of office, or alleged abuse of office, and if, upon that inquiry, this charge is substantiated, then I recommend his removal; and, although this point was taken there, it was overruled by the Senate. What does the Constitution say about the Governor's having exercised any judgment in the case? There is nothing of that kind. "May be removed by the Senate on the recommendation of the Governor." Not a word said as to the evidence upon which the

Governor shall act; that he shall have affidavits or witnesses, or proper judicial evidence; that he shall have a certain amount of evidence. Nothing of the kind. The Constitution gives notice to the people of the State that if they desire a removal from office, that the Governor is the door through which they are to pass for that removal. They are to make a case before the Governor such as he may deem sufficient to induce him to send the case to the Senate, where the final inquiry and investigation must be made. That was what was done in the Smith case, and what is done in every other case. It was done in the Prindle case. In the Prindle case the recommendation is, that if the Senate shall be of the opinion, after the party has been heard, that the charges are substantiated, that then they shall perform their constitutional function and do the final act to vacate the office. It is the same as in the case of Judge McCunn. What is this case in the 2d of Hill? It seems to me it required a considerable amount of professional courage to bring that case before the Senate to establish the principles for which it is cited here. It decides, as a legal proposition, that where an office can only be vacated by the action of the Governor and Senate, it is not vacated merely by an appointment by the Governor and Senate; that that did not empty the office; that the vacancy must exist before the Governor and Senate have authority, under the Constitution, to make the appointment. All there was in the case was that the relator had been appointed to the office. The answer to that was, that the respondent had been previously appointed to the office for a term which has not expired; and you don't pretend upon your pleadings (and that was all the court could say, the question being raised on a demurrer or a motion to quash), that the respondent was ever removed from the office. All you do is to make an agreement, which is illogical and unsound, that because the relator was appointed by the Governor and Senate, therefore the office had been emptied by a constitutional removal, and the court says that is not a legal inference. The office having been shown to have been full and the term not expired, and no cause existed for appointment until a due constitutional procedure to remove the incumbent from the office, we cannot say that the incumbent has been removed until you own the fact that he was removed upon the recommendation of the Governor. There is only one constitutional mode; you must aver that that constitutional mode was followed; that the Governor recommended the removal, and that the Senate, having power to act upon that recommendation, removed; of course the question there was not as to the formula. As to the manner in which the Governor confessed

to have exercised his function to remove the case, was decided upon an entire absence of any allegation, or pretense of an averment upon the record that any proceeding had been made upon any recommendation of the Governor to remove the incumbent, and vacate the office so that it could be filled by the appointment, which was alleged by the relator; I submit, therefore, "That looking to the substance of this, to what the people intended should be done, that every thing has been done here that the people and the Constitution intended. The case has been presented to the Governor. The Governor has sent his message to you with the constitutional "if" in it. Not absolutely and arbitrarily to remove this man, but to remove him if, pursuing the steps prescribed by the Constitution, you come to the conclusion that the charges are established and that he ought to be removed.

Adjourned to 2 P. M.

TWO O'CLOCK, P. M.

Senate met pursuant to adjournment.

In the few remarks which I shall make upon this preliminary question of jurisdiction, I am taking upon myself a duty and responsibility which I did not expect when I came into this case as one of the counsel in defense of Judge McCunn. The argument of this point was assigned to Judge Selden, and left wholly to him, but he is not here, and Judge McCunn cannot have the advantage of his great learning and ability.

The question is, however, one of such grave importance in my judgment that I should do less than justice to my client, under the circumstances, if I did not present one or two ideas which have occurred to me in listening to the arguments of the learned counsel who are conducting the prosecution. It occurs to me that in the determination of this question Judge McCunn is not to be considered as before you at all.

To be sure your decision upon this point will affect his case, as it will affect all future cases of a like nature that may come before the Senate; and I wish to appeal to you to deliberate and decide this jurisdictional question without any reference whatever to surrounding circumstances which may be peculiar to this case.

The question is, what does the Constitution dictate shall be done in order to give you jurisdiction to try a case of this kind?

I know there has been a strong feeling engendered in the public mind with reference to several judges in New York and their mode of conducting business. But, certainly this place, gentlemen, is

one that should divest your minds from prejudice against any particular individual.

In what capacity do you sit here? Can it be contended for a single moment under the law and the Constitution, and the duties that you have to perform, that you sit in any other capacity than that of a court? By your own rules you have resolved that in matters of evidence you will be controlled by the same rules that prevail in courts of record of this State. At the initial step of this proceeding you admit that you should be governed by those rules which are recognized in courts of justice. Why? Because you are performing here a judicial function. You are trying an issue. The first question that arises is: Have you jurisdiction of the case that you are about to try? Is it before you at all? And I take it for granted that, lifted by your oaths above any personal or partisan considerations, you will decide that question without reference to this or that man.

Have you jurisdiction of this case? You are now convened as the highest tribunal in this great State. You are making precedents which will affect the whole future of the State, and in so doing you will agree with me that the law and the Constitution are your only safe guides.

The Constitution authorizes you, in a case like the one before you, to do a certain thing after a certain other thing has been done. In other words, you may remove a judge, but only after the Governor recommends that he be removed.

How shall the Governor recommend that a judge be removed? The precedents in a case like this, gentlemen, are very few, and I shall have occasion to speak of them so far as they exist in a moment. Let us see what the evident intent of this provision of the Constitution is. Why was it made necessary that the Governor should recommend the removal of the judge before you could act upon it, or, as we claim, before you could acquire jurisdiction? Was it not because it was presumed that the chief executive of the State of New York would be a man of intelligence and integrity? One in whom the people would confide to make such recommendation only on a careful and intelligent scrutiny of the case. Can you presume that it was the intention of the Constitution that the Governor should make such recommendation without any investigation? If so, why should his recommendation be made necessary at all? Why not permit the Senate to remove any judge of its own motion? It is conceded on all hands that the Governor must take some action in order to give the Senate jurisdiction.

Does the language of the Constitution mean nothing, when it says that your action in a case like this must be preceded by the recommendation of the Governor? I contend, Mr. President, that that provision of the Constitution was intended to throw around the judiciary, in proceedings like this, some safeguards such as have been thrown around it in other proceedings which have been provided for, to secure the removal of judges. There are two other ways whereby a judge can be removed.

The first is by impeachment. In that case three bodies must act before the judge can be removed. The Assembly has its part to perform, likewise the Senate and the Court of Appeals.

A judge may also be removed by concurrent resolution, but in that case both the Assembly and Senate must investigate; both these bodies must spread the charges upon their respective journals, and each must hear and decide upon the case.

There is a third mode for removing a judge where the Governor recommends the removal, and the Senate hears and determines the case. It is under this provision of the Constitution that these proceedings have been brought before you. It is not now the Court of Appeals and the Senate and Assembly; it is not now the Senate and Assembly, as in the first and second cases cited, but it is upon the Governor and the Senate each discharging their respective duties that the responsibility here rests. The Governor shall recommend, and the Senate shall try and decide. The act of the one being as important as the act of the other in effecting the removal of the officer contemplated. It is not enough that the Governor calls attention to a particular case, or recommends the Senate to examine the case; he must say in effect: "I have heard and examined this case, and I have arrived in my own mind at a judicial determination of the same, and I recommend that this officer be removed from office."

When the Governor shall thus have heard the case and arrived at a judicial determination of the same, and in proper form recommended the Senate to act, then and not till then the Senate is authorized by the Constitution to assemble as a court and hear and determine the case.

I am not able to find another case in the whole history of the State of New York where the Governor has referred a case of this kind to the Senate, in which he does not say that he has investigated the case and has come to a judicial determination upon the same.

In the case of Judge Prindle the Governor in his message, says: "I have heard the counsel for the petitioner and for the said judge respectively, upon the charges, some of which relate to official misconduct. They were both before me," etc. In the case of Judge Curtis the Governor in his message, says: "After examining the same and hearing counsel, I deem it my duty," etc. In both cases the parties were before the Governor. In both cases he examined into the charges against them, and arrived at a determination as stated in his message that they should be removed.

Gentlemen, if you will take the message which the Governor has sent you with reference to Judge McCunn, you will find that there is not an intimation that his Excellency ever read or heard a word of evidence relating to these charges, or that Judge McCunn or his counsel were ever informed that the Governor had any thought of taking any action whatever in the premises.

This case comes before you in a remarkable manner, and I earnestly desire that you will bring your minds to the point in which it differs from every other, because my learned friend on the

other side has insisted so strongly upon the precedents which he claims should be your guide.

In the cases of Smith and Prindle and Curtis, the charges were filed with the Governor; he was appealed to to consider the case; he certifies to you in his message that he did consider it, that he did hear counsel, that he did arrive at a conclusion, and that that conclusion was that the officer had a right to be removed.

Now, how does this case come before you for consideration?

Not because any party in the world has been before his excellency the Governor, and claimed that Judge McCunn should be removed from office.

Not because the Governor has ever officially heard a word that reflected upon the official character of Judge McCunn.

He nowhere tells you in his message that he thinks any charge against Judge McCunn can be substantiated, and he nowhere recommends his removal from office. He simply recites to you the fact in his message, that the Assembly of the State of New York have requested him to send in these charges to the Senate, and that he has done so in accordance with their request.

Now, gentlemen, I contend that this whole proceeding is unprecedented, and nowhere finds warrant in the Constitution or the laws governing such cases. The Assembly of the State of New York sent out a roving commission to inquire into the conduct of several of the judges of New York city. And for what purpose? Notoriously for the purpose of bringing in articles of impeachment against Judge McCunn with others. The committee performed its duty.

They came back to the Assembly and reported. There were then two ways in which the Assembly, with that evidence of their own committee before them, could assume their just and proper share of the responsibility in removing this judge if in the opinion of that body he ought to be removed.

First, they could have prepared articles of impeachment if they thought the evidence warranted such a proceeding. Or, they could have moved a concurrent resolution for action by both the Senate and Assembly, had the evidence been found sufficient to justify them in so doing. By proceeding in either of these two ways the Assembly would have acted in accordance with the plain provisions of the Constitution. What did they do? Shirking the responsibility which the Constitution put upon them, and assuming a duty, or rather assuming a task, which is nowhere imposed upon them, the task of going out and gathering up this evidence; they then performed the extraordinary act of sending it to the Governor and asking him to do what they had no right to ask him to do, to transmit it to your honorable body, and ask you to remove him. The Governor seeing the Assembly throwing off the responsibility from their shoulders upon his, takes this basket of papers and tosses it over from his shoulder to you, without intimating to you that he knew what it contained, or cared what it contained. The Assembly not daring to bring articles of impeachment against Judge McCunn,

and not daring to introduce a concurrent resolution for his removal handed over the papers to the Governor, saying to him that they desired him to take part in removing an officer against whom they could not find sufficient evidence to warrant them in taking the steps pointed out by the Constitution. The Governor was doubtless aware that the Assembly had no right to make the request of him which they did, yet, out of deference to that body, he sends you the papers stating the fact that he did so at the request of the Assembly. Bear in mind that this message is sent to you on the last day of the legislative session. I have made the best effort I could to get the proceedings of the Assembly which are not yet printed.

But I am credibly informed that upon the very last day of the session these papers were sent to the Governor, who, in the multiplicity of his duties on that day, wrote the hasty message which brought this case before your honorable body. His message shows that the Governor did not examine this case. The surrounding circumstances show that he could not have examined it. Every precedent, however, which has been cited by the learned counsel upon the other side, shows that every message which has been sent to the Senate by any executive, suggesting the removal of an officer, states the fact that the Governor has had a hearing of the case before him; that the party implicated has appeared before him; and has either stated it as a fact, directly or by fair implication, that he has arrived at a judicial determination in his own mind that the implicated party should be removed from office. In every case the message has contained a distinct recommendation that the officer be removed. Bear in mind, gentlemen, that the removal of a judge from his office is one of the highest and most important acts that you can perform. Every step which you take in such a weighty proceeding should find a full and express warrant in the Constitution. Let me appeal to you whether you can subserve the public interests, whether you can benefit the State by violating one principle of the Constitution. Grant that the defendant is as guilty as his worst enemy would charge him to be, can you do the State any service by effecting his removal from office by proceedings in direct conflict with the provisions of the Constitution?

Will you not rather benefit the State by saying to the co-ordinate branches of the government, that you will take no cognizance of these charges until they, on their part, have taken such steps as gives you rightful jurisdiction and authority to act?

What motive may have induced the Governor to send this message, I am sure I do not know. It occurs to me that the action of the Assembly in sending him the resolution which they did, was so extraordinary and unwarrantable that he might well have treated it with silent contempt.

He saw fit, however, to comply with the request of the Assembly, but I contend that he has wholly failed to take the steps made necessary by the Constitution in order to give you jurisdiction to try this case. Precedents in proceedings of this kind are few, but

every one which has been produced goes to show that something more is required on the part of the Governor, than merely transmitting to the Senate charges which he has not examined, and there is nothing to be found in the whole history of the State, either in law or precedent, which entitles the action of the assembly to any weight whatever. All other messages in similar cases assure the Senate that the Governor has examined the charges and deems it his duty to recommend the removal of the officer. In this case, the Governor says he sends the charges to you at the request of the Assembly, and fails to make any recommendation that Judge McCunn be removed. The message shows upon its face that it is the result only of the request on the part of the Assembly. The Constitution requires the adjudication of the case both by the Governor and the Senate, and that the decision of the Governor shall precede the decision of the Senate. What evidence is there before you that there has been any concurrent action on the part of the Governor, to secure the removal of this officer? He, to be sure, has complied with the unauthorized resolution of the Assembly; but that was an act of official courtesy, not an act of official duty.

I find, nowhere, until I come into this case, any thing that would bear the name of an argument in favor of the position that the Governor has no duty to perform, except to hand over papers to you. My learned friend upon the other side says, "suppose the Governor, when it is his duty to appoint, and you to confirm, should add to his request that you appoint if you find the man fit and capable." I do not think that is a parallel case. Suppose the Governor, instead of that, when his duty was to appoint a captain of the port of New York, should say to the Senate, "I do not care to name a man, but you select who you please to be captain of the port of New York," does that comply with the law? Can you get together and make a captain of the port? A duty is devolved upon him to send in the name of a man. The Governor must do his part before you can do yours; so, in this case, the duty devolves upon him of recommending the removal of the officer, before you can stir one step toward his removal. In this case you have before you a message from the Governor, suggesting that you inquire into a batch of papers, which was taken, so far as you are concerned, by an irresponsible commission, and if on examining those papers you see fit to turn out Judge McCunn, to do so, and that is the end of the message. Judge McCunn has presided thirteen years upon the bench in the city of New York. How long a time was spent last winter in this investigation you are as well aware as I. That committee were aided by the very able counsel of the Bar Association, for the purpose of impeaching him, but it was found that impeachment could not be maintained, and then these able counsel united with the investigating committee in a persistent effort to secure his removal by a concurrent resolution of the Assembly and Senate, but the Assembly refused to second their efforts in that direction as they had already done in the case of impeachment. On the last day of the session, however, after the thirteen years of this man's official life had been raked

over from one end to the other, that Assembly said by their votes, "we are unable to impeach Judge McCunn; we have no evidence to warrant us in moving a concurrent resolution for his removal, hence we will put these papers which have been gathered up by our committee into a basket and send them to the Governor, and request him to take a part in this performance which we dare not and will not assume," and the Governor in his turn in effect says, "I know nothing about this case, and hence I have no recommendation whatever to make. The Assembly asked me to transmit these papers to the Senate, and, out of courtesy to that body, I comply with their request."

Mr. MURPHY — I desire to ask the counsel if you are not in error in saying they took action by concurrent resolution?

Mr. DAVIS — I was so informed; I may be mistaken about it; I have endeavored to get at the action of the Assembly, but have been unable to do so; if I am wrong I desire to be corrected. I learned from my associates that both efforts were made in the Assembly. Certain it is, that the Assembly did not bring articles of impeachment. Certain it is, that they passed a resolution asking the Governor to take action in the matter, and that the Governor bases his whole action upon that resolution, and does not certify that he has investigated the case and does not recommend the removal of Judge McCunn.

So far as the last clause of the Governor's message is concerned, I submit that the argument of my learned associate upon that point was exhaustive, and I shall not attempt to strengthen the position which he so ably maintained. To my mind, it is clear that the Constitution requires the judicial action of both the Governor and the Senate to secure the removal of a judge. If there is any force whatever in that provision of the Constitution, which requires action on the part of the Governor to precede the trial before the Senate, it must mean that the implicated officer shall not be subjected to such trial until he has been heard before the Governor, nor until the Governor shall have judicially determined that he ought to be removed, and shall have signified such judicial determination to the Senate by an unqualified recommendation that he be removed. Until the Governor has taken these prescribed preliminary steps, I do not believe the Senate has any more jurisdiction to try the case than they would have had these charges and this evidence come to them directly from the Assembly, without the interposition of the Governor.

Judge McCunn has not yet had a hearing before the Governor, and to that he is entitled by this provision of the Constitution, beforehe can rightfully be put upon trial before your honorable body. In my judgment, it is your clear duty to dismiss this case, for it has not come before you in the manner required by the Constitution. I will not occupy the attention of the Senate longer.

Mr. J. WOOD — Mr. President: For the purpose of enabling the Clerk to keep the proper record, there should be some pending

motion. I suppose the motion is to dismiss the proceedings for want of jurisdiction upon the ground stated in the second answer.

Mr. PECKHAM — Mr. President: I desire the attention of the Senate for a few moments while I make a few remarks in regard to the position that we take upon this motion to dismiss all further proceedings in the case of Judge McCunn, on the ground that this body never has acquired jurisdiction to proceed in the matter to any final judgment, and that it lacks that jurisdiction on the ground that there never has been, within the meaning of the Constitution, that recommendation on the part of the Governor which the Constitution calls for. This is no mere technical defense. I know that, to the laymen generally, a motion of this kind might seem to be what is termed a mere technicality, but it is an objection, which, if time deprives this Senate of the right to hear this case, and to decide it as much as if no message had ever been sent from the executive upon the question whatever. If we be right in our interpretation of this defense, of the construction which should be given to this article of the Constitution, then the Senate has no more right, legal jurisdiction to hear or try this case than the board of supervisors of this county. The defense is, as we claim, meritorious. That is, so far as the jurisdiction of the court, or of a tribunal or body assembled to act upon any question. If you will look for a moment at this recommendation, so called, of the Governor, it states, in the first place, that certain charges and testimony taken by the committee of the Assembly have been transmitted to the Governor, with a request, on the part of the House of the Assembly, that it be recommended to the Senate to take proceedings for the removal of McCunn. What says the Governor? "I respectfully transmit herewith printed copy of charges and specifications, so referred to me, alleging official misconduct on the part of the said John H. McCunn, and of the testimony taken by the judiciary committee of the Assembly in the case. I recommend that you inquire into the truth and sufficiency of the charges so made, and if the same shall be established, that the said John H. McCunn be then removed from office." Is that the recommendation, within this provision of the Constitution, that all judicial officers may be removed by the Senate, on the recommendation of the Governor, if two-thirds of that body concur therein? Does it mean that the Governor is to be the mere instrument through which street charges or rumors are to be presented to this Senate, and that the Governor is to take no responsibility upon himself by way of recommending to you not only the removal of this man, but stating the conclusions that he

has himself come to upon the charges which have been made? We say, and our interpretation of that clause is, that the Governor himself, to whom these charges are preferred, shall himself come to a conclusion that the charges are true, and that the charges, being true, are sufficient of themselves to warrant and to call for the removal of the party charged, and that then the Governor is to transmit those charges thus investigated by him, the truth of them, as far as the case having been looked into, and having been transmitted to you, with a recommendation on his part that this man should be removed; otherwise, why should it be that this mere utterly meaningless formality should be gone through with; that charges should be brought before the Governor, and he is to take no responsibility; he is to form no sort of opinion upon them, either as to their truth or as to their sufficiency, if true, to warrant removal; but the charge being made he delegates to this body a part of his own duty, and says, without any inquiry upon this question, without any knowledge whatever upon the truth or falsity of these charges, without any opinion based upon their sufficiency or insufficiency: "I simply say to you, investigate yourself; find out yourself whether they are true; and, second, whether they are sufficient; and if they be true and sufficient, then I recommend you to remove." Is that the recommendation within the meaning of the Constitution? If it be, it seems to me that it is a perfectly useless performance; it is a meaningless performance. The idea that the Governor of the State is to be invoked, and his high authority and character are to come into a case of this kind simply for the purpose of transmitting a charge made by a body corporate, or by an individual, and that charge thus made to the Governor, without an opinion from him as to its truth or as to its sufficiency, is to be simply sent to this body, with a recommendation that if they find it true and sufficient, then they are to remove. If I see that be in accordance with the true construction, it seems to me it is a perfectly meaningless piece of business to ask the Governor to do any thing of that kind. It seems to me the proper way, and the proper construction of it is to give each individual word proper weight, and to look at the remedies to be given under that construction. The Governor is no figurehead in matters of State concern; he is no mere automaton, moved by springs, where he has himself no sort of right, and where there is no necessity on his part to come to any conclusion or opinion one way or another. He is the chief magistrate of the whole State; he has the power with other and inferior officers not being judicial, with sheriffs, county clerks, and officers of that kind; he has power alone where charges are preferred against

them to give them an opportunity of being heard, and when heard, he comes to a conclusion in regard to these charges, and himself removes. There he has the whole power of unquestionable removal, after giving to these particular officers a chance of being heard. Well, now, when you come to officers of the higher grade, when you come really to the highest officer in the land, those who have, next to the legislative, the most delicate duty to perform, is it possible that the framers of the Constitution put in here the necessity of going to the Governor with these charges against justices of courts of record, and, before the Senate would have the right to remove one individual member of the judiciary, under that article, that it should have the recommendation of the Governor to that effect? Is it possible they meant, when they said that, that the Governor was to do nothing more than to transmit the charge that was brought before him, with a recommendation to the Senate that if they find it true, and find it sufficient, that then they remove, agreeing with the mere wording of that, that there be a recommendation on the part of the Governor to remove, if it be seen that he has in fact not investigated the charges himself, that he has taken no responsibility himself upon this question, is it possible then, by a fair and honest construction of this Constitution and this section, it can be alleged that the Governor has recommended the removal of a man from office when he says simply and solely: "I transmit charges, and if they are true and sufficient, then remove him." I deny that that is a recommendation within the spirit and the meaning of this article of the Constitution; if it were, it is utterly foolish, utterly useless, the merest matter of form in the world to have these charges sent to the Governor and the Governor send them to the Senate. They may just as well be sent to the Senate in the first instance, so far as the responsibility on the judgment of the chief magistrate is concerned. We claim, before a judicial officer can be removed, he has the right, it is his undoubted and jurisdictional right, that his case shall be investigated and determined; that it shall be investigated, determined and decided, not merely by the Senate, but that it shall be thus investigated, determined and decided by the Governor; that these two bodies, the executive and, to a certain extent, the legislative department of the government must consent, must concur. They must consent and concur after they have had an honest and a fair and a full investigation, and an honest and a fair and a full opportunity to make up their mind. That a man is not to be deprived of his office, which he has been elected to fill by the electors of his district, without the opportunity of being heard by

the Governor, and without the opportunity of having his recommendation to charges being heard by him come to the Senate, and the Senate act upon them with the recommendation and responsibility which that recommendation brings of the chief magistrate of the State, where he has himself investigated that matter, and himself taken the responsibility of advising the Senate that these facts have been brought, that these facts thus proved are sufficient, and that thus being proved and being sufficient, he recommends to this body also to remove. We claim, and I say that we have the right to the judgment of the Governor upon these questions. We have the right to ask of him, and he has not the right to shirk that responsibility. That when a charge is presented to him asking that we be removed from our judicial station, that charge shall be so far investigated by him as to allow him to come to an opinion founded upon some kind of an investigation, and, having investigated it, to come to an opinion founded upon that investigation. That is not only true, but it is sufficient; otherwise we say the fair import of this Constitution and this section of that article is entirely done away with. It cannot be possible that the framers of this article of the Constitution ever thought it was simply and solely the part of the Governor of the State — the part of the legislative department, so far as regards the enacting of the laws, and the executive, so far as execution of them is concerned — that that officer, thus empowered with all the powers that he has, was simply and solely to be made the mere *conduit* of charges made by any person, and, having been presented to him, that he should immediately present them to the Senate, and when he did so it was true, and recommended it, then, and then only, should the charges be investigated. In his recommendation here, the only thing he states about it is, that he asks you to inquire whether the charges are true, and whether they are sufficient, and, if true and sufficient, then he recommends you to dismiss. Sir, would it be an appointment or recommend on the part of the Governor if he should send in, for the appointment to some office for which he had the appointment, to the Senate, "I recommend that you appoint that man to the office of health officer of New York, and by a majority of your votes shall assume him to be the proper person." In what respect does that differ from this? He makes no recommendation in the one case or the other, predicated upon his own judgment in the case; that judgment in both cases is wholly and entirely lacking, and we claim that in this case we have the legal right, before we are placed on trial before this tribunal, to have the solemn adjudication of the

Governor, made upon investigation, that those charges are true, and that, being true, those charges are sufficient to warrant the removal. Is it a recommendation for the Governor to say that this health officer he nominates, and appoints that man to be a health officer who shall receive the majority of the votes of senators to that office? Is that a nomination or is this? But the learned counsel on the side of the prosecution speaks also in regard to the precedent. There has been, as has been stated, but one case under this article, that of Judge Smith, where the Senate has acted really in the case, and, although precedents may be well, and generally are fitly followed out, yet, wherever the case is a new one, wherever the construction of the statute on Constitution is a new thing, wherever there have been but few cases, and especially where, as in this case, the result is to be highly penal, because the removal from office of a man who is holding the position of judge of the Superior Court of the city of New York, and who, we assume, is of that class of men where the removal would be the same as if he were forever after disqualified from holding office, and where the punishment would be the same as in a different grade and class of men sentenced to imprisonment for life would be. Where the decision of this court is so highly penal, and where there has been but one single instance where the construction practically put upon the section of the Constitution by the Senate, in one particular case, I say, that if upon a calm scrutinizing review of that case, the senators who now compose the Senate of the State of New York should themselves come to the conclusion, that the precedent set, as has been stated by the case of Judge Smith, is one fraught with great danger to the accused, is one which ought not to be followed, is one which is at war with all our principles, and with all our ideas of criminal justice, then I say, that, under such circumstances, this Senate would be doing an injustice, not only to the accused, but doing an injustice to every man who may, by any possibility, in the long years of the future, come before a future Senate upon provisions similar to these, in our Constitution. And with the highest respect for the Senate which made that decision, and that precedent in the case of Judge Smith, I think that any man who has been bred to the law, any man having within his own mind and brain those grand principles of common law, in regard to criminals, those ideas that until we are proved guilty, we are presumed innocent; any man, I say, starting out to read this case of Judge Smith, under those circumstances, and with those principles, it seems to me would be shocked, when they come to look at the decision of the Senate of the State of New York upon

that particular message of the Governor, under those circumstances. Why, it seems to me, that that decision, so far as it regards the mere record of it, was simply and solely a proposition, that unless a man proves himself innocent, he is to be deemed guilty; a reversal in every form and in every degree of all the principles of common law justice, and of honest justice between man and man; presumed guilty, unless we prove ourselves innocent; the result of which is, or may be, removal from office, by the Senate of the State of New York, where he had failed to prove himself innocent of charges that he never was proved guilty of; so that under that construction, and under that precedent made in the case of Judge Smith, by the Senate, at that time, — I say it might occur, and may occur in the future, if that precedent be followed, that a man may be turned out of office, to which he has been elected by the electors of his district; that he can be turned out of that office simply and solely because he may have failed to prove himself innocent of the charges which he never was shown to be guilty of. If that be law, if that be justice, if that be the ordinary justice that be meted out to the commonest criminal, certainly it is contrary to the few ideas I have been able to acquire in regard to the principles upon which criminal justice is administered. That a man should be deemed guilty until he proves himself innocent, and that a failure to prove his innocence is a conclusive presumption of guilt, is something so utterly at war with all principles of justice, and all principles of law, that any precedent, or any case which assumes to establish such a precedent, I think this Senate will be very slow in following, and simply following it because it made a precedent. I say take away that precedent in the case of Judge Smith, and we do not rest upon the same foundation at all that Judge Smith's case did. I am not going into that, because my learned associate, who first addressed you, showed you all the difference there was in that case. We are brought down here to first principles, and that is, to inquire, as intelligent men, as judges acting and assuming to act in the case and in the capacity of a judge at any rate, what is the meaning of this clause in the Constitution which says that a man may be removed from a judicial office by the Senate, if two-thirds of their number concur, on the recommendation of the Governor. That recommendation, as I have already claimed, is not fulfilled when the Governor merely used the words of the article of the Constitution, and yet has utterly failed to investigate or to find out either the truth of the charges or their sufficiency; and that the accused here is therefore deprived wholly of the opportunity and the right

of being tried by the Governor, as well as by the Senate, upon the question whether in fact we have been guilty of these charges, and if guilty, whether in fact these charges are sufficient to warrant our removal.

Mr. MADDEN — I move the hall be cleared for the purpose of consultation. (Motion was carried.)

On the opening of the doors, it was announced by the President that the motion of respondent to dismiss the proceedings was denied.

Mr. MURPHY — I understood the counsel for the prosecution to intimate that, in case this motion was denied, they had a motion to make in regard to the testimony. I move you that they be allowed to make it now.

Mr. VAN COTT — Mr. President: The motion we propose to submit is, that the testimony transmitted by the Governor, with and as a part of his message, be received by the Senate as evidence in the case. I suppose that the evidence is *prima facie* competent. That is the view entertained by my associates. A very considerable part of the evidence is documentary; it consists of mere transcripts of pleadings and orders in the Superior Court. Those documents present the case, or series of cases, on which the defendant acted, and in which the irregularities we complain of were committed. They are supplemented to some extent by oral testimony, that oral testimony having been given by witnesses under oath, the witnesses having been sworn by the judiciary committee of the House. All that testimony, the documentary and the original documents there produced, as the records show, being admitted by the defendant himself to be the original documents, they being marked regularly as having been filed, they having been produced by the officers of the court from the files, and stated by him to be original documents taken from the files; and upon that basis of fact, recognized as fact through the whole investigation, we proceeded to give oral testimony connecting the defendant with the proceedings, and characterizing the proceedings. That is the general offer that we wish to make. If it is accepted, I see no occasion for discussion; if it is objected to, I should like to hear the objection and the grounds to it before we proceed to the discussion.

Mr. MOAK — Mr. President: We certainly shall object to it. It is the first time in my experience as a lawyer that I have heard the argument advanced that evidence taken for one purpose can be read as a matter of right for another and entirely different one. Let us see the circumstances under which that evidence was taken. Certain gentlemen presented what they claimed to be charges against Judge

McCunn for official misconduct. The committee was appointed by the Assembly, for the purpose of ascertaining whether there was reasonable or probable cause for the impeachment of Judge McCunn; and that was all that committee could have done. They could not remove Judge McCunn; they could not do any thing except to put Judge McCunn on his trial. I might be perfectly willing, were I placed in Judge McCunn's place, that, where a commission was a mere roving fishing excursion, and conscious of my innocence and integrity, I might be willing to give them any latitude; I might be perfectly willing to let the cross-examination of those witnesses go, and allow the case to be presented in the strongest aspect in which it could be, knowing that if the Assembly, a body which appointed that committee, on investigation, should say there was *prima facie* evidence or sufficient evidence to put him on trial for the purpose of impeachment, we would have an opportunity for a full and fair and candid examination of those witnesses before the court could pass upon our case, and can it be claimed?

Is there any man who has ever read the first principle of law, that evidence in one case and for one purpose is admissible in another case, in another court, and for another purpose? It is the first time in my limited experience in the law where it has been claimed, and we most certainly and earnestly protest against it; and if this rule would obtain, I would like to know what man could be safe. Instead of calling the witnesses *seriatim*, giving us a fair chance of cross-examining them, and of developing any fact which may tend to exculpate us, they read that portion of the testimony which tends to charge us with an offense, and throw the burden upon us of producing each one of those witnesses and making them our witnesses for the purpose of the direct examination. This is a question of more importance than the one we have been discussing. The question of whether Judge McCunn is to be tried here or not may not be deemed of much importance, but the question of whether he is to have a fair trial is of some question, and upon this question we respectfully claim as a right to be confronted, under the Constitution, with the witnesses who are to give the testimony against us, and of the right of cross-examination in the same manner that it may be properly brought before the Senate. If this thing is to be tried in this way, and this is evidence against us, we have the entire responsibility of producing every witness who may be necessary in the case. Instead of coming here presumed innocent and that there is nothing against us, we have the presumption against us, and this doctrine that my associate has referred to would certainly be invoked

against us. Upon this subject we respectfully, but at the same time earnestly, and I must say somewhat feelingly, insist that the witnesses who are to give the testimony upon which it is asked that the verdict or the decision of this body shall be rendered, that Judge McCunn may be removed from office or shall be acquitted, that these witnesses may be produced in the usual manner. Certainly, this case involves almost as much consequence, and should be tried as fairly and in the same manner, as a six penny trespass suit in a justice's court. There cannot a case be found in the book, and I defy the gentleman to find one, where evidence read in one proceeding before one tribunal has ever been used, except by consent, in any other tribunal and in another proceeding.

Mr. DAVIS — Mr. President: I wish to say, that it seems to me, this is a question that should be left for the counsel to arrange between themselves. If the counsel has some evidence that is documentary, if we can satisfy ourselves of it, we do not care to send to New York to get that, if the trial goes on here. Any thing that would be a matter of convenience back and forth, of course, we can arrange between ourselves; but I do not presume that this tribunal will say, as the accused had no counsel, there was only one or two there, a day or two. "We want to hold you to the rigid rules of evidence and cross-examination." If we do not think it is proper evidence, we will claim our right to have it brought here and tested before the Senate. It is stated to me by one of the gentlemen who was present, a portion of the time they did not have any of the privilege of objecting to evidence; that they were told it was an investigation, an inquisition to see what had been going on; that it was not controlled by the usual rules of evidence; that they were not attempting to connect anybody, but to ascertain how this man had been conducting affairs there. Mr. President: I submit that all this honorable body should do would be to say to the respective attorneys on the respective sides, to labor together as much as possible to save time and trouble, which we are willing to do. The moment we satisfy ourselves that any thing in the line of documentary evidence by examination is genuine, of course we will take it. I simply want to know that we are dealing with genuine papers. The moment I ascertain they are genuine, I should not want to bring the clerk from New York to testify to them. I should hate very much to have a mass of papers that we do not know any thing about voted to be competent evidence.

Mr. PECKHAM — Mr. President: I see by one of the rules adopted by your body, you lay down the following proposition: "All the

rules usual and legal in courts of record in this State, in regard to the introduction of evidence, the examination and cross-examination of witnesses must be observed" Starting out with that assumption, it seems to me there is no possible ground upon which the learned counsel on the other side can claim that evidence thus taken, under the circumstances that this evidence was taken, can be properly admissible in this proceeding. When the Assembly judiciary committee were investigating this case, Judge McCunn was allowed to be present out of grace, not of any right that he had to be present at all. He had not the legal right to examine or cross-examine a single witness. No witnesses that he had for the purpose of exculpating himself from any alleged wrong were allowed to be brought before the committee, and in addition to that, the rules of evidence, as stated to be the rules to exist in this tribunal for this occasion, were not in use then, and were declared by the committee not to be binding upon them under the circumstances under which they were then making that investigation. But, on the contrary, being there simply and solely as a committee of investigation for the purpose of finding out what, if any, wrong-doing had been committed by this accused official, for the purpose of having this testimony reported to the House, in order to give that House a chance to see whether those facts being proved hereafter, upon an investigation on articles of impeachment being preferred, were such as were right and proper for the Court of Impeachment to hold that the official should be condemned to a removal, and perhaps disqualified from holding any office in the future.

It seems to me to say, that evidence thus taken before a committee of the House for that purpose, that the accused is to be bound by that evidence before this tribunal is violative of every principle upon which evidence is admitted in courts of record. What is the effect of it? We are called upon then, very likely, for the purpose of proving our innocence; we are compelled to call as witnesses the very persons called there as witnesses against us, and we are to produce them here for the purpose of qualification, of denial, if we can, and we are to produce them here, clothed with an assumption that they are worthy of credit and are to be believed by this Senate, whereas the truth may be the reverse. We may claim that this evidence, thus taken, aside from the documentary evidence, was the evidence of men not entitled to credit in any form or manner; and yet, how is that question to be brought up here? When they produce them we have the right to cross-examine them, and to let it be seen by senators whether the witnesses brought by them are worthy

of credit and belief; but, if the other course is taken, we are to produce them ourselves, and then we are entirely concluded from any right to impeach those witnesses; and yet, we cannot get that evidence in any other form or shape.

Mr. MURPHY — Mr. President: It appears to me this is a most extraordinary course being pursued! We have had three counsel arguing the negative of the proposition, and none in the affirmative. I trust the counsel for the prosecution will state their views upon the subject.

Mr. PALMER — Mr. President: I would like to state to the counsel that we have a rule which will cut off discussion by allowing one counsel to appear on each side upon every question that may come up; we had that rule pending, and it will certainly be carried if we call it up.

Mr. VAN COTT—Mr. President: We have observed that rule in the discussion on our side, and I should say in reference to this particular discussion we are pursuing precisely the course pursued on a judicial trial. An offer was made of certain evidence, and it was objected to, and the party making the objection is being first heard according to the usual practice of the courts. The party offering evidence does not support his offer, until he has heard the objections, when objections are made to it. If no objection is made, it is received of course. I may be permitted to make a suggestion to the Senate that may economize much time. It has been intimated by counsel on the other side that by getting together we might compare notes and agree upon the body of the documents in the case. That being agreed upon, the Senate has that body of documents which makes the basis of the case for the prosecution in print, and it would leave nothing then but the oral testimony for the subject of this discussion. It might be that we could agree as to considerable parts of that oral evidence, for considerable parts were adduced by the defendant himself. It will require some elaborate examination of the record to put the Senate really in position to see whether that evidence was so taken that it can be received by the Senate and acted upon with confidence. I would suggest, therefore, as we are already past the hour of 6 o'clock, that if the Senate will adjourn for the day, and we will see if we can agree upon the testimony, and if we cannot agree upon the whole matter, we will leave the margin that we cannot agree upon to the direction of the Senate.

Mr. DAVIS — Mr. President: In order that there may be no misunderstanding, I will inform the Senate that I was quite unwell during the recess, and whether I will be able to go through this

testimony at this time, I am not prepared to say. I will do what I can with my present strength. I understand we are talking of the documentary evidence?

Mr. VAN COTT — Yes, sir.

Mr. MURPHY — Mr. President: I think the counsel for the prosecution might as well understand that the sense of the Senate is, that this testimony cannot be introduced, although we have taken no action upon the subject. And still, if the counsel wish to be heard on that question, let us have some reason given for that proposition at once. If they do not intend to insist upon that, I have no objection to adjourning.

Mr. VAN COTT — We shall press the proposition, but I am too unwell to proceed with the discussion at this moment, and if we can agree upon something I prefer to do so.

Mr. MOAK — Mr. President: If it is the sense of the Senate that the testimony be taken before a committee, we have no objection. That will, perhaps, obviate the whole difficulty.

Mr. JOHNSON — Mr. President: I offer the following resolution to appoint a committee to take the testimony. I wish it understood that I could not accept a position on the committee under any circumstance.

Mr. BENEDICT — Mr. President: I move to lay that resolution on the table.

This motion was carried, whereupon the Senate adjourned until to-morrow, at 10 o'clock, A. M.

THIRD DAY'S PROCEEDINGS.

The Senate met Thursday, June 20, 1872, at 10 o'clock, A. M., pursuant to adjournment.

Mr. MURPHY — Mr. President: The committee on rules, to which was referred the resolutions submitted by Senator Lewis in reference to limiting debate, have instructed me to make the following report. (The report was read by the Clerk and adopted.)

Mr. LEWIS — Mr. President: For reasons stated by the senator from the twenty-fifth (Mr. Woodin) yesterday, I move that he have indefinite permission to be absent during the session of this body.

Mr. BENEDICT — Mr. President: I understood it yesterday to be, with a modification, that the senator expected to be here to vote upon the question.

Mr. Lewis — I modify the motion in that regard, if necessary; but it seems to me unnecessary.

Mr. Benedict — Very well; I do not make any point about it.

Mr. Madden — I think no motion is necessary; we have not been in the habit of making these motions; I hope the motion will be withdrawn.

Mr. D. P. Wood — Mr. President: I agree with the senator from the tenth (Mr. Madden), while every one in the Senate will accord to any senator who is necessarily absent from his duties here, the privilege of going, I think we ought not to put upon the record that there has been anybody excused. If it is necessary for anybody to go home, let him go and return as soon as he can, providing there shall always be a quorum here. If we commence by granting excuses, I do not know where we shall end.

The President *pro tem.* — It is not my intention or desire to be excused at the final disposition of the case.

Mr. Lewis — Mr. President: I had supposed this was rather an exception from the ordinary rule, of senators being absent; and having noticed some pretty severe comments on the part of some newspapers, I thought that perhaps it was due to the senator from the twenty-fifth (Mr. Woodin), whose family is in the condition that he is not able to be away from home, that there should go upon the record of this proceeding, this consent, that he might be absent from the proceedings of the Senate.

Mr. Madden — Mr. President: I do not see that this is different from any other case; we simply meet as a Senate for a certain class of business; we are to obtain information in relation to it just as we would in relation to legislation, with the addition that the party has the privilege of being heard. It is not like a court where the judge should be present; we meet as a Senate; we are to obtain information in any way we can, by oral testimony, or through a committee, or in any other way. I do not deem it different from any other ordinary duty.

The President — Is the motion withdrawn?

Mr. Lewis — Yes, sir.

Mr. Parsons — Mr. President: The question which is under discussion was opened on behalf of that side which has been called the prosecution by the senior counsel (Mr. Van Cott), who is unable, through illness, to be present this morning, and with the permission of the President I will continue that discussion. The wish of those who appear to press these charges, they come here on the invitation of the Senate, is to reach, as speedily as possible, a determination of

these questions, to save as far as is possible the time of the Senate, and both with respect to the rights and interest of the accused judge, and as well of those for whom we appear, to reach as speedily as possible a solution of the question which the Senate is called upon to consider. In this view, therefore, it seems to be suitable, unless there is some necessity which requires otherwise, that the case shall be got before the Senate as rapidly as can be, consistent with the circumstances of the case, and that the accused judge shall be treated fairly and shall have every right which he can fairly claim at the hands of the Senate, to have his case fairly presented, and to be in his defense.

The PRESIDENT—This is upon a motion to proceed with proof before the Governor as evidence in this case.

Mr. PARSONS—It is, Mr. President. I understood the motion was made yesterday, the discussion having partially proceeded yesterday. The view we take of the question is this, that the Senate has the right to hear this case upon any testimony which is satisfactory to itself; and, in fact, we might go farther than that and say that we think there is no question of the power of the Senate to determine this case without taking testimony upon any information upon which the Senate felt satisfied to proceed to judgment in this case. The discussion, so far as has proceeded, and all that has been said in the Senate upon the various questions which have been presented, they assumed that the Senate is sitting here as a court; that witnesses are necessarily to be examined; that testimony must be taken; that there is a prosecutor; and that all the forms and ceremonies which surround the presentation of a case in court is to attend the consideration of the case by the Senate; but I think that those who have jumped at that conclusion can scarcely have considered the language of the Constitution, and certainly cannot have had their attention called to the debates which threw light upon what was intended by the framers of the Constitution in the adoption of the article under consideration. The Constitution of 1777 contained no provision for the removal of judges of the higher courts. The Constitution of 1821 contained no such provision. There was the right of removal of recorders, of judges of county courts, of other inferior judicial officers. But the only way in which the people could relieve themselves of a judge of one of the higher courts, was by the dilatory and complex process of removal by impeachment. In 1845 there was passed a special amendment to the Constitution of 1821, providing, that in respect to those judicial officers who could be removed under that Constitution, the Constitution of 1821, there should be the same right which the Constitution of 1846 incorporated in respect to the

process of removal of all judicial officers, that is to say, the accused are to be furnished with a copy of the charges, and had the right — "the opportunity" is the expression used in the Constitution, or in the amendment rather — had the right of being heard in his defense. Senators will see that still there was no provision made in respect to subordinate judicial officers for any presentation, by testimony, of a case on the part of the prosecution. The Senate was supposed, by the fact of the presentation of the charges by the Governor, to be possessed of the case, and there was accorded to the accused the right to be heard in his defense. That there was no intention whatever in the framers of the Constitution that the case should be presented as in the ordinary common-law court, is put beyond question, I think the senators will conclude, by a very brief consideration of the debate in the constitutional convention on the adoption of section 11 of article 6, which is the section in question. The section is reported incorporated into the Constitution of 1821, the amendment of 1845, and it reads thus: "Justices of the Supreme Court and the justices of the Court of Appeals may be removed by joint resolution of both Houses of the Legislature, if two-thirds of all the members elected to the Assembly, and a majority of all the members elected to the Senate, concur therein. Surrogates and all judicial officers, except those mentioned in this section, and except justices of the peace, may be removed by the Senate on the recommendation of the Governor; but no such removal shall be made unless the cause thereof be entered on the journal, nor unless the party complained of shall have been served with a copy of the complaint against him, and shall have had an opportunity of being heard in his defense. On the question of removal, the yeas and nays shall be entered on the journal. I must ask the indulgence, Mr. President, of the Senate for a very short period, while I show what was the action of the constitutional convention in respect to that section, because it furnishes a strong argument for the action of the Senate; it was the convention of 1846.

Mr. Morris shortly before had been removed from his office of recorder of the city of New York without being heard, and it was in deference to his case that the amendment was incorporated. Mr. Morris moved to insert the following: "The accused shall have the opportunity to introduce witnesses," which is exactly what is claimed under this Constitution as it now is, as the right of the judge against whom these charges have been preferred. That amendment of Mr. Morris was agreed to, and, as the Constitution then stood, there was the right to call witnesses by the defense, and,

in addition to that, the same right he has now to be heard in his defense. On the following afternoon Mr. Brown asked consent to move a reconsideration of the amendment made to the pending section on the motion of Mr. Morris; that is, the amendment which gave the right to the accused judge to be heard, and, in addition, to introduce witnesses for his defense. Mr. Morris' amendment was reconsidered and rejected; and the Constitution of 1846, as re-enacted by the last constitutional convention, so far as this clause is concerned, therefore, brings this case before this Senate with a provision that there is no express right, and no right according to the interpretation given to this section by the debates of the constitutional convention, of the accused to be heard by witnesses, or do any thing other than that which the plain language in the constitution implies, the right to be heard in his defense, and no provision whatever that there shall be any thing in the nature of the trial, that there shall be any prosecutor, that there shall be any right to call or examine witnesses on behalf of the complainant, or any other duty on the part of the Senate than to take the charges which come from the Governor, and to hear the accused in his defense against those charges. What we insist upon, Mr. President, is this, that the accused has just the right which the Constitution confers upon him, and that is, a right to an opportunity of being heard in his defense. We don't deem it necessary here to challenge his right. If he needs to be heard in that by the introduction of evidence or the presentation of documents to the Senate by calling and examining witnesses before the Senate, but all the right that he has is a right to be heard in his defense against the charges which come from the Governor, and against such information as the Governor communicates with these charges, it is necessary by the mere fact of receiving them from the Governor, before the Senate, for their consideration.

One thing, it seems to me perfectly clear, here are two proceedings provided by the Constitution by which judges may be removed from office. One looks to a regular trial, the Senate is to convene as a court of impeachment, in order that the highest judicial ability of the State may aid the Senate; the judges of the Court of Appeals become a component part of the tribunal. There is the right to the accused to be present and to be heard, and the Assembly attend before the Senate as prosecutors, and therefore there is all the machinery of a court, a prosecution, a prosecutor, a tribunal, the right to examine witnesses, as I shall presently call the attention of the Senate, an oath to be administered to the Senators, that they shall hear the case on evidence.

No such provision in reference to this matter, and the accused is to be tried on the charges presented against him; but what is this proceeding? In the first place it is intended to be summary; it is a co-ordinate proceeding. It may meet the same case, with this difference, that while there is in the case of trial by impeachment, the necessity of delay, here there shall be no necessary delay, here the process shall be speedy; the public interests are involved, charges have been made that a judicial officer should not keep his seat, that he should not do what the judge in this case has been doing, since the Assembly have, by unanimous vote, determined that he has been guilty of mal and corrupt conduct in office, and the rights of the people demand that there shall be a speedy and immediate determination of the questions and charges presented against him, without the delay which becomes necessary if there is to be all the formality of a trial, and which has been sufficiently indicated to the Senate in the discussion already taken place, as likely to occupy between now and the 1st of January unless we proceed to trial, on any form which the Senate shall see fit to give to the proceeding. My associate suggests, bearing upon this very matter, that to obviate this difficulty, to subserve the public interests, and to protect against the exercise by a judge of his judicial functions when charges of this kind are pending against him, after the articles of impeachment shall be preferred to the Senate against him, he becomes by that act suspended from the exercise of his judicial functions, but here there is no suspension. This judge has, since these charges have been presented to the Senate, and since he has been arraigned before the Senate, been holding his court, and been proceeding in the exercise of his judicial functions as if no such charges had been presented against him. Here there is no limitation upon the grade of the offense for which the accused judge shall be removed. That is left entirely to the Senate as the body charged with the protection of the interests of the people. The people have reserved to themselves the right of summary removal; of removal without the necessity of going through all the form and ceremony of a trial, and the necessary delay consequent thereon. All the discussion which has taken place on this subject has assumed that the Senate was sitting here as a court; that the ordinary rules of evidence apply, but I wish to know where in the Constitution there is any warrant for any assumption of that kind?

When the Senate sits as a court, section 1 of article 6 provides that, before the trial of impeachment, the members of the court shall take an oath or affirmation truly and impartially to try

the impeachment according to the evidence. "No person shall be convicted without the concurrence of two-thirds of the members present. Judgment in cases of impeachment shall not extend further than to removal from office, or removal from office and disqualification to hold and enjoy any office of honor, trust or profit under this State." Is there no significance in the fact that no provision of this kind appears in the article which relates to the removal of judicial officers? Here there is no oath provided for the members of the Senate; there is no provision made for evidence, and I have made some little examination this morning with my associates, which, it seems to me, justifies us in the assertion that there is no provision whatever of law which permits the Senate to administer an oath to witnesses who shall be presented here on either side. The right to administer an oath is conferred by the Revised Statutes, which give the right to the chairman or other officer of the committee of the Senate or Assembly to administer an oath. The witnesses who were examined before the judiciary committee of the Assembly were examined under the provisions of the Revised Statutes, and with the sanctity of an oath administered by the power thus conferred. I ask the Senate where is the right to administer an oath in this proceeding? I have been unable to find it. I speak with great diffidence, of course, in respect to the want of any thing which may be supplied by the statutes, particularly as the opportunity we have had for an examination on this subject has been so very slight, and yet we have made some examination and failed to find any provision whatever for the right of the Senate either to call witnesses here, or when witnesses come to the bar of the Senate, to administer such oath to them as that the testimony received from them shall be received under the sanctity of an oath, or that there may follow from any false statement which they shall here make any prosecution for perjury against them. Will the Senate be so good as to consider this difference between this proceeding and the ordinary trial in a court? When an indictment is prepared, there is a district attorney to prosecute; when this Senate sits as a court of impeachment, the Assembly appear here to prosecute with their managers selected to conduct the prosecution, but who appear here to prosecute? It is true we come here by the invitation of the Senate, but so conscious were we of the fact that no provision was made for the prosecutor, that when the accused judge attended here to be arraigned, we staid away; we had received then no invitation from the Senate on the subject, and we, therefore, being charged with no duty, notwithstanding the earnest duty we felt in this mat-

ter, it was not until, in view of that fact, the action of the Senate upon the subject, that invitation in response to which we appear here to assist the Senate in any respect they may permit. What provision can be found in the Constitution that the Senate shall get together evidence in respect to these charges by the examination of witnesses — by procuring documents to be brought here from the city of New York? There is another argument which the Constitution furnishes, and it seems to me that is unanswerable. There is precisely the same provision in respect to the process of removal of judges of the Court of Appeals and of the Supreme Court, by concurrent resolution. There is the right there to the accused to be heard in his defense. Bear in mind the leading difference and distinction between the two processes, one of removal, and the other by trial of impeachment. The one intended to be summary, and the other to be hampered by all the ordinary restrictions, which apply to the investigation of questions in court. The interpretation which is claimed for this section of the Constitution involves this necessity, and the Senate must permit me to follow up the absurdity, that when the attempt is by summary process to remove a judge, that there shall be the right, on his part, to two trials, one in the Assembly, and another in the Senate, and if the interpretation contended for be correct, then there are to be two trials in the speedy proceeding against one, which is followed by the immediate suspension of the judge, in the exercise of the duties of his office. What is meant by a hearing of the accused judge in his defense? I suppose that which was running through the minds of the members of the constitutional convention, was that hearing which was provided in the Court of Chancery, upon testimony which came from the master to the chancellor. The chancellor did not confront the witnesses. The chancellor did not hear the testimony taken, but he received from the master the evidence which was gathered together before him, and the expression used to distinguish that proceeding from an ordinary trial, was that which took place before the chancellor, was "a hearing," the very expression which was adopted by the constitutional convention to designate this proceeding. It is a hearing of the case. It is not a hearing of the complaint. It is not a hearing by prosecutors or of the prosecution, but solely a hearing of the accused in his defense, the groundwork of which shall be the charges, and such testimony in support of the charges, as come to the Senate from the Governor. The next question is, whether it is fair to the accused, that the Senate shall receive this testimony, which thus comes from the Governor and act upon that? Can there be any question about

that? Suppose, for example, by way of illustration, that one of the witnesses whose testimony was taken by the Assembly committee had died. On ordinary rules of evidence, if one of the witnesses then examined had died, and this were an impeachment trial, there could be no question whatever of the right of the prosecution to read the testimony of that witness. The charges are precisely the same. There have been placed upon our table the charges now before the Senate, and they are precisely the charges in support of which testimony was offered before the judiciary committee of the Assembly; the issue, therefore, is precisely the same. The accused was present and represented by counsel. I am at a loss to understand what is intended by the expression made use of by the counsel for the defense, that Judge McCunn was only present before the judiciary committee of the Assembly, *ex gratia*, as a matter of favor to him. The learned counsel who made that statement says he was only informed of what took place before the judiciary committee of the Assembly; in this respect he has been entirely misinformed; because the fact is, that the judiciary committee, before entering upon the discharge of the duties devolved upon them by the resolution under which they communicated to both sides; to the bar association which had presented these charges, and to the accused the action they had taken, which permitted both parties to be present, both parties be represented by counsel, and both parties to examine and cross-examine witnesses, both parties to introduce evidence on their own side which was all that the law requires, but that opportunity was availed of by the accused judge, as well as by those who appeared to prosecute the charges; witnesses, not one being examined in his behalf, but he being represented by counsel, counsel who now appear here, and who do not merit the terms in which their associates spoke of them, as being either incompetent, or negligent in the discharge of their duties. They attended to look after the interests intrusted to them, and they did so with ability and vigilance, and the learned judge was present and exercised his privilege to examine and cross-examine witnesses who appeared before that committee. The case, as sent here by the Governor, states "Judge McCunn was present in person with his counsel, James F. Morgan, Esq., Daniel R. Lyddy, Esq.," both of whom I see among the counsel. What is the objection taken to this testimony, which has not been covered by the general observation which has been made? If the Senate please, Mr. President, the objection taken is this, that Judge McCunn desires an opportunity of again having these witnesses examined. Upon what principle?

They were examined, when examined before the judiciary committee, under oath; an indictment for perjury lies in respect to the testimony they then gave. What right is there to the accused, to insist upon the second examination of witnesses upon the second charge? I mean what right, in ordinary fairness, can be insisted upon by him, when there is no obligation on the part of the Senate that they shall go through this ceremony of again examining the same witnesses in respect to the same charges? These are questions which are of very great importance, because this case, as no other case has been, is likely to become a precedent, in respect to the provisions of the Constitution under consideration. No such point was taken in the Smith case. The right there to have the case presented by testimony was conceded at once. In that case no testimony had been taken in the manner in which this testimony has been taken. The case being different, the question could not arise. If the question had been the same the point was not there raised, and this question now first comes before the Senate for consideration. It may be argued that the Senate has already taken action, by their rules, in respect to this matter. I find the Senate has adopted a rule for its guidance on this investigation, applicable to the examination of such witnesses as shall be produced, but not a rule which involves the necessity of having all the testimony which is presented to the Senate presented from the examination of witnesses, and a rule which does not at all interfere with the Senate's rights to receive this testimony sent by the Governor with his message, and this is a rule of which the Senate, of course, has entire control.

Mr. MURPHY — Mr. President: Before Mr. Parsons sits down, I should like to ask him a question. Do I understand you to maintain the position that witnesses cannot be examined as in the trial of impeachment?

Mr. PARSONS — No, not at all, sir. There is that right conferred in the impeachment trial, and no such provision here which, it seems to us, demonstrates there is no right here to administer an oath.

Mr. MURPHY — Mr. President: I understand the counsel to make the suggestion, in case a witness who has been examined before the Assembly committee, for the purpose of founding articles of impeachment, dies, this testimony, as there taken, could be introduced in the trial in the Court of Impeachment.

Mr. PARSONS — If he were dead! That very question came before the Supreme Court, in the 2d of Johnson, page 17, where the

court held the testimony competent under such circumstances. It is a mistake to say the sole authority of the judiciary committee of the Assembly, under the resolution under which they acted, was to obtain testimony looking to the impeachment of the accused, or rather to the charges against whom was presented the charges of the Bar Association. The resolution directing the action of that committee was of the broadest character, and looked either to proceedings by impeachment, removal by concurrent resolution, in the case of a judge of the Supreme Court, removal through the action of the Governor, as in this case, or a general examination into the complaint which had been made of the administration of justice in the city of New York.

Mr. Robertson — Mr. President: Before the counsel for the defense proceed, I desire to ask the counsel, upon the part of the Bar Association, a question, with a view of hearing the counsel for the defense on that question. If I understand the counsel correctly, his view is this, that the provision of the Constitution, or that portion of the Constitution under which the Senate is now acting, contemplates that the Senate will only act on the papers transmitted to the Senate by the Governor, at the time he transmitted the charges, and that, if any additional testimony is taken by the Senate, it is a matter of grace on the part of the party requesting it. Is that correct?

Mr. Parsons — Very nearly, Mr. Senator; the position we take is, the Senate primarily acts upon the documents which attend the Governor's message, with the right then to the accused to be heard on his defense, and such right as results from that necessarily to any person interested in the prosecution, on the invitation of the Senate to introduce further testimony.

Mr. J. Wood — I desire to ask Mr. Parsons whether the Governor is bound to send any thing more to the Senate than the charge, with a recommendation of removal? Whether the Governor is required by the Constitution, or in any way, to transmit the evidence before him for the reason why he recommends?

Mr. Parsons — We think not. And that only suggests a question of the authentication of the evidence, which we think is sufficiently authenticated, by the fact that it accompanied the Governor's message.

Mr. D. P. Wood — Mr. President: I desire to ask the counsel whether, under his construction, if the case had been presented to the Governor on *ex parte* affidavits, and the Governor had sent it to the Senate upon those affidavits, whether, in his view, it would be a

matter of grace to the defendant whether he be allowed to call witnesses upon the case in his defense?

Mr. PARSONS — We think exactly that. We think there is no question whatever of the power of the Senate to act upon evidence which they obtained in any way, provided it is satisfactory to themselves. Any evidence, however it comes, in support of these charges, gives jurisdiction to the Senate to act, with the right, of course, on the part of the Senate, to determine whether evidence, thus coming, shall be satisfactory; and with the right on the part of the Senate to determine what they shall allow to the accused, as matter of grace, if the expression be preferred, what shall be conceded to the accused in the way of introduction of evidence, the absolute right being to him to be heard in his defense, which, I suppose, means to be by himself and by counsel.

Mr. MURPHY — How are we to get evidence unless we have a right to examine witnesses?

Mr. PARSONS — There is no provision, and I have no objection to press upon the Senate the fact there is no provision that evidence shall come before the Senate, in the legitimate significance of that term. When the Senate sits as a court of impeachment, senators are to be sworn to try the case fairly and impartially upon evidence, which, I suppose, means such evidence as courts of law receive; but there is no such provision in respect to this process of removal by the action of the Senate on the recommendation of the Governor, and, therefore, the Senate themselves are to interpret and to determine, I should say, that which they will regard sufficient—call it evidence if you like, call it what you choose—that which shall be sufficient to justify the removal.

Mr. MURPHY—I understood the counsel to say that as matter of favor we may permit the defendant to introduce testimony. I think the Senate has the full control of the proceeding. If we have the right to permit him to introduce testimony, how can we introduce it when we swear the witnesses on the question? How do we introduce testimony and who is to take the testimony either? Must we not take it, or somebody deputed by us?

Mr. PARSONS—We think not. We think the Senate acts under such authority as is conferred upon the Senate, and that no authority is to be necessarily implied; but there are ways of course in which the testimony for the defense may be presented here which did not involve the necessity of having witnesses examined in the exercise of the legislative duties of the Senate. They act upon information satisfactory to themselves; and the same kind of information coming

to the Senate from different sources, we insist, so far as concerns the provisions of the Constitution, will justify action on their part in the removal of the accused judge.

Mr. PERRY—If the counsel will permit me I would like to ask him one question. In case the charges had been transmitted to the Senate, unaccompanied with any testimony or documents whatever, of any kind, and recommended the removal of the accused, is the counsel of the opinion the Senate could remove on such a paper without taking testimony?

Mr. PARSONS—I have no question about it, that if the accused saw fit to waive his right to be heard in his defense upon these charges, the right of the Senate to remove cannot be gainsaid; but the accused has the right to be heard, and that right may involve the propriety or necessity of further proceedings before the Senate. I hope the Senate will understand clearly the position which we take. We do not insist that the power of the Senate is limited. We do not deny the power of the Senate, if they cannot administer oaths to hear testimony; but we say the Senate has the right to act upon the testimony which thus comes from the Governor, and our motion is that the Senate do act upon that testimony which has been taken under such circumstances as assume that justice has been done to the accused judge, if the Senate shall act upon that evidence alone.

Mr. MOAK—Mr. President: When I commenced the reading of the law, the first book I read was Blackstone's Commentaries, and in that I learned that the parliament of Great Britain was omnipotent, and had a right to pass any law; and it was inherently a court, and the highest court of the kingdom of Great Britain. I learned that in that respect, it had absolute power, and was the final resort of every person who desired to have his rights determined, and that it was originally a court of itself, and that it was only by common usage that it acquired power to make laws by consent of the sovereign of England. I learned that the proper theory of reading law was to commence with the common law, and then come to the statute, instead of commencing with the statute; and going along a little farther, I learned that the Governor of this State, the Assembly and the Senate, took the place, so far as this State government was concerned, of the parliament of Great Britain; that they had absolute rights without any restriction, except so far as they were restricted by the State Constitution; and going a little farther in the history of the administration of justice in this State, the question arose in this class of cases: The Legislature said that a town, or a majority of the tax payers of a town, might consent to the bonding of the town,

and if so, that the town should issue its bonds, and it should become a debt against the town.

The question arose and was discussed, and it went to the Court of Appeals, as to whether even a majority or two-thirds of the tax payers signing and consenting that a debt should be created against the town, could bind the other without their consent; and the Court of Appeals, in considering that question, said: "The Legislature is omnipotent," within its proper provisions, of course, except so far as the Constitution has restricted its powers; and I learned, when I read Story's Commentaries upon the Constitution of the United States, that the Legislature of the general government was a delegated Legislature, and that they had no power except such as the State had surrendered them. If we take the common-law principles, we shall see very readily why there is no provision, and why the gentleman has not been able to find one. It has not been taken from it, and the senators will recollect that it was only since 1846 that a senator, without taking any additional oath, without changing his seat at all, transferred himself from the position of a legislator to that of a member of the Court of Impeachment, a Court of Errors, and heard causes decided; and that is the reason why the gentleman has not found any power in the Senate to administer oaths. They have got that power by virtue of their inherent rights, and by virtue of the authority under which they sit; but it is true that when they come to the question of whether a committee could administer an oath or not, they were not the Senate. Whenever a judicial body attempts to act by proxy, of course the proxy has not the power to administer the oath, and a statute had to be passed allowing them to do it. It strikes me, as a full answer to so much of the gentleman's argument, that the Senate has not the power to administer an oath.

Mr. BENEDICT — Does the counsel mean to suggest that the Senate has the omnipotence of the parliament of Great Britain?

Mr. MOAK — It has all within its proper jurisdiction; within any power granted it. It has the same power, so far as any act of the Senate or of the House of Lords in England is concerned, as decided by the Court of Appeals, as I understand the decision, except so far as restricted by the statute or Constitution.

Mr. PARSONS — Is this a legislative proceeding?

Mr. MOAK — I do not know how to answer that question. It is legislative in one sense, and it is judicial in another. It is somewhat anomalous. I do not propose to christen the child; it is here, and we have got to take care of it. The gentleman cites the proceedings in the constitutional convention of 1846. The gentleman well knows,

and so do I, and so does every member of the Senate, that, up to 1846, the Governor appointed all the officers, almost, of the State; appointed judges of the Supreme Court, the Chancery, the circuit judges, and the judges of this very court, I believe, although I am not certain; and he appointed the judges of the Court of Common Pleas in the city of New York. That being so, it was an inherent principle, that the power which had authority to appoint could remove; but, in 1846, for certain reasons, a revolution was created, which provided that most of the officers should be elected; and hence, the same power which gave a man an office only could deprive him of it, unless some method was provided for removal. That being so, the very instrument that provided how they should be elected, provided how they might be removed. I do not desire to discuss this question at any very great length. It strikes me that I cannot, for I have not the patience to. A man charged with a high crime and misdemeanor, and to be put on trial for an offense which blackens his reputation for life, has a right to have witnesses sworn; and a man can be removed for a much less one without an opportunity to be heard at all. He may have the benefit of a trial in one case, but in another, which involves much less, and for which he could not be impeached at all, according to the rule of the gentleman, he may be summarily disposed of. In other words, when the electors have elected a man, and when you want to get him, as an opponent, out of the way, all the Governor has got to say is, "we will get rid of this man;" and the Senate says, "we will concur in it; we do not desire to hear any thing;" and you remove him summarily. It strikes me it is a wheel within a wheel; and I do not think that is the theory of our State Constitution.

Mr. MURPHY—Mr. President: Is discussion in order?

The PRESIDENT—Yes, sir.

Mr. LEWIS—I rise to a point of order; that the discussion is not in order on the part of senators.

The PRESIDENT—Will the senator state wherein it is not?

Mr. LEWIS—It is not, under the fourth rule.

Mr. D. P. WOOD—I think the senators can say all they wish to on a motion to be excused from voting.

Mr. BENEDICT—Mr. President: I have something to say on the subject; I have no objection to discussing it in open session of the Senate, if it is the wish of the Senate, but I understand the rule to preclude that.

Mr. PERRY—I renew the motion, that the Senate now proceed to hold a private consultation. (Mr. Perry's motion was carried.)

Upon the opening of the doors, it was announced by the PRESIDENT, that a resolution was passed, denying the proposition of the counsel for the prosecution.

Mr. DAVIS — Mr. President: A question arose as to taking this evidence before the Senate or before a committee of the Senate; I am desired, by Judge McCunn, to say, that he is contented to abide by the judgment of the Senate on that question, so that the proper safeguards shall be thrown around the proceedings, if they are taken by the committee, and he has no proposition to make, except that he will accept the decision of the Senate upon that question.

Mr. MURPHY — I think we cannot take the responsibility; the question rests between the prosecution and the respondent whether they will agree to that mode; we cannot undertake to judge of that matter.

Mr. DAVIS — Mr. President: I had understood it was Judge McCunn's right to demand a hearing here; he waives the right to demand that, and expresses his wish and willingness to abide by any decision which the Senate may arrive at, as being the best under the circumstances of the case.

Mr. MURPHY — Mr. President: Our judiciary committee reported that it was competent for the respondent to say whether the testimony should be taken before the Senate, or a committee of the Senate, but with him alone must rest the decision; if he elects to take it before the Senate, the Senate will hear it; if he elects to take it before a committee, the Senate will appoint a committee.

Mr. D. P. WOOD — Do I understand the senator to say, that the Senate will appoint a committee if the judge elects?

Mr. MURPHY — What I say is, that the judiciary committee reported that it is within the power of Judge McCunn to say whether the testimony should be taken before the Senate or before a committee of the Senate. He elected to take it before the Senate. Now, we cannot undertake to say to Judge McCunn, "we want it taken before a committee." All we say is (as I suppose; I am only speaking of one member of the Senate), that we are willing to take it before a committee.

Mr. D. P. WOOD — Mr. President: I rise at the earliest opportunity, to say to the honorable senator from the third (Mr. Murphy), that I am not willing to take it before a committee. I understand the senator to speak for the Senate; that they are willing.

Mr. MURPHY — Mr. President: No, sir.

Mr. D. P. WOOD — Mr. President: I wish the counsel for the

respondent, in deciding upon their course, to decide irrespectively of what may be the views or wishes of the Senate. They have expressed no opinion upon the subject yet, whatever. That would be a subject for their opinion, whenever the counsel for the respondent expresses his wishes.

Mr. PALMER — The report of the judiciary committee, after the taking of the evidence in this case, was accepted by the Senate, and Judge McCunn has already elected to be tried before the Senate. Unless these proceedings here are reconsidered, we will have to proceed with the trial before the Senate.

Mr. DAVIS — Mr. President: The only point in my speaking at all was, because I understand it would be a convenience to the Senate not to have it tried before that body; and in order that the feelings of Judge McCunn might be known on the resolution, I stated what I did. I understood that there was a resolution pending, offered by Senator Johnson.

Mr. JOHNSON — Mr. President: I believe there is such a resolution which was offered last evening, and that it now lies on the table. In offering the resolution I said I would not offer it if it was not in accordance with views of counsel on the part of the prosecution and of the defense, and if there is any objection from either of those sources, I would ask the sense of the Senate upon that resolution. For that reason, I ask that the resolution be taken from the table.

Mr. PERRY — Mr. President: Before that question is put, I would like to inquire whether there is any objection on the part of the respondents to the adoption of the resolution?

Mr. PECKHAM — No, sir.

[Mr. Johnson's motion was lost.]

[Mr. ALLEN offered a resolution which was carried, designating that all motions and resolutions be sent to the desk in writing.]

Mr. BENEDICT — Mr. President: I move that the trial now proceed.

Mr. DAVIS — Mr. President: If that is the next order of business, I have a word to say—a suggestion to make to the Senate. It seems that all the preliminary questions which arise in this case have been disposed of, and we stand here at this time about to enter upon the trial. The counsel for the respondent in this case have believed that some of those preliminary questions would have been decided in their favor, which would have prevented the entire trial. We desire very much to have Judge Selden here. I submit to the Senate, under the circumstances, whether this case should not be so far continued, as to allow Judge Selden to be present. I have his telegram, stating "I cannot go until Tuesday." Whether he meant

he could not arrive here until Tuesday, or leave there, I cannot state. I wish to submit to you, gentlemen, under the circumstances, the importance of this trial, particularly to my client, Judge Selden's well-known ability, and the fact that he (McCunn) relied upon him mainly as his counsel in the matter; the fact that we have argued and disposed of all these preliminary questions, whether, in justice to Judge McCunn, this matter could not be continued until next Tuesday to give time for Judge Selden to get here. I will state further, that I hold in my hand a telegram that my brother-in-law has died at Medina, and is to be buried to-morrow. He was taken sick very suddenly, leaving my sister entirely alone. I feel the very deep importance of my going there. Under all the circumstances, I think it right and proper that the Senate should give Judge McCunn an opportunity to have his own chosen counsel present. He simply wants to have his trial under such circumstances as, perhaps, others would desire to have. I feel as one of the associate counsel in this case, that I shrink from the responsibility of trying a case of this kind when Judge Selden can be here so soon, and, if possible, I trust the Senate will give us until some day next week. [The question was here taken on the motion of Senator Benedict that the Senate proceed with the trial, which was adopted.]

Mr. Parsons — Mr. President: The Senate having determined, and having ordered that the case shall proceed as an ordinary trial, the first proceeding on our side would be the presentation of the case on the part of the prosecution as an opening, and Mr. Harrison is now prepared to address the Senate.

Mr. Harrison — Mr. President, and Senators: I think it proper to state for myself, at the outset of my remarks, as it has already been stated by my associates who have addressed you, that we do not appear here in the character of counsel for a prosecution. We are here upon the invitation of the Senate, familiar with the facts of the case, and prepared to assist the Senate in the investigation which it shall make into the truth of the charges which have been submitted to the Senate by the Governor with his recommendation for your action.

These charges were originally preferred against Justice McCunn to a committee of the Assembly, which came to the city of New York under a resolution of that branch of the Legislature, directing the committee to inquire into the complaints which had been made against certain judicial officers, not naming them. The resolution contemplated the possibility of action of different kinds in differ-

ent cases by the Assembly upon the reports to be made by that committee; for example, it contemplated, either that articles of impeachment be preferred against an officer against whom charges should be made before the committee, and for whose case impeachment might be the proper proceeding; or that legislation be had if the committee should report that the testimony had satisfied them that such action by the Legislature is necessary to the due administration of justice in the city of New York; or that there be a concurrent resolution of the Senate and Assembly for the removal of a justice of the Supreme Court against whom charges had been made and proved; or that there be such other action which the committee might recommend to the Assembly for any particular case.

That committee sat for many days in the city of New York, and for about a week it was employed in investigating these charges made against John H. McCunn, a justice of the Superior Court of the city of New York. When the testimony was all in, and the committee had returned to Albany and was prepared to report upon this case, the session of the Legislature was very nearly at an end. It was conceded that a trial before the Court of Impeachment would be a very long and tedious proceeding. The members of the committee were unanimous that the charges had been substantiated against Justice McCunn, to a degree showing that he had been guilty of mal and corrupt conduct in office and, though they have stated no reason for the action they took in preference to recommendation that the accused be impeached, it is fair to assume that they were of opinion that the case is not one for the tedious proceeding of impeachment, and trial before a court of impeachment, but that it is so plain, that the facts in support of the charges are so clear, as to demand that the summary method of removal by the Senate, as allowed by the Constitution, should be adopted. What they did was to make a report, signed by every member of the committee, setting forth, by preamble and resolutions, that they find the accused to have been "guilty of mal and corrupt conduct in office," and recommending the Assembly to call upon the Governor to institute proceedings for his removal by the Senate. That report of the committee was unanimously adopted by the Assembly, upon the call of the ayes and noes; and the Governor promptly transmitted the charges to the Senate with his own recommendation that the judge be removed by you from office.

The Bar Association was a party to the proceedings before the Assembly committee, when it sat to hear complaints in the city of

New York. That association was established, as it declares in its constitution "to maintain the honor and dignity of the profession of the law, to cultivate social intercourse among its members, and to secure a proper administration of justice." It has nothing to do with politics, or with political parties. It is composed of many hundreds of lawyers residing in the city of New York, or elsewhere in the State, who have been forced, by observation of many recent cases of tyranny, wrong and corruption, by several of the members of the judiciary, to adopt vigorous measures to correct that evil. We preferred these charges against Justice McCunn, because we find that the usefulness of the Superior Court of the city of New York is greatly impaired, yes, paralyzed, by his presence there.

It is not necessary that I should assume now to instruct the members of the Senate as to what the demeanor and character of a judge in the State of New York should be. The history of this State is made luminous by the illustrious lives and learned and right decisions of its judicial officers; and every one of you is personally familiar with the manner of life and daily conduct of many of the justices now upon the bench, who are themselves examples to all times.

All that I shall now do will be merely to attempt to show you a living instance of what a judge should not be, but what the accused man now before the bar of the Senate is.

With regard to Justice McCunn, then, we claim that, in the administration of his office, he has been guilty of such gross partiality, such arbitrary disregard of right, and such willful interference for his own selfish and corrupt purposes in cases pending before him, as to have destroyed the confidence of all the people of the State, in his ability to deal fairly and justly in the trust confided to him by the electors in the city of New York, and to have brought the court in which he sits into contempt.

Of course, the charges upon which we rely relate principally to his conduct in matters brought before him upon motions for orders, or where he has the jurisdiction of a chancellor. It is there he acts without the intervention of a jury, and it is there he is solely responsible for any wrong that may be done to the citizen. We have not thought it necessary to consume your time by speaking of a great many cases of particular wrong-doing. The general conduct of the man is notorious. His presence upon the bench is an outrage upon us of the bar, and upon all the people of the State of New York. No litigant is safe before him. I shall show you why it is so, by sketching, briefly and hurriedly, the outlines of the history of sev-

eral cases which have recently attracted public attention, and concerning which we shall go into evidence. I shall tell you what he actually did in those certain particular cases — shall inform you to what a regular and well-ordered system he has reduced his tactics for oppression and plunder, by showing you how he outraged the individuals who were the unfortunate parties then at his mercy. I shall not presume to indulge in declamation before you, but shall make a plain statement of facts merely, with only so much of comment as to give continuity to the narrative, leaving it to you to draw the unavoidable inferences. And I beg you, senators, to bear it in mind that the matters about which we shall go into evidence concerning the hardships put by this man upon the particular parties to the suits mentioned, not only indirectly but directly affect the constituents of every one of you here present to-day. The people of the whole State are deeply concerned and interested in the administration of justice in every portion of the State; and, though the judicial officer in any particular locality is elected by the people of that locality only, and holds his court there only, he has to pass upon questions of liberty and property which come home to the firesides of all the citizens of this State, and, indeed, of all the citizens of all the States. New York is the great commercial emporium of the country. When the wheels of justice are clogged here, the effects are felt everywhere throughout the United States. It is an evidence of the wisdom of our fathers, therefore, that they provided, in the Constitution of the State, that the people of the State, here assembled, by you, their chosen representatives, in this body, shall have the power at any time to correct the mistake of a mere majority of the voters of a county or district who may have put a bad judge on the bench, by removing him from office summarily.

The first case in the order of charges preferred is that of *Clark* v. *Bininger*.

The firm of A. Bininger & Co. was one of the oldest and best known in the city of New York; they were wholesale dealers in liquors. The firm consisted of two members (Mr. Clark and Mr. Bininger). Their articles of agreement provided that the copartnership should be terminable at any time, on a notice of fifteen days, to be given by either party to the other. In November, 1869, such a notice was given by Mr. Bininger to Mr. Clark. Mr. Bininger was entitled to the sole continued possession of the assets, and to wind up the affairs of the firm. A consultation was immediately had by Clark with a lawyer, who, while yet considering how he should be able to secure to his client the possession of the assets

of the firm, and to retain for him control of the business, chanced to meet one Hanrahan. Hanrahan was then the partner of James F. Morgan, and James F. Morgan is the brother-in-law of Judge McCunn. The firm of Morgan & Hanrahan, attorneys, etc., was the successor in business to Judge McCunn himself, and in what I shall now say I shall assume — and by what we shall prove here, we shall, I think, conclusively show — that there was a conspiracy between the two members of that firm and Justice McCunn himself and some others, to accomplish the very things which were afterward done, to their own gain and advantage, and to the very great injury of the parties litigant, and to the creditors of A. Bininger & Co. Counsel for Clark, while talking to Hanrahan (at McCunn's old office, and where the judge was still a frequent visitor and kept a desk) about another matter, chanced to remark that he was about to bring a suit of some sort or other for settlement of the affairs of the copartnership of A. Bininger & Co., and to secure possession of its assets. Hanrahan said: "Why, I can help you; I am here with Judge McCunn, you know; bring your suit in the Superior Court; I will have myself appointed receiver of that property, if you ask for a receiver; and we will see if you and I can't be of advantage to each other." A bargain was made between them. There was an appointment, in compliance with that agreement, that Judge McCunn be at his own private residence, at a certain time, which was to be the end of the fifteen days' notice required for the termination of the copartnership. Until those fifteen days should expire, the partnership was to be still in existence, and Clark could have nothing to complain of against his partner. With the first minute of the sixteenth day, however, every thing would be changed. The notice which had been served by Bininger would then have terminated the copartnership, and Clark's imaginary wrongs would then instantly become full-grown and clamorous.

At midnight then, the last moment of the very day the copartnership should end, it was arranged that Justice McCunn should be at home to hear the plaintiff's complaint and to appoint a receiver, without reference to the facts or merits of the case.

It is not necessary for me to refer now to the rules and practice of the courts, as we shall prove them here, further than to explain, in the briefest way, the bearing of those rules upon the salient facts of this case. The Superior Court has six justices. They are assigned to the different departments of the court in turn. In any particular month, two of those justices are assigned to hold trial

terms, and another is assigned to try an equity calendar. The other three may be sitting for a part of the day during the month at the general term, but one of them always holds the chambers of the court during at least an hour or two in the morning, to hear motions for orders. There is a special term of the court at chambers, where the judge sits as a court, in the chambers of the court; and where many of the orders made are orders of the court, made in matters in which only the court can make a valid order. Every justice has also his private chambers where he sits as a judge merely, not as the court; and orders made by him there are judge's orders merely, not orders of the court, or of the same force or effect. They are of no force or effect in cases in which only the court, and not the judge merely, is empowered to act. Those of the Senate present who are lawyers, and who practice in places other than the large cities of this State, are not likely to have encountered the particular temptations and difficulties which beset lawyers in the city of New York in attempting to get orders from a judge. It is only in Brooklyn, New York and Buffalo, I believe, that there can be found more than one judge of the same court residing in any one county. So, that, when applications are to be made, elsewhere than in those three cities, to a judge for orders in a case pending in his court, or about to be brought there, there is no temptation, because there is no opportunity to bring into the case the sympathies and influence of another person who sits upon the same bench. The application is made to the one justice resident upon the spot, and can generally be made in court or in the office he uses as his chambers, as easily as at the judge's private residence. It is only in case of such emergency that the interests of a client may be prejudiced by even the delay necessary to get the judge into court or into his chambers; that it is usual to make application to him at his private house. In the Superior Court of the city of New York, the rule requires that, to the justice who is assigned to hold the chambers of the court shall be made every application for an order, which, to be operative, must be an order of the court at special term; and the rule prevails there, as everywhere, of course, that in matters wherein the court must act, application must be made during a term of the court, and at a sitting of the court. Those rules require also, that even an application for a mere judge's order must be made only to the justice then assigned to hold the chambers of the court, unless there be good cause and excuse shown for applying for the order to another justice.

Justice McCunn was not assigned to hold the special term at chambers of the Superior Court, at the time of which I am speak-

ing. He was not entitled to receive an application, or to make an order in any matter that should be addressed to a judge holding special term of the court at chambers—he was not authorized to make even a simple "judge's order," unless the applicant for it could show that the justice assigned to the chambers of the court at that time was inaccessible, or that there was other good reason for not taking the usual course. But he found no difficulty in that fact, or in the lateness of the hour selected for the meeting. He cheerfully agreed to sit up at his house until midnight to make—not a mere "judge's order," which, in a case in which he was authorized to make it at all, he could make wherever he should chance to be—but an order appointing a receiver of the copartnership property of A. Bininger & Co., which was to be considered an order of the court, which could be made only by the court, and which could be regularly made only by some justice assigned to sit as the court, and then actually holding the special term of the court at chambers.

Just before midnight, then, of the 18th of November, 1869, we have this collection of people in the Justice's private library, at his residence, pursuant to the appointment: First, the Judge himself; then the plaintiff in the case; the counsel for the plaintiff; and one or two others, friends of all the conspirators. The plaintiff had brought along some bottles of wine and a cork-screw, supposing that the session might be long and the members of the company thirsty. He presented them to the Judge, innocently, expecting that functionary to play the part of host in his own house, and to use them to enliven the company during the anxious vigil before the witching hour of midnight should arrive. The Judge accepted the wine and the cork-screw, with profuse expressions of thanks; but it did not seem to occur to him that the cork-screw was available for immediate service, and the bottles still remained unopened and the cork-screw unused when the company departed.

The plaintiff is, I believe, of the opinion, to this day, that Justice McCunn is a solitary drinker.

When the clock struck midnight, the Judge—very punctilious about the precise moment at which he should begin his proceedings in this memorable case, though he never seems to have known when to stop, so long as the money held out—called attention to the fact that he was now ready to hear the complaint. The papers were laid before him, the complaint and an affidavit were sworn to by the plaintiff on the spot; and the Judge, thereupon, immediately made one order enjoining Bininger from disposing of or interfering with his own property, and another appointing Hanrahan receiver

of all the copartnership property of A. Bininger & Co. The latter order directed the receiver to go on and sell the assets, converting them into money. The only papers before the Judge, and upon which the appointment was made, were the affidavit of the plaintiff and the complaint, which were sworn to before the Judge himself. Those papers disclose the fact, which was mentioned also to the Judge, in conversation at the time, that the assets of the firm then amounted to several hundred thousand dollars in value—the personal property alone. The stock of goods on hand was worth $120,000. In selecting a receiver, the Court appoints a person to be its own officer, and who is to take charge of the property in dispute, to keep it from being lost or wasted, and to preserve it in the interest of the parties to the suit and of their creditors. The selection should, of course, be a man of good character and habits; and, when there are large sums of money in question, he should be also a person of pecuniary responsibility. Justice McCunn had known Hanrahan for many years. Hanrahan was, to all intents and purposes, one of his own private clerks. With all the city of New York from which to choose; from among all the lawyers, to select one who, as a sworn and practiced officer of the court, would be likely to know how to conduct himself in the difficult questions that might arise; among all the merchants from whom to designate one familiar with the best methods for conducting the business of wholesale dealers in liquors, and able to carry it on to the advantage of all the parties in interest; with all the State of New York to choose from, he selected this man, Daniel H. Hanrahan, who, as the Judge himself afterward admitted, was a drunken, worthless fellow. He was entirely without pecuniary responsibility, and Justice McCunn knew it. But the judge exacted from the receiver an undertaking in only $1,000, as a bond of security for the administration of the trust which was placed in him, to dispose of and account for property amounting to several hundred thousand dollars in value; and even the bond, actually approved, was so drawn as to have been unavailable to any person who might have tried to enforce it against the obligors.

It is not usual, under the practice of courts of equity, to appoint a receiver, *ex parte*, at any time, unless it is shown that the rights of the person applying for the appointment are in great peril, and will be irreparably injured by even the delay necessary to inform the opposite party of the application which is made. There was no suggestion of any such peril or danger in this case; and if a judge should have made any *ex parte* order in reference to a receivership

at all, it should have been merely an order requiring the defendant to show cause, before the court, why a receiver should not be appointed by the court at a time stated.

Hanrahan, the receiver in this case, executed his bond early the next morning after the midnight meeting in the library. His partner, James F. Morgan, the justice's brother-in-law, and another—a notoriously impecunious clerk of theirs, a hanger-on in their office — were the two sureties on the bond. Justice McCunn indorsed that bond with his official approval, at Morgan's request, though he very well knew the insufficiency of both the sureties. The bond was filed in the office of the clerk of the court as soon as the door was opened, and Morgan and Hanrahan walked thence down to the warehouse of A. Bininger & Co., and took immediate possession. Mr. Bininger had not yet arrived; when he came in he was met by Hanrahan, who informed him that he was there, with the fiat of the court, as receiver of all that property; that he had possession of it, and that Mr. Bininger's presence was no longer required. Mr. Bininger, very naturally, expressed himself greatly surprised, informed Hanrahan that he should institute proceedings to have that order set aside, and walked off, wondering what next. As we are proving a conspiracy between the parties, we shall prove the individual declarations of all of them, and their individual acts; and shall charge Justice McCunn with his share of responsibility. Hanrahan followed Bininger to the street, with the assurance that it could make no manner of difference what application Bininger might make to have the proceedings set aside; that this was Justice McCunn's case; that Justice McCunn had put him there, and would keep him there; and, that, whatever order might be made by any other judge, all that would be required of the receiver would be to ask for such order thereupon as he might want, and to get it from Justice McCunn. He afterward, repeatedly, made good that boast.

As soon as the creditors of the firm became aware of the proceedings by the plaintiff, of the character of the man actually appointed receiver, and of the probability that they would get nothing out of the case—as the receiver was himself a vagabond, Justice McCunn the manager of the case, and the receiver's bond utterly worthless—they instituted proceedings in bankruptcy against the firm, and had assignees in bankruptcy appointed, to rescue the property, if possible, from the hands of the highwaymen who had got control of it. Their object in going into the United States Court in bankruptcy was to get not only beyond the reach of McCunn, but beyond the

jurisdiction of the court in which he sat, and which was itself tainted with suspicion by his acts!

The moment McCunn learned what was going on he began to bestir himself. He had frequent consultations with the plaintiff and plaintiff's counsel at Hanrahan's office, where, as I have said, the judge kept a private desk in an inner room; paid frequent visits to the plaintiff's house; advised plaintiff what to do; suggested what motions counsel should make, telling counsel to bring those motions before him; sometimes he drew the forms of orders to be entered, promising to sit in the court room and after, for form's sake, hearing what had to be said by both sides, to grant the order as arranged beforehand. In fact, the orders were generally drawn either by, or in the presence of, the judge, in Clark's library, late at night, and before the first papers, upon which to make the motion, had been drawn up.

He enjoined the officers of the United States Court from performing their duties; issued all sorts of fiats against them and threatened them with the penalties of contempt, imprisonment and fines, if they should presume to do what the United States Court, of proper jurisdiction in the case, had ordered them to do. Not content with that, he determined to employ something even more unusual than his very remarkable orders in this case. On the 4th of December, about two weeks after the original order appointing the receiver had been made, McCunn went in person to the sheriff's office in the city of New York with a paper which we shall produce before you, of a sort the most remarkable ever heard of in a case in which a judicial officer has been concerned anywhere within the limits of civilization —a fiat over his own hand and seal, and not even purporting to be an order of the court. It is in these words:

"*Whereas*, It has been made to appear to this court upon oath, that certain persons unknown, who call themselves United States deputy marshals, have taken forcible possession of the partnership property belonging to the plaintiff and defendant in this suit, which they are not entitled to take possession of:

"Be it known, therefore, that I hereby direct the sheriff of the city and county of New York, to take possession forthwith, of the said property belonging to the said firm, now in store Nos. 92 and 94 Liberty street, or wheresoever the same may be found, and to keep the same safely until the further order of this court.

"Witness my hand and seal, this 4th day of December, 1869.

"(Signed) JOHN H. McCUNN,

"*Justice Superior Court.*"

He took that paper himself, I say, to the under-sheriff of the city and county of New York. Fortunately for the interests of the people of New York, the under-sheriff has been a long time in office, is a man of character and determination, is familiar with the powers and duties of sheriffs, and has been accustomed for so many years to deal with the orders of courts as to be himself quite competent to measure the extent of his powers, under any particular order assumed to be given him. He read the paper and told Justice McCunn that he could not receive such a document upon the files of the office, saying, "You have no more power to make that order, or I to execute it, than you have to order me to go into the park and to shoot the first man I may meet there. How can you send a man down there to punch the heads of the officers of the United States Court?" With that, the under-sheriff handed the paper back to the judge, who, very well knowing that he had no power to give such an order as that, and the sheriff no power to execute it, put it into his pocket and walked into the sheriff's outer office. From among the hangers-on there he selected two or three, and told them to come to his house that night for private instructions in a matter of importance. It was a dull season for sheriff's officers and their needy followers, and the justice easily drummed up recruits ready to undertake the performance of any enterprise which promised an agreeable pastime, and some money. After mustering his recruits, in the presence of Morgan and of the receiver, he told them that they should be well paid for what was to be done, and that they had better have several friends with them ready to act very early the next morning upon the instructions to be given, at his (the judge's) house, that night. These fellows went to the judge's house, and got their instructions from McCunn himself, with liberty of plunder and promise of money. Thence they proceeded, before daylight, to Bininger's warehouse, and took possession. When the United States marshals arrived in the morning, McCunn's bullies undertook to keep them out of the premises, and there was a free fight in the street, upon which the justice himself looked down from a neighboring window, with expressions of satisfaction at the sight of the prowess of his auxiliaries.

From that time he identified himself entirely with Clark, inducing Clark to believe that he was his friend. His visits to Clark's house were almost nightly. He assured Mr. and Mrs. Clark what a truculent fellow he was, and what he could do in an emergency; that, if necessary, he would even arrest the judge of the United States Court in bankruptcy, and lock him up for contempt of the mighty orders

of a justice of the Superior Court of the city of New York. The plaintiff mildly suggested: "But suppose the other judges in the Superior Court should set aside your orders?" to which the doughty McCunn made smiling reply: "Oh, they can't interfere with me. I will set aside their orders as fast as they can make them," and thereupon, with winks and mysterious nods, he prescribed the proceedings necessary at the moment to be taken in furtherance of his plans.

After a while, these communings became so frequent that the justice was himself smitten with some sense of the possible impropriety of his conduct, and began to be alarmed lest his visits should be observed. On one occasion when at Clark's house at night in consultation with a member of the family, the front door bell was rung; the judge withdrew into a corner and whispered: "Don't let me be seen here, this is confidential, it would not look well for a judge to be seen here and advising a party."

At one juncture he thought it better to have motions for orders made before some of the other justices of the court, but told Clark not to fear; that it would be all right; that he would still manage the business himself in some way; that all the judges in the Superior Court would comply in this matter with his wishes. He confessed to the kind of influence he himself was amenable to in making orders in cases before him, by selecting particular counsel for Clark to argue special motions before particular judges. He suggested that one of the motions should be made before a certain judge, saying: "And you had better go and get 'so and so' to make that motion before him, because he is his partner; give that lawyer a good retainer and you will be very likely to get your order; but when you are ready to move for the order about so and so, go and retain the regular counsel to the sheriff — because the sheriff will have to be called into play there; and we want to be sure of him by buying his counsel." Clark gave his retainers and he got his orders.

It is proper to say here, that, notwithstanding McCunn's boasts as to his influence over his brethren on the bench, with the exception of the two cases to which I have referred, the one where the sheriff's attorney was brought into play, and the other where the partner of the judge was called upon to argue the motion before him, there was no application granted upon Clark's motion by any judge other than McCunn himself. They refused to have any thing to do with the case, some of them said, "we won't touch it, it is a case which ought not to be in the court." And I should add that, in the particular instance where the application was made before

another justice and argued by a lawyer who had been a partner of that justice before his elevation to the bench, the application was reasonable enough, and ought to have been granted of its own merit, on the motion of any body. There was no necessity whatever for McCunn's *naive* disclosure of the kind of considerations which influenced him, by advising that the judge's former partner should be brought to argue the case.

The assignee in bankruptcy once went to the warehouse and, standing outside and talking through a small opening in the door, informed the receiver — who was constantly there in possession, entrenched with his troops behind barred doors, like soldiers in a beleagured fortress — that he was an officer of the United States Court in Bankruptcy, and that he had come there to make formal and personal demand of surrender of the property. The receiver despatched a trusty courier to McCunn with the news, and McCunn, thereupon and without any application by a party to either of the suits, himself instituted proceedings to punish the assignee in bankruptcy as for contempt of his authority, and issued a new manifesto for his arrest for violation of orders of the Superior Court, warning the unhappy man not to attempt again to interfere, even in that mitigated way, with the property in the possession of the receiver, lest a worse thing should befall him. He several times dragged officers of the United States before him, upon those charges of contempt; and, finally, he grew so bold, as on one occasion, to dispense with even the formality of a written order on the subject, but gave oral directions to two or three people lounging about the court room, his bullies and auxiliaries, to go to the office of John S. Beecher, one of the assignees in bankruptcy, and to bring him to the court-house without any process or any pretense of process. He stated that if Beecher should ask for sight of a warrant for the proceedings, they might tell him that their warrant was Judge McCunn's direction. Two ruffians thereupon went forth, found Beecher in Wall street, and collared and dragged him before McCunn. The judge's truculent fit was passed, by the time they reached there, however, and he contented himself with threatening Beecher and letting him depart with a warning not to do so any more, but without explaining as to what the offense was which was forbidden to be repeated.

Thus, and in many other ways, the regular proceedings in the United States Court were constantly obstructed.

The receiver put into possession by McCunn was constantly selling off the property and dividing the proceeds as spoils, thus accomplishing the immediate object on McCunn's part of all these pro-

ceedings. The bargain between McCunn, the receiver and Morgan, was neither more nor less than a vulgar conspiracy to absorb all the property of both litigants for their own use, if possible. To be sure of that, it was necessary to keep the property out of the hands of the custodian in whose charge it was ordered by the United States Court in bankruptcy to be surrendered. And to that end McCunn had to keep his mercenaries in good humor, by occasional largess. While they were actually shut up in the besieged citadel, these worthy gentlemen had to content themselves with the costly wines and old whiskies there stored. But when they got out, after whipping off the United States marshals and holding the castle for several weeks against all comers—after performing their whole duty as auxiliaries—they wanted money and clamored for it. Of course, McCunn could not afford to pay them out of his own pocket—though he will I suppose try to prove before you, as he did before the committee of the Assembly, that he has a fortune of a million and a half of dollars. He has it on the record of the proceedings before the committee, too, that he was once a soldier himself; and his whole career shows that he knows how to subsist his men upon the supplies of the enemy. Since he has got to be a judge, the enemy is any unhappy litigant before him who chances to have money. In this case he caused a motion to be made before him that the sheriff be paid his reasonable fees and allowances for executing the orders of the Superior Court—very well knowing that no order had been directed to the sheriff or any body else in the matter by the Superior Court, and that the sheriff had executed no orders made even by McCunn personally. Upon the hearing, he actually ordered the receiver in this case to pay over $4,000 of Bininger's money to the three men, who, as he says, "were sent there by me," to whip the United States officers off the premises! So much of the order was a sop to the mercenaries, to stay their clamors for pay. The judge shrewdly followed that direction with a proviso that the money should be actually paid to them only when the receiver should find himself with a surplus of cash on hand for which there was no better use. Unfortunately for the mercenaries, that time never came, the officers needed all the funds for themselves; the private fighters never received their pay!

When matters had got to such a pass that the creditors saw very well they were not going to get any thing out of the assets of the copartnership if the conflict should be protracted, their counsel, the counsel for Bininger and the counsel for Clark entered into a preliminary agreement for an amicable compromise and settlement of

all matters in dispute. By that agreement, the creditors were to take so much of the assets of the firm as then remained in the hands of the receiver, as settlement in full for the debts of the concern, and were to give receipts for payments in full, though they could not thereby realize the full amounts of their claims, by a considerable discount. This proposition was reduced to writing and was sent to Clark, who by that time had got so completely into the power of Judge McCunn as to be afraid to do any thing without his judicial advice. He saw McCunn for a moment during the morning and mentioned that there was a proposition for settlement.

The judge said: "Don't do any thing about this until I see you." McCunn went to Clark's house that night, and read over the agreement. Seeing that, under a settlement of that sort, the property would all go out of the hands of the receiver, and be beyond his reach, he said: "Don't do this; this is all wrong; this will ruin you; I will draw an agreement that you can settle upon." He sat down, and did draw, thereupon, a proposition which he left with Clark; he himself hurried home, aroused Morgan, and instructed him of the danger there was of an amicable settlement between the parties. The next morning, a large part of the stock of goods, then in the warehouse, was mysteriously hurried off and sold. The conspirators had evidently determined to convert every thing into money. Clark, acting under McCunn's direction, refused, next day, to sign the agreement for settlement, already drawn. The proposed terms of settlement, advised by McCunn, the creditors considered preposterous. While counsel were still considering what to do, information came of the sudden removal, that morning, and private sale, by the receiver, of a large part of the stock theretofore in the warehouse; and that brought the creditors to the precise result McCunn desired. They refused any further consideration of any proposition of settlement.

McCunn availed himself of the temporary lull in the conflict thus secured, to instruct the receiver to sell all the rest of the property at auction, and for cash; and the sale was advertised. That sale, at auction, seemed likely to be a sacrifice of the property, and some of the creditors of the firm went before the judge of the Superior Court, then holding the chambers of the court, and to whom, as I said before, application for an order should regularly be made—and, upon proper affidavits, asked for, and got an order, requiring the receiver to show cause why that sale should not be stayed, and, mean time, restraining the receiver from selling, until all the parties could be heard in open court and a further order be thereupon made

by the court. Immediately, upon the service of that order upon the receiver, he walked up to the judge (McCunn), who, upon the back of the papers (the order and affidavits on which it had been made), without reading or inquiring into the case they disclosed, ordered that that order be modified so far as to allow the sale to go on. He thus practically reversed the order, without pretense of knowledge of the facts on which it had been made. The sale was proceeded with; the property was sacrificed; and, as the result of all these things, the members of the firm of A. Bininger & Co. lost $120,000. The creditors were left to the proceedings in bankruptcy, in which all the copartnership property (other than the stock of goods which went into the possession of the receiver) has been taken and the real and personal property of both the members of the firm has been seized. It has all been applied upon account of the debts and lawyers' fees, expenses, etc.; and the debts are not yet paid.

When Judge McCunn began his beneficent proceedings, the firm was solvent; its assets, alone, much more than sufficient to pay its debts, and each of the individual partners had a private, separate fortune.

We shall show that the receiver was constantly drunk during these proceedings; that the business was done by Morgan and McCunn all the time; that the receiver kept no bank account; that as sales occurred, the money was brought to the office of Morgan & Hanrahan, and there divided up. Morgan admits that he, himself, took what, by a generous estimate of the value of his services, he considered a sufficient fee. He says he gave some to Hanrahan, and that some of it he gave to Thomas J. Barr, of whom I shall have more to say in another case, and who was appointed to be co-receiver with Hanrahan in this case. Barr pretends to have deposited in a savings bank all that he got — and the savings bank has failed. It matters little to Bininger, or to his creditors, who got the money; they did not, and never will. We shall, however, trace a portion of that money to Justice McCunn; how much of it we shall prove to have gone directly to him, I am not now prepared to say. The witnesses are all unwilling. Most of those who can testify to these particular matters are parties to the outrages we complain of; and it is very difficult to get the truth out of any of them.

Hanrahan, upon whom we relied for disclosures, has fled beyond the jurisdiction of the State, and cannot be reached by process upon which to bring him before the Senate. But we shall show that

Morgan, having lived for many years in one of Judge McCunn's houses, at a small rent, and being just at this particular time flush with Bininger's money, bought the house from his brother-in-law, at a fancy price; and the judge thus pocketed a handsome dividend of the plunder, knowing, at the time, where the moneys came from, and that Morgan had no right whatever to use them.

The second case in the order of the charges is *Corey* v. *Long*. It is this: Corey and Long had been copartners in business, as dealers in silk goods. Corey had, in December, 1869, sold all of his interest in the copartnership and its assets, to Long — had made an absolute sale and assignment of all his right, title and interest, in what had been copartnership property — and Long had paid him in full for it. In January, 1870, Corey found himself out of business, and also out of money; and it occurred to him that it would be a masterly stroke of policy to make a living out of Long, and to assume, if possible, absolute control of the old business. Having an intimate friendship with James M. Gano (another brother-in-law of Justice McCunn), and a slight personal acquaintance with McCunn himself, through Gano, he readily devised a scheme for getting into possession of Long's property. His proceedings were simple, but ingenious. Corey went to a lawyer, informed him that he desired to institute an action to secure the appointment of a receiver of the sometime copartnership property coloring the facts, so far as he disclosd them at all, so as to make a specious case. Upon the statements made, the attorney drew a complaint and affidavit, which were sworn to by Corey. Thereupon were drafted an order enjoining Long from disposing of or interfering with his own property, and another order that the defendant show cause before the court, on a day certain, why a receiver of the property should not be appointed. The lawyer had just at the moment an engagement in his own office, and so a young gentleman, a friend of Corey's, volunteered to carry the papers to the court-house, and to submit them to the scrutiny of Justice McCunn. The judge, who knew more about the facts than was disclosed in the papers, was prompt to assume the role in the drama which Gano and Corey had arranged with him for. He granted the order, enjoining Long from interfering with the property; and then, instead of signing the draft order requiring defendant to show cause why a receiver should not be appointed by the court after hearing the parties, he proceeded, not upon motion of the plaintiff in court made, but pursuant to the previous private understanding, to so erase and interline the draft order submitted to him, as to make it a present absolute order,

appointing Gano receiver, and requiring him to sell the property. Gano walked immediately to the defendant's store, accompanied by Corey, and announced to the people on the premises that he assumed possession. The stock of goods was worth some $12,000, but, as his brother-in-law, the judge, had not required him to file the usual bond with sureties for his conduct as receiver, little did Gano care for the consequences to the defendant of what might happen to the property. Gano was quite a youth, impecunious, irresponsible and dependant on Judge McCunn for support. That amiable brother-in-law had, in fact, not only maintained Gano and Gano's family in his own house for several years, rent free and without charge for board, but he had several times paid Gano's improvident debts.

I repeat, that, not upon motion in court, but pursuant to an arrangement secretly made behind the bench, Justice McCunn assumed to make his own needy brother-in-law the receiver of the defendant's property, and to order him to convert it as soon as possible into cash, without even the formality of exaction of the usual bond and sureties for proper administration of the trust.

At this point, the Senate upon motion, took a recess for dinner.

AFTERNOON SESSION.

The Senate re-assembled at 4, P. M.

Mr. S. C. ROGERS appeared and took the required oath as a stenographer.

Mr. HARRISON continued his opening speech explanatory of the charges, as follows:

Mr. President and Senators; when the Senate took its recess, I had commenced to state the facts we shall prove in support of the second of the charges against Justice McCunn. I repeat only so much of what I said as to give the story coherence.

That charge relates to the conduct of the accused in the case of *Corey* v. *Long* in which an application was made to him for an order that the defendant show cause why there should not be appointed a receiver of the assets which had been of the then late firm of "Walter P. Long & Co.," but which careful examination of even the specious papers submitted to him, shows to have been then the absolute and sole property of the defendant, in which the plaintiff did not really claim an interest. Instead of signing the draft order submitted, Justice McCunn, pursuant to a previous private understanding with

the plaintiff, arbitrarily and illegally, thereupon made an absolute order, of his own contriving, appointing his own brother-in-law to be receiver of the property, and directing him to sell it without further ado—that person being an amiable and weak young man, a dentist by occupation, with no knowledge of the business he was appointed to carry on as receiver, but being, withal, a personal friend of the plaintiff. No security was exacted from the receiver for an accounting for the proceeds of his sales. The property was worth about $12,000. The dentist took possession immediately, and proceeded to obey the order he had received, as cheerfully as if he were about to pull a tooth. The property consisted, as I have said, of assorted silk goods. As Gano had no personal knowledge of the manner in which such goods should be handled, he immediately put Corey, the plaintiff, into possession of defendant's property, and directed him to sell it, under the name and style of deputy receiver; all, of course, in performance of the bargain made before the suit was instituted. Corey did sell the goods, as fast as possible, and turned over to Gano as his superior officer, $8,000 of the proceeds.

As soon as he could, Long got both the orders made by McCunn vacated and set aside; and while his proceedings for that object were still pending the creditors of the firm instituted proceedings in bankruptcy, to make sure, if possible, of rescuing something upon account of their own claims. Mean time, however, Corey had been brisk with his sales; he had got off all the goods—had pocketed what he could of the proceeds, and had turned over the $8,000 I have mentioned of the balance, to the receiver. The creditors with much difficulty, extracted about $4,000 from the dentist, the other $4,000 they have not yet got, and probably never will get; some of it Gano has expended for his own entertainment; some of it the judge ordered to be distributed to the attorneys who, in one way or another had to do with the proceedings.

You will find that in all such cases this worthy justice attempts in that way to bribe lawyers to advise their clients, who have been plundered, to submit to the situation.

One, at least, of the lawyers in this particular case, never got his share of the booty, though the judge had caused a special order to be entered, allotting him $350; but somebody got it, and the fact, that the order was entered, is supposed by the persons in interest, to be a bar to the recovery of the amount by Long or his creditors. The receiver certainly charges that payment to "somebody," as a proper disbursement. To be sure, he confesses that he kept no books of account as receiver, and that he never drew checks in these mat-

ters; that he never, in fact, had any bank account, except as agent to collect Judge McCunn's rents, to which account he deposited all the moneys that came into his hands, when they accumulated in amounts large enough to be worth depositing. About this particular $350, of Long's moneys, Gano says he does not remember to whom he paid it, or when; that he recollects nothing about it, except that the order is certainly signed by Justice McCunn; that it was presented to him (Gano) one afternoon, at his up-town (dentist) office, and that he paid the money to whoever handed him the order, in bank notes.

You will find that the particular friends and relatives of the several judges who are arraigned before you this summer, never use checks; they settle their transactions with bank notes only, which tell no tales. The faces in the vignettes, upon greenbacks, are faces of the dead only.

The next case upon which we have based a charge, is *Elliott* v. *Butler*.

Mrs. Elliott had rented a house from Justice McCunn himself, No. 54 West Twenty-fourth street, in the city of New York, which she had kept as a boarding-house. She sub-let that house to Mrs. Butler. Mrs. Butler paid her $800 in advance, for the first month, $300 of the amount as rent for the furniture, which belonged to Mrs. Elliott, and $500 as the rate of rent Mrs. Elliott had herself to pay to Justice McCunn, her landlord. The agreement was, that Mrs. Butler should pay monthly, in advance, the whole sum of $800 to Mrs. Elliott, who was to settle with Justice McCunn. Some dispute arose between the ladies, and Mrs. Elliott sued Mrs. Butler, her complaint showing an ordinary cause of action at law upon contract to recover money which plaintiff claimed to be due to her by defendant.

Plaintiff's counsel, at a time when several of the judges in New York were freely granting injunctions to all comers, conceived the theory, that this was a good chance for a receivership of defendant's property; and he submitted to Judge McCunn the plaintiff's complaint and affidavit, which informed the learned justice that the defendant had been guilty of a breach of her contract with plaintiff; that defendant was poor and had nothing wherewith to be compelled to make her stipulated payments to plaintiff, except the weekly income from the boarders in the house; that the plaintiff was herself impecunious, and could not pay her own rent to the landlord unless she could somehow manage to appropriate the amount of the weekly bills as they should become due by the boarders to

defendant. The complaint concluded with a prayer that the landlord himself appoint a receiver forthwith of defendant's property, for satisfaction of his own claims against the plaintiff! The judge was struck with the frankness of his tenant, and took the warning kindly. He immediately granted the prayer of the plaintiff, and appointed his own brother-in-law, our old friend Dr. Gano, the dentist, to be receiver of all the property of the defendant, and especially of all the sums of money due and to become due to her from the boarders in the house! What do you think of that? I will guaranty it to be one of the most remarkable proceedings ever heard of in any tribunal called a court of justice.

Judge McCunn admits, as is shown by the printed evidence transmitted to the Senate by the Governor, that he selected Dr. Gano, as the receiver in this case, *because* the Doctor was his own agent to collect the rents of, among others, that very property, and was familiar with it—admits that he perfectly understood that the money to be collected by the receiver, when appointed, was to go into his (McCunn's) own pocket—that it was his own case, that he was acting as a judge in his own pecuniary interest; admits that he selected his own dependent brother-in-law to be receiver, that there might be no leakages and that he might be sure to secure every penny to himself!

Dr. Gano walked straight to the house, accompanied by McCunn, and took possession. Their first precaution was to post a policeman at the front door, to prevent (as they explained to Mrs. Butler) any of the boarders from escaping from the premises with their trunks without payment to Dr. Gano of their dues to defendant! And when one of the boarders attempted to pass out with his luggage—having already paid his board in full to date to Mrs. Butler before the appointment of the receiver — the policeman stopped him, and seized the trunks — and Judge McCunn, who was appealed to by the boarder, and was begged to interfere, actually refused to allow him to get away his luggage until the man had paid again half the amount of his board bill to the receiver.

Dr. Gano remained there several days in that attitude — practically keeping the boarders prisoners in the house. Of course Mrs. Butler, after spending several days in useless entreaties to McCunn, stopped keeping a boarding-house, where all the expenses were hers and all the gross proceeds were appropriated by the judge's brother-in-law. But the receiver succeeded, mean time, in collecting from the boarders several hundred dollars — and pocketed them. He had made the collection really as McCunn's agent, and he actually turned over

the money to McCunn; the evidence shows that the judge got every penny.

Though the amount of money involved in that case was small, the conduct of Justice McCunn was, throughout, so shameful as to be, of itself, cause sufficient for summary removal from the bench.

The next charge is founded upon the proceedings of Justice McCunn, in a case entitled *Brandon* v. *Buck et al.*

The facts as we shall prove them, are these: A charter had been got for a company, to be known as the "Hansom Cab Company of the city of New York." There had been subscriptions to the capital stock, amounting to something over $12,000, and that amount had been paid in. The charter had provided, that, until a certain sum (in excess of $12,000) should be paid in by subscribers to the capital, the company could not be organized. The amount paid up was placed with Duncan, Sherman & Co., bankers, as an ordinary deposit, upon the understanding that if the company should be thereafter organized, those bankers should pay over the amount to the treasurer of the company, to be selected; but that, if the company should not be organized under the charter, the money should be returned by Duncan, Sherman & Co., to the several individuals who had paid it in.

There was a meeting of the subscribers, and it was ascertained that the moneys paid in did not amount to a sum sufficient to entitle the corporators to organize the company. Some quarrel ensued, and one Brandon, who had expected to be president of the company, brought an action in the Superior Court against every body else interested in the enterprise. The litigants expected the suit to go on regularly to judgment, until, one bright day, they learned, to their astonishment, that Daniel H. Hanrahan (the man who figured as receiver in the Clark-Bininger case, and was admitted, even by McCunn, to be a drunken, worthless fellow) had walked into the office of Duncan, Sherman & Co., informed them that he had been appointed by Justice McCunn, in the suit of *Brandon* v. *Buck et al.*, to be receiver of the funds of the Hansom Cab Co., and demanded possession of the moneys on deposit there. The bankers sent for counsel, who, after looking at the order brought by Hanrahan, called his attention to the facts that Duncan, Sherman & Co. were thereby directed to pay over to him, as receiver, not a particular fund or sum, but only "the moneys mentioned in the complaint;" that no copy of the complaint had been served on the bankers, and that, until the copy complaint should be served, they could not know to what moneys the order referred. Hanrahan was

rather disconcerted at that view of the matter, and departed, promising to serve the complaint.

None of the parties to the suit had applied for, or had heard of, any application for a receiver; so far as they knew, Judge McCunn had issued the manifesto assuming to appoint one, entirely of his own motion; and when they ascertained who Hanrahan was, they were all so filled with fear that the moneys might yet get into his hands — and so be lost to every body but that worthy himself, and McCunn and Morgan, his pals — that they made haste to compose their own causes for strife with each other, signed a stipulation, and actually entered an order discontinuing the action of record.

It was on the 23d of February that Hanrahan had been appointed receiver; a few days afterward the consent for discontinuance was filed, and the order of discontinuance was entered. But, notwithstanding that last fact, the persistent judge, on the 21st of March, not upon application by any body a party to the suit, but tempted only by the fact that Duncan, Sherman & Co. are rich bankers, and that he knew of a certain deposit of $12,000 in their hands, ready to be grabbed by somebody, made another order — this time relieving Hanrahan from further performance of his arduous duties as receiver in *Brandon* v. *Buck et al.*, appointing Joseph Meeks, then a clerk in the Superior Court, to be "deputy receiver" of the same property of which Hanrahan had been receiver, and directing Duncan, Sherman & Co. to pay over the balance of the $12,000 to Meeks, after first paying Hanrahan $500 for his fees, etc., for the services I have mentioned, actually rendered by him as receiver.

To be sure, there was no suggestion that there was any fund in the hands of those bankers which could properly be made the subject of a receivership; there were no papers to show that the plaintiff had any right to appointment of a receiver of any fund; no application had been made to the court for appointment of anybody to be receiver of any fund whatever; there was not a whisper that the particular fund aimed at was insecure in the hands of Duncan, Sherman & Co.; and as the suit of *Brandon* v. *Buck et al.* had itself actually been discontinued of record, there was no case pending in the court in which any order whatever could be made. But those facts were mere bagatelles to Justice McCunn.

Meeks walked down to the bank, and had an interview with Duncan, Sherman & Co., in which he told them of the new order, and they, through their counsel, told him of the old facts; Meeks then begged to assure them that he had never had any thing to do

with the matter, and that, until that moment, he had known nothing about the facts—and he thereupon politely withdrew.

The facts of that case show two deliberate attempts by Justice McCunn to rob $12,000 on deposit in the hands of Duncan, Sherman & Co., which could not have been properly reached by a receivership, under any circumstances, and for which those well known bankers were abundantly responsible to the persons who had made the deposit with them, or to any body else who could show a good claim to it.

The next of the charges relates to a portion of the moneys called by the newspapers, a few years ago, the "Fenian Fund."

One John O'Leary had, sometime in 1865 I believe, come to the banking house of August Belmont & Co., and bought bills of exchange upon the correspondents of that house in London, the Messrs. Rothschild, for something over $16,000 in gold. The bills had been sold over the counter, in the usual course of business; and the money had been immediately remitted to the Rothschilds, to meet the bills when they should be presented for payment. The fact is, that the bills never were presented, and for the reason, I believe, that the indorsees learned that the British government had instituted some sort of proceeding in London to seize the funds, upon allegation that they were intended to be used in Ireland by the Fenians in fomenting treason.

Afterward, and in 1869, one O'Mahoney, claiming to be an officer of the "Fenian" organization in New York, brought an action against Belmont and Ernest B. Lucke (who was at that time the "Co.," in the house of "A. Belmont & Co.,") to recover that amount of something over $16,000 in gold, which had been paid by O'Leary for the bills of exchange. Neither his complaint nor his affidavit alleged that he then was or ever had been the owner of the bills of exchange, or that the bills had been presented and protested for non-payment, or that they had been destroyed, or that any thing whatever had happened to deprive them of their original character of outstanding obligations of both the drawers and the drawees. He did not allege any thing tending to make Belmont & Co. accountable to any body for the payment of that money. And yet plaintiff prayed that a receiver of that amount of the moneys of A. Belmont & Co. be appointed.

The motion for a receiver was made before Justice McCunn; of course, that excellent judge had had an understanding in advance as to what he should do. It was midsummer. The judge's term of office was drawing to an end. He desired to be selected for renom-

ination by Tammany Hall — and the Tammany candidate was to be chosen early in the autumn. Another and a formidable aspirant for the place was already in the field — and had been making large promises to the gentlemen supposed to control the nomination. Judge McCunn is a veteran politician, and knows how to take his measures in advance. He improved this application as an opportunity for himself, granted the prayer of the complaint, and appointed Thomas J. Barr (a political magnate, influential in Tammany Hall, and greedy for plunder) to be receiver of the so-called "fund." It mattered not that the application was *ex parte*, or that the papers before the judge contained no allegations upon which he could be justified in appointing a receiver.

Barr understood that the appointment meant plunder — and that it was to be upon account for services in helping to secure McCunn's nomination. He went cheerfully to the banking house, and demanded that the moneys be forthwith paid over to him. Mr. Lucke and his counsel explained that there were difficulties in the way, and suggested that Mr. Barr had better withdraw both his pretensions and himself. He departed, but only for consultation with his friend McCunn.

The papers had been served on Mr. Lucke, but never on Mr. Belmont. When McCunn heard from Barr what had occurred in the interview at the bank, that astute justice, who is never at a loss for an expedient, made an order requiring Mr. Lucke to show cause, before him, why he should not pay over the moneys to Barr, or be committed as for a contempt.

On the return day of that order, Mr. Lucke appeared with counsel before Judge McCunn, and read an affidavit, setting forth the facts about the bills of exchange, and showing that he personally had, in 1869, but just became a partner in the house, and that he had had no share or interest in the firm at the time the bills had been drawn, and no responsibility for any thing that might have happened to those bills, or to the money they represented. That affidavit would have been enough, under any ordinary circumstances, and before any reasonable judge, to put a final stop to the proceeding against Mr. Lucke, then and there; but the receiver's counsel asked for an adjournment of the motion, and for leave to read counter affidavits — saying that Mr. Lucke's assertion that he was a new partner in the house, took the receiver by surprise, that they expected to prove Mr. Lucke personally accountable for plaintiff's supposed wrongs, etc. Of course, the judge granted the request for an adjournment, but there was a stipulation between counsel in open court, that the

additional affidavits to be prepared for the receiver, should be served on Mr. Lucke before proceeding with the motion. Notwithstanding that fact, however, and Judge McCunn's full knowledge of it, he, in a few days afterward, issued another fiat, *ex parte* and this time peremptory ordering Mr. Lucke to pay over the moneys to Barr forthwith out of his own pocket, or be committed to the common jail of the county, as for a willful contempt of an outraged court!

The pretended fund, with interest thereon, amounted, by this time, to $26,000 in currency. The weather was very warm, the judge utterly arbitrary and violent in conduct, and abusive in language from the bench; the vision of the county jail was not reassuring. Mr. Lucke is a banker, not a hero; he was not covetous of the fame of a martyr; and so he made up his mind that it would be better to trust his $26,000 to the court, than to go to prison with a prospect of there remaining until the demand against him should grow to still larger sums. He drew his check for the amount named, payable to Barr's order, handed it to the judge, and was graciously allowed to leave the court room! The check was cashed.

The order appointing the receiver, and that extorting the check from Mr. Lucke, have long ago been vacated and set aside as utterly illegal, and the suit itself, in which these proceedings were had, has been discontinued; but Mr. Lucke has never been able to recover more than a few hundred dollars of the amount taken from him. The files of the court show that, as soon as the cash had been got in hand, the judge proceeded, according to his usual method, to make allowances out of it for all of the attorneys in the case, friends alike and foes, actually giving a part of the largess to Mr. Lucke's own counsel, who returned so much of the money to Mr. Lucke himself, and that is all the owner has ever seen of his $26,000!

Shortly after these proceedings, the newspapers began to comment on them, and the readers thus ascertained that there was a "Fenian fund" in New York, among them, some who had "Fenian bonds" which they were anxious to have paid. Judge McCunn met, in a street car, an acquaintanee of his (a lawyer), and had a conversation with regard to an action to be instituted upon some of these bonds to recover some of the "fund." The judge ended the talk by advising the lawyer to bring such a suit in the Superior Court, and to move before him for the appointment of a receiver of all the "Fenian funds," who should be directed to proceed to apply the moneys, as fast as collected, in payment of the bonds sued on. The lawyer was prompt to perceive that the suggestion meant plunder, and fancied he saw that he could get some of it into his own pocket.

He had an Irish client who owned a few of the bonds, and arranged with him for an action, which was instituted; the summons and complaint naming, as one of the defendants, the receiver who had been appointed in the Belmont case, and who still had in hand some of the booty got from Mr. Lucke.

Besides the amount of that balance there was then $18,000, said to be "Fenian" moneys, in the hands of the chamberlain of the city of New York, deposited there by an order of the Supreme Court, made in an action then still pending in that tribunal. Two persons had laid claim to that sum, which was theretofore in the possession of a third party, who had been separately sued in the Supreme Court by both claimants. The defendant had come into that court, showing that he was merely custodian of the moneys, a stakeholder, ready and willing to pay it over to either of the claimants who could prove his title, and praying that the two plaintiffs be interpleaded. The court so ordered, and required the money to be paid over to the chamberlain, to await the event of the action between the conflicting claimants.

The new suit, instituted at McCunn's suggestion, as I have said, was *Bailey* v. *O'Mahoney et al.* The judge granted the prayer for a receiver therein, pursuant to arrangement made in the street car—appointing his political friend Barr to be receiver of the $18,000 also, and ordering the chamberlain to pay it over to him. The chamberlain very well understood that he had no power to pay over, upon an order of a justice of the Superior Court, moneys deposited with him by the Supreme Court for a special purpose. But Barr was the chamberlain's brother-in-law, it was all among friends, you know, and the $18,000 got into Barr's hands, where it swelled his account of "Fenian funds" to $44,000. McCunn thereupon went to work making allowances to counsel again, but this time showing discrimination in favor of his special, particular friends only. Some who thought they ought to have come in for a share didn't get any, among them, the lawyer who had had the talk in the street car, and had then fired the first gun in the brilliant campaign which resulted in the capture of the $18,000. McCunn did not need his assistance any longer; could afford to dispense with his services; indeed, wanted for better use so much of the money as Barr would allow him to dispose of.

The $18,000 went the way of what had been taken from Mr. Lucke—so far as the original claimants for it were concerned. They could never get trace of it again.

When there is plunder within easy reach, Justice McCunn acts

upon a rule like that to be found in rustic almanacs which predict changes of the weather. "About this time" he "looks out for brothers-in-law"—and for himself!

And so it happened here. He and James F. Morgan arranged a nice little plan of their own. An item appeared in the New York *Sun* newspaper stating that, at a certain hour on a day mentioned, Justice McCunn would pay off the "Fenian Bonds" at the chambers of the Superior Court—having the funds in hand for the purpose. When that time came, there was a large assemblage of Irish laborers and servant girls in the chambers of the court, with their bonds in their hands, ready to receive their *pro rata* shares. An officer of the court was there, who answered inquiries on the subject, by saying that his Honor had just stepped out, but that the bondholders had better see the judge's brother-in-law, Mr. Morgan. With that, the speaker distributed to the crowd cards printed with the legend of "Morgan & Hanrahan, successors to John H. McCunn," etc., and assured his hearers that those gentlemen could arrange their matters for them. Thereupon, a number of the servant girls and laborers went to the address indicated on the card, and handed their bonds to Morgan for "collection."

Morgan brought suit against somebody on those bonds and he and McCunn certainly got something handsome from Barr on them; we do not expect McCunn to be able to show that they divided with the servant girls and navvies!

The case which furnished the material for the sixth charge is *Hicks* v. *Bishop*.

The papers there disclose this as what the plaintiff called his case against the defendant: that the plaintiff was the owner of $1,500 worth of the capital stock of an incorporated company, and that the defendant had defrauded that company of $35,000; the plaintiff's complaint did not state how large a proportion of the capital stock that $1,500 was, but his allegation was merely that, by reason of his own ownership of that amount of stock, and of the defendants' alleged fraud upon the company, he, the plaintiff, had sustained damages. He thereupon moved before Justice McCunn for an order that the defendant be arrested and held to bail, and McCunn forthwith made an order to the sheriff of the city and county of New York, to arrest the defendant and to hold him in bail in the sum of $40,000. Even if the plaintiff could, upon the allegations he made, have sustained an action in his own name against the defendant at all, it is not likely that he could have recovered more than $1,500, which was the par value of the plaintiff's stock in the company. A

defendant is never held to bail in a civil action in a sum in excess of the amount of the plaintiff's demand against him. But here, you observe, Bishop was required to find bail in $40,000 at the suit of a plaintiff whose demand against him was, if any thing at all, not more than $1,500.

Counsel for defendant, very naturally, supposed that the judge had, by mere inadvertence and oversight, fixed the bail at a sum so oppressive to his client.

He promptly moved that the order of arrest be vacated, or that, at the least, the amount of bail be reduced.

He was astonished to find that the righteous judge had an interest in the pursuit of his victim, not disclosed by the papers in the case. The application should have been granted, of course. It was denied — the judge positively refusing to reduce the bail — and so Bishop, who was poor and without friends, lay in the common jail, while justice marched with tardy steps toward final judgment in a court where a case is many months on the calendar before it can be reached for trial.

With charge No. 7, we come to the proceedings in *Van Ness* v. *Leeds et al.*

There, there was a sum of money in the hands of Leeds & Minor, well known auctioneers in New York, the proceeds of a sale of property by that firm. There were several persons who made conflicting claims to the amount. It was agreed between them that there should be instituted an amicable suit to procure a judicial decision as to who was entitled to it. By general consent, the money was to remain, mean time and until judgment, in the hands of the auctioneers, who were pecuniarily responsible, and who had agreed to pay seven per cent interest on the amount, as long as it should be left with them.

Van Ness, one of the claimants, brought suit in the Superior Court against every body in interest —his complaint praying judicial construction of the rights of the several parties. When the answers were all in, it was consented that the issues be referred to Thomas H. Edsall, Esq., a reputable lawyer, as sole referee to hear and determine; and an order to that effect was entered, upon the consent. The parties all made formal appearance before the referee, and there were several hearings. The plaintiff proved his case and rested. One of the defendants perceived that the plaintiff's case was made out, and that his own chances were poor. Just then, he fell in with one of Judge McCunn's intimates, to whom he expressed his regret that he had gone to trial of his rights

instead of having taken what he thought he might have got upon a compromise of his claim. The judge's friend was amiable, and assured the fellow that he would make it all right for him — would get Justice McCunn to block the proceedings, and thus force the plaintiff to a compromise.

Upon motion thereupon made before McCunn, he granted an order that the plaintiff show cause why the order of reference to Mr. Edsall should not be vacated and set aside, and why the case should not be restored to the calendar, to be tried at a regular term of the court, in due course — upon the specific ground and allegation that the case was not one which, under the statute, could be referred without consent of all parties, and that there had been no such consent.

Plaintiff did not suspect that the judge had been "seen." He supposed the proceedings to be merely an ill-advised attempt of the moving party to extort a settlement with him. Upon the return-day of the order, plaintiff appeared before the learned justice and admitted that the case was one which could not be referred without consent of parties. He conceded that, unless the consent for reference to Edsall was valid and operative, the case would have to be restored to the calendar to be tried before the court. He contented himself with reading the order of reference and the stipulation of the parties on which the order had been entered — supposing that, in so plain a case, the motion would be denied, of course. The learned judge had his doubts — he took the papers and would consult the authorities. A few days afterward, Van Ness found upon the files of the court, an order that the order of reference to Edsall be vacated and set aside; but that the issues in the action be referred to William M. Tweed, Jr., as sole referee, to hear and determine, while our old friend, Thomas J. Barr, was appointed receiver of the funds, pending judgment by the new referee with the ominous name!

Tweed had not been asked for by any of the parties. There was no pretense that there was any danger to the funds while in the hands of "Leeds & Miner." No receiver had been suggested by any body!

Barr, as receiver, got possession of the money, and held on to it for many months. The plaintiff felt sure of his case; was willing to try it before any body, and he thought that his shortest way to even a share of his money, was to press the action to trial, instead of encountering any more of McCunn's orders, by attempting to get rid of that one. He, therefore, proceeded before young Tweed,

as referee, who kept the case going, and kept on charging $10 a day, for his valuable services as referee, until he got tired of hearing or adjourning it, and then made a report on which there was judgment for the plaintiff.

Van Ness, finally, got some of his money in the judgment. But as the immediate result to him of McCunn's arbitrary and illegal order, he had to pay two referee's bills instead of one; was mulcted in a large sum for commissions to Barr, as receiver; he lost all the interest he would otherwise have got from "Leeds & Miner," during the time Barr had the money; and, after all that, he had an expensive law suit with a fellow who turned up as the receiver's counsel, claimed from Van Ness seven or eight hundred dollars for services to Barr in robbing him, and who finally got nothing.

In that case, McCunn seems to have entirely renounced the friend who made the motion itself, which proved such a boomerang. His final object seems to have been partly to torment Van Ness, for whom he cherished a personal dislike; partly to pay Barr and Tweed a little more (by allowing them to plunder this plaintiff) upon account of the renomination they were to secure for him — which they afterward did secure for him, and which resulted in his re-election by the mob in the city of New York, and necessitated these proceedings for his removal, by all the people of the State, from the bench where he disgraces them.

That, Senators, is the substance of the charges, on which you are asked to remove John H. McCunn from his place as a justice of the Superior Court of the city of New York, for mal and corrupt conduct in office. And, that those of you who are practising lawyers and who sometimes see, in the books of current reports of cases in the Superior Court, readable opinions delivered by this man, may not be misled into supposing him to be a capable writer upon questions of law, we shall prove, finally, the fact that every opinion published by him during the last six years has been written for him by somebody else! In a *habeas corpus* proceeding, indeed, to which we shall call your attention, there were not only two opinions of different results, but they were both written for the learned judge, and both by the same man! The first opinion decided that the relator could not be held and should be discharged. The judge read it privately to relator's counsel; told him he had sat up nearly all night writing it, and promised to file it and to enter the order immediately. In a day or two, counsel found that an order had been made sustaining the return made to the writ and remanding the prisoner! He called on the judge for an explanation; McCunn

had the frankness to tell him that he still thought the prisoner should have been discharged, on the facts and the law of the case, but that some of his (McCunn's) friends had suggested that if that fellow was released he might interfere with some political combinations which were of personal interest to the judge himself, and that he had, therefore, decided to hold the prisoner, and had filed an opinion which mustered reasons for doing so!

When you shall have heard the witnesses we shall produce, you will, I am sure, be of the opinion that their testimony bears me out in the statements I have made. That testimony has nearly all been once taken before the Assembly Committee on the judiciary, and it appears in the printed report by that committee, which I see lying on your desks. Upon it, that committee unanimously found that Justice McCunn has been guilty of mal and corrupt conduct in office, and submitted to the Assembly for adoption by it, a preamble and resolutions calling upon the Governor to recommend his removal by the Senate; the Assembly adopted those resolutions by a unanimous vote; and the Governor promptly sent you his recommendation. Judge McCunn is as effectually condemned by those proceedings of the Assembly, as he could possibly have been by presentation of articles of impeachment against him. All that articles of impeachment could have charged, would have been "mal and corrupt conduct in office," which is precisely what is charged here, with a unanimity unparalleled in proceedings by legislative bodies. The manifest object of the Assembly, in pursuing this course, was to attain the more speedily in a case so flagrant, and where the facts are so plain, the result which would be the immediate effect of conviction by the court of impeachment — a summary removal from office, of this man, who ought not to be upon the bench for a single day longer.

We adjure you, then, Senators, to proceed immediately with the investigation into the truth and sufficiency of the charges, and to deliver us forthwith from the opprobrium of the presence of John H. McCunn in the Superior Court of the city of New York, where he has had the audacity and shamelessness to show himself, sitting upon the bench — not only since these charges came to the knowledge of the committee on the judiciary, but even since the vote taken on them by the Assembly itself — yes, since he was formally arraigned here, and since the day was actually set by you, for commencing these proceedings for his removal from office — to the great scandal and shame of the city of New York — destroying the usefulness of that court, and bringing all the machinery of government in this

State for the administration of justice, into contempt throughout the civilized world.

I shall be greatly surprised and disappointed, if your final vote, Senators, upon these charges shall be less expressive of reprobation of the things we now complain of, against John H. McCunn, than was the unanimous vote of the members of the other branch of the legislature.

Mr. BENEDICT — I arise to make a motion that when the Senate adjourns this evening, at the end of this session, it adjourn to meet on Tuesday morning next. I make this motion because, in the first place, one of the gentlemen who are counsel for the defense has informed the Senate this morning that he desired to have the case adjourned to that time, that it was important that he should attend the funeral of his brother-in-law, and be present in the affliction of his sister at Medina, which is in Niagara county. In the next place, upon two occasions it has been asked that a postponement be had for the presence of Judge Selden. I had been informed incidentally yesterday, that Judge Selden would not, or could not be here at all. But I am now informed he is certain to be here on Tuesday next. Now while, so far as I am concerned, I am quite satisfied with the gentlemen who have charge of this case on the defense, and their ability to manage it, still I think, really, when they have such a senior and leading counsel in the case as Judge Selden, whom they greatly desire to have present, that there is some reason why the case should be put over to that time, and the request of the gentleman to attend the funeral of his kinsman is a reason why he should be excused, and that that may have an important influence upon other gentlemen who are conducting the cause. They are comparatively young men I may say, to a certain extent, much younger than Judge Selden, and for these reasons I move when this Senate adjourn to-night (I think it has been understood by some of the senators that any way we should adjourn to-morrow, in the middle of the day), that we might, without inconvenience to ourselves, and would promote the cause of justice if we adjourn over this evening until Tuesday morning next. I do this now, because it might influence the gentlemen in putting in their testimony.

Mr. D. P. WOOD — Mr. President: Before a vote is taken on this question I would like to inquire of the counsel for the prosecution whether they have witnesses here ready to proceed with now?

Mr. PARSONS — Mr. President: We proposed as soon as Mr. Harrison completed his opening to send to the Clerk the names of the witnesses who have been subpœnaed by the sergeant-at-arms, that

the Senate might inform itself who of those witnesses are here, and might take some action looking to the enforcement of the attendance of witnesses. Some are not here, and some have said they will not come, and unless the witnesses are all here, it is impossible that the case can be presented in that orderly manner which, it seems to me, will best promote the consideration of the case suitably by the Senate. Again, of the witnesses who have been subpœnaed, some are here, and have been here for two days; some are very desirous of returning to the city of New York, and all are very anxious to know what provision is to be made by the Senate for their over expenses in coming here, and for the time consumed while detained. It has seemed to me suitable that we bring to the consideration of the Senate these questions for the action of the Senate in the premises.

Mr. Benedict — Mr. Parsons, will you not be able to go on with your testimony this afternoon?

Mr. Parsons — We can go on, but not in the order the case really requires. I think, however, that a good part of the time that still remains may be occupied in producing documentary evidence to be put in charge of the Senate, so as to dispense with the presence of the clerk of the Superior Court.

The President — The Clerk will call the names of the witnesses who have been subpœnaed.

The Clerk here called the names of the witnesses, whereupon the following persons answered: James F. Morgan, James M. Gano, Joel O. Stephens, Rocellus Gurnsey, Roger A. Pryor, L. Gustavus Erhardt, Abram Bininger.

The President — I would inquire of Colonel Davis whether it is necessary for him to go to-day; whether, if we are to have a morning session to-morrow, it would be in time for him to go to his brother-in-law's funeral?

Mr. Davis — I would not be in time, but if the Senate decided it was important to go on, I should leave it to my associates. It requires about thirteen hours' ride to reach Medina.

The President — There are a number of witnesses present, and it is important to take all the testimony we can before adjourning.

Mr. D. P. Wood — The reason of my making my inquiry of the counsel for the prosecution, was for the purpose of ascertaining from them whether they would be able to go on with the case until to-morrow at two o'clock, with the view of offering as an amendment to the motion of the senator from the fifth (Mr. Benedict), that when we adjourn to-morrow, at 2 o'clock, we adjourn over until Tues-

day. It is to save the time, if counsel for the prosecution are prepared to go on with the testimony. I suppose the counsel upon the other side (Mr. Davis) would be able to attend his brother-in-law's funeral, and the taking of the testimony, if proceeded with, as much of it would be documentary, and, in any event, would be only one session of testimony, which, I suppose, his associates would attend the taking of. If it was desirable to retain the right to cross-examine witnesses after his return, that right would be granted, and the time of the Senate saved between now and to-morrow at two o'clock. The counsel started an inquiry here which is of importance, and upon which I will offer a resolution, before we adjourn, and that is in relation to the payment of the expenses of this proceeding; it is a question that has been before started in various ways. The clerks have frequently called upon me to ascertain whether any provision was made during the session for the expenses of this court. I am sorry to say there was none. It was entirely an oversight on the part of the Legislature, but I will offer a resolution inviting the Comptroller to make provision for the payment of the expenses of this proceeding and the other proceedings before the Senate, and he, undoubtedly, will make those provisions; he, undoubtedly, can procure the advance of money, to be taken care of by the next Legislature. It is a thing that has been done heretofore in other matters, and of course these expenses must be paid in some way, and there can be no question about the justification of the Comptroller in making such temporary provision, particularly under the resolution of the Senate requesting him so to do.

Mr. PARSONS — The testimony of many of the witnesses would be quite unintelligible, unless produced in the regular order. The first witness to be examined in support of the first charge, is Abraham B. Clark, who has been regularly suspœnaed, but who has asserted, under the advice of counsel, that he did not feel called upon to obey the subpœna of the Senate. The next witness is Melville B. Clark, who was here this morning, but whom we have missed since noon to-day. If the Senate is to adjourn at 2 o'clock to-morrow, I doubt if any thing is gained to the convenience of the Senate, if we ask them to remain here until 2 o'clock to-morrow, as against adjourning at the close of this evening's session.

Mr. BOWEN — Mr. President: I would like to know what compensation witnesses are entitled to.

Mr. D. P. WOOD — Mr. President: I suppose, in the absence of any special provisions, it would be the ordinary fees of witnesses in a court of record. They have been paid in the Smith case, three

dollars a day, and ten cents mileage. I do not know of any authority to pay it, unless it was by some special provision. I think special provision was made in that case, for the expenses of that trial. Most of it took place during the session of the Legislature; and I think it will be, although I have not consulted the books, ascertained that special provisions were made for the payment of that sum. It is not an unreasonable sum, but it is a proper sum; and if the Senate, by resolution, request the Comptroller to pay that amount, he would do it, and the next legislature would make whatever provision the Senate indicated they wished to have made to meet the action of the Comptroller, under the request of the Senate.

The PRESIDENT — The question is upon the motion of the senator from the fifth (Mr. Benedict).

Mr. D. P. WOOD — My attention was drawn from the last remarks of the counsel who has just taken his seat. I would ask whether he has documentary evidence which will take up the time?

Mr. PARSONS — I think we can, in what remains of this afternoon, examine the clerk of the Superior Court in regard to the papers, and then they can be put into the case as is deemed necessary.

Mr. D. P. WOOD — I withdraw the motion.

Mr. MADDEN — Mr. President: I move we go into executive session at half-past six o'clock, for the purpose of receiving communication from His Excellency the Governor; I will modify it by saying a quarter to 7 o'clock.

The PRESIDENT — The first question is in regard to the resolution of the gentleman from the fifth Mr. Benedict).

Mr. PALMER — I have to make my usual amendment, and I move to make it half-past 4 o'clock in the afternoon.

The amendment being offered was withdrawn, and the motion of the senator from the fifth (Mr. Benedict) was carried.

The PRESIDENT — What is the pleasure of the Senate in regard to the executive session of the Senate at a quarter to 7 o'clock?

The motion of the senator from the tenth (Mr. Madden) was then carried.

Mr. D. P. WOOD — Mr. President: That we may not overlook it, as it is a matter of some importance, I move that the Comptroller of the State be requested to make the necessary provision to pay the expenses of the proceedings in the trial of the various judges, now pending before the Senate. Motion carried.

Mr. PARSONS — We now ask the Senate as to what action shall be taken in respect to compelling the attendance of witnesses, who apparently have intentionally abstained from obeying the subpœna

of the Senate, and I call particular attention to the case of Abraham B. Clark, who, I understand, was regularly subpœnaed, and who is asserted to have stated that under the advice of counsel he would not come here. It is important that the Senate should take appropriate action in regard to the matter now, because when we meet here on Tuesday morning, if he or other witnesses are not in attendance of course it is impossible that the case proceed.

The PRESIDENT — The sergeant-at-arms will make return in regard to the service of subpœnas.

Mr. BENEDICT — Mr. President: I move Mr. Clark show cause why he has not appeared before this body.

Mr. MOAK — Mr. President: I suggest to the counsel upon the other side, inasmuch as Judge Selden will undoubtedly be here Tuesday, and as we shall desire to cross-examine the clerk of the Superior Court, as to some matters, certainly, and we have been in some little consultation among ourselves as to how far that examination should go, whether the prosecution will consent with the concurrence of the Senate to wait until Tuesday, and then put in the evidence in the order in which it will occur. I very much doubt whether it will facilitate matters much by simply proving those are the records of the court.

Mr. PARSONS — The clerk of the court has been here two, and possibly three days. It is a matter which concerns his convenience largely as well as the convenience of his court. We can scarcely assent, and think whatever is required of him should be taken advantage of now, and save him from the very great inconvenience of coming back here again from New York and being detained here, and we shall also ask to examine Joel O. Stevens, the under-sheriff of New York.

Mr. MOAK—Mr. Boese has an entirely competent clerk, I understand.

Mr. BENEDICT—Mr. President: It seems to me that the experience of every lawyer will suggest that we shall have removed the possible obstacle to proceeding next week if we give in the testimony of Boese, the clerk, in regard to the documents. If the documents are put in now we can go right along next week. If Mr. Boese is sick or somebody else is out for an hour, we cannot put in the papers, and I am free to say that I cannot see any reason why all these documents should not be consented to.

Mr. DAVIS—Mr. President: I wish the senators might take into consideration that it is now 5 o'clock and after, and Judge Selden will be with us on Tuesday, and we will be very happy to commence

the case, and with the day I shall devote to it in New York, I think the most of this might be arranged. I very much dislike to open this case now in Judge Selden's absence. We very much wish this short time might be bridged over. I think it is due to Judge McCunn, and I believe my brothers upon the other side will hardly care to press us into the trial of the case, under the circumstances.

Mr. PARSONS—We must oppose that. It is proper to state that we have no confidence in our ability to agree upon testimony. We made an effort in that direction last night, and we did not succeed very well. We think it is much better that the testimony of Mr. Boese should be taken now, and these documents authenticated, and we will receive their authentication until Judge Selden's presence here Tuesday morning.

The PRESIDENT—Regarding the first suggestion made by the counsel for the prosecution in regard to the presence of witnesses who did not respond to the call, I will say there is no return made here of the services of subpœna upon Mr. Clark. The sergeant-at-arms is not present; he has gone home.

Mr. GRAHAM—The sergeant-at-arms has gone home, but his deputy is here, however.

The PRESIDENT—The deputy did not make the service, and the sergeant-at-arms is not here. Of course, we cannot make any order in regard to compelling the attendance of Mr. Clark on account of that.

Mr. PARSONS—May I inquire of the President whether we are considered as being charged with any responsibility, in regard to the attendance of witnesses? We have not so regarded it.

The PRESIDENT—I do not know that you are; at the same time you have the general charge of the attendance of witnesses on behalf of the prosecution. I suppose the proper course now would be to have a new subpœna served upon Mr. Clark to attend on the day to which we adjourn.

Mr. PALMER—What is the question before the Senate?

The PRESIDENT—We are now considering what is to be done in regard to the non-attendance of witnesses who have been subpœnaed, and where there is no return by the sergeant-at-arms.

Mr. PALMER—I propose that without delay we enforce the attendance of witnesses.

The PRESIDENT—Our officer has gone away and we cannot have the return.

Mr. MADDEN—Mr. President: You had better put in some other officer who will attend to his business.

Mr. J. Wood—Mr. President: I move that upon the filing of due proof of service of subpœnas upon witnesses and their non-attendance, that an attachment issue against them, returnable on Tuesday morning, at 10 o'clock. The attachment is not to issue unless there is proof of service. The names of the witnesses have been called and they do not answer.

Mr. Madden—I wish to ask the Chair to appoint some officer who understands his duty, and will do it intelligently and properly. The sergeant-at-arms has not been sick. The idea that the respondent and Senate should be detained, owing to the neglect and ignorance, or some other cause, of the sergeant-at-arms! If he does not understand his duty, does his assistant? If he does, I hope he will attend to it. I understand there are some witnesses attending here. Is there any objection to hearing them, though the sergeant-at-arms has not made his returns? Why should the prosecution object, even if the return is not here?

Mr. J. Wood—Mr. President: I move the following resolution:

Resolved, That, on filing due proof of the service of a subpœna issued in this proceeding on the witnesses whose names have been called by the Clerk, and who did not respond, and have not attended in response to the mandate of said subpœna, an order be entered directing the issuing of an attachment against said witnesses, respectively, for contempt of the process of the Senate; and that an attachment be forthwith issued against said witnesses in the usual form of attachments against defaulting witnesses in courts of record in this State, and as provided in the Revised Statutes, which attachments shall be returnable on Tuesday morning next at 10 A. M.

Motion carried.

Thomas Boese, a witness called on behalf of the people, being duly sworn, testified as follows:

By Mr. Parsons:

Q. Mr. Boese, do you hold any official position, and, if so, state what it is, and how long you have occupied that position? A. I am clerk of the Superior Court of the city of New York; I have occupied it since January 1st, 1872.

Q. Have you been subpœnæd to produce for this investigation or proceeding certain records from the files of the clerk's office of that court? A. I have.

Q. Produce such papers as in obedience to that subpœna you have brought here? (Witness produced same.)

Q. Have you any list or statement of the papers which you have produced? A. I have.

Q. Will you produce that, if you please? (Witness produced same.)

Q. Is that an accurate list of such papers, as in obedience to the subpœna, you have produced? A. Yes, sir.

Mr. PARSONS — We ask that, for convenience, that be marked by the clerk.

The same was here marked "Exhibit A," and considered read in evidence, and read as follows:

PAPERS REQUIRED BEFORE THE HONORABLE SENATE OF THE STATE OF NEW YORK IN THE MATTER OF JOHN H. McCUNN, JUSTICE SUPERIOR COURT, CITY OF NEW YORK, JUNE 19, 1872.

CLARK v. BININGER.

(Papers in *italics* are those particularly named in requisition.)

No. 1. Petition of Bininger. Order Judge McCunn, November 19, 1869. *Order Judge McCunn appointing Hanrahan receiver.* Order Judge Fithian. Receivers' bonds.

No. 2. Petition of Beecher. Complaint. Affidavit C. W. Bangs. *Order Judge Jones, March* 30, 1870. Order Judge Jones, March 31, 1870. Affidavit W. B. Nassau. Affidavit C. W. Bangs. Order Judge Jones, April 2, 1870. Affidavit of Robert Smith.

No. 3. *Order Judge McCunn modifying order of March* 30, 1870.

No. 4. *Order Judge McCunn taxing sheriff's fees.*

No. 5. *Injunction order Judge McCunn, January* 19, 1870.

Nos. 6 and 7. *Have not been filed in this court at any time.*

(Papers in same suit not particularly designated.)

No. 8. Petition of Bininger, April 7, 1870. Affidavit Chas. Thies, April 16, 1870. Injunction order Judge McCunn, November 19, 1869. Order Judge Fithian, November 27, 1869. Order Judge Jones, March 30, 1869. Affidavit G. N. Titus. Affidavit L. H. Dunkin. Affidavit W. B. Gifford. Affidavit John Jacques. Affidavit L. H. Dunkin.

No. 9. Affidavit G. N. Titus. Order Judge Monell, April 27, 1870. Order Judge Monell, April 30, 1870. Supplemental complaint. Letter from G. N. Titus to C. W. Bangs, May 10, 1870. Notice of appeal, May 12, 1870. Notice of appeal, May, 16, 1870. Notice of appearance, May 11, 1870. Order Judge Blatchford, U. S. Court, February 23, 1870.

No. 10. Affidavit of Henry Howard, April 22, 1870. Order Judge Monell, April 20, 1870. Petition Bininger, April 20, 1870. Affidavit A. B. Clark, April 18, 1870. Letter from Conway, Gordon

& Garnett, to T. L. Brown, April 6, 1870. Letter from W. A. Ritter to T. L. Brown, April 7, 1870. Telegram from C. G. & G. to T. L. Brown, April 18, 1870. Letter from same to same, April 18, 1870. Letter from Retter to Brown, April 18, 1870.

No. 11. Affidavit of Hanrahan, March 31, 1870. Order Judge Jones, March 30, 1870. Petition Bininger, March 29, 1870. Order Judge McCunn, November 19, 1870. Order Judge McCunn, November 19, 1870. Order Judge Fithian, November 27, 1869. Receivers' Bonds.

No. 12. Order Judge Fithian, November 22, 1869, and affidavit of Bininger. Order Judge McCunn, November 19, 1869. Order Judge McCunn, November 19, 1869. Summons and complaint, November 19, 1869. Agreement June 1, 1869.

No. 13. Petition of creditors, March 18, 1870.

No. 14. Order Judge McCunn, March 30, 1870.

No. 15. Petition Hardy, Blake & Co.

No. 16. Order Judge Jones, April 2, 1870.

No. 17. Order Judge Monell, May, 1870.

No. 18. Order Judge McCunn, May 31, 1870.

No. 19. Judge Monell, April 9, 1870.

No. 20. Affidavit John Jaques, April 27, 1870.

No. 21. Petition of H. Tiffany and order of Judge Monell, April 5, 1870.

No. 22. Order Judge Fithian, November 27, 1869.

No. 23. Affidavit C. W. Bangs, May 20, 1870.

No. 24. Affidavit J. S. Beecher, January 26, 1870.

No. 25. Letter of Hanrahan to Compton, November 23, 1869.

No. 26. Order Judge Jones, March 30, 1872.

No. 27. Affidavit of Bininger, and order Judge Jones, December 8, 1869.

No. 28. Affidavit of Bininger, December 9, 1869.

No. 29. Notice of appeal, May 20, 1870.

No. 30. Affidavit of merits, April 14, 1870.

No. 31. Receiver's bond, April 30, 1870.

No. 32. Petition and order Judge Monell, April 19, 1870.

No. 33. Notice of appeal, May 14, 1870.

No. 34. Order Judge Fithian, November 27, 1869.

No. 35. Order Judge McCunn, January 11, 1870.

No. 36. Affidavit G. N. Titus, May 25, 1870.

No. 37. Notice of appeal, May 18, 1870.

No. 38. Petition of creditors, April 9, 1870.

No. 39. Affidavit for injunction, December 15, 1869.

No. 40. Affidavit of Hanrahan, January 11, 1870.

No. 41. Order Judge Monell, June 8, 1870.

No. 42. Order Judge Jones, April 12, 1870.

No. 43. Order Judge Monell, May 24, 1870.

No. 44. Order Judge Monell, May 13, 1870, and summons and complaint.

No. 45. Two notices of appeal, May 24, 1870.

No. 46. Order Judge Fithian, November 27, 1870.

No. 47. Order Judge Spencer, February 24, 1870. Proceedings U. S. Court.

No. 48. Order Judge Barbour, July 11, 1870.

No. 49. Order Judge Monell, April 25, 1870.

No. 50. Bond, November 19, 1869.

No. 51. Bond, November 9, 1869.

No. 52. Order Judge Monell, April 30, 1870.

No. 53. Order Judge Monell, May 24, 1870.

No. 54. Order Judge Jones, April 5, 1870.

No. 55. Answer, June 13, 1870.

No. 56. Judgment roll.

No. 57. Affidavit Morgan, April 18, 1870, and Hanrahan, March 30, 1870. Order Judge McCunn, March 30, 1870. Affidavit Hanrahan, April 18, 1870.

No. 58. Affidavit Hanrahan, June 16, 1870. Order Judge McCunn, May 31, 1870. Affidavits of J. Purroy and others.

No. 59. Memoranda.

COREY v. LONG.

No. 1. *General Term order, March*, 1870.

No. 2. *Order Judge McCunn, January* 1870.

No. 3. *Summons and complaint. Affidavits A. H. Corey, Jacob Beck. Agreement, undertaking of Corey and Morgan, not filed.*

No. 4. *Order Judge McCunn, January* 15, 1870. *Order Judge McCunn, January* 15, 1870. *Summons and complaint, January* 15, 1870. *Affidavit A. B. Corey and Jacob Beck, January* 15, 1870. Agreement.

Nos. 5 and 6. *Order Judge Freedman, January* 7, 1870, *not on file. Order Judge McCunn, January* 17, 1870, *not on file.*

No. 7. *Affidavit W. P. Long, January* 20, 1870, *and four letters.*

No. 8. *Affidavits of A. B. Corey, James S. Blake, January* 21, 1870. *A. Meller, January* 6, 1870. *C. B. Corry, January* 21, 1870. *Jacob Beck, January* 21, 1870.

No. 9. *Order Judge Barbour, January* 28, 1870.

No. 10. *Opinion not filed.*

No. 11. *Notice of appeal, February* 23, 1870.

No. 12. *Order of Judge Barbour, January* 29, 1870.

No. 13. *Affidavits of A. B. Corey and G. L. Simonson, January* 29, 1870. *W. P. Long, January* 26, 1870, *not on file. Order of Judge Barbour, January* 31, 1870. Affidavit of W. P. Long, January 31, 1870.

No. 14. *Points on appeal.*

No. 15. *Notice of appeal, February* 23, 1870.

Nos. 16 and 17. *Appellants and respondents, points not filed.*

PAPERS REQUIRED IN SAME NOT PARTICULARLY DESIGNATED.

No. 18. Affidavit of C. B. Corey, March 7, 1870. Order June 8, 1870, Judge Jones. Affidavit of E. Garretson, March 9, 1870. Examination of C. B. Corey, March 9, 1870.

No. 19. Deposition of W. P. Long, Nov. 28, 1868.

No. 20. Order of Judge McCunn, May 9, 1870.

No. 21. Receiver's bond, Jan. 31, 1870.

No. 22. Order of Judge Barbour, March 1, 1870.

No. 23. Order of Judge Freedman, July 28, 1871.

No. 24. Order of Judge McCunn, May 24, 1871. Affidavit of Morgan, May 25, 1871.

No. 25. Petition of McFarlane, May 25, 1870.

No. 26. Affidavit of merits, February 7, 1870.

No. 27. Exceptions.

No. 28. Order of Judge Barbour, January 22, 1870.

No. 29. Order of Judge McCunn, May, 1870.

No. 30. Affidavit of W. P. Long, May 25, 1870. Complaint, Jan. 15, 1870. Answer, Feb. 7, 1870.

No. 31. Order of Judge Freedman, July 26, 1870. Affidavit of Morgan, July 26, 1870. Order of Judge Freedman, July 19, 1871.

No. 32. Affidavit of A. Monell, July 17, 1871. Order of Judge Freedman, July 17, 1871.

No. 33. Judge Barbour, January 27, 1870. Order.

No. 34. Affidavit and order of Judge Freedman, May 12, 1871.

No. 35. Petition of James M. Gano, Feb. 4, 1870.

No. 36. Order of Judge Freedman, July 19, 1871.

No. 37. Report of referee, June 10, 1872, and certified copies of orders of Judges Barbour and McCunn.

No. 38. Report of referee, May, 1871.

O'Mahony v. Belmont.

No. 1. *Affidavit of R. J. Page. Order Judge McCunn, June* 30, 1869.

No. 2. *Summons* and complaint, *June* 29, 1869.

No. 3. *Affidavit of E. B. Lucke, July* 9, 1869.

No. 4. *Order of Judge McCunn, July* 16, 1869.

No. 5. *Order of Judge McCunn, July* 17, 1869. *Affidavit of T. J. Barr, July* 17, 1869.

No. 6. *Affidavit of W. W. McFarland, not filed; found on page* 30, *printed pamphlet, marked No.* 57.

No. 7. *Order of Judge McCunn, July* 20, 1869.

No. 8. Affidavit of T. J. Barr, July 21, 1869. *Order of Judge McCunn, July* 21, 1869. *Order of Judge McCunn, July* 27, 1869.

No. 9. *Order of Judge McCunn, July* 20, 1869.

Papers in same Suit not particularly Designated.

No. 10. Affidavit of T. N. Dwyer, R. J. Page, M. Cavanagh, W. M. Curry, J. O. Mahony, July 9, 1869.

No. 11. Exceptions.

No. 12. Notice of appeal, July 14, 1869.

No. 13. Affidavit of J. Henderson, Nov. 22, 1869.

No. 14. Affidavit of T. J. Barr, Feb. 13, 1872. Bill and affidavit of J. Henderson, Feb. 4, 1871.

No. 15. Affidavit of merits, Sept. 22, 1869.

No. 16. Notice of appeal, July 8, 1869.

No. 17. General Term order, Nov. 14, 1870.

No. 18. Order Judge Sedgwick, March 8, 1872.

No. 19. Affidavit of J. Larocque, July 20, 1869.

No. 20. Order of Judge McCunn, July 2, 1869.

No. 22. Order of Judge Freedman, Dec. 18, 1869.

No. 23. Notice of trial, August 31, 1869.

No. 24. Clerk's certificate, Nov. 14, 1870.

No. 25. Affidavit of merits, Sept. 22, 1869.

No. 26. Order of Judge McCunn, May 19, 1870.

No. 27. Order of Judge McCunn, Jan. 10, 1871.

No. 28. Exceptions, Feb. 24, 1872.

No. 29. Order of Judge Spencer, Nov. 1870. Affidavit of J. W. Weed. General Term order, Nov. 14, 1870. Printed orders Judge McCunn, July 16 and 20, 1869.

No. 30. Affidavit of J. Henderson, February 14, 1871. Order of Judge Barbour, September 23, 1871.

No. 31. Receiver's bond, July 17, 1869.

No. 32. Notice of appeal, Nov. 28, 1869.

No. 33. Affidavit of A. G. Rein and order of Judge Monell, July 9, 1869. Affidavit of A. De Rudder, July 12, 1869.

No. 34. Order of Judge Spencer, Dec. 2, 1870. Affidavit J. Henderson, Dec. 1, 1870.

No. 35. General Term order, Dec. 16, 1870.

No. 36. Order of Judge Sedgwick, March 16, 1872.

No. 37. Notice of appeal, May 21, 1870.

No. 38. Petition and order of Spencer, Judge, Nov. 21, 1871.

No. 39. Affidavit and order of Judge McCunn, August 18, 1869.

No. 40. Order of Judge Monell, Feb. 20, 1872.

No. 41. Order of Judge McCunn, September 25, 1871.

No. 42. General Term order, Jan. 13, 1871.

No. 43. Notice of argument, Oct. 20, 1870.

No. 44. Referee's report.

No. 45. Notice of motion, Jan. 9, 1871.

No. 46. Petition Thos. J. Barr. Affidavit of J. Henderson and order of Judge Sedgwick, March 6, 1872.

No. 47. Order of Judge Monell, Feb., 1872.

No. 48. Order of Judge Sedgwick, March 16, 1872.

No. 49. Order of Judge Spencer, Nov. 22, 1870.

No. 50. Affidavit of J. Larocque, March 16, 1872.

No. 51. Notice of appeal, June 21, 1870.

No. 52. Affidavit H. E. Tallmadge, Jan. 9, 1871.

No. 53. Affidavit of J. W. Weed, Jan. 5, 1871. Affidavit of T. J. Barr, July 29, 1869.

No. 54. Petition of J. P. Lindsay, Feb. 1, 1872. Order of Judge Barbour, Feb. 2, 1872. Affidavit of E. E. Williams, Feb. 5, 1872.

No. 55. Order of Judge McCunn, July 27, 1869. Order of Judge Jones, March 16, 1870. Affidavit of J. Henderson, May 16, 1870. Order of Judge Freedman, May 16, 1871.

No. 56. Affidavit of W. W. McFarland.

No. 57. Papers on appeal, Sept. 25, 1871 (printed pamphlet).

BRANDON v. BUCK.

No. 1. *Not filed.*

No. 2. *Order of Judge McCunn, Feb.* 28, 1872.

No. 3. *Order of Judge McCunn, March* 21, 1870. Consent, summons and complaint, March 8, 1870. Charter Hansom Cab Company.

No. 4. *Undertaking, Joseph Meeks and James F. Morgan.*

HICKS v. BISHOP.

No. 1. *Affidavit of N. Hicks, June* 30, 1869.
No. 2. *Not filed.*
No. 3. *Affidavit of P. W. Bishop, July* 29, 1869, *and order of Judge Freedman.*
No. 4. Affidavit of J. W. Hand and orders by Judge Jones.
No. 5. Order of Judge McCunn, Aug. 16, 1869.

BAILEY v. O'MAHONY.

No. 1. *Order of Judge McCunn, July* 21, 1869. Summons *complaint.*
No. 2. *Order of Judge McCunn, Aug.* 4, 1869.
No. 3. *Not filed.*

ELLIOTT v. BUTLER.

No. 1. *Order of Judge McCunn, Dec.* 10, 1869.
No. 2. *Not filed.*
No. 3. *Not filed.*

VAN NESS v. TALIAFERO.

No. 1. Order of Judge McCunn, June 4, 1869.
No. 2. Receiver's bond.
No. 3. Order of Judge McCunn.
No. 4. Answer.
No. 5. Brief.
No. 6. Consent, May 21, 1869.
No. 7. Notice of appearance, April 21, 1869.
No. 8. Order of Judge McCunn, June 4, 1869. Affidavit of Taliafero, June 4, 1869.
No. 9. Summons, March 27, 1869.
No. 10. Notice of reference, May 22, 1869.
No. 11. Order of Judge McCunn, June 5, 1869.
No. 12. Order of Judge McCunn, June 5, 1869.

Indorsed: Catalogue—Papers to be used before Court of Appeals and Senate, from Superior Court, in the matter of Hon. John H. McCunn. Exhibit "A."

Transmitted to the Clerk and printed.

By Mr. PARSONS:

Q. Is there any record of the court on the subject? A. I do not think it is formally entered as such, with the exception of the manner in which it is printed through the newspapers and published throughout the country.

Q. State whether, during the time that certain justices hold the terms to which they are so assigned, it is the practice during any part of the term for other judges to take their place? A. Very common practice for other judges to take the place of the judge assigned to a particular part of the court.

Q. Is there any record or minute of any kind kept by the clerk of the court showing what particular judges sat in particular parts of the court on any particular date? A. Yes, sir. It is always the custom, and it is necessary to keep a proper record, that the judge holding the special term, if you please, may have his name appear and the particular day. For instance, Judge McCunn presides, or Judge Barbour, etc. That is a necessary record of the court.

Q. How many judges of the Superior Court are there? A. Six.

Q. How are they divided in any particular term? A. We have two parts of the trial term; one to each. One holds chambers and special term. Generally one judge holds both. Probably there will be three holding general term.

Q. How frequently are terms held? A. They hold special term every month during the year, and chambers every month, except in cases of absence or sickness of judges. Trial terms are held with the exception of July, August and September, and general term more or less every month, with the exception of July, August and September. Generally in September, however.

Q. How long has that been the order of business of the court? A. It has been so for years. Probably for the last eight or nine years, at least. I was looking over the record the other day.

Q. Have you prepared a statement show—

Q. State whether or not such orders or other papers among those produced by you as purport to be signed, either with the full name or by the initials of Judge McCunn, are so signed in his original handwriting? A. They are.

Q. Are the justices of the Superior Court of the city of New York assigned to special judicial duty; to hold certain special terms?

Mr. Moak — I object on the ground that the records of the court will show whether that is the fact or not. The statute so requires. They are assigned in writing.

Witness — I can explain how it is done.

By the President:

Q. Answer whether they are assigned? A. The judges meet generally in December and assign themselves to particular parts of the court, and that is generally printed. The assignments are made by the court.

Q. Is this an order of the court? A. Yes, so considered; it is not formally entered except as printed; generally the justices regularly sitting at the special terms and chambers of the Superior Court of the city of New York during the years 1868 down to 1872 inclusive, so far as 1872 has proceeded? A. Yes, sir.

Mr. Moak — Do you mean regularly sitting, or assigned to sit?

Mr. Parsons — Regularly sitting?

Witness — Yes, sir.

Q. (Showing witness paper.) Will you look at that paper and state whether that is the paper of which you speak? A. Yes, sir, that is the paper.

Q. And does that paper, Mr. Boese, correctly and accurately show the judge regularly holding special term and chambers branch of the Superior Court at the date specified in the paper? A. Yes, sir.

Mr. Parsons — We offer that paper.

The same is considered read and marked "Exhibit B," and is as follows:

Names of the Justices holding the Special Term and Chambers of the Superior Court of the city of New York for the years 1868, 1869, 1870, 1871 *and* 1872.

January	2	Garvin, J.
January	3	McCunn, J.
January	4	Jones, J.
January	6 to 25 inclusive	Monell, J.
January	27 to 28 inclusive	Barbour, J.
January	29 to 30 inclusive	Jones, J.
January	31	McCunn, J.
February	1 to 29 inclusive	Jones, J.
March	2 to 30 inclusive	Robertson, J.
March	31	Barbour, J.
April	1	Monell, J.
April	2	Garvin, J.
April	3	McCunn, J.
April	4	Jones, J.
April	6 to 25 inclusive	Garvin, J.
April	27	Jones, J.
April	28	Barbour, J.
April	29 to 30 inclusive	Monell, J.
May	1	McCunn, J.
May	2	Jones, J.
May	4 to 8 inclusive	McCunn, J.
May	9	Jones, J.

May	11 to 13 inclusive	Garvin, J.
May	14 to 30 inclusive	McCunn, J.
June	1 to 27 inclusive	Garvin, J.
June	29 to 30 inclusive	McCunn, J.
July	1	Jones, J.
July	2 and 3	McCunn, J.
July	6 to 8 inclusive	Robertson, J.
July	9	Garvin, J.
July	10 and 11 inclusive	Robertson, J.
July	13 to 31 inclusive	Jones, J.
August	1 to 4 inclusive	Jones, J.
August	5 to 19 inclusive	Garvin, J.
August	20 to 31 inclusive	Robertson, J.
September	1 to 3 inclusive	Robertson, J.
September	4 to 30 inclusive	Jones, J.
October	1 to 3 inclusive	Jones, J.
October	5	Robertson, J.
October	6 to 14 inclusive	Jones, J.
October	15 to 31 inclusive	Robertson, J.
November	2	Robertson, J.
November	4 to 6 inclusive	Barbour, J.
November	7	Garvin, J.
November	9 to 30 inclusive	Barbour, J.
December	1 to 3 inclusive	Barbour, J.
December	4 to 19 inclusive	Jones, J.
December	21 to 31 inclusive	Garvin, J.
1869.		
January	2	Fithian, J.
January	4 to 21 inclusive	Barbour, J.
January	22 and 23	Freedman, J.
January	25 to 29 inclusive	Barbour, J.
January	30	Freedman, J.
February	1 to 27 inclusive	Freedman, J.
March	1 to 31 inclusive	Jones, J.
April	1 to 3 inclusive	Jones, J.
April	5 to 30 inclusive	Monell, J.
May	1	Monell, J.
May	3 to 31 inclusive	McCunn, J.
June	1 to 30 inclusive	McCunn, J.
July	1 to 3 inclusive	McCunn, J.
July	5 to 19 inclusive	Monell, J.
July	20 to 31 inclusive	Freedman, J.

August	2 to 3 inclusive	Freedman, J.
August	4 to 18 inclusive	McCunn, J.
August	19 to 31 inclusive	Jones, J.
September	1 and 2	Jones, J.
September	3 to 18 inclusive	McCunn, J.
September	20	Freedman, J.
September	21 to 23 inclusive	Barbour, J.
September	24 to 30 inclusive	Freedman, J.
October	1 and 2	Freedman, J.
October	4 to 6 inclusive	Jones, J.
October	7	Freedman, J.
October	8 to 30 inclusive	Jones, J.
November	1 to 19 inclusive	Fithian, J.
November	20 to 21 inclusive	Jones, J.
November	22 to 30 inclusive	Fithian, J.
1869.		
December	1 to 5 inclusive	Fithian, J.
December	8 to 11 inclusive	McCunn, J.
December	13 and 14	Freedman, J.
December	15	Fithian, J.
December	16 to 31	Freedman, J.
1870.		
January	3 to 31 inclusive	Barbour, J.
February	1 to 5 inclusive	Barbour, J.
February	7 to 28 inclusive	Spencer, J.
March	1 to 5 inclusive	Spencer, J.
March	7 to 31 inclusive	Jones, J.
April	1 and 2 inclusive	Jones, J.
April	4 to 14 inclusive	Monell, J.
April	16	Spencer, J.
April	18 to 30 inclusive	Monell, J.
May	2 to 16 inclusive	McCunn, J.
May	18	Barbour, J.
May	19 to 31 inclusive	McCunn, J.
June	1 to 5 inclusive	McCunn, J.
June	6 to 30 inclusive	Freedman, J.
July	1 and 2	Freedman, J.
July	5 to 23 inclusive	Barbour, J.
July	25 to 30 inclusive	Freedman, J.
August	1 and 2	Freedman, J.
August	3 to 19 inclusive	Spencer, J.
August	22 to 31 inclusive	Monell, J.

September	1 and 2 inclusive	Freedman, J.
September	5 to 9 inclusive	Barbour, J.
September	10 to 30 inclusive	Jones, J.
October	1 to 31 inclusive	Jones, J.
November	1 to 5 inclusive	Jones, J.
November	7 to 30 inclusive	Spencer, J.
December	1 to 3 inclusive	Spencer, J.
December	5 to 31 inclusive	Monell, J.
1871.		
January	3 to 31 inclusive	Barbour, J.
February	1 to 4 inclusive	Barbour, J.
February	6 to 28 inclusive	Freedman, J.
March	1 to 4 inclusive	Freedman, J.
March	6 to 31 inclusive	Jones, J.
April	1	Jones, J.
April	3 to 29 inclusive	Spencer, J.
May	1 to 31 inclusive	McCnnn, J.
June	1 to 4 inclusive	McCunn, J.
June	5 to 30 inclusive	Monell, J.
July	1	Monell, J.
July	3	Spencer, J.
July	5 to 7 inclusive	Monell, J.
July	10	Spencer, J.
July	11 to 14 inclusive	Monell, J.
July	17 to 31 inclusive	Freedman, J.
August	1	Freedman, J.
August	2 to 11 inclusive	Barbour, J.
August	14 to 17 inclusive	McCunn, J.
August	18 to 31 inclusive	Spencer, J.
September	1 to 15 inclusive	Jones, J.
September	16 to 30 inclusive	McCunn, J.
October	1 to 31 inclusive	Jones, J.
November	1 to 4 inclusive	Jones, J.
November	6 to 29 inclusive	Spencer, J.
December	1 and 2 inclusive	Spencer, J.
December	4 to 30 inclusive	Freedman, J.
1872.		
January	2 to 31 inclusive	Barbour, J.
February	1 to 3 inclusive	Barbour, J.
February	5 to 29 inclusive	Monell, J.
March	1 and 2	Monell, J.
March	4 to 30 inclusive	Sedgwick, J.

April	1 to 4 inclusive	McCunn, J.
April	5 to 7 inclusive	Barbour, J.
April	8 to 18 inclusive	McCunn, J.
April	19 and 20	Curtis, J.
April	22	McCunn, J.
April	23 and 24	Monell, J.
April	25	Curtis, J.
April	26	Sedgwick, J.
April	27	Curtis, J.
April	29	Barbour, J.
April	30	Monell, J.
May	1	Freedman, J.
May	2	Curtis, J.
May	3	Sedgwick, J.
May	4 to 31 inclusive	Curtis, J.
June	1	Curtis, J.
June	3 to date	Freedman, J.

Dated *June* 18, 1872.

Indorsed: Names of justices holding special terms and chambers of *Superior Court* of the city of New York, for the years 1868, 1869, 1870, 1871 and 1872. June 18, 1872. Exhibit "B."

Q. The list "Exhibit A," refers to certain papers by members, for example, in the case of *Clark* v. *Bininger*, numbers six and seven, with the memorandum have not been filed in this court at any time; and, again, for example, in the case of *Brandon* v. *Buck*, number one not filed; in the case of *Bailey* v. *O'Mahony*, number three not filed, correspond to what; to what refer the numbers, and what is the meaning of the memorandum that papers have not been filed? A. It means no such papers were filed in the court; we keep a record of all papers filed, and that record shows that no such papers as mentioned in the subpœna was filed at all.

Q. To what do the numbers mentioned in my question refer; in the case of *Bininger* v. *Clark*, for instance? A. They refer to corresponding numbers on the subpœna.

Q. Is that true with reference to all the numbers which appear upon the paper marked "Exhibit A?" A. Yes, sir.

Q. For the sake of showing what papers are not produced, and that such papers are not filed, which we mentioned in the subpœna? A. Yes, sir.

Same offered in evidence; considered read; marked "Exhibit C," and reads as follows:

THE PEOPLE OF THE STATE OF NEW YORK, BY THE GRACE OF GOD FREE AND INDEPENDENT.

To Thomas E. Boese:

GREETING: You and each of you are hereby commanded and required, that, laying aside all other business and all pretenses and excuses whatsoever, you be and appear in your own proper person, before the Senate, at the Senate chamber, at the Capitol, in the city of Albany, on the 19th day of June, A. D. 1872, at 10 o'clock A. M. of that day, to be examined as witnesses, and to testify the truth, and to give evidence on our behalf concerning certain charges then and there to be tried and determined before our Senate of our said State, which have been made against John H. McCunn, justice of the Superior Court of the city of New York, and upon which our Governor of our said State has recommended to our Senate aforesaid, that the said John H. McCunn be removed from his said office of justice, and that you bring with you and produce on said trial the papers hereto annexed, and all other papers, books, deeds or documents pertaining to the matter to be inquired about and investigated on said trial and determination.

And hereof fail not at your peril.

Witness, Hon. ALLEN C. BEACH, the Lieutenant-Governor of our said State of New York, and the President of the Senate thereof, this 14th day of June, in the year of our Lord 1872.

[L. S.]

Attest: CHAS. R. DAYTON,
Clerk of the Senate.

The following papers in the action wherein Abraham B. Clarke was plaintiff and Abraham Bininger was defendant:

No. 1. The order signed by J. H. McCunn, justice, dated November 19, 1869, appointing Daniel H. Hanrahan, Esq., receiver; and,

No. 2. The order signed by S. Jones, judge, dated March 30, 1870, requiring Daniel H. Hanrahan, Esq., receiver, to show cause, etc., and enjoining the said Hanrahan and Thomas J. Barr, etc.

No. 3. The order signed by John H. McCunn, justice, dated March 30th, 1870, annulling, vacating and setting aside the last-mentioned order of S. Jones, justice, and ordering a sale, etc., and the proceeds thereof to be deposited, etc.

No. 4. The order of John H. McCunn, justice, dated at the top June 1, 1870, and at the bottom June 16, 1870, taxing, and adjusting and allowing to the sheriff $4,234 for fees, etc.

No. 5. The order signed by John H. McCunn, dated January 19, 1870, enjoining John S. Beecher and Paul J. Armour, etc., from interfering, etc., with the said receiver.

No. 6. The order signed John H. McCunn, justice, dated December 4, 1869, directing sheriff, etc., to take possession, etc.

No. 7. The order dated 6th of December, 1869, signed John H. McCunn, justice, at Special Term, directing sheriff to take possession, etc.

The following papers in the action, wherein Albert B. Corey was plaintiff, and Walter P. Long was defendant:

No. 1. The order of the General Term of the Superior Court, dated March, 1870, signed C. L. M., reversing the order dated 28th of January, 1870, denying a motion to dissolve an injunction, etc.

No. 2. The order signed John H. McCunn, justice, dated January 18, 1870, appointing James M. Gano, receiver, etc.

No. 3. The summons, complaint, affidavit of Albert H. Corey; affidavit of Jacob Beck; agreement between Long and Corey, dated 7th of December, 1869; undertaking of C. B. Corey and James F. Morgan.

The following papers in the action, wherein Anna M. Elliott was plaintiff, and Mary P. Butler was defendant:

No. 1. The order signed John H. McCunn, justice, dated 10th day of December, 1869, appointing James M. Gano, receiver, etc.

No. 2. The order signed John H. McCunn, dated December 10, 1869, enjoining said Mary P. Butler, etc., from, etc.

No. 3. The summons, complaint in the said action, dated and sworn to December 10, 1869.

The following papers in the action, wherein Edward W. Brandon, was plaintiff, and Jerome Beck and others, were defendants:

No. 1. The summons dated February 23, 1870. The complaint sworn to 8th February, 1870. The order signed John H. McCunn, dated February 23, 1870, appointing Daniel H. Hanrahan, receiver, etc. The order signed J. H. McCunn, dated March 21, 1870, appointing Joseph Weeks, receiver, etc. The undertaking signed Joseph Weeks and James F. Morgan, to the clerk of the Superior Court, in the sum of $5,000.

The following papers in the action wherein John O'Mahony was plaintiff, and August Belmont and Ernest B. Lucke were defendants:

No. 1. The order requiring the defendants to show cause why a receiver should not be appointed, dated June 30, 1869, signed John H. McCunn, justice. The summons for relief, dated June 29, 1869.

No. 2. The affidavit of Roger J. Page, sworn to June 30, 1869.

No. 3. The affidavit of Ernest B. Lucke, sworn to July 9, 1869.

The order dated 16th July, 1869, signed John H. McCunn, appointing Thomas J. Barr receiver, etc., and the notice annexed thereto.

No. 5. The order signed John H. McCunn, dated July 17, 1869, requiring the defendants in said action to show cause on the 20th July, 1869. The affidavit of Thomas J. Barr, sworn to 17th July, 1869.

No. 6. The affidavit of W. W. McFarland, sworn to July 20, 1869.

No. 7. The order signed John H. McCunn, dated 20th July, 1869, providing for the payment of $16,738.70, etc.

No. 8. The order to show cause why Thomas J. Barr should not be made a party defendant in the said action, signed John H. McCunn, dated July 21, 1869.

No. 8. The order signed J. H. McCunn, dated 27th July, 1869, making Thomas J. Barr a party defendant to said action.

No. 9. The order signed John H. McCunn, dated 20th July, 1869, filed 29th July, 1869, requiring the receiver to pay $1,000 to Roger J. Page.

No. 1. The order of injunction dated July 21, 1869, signed John H. McCunn, justice, restraining John O'Mahony, in the action wherein William H. Bailey was plaintiff and John O'Mahony, Thomas J. Barr, August Belmont and Ernest B. Lucke, were defendants.

No. 1. The complaint in said last-mentioned action.

No. 2. The order signed John H. McCunn, dated 4th August, 1869, appointing Thomas J. Barr, receiver, etc.

No. 3. The answer of Ernest B. Lucke, sworn to 9th July, 1869.

The following papers in the action wherein Norbury Hicks was plaintiff, and P. W. Bishop was defendant:

No. 1. The affidavit of Norbury Hicks, sworn to 30th June, 1869.

No. 2. The order signed J. H. McCunn, dated New York, July 3, 1869, requiring the sheriff of New York city and county, to arrest P. W. Bishop, and hold him to bail, etc.

No. 3. The affidavit of Phiteus W. Bishop, sworn to July 29, 1869.

No. 3. The order signed John J. Freedman, requiring plaintiff or his attorney to show cause why the foregoing order of arrest should not be vacated.

The following papers in the action wherein Edward Van Ness was plaintiff, and Sarah A. Talafero and others, were defendants.

No. 1. The order of John H. McCunn, dated 4th June, 1869, to show cause and stay proceedings.

The following papers in the action wherein Albert H. Corey was plaintiff, and Walter P. Long was defendant.

The order signed John H. McCunn, dated January 15, 1870, enjoining Walter P. Long, etc.

The summons in said action.

The complaint, sworn to 15th January, 1870.

The affidavit of Albert B. Corey, sworn to 18th January, 1872.

No. 4. The affidavit of Jacob Beck, sworn to 15th January, 1870.

No. 5. The order signed John J. Freedman, J. S. C., dated January, 1870, requiring the plaintiff to show cause, etc.

No. 6. The order signed John H. McCunn, J. S. C., dated January 17, 1870, modifying said order of John J. Freedman, J. S. C., January 17, 1870.

No. 7. The affidavit of Walter P. Levy, sworn to Jan. 20, 1870.

No. 8. The affidavit sworn to by Albert B. Corey, dated 21st of January, 1870; the affidavit of James S. Blake, sworn to January 21st, 1870; the affidavit of Alfred Meller, sworn to January 6th, 1870; the affidavit of Cornelius B. Corey, sworn to Jan. 21st, 1870; the affidavit of Jacob Beck, sworn to 21st day of January, 1870.

No. 9. The order of John M. Barbour, dated 28th January, 1870, denying motion to vacate order, etc.

No. 10. The opinion of the court upon said motion.

No. 11. The notice of appeal, dated February 23d, 1870, in said action.

No. 12. The order signed John M. Barbour, dated January 29th, 1870, requiring the defendant, etc., to show cause, etc.

No. 13. The affidavit of A. B. Corey, dated 29th January, 1870. The affidavit of G. L. Simonson, sworn to 29th January, 1870. The affidavit of Walter P. Long, dated 26th January, 1870. The order of John M. Barbour, dated 31st January, 1870, appointing James M. Gano receiver.

No. 14. The points upon the appeal.

No. 15. The notice of appeal, dated February 23d, 1870.

No. 16. The defendant and appellant's points.

No. 17. The respondent's points, together with any and all other papers in said action, or either of them, or referring to them, or any of them now upon file in the Clerk's office of the Superior Court of the city of New York, and also a tabular statement of the names

of the justices presiding at Special Term Chambers of the said Superior Court, during the years 1868, 1869, 1870, 1871, 1872. Said statement to show which of the justices of said court there presided on each and every day during said years when a special term was held at Chambers.

By Mr. Moak:

Q. Did you compare the numbers with the numbers on the subpœna? A. Yes, sir; I did this for the convenience of the Senate and counsel upon both sides; I thought it would be much more convenient.

By Mr. Parsons:

Q. Has a search been made for those papers required to be produced by the subpœna, which on examination are stated not to be on file? A. Yes, sir.

Q. And are such papers now found upon the files of your clerk's office? A. Yes, sir.

Q. Are such papers, which are marked on Exhibit A. on the list as not filed now on file in your office? A. No, sir.

Q. You have satisfied yourself by the search made for them? A. Yes, sir; by a personal search.

Q. Have you any personal knowledge as to whether such papers have been on file or not? A. No, sir, only from the records; we keep a record of every paper filed; so if it had been filed, as near as I can judge, the record would show it.

Q. The papers which are stated not to be on file you did not find on file, and those papers which are stated not filed you judge not to have been filed, for the reason that you find no appropriate entry of filing in the book? A. Yes, sir.

Q. In some cases it says, "have not been filed in the court at any time," and in other cases, "not filed;" is there any difference in those two cases? A. No, sir; there is no difference; it's barely possible that — no, there is no difference; there is a mere distinction in the language, although it is possible that the paper so marked might at one time have been marked; but from the examination of the record it is equivalent. For instance, it is possible that the summons and complaint might have been inside of another paper; the clerk, in making up the record, would naturally say, if in case it was a motion for an injunction, "injunction order filed;" and he might not see every paper inside of it.

Q. Is it your custom to certify copies of papers which are not actually on file? A. No, sir.

Q. Is there an invariable rule? A. Yes, sir; that's the rule.

Q. Is it a fact then in respect to papers in the case of *Wright* v. *Butler*, that if your office has certified copies of papers Nos. 2 and 3, mentioned on the subpœna in the case, that at the time of the certifying, the original papers were on file? A. There is no question about it in my mind; I don't think any clerk would certify a paper to be a correct copy unless the original was on file.

Q. Is that true in reference to all papers of which there are certified copies certified by your office, now outstanding, although the originals are not now on file? A. I should judge so; I cannot swear positively as to what the practice of those who were before me might be, but the invariable rule of the clerk is never to certify a paper unless the paper is on file.

Q. Did you state, sir, and is it a fact that the papers you have produced are produced from the original files in your office? A. Yes, sir.

Mr. Davis — I wish to ask the indulgence of the Senate to allow the cross-examination of this witness to delay until Judge Selden arrives on next Tuesday. I know I have pressed this request very strongly. I think my brother on the other side will appreciate my feelings in the matter. It is an important part of the case, and we do not come here expecting to take the position of managing this case. In any event, if we cross-examine him, for a half hour or an hour, I think the Senate would allow Judge Selden to further continue it, if he saw fit. I beg the indulgence of the Senate to allow us to cross-examine on Judge Selden's arrival. I do not think we gain a particle of time by going on. I make the motion that we be permitted to suspend the cross-examination of this witness till next Tuesday.

Mr. Parsons — Will there result from that an inability on our part to put these papers in evidence, and have them placed in the charge of the Senate as evidence in the case, to be brought in as evidence when the occasion arrives for them?

Mr. Peckham — They can be put in the custody of the Senate.

Mr. Parsons — We wish to put them beyond the reach of technical objections; we want the matter disposed of at the present time.

Mr. Davis — We wish to say that this is a matter of so grave importance and magnitude that inasmuch as we have but about an hour left to examine this witness, that the Senate, as it occurs to me,

should agree with me and my friends upon the other side, that we should have the advantage of our leading counsel in this case; I do not desire that these papers shall be put beyond the reach of what is called technicalities; I desire that Judge McCunn should have the advantage of his counsel in examining this witness; we only ask to suspend this examination until counsel, upon whom we depend, shall be present; I do not desire that one paper be put beyond the reach of what my friend terms technicalities until leading counsel is present in this case; we all know his reputation; it is not only a State, but a national reputation; let him be with us in this trial; I trust the Senate will grant us so much as a right; I move that the cross-examination be suspended until next Tuesday. [Motion carried.]

Mr. PARSONS — I offer in evidence the papers. I do not know what the effect of the granting of the motion is.

Mr. MOAK — I will inquire whether Mr. Parsons has copies of the papers marked A, B and C.

Mr. PARSONS — We have not.

The PRESIDENT — All who have been subpœnaed to attend as witnesses in this trial, will appear here next Tuesday morning at 10 o'clock.

Whereupon the Senate adjourned until Tuesday, June 25th, at 10 o'clock, A. M.

ALBANY, *June* 25, 1872.

The Senate met at 10 A. M., pursuant to adjournment.

The President, Hon. ALLEN C. BEACH, in the chair.

The Clerk called the roll, and the following senators were found to be present:

Messrs. Baker, Bowen, Cook, Dickinson, Graham, Harrower, Palmer, Perry, Robertson, Tiemann, D. P. Wood, J. Wood.

The PRESIDENT — There is no quorum present; what is the pleasure of the Senate?

Mr. GRAHAM — I move, sir, that we take a recess until four o'clock.

Mr. PARSONS — Before the question is put, we should like to have the names of the witnesses who have been subpœnaed called.

Mr. GRAHAM — I withdraw my motion.

Mr. PARSONS — We should be glad to have a list of the witnesses sent to the clerk's desk, and called.

The clerk then read the following list of witnesses:

Mansfield Compton, Abraham B. Clark, Melville B. Clark, Henry B. Herts, Francis N. Bangs, John S. Beecher, Abraham Bininger, Thomas F. Morgan, Joel O. Stevens, Michael J. Kelly, Joseph A. Hoffman, George N. Titus, Allen B. Niver, George E. Hickey, John E. McGowan, Thomas J. Barr.

Of whom the following responded:

Mansfield Compton, Melville B. Clark, Francis N. Bangs, John S. Beecher, James F. Morgan, Joel O. Stevens, Joseph A. Hoffman, George N. Titus, George E. Hickey, John E. McGowan, Thomas J. Barr.

Mr. STICKNEY — We should be glad to have the witnesses informed of the necessity of their attendance here at the hour to which the Senate may adjourn.

The PRESIDENT — The witnesses will be required to attend at 4 o'clock.

Mr. D. P. WOOD — Before any adjournment is taken, I would like to inquire whether there are not some trains coming in from the east and the west that will arrive before 2 o'clock, that would be likely to bring enough senators to make a quorum? If there is we had better take a short recess until after such trains shall arrive.

Mr. PALMER — There is no train from New York before two o'clock.

Mr. D. P. WOOD — There is one from the west about two o'clock. I move, Mr. President, that the Senate take a recess until about 4 o'clock.

Mr. PALMER — If the senator will withdraw his motion for a moment—

Mr. D. P. Wood — Certainly.

Mr. PALMER — I have no idea that the Senate will have a quorum to-day. I move that the clerk be instructed to telegraph the absent senators that there is no quorum.

Mr. J. WOOD — I would like to have it that if the senators are not present, a call of the Senate will be made and they will be sent for.

The PRESIDENT — There being no quorum present, we can transact no business, except to adjourn; and the clerk will telegraph the senators, as requested by the senator from the 11th (Mr. Palmer).

The President then put the question, upon the motion of Mr. D. P. Wood, to take a recess until 4 o'clock P. M., which was carried.

AFTERNOON SESSION.

The Senate re-convened at 4 P. M., June 25, 1872, when the proceedings were resumed.

Mr. D. P. WOOD — Mr. President: At the last session of the Senate there was some difficulty in procuring the attendance of witnesses, and getting returns on subpœnas from lack of force in the department of the sergeant-at-arms, and after consultation with some of the senators it was determined to call in the assistance of another of the regular officers of the Senate, there being no power to employ a new one, and, with a view of carrying out their wishes, I offer the following resolution:

"*Resolved*, That the assistant post-master be added to the list of officers of the Senate heretofore designated to attend this extra session, to serve during such extra session as an additional assistant to the sergeant-at-arms."

The question was put on said resolution and was adopted.

By the PRESIDENT — At the close of the last session, Mr. Boese was on the witness-stand, and the counsel for the prosecution will cross-examine the witness.

Mr. D. P. WOOD — Mr. President: One of the assistant stenographers, not having been sworn in, I move that Chas. G. Tinsley be sworn as an assistant stenographer. The question was put on said motion and it was declared in the affirmative, when Mr. Tinsley was duly sworn.

The following counsel appeared on behalf of Judge McCunn: Hon. HENRY R. SELDEN, N. C. MOAK, Esq., A. C. DAVIS, Esq., W. S. HEVENOR, Esq.

Messrs. PARSONS, STICKNEY and HARRISON appeared as counsel for the prosecution.

CROSS-EXAMINATION OF MR. BOESE.

Cross-examined by Mr. SELDEN:

Q. Have you a list of the papers referred to in your testimony on the direct examination? A. No, sir; it was left with the Senate, and I have not seen it since.

Q. What was that list? what did it contain? A. It was a memoranda of all the papers I was required to produce on this trial; some specially designated; and the latter part of the subpœna directed me to bring all papers appertaining to the suit.

Q. You brought all the papers that you could find that was specially referred to in the notice? A. Yes, sir.

Q. And all the other papers that you find in the cases that were referred to? A. Yes, sir; of every kind and nature, and the memoranda contained the list of all.

Mr. PARSONS — Mr. President: Allow me to say to the counsel of Judge McCunn, that we have the draft of the list of papers from which the subpœna was prepared, and if that will facilitate the examination of the witness, it is at their service.

Mr. MOAK — Does that contain all the papers in the different causes, or all that you desired?

Mr. PARSONS — It contains all the papers that the witness was subpœnaed to produce here; I couldn't tell you whether it contains a list of all the papers in the suits; I presume not, however.

The WITNESS — The subpœna reads: "Together with any and all papers in said action, or either of them; or referring to them or any of them filed in the clerk's office." I supposed that meant all papers of every kind and nature, and, under that, I brought every thing.

Q. I understood you to say in your examination that you did not file all the papers that were mentioned in that memoranda? A. No, sir.

Q. That appeared at some time to have been in the office? A. Yes, sir; I didn't — I would like to state here —

Q. I wish you to explain about that? A. I may have been misunderstood on the direct examination; on my memoranda there are two notes, one of papers on file, and others not on file and never been filed, and I think I was understood to say the mark on the papers not on file and never been filed, meant to imply the same thing; they do not; those marked not on file meant to imply they had been on file and were not on file at the present time; that explanation I would like to make.

Q. The inquiry I wish to make is whether, when you say they are not on file, you mean any thing more than you did not find them? A. That is what I mean; it means more than that, that they were once on file.

Q. Doesn't it happen sometimes that papers get out of their place, and are not found on searches, and are still in the office? A. Yes, sir; sometimes in a multitude of papers; take, for instance, the Benedict case; the papers were taken out of court probably twenty times, and they were used before the judiciary committee of the Assembly, and they took them from the custody of the clerk, and said they had the right to do it, and kept them, and from the marks

on the papers, they bore indications that the original orders were used by the printers in setting them up, and I think some of them were mislaid by that committee, or their officials.

Q. They were also used before Mr. Darlington, as referee? A. Yes, sir; used in the United States Court, I think, and twenty times, I suppose, altogether, and when motions have been made before the special terms.

Q. Among the papers that you handed up and put in before was a list of the judges assigned to hold special terms? A. It was a statement giving the names of judges that held the special terms, I think, from '67; there is a distinction between those who were assigned to and those who held the courts.

Q. Did that indicate any thing more than the judges who commenced holding the terms on those respective days? A. That is all that it did indicate.

Q. Did it happen occasionally there was a change of judges during the day that did not appear in that list? A. If you will permit me to explain, I will state how that is.

Q. Do so. A. It is a common thing, after the judges have made their assignments for the year, from sickness or any other purpose, other judges to agree to act for them; and on such occasions, the record always shows the name of the judge who presided at special term or chambers during that time, but independent of that I presume that is what you want to ascertain; it is a common thing for judges, if you please, occasionally to relieve their associate an hour or so in a special term or chambers; sometimes the judge will want to go away for an hour, or half a day, and the record don't show that change for an hour or so.

Q. The orders which are made in that case would show the name of the judge who made the order? A. Yes, sir.

Q. Does it also occasionally happen, that when a matter comes before a judge in some cause that has been before another judge, that the judge that it is brought before requests the counsel to take it before the other judge, and have him dispose of it, because he is familiar with it? A. That is sometimes done; of course it is an exception to the rule; it is a very common thing in courts, when an application is made of counsel in the proceeding with which another judge is very familiar, for the judge at special term to say, you had better take that order before judge so and so, as he is familiar with the case, and he will know whether the order should be granted or not; that, of course, is no unusual thing, I suppose, in any of

the courts; that is sometimes done, but not very often; it has happened occasionally when a judge is engaged in the trial term, that during the trial, he sometimes makes an order in some non-enumerated matter that comes before him, or *ex parte* matter; for instance, a judge holding a special term is through his business and leaves at 1 or 2 o'clock, and the judge in the adjoining room holding the trial term and counsel who want an *ex parte* order, the judge very often grants it.

Q. Go before the judge at trial term and to get the order from him? A. Yes, sir, when he can do so without interfering with his business; that is often done in all the courts.

Q. How long have you been clerk of the Superior Court? A. Since January, 1872.

Q. Have you been clerk of other courts there, previously? A. I was clerk of the Common Pleas and Special Term and Chambers.

Q. You are an attorney of the court? A. Yes, sir.

Q. Have you also been in practice to some extent? A. Yes, sir; more or less for the last twenty years.

Q. Have you been very familiar with the ordinary course of practice? A. Yes, sir.

Q. At the chambers, and at the trial terms, and motion terms? A. Yes, sir.

Q. During all that time? A. Yes, sir; visiting the courts weekly.

Q. When an *ex parte* order is made by a judge, does he usually hand it with the papers to the attorney to be filed? A. Usually so.

Q. That is the usual practice? A. Yes, sir.

Q. It is the business of the attorney to see they are filed ordinarily? A. Yes, sir. The judge to sign it, and for him to hand the papers to be filed to the clerk, to get a certified copy.

Q. Is the pressure of business upon the judges for orders and the like very continuous? A. At times, very; in all the courts in the city of New York.

Q. At what hour do the courts usually sit for special terms? A. From ten to one, and running through to two or three; the chambers and special term are held in the same room, and the same judge holds both; the special term from 10 to 12, and the calendar right through; orders generally granted from 10 to 12.

Q. The number of cases on the calendar is very large? A. In the vicinity of 2,000; for instance, in the Superior Court, over 1,900.

By Mr. BENEDICT:

Q. That is on a trial term? A. Yes, sir.

Q. About how many orders does the judge usually grant during the sitting of a day there? A. That is almost impossible to answer; sometimes in the heated term, for instance, there are very few; a dozen; sometimes may be 30 or 40.

Q. Sometimes even more than that? A. It is possible, but not often.

Q. Is it usual or regular to apply to another judge for chamber orders that the judge regularly assigned, when sitting at chambers?

Mr. MOAK — We object to whether it was regular or not.

Mr. PARSONS — Then I will subdivide the question.

Q. Is it regular? A. No, sir.

Q. Please now to produce and hand to the clerk of the Senate the papers mentioned in your direct examination, and produced here by you on the subpœna of the Senate. [The same were produced by the witness.]

Mr. DAVIS — We wish to inquire the object of presenting that bundle of papers on the part of the counsel?

Mr. PARSONS—We desire to have the papers placed in the custody of the Senate on the testimony of Mr. Boese, so that when the papers be put in evidence we can call for them from the clerk of the Senate and consider them authenticated by the testimony of Mr. Boese.

Judge SELDEN — I do not consider the papers as evidence against us upon the testimony of Mr. Boese. I simply wish not to be foreclosed upon that question. The question as to whether the papers, as authenticated are against us, can be determined when it arises.

Mr. PARSONS — What we think is, that the Senate will require the continued attendance of Mr. Boese during the whole session of the Senate, and we take it for granted, that his testimony, so far, authenticates these papers as being brought here from the files of the court, as that, if his testimony entitles the papers to be received in evidence, we may offer them as evidence in the case after further examination of Mr. Boese. We desire, if there is to be a cross-examination of Mr. Boese in regard to these papers, that that cross-examination be now completed.

Judge SELDEN — That explanation is sufficient; we simply wish not to be foreclosed as to any particular papers, and such as are records would be authenticated here afterward by this witness. We do not wish to have Mr. Boese stay here.

Mr. PARSONS — That is all, then. It may be entered that the clerk of the Senate takes possession of the papers, so that they will be considered in his possession from this time.

The PRESIDENT — It is so noted.

By Mr. PARSONS:

Q. Since you were subpœnaed as a witness, have you been requested to produce from the files of your clerk's office, other papers, and if so, have you produced the papers which I now place in your hands [handing the same to the witness]? A. I have.

Q. State whether those are original papers, also produced by you from the files of our court? A. Yes, sir; those have been taken from the files of the court.

Q. Are they original papers? A. Original in what sense?

Q. Original in the sense of being originals, and not copies of originals?

By Mr. BENEDICT — Originally filed do you mean?

By Mr. PARSONS — Original files of papers; placed on file as originals? A. I will have to look at them to see.

Q. Please to do so.

Judge SELDEN — Don't the papers themselves show it?

Mr. PARSONS — Perhaps so; but it will be better to take the answer of the witness? A. I can say in reference to these papers, that they appear to be two copies of summons and complaint; this is the regular file mark of one of my clerks, and this other paper appears to be an original undertaking; the mark I think of Judge McCunn.

Judge SELDEN — Be kind enough to state the numbers.

Mr. PARSONS — I will indicate the papers. Summons and complaint, affidavit for injunction — two papers are in two suits. One, that of *Abraham B. Clark* v. *The Bank of America and others;* and the other *Abraham B. Clark* v. *Milton J. Hardy and others;* an undertaking in injunction in the suit of *Abraham B. Clark* v. *Milton J. Hardy and others.*

The WITNESS — The undertaking is approved by the judge.

Q. The affidavit to the complaint, and the affidavit for the injunction in the suit of *Abraham B. Clark* v. *The Bank of America* and others, purporting to be verified before J. H. McCunn, justice — state whether or not the signature J. H. McCunn, justice, is the original signature of Judge McCunn? A. [Looking at same.] Yes, sir.

Mr. PARSONS — The answer is "yes" as to both papers.

Q. The affidavit verifying the complaint, and the affidavit for injunction in the suit of *Abraham B. Clark* v. *Milton B. Hardy and others*, purporting to be verified before James F. Morgan, com-

missioner of deeds, state whether the signature, "James F. Morgan," is the original signature of James F. Morgan now present as a witness? A. I don't know his signature.

Q. The undertaking on injunction in the suit of *Abraham B. Clark* v. *Milton B. Hardy and others* has upon the back, "approved J. H. M;" state whether the initials "J. H. M." are in the handwriting of Judge McCunn? A. I should say it was, sir.

Mr. Parsons, to the witness:

Q. Please now hand to the clerk of the Senate the file papers about which you have been last examined. [Whereupon the witness gave the same to the clerk of the Senate.]

Q. Look at the two affidavits of Abraham B. Clark, made in the suit of *Abraham B. Clark* v. *Abraham Bininger*, both verified 19th November, 1869, and purporting to be verified before J. H. McCunn, justice, and state whether the signature to the verification is in the original handwriting of Judge McCunn? A. Yes, sir; I should so judge it to be.

Mr. Parsons—We desire to have those papers marked for indentification, by the clerk. You will mark them "For indentification, June 25, 1872." They will not be put in evidence now.

Mr. Moak—What propriety is there in singling out various papers and producing them?

Mr. Parsons—They are not papers from the files of the courts; they are papers produced by the witness which we desire to authenticate now, and to be introduced in evidence, subsequently.

Mr. Moak—If the counsel will be kind enough to state what they are, so the stenogragpher may take upon his minutes what they are, in order that we may know what they are, perhaps it will facilitate matters.

Mr. Parsons—They are affidavits in the suit of *Clark* v. *Bininger*, approved November 19, 1869. You can examine them for yourself. [Handing some to respondent's counsel.]

Q. [Showing witness papers.] Look at the two injunction orders now produced to you, one in the suit of *Abraham B. Clark* v. *Milton B. Hardy and others*, dated December 16, 1869, and the other in the suit of Abraham B. Clark against Frederick C. Ives, dated December 10, 1869, and both purporting to be signed by J. H. McCunn, justice, and state whether those orders are signed by Judge McCunn in his handwriting? A. I should say they are both signed; after all the signature to both orders was that of Judge McCunn.

Mr. PARSONS — We wish to have those papers marked by the clerk of the Senate for identification as of this date. [The papers were so marked.]

Mr. PARSONS — That is all.

The PRESIDENT — Any thing further from this witness:

By JUDGE SELDEN — A single other question.

Q. Do you know, Mr. Boese, whether it is customary when a pressing necessity occurs for lawyers to go the judge's house, and obtain orders there out of court? A. I have known cases of that kind where counsel have gone to the residence of judges.

Q. And obtain orders? A. Yes, sir.

Q. Besides Judge McCunn? A. Yes, sir.

Q. Orders to show cause were obtained in that way very frequently? A. Sometimes, but it is the exception and not the rule.

Q. Orders to show cause are not entered until the motion is heard, usually, are they? A. It is not usual; I might state that sometimes counsel obtain orders from the court and neglect to file them for a long time, and sometimes never do it, when they should be on file: but the rule is as suggested.

By Mr. DEVLIN:

Q. The cause is this: if I get an order from the judge to grant an injunction, and an order to show cause why it should not be continued, or a default be taken, it is usual to file that order until the motion is made? A. No, sir; it is not; it is usually filed when the papers are submitted to the judge.

By Mr. PARSONS:

Q. I desire you to state to the Senate to what extent it is usual to apply at the house of a judge, or out of court, for chamber orders; you say it is sometimes done, but it is exceptional? A. Yes, sir; I would state here that it is very seldom done by the judges; as a rule, they consider it wrong to receive applications of that kind at their houses; sometimes under extraordinary circumstances, the judges grant such orders; I do not know that I could express it any better than by saying that it is the exception and not the rule.

Q. Is it very rare? A. Yes, sir; it is rare so to do.

Mr. PARSONS — That is all.

By Mr. DEVLIN:

Q. Is not the reason, if you know the reason, they decline such applications because they don't want to be disturbed at their resi-

dence, about matters of business, and not because they don't think they have the right, or that there is any impropriety of the counsel coming to them in that way? A. I think it is proper to state, Mr. Devlin, that one reason is, that judges think that the judge holding the special term should attend to the business; and another reason is, that they don't like to be disturbed.

Q. But they never put in on the ground that they haven't the right to do it, or that it is improper to do it; did you ever hear that? A. Well, I think, as the rule, that the judges are inclined to think that it is best to have the business done in the court; and after that, when the papers are submitted to the judge, at his residence, of course, then he judges of the propriety of sending the papers to him; I will state here that orders are often granted at their residence, and I have been present myself on such occasions.

By Mr. PARSONS — Answer the question if you please. Do you not know that there is a well-understood feeling on the part of the judges that it is improper to make an application for an order to a judge, at the house, when the application can be made to the judge regularly assigned to hold the chambers?

Mr. MOAK — We object to that question, unless confined to the time in controversy here.

Mr. PARSONS:

Q. I am covering that period of course? A. The very idea of making assignments, is that the judges who perform this duty, in the particular part to which they are assigned, and it is fair to state that judges think as a rule that it is wrong, and sometimes they are subject to censure, for granting orders away from the courts; that has been the case in some of the other courts; although I might state here, that there have been orders granted out of court by most of the judges; orders of a certain kind; it is proper to state that it is not considered the best method of obtaining orders; not considered the best method by the judges.

Q. What is the feeling of the judges so far as it is generally understood, and what is the rule in respect to what judge application shall be made, when application is made out of court; whether to the judge holding the chambers at the time, or to some other judge.

Mr. MOAK — If the counsel will confine his question to a year ago, or some other time, it may be proper. I do not know what the feeling may be now; but I suppose judges now won't dare hardly to grant any order without examining the papers; but the question should cover the period complained of.

Mr. Parsons — I always mean covering that period; and the witness will answer with that qualification.

The Witness — I can state that the rule, so long as I can recollect, has been, that when counsel apply for an order he should go to the judge who has charge of the particular department of court when the application should be made.

Q. Do you mean when the application is for a chambers order, or for a special term order, that the application should be made to the judge assigned to hold chambers or special term? A. Yes, sir; I might explain, and it is fair to state, that sometimes counsel go to the judge's house, and they state that they could not find the judge who holds the chambers regularly; and so they would make application to another judge, who, upon the statement of counsel, would grant the order.

By Mr. Benedict:

Q. I was going to ask whether when you apply to another judge than the judge at chambers, whose business it is to attend to that portion of the business, the judge to whom you apply requires any explanation why you came to him? A. Yes, sir, that is the rule; as a rule, it is so; of course, it is just as the judge sees fit; sometimes it is; he may not do it; I don't know that they always do.

Mr. Devlin:

Q. Do you remember the order of prohibition upon the old board of aldermen on the first day of January last? A. Very well, sir.

Q. Do you know who granted that order? A. I do.

Q. Who was it? A. Judge Brady.

Q. Where was it granted? A. I am not sure where it was.

Q. What day of the month was it? A. I think it was the first day of January.

Q. Were there any courts holding on the first day of January? A. No, sir.

Q. If it was granted on that day it must have been granted out of court? A. I have no doubt it was; I have known of many cases —

Q. That particular case? A. Yes, sir.

Q. That was granted out of court? A. Yes, sir; I wish to be understood as saying that often writs are granted out of court, about which no complaint is made whatever, I presume by every judge on the bench of a court of record in our city.

MELVILLE B. CLARK, a witness called in behalf of the people being duly sworn, testified as follows:

Mr. PARSONS:

Q. Mr. Clark are you the son of Abraham B. Clark? A. I am.

Q. Was Abraham B. Clark the plaintiff in a suit brought in the Superior Court of the city of New York by him against Abraham Bininger, for the dissolution of a copartnership between these two parties? A. He was.

Q. Do you remember the date when that suit was commenced? A. As near as I can recollect it was about the 4th of November; about that time, I think.

Q. What year? A. 1869.

Q. Can you tell by reference to papers what was the exact date upon which the suit was commenced? A. I could.

Q. Had there been a copartnership between Mr. Clark and Mr. Bininger? A. I had always understood they were partners; I never saw the copartnership agreement.

Q. What was the business of the copartnership? A. Wholesale wines and liquors and family groceries.

Q. Where was the business conducted? A. 92 and 94 Liberty street.

Q. How long had you known of the existence of the copartnership, or of the business done by them prior to November, 1869? A. As long as I had known any thing at all; they had always been copartners.

Q. About how many years back of November, 1869; can you recollect? A. Well, I can recollect fifteen or eighteen years, I suppose.

Q. Where did your father reside at that time? A. 117 Park avenue.

Q. In the city of New York? A. In the city of New York.

Q. Did the firm have a stock, and of what, generally, did the stock consist at the time of the dissolution of the firm? A. It was principally liquors.

Q. Give the Senate some idea of the extent of the stock? A. Very large stock; at that time I was not in that business at all, and of course didn't known its real value; I knew it was an immensely valuable stock, but the exact amount I could not say; I supposed always that the stock was —

M. SELDEN — One moment.

Mr. Parsons:

Q. I do not desire to know what you supposed. A. I did not know its exact value.

Q. Have you ever had any thing to do with that business? A. Yes, sir.

Q. And have you any knowledge of the value of a stock of that character? A. I have now; yes, sir.

Q. Please state some sum beyond which, at all events, was the value of that stock? A. Well, it was worth fully $100,000; I should judge more.

Q. At least that? A. At least that.

Q. When did the firm become dissolved, and how, if you know? A. I believe it was on the 19th of November, and by a suit of my father against Mr. Bininger.

Mr. Bininger:

Q. What if any thing had happened before the commencement of the suit; had a notice of any kind been given; and if so state what kind of a notice?

Mr. Moak — We want to object to that, unless he was present; unless the gentleman knows the fact that the notice was given; and if so, it should be produced.

The Witness — I merely know by hearsay.

Mr. Parsons:

Q. Look at the paper now handed to you, and state if you can fix the date when the firm became dissolved, and also state whether there was such a notice, and, if so, when the notice of dissolution was served?

Mr. Moak — We desire to object to that unless this witness was present when the notice was served. His mere conclusion that it was served we certainly desire to object to.

Mr. Parsons — I ask him to state if he knows, and only if he knows?

A. I do not.

Q. Can you, by the aid of the paper, fix the date when the firm became dissolved? A. Yes; it became dissolved on the 19th day of November, 1869.

Q. You state that your father on that day commenced a suit against Mr. Bininger; did any proceeding in that suit take place before Judge McCunn, and if so, when, on that day?

Mr. Moak — That we object to, unless the witness was present.

Mr. Parsons — Precisely; he was present, as we suppose.

Mr. Moak — The counsel's intention may be very good, but from the way the question is put, it would be quite likely for the witness to answer, if he knew only by hearsay.

The President — There is no presumption that the witness will answer any question than the one asked him.

Mr. Stickney requested the stenographer to read the question, which was done.

A. Suit was commenced, I believe, on the last hour of the 18th of November; that is, midnight of the 18th of November.

Q. Now state what, you being present, took place that evening in reference to that suit? A. Papers were drawn up by counsel.

Q. By what counsel? A. Mr. Mansfield Compton.

Q. Now present? A. Now present; my father's attorney; and were proceeded with in the regular way; he went to the judge's house and received the papers from him necessary to go on with the suit, whatever it was.

Q. What judge do you speak of? A. Judge McCunn.

Mr. Devlin:

Q. Did you go there with him? A. I was at the house.

Mr. Parsons:

Q. Who went to the judge's house, and at what hour? A. Mr. Compton, my father and myself, shortly before 12 o'clock on the night of November 18th, 1869.

Q. About what hour of the evening was it that you went to Judge McCunn's house? A. That was about the hour, sir; I don't know more definitely than that.

Q. How shortly before midnight? A. I suppose fifteen minutes would cover the time.

Q. Did you take any papers with you, or were papers drawn on that occasion? A. Papers were taken by Mr. Compton, my father's counsel.

Q. Did you see what the papers were? A. I know it was in this suit to settle this copartnership and appoint a receiver.

Q. Was any thing taken with you other than the papers of which you speak, on this visit to Judge McCunn's house? A. Not particularly that I remember of, except that my father took a couple of bottles of wine.

Q. What kind of wine? A. It was German wine.

Q. Any thing else; any convenience for getting at the wine? A. Not that I know of; there might have been a cork-screw.

Q. Only state what you know, please, sir? A. Well, there was a cork-screw there.

Q. What took place between the time of your reaching Judge McCunn's house, and the time when the clock struck twelve; was there conversation; and if so, what was said, so far as you now remember? A. There was conversation carried on relative to the character of the paper; precisely what it was I don't remember any thing more than it was relative to the papers generally; the subject-matter.

Q. You have stated that the papers were prepared for the appointment of a receiver; was any thing said in this conversation before the clock struck twelve, in reference to the proposed application for the appointment of a receiver, and was any person named who was suggested to be receiver? A. I think that I heard the name of Murray Hoffman suggested; and I heard one or two other names there, but that is the only one I remember distinctly, because I happened to know him by reputation, and I remember his name.

Q. Do you remember who suggested the name of Murray Hoffman? A. I do not.

Q. Was Murray Hoffman appointed receiver? A. He was not.

Q. Was any other name that you can now recall mentioned? A. I cannot recall it.

Q. Was the name of Mr. Hanrahan mentioned? A. Not to my knowledge.

Q. Did you, at that time, know a person by the name of Daniel H. Hanrahan? A. I did not.

Q. Had you heard the name? A. I had not.

Q. Had you been in communication with your father, in respect to the proposed proceedings for the dissolution of this firm, prior to the visit to Judge McCunn's house?

Mr. Devlin—We object to that.

Mr. Parsons—I merely desire to know the fact; I am not going to ask what they said; merely whether you was then in consultation and communication with him in regard to these proposed proceedings? A I don't think I was there at that time; no, sir.

Q. Now state what took place when the clock struck twelve? A. The papers were signed.

Q. Signed by whom? A. Judge McCunn.

Q. Look at the two affidavits which have been marked this day for identification; each entitled in the suit of *Abraham L. Clark* v. *Abraham Bininger & Co.*, purporting to be verified before Judge McCunn on November 19, 1869, and state whether they were

affidavits which on that occasion were signed by your father and verified by Judge McCunn? A. Those I should judge to be the papers.

Q. And are they papers which were taken on that occasion to Judge McCunn's house by Mr. Compton? A. They are.

Q. How shortly after twelve were those papers signed? A. Well, it was just shortly after twelve; when they presumed it was 12 o'clock; I believe there was a short allowance made after it should be 12 o'clock.

Q. An allowance for difference of time, or difference in watches? A. Difference of time; yes, sir.

Q. In the conversation on that occasion, was there any thing said about the stock of this firm, or the value or extent of its stock? A. I remember it was generally alluded to, as a very valuable stock.

Q. Do you remember any amount was stated as being the value of the stock? A. I think my father spoke of an account of stock having been taken a short time previous; I think those were his words, but the amount exactly, I don't remember.

Q. What is your best recollection, if you have any? A. Well, it was a large amount; over $100,000; the exact amount, I do not remember.

Q. Look at the complaint now produced, being the first paper of the judgment roll in the suit of *Clark* v. *Bininger*, that being one of the papers produced by Mr. Boese from the files of the clerk's office of the Superior Court, and state whether that also is one of the papers then signed by your father, and verified before Judge McCunn? A. That is verified on the 19th of November by my father before Judge McCunn.

Q. And is it one of those papers, according to such recollection as you have? A. According to such recollection as I have; yes, sir.

Q. How long after the papers were signed did you, your father and Mr. Compton remain at Judge McCunn's house? A. A very short time; I cannot recollect now how long it was; we sat there in conversation probably half an hour, I should judge.

Q. At any time while you were there, did you hear mentioned the name of Hanrahan?

Mr. Devlin — The counsel has asked that question before and the witness answered "no."

Mr. Parsons — I asked him if he heard that name mentioned before the papers were signed; I now ask him if he heard it mentioned at any time while they were there? A. I did.

Q. Where, according to such recollection as you now have, did

you first hear mentioned the name of Mr. Hanrahan? A. I don't think it was in Judge McCunn's house; I think that was on the return from Judge McCunn's house; I don't think I heard Hanrahan's name mentioned in Judge McCunn's house that evening.

Q. When you left Judge McCunn's house, what became of the papers which had been signed while you were there? A. That I don't recollect.

Q. Did you see what became of any of them? A. No, I did not.

Q. What, if any thing, was done by yourself the next morning with reference to any person, as receiver, taking possession of the stock of the firm?

Mr. SELDEN — That I object to. I don't know that we are responsible for what they did. If Judge McCunn was present, then it may be competent.

Mr. PARSONS — We suppose, sir, that when an illegal act is done, the person by whom the act is done is responsible for the consequences. But we offer this testimony for the further purpose of showing what proceedings were subsequently done and taken before and by Judge McCunn upon the facts that transpired the morning succeeding, or the same morning the appointment of this receiver. We desire to show by the testimony of the witness that this man, Hanrahan, on the morning of his appointment took possession of this stock, and as soon as we can find the order we shall introduce that order showing his appointment as receiver.

Mr. SELDEN — All he knows about Mr. Hanrahan is, that after he left Judge McCunn's house, he thinks his name was mentioned.

The WITNESS — I had the papers in my possession before 10 o'clock the next morning. [The question was put as to whether Mr. Selden's objection should be sustained, and decided in the negative.]

Mr. PARSONS — You may state whether, the next morning, Mr. Hanrahan, as receiver, took possession of the stock?

Mr. DEVLIN — O, no; ask him what he did.

Q. State then what transpired the next morning, within your knowledge, so far as it concerns any possession taken by anybody, of the stock of this firm? A. I received certain papers and proceedings at Mr. Hanrahan's office before 10 o'clock in the morning.

Q. From whom did you receive those papers? A. That I cannot recollect; but I did have them in my possession before 10 o'clock the next morning.

Q. Can you state what the papers were? A. They were the order appointing the receiver and injunction; one thing and another

of that kind; I don't remember the exact nature of the papers; it was the appointment of the receiver and the injunction, or something of that sort, in connection with the suit.

Q. Had you seen these papers previously, and if so, at what time? A. The papers, I suppose, were those I had seen at Judge McCunn's the night previous; the identical papers.

Q. State whether they correspond with the papers you received at Judge McCunn's house?

Mr. SELDEN — I think that won't do.

By Mr. PARSONS:

Q. Well, what is your recollection as to whether they were the same papers that had been at Judge McCunn's house the previous night? A. They were.

Q. What did you do with those papers? A. I handed them to Mr. Hanrahan, and after waiting some time in his office, I went with him and Mr. Gorham to the firm store, 92 and 94 Liberty street, and I pointed out Mr. Bininger to Mr. Hanrahan; Mr. Hanrahan served him with the papers, and took possession of the store.

Q. You haven't yet stated what was the former name of the copartnership; please do so? A. Bininger & Co.

Q. How early in the morning was that? A. That was about 11 o'clock, as near as I can recollect.

Q. Where did you find Hanrahan? A. In Wall street; I think his office is No. 14.

Q. What was his occupation? A. A lawyer.

Q. What was the firm? A. I think it was Morgan & Hanrahan.

Q. Do you know Mr. Morgan? A. I do.

Q. Is he now present? A. I don't see him.

Q. Have you seen him during the session of the Senate? A. I saw him in the morning session.

Q. Do you know whether he is any connection of Judge McCunn, and, if so, what? A. I believe he is a brother-in-law of Judge McCunn.

Q. What was the relation between him and Mr. Hanrahan? A. I think they were partners.

Q. In the law business? A. In the law business.

Q. Do you know any thing about any succession by them to the business of Judge McCunn, or of any connection between them and Judge McCunn in business? A. I do not.

Q. Did you see the sign over their office door, or at their office? A. I don't distinctly recollect; I remember seeing the letter heading.

Mr. SELDEN — We submit that is a good ways away from us.

Q. Have you subsequently seen Judge McCunn at that office? A. I have not; no, sir.

Q. Look at the paper now handed you, being a receiver's bond in the suit of *Clark* v. *Bininger*, and being one of the papers produced by Mr. Boese from the clerk's office of the Superior Court, and state whether that is one of the papers that was presented before Judge McCunn on the occasion of which you have spoken?

Mr. SELDEN — The counsel don't intend to put the question in that form, I think; the proper question is, I think, whether he has ever seen that paper before, and where he has seen it.

Q. Look at the paper shown you, and state whether you have ever seen it before, and if so, where? A. I never saw that before to my knowledge.

Q. Have you ever seen the signature of James F. Morgan? A. I have.

Q. Are you acquainted with his handwriting? A. Pretty well; yes, sir.

Q. State whether this receiver's bond, this paper, is signed by him, or whether that handwriting is his? A. I don't recognize that as being his; it may be; I don't recognize it.

Q. Do you know the signature of Mr. Hanrahan? A. I hardly know it well enough to swear to it.

Mr. PARSONS — We now introduce the original complaint in the suit of *Clark* v. *Bininger;* the two affidavits made by Abraham B. Clark, and verified before Judge McCunn on the 19th of November, 1869, in the suit to each of which the witness has testified; and we also introduce the receiver's bond in that suit produced by Mr. Boese from the files of the clerk's office of the Superior Court.

Q. While those papers are being examined, let me ask you what became of the two bottles of wine? A. I don't know, sir.

Q. What? A. I don't know what became of it.

Q. Where were they, and what became of them down to the time you left Judge McCunn's house? A. I guess we left them behind.

Q. What became of the cork-screw? A. Must have had that, too.

Q. How did that happen to remain there? A. Probably was forgotten.

Q. Was the wine opened when you were there? A. I think one bottle was.

Q. And the other remained? A. Yes, sir.

Q. Was the one bottle that was opened drank? A. I think it was, or the greater portion of it.

Q. Did they all take a part? A. I think they did, if I recollect right.

Q. What part did the judge take? A. That I don't remember.

Q. Did he take any part? A. I suppose he did.

Mr. SELDEN — That part of the judge!

Mr. PARSONS — That is the part for which he is suited.

Q. Is there any objection to those papers?

Mr. SELDEN — Yes, sir; we object to the papers on the ground that they are transactions prior to the time when the judge came into office; we do not suppose it is allowable to go back of the time when he came into office for his acts, as not furnishing a ground upon which he can be removed; I don't know that we have any other objection to the papers.

The PRESIDENT: Do counsel desire to be heard upon the subject?

Mr. PARSONS — Mr. President: We desire to say this; these are papers upon which was founded Judge McCunn's own act present before him, and upon which was made this order, and we are unable to see what objection can be successfully made to them.

Mr. PARSONS — We had supposed that question was passed upon by the Senate in overruling the demurrer in Judge Prindle's case; although this act was prior to the present term of office of Judge McCunn, it is one of a series of acts which continue right down into his present term of office and almost to the present time, as a mere history of the case, with a view of the introduction of evidence of such acts as transpired during his present term of office, and we suppose it is competent in view of the action of the Senate in Judge Prindle's case.

Mr. SELDEN — I do not wish to argue this question now; I am willing it shall be passed upon by the Senate without argument; we don't waive any thing by neglecting to argue the question. [The question was put as to the objection, and it was decided in the negative, and the papers were received in evidence.]

The summons and complaint are in the words following:

EXHIBIT 4.

SUPERIOR COURT OF THE CITY OF NEW YORK.

ABRAHAM B. CLARK, *Plaintiff*,
agst.
ABRAHAM BININGER, *Defendant*.

Summons for relief.

To the defendant, ABRAHAM BININGER:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber at his office, No. 238 Broadway, New York city, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

M. COMPTON,
Plaintiff's Attorney.

Dated New York, *November* 19, 1869.

SUPERIOR COURT OF THE CITY OF NEW YORK.

ABRAHAM B. CLARK, *Plaintiff*,
agst.
ABRAHAM BININGER, *Defendant*.

The plaintiff, by this, his complaint, states:

I. That on or about the 1st day of June, 1861, this plaintiff and the defendant entered into a copartnership, under the firm name and style of "A. Bininger & Co." for the purpose of carrying on the importation and sale of liquors, etc., under the following articles of copartnership heretofore annexed, marked Exhibit "A," and made a part of this bill of complaint.

II. That the plaintiff hath kept and performed said articles of copartnership on his part to be kept and performed.

III. The plaintiff and defendant continued to act as such partners and carry on said business, at the city of New York and elsewhere, under said articles of copartnership, in conformity therewith, from said 1st day of June, 1861, until the 4th day of November, 1869, on which last-mentioned day the said defendant gave this plaintiff the following notice:

"NEW YORK, *November* 4, 1869.

ABRAHAM B. CLARK, Esq.:

Dear sir — Please take notice that under the existing articles of our copartnership agreement providing for its dissolution on giving fifteen days' notice in writing of such dissolution, I hereby give you notice that, on and after the 19th day of November, 1869, the partnership heretofore existing between us, under the firm of A. Bininger & Co., will be dissolved.

Very respectfully yours,
ABRAHAM BININGER."

Whereby said partnership became dissolved on said 19th day of November, 1869.

IV. That the plaintiff and said defendant made their contributions to the capital of said copartnership pursuant to said articles, and thereupon the business contemplated therein was commenced and carried on by them, at numbers 92 and 94 Liberty street in this city and elsewhere, and that they now own said premises, which is very valuable, and other real estate, and a large and valuable stock of goods. That they have also a large amount of debts due them, and a valuable good-will of ninety-three years' standing, which are of far greater value taken together than if separated; and that no equitable division of the assets and good-will of said copartnership can be made without great loss to both parties, except by a sale thereof and a division of the proceeds. That said good-will is of far greater value than the entire assets of said firm.

V. The plaintiff further states and shows that at the time of the formation of the said copartnership, and simultaneous with the execution of said articles, this plaintiff, in consideration of the defendant's advancing to this plaintiff the sum of $45,000, to be contributed to the capital of said copartnership, as his portion or share thereof, this plaintiff executed to this defendant under his hand and seal his individual half interest or share in the stock, trade, goods, wares and merchandise, choses in action, book accounts, belonging to the old firm of A. Bininger & Co., prior to said 1st day of June, 1861, of which this plaintiff and the defendant were equal partners and equally interested therein, excepting certain book accounts and claims in a schedule annexed to said bill of sale; that exhibit B, hereto annexed and made a part of this bill of complaint, is a copy of said bill of sale and schedule annexed thereto.

VI. That, on said 1st day of June, 1861, and at the time of the execution of said bill of sale, and simultaneously therewith, the said

defendant executed to this plaintiff an agreement wherein and whereby for a valuable consideration, therein expressed, the said defendant agreed to and with this plaintiff, that if he would pay or cause to be paid out of his shares and proportion of the net profits of said copartnership to the said defendant on or before the dissolution of said copartnership the sum of $45,000, in said bill of sale expressed, he would retransfer and reconvey to this plaintiff all the property proportions, right, title and interest, or the proceeds thereof, so conveyed by this plaintiff to said defendant; that exhibit C, hereto annexed and made a part of this bill of complaint, is a copy of said agreement last mentioned.

VII. The plaintiff further states and shows that said defendant did not pay to or contribute toward the capital stock of said copartnership the said sum of $45,000, as in said bill of sale expressed, and in accordance with his agreement, as a consideration for the execution of the same; but on the contrary thereof, he only advanced to and contributed the sum of $40,501.

VIII. The plaintiff further states and shows that since the formation of said firm there has been collected and placed into said firm, of said debts, claims and demands, receipts from the operation of said bill of sale, the sum of $35,000, one-half of which sum belongs to this plaintiff, and which the plaintiff claims was a payment on said sum of $40,501, so advanced as aforesaid.

IX. The plaintiff further shows and states that on or about the 22d day of July, 1865, this plaintiff paid to the said defendant, by the sale or purchase by him (the defendant) of certain lands on River Creek, in the State of Virginia, $22,363.13, of which sum this plaintiff stands credited on the books of said firm as against said advance hereinbefore mentioned by said defendant, which sum, together with the interest thereon from the day of said sale, this plaintiff is entitled to set off against said $40,501.

X. The plaintiff further shows and states that, on the 9th day of November, 1869, the plaintiff notified the said defendant in writing, that he appropriated so much of his share, proportion and interest of the net profits of said farm as would pay and liquidate the said sum of $45,000, in said agreement provided, and at the same time demanded a reconveyance over, and transfer of said real estate property, assets, claims and demands in said bill of sale so conveyed to said defendant on the 1st day of June, 1861; that exhibit "D," hereto annexed, is a copy of said notice, and made a part of this bill of complaint; that said defendant has not reconveyed and retrans-

ferred said property, or any part thereof, but, on the contrary, has refused and still refuses to retransfer and reconvey the same.

XI. The plaintiff further shows and states, that the said defendant has, since the formation of said copartnership, without the consent of this plaintiff, withdrawn from said firm the sum of $50,000, in cash and notes, for the benefit of his brother, Andrew Bininger, and for which he has taken security to himself individually, and not to said firm, and that said sum is a dead and outstanding claim against the said Andrew Bininger; and that said defendant denies to this plaintiff any and all interest in and to said security or participation therein.

XII. The plaintiff further shows and states, that the said defendant has, since the formation of said copartnership, withdrawn from said firm, without the consent of this plaintiff, the sum of $25,000, of the firm's notes, which he loaned to one David Wagstaff, a brother-in-law of said defendant, a part of which notes have been paid by said firm; and a part of which are still an outstanding claim against said firm; that the said Wagstaff has failed, and said sum of $25,000 is a dead and outstanding claim in the hands of said firm against the said Wagstaff.

XIII. The plaintiff further shows and states, that the said defendant has, since the formation of said partnership, without the consent of this plaintiff, withdrawn large and exorbitant sums from said firm for private uses and personal expenses; that during the defendant's absence in Europe, in the years 1865 and 1866, as hereinafter stated, the defendant drew enormous sums of money from said firm, amounting, in the aggregate, to $40,000, and upward; that said drafts upon said firm greatly embarrassed and crippled their business, and made it necessary to raise money on the stock.

XIV. The plaintiff further shows and states that, in July, 1865, the defendant went to Europe, and returned in November, 1866, that during said defendant's absence the entire control and management of the business of said firm was left to this plaintiff, as a partner thereof; that he bought goods, signed notes and checks, all of which acts and doings have been ratified by the said defendant; and he, the plaintiff, further says, that he signed the checks of said firm as such partner up to the said 9th day of November, 1869.

XV. The plaintiff further shows and states, that the period covered by the defendant's absence in Europe, as aforesaid, was the most profitable year of any time during the continuance of said copartnership; and that said firm made, during said year, over $60,000; that said firm has done a large and profitable business since said 1st day

of June, 1861; that the profits of said firm since said 1st day of June, 1861, to the 4th day of November, 1869, amount to, in the aggregate, $300,000, upwards.

XVI. That by reason of the withdrawal from said firm said sums of money and notes, the said firm became crippled and embarrassed in their business, and were compelled to borrow large sums of money at different times, at ruinous rates, to replace the moneys so withdrawn by said defendant; that, on or about the 4th day of November said firm was compelled to suspend payment, and the plaintiff charges that said suspension was attributed mainly to the acts and doings of said defendant, as hereinbefore mentioned, and in the fiscal management of the affairs of said firm.

XVII. The plaintiff further shows and states, that said defendant has, since said suspension, usurped the entire control and management of said business, and has deprived to this plaintiff any right or voice in the liquidation or management of the same, and has threatened to kick this plaintiff out of their said store, Nos. 92 and 94 Liberty street, on and after the 19th day of November instant (1869), if he interferes in any manner with the settlement of said business.

XVIII. The plaintiff further shows and states, upon his information and belief, that said defendant has since said suspension, opened an account in the Atlantic Bank in the city of New York, as executor, in which he has deposited all the receipts of money received by said firm since said suspension, as executor; and the plaintiff charges and verily believes that the opening of said account and the depositing of said moneys as aforesaid, is for the purpose of converting said moneys to his own use, and to deprive this plaintiff of his rights in said firm.

XIX. The plaintiff further shows and states that the assets of said firm amount to the sum of $500,000, or thereabouts. That the entire indebtedness of said firm does not exceed the sum of $200,000, $135,000 of which is borrowed money at enormous and ruinous rates, some part of which is due to friends of said defendant, and which the said defendant is interested in, in some manner, as the plaintiff is informed and believes, and so charges this fact to be, and if the management and settlement of said business be left to said defendant, the right and interest of this plaintiff and creditors of said firm will be greatly jeopardized, if not sacrificed.

XX. The plaintiff further shows and states that the said defendant has drawn, since said 1st day of June, 1869, from the assets of said firm, for interest on said $45,000, the following sums; In January, 1869 the sum of $1,019.65; February 28, $950.12; March 31,

$953.36; April 30, $990.40; May 31, $1,018.69; June 30, $930.55; June 3, $650; July 31, $1,094.24, and that previous to said 1st of January, 1869, from said 1st day of June, 1861, about $7,000 a year.

XXI. The plaintiff further shows and states that the stock in trade and assets of said firm on said 1st day of June, 1861, at the time of the execution of said bill of sale amounting to and were of the value of $156,227.78, and their book accounts, notes, etc., belonging to said firm, were of the value of $50,000; real estate on Liberty street, $125,000, subject to a mortgage of $24,000; on Thames street about $40,000, subject to a mortgage of $4,000.

XXII. The plaintiff further shows and states that at the time of the serving of said notice by this plaintiff on said defendant, hereinbefore mentioned, there was a sufficient sum of the net profits, or share thereof, belonging to this plaintiff, to have paid and discharged any sum due and owing to said defendant by reason of said advance or loan to this plaintiff on said first day of June, 1861.

XXIII. The plaintiff further shows and states that upon a final accounting between this plaintiff and said defendant, there will be a large sum found due to this plaintiff (after paying all just debts of said firm) over and above all advances or other sums made by said defendant to this plaintiff or said firm.

Wherefore, the plaintiff demands judgment that the said partnership be dissolved; that a receiver of the property, rights and good-will of said partnership, be appointed, with power to dispose of the same for the benefit of all parties entitled thereto, and that the proceeds thereof be divided, after the payment of all just debts of said partnership and costs of this action between the parties hereto, according to their respective rights, and that the defendant be enjoined and restrained from interfering with the property, rights and good-will of said partnership.

M. COMPTON,
Plaintiff's Attorney.

City and County of New York, *ss.:*

Abraham B. Clark, the plaintiff above named being duly sworn, says the foregoing complaint is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

Subscribed to before me this 19th day of Nov., 1869.

ABM. B. CLARK.

J. Kenyon, *Justice.*

NEW YORK, *November* 9, 1869.

ABRAHAM BININGER, Esq.:

Sir — Take notice that I hereby appropriate so much of my share, proportion and interest of the net profits of the firm of "A. Bininger & Co.," as will liquidate the sum of $45,000, provided for in the agreement of the undersigned and yourself on June 1, 1861. And I hereby demand of you the immediate reconveyance to me of all my share, proportion and interest of, in and to, the stock in trade, goods, wares and merchandise belonging to the firm of "A. Bininger & Co.," of which was conveyed to you under and by virtue of a "bill of sale" dated the 1st day of June, 1861. And, also, a reconveyance of all those certain pieces and parcels of land situate, lying and being in the city and county of New York, distinguished by numbers 92 and 94 Liberty street, and 18 and 20 Thames street, as provided in said agreement of June 1, 1861, and as conveyed to you by a certain indenture bearing date the 1st day of June, 1861, between the undersigned and Isabella, his wife, and Abraham Bininger, and recorded on the 6th day of July, 1861, in liber 843, page 214, in the register's office of the city and county of New York.

ABRAHAM B. CLARK.

Served by J. W. J., Nov. 9, 1869, on Abraham Bininger, corner Thames and Liberty streets.

ARTICLES OF COPARTNERSHIP made this 1st day of June, in the year one thousand eight hundred and sixty-one, between *Abraham Bininger*, of the city of New York, of the first part, and *Abraham B. Clark*, of the said city, of the second part.

WHEREAS the said parties to these presents have heretofore been partners in trade, transacting business under the name and style of A. Bininger & Co., in pursuance of articles of copartnership heretofore made and executed between them.

AND WHEREAS, the said party of the second part hereto, hath sold, assigned, transferred and set over, unto the said party of the first part, all his share, proportion and interest, stock in trade, goods, wares and merchandise, book accounts, promissory notes, things in action, property, assets, and effects, of what nature and kind soever, and wheresoever situate, belonging to said firm, saving and excepting sundry specified book accounts, claims and demands, to have and to hold the same for his own sole use and benefit forever.

AND WHEREAS, the said party of the first part desires to retain the benefit and advantage of the knowledge and skill of the said party

of the second part in the business heretofore carried on by them, and the said parties have determined to continue their said copartnership, but it has been agreed between the said parties, that the covenants, stipulations and agreements contained in the said articles of copartnership, heretofore made and executed, shall cease, and that the affairs of the said copartnership, and the rights, shares and interests of the said parties respectively, shall be as the same are hereafter established. *Now, therefore,* these presents witness, that the said parties have agreed to and with each other, in manner and form following, that is to say:

First. The said partnership shall be carried on as heretofore, under the name, style and firm of A. Bininger & Co.

Second. All the fiscal transactions of the said firm, of what nature or kind soever, shall at all times be and remain under the sole and exclusive control and management of the said party of the first part.

Third. That the said party of the second part shall not, nor will sign nor indorse any bill, bond, note, specialty, nor make use of the name of the firm at any time during the continuance of this copartnership, without the express license and consent of the said party of the first part, and no longer and for no other purpose than for the period and purpose such express license shall justify.

Fourth. All the stock in trade, goods, wares and merchandise of the said firm, and all money in banks and elsewhere, book accounts, promissory notes, claims and demands, and all assets, property and effects whatsoever, used in or belonging to the said joint trade and business, shall be the sole and exclusive property of the said party of the first part; and on the termination of this copartnership, as herein limited or sooner, dissolution thereof shall be held and retained by the said party of the first part; subject to an accounting for the proportion of the said party of the second part in the net profits of the said copartnership, as hereinafter provided.

Fifth. An account of all the stock in trade and of the debts and credits of the said copartnership, shall be made on or about the 1st day of March, in each year, during the copartnership, and the net profits of the said joint trades shall then be ascertained and determined, and the same shall be appropriated to the said parties as follows, that is to say: The sum of $7,000 shall be first set apart to the credit of the said party of the first part, as compensation for the use of his capital and stock in trade in said copartnership, the residue of said net profits shall then be divided into two equal parts, and one-half thereof shall be set apart to the credit of the said party of the first part and the remaining half to the said party of the second part.

Sixth. The said party of the first part may draw from the concern the whole or such part of the net profits to be set apart to him as aforesaid, as he shall deem proper, and also so much of the capital used in the said concern as he may deem proper, over and above the sum of $100,000, which sum shall always be retained therein. The said party of the second part shall not draw from the portion of the net profits which shall be set apart to him as aforesaid, more than $6,000 in any one year, and not exceeding $500 in any one calendar month.

Seventh. Each of the said parties shall be allowed lawful interest on his portion of the net profits of said firm as shall not be withdrawn by him.

Eighth. This copartnership shall continue until the 1st day of March, in the year 1866, subject, however, to be previously dissolved by either of the said parties after fifteen days' notice to the other of them.

In witness whereof the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

ABRAHAM BININGER. [L. S.]
ABRAHAM B. CLARK. [L. S.]

Sealed and delivered in the presence of Edward De Witt.

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } *ss.:*

On this ninth day of July, A. D. 1861, before me came Edward De Witt, the subscribing witness to the foregoing instrument, to me known, who being by me duly sworn, saith that he resides in the town of Yonkers, in the county of Westchester; that he knows Abraham Bininger and Abraham B. Clark, the individuals described in and who executed the said instrument, and that the same was executed and acknowledged by them in deponent's presence, and that he, the deponent, thereupon subscribed his name as a witness thereto.

JAMES G. COOPER,
Commissioner of Deeds.

WHEREAS, Abraham B. Clark has sold, assigned, transferred and conveyed to Abraham Bininger all his share, proportion and right, title and interest in and to all the partnership assets, property and effects of what nature and kind soever, in possession or belonging to the mercantile firm of A. Bininger & Co., saving and excepting sundry specified book accounts, claims and demands, and also in and to certain real estate situate in the city of New York, distinguished by the numbers 92 (ninety-two) and 94 (ninety-four) Liberty street, and 18 (eighteen) and 20 (twenty) Thames street.

And whereas, The said Abraham B. Clark and Abraham Bininger have entered into new articles of copartnership under the said name and style of A. Bininger & Co., whereby it is agreed that the net profits of the said copartnership shall be equally divided between the said parties, after paying thereout to the said Abraham Bininger the sum of $7,000 per annum, as compensation for the use of his capital and stock in trade.

And whereas, The said Abraham B. Clark, desires an opportunity to re-purchase from the said share and proportion, and right, title and interest in the said assets, property and effects of the said copartnership and in said real estate.

Now, therefore, this agreement witnesseth that the said Abraham Bininger, party of the first part, to these presents, in consideration of these premises and of the sum of one dollar, hereby promises and agrees, to and with the said Abraham Bininger Clark, party hereto of the second part, that if he, the said Abraham B. Clark, shall and will pay, or cause to be paid, to the said Abraham Bininger the sum of $45,000, on or before the dissolution of the said copartnership, either in accordance with the limitation thereof, specified in said agreement, or in accordance with the notice for that purpose in said agreement, provided then, that he, the said Abraham Bininger, shall and will re-transfer and re-convey to the said Abraham B. Clark all the said share and proportion, right, title and interest so conveyed and transferred by said Clark to said Bininger, as above mentioned, or the proceeds thereof. And the said Abraham Bininger Clark hereby promises and agrees that he will purchase the said share, proportion and interest, and pay for the same in the manner aforesaid, and for that purpose will appropriate all his share and proportion of the net profits of the said copartnership over and above the annexed sum of $6,000 specified in the said articles of copartnership.

Signed and sealed this first day of June, in the year one thousand eight hundred and sixty-one.

ABRAHAM BININGER. [L. S.]
ABM. B. CLARK. [L. S.]

Witness: The words "saving and excepting sundry specified book accounts, claims and demands," interlined between the fifth and sixth lines on first page, and the word "argument," at the end of the instrument, erased, and "articles of copartnership" interlined, all before execution.

Edward De Witt.

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } *ss.:*

On this ninth day of July, A. D. 1861, before me came Edward De Witt, the subscribing witness to the foregoing instrument, to me known, who being by me duly sworn, saith that he resides in the town of Yonkers, in the county of Westchester; that he knows Abraham Bininger and Abraham B. Clark, the individuals described, and who executed the said instrument, and that the same was executed and acknowledged by them respectively in deponent's presence, and that the deponent thereupon subscribed his name as a witness thereto.

JAMES G. COOPER,
Commissioner of Deeds.

KNOW ALL MEN BY THESE PRESENTS, that I, Abraham B. Clark, of the city of New York, of the first part, for and in consideration of the sum of $45,000, lawful money of the United States, to me in hand paid, at or before the ensealing and delivery of these presents, by Abraham Binninger, of the said city of New York, of the second part, the receipt whereof is hereby acknowledged, have bargained and sold, and by these presents do grant and convey unto the said party of the second part, his executors, administrators and assigns, all my share and proportion, and interest of, in and to the stock in trade, goods, ware and merchandise belonging to the firm of A. Bininger & Co., of which I am a member, now being in the city of New York, or wherever else the same may now be; and also all the book accounts, promissory notes, things in action, claim and demands whatsoever; and all other assets, property and effects belonging to the said firm, saving and excepting all my share, right, title and interest in and to the book accounts, claims and demands specified in the schedule hereto annexed; to have and to hold the same unto the said party of the second part, his executors, administrators and assigns forever. And I do for myself, my heirs, executors and administrators, covenant and agree to act with the said party of the second part, to warrant and defend the sale of the said property, share, proportion and interest hereby sold unto the said party of the second part, his executors, administrators and assigns, against all and every person whomsoever.

In witness whereof, I have hereunto set my hand and seal, the first day of June, in the year one thousand eight hundred and sixty-one.

ABRAHAM B. CLARK. [L. S.]

Sealed and delivered in the presence of Edward De Witt.

Schedule referred to in the within bill of sale:

Blair & Chamberlayne, Richmond, Va	$1,224 32
J. P. & S. E. Ballard, Richmond, Va	1,287 42
J. P. Ballard, Richmond, Va	10,230 00
E. W. Tompkins, Richmond, Va	1,985 58
Minnis & Co., Richmond, Va	447 57
White & Young, Petersburg, Va	71 26
Henry Paunill, Petersburg, Va	63 68
G. W. Sutherland, Petersburg, Va	359 98
J. L. Carrington & Co., Richmond Va	1,212 52
J. L. Carrington, Petersburg, Va	533 87
Alex. Wilson, Petersburg, Va	721 98
A. D. Thompson, Petersburg, Va. ($657.50, $48.28)	405 78
S. R. Ausman, Hampton, Va	153 70
Walker Mears, Wilmington, N. C	336 20
Jas. Cassidy, Wilmington, N. C	671 05
I. G. Burr, Wilmington, N. C	36 00
J. H. Flamm, Wilmington, N. C	192 00
——— ———	37 25
S. J. Carter, Nashville, Tenn	2,984 40
Kendig & Cook, Memphis, Tenn	50 00
T. T. Tobin, Houston, Tex	545 55
A. G. Rathburn, Galveston, Tex	102 78
J. M. Hall, Hall's Bluff	1,284 21
T. A. Caswell, St. Louis, Mo	1,774 21
Scanlan Bros., St. Louis, Mo	2,539 05
R. M. Scanlan, St. Louis, Mo	441 36
C. Gautier, Washington, D. C	1,771 49
M. D. & T. R. Fields, Washington, D. C	1,677 41
Jno. Libby, Washington, D. C	1,264 58
——— ———, Charleston, S. C	4,222 50
M. S. Foote, Savannah, Ga	556 40
M. Duggan, Savannah, Ga	1,097 06
V. R. G. Ross, Savannah, Ga	253 44
A. Bhuee, Savannah, Ga	67 38
R. Bradley, Savannah, Ga	18 00
S. B. Robbins, Augusta, Ga	934 55
H. Sanford	20 00
Van Marcus, Columbus, O	1,193 56
H. Cook, Columbus, O	515 93
Wm. Whippler, Macon	1,662 34
E. Manssenst, Macon	573 28

Asa Holt, Mobile, Alabama	$2,441 48
M. H. Rayford, Mobile, Alabama	680 53
—— ——, Huntsville, Alabama	2,527 23
W. C. Raymond, New Orleans, La	605 75
McLean & Obl, New Orleans, La.	451 55
Jas. Syms, New Orleans, La	2,348 00
James Donovan	976 18

ABM. B. CLARK.

Indorsed: Superior Court. *Abraham B. Clark* v. *Abraham Bininger.* Summons and complaint. M. Compton, plaintiff's attorney, 231 Broadway. "Exhibit 4." C. R. D. Filed November 24, 1869.

Mr. PARSONS — We desire now to have it noted that unless the other side desire, we do not put in evidence the two affidavits which were testified to by Mr. Boese, and the present witness. We next read the receiver's bond.

Mr. DEVLIN — Mr. President: If the counsel will allow me to interrupt him, the counsel on this side of the chamber consider it vital that all these papers should be printed in full, in order to see that a good case was made out before Judge McCunn in issuing an injunction, and appointing a receiver on the dissolution of the partnership. Not only the complaint, but all the affidavits which were submitted to him.

Mr. PARSONS — Do the counsel on the other side deem it necessary first to print the original complaint and the copy?

Mr. DEVLIN — Only the original. We think it was proper to show by the witness all the papers before Judge McCunn at the time the order was made, but one of those papers consists of a copy of the original complaint, then also before him, with two affidavits referring to that copy. We don't think it material to put in evidence those papers, inasmuch as they are not much more than a duplication of the original complaint, then the affidavits should go in, and the reference will be the original complaint, and the affidavits?

Mr. PARSONS — No objection to that. The two affidavits, testified to by the witness as being verified November 19, 1869, before Judge McCunn, is also offered in evidence, but that the copy complaint referred to in one of those affidavits is not to be printed, it being copy of original complaint, which has been marked "Exhibit 4," and the affidavits will be marked Exhibit 5 and 6.

Exhibit "C."

SUPERIOR COURT — City of New York.

Abraham B. Clark
agst.
Abraham Bininger.

City and County of New York, ss.:

Abraham B. Clark, the plaintiff above named, being duly sworn, says that this action has been actually commenced against the said defendant for a settlement of partnership between the plaintiff and defendant, upon the summons and complaint of the plaintiff, a copy of which is hereto annexed and made a part of this affidavit; that he has read the said complaint in this action and knows the contents thereof; that he is familiar with all the material matters stated in said complaint, and has actual knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes to be true, and that, from such knowledge, he knows that the matters of fact therein are true.

ABRAHAM B. CLARK.

Subscribed and affirmed to before me this 19th day of November, 1869.

J. Kenyon, *Justice.*

Exhibit 5.

SUPERIOR COURT OF THE CITY OF NEW YORK.

Abraham B. Clark
agst.
Abraham Bininger.

City and County of New York, ss.:

Abraham B. Clark, the plaintiff above named, being duly sworn, says: That on the breaking out of hostilities between the North and South, known as the "southern rebellion," and the general discredit of the houses, having done business with the South, together with the sudden cutting off of remittances from that quarter, rendered it prudent for said firm of "A. Bininger & Co." to increase their working capital. That said defendant proposed to this deponent, on or about the said 1st day June, 1861, to furnish the amount of capital required, if deponent would execute to him a bill of sale of his interests in the assets of said firm at that time, as a security for his proportion of said loan or advance. That in this extremity, deponent executed to

said defendant in confidence, said "Exhibit B" in said complaint mentioned, reserving his one-half interest in the collection of debts due from Southern debtors to said firm, and took back from said defendant a deficience of the same, marked "Exhibit C," mentioned in said complaint. That said "bill of sale" was not intended as an absolute conveyance of said deponent's in said firm, but only a security for said advance or loan. That said advance or loan is the same, and is the only consideration for the execution of the said "bill of sale" or "Exhibit C," mentioned in the complaint. Deponent further says: That he and said defendant entered into copartnership with one Fisher, in the year 1821; that said defendant did not take any active part in said business until the year 1836; that, from the year 1821 to said 1836, the business was conducted and managed by this deponent and said Fisher, and that from 1836 to the 1st day of June, 1861, this deponent chiefly conducted and managed said business.

ABM. B. CLARK.

Subscribed and affirmed before me this 19th day of November, 1869.

J. KENYON, *Justice.*

Indorsed: Exhibit 5, C. R. D.

The next read in evidence, the receiver's bond in the same suit, upon which was made the order appointing the receiver. It is a bond executed by Daniel H. Hanrahan as principal, and of Jas. F. Morgan and Wm. R. Gorham as sureties. It purports to be in the sum of $10,000. It is acknowledging and the justification of the witness dated November 19, 1869. The bond is dated November 18, 1869. It is indorsed "I approve of the within bond, and of the sufficiency of the sureties, November 19, 1869."

JOHN H. McCUNN, *Justice.*

Filed *November* 19, 1869.

The PRESIDENT — Any thing further from this witness?

Mr. PARSONS — Yes, sir.

Q. Mr. Clark, where did you reside in November, and succeeding November, 1869? A. 47 Park avenue.

Q. With your father? A. Yes, sir, with my father.

Q. You have spoken of your going to Judge McCunn's residence; where was his residence at that time? A. Twenty-first street, west of Seventh avenue.

Q. Down to that time, had there been any acquaintance between your father and Judge McCunn, or any member of your father's family, so far as you know? A. There had not.

Q. Did you, subsequent to Mr. Hanrahan's taking possession of the stock of the firm, have any interview, or were you present at any interview with Judge McCunn? A. Yes, sir, I was.

Q. When and where was it? A. Shortly after the commencement of the suit, at my father's house.

Q. How shortly after the commencement of the suit? A. I do not remember exactly; I should judge it was six or seven days afterward; five or six days.

Q. At what hour? A. Generally quite late; near midnight.

Q. From the time Hanrahan was appointed receiver, on how many occasions do you know Judge McCunn to have called at your father's house? A. Oh, several times; I don't remember, precisely.

Q. How many such occasions do you remember? A. Distinctly, I could remember three or four occasions.

Q. State what took place on the first occasion when Judge McCunn so called? A. I think it was in relation to the federal suits which had been commenced, or something of that nature.

Q. How long was he present there? A. On that occasion I think he was present probably upward of two hours, as near as I can recollect.

Q At what hour did he come? A. Probably 11 o'clock, or may be half-past 10.

Q. Do you remember an order, or any order made in the suit of Clark against Bininger, by Judge Fithian? A. I remember the suit before him.

Q. Some proceedings before Judge Fithian? A. Yes, sir; some proceedings before him.

Q. Do you remember any conversation at your father's house, between Judge McCunn and your father, in respect to any order granted by Judge Fithian? A. Yes, sir; I remember he advised the employment of Clark, Fithian's partner.

Q. When was that? A. That was shortly after the commencement of the proceedings.

Q. Can you state whether or not that was the first occasion when Judge McCunn was to your father's house? A. I think it was.

Q. And how shortly after the commencement of the suit? A. Well, it could not have been more than five or six days; five days, probably.

Q. What was said at that time in respect to any order which had been made by Judge Fithian, that had been made or would be made? A. I don't remember positively; I know that Judge McCunn ad-

vised the employing of Clark; he said he was a very able lawyer and advised his employ.

Q. What was it that Clark was to be employed to do, according to what was said at that time? A. That I don't really recollect; some motion to be made or something of that kind.

Q. Before what judge was such motion to be made; what was said in that interview in respect to the proceeding that was to take place before Judge Fithian? A. I don't remember what the case was about, except that Clark was to be employed, and the case was to come up before Judge Fithian; what the exact nature of it was I do not at this time remember.

Q. Did your father know Mr. Clark at that time? A. He never had met him before to my knowledge.

Q. What did Judge McCunn say in reference to Clark? A. He said he was a very able lawyer, and that he was a partner of Judge Fithian, and would have great weight with him, or matter to that effect.

Q. Was Judge Fithian a judge of the Superior Court. A. He was.

Q. The same court as Judge McCunn presided over? A. Yes, sir.

Q. How long was Judge McCunn present at your father's house on that occasion? A. Probably an hour.

Q. Who were present at the interview besides yourself and Judge McCunn, if anybody? A. I believe Mr. Compton and Mr. Hoffman, my brother-in-law, and one on two members of the family.

Q. What members do you refer to? My mother was present, and my sister, and probably my brother.

Q. Do you remember any occasion when Judge McCunn was at your father's house and any thing taking place about any proposed settlement of this suit of your father against Mr. Bininger, and if so, I desire you to state what transpired on that occasion while Judge McCunn was present? A. I remember the proposition made by Mr. Bininger, through Mr. Titus; was presented to my father, and he in courtesy to Judge McCunn, and the kindness he had apparently taken about our family, asked Judge McCunn's opinion about it, and Judge —

Q. Where did this take place? A. At our house.

Q. What time? A. Probably 11 o'clock at night.

Q. What time did Judge McCunn reach your house, after 11 o'clock? A. Probably a little earlier, or about that.

Q. Do you know how he happened to come? A. I believe he was invited to the house for this purpose.

Q. Now you may state what took place in the interview? A. Their proposition for a settlement, drawn up by, I think, Mr. Titus, on behalf of the creditors, and also of the parties to their suit, proposing a settlement, which Judge McCunn seriously objected—

Q. One moment, sir; proposing a settlement of what? A. Proposing a settlement of the difficulties and claims of the creditors upon the concern generally.

Q. What had the settlement to do with the suit pending between your father and Mr. Bininger?

Mr. Devlin — Suppose you let the witness make the explanation.

Mr. Parsons — He can make it if he knows.

Mr. Devlin — May it please, Mr. President, the counsel upon the other side, almost all through this examination, has been asking questions involving the answer, being leading, or taking the witness' inference instead of what was said and done: "What did you understand? what did you consider? and matter of that sort. I respectfully submit that the proper way to examine him, is to ask him to state what was said on that occasion. Undoubtedly, he has a right to call his attention to any particular topic, but not to ask his understanding, or consideration, or conclusion, but let us know what was said and done.

Witness — All suits were to cease between my father and Mr. Bininger —

Mr. Devlin — I object to that kind of an answer; let him state what was said and done.

Mr. Parsons — Mr. President: I think we shall keep within any rule that the other side will be disposed to lay down.

Q. What, Mr. Clark, was said, if any thing, in the interview, as to what the settlement was to be in regard to any pending suits? A. It was a settlement of the copartnership debts, and the payment of the existing debts, by their surrendering their joint property, and they were to be released from their individual property, should the partnership property fail to cover an amount sufficient to pay the creditors, and all suits between the two parties, then existing, were to cease.

Q. Were there at that time pending any suits between your father and Mr. Bininger, except their suit in which Judge McCunn had appointed a receiver, and which was pending in Judge McCunn's court? A. I think there was not.

Q. Were any papers produced in that interview. A. There was this original agreement.

Q. You have spoken of Mr. Titus as having prepared this proposed settlement; who was Mr. Titus? A. Mr. Bininger's counsel.

Q. Is Mr. Titus now present as a witness? A. He is now present.

Q. He is the gentleman to whom you referred? A. Yes, sir; I believe he drew up the paper as Mr. Bininger's counsel, as I supposed he was.

Q. When did you first see this paper? A. That afternoon.

Q. Prior to the interview when Judge McCunn was present? A. Yes, sir.

Q. State what was said or done by Judge McCunn on that occasion in respect to this proposed amendment? A. Judge McCunn objected.

Mr. DEVLIN:

Q. What did he say; how did he object; what were his words? A. He said, "Mr. Clark, if you sign that paper you sign your death warrant; I will draw you up a paper and you can offer that to the creditors, and if they accept that then you will be all right; but this will be your death warrant if you sign it."

Q. How long did that interview last? A. Quite a long time; I should say fully two hours, if not over.

Q. Did Judge McCunn draw up any thing while you were there? A. Yes, sir; he drew up a memorandum and he read a number of points in it, and said he would draw up another one different from that at his house more fully.

Q. Was that paper left with your father, or was it taken away by Judge McCunn; what became of it? A. It was taken away by Judge McCunn, so far as I know.

Q. Did you hear it read? A. I heard the points read.

Q. State what you heard read? A. I can't remember that exactly; the subject-matter of it I cannot remember exactly; it was in relation to some new startled proposition to settle pending difficulties, but what the precise language of it was I cannot state now.

Q. Did you hear it read, or did you read yourself the paper which had been prepared, as you understood, by Mr. Titus? A. I had read it; yes, sir.

Q. (Showing paper). Will you look at the paper now handed you and state whether you can now recognize that? A. It is written; that is a copy made by myself.

Q. Copy made when? A. On the 24th of March, 1870.

Q. Made from what? A. It must have been made from some

original document, because this is my handwriting, and I certainly copied it.

Q. Fix as near as you can the date of this interview? A. I can't tell that; I can't recollect that unless I could think for a while, and bring together some surrounding events; it must have been probably about this time.

Q. About what time? A. Twenty-fourth of March, 1870.

Q. Do you remember making that copy? A. Yes, sir, I do, very well.

Q. Did you make that copy before or subsequent to the interview when Judge McCunn was present? A. I think, sir, that was previous, but as to that I am somewhat at a loss.

Q. Can you remember whether the paper presented at the interview was the original from which you made that copy, or whether it was that copy? A. That is a copy.

Q. That's not my question; can you recollect which was present at the interview? A. The original, from which I prepared this copy.

Q. That you are sure about? A. Yes, sir.

Mr. PARSONS--We propose to read in evidence this copy.

Mr. DAVIS—Let us look at it?

Judge SELDEN, to witness:

Q. Those four or five lines at the end are whose writing? A. They are not my handwriting; I refer to the sixth line succeeding the blank date.

By Mr. PARSONS:

Q. The paper contains memoranda on the margin in a different handwriting; do you know the handwriting of the memoranda there? A. I do.

Q. Whose is it? A. My father's.

Q. When made, so far as you know? A. It must have been made subsequent to the writing of that.

Q. When, with reference to the interview at which Judge McCunn was present, as to whether before or after that interview? A. Probably about that time; I dont know.

Q. In whose handwriting are the six lines upon the paper, being the lines succeeding the attestation clause? A. In my father's handwriting, but it is evidently written in a hurry, or with a bad pen.

Q. Was there any thing said in the interview as to whether your father was, or was not, satisfied with the terms proposed by this paper? A. My father was perfectly satisfied with the terms of the paper up to the time.

By Mr. Devlin:

Q. What did your father say? A. He was perfectly satisfied with the terms of the paper.

By Mr. Parsons:

Q. What was said by your father in the interview when Judge McCunn was present? A. He expressed himself satisfied but asked for Judge McCunn's opinion.

Q. Was any determination arrived at the close of the interview as to whether the proposed settlement should or should not go through? A. It was abandoned.

Q. And abandoned on what — what had happened in reference to that?

Mr. Devlin — No! no! Mr. President, I object to his giving his conclusion?

Mr. Parsons — I will put the question in a different form.

Q. Had any thing — any other thing — happened in respect to the paper between the time when your father was satisfied, as he expressed it to Judge McCunn, to execute the prepared settlement, and the time when that prepared settlement was abandoned, except the interview with Judge McCunn? A. None that I know of.

Mr. Parsons — Shall we read the paper?

Mr. Devlin — It is printed in the book.

Exhibit 8.

AGREEMENT AND SETTLEMENT.

This agreement, made this 24th day of March, 1870, between Abraham Bininger, of the late firm of A. Bininger & Co., of the first part, Bininger Clark, of said late firm, of the second part, and the creditors of said late firm of Bininger & Co., parties of the third part,

Witnesseth that the said Abraham Bininger and the said A. Bininger Clark, parties of the first and second parts, for and in consideration of one dollar to them in hand paid, the receipt whereof is hereby acknowledged, and in consideration of the stipulations, agreements and releases hereinafter mentioned on the part of the creditors of A. Bininger & Co., hereby agree to transfer all the property of every name and kind belonging to said late firm of A. Bininger & Co.

To wit, all the property and stock now in their stores, Nos. 92 and

94 Liberty street, the real estate as follows: The stores and premises known as Nos. 92 and 94 Liberty street; the premises known as 18 and 20 Thames street, all in the city of New York. The two estates, one in West Virginia, the other in Virginia, together with all debts, bonds and book account of every name and kind belonging to said late firm; and also all mortgages given to said firm, and all life policies and endowment policies taken out, for said firm's benefit, or in their name; also all goods in bond; all such property to be taken, subject to all liens, mortgages and incumbrances now upon the same. To any person or persons designated by such portion of the said creditors as represents two-thirds of the indebtedness of the said A. Bininger & Co. And the person or persons thus designated, except Mr. Beecher and Bininger, shall receive the property aforesaid, and have and hold the same, to and for the use and benefit of said creditors, and for the purpose of the payment of said firm debts, and in consideration of such conveyances and transfer by said A. Bininger & Co., and in consideration of one dollar to each of said creditors, paid by said parties of the first and second parts, the receipt whereof is hereby acknowledged. We, the said creditors, hereby agree to release and discharge the two parties of the first and second parts individually, as well also as members of the late firm of A. Bininger & Co., of and from all claims and demands of every name and kind which they owe to us, either due or to become due up to the present date. The property so transferred to be taken possession of subject to all the legal claims and liens of the receiver.

That said creditors to discontinue or procure a discontinuance of all proceedings taken in the Bankrupt Court of the United States against the said A. Bininger & Co.

This agreement to be void and of no effect unless such portion of the creditors of said A. Bininger & Co., as own or represent, before stated, shall sign the same, and unless the said Bininger and Clark shall sign the same, as members of said late firm.

Witness our hands and seals, this day of , 1870.

And the said Abraham Bininger, and the said Abraham B. Clark, each hereby covenant and agree to with the other that they will discontinue all suits against each other, without costs to the other, and exchange mutual releases with the other.

Mr. Devlin — I understand the counsel on the other side not to introduce the marginal writing, or the writing at the end of the paper.

Mr. PARSONS — I think the paper should be reproduced in print, so far as possible, to indicate the handwriting.

Mr. DEVLIN—It is not pretended, as I understand it, that either the marginal writing, or the writing below the attestation clause, was in the paper at the beginning.

Q. You copied, did you not, in your own handwriting, all that was in the original paper? A. All that was in the original paper.

Mr. PARSONS — The point is here, that the witness cannot state whether the paper was copied before or after the interview.

Mr. DEVLIN — I submit, Mr. President, that it is for the counsel on the other side to show that the marginal writing and the writing below the attestation clause, was put in this paper before the interview, and it is now for us to prove that it was not.

Mr. PARSONS — The whole object of the offer is to show that Judge McCunn broke up the settlement to which the parties had assented. I submit that the only way this paper can be fairly before the Senate is to print the paper as the paper now appears.

Mr. DEVLIN — Mr. President: There is what I deem essential matter in the subscription part of the paper — that is the writing below the attestation clause — just introduced. It reads, "and the said Abraham Bininger and the said Abraham B. Clark, each hereby covenant and agree to and with the other that they will discontinue all suits against each other, without costs to the other, and exchange mutual releases with the other." Now all that is in a different handwriting from the other part of the instrument, except what is on the margin.

Mr. PARSONS — May I inquire what is the pleasure of the Senate in respect to the paper?

The PRESIDENT — How does the counsel offer the paper?

Mr. PARSONS — We offer the paper as it now appears.

The PRESIDENT — Does the counsel object to it?

Mr. DEVLIN — Yes, sir. In addition, the marginal writing is this: "the said creditor to discontinue or procure a discontinuance of all proceedings taken in the Bankrupt Court of the United States against said A. Bininger & Co." That does not seem to have been in the original.

Mr. PARSONS — May I, before the question is put, ask the writer a further question?

The PRESIDENT — Certainly.

Mr. PARSONS:

Q. Mr. Clark, do the marginal memorandum and the clause at

the end of the paper, which have just been read by Mr. Devlin, refresh your recollection on the subject of whether the paper contained those portions before the interview with Judge McCunn? A. I think it did; I have been thinking over it just now; I have not seen this paper or heard any thing of it since the time of the suit. I have been thinking over it, and I believe they did.

Q. Do they refresh your recollection as to whether the paper then present, was the paper from which you made this copy of this original paper now produced to you, with your father's handwriting upon it? A. That I don't know.

Q. Have you no recollection on that subject? A. It must have been the original paper from which I copied this.

Q. The question is, do these portions which have been read refresh your recollection as to whether the paper, present at the interview, was the paper which has now been handed to you? A. No, sir; it was not that paper.

Q. Well, can you remember whether the paper then present contained these portions in the handwriting of your father? A. I believe they did.

Mr. DEVLIN:

Q. Do you recollect, not what you believe? A. Well, I am a little doubtful on the subject; I would a little rather say I don't recollect than that I do.

Mr. PARSONS:

Q. Have you any recollection as to whether the original paper then present contained any provision with respect to a settlement of the bankruptcy proceedings, and the suit pending between your father and Mr. Bininger? A. Undoubtedly it did.

Mr. DEVLIN:

Q. Have you any recollection on the subject at all? A. I have.

Q. Now, is that recollection based upon a renewal of the fact as your memory, or because you see it in that paper, and suppose from that it was in the original? A. No; I recollect distinctly the subject of the proposition made.

Q. What was that? A. As I said before, it was a settlement of the pending difficulties; that is, that the firm make arrangements to give up their joint property to pay their creditors; and in return they were to have their private property entirely released, even should there not be enough to pay the full debts of the concern.

Q. That was all? A. That was in the original document.

Q. Do you recollect any thing else that was in? A. I do; considerable other writing; a general disposition of all the suits, etc.

Q. Have you any recollection that those words on the bottom and on the margin of that paper, were in the paper that was under discussion that night? A. I have not seen those words in the margin.

Q. Then how do you know what it is? A. I can recognize the document from hearing it read. [The paper was handed to the witness that he might read the words on the bottom and margin.] I have read it, sir.

Q. Now, Mr. Clark, without relying upon the fact that those words are on the paper, but simply relying upon your recollection, do you recollect that those words were in the paper submitted that night? A. I recollect the whole sense and substance of it, and I suppose those words must have been there.

Q. Have you any recollection on the subject? A. I have recollection on the subject.

Q. That those words were in the paper? A. Yes, sir.

Q. When did you make the copy of this paper? A. I believe the 24th of March.

Q. From whom did you get the original to make the copy? A. It was handed to me by my father or Mr. Compton.

Q. At home or in the store? A. At home, I believe; might have been in the store.

Q. Before the interview with Judge McCunn, and up to that time, did you go out of the house, or did that original paper go out of the house after you made the copy? A. I don't know what disposition was made of it.

Q. Well, did you go out of the house after this, before the interview for any business connected with the original paper? A. I didn't go out of the house.

Q. Did your father go out? A. No, sir.

Q. What time in the evening was it you made this copy? A. That I don't remember, when I drew it up, precisely.

Q. You don't remember whether it was on that day or not? A. Yes, I have testified that it was on the 24th of March.

Q. And that was the day of the interview? Yes, as near as I can place it.

Q. Who did you say drew the original paper? A. That paper was drawn by Mr. Titus.

Q. Was Mr. Titus up at the house with the paper? A. No, sir.

Q. How did it reach your house? A. It reached our store in the afternoon through Mr. Bowen; the paper that Mr. Titus drew up, he said.

Q. Then it was brought up to your house, by whom? A. It was given to my father at the store, or rather I should say, that I recollect now that the paper that was brought by Mr. Compton was given by him to Mr. Titus.

Q. On the 24th of March? A. I don't know exactly the day; I believe that was the time.

Q. Then it was brought up to the house? A. Yes, sir.

Q. And then you made the copy? A. I didn't make any copy of Mr. Titus' proposition.

Q. I thought you said this was in your handwriting? A. So it is.

Q. Well, what is it? A. It is a copy of the proposition of settlement.

Q. Who drew that proposition? A. That is the one that Judge McCunn drew.

Q. Where is the one that Mr. Titus drew? A. That I haven't seen.

Q. Then I understand you now to say, that this is the proposition Judge McCunn made? A. Will you allow me to look at that again, sir; I will have to read it over clearly.

Q. Certainly. [Handing witness the paper referred to.]

Mr. Devlin:

Q. Now, Mr. Clark, perhaps I may refresh your recollection a little. Do you remember that Judge McCunn, in our office, made a sketch, or dictated to you as much as he thought ought to be executed, to you among the papers? A. I remember he dictated such a paper.

Q. Is that the paper? A. This is not the paper; no, sir; he made his own sketch in his own handwriting that evening.

Q. Didn't you copy it off? A. I didn't that evening; he read it to the family generally.

Q. Didn't you make that as a copy from it then? A. Not that evening.

Q. Well, is not that a copy of it? That I don't know.

Q. Then you don't recollect really whether it is Titus' paper or Judge McCunn's? A. That is the document proposed by Judge McCunn.

Q. That is what we supposed; and those marginal notes or memorandums, and the memorandum at the bottom were additional sug-

gestions that were made by your father to make the paper complete in his judgment, were they not? A. I don't know who made the suggestions.

Q. They were suggestions of your father, were they not? A. I don't know, sir.

Q. The memorandum I am speaking of now? A. Yes, sir; I don't know whether these were or not.

Q. I mean those suggestions were written by your father? A. They were written by him.

Q. As proper to be incorporated or added to what Judge McCunn had already suggested? A. That I don't know; but I think they are in his handwriting.

Mr. BERRY:

Q. At this interview that evening, when Judge McCunn was at your office, was there more than one paper present? A. There was.

Q. Well, there was only one paper proposed, but subseqently this second paper was made; at the commencement, then, there was one paper? A. Yes, sir.

Q. And before you adjourned there was another, in consequence of his having suggested one? A. Yes, sir.

Q. Now, a short time ago, you made this statement, that Judge McCunn said that if your father signed that paper he would sign his death warrant? A. Yes, sir.

Q. What paper did he refer to when he made that remark? A. The paper drawn up by Mr. Titus; it was the paper that Judge McCunn alluded to, as being a written paper for my father to accede to.

Q. Now, did you say that this paper was not the paper that the judge referred to? A. Well, sir, that I could not tell clearly, but I could give the sum and substance of what he said about the papers.

Mr. DEVLIN:

Q. As I understand this matter, the paper that come from Titus was a proposition of settlement to your father, and the other one was intended to be a counter proposition back to your side? A. Yes, sir.

Mr. PARSONS:

Q. You stated that, down to the time that Judge McCunn came

there, your father was satisfied with the proposition of settlement which had come from Mr. Bininger? A. Perfectly.

Q. Is that paper with which you say your father was satisfied, the paper which had been received from Titus? A. It was the paper; yes, sir.

Q. And whether this is the paper, or whether that is the paper drawn up on the memorandum made by Judge McCunn, you are in doubt? A. I am in doubt.

Q. Where was your place of business at this time? A. 96 Liberty street.

Q. How near to the place of business of A. Bininger & Co.? A. Next door.

Q. How frequently were you in the habit of visiting their place of business from the commencement of this suit? A. I was in there quite frequently.

Q. Do you know whether, on the 24th of March, 1870, there had been made any sales, or any considerable sales, of any portion of their stock by the receiver? A. The store was open as usual for quite a little while afterward, just as usual; their business was conducted as usual; only the moneys received were paid into the hands of the receiver, Hanrahan.

Q. Do you mean that the ordinary sales were made? A. Just as usual; that is, the ordinary cash sales; I believe there was no letter orders.

Q. What do you know, if any thing, of any considerable sale — any unusual or extraordinary sale — about the time and after this interview between Judge McCunn and your father? A. I remember on the following day that there was a large quantity of whisky sold.

Q. What amount? A. There was 110 barrels on the floor of whisky, which I was told the next morning, had been sold.

Q. Never mind what you had been told, but did you go into the store and see if that had been removed? A. Yes, sir; 110 barrels of whisky; I believe that was the quantity.

Q. Do you know what was the value of that 110 barrels of whisky? A. I don't know positively.

Q. Have you any knowledge on the subject of the value of that whisky, and can you state some sum which the value certainly exceeded? A. I should say it was worth $3.25 or $3.50 per gallon.

Q. How large would that make the value of the 110 barrels? A. About $120 a barrel, I should judge; according to the quantity of whisky which was in the barrel.

Q. That would be in the neighborhood of $13,000? B. About $13,000.

Q. When, prior to the day succeeding this interview at your father's house, had you seen this whisky there? A. The day before.

Q. And the next day you were there and it was not there? A. It was not there; it was being shipped then; I saw it.

Q. That was the day preceding the interview at your father's house? A. Yes, sir.

Q. Down to that time had there been any other than the usual and ordinary sales in the business of the firm? A. No, sir.

Q. You have spoken of a Mr. Gorham who accompanied Mr. Hanrahan and yourself on the occasion when Hanrahan took possession. Who is Mr. Hanrahan? A. That I don't know, sir.

Q. Where did you find him? A. In Mr. Hanrahan's office.

Q. What do you know with reference to whether he is or is not the same as the surety on the receiver's bond? A. I have heard stated that he was.

Q. Did you learn what relation, if any, he had to Judge McCunn, or to Judge Morgan, Judge McCunn's partner, or to Hanrahan, the receiver, and if so, what was it? A. No, sir; I never heard any thing particularly, except that they were in business together in California, or were there at the same time; nothing further than that.

Q. What, if any thing, did he have to do with the receivership? A. Nothing that I know of; he was charged as surety by the sheriff; he was sheriff and was in charge of the firm property.

Q. From what time? A. From the time of the appointment of Hanrahan as receiver down to almost the sale of the entire goods.

Q. During the time that the stock remained in the hands of the receiver? A. Yes, sir.

Q. You say *sheriff;* what do you mean by sheriff? A. Well, he was the sheriff in charge of the goods, as I understood it.

Q. Do you mean an officer? A. An officer of the court.

Q. An officer of which court? A. The Superior Court.

Q. Judge McCunn's court? A. Judge McCunn's court.

Mr. Devlin:

Q. You say he was an officer of Judge McCunn's court; do you know that fact? A. Not positively, only I was told so.

Mr. Parsons — Mr. Devlin: The fact that he was stating was that he was in possession under the receiver, and I suppose it is sufficiently inferred from that that he held that kind of office of

Judge McCunn's court; I desire to know what he meant by stating that he was a sheriff.

Q. On any occasion when Judge McCunn has called at your father's house, have you heard any thing said by him with reference to whether or not it should be permitted to be known that he was coming to your father's house? A. I can't clearly remember whether he ever warned us not to say any thing about it; it was usually done in such a quiet way that we all understood we were not to say any thing about it.

Mr. DEVLIN — No, no, that won't do.

Mr. PARSONS:

Q. Don't state what was understood; I desire to know whether you ever heard him say any thing on the subject? A. I don't know that I can say.

Q. Do you know why it was that he came out so late an hour in the evening when he made these calls? A. Yes, sir; I know why he came at that hour.

Mr. SELDEN — It is a mere matter of opinion any way.

Mr. PARSONS:

Q. Do you know it from any thing said by Judge McCunn? A. No, sir.

Q. You have spoken of these kindnesses received by your father from Judge McCunn as occasioning his being invited to your father's house at this interview in March, 1870. To what did you refer? A. Well, Judge McCunn had, seemingly —

Q. Don't state what he had seemingly done; but if there is any fact that you can state I desire you to state it? A. Judge McCunn stated that he would protect the property for my father, and would see that he was righted in this matter, and that he would replace him in the firm and in possession of the gooods, and such talk; assured my mother that he would see this thing done and done properly; stand by them, and such allusions as that.

Q. How often did you hear Judge McCunn talk in that strain? A. Oh, almost every time; express a great deal of friendship and kindness.

Q. You have spoken of interviews at your father's house; were there also interviews at Judge McCunn's house between Judge McCunn and your father of which you know? A. I know that he went once or twice to Judge McCunn's house; I was not with him on many of these interviews that I heard of.

Q. On how many occasions were you with your father, when he called at Judge McCunn's house before the commencement of this suit? A. I think about twice.

Q. Can you fix the dates? A. I cannot fix the dates exactly; I called on business there, and asked him to the house, and asked him if he would be in, that my father would be in in the evening, or something of that notice; I can't fix the dates of it, at all.

Q. Do you remember any thing said by Judge McCunn on the subject of an allowance to be made by him to Mr. Compton? A. I remember very well that he said he would make an allowance of $10,000 to Mr. Compton.

Q. When was that said? A. That was going from our house I think one evening; I was walking down with him toward his; what time it was exactly I don't remember.

Q. Won't you state all of that conversation that you remember? A. Well, he said Mr. Compton had worked very faithfully in this case, and that he wanted to do well by him; and that he wanted my father to have some money, and he would make an allowance of this sum, with the understanding that Mr. Compton was to divide it.

Q. Divide with whom? A. With my father.

Q. Your father the plaintiff in the suit? A. Yes, sir.

Q. Do you remember any conversation with Judge McCunn, when any thing was said on the subject of Mr. Vanderpoel being employed? A. I remember that there was a time that Judge McCunn advised the engagement of Judge Vanderpoel, of the firm of Brown, Hall & Vanderpoel.

Q. Won't you fix, as nearly as you can, the time; state the conversation and when it took place? A. I think it was at our house, and, if I am not mistaken, it was at the time of the bankruptcy proceedings.

Q. What reason, if any, did Judge McCunn assign for the employment by your father of Mr. Vanderpoel? A. That he had a very great degree of influence with the sheriff; that was one reason that I can remember very distinctly; there were various other reasons.

Q. State them so far as you recollect them? A. I don't recollect any thing positive further than that, except that he had very great influence with the sheriff.

Q. Who was present at this interview? A. I don't remember positively; Mr. Hoffmire, I think, was present.

Q. Your brother-in-law? A. My brother-in-law, also my father was present; I am not sure but Mr. Compton was present also.

Q. Had Mr. Vanderpoel ever been employed by your father down to that time? A. He had not.

Q. Did you ever hear Judge McCunn speak in any disparaging terms of Mr. Hanrahan at any time? A. I do not remember to, up within a very short time.

Q. Have you within a short time? A. I have heard him say recently—

Mr. DEVLIN — Wait a moment; that we object to.

WITNESS — During the proceeding of the case—

Mr. PARSONS — Wait a moment; an objection is taken.

Mr. DEVLIN — How is it material what Judge McCunn's opinion now is? The question is what the opinion then was.

Mr. PARSONS — It does not appear and could not be known, whether the opinion expressed by him relates to the present time or to his opinion at the time he appointed him receiver.

Judge SELDEN — You can ask the witness that question.

Mr. PARSONS — The proper question is to ask him what Judge McCunn has said at any time in reference to Mr. Hanrahan.

The PRESIDENT — Is the question pressed and objected to?

Mr. DEVLIN — It is.

The PRESIDENT — The question is, whether the objection shall be sustained.

Mr. DEVLIN — Before the question is put, let me say we do not object to the question, except as to its form. That it should give the witness an opportunity to say whether or not this expression of Judge McCunn, as to his opinion of Hanrahan, was as to his opinion at the time he appointed him receiver, or his opinion at the time he made the remark. We do not object to the inquiry, if the question is changed.

Mr. PARSONS — We do not think it suitable that the witness himself should put his construction to the expression of Judge McCunn.

Mr. DEVLIN — You ask him whether he said any thing disparaging.

Mr. PARSONS — If that is the objection I will modify the form of my question. I will ask whether he ever heard him speak in terms of praise of Hanrahan.

Mr. DEVLIN — That is equally objectionable.

Mr. PARSONS — I will ask him whether he ever heard him say any thing in regard to Mr. Hanrahan.

Mr. DEVLIN — That is objected to.

The PRESIDENT — The question is whether that objection shall be sustained.

[The question was then put and decided in the negative.]

Q. Answer, sir? A. Judge McCunn said that Daniel H. Hanrahan was one of his boys, and he would see that he did well; that he was a deserving man, and he would see that he would be right.

Q. When was this? A. That was at the time he was appointed receiver.

Q. Have you since heard Judge McCunn speak about him? A. Yes, sir, I have.

Q. What did he say? A. He said he was a scoundrel.

The PRESIDENT — Any thing further of this witness.

Mr. PARSONS — Nothing further.

The PRESIDENT — Cross-examine.

By Mr. DEVLIN:

Q. Mr. Clark, when did he say he was a scoundrel? A. I heard Judge McCunn say so in this very hall, last week.

Q. Mr. Clark, when he said it the other day, didn't he say that he considered him a good man when he made him receiver, or he would not have made him receiver? A. Yes, sir; he said so.

Q. I want to call your attention to the interview between yourself and your father and Mr. Compton and Judge McCunn; take your recollection back to that; don't you recollect that it was Judge McCunn who suggested the appointment of Murray Hoffman as receiver in that case? A. I think I heard him mention his name as a very proper man.

Q. Did Mr. Compton say "no," he would prefer to have Hanrahan? A. That I did not hear at all; I know subsequently Hanrahan was appointed.

Q. We know that too, but you did not hear Mr. Compton or any one else, excluding Judge McCunn, say they did not want Murray Hoffman, but would prefer Mr. Hanrahan? A. No, sir.

Q. Did you not hear Judge McCunn object to Mr. Hanrahan as the receiver, and Mr. Compton say "no, he was a good man and he was a judge in California, and I knew him there?" A. I heard Mr. Compton make those remarks.

Q. What was the reason of his making those remarks? A. That I don't remember.

Q. You don't remember that it arose from the objection that Judge McCunn made to the appointment of Mr. Hanrahan? A. I remember that is the first knowledge I had of Hanrahan, that Mr. Compton said he had been a judge of some court in California.

Q. Was there any body raising objection to Mr. Hoffman and suggesting Mr. Hanrahan that night? A. Not that I heard of.

Q. When this wine was brought to the house, in regard to which the counsel on the other side has spoken, did not Judge McCunn say he did not like to have wine brought there, or any thing of that sort? A. Not that I remember of; I did not hear him say any thing of that kind.

Q. Did Judge McCunn drink any of that wine? A. I don't really know; I am inclined to think he did not do any thing more than to taste it.

Q. Just enough to judge? A. Yes, just enough to judge.

Q. Now, when these papers were brought to Judge McCunn's house on that evening and your father swore to them there before him, did not Judge McCunn retain the papers and say he did not sign the order that night, and that he would meet the counsel at the court in the morning at 9 o'clock or half-past 9 o'clock, and then give him the order, if it was proper? A. I did not hear him say so.

Q. You didn't hear him say so? A. No, sir.

Q. Don't you recollect that he retained the papers at his house that night? A. No, sir, I do not.

Q. Do you recollect that either Compton or your father took them away? A. No, sir.

Q. *You* do not? A. I did not.

Q. Where did you first see those papers after you had seen them at the house that evening? A. From either Compton or my father I took them, and had them in my possession before 10 o'clock next morning; I received them from one or the other of them.

Q. Where did you receive them? A. Up town; either at my house — I received them that night, but I cannot positively place my recollection as to where.

Q. Why are you positive you received them before 10 o'clock next morning? A. Because I was in Hanrahan's office.

Q. How do you recollect that? A. I was to be there by appointment; Mr. Compton told me to be there sure at 10 o'clock.

Q. For what? A. To hand those papers to Hanrahan.

Q. When did Mr. Compton tell you that? A. During our walk from the judge's house to our room.

Q. Did he tell you where to get the papers? A. No, sir.

Q. How did you know where to go for them? A. I don't remember whether he gave them to me, or whether he gave them to my father, and my father gave them to me next morning.

Q. Are you sure whether your father or Compton took them away that evening? A. I am not sure, but I suppose not.

Q. Did you meet Mr. Compton somewhere before you met him at court next morning? A. No, sir.

Q. Didn't he say he would step into the office and get the papers and then meet you in the morning? A. No, sir.

Q. Your mind is an entire blank as to when and where you got them? A. No, sir; not as to when I got them it is not; I got them previous to 10 o'clock.

Q. You don't know what hour before 10 o'clock? A. Yes, sir: I had them at that hour.

Q, When did you get them? A. I don't know, I say.

Q. Then your mind is a blank upon that point? (No answer.)

Q. Nor where you had them? A. I had them in possession before 10 o'clock next morning.

Q. With that exception, your mind is an entire blank from the time you left Judge McCunn's house, in regard to the papers, as to where you got them, or from whom? A. I don't recollect from whom I got them.

Q. Nor where? A. No, sir; nor where.

Q. Nor when? A. No, sir; except it was previous to 10 o'clock next morning.

Q. I understand that; it might have been 8:48 or 9:49? A. Yes, sir.

The PRESIDENT:

Senators, in pursuance of their own rules, and also for the convenience of their own rules, should have the kindness to rise and address the chair when they wish to make any observation.

Mr. J. WOOD — Mr. President: I would like to ask the witness a question.

By Mr. J. WOOD:

Q. When you left home in the morning on an engagement to meet Mr. Compton at Mr. Hanrahan's office, did you have these papers? A. I had those papers in my possession when I left my house the following morning, but had no appointment to meet Mr. Compton, but an appointment to take them to Hanrahan's office.

Mr. BENEDICT — How did you go down town to meet Mr. Hanrahan?

The PRESIDENT — The senator from the fifth (Mr. Benedict) is out of order.

Mr. BENEDICT — Mr. President: I beg to ask one question.

By Mr. Benedict:

Q. You know you had the papers before you started to go down town? A. Yes, sir.

Q. What time did you go down town? A. About 9 o'clock.

Q. Do you know you had them at 9 o'clock? A. Yes, sir.

Q. Any earlier period than that? A. I might, possibly.

Q. You have no memory whether you had or not? A. No, sir; I certainly had them in time to take them to Hanrahan's office at 10 o'clock next morning.

By Mr. Devlin:

Q. Did you stop anywhere on your way down town that morning? A. I did not that I remember of.

Q. How did you go down? A. I think I took the Fourth avenue down to the City Hall, and walked down to Wall street the rest of the way.

Q. Did you meet Compton at Hanrahan's office? A. No, sir.

Q. You met no one except the counsel and attorneys, and Hanrahan there? A. I met nobody there except Hanrahan.

Q. He was the only one you met there? A. Yes, sir.

Q. How is it that you recollect now that you had these papers at 9 o'clock in the morning, if you did not recollect a few minutes ago that you had them, except that it was 10 o'clock? A. I started about that time to go with them to go to Hanrahan's office; I was there at ten (10) o'clock, and of course that I am perfectly able to swear to.

Q. That is the only reason? A. Yes, sir.

Q. How do you know it was 10 o'clock when you were at Hanrahan's office? A. I was to be there at 10 o'clock; so I was there at the time of my appointment.

Q. That is the reason; did you carry a watch with you and look at it, and make any observations as you went down, to know you was there at 10 o'clock? A. Yes, sir; I did.

Q. What did you look at? A. City Hall clock.

Q. Did you look at Trinity church clock as you went down? A. I might.

Q. You spoke of Judge McCunn coming to your father's house; do you not know that he was invited to come there? A. I don't know that he was not; he was there.

Q. Was he expected to be there by the family; by your father? A. Yes, sir; I believe they had expected him.

Q. Now, Mr. Clark, was there not a great deal of bitterness of feeling between your father and Mr. Bininger regarding the business they had been so long transacting together? A. Yes, sir; there was.

Q. There is a relationship existing between your father and Mr. Bininger? A. Yes, sir.

Q. What is it? A. First cousins.

Q. How many years have they been in partnership together? A. I don't know.

Q. About? A. I suppose about twenty years.

Q. Your father had given his attention principally to the business, had he not; in the conducting of it? A. I don't know, sir; I know he attended to it all the time.

Q. Bininger, on the other hand, was abroad a good deal of the time? A. I know he was abroad sometimes.

Q. Your father attended to the business all the time? A. Yes, he attended to the business in the mean time.

Q. Don't you know that your father was dissatisfied with Mr. Bininger's inattention to the business of the firm? A. I never heard him say so.

Q. Do you know the fact? A. I do not.

Q. Were not the relations very cordial between your father and Mr. Bininger up to within a short period of time before the dissolution occurred? A. I believe they were, sir.

Q. Did not the dissolution arise from a notice that had been served by Bininger upon your father, that has been read here from the complaint? A. I believe that was the first step.

Q. How long had Bininger been from Europe when that notice was served; how long had he been away from the city? A. I think he arrived home about two years before, as near as I can reckon.

Mr. Benedict — Two days?

Witness — Two years.

By Mr. Devlin:

Q. Was he attending to business from the time he arrived up to the time of the receiving of the notice? A. As far as I am able to know, he was.

Q. Gave the same attention to business that your father did? A. I suppose he did, sir.

Q. Do you know what was the cause of difficulty between your father and Mr. Bininger? A. I have heard various reasons, but I, at that time, didn't know.

Q. Do you know now?

Mr. Parsons — May I inquire whether counsel deem this important?

Mr. Devlin — I deem it important to show why the application was made to Judge McCunn, at midnight, on the night of the 18th, for an injunction and receiver was that Bininger should not get ahead of him in the same mode of action, which would go to show the bitterness between these people.

Mr. Parsons — We do not object, if the witness does not object.

Q. State what the origin of the difficulty was between the two? A. I don't know, sir; I believe there was some financial difficulty, one way or the other.

Q. Didn't your father attend to the financial affairs of the concern generally? A. I think not; I think Mr. Bininger attended to that; that I don't know, however.

Q. Do you not know that your father objected to Mr. Bininger's large expenditures of money and drawing so much money from the firm? A. I didn't know it at the time; I knew it since.

Q. Were your father and Bininger on speaking terms, except in mere matters of business, at the time this notice was served of the dissolution? A. They were up to that time.

Q. At that time? A. I don't know; I wasn't there.

Q. Is Bininger a gentleman of family? Yes, sir.

Q. Does his family live in New York? A. No, not now.

Q. Did they at that time? A. Yes, sir.

Q. Up to what time did they reside there? A. I don't know precisely.

Q. Were your family and Bininger's family on terms of intimacy and visiting each other frequently? A. No, sir.

Q. Never? A. We never had been particularly intimate; no, sir.

Q. You were cousins, and your father and he partners in business? A. Yes, sir.

Q. The families not intimate? A. Not particularly; my mother and his wife visited frequently.

Q. Did he have any sons or daughters? A. Yes, sir; we had been to school, and therefore not thrown together.

Q. The heads of the families were intimate — in a social way, I speak? A. Yes, sir, as far as I know.

Q. About the 18th of November, 1869, did that intimacy cease between them? A. Yes, sir.

Q. You a member of the family and don't know the cause of the

difficulty between your father and Bininger? A. I don't know positively; no, sir.

Q. What do you know about it, whether positive or not? A. I don't know any thing farther than the papers speak of.

Q. What do the papers say?

By Mr. Parsons:

Q. What papers do you refer to? A. The general papers, the complaint; that is all that I know about it; I suppose the declarations of Clark himself, or contents of the papers are not to be brought in evidence in this way.

Q. Are you not aware that Bininger said he would drive your father out of business, and make him a beggar, or words in substance; that the house was his, that he had established it; that it bore his name? A. I had heard something of that kind.

Q. That property was the cause of the difficulty? A. That was so probably after the suit was commenced.

Q. I don't ask you about the time; they ceased to be visitors before that? A. Yes, sir.

Q. Had not they quarreled before the 18th of November, 1869? A. I don't know.

Q. Don't know any thing on the subject? A. I don't know whether they quarreled or not.

Mr. Parsons—Will you have him tell whether this is what he heard Bininger say, or what he heard Clark?

Mr. Devlin—What they both said?

Mr. Parsons—We object to what Clark said.

Mr. Devlin—You can cross-examine him on that.

Q. When your father and you and Compton was at Judge McCunn's house, did your father state to Judge McCunn the grievances he had against Bininger, and what Bininger had done to him, and how he had treated him? A. Not that I remember particularly.

Q. Was there any conversation on that subject? A. If there was I don't remember.

Q. What? A. I don't remember precisely.

Q. Do you remember at all, whether precisely or not? A. I don't.

Q. Don't remember? A. No.

Q. Are you aware of any conversation that occurred between Judge McCunn and your father, previous to this interview at Judge McCunn's house — conversation that occurred between your father

and Judge McCunn on the subject of the differences between Bininger and your father? A. At what time, sir?

Q. Any time previous to the interview at your house on the 18th of November? A. No, sir; never saw them together before that time.

Q. Never knew they were together? A. Never saw father and Judge McCunn, before that time, together.

Q. Had you visited Judge McCunn's house, or seen him before that? A. No.

Q. Had any of your family? A. No.

Q. Not that you are aware of; have you heard any conversation between your father and Bininger in regard to their difficulties previous to the 18th of November? A. No, sir; I wasn't present at any of their conversations; never heard any of them.

Q. Didn't your father, or Compton, or yourself, apologize to Judge McCunn for calling on him so late on the evening of the 18th, and tell him the reason? A. Not that I know of; no, sir.

Q. They didn't say any thing at all? A. No.

Q. They rang the bell, and the girl came to the door, and you asked if Judge McCunn was in; was that it? A. Yes, sir.

Q. Then you were shown to the library? A. Yes, sir.

Q. There was no explanation made of the cause of their late visit, or any thing of that sort? A. I was the last one in, and naturally wouldn't hear what was said first; I did not hear any such thing myself.

Q. Behind your father, or Compton, were you? A. The staircase was a narrow one, and I was quite a little distance behind them.

Q. You didn't hear what the conversation was? A. I didn't when we entered the room.

Q. Then the papers were handed to Judge McCunn? A. Yes, sir.

Q. He read them over? A. Yes, sir; I suppose so.

Q. Which of them did he sign? A. There were three papers; I don't know exactly which they were.

Q. You don't know which he signed first? A. No.

Q. Don't you know that he signed the affidavit of your father first; didn't your father swear to the papers? A. I believe he did.

Q. Didn't he sign that affidavit first? A. Yes, sir; I believe so.

Q. Did he sign any other papers than that one? A. Yes, sir; I believe he did.

Q. If you mean the word believe in the sense of recollect, say I recollect. A. I recollect Judge McCunn's signing these papers that night.

Q. Three papers? A. Whatever papers they were.

Q. Who signed the affidavit; what other paper did he sign? A. Whatever papers there were to be signed on that occasion, he signed.

Q. You are arguing in your own mind; I want to know what you recollect he signed; if you have any recollection on the subject say so? A. He signed those papers I have already sworn to, whichever papers they were.

Q. What were they? A. If you will show me the papers I will identify them.

Q. When you went to Hanrahan's office, were there any papers signed there? A. Not that I know of; no, sir.

Q. Were you in the room with Hanrahan all the time? A. I was there, sir.

Q. When you went in you took the papers and went out with him? A. I staid and waited for him.

Q. If any papers had been signed you would have seen it? A. Yes, sir.

Q. Wasn't that bond executed in Hanrahan's office that morning? A. It might have been.

Q. You said no paper was signed there that morning? A. Not to my knowledge; it might have been signed there; I don't know that it was.

Mr. Parsons:

Q. Did you take this bond with you to Hanrahan's office that I show you? A. I don't remember whether I did; I handed what papers there were.

Q. Is this one of the papers that Judge McCunn signed that night? A. I couldn't say.

Q. Look at it and see? A. I couldn't tell by looking at it.

Q. You will see his indorsement on the back of it? A. No, sir; I believe not.

Q. Do you know whether that is one of the papers he signed that night; did he make that indorsement that night? A. I don't know; I didn't see his signature on it, and therefore didn't suppose he signed it.

Q. Is that Judge McCunn's signature in the middle of that paper? A. Yes, sir.

Q. Did he sign that that night? A. I don't know.

Q. How would you know, when you don't know whether he signed this when I show it to you? A. I saw him sign those papers

that were taken down there; they were the affidavits and the order for the receiver.

Q. Wasn't that paper taken down there? A. I don't know; it might have been.

Q. Some of those might not have been taken down there under that theory? A. The two affidavits were taken down there, and the appointment of the receiver was signed there that night.

Q. Did you read that over on your way down? A. No, sir.

Q. How do you know they were the same papers as at McCunn's house that night? A. I saw them there enough to recognize the papers, and have seen them since.

Q. How do you know there wasn't something put on the outside of the paper; did you examine on the inside of the paper? A. I didn't.

Q. How do you know it was the same paper? A. Had a knowledge of it, and recognized it in a general way.

Q. You don't know whether this paper was among them or not? A. I am not positive.

Q. You say there was no paper signed in Hanrahan's office after you went there? A. Not to my knowledge.

Q. Wouldn't you have seen it if it was so? A. I might not.

Q. You didn't see him sign any paper that morning? A. No, sir.

Mr. DEVLIN — This paper is a bond on the injunction, and it is acknowledged by the notary public on the 19th of November, 1869. The paper must have been signed at Hanrahan's office, no doubt.

Mr. PARSONS — Mr. President: I submit that is not a proper statement. The papers all bear date the 19th of November.

Mr. DEVLIN — Here is a notary public entirely disconnected with the matter. It is not pretended that Hanrahan was there, or that the sureties were there. This is executed by them and acknowledged by them on the 19th.

Mr. PARSONS — We submit it is not competent for counsel to make a statement of facts which are not in evidence. We submit there is no testimony that justifies the statement that that paper was executed at Hanrahan's office on the morning of the 19th of November.

The PRESIDENT — The senator will probably discover that fact.

Mr. D. P. WOOD — The hour of adjournment having almost arrived, I move that this session be extended indefinitely.

Mr. PARSONS — There are witnesses in attendance who have been here during the whole day, and who made their arrangements to be

in New York to-morrow morning in the expectation that their testimony would be taken during the morning session, and they have been disappointed, and many of them will be very seriously inconvenienced unless they leave during the night; and it has occurred to us possibly, under the circumstances, that the Senate would hold an evening session.

Mr. DEVLIN — That would run it into 10 or 11 o'clock at night.

Mr. PARSONS — I hope so.

Mr. D. P. WOOD — If we have an evening session the printers cannot print the testimony so as to have it on our files in the morning.

Mr. BENEDICT — I don't think that is necessary; it is more important that we should accommodate these witnesses, I think.

The Senate took a recess until 8 P. M.

The Senate re-convened at 8 P. M.

Mr. D. P. WOOD — Mr. President: There has been a question raised in relation to the pay of witnesses in attendance upon these proceedings, and there is a question as to the amount they should be paid. Witnesses are claiming three dollars a day and mileage. To put an end to all controversy, and designate what shall be paid them, not only for their own benefit, but for the guidance of the Comptroller, I offer the following resolution:

Resolved, That the Comptroller be requested to pay, upon the certificate of the presiding officer of the Senate, witnesses attending in the proceedings pending before the Senate upon charges against John H. McCunn, one of the justices of the Superior Court of the city of New York; George M. Curtis, one of the justices of the Marine Court of the city of New York, and Horace G. Prindle, county judge of the county of Chenango, the same fees and mileage as are allowed witnesses in courts of record.

The question being put upon the resolution, it was declared adopted.

Mr. J. WOOD — Mr. President: I hope the Senate will not adopt any such narrow rule as that.

The PRESIDENT — The resolution is adopted.

Mr. PERRY — Mr. President: I move to reconsider the vote by which this resolution was adopted.

Mr. Perry's motion to reconsider was put and declared adopted.

Mr. D. P. WOOD — Mr. President: It will be seen that under the provisions of that resolution, the witnesses attending from New York

will get for one day's attendance between $13 and $14, which will cover their expenses. That resolution was offered after consulting with the Comptroller upon this very question, as there is no authority for paying any more, that any body has been able to find, and the Comptroller is willing to pay the legal fees paid witnesses, and I put the resolution in that form. If there was any authority for paying more, of course, I should have no objection to putting it in the resolution. In the Smith case more was paid, that is to say, it would be more in some cases and in some cases it would be less, if we should say $3 a day.

Mr. J. Wood — And ten cents mileage was allowed, and it has been suggested at $5 a day and the actual traveling fees. That, in some cases, would be less than this, and in some cases it would be more.

Mr. D. P. Wood — It was put in this form because we knew of no authority for paying more. If the senator from the thirtieth (Mr. James Wood) or from the second (Mr. Perry) can state any law authorizing any larger fee than this, there will be no objection to putting it in the resolution.

Mr. Perry—Mr. President: I would like the senator to state how he makes it out that a witness attending one day from New York gets $12 or $15.

Mr. D. P. Wood — Mr. President: I suppose the mileage allowed by law, as provided by this resolution, is eight cents a mile from New York to this city, and that would be $12. One day's attendance would be 50 cents; that will pay his expenses, yet I have no objection to making it more if any body can show authority for paying more.

Mr. J. Wood — There is just as much authority for paying $3 a day, and ten cents mileage as there is for paying legal fees to witnesses in courts of justice; I suppose there is no law, and we will have to provide for the expenses of witnesses as we do for the other officers of the Senate, by the supply bill of next winter, but it seems to me in this matter before this Senate, when we are calling witnesses to come away from their business, and subject them to a large expense, that we ought to pay them a reasonable compensation. This fee which the senator from the twenty-second (Mr. D. P. Wood) proposes is the amount fixed by the statutes to be paid by the losing party to the successful antagonist in a court at law; it is as large perhaps as ought to be imposed upon a defeated party in a litigation, but it ought to form no precedent for the payment of witnesses' fees here before this tribunal. If the Comptroller will not pay now, let

it be paid some time. It seems to me it is small business to subject witnesses to coming here and pay simply their expenses; it is bad enough to compel senators to come here and spend their time at three dollars a day; don't let us subject the witnesses here to any such picayune compensation.

Mr. PERRY — Mr. President: I fully agree with the remarks of the senator from the thirtieth (Mr. D. P. Wood); I think, so far as the statute is authority, we have, in fact, more authority for adopting the precedent laid down in the Smith case than we have for adopting this resolution. The statute referred to by Senator D. P. Wood has no application to a proceeding of this kind, and I see no reason why we should depart from the precedent in the Smith case. The witnesses in this case are inconvenienced as much as in that case, and this proceeding has been enforced upon us by the people, and we are here doing our duty for the people, and I don't think we are justified at the present in adopting this picayune principle, of paying the witnesses. For one, I would like to reconsider the vote by which this resolution was adopted, with the view of having the resolution laid upon the table for the present, and having a conference to see if we cannot reach a conclusion, so that we can pay a fair compensation to the witnesses, and I want no farther justification for my own vote in this matter, than the precedent in the Smith case. In the Smith case there was paid three dollars a day and ten cents mileage.

Mr. MADDEN — I have no objection to reconsidering the question, and I hope we will not spend much more time in these preliminaries. I differ from the senator from the second (Mr. Perry) that this matter has been forced upon us by the people of this State.

Mr. D. P. WOOD — Mr. President: I rise to a point of order. My point of order is, that this debate is out of order. If we debate these questions, we shall never get through with this trial.

The PRESIDENT — The Chair is of the opinion that the question is well taken.

The question being put upon the motion to reconsider, the motion was declared adopted.

Mr. D. P. WOOD — Mr. President: If the gentleman will give way for a moment, I will say that this resolution has been offered to-night with a view of meeting the urgent necessities of some witnesses who are here without any provision to pay them, and if this case goes over the Senate will see in what position it leaves these witnesses.

Mr. MADDEN — Mr. President: I move to amend to pay them five cents a mile each way and three dollars a day.

The question was put on said motion, and it was declared adopted.

Q. In your examination you made some statement about a suit pending before Judge Fithian; what was that suit? A. I don't know the nature of it.

Q. Was it a suit against your father? A. I think so.

Q. Arising out of the partnership affairs? A. That I don't remember; it was a suit in connection with the affairs of A. Bininger & Co. and their liabilities.

Q. Was it brought between Bininger and your father, or between other parties and your father and Bininger? A. It was brought against my father.

Q. Who was the plaintiff? A. I am not aware of that.

Q. It was not Bininger? A. No, sir.

Q. Mr. Fithian was judge of the Superior Court at that time? A. Yes, sir.

Q. How many judges are there of the Superior Court? A. I don't know; I have heard there were five or six.

Q. There are six; in that suit your father was not plaintiff? A. My father was defendant in that suit.

Q. How did you know it was brought before Judge Fithian? A. Because it was already brought, and it was to be defended.

Q. It was brought in the Superior Court? A. Yes, sir.

Q. Was there any body that could tell what judge it would come before; was it to come before him upon a motion, or what? A. I don't know; we were advised to employ the partner of Judge Fithian, Mr. Clark.

Q. What do you mean by "we" were advised? A. My father.

Q. You mean him when you say "we?" A. Yes, sir.

Q. You don't know the nature of the suit, and you don't know what reason there was to suppose it was coming before Judge Fithian? A. No, sir.

Q. Did you know Clark was his partner at the time he (Fithian) was judge? A. I was told so; yes, sir.

Q. You did not know of your own knowledge? A. No further than I know of any firm.

Q. Do you know Judge Fithian? A. I do, slightly.

Q. Do you know his partner, Mr. Clark? A. Yes, sir.

Q. Did either of them tell you he was his partner when the judge was upon the bench? A. Not that I remember of.

Q. It was only from mere rumor that you supposed at that time

that Clark was the partner of Fithian? A. Only a rumor, and I saw his name directly over Clark's.

Q. That was an office he had before he was judge. Didn't the judge recommend the retaining of Clark because he was an able lawyer? A. That was one of the reasons; yes, sir.

Q. The other reason that he was Judge Fithian's partner; that it was coming before Judge Fithian, if at all, had not reference to Judge Fithian's action in the suit? A. I believe that was the reason he was engaged, because he was a partner; that was the reason he was engaged.

Q. Your father engaged him because he was a partner of Judge Fithian? A. Yes, sir.

Q. Mr. Vanderpoel was suggested as a proper party to be retained as counsel in what suit? A. In some of the bankruptcy suits.

Q. That was a proceeding taken by the creditors of Bininger & Co., in the bankruptcy court, against members of that firm, and have an appointment in bankruptcy? A. Yes, sir; the suit had been commenced in bankruptcy.

Q. There was a difficulty arose between the State and Federal authorities in regard to this property? A. Yes, sir.

Q. And the United States authorities undertook to take the property from his possession? A. Yes, sir.

Q. Did you know that Mr. Vanderpoel was the counsel of the sheriff of New York? A. No, sir.

Q. Did you know that Brown, Hall & Vanderpoel were? A. I knew that firm was.

Q. Was not this suggestion made by Judge McCunn for the purpose of strengthening the sheriff in his holding on the State laws to the property as against the Federal authorities? A. It might have been so.

Q. Don't you know it was said it was important the sheriff should be well advised as to securing the property, as Vanderpoel was his counsel, so as to secure your father's rights as against the Federal authorities? A. I know Judge McCunn advised the retaining of Vanderpoel.

Q. For that reason? A. I don't know; I know Judge McCunn advised the retaining of Vanderpoel, because he had influence with the sheriff and was an able lawyer.

Q. What idea did you get that there was any necessity of having the influence of the sheriff? A. That would be one aid; that he was a very able lawyer and would assist the case.

Q. Assist it against whom? A. Against whoever brought the bankruptcy suit.

Q. You have spoken something about an allowance to be made to Mr. Crompton; where did that conversation occur? A. It occurred as I was accompanying the judge in his walk from my father's house toward his own.

Q. Which evening was that? A. Some evening along about December, as near as I can remember.

Q. Have you told any thing about the judge being at you house at that time? A. I suppose I have alluded to it; yes, sir.

Q. How did the subject of allowance come up? A. It was in speaking of Mr. Compton; I don't know but what Compton was to make the application to him.

Q. You heard Compton was about to make an application to him? A. He probably said something of that kind, and the judge said —

Q. Was Compton in your company? A. No, sir.

Q. What do you mean by saying that Compton probably said something to the judge on the subject? A. Because the judge made the remark that night that he would make an allowance to Compton of $10,000, provided and with the understanding that he was to give one-half that amount to my father.

Q. What brought up the subject of allowance between you and the judge? A. I don't remember; I presume we were talking about the suit.

Q. Didn't the judge say Compton had a great deal of work to do and had labored very hard in this matter and ought to be very well compensated? A. Yes, sir.

Q. Did not he say that your father was not at the time in circumstances, owing to the litigation and tying up of the property, to pay him as much as he ought to receive? A. The judge didn't say to me that my father was not able to pay him.

Q. Didn't he suggest it to you that he being all tied up with these suits, that the property was not in money, to compensate counsel, and therefore an allowance ought to be made him? A. I don't remember any thing farther on that particular point than that the judge said he would make an allowance of $10,000.

Q. How do you come to recollect that suit and nothing that preceded it? A. Because that was a very important point.

Q. Important to who? A. To my father and to Mr. Compton; half of $10,000.

Q. You don't recollect how the conversation succeeded that? A. I remember *that* very distinctly.

Q. Was your father in a condition at that time to compensate his

counsel as they ought to be? A. I didn't know any thing about his finances.

Q. Didn't Judge McCunn say that Compton, considering the circumstances of your father, if he got such a large allowance, might well afford to lend him some of it until he got his affairs straightened out? A. No doubt, the judge's intentions were very pleasant and friendly; but I don't remember any such remarks or suggestion particularly.

Q. He simply volunteered that outright, that the judge said he was going to give Compton an allowance of $10,000, with the understanding it was to be divided with your father; were those the very words? A. About the very words, as near as I can recollect.

Q. How far did you accompany Judge McCunn? A. As far as the Fifth Avenue Hotel.

Q. There you left him; what part of the journey was it that this conversation took place? A. It was on the way down.

Q. You lived at 47 Park avenue? A. Yes, sir; that is at Thirty-seventh street.

Q. Fifth Avenue Hotel is corner of Twenty-third street? A. Yes, sir.

Q. Park avenue is Fourth avenue? A. Yes, sir.

Q. That was a good mile that you walked? A. Yes, sir; about a mile.

Q. What time in the evening was it? A. I should judge it was quite late; it was when we reached the hotel; it must have been nearly 12 o'clock, or after that; after that.

Q. Do you remember what particular part of the journey down this conversation occurred? A. That I cannot remember; not what block it was upon; I should judge it was about Twenty-eighth or Thirtieth street.

Q. What took you to the Fifth Avenue Hotel? A. I was invited by the judge to take a walk with him.

Q. As far as the Fifth Avenue Hotel? A. He didn't mention particularly.

Q. You left the judge at the Fifth Avenue Hotel? A. Yes, sir; bid him good evening there.

Q. Did you communicate this conversation to any body at any time? A. I think I remarked it several times.

Q. To who? A. Both to my father and to Mr. Compton, also.

Q. How soon after the conversation did you tell Compton? A. Just as soon after as I saw him.

Q. How long was that? A. Probably the next day; I cannot remember how long it was.

Q. What did he say? A. He said he was very much pleased, indeed.

Q. You recollect that distinctly? A. Yes, sir.

Q. Was any body with him when he told him? A. Not that I remember of.

Q. Was any body there when you told Compton, besides yourself and him? A. Not that I remember.

Q. Where was it that you told him? A. I don't remember; I don't remember at what point the conversation took place.

Q. Where did you tell your father? A. At the house.

Q. That evening? A. No, sir; I did not see him until the following morning.

Q. Did your father say so? A. I don't remember what he did say particularly.

Q. What did Compton say when you communicated the fact to him about dividing the money with your father? A. He seemed to understand it perfectly.

Q. I did not ask that; what did he say? A. I don't remember what he said, any thing more than he was pleased; I don't remember what he said particularly.

Q. If you don't remember particularly, do you remember generally, what he said? A. No, nothing more than he was pleased; that is about as general as I can get at it.

Q. I am speaking of the matter of dividing it with your father? A. That was perfectly understood.

Q. What did he say? A. He acceded to it as far —

Q. What did he say? A. I don't remember.

Q. Do you remember any other conversation you had with McCunn in that walk from your father's house to the Fifth Avenue Hotel that night? A. Yes, sir; at that time my father was in very miserable health, and the judge invited me to accompany him; and he gave me advice to be very careful of my father; to be careful of his health; that he was breaking down, etc.; I remember that particularly.

Q. Any thing else? A. No, sir.

Q. How long did it take you to walk from your house to the Fifth Avenue Hotel?

Mr. MADDEN — Mr. President: It seems to me we are taking up a considerable time with an unimportant matter; I wish to give the largest latitude.

Mr. DEVLIN — If the senator will take my place and defend Judge McCunn, I will yield it willingly; I am very nearly through, and it is usual to test the witnesses' recollection about the circumstances connected with the conversation; and we consider this an important item of testimony.

Q. Judge McCunn was at your father's house the night that the papers were drawn by Titus; was he invited to be there? A. I think he was.

Q. Did he take the invitation to him? A. No; I don't know who took it, exactly; it might have been me, and it might have slipped my memory.

Q. Who was there besides the members of the family and Judge McCunn? A. Mr. Compton; that was all.

Q. Compton brought this paper; do you recollect what he said when he brought it? A. He advised the acceptance of the paper.

Q. Did he say who it came from, or any thing of that kind? A. We all understood that.

Q. You understood that was a proposition from the other side to settle? A. Yes, sir.

Q. You said your father was entirely satisfied with it, but asked the opinion of Judge McCunn on the subject? A. Yes, sir; my father said he was satisfied with it, and would sign it; but that the judge had displayed so much sympathy for him in his case, etc., that he thought it a matter of courtesy to ask his opinion.

Q. Said so then in the presence of the judge? A. No; said so to me, when the document was handed to him.

Q. I asked what he said there? A. He showed Judge McCunn the proposition, and asked his opinion.

Q. After Judge McCunn gave him his opinion upon it, was he then satisfied to sign it? A. Not after he was told it would be a death warrant? he was influenced then; he refused to sign it then.

Q. Was any thing further done about the transaction then; about that one paper? A. No, sir; the proposition was then presented to Bininger, through his attorneys.

Q. This one you had here to-night? A. Yes, sir.

Q. When did your father's health begin to break down? A. His health commenced to fail probably a month or two preceding any struggles; commenced to be in very poor health.

Q. What is your age? A. Twenty-six years old.

By Mr. Parsons:

Q. On your examination the matter has been left in a rather confused condition?

Mr. Devlin — The only objection we have is to leading the witness.

Q. Do you know enough of the machinery of the courts, or know any thing about the special terms, to answer in reference to any thing about any particular judge who might be holding in any particular motion to be heard? A. No, sir; I do not.

Q. You have been asked by Mr. Devlin in reference to your going to Judge McCunn's house that evening, and what was said immediately on entering the house; do you know whether an appointment had been made with Judge McCunn prior to your going there, or whether any thing of that kind had occurred?

Mr. Devlin, to the witness:

Q. It is of your own knowledge, Mr. Clark? A. Not of my own knowledge; I had no information of it.

Q. Do you know nothing of the subject? A. Nothing, except through hearsay.

Q. You have also, on your examination by Mr. Devlin, spoken about the sheriff being in possession of the stock of A. Bininger & Co., and some conflict for possession of the property between the sheriff and United States authorities; was it the sheriff who was in possession, or Mr. Hanrahan, the receiver? A. It was Mr. Hanrahan, the receiver.

Q. Now, can you state what it was they did state at this time in respect to what the sheriff could do in regard to the possession of Hanrahan, and what was the occasion of any action on the part of the sheriff to influence which Mr. Vanderpoel should be employed? A. I don't clearly understand your question so as to know what you mean, so that I can give a proper answer.

Q. At the time when Mr. Vanderpoel's name was mentioned, I understood you, the receiver was appointed and in possession? A. Yes, sir.

Q. Was there any occasion to have the possession of the receiver protected? A. Yes, sir; there were proceedings brought by some of the creditors in bankruptcy, in the United States court, to take possession of the store, over the head of the receiver.

Q. What was said, if any thing, in any interview, in Judge McCunn's presence, in respect to any instrumentality of the sheriff to

protect the interests of the receiver? A. I don't really remember clearly.

Q. You have testified in regard to your accompanying Judge McCunn to the Fifth Avenue Hotel; did any little circumstance happen at the Fifth Avenue Hotel? A. No, sir; nothing very particular.

Q. If any thing happened there, I should be glad to have you inform the Senate? A. Well, I believe we had a cigar together, or something of that kind.

Q. Was there not something more than that? A. Nothing more than that.

Q. I wish you to tell all there is of that matter? A. That is all.

Q. Don't you recollect any thing further? A. No, sir.

Q. Mr. Clark, since the adjournment of the Senate, or rather since the recess, have you reflected at all in reference to the agreement, the copy of which, in your own handwriting, was produced, and can you now state (I mean of positive recollection, don't give us any guesses) whether that agreement is the agreement that was prepared by Mr. Titus, or the agreement prepared upon the memorandum drawn up by Judge McCunn? A. Since leaving here I have thought over the matter, and I have come to the conclusion that that is the memorandum drawn up by Mr. Titus, and I can tell you how I fasten it in my memory. The first proposition by Mr. Titus, by the advice of my father's counsel, wanted one or two small corrections.

Q. These are the corrections that are on the margin of the agreement, in the handwriting of your father? A. Yes, sir; that proposition was again submitted and adopted by him.

Q. With this change? A. They were willing to assent to those changes, and that is the proposition that would have been agreed to by all parties; that is the proposition that was brought before us by Judge McCunn; I remember it distinctly, and I fasten it in my memory in that way.

Re-examination by Mr. DEVLIN:

Q. It is not five minutes since you said the papers that were here this evening were a counter-proposition to the one introduced by Mr. Titus? A. You alluded to that, and I said that was the proposition by Mr. Titus.

Q. Have you had any conversation since the Senate adjourned, on this subject, with any body? A. Yes, sir; I have told this question.

Q. I mean in regard to this paper? A. Nothing more than I spoke to Mr Titus about it, and told him I had called it to my memory; I spoke to Mr. Parsons about it in the hotel, and told him that I was thoroughly convinced, and could explain it to the Senate.

Q. How did you come to think you were mistaken, when you were quite positive, when you were on the stand before, that this was the paper that Judge McCunn had drawn? A. I was not very positive before, because I had not seen any of those papers since they were drawn up, which was in 1869, or 1870, and of course my memory is a little bit confused about it; but since I have thought it over, I am perfectly clear upon the matter.

Q. You have talked with nobody except Mr. Titus, and Mr. Parsons, to communicate that matter? A. No, sir.

Q. Has any body spoken to you about the subject? A. No, sir.

Q. Where is the counter-proposition that you propose to give to these people? A. That I have not seen.

Q. Do you know where it is? A. No, sir.

Q. Do you know what the contents were? A. No, sir; I don't know exactly.

Q. How did it differ from this one? A. It must have differed very materially.

Q. I ask you how? A. I don't remember that at all.

Q. How long after you left here did you communicate with Mr. Titus, in regard to the paper? A. When I walked to the foot of the Senate, I remembered the marginal writings then.

Q. Didn't you remember it when you were sitting there upon the witness' stand? A. No, sir.

Q. Walking out of the chamber you recollected it was the Titus paper; that this marginal writing was intended as a proposition? A. Yes, sir; I recollect the whole circumstance.

Q. What did you make a copy of the Titus paper for? A. It was to bring in these alterations.

Q. The alterations are not copied? A. It had been altered once or twice; this is the second time it was altered; this is the paper that was agreed upon by both of them.

Q. You had altered it before? A. It had been altered, principally by my father.

Q. It was sent to you as complete, I understand you? A. That one now is complete.

Q. It was sent to you that evening, as complete, and then you wanted these alterations? A. Not that afternoon; this proposition that was agreed to that afternoon, that we all agreed to adopt.

Mr. PARSONS — That is all, Mr. Clark. Mr. President: May I be pardoned? there is a subject I had a memorandum of, which, with the leave of the Senate, I will ask a question in regard to.

Re-direct examination by Mr. PARSONS:

Q. Mr. Clark, do you remember, at any time, an interview with Judge McCunn when any thing was said about the injunction to be obtained by your father to protect against bankruptcy proceedings?

Mr. DEVLIN — Mr. President: I do not want to make any technical objections, but this is going to reopen the whole matter.

Mr. PARSONS — We withdraw it, if it is objected to. It was unintentionally forgotten, but certainly if there is objection we shall not press it.

The PRESIDENT to the witness: That will do, sir.

JOEL O. STEVENS, a witness called on behalf of the people, being duly sworn, testified as follows:

By Mr. STICKNEY:

Q. Mr. Stevens, your position is what, now? A. I am under-sheriff of the county of New York.

Q. How long have you been acting in that capacity? A. Some nine years in that position.

Q. How long have you been connected with the sheriff's office in any capacity? A. Since 1854.

Q. You were, as I understand you, under-sheriff in December, 1869? A. Yes, sir.

Q. Do you remember the suit of *Clark* v. *Bininger* in the Superior Court? A. I have heard of such a suit, sir.

Q. Did you, at any time, see Judge McCunn in relation to the matters involved in that suit? A. I saw him on one occasion in reference to it.

Q. Where? A. At the sheriff's office.

Q. As near as you remember, at what time? A. Well, it must have been about that time, but I cannot recollect exactly, as we have no record of it in the office.

Q. What took place then; give the whole of the conversation? A. There was an order of some kind prepared by Judge McCunn, directed to the sheriff, the tenor of which I cannot distinctly state now, but it was of such a nature that I refused positively to execute it.

Q. The order in this suit of *Clark* v. *Bininger?* A. Yes, sir.

Q. (Showing paper) Will you look at that paper and state as near as you can whether that was the paper or a copy of it? A. I cannot identify it as being exactly the verbiage of the paper presented, but it was something very similar to that.

Q. (Showing the second paper) Will you look also at that paper, and see if that, or a copy of that, was presented to you? A. I am inclined to think, Mr. Stickney, that this is the paper presented to me, instead of the first one; I think so.

Mr. STICKNEY — We will offer in evidence this paper.

Mr. MOAK — That is not the original paper, but we served a subpœna upon Mr. Boese, the clerk of the Superior Court, to produce it, and the original does not appear on the files of the court. It is a paper of Judge McCunn's, on the hearing before the Assembly judiciary committee. It may be a correct copy. This paper, if the President please, we desire to object to. In the first place, it does not appear to be the original, and in the next place it turns out that Judge Woodruff and Judge Blatchford, sitting together, decided that the receiver was entitled to the possession, and that Judge McCunn was a better lawyer than either. That is a reported case. Certainly we object to the admission of the copy, until it is shown that the original is lost.

The PRESIDENT — Shall the objection be sustained?

[The question upon the objection being put to the Senate was overruled.]

Q. Did you ever receive this paper in your office? Did the sheriff, or you, as the representative, ever receive this paper that you have mentioned as executed, which Judge McCunn brought to you? A. There was a paper brought to me, which I presume was the original, of which that is a copy, but this paper I have never seen before.

Q. The original, that was brought to you or the sheriff, did you take it? A. No, sir; I emphatically refused to receive it, notwithstanding what Mr. Moak, says; Judge Woodruff and Judge Blatchford did not decide as he states, although they are better lawyers than—

Q. Did Judge McCunn take away the paper? A. Yes, sir; he said if I would not execute it he would go to some marshal to execute it.

Mr. STICKNEY — We will read as follows:

EXHIBIT —.

NEW YORK SUPERIOR COURT.

At a Special Term of the Superior Court of the city of New York, held at the city and county of New York, the 6th day of December, 1869, at the court-house thereof, in said city.

Present — Hon. JOHN H. McCUNN, *Justice.*

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

WHEREAS, on the 19th day of November, 1869, Daniel H. Hanrahan, Esq., was duly appointed receiver in this action of the property and effects of the firm of A. Bininger & Co.; and whereas the said Hanrahan, duly took possession of said property belonging to said firm, situate at 92 and 94 Liberty street, in said city, and was in the lawful possession of the same under said order of appointment, and it having been made to appear to this court by the affidavit of the said plaintiff that certain persons unknown, but calling themselves United States deputy marshals, have forcibly entered said store, and claim to have possession of the same and said property, and are exercising or claiming to exercise control over said property, and the receiver thereof;

Now, therefore, be it known that I order and hereby direct the sheriff of the city and county of New York, or any marshal or marshals in and for the city of New York, or any person whom the receiver may call upon, to forthwith take possession of said property, and remove, by force, if necessary, all persons whomsoever, excepting those acting under said receiver, and that the said sheriff protect and assist the said Daniel H. Hanrahan, receiver, as aforesaid, in his possession of said property, and in holding and keeping possession of the same in conjunction with said receiver, from all persons whomsoever, until the further order of this court.

[SEAL] JOHN H. McCUNN,
Justice Superior Court.

Q. Will you state the whole of the conversation that Judge McCunn had with you? A. I have stated it generally; the order was presented to me, and I refused very positively to receive it; Judge McCunn then withdrew.

Q. What reply did you give him; what did you say to him?

A. I made the remark that he had just as good a right to order me to assassinate the first man I saw in the park, as to issue that order.

Q. What year did I understand you to say that you first began your connection with the sheriff's office? A. In 1854.

Q. Since 1854, has there been any such process, or similar process in the sheriff's office, except on this one occasion?

Mr. DEVLIN — I don't think that is of any consequence.

The PRESIDENT — Do you insist upon the question?

Mr. STICKNEY — I am ready to withdraw it on any intimation of the President; I believe we will ask the question to be answered. [The question upon the objection being put to the Senate, was sustained.]

Q. Who, do I understand you, brought this order to the office? A. I don't recollect who it was that presented it to me; I don't think it was Judge McCunn who came with the paper originally; it was left with me by some other person, if my memory serves me; and Judge McCunn came subsequently to see me in reference to it, and to know why I refused to execute it, or something of that kind.

Q. You have no recollection who it was presented by? A. No, sir; I cannot call to mind who it was.

Q. Do you recollect whether James F. Morgan was there in relation to the same paper, or was it Judge McCunn? A. I really cannot fix my mind upon whom the person was that brought it.

Q. Did you ever have any writ or process issued by the sheriff, or executed by him, in this suit unless you call this paper a process? A. None, sir.

Cross-examined by Judge SELDEN:

Q. I suppose all process issued out of the Superior Court is directed to the sheriff of the county? A. Yes, sir.

Q. At what time was it that this order came to you? A. I cannot fix the date; it was about the latter part of the year 1869.

Q. Are you sure it was before 1870? A. Yes, sir; I am quite clear it was.

Q. How long before do you think? A. It was sometime in the latter part of 1869; nearly the close of the year.

Q. How long did the interview between you and McCunn last? A. Perhaps ten minutes.

Q. Nothing more was said or done about it, as far as you were concerned than you have related? A. No, sir; nothing.

Judge SELDEN — That is all, I believe.

MANSFIELD COMPTON, a witness called in behalf of the people, having been duly sworn, testified as follows :

Examined by Mr. STICKNEY :

Q. Mr. Compton, you are the attorney for the plaintiff in this suit of *Clark* v. *Bininger* in the Superior Court? A. I was.

Q. When did you first have an interview with Mr. Justice McCunn in relation to the proceeding in that suit? A. The evening of the 19th of November, 1869.

Q. By what do you mean between the 19th and 20th, or between the 18th and 19th? A. The 18th.

Q. Where was that? A. In his house in New York.

Q. At about what time? A. Well, I think that it was about 9 o'clock in the evening of the 18th.

Q. Will you state what took place. A. I went there for the purpose of making an appointment with him at midnight.

Q. And what did you say? A. I told him I wanted to have some papers issued immediately after the expiration of the 18th; the 18th was Thanksgiving day.

Q. Did you state what the papers were? A. I think I did; I won't be sure though, whether I did then or when I went with the papers.

Q. Did you say any thing to him at that time, 9 o'clock I mean, as to what kind of proceeding you wished to take? A. I don't remember distinctly; I think very likely I said I wished to get a receiver appointed and have an injunction.

Q. Did you mention the name of any receiver? A. Not at that time.

Q. Was there any thing else that took place, that was said then? A. I don't think there was on the evening of the 18th ; I merely called there and asked him if it would be convenient for him to be in about 12 o'clock ; that I would call with some papers; he said he would be there.

Q. Then at what time did you go there next? A. Well, it was just before 12 o'clock.

Q. With whom ? A. With Abraham B. Clark and Melville B. Clark.

Q. What took place then? A. I submitted my papers to him ; told him what I wanted, and suggested the name of Hanrahan as receiver.

Q. What did you say? A. He took the papers and looked at them ; swore Mr. Clark.

Q. To what papers did he swear Mr. Clark? A. He swore him to the complaint and the affidavit on injunction.

Q. What was next done? A. Well, I am not clear now about whether any thing further was done that evening, or the next morning.

Q. At what time was the order appointing the receiver signed? A. Well, that is what I am not clear about; whether it was that evening or not.

Q. Won't you reflect, and state as near as you can? A. I have been trying to do that, Mr. Stickney, but I have no distinct recollection about those papers being signed that night or the next morning; they may have been signed that night, or they might have been signed the next morning; I would not undertake to say.

Q. Have you any recollection of seeing him any where else, except at his house? A. I have no distinct recollection of seeing any one the next morning, except Melville B. Clark, and that was when he came to my office to inform me that the receiver had taken possession of the store.

Q. At about what time of day was that? A. About 11 o'clock.

Q. Then he told you the receiver had taken possession? A. Yes, sir.

Q. But you have no recollection of seeing Judge McCunn at any time, except at his house? A. I don't recollect whether I did or not.

Q. What did you do with the papers when you left Judge McCunn's house? A. Well, if he signed them that night, I gave them over to Melville B. Clark or Abraham B. Clark; if he didn't sign them that night, why, I probably didn't give them to them until the next morning.

Q. Did you see Melville B. Clark at any time after you left Judge McCunn's house, until the time you have mentioned? A. I have no recollection.

Q. Or his father? A. I have no recollection of seeing any of them until after I was informed by Melville B. Clark that the sheriff had taken possession of the property.

Q. That the sheriff had taken possession? I mean the receiver.

Q. Will you look at the paper now shown you and state whether that is a copy made in your office? A. This was made in my office; that is indorsed in my handwriting; the original injunction order.

Q. Will you examine those papers and state whether or not all of those papers, except the first one, were not served from your

office; except that first paper, the order of Judge Fithian, and that back sheet; I ask you if those are not from your office? A. The first and the last are not.

Q. Well, I will ask you the question in another form; this copy of an injunction by order, the copy of order of appointment of receiver, the copy of summons, complaint and affidavits, in a suit of *Clark* v. *Bininger*, were copies served from your office? A. Yes, sir, they were made at our office; I don't know whether they were served from there.

Q. Is that copy of order of appointment of receiver, in the suit of *Clark* v. *Bininger*, a true copy of the order made on the 19th of November, 1869, by Judge McCunn? A. I think it was.

Q. Have you any doubt about it? A. I have no doubt about it at all; I don't know that I have seen the order since November 19, 1869.

Mr. Stickney — It appears, Mr. President, from the record produced by Mr. Boese, that the original order of appoining a receiver on the 19th November is not now on the files of the court, so that we offer in evidence this copy of the order which is now testified to by Mr. Compton.

Mr. Devlin:

Q. Do I understand that you cannot testify positively that there is a correct copy of that order? A. No, I wouldn't want to say positively.

Q. Did you ever compare it? A. No, sir.

Q. Do you know whether that order is the same one or not? A. I don't know; it seems to me it purports to be that order; I have not read it over.

Mr. Davis — We object to it, Mr. President; I submit that it is rather hard to compel us to take as orders that are supposed to be sufficient to remove a judge, a copy which the witness says he could not swear to. That such a copy should be taken as the basis of the removal of a judge from office.

Mr. Stickney:

Q. In whose handwriting is that? A. That I don't know.

Q. But you say these papers were served from your office? A. These papers were served from our office, and this paper was served on me as a copy of the order for appointment of a receiver.

Q. How many times have you examined the original order of

Judge McCunn of the 19th of November, appointing a receiver? A. I don't know that I have seen that order since he signed it.

Q. Will you examine that paper and state to the best of your recollection whether it is an exact copy? A. According to my recollection I should think that was a copy; I couldn't swear to it positively.

Q. Have you any doubt about it? A. No; I have no doubt about it; it was served on me as a copy.

Q. Was it not first served from your office? A. That paper was not; these other papers were.

Q. In whose handwriting is that indorsement? A. I don't know handwriting; if this paper came out of my package that I brought up—I see it is marked "filed."

Q. These papers are from the files of the court? A. I don't recognize that handwriting; I think Mr. Titus might be able to explain that.

Mr. STICKNEY — We will offer the paper as it is, and take the judgment of the Senate upon it.

The question being put as to whether the objection to the paper should be sustained, was decided in the negative. The paper was marked exhibit No. 10, and read as follows:

EXHIBIT No. 10.

SUPERIOR COURT OF THE CITY OF NEW YORK.

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.
} *Order of appointment of receiver.*

The above named plaintiff having commenced an action against the said defendant for a settlement of partnership and for an accounting, and it appearing to my satisfaction by the complaint and affidavits hereto annexed, that a cause of action exists against the said defendant, and that the acts and doings of the said defendant have been and are contrary to equity and good conscience, and that no equitable division of the assets and good will of said partnership can be made without loss to both parties, except by sale thereof and a division of the proceeds, I do hereby order that Daniel H. Hanrahan, Esq., of the city, county and State of New York, be and he is hereby appointed receiver of all the debts, property and equitable interest, rights and things in action of the said partnership, with power to dispose of the same for the benefit of all parties concerned,

according to law; that such receiver, before he enter upon the execution of his trust, execute to the clerk of this court a bond, with sufficient sureties, to be approved by me, in a penalty of $1,000, conditioned that he will faithfully discharge the duties of such trust, and file the said bond with the clerk of said court, and that the said receiver, upon filing such bond, be invested with all rights and powers as receiver, according to law.

Dated NEW YORK, *November* 19, 1869.

J. H. McCUNN, *Justice.*

By Mr. STICKNEY:

Q. What conversation had you had with Mr. Hanrahan, prior to your meeting with Judge McCunn and prior to Mr. Hanrahan's appointment by Judge McCunn as receiver, in relation to those matters?

Mr. MOAK — That we object to; the conversation Hanrahan and the witness had in Judge McCunn's absence, on the ground that such a conversation is clearly inadmissible within the rules of law.

Mr. STICKNEY — We expect to prove, as it was testified to before the Assembly judiciary committee that, before Mr. Compton had his interview with Judge McCunn, he saw Mr. Hanrahan and spoke to him in relation to these matters, and that Mr. Hanrahan said to him: "If you bring that suit in the Superior Court and apply to Judge McCunn he will appoint me receiver." That the application was made to Judge McCunn in pursuance of that arrangement, and that Judge McCunn did appoint Hanrahan receiver.

A SENATOR:

Q. Was this communicated to Judge McCunn?

Mr. STICKNEY — We shall not claim to show that.

[The question being put as to whether the objection should be sustained was decided in the negative.]

A. I was at Hanrahan's office on another reference, or on a reference, and after the reference was over he asked me if I could not do something for him, and placed it upon the ground that he had met me in California; that Californians ought to help one another when they get to New York; I stated to him that I was about bringing a suit wherein I should want a receiver, and he asked me or requested me to bring it in the Superior Court, and asked me to suggest his name to Judge McCunn; that is the substance of it.

Q. What did he say, if any thing, as to what Judge McCunn would do?

Mr. SELDEN — That we object to. The whole subject of what Hanrahan and this man said together seems to bear very little upon Judge McCunn in any way.

Mr. STICKNEY — Certainly, if the testimony fails to connect it, we should be perfectly willing to have it stricken out.

Q. Was any thing said about Judge McCunn in that conversation? A. I think he said if I would suggest his name, Judge McCunn would appoint him; I am under that impression.

Q. Do yon know what relations between Judge McCunn and Mr. Hanrahan there were? A. No, I do not.

Q. Do you know whether they were on terms of intimacy or not? A. That I don't know only from —

Q. Have you at any time, seen Judge McCunn in Mr. Hanrahan's office? A. Yes, sir; I have seen him in that office several times; I don't know how many times.

Q. During this litigation? A. Yes, sir.

Q. Mr. Hanrahan was whose partner? A. Mr. Morgan's partner.

Q. The firm name was what? A. Morgan & Hanrahan.

Q. How many times, according to your best recollection, did yor see Judge McCunn in that office? A. Oh, I would not undertake to say, Mr. Stickney; I could not say.

Q. Did you see Judge McCunn in their office in relation to any thing except the matters in litigation in this suit?

Mr. SELDEN — He has not said that he saw him in relation to those matters.

By Mr. STICKNEY:

Q. Did you see him at any time, in their office, in relation to matters involved in that suit? A. I think I did once; whether I did more than that I could not undertake to say.

Q. Have you no recollection whether you did more than once? A. I have not a distinct recollection.

Q. Did you see him at any time there in relation to any thing else? A. Not that I am aware of; I may have done so.

Q. Who was Mr. Morgan; what relation or connection was he to Judge McCunn? A. I understood that he was a partner of Judge McCunn; I don't know of my own knowledge.

Q. Do you know what business connection he had ever had with Judge McCunn? A. No, I don't know that I do.

Q. Who did Morgan succeed in business? A. I believe the sign was that they were the successors to McCunn and Moncrief, or Jno. H. McCunn; I don't recollect distinctly which.

Q. Do you know whether or not Judge McCunn had a desk or small apartment in their office? A. Well, I think when I saw him there he was in the office that Mr. Hanrahan occupied; there were three rooms; an outside room and two inside rooms; Mr. Morgan had one and Mr. Hanrahan had the other; when I saw Judge McCunn there, he was in Mr. Hanrahan's department, if I recollect right.

Q. That don't quite answer my question. Do you know whether he had a desk or small room there? A. I don't recollect whether he had a distinct desk; I don't know whether it was his desk; there were one or two desks in that room; perhaps a desk and table.

Q. Have you seen him several times occupying or using one. A. I don't know that I ever saw him using a table there; I may have done so; my recollection is not distinct about those matters that took place at that office.

Q. Will you look at the paper now shown you signed by Mr. Justice Fithian, dated November 22, 1869, and state whether you recollect what time that was served upon you? A. There was such an order as that served upon me, I believe.

Mr. STICKNEY — This is the original order to show cause, which we offer to read in evidence.

The paper referred to was marked exhibit No. 11, and reads as follows:

EXHIBIT No. 11.

SUPERIOR COURT — CITY OF NEW YORK.

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

On the annexed affidavits, and upon the summons, complaint, affidavits and papers upon which the injunction order, and order appointing a receiver in this action were made on the 19th instant, and upon said orders, copies of which were served upon the said defendant, it is hereby ordered that said plaintiff, or his attorney, show cause before one of the judges of this court, at special term, at City Hall, on the 25th day November instant, at 10 o'clock, in the forenoon, why said injunction order should not be vacated, and why said order appointing a receiver, and the receivership in this action should not be set aside, or why said orders, and each of them should not be modified as may be just, or why such order, or further or

different order, or relief, should not be granted and made as the nature of the case may require, and in the mean time, and until the further order of this court, that Daniel H. Hanrahan, Esq., the receiver so appointed, do refrain from selling or disposing of any of the copartnership property and effects of the firm of A. Bininger & Co.

T. J. FITHIAN,
Justice.

November 22, 1869.

City and County of New York, *ss.:*

John Jacques, being duly sworn, says that on the 23d day of November, 1869, at the city of New York, he served the foregoing order to show cause, together with the affidavits of Abraham Bininger, made the 22d day of November 1869, and Edward W. Cone, made the same day, on M. Compton, the attorney for the plaintiff herein, at his office, by delivering to and leaving with a clerk in charge of the said Compton's office, during the temporary absence of said Compton, true copies thereof, and at the same time exhibiting to the said clerk the original order to show cause, under the signature of the justice thereto affixed. Defendant says that the person he so served informed him that the said Compton was tempo rarily absent. Defendant further says that at the same time and place, he served a regular notice of appearance and retainer of Edward W. Cone, Esq., for the defendant, Abraham Bininger, by delivering to and leaving with said clerk a copy of such notice.

JOHN JACQUES.

Sworn to before me this day of November, 1869.

John Hayes,
Notary Public in and for New York County.

Mr. Stickney:

Q. Mr. Compton, will you state whether you received the letter now shown you at any time? A. Yes, sir; I believe I did.

Q. Whose signature is that? A. I believe that is Mr. Hanrahan's signature; it purports to come from him.

Q. Did you see Judge McCunn at his office, about the date of that letter? A. I think that was the time that I saw him there.

Q. As stated in this letter? A. Yes, sir; I think so.

Q. What is your best recollection? A. I recollect seeing Judge McCunn at their office once or twice, but I could not state the date.

Q. What is your best recollection as to whether you saw Judge McCunn at Hanrahan's office just after you received that letter? A. I think it is very likely I went down; I am not positive about it.

Q. What is your best recollection? A. Well, my recollection is that I did; I think I did; where did you get that from, Mr. Stickney?

Mr. STICKNEY — That was in the files of the court.

Mr. STICKNEY — I offer to read the letter in evidence; Mr.—

Mr. SELDEN — If that letter was shown to Judge McCunn, if he knew any thing of it, it might be evidence; but not without, certainly; it is a letter from Hanrahan to this witness.

Mr. STICKNEY — The letter requests Mr. Conklin to meet Judge McCunn at Hanrahan's office.

Mr. SELDEN — Suppose it does; what does Judge McCunn know about that?

Mr. STICKNEY — The witness then testifies that he did meet Judge McCunn at Hanrahan's office, in pursuance of the request or appointment, whatever it may be called, contained in this letter.

Mr. D. P. WOOD — Does the witness testify that he met Judge McCunn at the office in accordance with the request of that letter?

Mr. STICKNEY — He says that is his best recollection.

Mr. SELDEN — It does not appear that Judge McCunn ever knew any thing about that letter; not a particle of evidence that he ever heard of it.

Mr. STICKNEY — The letter appoints a meeting with Judge McCunn, and it appears that the meeting took place.

Mr. SELDEN — But there is no evidence that Judge McCunn ever knew any thing about that letter.

Mr. STICKNEY — We do not conceive that it is possible for him to have gone without knowing about that letter.

The question being put as to whether the objection should be sustained, was decided in the negative.

The letter was read in evidence by Mr. Stickney, as follows:

EXHIBIT NO. 12.

NEW YORK, *November* 23, 1869.

M. COMPTON, Esq.:

Dear sir — Please remain in your office or be where you can be found at any time during the day. The judge has granted the order modifying the order of yesterday, and giving me again the power to sell, etc. The judge will be at my office during the day, and when

he comes Mr. Morgan will send for you, as he (the judge) wishes to see you both together.

Very respectfully,

DAN. H. HANRAHAN.

Mr. STICKNEY - - According to your recollection, was or not Judge McCunn there to meet you, as stated in that letter? A. I don't recollect, sir, that Judge McCunn was there; I don't recollect whether I saw the judge positively.

Q. Well, I ask you what is your best recollection? A. Well, I think it is very likely I went down; I have no distinct recollection about it.

Q. Was any thing said at that meeting, as nearly as you can remember, as to the modification of this order of Judge Fithian? A. At what meeting?

Q. At Hanrahan's office? A. I don't recollect distinctly of going there and ever meeting any body there; I can only say this: that I presume I went.

Q. Have you any doubt about it? A. I can't say any thing more.

Mr. SELDEN — The counsel will see now that the ground upon which that letter was admitted utterly fails.

Mr. STICKNEY — He said that, according to his best recollection, he did go there.

Mr. DEVLIN — He said he had no recollection of seeing Judge McCunn there.

Mr. STICKNEY — He says he cannot swear positively that he saw him there.

Q. Where did an interview take place that you certainly remember you had with Judge McCunn? A. I couldn't say, particularly.

Q. Can you state how many interviews you did have at that office? A. I can only state that I saw Judge McCunn there once or twice; but when it was, on what occasion, or what business was done, I couldn't say.

Q. Did you at any time meet Judge McCunn at Mr. Clark's house? A. Yes, sir.

Q. Will you state when the first time that you met him there was? A. I couldn't state that.

Q. Can you state any time when you met him there? A. I can only state that I met Judge McCunn there, the only time that I can speak of positively is at the time the agreement spoken of here was submitted to him for his opinion.

Q. Will you look at the paper now shown you, marked Exhibit No. 8, and state whether you saw Judge McCunn in relation to that or some agreement of settlement between these parties, Clark and Bininger? A. I saw him there one night in relation to some settlement between Clark, Bininger & Co., and the creditors; it must have been after this, I think.

Q. Will you state every thing that took place at that time? A. Mr. Titus and myself had been some time trying to settle these matters between Clark and Bininger; we had talked the matter over between ourselves, until we had arrived at a basis of settlement which we thought both parties would agree to, I was trying to think this agreement here, without these marginal alterations, was the agreement that Titus and I agreed upon in the first instance, I don't think it was exactly the agreement that was submitted.

Q. Come as quickly as you can to what took place in Judge McCunn's presence? A. Well, the agreement that was submitted here amounted to this; I don't think it was exactly like this; I had advised Mr. Clark to sign the agreement; Mr. Bininger had signed the agreement, and I advised Mr. Clark to do it, Mr. Clark promised me he would do it, but he said he wished to see Judge McCunn before he signed it, and he took the paper to go to Judge McCunn's house to see him; that evening I called at Clark's house to see what the result was; he said he had called at Judge McCunn's house and he was not in, but he left his name; I remained at the house until about 9 o'clock, when the judge came in, and the paper that Bininger had signed was submitted to him, and he disapproved of it.

Q. Will you give us, as nearly as you can, the words that were used? A. I couldn't undertake to say the exact words he used; all I can say is, he disapproved of that agreement.

Q. Is that all you can remember? A. I couldn't state his words.

Q. Is that all you remember that took place there? A. If you suggest any thing, there may be something else; I was a little provoked that that agreement was not carried out; I had promised Mr. Titus it would be carried out.

Q. What did you say there? A. Oh, I didn't say much of any thing; I found Mr. Clark was disinclined to carry out the agreement when the judge thought it was not exactly the agreement that should be made, and I was somewhat provoked, and went out of the room and left them talking; there was very little transpired before me.

Q. I understood you to state that there was one interview at Mr. Hanrahan's office which you do remember about? A. I remember seeing Judge McCunn there once.

Q. Do you remember what took place then or what was spoken of? A. Well, I don't recollect.

Q. Did Judge McCunn, at any time in your hearing, say any thing about retaining Mr. Barr? A. Not in my hearing.

Q. Was there any other proceeding that you remember, except this order to show cause, which has been put in evidence, that was coming up before Judge Fithian? A. No, sir.

Q. Did Judge McCunn, in your hearing at any time, say any thing in relation to the employment or retainer of Mr. Vanderpoel? A. I am inclined to think Judge McCunn did say something about retaining Mr. Vanderpoel in some contempt proceedings; I think it was contempt proceedings; no it was not contempt proceedings; it was a motion that Mr. Bangs made in the Superior Court for the Superior Court to order the receiver to deliver over the partnership's property.

Q. State what was said in Judge McCunn's presence? A. Well, I couldn't act on that motion for the reason that the United States had enjoined me from appearing on that motion, and enjoined my client; and I think I spoke to Judge McCunn once about it; and I think he spoke of retaining Mr. Vanderpoel; I know Mr. Vanderpoel appeared on that motion.

Q. What did he say about it? A. He suggested that Mr. Clark employ Mr. Vanderpoel, I think.

Q. Did he give any reason for it? A. Not that I am aware of, any further than that he was an able man.

Q. Did Judge McCunn say any thing at that time in your hearing about giving you an allowance? A. Yes, sir; he said several times that he would give me an allowance.

Q. Did Judge McCunn ever say any thing in your hearing about protecting Mr. Clark, or getting his rights, or any thing of that nature? A. I don't remember.

Q. Do you know who was holding chambers on the 19th of November, 1869? A. Judge Fithian.

Q. Do you know of any practice of the court requiring that application for a receiver, or for an injunction, or similar applications should be made to the judge holding chambers or special term? A. Well, it was usual to make them to the judge holding chambers.

Q. And what was your reason for going to Judge McCunn? A. Well, my reason was — one reason for going there was — I wanted to get my suit initiated as early as possible; from what my client told me, and from the notice of dissolution that had been served upon me, we anticipated a counter movement from Bininger, and I wanted to

get the start; and I knew where Judge McCunn lived, and I didn't know where Judge Fithian lived; I think I told Judge McCunn my reasons for coming to him; I believe I did; it is very likely I did.

Q. Did Judge McCunn refer you to Judge Fithian? A. I don't remember that he did; he may have done so.

Q. Have you any recollection that he did? A. I have no recollection about it; I know I was extremely anxious to get that suit initiated as early as possible on the morning of the 19th, because the partnership was dissolved on that day.

Q. Did you make any inquiries as to where Judge Fithian was? A. I don't remember; there was another reason for going to Judge McCunn.

Q. What was it? A. Mr. Hanrahan had stated to me, as an inducement to bring that suit in the Superior Court, that he would give one-half his commission; and if I had gone to Judge Fithian, he probably would not have appointed Mr. Hanrahan, and then I would not have made quite so good a speculation out of the suit.

Cross-examination by Mr. SELDEN:

Q. At what time did you go to Judge McCunn, on the occasion when you applied for the injunction? A. It was just 12 o'clock, a little before.

Q. There was nothing done, I suppose, with the papers, until after 12 o'clock? A. The judge may have looked at the papers, but nothing was done; we waited some little time.

Q. Clark was not sworn, nor any of them signed the papers? A. No, sir; I think that Judge McCunn stated, after the clock struck twelve, that he would wait a little while for variance in time, I won't be sure whether he did or not; some body did, I believe.

Q. Now, in relation to the receivership; was there any other name mentioned besides that of Hanrahan, in connection with the receivership at that time; did any one mention Murray Hoffman? A. Well, I have heard Murray Hoffman's name mentioned, two or three times, in connection with the receivership, but whether it was mentioned then and there, I couldn't say; I don't recollect.

Q. Your application was to have Mr. Hanrahan appointed? A. Yes, sir; and my reason for having Mr. Hanrahan appointed, was, that he had made me a proposition which was beneficial to me.

Q. You had been acquainted with Mr. Hanrahan before that? A. I knew Mr. Hanrahan as early as 1855.

Q. Did you regard him as a very suitable man to be appointed at

that time as receiver? A. Why, yes; I thought he was a suitable man.

Q. In what capacity had he acted in California, while you were there? A. He was a judge of one of the justices' courts there, and he was connected with the sheriff's office at one time; I think he had charge of Adams & Company's property at the time of their failure.

Q. Was he a man, down to that time, so far as you knew, of temperate habits? A. When he was in California, I regarded him as a man of temperate habits; I was not aware that he was intemperate until some time after his appointment as receiver.

Q. He was a lawyer? A. Yes, sir.

Q. A good business man, and a man of intelligence? A. Yes, sir, he was a good business man; he was a rapid business man.

Q. An uncommonly good business man; how do you recollect distinctly whether the papers that were signed there were not left with Judge McCunn to be delivered on the next morning after the court opened? A. It may have been so; I have no recollection about it; I couldn't undertake to swear whether I carried those papers away, or left them there, or some body else carried them.

Q. You don't know whether the order for a receiver was signed that night or not, do you mean to say? A. I wouldn't undertake to say it was or was not.

Q. Do you recollect when the receiver's bond was executed? A. I dont know any thing about that; I had nothing to do with that; that was the receiver's business.

Q. What is the penalty of the bond as given? A. I never saw the bond; I may have seen it, but I do not remember now; all I know about that bond is, that there was a copy served on me once; I may have seen the bond.

Q. Is the paper I now show you the bond? A. Yes, sir; this is the bond; the penalty is $10,000.

Q. When does it purport to have been acknowledged first, and the affidavits of the sureties sworn to? A. the 19th of November, 1869.

Q. Before whom? A. Levi Gray.

Q. Do you know where his office is? A. No, sir; I do not know him at all.

Q. Do you know whose handwriting that bond is in; is it not Mr. Hanrahan's handwriting? A. I don't think it is; I may be mistaken; I think it is likely it was done in his office by some of his clerks.

Q. You had no bond with you but Judge McCunn's? A. Not for a receiver; the only bond I had there was a bond on injunction; an undertaking on injunction.

Q. Did you draw the order for the appointment of the receiver? A. I did.

Q. You had the draft of that order before you went to Judge McCunn's, did you? A. Oh, I had the original order.

Q. You had drawn it before you went there? A. Yes, sir; certainly, I had all the papers drawn before I went there.

Q. In the original order, what was the amount of the security required from the receiver? A. I do not remember the exact amount; all I know about it is what has been read in this order; I don't recollect what the amount was.

Q. The order expresses $1,000; what I want to know is, whether it was not a mistake in copying? A. I wouldn't undertake to say, sir; for I don't recollect any thing about it.

Q. You don't know that the bond was given for any more than the order required? A. That I don't know, for I don't know what the order did require; I don't recollect.

Q. Were you present when the motion before Judge Fithian was argued on that order to show cause? A. I was, and participated in the argument.

Q. What was the result of that motion? A. The motion was denied.

By Mr. Moak:

Q. I show the witness the order; is that the order? A. I think it is; it is signed by Judge Fithian; I won't be sure; yes, I think that is the original order, as near as I can recollect.

By Mr. Selden:

Q. You think that is the order made by Judge Fithian? A. I think it is.

Q. Is that his signature? A. I believe it is; I couldn't swear positively, but it looks like it, as I recollect his signature; I am not very familiar with it.

Mr. Benedict — I would like to hear the order read.

The order was read by the Clerk, and marked Exhibit No. 13.

Exhibit No. 13.

SUPERIOR COURT OF THE CITY OF NEW YORK.

Abraham B. Clark
agst.
Abraham Bininger.

The motion to dissolve the injunction and to set aside the receiver appointed, having been this day heard before Judge Fithian, and being under,

Now, on motion of Edw. W. Cone, defendant's attorney, and on hearing M. Compton, of counsel for plaintiff, in opposition, it is ordered that Daniel H. Hanrahan, Esq., the receiver appointed herein, until the further order of this order, make no disposition of the property and effects of the firm of A. Bininger & Co., except to sell and dispose of the same, in the usual course of business, and on the usual terms, and collect all debts due said firm, and that he deposit all money heretofore received by him, from whatever source, and which may hereafter be received by him, in the United States Trust Company, except such as may be necessary for current expenses of said business and the expenses of litigation.

T. J. FITHIAN,
Justice.

Mr. Selden:

Q. Did Judge Fithian write an opinion on that? A. Yes, sir.

Q. Do you know whether the case has been reported? A. I presume the opinion is among my papers that I was subpœnaed to bring here.

Q. Will you produce it? A. If the gentleman will hand me the papers, I presume the opinion is among them? [Mr. Stickney handed some papers to the witness.] This is a certified copy of the decision.

Mr. Selden — We offer that decision in evidence as sustaining this particular order of Judge McCunn.

The paper was marked Exhibit No. 14.

Exhibit No. 14.

NEW YORK SUPERIOR COURT.

Abraham Clark, Plaintiff, *agst.* Abraham Bininger, Defendant.	*Heard Special Term, Nov.*, 1869.

This is an action by one copartner against another, for an accounting and settlement of partnership assets and business, and praying for an injunction and the appointment of a receiver.

Upon the complaint, schedules and exhibits and affidavits annexed, an order of injunction was granted and a receiver appointed *ex parte* by one of the justices of this court. The defendant now moves this court at special term on notice, and on the same papers, for an order dissolving such and setting aside the order appointing a receiver.

Decided *December* 6, 1869.

G. W. TITUS and E. CONE,
For the Motion.

M. COMPTON and L. B. CLARK,
Opposed.

Fithian, J. — The papers on which the motion is made show substantially among other things the following facts, which I deem material.

It appears that as long ago as the year 1821, the parties to this suit, together with one Fisher, entered into partnership in the wine and liquor business, in this city, upon what terms does not appear. That from 1821 to 1836, the defendant Bininger, although a partner, took no active part in the business, but the same was conducted and managed by plaintiff and Fisher. That from 1836 to June, 1861, the business was chiefly managed and conducted by the plaintiff himself, from which I infer that Fisher went out in 1836. That in June, 1861, the firm was crippled by the stagnation of business consequent upon the breaking out of the war, and the suppression of payment of debts owing to the firm by the South. That for these reasons it was found necessary to increase the capital to be used in the business, and that thereupon it was agreed by and between the plaintiff and defendant, that the latter should, and he did loan and advance to the plaintiff the sum of $45,000, to be used in the said business (see affidavit of plaintiff). That to secure the payment of such loan and advance, the said plaintiff did on the 1st day of

June, 1861, execute and deliver to the defendant an absolute bill of sale of all and singular the plaintiff's interest in all the stock, property and assets, real and personal, of the said firm of "A. Bininger & Co.," securing and accepting the one-half interest of plaintiff in certain debts due the firm, a schedule of which was annexed to the bill of sale, amounting nominally on their face, to about the sum of $60,000.

And thereupon new articles of partnership were entered into between plaintiff and defendant, reciting the existence of the former partnership and that plaintiff had sold his interest as aforesaid to defendant, and that defendant desired to retain the knowledge and skill of plaintiff in this business. It was therefore agreed that said partnership be continued upon the terms therein stated, viz.: The same firm name to be retained, all fiscal transactions to be under the exclusive control of the defendant; that plaintiff Clark should not sign the firm name to any bill, bond, note or specialty, except by the consent and license of Bininger; that all the stock and property and effects of the firm should be the sole and exclusive property of Bininger, which on the dissolution or termination of the firm should be held by Bininger, subject to an accounting with Clark for his portion of the net profits, as hereafter stated; that an account and statement of stock and partnership business to be taken on the 1st day of March each year during the continuance of the partnership, and the net profits ascertained and thereupon apportioned to the parties as follows: $7,000 of the profits to be set apart to defendant as compensation for the use of his capital, and the balance to be divided equally between the parties and placed to their credit respectively on the *books of the firm, share and share alike.* Further, that Bininger might draw from the concern as much of the profits standing to his credit as he chose, and as much of the capital stock as he chose, but not reduce the same below $100,000; Clark however, not to draw from his share of the profits over $6,000 a year, each party to be credited with interest on his profits remaining undrawn. The partnership to continue until the 1st of March, 1866; subject, however, to be dissolved by either party on fifteen days' notice to the other.

At the same time with the execution of these papers, the defendant, Bininger, executed to the plaintiff, Clark, an instrument in writing as follows, in substance reciting the sale of Clark's interest in the partnership effects of the old firm, as before stated. Also, that the parties had entered into new articles of copartnership, "whereby it was agreed that the net profits shall be divided equally

between the parties, after paying to Bininger therefor $7,000 per year as compensation of his capital;" also, reciting that Bininger was desirous of giving Clark, the plaintiff, the right to repurchase the interest, stock, effects and assets of the firm which he had so as aforesaid sold to Bininger. Therefore, it was agreed that if Clark should pay, or cause to be paid, to Bininger the said sum of $45,000, on or before the dissolution of the partnership, either by limitation or by notice in the partnership articles provided, then Bininger would reconvey to Clark all the said interests in said partnership effects by Clark sold to Bininger on the "proceeds thereof," and Clark therein agrees that he will so repurchase said interest as aforesaid, "and for that purpose will appropriate all his share and proportion of the net profits of the said copartnership, over and above the annual sum of $6,000, specified in the articles of copartnership" (the sum Clark was authorized to draw).

The foregoing facts appear from the articles of agreement, and the affidavits annexed to the complaint. The plaintiff then alleges in the complaint, that the partnership thus formed continued in business until the 4th day of November, 1869, when the defendant, Bininger, served plaintiff with written notice of dissolution, pursuant to the articles of copartnership, for and from the 19th of said November. The plaintiff alleges that he had reported the articles of copartnership on his part. That the good-will of the business was very valuable. That of the $45,000 to be loaned by defendant as capital, but $40,501 was paid in. That of the schedule of bills receivable which were excepted from the sale of assets by plaintiff to defendant, there had been collected and received, and paid into said firm, during its continuance, the sum of $35,000, one-half of which belonged to the plaintiff, and which he claims as a payment on account of the $40,501 loan. That, on the 22d of July, 1865, plaintiff paid to the defendant in real estate $22,363.13, which now stands to his credit on the books as a payment on account of said loan. That, on the 9th of November, 1869, the plaintiff notified defendant that he thereby appropriated, out of the profits belonging to him in said firm, so much as would be necessary to liquidate any balance unpaid on said $40,501 loan, and demanded a retransfer of his interest in the partnership business, which defendant refused to execute or make.

The complaint then proceeds to charge the defendant with various acts of misconduct, among which was drawing and appropriating to his own use large sums of money from the profits and capital of the firm, much more than was authorized by the articles of copartner-

ship. That he borrowed, and appropriated to his own use, large sums of money, and gave the firm notes as security. In consequence of which acts of defendant the cash resources of the firm were crippled, and it was compelled to suspend payment about November 4th, 1869.

That the defendant was absent in Europe during the years 1865 and 1866, and that during that time plaintiff had the sole charge and control and management of the business; that it was profitable, and during that time netted over $60,000 profits; that, since the suspension and dissolution, defendant and plaintiff have disagreed, and defendant has "usurped" the entire control of the property and threatens to exclude plaintiff by force if he attempts to interfere in the settlement of the partnership affairs; that defendant has opened a new bank account in his individual name, as "executor," and deposits partnership moneys in that account; that the partnership assets and property amonnt to over $500,000, and the debts do not exceed $200,000. That, at the time of the execution of the bill to defendant, in June, 1861, the stock on hand of the partnership was $156,227.78; real estate $165,000, subject to mortgages for $28,000; books of account (sold to defendant) $50,000. That at the time of dissolution there were large profits coming to plaintiff. All these allegations are unanswered by defendant, and so far as they are properly verified, must on this motion be taken as true. The defendant moves on these papers to vacate the order of injunction, an order appointing a receiver, and the first alleged ground for the motion is that the complaint is not accompanied by a sufficient affidavit of verification. The Code, section 220, provides that it must "satisfactorily appear to the judge by the *affidavit* of the plaintiff or of any other person that sufficient grounds for an injunction exist, or it will not be granted." It has been held that a complaint with the ordinary and usual jurat or verification alone is not a sufficient affidavit to authorize an injunction. *Bostwick* v. *Elton*, 25 How. 342. But where the allegations in the complaint are made positively, and not on information and belief merely, and which allegations are sworn to be true, may be taken and treated as an affidavit. This seems to be the result of the authorities: *Badger* v. *Wagstaff*, 11 How. 502; *Woodruff* v. *Fisher*, 17 Barb. 229; *Jones* v. *Atterbury*, 1 Code, 87; *Levy* v. *Levy*, 1 Abb. 89; 15 How. 395.

In this complaint, with one or two trivial and immaterial exceptions, the allegations are all positive, and not on information and belief. The complaint is accompanied by the usual verification, and

also a special affidavit of the plaintiff to the effect that the action had been commenced by the complaint and summons which he annexes to and makes a part of his affidavit. That, to his actual knowledge, he knows the contents of the complaint and of the matters set forth in the complaint, except such as are therein stated on information and belief, and that from such knowledge he knows that the matters of fact therein stated are true. The affidavit is somewhat inartificial, but I think it is substantially an oath that all the matters in the complaint alleged as facts, and not therein stated on information and belief are true. I think this is sufficient within the authorities. No such affidavit, however, is required for the appointment of a receiver. There is no provision of the Code prescribing in what mode or manner the facts authorizing the appointment of a receiver shall be made to appear to the court or judge. That is left substantially to the rules and practice of the court.

The next objection is that the plaintiff has failed in his papers to show or "establish" (as required by section 244 of the Code) any apparent right to or interest in the property the subject of the litigation. That, upon plaintiff's own showing, he had no right or interest whatever in the partnership property or effects, but only an interest in the profits as compensation for services rendered. Without attempting to review or comment in detail upon the able and learned argument of the counsel for the defendant, it must suffice to say, briefly, that I am unable to concur with him in that view of the case. In my opinion, the several articles of agreement upon their face, together with all the surrounding circumstances, preclude the idea that either of these parties intended that this plaintiff, who had been an equal partner in this business for forty years, and who was then an owner of one-half interest in real and personal property in the firm, valued at $370,000 and upward, should divest himself wholly and absolutely of all that interest in order to borrow of his copartner, for the use of the business, $45,000, and he remain merely as a clerk. The contracts executed between the parties will bear no such construction. On the contrary, I am clearly of opinion that upon those three agreements, taken and construed together as they must be, the plaintiff remained, and now is the joint owner with the defendant of an undivided one-half of all the partnership property, and effects, real and personal, subject only to a *mortgage lien* on such one-half in favor of defendant for the amount remaining unpaid of the sum advanced to plaintiff. This mortgage lien has never been foreclosed or the plaintiff's equity of redemption cut off. That equitable interest was, at the execution of the mortgage, and now is

alleged to be, worth four times the amount of the mortgage. It is asserted that this mortgage became absolute, and forfeited on the 1st of March, 1866. Suppose that were true, the defendant must still foreclose his mortgage lien, either by suit in court, or a sale under the mortgage. That is to say, he must in some way resort to the property to realize for his debt. Equity will not permit him to keep it all; and if he sells or converts it into money, he must account for the proceeds over and above the amount of his mortgage debt, etc. But the mortgage did not become due at the time before stated. The partnership was not then dissolved. It was continued by mutual consent, and finally dissolved in the manner provided by the articles of copartnership. And, now, there is to be an accounting and final settlement of the property and affairs of this firm; and that this $45,000 loan is to enter into that accounting is clear, because a part of the *mortgaged property* is the profits which may remain in the firm belonging to the plaintiff after dissolution (see agreement to reconvey). These profits cannot be ascertained until an accounting be had. All this is upon the assumption that the mortgage is still outstanding and unpaid, but the complaint alleges that before the dissolution it was substantially paid and satisfied.

If, therefore, a partnership be shown to exist in the profits and property of a firm, and there be a dissolution, and the partners are unable to agree among themselves as to the disposition and control of the property, upon a bill, filed by one partner to close up the concern, it is a matter of course to appoint a receiver. *Low* v. *Ford*, 2 Paige, 310; *Goulding* v. *Baig*, 4 Sandf. 717; *Whitwright* v. *Stimpson*, 2 Barb. 579; *Dayton* v. *Wilks*, 17 How. 510. Accordingly, there must be a receiver in this case.

The very unpleasant relations apparently existing between plaintiff and defendant, together with the acts of misconduct and misappropriation of funds, charged against the defendant in the complaint, indicate the impropriety of appointing him such receiver, as desired by the defendant's counsel. As regards the person heretofore appointed receiver, while no direct charges of unfitness are alleged against him, yet it is said he is a stranger to the parties, and has not given adequate security, and indicating a fear and anxiety on the part of defendant and his counsel that the funds would not be safe in his hands and control. While I do not feel at liberty, on the grounds above, to put upon this receiver the stigma of a removal for personal unfitness, I am desirous, nevertheless, that there should be no reasonable ground for suspicion or anxiety, as to the entire fitness of the person so appointed, and the absolute security of the

fund. I have concluded, therefore, to appoint an additional or co-receiver. And I do accordingly direct that Thomas J. Barr, whom I personally know to be a fit person in all respects, be appointed co-receiver of the property and effects of such firm, with full powers as such receiver; and that he give security for the faithful performance of his duty in the sum of $50,000, with two surcties to justify before the court or a judge, if required by defendant. That order must contain a clause, however, that the fund be charged with the fees and expenses of but a single receiver, such fees to be divided between the two, as the court may direct.

The motion to vacate injunction and order appointing receiver is denied, without costs, and let an order be entered as above directed.

(A copy.) T. EASTNOR BENNETT,
Special Term Clerk.

Mr. SELDEN — I offer in evidence, also, this order denying the motion. The paper was marked Exhibit No. 15.

EXHIBIT No. 15.

At a Special Term of the Superior Court of the city of New York, held at Chambers in the City Hall of said city on the 27th day of November, 1869.

Present — Hon. F. J. FITHIAN, *Justice.*

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

A motion having been made in this cause for an order vacating the injunction order and the order appointing a receiver in this action, made on the 19th day of November, 1869, and on hearing Mr. Titus for the motion, and Mr. Clark and Mr. Compton opposed, it is ordered that the said motion be, and the same is hereby denied, without costs.

And it is further ordered that Thomas J. Barr be and he is hereby appointed an additional or co-receiver with Daniel H. Hanrahan, of all the debts, property, equitable interests, rights and things in action of all the partnership heretofore existing between the plaintiff and defendant; and it is further ordered that the said Thomas J. Barr, before he enters upon the execution of his trust, execute to the clerk of this court a bond, with sufficient sureties, to be approved by a justice of this court, in the penalty of $50,000, conditioned that he

will faithfully discharge the duties of such trust, and file the same with the clerk of said court.

And it is further ordered that both the said receivers shall together receive or be entitled to only the fees allowed by law to one receiver.

And it is further ordered that the said receivers, or either of them, may at any time apply to this court for directions and orders in this action.

F. J. FITHIAN,
Justice.

Q. You speak of seeing Judge McCunn at Hanrahan's office; I understood you to say that you don't recollect of seeing him there but once? A. But once; I wouldn't undertake to say I had seen him more than once.

Mr. SELDEN—The opinion and the two orders should be numbered.

Q. Do you recollect any thing about what took place on that occasion? A. No, sir.

Q. At the time of the meeting when the proposed settlement was introduced at Clark's house, did Judge McCunn give any reason why he didn't approve of the settlement; didn't he say that it would take the property out of the State courts? A. He expressed himself in this way: that he thought it was a trick of my opponents, my adversary, to get possession of that property — to get it out of the hands of the receiver; I think he so expressed himself.

Q. To get it out of the hands of the State courts, into the Federal courts? A. He so expressed himself.

Q. That was the ground of his objection? A. That is my remembrance now.

Q. Had there been, before that time, a good deal of controversy before the State and the United States courts, in regard to the control of this property? A. We were at it almost every day, from about the 5th of December to about the 30th of March, I think; several days after the amended agreement; the agreement had been engrossed, several days after; I think about the 30th, and it might have been a day or two earlier.

Q. There had been a very severe strife in the courts down to that time? A. I think almost every day; I know they kept me at work night and day, and sometimes all night.

Q. What was the ultimate decision of the courts on that subject, as to which had the right to control the property? A. Both courts decided that the title was vested in the receiver of the State court.

Q. That was ultimately conceded by the United States court? A. There was a very severe struggle over it, though.

Q. Did you ever get any allowance, as counsel, from Judge McCunn in the case? A. No, sir.

Q. Did any of the persons connected with the matter get any allowances from him? A. Not that I am aware of.

Q. Do you know that applications were made by other counsel to him? A. I am not aware of it; there may have been; I have no recollection of any one myself.

Q. Did you make an application? A. I did.

Q. Did he deny it? A. No, sir.

Q. Did he grant it? A. No, sir; I submitted it to him, and I have never heard of his decision yet; I spoke to him once about it and he told me that he had made up his mind not to make any further orders in that case; I have never said any thing more about it to the judge.

Q. Did young Mr. Clark, Melville B. Clark, ever tell you that Judge McCunn promised to make you an allowance of $10,000 if you would divide it with his father? A. I think he did; somebody told me so; I know I calculated that when I got that allowance, that I would get $10,000, and I supposed I would have to divide half or give half of it to the old gentleman; I should have done so if I had got it.

Q. You never got any allowance from Judge McCunn? A. No, sir; nor any other judge in that case.

Q. Didn't you tell the young man that you would be entitled to an allowance, and you would allow a part of it to his father? A. I may have told him that I would be entitled to an allowance of $10,000; I supposed I would.

Q. That you would be legally entitled to it? A. Under the Code; perhaps more; I may have said to the young man, that I would be entitled to $10,000, but I don't recollect of saying so.

Q. You have no distinct recollection on the subject? A. No, sir.

Re-examination by Mr. STICKNEY:

Q. The bond given by the receiver has been shown to you, and you have been referred to the date of the acknowledgment; what date does it appear to have been executed?

Mr. MOAK — The paper itself shows, I suppose?

A. It purports to be made on the 18th; acknowledged on the 19th; I see the 18th in the bond.

Q. Who is the Mr. Clark who is mentioned as one of the counsel in the order by Judge Fithian? A. Lucius B. Clark.

Q. Whose partner was he or had he been? A. He had been Judge Fithian's partner before Judge Fithian was appointed judge.

By Mr. SELDEN:

Q. Do you know whether Mr. Titus made a claim for a large allowance in this matter? A. I don't recollect now; I may have heard so; it seems to me I do recollect something about Titus; I have no distinct recollection about it.

By Mr. D. P. WOOD:

Q. Were you examined before the committee of the Assembly in this proceeding? A. I was.

Q. Did you not there testify, "this order appointing the receiver, and for the injunction, was seized by the judge in that interview at his house that evening?" A. I think I stated there that was my impression.

Q. Didn't you state it in unqualified terms? A. I got the order signed then; I don't think I did; I may have done so; then I interrupted him and handed him the papers; that is, after 12 o'clock, and he looked at them and signed my order appointing the receiver and the injunction.

Q. You presented the papers and got the order signed then? A. I got the order signed then.

Q. Did you not also testify on that occasion that you took the order appointing the receiver away with you that night, when you and Mr. Clark went away? A. My recollection is, that that was my impression; I may have stated it as it is so stated there.

Q. When you and Clark went away, had you the order? A. I think I had.

Q. You had the order appointing the receiver? A. I had; I think I got those papers that night; I don't recollect distinctly about it; I couldn't say distinctly whether I did or didn't take the papers away with me; I may have done so.

The Senate thereupon adjourned until to-morrow, Wednesday, June 26, 1873, at 9 o'clock.

FIFTH DAY'S PROCEEDINGS.

The Senate met at 9 A. M., June 26, 1872.

A quorum present. Messrs. Van Cott, Parsons, Stickney, and Harrison appearing for the prosecution; Messrs. Selden, Devlin, Davis, Moak and Hevenor for the respondent.

Mr. D. P. Wood — Mr. President: I move that the Senate go into private consultation.

The question was put on said motion and declared carried.

Upon the reopening of the doors, Mr. Selden said: Mr. President — I move to strike out of the proceedings of yesterday the letter of Mr. Hanrahan, as incompetent. I think it appears that Judge McCunn had no connection with that letter, and I think it is not proper evidence against him. I don't wish to argue it.

Mr. Parsons — Mr. President: We think that the evidence in the case shows such intimate relations between Judge McCunn, Hanrahan and Morgan as to entitle us to put in evidence all the action of either of those parties in respect to the matter in question.

The question was put on Mr. Selden's motion and declared lost.

George E. Hickey, being duly sworn on behalf of the prosecution, testified as follows:

Examined by Mr. Parsons:

Q. Do you know Judge McCunn? A. I do, sir.

Q. How long have you been acquainted with him, personally? A. Five or six years.

Q. What, during that five or six years, has been your occupation? A. I have been a deputy sheriff in the sheriff's office, under Sheriff O'Brien, three years; at the present time I am one of the clerks in the clerk's office of the Superior Court of New York city.

Q. What has been the nature of your acquaintance with Judge McCunn; socially, politically, professionally, or what? A. Politically.

Q. When did it commence? A. Five or six years ago.

Q. Did you know Daniel H. Hanrahan? A. I did, sir.

Q. When did you first become acquainted with him? A. Two and a half or three years ago, I suppose.

Q. Was it subsequent to his appointment as receiver of the property of A. Bininger & Co.? A. No, sir, it was at that time; at the time he became appointed receiver.

Q. Did you at any time have any charge of the property of that firm? A. I did, sir.

Q. Can you tell when your charge commenced? A. At the same time that Hanrahan was appointed receiver; from that time; the very day.

Q. Were you at that time a deputy sheriff? A. I was, sir.

Q. In acting in respect to that property, or taking charge of that property, did you have any authority from the sheriff? A. No, sir; I went there as a private individual.

Q. Who went with you, if any one? A. I brought five men there with me at that time.

Q. Was John E. McGowan one? A. He was.

Q. What was his occupation? A. Clerk in the sheriff's office.

Q. Did he go there under any authority from the sheriff? A. No, sir.

Q. In what capacity did he go there? A. As I did; as a private individual.

Q. How long did you and the five persons whom you say you took there continue in charge of that stock? A. Four or five months; I can't tell the exact length of time.

Q. Can you by looking at that bill I show you? A. Yes, sir; from December 4, 1869, to April 9, 1870; 126 days.

Q. Do you know the handwriting of Judge McCunn? A. I do.

Q. Will you look at those words written on the back of the paper now handed you: "In this case the three deputies placed in charge by me should be paid, and no more. Order to that effect. John H. McCunn," and state in whose handwriting it is? A. It is Judge McCunn's handwriting.

Mr. PARSONS — Mr. President: We offer in evidence that indorsement and the papers upon which the indorsement is made.

Mr. PARSONS read them to the Senate.

Q. State whether you signed the affidavit purporting to be signed by you? A. Yes. sir; that is my signature.

Mr. PARSONS — I would like to have the affidavit marked. (Marked Exhibit No. 16).

The paper was in the words following:

EXHIBIT No. 16.

SUPERIOR COURT OF THE CITY OF NEW YORK.

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

CITY AND COUNTY OF NEW YORK, *ss.:*

Daniel H. Hanrahan, of said city, being duly sworn, deposes and says, that he was the receiver in the above entitled action; that as

such receiver this deponent on or about the 6th day of December, A. D. 1869, made application that the sheriff of the city and county of New York should protect this deponent in the possession of the property levied on by him in the above entitled action; that such action in calling on said sheriff to aid this deponent in the protection of said property, was had by order of this court to protect its jurisdiction, and to protect the property against the United States marshal of this district and his deputies, who claimed the possession of the same, and had attempted to take possession thereof by force; deponent verily believes that the only persons placed by the sheriff in custody of said property were Lawrence Delmour, John McGowan and G. E. Hickey; that there may have been other persons deputized by the said sheriff, but deponent does not recollect their names, nor does he believe that any others than the above named so aided this deponent in such protection of said property. That deponent believes the above named deputies were in possession of said property night and day from said 6th day of December, A. D. 1869, to the 27th day of April, A. D. 1870, both inclusive.

DAN'L H. HANRAHAN.

Subscribed and sworn before me this 16th day of June, A. D. 1870.

MICHAEL KELLY McCARTER,
Notary Public, New York County.

At a Special Term of the Superior Court of the city of New York, held at the Court-house in said city, May 31, 1870:

Present—Hon. JOHN H. McCUNN, *Justice.*

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

The sheriff of the city and county of New York having applied to the undersigned, Hon. John H. McCunn, one of the justices of this court, to tax, adjust and allow to him certain fees and expenses in keeping and preserving certain property in the above action, under orders from this court, and notice having been duly given to the attorney for the plaintiff, to the receiver, Thomas J. Barr, to the receiver Richard Hanrahan, but due notice not having been given to the attorney for the defendant's assignee in bankruptcy, and not having been given to the attorney for the defendant, it is ordered that said application stand adjourned to the 1st day of June, 1870,

at 10 A. M., at the Special Term of this court, and that, mean time, notice thereof be given to the attorneys for said defendant and his assignee.

(A copy.) JAMES M. SWEENEY, *Clerk.*

NEW YORK SUPERIOR COURT.

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

Sheriff's fees and disbursements.

For keeper's fees of Joseph Perroy, from December 4, 1869, to April 9, 1870, being 126 days and nights, he being employed under order of the court directing sheriff to keep charge and prevent removal of property from 92 and 94 Liberty street, in custody of receiver appointed by the court, $10 per day and night	$1,260 00
For like fees of Patrick Tannen, for like time employed under same order	1,260 00
For like fees of Lawrence Delmour, for like time employed under same order	1,260 00
For like fees of Thomas Baker, for like time employed under same order	1,260 00
For like fees of George E. Hickey, for like time employed under same order	1,260 00
For like fees of John E. McGowan, for like time employed under same order	1,260 00
	$7,560 00

At a Special Term of the Superior Court of the city of New York, held at the new Court-house, May 30, 1870.

Present—Hon. JOHN H. MCCUNN, *Justice.*

I, the undersigned, a justice of the Superior Court of the city of New York, do hereby tax and adjust and allow to the sheriff of the city and county of New York the sum of for the services within mentioned, rendered pursuant to the orders of the said court, which sum I hereby certify to be reasonable and proper for his trouble and expenses in keeping and preserving the property within mentioned, pursuant to said orders. And I hereby direct the said sum

to be paid to the said sheriff, by the receiver in the within entitled action appointed by this court, out of the funds in his hands.

Indorsed: "New York Superior Court. *Abraham B. Clark* v. *Abraham Bininger.* Sheriff's fees for keeping property, and certificate and order of adjustment. Brown, Hall & Vanderpoel, attorneys for sheriff."

GENTS — Take notice, that upon the annexed affidavit, and upon the orders and proceedings in the within action, I shall present a bill, of which the within is a copy, to the Hon. John H. McCunn, one of the justices of this court, for taxation and allowance, on the 31st day of May, 1870, at 10 o'clock, A. M., or as soon thereafter as counsel can be heard, at a special term of this court, in the new Court-house, in the Park in this city.

Dated NEW YORK, *May* 30, 1870.

JAMES O'BRIEN, *Sheriff, etc.*

To THOMAS J. BARR, Esq., *Receiver.*
RICHARD HANRAHAN, Esq., *Receiver.*
C. W. BANGS, *Attorney for Assignee of Defendant.*
M. COMPTON, Esq., *Attorney for Plaintiff in Bankruptcy.*
GEORGE N. TITUS, Esq., *Attorney for Defendant.*

SUPERIOR COURT.

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

CITY AND COUNTY OF NEW YORK, *ss.:*

Joseph Purroy, Patrick Tannem, Lawrence Delmour, Thomas Baker, George E. Hickey and John E. McGowan, being severally duly sworn, each for himself, deposes and says: That he was on the 4th day of December, 1869, appointed and deputed by the sheriff of the city and county of New York, to take charge of certain property at Nos. 92 and 94 Liberty street, in the city of New York, under the orders of the Hon. John H. McCunn, one of the justices of the Superior Court of the city of New York, and thereafter, under said orders, and the order of the said Superior Court, dated the 6th day of December, 1869, he continued in charge and custody of the property at the said premises, and each deponent says, that he, and his co-deponents, each kept faithful watch of the said property, from the said 4th day of December, 1869, to and including the 9th day

of April, 1870, and that the presence of so large a number of keepers was absolutely necessary, from the fact that the sheriff was commanded by said orders to preserve the said property, and from and after said fourth day of December various attempts were made by persons calling themselves United States deputy marshals, to seize, take possession of and carry away the said property from the receiver, who had been appointed by the Superior Court receiver of the said property. And, further, each deponent for himself says in view of the constant care required, and the character of the services rendered, the sum of ten dollars for each day and night for keeping said property is a reasonable and proper charge, and is the charge this deponent has made against said sheriff for said services.

THOS. BAKER,
PATRICK TANNEM,
LAWRENCE DELMOUR,
JOSEPH PURROY,
JNO. E. McGOWAN,
GEORGE E. HICKEY.

Sworn to before me this 30th day of May, 1870.
W. R. W. CHAMBERS.

Indorsed: N. Y. Superior Court. *Abraham B. Clark* v. *Abraham Bininger.* Due service of a notice of which the within is a copy hereby admitted. New York, May 30, 1870. James F. Morgan, attorney for Hanrahan, and of the receivers. Exhibit No. 16. C. R. D. June 26, 1872.

Q. Do you know the signature of James O'Brien, sheriff? A. Yes, sir.

Q. State whether the notice with this paper purporting to be signed Jas. O'Brien is signed in the handwriting of Jas. O'Brien? A. No, sir; it is not signed by him.

Q. Do you know whether at that time there were terms of intimacy, or what were the relations between James O'Brien, then sheriff of New York city and county, and Judge McCunn?

Mr. SELDEN — That is objected to.

Mr. PARSONS — I desire to furnish such evidence as is within the power of the witness bearing upon the probability that Judge McCunn knew that was not the signature of Jas. O'Brien.

Mr. SELDEN — I presume it is not; likely some clerk in the office of Brown, Hall & Vanderpoel, who prepared those papers on behalf of the sheriff; presented them to the judge.

Mr. PARSONS — We offer the testimony in connection with the testimony which came out yesterday, from Clark, Jr., that Judge McCunn recommended Clark to go to Vanderpoel, because Vanderpoel had influence with the sheriff, and we propose to show in pursuance of that arrangement stated by Judge McCunn himself, the name of Sheriff O'Brien was asked in connection with this occasion, by the attorney to whom McCunn recommended Clark, and without the action or participation on the part of Mr. O'Brien, and we propose to show this is a pretense from beginning to end, concocted by the judge with a view of saddling the estate with these expenses.

Mr. SELDEN — I don't see what bearing that has with the case, it is not a fact.

Mr. PARSONS — I desire to show the relations between Sheriff O'Brien and Judge McCunn at that time were of the utmost intimacy, so that Judge McCunn could be, or was informed that O'Brien's name was being used without any apparent authority from him.

Mr. SELDEN — The counsel wants to prove a fact, that a certain thing was done by merely showing there was an intimacy between these parties; that is not the way to prove it; if the fact exists let him show it.

The question being put upon the objection, it was announced the objection was sustained.

Q. Did you read the affidavit which bears your signature before you verified it? A. It is so long ago now that I can hardly remember whether I did or not at the time, but I suppose I did; I don't believe I put my signature to a paper unless I did at the time I read it.

Q. Had any of the six persons mentioned in that affidavit, either Joseph Purroy, Patrick Tannem, Lawrence Delmour, Thos. Baker, Geo. E. Hickey, John E. McGowan, been appointed or deputized by the sheriff of New York city to take charge of that property or to assist Hanrahan? A. No, sir; it was strictly outside of the sheriff's office.

Q. The whole proceeding? A. Yes, sir.

Q. Who was it that procured Brown, Hall & Vanderpoel to act in making this application, so far as you know; do you know any thing on the subject? A. I believe we retained Mr. Cummings, of the firm of Brown, Hall & Vanderpoel, to tax our bill before the judge; before Judge McCunn.

Q. Why before McCunn? A. I dont know; I suppose he was sitting at the time.

Q. Have you any knowledge that he was sitting at the time? A. I believe he was; I can't say that I have.

Q. Have you any knowledge that Cummings of that firm was retained; had you any thing to do with retaining him? A. Yes, sir.

Q. Had you personally to do with it; toward taxing your bill; toward employing Cummins to procure the taxation of your bill? A. Yes, sir.

Q. You personally had to do with that? A. Yes, sir.

Q. Have you ever seen the order of the 4th of December, 1869, which is mentioned in your affidavit or a copy of it, that he was on the 4th day of December, 1869, appointed a deputy by the sheriff of the city and county of New York, to take charge of certain property at Nos. 92 and 94 Liberty street, in the city of New York, under the orders of the Hon. John H. McCunn, etc.; I read from your own affidavit; look at that paper and state whether that is a copy of the order you refer to? A. It is the order of Judge McCunn.

Q. Whether you can identify that as a copy of the order of December 4, 1869, mentioned in your affidavit? A. If I swore to that at that time, it must be so, my memory at that time was fresher than at the present, and must be so.

Q. Do you mean that must be a copy of the order? A. I have seen an order to that effect.

Q. What is your recollection as to whether this is a copy? A. To the best of my knowledge, that is a copy of the order.

(Marked Exhibit No. 17. Read in evidence in the words following:)

EXHIBIT No. 17.

SUPERIOR COURT.

ABRAHAM CLARK
agst.
ABRAHAM BININGER.

WHEREAS, It has been made to appear to this court, upon oath, that certain persons unknown, but calling themselves United States deputy marshals, have taken forcible possession of the partnership property belonging to the plaintiff and defendant in this suit, which they are not entitled to take possession of;

Be it known, therefore, that I hereby direct the sheriff of the city and county of New York to take possession forthwith of the said property belonging to the said firm, now in the store Nos. 92 and

94 Liberty street, or wheresoever the same may be found, and keep the same safely until the further order of this court.

Witness my had and seal this 4th December, 1869.

(Signed) JOHN H. McCUNN,
Justice Superior Court.

Q. Mr. Hickey, did the sheriff do any thing under that order, or was any thing done under that order except what you have stated, that you and others went down and took possession? A. The sheriff had nothing to do with it, sir.

Q. Who are the three persons mentioned in Judge McCunn's memorandum in this case; "the three deputies placed in charge by me;" who are those three deputies? A. Well, I can't tell, sir; I was acting strictly under the receiver at that time, unless he may mean Mr. McGowan and myself, and Mr. Delmour.

Q. Were you the deputies? A. I know I was a deputy at that time.

Q. But were you acting as deputies in being placed in charge of that property? A. No, sir.

Mr. PARSONS — We next offer the order made by Judge McCunn in conformity with his fiat indorsed upon the papers, being the order upon that application; this is one of the papers produced by Mr. Boese from the files of the court, and I will read it.

Mr. PARSONS here read the same in the following words:

EXHIBIT No. 18.

At a Special Term of the Superior Court of the city of New York, held at the new Court-house in the city of New York, June 1, 1870.

Present — Hon. JNO. H. McCUNN, *Justice.*

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

An application being made to the undersigned, John H. McCunn, a justice of the Superior Court of the city of New York, to tax and adjust the sum to be allowed to him for his services in keeping and preserving the property in the hands of the receiver appointed by the court pursuant to orders issued out of this court, and presented the items of his claim with the joint affidavit of Thomas Baker, Patrick Tannem, Lawrence Delmour, Joseph Purroy, John E. McGowan and George E. Hickey; and due notice having been given of this application to Thomas J. Barr and Richard Hanrahan,

receivers in this action, to the attorneys for the plaintiff and defendant, and of the assignee in bankruptcy of the defendant; and said receivers and said plaintiff appearing, by their respective attorneys, James Henderson, James F. Morgan and M. Compton, and being heard, and the affidavits submitted by them considered; and the said assignee in bankruptcy and defendant not appearing, on motion of Brown, Hall & Vanderpoel, plaintiff's attorneys, I do hereby tax and adjust, and hereby allow to said sheriff the sum of $4,230, being ten dollars for each day and night that officers Delmour, McGowan and Hickey were in charge, for his said services; which sum I hereby certify and allow as reasonable and proper for said services, in keeping and preserving said property, pursuant to orders from this court. And it is hereby ordered that Richard Hanrahan, Esq., receiver in this action, after paying his own fees, if he is entitled to such, pay the said sum last mentioned to said sheriff, if sufficient funds are in his hands, and if sufficient funds are not in his hands, then that Thomas J. Barr, Esq., the other receiver in this action, pay any deficiency which may remain (after said Hanrahan's applying the moneys in his hands, as aforesaid) to the said sheriff.

January 16, 1870. J. M., *Jus.*

Indorsed: Charge 1, "D." N. Y. Superior Court. *Abraham B. Clark* v. *Abraham Bininger*. No. 4. Order taxing sheriff's fees. Brown, Hall & Vanderpoel, att'ys for plff. E. Filed June 20, 1870.

Q. (Showing paper.) You say you know the handwriting of Judge McCunn; state in whose handwriting are the words filling a blank in this order, as originally prepared, "$4,230, being ten dollars for each day and night that officers Delmour, McGowan and Hickey were in charge," and also these words, interlined, "after paying his own fees, if he is entitled to such;" look at that and state your opinion as to whether they are or are not in the handwriting of Judge McCunn? A. I can't swear that is Judge McCunn's handwriting, Mr. Parsons; not that (indicating).

Q. Can you testify as to the interlined words, "after paying his own fees, if he is entitled to such?" A. It looks like Judge McCunn's handwriting, to the best of my belief.

By Mr. Benedict:

Q. You think it is his handwriting? A. Yes, sir.

By Mr. Parsons:

Q. What is your opinion as to the words filling the blank? A. I couldn't say, sir.

Cross-examination by Mr. DEVLIN:

Q. Mr. Hickey, do you know whose handwriting this order is in? A. No, sir.

Mr. PARSONS — Do you desire to know the handwriting?

Mr. DEVLIN — Yes, sir.

Mr. PARSONS — We admit it is in the handwriting of Mr. Cumming, of Brown, Hall & Vanderpoel's office.

Q. Mr. Hickey, how long were you deputy sheriff before this proceeding in regard to the Bininger estate? A. About two years, I guess.

Q. During that time were you in constant attendance at the sheriff's office? A. I was, sir.

Q. The rule of the office, I believe, is to give executions and other papers to be served or executed by deputy sheriffs in certain order, as they come? A. Yes, sir.

Q. And the deputies remain there to receive them and then go and execute them? A. Yes, sir.

Q. At the time you were acting as custodian, 92 and 94 Liberty street, you were not a regular deputy sheriff, were you? A. I was not the leading deputy; I had the transportation of prisoners to Sing Sing; at that time I had an associate to do it, and all along.

Q. Isn't it a rule, or wasn't it a rule of the sheriff's office, that when any opinion was to be taken upon questions of law, or any motion was to be made in court for the deputy who had charge of that particular matter to go to the office of Brown, Hall & Vanderpoel, as a matter of course, without consulting the sheriff; for instance, to have your fees taxed in an attachment case, and a motion had to be made in the matter, you went to Brown, Hall & Vanderpoel, without consulting the sheriff or under-sheriff? A. No, sir; I would not consult them at all.

Q. Pursuant to that custom you called upon Brown, Hall & Vanderpoel, to have the bills taxed? A. Yes, sir.

Q. Did you ever receive any thing? A. Never received one dollar for services rendered, nor the men brought with me.

Q. Did any of the men receive any thing? A. None of them ever received a dollar.

By Mr. BENEDICT:

Q. That is, for the services during the several months? A. Yes, for the services during the several months; I am out of pocket out of the whole arrangement; I have paid money to the men myself to keep them along.

Q. Did the sheriff receive any thing? A. Not a dollar; he was not connected with this in any way.

Q. When you went down to take possession of the goods, or to protect the receiver in possession of them, who told you to go? A. I went by the order of the receiver, Mr. Hanrahan.

Q. He told you? A. Yes, sir; I was acting strictly under him.

Re-direct examination by Mr. PARSONS:

Q. Did you not state that you specially arranged with Mr. Cumming to make this application for your associate? A. It was among us.

Q. Do you mean it was pursuant to the ordinary practice which you pursued, when questions concerning the sheriff arise, to call upon Mr. Cumming? A. The deputies, as a rule, when they have a bill to tax, always engage Brown, Hall & Vanderpoel; we engage Mr. Cumming of that firm.

Q. You specially engaged him in this business? A. Yes, sir; it was just for our bill.

Q. Not as a deputy sheriff? A. No, sir, not at all.

By Mr. BENEDICT:

Q. Who was to pay Messrs. Brown, Hall & Vanderpoel for their services? A. We expected to pay them out of the fees when we got them; out of our money when we got it; I have been running for the last two years and a half after my money; trying to find Adam.

By Mr. PARSONS:

Q. You found that Judge McCunn's order was not omnipotent, although he put his name to it? A. Yes, sir.

Q. You stated in answer to Mr. Devlin, that you were sent down there by Mr. Hanrahan; do you remember when you saw Judge McCunn on the subject? A. Well, I had an appointment to meet Mr. Hanrahan at Judge McCunn's house.

Q. Did you go there? Q. Yes, sir, I did.

Q. Did you see Judge McCunn? A. Yes, sir, he was in the room at the time.

Q. Had a conversation there in his hearing? A. Yes, sir, with Mr. Hanrahan.

Q. How shortly before you took possession of the property was that? A. Well, I suppose it was about six hours; no, about 10 o'clock or about 10:30 o'clock I was there.

Q. Is that the occasion to which you refer in saying that you got your orders from Mr. Hanrahan? A. Yes, sir.

Q. 10 o'clock in the evening or afternoon? A. Evening.

Re-cross examination by Mr. DEVLIN:

Q. Mr. Hickey, refresh your recollection and tell me whether you did not testify that you did not see Judge McCunn at all, before the House committee? A. When I went before the House committee in the Fifth Avenue Hotel, I didn't know what they required of me; I had no recollection at all, but I have had a chance in the mean time to refresh my memory.

Q. Please to tell me this; how often, if at all, persons representing themselves as deputy and United States marshals came to the store, while you were in charge, to take possession of it from the receiver? A. I believe they made a raid there once or twice, to the best of my belief.

By Mr. PARSONS:

Q. Were you present at the time? A. I was, sir.

Mr. PARSONS — We have supœnaed and have present here Mr. McGowan, whose testimony would simply cover the same ground as that of Mr. Hickey, and unless the Senate desire, we do not care to call him, although we desire to put him in a way to procure his witness fees. We may consider he is entitled to his witness fees without being examined.

Mr. MURPHY — Is he present?

Mr. PARSONS — He is.

Mr. MURPHY — Let him be called.

The witness here appeared.

Mr. PARSONS — He appears, and it is not deemed necessary to call him; we don't desire to occupy the time of the Senate; he was the associate of the last witness.

THOMAS BOESE, recalled by the prosecution and testified.

By Mr. PARSONS:

Q. (Showing exhibit 18.) Mr. Boese, state, if you please, in whose handwriting are the words filling a blank, in exhibit 18, "$4,230, being ten dollars for each day and night that officers Delmour, McGowan and Hickey were in charge," and also the words interlined in that same order, "after paying his own fees, if he is entitled to such?" A. I don't think I could state positive as to that, Mr. Parsons.

Q. I don't ask you to state positively, but I ask you whether you are familiar with the handwriting, and what your opinion is in reference to whose handwriting it is? A. My opinion is, that it is Judge McCunn's handwriting, but I couldn't say positive as to that; it is somewhat different from his usual style of writing.

Q. Are you quite familiar with his handwriting? A. Yes, sir; I should say what I know of his handwriting that it is; I would not be positive as to it; it is a better writing than he usually employs.

Cross-examination by Mr. DEVLIN:

Q. Mr. Boese, will you tell us in whose handwriting are the words, "on motion of Brown, Hall & Vanderpoel, attorneys for the sheriff," interlined between the last and next to the last line on the first page here? A. I couldn't tell you, sir.

Q. Is it not Judge McCunn's? A. I should say not; there is some interlineation here; the words "Richard Hanrahan," I think, are a little different from McGowan and Hickey.

Q. There are two kinds of writing there? A. Yes, sir; one in the filling up, and the other in the interlineation.

Mr. PARSONS — We know the handwriting, if you desire; it is clearly Mr. Cumming's; that is clearly his handwriting.

Mr. DEVLIN — Of Brown, Hall & Vanderpoel's office?

Mr. PARSONS — Yes, sir.

Mr. STICKNEY — We next produce, if the Senate please, a paper which was mislaid before, and which is a certified copy of the order appointing a receiver on the 19th of November, and we produce it in order that the preceding copy which has been put in evidence is perfectly correct; the amount of the bond required is $1,000; this is a certified copy.

GEO. N. TITUS, a witness sworn on behalf of the prosecution, testified as follows:

Mr. STICKNEY:

Q. Mr. Titus, your profession is what? A. Counselor at law.

Q. In New York city? A. Yes, sir.

Q. You have been so for how long? A. Since 1835 or 1836.

Q. What connection did you have with the case of *Clark* v. *Bininger*? A. I was Mr. Bininger's counsel from the commencement of that litigation, up to some time in the latter part of the spring of 1870.

Q. (Shown paper.) I will show you now the receiver's bond, which has been produced in evidence and marked Exhibit 7; will you look at that bond and state whether you examined that early in the litigation on the files of the clerk's office of the Superior Court? A. I can't state the first time I saw it.

Q. Did you examine it early in the litigation? A. I saw it in the course of the winter of 1869 and 1870, or certainly in the month of March, 1870.

Q. In the clerks office of the Superior Court? A. Yes, sir.

Mr. BENEDICT — What is that, Mr. Stickney?

Mr. STICKNEY — They have received his bond, which has been put in evidence.

Q. This bond now reads in this way: "Whereas, by an order made by the Hon. J. H. McCunn on the 18th of November, 1869, the above bounden Daniel H. Hanrahan was appointed receiver," etc., and then follow "a judgment debtor" with a line drawn through them; state whether the words "a judgment debtor" were erased at the time you saw that bond in the clerk's office? A. I am confident they were not erased.

Mr. DEVLIN — Is that material, unless you connect it with the erasure?

Mr. STICKNEY — We consider it material in this way, that the bond of the receiver is approved by Judge McCunn, reading that he is appointed receiver of the property of Mr. Bininger, "a judgment debtor."

Mr. DEVLIN — Mr. President: May it please you and the Senate, that cannot prove mal or corrupt conduct upon the part of Judge McCunn; it would be simply carelessness or omission to read the bond; the omission to leave those words in would not be malfeasance or corruption in office, and I cannot see how that would be material unless they connect with making the erasure; if it was, why then it was wrong for us to have done it; but until they lay the foundation that we perpetrated the wrong of making the erasure, I do not see how the matter can be proper at all. The mere blunder of the judge is very common, I presume, in the country; certainly it is in the city. The man takes the bond and looks at the amount, and relies upon the accuracy of the practice and the gentleman who presents the paper to him, knowing that if any informality results the order can be set aside, and therefore it is in the interest of the client that he should have the paper properly drawn, and the judge relies upon the client's counsel drawing the paper correctly, and I have never known a case scarcely in which the judge examined

all the words in a bond presented to him for approval. It is only the sufficiency of the surety which is looked at. In the old chancery practice the vice-chancellor approved the form of the bond as well as the sufficiency of the surety. Judge McCunn relied upon the bond being formally drawn, and if by that confidence, that is universally observed by the judges toward the bar, it was an error that any other judge might have fallen into, and it does not point to, and much less prove, any malfeasance in office, and therefore, unless the counsel connects us with the erasure, I claim that fact is not competent evidence in this case. I do not mean to take any technical objection. Putting it in the most liberal sense, it is not evidence against us. All these matters go down upon the record, and they will be published. They will be published, no matter what was the opinion of the court. Therefore, all evidence which is not material (not in a technical point of view, but generally), it is the duty of this Senate to exclude, in order to enable us to be relieved from this public condemnation which may be inflicted upon us by reason of improper matter appearing upon the record.

Mr. MURPHY — Do these bonds come from the records of the court?

Mr. STICKNEY — Yes, sir.

Mr. MURPHY — Do you seek to impeach it?

Mr. STICKNEY — We show its condition at the time it was presented to him, and at the time he approved it; we intend to claim there was no security from this receiver, who was appointed receiver of this $500,000 worth of property; do I understand that counsel take any objection, because otherwise there is no other point before the Senate.

Mr. DEVLIN — I argued the objection before the Senate.

The PRESIDENT — Is the Senate ready for the question?

Mr. BENEDICT — What is the objection?

Mr. DEVLIN — The objection is to proving by this witness, or any witness, that there was any erasure made in that bond or any words stricken out of the bond, unless the act be connected with us; if the counsel says he will connect us with it, I will take his word for it that he will do so; but if he does not make that avowal or connect us with it, I think all evidence in regard to the change of the bond ought to be ruled out.

Mr. BENEDICT — It seems to me that is a part of the papers in this transaction, but as to its materiality, I don't think there is the slightest materiality in it, but I think there is competent proof, nevertheless.

The PRESIDENT then put the question upon the objection and the objection was overruled.

Mr. MOAK — The stenographer, we suppose, will take our objections, so they may appear upon the record.

The PRESIDENT — The stenographer will take every thing that is said.

Mr. MOAK—I assumed that was so, but on looking over the record I think it lacks some few things that were said.

Mr. D. P. WOOD—I would like to make a suggestion to counsel on both sides, that these proceedings are conducted with such rapidity, sometimes two or three talking at a time, that I have been informed that it is almost impossible for the stenographer to get every thing down. If the counsel will give sufficient time, they will get it down, I have no doubt.

Mr. MOAK — If the stenographer will indicate it, we will give him time.

Mr. D. P. WOOD — The stenographers intend to take every thing. They are sworn to do so. I have no doubt they will take every thing it is possible to be reported.

Q. Mr. Titus, do you remember making an application to Mr. Justice Jones, in the month of March, in relation to the sale of the partnership property? A. I remember making an application to Justice Jones, in March, 1870, to enjoin the sale that was advertised by the receiver, Hanrahan.

Q. (Showing paper.) Will you look at this paper and see whether that is Judge Jones' order? A. Yes, sir; it is.

Mr. STICKNEY — This is from the files of the court, and we will read this order in evidence, and I suppose the counsel for the other side will wish all the papers upon which it was granted to go in.

Mr. MOAK — We should prefer they should be in evidence, because we claim that was an *ex parte* order, granted on quite as insufficient ground as any charge against us.

Mr. STICKNEY — Then we will offer, as it is desired, Judge Jones' order of the 30th of March, 1870, in the suit of *Clark* v. *Bininger*, with the papers on which it was granted.

Mr. STICKNEY here read the same as follows, which is marked Exhibit No. 19.

EXHIBIT No. 19.

SUPERIOR COURT OF THE CITY OF NEW YORK.

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

Upon the petition of said Bininger and other papers annexed, and upon the proceedings and pleadings in this action;

It is ordered that the plaintiff, and Daniel H. Hanrahan, receiver, and Thomas J. Barr, co-receiver in said action, respectively show cause before one of the judges of this court at Chambers, in the Court-house in the city of New York, on the 2d day of April, at 12 o'clock A. M., why the prayer of said petition should not be granted, and in the mean time, and until the hearing and decision of the motion to be made under and pursuant to this order, the said Daniel H. Hanrahan and Thomas J. Barr, and their and each of their attorneys, agents and servants, or employees, are and each of them is hereby ordered and directed absolutely to desist and refrain from making or causing, or permitting to be made, any sale or other disposition of any of the stock, property or effects embraced in the order appointing a receiver in the above entitled action, or claimed to be held by them or either of them as receiver or co-receiver, as aforesaid.

And it is further ordered that said defendant may, this day, serve additional papers to be used on said motion.

Dated *March* 30, 1870.

J. H. M., *Judge.*

SUPERIOR COURT OF THE CITY OF NEW YORK.

ABRAHAM B. CLARK, Plaintiff,
agst.
ABRAHAM BININGER, Defendant.

To the Honorable Judges of the Superior Court:

The petition of the above-named defendant respectfully shows: That, on or about the 1st day of June, 1861, your petitioner and said plaintiff made and entered into a copartnership agreement for conducting business, in the city of New York, under the firm name of A. Bininger & Co., and that such business was carried on by them until the month of November last, when said firm was dissolved.

That said firm business was conducted before, and at the time of said dissolution, at Nos. 92 and 94 Liberty street in said city.

That, on the 19th of said month of November, said plaintiff commenced this action against your petitioner, demanding judgment that said partnership be disolved, that a receiver of the partnership property be appointed, and that the proceeds of such property, after payment of all just debts of the parnership and the costs of this action, be divided between the parties hereto, according to their respective rights, and that your petitioner be enjoined and restrained from interfering with such property.

That, on said 19th day of November last, an injunction order, of which a copy is annexed and marked A, also an order for the appointment of a receiver, of which a copy is annexed and marked B, were served upon your petitioner at his store Nos. 92 and 94 Liberty street, and one Daniel H. Hanrahan, named in said last-mentioned order, then took possession of the store, books of account, property and effects of your petitioner's said firm, and that said Hanrahan and those acting under or in connection with him still retain exclusive possession thereof.

That said injunction order was obtained, and said Hanrahan was appointed receiver in and by said order marked B, without the knowledge of your petitioner and without notice to him of any application to be made therefor.

That the stock of said Bininger & Co., in their said store in Liberty street, at the time said receiver took possession thereof as aforesaid, consisted of wines, liquors of various kinds, etc., etc., of the value of about $120,000. That said firm also then owned and had notes, bonds and mortgages, and book debts against different parties amounting to about $35,000 to $40,000, which were taken possession of by said receiver, a considerable part of which has been collected by him, as your petitioner is informed and believes; and that said firm at the time said receiver was appointed, owned certain real estate in the city of New York and elsewhere; that all said firm property was fairly worth, at the time said receiver was appointed, more than $300,000.

That the debts and liabilities of said firm then amounted to about $215,000.

That a motion was made to vacate said injunction order, and order appointing receiver, before Judge Fithian, upon the papers on which said orders of the 19th of November, 1869, were made; that said motion was denied by Judge Fithian, and an order was made by him of which a copy is annexed and marked C.

That said appointment of Thomas J. Barr, as co-receiver with Daniel H. Hanrahan, was not made at the request or by the procurement of your petitioner.

That, as your petitioner is informed and believes, an undertaking was filed by or on behalf of said Thomas J. Barr, of which a copy is annexed and marked D, and that this is the only undertaking executed or given by him under said order C.

That your petitioner is uninformed to what extent, if any, the said Barr has acted as such co-receiver.

That your petitioner has answered the complaint in this action; that the same has not been brought to trial, but is still pending in this court, and that no order or other proceeding has been had therein to ascertain or determine who are the creditors of the firm of A. Bininger & Co. entitled to be paid from the proceeds of the firm property, or the amount of debts justly owing by said firm, to the knowledge or belief of your petitioner.

That said Hanrahan, receiver as aforesaid, on or about the 26th instant, advertised the wines, liquors, etc., etc., the store fixtures and furniture, iron safes, etc., constituting the stock of said firm, for sale at auction by Henry B. Hertz, auctioneer, on the 31st day of March instant, and that the value of such property so advertised was, when taken possession of by said receiver, about $120,000, and that there has been but little depreciation in the value thereof since that time.

That in the best judgment of your petitioner, a sale of said property at auction, as advertised, must result in a heavy sacrifice of the property; that no part thereof needs to be sold for its preservation nor to provide the means for the present payment of any of the firm, debts, and your petitioner is assured by many of the creditors of said firm that all, or a large majority of them in amount, are ready and willing to take the firm property as it is in payment and satisfaction of their debts against said firm, and that they are opposed to the contemplated sale thereof by said receiver.

That, as your petitioner is informed and believes, the said receiver Hanrahan has collected from five to ten thousand dollars of the debts owing to said firm at the time he took possession as aforesaid, and has sold at private sale, or taken away from said store, Nos. 92 and 94 Liberty street, within the last ten days about one hundred and twenty-five barrels of whisky, of the value of from twenty-five thousand to thirty thousand dollars, and has not accounted therefor.

The said firm of Bininger & Co. have an interest in the lands and premises Nos. 92 and 94 Liberty street, and No. 18 Thames

street, in the city of New York, of the value of at least sixty thousand dollars, and that said receiver Hanrahan threatens to sell the same.

That the paper annexed and marked E, is a copy of the undertaking given by said Hanrahan as receiver in this action.

And your petitioner further shows that at the time said receiver took possession as aforesaid, various parties had wines and liquors in said store of A. Bininger & Co., of large value, upon storage, in which said firm had no interest, and that the same is in danger of being sold by said receiver in the mass of property advertised by him as aforesaid.

Your petitioner is informed and believes that a large quantity of the whisky taken from the store of said firm as aforesaid has been stored by said receiver at some place or places in the city of New York, subjecting the estate to unnecessary expense of storage and hazard to such property.

Your petitioner is advised by his counsel and believes, that said receiver and co-receiver have not, nor has either of them, the right or authority by law to sell the property of A. Bininger & Co., or any part thereof; that the property is advertised by said Hanrahan alone, who is, as your petitioner is informed and believes, unable pecuniarily to respond for one-tenth part of the value of the property held by him as aforesaid, and that a sale thereof, if permitted, will result in great loss to the creditors of said firm, and the parties in this action.

Your petitioner therefore prays that the said Daniel H. Hanrahan and Thomas J. Barr, and that each of them, may be ordered by this court to give new or additional bonds or undertakings for the faithful performance of their and each of their duties as receiver and co-receiver as aforesaid, to the amount of at least two hundred and twenty-five thousand dollars, to be duly approved by one of the justices of this court, upon and after notice of justification of the sureties to the attorneys of the respective parties in this action, and that all proceedings and acts of said receiver and co-receiver be stayed and forbidden until such bonds or undertakings shall be given, and the sureties therein shall have justified in the manner provided by law; also, that said receiver and co-receiver, and their and each of their attorneys and agents, be forbidden by the order of this court to make the sale of said property advertised for the 31st instant, or to make any sale or sales of said property except by and under the order and direction of this court, to be made and given upon and after notice of application therefor to the respective attorneys of your petitioner, and said plaintiff in this action, to be given at least

five days before such application shall be made. And that your petitioner may have such further, other or different relief in the premises as the nature of this case may require. And your petitioner will ever pray, etc.

ABRAHAM BININGER.

EDWARD W. CONE, *Attorney for Petitioner.*
GEORGE W. TITUS, *Of Counsel.*

CITY AND COUNTY OF NEW YORK, *ss.:*

Abraham Bininger, the above-named petitioner being sworn, saith, that he has read the above petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters that be believe it to be true.

ABRAHAM BININGER.

Sworn to before me this 29th day of March, 1870.

THOS. COOPER CAMPBELL,
Notary Public, City and County of New York.

(A.)

SUPERIOR COURT OF THE CITY OF NEW YORK.

ABRAHAM B. CLARK *agst.* ABRAHAM BININGER. } *Injunction by Order.*

It appearing satisfactorily to me, by the affidavit and complaint of Abraham B. Clark, the plaintiff, that sufficient grounds for an order of injunction exist, I do hereby order that the defendant, his agents, attorneys, counselors or employees, refrain from interfering in any manner with the property, store, stock, debts, dues, demands or money belonging to the firm of A. Bininger & Co., or the books thereof wheresoever situate, until the further order of this court; and in case of disobedience to this order, you will be liable to the punishment therefor prescribed by law.

Dated NEW YORK, *November* 19, 1869.

JOHN H. McCUNN, *Justice.*

(B.)

SUPERIOR COURT OF THE CITY OF NEW YORK.

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

Order of Appointment of Receiver.

The above named plaintiff having commenced an action against the said defendant for a settlement of partnership, and for an accounting, and it appearing to my satisfaction by the complaint and affidavits hereto annexed that a cause of action exists against the said defendant, and that the acts and doings of the said defendant have been and are contrary to equity and good conscience, and that no equitable division of the assets and good-will of said partnership can be made without loss to both parties, except by sale thereof, and a division of the proceeds; I do hereby order that Daniel H. Hanrahan, Esq., of the city, county and State of New York, be and he is hereby appointed receiver of all the debts, property, equitable interest, rights and things in action of the said partnership, with power to dispose of the same for the benefit of all parties concerned, according to law; that such receiver, before he enter upon the execution of his trust, execute to the clerk of this court a bond, with sufficient sureties, to be approved by me, in a penalty of $1,000, conditioned that he will faithfully discharge the duties of such trust, and file the said bond with the clerk of said court, and that the said receiver, upon filing such bond, be invested with all rights and powers as receiver according to law.

Dated NEW YORK, *November* 19, 1869.

J. H. McCUNN, *Justice.*

(C.)

At a Special Term of the Superior Court of the city of New York, held at chambers, in the City Hall of said city, on the 27th day of November, 1869.

Present, Hon. F. J. FITHIAN, *Justice.*

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

A motion having been made in this cause for an order vacating the injunction order, and the order appointing a receiver in this

action, made on the 19th day of November, 1869, and on hearing Mr. Titus for the motion, and Mr. Clark and Mr. Compton opposed, it is ordered that the said motion be and the same is hereby denied without costs.

And it is further ordered that Thomas J. Barr be and he is hereby appointed an additional or co-receiver, with Daniel H. Hanrahan, of all the debts, property, equitable interest, rights, and things in action of the partnership heretofore existing between the plaintiff and defendant; and it is further ordered that the said Thomas J. Barr, before he enter upon the execution of his trust, execute to the clerk of this court a bond, with sufficient sureties, to be approved by a justice of this court, in the penalty of $50,000, conditioned that he will faithfully discharge the duties of said trust, and file the same with the clerk of said court.

And it is further ordered that both the said receivers, shall together, receive or be entitled to only the fees allowed by law to one receiver.

And it is further ordered that the said receivers, or either of them, may, at any time, apply to this court for directions and orders in this action.

F. J. FITHIAN, *Justice.*

(D.)

Know all men by these presents, that we, Thomas J. Barr, of the city and county of New York, State of New York, and of the same city and State, are held and firmly bound unto James M. Sweeny, clerk of the Superior Court of the city of New York, in the sum of fifty thousand dollars, lawful money of the United States, to be paid to the said James M. Sweeny, clerk as aforesaid, for which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated the day of December, in the year one thousand eight hundred and sixty-nine.

Whereas, by an order made by the Honorable F. J. Fithian, one of the justices of the Superior Court of said city of New York, on the 27th day of November, 1869, the above bounden Thomas J. Barr was appointed receiver of all the debts, property, equitable interests, rights, and things in action of Abraham Bininger, defendant.

Now the condition of this obligation is such, that if the said Thomas J. Barr shall well and faithfully discharge the duties of this

trust, as such receiver, then this obligation to be void, otherwise to be in full force and effect.

THOS. J. BARR,
WALTER ROCHE.

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } *ss.:*

One of the obligors named in the foregoing bond, being sworn, says that he is a resident and freeholder within this State, and is worth the sum of one hundred thousand dollars, over and above all his debts and liabilities.

WALTER ROCHE.

Sworn before me this 8th day of December, 1869.

R. E. SELMES, *Notary Public.*

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } *ss.:*

On the 8th day of December, 1869, before me personally appeared Thomas J. Barr and Walter Roche, known to me to be the individuals described in, and who executed the foregoing bond, and severally acknowledged that they executed the same.

R. E. SELMES, *Notary Public.*

(E.)

Know all men by these presents, that we, Daniel H. Hanrahan, as principal, and James F. Morgan, of the city of New York, and William R. Gorham, of the city of New York, are held and firmly bound unto the clerk of the Superior Court of the city of New York, in the sum of ten thousand dollars, lawful money of the United States, to be paid to the said clerk of the Superior Court of the city of New York. For which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seal, dated the 18th day of November, in the year one thousand eight hundred and sixty-nine.

Whereas, by an order made by the Honorable John H. McCunn, on the 18th day of November, 1860, the above bounden Daniel H. Hanrahan was appointed receiver of all the debts, property, equitable interests, rights, and things in action of Abraham Bininger, a judgment debtor.

Now the condition of this obligation is such, that if the said Daniel H. Hanrahan shall faithfully discharge the duties of this trust,

as such receiver, then this obligation to be void, otherwise to be in full force and effect.

DANIEL H. HANRAHAN, [L. S.]
JAMES F. MORGAN, [L. S.]
WM. R. GORHAM. [L. S.]

CITY AND COUNTY OF NEW YORK, *ss.:*

James F. Morgan, one of the obligors named in the foregoing bond, being sworn, says, that he is a resident and householder within this State, and is worth the sum of twenty thousand dollars over and above all his debts and liabilities.

JAMES F. MORGAN.

Sworn before me this 19th day of November, 1869.

LEVI GRAY, *Notary Public, N. Y. City and County.*

CITY AND COUNTY OF NEW YORK, *ss.:*

William R. Gorham, one of the obligors named in the foregoing bond, being sworn, says, that he is a resident and householder within this State, and is worth the sum of $20,000, over and above all his debts and liabilities.

WM. R. GORHAM.

Sworn to before me this 19th day of November, 1869.

LEVI GRAY, *Notary Public, N. Y. City and County.*

STATE OF NEW YORK, }
CITY AND COUNTY OF NEW YORK, } *ss.:*

On the 19th day of November, 1869, before me personally appeared James F. Morgan and William R. Gorham and Daniel H. Hanrahan, known to me to be the individuals described in and who executed the foregoing bond, and severally acknowledged that they executed the same.

LEVI GRAY,
Notary Public, N. Y. City and County.

Indorsed: Superior Court, city of New York, *Abraham B. Clark* v. *Abraham Bininger.* I approve of the within bond, and of the sufficiency of the sureties. November 19, 1869. John H. McCunn, Judge. Petition and papers to postpone sale. E. W. Cone, defendant's attorney, 63 William street, New York city.

Mr. TITUS:

Q. Where was Judge Jones sitting at the time the application was made to him for that order? A. In the court room.

Q. In what part? A. In special term for hearing applications of this trial.

Q. Do you remember whether he was the judge regularly holding chambers at that time? A. I do; he was.

Q. Do you remember whether that order was modified or vacated in any way, and if so by whom? A. (Hesitating.) I was reflecting how much I knew of the matter personally; upon the subsequent motion it comes to my mind that that order was recorded by Judge McCunn, so far as to permit the sale to go on; I think until the second motion made by me was heard, I didn't know, although I had perhaps some information; but I can't state positively as to any knowledge before that time; on the making of that second application, which was made before Judge Monell the following month of April, it appeared by the affidavit of Hanrahan that Judge McCunn had modified that order so as to permit that sale to go on, and it did go on.

Q. You were the attorney to Mr. Bininger? A. Well, whether I had at that time been substituted attorney upon the record I cannot say from memory, but I had entire charge of those motions. Mr. Bininger came to me and requested that I would make an application for him to stay that sale if it were possible.

Q. Did you have any notice, or was any notice as far as you know given to the defendant or his attorneys, of any application to be made to Judge McCunn, for a modification of Judge Jones' order? A. None to me; and I never had heard any was given to Mr. Edward Cohn, who had been his attorney of record, and perhaps was at that time; I can't say as to that.

Mr. Stickney — We will now read in evidence the order of Judge McCunn, dated the same day (March 30, 1870), produced from the files of the court, modifying and annulling this stay.

Mr. Moak — You will read the papers upon which the modification was made?

Mr. Stickney — It appears in this shape; reciting no papers except those used in obtaining the order from Judge Jones.

Mr. Hevenor — It recites the affidavit of Daniel H. Hanrahan, also.

Mr. Stickney — That we will produce here.

Mr. Moak — That is considered read, is it?

Mr. Stickney — I will offer it the next thing.

Mr. Stickney here read the order marked "Exhibit No. 20," as follows:

Exhibit No. 20.

SUPERIOR COURT OF THE CITY OF NEW YORK.

Abraham B. Clark
agst.
Abraham Bininger.

On the petition of Abraham Bininger, dated the 30th day of March, 1870, and the order to show cause, and injunction made by Mr. Justice Jones, dated the 30th day of March, 1870, the affidavit of Daniel H. Hanrahan, copies of which are hereto annexed.

It is ordered that the order to show cause herein, dated March 30, 1870, made by Mr. Justice Jones, directing Daniel H. Hanrahan and Thomas J. Barr to desist and refrain from making or causing or permitting to be made, any sale or disposition of the property of A. Bininger & Co., be and the same is hereby annulled, vacated, set aside and discharged, so far as to allow such sale to proceed and be completed.

It is further ordered that said Daniel H. Hanrahan, by Henry B. Hertz, Esq., auctioneer, sell and dispose of all the personal property of said A. Bininger & Co., held by said Hanrahan or Mr. Barr, at public auction, on the premises Nos. 92 and 94 Liberty street, on the 31st day of March, 1870, commencing at 10 o'clock A. M., for cash, and to continue such sale, on such other or further days, until the entire stock of said firm shall be disposed of.

And it is further ordered, that the proceeds of such sale shall be paid to Daniel H. Hanrahan, and by him deposited in the New York Life and Trust Company, or in the Shoe and Leather Bank of the city of New York, subject to the order of this court, after first paying the expenses attendant upon such sale.

Dated New York, *March* 30, 1870.

JOHN H. McCUNN, *Justice.*

Indorsed: Charge 1, "C." W.W.M. Superior Court. *Abraham B. Clark* v. *Abraham Bininger.* Order modifying order of 30th inst. No. 3. Filed March 23, 1870. Exhibit No. 20. C. R. S.

Mr. Bowen — Is that a special term order?

Mr. Stickney — It is a judge's order, and not a special term order.

Mr. Stickney — We now produce from the files of the court the affidavit of Mr. Hanrahan, which is the one attached to the certified copy of the order I have just read; that is the order of the 30th of

March, Mr. Hanrahan's affidavit being sworn to before James F. Morgan on the 31st of March, the day subsequent. Then we read, particularly to the Senate, on the back part of the certified copy of the order I last read, this indorsement, in Judge McCunn's handwriting: "Let the within order be so far modified as to allow the proceeds of sale be deposited in joint names of Hanrahan & Barr as receivers in the Trust Co.'s, or in any bank said receivers may select," with Judge McCunn's initials, and dated March 31. Those papers we will put in evidence.

Same marked Exhibit 21, and read as follows:

EXHIBIT No. 21.

SUPERIOR COURT OF THE CITY OF NEW YORK.

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

CITY AND COUNTY OF NEW YORK, *ss.:*

James F. Morgan being duly sworn, says that he is the person referred to in the affidavit or petition of Abraham Bininger, made on the 7th day of April, 1870, and on which a motion has been made to punish, among others, deponent, for contempt for violating an order made by this honorable court, dated March 30th, as referred to in said petition of said Abraham Bininger.

Deponent further says it is true, as alleged in the petition of said Bininger, that deponent acted as the counsel of Daniel H. Hanrahan, one of the receivers, as alleged by him, said Bininger; and deponent further says that, in pursuance of his duties as such counsel, he did and has advised the said Daniel H. Hanrahan in relation to his obligations, and what was required of him in the execution of his trust as such receiver.

Deponent further says that he is not aware that a large portion of the creditors of A. Bininger & Co. objected to the sale of the partnership property of said firm, as referred to in the petition of said Bininger, but states, from his own personal knowledge derived, that the persons representing themselves as creditors, and whom deponent believes are referred to in the petition of said A. Bininger, are not, nor were they desirous that such sale of the partnership property should take place, because, as deponent is informed and believes, and charges, were from the time of the appointment of said Daniel H. Hanrahan, receiver, in collusion with said Bininger, to obtain

the possession of the property of said Bininger & Co., and have also been acting in concert with said Bininger and one John S. Beecher, an assignee in bankruptcy, appointed by the district court of the United States for this district and sitting as a court of bankruptcy.

Deponent further says that late on the 30th day of March last, he was, as the attorney of said Hanrahan, served with a copy of an order made by his Honor Justice Jones, which order this deponent is now charged with violating, which said order, among other things, enjoined the sale of the property of A. Bininger & Co., which sale had already been extensively advertised to take place on the next day; and thereupon consulted his client, and on the morning of the 31st of March, between 9 and 10 A. M., obtained an order from his Honor Justice McCunn, on the papers on which said order of his Honor Justice Jones, was made; also upon the additional petition of Daniel H. Hanrahan, modifying the order of his Honor Justice Jones, so far as to allow the sale as advertised for the 31st ult., to be proceeded with; which said petition and order modifying, are hereto annexed, marked exhibits A. and B. respectively, and to which deponent prays leave to refer.

Deponent further says that the said sale was had and made by virtue of the said order of the 31st ult.

Deponent further says that he is aware of all that has been done by Daniel H. Hanrahan, receiver, appertaining to his trust as such that it is untrue that he has removed for storage any amount of liquor or other property or effects of said firm, or that any property has been taken from the said store or removed therefrom, except such as has been disposed of by said Hanrahan in pursuance to law.

That the said Hanrahan has not made excessive or unlawful claim for fees, but on the contrary, said Hanrahan has beeu advised and is also well aware that it is not in his power to fix his own fees, but that the same can only be fixed by the court appointing him.

Deponent further says, that it is false, untrue, that the law firm of Morgan & Hanrahan have unlawfully obtained and kept a large amount of money, the property of A. Bininger & Co., or otherwise; or that said firm of Morgan & Hanrahan have received any money at all, arising out of the sale of the property of the firm of A. Bininger & Co., or in any way derived therefrom.

Deponent further says, that Abraham Bininger and the creditors of his late firm, have been in collusion, and have conspired together during the last four months, and have prosecuted, instituted and commenced all sorts of motions and proceedings, for the purpose of

getting into the possession of John S. Beecher the property of the firm of A. Bininger & Co., and have kept deponent almost constantly engaged in opposing motions and applications for orders, etc.

That the real object that the defendant, Bininger, has in view, on this motion, is not to punish Thomas J. Barr, Esq., for contempt, but to punish Daniel H. Hanrahan, or remove him, and thus get the property into the possession of his friend, and the friend of his bogus creditors, represented in the person of John S. Beecher, assignee in bankruptcy.

Deponent further says that he believes and charges that the said Bininger's real object is to proceed against Mr. Hanrahan individually, on this motion as aforesaid, well knowing that the moment his duties as receiver have ceased, although Mr. Barr may be still acting as co-receiver, the whole of the property of the late firm rests in his friend, John S. Beecher, assignee in bankruptcy as aforesaid, who was appointed prior to Mr. Barr, co-receiver herein.

Deponent further says, of his own personal knowledge, that Daniel H. Hanrahan has been scrupulous to preserve and keep, and conduct the management of his trust, as required by law and the practice of this honorable court, and will account for his acts when required.

JAMES F. MORGAN.

Sworn to before me
April 18, 1870.

E. B. Barnum, *Notary Public, N. Y. County.*

(A.)

SUPERIOR COURT OF THE CITY OF NEW YORK.

Abraham B. Clark
agst.
Abraham Bininger.

City and County of New York, *ss.:*

Daniel H. Hanrahan, being duly sworn, says that on the 19th day of November, 1869, by an order made by the Superior Court of the city of New York, he was appointed receiver of the estate, chattels and effects, and all property of whatsoever kind of the plaintiff and defendant, then doing business under the firm name of A. Bininger & Co.; and by virtue of such appointment duly filed his bond, approved by one of the justices of this court, as required by law, and thereupon took possession of such property as such receiver, and

still remains in possession of the same, which consists of a large stock of wines and liquors of every description, valued at about $75,000, and also real estate of the value of say $150,000.

Deponent further says that the said plaintiff and defendant, as such copartners, are indebted to various parties, amounting in the aggregate, as near as deponent can ascertain, in the sum of about $200,000.

Deponent further says that he is under considerable expense, and has so been since his appointment, in preserving the said property from loss, and also in employing counsel to defend the possession of the same, which was sought to be taken from deponent in various ways by reason of a petition filed in the District Court of the United States, in bankruptcy, wherein deponent was enjoined by their Honors Judges Blatchford and Woodruff. Subsequently, however, and on the day of February, 1870, Judge Blatchford refused to further enjoin deponent, and filed his opinion to that effect, in writing; and the matters above set forth were dismissed before his Honor Judge Woodruff, after hearing counsel.

Deponent further says that issue has been joined in this action; that the personal property is fast decreasing in value by leakage and evaporation; that a large portion of said personal property consists of Hungarian wines; wines which, deponent is informed by persons engaged in that business, will not keep much longer, and if allowed to remain in the store will result in a total loss.

Deponent further says that, on the 26th day of March, he caused to be inserted a daily notice for six days, in the New York Herald, World, and Journal of Commerce, also in the Boston Post, and Staats Zeitung, that he would dispose of the said personal property at auction, on Thursday, March 31, at 10 A. M., for cash, on the premises of said late firm, 92 and 94 Liberty street, and also caused to have printed catalogues of all of said wines and liquors, and an inventory taken of the same, which said catalogues have been sent to all the principal dealers in the city of New York, and Boston, Philadelphia, Baltimore, Washington, Albany, and other large cities, as well as to numerous connoisseurs who would be likely to purchase liquors of the quality and kind in possession of deponent, as such receiver.

Deponent further says that it is widely known throughout the city of New York and vicinity, also Boston, by liquor dealers, by reason of such advertisements and catalogues, and is expected that the stock is intended to be sold on Thursday, the 31st inst., as aforesaid, and deponent believes that said stock will sell at high prices.

Deponent further says that an order was made and served late this 30th day of March, granted by this court, a copy of which, as well as the petition on which the same was granted, are hereto annexed, which said order directs that deponent, as such receiver, desist and refrain from making the said sale aforesaid, and that if said sale is not to be proceeded with, a great loss will ensue by reason of the costly advertisements, catalogues, labor, etc., bestow in arranging the said stock for sale.

Deponent further says that he has not taken from the store 125 barrels of whisky, or any number of barrels of whisky, and stored the same, as set forth in the petition referred to aforesaid; but, on the other hand, has been scrupulous to preserve the property and effects of said firm, and has used more than ordinary exertion to have them bring a high price at said auction sale, which, if adjourned or restrained, will excite suspicion in the minds of those who may come to the premises for the purpose of purchasing, which cannot be allayed, and that on a future sale it will be hard to get persons to attend the same, and then to offer small prices, whereby the property held by deponent will be sacrificed.

Deponent asks that the order made by this court, dated March 30, 1870, returnable 2d of April at 11 A. M., enjoining deponent as aforesaid, a copy of which is hereto annexed, be vacated and set aside.

DANIEL H. HANRAHAN.

Sworn and subscribed before me this 31st day of March, 1870.

JAMES F. MORGAN, *Commissioner of Deeds, N. Y. C.*

Indorsed: N. Y. Superior Court. *Abraham B. Clark* v. *Abraham Bininger.* Affidavit of D. H. Hanrahan.

(B.)

SUPERIOR COURT OF THE CITY OF NEW YORK.

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

On the petition of Abraham Bininger, dated on the 30th day of March, 1870, and the order to show cause, and injunction made by Mr. Justice Jones, dated the 30th day of March 1870, the affidavit of Daniel H. Hanrahan, copies of which are hereto annexed:

It is ordered that the order to show cause herein, dated March 30,

1870, made by Mr. Justice Jones, directing Daniel H. Hanrahan and Thomas J. Barr to desist and refrain from making, or causing or permitting to be made, any sale or disposition of the property of A. Bininger & Co., be and the same is hereby annulled, vacated, set aside and discharged, so far as to allow such sale to be proceeded with and completed. It is further ordered that said Daniel H. Hanrahan, by Henry B. Hertz, auctioneer, sell and dispose of all of the personal property of said A. Bininger & Co., held by said Hanrahan or Mr. Barr, at public auction, on the premises Nos. 92 and 94 Liberty street, on the 31st day of March, 1870, commencing at 10 A. M., for cash, and to continue such sale on such other or further days, until the entire stock of said firm shall be disposed of; and it is further ordered that the proceeds of such sale shall be paid to Daniel H. Hanrahan, and by him deposited in the New York Life and Trust Company, or in the Shoe and Leather Bank of the city of New York, subject to the order of this court, after first paying the expenses attendant upon such sale.

Dated NEW YORK, *March* 30, 1870.

JOHN H. McCUNN, *Justice.*

(A copy.)

JAMES M. SWEENEY, *Clerk.* [L. S.]

Indorsed: Superior Court. *Abraham B. Clark* v. *Abraham Bininger.* Order vacating stay. James F. Morgan, attorney at law.

SUPERIOR COURT OF THE CITY OF NEW YORK.

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

CITY AND COUNTY OF NEW YORK, *ss.:*

Daniel H. Hanrahan, of said city and county, being duly sworn, deposes and says, that he, this deponent, has read the petition of said defendant, Abraham Bininger, filed in this action on the 7th day of April, A. D. 1870, and the schedules and papers thereto annexed; that the verification to said petition is made on information and belief, and not on positive knowledge. That, on the 19th day of November, A. D. 1869, this deponent was, by an order duly made by one of the justices of this honorable court, and duly entered therein, appointed a receiver of all the goods, property, assets and effects belonging to the firm of A. Bininger & Co., then doing bus-

iness in said city of New York, and, having first filed the bond required by such order, this deponent entered upon his duties as such receiver, and, in pursuance thereof, took possession, on said 19th day of November, A. D. 1869, of a very large stock of wines, liquors, etc., belonging to said firm, and of certain buildings and real estate in said city, also being the property of said firm.

That, upon so taking possession of said property, this deponent, on said 19th day of November, A. D. 1869, found the premises under the control of Abraham Bininger, the defendant, and a number of clerks and employees of him, said Bininger.

That this deponent is informed and verily believes the truth to be, that said firm of A. Bininger & Co. was composed of the plaintiff and the defendant in the above entitled action, and had been for a great number of years engaged in the business of importing and selling wines, brandies and other liquors and merchandise, at Nos. 92 and 94 Liberty street in said city of New York.

That this deponent, upon taking possession of said premises and property, discovered that by closing the doors of said premises, and omitting to continue the said business, the same would be entirely ruined, and that very great loss, waste and injury would occur to the said business of said firm, and to the said property. That this deponent, upon so taking possession of said property, retained for some weeks the clerks, cashier, book-keeper and other employees of said defendant Bininger, and expressed to said defendant the desire of this deponent not to injure or interfere with the business of said firm, further than might be absolutely necessary for the proper execution of this deponent's duties as such receiver, and this deponent allowed said defendant, Bininger, as well as said plaintiff, Clark, to enter said store and premises at all times, and to exercise supervision over all the acts and doings of this deponent as such receiver.

And this deponent further says that although he, this deponent, in all of his actions as such receiver, endeavored to prevent loss, waste and injury to said property, and the business of said firm, the said defendant Bininger, disregarding and in contempt of the orders of this honorable court, illegally colluded and conspired with certain creditors of said firm, and commenced, or caused to be commenced, and prosecuted various proceedings in bankruptcy, and endeavored, by force and violence to eject this deponent from the premises and property, and to that end and purpose caused various orders to be made in the District Court of the United States for this district, and in the Circuit Court of the United States for this circuit, and caused orders to be procured in said District Court, directed to the marshal

of the United States for said district, and commanding him to eject this deponent from the possession of said premises and property, and thus prevent this deponent from properly executing the duties of his trust as such receiver.

And this deponent further says that said defendant Bininger has illegally and improperly, and in utter disregard and contempt of the orders of this honorable court, and without asking leave of this honorable court, thereto instituted various suits and proceedings against this deponent, as such receiver, and has, in conjunction with the creditors of said firm, made extraordinary and incessant efforts to set aside the orders of this court, and has, ever since this deponent's appointment as receiver as aforesaid, annoyed and harassed this deponent in the execution of his said trust, and has rendered it necessary for this deponent, in the execution of his said trust, to expend large sums of money in employing a number of persons to resist the attempts of said marshal of the United States to eject this deponent, as such receiver, from said property, and also to expend large sums of money in securing counsel to defend the various suits and proceedings commenced and carried on by said defendant Bininger and by said creditors against this deponent as such receiver.

That this deponent, at or about the time of the commencement of the said proceedings in bankruptcy, informed the defendant Bininger that the result thereof would be to cause the expenditure by this deponent as such receiver, large sums of money in resisting the illegal and collusive proceeding of said Bininger and said creditors to prevent this deponent from executing his duties as such receiver, but that said Bininger, utterly disregarding and in contempt of the orders of this honorable court, persisted in his said collusive and illegal acts and proceedings, and has delayed and hindered this deponent for more than three months from selling and disposing of the said property, as required by the said order so appointing this receiver as aforesaid.

And this deponent further says that he is informed and verily believes that the said defendant has, through his agents or attorneys, prevented tenants and others owing moneys to said firm from paying such debts to this deponent as such receiver, and has, in various other ways, harassed and annoyed this deponent in the execution of his said trust.

And this deponent further says that, by reason of the aforesaid illegal and collusive acts of said defendant Bininger, this deponent was compelled to employ various keepers to hold and defend this deponent's possession of said property as such receiver, and that, in

order that no waste or loss should occur to said property, this deponent selected one William R. Gorham to act in this deponent's absence, as a head keeper, but this deponent expressly denies that he has ever deputized or authorized said William R. Gorham to, in any way, exercise any control over said property, excepting under this deponent's direction and orders; that this deponent selected the said William R. Gorham to act as such head keeper for the reasons that the said Gorham is a man of respectability and experience.

That said William R. Gorham was formerly sheriff of the city and county of San Francisco, in the State of California, and as such, to this deponent's knowledge, had at various times under his control a very great amount of property and moneys, and had great experience and knowledge of the duties of keepers of property, under such circumstances; and this deponent denies that said William R. Gorham is utterly or at all unsuitable to take charge of such property; but this deponent avers, that the said William R. Gorham has never held any control or authority over said property, save and except as a keeper, under this deponent as such receiver.

And this deponent further says that, at the time of the making of said order of the 30th of March, 1870, by the Hon. Samuel Jones, one of the justices of this court, and for some weeks thereafter, this deponent was confined to his house, and was under treatment for congestion of the lungs.

That this deponent was not served with said order, or with a copy thereof. That this deponent is informed by James F. Morgan, Esq., the counsel of this deponent, and verily believes the same to be true, that after the making of said order of the 30th of March, 1870, and before the sale in said petition mentioned, an order was made by one of the justices of this honorable court modifying said order of the 30th of March, 1870, so far as to allow the said sale to be proceeded with, and the moneys received therefrom to be deposited in the New York Life and Trust Company, a copy of which said order and petition are hereto annexed, and to which deponent prays leave to refer on this motion.

And this deponent further says that he admits that, soon after the commencement of this action, he, this deponent, was required by an order of this honorable court in this action, *made upon the application* of this deponent, to deposit moneys collected, or received by deponent as such receiver, in one of the life and trust companies in the city of New York, but this deponent alleges that in and by the said order this deponent was expressly authorized to retain in his hands sufficient moneys to meet the necessary expenses of this trust

as such receiver and of litigation, as by reference to said order will more fully appear.

That this deponent did open an account with said trust company, and that immediately thereafter the said defendant, Bininger, colluding as aforesaid with said creditors, caused an injunction to be issued for the purpose of preventing this deponent, as such receiver, from being able to meet the expenses of the vexatious and harassing litigation and proceedings the said defendant had caused to be instituted against deponent as such receiver.

And this deponent further says that he admits that no accounting has been yet had of the various moneys received by deponent in the execution of his said trust, but this deponent avers that the vexatious and illegal and improper proceedings instituted as aforesaid by said defendant, Bininger, against this deponent as such receiver, have delayed and prevented the sale and disposition of said property, and have rendered it impossible thus far for deponent to complete the execution of his said trust as such receiver.

That this deponent is at all times ready and willing to account for all moneys received by him in the execution of his trust as such receiver, and that such an accounting has not been had, because no order for such an accounting has been applied for or made.

That but a small portion of the assets of said firm have been realized, by reason of the delays and obstacles interposed by the defendant and by said creditors of said firm and their respective attorneys and agents.

That the opposition thus made to the execution of this deponent's said trust has been unusual, and has for four months last past occupied the whole time and attention of this deponent, and of his counsel, and that this deponent, were it not for this opposition, could have long since completed the execution of said trust, and made an accounting in accordance with law.

And this deponent positively denies that this deponent, or any other person whatever, has removed or caused to be removed for storage in any other place, from said premises 92 and 94 Liberty street, fifty-four casks of whisky marked (A), or forty-three other casks of whisky marked (O. K.), or ten other casks of whisky marked (R), or seven other casks of whisky, or any amount of whisky or liquors of any kind soever.

And this deponent denies that he has made, or now makes, any excessive or unlawful claim for fees or compensation for their services in the said trust, and also denies that by any act of this deponent any settlement or attempted settlement has been defeated;

but this deponent avers that he, this deponent, claims no further compensation than such is usually granted under the rules and practice of this court in similar cases, the amount whereof, as this deponent avers, is not and cannot be fixed by this deponent as receiver, but is settled by said rules and practice.

And this deponent denies that he, this deponent, has violated any of his duties as such receiver as aforesaid, and avers that, in opposing the illegal and improper proceedings and actions brought by said defendant to eject this deponent from the possession of said premises, he, this deponent, has prevented the said property from being wasted and altogether lost; and this deponent avers that the present proceeding has been instituted by said defendant, for the purpose of carrying out his former illegal and improper attempts to remove said property out of the possession of this honorable court, and get it into the possession of John S. Beecher, assignee in bankruptcy, who was appointed at the instigation of said Bininger and various alleged creditors, with whom said Bininger has acted in collusion, for the purpose of ousting not only deponent, but his late partner, Mr. Clark, the plaintiff in this suit, from all possession and control over the property, as deponent has satisfied himself from their acts and doings, and charges the truth to be.

DANIEL H. HANRAHAN.

Sworn to before me, April 18, 1870.

E. B. BARNUM, *Notary Public, N. Y.*

Indorsed: N. Y. Superior Court; *Abraham B. Clark* v. *Abraham Bininger*. Affidavit of D. H. Hanrahan. James F. Morgan, of counsel, 14 and 16 Wall street, N. Y. city. Filed June 27, 1870.

KNOW ALL MEN BY THESE PRESENTS, that we, Daniel H. Hanrahan as principal, and James F. Morgan, of the city of New York, and William R. Gordon of the city of New York, are held and firmly bound unto the clerk of the Superior Court of the city of New York in the sum of ten thousand dollars lawful money of the United States, to be paid to the said clerk of the Superior Court of said city of New York. For which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents, sealed with our seals, dated the 18th day of November, in the year one thousand eight hundred and sixty-nine.

Whereas, by an order made by the Honorable John H. McCunn, on

the 18th day of November, 1869, the above bounden Daniel H. Hanrahan was appointed receiver of all the debts, property, equitable interests, rights and things in action of Abraham Bininger;

Now, the condition of this obligation is such, that if the said Daniel H. Hanrahan shall faithfully discharge the duties of this trust as such receiver, then this obligation to be void, otherwise, to be in full force and effect.

DANIEL H. HANRAHAN, [L. S.]
JAMES F. MORGAN, [L. S.]
WM. R. GORHAM. [L. S.]

CITY AND COUNTY OF NEW YORK, *ss.:*

James F. Morgan, one of the obligors named in the foregoing bond, being sworn, says that he is a resident and householder within this State, and is worth the sum of twenty thousand dollars over and above all his debts and liabilities.

JAMES F. MORGAN.

Sworn to before me this 19th day of November, 1869.
LEVI GRAY, *Notary Public, New York City and County.*

CITY AND COUNTY OF NEW YORK, *ss.:*

William R. Gorham, one of the obligors named in the foregoing bond, being sworn, says he is a resident and householder within this State, and is worth the sum of twenty thousand dollars over and above all his debts and liabilities.

WM. R GORHAM.

Sworn to before me this 19th day of November, 1869.
LEVI GRAY, *Notary Public, New York City and County.*

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } *ss.:*

On the 19th day of November, 1869, before me personally appeared James F. Morgan and William R. Gorham and Daniel H. Hanrahan, known to me to be the individuals described in and who executed the foregoing bond, and severally acknowledged that they executed the same.

LEVI GRAY,
Notary Public, New York City and County.

Indorsed: Superior Court of the City of New York; *Abraham B. Clark* v. *Abraham Bininger;* Receiver's Bond. I approve of

the within bond, and of the sufficiency of the sureties. November 19, 1869. John H. McCunn, Judge.

Judge SELDEN — That is a modification of the order of March 30th.

Mr. STICKNEY — Yes, sir.

Mr. MOAK — It is proper to say to the Senate that these affidavits that show any sort of excuse, on the part of Judge McCunn, for any thing, are not stated at all. This affidavit of Hanrahan is a long affidavit, in which he states, in substance, that this sale has been advertised for a long time in all the principal cities of the United States, at large expense; and that this order was served on him late on the 30th, and that the sale was advertised to take place on the next day, and there were likely to be purchasers from all parts of the United States; and unless the order was modified, the entire expense of advertising and posting would be lost, and that parties would not come the second time when the property was sold. That is the substance of it, as I understand. I believe I have stated, substantially, correct.

By Mr. STICKNEY:

Q. Do you know whether the sale then proceeded, by auction, on the morning of the 31st? A. So I understood it; I was not at the sale, but it was a matter of public notoriety, and known to all the parties in the controversy.

Cross-examination by Mr. MOAK:

Q. Mr. Titus, how long have you been a counselor of the Supreme Court, practicing in New York? A. I stated on my direct examination that it was some thirty-five or thirty-six years since I was admitted.

Q. Was any motion made in this case at any time, on behalf of Mr. Bininger, to set aside this order appointing a receiver, on the ground that the appointment was without notice to Mr. Bininger? A. I made application in Mr. Bininger's behalf upon the papers on which the orders were made to vacate the order appointing the receiver and granting an injunction.

Q. That is not quite an answer to my question; my question was whether you made a motion to set it aside, on the ground that the appointment was made *ex parte?* A. I have not the points with me that I presented on that motion. Whether that was taken then or not I do not remember.

Q. Have you now any recollection that such a ground was urged at any time on any motion on an application to set aside the order? A. Well, I can only speak from present impression rather than from distinct recollection.

Q. I ask you for your recollection, Mr. Titus? A. I should state ——

Q. Be kind enough to answer my question; have you now any recollection of any motion to set aside the order appointing a receiver, of having made it on the ground, or made one of the grounds, that the order was made *ex parte?* A. I have a general recollection that among the points I presented on that motion, that it was an extraordinary proceeding that an order of that kind should have been made *ex parte.* I didn't remember of knowing of such an order being made before.

Q. The motion which you made to set aside the appointment of the receiver, was made before whom? A. Judge Fithian.

Q. That motion was denied? A. Yes, sir.

Q. After a full hearing on both sides? A. I presented it as fully and ably as I could; the counsel upon the other side said what they deemed necessary to say.

Q. Your order obtained from Judge Jones, staying the sale of this property on the 31st of March, was obtained on the 30th, wasn't it? A. That appears to be the date of the order, and I have no doubt it is the correct date.

Q. Do you recollect what time in the day of the 30th you obtained that order? A. I cannot mention the hour, but I know it was during the session of Judge Jones upon the bench of the Superior Court.

Q. Have you any knowledge of what time upon the 30th the papers were served upon Hanrahan and Barr? A. I cannot speak from personal knowledge, because I did not personally make the service; but I directed service to be made.

Q. Your order staying the sale next day, was obtained *ex parte?* A. Yes, sir.

Q. You gave no notice to the receiver or counsel of the application for the order? A. No, sir; I gave no notice to any one that I remember.

Q. And did your orders state, or did your moving papers to obtain the order, state any thing about the fact that the sale had been extensively advertised in almost all the large cities of the United States? A. I must refer you to the papers.

Q. Do you recollect that it did; I will get your recollection?

A. I don't recollect that fact; I am not aware now that it was within my knowledge.

Q. Well, it turned out on an investigation afterward that the sale of this liquor had been largely advertised in Philadelphia and Boston, and in the papers in New York, New Orleans and Chicago, and various other large cities? A. I don't know.

Q. Wasn't that sworn to in the affidavits? A. I don't remember; I heard Mr. Hanrahan's affidavit read with motion that I referred to before Judge Monell, and it is only my general recollection of the contents that I now speak from.

Q. Don't you recollect that it appeared in the affidavits on that motion that such was the case? A. It is difficult for me to separate one fact from another; I had that information in some way that that had been largely advertised.

Q. I will get at it in another way; was there any such fact stated in the papers that were used before Judge Jones on your application? A. I state now that I do not recollect, but still must refer to the petition.

Q. Do you recollect that any fact was stated before Judge Jones, except such as appeared in your papers? A. This additional fact was presented to Judge Jones — that I think is not connected with the petition, and it was this, the creditors —

Q. I didn't ask you what it was; as a lawyer you recollect? A. I am a witness now, and if I am wrong, you must correct me.

Q. Lawyers make very poor witnesses sometimes; do you recollect that any fact was stated to Judge Jones, except such as appear in your moving papers? A. No, I don't remember any, except what appear in my moving papers.

Q. Have you now any recollection that it was stated in the moving papers that large sums had been expended by receivers in advertising throughout the United States? A. I don't remember that, sir.

By Mr. Benedict:

Q. Who were the counsel upon the other side in that case before Judge Fithian? A. Well, there were several counsel appeared there on the motion; first, Mr. Compton appeared, and I think Mr. Morgan, and an objection was made when the motion was first brought on, that the receiver had no counsel there, and wished to be heard; I objected to any receiver being heard in the matter, and I supposed he had nothing to do with it; notwithstanding, it was postponed to

a subsequent day, and then Mr. Clark and Mr. Compton appeared in opposition to the motion.

By Mr. D. P. Wood:

Q. What Clark appeared? A. He is a lawyer, and I understand him to have been the gentleman who was mentioned here yesterday, as a person recommended by Mr. Abraham B. Clark to be employed; he was a stranger to me, but, on inquiry, I learned his name was Mr. Clark.

Q. Do you know his given name? A. I have an impression it was Lucius; I may be mistaken about that; the gentleman was referred to yesterday by Mr. Melville B. Clark, in his testimony.

By Mr. Tiemann:

Q. Was he the former partner of Judge Fithian? A. I didn't know that; he was a stranger to me; I don't remember to have seen him in any stages of the controversy afterward.

Q. How soon after a receiver was appointed were you aware of the bankruptcy proceedings being commenced? A. I think it must have been nearly a month after; I may be in error as to the exact time; it was not until after the order of Judge Fithian was made, I think.

Q. That was the order about which there was some controversy? A. That may be, but still it is my impression that the bankruptcy proceedings were not commenced until after that time; I can't state the exact time; I have not the data before me that will enable me to do so.

Q. You said Mr. Hanrahan's affidavit was used in the motion; which motion do you refer to? A. The motion that I made before Judge Monell for the removal of both the receivers, Barr and Hanrahan, in consequence of their making the sale of the property in defiance of the injunction ordered by Judge Jones.

Q. That motion was denied, was it not? A. It was granted; it was granted, absolutely, as to Hanrahan, and it was denied to Barr, conditionally; the condition was that he should give the security which Judge Jones had directed should be given by both receivers, and then he should act as sole receiver.

Q. But it was not granted on the ground that the sale was improper, was it? A. I understand it was granted on the ground that Hanrahan had, regardless of the order of Judge Jones, gone on and made the sale.

Q. Without giving security? A. No; that he had gone on and made the sale in defiance of the order of Judge Jones.

Q. Do you mean to say that this order of Judge McCunn's was not decided to be illegal? A. I don't know that that order of Judge McCunn's was ever brought up for adjudication; Judge Jones had made the order prohibiting that sale absolutely until an order of the court, and Hanrahan made the sale notwithstanding the order, and it appeared on his defense, in a motiom made before Judge McCunn, that his justification was, that Judge McCunn had authorized him to make the sale.

Q. That this order of Judge McCunn's, modifying the order of Judge Jones, was his justification? A. That was his justification.

Q. Well, you understood Mr. Barr to have taken part in the sale, didn't you, and to have sanctioned it? A. I only know that here with these two men, Hanrahan and Barr, in charge of that property, and it had been advertised for sale, and I supposed then it was the joint action of both.

Q. Well, it was conceded on the motion, was it not? A. No, I believe not; Mr. Barr, I understood, disclaimed having sanctioned that.

Q. Are you certain that Barr's affidavit was not read by Mr. Cohn? A. It may have been; I have no recollection of the contents of his affidavit; I think there was an affidavit read by him.

Q. And Mr. Barr was retained as receiver, on condition that he gave the amount of bond which Judge Jones had fixed? A. Yes, sir; that was the first order made by Judge Monell, and as he was unable to give security to quite the amount, Judge Monell made a modification reducing the amount, and he gave a bond and then continued sole receiver after that.

Q. Do you recollect when that order was made? A. It was made in April, 1870.

Q. And from that time down Mr. Barr continued the sole receiver of the property? A. He was sole receiver after that; Hanrahan was removed.

Q. How many motions do you think you made in that case? A. Do you mean in the Clark and Bininger case?

Q. Yes. A. I do not now remember but three that I made.

Q. How many were made by other parties? A. Well, Mr. Compton's motions were quite frequent.

Q. Will you be kind enough to answer my question without comments upon counsel? A. You ask me a question that I have got to

take a little time to answer; I intended no comment on counsel and made none.

Q. Your answer was that Mr. Compton's motions were quite frequent, was it not? A. Yes, but I don't consider that a comment upon counsel; there were certainly two motions made by Mr. Compton to punish for contempt.

Q. I didn't ask you what they were? A. Well, I remember two made by Mr. Compton; also a third motion made by Mr. Compton.

Q. There was considerable feeling in that case, was there not, Mr. Titus? A. Yes, sir.

Q. Both on the part of the parties, the counsel, and the attorneys? A. Yes, sir; I think there was.

Q. You participated in that feeling to some extent, I suppose? A. Naturally, I think I did.

Q. When was the last proceeding in that action that you now recollect? A. Well I can't tell you the date.

Q. About when? A. The last that I remember was in June, 1870, in the action.

Q. Then the proceeding was pending on the action, and proceedings taken in that and outside proceedings by other parties in the United States Court from November 19, 1869, until some time in June, according to your recollection? A. Yes, sir.

Q. Were those proceedings in bankruptcy to your knowledge instituted by the advice or arrangement of, or arrangement with your client, Mr. Bininger, by the creditors? A. Mr. Bininger knew of the proceedings.

Q. Did he countenance them? A. I can only answer you in this way; he didn't oppose them.

Q. Do you know the fact that they were taken in his interest, and were countenanced by Mr. Bininger, under his directions and counsel? A. I cannot say that they were done in his interest; if you will allow me to state —

Q. Well, you have answered it so far, I will separate it; were they taken after a consultation with you? A. My opinion was asked as to whether proceedings in bankruptcy —

Q. Mr. Titus, you know what a consultation is, as a lawyer, do you not? A. Yes, sir.

Q. Now, were these proceedings taken after consultation with you by the creditors who took them, or their attorneys or counsel? A. Yes, sir.

Q. While they were pending did you have, as counsel for Mr. Bininger, consultations with the counsel or the attorneys for the

petitioning creditors as to what course should be taken? A. No, sir, not as to what course should be taken; he acted independently of any counsel.

Q. Did they consult with you as to whether the proceedings would be acceptable to you or to Mr. Bininger? A. They consulted with me as—no, I won't say "*them;*" Mr. Cohn consulted with me as to whether proceedings in bankruptcy would lie; and I expressed to him my opinion that they would under the circumstances of the case, and from that time Mr. Bangs, who was the counsel for the creditors, acted in all those proceedings of the bankrupt court; I took no part in them whatever, except that I knew they were going on.

Q. Mr. Cohn, who advised with you as to whether bankrupt proceedings would lie or not, was the same Mr. Cohn who was Bininger's attorney of record? A. Yes, sir.

Q. How soon after he advised with you as to whether these proceedings would lie, and you advised that they would lie, were they instituted? A. Within a few days.

Q. And after that time were you consulted either by Mr. Cohn, by Mr. Bangs, or by any body else who was interested in the bankrupt proceedings, as to whether certain proceedings were acceptable to Mr. Bininger or not? A. I don't think I was consulted by either of those gentlemen, or by any other person, after that time, upon that subject; the whole matter was dropped by Mr. Bangs as the counsel for the creditors, and he adopted his own course of action; Mr. Bininger was helpless in the case, in the position which he occupied; he could do nothing.

Q. He didn't oppose any thing? A. He didn't oppose any thing, that I know of.

Q. After these bankrupt proceedings were commenced, did you take any steps in that action in the Superior Court? A. Not until this application was made to Judge Jones, that I now remember; I appeared in the Superior Court several times.

Q. I don't ask you what you did, but simply whether you did any thing? A. I did not initiate any proceedings then that I remember of.

Q. Before taking any proceedings in the action in the Superior Court, did you consult with Mr. Cohn, or did Mr. Cohn consult, to your knowledge, with the attorney in the bankrupt proceedings? A. Yes, sir; I remember consulting with Mr. Bangs once in reference to ——

Q. I don't ask you what it was in reference to? A. Very well, sir; I remember once distinctly consulting with Mr. Cohn.

Q. Did you consult with them upon this subject more than once during the pendency of the bankrupt proceedings? A. I don't remember that I did.

Q. Were you advised by Mr. Cohn that he had consulted with the attorneys in the bankrupt proceedings? A. I remember hearing Mr. Cohn say that he had seen Mr. Bangs in reference to such matters as were going on in the bankruptcy court.

Q. At different times? A. Yes, sir.

Q. Quite frequently? A. Well, I can't say how frequently; several times.

Q. There was no step, I take it, that you were aware of that you could take to get the property into the hands of Mr. Bininger, or those who were in his interest, that occurred, that you didn't take, was there? A. I don't remember that I took any steps to get the property into the hands of Mr. Bininger.

Q. Well, into the hands of those whom you believed to be in his interest? A. The steps that I took, if I may be permitted to state that in this connection, were to get the property into the hands of the creditors of this firm; that was Mr. Bininger's first aim and effort.

Q. Now, Mr. Titus, as a lawyer, you have not yet quite answered my question; my question was whether there was any one step which you were aware of, which would get the property into the hands of those who were friendly to Mr. Bininger, which occurred to you to take, that you did not take? A. I dont know that I took any between the motion that I made for the dissolution of the injunction before Judge Fithian and the time I made the application to Judge Jones, saving what I did in the way of negotiating between Clark and Bininger to settle the matter.

Q. That does not quite answer my question; my question was whether there was any step which occurred to you, which would tend to get the property into the hands of those who were friendly to Mr. Bininger, that you did not take? A. Well, I told you that I did not take any that I now remember, except those that I have mentioned.

Q. Do you regard that as an answer to my question? A. Yes, sir; I do, if you will put it in a different form, perhaps, I can give a better answer.

Q. Now, Mr. Titus, I take it from your reputation you are a gentleman engaged in extensive practice in the city of New York? A. I have been.

Q. You went yourself personally to the clerk's office to examine the bond? A. I did.

Q. Is that an ordinary occurrence with you? A. In a case like this I should, I think, do it always; I should not trust to a clerk to make an examination of papers for the purpose for which I needed these.

Q. Who made this copy which is now produced, and which is shown to you here? A. I don't know who made it, it was an original paper that was shown to me.

Q. I understood it was a copy? A. No, sir; it was the original bond that was shown to me.

Q. Have you any copy of that? A. Yes, sir (witness produces paper), I have a copy that I obtained from the clerk's office.

Q. Did you see the original order for the appointment of a receiver? A. I am not clear whether I saw that order or not; a copy of that having been served upon Mr. Bininger, with the papers that came into my hands, in the early part of the case.

Q. Then you are not at all positive of the fact that the order prescribed that the bond should be in the penalty of $1,000, instead of $10,000? A. Of course I cannot be, as to the original order that I never saw.

Q. Well, that is a very easy mistake to make in copying, from one to ten, particularly when it is not very well written? A. Well, I should think it was rather extraordinary in copying a paper of that kind, to copy one, for ten.

Q. If a word was not well written? A. Well, under any circumstances, I should think that was rather an unusual mistake to make.

Q. Mr. Titus, did you present any claim for services in this action, to the receiver? A. Yes, sir.

Q. To what amount? A. My impression is that the claim that is pending before Mr. Darlington, is a little less than $5,000.

Q. Is it not over $10,000? A. No, it is not; it does not exceed $5,000; I will explain to you, sir, if you will permit me; the claim that was first presented by me before Mr. Darlington, under the judgment that was entered in this action was nearly $10,000, but it embraced many other controversies than those which are now before him; one of which was a suit that we brought in the second district in the supreme court, to restrain Mr. Clark and his son from using the firm name as "A. Bininger Clark & Co.," in the carrying on of their business; and there were various charges that were made for services in the contempt cases, so-called, in the superior court.

Q. Those were in the bankruptcy proceedings? A. Yes, sir; but I am telling you what was expressed in the whole bill that was presented before Mr. Darlington; and there were claims also for com-

pensation for my services in the negotiations between Bininger and Clark, during the months January, February, and a part of March, to settle this matter. Objections were made to many of the claims that I presented there, as not being embraced in the order or judgment made by Judge Monell, and they were withdrawn to a great extent; in consequence, the claim was reduced before Mr. Darlington, so that, I think, it is between $4,500 and $5,000.

Q. You do not mean that, with your fair practice, you left the first district of New York and brought a suit in the second district? A. I do; I mean that exactly.

Q. Well, if I understand you rightly, there was one suit to restrain Clark from using the firm name? A. Yes, sir; not the firm name, but the name I have mentioned.

Q. The name of the old firm? A. No; the name of the old firm was A. Bininger & Co.; Clark had opened a store near to them, under the name of A. Bininger Clark & Co.; it was to restrain the use of that name.

Q. Well, his name was A. Bininger Clark, wasn't it? A. So he says; I had known it as Abraham B. Clark, before that time.

Q. Where did Mr. Clark reside, at the time that you brought this action in the second district? A. In New York.

Q. Where did Mr. Bininger reside? A. At Whitestown, on Long Island.

Q. Where was the venue laid in that action? A. In Kings county.

Q. I understand you to say that this bill included for services in the contempt proceedings? A. Yes, sir.

Q. Well, those contempt proceedings were against the assignee in bankruptcy, were they not? A. Yes, sir; they were against Bininger.

Q. What proceedings were taken against him? A. These contempt proceedings he was proceeded against. Motions were made against him, against Mr. Bangs, against Mr. Beecher, and there were other parties named, to punish them for alleged violations of injunctions granted by Judge McCunn to restrain any proceedings in the bankrupt court.

Q. For whom did you act on that proceeding? A. For Mr. Bininger.

Q. For him alone? A. For him alone.

Q. And in the order of judgment which provided that the expenses and costs of the suit of *Clark* v. *Bininger*, you, as a lawyer, presented to Mr. Darlington charges for services in two different

proceedings? A. I presented those charges that I have mentioned under that judgment.

Q. Did you, as a lawyer, regard that as a legal charge? A. I did, or I should not have presented it.

Mr. PARSONS — We should like to inquire whether it is Judge McCunn or Mr. Titus that is being tried.

Mr. MOAK — The question of how much feeling the witness has is perfectly competent, it seems to me, to be developed on the cross-examination, for the purpose of showing how far his feelings may have colored his evidence. There is no question but what Mr. Titus is a fair gentleman, but we are all liable to have some feeling, of course.

FRANCIS N. BANGS, called in behalf of the people, having been duly sworn, testified as follows:

By Mr. STICKNEY:

Q. Your profession is what? A. Lawyer.

Q. How many years have you been so? A. Twenty years and upward.

Q. Will you state what connection you had with the Clark and Bininger litigation? A. If that question is applicable only to the suit in the superior court, it was this —

Q. Just state what connection you had with all those litigations? A. I was employed by creditors of Clark and Bininger, who were then said to be insolvent, to procure the application of their property — their individual property — to the payment of their debts, by proceedings in bankruptcy; I was also employed to have an assignee appointed for the purpose of getting control of the suit then pending in the Superior Court, so that Mr. Clark should cease to have control of the suit, and should cease to be able to obtain orders concerning the disposition of the joint property; after the proceedings in bankruptcy, which were instituted in pursuance of that employment, were over, so far as that an assignee was appointed, I was employed by the assignee to recover the property of Bininger and Clark, Mr. Bininger's property amounting to about $50,000; Mr. Clark's property, as it was believed, amounting to $200,000; and I was also employed by the assignee, under the bankruptcy law, to apply to the Superior Court to be admitted to prosecute and try the suit then and there pending, so that that suit might be wound up and the property delivered to him; I was also employed in the earlier stage of the proceedings, by petitioning creditors, to defend three

suits brought in the Superior Court against them, in which Judge McCunn had issued an injunction against those petitioning creditors; that was my professional connection with these litigations.

Q. You have mentioned that the object of the creditors was to hinder Mr. Clark from obtaining orders in relation to the joint property of the firm: orders from whom? A. From the Superior Court.

Q. From what judge of the Superior Court?

M. MOAK — That I object to. The acts of some body else out of court, as to what they desire to do, are not material.

Mr. STICKNEY:

Q. Who had granted orders in relation to the joint property, prior to this time? A. As I understood, Judge McCunn and Judge Fithian.

Q. Will you state who was the assignee appointed? A. John S. Beecher.

Q. Do you remember the occasion of the arrest of Mr. Beecher, under an order of Judge McCunn? A. I was not a witness to his arrest, sir; I was a witness to his detention under the alleged arrest.

Q. Will you state what took place in your presence, in relation to that? A. Yes, sir; Mr. Beecher's election, which is not precisely the same as his appointment, took place on the 18th of January, 1870, that is, the creditors met on that day and designated him as their choice for assignee; that had to be approved by the court; after that approval I received from Mr. Beecher a paper, which I now have in my hand, dated 19th January, 1870, signed "A copy, James M. Sweeny, clerk." I advised Mr. Beecher concerning that, and in the course of a few days after that received from Mr. Beecher, as having been served upon him, this order, without date, signed "John H. McCunn," which reads as follows:

The witness here read the following paper, which is marked "Exhibit No. 22."

EXHIBIT No. 22.

SUPERIOR COURT OF THE CITY OF NEW YORK.

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

It appearing satisfactorily to me, by the affidavit of Daniel H. Hanrahan, receiver of the property and effects of A. Bininger & Co., and duly appointed such receiver on the 19th day of Novem-

ber, A. D. 1869, that John S. Beecher and Paul J. Armour, claiming to be assignees in bankruptcy of the said firm of A. Bininger & Co., are about to attempt to eject the said Daniel H. Hanrahan, receiver, as aforesaid, from the possession of certain goods and property taken into his possession, under and by virtue of said order of appointment;

Now, therefore, I do hereby order that the said John S. Beecher and Paul J. Armour, and each of them, and any other person or persons who may claim to be acting as assignee of said firm in bankruptcy, be and they and each of them, their servants, agents and all persons whomsoever acting under them or either of them, are hereby enjoined and restrained from in any manner interfering with or disturbing the said receiver in his possession of said property as such receiver, whether such interference be made as assignee or assignees, or otherwise.

And for a violation of this order they and each of them shall be liable to the punishment prescribed by law.

Dated NEW YORK, *January* 19, 1870.

JOHN H. McCUNN, *Justice.*

Indorsed: Charge 1, "E." C. P. V. Should be "E." Superior Court of the city of New York. *Abraham B. Clark* v. *Abraham Bininger.* Order of receiver for injunction. James F. Morgan, of counsel for receiver. Filed January 19, 1870.

Mr. STICKNEY:

Q. At that time were Mr. Beecher and Mr. Armour parties to that suit at all? A. No, sir.

Q. Had they received any notice of any kind of an application for that order? A. Not that I am aware of.

Q. Then what took place next? A. Then was served this order without date requiring cause to be shown on the 25th why Beecher should not be punished for contempt of court in disobeying that order of the 19th of January; the papers I hold in my hand are the order and the papers upon which it was granted.

Mr. STICKNEY:

We will put these papers in evidence, and I will read, particularly, one portion of the order: "Now, therefore, I do hereby direct that the said John S. Beecher show cause before me, at part one, trial term of the Superior Court, State of New York, at the new courthouse in the said city, on the 25th day of January," etc.

The papers referred to were marked Exhibit No. 23, and read as follows:

EXHIBIT No. 23.

SUPERIOR COURT OF THE CITY OF NEW YORK.

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

It appearing satisfactorily to me, by the affidavits of Charles L. Morgan and James F. Morgan that John S. Beecher, an alleged assignee in bankruptcy, has attempted to take possession of the property and effects of A. Bininger & Co., now in the possession of Daniel H. Hanrahan, Esq., a receiver appointed by this court on the 19th day of November, A. D. 1869, and that said Beecher interfered with and disturbed the receiver in his possession of the said property, in violation of an order granted by this honorable court, dated January 19th, 1870, and duly served on said Beecher, on the 19th January, 1870;

Now, therefore, I do hereby direct that the said John S. Beecher show cause before me at part one, trial term of the Superior Court of the city of New York, at the new Court-house, in said city, on the 25th day of January, A. D. 1870, at 10½ A. M., why he should not be punished for an alleged contempt of this court, for violating the said order of January 19, 1870.

JOHN H. McCUNN, *Justice.*

SUPERIOR COURT OF THE CITY OF NEW YORK.

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

CITY AND COUNTY OF NEW YORK, *ss.:*

Charles L. Morgan, being duly sworn, says that he is in and upon the premises Nos. 92 and 94 Liberty street, in the city of New York, of the late firm of A. Bininger & Co., as one of the keepers or representatives of Daniel H. Hanrahan, Esq., a receiver now in the possession of said premises and property, under an order of the Superior Court of the city of New York. That, on this 24th day of January, 1870, a person representing himself as John S. Beecher, an alleged assignee in bankruptcy proceedings, wherein the parties

hereto are alleged debtors attempting to take possession of the said property in possession of said Hanrahan, receiver, as aforesaid.

That said John S. Beecher came to the doorway of said premises and demanded admission in and possession of said premises, as deponent has been advised, is informed and verily believes, in violation of an order issued by this honorable court.

(Signed) CHAS. L. MORGAN.

Sworn to before me this 24th day of January, 1870.

(Signed) THOMAS H. BAROWSKY,
Notary Public, N. Y. County.

NEW YORK SUPERIOR COURT.

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

CITY AND COUNTY OF NEW YORK, *ss.:*

James F. Morgan, being duly sworn, says that on the 19th day of January, 1870, at No. 98 Front street, in the city of New York, he served a certified copy of an order of injunction, with the seal of this court attached thereto, on John S. Beecher, by delivering to and leaving with said John S. Beecher the said certified copy. Deponent further says that he knew the person so served to be the John S. Beecher referred to in the annexed order, which is a copy of the order so served on him as aforesaid.

JAMES F. MORGAN.

Sworn to before me this 24th day of January, 1870.

LEVI GRAY,
Notary Public, New York City and County.

SUPERIOR COURT OF THE CITY OF NEW YORK.

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

It appearing satisfactorily to me, by the affidavit of Daniel H. Hanrahan, receiver of the property and effects of A. Bininger & Co., and duly appointed such receiver on the 19th day of November, A. D. 1869, that John S. Beecher and Paul J. Armour, claiming to be assignees in bankruptcy of said firm of A. Bininger & Co.,

are about to attempt to eject said Daniel H. Hanrahan, receiver as aforesaid, from the possession of certain other goods and property taken into his possession under and by virtue of said order of appointment;

Now, therefore, I do hereby order, that the said John S. Beecher and Paul J. Armour and each of them, and any other person or persons who may claim to be acting as assignees of said firm in bankruptcy, be and they and each of their servants, agents and all persons whomsoever acting under them or either of them, are hereby enjoined and restrained from in any manner interfering with or disturbing the said receiver in his possession of said property as such receiver, whether such interference be made as assignee or assignees or otherwise.

And for a violation of this order, each of them shall be liable to the punishment prescribed by law.

Dated NEW YORK, *January* 19, 1870.

(A copy.) JAMES M. SWEENEY, *Clerk.*

Indorsed: New York Superior Court. *Abraham B. Clark* v. *Abraham Bininger.* Copy affidavits and order to show cause. James F. Morgan, of counsel for Daniel H. Hanrahan, receiver, 14 and 16 Wall street, New York city.

Mr. STICKNEY — At that time was Mr. Justice McCunn holding special term or chambers in the Superior Court? A. Yes, sir.

Q. Did you appear before him on the 25th? A. I did, I think on the 25th.

Q. Where was he then sitting? A. He was sitting with a jury at the trial term.

Q. Will you state what took place before him in your presence, on that day? A. On the receipt of this order to show cause, one of my partners, at my request, went to court and returned, and in consequence of his information, I went to court, where I found Judge McCunn engaged in the trial of a case before a jury; I sat down, and while sitting an attendant upon the court, a person whom I recognized as such, came into the room and went behind the bench and made a communication to Judge McCunn in a whisper, or a subdued tone, that I did not hear; Judge McCunn turned to him and said: "Go and take him," or "Go and bring him; that is your warrant; take some one with you and bring him."

Q. In what tone was that said by his honor? A. Well, as loud as I have used; perhaps louder; it was entirely audible; the man left the room, and within half an hour afterward, Mr. Beecher made

his appearance in the court room with this man upon one side of him and another person upon the other; I conversed with Mr. Beecher; shall I state the conversation?

Mr. STICKNEY — We ask that it be stated?

Mr. MOAK — We object to it.

Mr. TIEMANN — Let us have it.

Mr. MOAK — We object to it, unless it is shown that it was in an audible tone, or was heard by Judge McCunn.

The WITNESS — It was in an audible tone, but it was not heard by Judge McCunn.

Mr. MOAK — Then we object to it.

Mr. STICKNEY — We do not press it.

WITNESS — Mr. Beecher came in and sat down, and at the first pause that occurred in the proceedings, I arose and adressed Judge McCunn, saying that I wished to bring to his attention a matter which would undoubtedly command his preference, inasmuch as it affected the liberty of a citizen.

Q. How long had Beecher been there? A. I should judge five or ten minutes; I was as prompt as I could be; I said that a client of mine, Mr. John S. Beecher, had been seized in the public streets and brought to court by two men; Judge McCunn said that they were officers of his court; I said that he was there kept against his will, and I requested that his honor would inquire into the cause of his detention; he said I could sit down, that he should not interrupt the trial then in progress; I think that he intimated that he would take it up some time or other; Mr. Beecher sat there for a length of time, that I cannot state definitely, I should say from one to two hours; he walked toward the door once, and one of the two men who had accompanied him to the room, walked to the door after him and Mr. Beecher returned and sat down; I prepared a petition for a writ of *habeas corpus* and Mr. Beecher swore to it before the clerk of the court, rising up as he did so, quite visibly; and the judge interrupted the counsel who was engaged in the trial of the cause and stated that Mr. Beecher might go until the next morning; he must be there the next morning; I cannot now give the exact order of the conversation, though I think I can give pretty much all that took place; Mr. Beecher, myself, and the judge spoke by turns; I said to the judge substantially that Mr. Beecher would be there in the morning, if there was any legal order compelling him; the judge said, "No fear, sir, no fear; we will bring him;" when he said Mr. Beecher might go, Mr. Beecher asked where he might go; the judge said he might go to Ludlow street jail or he might go to

the bosom of his family, just as he chose; Mr. Beecher pressed him for a more categorical direction; he said he would go where the court should direct him; the court said he might go to his family and Mr. Beecher went away and went from the room; I don't know where he went; on the next morning I attended, and the trial before Judge McCunn was still in progress; that is, it was still unfinished; the trial was not resumed the next morning, that I am aware of, until the proceedings that I am about to state were finished; Mr. Beecher was not there; Judge McCunn addressed himself to the audience generally and inquired, "Is Mr. Beecher here?" there was no answer; he inquired again, "Is Mr. Beecher here?" and there was no answer; he addressed himself to me and said, "Mr. Bangs, is Mr. Beecher here?" I said, "Not that I am aware of," and at that moment Mr. Pryor, who appeared, or announced himself as appearing for the receivers, addressed Judge McCunn, saying that there was no necessity for the personal attendance of Mr. Beecher, and that they did not require it; upon which Judge McCunn, turning toward his right, I should think, said, "Is the sheriff here," raising his hand; and a burly young man came up, and the judge said, "You can go, we don't want you any more," and the proceedings went on; there were affidavits and papers read upon both sides, and discussion upon both sides, which ended in the postponement of the decision until two or three days after, when an opinion was delivered, published as delivered, and that is the last I ever heard of that.

Q. What was this proceeding that was then before Judge McCunn? A. It was a proceeding founded on this order of his, requiring Mr. Beecher to show cause why he should not be punished for contempt of court in violating the order of the 19th of January.

Q. At the time Mr. Beecher was arrested by these two officers, was there any one paper or warrant of any kind, as far as you know? A. No, sir; that was a part of my statement to the court, that he had been arrested without warrant, and was brought to court by two men and kept against his will.

Q. Was it claimed or stated on behalf of any one, and, if so, by whom, that there was any warrant of authority for his arrest; any written authority? A. Well, there was nobody there to make any claim; all that was said upon the subject of any justification of his being brought there was what the judge said, as I have stated; he said those men were officers of his court.

Q. Will you state what points you stated before Judge McCunn, on behalf of Mr. Beecher, on this hearing, and what disposition he

made of each one? A. The first objection was, that this order to show cause was returnable at part one of the trial term of the Superior Court, when, by the rules and practice of this court such an order should be made returnable before the judge at chambers or special term. The judge said, "I overrule the objection." The second objection was, that the order which Mr. Beecher is accused of violating is void. It is an order dated the 19th of January 1870; it is not capped as having been made anywhere in court, or as having been made by any judge of the court; it is signed "James M. Sweeny, clerk; a copy." It recites that "it appears satisfactorily to me," James M. Sweeny, clerk, "by affidavits, that John S. Beecher and Paul J. Armour, claiming to be assignees," and so on, "are about to attempt to eject Daniel H. Haurahan, receiver, from the possession of the property," etc. "Now, therefore, I," that is, James M. Sweeny, clerk, "order that Paul J. Armour and John S. Beecher, and each of them, desist and refrain"—— To which the judge said, "that 'I' means the court." I said, "it does not purport to be made by the court." To which the judge said, "I overrule the objection." The next objection was that Mr. Armour and Mr. Beecher are not parties to this action; that no undertaking was given upon that injunction, and that, so far as appears, no process in the action of any kind has ever been served upon them, and no action commenced against them. The judge overruled the objection. The next objection was that this was a proceeding against an officer of the United States District Court, as assignee; as such he is entitled to the benefit of the bankrupt law, which is the paramount law of the land, and which provides that actions and proceedings shall not be commenced against an assignee in bankruptcy until after twenty days' notice. The judge overruled the objection. The next objection was that the acts complained of in the moving affidavits did not amount to a contempt of this court, nor to a violation of any order of this court. That was expanded considerably. And then arose a discussion, and papers were read upon both sides. I don't know that there were any other printed objections besides these; there is none that I find.

Q. Was there any undertaking on file so far as you know? A. Not so far as I know; I did not personally examine; I wish to say, Mr. Stickney, you asked me what my connection with the litigation was, and it occurs to me that I have omitted one statement. After obtaining from the Superior Court, on the 14th of June, 1870, a judgment in the case of *Clark* v. *Bininger*, that the assignee in bankruptcy was entitled to the property, subject to certain liens, I

was employed by the assignee to prosecute a reference of that judgment before Mr. Darlington, for the purpose of determining the extent of those liens and the quantity of the property that was deliverable to Mr. Beecher as assignee. That was the judgment of the Superior Court of the 14th June, 1870.

Mr. STICKNEY:

Q. Is the paper that is now shown you the judgment that is referred to? A. Yes, sir,

Mr. STICKNEY—We will ask that the judgment itself, not the entire judgment roll, but past the judgment of June 14, be put in evidence.

The paper was marked Exhibit No. 24, and read as follows:

EXHIBIT No. 24.

NEW YORK SUPERIOR COURT.

ABRAHAM B. CLARK
agst.
ABRAHAM BININGER.

At Special Term, held the 14th day of June, 1870.

Present—Hon. C. L. MONELL.

John S. Beecher, as assignee in bankruptcy of Abraham B. Clark, having been admitted to prosecute this action and defend the same, now, on motion of F. N. Bangs, of counsel for said Beecher, assignee, it is ordered that this action, except for the purpose of carrying this order into effect, be and the same is hereby discontinued, and that the said John S. Beecher, as assignee in bankruptcy, as aforesaid, is entitled to the delivery and possession of all the partnership property, estate and effects of the partnership of A. Bininger & Co., existing on the 19th day of November, 1869, being the day of the commencement of this action, and the proceeds thereof, in whatsoever shape the same exist, subject only to the lien thereon, if any, of the receivers heretofore appointed in this cause, for their lawful commissions, compensation and expenses, and of the attorneys and counsel for the respective parties, if any, and that the said assignee is entitled to the benefit of all orders for an accumulating heretofore made in this cause against the said receivers, or either of them, and to the benefit of all bonds and securities heretofore in this cause, by the said receivers, or either of them.

And it is further ordered that the said receivers, and each of them, do forthwith, upon the service upon them, respectively, of a copy of this judgment, pay, transfer and deliver over to said assignee, possession of all and singular the property and effects of the late partnership of A. Bininger & Co., remaining in the hands of said receivers, or either of them, and the proceeds of all such properties which have been disposed of by the said receivers, or either of them, in whatsoever shape the said proceeds may now exist, reserving only such portions of such property and proceeds as shall be sufficient to satisfy the costs and expenses of the references had and to be had in this cause, and the claims of the receivers for their lawful commissions, compensation and expenses; and the respective claims of the attorneys and counsel for the respective parties in this cause, namely, M. Compton, G. N. Titus and E. W. Cohn, Esqrs., such claims to be specified as hereinafter directed, and that it be, and it is hereby referred to Thomas Darlington, Esq., of the city of New York, counselor at law, to ascertain and report what property came into the possession of the said receivers, or either of them, at the time of the commencement of this action, or at any time thereafter; and the value of such property, and what disposition has been made of such property, or any portion thereof by the said receivers, or either of them, and how much of said property remained in the hands of said receivers, or either of them, at the time of the entry of this judgment, and the value thereof, and how much of said property has been disposed of by the said receivers, or either of them, and the value of the property so disposed of, and the manner and means by which such disposition was effected, and the proceeds thereof, and what were the proceeds of such properties so disposed of, and in what shape such proceeds existed at the time of the entry of this judgment, and the amount of the lawful commission, compensation, any expenses, if any, of the said receivers, and each of them, and the amount of money, if any, for which they, or either of them, is or are liable to the said assignee in this cause under this judgment, and whether or not the said receivers had, or either of them has, been guilty of any neglect, violation or omission of duty as such receivers, and the amount, if any, of the damage sustained by the said assignee, in consequence of such omission, neglect or violation of duty; and also, what would be a proper allowance to G. W. Titus, Esq., as counsel for the proceedings heretofore had in this cause, for the purpose of procuring the removal of the said receivers, or either of them, from office; and for the purpose of compelling the said receivers, and each or either of them, to give or to

renew their security, or the security of either of them, in this cause, or for any other proceedings in this action specially instituted by said Titus.

And it is further ordered and adjudged that the said receivers, Daniel H. Hanrahan and Thomas J. Barr, do attend from time to time before the said referee, as they may be required by his order or summons for that purpose, then and there to furnish and deliver to the plaintiff, in writing and under oath, under the direction of the said referee, a statement, in dollars and cents, of the amounts claimed by them respectively for their fees, compensation and expenses as such receivers, and an inventory and statement of all the property of the said partnership of A. Bininger & Co. which has come into their possession or under their control, or into the possession or under the control of either of them, since the said nineteenth (19th) day of November, eighteen hundred and sixty-nine (1869), and also an account, in writing and under oath, of the disposition made by them of said property or any part thereof, and of all sums of money received by them, or either of them, from any sale or disposition of the same made by them, or either of them, of said property, and of the payments made by them out of the proceeds of such property, and that they do bring with them and produce and deliver to said referee, to be delivered by said referee to the said assignee, all the books of account of said firm of A. Bininger & Co. which have at any time come into their possession or under their control, or in the possession or under the control of either of them, and all books of account relating to said property kept by them, or either of them, and all certificates of deposit, bank books, vouchers and evidences of debt in their possession or under their control, or in the possession or under the control of either of them, as such receivers or such receiver as aforesaid; and that such receivers, and each of them, do, under the direction of said referee, pay, transfer and deliver over to the said assignee all such sums of money, property and estate, and all books, vouchers and accounts relating thereto, which were the property of said firm of A. Bininger & Co., or are the proceeds of such property, so far as the same shall not be necessary to satisfy any alleged claim of said receivers for their compensation, commissions and expenses as aforesaid, as said receivers, and the aforesaid claims of the said attorneys and counsel in this cause, and the costs and expenses of said references, so far as such property shall not have been already delivered by the said receivers to said assignee, pursuant to the command of this judgment; and that the said referee do ascertain what would be a proper and reasonable compensation to the respective attorneys

and counsel in this cause, for their services therein, to the end that whenever the referee's report shall come in, the court may make such order for the payment thereof as may be proper and equitable; and that unless each of the receivers do, upon being required by said referee, and within the time specified by him, file with said referee a statement, in writing and under oath, in dollars and cents, of the amount to which he believes himself entitled for his fees, compensation and expenses, then the delivery and payment hereinabove adjudged to be made by said receiver shall be without any reservation in favor of the receiver so omitting or neglecting to file such statement and claim.

And it is further ordered that the said referee do report upon the matters so referred to him with all convenient speed.

And it is further ordered and adjudged that the said assignee have leave, and leave is hereby given to him, to apply to the court for such further directions as may be advised upon the footing of this judgment, and leave is hereby given to him to continue the prosecution of a motion heretofore made in this cause to punish the said receivers, or one of them, for an alleged violation of the orders of this court, and alleged contempt or contempts of this court.

(Enter this.)

C. L. MONELL, *Judge.*

Cross-examination by Mr. Moak:

Q. Was there any opposition to this judgment by any body, Mr. Bangs? A. Yes, sir.

Q. Who opposed? A. Well, sir, I must caution you, that I may seem to say something not responsive to your question; it requires a long answer, which may seem to you not responsive; it would be a long story.

Q. Then you need not answer it at all; there were several motions and proceedings had by you on the part of Mr. Beecher, were there not, in the Federal courts? A. Quite a number, sir.

Q. One of them was to compel the receiver in the Superior Court to deliver over the property to Mr. Beecher, the assignee in bankruptcy? A. No, sir.

Q. In substance that? A. No, sir.

Q. Is there not a case of that character reported in the Bankruptcy Register? A. Not that I am aware of, sir; I made no such motion.

Q. Was there such a motion made? A. Not that I am aware of, sir.

Q. What was the first motion you made? A. The first motion

I made was in the United States Circuit Court, founded upon a bill in equity, brought by Mr. Beecher against the two bankrupts, and against the two receivers, for the appointment of a receiver in the case, and for an injunction against Hanrahan and Barr executing trust professed to be imposed upon them by the State court.

Q. That motion was denied, on the ground that the Circuit Court had not jurisdiction, was it not? A. It was denied, but not on that ground; the ground was, that I had not made a case for a preliminary injunction and receiver.

Q. What was the next proceeding that you took in the Federal court? A. The next proceeding in the Federal court was a motion in the district court, founded on a petition for an order that the marshal deliver the property to Mr. Beecher; that the marshal take the property from the receivers, and deliver it to Mr. Beecher.

Q. That motion was denied, was it not? A. Yes, sir.

Q. On the ground that the court had no jurisdiction to order that? A. No, sir.

Q. On what ground was it denied? A. On the ground that I had not made a case for the remedy.

Q. On the ground that the law did not allow it? A. On the ground that the facts stated did not justify the remedy asked for.

Q. Will you state again the first proceeding which you took? A. I filed a bill in the Circuit Court of the United States, in equity, against the two bankrupts and against the two receivers; on that bill, I am not certain whether accompanied by affidavits or not, I made a preliminary motion for an injunction against these two receivers from executing their trust, and for the appointment by the United States court of a receiver, *pendente lite*, of the property; that motion was denied; I proceeded in the District Court by summary petition for an order that the marshal take the property and deliver it to the assignee; that motion was denied.

Q. What was the next proceeding that you took in any of the Federal courts? A. I don't think there was any proceedings in the Federal courts after that.

Q. What proceeding did you take in the Federal court against anybody connected with this case, after that time? A. Well, I have taken proceedings against Mr. Bininger, to punish him for contempt of court in withholding his property, and obtained an order thereupon; I have proceeded against Mr. Clark to recover property of his, and have recovered, and there has been distributed among creditors some forty odd thousand dollars, I think; there is considerably more remaining undistributed; I have commenced a suit against him and

his wife to recover property in Park avenue, in the city of New York, that is valued by witnesses at $145,000; I have commenced proceedings against him in the Federal courts to recover some lands and land contracts in Wisconsin that are variously estimated at from $20,000 to $40,000, and in those suits have obtained a receiver of this land and contracts; I have a non-bailable attachment out now against Mr. Clark, founded on a judgment against him in the district court convicting him of contempt; I am not aware of any other proceeding.

Q. Was an appeal taken from any proceeding instituted by him from the district court to the circuit court? A. Yes, sir.

Q. What was that? A. An appeal from an adjudication in bankruptcy.

Q. Was there any other appeal? A. Yes, sir.

Q. What was that? A. I cannot tell you; that is, I cannot state what order that appeal applied to; but those appeals have not been pursued since, so that my memory has not been refreshed about it.

Q. Who consulted you with reference to instituting these bankrupt proceedings? A. Edward W. Cohn.

Q. The same gentleman who was counsel for Mr. Bininger in the Superior Court? A. The same gentleman, sir.

Q. Who next consulted you upon the subject? A. John S. Beecher.

Q. The same gentleman who was afterward appointed assignee? A. Yes, sir.

Q. Who was present when he consulted you besides yourself? A. I can't say that any body was; I don't mean to say that nobody was, but I have no recollection of any body being present.

Q. How long after you were first consulted was it that you commenced the first proceeding; took the first step in the bankruptcy proceeding? A. I may be wrong a trifle about dates, but my impression is the first bankruptcy proceeding was commenced the 4th of December, and I was consulted somewhere between the 25th and 30th of November.

Q. You think the first paper in the bankruptcy proceeding was filed on the 4th of December? A. Either prepared or filed.

Q. How long after that was it that the papers were served on Clark & Bininger, in the bankruptcy proceeding, or about how soon? A. I can only answer upon hearsay; by the return of the marshal, they were served in time to require their appearance on the 11th of December.

Q. That doesn't quite answer the question? A. You are aware the rule required the service of the papers five days before the return; the fourth was seven days before; whether they were seven days or five days before I don't know.

Q. They were served as early as the 6th? A. I should say so.

Q. How soon after that was it that the election was held for assignee? A. From the 11th of December to the 18th of January would be five weeks.

Q. It was the 18th of January that the assignee was elected? A. Yes, sir.

Q. How soon after the assignee was elected was it that the election was sanctioned by the Court of Appeals? A. Within a couple of days.

Q. It must have been about the 20th that the election was approved by the court? A. About that.

Q. When was the first proceeding before Judge McCunn against Beecher for contempt? A. On the 25th of January.

Q. Between the time when the assignee was elected and approved and the 25th of January, had there a controversy arisen as to whether the assignee in bankruptcy or the receiver in the Superior Court was entitled to the possession of the property? A. I should say not; not in the sense in which you ask the question; if you refer to the controversy before any court, the answer is "no."

Q. I refer to a controversy by going to the store, for instance, and both of them claiming possession? A. I shouldn't call that a controversy.

Q. Between the 20th of January and the 25th of January had Beecher, as you understood it, gone to the store and claimed possession of the property as assignee in bankruptcy, to the exclusion of the receiver in the Superior Court? A. As I understand it, he hadn't.

Q. Or any one in his behalf? A. Or any one in his behalf; I didn't understand that he had; I understood that he hadn't; that is, so far as your question refers to a claim heard by him; I don't mean to deny; on the contrary, I mean to say that he, under my advice, had gone to the store, but made no claim, for he had no opportunity to make any, the door being shut in his face.

Q. He had gone for the purpose of taking possession? A. He hadn't, that I know of; we went there to inform the persons there that Beecher had become assignee of Clark & Bininger, and therefore had acquired title to the property, and to ask what property there was, and to get possession of it.

Q. You had gone for the purpose of getting the possession of the property? A. Ultimately.

Q. You or Beecher claimed, or you for him claimed, that the assignee in bankruptcy was entitled to the possession, to the exclusion of the receiver? A. I don't think we did; I have no recollection of having made that claim between the dates you named.

Q. There was a time when there was a conflict between the men employed by the receiver and the men employed by Beecher? A. No, sir; not that I ever heard of; never heard of any men being employed by Beecher to take possession of that property.

Q. Judge McCunn's order required Beecher to show cause, on the 25th of January, why he shouldn't be restrained from interfering with the receiver in the Superior Court? A. No, sir.

Q. What was that order, as you understand it? A. Required him to show cause why he shouldn't be punished for contempt of court, for violating the order of the 19th of January.

Q. I see in 7 Blatchford's Circuit Court Reports, at page 159, a proceeding taken on the 11th of January, 1870, before Judge Woodruff, in which the report states that you appeared for the application, and Roger A. Pryor opposed, for a writ of prohibition? A. Yes, sir.

Q. That you didn't state? A. That wasn't a proceeding against any of the parties.

Q. I asked you for the proceedings in regard to the matter? A. That did escape my recollection.

Q. You asked to prohibit the receiver from interfering with —? A. No, I asked, under the section of the judiciary act, to prohibit that court from interfering with property that had been vested in the receiver; that motion was heard.

Q. That was denied? A. Yes, sir; but not on the ground that—

Q. I don't ask that; I only ask whether that is an authentic report? A. I suppose I did.

Q. I see an appeal from an order reported in 7 Blatchford's Reports, at page 165, in which you are reported as making the motion, and Roger A. Pryor opposing it, in the matter of Abraham Bininger and Abraham B. Clark, in which it was held by the court, Judge Woodruff writing the opinion, that the court has no power to execute the decrees of the district court, or to assume the primary exercise of jurisdiction conferred on the district court by the first section of the bankrupt act? A. Yes, sir.

Q. Was that motion made; that proceeding taken? A. The proceeding you state was an appeal from an order; there was no such proceeding taken.

Q. There was an order to appeal from? A. I did not say that; if you say an appeal from an order I don't know any thing about it; there was no appeal from an order.

Q. Was there a proceeding taken from the district court before Judges Woodruff and Blatchford, as reported in this case in 7 Blatchford? A. Which case? There are four cases reported there.

Q. On page 165? A. I don't know the pages by memory; the report commences on page 165 and ends on page 176, and was an appeal from an order.

Q. I didn't ask that; I asked if such a proceeding was taken in that court? A. As what?

Q. As is there reported? A. This is a petition of Beecher founded on it; such a proceeding was taken.

Q. I now show you a report in 7 Blatchford, page 262; did such proceeding as there stated in that report occur? A. I cannot answer that question with absolute certainty, unless I read the whole of it; if you allow me to assume it is a report of the proceedings, I can say yes, that proceeding did take place, and I believe it to be a report; I have seen the report frequently, and it is entirely in accordance with my recollection.

Q. I now show you 7 Blatchford, page 170; is that a correct report of the proceedings had in that matter? A. I believe it is, sir; yes, sir; I know so; I say it is, because I see it agrees perfectly with my statement of it that I made some time ago.

Q. I show you a report in the 3d Bankruptcy Register, page 130; was that proceeding as there reported substantially? A. Yes, sir.

Q. I show you a report in the 3d Bankruptcy Register, page 121; is that a correct, or substantially a correct report of the proceeding, as there detailed? A. Yes, sir.

Q. I show you a report in the 3d Bankruptcy Register, page 123; is that a correct, or substantially a correct report of the proceedings had? A. Yes, sir; it was under that decision that we got possession of the suit in the Superior Court.

Q. Did you understand me as asking what the decision was? A. I don't know that my attention was directed to that point, by any question of yours.

Q. I ask you again if you are counsel in the case? A. No, sir; not in any sense.

Q. How many proceedings in bankruptcy did you commence? A. Do you mean to get people adjudged bankrupts?

Q. Yes, sir. A. Two.

Q. You said you were employed to get into the case, in the Supe-

rior Court? A. Yes, sir; to get an assignee appointed who would get into that.

Q. Did you make such a motion? A. Yes, sir.

Q. Before whom? A. Judge Monell.

Q. Was that granted? A. If you will let me use the judgment-roll I can tell you more accurately; I have not looked at the judgment-roll, and I have the order made on that motion, the 20th of April, 1870, by Judge Monell, and, as I understand it, he did grant that motion.

Q. Was there an opinion by Judge Monell delivered on that question? A. Yes, sir; I would like to read it.

Q. No, sir. A. I would like to read the order; I said, as I understand it, he granted my motion.

Q. Have you any idea that the Senate and counsel can read? A. No, sir.

Q. Do you know whether the opinion of Judge Monell on that motion is reported or not? A. I do.

Q. Where is it reported? A. I cannot say that it was reported elsewhere than the papers.

Q. Was it not reported in Abbott's Practice; my impression is that on these contempt proceedings you stated the fact that Judge McCunn's opinion said the fine should be six cents? A. I think I so stated; yes, sir; allow me to say I am not sure that his opinion did so say, but that is my impression.

Q. You understood the main part of the proceedings to determine which was entitled to the possession of the property, the receiver or assignee in bankruptcy? A. I don't so understand it at all.

Q. That opinion does say that the title is in the receiver, in substance? A. I think so; yes, sir.

Q. When you had adjudicated as to which of the parties was entitled to the possession of the property, did you consider the ground of the fine that was imposed very material; did you understand the main object of the adjudication to be as to who was entitled to the possession? A. I have answered that; I don't understand the object of the proceeding to be as you state, to have the adjudication upon the title; on the contrary, I stated that the question did not arise in the proceedings, and refused to discuss it.

Q. The question is, what was claimed on the other side to be the object of it, and what was considered by the court to be the object of it? A. Did you ask me what was claimed on the other side?

Q. Yes, sir? A. Mr. Pryor did claim on the argument of that motion that the question was presented as to which had the better

title, and my recollection is, and I am quite confident of it, that he had not argued that question; that he stated it, and insisted the court should decide it.

Q. Do you mean that Mr. Pryor claimed there for a moment that any body could be interfered with, punished for contempt, for interfering with the rights of the receiver, an officer of the court, unless that receiver had attended to the property? A. No, certainly not; I don't think my answer is quite correct; I think that Mr. Pryor had claimed that the possession of the receiver was enough to justify a proceeding for contempt against any one, but not enough to interfere with the possession.

Q. Suppose he had a better right? A. My impression is, and my belief is, and it strengthens as I recall it, that Mr. Pryor did insist that the receiver's possession was a sufficient fonndation for proceedings for contempt; he did insist that the question of title arose, and wanted the court to decide it, but I don't think he argued it.

Q. The court on that motion did decide, or by the opinion did decide, as I understand you, that the receiver had the right to possession, as against the assignee? A. I so understood the opinion.

Q. After that he went on to adjudicate, or say that the fine should be bnt six cents? A. I think that was in the opinion.

Q. Didn't the opinion state that it was not claimed that there was any intentional contempt of court, but that it was a mere conflict of title, and when that was decided the question of punishment was not very material, or in substance that? A. I cannot say as to that; my recollection perfectly agrees with your statement; I think the opinion stated that the parties should act under the advice of counsel without disrespect, and that the punishment would be nominal; I think that is the form of it.

Q. You say that Judge McCunn said to Beecher that he might go and return to-morrow morning, in substance? A. He said, without addressing himself toBeecher, that Beecher must retnrn in the morning; addressing himself as much to me as to Beecher, I think.

Q. He did say that Beecher might go? A. Yes, sir.

Q. And must return in the morning? A. Not in that exact connection.

Q. He said that in the conversation? A. Yes, sir.

Q. When he said that Beecher might go, did you understand that it was any thing except a promise that he might leave the court? A. Certainly not.

Q. Then why did Beecher ask when he might go? A. I cannot tell you why.

Q. Was there little something of contempt in that; in his tone and manner? A. No, sir, not a bit.

Q. Did you hear any thing that could lead any body to suppose any thing but that he had permission to go where he should choose? A. I should think a doubt might arise in the mind of a layman like Mr. Beecher, what he was at liberty to do and where he was at liberty to go; I should think so.

Q. Will you use Judge McCunn's language, as near as you can, when he said he might go? A. Judge McCunn stopped the counsel who was examining a witness in the trial, I think, and requested him to suspend or sit down, and Judge McCunn turned toward us where we were sitting, and said that he could not go on with that, that afternoon, and "Mr. Beecher may go now;" I think that Beecher's question followed, but I am not certain. I don't think it was in that connection that McCunn said he must return the next morning; I think the address of Beecher took place first; Beecher said, "where shall I go;" and after some time Beecher said, "I will go just where the court directs," but whether it was before or after the answer of the court, I don't recollect; and Judge McCunn said, "you can go to Ludlow street jail, or to the bosom of your family, just as you choose." It may be then that he said, "I will go where the court directs;" then Judge McCunn said, "Mr. Beecher must return to-morrow morning;" and I said, in continuation of what I had already stated to the court, "Mr. Beecher will return to-morrow morning, if there is a lawful order of the court requiring it."

Q. Your tone was very affable and respectful to the court? A. Entirely so.

Q. You intended it to be so? A. Yes, sir.

Q. You were in a very amiable mood? A. Quite.

Re-direct-examination by Mr. Stickney:

Q. You have spoken of the decision of Judge McCunn, as to the right of the assignee in bankruptcy, to take possession of the partnership property in a case similar to this; in what suit was that? A. *Corey* v. *Long*.

Q. What was that case? A. Corey & Long had been partners; they dissolved; they became insolvent; Corey began a suit in the Superior Court to have the partnership property, or what had been partnership property, applied to the payment of the firm debts; in that suit James M. Gano was appointed receiver of the partnership property by Judge McCunn; I commenced proceedings in bank-

ruptcy against Corey & Long to get an adjudication of bankruptcy, and get an assignee appointed, and went into the Superior Court, and moved before McCunn for an order declaring the action.

Mr. MOAK — Mr. President: We object to the counsel stating all these proceedings that were done, in his way, because the counsel with all due respect, has a great deal more of a vivid imagination than I have got, and I had rather take them from the papers, in my dull way; I raise the objection, that the proceedings taken should be shown by the papers, because then we could, at our leisure, get out what they did say; I have no doubt he intends to state them correctly, but I prefer taking them the other way.

Mr. STICKNEY — It would save going through a large mass of papers.

Q. What was the date of that order? A. In the month of May, it was the day of May, 1870; the day of the month don't appear in the order.

Q. What was the effect of the action of Judge McCunn; was it not to hinder the assignee in bankruptcy from reaching the individual property of Clark?

Mr. MOAK — We object to it, on the ground that it asks for a conclusion of the witness, and not a fact, and that the question of whether it was or not, has to be determined by the Senate, from the facts in the case.

The PRESIDENT put the question as to whether the Senate would sustain the objection, and it was decided in the affirmative.

Q. There has been mentioned a conflict of jurisdiction between the State court and Federal courts; was there any conflict, so far as you know, except what was caused by the order of Judge McCunn, in this suit and in the other suits?

Mr. MOAK — I object to that on the same ground. The question of whether they caused it has to be determined, we think, by the facts in the case; the question, what was done, is proper, of course; we object to it on the ground that, whether the fact was caused by Judge McCunn's order or not, it is a question of fact which is to be decided by the Senate from what occurred; that the witness' determination on that question is not admissible.

The PRESIDENT put the question as to whether the Senate would sustain the objection, and it was decided in the negative.

A. There was plenty of conflict that was caused by other orders than Judge McCunn's; if the United States court had made no orders, there would have been no conflict.

By Mr. BENEDICT:

Q. The conflict came from both sides; from both courts? A. I don't understand that there was a conflict between the courts; there was a conflict between parties.

Q. The question was about the conflict of jurisdictions; a conflict between the parties? A. We claimed we had a better title to the property than the receiver had, and that the United States court had a right to enforce our better title; the receivers claimed they had a better title than we had, and that the State court had a right to protect their title; that was the conflict.

Q. Was there any order or proceeding in the nature of a conflict before this order of the 19th of January enjoining Beecher that was put in evidence? A. In a certain sense there was, and in a certain sense there was not; after Beecher's appointment there was no conflict whatever until the order of the 19th of January was served upon us; on the contrary, I was engaged at that time in drawing up a petition on his behalf to the Superior Court, setting forth his appointment, and asked that court for an order to admit him, instead of Clark, as plaintiff in that suit, on the ground that we had acquired an interest in that; before the appointment and the adjudication in bankruptcy, there was some difficulty growing out of the fact that in the bankruptcy proceedings the United States court issued a provisional warrant to the marshal to take possession of the property of Clark & Bininger; with that warrant the marshal went to the store of Clark & Bininger, and claimed that the warrant entitled them to the possession of the property, and the marshal's and the receiver's men, as I understood, remained in possession, and so very friendly, that the property and the party suffered by it. If the Senate will allow me, I would like to explain one answer that was drawn from me upon the cross-examination, because I think it leaves myself, and the fact I meant to state, in a wrong position. I was asked about what I understood to be the decision of the United States courts upon the subject of jurisdiction; I answered, that in my opinion it hadn't decided against this jurisdiction. I can make a very brief explanation; I know that the circuit court denied this jurisdiction to entertain certain proceedings which I asked there, but so far as the circuit court is concerned, it has not, to my knowledge, denied that it had jurisdiction to settle the question of title between the receiver and the assignee. So far as I know, the circuit court has never passed upon the question of title between the receiver and the assignee. In respect to the district

court, I mean to be understood as saying that I don't know that it has ever decided this case, and in other cases it has decided the contrary, that it had no jurisdiction to decide the question of title between the assignee and receiver, and it did decide it had no jurisdiction of certain proceedings, which I instituted for the purpose of trying question of title, on the ground the proceedings were wrong in form, and asked a particular remedy which it hadn't power to grant; I may be mistaken, but that is the way I mean to be understood.

Mr. Moak:

Q. You mean to be understood that the reason why you didn't succeed was that you didn't know how to get at it, and because the court had not jurisdiction? A. Just exactly so, and nobody else did at that time.

Q. In the case of *Corey* v. *Long* did you make a motion to dissolve the injunction? A. I didn't.

Q. Did Mr. Hill? A. I don't know.

Q. What did you have to do with that case, and when did you come into it? A. If you will allow me to see the papers, I will speak by them.

Q. We haven't any; my question was, when you came into the case? A. In May, 1870.

Q. What had been done in the case? A. According to my opinion, an injunction had been granted and a receiver appointed.

Q. Was a motion, subsequently, made in the case to dissolve the injunction? A. I only know from hearsay.

Q. Have you seen a report of it? A. I have.

Q. Did you understand the opinion; I show you the opinion on page 86 in the printed report of the Assembly proceedings; did you understand the opinion of which that is a copy to have been delivered by Judge Barker at special term? A. I never saw it until I saw it in this book; then I understood such an opinion had been delivered.

Q. And that that order was appealed from, and the decision of the Superior Court upon that reported in 2d Sweeny, page 491? A. I wasn't aware of that fact before this moment.

Q. I hope, then, I can enlighten you; do you understand that to be a report of the case on appeal? A. You so say; I never saw it before; I understood nothing upon the subject, until you showed it to me; I never saw it before.

Mr. Madden — Mr. President: It is necessary to have an executive session, and I move that when we adjourn it be to 3:45 P. M.

The question was put on said motion, and it was declared carried.

John S. Beecher, being duly sworn, on behalf of the prosecution testified as follows:

Examined by Mr. Parsons:

Q. Have you been present during the examination of Mr. Bangs? A. Yes, sir.

Q. Are you the gentleman, John S. Beecher, of whom he spoke as having been appointed assignee in bankruptcy of the firm of A. Bininger & Co.? A. Yes, sir.

Q. Did you hear the testimony of Mr. Bangs about your having been brought, on one case, into the Superior Court, before Judge McCunn, with an officer of the court on each side of you? A. Yes, sir.

Q. State the circumstances which resulted in your being brought there, on that occasion? A. A gentleman — a man, I don't know whether he is a gentleman — called at my office about noon, I should think, of that same day, and said he wanted me to go up to the Superior Court, before Judge McCunn.

Q. Was he one of the two persons that subsequently accompanied you when you went to the court? A. Yes, sir, and I asked him for his authority, and he showed me a badge and said he was a deputy sheriff, I think; I asked him if he had any other authority and he said no; I told him I was busy then and couldn't go with him; if he wanted to take me away from my business he must show his authority; he tried to argue it, and I told him there was no use of arguing it, and I sat down to my desk to attend to my business and left him standing there, and he went out.

Q. Was any thing said in that conversation about a warrant? A. I asked him if he had any warrant, any paper to take me, and he said no, that he was a deputy sheriff, and I declined to go; I was in Wall street about an hour from that time I think; it might have been less, I don't remember the time, and it was between William and Pearl streets; near by Brown Bros., in the street; I was going to Brown Bros., as I had some business there, and it was raining hard, I remember, and just as I was going in the door two men walked up behind me and one took hold of one arm and the other of the other and said, "we want you," and I turned around to see who they were, and recognized one of the men that was in my office; I

mean the one man; I asked him what they wanted, and they said they wanted me to go to the court; and I said, "if you will show me your authority or warrant of any kind I shall go, but not without you do;" and they said, "we are deputy sheriffs, and that is all there is about it;" and I said, "show me your authority," and I declined to go; and they took me by not much force, because I didn't care to be seen in Wall street; and I said, "you are two to one, and I will go along with you, provided you will let go of my arm," and they said, "you go in advance, and go up to the court room."

Q. Was the name of any judge mentioned in this conversation? A. Judge McCunn's name occurred; they said he wanted my presence there; that he had sent for me; I think those are the words; I went with them up to the court; when I went in, I found my counsel (Mr. Bangs) sitting there.

Q. Had you any opportunity to communicate with Mr. Bangs? A. No, sir; he asked me what I was doing there, and I said, "these two men have brought me here;" I then remained there; he said "sit down," and I remained there, I should think, two hours, with the exception of when I wanted to leave the court room for a moment, and one of these officers went with me, and I wasn't gone but a few moments; I was gone perhaps five minutes, and I remained there until Mr. Bangs had an opportunity to ask me why I was brought there.

Q. I desire you to state what occurred while you were there; in the first place, were any arrangements made to procure a writ of *habeas corpus*, and what took place in regard to that matter? A. I don't remember positively about that; I don't remember the particulars about getting a *habeas corpus*.

Q. Take up the narrative where you do remember it? A. Mr. Bangs had this conversation with the judge which he stated, as near as I can remember; I think, the judge asked me to stand up; I don't remember, however; I stood up very near him, as near as you are from me, and he said then I could go; the officers were there and I didn't know exactly his meaning; I said "where shall I go, if you please."

Q. Where did these two men remain at the time of the colloquy? A. As near as the table perhaps; and he said "you can go to Ludlow street jail, or to the bosom of your family, just as you like," and I replied I shall do whichever you direct, and he said "well I should advise you to go home," and I went home.

Cross-examined by Mr. Moak:

Q. What day was it you went up there with these two men? A. I don't recollect the day of the month; I couldn't have told the day of the month, only by this testimony, by these papers here which I believe was the 25th of January.

Q. Previous to that time, there had been papers served on you to show cause before the court held by Judge McCunn, on that day? A. One signed by Sweeny, I think.

Q. Requesting you to show cause before McCunn or the court, on that day? A. I don't think there were any proper papers served on me.

Q. Without determining whether it was proper or not, will you answer whether there had been a paper or not served on you? A. I think there had.

Q. Did that paper require you to show cause the same day you went there with these men, or on the day before? A. I couldn't say.

Q. There was a paper served upon you, whether good or not, requiring you to show cause before the court of Judge McCunn? A. I think there was some paper.

Q. That paper required you to show cause on the 25th of January? A. I don't remember the date.

Q. Wasn't it the day before you went up with these men that you were required to show cause? A. That I don't remember; I shouldn't have remembered this date, except from listening to the evidence here.

By Mr. Perry:

Q. Do you know the names of these two men that went up with you that day? A. I knew them at the time, because I asked them their names, and they gave me their names, because I wanted to be sure, and I found they were sheriffs or officers of the court.

By Mr. Perry:

Q. Can you state their names? A. I could not; I put their names down at the time, but I don't remember them now.

By Mr. Parsons:

Q. Which do you mean, sheriffs or officers of Judge McCunn's court? A. They told me they were sheriffs; each man showed me a badge, I remember, and that is all I know about it.

Abraham Bininger being duly sworn, on behalf of the prosecution, testified as follows:

Q. You were defendant in the action of *Clark* v. *Bininger* in the Supreme Court? A. Yes, sir.

Q. At the time receiver, Mr. Hanrahan, was appointed, what was the fair market value of your stock then in the store? A. Between $100,000 and $120,000.

Q. Which consisted of what? A. Of old wines, liquors, etc.

Q. What kind of wines? A. Of old wines; wines of every country in the world; brandy, whisky, gin, rum; many of them very old.

Q. What other property was taken possession of by the receiver, besides the actual stuff in the store? A. Took possession of the book debts, bonds and mortgages.

Q. How much did they amount to? A. Between $40,000 and $50,000.

Q. At what time did you first see Mr. Hanrahan, the receiver? A. On the morning of the 19th of November.

Q. Where? A. At my store, between 10 and 11 o'clock, I think.

Q. Were the papers then served upon you in that suit? A. Yes, sir.

Q. By whom? A. Hanrahan.

Q. Do you remember examining the copy of the order appointing the receiver, which was served upon you? A. I think I read it through.

Mr. Stickney — Mr. President: I may state here that the copy of the order appointing the receiver, which was served upon Mr. Bininger himself, has already been put in evidence, but it has gone to the printers, as I am informed, so that I cannot show it to the witness.

Q. What was the amount of security required of the receiver, as appeared by the copy served upon you? A. $1,000.

Q. Is your recollection very clear on that point? A. Very clear.

Q. What took place between you and Hanrahan? A. Nothing; I of course was very much astonished; I had no intimation of any legal proceedings having been commenced, and I scarcely knew what to do; I communicated with my friend—

Q. I don't ask that; what conversation took place between you and Hanrahan? A. At that moment very little; I didn't know at that time what the papers were; he told me that he was a receiver.

Mr. Moak — What the gentleman didn't know we object to, and in the second place, we object to the conversation that occurred.

By the Witness — There was none.

Q. When did you next see Hanrahan? A. The next morning.

Q. At your store? A. Yes, sir.

Q. What then took place between you?

Mr. Moak — Mr. President: We object to that, on the ground that conversations between the receiver and this witness, in the absence of Judge McCunn, are not admissible as against him.

Mr. Stickney — Mr. President: The evidence thus far shows that, at the beginning of this affair, Hanrahan says to Compton, "go to Judge McCunn; apply to him and he will appoint me receiver;" under an agreement that arrangement is made; under an agreement between Hanrahan and Compton that they shall divide their fees, we find Clark and Compton going to McCunn's house, at night, and McCunn going continually to Clark's house; and we find McCunn meeting Morgan and Compton at Hanrahan's office, as the testimony shows, in pursuance of an arrangement made in Hanrahan's note to Compton, and we think that note clearly establishes, all through this affair, that McCunn, and Clark, and Compton, and Hanrahan, were combined to deprive the parties entitled to this property out of the property.

Mr. Moak — Mr. President: It is undoubtedly true that any body can imagine, that gentlemen can imagine almost any thing; but I have failed to see, and I think any one who considers it for a moment, without prejudice or passion, will see that the simple fact that a man who at the time was concededly a respectable attorney, says to another gentleman of the profession, who is about commencing a suit, "If you apply to Judge McCunn, he will appoint me receiver." Is that the slightest evidence of a conspiracy? I have no doubt there are in this city a dozen who could say, confidentially, to an attorney who is about commencing a suit, and desiring to have a receiver appointed: "If you will go to Judge Leonard, and if you suggest my name, I have no doubt he will appoint me receiver." I don't see how that shows any thing. I don't see any thing, thus far, in the proceedings that Judge McCunn was acting in a conspiracy. The only fact shown is, that he visited Clark's house, and there had conversations with him and with his son. Assuming it all to be true, I fail to see how that shows any conspiracy to cheat any one, or do any thing particularly wrong. It may be the Senate will think otherwise, but it strikes me there is no evidence here of any conspiracy, within the meaning of that term, as understood by lawyers, which would let in acts and declarations of a third person in Judge McCunn's absence.

Mr. Stickney — We are now content to leave the decision of the question to the Senate.

The question being put it was overruled.

Q. Will you state the conversation that took place between yourself and Hanrahan? A. The next morning, after I had read the papers, I knew what they were, and Mr. Hanrahan and myself had some conversation in connection with the very extraordinary proceeding, entirely *ex parte*, without my having an opportunity to be heard, that he should be put in possession of the various stock, which Mr. Clark swore was between $400,000 and $500,000, upon a bond of $1,000, and without any knowledge that I could have an opportunity of stating my side of the case.

Q. I understood you stated this to Hanrahan? A. I said that to Hanrahan; he then informed me that he had raised the bond voluntarily from $1,000 to $10,000, and had been accepted in that way; I then saw counsel, and the proceeding before Judge Fithian took place; after the return from court, Mr. Hanrahan had a conversation with me again, and told me it was utterly useless for me to attempt to remove him from his receivership, and at the same time handed me a card, upon which was printed, Morgan & Hanrahan, successors to John McCunn;" he stated he had been in business some time as a lawyer, and that he considered himself the successor of a highly respectable gentleman which I did not deny; and, moreover, it was utterly useless for me to atempt any proceeding by which to turn him out, as Judge McCunn would grant any order that it was necessary to grant, in order to keep him in possession of the estate.

Q. Was any thing said there about Judge Fithian's order staying the sale of the property? A. Yes, sir.

Q. What was said about that? A. He said that he would have that reversed in about the time that it would take to go to the City Hall and return.

Q. Do you know whether that was done? A. Yes, sir, it was done; and, not only that, but after proceedings in bankruptcy commenced, there was an injunction served on them from the circuit or district court preventing his going on with the sale of the goods; he at first decided they would not pay any attention to it, and afterward they did, and he told me that would be set aside, and it was set aside by an order.

Q. Order made by whom? A. By Judge McCunn.

Q. At the time this receivership was appointed by Judge McCunn, how much was owing by your firm? A. About $200,000.

Q. What was the amount of assets of the firm, excluding individual property? A. About $400,000, we estimated it.

Q. And, after the receivership, was there sufficient property to pay the debts of your firm?

Mr. Moak — Wait a moment; that is objected to; if the President please, we claim in the most enlarged view that could be taken of this case, that the only question that the Senate can investigate on this subject is, whether any of this property taken possession of by the receiver was wasted. Upon the question whether their property would pay their debts or not, I never knew any gentleman who went into bankruptcy who did not insist he could pay his debts.

Mr. Stickney — We withdraw it.

Q. Will you state what you know of your own knowledge as to the management and conduct of the receivers and the men who were with them in the charge of your store?

Mr. Moak — If the President pleases, we object; we object on the ground that it is not admissible as against us; certainly, the conduct of parties, other than the receivers, who were not appointed by Judge McCunn, and who were selected by the receivers, is not admissible.

Mr. Stickney — The question may be answered in this view, that having proved, as we claim, a clear wrong on the part of the judge, we are entitled to show what was the damage resulting to the parties from this wrong; the wrong being, as we claim, in the appointment of an improper person for receiver, and we claim we are entitled to show just what those persons in charge did.

The President put the question upon the objection, and the objection was overruled.

Q. You will now state, sir? A. I know, judge, Mr. Hanrahan to be an exceedingly improper person.

Mr. Moak — That we object to, most certainly.

Q. State matters within your own knowledge? A. It must be from observation; I suppose he hadn't been in the store half an hour, before from sixty to a hundred drinks had been taken by him and his friends.

Q. State other matters? A. It was continuous; day by day the property was wasted by treating himself and his friends, and as long as I remained there.

Q. How long did you remain? A. I remained about a fortnight, and then I was forced out of the store.

Q. How much of the fortnight was you in the store? A. All the time; every day.

Q. Where were the drinks taken from? A. From the shelves; the bottles were opened and the liquor drank up; always selected

the oldest and best; they asked the young men which was the best, and they helped themselves to it.

Q. How long did this continue? A. As long as I was there; fourteen days.

Q. As far as you know, was any account taken? A. There was an account attempted to be kept by some of the young men.

Q. By whose direction? A. By my direction.

Q. Did the receiver keep any? A. No, he did not.

Q. That is, as far as you know? A. Not as far as I know.

Q. At the end of the fortnight, how often did you go there? A. Never was in the store again.

Cross-examination by Mr. Moak:

Q. You were examined before the Assembly judiciary committee, were you not? A. I was, sir.

Q. I now call attention, which is on page 96 of report; before that committee, did you say a word upon the subject of Mr. Hanrahan saying that he had voluntarily raised the bond from $1,000 to $10,000? A. No, sir; that has been called to my recollection since I have been here in Albany.

Q. You didn't say a word then about it? A. No, sir.

Q. Before that committee did you say a word upon the subject of his saying that Judge McCunn would grant any order that was necessary? A. My impression is that I did.

Q. Will you say you did? A. No, sir, I will not swear positively, unless I see the book.

Q. Is not this what you said: "Q. Can you remember any conversation that took place then" [that is, speaking of the time when you first saw him]? "A. At that moment, I do not?" A. That is correct.

Q. "Q. When did you next see him? A. I next saw Hanrahan the following morning. Q. State what took place between you then? A. In a general conversation, I, of course, was expressing my astonishment at being served with process, entirely *ex parte;* that I had not been heard, and that it was not true, the disposition upon which it was made. I had read it through." Did you proceed to state any thing on the subject of his saying that you could not turn him out? A. Not at that moment.

Q. Did you at any time during that examination? A. Yes, sir.

Q. Did he then say that you could not turn him out? A. Yes, sir.

Q. You are sure of that? A. Yes, sir.

Q. Didn't you say a moment ago that it was after Judge Fithian

made the order that it happened? A. It all happened within three days.

Q. Didn't you say, not more than five minutes ago, that he did not say that until after Judge Fithian's order was made? A. Yes, sir; I said so.

Q. Which statement was right; what you said five minutes ago, or what you now say? A. What I said just now; my recollection has come to me as my attention has been called to this case.

Q. Did you say any thing before Assembly committee that you had any conversation with him after the order of Judge Fithian? A. No, sir; Judge Fithian's name was not mentioned in my testimony at all.

Q. Then that portion of the testimony you have never given, that he told you after Judge Fithian's order was made, that it would not do you any good; you did not tell that before the Assembly committee? A. No, sir.

Q. Not a word of it? A. No, sir; not a word of it.

Q. You have had some little feeling in this matter, I take it, Mr. Bininger? A. I should suppose, sir, I might have a little feeling; very naturally would.

Q. That is not the question; have you had? A. Yes, sir, I have; a feeling of having been wronged and robbed.

Q. I didn't ask you what kind of feeling you had; I simply asked you if you had feeling? A. Well, sir, I told you what it was.

Q. Did you state any thing before the Assembly committee of this liquor being drank by Hanrahan, and those who were there with him? A. No, sir; I did not.

Re-direct examination by Mr. STICKNEY:

Q. Were you asked on your examination before the judiciary committee any thing about Mr. Hanrahan's remark, as to his raising the amount of the bond? A. No, sir.

Q. Were you asked any thing as to drinks that were taken while the receiver was there? A. No, sir.

Q. Or was Judge Fithian's name mentioned to you in the questions which were put? A. No, sir.

Q. I will call your attention to another portion of your testimony, which the counsel did not choose to read to you; I mean which he did not read to you, on page 96; the question was, "Q. Who handed you that? A. Hanrahan. Q. What did he say? A. It was in reference to his high respectability, and being the successor of Judge McCunn, and a proper person to have charge of the establishment,

which had commenced so far back as ours; I told him that I should resist, to the best of my ability, having my property taken from my hands? he informed me it would be useless, with his connection with Judge McCunn, to try to turn him out as receiver;" do you remember giving that testimony? A. Yes, sir.

Q. Do you remember giving this testimony: "By Mr. Prince: Q. That was not the question; what did he say at that time? A. He said that it would be of no avail; that he could have it set aside?" A. Yes, sir; I remember giving that testimony.

Q. Do you remember giving this testimony: "Q. Is that all the conversation you had with him that you remember? A. I had no other of any consequence that I recollect; the only other matter of interest connected with him was after the United States officer had served an injunction upon him to restrain him from selling goods; he told me that he could have that revoked in about the time it would take to walk to the City Hall and back, which he did?" A. I do.

Mr. D. P. Wood — Mr. President: I would like to ask the witness a question. I understood the witness to say that the property taken possession of in the store was valued at from $100,000 to $120,000, and that book accounts and bonds of the concern were from $40,000 to $50,000? A. Yes, sir.

Q. You afterward stated that the indebtedness of the concern was about $200,000, and the assets of the concern about $400,000? A. Yes, sir.

A. In what did the assets consist besides the stock of goods? A. Real estate; the store we occupied; we owned two buildings.

Q. Did that pass into the hands of the receiver? A. They claimed so; I don't think they ever had possession; they collected some of the rents.

Q. All beyond the book accounts and bonds, etc., was real estate? A. Yes, sir.

Mr. Benedict — Mr. President: I would like to ask the witness a question.

Q. Do you recollect whether you said at that time: "Q. When I say troops I mean roughs? A. There were troops of drinkers when I left there." You said something then about the drinkers? A Yes, sir, in that way I did.

Re-cross examination by Mr. Moak:

Q. Were you asked, on the former examination, to state the conversation, and all the conversation, between Hanrahan in this lan-

guage: "Q. State what took place between you then?" A. I was asked that.

Q. And under that question you went on to state what took place, and then stated—that was all? A. As far as I recollect, that was the oath I took.

JOSEPH A. HOFFMIRE, a witness called in behalf of the prosecution, being duly sworn, testifies as follows:

By Mr. STICKNEY:

Q. Mr. Hoffmire, what relation are you to Abraham B. Clark? A. Son-in-law.

Q. Where did you live the latter part of the year 1869 and the year 1870? A. 47 Park avenue.

Q. In the same house with Mr. Clark? A. Yes, sir.

Q. Do you remember the suit of *Clark* v. *Bininger*? A. Yes, sir; I recollect something about it.

Q. While that suit was pending, did you at any time see Judge McCunn at Mr. Clark's house? A. Yes, sir.

Q. How often did you see him there? A. Quite often.

Q. Did you at any time see him there in company with Mr. Compton? A. Yes, sir.

Q. How often did you see him there in company with Mr. Compton? A. Quite often.

Q. Is that your recollection of the whole? A. Yes, sir.

Q. At what time of the day or night did Judge McCunn usually come there? A. Generally, came there in the evening.

Q. At about what hour? A. It was always rather late in the evening.

Q. Do you remember hearing Judge McCunn say any thing as to being confidential in regard to his visits there, or not mentioning any thing about them? A. I heard him mention it once or twice.

Q. Will you state what he said? A. I think, he said on one occasion that he would not like to have it known that he visited the house.

Q. Did he give any reason? A. Well, I don't recollect whether or not he did; it strikes me he did, though.

Q. What, according to your best recollection, did he say? A. I think he said it would not be proper, or something to that effect; it would not be proper to have it known that he was at the house, being a judge, or something to that effect; I don't recollect the exact words.

Q. Was this said by him more than once? A. I think it was said about twice; at one time he mentioned it in the hall, just as he was leaving, and that he would like to have it confidential.

Q. Was any officer ever there at the house with Judge McCunn? A. He called there one evening with the sheriff.

Q. Do you remember the name? A. Sheriff O'Brien; he was sheriff at that time.

Q. More than once? A. Only once.

Q. Do you remember what took place that evening? A. I do not.

Q. Did you ever hear Judge McCunn speak to Sheriff O'Brien? A. I don't think I did.

Q. Were you present at the giving of the testimony of Melville B. Clark before the Senate? A. Yes, sir.

Q. Did you notice his testimony; did you listen to it? A. Yes, sir.

Q. And did you listen particularly to his testimony as to interviews held with Judge McCunn at Mr. Clark's house? A. I did; yes, sir.

Q. Was his testimony correct?

Mr. Moak—Wait one moment? You needn't answer that. If the President please, we do not desire to have the witness corroborated in that way. That question I object to, as entirely improper as to what was said and done. Let the witness state it in his own way.

Q. At which of these conversations that Melville B. Clark testified to were you present? A. I was present at a number of them. I can't state exactly which ones.

Q. Were you present at the conversation when the agreement, or settlement, or paper of that nature, was submitted to Judge McCunn? A. Yes, sir, I was.

Q. Was Mr. Clark's statement of what took place there according to your recollection?

Judge Selden — We submit that is not orthodox; simply ask the witness what he knows was said there.

Mr. Stickney — It is merely corroborating testimony; we did not wish to take the time of the Senate in going over all these particulars. We do not care to ask the witness particular questions about that; you may cross-examine him.

Cross-examination by Mr. Moak:

Q. You were sworn before the Assembly committee? A. Yes, sir.

Q. Did you testify to this in answer to a question from Judge

McCunn: "Q. And my going to Mr. Clark's house was about that litigation in the United States court? A. Well, some of it was, and some of it was in regard to keeping it in the State courts." A. That is the way I testified; yes, sir.

Q. Mr. Clark yesterday testified that Judge McCunn was not there that he recollected of, until the proceedings in the United States court had been commenced; is that your recollection? A. I can't tell the first time he was at the house.

Q. Do you recollect his being there —

Mr. PARSONS — I wish to correct the counsel; he stated just the reverse; he said he was there within five or six days of the commencement of the suit.

Mr. MOAK — The stenographer's minutes will show what that was. It was discussed as to whether we should ask him, and we recollect what it was.

Q. Do you recollect of his being there at all, until the proceedings were commenced in the United States court? A. He was there shortly after the receiver took possession of the property.

Q. That does not answer my question; did you hear of his being there before the proceedings in the United States court were commenced? A. I don't recollect what time the proceedings in the United States court were commenced.

Q. Then you can't answer the question, as I understand you? A. No, sir.

Q. Did you testify to this on the former examination: "Q. There was a fight between them to get possession of the store? A. Yes, on Saturday afternoon"? A. Yes, sir.

Q. That is correct, is it? A. Yes, sir; that is correct.

Q. Did you testify to this: "Q. Had he ever been there at the house before the time you speak of when the fight was at the store? A. I do not recollect whether he was or not." A. I think I testified to that.

Q. That is correct now according to your best recollection? A. According to my best recollection, it is.

Q. You say the sheriff came there once; was that after the proceeding had been commenced in the United States court? A. I can't say in regard to that.

Q. Didn't you understand it was after the proceedings; that the sheriff was there to see whether the property should be given up? A. No, sir; I didn't understand it so.

Re-direct examination by Mr. STICKNEY:

Q. Did Judge McCunn ever state any thing in your hearing about his having seen the fight between the United States marshals and the receiver's men? A. That fight between the United States marshals and the receiver's men was on Saturday afternoon, and he called, I think, either on Sunday evening or Monday evening; I am not positive which; and he said he saw it; he was somewhere out of the way and he didn't want to be seen.

Q. At 1:50 P. M., Mr. Perry moved that the Senate take a recess to 3:45 P. M., which was carried.

Whereupon the Senate adjourned to 3:45 P. M.

AFTERNOON SESSION.

The Senate in extra session re-assembled at 4 o'clock P. M.

The PRESIDENT — The counsel will call the next witness.

Mr. STICKNEY — Will the Clerk call James F. Morgan.

The Clerk here called James F. Morgan, who failed to respond.

The PRESIDENT — Is there not another witness who can be called without this delay?

Mr. PARSONS — Mr. Abraham B. Clark is not here, although we have been informed that he would be here, and we had expected to find him here this afternoon. Mr. Morgan is in town.

The PRESIDENT — If the Senate is willing I will say that the Chair will order that this case shall proceed. It is not proper that the Senate be kept waiting.

Dr. PARSONS — The proceedings on our part will be to ask an attachment for Mr. Morgan and that the sergeant-at-arms be instructed to compel his presence here. There are only two witnesses further to examine in the Bininger case. One is Abraham B. Clark, under an order looking to his attachment, and James F. Morgan, and we desire to finish this case before proceeding with another charge.

Mr. D. P. WOOD — I would like to inquire whether it is understood that these witnesses are unwilling witnesses?

Mr. PARSONS — We do not wish to say any thing by way of reflection upon Mr. Morgan, but we suppose, under all the circumstances of the case, that he is more or less an unwilling witness.

Mr. D. P. WOOD — I inquired simply to ascertain whether it was a matter of accident or not.

Mr. MOAK — Purely accidental, sir; he has been waiting here upon the Senate all the time.

Mr. PARSONS — I think, in three minutes, that he can be brought here, if the sergeant would step to Judge McCunn's room.

Mr. J. WOOD — I will state that the sergeant-at-arms started almost immediately upon the call, and I presume went after Mr. Morgan.

The PRESIDENT — If the Senate is willing to wait, the Chair has no objection; the sergeant-at-arms has returned, and reports that he is unable to find the witness.

Mr. PARSONS — Will the President ask the sergeant-at-arms whether he looked for him in Judge McCunn's room?

Mr. CHATFIELD — I think it is quite evident that this witness means to give us the slip, and I move that we proceed with the case by examining some other witness.

Mr. PARSONS — Why did not the sergeant-at-arms bring him?

SERGEANT-AT-ARMS — I will state that I saw him coming up from the lower part of the park, and he said that he would come up right away. I told him he was wanted as a witness.

At 4:30 Mr. Morgan appeared.

Mr. DAVIS — It is proper to state that Mr. Morgan went to get his bundle of papers, which he presumed would be wanted here.

The PRESIDENT — That is a poor excuse; he has kept the Senate waiting half an hour; the Clerk will swear the witness.

JAMES F. MORGAN, a witness called on behalf of the prosecution, being duly sworn, testified as follows:

By Mr. PARSONS:

Q. Are you an attorney and counselor at law? A. Yes, sir.

Q. When were you admitted to practice? A. 1863.

Q. Are you related in any way, and, if so, in what way, to Judge McCunn? A. Brother-in-law.

Q. Were you in his office at any time? A. While practicing law.

Q. Yes, sir? A. No; I was not in his office when he was practicing law.

Q. Have you been in his office at any time, whether when he was practicing law, or subsequently? A. Never in his office at any time, either when practicing law or since.

Q. What is the fact in reference to your connection with him, or with any office which he ever held? A. The firm of Morgan & Hanrahan were successors to the firm of Fine & Morgan; and Fine & Morgan were successors to the firm of Fine, Chittenden &

Morgan; and Fine, Chittenden & Morgan were successors to Fine & Chittenden; and Fine & Chittenden were successors to McCunn & Moncrief.

Q. The office with which you were connected as a partner were successors in business, through one or two removes, to McCunn? A. Through the firm of Fine & Chittenden; I was a member of the firm of Fine, Chittenden & Morgan.

Q. Do you remember the appointment of Hanrahan as receiver of Bininger & Co.? A. I knew that he was appointed on the 19th of November, 1869.

Q. How early in the day? A. About 10 o'clock that day.

Q. Was he your partner in business? A. At that time.

Q. How long had he been your partner in business? A. I don't think more than six months, but I won't be certain as to the exact time.

Q. Do you remember the execution of the bond? A. Yes, sir.

Q. Were you a surety on that bond? A. Yes, sir.

Q. How long prior to that time had Judge McCunn known you? A. Since 1863, I think.

Q. That was some seven years, was it? A. Yes, sir.

Q. Was he somewhat familiar with your circumstances? A. I don't know.

Q. What opportunities had he for becoming acquainted with your pecuniary situation? A. None.

Q. Do you mean to state that? A. Yes, sir, I do positively.

Q. Knew nothing whatever upon the subject? A. Nothing whatever.

Q. Is it the fact that you were worth $20,000 at that time? A. Yes, sir.

Q. Who is Wm. R. Gorham, who was a surety upon that receiver's bond? A. He is a gentleman who formerly resided in San Francisco, and used to be sheriff of San Francisco.

Q. What was his occupation at the time the receiver's bond was executed? A. He had not been doing any thing, I think, for a year prior to that time.

Q. Did he become an employee of Hanrahan as receiver of Bininger & Co.? A. He was acting, if I may use the term, as a deputy receiver.

Q. Under whom? A. Under Mr. Hanrahan, taking charge of this stock.

Q. From what time? A. I don't know; I think within a few days of his appointment.

Q. What was his occupation at that time? A. He was doing nothing, except when Hanrahan called him in to look after this property.

Q. Was he an acquaintance of Judge McCunn? A. I don't know.

Q. Had you ever seen Judge McCunn and he in company together? A. No, sir.

Q. Never? A. Never.

Q. Was he in the habit of frequenting your office? A. I had seen Mr. Gorham in our office, prior to this time, once or twice.

Q. Was he an acquaintance of yours? A. No, sir; I don't think that I had ever been introduced to him; I had seen him in the office, and had been told by Hanrahan who he was.

Q. Did he execute the receiver's bond on the same occasion you did? A. Yes, sir.

Q. Where was it? A. Down at our office, in Wall street.

Q. And at what hour in the morning? A. I should say, at 10 o'clock; certainly not earlier than 10 o'clock, because —

Q. No matter about the cause; how much later than 10, was it? A. That, sir, I can't say.

Q. Is that your best recollection? A. Possibly 11 o'clock, and it may have been 12; I am almost willing to say it was 11 o'clock in the day.

Q. Was not the receiver's bond approved by Judge McCunn, subsequent to the time that the receiver actually had taken possession of the stock of Bininger & Co., under the order of Judge McCunn? A. No, sir.

Q. You will state that positively? A. I will swear to that fact, positively.

Q. Did you go with Hanrahan when he went to take possession of the stock? A. I did not.

Q. Do you know when he took possession of the stock? A. It may have been —

Q. Do you know? A. I know when he left the office and said he was going down to take charge of the stock.

Q. Who went with him? A. I don't remember.

Q. Do you remember his going, about 10 o'clock that morning, with Melville B. Clark, starting for the store of Bininger & Co.? A. I do not; I say that is a mistake; he certainly did not go down at 10 o'clock.

Q. You mean to contradict Mr. Clark? A. I mean to say Mr. Clark is mistaken.

Q. Who procured the approval of Judge McCunn upon that bond? A. I did.

Q. Where? A. At the Superior Court.

Q. How, shortly after it was executed? A. Almost immediately.

Q. Where did you find Judge McCunn? A. I don't remember whether he was in the chambers or trial term.

Q. Don't you remember very well that he was not at chambers? A. I don't remember that he was not at chambers.

Q. Do you mean to state that positively, that you don't remember that he was not then sitting at chambers? A. I don't remember that he was not sitting at chambers; the only knowledge I have upon that point is from looking at the assignments.

Q. From looking at the assignments are you satisfied that he was not holding chambers? A. The presumption is, that he was not holding chambers; yet he is not disqualified, because judges often sit at chambers without assignment.

Q. Inform the Senate, without argument, where you found him? A. I found him at the Superior Court, but whether at chambers or trial term I cannot say; I do not now remember.

Q. Is that the best answer you can give? A. That is the best answer, Mr. Parsons, I can give.

Q. Had you seen the order appointing Hanrahan receiver before the bond was executed? A. I saw the order that morning, but I can't say whether I saw it before or not.

Q. Who drew the bond? A. I think Mr. Hanrahan.

Q. Did you see him? A. I think I was there; yes, sir.

Q. Don't you remember the order was drawn the previous day? A. Do you mean the order appointing the receiver?

Q. I mean to say the bond? A. I mean to say that it was not.

Q. Have you looked at the bond and seen that it is dated the 18th? A. No, sir.

Q. Has your attention been called to that circumstance? A. It has not, sir.

Q. Do you remember the execution of the bond? A. I do, sir.

Q. Where was the bond drawn? A. It was executed on the following—

Q. That is not the question; when was it drawn? A. At the time it was executed.

Q. That you mean to be sure about? A. I do.

Q. Do you remember an order granted by Judge Jones, restraining a sale of the stock of Bininger & Co., by Hanrahan, as receiver? A. I do.

Q. When did that order come to your notice? A. It was given to me by Mr. Hertz, the auctioneer.

Q. When was the sale to take place that that order restrained? A. I think it was on the 31st of March.

Q. When did you receive the order? A. The order came into my possession the day before, or, possibly, may have been two days, but I think it was the day before.

Q. Did you procure from Judge McCunn an order which modified Judge Jones' order? A. Yes, sir.

Q. Where did you then find Judge McCunn? A. At the Superior Court.

Q. Whereabouts is the Superior Court? A. I can't say whether it was at chambers, or whether he was holding the trial term at that time.

Q. Don't you know that Judge Jones was then holding the chambers? A. I do not; that is, from the assignment that he was assigned to hold chambers.

Q. Do you mean to state to the Senate that you fail to remember whether you then saw Judge McCunn at the chambers? A. I didn't say so, Mr. Parsons.

Q. Did you then find him at the chambers? A. I don't remember; there were two orders granted there; one of them signed by Judge McCunn while sitting at special term, although during Judge Jones' assignment, and whether it was this order or the subsequent order I don't now remember.

Q. You have spoken of two orders. Do you remember one was signed by Judge McCunn when he was not sitting at chambers? A. I do not.

Q. Do you mean to state that you have no recollection upon that subject?

Mr. Moak — One moment; I submit to the President whether that is a fair way to examine a witness, when the witness states it. It is not fair to ask him whether he means to state it in repetition?

Mr. Parsons — He has stated as to one order that he remembers obtaining at chambers, and now I am asking him in regard to the other order.

The President — The Chair understands it depends upon circumstances. The Chair will direct the counsel to proceed in his own way.

Q. Will you answer where you procured that order from Judge McCunn? A. In the Superior Court, at the City Hall in the city of New York.

Q. Is that all you have to say? A. That is all I can say; I can't say whether I obtained it at special term or trial term.

Q. Can you tell the Senate why you went to Judge McCunn to procure a modification of the order that Judge Jones had granted? A. Judge Jones was not at court.

Q. Will you state that positively? A. Yes, sir.

Q. When did you apply for it? A. I think in the afternoon.

Q. What time in the afternoon? A. I don't know; I didn't tax my mind with it.

Q. Didn't you obtain that order at Judge McCunn's house? A. No, sir; and never did obtain an order from Judge McCunn in my life.

Q. You state that positively? A. I do sir.

Q. Did you know of the sale by Hanrahan of portions of this stock? A. Yes, sir.

Q. Did the proceeds of such sales come into your possession? A. Some of them were deposited in the Gallatin National Bank.

Q. Won't you answer the question, if you please? A. I say some of the proceeds were deposited in the Gallatin National Bank, wherein the firm of Morgan & Hanrahan kept an account; I will say, too, in addition, that while Hanrahan was sick, some of these moneys were paid over to me by Mr. Hertz, who was the auctioneer.

Q. Do you state that Morgan & Hanrahan kept an account in the Gallatin National Bank at that time? A. There was an account in the Gallatin National Bank which was in my name, Jas. F. Morgan.

Q. Do you say that, at that time, Morgan & Hanrahan kept an account in the Gallatin National Bank? A. I say Jas. F. Morgan kept an account there, but the moneys in there belonged to Morgan & Hanrahan.

Q Will you state whether the proceeds of the stock of Bininger & Co. came into your possession? A. Some.

Q. Can you state what amount? A. My bank-book will show.

Q. Don't you remember about the aggregate amount? A. I can't say, Mr. Parsons; I don't remember; these books here will show.

Q. Have you any recollection upon the subject? A. Possibly $6,000 or $8,000 or $10,000.

Q. Not more than that? A. No, sir.

Q. Wasn't it more than the amount you received as fees? A. No, sir, not over $10,000; oh, yes, there was some money paid by the order of the Superior Court to satisfy the mortgage; some $2,000 or $3,000; probably, in all $14,000 or $15,000.

By Mr. Morgan:

Q. Did you act as counsel to Mr. Hanrahan, your partner, as receiver of this property? A. Throughout the litigation.

Q. When did your partner appoint you as counsel? A. At the time of his appointment.

Q. How shortly after his appointment? A. Oh, I don't know, Mr. Parsons; within a very short time?

Q. How early in the day of the 19th day of November? A. Oh, I don't know; I can't say.

Q. Was it before the bond was drawn? A. Oh, yes, sir.

Q. Was it on that day? A. Yes, sir.

Q. Have you no recollection of the time? A. No, sir.

Q. Did he employ you at all; didn't you assume to act for him without any employment at all? A. No, sir; I did not.

Q. How long did the suit of *Clark* v. *Bininger* continue? A. The original suit in the Superior Court?

Q. The suit of *Clark* v. *Bininger*? A. I have no knowledge of the suit after Mr. Beecher was let in as a party to the suit, which was in the fall of 1870, some time.

Q. When did Hanrahan cease to be receiver? A. About that time.

Q. Can you specify? A. No, sir; I cannot, Mr. Parsons; I can by referring to these orders.

Q. Don't you remember the order of Judge Monell which removed him as receiver? A. Yes, sir; I know of the order of Judge Monell; that required him to the further securities, and on non-compliance to be removed.

Q. Did he file further security? A. No, sir.

Q. When was that order made? A. I can't remember the time.

Q. Wasn't it in April, 1870? A. It may have been.

Q. That is your recollection, isn't it? A. It may have been; yes, sir.

Q. Was he not restrained from further action, as receiver, by that order, unless he filed additional security? A. I think he was.

Q. So that his receivership continued from November 19th, when he was appointed, down to the month of April, 1870? A. Down to the time of granting of this order, and the date I cannot remember now; the order is here.

Q. How much of the proceeds of the stock of Bininger & Co. went to you, as fees as counsel for the receiver? A. $10,000.

Q. Wasn't it $11,000? A. It may have been; I forget; either $10,000 or $11,000.

Q. How was that money that came to you as fees, paid to you? A. By Hanrahan.

Q. How? A. In checks and money.

Q. Do you mean Hanrahan's checks? A. No, sir.

Q. What do you mean by checks, and quote the word checks? A. Checks received by him from Mr. Hertz, the auctioneer, mostly.

Q. Do you mean the proceeds of sale? A. Yes, sir.

Q. The proceeds that you had deposited in the Gallatin National Bank? A. No, sir; I had deposited only a few; I say that I deposited a portion of them.

Q. Do you know who prepared the account of Hanrahan, as receiver? A. I think I prepared it myself; possibly I may have.

Q. Can you tell by looking at the account now shown you, the dates of the payments to you, of this sum of $10,000 or $11,000? A. I can, sir.

Q. Look at the account and specify the dates and amounts? A. November 26, 1869, $1,000; April 2, 1870, $6,500.

Q. How near was that to the date of the order removing him? A. I cannot specify the date without looking at the order.

Q. Don't you know that it was after the proceedings had been taken for his removal? A. I do not.

Q. You have no recollection on that subject? A. No, sir.

Q. Proceed and state the further amounts making up the $10,000 or $11,000? A. Not from this account, Mr. Parsons; I cannot.

Q. State from recollection, then? A. I cannot remember.

Q. Have you no recollection? A. My bill shows it, which is also with the referee; if I should see the bill I could state.

Q. Can't you state when the date was, as compared with the time Hanrahan ceased to be receiver? A. No, I cannot.

Q. What was the additional amount? A. The additional amount was making up the sum of $11,000.

Q. Do you mean to answer $11,000? A. No, I think there was $500 or $600 less than $11,000.

Q. Is the paper which you have just had in your hands the account of Hanrahan as receiver? A. This is the account as first presented.

Q. Down to what page does that account extend? A. May the 1st, 1870, I suppose.

Mr. Parsons — We desire to have it noticed as testimony in the case, that the account shows that down to that time the total receipts were $22,704, and the total expenditures, $17,046.44; leaving a surplus of $5,657.56.

Q. During this period between the appointment of Hanrahan, as receiver, or rather the time when you first received $1,000 from him, down to the time of the last payment by him to you, did you have any pecuniary transactions with Judge McCunn? A. I purchased from Judge McCunn on the 4th of January, 1870.

Q. Did you make him a payment upon that house? A. I did.

Q. What did you pay him for the house? A. $14,000.

Q. How did you make your payment to him? A. In a check on Jay Cooke & Co. for $7,000 and odd, and the balance in cash or check (referring to book) $1,630 in my own check, January 4, 1870; check on Jay Cooke & Co. for $7,670; I held back $500 for taxes on the premises and, afterward, I gave Judge McCunn $500 in a check.

Q. What is the date? A. The check book doesn't show the date; it was in January, 1870.

Q. Does that complete the cash payment? A. Yes sir.

Q. Was the balance paid in mortgages? A. $4,200.

By Mr. MOAK:

Q. Do you mean mortgages that you gave back or that you assumed? A. There was a mortgage on the house for $4,200.

By Mr. PARSONS:

Q. Were Jay Cooke & Co. private bankers? A. No, sir.

Q. What was their business? A. They were general bankers and brokers.

Q Were they not private bankers as contra-distinguished from an incorporated bank? A. Yes, I suppose, in that sense they were.

Q. I wish you now to state to the Senate what amount of proceeds of A. Bininger & Co.'s stock had come into your possession, prior to the time that you made these payments to Judge McCunn. A. $1,000.

Q. Is that all which had come to your possession? A. There was some more of this money which was deposited in the Gallatin National Bank.

Q. I want to know if you can state any other amount that was deposited in the Gallatin National Bank, prior to this payment that you made to Judge McCunn? A. Definitely, I cannot say.

Q. Can you answer this question, whether the $6,500 which you say was paid him on the 2d of April, 1870, was paid in one specific sum, or whether it consisted of a debit against amounts then on deposit? A. To some extent it did, because there was money in the Gallatin National Bank at that time.

Q. Are you correct in stating the 2d of April, 1870, as the date when you gave credit for the $6,500? A. Yes, April 2d.

Q. How near was that to the procurement by you of the modification, by Judge McCunn, of Judge Jones' order, which enabled the sale to take place? A. Within a couple of days.

Q. If you had not procured that modification, and so enabled the sale to take place, would the receiver have had money enough to have paid you that amount? A. I don't know that he had $6,500 at that time; I don't think he had.

Q. How much of that $6,500 was procured by the receiver, from the sale which Judge McCunn thus permitted to take place? A. Not a dollar.

Q. How do you reconcile that statement with the answer you have just given? A. In this way; here is the receipt by Mr. Hanrahan, on the 23d of March, of $8,114.

Q. Do you know where that came from? A. That came from the sale of 111 barrels of whisky.

Q. Do you know any thing about the circumstances of that case? A. Well, I know something about it.

Q. Were you here during the examination of Mr. Melville B. Clark, about a proposed settlement which Judge McCunn prevented just after that time? A. I heard a portion of that testimony; I could not now say exactly what he testified to.

Q. Did you know of the sale of that 110 barrels of whisky on the day succeeding the evening when Judge McCunn was at Mr. Clark's house? A. I don't know any thing about Judge McCunn's being at Mr. Clark's house.

Q. Well, the visit of Judge McCunn to Mr. Clark's house, according to the testimony? A. I don't know the time, Mr. Parsons.

Q. State what you know in regard to the sale of that 110 barrels of whisky? A. I know that Mr. Hanrahan sold this whisky to Mr. Woodro for the sum of $8,114.

Q. What did you have to do with the sale? A. Nothing.

Q. From whom did you learn it? A. I learned it from Mr. Woodro, at the time; I saw him when he came to the office.

Q. How much of that $8,000 went to you in fees? A. I could not say whether that was deposited in the Gallatin National Bank or not; I can very easily tell you (referring to memorandum book); I couldn't say what particular portion of that $8,000 went to me; I know that I was paid these moneys out of these receipts, as shown by that account.

Q. Look at the item under date of April 2d, 1870, "paid Roger

A. Pryor, counsel fee $2,500," and state whether that was paid to Mr. Pryor by direction of Judge McCunn, for services claimed to have been rendered by Mr. Pryor to Hanrahan, as receiver.

Mr. Moak — That is objected to, unless they produce the order of Judge McCunn directing the payment.

By Mr. Parsons:

Q. Was there any such order of which you knew? A. No, sir.

Q. Then answer the question? A. The money was not paid by any order; there was no order; it was not paid at the direction of Judge McCunn.

Q. Well, it was paid to Mr. Pryor for services rendered to the receiver? A. It was.

Q. Who employed Mr. Pryor? A. Mr. Hanrahan.

Q. Were not you counsel for Hanrahan? A. I was.

Q. Was Pryor added as counsel, also? A. He was; the motions came thick and fast in that case; one man could not attend to them.

Q. Were you not present on the motions? A. I was.

Q. Mr. Pryor also? A. Yes, sir; Mr. Pryor was present on the motions in the Superior Court, and on this review matter in the Circuit Court of the United States.

Q. Wasn't you present at the motions in the Superior Court? A. I was in court the day of the motion to punish Mr. Beecher for contempt.

Q. Was your attendance upon that motion among the services which you rendered Mr. Hanrahan? A. Yes, sir.

Q. Were you present on the motion before Judge McCunn? A. I think I read the affidavits.

Q. Was that all the professional services you rendered upon that motion? A. I think so.

Q. Have you been appointed, upon any occasion, by Judge McCunn as receiver, or have you acted as counsel for other persons who have been appointed by Judge McCunn, as receivers?

Mr. Moak — That we object to; there is no such charge in this case.

Mr. Parsons — We ask it as bearing upon the main charge. What we claim, Mr. President, is that here was a scheme on the part of this judge, through his brother-in-law, to plunder this and other estates, and that corresponding transactions in regard to other estates near this time bear upon the principal charge.

The question being put as to whether the objection should be sustained, was decided in the negative.

By Mr. PARSONS:

Q. Answer, please, whether you yourself have been appointed receiver in any case by Judge McCunn, and, also, whether you have acted as counsel for other persons than Hanrahan who have been appointed receivers by Judge McCunn? A. I was appointed receiver in the case of *Stevenson* v. *Turner*, and I acted as counsel for Mr. Gano, in the case of *Corey* v. *Long*.

Q. Is that all? A. Those are the only cases that I remember now.

Q. Have you forgotten the case of *Elliott* v. *Butler?* A. I didn't act in that case.

Q. Do you mean to state that you didn't act in that case? A. Nothing to do with it, Mr. Parsons.

Q. Do you mean it to be understood that you have now stated the only cases in which you have been appointed by Judge McCunn receiver, and in which you have acted as counsel for other persons who have been appointed by Judge McCunn, receiver? A. Well, I think there is another case; at this moment, I do not remember what case it was.

Q. Who is Mr. Gano, of whom you spoke? A. He is my brother-in-law, and also a brother-in-law of Judge McCunn.

Q. Now present? A. Yes, sir.

Q. Was he receiver in the case of *Corey* v. *Long?* A. Yes, sir.

Q. Was he receiver in the case of *Elliott* v. *Butler?* A. Yes, sir.

Q. Do you remember the case of *Brandon* v. *Burke?* A. Yes, sir.

Q. Who was appointed receiver in that? A. Mr. Hanrahan and Mr. Mix.

Q. Was Hanrahan your partner at that time? A. He was.

Q. Did you act as counsel for him? A. I did.

Q. Why did you not mention that case? A. That is the case I could not call to mind.

Q. Have you ever read these charges? A. I have, sir.

Q. And have forgotten that that case is among them? A. I did, for the moment.

Q. Now, Mr. Morgan, have you not forgotten other cases? A. No, sir.

Q. Or may you not remember other cases? A. I do not remember any others.

Q. I would like to have you inform the Senate how many cases in court you had tried prior to the receipt by you of these large sums from Hanrahan as receiver in the Bininger case.

Mr. MOAK — That is objected to, on the ground that it is incompetent and improper.

The question being put as to whether the objection should be sustained, it was decided in the negative.

By. Mr. PARSONS:

Q. Answer the question, please? A. Not many; the firm of Fine & Morgan had many cases in court, and they were tried by Mr. Fine.

Q. Was the firm of Fine & Morgan counsel for Hanrahan in the Bininger case? A. No, sir; that firm had dissolved, about six months or a little more, prior to the appointment of Hanrahan as receiver.

Q. Will you be so good, then, as to answer the question I put you? A. Will you please repeat it?

Q. How many cases in court had you tried before Hanrahan's appointment as receiver? A. Well, I tried the cases for the firm in the marine and district courts.

Q. Those are called minor courts in the city of New York? A. Yes; they are not called courts of record.

Q. Was that the extent of your counsel, positively, down to that time? A. Down to the dissolution of Fine & Morgan.

Q. I mean down to the time of your appointment as counsel for Hanrahan? A. After the dissolution of Fine & Morgan and the formation of the firm of Morgan & Hanrahan, I tried the cases.

Q. What I want to know is, can you state how many cases you did try? A. I could not tell you?

Q. Can't you tell the Senate whether you ever tried any case? A. Oh, yes.

Q. In a court of record? A. Yes, sir.

Q. Did you not testify on the subject before the judiciary committee of the Assembly? A. I believe I did.

Mr. MOAK — I object to any evidence of what he testified to there.

Mr. PARSONS — Do you object to my showing him that he was mistaken?

Mr. MOAK — No, sir.

Mr. PARSONS — I do not propose to ask him what he testified to there?

Q. Can you state to the Senate any case that you had tried in a court of record prior to your appointment by Hanrahan as counsel? A. I don't remember; the time was very short between the disso-

lution of Fine & Morgan and the formation of the firm of Morgan & Hanrahan.

Q. Have you now answered the question as well as you can? A. Yes, sir.

Q. You cannot remember the name of any case? A. No, sir.

Q. I asked you whether you had been appointed receiver by Judge McCunn, or whether you had acted as counsel for persons appointed as receiver by him; please answer, whether you had received patronage from Judge McCunn in your appointment as referee in cases?

Mr. Moak — That I object to, on the same ground, and I desire my objection to be noted; that there is no charge of that character here, or any thing upon the subject for trial; that evidence, upon that subject is not admissible. We have not been notified of any such charge against us.

Mr. Parsons — Do you make any other objection than that? That was overruled before, Mr Moak.

Mr. Moak — I don't know, sir; we claim this to be entirely different. You claimed that it was inadmissible before, because it was business of the same character. We desire to raise the further objection that the orders of reference are the best evidence, if references were made.

The question being put as to whether the objection should be sustained, was decided in the negative.

Mr. Parsons:

Q. Answer, please? A. I have been appointed by Judge McCunn in numerous cases.

Q. And had you, prior to June, 1870? A. I think so; I have made out a detailed statement of those cases, which is in the printed book.

Q. Mr. Morgan, were you ever appointed by any other judge as referee? A. Only once.

Mr. Moak — That we certainly object to.

Mr. Parsons — Well, he says only once. You may examine him, Mr. Moak.

Mr. Moak — I ask, if the Senate please, that that evidence be stricken out, or that the evidence be passed upon.

The question being put as to whether the evidence should be stricken out was decided in the negative.

Cross-examination by Mr. Moak:

Q. Mr. Morgan, what is your age? A. Thirty-one years.

Q. How long ago did you commence the practice of the law? A. In 1863, I think.

Q. At that time, how long had you read as a student? A. For some three or four years.

Q. In whose office did you read? A. A. & W. C. Pell.

Q. When you commenced the practice of law, in 1863, did you commence the practice alone or with a partner? A. In the first, for a short period of time, I was a clerk with the firm of Fine & Chittenden, and then, in the month of January, 1864, I went into the firm of Fine & Chittenden.

Q. And from that time down you were a member of one of these firms that you have named? A. Yes, sir.

Q. State the extent of the practice of those firms? A. Well, my share as a partner in the firm of Fine & Morgan would amount to about $8,000 or $9,000 a year.

Q. What proportion of the moneys received did you receive as your share? A. One third.

Q. And what was the amount of receipts of the firm of Fine & Morgan? A. Fine & Morgan made not less than $16,000 a year.

Q. When were you married? A. In June, 1864.

Q. You married a sister, I believe, of Judge McCunn's wife? A. Yes, sir.

Q. Now, you said that in January, 1870, you purchased a house of Judge McCunn? A. Yes, sir.

Q. When did you make the contract for that purchase? A. Oh, it was in the month of November, about the 1st or 2d.

Q. Was that contract made in writing? A. Yes, sir.

Q. Have you it here? A. (After looking over a bundle of papers.) No, sir, I have not got that contract here; I will produce it, however.

Q. That contract you say was in writing, and was made in the fore part of November, 1869? A. It was made, I think, on the 1st of November, 1869.

Q. Had you been living in that house for some considerable time before that? A. I lived in the house from the 1st of May, 1865.

Q. How long had Judge McCunn owned it, if you know? A. Well, he owned it at that time, and I understood for years prior to that time; still, I have no knowledge on the subject.

Q. Had you been paying him rent? A. I had, sir.

Q. How much per year? A. $900 a year, except the last year, I paid him $1,400.

Q. You have said that, on the 4th of January, 1870, when

you took the deed, you paid $7,000 and over, in a check on Jay Cooke & Co.? A. Yes, sir.

Q. State how you received that money? A. That was from the sale of ten-forty bonds which I had in my safe, which belonged to me, and which I had saved up, from time to time.

Q. How long had you had those bonds? A. Oh, some of them for four or five years, and some of them two and three years; I had at that time $10,000 or $11,000 in bonds; I did not sell them all.

Q. You sold a portion of them, from which you received the amount of this check of Jay Cooke & Co., and turned that check over to Judge McCunn? A. Yes, indorsed it over to Judge McCunn, in part payment for the house.

Q. Have you that check here? A. No, sir; we will have it here, though.

Q. What did you pay the balance in? A. Cash; check of $1,630 on the Gallatin National Bank.

Q. Did you receive a deed from Judge McCunn, of those premises? A. I did at that time.

Q. Have you that deed here? A. Yes, sir (witness looks over a bundle of papers); well, I certainly had that deed when I came here.

Q. Well, if you don't find that, you will have to look for it hereafter. Did you receive this deed on the 4th January, 1870? A. I did, sir; it is strange where that deed has gone.

Q. Well, if you have not got it with you, there is no use worrying over it. You retained $500, you say, to pay taxes? A. Yes, sir.

Q. Or, rather, retained that until a certificate was brought that the taxes were paid? A. Yes, sir.

Q. When did you pay that $500? A. (Referring to the book.) Ah! here is the deed in this book; that $500 must have been paid after the 17th.

Q. It was either the 17th or 18th? A. Yes, sir.

Q. Well, from the fact that no additional date was given, probably it was the 17th?

Mr. Moak—We now offer in evidence, the deed from Judge McCunn to the witness. It is of the property known as No. 232 West 21st street. The consideration stated in it is $14,000. It is dated the 3d day of January, 1870; executed by Judge McCunn and wife to the witness; acknowledged January 3d, 1870; recorded in the register's office, January 4, 1870.

The President—Do you desire the paper marked as an exhibit?

Mr. Moak — No, sir; I only desire to state those facts.

Q. No; you have stated that some of the moneys collected by the receiver, or received by him from the sale of some of the property of Bininger & Clark, or Clark & Bininger, whichever it was, went into the Gallatin National Bank. Can you state how that money was received, and how it went into the bank, deposited to the credit of James F. Morgan? A. It was received in bills or in checks, and deposited, by Hanrahan, in the Gallatin National Bank.

Q. To the credit of James F. Morgan, so far as the book showed? A. So far as the book showed.

Q. But you say the account was, in fact, a partnership account? A. Yes, sir; on the end of the checks is written Morgan & Hanrahan.

Q. That is, the checks that were drawn on the Gallatin National Bank? A. Yes, sir.

Q. State how that money was received? A. It was money received by Mr. Hanrahan, as receiver of the firm of Bininger & Company.

Q. From what source? A. From sales which were made; every-day sales in the course of business, and from a sale of 101 barrels of whisky.

By Mr. Parsons:

Q. One hundred and one, or one hundred and ten? A. (After looking at a paper.) One hundred and eleven.

By Mr. Moak:

Q. Do you recollect what it was sold at per gallon? A. I think two dollars.

Q. You say, you first knew of Hanrahan's appointment on the 19th of November; was that after you had gone down to the office? A. Yes, sir.

Q. Up to that time had you heard of his appointment, or had any intimation that he was to be appointed? A. I did not know it until he told me at the office, on that morning.

Q. Then the bond was executed? A. Yes, sir.

Q. What was done with it? A. It was taken by me from the Superior Court.

Q. Where was your office at that time? A. 14 and 16 Wall street.

Q. And was it there approved? A. No, sir; the first bond was

not approved; the first bond was in the sum of $1,000, and Judge McCunn said it was a small amount; that the firm of Bininger & Co. were possessed of a good deal of money, and then I drew a new bond and executed in the sum of $10,000; that is the bond that was approved.

Q. What was done with it then? A. It was approved and filed.

Q. Do you know when this young man, Clark, went over to the place, or when Mr. Hanrahan went; up to that time where had Hanrahan been? A. Down at the office.

Q. State who was at the office when you left? A. I think I left him there when I went over to the court.

Q. Had he been away previous to that time, after, say half-past 9 or 10 o'clock? A. No, sir.

Q. In there during the whole time? A. Yes, sir.

Q. Mr. Hanrahan came from California to New York, did he not? A. Yes, sir; he came with the firm of Fine & Morgan, about two or three years prior to this; he was the managing clerk of the firm of Fine & Morgan.

Q. How long had he been managing clerk for that purpose? A. About two years I should think, at the least.

Q. And then, on the going out of Mr. Fine, he was taken in as partner? A. I took Mr. Hanrahan at the time Mr. Fine went out.

Q. Up to that time, did you know the fact of his being intemperate? A. No, sir.

Q. Up to the time that he was appointed receiver? A. No, sir; I never had heard that he drank any spirituous liquors or malt liquors.

Q. Then, until the time he got into the charge of Clark & Bininger's poor whisky, he was a temperate man, so far as you know? A. The most temperate man I ever knew, up to that time.

Q. What was his general conduct? A. He was a very able man.

Q. What was his age? A. Forty years of age.

Q. A man of family? A. Yes, sir.

Q. Where did he reside? A. In Thirty-fifth street, New York.

Q. Keeping house? A. Yes, sir.

Q. During the time he was your partner, up to the time of his appointment as receiver, was his conduct, as far as you know, perfectly exemplary? A. Yes, sir.

Q. State his capacity for business? A. Good.

Q. What share of the proceeds was he allowed? A. One-third.

Q. The counsel asked whether, up to the time of your being employed as counsel for this receiver, you had tried suits in court;

state whether, previous to that time, you had been a counsel for various parties in the city of New York? A. Yes, sir.

Q. What department of the business had you had charge of, besides the trial of cases in the law courts? A. The usual office business.

Q. Had you been the managing partner of the concern? A. Yes, sir, in the office.

Q. Managing all the financial affairs of the firm? A. Yes, sir; real estate matters.

Q. You divided your business, then, I suppose? A. Yes, sir.

Q. By certain members of the firm doing the court business? A. Mr. Fine did the counsel business.

Q. When Mr. Fine left you, what did he go into? A. The firm of Fine & Gallagher was formed.

Q. When he left, who then became the active court member of your firm? A. I did.

Q. From that time down to the present, have you been engaged in practicing in all the courts of New York? A. I have, sir.

Q. In the trial of causes? A. Yes, sir.

Q. And the argument of motions? A. Yes, sir.

Q. Arguing of cases at general term? A. Not at general term; that is, I have not argued a case at the general term since the formation of the copartnership of Morgan & Hanrahan, except a case, a couple of months ago, in the Supreme Court in Kings county.

Q. I see you are the counsel who argued most of the motions in the United States court in these cases? A. Several of them.

Q. In all of these motions you were successful? A. Yes, sir.

Q. You argued them alone? A. I think in most of them Mr. Pryor was with me; I am speaking of motions in the district court.

Q. You said, at the time that you signed the receiver's bond, you were worth $20,000 and over; state what that property consisted of? A. Ten-forty bonds, my furniture in my house; my yacht, moneys due me by Charles Morgan, my father.

Q. Any thing further? A. I don't remember any thing else.

Q. You were asked whether you obtained the order from Judge McCunn modifying Judge Jones' order forbidding the sale; state the circumstances in regard to the service of Judge Jones' order; what had been done previous to that time by the receiver, if you know, in regard to the sale and the circumstances under which you received the order from Judge McCunn? A. An order had been made out a little while prior to the day of the sale of his property, and Mr. Hertz, an auctioneer, had been employed by Hanrahan to sell it, and had

advertised it extensively, as I understand, and on the day on which the sale was to have taken place, or the day before that, I think it was the day before the sale, or the papers which were served, and on the additional affidavit of Hanrahan, I made an application to Judge McCunn and obtained this order allowing the sale to proceed; the sale did proceed, and then on the day of sale another order was served enjoining the sale, and Judge McCunn also modified that order so far as to allow the goods which had been sold to be delivered, with the direction that Hanrahan should deposit the moneys in the New York Life Trust Company.

Q. About what realized from the sales which took place that day? A. About $12,000.

Q. Were you aware of the fact, at any time, that there was an alleged waste of this stock of Binninger & Co.; I mean at the time when the sale occurred? A. I am certain, sir, that there was no waste.

Q. I don't mean that; they claim that there was a great deal of it drank; were you aware that any of it was being drank or used up? A. Oh, I don't know that any of it was drank.

Q. Or used up in any way? A. Oh, I have seen, when I have been in there, persons who were drinking; that is to say, taking a drink of brandy or something of that kind.

Q. Well, to any extent? A. Oh, no; there was no waste of this property.

Q. How long had this sale been advertised, previous to the time when it took place? A. I couldn't say specifically.

Q. For about how long? A. For quite a number of days.

Q. Advertised in the New York papers? A. Yes, sir.

Q. And by handbills in New York? A. Yes, sir.

Q. To what extent, so far as you know, by handbills? A. I don't know; a great many out; there were a great many persons at the sale.

Q. Were you present at the sale? A. Yes, sir.

Q. How many persons were present? A. I couldn't tell you; the place was full of people.

Q. How large a store was it? A. The ground floor was twice as large as this room, almost; as large and half as large again as this room.

Q. Where did the auction take place? A. On that floor.

Q. State how the bidding was? A. Well, the bidding was spirited.

Q. About what time did the sale commence? A. I think it was about 10 or 11 o'clock; I forget the time.

Q. Was there a catalogue made out? A. Yes, sir.

Q. A circular? A. Yes, sir.

Q. Have you one of them? A. (Producing paper.) That is one of them.

Q. Were these extensively circulated? A. Yes, sir.

Q. Do you know any thing about how many copies were circulated? A. I do not; I couldn't now say; I do remember at the time, though, the sale was made very public and generally known.

Q. Now state how the receipts of Hanrahan, as receiver, came to be deposited in the Gallatin National Bank; if there was any particular reason for it? A. No particular reason; Mr. Hanrahan kept no individual account.

Q. Now, will you give the Senate some idea of the amount of business that was done, the class of litigations, and the courts that they were in, in connection with this matter, giving it in detail, as much as you can? A. Well, in the first instance, a few days after Mr. Hanrahan was appointed receiver, a motion was made by Mr. Bininger to vacate the order appointing Hanrahan, on several grounds.

Q. About what was the extent of the motion papers, Mr. Morgan? A. Well, they were not very extensive, but the motion was argued at considerable length before Judge Fithian.

Q. Who appeared as counsel on the part of Mr. Bininger? A. Mr. Titus and Mr. Cohn.

Q. Is Mr. Titus one of the best lawyers in the city of New York? A. Good lawyer; good lawyer.

Q. Well, what next? A. This motion to set aside the appointment of Mr. Hanrahan, as receiver, was denied by Judge Fithian, and I now hold in my hand his original opinion which was delivered on this motion, wherein he holds that the case of *Clark* v. *Bininger*, on the papers as presented to Judge McCunn, presented a proper case in law for a receiver.

Mr. MOAK — We desire to put this in as an exhibit, for it is a very exhaustive opinion upon that subject.

The paper was marked Exhibit No. 25, and reads as follows:

EXHIBIT No. 25.

SUPERIOR COURT.

ABRAHAM CLARK
agst.
ABRAHAM BININGER.

This is an action by one copartner against another, for an accounting and settlement of partnership assets and business, and praying

for an injunction and the appointment of a receiver. Upon the complaint, schedules, and exhibits, and affidavits annexed, an order of injunction was granted, and a receiver appointed, *ex parte*, by one of the justices of this court. The defendant now moves this court, at special term, on notice and on the same papers, for an order dissolving suit, and setting aside the order appointing a receiver.

Mr. Geo. W. Titus and *Mr. E. Cohn*, for motion.

Mr. M. Compton and *Mr. S. B. Clark*, opposed.

The papers on which the motion is made show, substantially, among other things, the following facts, which I deem material:

It appears that, as long ago as the year 1821, the parties to this suit, together with one Fisher, entered into partnership in the wine and liquor business in this city, upon what terms does not appear; that from 1821 to 1836, the defendant Bininger, although a partner, took no active part in the business, but the same was conducted and managed by plaintiff and Fisher; that, from 1836 to June, 1861, the business was chiefly managed and conducted by the plaintiff himself; from which I infer that Fisher went out, in 1836. That, in June, 1861, the firm was crippled by the stagnation of business, consequent upon the breaking out of the war, and the suspension of the payment of debts owing to the firm by the South. That for these reasons it was found necessary to increase the capital to be used in the business; and that thereupon it was agreed by and between the plaintiff and defendant that the latter should, and he did, loan and advance to the plaintiff the sum of $45,000, to be used in the said business (see affidavit of plaintiff). That, to secure the payment of such loan and advance, the said plaintiff did, on the 1st day of June, 1861, execute and deliver to the defendant an absolute bill of sale of all and singular the plaintiff's interest in all the stock, property and assets, real and personal, of the said firm of "A. Bininger & Co.," securing and accepting the one-half interest of plaintiff, in certain debts due the firm, a schedule of which was annexed to the bill of sale, amounting, severally, on their face, to about the sum of $60,000.

And thereupon new articles of partnership were entered into between plaintiff and defendant, reciting the existence of the former, partnership, and that plaintiff has sold his interest, as aforesaid, to defendant, and that defendant desired to retain the knowledge and skill of plaintiff in the business. It was, therefore, agreed that said partnership *be continued* upon the terms there stated, viz.: The same firm name to be retained; all fiscal transactions to be under the exclusive control of defendant; that plaintiff, Clark, should not sign the firm name to any bill, bond, note or specialty, except by the con-

sent and license of Bininger; that all the stock and property, effects of the firm, should be the sole and exclusive property of Bininger; which, on the dissolution or termination of the firm, should be held by Bininger, *subject to an accounting with Clark for his portion of the net profits, as hereafter stated;* that an account and statement of stock and partnership business, to be taken on the 1st day of March each year, during the continuance of the partnership, and the net profits ascertained and thereupon apportioned to the parties, as follows: Seven thousand dollars of the profits to be set apart to defendant as *compensation for the use of his capital*, and the balance to be divided, equally, between the partners, and placed to their credit, respectively, on the *books of the firm*, share and *share alike;* further, that Bininger might draw from the concern as much of the profits standing to his credit as he chose, and as much of the capital stock as he chose, but not reduce the same below $100,000; Clark, however, not to draw from his share of the profits over $6,000 per year; each party to be credited with interest on his profits remaining undrawn; the partnership to continue until the 1st of March, 1866, subject however, to be dissolved, by either party, on fifteen days' notice to the other.

At the same time with the execution of these papers, the defendant, Bininger, executed to the plaintiff, Clark, an instrument in writing, as follows, in substance: Reciting the sale of Clark's interest in the partnership effects of the old firm, as before stated. Also, that the parties had entered into new articles of copartnership "whereby it was agreed that the net profits shall be divided, equally, between the parties, after paying to Bininger therefrom $7,000 per year, as compensation for use of his capital." Also reciting that Bininger was desirous of young Clark, the plaintiff, having the right to *repurchase* the interest in the stock, effects and assets of the firm, which he had so, as aforesaid, sold to Bininger. Therefore, it was agreed that if Clark should pay, or cause to be paid to Bininger the said sum of $45,000, on or before the dissolution of the partnership, either by limitation or by notice, in the partnership articles provided, then Bininger would reconvey to Clark all the said interest in said partnership effects so by Clark sold to Bininger, or the "proceeds thereof." And Clark therein agrees that *he will* so repurchase said interest as aforesaid, "*and for that purpose he will appropriate all his share and proportion of the net profits of said copartnership over and above the annual sum of* $6,000, *specified in the said articles of copartnership*" (*the sum Clark was authorized to draw*).

The foregoing facts appear from the articles of agreement and the

affidavits annexed to the complaint. The plaintiff then alleges in the complaint, that the partnership thus formed, continued in business until the 4th day of November, 1869, when the defendant, Bininger, served plaintiff with written notice of dissolution, pursuant to the articles of copartnership, for and from the 19th of said November. The plaintiff alleges that he had kept the articles of copartnership on his part. That the good will of the business was very valuable. That of the $45,000 to be loaned by defendant as capital, but $40,501 was paid in. That of the schedule of bills receivable, which were excepted from the sale of assets by plaintiff to defendant, there had been collected, and received, and paid, into said firm during its continuance, the sum of $35,000, *one-half* of which belonged to the plaintiff, and which he claims as a payment on account of the $40,501 loan. That, on the 22d of July, 1865, plaintiff paid to the defendant, in real estate, $22,363.13, which now stands to his credit on the book, as a payment on account of said loan. That, on the 9th of November, 1869, the plaintiff notified defendant that he thereby appropriated out of the profits belonging to him in said firm, so much as would be necessary to liquidate a balance unpaid on said $40,501 loan, and demanded a retransfer of his interest in the property, which defendant refused to execute or make.

The complaint then proceeds to charge defendant with divers acts of misconduct, among which was dividing, and appropriating to his own use, large sums of money from the profits and capital of the firm, much more than was authorized by the articles of copartnership. That he borrowed, and appropriated to his own use, large sums of money, and gave the firm notes as security. In consequence of which acts of defendant, the cash revenues of the firm were crippled, and it was compelled to suspend payment about November 4th, 1869. That the defendant was absent in Europe, during the years 1865 and 1866, and that, during that time, plaintiff had the sole charge, control and management of the business. That it was profitable, and, during that time, netted over $60,000 profits. That, since the suspension and dissolution, defendant and plaintiff have disagreed, and defendant has "usurped" the entire control of the property, and threatens to exclude plaintiff by force, if he attempts to interfere in the settlement of the partnership affairs. That defendant has opened a new bank account in his individual name, as "executor," and deposits partnership moneys in that account. That the partnership assets and property amount to over $500,000, and the debts do not exceed $200,000. That, at the time of the execution of the bill of sale to defendant, in June, 1861,

the stock on hand of the partnership was $156,227.78; real estate $165,000, subject to mortgages of $28,000; books of account (sold to defendant), $50,000. That, at the time of dissolution, there were large profits coming to plaintiff.

All these allegations are unanswered by defendant, and so far as they are properly verified, must, on this motion, be taken as true. The defendant moves, on these papers, to vacate the order of injunction and order appointing receiver. And the first alleged ground for the motion is, that the complaint is not accompanied by a sufficient affidavit of modification. The Code, section 220, provides, that it must "satisfactorily appear to the judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds for an injunction exist, or it will not be granted." It has been held under this section, that a complaint with the ordinary and usual jurat or verification alone is not a sufficient affidavit to authorize an injunction. (*Bostwick* v. *Elton*, 25 How. P. R. 362.) But where the allegations in the complaint are made positively, and not on information and belief merely, and which allegations are sworn to be true, may be taken and treated as an affidavit. This seems to be the result of the authorities. (*Badger* v. *Wagstaff*, 11 How. 502; *Woodruff* v. *Fisher*, 17 Barb. 229; *Jarvis* v. *Atterbury*, 1 Cranch R. N. S. 87; *Levy* v. *Levy*, 6 Abb. 89; 15 How. 395.) In this complaint, with one or two trivial and unimportant exceptions, the allegations are all positive, and not on information and belief. The complaint is accompanied by the usual verification, and also a special affidavit of the plaintiff, to the effect that the action had been commenced by the complaint and summons which he annexes to and makes a part of his affidavit; that he knows the contents of the complaint, and "has actual knowledge" of the matters set forth in the complaint, except such as are therein stated on information and belief; and that from such knowledge he knows that the matters of fact therein stated are true. The affidavit is somewhat inartificial, but I think it is substantially an oath that all the matters in the complaint alleged as facts, and not therein stated on information and belief, are true. I think this is sufficient within the authorities. No such affidavit, however, is required for the appointment of a receiver. There is no provision of the Code prescribing in what mode or manner the facts authorizing the appointment of a receiver shall be made to appear to the court or judge. That is left, substantially, to the rules and practice of the court.

The next objection is that the plaintiff has failed in his papers to

show or "establish (as required by section 244 of the Code) any apparent right to or interest in the property the subject of the litigation; that, upon plaintiff's own showing, he had no right or interest whatever in the partnership property or effects, but only an interest in the profits as compensation for services rendered." Without attempting to review or comment in detail upon the able and learned argument of the counsel for the defendant, it must suffice to say, briefly, that I am unable to concur with him in that view of the case. In my opinion, the several articles of agreement upon their face, together with all the surrounding circumstances, preclude the idea that either of these parties intended that this plaintiff, who had been an equal partner in this business, for forty years, and who was then an owner of one-half interest, in real and personal property in the firm, valued at $370,000, and upwards, should divest himself wholly and absolutely of all that interest, in order to borrow of his copartner, for the *use of the business*, $45,000, and to remain merely as a clerk. The contracts executed between the parties will bear no such construction; on the contrary, I am clearly of opinion that upon those three agreements, taken and construed together, as they must be, the plaintiff remained, and now is, the joint-owner with the defendant of an undivided one-half of all the partnership property, effects, real and personal, subject only to a *mortgage lien*, viz., such one-half in favor of defendant on the account remaining unpaid of the sum advanced to plaintiff. This mortgage lien has never been foreclosed, or the plaintiff's equity of redemption cut off. That equitable interest was, at the execution of the mortgage, and now is, alleged to be worth four times the amount of the mortgage. It is asserted that this mortgage became absolute and forfeited on the 1st of March, 1866. Suppose that were true, the defendant must still foreclose his mortgage lien, either by suit in court, or a sale under the mortgage; that is to say, he must in some way resort to the property, to realize for his debt. Equity will not permit him to keep it all. And if he sells or converts it into money, he must account for the proceeds over and above the amount of his mortgage debt, etc. But the mortgage did not become due at the time before stated; the partnership was not then dissolved; it was continued by mutual consent, and, finally, dissolved in the manner provided by the articles of copartnership. And, now, there is to be an accounting and final settlement of the property and affairs of this firm, and that this $45,000 loan is to enter into that accounting, is clear, because a part of the *mortgaged property*, is the *profits* which may remain in

the firm, belonging to the plaintiff after dissolution (see argument to recover). These profits cannot be ascertained until an accounting be had. All this upon the assumption that the mortgage is still outstanding and unpaid, but the complaint alleges that before the dissolution, it was, substantially, paid and satisfied.

If, therefore, a partnership be shown to exist in the profits and property of a firm, and there be a dissolution, and the parties are unable to agree among themselves as to the disposition and control of the property, upon a bill filed by one partner to close up the concern, is a matter of course to appoint a receiver. (*Law* v. *Ford*, 2 Paige, 310; *Goulding* v. *Bain*, 4 Sanford, 717; *Wright* v. *Stimpson*, 2 Barb. 379; *Dayton Wilks*, 17 How. 510.) Accordingly, there must be a receiver in this case.

The very unpleasant relations apparently existing between plaintiff and defendant, together with the acts of misconduct and misappropriation of funds *charged* against the defendant in the complaint, indicate the impropriety of appointing him such receiver, as desired by the defendant's counsel. As regards the person heretofore appointed receiver, while no direct charges of unfitness are alleged against him, yet it is said he is a stranger to the parties, and has not given adequate security, and indicating a fear and anxiety, on the part of defendant and his counsel, that the funds would not be safe in his hands and control. While I do not feel at liberty, on these grounds alone, to put upon this receiver the *stigma* of a removal for personal unfitness, I am desirous, nevertheless, that there should be no reasonable ground for suspicion or anxiety as to the entire fitness of the person so appointed, and the *absolute* security of the fund. I have concluded, therefore, to appoint an additional or co-receiver; and I do, accordingly, direct that Thomas J. Barr, whom I personally know to be a fit person in all respects, be appointed co-receiver of the property and effects of such firm, with full power as such receiver. And that he give security for the faithful performance of his duty in the sum of $50,000, with two sureties, to justify before the court or a judge, if required by defendant. That order must contain a clause, however, that the fund be charged with the fees and expenses of but a *single* receiver, such fees to be divided between the two as the court may direct. The motion to vacate injunction and order appointing a receiver is denied, without costs, and let an order be entered as above directed.

T. J. FITHIAN,
Justice.

Indorsed: Superior Court. *Abraham Clark* v. *Abraham Bininger*. Opinion on motion to vacate orders. T. J. Fithian, Justice. Exhibit No. 25. C. R. D.

The WITNESS continued — From that there was no appeal taken, and the order entered upon that decision stands now, and was in no way reversed. Shortly after that, the Bank of America filed a petition in bankruptcy against Mr. Clark and Mr. Bininger, and on that petition a receipt of direction was issued by Judge Blatchford of the district court, sitting as a court of bankruptcy, to the United States marshal, to take this property. The marshal came down to the store and got into possession, I commenced an equity suit in the name of Mr. Hanrahan, as receiver; wherein I obtained an injunction enjoining the Bank of America from prosecuting that petition.

Mr. PARSONS — We desire to see these papers, in order that we may know from whom this injunction was obtained.

The WITNESS — I say that the injunction was obtained from Judge McCunn. Hardy, Blake & Co. immediately filed another petition in bankruptcy against Clark and Bininger, and a similar precept or direction was ordered from the district court by Judge Blatchford to the marshal; I filed a bill in the first case and got an injunction from Judge McCunn enjoining Hardy, Blake & Co., and they obeyed that injunction.

Mr. PARSONS:

Q. Do you state that those injunction suits were commenced in the name of Hanrahan as receiver? A. Yes, sir.

Q. Here are the three orders of injunction (showing witness papers)? A. Yes, those were the orders.

Mr. MOAK:

Q. What is the fact as to who was the plaintiff? A. I see Mr. Compton is on here as attorney; these are not the papers to which I refer.

Q. Have you the papers? A. I have not; they are on file.

Mr. PARSONS — We must be permitted to object to the witness stating the contents of papers which are not produced, when we have very good reason to suppose that he is mis-stating. If we thought he was correct in his recollection, we would not raise the objection.

The question being put, as to whether the objection should be sustained, was decided in the affirmative.

Mr. PARSONS — On any difference in the Senate, we will withdraw the objection.

Mr. MOAK:

Q. Go on, Mr. Morgan? A. When a petition was filed in the district court, by the firm of Ives, Beecher & Co., an injunction was granted by Judge McCunn, restraining them, which they disobeyed; proceedings were then taken against Mr. Beecher for contempt; that motion came on before Judge McCunn, and Judge McCunn wrote an opinion and fined him; I don't know how much, whether six or ten cents.

Q. Is that opinion reported? A. I think so.

Q. Do you recollect the title of the cause? A. No, sir.

Q. Have you a copy of that opinion? A. I have not.

Q. Go on? A. The United States marshal and Mr. Hanrahan, as receiver, were at this time in possession of the property; a motion was then made by Mr. Bangs, in the District Court of the United States, and also a similar motion in the Circuit Court of the United States, praying for an order or a decree to the United States marshal to remove all persons having possession, or claiming the custody or control of this property, and that the marshal should take absolute control; that motion came on before Judge Blatchford, was argued, and he rendered a decision; Mr. Bangs then renewed his motion, and that was argued on the question of comity of relation between the State and the Federal courts, before Judge Blatchford; I hold in my hand an opinion which is certified, and which is the opinion delivered on that motion by Judge Blatchford. "I think when property is lawfully placed in the custody of a receiver by the court which appoints such receiver, it is in the custody and under the protection and control of such court for the time being, and no other court has a right to interfere with such possession, unless it be some court which has a direct supervisory control over the court whose process has first taken possession or some superior jurisdiction in the premises. In the present position of this case it does not appear that the court has such superior jurisdiction in the premises or such superior control," and he, therefore, denied the motion for the direction to the marshal to take this property. That decisions reported in the books, and on the question of comity of relation between the State and Federal courts, and, have often fancied, has more weight than all the decisions I have ever read combined.

Q. What next? A. The marshals were then withdrawn from

the premises; that motion I argued; a similar motion came on in the circuit court, wherein Mr. Pryor attended and also proceedings upon review (if I understand right) of this motion, and the writ of prohibition was also granted, which was also attended to by Mr. Pryor.

Q. Granted or asked for? A. Asked for; he appearing, as I understand, at that time; in the month of April or about that time; it was after that, I think; the assignee in bankruptcy then came into the Superior Court and asked to be substituted, nominally, as plaintiff and defendant in the suit; that motion was granted, and he was substituted in the suit of *Clark* v. *Bininger;* an order was made directing Mr. Barr and Mr. Hanrahan, or Mr. Hanrahan, to deliver over to Mr. Barr all the property which he had, which he did, directing Mr. Barr to deliver over to the assignee in bankruptcy all the property which he had, except and saving sufficient to satisfy the liens which had accrued on this property in the State court; Mr. Barr did transfer to the assignee in bankruptcy all of the property, excepting some personal property in Liberty street.

Q. What further, if any thing? A. It was referred to Mr. Thomas Darlington, as referee, to pass the accounts of Mr. Hanrahan, and to pass the accounts of Mr. Barr, Mr. Titus, Mr. Compton, and the sheriff's bill for fees; that reference has been pending for a year or more, and has been finally submitted to Mr. Darlington, and he had not, up to the time I left New York, made his decision.

Q. From the time the proceedings were first commenced up to the time they were finally wound up by judgment in the Superior Court, there was a pretty active practice going on in all branches of the Superior Court and of the Federal courts in the city of New York? A. Yes, sir; both at the same time.

Q. What counsel was engaged on the other side? A. Mr. Bangs.

Q. Bangs says his bill was $5,000? A. Mr. Titus —

Mr. Parsons — There is no such testimony, and I think it is improper to state that.

Mr. Moak — I didn't mean Mr. Bangs; I meant the other gentleman, Mr. Titus.

Q. Do you know what Bangs' bill was? A. Bangs, representing the assignee in bankruptcy, of course, made no claim in the State court.

Q. You don't know what his bill was? A. No, sir.

Q. What counsel were engaged on the part of the receiver except yourself? A. Mr. Pryor.

Q. Anybody else? A. That is all.

Q. Compton was not counsel for the receiver? A. No; Compton was attorney for Clark.

Q. So that you and Pryor were counsel against Bangs and Titus? A. Yes, sir.

Q. You state, prior to the time you made the payment to Judge McCunn, on the 4th of January, 1870, you had received of the assets of the firm of Clark & Bininger, of the receiver, $1,000; when did you receive that, and how? A. It was November 26, 1869.

Q. You said you were appointed receiver in the case of *Stevenson* v. *Turner*, in answer to a question put by counsel; state what there was in that case? A. The proprietors of a saloon on Banks street in the city of New York; a billiard or drinking saloon, or a sort of hotel; I was receiver, and the amount of money in the case I received was a couple of thousand dollars; three thousand dollars or something of that kind; it was five or six years ago.

Q. Is that matter all wound up? A. Long ago.

Q. Without any pretense of unfairness or any thing else? A. Not at all.

Q. Mr. Gano was your brother-in-law? A. He married Miss Waring, who was a sister of Judge McCunn's wife and my wife.

Q. He married a sister of the wife of Judge McCunn and your own wife? A. Yes, sir.

Q. You were asked about the case of Hanrahan & Weeks, as receivers; is that one of the cases referred to in the charges? A. Yes, sir.

Q. The $6,500 that you received from the receiver; did you receive that without any order from Judge McCunn for payment? A. Yes, sir; Judge McCunn made no order; and I may say, in that connection, that I went to Judge McCunn for an order allowing counsel fees, and he refused to grant it.

Q. When was the last time that Judge McCunn made any order in the case, according to your recollection, as far as you know? A. That order of the 30th or 31st of April was the last.

Q. Thirtieth March you mean? A. Yes, sir.

Q. On the 31st of March, whichever date it was, did you take any part in arranging for the sale of liquors sold at auction? A. No. sir; I was in the habit of going there every day; Mr. Gorham was there; a very responsible gentleman.

Q. Who was Mr. Gorham? A. He used to be sheriff of San Francisco, and is not now in any business.

Q. Where does he reside? A. In the city of New York.

Q. Has resided there how long? A. He came here shortly before this Bininger suit.

Q. What is his pecuniary condition? A. He is a responsible man; no question about it.

Q. Where did you obtain the order from Judge McCunn modifying the order of Judge Jones? A. At the Superior Court; possibly at chambers or special term.

Q. You went there on that occasion, and found Judge Jones, who had granted the order, had left? A. Yes, sir; or one of those orders; there are two orders, one on the 30th of March, and one on the 1st of April, I think.

Q. Thirty-first, the other is, I think? A. That was the first order.

Q. What is your recollection as to which one it was that was obtained from Judge McCunn in Judge Jones' absence? A. I think that was the first order.

Q. What affidavits did you present to Judge McCunn? A. The affidavit here of Mr. Hanrahan.

Q. This affidavit read and referred to here? A. I have not heard it read; I have not been here all the while.

Q. Where is Mr. Hanrahan now? A. I suppose; I believe him to be somewhere in Texas, or down in New Orleans, or in San Francisco.

Q. When did you dissolve partnership with him? A. last spring.

Q. Have you seen him since about that time? A. He then commenced to practice law in Jersey City, and the first I knew he had gone away, and had taken his family with him and gone on a steamer which went to New Orleans.

Q. Have you seen him since, or heard from him? A. No, sir; yes, I did, I saw a gentleman who said he saw him in San Francisco.

Q. You dissolved partnership last spring? A. Yes, sir.

Q. The spring of '71? A. Dissolved in the month of July, '71.

Q. That is not last spring? A. It was about eleven months ago.

Re-direct examination by Mr. PARSONS:

Q. Who is Mr. J. T. Albright, whose name appears in Mr. Hanrahan's account, as having received a counsel fee of $150, on the 2d April, 1870, on a motion before the Superior Court?

Mr. MOAK — Mr. President: We desire to object to that evidence as immaterial; there is no pretense that it was done by the order of Judge McCunn, or that he ever knew of it or heard of it.

Mr. PARSONS — Mr. President: That is no objection, merely on the order of proof.

Mr. Moak — Mr. President: I do not understand the counsel to announce that he expects to prove it.

Mr. Parsons — Mr. President: It seems to be pretty apparent, in reference to all this testimony, and in fact to this whole case, we are groping in the dark; these transactions of which we are inquiring were not in the broad day; here is a circumstance we may be able to connect Judge McCunn with; we think the employment of Mr. Albright compares with the employment which was suggested by Judge McCunn.

The question being put as whether the Senate would sustain the objection, it was decided in the negative.

A. Mr. Albright is a lawyer.

Q. Had he at that time any relation to or association with any justice of the Superior Court? A. Not that I know of.

Q. Don't you know? A. I know that he was in the office with Mr. Bushnell, and that Mr. Bushnell had been oftentimes appointed referee by Judge Jones.

Q. What was the association between Judge Jones and Mr. Albright? A. None whatever.

Q. What motion was that for which Mr. Albright was employed? A. That was some motion before Judge Jones, I don't know what it was.

Q. For whom did Mr. Albright act as counsel? A. For Mr. Hanrahan.

Q. Who employed him? A. Mr. Hanrahan.

Q. What had you to do with it? A. Nothing.

Q. Did you see him? A. I did.

Q. In connection with the employment? A. I saw him in court on this motion; it was some motion; I don't remember what that motion was.

Q. Can you suggest to the Senate why it was that, for the motion to come on before Judge Jones, Mr. Albright was the counsel selected? A. I cannot.

Mr. Moak — Mr. President: We desire to object to that, on the ground that Judge McCunn is not connected with that, in any way, and there is no claim that they will connect it.

Q. Was that one of the motions, that motion upon which Albright was employed, one of the motions upon which you represented Hanrahan as receiver? A. No, sir; I don't remember now; I can't say what motion it was that was on before Judge Jones; oh, Mr. Albright attended for Mr. Hanrahan; he was employed, and whatever it was, I didn't interfere.

Q. You stated, under the examination by the counsel for Judge McCunn, that there was a receiver's bond in the penalty of a thousand dollars; when was that bond drawn? A. At the same time.

Q. Do you mean at the same time of the second one? A. Within a short space of time; the first bond was in the sum of a thousand dollars.

Q. What day was the first bond drawn? A. The same day the second bond was; probably not more than half an hour before the second one.

Q. Did you take that bond to Judge McCunn? A. I did.

Q. Was the arrangement for the increase of the bond from $1,000 to $10,000 made on the occasion you called on Judge McCunn? A. Yes, sir.

Q. Was it for the insufficiency of the first bond? A. No; all the conversation that took place—I went up to Judge McCunn, and he said, Mr. Morgan, this firm of Bininger & Clark seem to be doing a large business, and this bond is small, and you execute this bond in the sum of $10,000; and I said your order is in the sum of $1,000; and he said, it makes no difference, you execute the bond in the sum of $10,000; and that is why this bond came to be executed in the sum of $10,000.

Q. Were you right in saying to Judge McCunn's counsel, that the bond given simply required a bond in the sum of $1,000? A. Yes, sir.

By Mr. Benedict:

Q. Did you take these two bonds with you to judge McCunn? A. No, sir; I did ultimately; I first went with one bond to Judge McCunn.

Q. And then he told you to make the affair one? A. Yes, sir; I went back to Wall street again and did it, and I went up a second time.

Q. You were asked for the counsel for Judge McCunn as to your extensive practice in all the courts subsequent to the appointment of Mr. Hanrahan as receiver; whether down to the present time you have ever actually tried a case in court before a jury in a court of record? A. I tried a case a few days before I was on the stand on the last examination, which lasted four or five days.

Q. Is not that the only case you have ever tried? A. No, sir, I have tried a good many cases.

Q. Prior to that time? A. Yes, sir; and argued more motions than you have during the same time.

Q. Prior to your examination before the judiciary committee? A. Yes, sir.

Q. Didn't you state on your examination before the judiciary committee, that one case was all that you had tried down to that time? A. I did not; if the stenographer so took it down it was a mistake.

Q. Can you name any other case prior to that examination? A. I tried the case of *Whitbeck* v. *Morgan* a few weeks after that in the Supreme Court in Kings county.

Q. Do you remember any other than those two in all the courts of record in this State? A. I think that during this winter since I was here, since I was on this examination, I tried the case of *Harrison* v. *Toss* in the Superior Court before Judge Monell, and the trial was on two days, and a juror was taken sick and the case went over; it was a case in which one shot the other.

Q. You have stated Judge McCunn gave you a modification of his own order modifying Judge Jones' order, which modification required proceeds of the receiver's sale to be deposited in the New York Life Insurance and Trust Company? A. Yes, sir.

Q. Can you explain how it is that when Judge McCunn had made that modification the proceeds of the sale in point of fact got into the Gallatin National Bank into your bank account? A. Not after that time.

Q. Were not all the proceeds from the receiver's permitted by Judge McCunn's order modifying Judge Jones' order receiver subsequent to the 31st of March, 1870? A. Yes, sir; there must have been about $2,000 received since that time.

Q. The amount is not much larger? A. The amounts are over $4,000 and $6,000.

Q. Explain how, if that order of Judge McCunn, requiring these payments to be made into the New York Life Trust Company, that the money got into your Gallatin National Bank account? A. I have not said the money got there.

Q. Didn't the money get there? A. Some of it; the explanation of that is simply this: That that order directing this payment at the same time provided for the payment of the expenses; there was money deposited in this bank to meet the expenses, and money deposited there to pay this mortgage.

Q. Do you remember that you got another order, a third order of modification from Judge McCunn, and that modification permitted any use to be made by Mr. Hanrahan of money that he liked? A. I do not.

Q. Is that the fact? I don't know of any such order.

Q. Do you mean to say that you don't know of an order modifying the order directing the deposit in the Trust Company? A. I know of no order granted by Judge McCunn which did not require the proceeds to be deposited in the Trust Company.

Q. Was there more than one such order requiring the funds to be deposited there? A. There were two orders; the first order was made on the 30th or 31st, as made, and there was another order on the 1st or 2d of April.

Q. On the next day? A. That or the day after.

Q. Wasn't there a subsequent order obtained by you from Judge McCunn relieving the provision requiring the deposit in the Trust Company? A. No, sir, not that I know of; these two orders required the proceeds to be deposited.

Q. You have spoken of services rendered by you, among the other services rendered by you to Mr. Hanrahan, as receiver, in the preparation of bills of complaint, in three suits, upon which to obtain injunctions against creditors who were proceeding in bankruptcy? A. Yes, sir.

Q. Give the titles of those three suits? A. Hanrahan, as receiver, plaintiff, against Bank of America, and against Isaac Beach & Co., and against Hardy, Blake & Co.

Q. Will you state whether there were any such suits brought by Mr. Hanrahan, as receiver? A. Yes, sir; I drew three complaints for Mr Hanrahan in three such suits.

Q. Complaints upon which judgment was obtained from Judge McCunn? A. Yes, Sir.

Q. Do you state positively? A. Yes, sir.

Q. What did you do with the papers upon which these injunctions were obtained? A. When I come to think of this matter, it may be possible that those injunctions of Compton have got in there.

Q. Didn't you know perfectly well, when you were giving your testimony, that the fact was that the suits were commenced by Mr. Compton in behalf of Mr. Clark? A. No, sir.

Q. Will you still adhere to your statement that the suit was brought in the name of Mr. Hanrahan? A. Yes, sir; if there is a question about it I will get the papers now.

Q. There is, and you still adhere to the statement? A. Yes, sir.

Q. Did you apply to Judge McCunn, and in either of such suits obtain injunctions? A. Yes, sir.

Q. There were three injunctions; one in the suit of *Abraham B.*

Clark v. *Milton B. Hardy and others;* another, *Abraham B. Clark* v. *Bank of America;* another, *Abraham B. Clark* v. *Frederick C. Ives and others;* state whether you procured from Judge McCunn those injunction orders? A. No, sir.

Q. Either of them? A. No, sir.

Q. Do you know who did? A. No, sir.

Q. Were they not all obtained from Judge McCunn? A. Yes, sir; in Judge McCunn's handwriting.

Q. Was Judge McCunn holding the regular special term and chambers part of the Superior Court when either of those three injunctions, or when either of the three injunctions you procured from him were obtained? A. I don't remember; I cannot say.

Q. Haven't you refreshed your recollection, and don't you know very well that he wasn't? A. I haven't refreshed my recollection; I cannot say whether he was holding the special term at that time or not.

Q. Can you explain to the Senate how it happens that all these six injunction orders were all got from one judge, and that one judge was Judge McCunn, the orders being in six different suits and obtained at different times? A. There is a question which underlies this case, as I before stated, as to the relation of the two courts, and Judge McCunn had taken the position that the possession of the State courts couldn't be interfered with, and the other judges, in view of that fact, they being very grave questions, which were not settled, didn't desire to grant any orders.

Q. How did you ascertain no other judges of the Superior Court would give any of these injunction orders? A. I didn't say that wouldn't give injunction orders.

Q. How did you ascertain that the other judges of the Superior Court desired that applications for such injunction orders shouldn't be made to them? A. I understood it generally.

Q. From whom? A. From—I don't remember now.

Q. Did you ever hear any judge say so? A. I think I did; I think Judge Jones told me so.

Q. Do you state that positively? A. I will not; I think Judge Jones told me so.

Q. Did you ever apply to any other judge for any order in this whole litigation? A. I don't remember that I did.

Q. Don't you remember that you didn't? A. I have no recollection.

Q. There were so many proceedings, why did you always go to Judge McCunn? A. Because, as I say, there was a question in this

case that a good many men didn't understand; it was a new and novel question, and they hadn't given it consideration, and didn't, in all probability, feel like issuing these orders; and I say now, as a matter of law, these orders were all valid orders, and Judge McCunn, when he enjoined the Bank of America, and Hardy & Co., and Blake & Co. and Isaac Beach & Co., did so properly, and the orders were valid; had the right to issue them under the decision of Judge Blatchford.

Q. Do you know Abraham B. Clark? A. I do.

Q. Did you see him pretty frequently from November 16, 1869, forward? A. I saw Mr. Clark in the store.

Q. Did you see him pretty frequently? A. I don't suppose I ever saw Clark ten times.

Q. Did you ever see him and Judge McCunn together? A. Never.

Q. Are you quite sure of it? A. I am as positive of that as I am that the sun shines during the day generally.

Q. When did you first learn that Judge McCunn was in the habit of going to Clark's house, and Clark in the habit of calling upon Judge McCunn, about this litigation? A. I never knew that until I attended before the committee of the Assembly at the Fifth Avenue Hotel.

Q. Didn't Judge McCunn on any of these occasions when you called upon him for orders in suits in which Clark was interested, didn't he ever raise the objection that he was in consultation and advised with Clark? A. Never.

Q. Never mentioned the matter? A. No, sir.

Q. Never refused to sign any order upon that ground? A. Well, yes; he didn't refuse on that ground.

Q. Didn't refuse to sign on any ground? A. Yes, sir.

Q. How did he overcome his scruples and finally sign the order? A. Because he made up his mind that it was his duty in his province to use the injunctions which he did, and he was right; it is generally known in the civilized world —

Q. You have stated to the counsel of Judge McCunn that from the time of your appointment as counsel for Hanrahan you were actively engaged as counsel in proceedings in all departments of the Superior Court and of the Federal courts? A. Yes, sir.

Q. Will you again make that statement? A. That I was —

Q. Engaged as counsel for Hanrahan in all departments of the Superior Court and Federal courts? A. Yes, sir.

Q. Did you appear as counsel, or take any proceedings as counsel,

in the trial branch of the Superior Court? A. On what motion, or on what trial.

Q. That is what I want to know? A. If you know the trial I don't.

Q. Neither do I.

Q. You say that you acted as counsel for Hanrahan as receiver, in all departments of the Superior Court, in the trial terms of the Superior Court; the departments of that court? A. Yes, sir.

Q. What proceeding was it which took place at the trial term of the Superior Court in which you acted as counsel for Hanrahan? A. The motion to punish Beecher for contempt was on at Part two.

Q. Was that a proceeding in the trial term of the Superior Court? A. No, it was a judge's order.

Q. State whether you are correct, or whether you have not made a mis-statement in respect to your having acted as counsel for Hanraran in any proceeding which was at the trial term of the Superior Court? A. I don't know that I have made any mistake; it is very certain that I was present on this motion at the trial term, when the motion to punish Beecher for contempt was up.

Q. That was a proceeding before Judge McCunn as chamber judge, he at the time holding the trial term of the Superior Court? A. Yes, sir.

Q. There are two trial terms of the Superior Court? A. Yes, sir.

Q. Is another department of the Superior Court the general term? A. Yes, sir.

Q. State the proceeding in which you acted as counsel for Hanrahan, which came on at the general term of the Superior Court? A. I don't know of any.

Q. Leaving out the general term and the two trial terms, what department of the Superior Court remains? A. The special term.

Q. Is the special term the only branch of that court in which you acted as counsel for Hanrahan? A. I was there on the motion to vacate the order appointing Hanrahan.

Q. Why didn't you say to Mr. Moak, you acted as counsel for receiver in all the departments of the Superior Court? A. If I stated I hadn't, it is clearly a mistake. There were no motions or proceedings ever taken by Hanrahan, or against him, when I wasn't in court.

Q. Were any such proceedings at the chambers term? A. Proceeding before Judge McCunn, holding, if I remember right, Part one.

Q. Was he holding Part one in respect to this business? A. No.

Q. Were any of these proceedings, other than these proceedings, in the nature of chambers business? A. I don't understand that.

Q. What happens at Part one? A. Trial term; it was a motion.

Q. Do you mean that you didn't understand my question? A. I mean to say I didn't the way you put it.

Q. Come to the Federal courts? A. In that connection I will say, that Beecher had violated an order made by Judge McCunn.

Q. I didn't ask that; come to the Federal courts; what proceedings took place in either branch of the United States court, in which you, as counsel for Hanrahan, did any thing other than to read one or more affidavits? A. On this motion, wherein this comity of relation, between the State and Federal court, came up, the motion was argued by me, and this certified copy of the opinion has this indorsement.

Q. No matter about that. A. P. N. Bangs for the assignee, and James F. Morgan for the receiver, and that motion I argued.

Q. Was Mr. Pryor present? A. No; the motion ran through two days, or it may have been in the morning, but, at any rate, Pryor had made his motion before I got there.

Q. Did you open your mouth in that proceeding, except to read some affidavits? A. I argued that motion; this question before the District Court of the United States, as I have already testified to, and there is no doubt about it.

Q. Bangs being opposed to you? A. Yes, sir.

Q. You have stated, on your examination by Judge McCunn's counsel, that the District Court decided that the view taken by Judge McCunn was correct? A. Yes, sir.

Q. Maintaining the possession of the receiver against the right of the assignee in bankruptcy; you have stated that? A. Yes, sir.

Q. Have all those proceedings in the Superior and Federal courts come to an end? A. No.

Q. I mean so far as the custody of the property is concerned? A. They have come to an end in the Superior Court; the assignee in bankruptcy applied there for the property, and when the assignee applied, the Superior Court directed the property to be paid for to the assignee.

Q. That was on the ground the assignee was entitled to it, or the receiver entitled to it? A. That was on the ground that the assignee was entitled to this property, when he came into the Superior Court and asked for it.

Q. That is, as against the receiver, that he was entitled to it? A. Yes, excepting the liens.

Q. For commissioners? A. That had occurred in the State court.

Q. For fees; do you remember that when the order was made by Judge Monell to remove Hanrahan, as receiver, and restrain further action by him, as receiver, there was a fund of about $4,000 in bills which had been received by him on deposit in your safe? A. No, not in my safe.

Q. In the safe of Morgan & Hanrahan? A. No.

Q. Where was the money? A. Hanrahan had a safe of his own.

Q. In the office of Morgan and Hanrahan? A. Yes, sir, there were three safes there; one was an office safe, and Hanrahan had one and I had a safe.

Q. What became of that money? A. Which?

Q. That $4,000? A. That was in Hanrahan's safe.

Q. Yes, sir, if it was there? A. I don't know that it was there.

Q. That $4,000 about which you understood me to inquire? A. I don't know what $4,000 you refer to.

Q. Do you remember a sum of $4,000, or about that sum, which came from the receiver to you pending the reference before Darlington? A. Yes, sir, I understand you now.

Q. Didn't you understand that before? A. No.

Q. Was there any other $4,000 about which you thought I was inquiring? No.

Q. Tell about that? A. Hanrahan paid this bill of mine as counsel, amounting to whatever it was; $11,000, or $10,000, or $11,500, with this money.

Q. Was that after Judge Monell had restrained his making any payments? A. I don't remember as to the time.

Q. Don't you remember that? A. No.

Q. Do you mean to say that you didn't remember whether that $4,000 was paid to you, before or after that order restraining the payments by Judge Monell? A. I cannot at this moment say on what day or time this $4,000 was paid to me.

Q. Is that the question I have asked you? A. I presume that is an answer to your question.

Q. Answer me the question I put to you; do you not remember that this sum, $4,000, or whatever it was, was paid by Hanrahan to you, after Judge Monell's order removing him as receiver, and restraining any action or payment by him as receiver? A. I don't.

Q. You mean to state that positively? A. I do.

Q. Wasn't this the situation, that Judge Monell, in making his order in April, I think April 26th, or whatever the date was when Hanrahan came to make out his account, there remained a sum of

about $4,000, and that that went to you and squared the account? A. I mean to say there was a balance of $4,000.

Q. Didn't that go to you? A. Certainly.

Q. So that all the proceeds of Clark & Bininger, as received by Hanrahan, were used up in the expenses, with the exception of the sum of about $4,000, and that you received as counsel, in addition to the payments previously made? A. Yes, sir.

By Mr. D. P. Wood:

Q. What was the total amount received by the two receivers from this estate of Bininger & Co.? A. As near as I can say, Mr. Senator, about $60,000; I think Mr. Barr received $40,000, as near as I can remember.

Q. Mr. Hanrahan $20,000? A. Yes, sir.

Mr. Parsons — It is $22,000?

The President — The Chair has received a communication from the counsel for the accused, and from the accused to his counsel, and which he deems proper to lay before the Senate, which the clerk will read.

The communication is in the words following:

Albany, *June* 26, 1872.

To the Honorable the Senate of the State of New York:

I inclose you herewith a letter just placed in my hands by my counsel, who had been conducting, in my behalf, the investigation now going on before your honorable body. It is impossible for me to disregard the advice of these gentlemen, so distinguished at the bar for ability and integrity. I therefore feel it my duty to yield to the advice of my counsel, and leave it to your honorable body to take such action in the premises as you may deem advisable.

Very respectfully,

JOHN H. McCUNN.

Albany, *June* 26, 1872.

Hon. John H. McCunn:

Dear Sir — The proceedings before the Senate of this State, upon charges brought against you, and communicated to it by the Governor, have reached a point where, as your counsel, we consider it our duty to make the following communications to you:

Before undertaking your defense we were entirely satisfied of your innocence of intentional wrong in the transactions on which

were based the charges against you; and we have thus far seen nothing to induce a change of the opinion with which we entered upon the investigation.

Our examination of that part of the Constitution upon which the proceedings against you are assumed to be based, viz.:

"All judicial officers, except those mentioned in this section (judges of the Court of Appeals and justices of the Supreme Court), and except justices of the peace and judges and justices of inferior courts, not of record, may be removed by the Senate, on the recommendation of the Governor, if two-thirds of all the members elected to the Senate concur therein," has led to the conclusion, in which we are supported, as we believe, by the action and opinions of two former Governors, acting under the same, or similar, constitutional provisions, that an unqualified recommendation by the Governor of your removal was necessary to confer jurisdiction upon the Senate. This recommendation the Governor has not, in your case, made, and we are of opinion, therefore, that the proceedings before the Senate are not warranted by the Constitution.

The determination of the Senate to investigate charges for acts alleged to have been done by you prior to the time of the election under which you now hold your office, involves, of necessity, a mere review of the propriety of your election by the people, a power which, we believe, is not conferred upon the Senate. If it can be done in one case, it can be done in all cases of the election of officers coming within the provisions of the Constitution which we have quoted, without reference to the conduct of the officers after their election.

Notwithstanding these convictions, we were willing to aid you as far as our assistance could be of service; and the Senate having determined that "all the rules, legal and usual, in courts of record in this State, in regard to the introduction of evidence and the examination and cross-examination of witnesses," should be observed, we hoped not only that the investigation might lead the Senate to the conclusion that you ought not to be removed from office, but that nothing for which you were not properly and legally responsible would be admitted in evidence to operate elsewhere than before the Senate to your prejudice. We beg leave, however, to state, without intending any reflection upon the Senate, or upon the gentlemen conducting the proceedings against you, that our views in regard to the admissibility of much of the evidence produced against you differ so widely from the rulings on the subject, that we are disposed to question the propriety of our continuing longer in the position we

have occupied, and to doubt whether our doing so would be of any essential service either in your defense, or in excluding from the record of the proceedings against you, of what we deem irrelevant and improper evidence. We, therefore, with your approbation, are disposed (and we would avise you to that course) to leave it to the Senators, unimpeded by you, or by us in your behalf, to make such disposition of the charges against you as, in their judgment of their power and duty, shall seem just and right.

If their judgment should be against you, which we earnestly desire may not be the case, the jurisdictional question to which we have alluded will, as we believe, be open to review by another tribunal, if it should be your choice to present them there.

Very truly yours,

H. R. SELDEN,
JOHN E. DEVLIN,
A. C. DAVIS,
N. C. MOAK,
W. S. HEVENOR.

Mr. CHATFIELD — Mr. President: I move that the hour of adjournment be indefinitely postponed.

Mr. PERRY — I move to amend the motion of the senator by adjourning until to-morrow morning at 9 o'clock.

Mr. ROBINSON — Mr. President: I desire to inquire at what time the case of Judge Curtis is returnable; I think it was 7 o'clock this evening.

The PRESIDENT — It was returnable before the committee, the Chair is advised.

Mr. PALMER — Mr. President; I move an amendment to the amendment, that we take a recess until 8 o'clock.

Mr. D. P. WOOD — Mr. President: I don't see any occasion for changing our course of proceedings in consequence of any thing that has taken place here within the last few moments; it appears to me it is our duty to go on as we have begun and as we have ruled, fixing the time of our session, the length of the session, and I think we should take the usual adjournment until to-morrow morning, unless there is other business; it is suggested that this case may be finished to night; if any such encouragement as that can be given by the counsel for the prosecution, I should have no objection to sit until 8 o'clock; I think we had better adjourn until to-morrow morning, and that will give the counsel time to consult.

Mr. PARSONS — Mr. President: I simply desire to express the

hope that the Senate will abstain from taking a recess out of deference to any surprise which they may think has occurred on our side, or any want of readiness to meet what we do not regard as an emergency; we are prepared to go right on.

By Mr. PERRY — I had intended, without reference to the communication received, to make a motion to adjourn until to-morrow morning at 9 o'clock; we have been in continuous session eight hours, and, on consultation with some of the senators, I am satisfied it is the desire we should have some rest, without regard to any communication or any matters that have come up recently; I think it is imminently proper we should adjourn until to-morrow morning and go to work in the usual way, and I insist upon my amendment.

The PRESIDENT — The hour of 7 o'clock having arrived, the Senate is adjourned until to-morrow morning at 9 o'clock.

ALBANY, *June* 27, 1872.

The Senate met at 9 A. M., pursuant to adjournment.

The President Hon. ALLEN C. BEACH, in the chair.

The CLERK called the roll, and the following senators were found to be present:

Messrs. Adams, Allen, Baker, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Lewis, Lowery, Madden, Perry, Robertson, Tiemann, Weismann, D. P. Wood, J. Wood.

Messrs. Parsons, Van Cott, Stickney, and Harrison, appeared as counsel, in behalf of the prosecution.

The respondent did not appear, either in person or by counsel.

The PRESIDENT — A quorum being present, the prosecution will proceed with the case.

Mr. HARRISON — Will the Clerk please call James M. Gano.

The CLERK called James M. Gano; no response was made.

Mr. HARRISON — We ask that the sergeant-at-arms be instructed to attach him and bring him into the Senate chamber.

GEORGE N. BANGS, called on behalf of the people, being duly sworn, testified as follows

By Mr. PARSONS:

Q. Are you an attorney and counselor at law? A. Yes, sir.

Q. Of what firm? A. Of the firm of Bangs & North now.

Q. Are you a partner, and for how many years have you been a partner in the business of Francis N. Bangs? A. Yes, sir; for six or seven years.

Q. Do you remember certain proceedings in the Superior Court of the city of New York, before Justice J. H. McCunn, in the suit, or growing out of the suit of *Clark* v. *Bininger* against John C. Beecher, as assignee of A. Bininger & Co.? A. I do.

Q. State, if you please, any thing which came under you observation on the part of Judge McCunn with reference to any arrest of Mr. Beecher? A. Within a day or two of Mr. Beecher's appointment as assignee in bankruptcy of Mr. Bininger and Mr. Clark, Mr. Beecher brought to the office an order to show cause which had been served upon him that morning about 10 o'clock, returnable before Judge McCunn at half-past 10; the order requiring him to show cause why he should not be attached for contempt in making a claim to the property of Bininger & Clark as receiver; I went to the Superior Court in response to that order (as it was returnable immediately) early in the morning; Judge McCunn was holding trial term; Mr. Jas. F. Morgan appeared there; before the calling of the calendar, when Judge McCunn came in and took his seat, he inquired of Mr. Morgan if he had any business in court; Mr. Morgan announced that he appeard in the matter of Bininger, and Judge McCunn inquired if Mr. Beecher was in court; no response was made; on his inquiry again, I announced that I appeared as representing Mr. Beecher, stating the fact that an order had just been served; and the judge demanded that Mr. Beecher should attend, and inquired where Mr. Beecher was; I replied that I did not know, and he then ordered an officer of the court, who was standing by, to go and bring Mr. Beecher; he directed him to go with me; I declined to go with the officer, and I immediately left the court-room and went down to the office.

Q. Did the officer leave on the direction of Judge McCunn? A. He did.

Q. Was any warrant or any authority of any kind prepared, while you were there and furnished to the officer? A. None whatever.

Q. How shortly after the direction from Judge McCunn for him to go and bring Mr. Beecher did he start? A. Immediately.

Q. Was there time for the preparation of any papers of any kind? A. No, sir.

Q. I have been informed, sir, that something, at some time, occurred in your presence, on the part of Judge McCunn, to the

effect that he would take certain action against Mr. Bininger; do you remember any declaration of that kind? A. No, I do not recollect.

Q. Any thing to the effect that he would drive him away, or any such expression? A. No, I don't recollect any such thing in my presence.

EDWARD VAN NESS, a witness, called in behalf of the people, being duly sworn, testified as follows:

Mr. STICKNEY:

Q. Mr. Van Ness, your are a counselor at law in the city of New York? A. Yes, sir.

Q. What connection had you with the case of *Van Ness* v. *Taliaferro*? A. I was the plaintiff.

Q. Did you appear in person in that suit? A. No, sir.

Q. Who was the plaintiff's attorney? A. Sidney W. Cooper.

Q. The case was pending in the Superior Court, was it? A. The cause had been referred, by consent, to Thomas Edsall.

Q. It had been referred by consent? A. Yes, sir.

Q. Was that by consent of the parties, or not? A. Yes, sir.

Q. And will you state what afterward took place? A. The action was brought to test the title to about $3,000, which was in the hands of Leeds & Miner, auctioneers; all the defendants appeared and put in answers; the attorneys for all the parties referred this action, by consent, to Thomas Edsall; and all the parties appeared before Thomas Edsall, and the plaintiff rested.

Q. How far had the hearing before Thomas Edsall proceeded? A. The plaintiff had produced his evidence and been cross-examined and had rested; one of the defendants then moved, on an affidavit, that he had not personally given his consent to this reference.

Q. His attorney consented? A. His attorney had consented.

Q. What was the motion then made? A. He made a motion before Judge McCunn to set aside this order of reference, on the ground that the case was not referable; that it ought to be brought before the court.

Q. By whom had the order of reference been entered? A. By Judge McCunn, on consent.

Mr. STICKNEY — I will read to the Senate, from the files of the court, the original order to show cause, granted by Judge McCunn, and ask to have that order, with the papers annexed, put in evidence, and it will be marked exhibit No. 26:

Exhibit No. 26.

At a Special Term of the Superior Court, held at the City Hall in the city of New York, on the 5th day of June, 1869.

Present — Hon. John H. McCunn, *Justice.*

Edward Van Ness
agst.
Sarah A. Taliaferro, Balthezar Decker, Henry H. Leeds and Allen B. Miner.

Upon the affidavit of Sarah A. Taliaferro, and the order made herein and entered on the 4th inst., and on motion of Mr. Cooper, plaintiff's attorney, let the defendants Taliaferro and Deckert show cause, before one of the justices of the court, at the City Hall, in the city of New York, on the 7th day of June, instant, at 10 o'clock in the forenoon of that day, why the said order, made and entered herein, on the 4th day of June, instant, should not be vacated, and for such other and further relief as to the court may seem just, with costs. In the mean time, let the reference now pending before Thomas H. Edsall, Esq., stand adjourned until the hearing and determination of this motion.

J. H. McCUNN,
Justice.

Indorsed: New York Superior Court. *Edward H. Van Ness* v. *Sarah A. Taliaferro et al.* Order to show cause. Motion vacating order appointing a referee granted, and a new referee appointed, together with a receiver. Wm. M. Tweed, Jr., new referee, and Thomas J. Barr, receiver. J. H. M. received, June 6, 1869. Adjourned to Monday, June 8, 1869, at 10 o'clock. Dated June 9, 1867.

At a Special Term of the Superior Court of the city of New York, held at the City Hall, in the city of New York, on the 4th day of June, 1869.

Present — Hon. John H. McCunn, *Justice.*

Edward Van Ness, Plaintiff,
agst.
Sarah A. Taliaferro, Belthaser Decker and others, Defendants.

Order to show cause and for stay of proceedings.

On the proceedings in this cause, the consent and order to refer, and on the affidavit of Sarah A. Taliaferro, and the papers on which

the motion to refer was founded (and on such other affidavits and papers as may be served upon the plaintiff's attorney within two days prior to the time of the hearing herein mentioned), let the plaintiff and his attorney show cause before any of the justices of this court, at chambers thereof, on the 12th day of June, 1869, at 11 o'clock A. M., at the City Hall, in the city of New York, why the consent and order of reference in this action should not be set aside and vacated, and why the issues joined in said action should not be tried by the court, or for such other or further order as the said judge or court may deem meet.

And in the mean time, and until the hearing and determination of the motion under this order, let all proceedings before the referee, Thomas H. Edsall, be stayed.

JOHN H. McCUNN,
Justice.

Indorsed: New York Superior Court. No. 1. *Edward Van Ness* v. *Sarah A. Taliaferro, Belthaser Decker and others.* Order to show cause and for stay of proceedings. Order of June 4, 1869. Sidney H. Stewart, attorney of defendants Taliaferro and Decker. Exhibit 26, June 27. C. R. D.

Mr. STICKNEY:

Q. Before whom did the hearing on that motion to set aside the order of reference come? A. Before Judge McCunn.

Q. Did you appear? A. Yes, sir; counsel appeared for me; I was there.

Q. On the hearing on that motion, did any party, by counsel or otherwise, ask for any thing except that the original order of reference should be vacated and set aside, and the case tried by the court? A. No, sir.

Q. Had you ever received any notice of motion, or any order to show cause for any other relief than that? A. No, sir.

Q. Did all of the other parties, except the moving party, oppose the motion or not? A. They took no particular interest in it; I was the only one that opposed the motion; we regarded the motion as so frivolous that there was no particular opposition made to it.

Q. Did you appear in opposition? A. Yes, sir, we appeared in opposition; we merely stated to Judge McCunn that the papers appeared to be frivolous.

Mr. STICKNEY — I will read this indorsement on the paper, from

the files of the court, in the handwriting of Judge McCunn: "Motion vacating order appointing a referee" —

Mr. Lewis — What evidence is there that this is the handwriting of Judge McCunn?

Mr. Stickney — Mr. Boise testified generally —

Q. Mr. Van Ness, will you look at the indorsement upon the paper, and state in whose handwriting it is? A. I couldn't say; I suppose it to be Judge McCunn's; I know Judge McCunn made that order.

Q. Have you often seen Judge McCunn's handwriting? A. I have occasionally.

Q. Your best opinion is, that that is whose handwriting? A. Well, I think that is Judge McCunn's handwriting; I couldn't say; I know his initials appeared in the order made on that motion.

Mr. Stickney — Mr. Boise testified that all these papers produced by him, bearing the signature or the initials of the judges, were genuine.

Mr. Murphy — Does the witness say he is acquainted with the handwriting of Judge McCunn?

Witness — Well, I can't say that positively; I have seen his initials to papers.

Mr. Murphy — Are you acquainted with his handwriting? A. No, I can't say that I am; I know the order that was entered on that motion, was signed with Judge McCunn's initials.

Mr. Stickney — As these papers came from the files of the court, under Mr. Boise's testimony, we will offer it in evidence, and I will take the direction of the Senate as to whether I shall read it or not.

Mr. Bowen — Read it.

Mr. Stickney — "Motion vacating order appointing a referee granted, and a new referee appointed, together with a receiver; William M. Tweed, Jr., new referee, and Thomas J. Barr, receiver.

J. McC.

Q. Do you know that such an order was entered? A. After this motion was argued, a month or two elapsed, and one day I found an order on file, written out in full, vacating this order of reference to Mr. Edsall and appointing Wm. M. Tweed, Jr., a referee in his place, and appointing Thomas J. Barr receiver, and ordering Leeds & Miner to pay the money over to him; that order, I know, had Judge McCunn's initials upon it, and was acted upon by all the parties; that order was not in the handwriting of either of the attorneys to

that suit; I think all of them told me that they had not written or drawn that order, and were all opposed to it.

Q. And had any party asked for the appointment of the referee? A. No, sir, they were all opposed to it.

Q. And had any party asked for the appointment of a new receiver? A. No, sir, they were all opposed to it.

Mr. Stickney — In order to satisfy the Senate on this point, on this question of handwriting, I will read the testimony of Mr. Boise taken here: "State whether or not such orders or other papers among those produced by you as purport to be signed either with the full name or with the initials of Judge McCunn are signed in his original handwriting? A. They are."

Mr. Perry — Is this one of the papers produced by you?

Mr. Stickney — It is one of the papers produced from the files of the court.

Q. What additional expense did that entail upon your party? A. About three or four or five hundred dollars; I can't state the amount exactly.

Q. In what form? A. We lost the interest on this money for a year and a half; there were the receiver's fees of five per cent.

Q. Allowed by whom? A. They were allowed by Judge Monell.

Q. And what else? A. Then I had to litigate with the receiver's counsel; he wanted $400 or $500 fees, and they were cut down to twenty-five dollars.

Q. And was this fund or not, in the hands of Leeds & Miner secure? A. They were responsible parties, and would have paid interest on this money; Mr. Leeds so told me.

Q. Did any of the parties wish it removed from their hands? A. No, sir; all the parties wanted to remain with them.

Joseph Larocque, a witness called in behalf of the people, being duly sworn, testified as follows:

By Mr. Stickney:

Q. Mr. Larocque, you are a counselor at law in New York city? A. I am.

Q. Have you been so for how many years? A. Since 1852.

Q. Do you remember a case in the Superior Court in the city of New York, *Brandon* v. *Buck*? A. I do.

Q. What was your connection with that suit? A. I was one of the attorneys of the firm of Duncan, Sherman & Co.

Q. When was that suit commenced? A. The first knowledge I

had of the suit was, I think, about the 23d of February, 1870, when I was sent for to the office of Duncan, Sherman & Co., and there saw Mr. Hanrahan, claiming to be a receiver, and a few minutes later Mr. James F. Morgan, claiming to be counsel for Hanrahan, as receiver.

Q. What did Morgan and Hanrahan say? A. Mr. Hanrahan had with him an order made by Mr. Justice McCunn, of which the paper handed me by the counsel, and which I hold in my hand, is, I think, a copy, dated the 23d of February, 1870.

Q. It is a certified copy, is it not? A. Yes, sir; purporting to appoint Mr. Daniel H. Hanrahan receiver of certain moneys which were referred to as "mentioned in the complaint," and directing that Duncan, Sherman & Co. should pay this money over to Mr. Hanrahan, as receiver; I was sent for to advise with them as to their action in the premises; upon examining the order I found that, in the first place, it did not appear on whose application the order had been made; there was an attorney for the plaintiff mentioned, and in the next place the money which was directed to be paid was described as money "mentioned in the complaint." I called Mr. Morgan's attention to the fact that the papers were incomplete; that, in order to advise my client properly, a copy of the complaint should be served with the order. Upon that suggestion, he promised to send me a copy of the complaint, and the matter stood over until the following day.

Q. Your clients, Duncan, Sherman & Co., were mentioned as defendants in the suit? A. Yes, sir.

Q. Was any summons served upon them? A. Not to my knowledge.

Q. Or any paper except this order for the receivership, which was presented by Mr. Hanrahan? A. The first intimation, so far as I know, that any one had of the pendency of any such a suit, was the demand of this money by Mr. Hanrahan, under this order.

Q. Will you state what finally appeared to be the money which was alleged to be covered by the terms of that order? A. By an act of the Legislature, a charter had been granted to a company, known as the Hansom Cab company, and under the act of the company, was authorized to organize when subscriptions to the capital stock to a certain amount should have been made, and the percentage of such subscriptions deposited; my recollection is that the subscriptions were twenty-four per cent; I won't be positive about that. Preliminary to the organization, books of subscription had been opened in various places, among others, the office of Duncan, Sher-

man & Co., and subscriptions toward the capital stock of this company had been there received, and deposits made of those subscriptions; those deposits amounted to about the sum of $12,000.

By Mr. MURPHY:

Q. Are you stating this of your own personal knowledge? A. I am, so far as the papers and books have been under my view, and I have been engaged as counsel in conducting that business of the firm; I didn't see the subscriptions or the parties making them.

By Mr. STICKNEY:

Q. Go on? A. The company failed to organize; no satisfactory evidence, as I am advised, ever being presented of enough subscription having been made; this suit in which this receivership was made was brought by Mr. Brandon, who was one of the corporators, and one of the promoters of this corporation; claiming moneys due him on account of expenditures made on account of the corporation.

Q. And was this money, so far as you understood it, then, money for which Messrs. Duncan, Sherman & Co. were liable to the subscribers, in case the full amount required by the act was not paid in or on the subscriptions? A. All I can say as to that is, that in a subsequent suit brought for the purpose of adjudging the title to this money, it was adjudged to belong to the persons who had paid it on subscription.

Q. Was there in the papers, the complaint in the suit, or in any other papers, any plea put forward on the part of the plaintiff, that he was entitled from the corporation to certain compensation for services rendered in organizing; services and disbursements? A. My recollection is, that the claim was to compensation and reimbursement for services and disbursements in obtaining the charter, and made subsequently on behalf of the corporation.

Q. The corporation never was organized? A. No, sir.

Mr. STICKNEY — We will put in evidence, if the Senate please, the complaint with the summons in this action from the files of the court, and ask to have them marked Exhibit 27.

EXHIBIT No. 27.

SUPERIOR COURT OF THE CITY OF NEW YORK.

EDWARD W. BRANDON, Plaintiff,
agst.
JEROME BUCK, HENRY SPEAR, JAMES STUART PEARSE, JACOB O. SEYMOUR, JAMES W. HUSTED, WILLIAM J. KERR, JAMES M. AUSTIN, ALEXANDER WILDER, HUGH MURRAY, THOMAS H. LANDON, WILLIAM B. AVERY, JAMES M. ADAMS, PETER GILLESPIE, WALTER ROCHE and GEORGE MURRAY, and WILLIAM B. DUNCAN, DAVID DUNCAN, WILLIAM WATTS SHERMAN, FRANCIS H. GRAIN, composing the firm of Duncan, Sherman, & Co., and SIDNEY P. SLATER.

Summons — relief — com. ser., Defendants.

To the defendants above named and each of them: You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, to serve a copy of your answer to the said complaint on the subscriber at his office, No. 247 Broadway, corner of Murray street, in the city, county and State of New York, within twenty days after service hereof, exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid, the plaintiffs in this action will apply to the court for the relief demanded in the said complaint.

Dated NEW YORK, *March 7th*, 1870.

DUBOIS SMITH, *Plaintiff's Attorney*,
No. 247 Broadway, New York City.

SUPERIOR COURT OF THE CITY OF NEW YORK.

EDWARD W. BRANDON, Plaintiff,
agst.
JEROME BUCK, HENRY SPEAR, JAMES STUART PEARSE, JACOB O. SEYMOUR, JAMES W. HUSTED, WILLIAM J. KERR, JAMES M. AUSTIN, ALEXANDER WILDER, HUGH MURRAY, THOMAS H. LANDON, WILLIAM B. AVERY, JAMES M. ADAMS, PETER GILLESPIE, WALTER ROCHE and GEORGE MURRAY, and WILLIAM B. DUNCAN, DAVID DUNCAN, WILLIAM WATTS SHERMAN, comprising the firm of Duncan, Sherman & Co., and SIDNEY P. SLATER, defendants.

CITY AND COUNTY OF NEW YORK, *ss.:*

The plaintiff by this complaint states:

First. That he procured and caused to be passed and enacted by

the people of the State of New York, in Senate and Assembly represented, on the 6th day of May, 1869, an act, of which hereto annexed marked "A," which forms a part hereof, is a copy.

Second. That thereupon, and on or about the 24th day of May, 1869, it was mutually agreed between the plaintiff and the defendants (excepting the defendants, William B. Duncan, David Duncan, William Watts Sherman and Francis H. Grain), who are individually mentioned in section one of said act, with the exception of James Stuart Pearse, who represented Charles Roome, one of the individuals mentioned in said section one of said act, who had resigned his interest therein and assigned the same to said Pearse; and James W. Husted, who represented James B. Archer, one of the individuals mentioned in said section one of said act, who had resigned his interest therein and assigned the same to said Husted, as follows: They accepted the said act and the franchise and powers thereby conferred, and the conditions thereby imposed, and that they would organize and conduct the business therein mentioned under the corporate name of "The Hansom Cab Company," under and in pursuance of the provisions of said acts, and for the purpose of accomplishing the same, would purchase such office furniture, fittings and fixtures, employ individuals, hire offices, advertise said project any business in the newspapers, and disburse such moneys in and concerning the same as should be necessary; and that a book for the subscription to the stock of said company to be organized under the provisions of said act should be opened, and that the defendants Jerome Buck and Henry Spear, and this plaintiff, who were thereby constituted their agents for said purposes, shall receive all moneys which should be paid as subscription for said stock to be issued by said company, and that this plaintiff should hire such offices, purchase such furniture, fittings and fixtures, and employ such individuals, and pay for the same; and the moneys so disbursed should be repaid to him out of all moneys, property and assets which they should acquire jointly as aforesaid; and that for said money, to be disbursed by the plaintiff, the said defendants (excepting said William B. Duncan, David Duncan, William Watts Sherman and Grain) should be individually liable to pay to the plaintiff his share or proportion thereof, to be determined as by an equal division of the same between them.

That under and by virtue of this agreement, and by reason as aforesaid, this plaintiff, for the joint benefit, on the joint account and at the joint request of said defendants (excepting said William B. Duncan, David Duncan, William Watts Sherman and Francis H.

Grain) and himself, in said enterprise and business has, during the year 1869, advanced for said rent of offices which he has hired, office furniture, advertisements in said business, and individuals employed in said business, certain moneys amounting in the aggregate to the sum of $11,175, and has also purchased certain gas fixtures, fittings, and has caused certain painting to be done, amounting to the additional sum in the aggregate of $3,500, for which he is liable to pay; and is also liable and has agreed to pay for rent of offices, which he hired as aforesaid, $2,325.

That the plaintiff has necessarily paid out and expended, on and concerning the procuring and passage of said act, the sum of $9,000, no part of which has been repaid to the plaintiff; that at or about the time of the acceptance of said act and said agreement, and on or about the 24th day of May, 1869, it was mutually agreed between the plaintiff and the defendants (excepting the defendants William B. Duncan, David Duncan, William Watts Sherman and Francis H. Grain) that the same should be borne and equally divided between them and the plaintiff; that each of them should repay to the plaintiff his said proportionate share thereof, and also that the same should be paid out of any money or property which might be acquired by them jointly in said business.

That no part of said sums so paid as aforesaid by the plaintiff, or of said sums for which he has become liable to pay as aforesaid, has been repaid to the plaintiff; and he has not received any thing on account thereof, excepting the sum of $4,200, which has been received by the plaintiff, and, pursuant to the terms of said agreement with them, has been applied on account thereof.

That by occasion as aforesaid there now remains due and owing and unpaid from the defendants (excepting said William B. Duncan, David Duncan, William W. Sherman and Francis H. Grain) to this plaintiff the sum of $21,800.

That the defendants (excepting said William B. Duncan, David Duncan, William W. Sherman and Francis H. Grain) and this plaintiff, have acquired, by occasion as aforesaid, in said business, and which belongs to them jointly, the following money, viz.: $12,000 or thereabouts, in the possession of the defendants William B. Duncan, David Duncan, William Watts Sherman and Francis H. Grain jointly, as composing the firm of Duncan, Sherman & Co., subject to the order and disposal of the said defendants, Jerome Buck and Henry Spear, and the plaintiff, or subject to the order of Sidney P. Slater, treasurer of the Hansom Cab Co., as appears with the plaintiff and defendants, except Duncan, Sherman & Co., and said

act and charter and the privileges therein conferred, which are the total assets and property belonging to the defendants (excepting said Duncan, Sherman & Co.) and the plaintiff jointly and acquired in said business and under said agreements, which pursuant thereto is subject to being applied to the payment to the plaintiff on account of said indebtedness of $21,800.

That the plaintiff has demanded of the defendants that they apply the said money to the payment of the said indebtedness due the plaintiff pursuant to said agreement, but said defendants have refused and still refuse to apply the same, or any part thereof, toward the payment of the same or any part thereof, and through the defendants, Jerome Buck and Henry Spear, threatened, and are about to withdraw said sum of money now deposited with said Duncan, Sherman & Co., and so dispose of the same as to prevent the same being applied toward the payment of said indebtedness due the plaintiff, or any part thereof.

That said money and assets are not sufficient to pay in full the indebtedness and liabilities incurred in said business. That the terms and conditions of said act have not been complied with, $100,000 not having been subscribed to said company, and twenty-four per cent therein not having been paid in as required by section four of said act. That said act, and the conduct of said business therein mentioned as aforesaid, has been abandoned by said defendants (excepting said Duncan, Sherman & Co.)

Wherefore the plaintiff demands judgment:

First. That a receiver be appointed of all the said money and assets belonging to the defendants (excepting said Duncan, Sherman & Co.) and the plaintiff jointly as aforesaid, and that an injunction be issued by this court, enjoining and restraining the defendants, and each of them, from disposing of, or in any manner interfering therewith, except under the order of this court. And that such receiver take possession of the same, and that the said defendants William B. Duncan, David Duncan, William Watts Sherman and Francis H. Grain, jointly, as composing the firm of Duncan, Sherman & Company, pay in to the said receiver the sum of money so in deposit with them as aforesaid. That said receiver, under the order and direction of this court, sell and convert into money all the other of said assets and property, and that the same, together with said sum of money now on deposit with said Duncan, Sherman & Company, be paid the plaintiff, and be applied toward the payment of said indebtedness of $21,800 due him as aforesaid, and that the plaintiff recover judgment against the defendants (excepting the defendants

William B. Duncan, David Duncan, William Watts Sherman and Francis H. Grain) for the sum of $21,800, with interest thereon from the 5th day of March, 1870, and that the plaintiff have such other and further judgment and relief in the premises as may be proper, besides the costs of this action.

DUBOIS SMITH,
Plaintiff's Attorney.

CITY AND COUNTY OF NEW YORK, *ss.:*

Edward W. Brandon, being duly sworn, says, he is the plaintiff in this action; that the foregoing complaint is true of his own knowledge.

EDWARD W. BRANDON.

Sworn to before me this 7th day of March, 1870.

J. MURRAY LANGAN, *Notary Public, N. Y.*

SUPREME COURT OF THE STATE OF NEW YORK.

EDWARD W. BRANDON
agst.
JEROME BUCK, HENRY SPEAR and others.

CITY AND COUNTY OF NEW YORK, *ss.:*

Edward W. Brandon, being duly sworn, says, that he is the plaintiff in the above entitled action; that all the facts set forth in the foregoing complaint, which complaint forms a part of this affidavit, are within the personal knowledge of this deponent, and are true in each and every particular.

EDWARD W. BRANDON.

Sworn to before me this 7th day of March, 1870.

J. MURRAY LANGAN, *Notary Public, N. Y.*

"A."

CHAPTER 618.

AN ACT to incorporate the Hansom Cab Company.

PASSED, May 6, 1869.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Jerome Buck, Charles Roome, Edward W. Brandon, Jacob O. Seymour, Henry B. Archer, William J. Kerr, John H. Anthon, James M. Austin, Guernsey Sackett, H. Wilder Allen,

Henry Spear, Austin Myres, Hugh Murray, John E. Crowley, Henry Vandewater, Thomas H. Landon, Edward Brown, John J. Walsh, Frederick S. Massey, William Goldsborough, William Drennan, Walter Roche, John Kaiser, Jr., George Murray, Henry Suydam, William B. Avery, Nathaniel Jarvis, Jr., Thomas Tileson, Robert Cochran, James M. Adams, Hezekiah D. Robertson, John H. Hyatt, Peter Gillespie, are hereby constituted a body politic and corporate, by the name of "The Hansom Cab Company," by which title they are invested with the rights, powers and liabilities of corporations, as prescribed in the constitution of this State, and also as set forth in the eighteenth chapter of the Revised Statutes, so far as the same are applicable.

§ 2. The said corporation is hereby authorized and empowered to run cabs for hire in the counties of New York and Kings, for the conveyance of passengers, and for that purpose may purchase, construct, or cause to be constructed, cabs suitable for such uses; to purchase horses, and all other property necessary for the transaction of business, and also to purchase and hold such real estate as may be necessary for stables, office and stations for the proper management of such business.

§ 3. The said corporation shall be permitted to station its cabs at such places upon the streets in the cities of New York and Brooklyn, for the convenient access of passengers, as may be assigned for the purpose by the respective mayors of said cities. The corporation shall keep its cabs on hand at those places, at all hours of the day and night, and shall be subject to their use and management, to all laws and ordinances now in force, or which may hereafter be made in reference to the licensing, numbering, control and management of said vehicles. The mayors of said cities, respectively, shall apply and enforce said laws and ordinances.

§ 4. The capital of said corporation shall be $250,000 in shares of fifty dollars each, but may be increased not exceeding $150,000 for every additional 100 cabs that may be put in use by said corporation; and the corporation may organize and begin business when $100,000 are subscribed, and twenty-four per cent, thereon paid in. The stock shall be considered as personal property, and shall be transferable on the books of the company as may be prescribed by the by-laws.

§ 5. The business of said corporation shall be managed by a board of directors, nine in number, which number may be increased by a vote of two-thirds of the members of the board. The said directors shall be elected on the first Monday of June in each year; and every stockholder shall be entitled to one vote in person, or by proxy, for

each share of stock paid in and held by him for at least ten days before such election. The board of directors shall elect a president, vice-president, secretary and such other officers as shall be deemed necessary, and may remove such officers at pleasure. Said board shall make such by-laws and regulations as they shall consider necessary for the management of their business, which shall not be inconsistent with the laws and ordinances in force. The annual election of directors shall be held at such hour and place, and after such notice as the by-laws may prescribe. Jerome Buck, William J. Kerr, Austin Myres, Henry Vandewater, Charles H. Roome, Edward W. Brandon, Thomas H. Landon, Jacob O. Seymour, and Henry B. Archer, are hereby constituted the first board of directors, and shall hold office till the first annual meeting, and till their successors are chosen. Any vacancy in the board of directors may be filled by the remaining directors till the next annual election. In case of any failure to elect officers on the day appointed, the corporation shall not be dissolved for that cause; but an election may be held on another day, in such a manner as may be prescribed by the directors, or as provided in the by-laws.

§ 6. The drivers of each vehicle belonging to said corporation shall be entitled to demand and receive for the hire of such cab the fares here prescribed, as follows:

1. For any distance within and not exceeding one mile, for a single passenger, thirty cents; and for two persons, forty cents.

2. For any distance additional to one mile, for each mile and fractional part of a mile, for a single passenger, thirty cents; and for two persons, forty cents.

3. For any time within and not exceeding one hour, for a single passenger, seventy-five cents; for two persons, one dollar; and for any time additional, for each hour and fractional part of an hour, for a single person, seventy-five cents; and for two passengers, one dollar.

4. In addition to said fares, as here set forth, the said drivers are authorized to demand and receive one-half of the same in addition, when the passenger or passengers are so conveyed by them between the hours of twelve o'clock in the evening and six o'clock in the morning.

§ 7. No driver of a cab belonging to said corporation, who is stationed at or near a railway station, steamboat landing or ferry, shall leave the seat of the cab on the arrival of the cars, steamboats, or ferry boats, nor shall he leave his stand till he shall be engaged by a passenger, or some person authorized by a passenger.

§ 8. Within ten days after the organization of said corporation, the president and secretary shall cause to be prepared, and shall file in the office of the Secretary of State, and also in the offices of the county clerks, in the counties of New York and Kings, copies duly attested of the articles of association of the company, setting forth the amount of its capital, its terms of duration, and its purposes. All subsequent resolutions authorizing an increase of capital, shall be attested and filed in like manner. Each stockholder shall sign his name to such articles, with his residence, and the amount owned by him.

§ 9. This act shall take effect immediately.

STATE OF NEW YORK,
OFFICE OF THE SECRETARY OF STATE, } *ss.:*

I have compared the preceding with the original law on file in this office, and do hereby certify that the same is a correct transcript therefrom, and of the whole of said original law.

Given under my hand and seal of office, at the city of Albany,
[L. S.] this seventh day of May, in the year one thousand eight hundred and sixty-nine.

D. WILLERS, JR., *Deputy Secretary of State.*

Indorsed: Superior Court, No. 3. Edward W. Brandon against Jerome Buck et al. Summons, complaint and injunction order. Dubois Smith, plaintiff's attorney. Exhibit 27, C. D. R. Filed March 21, 1870.

Mr. STICKNEY — We will also put in evidence the order appointing Hanrahan receiver, and I will read these few lines from it. "On the annexed summons and complaint and affidavit, I do hereby order that Daniel H. Hanrahan, attorney and counselor at law, of No. 14 Wall street, in the city of New York, be and he is hereby appointed a receiver of all the money, property, debts, equitable interests, rights and things in action belonging to the plaintiff and the defendants (excepting the defendants hereinafter named), jointly, or in which they are jointly interested, arising out of the business and transactions mentioned in said complaint, and particularly of the sum of money, amounting to twelve thousand dollars or thereabouts in the possession of the defendants William B. Duncan, David Duncan, William Watts Sherman and Francis H. Grain, composing the firm of Duncan, Sherman & Company, and referred to in said complaint, and I do further order and direct the said defendants last named to pay and deliver to the said Daniel H. Hanrahan as said

receiver, on demand by him, said sum of money in their possession, amounting to twelve thousand dollars or thereabouts, and referred to in said complaint; and the defendants and each of them are enjoined and restrained from parting with or in any manner interfering with the said money or property, excepting in obedience to this order.

"NEW YORK, *February* 23, 1870.

"JOHN H. McCUNN,

"*Justice.*"

Indorsed: N. Y. Superior Court, No. 2. *Edward W. Brandon* v. *Jerome Buck and others.* Order of injunction and order appointing receiver. Filed March 3, 1870. Dubois Smith, attorney for plaintiff, 247 B'way, N. Y. city.

Mr. MURPHY — Who is the plaintiff in that suit?

The WITNESS — Mr. Dubois Smith: the name does not appear on the order.

Mr. STICKNEY — The order does not state that it is made on the motion of any counsel.

Q. Will you state, whether or not a consent was given by the attorneys on both sides to vacate that order appointing a receiver and to discontinue the suit, and what took place in relation to that? A. Between the time of my meeting Mr. Hanrahan, as counsel, at Duncan, Sherman & Co.'s office on the day of the service of this order and demand of the money, and noon of the following day, I ascertained that Mr. Dubois Smith was the attorney for the plaintiff and communicated with him on the subject; he expressed himself as unaware that any order had been made; he at once joined with me in a consent to the entry of an order vacating this receivership; my impression is that the consent also covered a discontinuance of the suit, but I won't be positive about that without refreshing my recollection by looking at the papers; that order was entered at once, and that terminated that receivership.

Q. And when did you next hear any thing about this suit? A. The next thing that I heard about this suit was some time in the month of March; I think on the 21st of March, 1870; from a letter which I hold in my hand, when I was sent for under precisely similar circumstances to attend at the office of Duncan, Sherman & Co.

Q. This was about how long after the suit had been discontinued? A. About a month; the former one was about the twenty-third of February, and this one was about the twenty-third of March.

Q. Had there been any application to the court for any order or proceeding whatever? A. Not to my knowledge; I found that

another order appointing Mr. Joseph Weeks, the deputy clerk of the Superior Court, receiver, in the place of Mr. Hanrahan, had been made, and that a copy of the order had been served and a demand made orally and also in writing by the new receiver for the payment of this sum of money.

Q. Had this money ever been paid over by Duncan, Sherman & Co. to Hanrahan? A. No, sir.

Q. What had he done? A. Nothing except to call upon them for the money; which they didn't pay.

Mr. STICKNEY put in evidence the following papers, which were marked Exhibit No. 28:

EXHIBIT No. 28.

At a Special Term of the Superior Court of the city of New York, held in the City Hall of said city, on the 21st day of March, A. D. 1870.

Present, Hon. JOHN H. McCUNN, *Justice.*

EDWARD W. BRANDON
agst.
JEROME BUCK, HENRY SPEAR, JAMES STUART PEARSE, JACOB O. SEYMOUR, JAMES W. HALSTED, WILLIAM J. KERR, JAMES M. AUSTIN, ALEXANDER WILDER, HUGH MURRAY, THOMAS H. LANDON, WILLIAM B. AVERY, JAMES M. ADAMS, PETER GILLESPIE, WALTER ROCHE, and GEORGE MURRAY and WILLIAM B. DUNCAN, WILLIAM WATT SHERMAN and FRANCIS H. GRAIN, composing the firm of Duncan, Sherman & Company, and SIDNEY P. SLATER.

A motion having been made in the above-entitled action for the appointment of John J. Murphy as receiver therein, and it appearing satisfactorily to me that Daniel H. Hanrahan, was, by a former order of this court, appointed receiver in the said action; now, upon the summons and complaint in said action, and upon the annexed consent of said Daniel H. Hanrahan it is ordered that upon payment to said Daniel H. Hanrahan, of the sum of $500, the amount of the fees due to him as such receiver, and not otherwise, Joseph Meeks, Esq., deputy of the court, be and he hereby is appointed receiver of all the moneys, debts, property, equitable interests, rights and things in action, belonging to the plaintiff and the defendants (excepting the defendants William B. Duncan, David Duncan, William Watts Sherman and Francis H. Grain, composing the firm of Duncan,

Sherman & Company, and Sidney P. Slater) jointly, or in which they have any interest, and also mentioned in the annexed complaint, and particularly of a certain sum of money amounting to $12,000 or thereabouts, now in the possession of William B. Duncan, David Duncan, William Watts Sherman and Francis H. Grain, composing the firm of Duncan, Sherman & Company, and subject to the order of the plaintiff and the defendants, Jerome Buck and Henry Spear, or subject to the order of the defendant, Sidney P. Slater, treasurer of the Hansom Cab Company, being the sum of money referred to in the complaint hereto annexed.

And it is further ordered that the said defendants, William B. Duncan, David Duncan, William Watts Sherman and Francis H. Grain, as composing the firm of Duncan, Sherman & Company, and also that the said defendant, Sidney P. Slater, on demand of the said Joseph Meeks, pay over to him, as such receiver, said sum of money.

And it is further ordered that the said defendant in this action, and each of them, be and they are hereby enjoined and restrained from disposing of, or from in any way interfering with any of the said money, or of the debts, property, equitable interests, rights and things in action belonging to the plaintiff and said defendants (excepting said defendants William B. Duncan, David Duncan, William Watts Sherman and Francis H. Grain, composing the firm of Duncan, Sherman & Company, and said defendant Sidney P. Slater, referred to in said complaint), until the further order of this court.

Dated *March* 21, 1870.

(Enter) J. McC.

SUPERIOR COURT OF THE CITY OF NEW YORK.

EDWARD W. BRANDON
agst.
JEROME BUCK AND OTHERS.

I, Daniel H. Hanrahan, receiver in the above action, do hereby consent that Joseph Meeks be substituted as receiver therein in my place and stead, upon payment to me of my fees therein, amounting to the sum of $500.

Dated NEW YOK, *March* 19, 1870.

DAN'L H. HANRAHAN.

Indorsed: New York Superior Court. *Edward W. Brandon* v. *Jerome Buck and others.* C. R. D.

The WITNESS — The order appointing Hanrahan receiver had been vacated on the twenty-fourth of February, according to my recollection, by the consent of parties.

Mr. LEWIS — Had he notice of the vacation? A. Yes; on the same day.

Mr. MURPHY — I think the contents of these orders ought not to be established in this way; the orders ought to be produced.

Mr. STICKNEY — I read from the original order.

Mr. MURPHY — Where is the order vacating?

Mr. STICKNEY — That we had produced (D) before the committee; the original order does not appear to be on the files now; it was produced before the Assembly committee; it has been called for, but does not appear among the papers produced by Mr. Boese. I now read from the back of the summons, complaint and injunction order, the following: "In this case, if the first receiver consents, I order that Mr. Meeks, deputy clerk of this court, be appointed in his place. See order. J. H. McC.

Q. Will you state what then took place with Mr. Meeks? A. I saw Mr. Meeks, the new receiver; called his attention to the nature of the suit and the previous proceedings; informed him that he need not make an application to set aside this order, and asked him to delay taking any action until I could have an opportunity, to which he cheerfully assented; I then prepared an affidavit and obtained an order to show cause why this order should not be vacated; before the return day of the order I again had an interview with Mr. Dubois Smith; in fact on the 21st of March, 1870, the day on which this was dated, I received a letter from Mr. Dubois Smith, which I hold in my hand.

Mr. STICKNEY—We will offer that letter in evidence.

Q. Do you know the signature to that? A. I am acquainted with Mr. Smith; have seen him write; am familiar with his handwriting; I believe that to be his handwriting.

Mr. STICKNEY—My associate thinks that we will not offer it in evidence; it may be questionable.

Q. Have you Mr. Meeks' letter which was received? A. I have, also a letter which was received by Duncan, Sherman & Co., together with a copy of the order.

Q. And that is from whom, whose is the signature? A. That is Mr. Meeks' signature.

Q. Are you familiar with his handwriting? A. I am; he is deputy clerk of the Superior Court.

Mr. STICKNEY—I will read this letter and have it marked as an exhibit.

The letter was marked Exhibit 29.

EXHIBIT 29.

CHAMBERS OF THE JUDGES OF THE SUPERIOR COURT,
NEW YORK, *March* 21, 1870.

Messrs. DUNCAN, SHERMAN & Co.:

DEAR SIRS—As receiver in the suit of Brandon against Buck and others, I herewith demand the sum of $12,000, or thereabouts, now on deposit in your hands to the credit of Messrs. Buck and others, The Hansom Cab Company, or its treasurer, in pursuance of the order I have served upon you. I will call upon you on Tuesday, at 11 A. M. (to-morrow), and if the money is not paid over to me, I shall take such steps to compel such payment as I shall be advised by counsel, and shall move to convict for contempt of the order of the Superior Court, appointing me receiver.

Respectfully,

JOSEPH MEEKS,
Receiver.

Mr. STICKNEY—The order, you remember, appointing Mr. Meeks, provided for his appointment on payment of $500 fees to Mr. Hanrahan; did Mr. Meeks furnish you any evidence that the $500 fees to Hanrahan had been paid? A. He did not.

Q. Had you any evidence, then, that his appointment had ever taken effect? A. No evidence that that condition of his appointment had ever been complied with; a certified copy of the order appointing him receiver, was left with Duncan, Sherman & Co.

Mr. STICKNEY—We will then produce from the files of the court Mr. Meeks' bond, as receiver, in which James F. Morgan appears as surety, and swears that he is worth the sum of $10,000, over and above all his liabilities; the affidavit of verification being dated the 21st of March, 1870.

Q. Is there any statement in any of the papers, so far as you know, or had it ever been claimed by any one, so far as you know, that this fund was entirely secure in the hands of Duncan, Sherman & Co.? A. No, sir.

Q. How long have you known that firm? A. Ever since its organization, I think.

Q. Do you consider them responsible to the amount of $12,000? A. Yes, sir.

Mr. Stickney—I now offer in evidence a certified copy of the first order appointing Hanrahan a receiver.

The paper was marked Exhibit 30, and read as follows:

SUPERIOR COURT OF THE CITY OF NEW YORK.

Edward W. Brandon, Plaintiff,
agst.
Jerome Buck, Henry Spear, James Stewart Pearse, Jacob O. Seymour, James W. Husted, William J. Kerr, James M. Austin, Alexander Wilder, Hugh Murray, Thomas H. Landon, William B. Avery, James W. Adams, Peter Gillespie, Walter Roche, George Murray and William B. Duncan, David Duncan, William Watts Sherman and Francis H. Grain, composing the firm of Duncan, Sherman & Company, Defendants.

On the annexed summons and complaint and affidavit, I do hereby order that Daniel H. Hanrahan, Esq., attorney and counselor-at-law, of No. 14 Wall street, in the city of New York, be and he is hereby appointed a receiver of all the money, property, debts, equitable interest, rights and things in action, belonging to the plaintiff and the defendants (excepting the defendants hereinafter named) jointly or in which they are jointly interested, arising out of the business and transactions mentioned in said complaint, and particularly of the sum of money amounting to twelve thousand dollars, or thereabouts, in the possession of the defendants William B. Duncan, David Duncan, William Watts Sherman and Francis H. Grain, composing the firm of Duncan, Sherman & Company, and referred to in said complaint; and I do further order and direct the said defendants last named to pay and deliver to the said Daniel H. Hanrahan, as said receiver, on demand by him, said sum of money in their possession, amounting to twelve thousand dollars, or thereabouts, and referred to in said complaint, and the defendants, and each of them, are hereby enjoined and restrained from parting with or in any manner interfering with the said money or property, excepting in obedience to this order.

Dated New York, *February* 23, 1870.

[L. S.] JOHN H. McCUNN,
Justice.

(A copy.)

JAMES M. SWEENEY,
Clerk.

Indorsed: New York Superior Court. *Edward W. Brandon* v. *Jerome Buck and others.* Certified copy. Order appointing receiver. Exhibit 30. C. R. D.

Mr. STICKNEY — If Mr. Larocque will step from the stand a moment, we desire to recall Mr. Morgan.

Mr. LEWIS — I want to ask the witness a question before he goes away.

Q. Do I understand you to say that that action was discontinued? A. I have not the paper before me, but my recollection is, that the consent that was signed, provided for the discontinuance of the suit as well as for the vacation of the receivership; I will not be positive about that however, without seeing the paper.

Q. At the time you made the motion to vacate the order appointing Meeks, was it one of the grounds of that motion that the action had been discontinued? A. No, sir; I think not; the application which I prepared showed that the proper parties were not before the court, and that the order had been improperly granted; those were the grounds on which we asked to vacate it.

Q. Do you know whether Judge McCunn had been informed that that action had been discontinued at the time he made this second order? A. Not to my knowledge, sir.

By Mr. MURPHY:

Q. Is Mr. Dubois Smith living? A. I believe so, sir.

Q. Practicing in New York? A. Yes, sir.

Mr. STICKNEY — He has been subpœnaed, I will state to the Senate.

James F. Morgan re-called. Examined by Mr. STICKNEY:

Q. Mr. Morgan, did you have any connection whatever with the suit of *Brandon* v. *Buck?* A. I went down to the office and made a demand of the sum, whatever it is; $12,000.

Q. Did you have the order, or a copy of the order appointing Hanrahan receiver at that time? A. I think so.

Q. From whom did you receive that order? A. Mr. Hanrahan.

Q. Have you any knowledge where or from whom he received it? A. I have no knowledge; my presumption is, there is no doubt about it, that the order was given him by Mr. Dubois Smith.

Q. Do you know anything of that? A. No, sir; I couldn't swear to it.

Q. I didn't ask you for your presumption, did I? A. No, sir.

Q. Did you have anything to do with the getting of that order

from Judge McCunn? A. Mr. Dubois Smith came to me at my house and wanted me to get this order from Judge McCunn; I told him I would not, and would have nothing to do with it; he said he wanted to have Mr. Murphy appointed receiver; I told him, you will have to go to Judge McCunn yourself, certainly I cannot go, because if I should go to Judge McCunn's house with you, or have any thing to do with the case, Judge McCunn would not appoint him receiver, if it is a proper case for a receiver; he went to court the next day and Judge McCunn appointed Hanrahan receiver; he became angry, it seems; came down to see me and said he wanted Mr. Murphy appointed receiver, and the next I knew he had concluded to set Hanrahan aside; in the meantime I had gone down and made this demand in compliance with the order, and I saw Mr. Larocque.

Q. Do I understand that your reason for not complying with that order was the impropriety of applying to Judge McCunn for orders? A. The impropriety of my applying to Judge McCunn for any order.

Q. Did I not understand you to testify yesterday that you got several orders from Judge McCunn? A. In the Clark and Bininger case, but in no others; I had been applied to to go to Judge McCunn every week in my life for orders; never did so.

Q. Never have done it? A. Except in the Clark and Bininger case.

Q. Never applied to him for any order? A. I say except in the Clark and Bininger case.

Q. (Showing paper) Will you look at the order just now shown you, produced from the files of the court, and dated February 27th, upon Mr. Hanrahan, receiver, and state whether you know the handwriting in which that order is? A. I don't know the handwriting.

Q. Will you look at the name "Daniel H. Hanrahan," and see if you know that handwriting? A. That is the handwriting of James F. Morgan; that is my handwriting.

Q. The name of "Hanrahan" in that order appointing him receiver is in your handwriting? A. Yes, sir.

Q. But you had nothing to do whatever with the procuring of that order from Mr. Justice McCunn? A. Nothing.

Q. You state that lawyers have frequently applied to you to make application to Mr. Justice McCunn for orders? A. Yes, sir.

Q. Have they ever applied to you to make application to any other judge for orders? A. No, sir.

Q. What do you suppose the reason to be? A. I am sure I don't know.

Mr. STICKNEY — That is all, sir. We shall require you, however, in another case.

JAMES M. GANO, a witness called on behalf of the prosecution, being duly sworn, testified as follows:

By Mr. HARRISON:

Q. Where do you reside Mr. Gano? A. New York city.

Q. Where, in New York city? A. I now reside at No. 309 West 22d street.

Mr. HARRISON — This is the Corey & Long case, which is the second of the charges presented against Justice McCunn.

Q. What is your occupation, Mr. Gano? A. I am a dentist.

Q. Are you a relation or any connection of Justice John H. McCunn, of the Superior Court? A. I married his wife's youngest sister.

Q. How long have you resided at your present house? A. About four days.

Q. Where did you reside previous to that time? A. Most of the time at Judge McCunn's residence.

Q. How long were you a resident in Judge McCunn's family? A. About four years.

Q. Were you ever appointed receiver by Judge McCunn? A. I was.

Q. Were you not appointed receiver in the case of Corey against Long? A. I was appointed receiver by Judge McCunn, but that order was vacated by Judge Barbour, and I was re-appointed by Judge Barbour.

Q. Did you act as receiver in that case? A. I did.

Q. Had you any personal acquaintance with either of the parties to that action? A. I knew Mr. Corey slightly, and Mr. Long also.

Q. Mr. Corey was the plaintiff? A. Yes, sir.

Q. (Showing paper) Do you recognize the signature to the paper which I now show you purporting to be the signature of John H. McCunn? A. I do, sir.

Q. Is that his handwriting? A. That is his signature.

Q. Do you recognize the handwriting of the words interlined "let James M. Gano be appointed?" A. I think that is his writing.

Mr. HARRISON — We offer in evidence the paper to which I have just referred, and I will indicate it by reading portions of it. It is an order signed by Mr. Justice John H. McCunn, with many interlineations and erasures. The erasures show that it was an applica-

tion for a judge's order to show cause why a receiver should not be appointed by the court. The interlineations show that after erasing portions of the order which gave the former character to it, it became an absolute order in these terms: "On reading and filing the complaint in this action, and the affidavits of Albert B. Corey and Jacob Buck, and on motion of Roger A. Pryor, Esq., let James M. Gano be appointed receiver of all the property and assets of what kind soever of the late firm of Walter P. Long & Co., with the usual powers and authorities of a receiver in such case provided."

Mr. D. P. Wood — May I inquire whether that is one of the orders proved by Mr. Boese?

Mr. Harrison — It is one of the original papers produced from the files of the clerk's office of the Superior Court, and proved by Mr. Boese to be an authenticated record of the court.

Mr. Benedict — Mr. Gano proves it also.

Mr. Harrison — Yes, sir. It is dated the 15th day of January, 1870; we suppose it to be the 15th. There is an uncertainty in the figures, which indicate that it may be the 15th or 18th, but we think it is the 15th. With that paper we offer in evidence the papers to which it refers, which are the originals produced by Mr. Boese and authenticated as the records of the court, viz.: the complaint and the affidavits; it is all one exhibit.

The papers were here marked as Exhibit 31, and read as follows:

Exhibit No. 31 — C. R. D.

**At a Special Term of the Superior Court of the city of New York, held at the new Court-house in said city on the* 15*th day of January*, 1870.

†[NEW YORK SUPERIOR COURT.]

Present — Hon. John H. McCunn, *Justice.*

Albert B. Corey
agst.
Walter B. Long.

On *reading and filing* the complaint in this action, and [on] the affidavit[s] of Albert B. Corey *and Jacob Beck, and on motion of Roger A. Prior, Esq.*, [let the defendant show cause, on the 22d day of January, 1870, at a special term of this court, to be held at the new court-house, in the city of New York, at 10 o'clock in the

* All the words above printed in italics were interlined in the original order.

† All the words above printed in brackets were in the draft, but were erased in the order.

forenoon of that day, or so soon thereafter as counsel †[can be heard why a] **let James M. Gano be appointed* receiver [should not be appointed] of all the property and assets, of what kind soever, of the late firm of "Walter P. Long & Co.," with the usual powers and authorities of a receiver in such case provided.

JOHN H. McCUNN,
Justice.

† [Dated NEW YORK, *January* , 1870.]

SUPERIOR COURT OF THE CITY OF NEW YORK

ALBERT B. COREY
agst.
WALTER P. LONG.

Summons—for relief—com. served.

To the defendant above named: You are hereby summoned and required to answer the complaint in this action, a copy of which is herewith served on you, and to serve a copy of your answer to the said complaint on the subscriber, at his office No. 37 Nassau street, in the city of New York, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated *January* 15*th*, 1870.

ROGER A. PRYOR,
Plaintiff's Attorney.

SUPERIOR COURT OF THE CITY OF NEW YORK.

ALBERT B. COREY
agst.
WALTER P. LONG.

The plaintiff complaining of the defendant alleges:

That on or about the first day of January, 1868, the plaintiff and defendant entered into a copartnership in the sewing silk business, conducted in New York city, under the firm name of "Walter P. Long & Co."

That the defendant was without capital or credit, and the business of the partnership was substantially built up by the means and energy of the plaintiff.

* All the words above printed in italics were interlined in the original order.

† All the words above printed in brackets were in the draft, bnt were erased in the order.

That, on the 7th of December, 1869, the plaintiff sold out and assigned his interest in the said copartnership to the defendant; and the defendant, by the terms of the said sale and assignment, agreed and undertook to indemnify and hold harmless the plaintiff from all claims and debts then existing against the said copartnership.

That, in consideration of said agreement and undertaking, the plaintiff retired from the said copartnership and delivered the possession and control of all its property to the defendant.

That due notice of said dissolution was given to customers and the public.

That, at the time of said dissolution the assets of said copartnership were abundantly sufficient to satisfy all its liabilities.

That, in violation of said agreement and understanding, the defendant, immediately on getting control of the said copartnership property and assets, proceeded to turn them into money, and appropriate them to his own individual use.

That he has neglected and refused to pay any of the copartnership debts against which he agreed to indemnify and hold the plaintiff harmless.

That he has incited creditors who hold said debts to institute actions thereon jointly against the plaintiff and defendant, in which actions, by collusion between defendant and said creditors, service of summons was made on the plaintiff only.

That said actions were commenced at the instigation of the defendant, are conducted by defendant's attorney, and the expenses of their prosecution are to be paid by the defendant.

That the defendant's object in these proceedings is to exempt himself and the late copartnership property from liability for the debts against which he undertook to indemnify the plaintiff, and to throw the entire burden of their payment on the plaintiff.

That the defendant is insolvent, and after payment of the said debts of the late copartnership by the plaintiff the plaintiff will be unable to recover any indemnity or contribution from the defendant.

That the said debts of the late copartnership amount to about $10,000.

That the property and assets of the late copartnership now held by the defendant are equivalent to about $10,000.

That if said property and assets are now put into the hands of a receiver they may be sold for enough to satisfy the said debts.

That if said property and assets be left in the possession or under the control of the defendant they will be dissipated and appropriated

by the defendant to his own use, in fraud of plaintiff and of the copartnership creditors.

That in default of the relief herein solicited, the plaintiff will be wholly remediless; wherefore the plaintiff prays judgment against the defendant:

1st. That the defendant be enjoined from disposing of, or in any way intermeddling with the property and assets of the late firm of Walter P. Long & Co.

2d. That a receiver, with the usual and necessary powers, be appointed to take possession of said property and assets, to convert them into money, and out of the proceeds to pay the said debts of the said copartnership of "Walter P. Long & Co.;" and for such other and further relief as to the court may seem just and proper; and for costs.

ROGER A. PRYOR,
Plaintiff's Attorney.

CITY AND COUNTY OF NEW YORK, *ss.:*

Albert B. Corey, being duly sworn, says that he is the plaintiff in this action, and the foregoing complaint is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

ALBERT B. COREY.

Sworn to before me this 15th day of *January*, 1870.

ALFRED ERBE,
Notary Public.

NEW YORK SUPERIOR COURT.

ALBERT COREY,
agst.
WALTER P. LONG.

CITY AND COUNTY OF NEW YORK, *ss.:*

Albert B. Corey, being duly sworn, says he is plaintiff in the above entitled action; that he has read the complaint herein, and that of his own knowledge said complaint is true; that in the purchase of deponent's interest in the copartnership of "Walter P. Long & Co.," defendant expressly agreed and stipulated to indemnify and hold deponent harmless against all claims, debts and demands, on account of said copartnership, as will more particularly appear by the exhibit hereto annexed, and marked "A;" that in violation of his said agreement, and in fraud of deponent's rights, defendant has refused since the 28th day of December, 1869, and still refuses to

pay any of the said debts of said copartnership; that defendant has permitted, and continues to permit, outstanding paper of said copartnership to go to protest, the defendant at the time having sufficient funds in the Park Bank to take up said paper; that he has incited, and is now inciting, creditors of said copartnership, especially one William Macfarland, to sue deponent jointly with himself, and has procured said creditors to serve process only on deponent; that defendant employed his own attorney, and at his own expense, to commence said actions; that meanwhile defendant is making away with the property and assets of said copartnership and is converting them to his own use; that judgment against deponent will be recovered in said actions which deponent will have to satisfy; that defendant is insolvent and wholly irresponsible, in so much, that if the said property and assets of the said copartnership be dissipated defendant will be unable to exact indemnity or contribution from defendant; that the indebtedness of said copartnership amounts to about $10,000; that the assets and property of said copartnership now in the possession of defendant are of the value of about $10,000; and deponent further says, that besides, and in addition to the said copartnership debts, the defendant owes individual debts to the amount of $7,800.

ALBERT B. COREY.

Sworn to before me this 15th day of January, 1870,

ALFRED ERBE, *Notary Public.*

SUPERIOR COURT, CITY NEW YORK.

ALBERT B. COREY
agst.
WALTER P. LONG.

CITY AND COUNTY NEW YORK, *ss.:*

Jacob Beck, being duly sworn, deposes and says, that he is the lawful owner and possessor of two certain promissory notes made by the defendant, Walter P. Long, which said notes were duly presented for payment by one Howard Campbell, notary public, on the 11th day of January, 1870, and that payment thereof was refused. That the said notes amount to the sum of $3,850 beside the interest due thereon, and said notes have not been paid, nor any part thereof, but remain still unpaid.

JACOB BECK.

Sworn to before me this 15th day of January, 1870,

STEWART S. CARR, *Notary Public, New York City.*

A.

This agreement made the 7th day of December, 1869, by and between Walter P. Long, of the city of Brooklyn, county of Kings, and State of New York, and Albert B. Corey, of the city, county and State of New York, witnesses that the said parties to these presents hereby agree that the copartnership heretofore existing under the firm name and style of Walter P. Long & Company be dissolved, from and after this date, by mutual consent.

And it is further agreed, that Albert B. Corey shall receive as his share of the capital, business and good-will of the said firm the amount heretofore agreed upon by the said Walter P. Long and Albert B. Corey.

And the said Albert B. Corey does hereby assign, transfer, and set over to the said Walter P. Long, all his right, title, and interest, in and to all debts, claims, dues and demands whatever, due, owing and payable to the said firm of Walter P. Long & Company, and also all his right, title and interest in and to all the property, effects, capital and good-will of the said firm.

And in consideration of the said Albert B. Corey agreeing to accept the consideration agreed upon, and also in consideration of the aforesaid assignment, the said Walter P. Long hereby agrees that he will pay all and every debt, due, claim and demand of all and every kind and nature whatever against the said firm of Walter P. Long & Company, and will hold the said Albert B. Corey free and clear of and from all claims and demands whatever thereon.

WALTER P. LONG, [L. S.]
ALBERT B. COREY. [L. S.]

Signed and sealed in presence of
S. H. DOUGHTY.

CITY AND COUNTY OF NEW YORK, *ss.:*

Albert B. Corey being duly sworn, says that the foregoing is a true copy of the original agreement of dissolution of the late copartnership of the firm of "Walter P. Long & Co."

ALBERT B. COREY.

Sworn to before me, this 17th day of January, 1870.

JOHN H. TURNER,
Notary Public, City and County of N Y.

Indorsed: New York Superior Court. *Albert B. Corey* v. *Walter P. Long.* Sum's compl't. Injunction order; order app't,

receiver and affit's. R. A. Pryor, plffs. atty., 37 Nassau St. Filed January 17, 1870.

Q. Did you perform the duties of receiver in that case yourself, Mr. Gano, or did you employ a substitute to carry on the business and make sales? A. I did not make sales; I employed men who were acquainted with the stock to make sales.

Q. Whom did you place in charge as your principal deputy to make the sale of that property? A. Mr. Isaac A. Conklin.

Q. Who else did you employ there for the purpose of making sales? A. Mr. Corey.

Q. The plaintiff? A. Yes, sir; and several others that had been in their employ, and understood the stock.

Q. And Mr. Corey, the plaintiff, under your employ, conducted that business by making sales of property? A. He sold some of the property.

By Mr. Bowen:

Q. What was this stock? A. Spool silk; sewing silk.

By Mr. Harrison:

Q. Had you ever carried on the business of a dealer in spool silk? A. No, sir.

Q. Had you ever been admitted as an attorney-at-law? A. No, sir.

Q. Had you ever been appointed receiver in any case previous to this? A. Yes, sir.

Q. What was the case? A. *Elliott* v. *Butler*.

Q. Who appointed you in that case? A. Judge McCunn.

Q. Is that the only case in which you had previously been appointed? A. No, sir.

Q. What case was it? A. I don't know.

Q. Who appointed you? A. Judge McCunn.

Q. Have you made any accounting of your proceedings, as receiver, in the case of *Corey* v. *Long?* A. I have, sir.

Q. That accounting was before Mr. Ambrose Monell, was it not? A. It was.

Mr. Harrison—We produce from the files of the court, the original papers filed there by the referee to pass upon that accounting, showing the referee's report and account, and the vouchers produced by the receiver upon the accounting. This is one of the papers which was produced here by Mr. Boese, the clerk of the court, and by him authenticated as one of the original records of the court.

The WITNESS—May I be allowed to state that all of this was done under the direction of an order from Judge Barbour, and not Judge McCunn?

Mr. HARRISON—This accounting is very voluminous, and we shall ask the attention of the Senate to only two or three items contained in it.

Q. Do you remember the aggregate proceeds of the sale of that property? A. About $8,000.

Q. How long were you in selling that property? A. About two months.

Q. And were all the assets of the firm sold? A. Yes, sir.

Q. Were all the assets which came into your hands, as receiver, sold? A. They were.

Q. Converted into money? A. Yes, sir.

Q. (Showing paper) Do you recognize that signature to that paper which appears among the papers attached to the referee's report upon that accounting? A. I should say it was Judge McCunn's.

Q. Do you remember to have seen that paper before? A. I do.

Mr. HARRISON—I will read the paper, if the Senate please:

SUPERIOR COURT OF THE CITY OF NEW YORK.

ALBERT B. COREY
agst.
WALTER P. LONG.

On reading and filing the application of Roger A. Pryor, Esq., counselor at law, ordered that James M. Garno, the receiver herein, pay to said Pryor, for professional services herein, the sum of $350.

(Enter.) J. H. McC.

The $350 is in figures, and appears to have been written with a heavy stroke over the other figures, and then changed; it does not refer to any affidavits or petition, or other paper, upon which the order could have been made by the court, or by the judge of the court, and it is not entitled as an order of the court, though it is signed by the judge's initials, with the direction to enter.

Q. What were the circumstances under which that paper came to you? A. It was brought to me by an agent from General Pryor, as I understand it.

Q. How do you know he was an agent from General Pryor? A. Well, I have been in the habit of going to the office, and I have re-

freshed my memory since I testified; it was Albert B. Corey and George L. Simonson who brought the order to me.

Q. Corey brought it to you, accompanied by Simonson? A. Yes, sir.

Q. What occurred when the order was brought to you? A. I looked at it and saw it was an order, as I supposed of the court, and I paid the money.

Q. How much money did you pay? A. $350.

Q. To whom did you pay it? A. To both of them, or to one of them; I don't know which one of them.

Q. Who was George L. Simonson? A. He was a man employed by the concern.

Q. What concern? A. I employed him to help make some sales.

Q. In the business of your receivership? A. Yes, sir.

Q. What was Simonson's business? A. He was a lawyer.

Q. Didn't Mr. Simonson appear in various proceedings in court in this case, either as counsel or attorney for the receiver or for the plaintiff? A. Not to my knowledge.

Q. Wasn't he Mr. Corey's lawyer? A. Not to my knowledge.

Q. Had you ever met him previous to the receivership in this case? A. I don't think I ever did; I don't remember to have.

Q. How came he to be employed in effecting the sale of this property? A. I first employed him to assist in taking account of stock, and figuring, etc.

Q. How came you to employ a lawyer to assist in taking an acount of stock in a merchant's establishment? A. I don't quite remember how it came about that I employed him; he happened to be present, or some thing of that kind; we had to take an account of stock at night, and we wanted all the assistance we could get.

Q. Where was Mr. Simonson's office at that time, if you recollect? A. It was in the same building.

Q. Same building with what? A. With the office of my receivership.

Q. Where was the office of your receivership? A. Corner of Read street and Broadway.

Q. Was that the store of Long & Co.? A. Yes, sir.

Q. In which the plaintiff, Mr. Corey, had been a partner? A. Yes, sir.

Q. Was that item of $350 so paid to Corey and Simonson, entered upon your account submitted to the referee in the case to pass your account? A. It was.

Q. (Showing paper.) Will you look at that paper, and at the entry

there, and inform me whether the handwriting of that entry is the same as the handwriting of the rest of the account? A. It is not.

Q. In whose handwriting is that? A. That I don't know.

Q. Can you explain how that came to appear there in a handwriting other than the handwriting of the rest of the account? A. I think it was entered there by counsel when I first went before the referee.

Q. After the account had been made up and put into his hands? A. The order was sent with the account, I think, and it was a court matter, and knowing nothing about law, I didn't know whether that should be put in there or not, or how it should be.

Q. Then it was put in there after the account had been made out, and after it had passed into the hands of your counsel? A. It was put in, I think, by my counsel, before it was sworn to, or was submitted to Mr. Monell.

Q. Who was your counsel in that case? A. James F. Morgan.

Q. Do you mean James F. Morgan, the brother-in-law of Judge McCunn? A. Yes, sir.

Mr. HARRISON — We call attention to the fact that it appears by this account, that out of the aggregate sum of $8,000, the proceeds of the sale of the property which came into the hands of the receiver in this case, $3,888.49 are charged as expenses of the receivership.

Q. What became of the balance of the proceeds of the sale of that property, Mr. Gano? A. Mr. Bookmaster received some of it, and the balance of the accounts are not passed yet.

Q. Who is Mr. Bookmaster? A. He is the assignee in bankruptcy.

Q. How much of it did he receive? A. $2,500, I believe.

Q. $2,500 was paid over by you to the assignee in bankruptcy? A. Yes, sir.

Q. And the remainder is still in your possession? A. Yes, sir; with the exception of some fees of Monell, that I paid by order of the court.

Q. How much? A. $350.

Mr. HARRISON — The report of the referee is dated May 15th, 1871, rather more than a year ago, and it is marked by the clerk of the court as filed May 16th, 1871.

Q. Then all of that $8,000, except $3,888.49, charged to this account as expenses of the receivership, and the $2,500 paid to the assignee in bankruptcy, and the $350 paid to the referee as his fees upon this report, is still in your hands? A. Yes, sir.

Q. Where do you keep your receiver's account? A. At present in the Broadway Bank, and also in the Second National Bank.

Q. Did you keep any separate account of the receivership in this account; separate bank account? A. I did.

Q. Where? A. At the Union Square Bank; it has failed.

Q. Do you still keep a separate account of these moneys, as received in this case? A. I do.

Q. Where is it? A. It is now in the Excelsior Bank.

Q. It has been, during all the period since the money came into your hands, and up to this date, a separate and distinct account, in the case of *Corey* v. *Long?* A. Not entirely so.

Q. During a portion of the time, at least, then, these moneys which came into your hands, as receiver, have been mingled with your other moneys and your own bank account? A. A little of my private bank account, I think, in the Excelsior Bank; I deposited one or two small checks of mine and drew on that account.

Q. Drew on that account as receiver, and checks you gave against your account of money as receiver? A. Yes, sir.

Q. And the checks you drew, to draw out your private account, were also checks of the receiver? A. Yes, sir.

Q. Why was that; in drawing out private money you gave checks against the receiver's account? A. I deposited, as receiver, but there was no other way to get it out.

Q. Why did you deposit it as a receiver's account, if you had a separate account? A. I had another separate account there.

Q. You had another bank account? A. It happened to be handy to do so is the reason.

Q. Have you been in the habit of keeping any other moneys whatever with your private account, except those mentioned? A. Yes, sir.

Q. What moneys? A. Judge McCunn's; I collected his rents.

Mr. Murphy—Mr. President: The witness has stated that he was appointed as a receiver by Judge Barbour. I have not heard any explanation of that matter. I wish to ask the witness a question:

Q. Did you act as receiver under appointment by Judge McCunn? A. I simply took possession, and an order was granted, vacating my appointment, and I left the building.

Mr. Harrison—I am going to put in the documentary evidence on that subject.

Mr. Murphy—Well, let us have all the facts on that subject.

Mr. D. P. Wood—Mr. President: I would like to ask the witness a question:

Q. Is Judge Barbour one of the justices of the Superior Court? A. He is the chief justice of the Superior Court.

Q. On what ground did he vacate the appointment of you as receiver? A. That I don't know, sir.

Q. On whose motion was it done? A. That I don't know; I am no lawyer.

Q. Was your appointment vacated and your re-appointment made by Judge Barbour, without your knowledge? A. It was.

Q. Both done the same day? A. No, sir, I think not; I think about a week elapsed.

Mr. D. P. Wood—I would ask the counsel if they have the orders of Judge Barbour.

Mr. Harrison—I have the orders, and I am just trying to lay my hands upon that order upon which the receivership was vacated. We now put in evidence the order of Judge Barbour [original], produced from the files of the Superior Court, as one of the authenticated records of the court. It is entitled as follows:

Exhibit No. 31.

At a Special Term of the Superior Court, held at the City Hall, New York, on the 22d day of January, 1870.

Present—Hon. John M. Barbour, *Chief Justice.*

Albert B. Corey
agst.
Walter P. Long.

On the complaint herein, the affidavit of Albert B. Corey and Jacob Beck, and on the further affidavits, on the part of the plaintiff, of George W. Simonson, and on the affidavit of Walter P. Long, after hearing James K. Hill in favor of the motion and Roger A. Pryor in opposition, it is hereby ordered that the order made herein on the 15th day of January, 1870, appointing James M. Gano receiver of all the property and effects of Walter P. Long & Co., be and the same is hereby vacated and set aside; the decision as to the injunction herein being reversed.

(Enter.) J. M. B.

Indorsed: No. 28. N. Y. Superior Court. *Albert B. Corey* v. *Walter P. Long.* Order vacating order appointing receiver, etc. James K. Hill, defendant's attorney. Exhibit No. 31. C. R. D. Filed January 22, 1870.

Mr. D. P. Wood—What is the date of that?

Mr. Harrison—The 22d of January. The order of re-appointment is also here, and is dated the 29th of January, I think.

Q. Do you know upon what grounds that order made by Judge McCunn, appointing you receiver in this case, was vacated and set aside? Have you not heard Judge McCunn say? A. I have, but that is all I know about it. I was under the impression that it was not legal, on account of being a brother-in-law of Judge McCunn.

Q. Did you not hear Justice McCunn state before the Assembly committee why it was vacated?

A Senator—Why ask him in regard to that?

Mr. Harrison—Judge McCunn stated in our presence, before the Assembly committee, that the real ground was that just stated by the witness.

Q. Did you hear Judge McCunn say that he would procure Judge Barbour to appoint you receiver upon a new motion? A. No, sir.

Q. Are you not aware of the fact that the re-appointment by Justice Barbour was made upon solicitation of Justice McCunn? A. No, sir.

Q. Did you have any personal acquaintance at that time with Judge Barbour? A. It appears to me I had been presented to him once or twice.

Q. Who by? A. That I don't remember.

Q. Where was it you were presented to him? A. I don't know that; I am not positive that that was the case; whether it was before or after this that I was present.

Q. Do you know how Justice Barbour got hold of your name as a person to be appointed receiver in this case? A. I think it was proposed by the attorney, Roger A. Pryor.

Q. By the attorney for whom?

Mr. Van Cott—He says that it was Roger A. Pryor who opposed his discharge.

Q. Who did Pryor appear for? A. The plaintiff, Albert B. Corey.

Mr. Harrison—We also put in evidence as one of the papers produced by Mr. Boise, clerk of the Superior Court, the order of injunction in this case, issued by Justice John H. McCunn, and signed by him, and dated January 15, 1870, enjoining the defendant from, in any manner, interfering with the property which was in his hands, and which, at one time, belonged to the copartnership of Walter P. Long & Co.

The same was here marked as Exhibit 32, and is as follows:

EXHIBIT No. 32.

SUPERIOR COURT OF THE CITY OF NEW YORK.

ALBERT B. COREY
agst.
WALTER P. LONG. } *Injunction order.*

It appearing satisfactorily to me by the affidavits of Albert B. Corey, Jacob Beck, and the complaint, verified of the plaintiff, that sufficient grounds for an order of injuction exist, I do hereby order that the defendant, Walter P. Long, above named, refrain from disposing of, interfering or intermeddling with, in any manner whatsoever, the property and assets of every description of the late firm of Walter P. Long & Co., and from all matters arising out of and connected with the business of said late firm, until the further order of this court, and, in case of disobedience to this order, you will be liable to the punishment therefor prescribed by law.

Dated NEW YORK, *January* 15, 1870.

JOHN H. McCUNN, *Justice.*

Indorsed: Exhibit No. 32. Copy.

Mr. HARRISON—We also offer that the order of the Superior Court, dated January 28, 1870, present John M. Barbour, chief justice, which was made upon a motion to vacate that order of injunction. That motion was denied. Also the order of the general term of the Superior Court in March, 1870, upon an appeal from the order of Chief Justice Barbour vacating the motion to vacate the injunction. The general term reversed the decision of the special term, and vacated the injunction, the receivership having been previously discharged. We also offer another order produced here by the clerk of the court, an original record from the files of the court, of the 27th January, 1870, made before Chief Justice Barbour. We ask that these papers be marked separately.

[The same were here marked respectively as Exhibits 33, 34 and 35, and read as follows:]

EXHIBIT No. 33, C. R. D.

At a special term of the Superior Court of the city of New York, held at the new City Hall, New York, on the 27th day of January, 1870.

Present—Hon. JOHN M. BARBOUR, *Chief Justice.*

ALBERT B. COREY
agst.
WALTER P. LONG.

The motion to punish the defendant for misconduct in disobeying the orders made herein by Mr. Justice McCunn on the 15th day of January, 1870, in interfering with the property and assets of the late firm of Walter P. Long & Co., and the possession thereof of the receiver under said orders, and in otherwise disobeying said orders, as for a contempt of this court, having come on for hearing; on reading and filing the order to show cause made herein on the 21st of January instant, by Mr. Justice McCunn, the injunction granted herein on the 15th day of January instant, the order appointing a receiver, the affidavits of George L. Simonson, of Cornelius B. Cory Philip Cosgrove and Albert B. Corey, after hearing Roger A. Pryor of counsel for the plaintiff, in favor of said motion, and J. K. Hill of counsel for defendant appearing in opposition thereto:

Ordered that the said motion be, and the same is hereby denied, with five dollars costs to the defendant.

(Enter) J. M. B.

Indorsed: N. Y. Superior Court. *Albert B. Corey* v. *Walter P. Long.* Order denying motion to punish, etc. J. K. Hill, defendant's attorney. Exhibit No. 33. C. R. D. Filed January 27, 1870.

EXHIBIT No. 34, C. R. D.

At a Special Term of the Superior Court of the city of New York, held in the new Court House in said city of NewYork, on the 28th day of January, 1870.

Present — Hon. JOHN M. BARBOUR, *Chief Justice.*

ALBERT B. COREY
agst.
WALTER P. LONG

On reading and filing the affidavit of Walter P. Long, and order made by John J. Freedman, justice of the court, why the order of injunction made by Hon. John H. McCunn should not be vacated

on part of defendant, and on reading and filing the complaint in this action, and the affidavits of Albert B. Corey, Cornelius B. Corey, James S. Blake, Jacob Beck, Alfred Mellen, and order of injunction made by Hon. John H. McCunn, justice of this court, and the order of Hon. John H. McCunn, made on the 17th day of January, 1870, modifying the order of Hon. John J. Freedman, justice of this court, on part of plaintiff; and after hearing J. K. Hill, Esq., on part of defendant, and Roger A. Pryor, Esq., in opposition thereto, ordered that the motion to vacate the order of injunction heretofore made be, and the same is hereby denied, with ten dollars costs, to abide event of action.

(Enter.) J. M. B.

Indorsed: No. 9. New York Superior Court; *Albert B. Corey* v. *Walter P. Long;* order denying motion to vacate order of injunction. Roger A. Pryor, att'y, pl'ff, 39 Nassau st., N. Y. city. Exhibit No. 34. C. R. D. Filed January 28th, 1870.

EXHIBIT No. 35, C. R. D.

At a General Term of the Superior Court of the city of New York, held at the new county Court-house in the city of New York, on the — day of March, 1870.

Present — Hon. CLAUDIUS L. MONELL, J.
" JOHN H. McCUNN, J.
" J. J. FREEDMAN, J.

ALBERT B. COREY, respondent,
agst.
WALTER P. LONG, appellant.

The appeal from the order entered herein on the 28th day of January, 1870, denying a motion to dissolve an injunction herein, coming on to be heard on the printed papers hereto annexed, after hearing James K. Hill of counsel for the appellant, and Roger A. Pryor, Esq., of counsel for the respondent, ordered, that said order be and the same is hereby reversed, and that the appellant recover the costs and necessary disbursements of this appeal from the respondent.

(Enter.) C. L. M.

Indorsed: No. 1. N. Y. Superior Court. *Albert B. Corey* v. *Walter P. Long.* General Term order reversing order denying motion to vacate injunction. James K. Hill, defendant's attorney. Exhibit No. 35. C. R. D. Filed August 26, 1870.

Q. Had you any personal acquaintance with Roger A. Pryor? A. I have been presented to him.

Q. Had you ever seen him at Judge McCunn's house? A. Yes, sir.

Q. Do you know what the relations were that existed between Judge McCunn and General Pryor? A. Friends, I believe.

Q. Intimate friends? A. Yes, sir.

Q. Together very frequently? A. Yes, sir.

Mr. HARRISON—That is all, sir, at present.

Mr. MORGAN—Dr. Gano desires to make a statement in explanation.

Mr. HARRISON—An explanation as to his testimony?

Mr. MORGAN—Yes, sir.

The WITNESS—The moneys which I had in the bank, belonging to other parties, were Judge McCunn's; they were collected by me, as his agent, for rents.

By Mr. MORGAN:

Q. Doctor, you took charge of Judge McCunn's house, did you not?—

Mr. VAN COTT—Well, wait a moment, and let us understand about this.

Mr. MORGAN—O, I will waive it then.

WILLIAM VAN WYCK, a witness called on behalf of the prosecution, being duly sworn, testified as follows:

Mr. HARRISON—This witness will be examined in the case of *Elliott* v. *Butler*, which is the third charge, I think.

Q. What is your occupation, Mr. Van Wyck? A. Attorney and counselor at law.

Q. Where do you reside? A. New York city.

Q. Do you know Justice John H. McCunn, of the Superior Court? A. I do.

Q. Have you any knowledge of the case of *Elliott* v. *Butler*? A. Yes, sir.

Q. Did you appear in that case for either party as attorney? A. I did.

Q. For whom? A. For the plaintiff.

Q. Please state what your connection with that case was? A. Well, sir; I drew—do you wish a statement of the case?

Q. No, sir; not of the case, but what your connection was with it; and you will please recite any application you made to any judge for an order? A. I made an application for an injunction

and receiver in that case upon the summons and complaint and affidavit attached to the complaint.

Q. Who did you make that application to? A. Judge McCunn.

Q. (Showing paper) Look, at that paper, if you please; do you recognize it? A. I do, sir.

Q. Is that an order which was made upon the application for the appointment of a receiver? A. It was, sir.

Mr. HARRISON—That is an original paper produced by the clerk of the court, from the files of the court, with Justice McCunn's signature in full; and I will read it as appears in Exhibit 36, from the words, "ordered that James M. Gano be, and hereby is appointed receiver," etc., to the end of the order, dated December 10, 1869.

The plaintiff is *Anna M. Elliott* v. *Mary P. Butler.*

The following papers were here marked Exhibit 36.

EXHIBIT No. 36.

SUPERIOR COURT OF THE CITY OF NEW YORK.

ANNA M. ELLIOTT
agst.
MARY P. BUTLER.
} *Injunction by order.*

It appearing satisfactorily to me, by the affidavit of C. C. Cox, on behalf of, and the sworn complaint of the plaintiff, that sufficient grounds for an order of injunction exists; I do hereby order, that the defendant, Mary P. Butler, her servants, agents, attorneys, counselors, and other persons in any manner claiming any right or authority from her, refrain from in any manner receiving, collecting or interfering with any of the income or revenues arising, or in any manner connected with or from that certain boarding house, in said complaint described, or from any of the boarders or inmates of said boarding house, living and liable to pay for board or other accommodations in said boarding house, No. 54 West Twenty-fourth street, in the city of New York, until the further order of this court, and in case of disobedience to this order, you will be liable to the punishment therefor prescribed by law.

Dated NEW YORK, *December* 10, 1869.

JOHN H. McCUNN, *Justice.*

Indorsed: Superior Court: *Anna M. Elliott* v. *Mary P. Butler.* Injunction order. Wm. Van Wyck, plaintiff's attorney, 6 Wall street.

SUPERIOR COURT OF THE CITY OF NEW YORK.

ANNA M. ELLIOTT
agst.
MARY P. BUTLER.

At a Special Term of the Superior Court of the city of New York, held at the City Hall, in said city, on the 10th day of December, 1869.

Present—Hon. JOHN H. McCUNN, *Justice.*

Upon the summons and complaint and affidavit of C. C. Cox, thereto annexed, and on motion of William Van Wyck, for the plaintiff in this action, ordered, that James M. Gano be and hereby is appointed receiver, to collect, receive and hold, subject to the order of this court, all moneys now due or to become due, from the boarders in the boarding house in said complaint mentioned, upon the said receiver executing and filing with the clerk of this court a bond in the usual form, to the people of this State, in the penalty of five hundred dollars, with two sufficient sureties, freeholder or householder of said city and county, to be approved as to its form and manner of execution by a justice of this court.

And it is further ordered that the boarders and lodgers in said house pay all sums, due from them to the defendant, to the receiver herein appointed, upon production of a certified copy of this order, and upon demand therefor.

JOHN H. McCUNN, *Justice.*

Indorsed: Superior Court of the city of New York. No. 1. *Anna M. Elliott* v. *Mary P. Butler.* Order appointing receiver. Exhibit 36. C. R. D. Filed December 10, 1869. Wm. Van Wyck, plaintiff's attorney, 6 Wall street, New York.

SUPERIOR COURT OF THE CITY OF NEW YORK.

ANNA M. ELLIOTT, Plaintiff,
agst
MARY P. BUTLER, Defendant.

Summons for Relief.

To the Defendant:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber at his office, No. 6 Wall street, city of New York, within twenty

days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated NEW YORK, *December* 10, 1869.

WILLIAM VAN WYCK,
Plaintiff's Attorney.

SUPERIOR COURT OF THE CITY OF NEW YORK.

ANNA M. ELLIOTT
agst
MARY P. BUTLER.

The complaint of the above-named plaintiff respectfully shows to this court:

That at the time hereinafter mentioned this plaintiff was and now is a married woman, and the wife of one Beaufort Elliott, and was possessed of certain property consisting of an unexpired term in a lease of certain premises known as No. 54 West Twenty-fourth street, in the city of New York, and of certain furniture and other personal property therein, subject only to a certain lien thereon.

That on or about the 25th day of October, 1869, the said plaintiff, being so possessed as aforesaid, the said defendant did, by certain false, wicked, and malicious representations, induce this plaintiff to enter into a certain contract with her, and that the sole object of the said defendant in entering into the same and inducing this plaintiff so to do, was that she (the said defendant) might defraud this plaintiff out of the possession thereof, and reap all profit arising therefrom.

That, by the terms of the above-mentioned contract or agreement, the said defendant agreed to hire and take from this plaintiff the said house and the furniture therein for the unexpired term of said lease, to wit: until the 1st day of May, 1871, at the monthly rent or sum of $800, payable monthly, in advance; and did further agree to put up a sum or forfeit of $800 for faithful performance of the covenants on her part to be performed in said lease contained.

That, by the terms of said lease, the said defendant was to enter into the possession and enjoyment of said leasehold premises and furniture on the 1st day of November, 1869, before which time the said defendant was to put up the said deposit of $800, and pay the said $800 rent for the said first month's rent, in advance.

That on or before the said day the said defendant did put up the

said $800 deposit, but did, by means of certain maliciously false and wicked statements, made by her with the intent to deceive and defraud this plaintiff, induce this plaintiff to extend the time for the payment of the said $800 rent due as aforesaid.

That this plaintiff, being so deceived by the said false, wicked, and malicious statements, and the tricks and devices of the said defendant, did allow the said defendant to enter into the possession and enjoyment thereof, without first exacting the payment of the said $800 rent due as aforesaid.

That the said defendant having then, by cheat and device, as aforesaid, succeeded in obtaining the temporary possession and enjoyment of the said household premises and furniture did enter into the occupation and use thereof, for the use of the same as a boarding house (for which purpose this plaintiff had for a considerable time used the same), and did thereupon and immediately thereafter come into a very large revenue paid to her by the boarders in said house.

That the income which this defendant had received from her boarders in said house, during the time she kept the same, had been her only support, and also the only means she had with which to pay the amount due the landlord of said premises for the rent reserved to be paid on his lease.

That after the said defendant had secured possession of the said premises, and come into the enjoyment of the said large revenue, in the manner hereinbefore narrated, she did wholly and entirely neglect to keep and perform the promises made by her as aforesaid, and also the covenants and agreements in said lease contained on her part to be performed.

That at first she merely made promises from time to time to pay within a few days, all of which said promises were totally false, and were never meant to have been kept or performed by her; that her object in making the same was to deceive this plaintiff, and thereby obtain as long a stay as possible in the said house, and derive as much income as possible therefrom.

That after the said defendant had obtained all the extension possible in this manner, and this plaintiff had become satisfied that the same had been made falsely and maliciously, and for the purpose of deceiving and defrauding this plaintiff, and this plaintiff was deceived thereby no longer, but refused to grant any longer extension of the time for the payment thereof, that thereupon the said defendant entirely changed her manner and refused to pay this plaintiff the

same, although she retained and still retains the possession of said property.

That this plaintiff thereupon caused summary proceedings for the dispossession of said defendant from said demised property to be taken before the Hon. Thaddeus H. Lane, a justice having jurisdiction thereof, and that in the said proceedings the said defendant has taken every means in her power to delay said proceedings.

That among other proceedings taken therein she, the said defendant, upon the return of the summons in said summary proceedings, did file an affidavit in which she denied, among other things, that she holds over in the possession of said premises, as in said summons and in the affidavit on which the same was granted is alleged, although the said defendant now is, and ever since the 1st day of November, 1869, has been in the enjoyment of the said premises and property, and in the receipt of a large revenue and income from the boarders thereof as aforesaid, and has paid no rent therefor.

That the said proceedings are still pending, and that the said defendant is still in the possession and enjoyment of the said property, and the revenue thereof, and is now inflicting and continues to inflict by false, wicked and malicious statements, to this plaintiff, and this plaintiff's confidence therein, great and irreparable injury, and she, the said defendant, reaps great and undeserved benefit, advantage and profit from her said fraud and wickedness.

That in consequence thereof, this plaintiff is deprived of the means of her support, and is left without any means of support whatever; that she is cut off from her resources with which she should pay the rent due to her superior landlord; that said landlord is now pressing for the payment of his rent, and that this plaintiff has no means of paying the same, although she knows the same to be justly due.

That in this, plaintiff verily believes the said defendant is a person of no pecuniary responsibility whatever, that she has no visible means of support, except that obtained from the boarders in said house, of which she obtained possession by fraud and deceit, as hereinbefore alleged, and that no court of law could grant this plaintiff adequate redress for the wrong and injury she has sustained from the said defendant as aforesaid.

That should this court refuse to interfere, by its equitable power of injunction, the said defendant will continue to reap, as she now reaps, the full benefit of her fraud, to the great injury of this plaintiff.

Wherefore, this plaintiff prays this court to restrain the said defendant, her servants, agents, attorneys, counselor, and other per-

sons, in any manner deriving any right or authority from her, from in any manner receiving, collecting or interfering with any of the income or revenue arising, or in any manner connected with any boarder or other person hiring or paying for accommodations in said house, No. 54 West Twenty-fourth street.

That a receiver be appointed to take, receive and hold all such sums, due or to become due, subject to the order of this court.

That the court decree that the said lease or agreement, executed between the plaintiff and this defendant, be delivered up to be canceled, and that the plaintiff have such damages as she shall have sustained by reason of the acts of the defendant hereinbefore set forth, and that the court grant such other or further relief, or both, in the premises, as may be just and proper, together with the costs of this action.

WM. VAN WYCK,
Plaintiff's Attorney, No. 6 Wall Street.

CITY AND COUNTY OF NEW YORK, *ss.:*

Caroline C. Cox, being duly sworn, says, that she is the agent for the plaintiff herein; that the foregoing complaint is true of her own knowledge, except as to the matters therein stated on information and belief, and as to those matters she believes it to be true.

That the grounds of this deponent's knowledge in this matter are, that she has read and examined the lease entered into between the plaintiff and defendant herein, and that this deponent has personally had charge of the said matter for the said plaintiff ever since the said defendant entered into the possession of said premises on the 1st day of November, 1869, and that all the transactions therein set forth as having occurred since that time have occurred between deponent as the agent of the plaintiff and the said defendant or her agent.

That the grounds of this deponent's information and belief in this matter are statements made to deponent by the plaintiff and her attorney and by the said defendant and her agent.

That the reason why this verification is made by deponent, rather than the plaintiff, is because deponent has large personal knowledge of the facts in said complaint set forth, and that the said plaintiff is not now in the city and county of New York, or in the same county with her said attorney, but is temporarily absent in the State of Georgia, and that the necessity for immediate action renders it

impossible to delay these proceedings until the same can be forwarded to her for verification.

C. C. COX.

Sworn to before me, this 10th day of December, 1869,

EDWARD MCKINLEY,
Notary Public, New York City and County.

CITY AND COUNTY OF NEW YORK, *ss.:*

Caroline C. Cox, being duly sworn, says that the foregoing complaint is true.

C. C. COX.

Sworn to before me, this 10th day of December, 1869,

EDWARD MCKINLEY,
Notary Public, New York City and County.

Indorsed: Superior Court of the city of New York. *Anna M. Elliott* v. *Mary P. Butler.* Summons and complaint. Exhibit No. 36. C. R. D. William Van Wyck, plaintiff's attorney, 6 Wall street, New York. Filed December 10, 1869.

Q. Did you take any steps in that action for procuring the appointment of receiver? A. I did not, sir.

Q. Did you have any personal acquaintance previous to that time with James M. Gano? A. I think not, sir; I think I met him for the first time on that occasion, after he was appointed receiver, to take charge of the house, but will not be positive as to that; certainly had no acquaintance with him.

Q. Did you suggest his name as a person to be appointed receiver? A. I am under the impression that I did not.

Q. Who did? A. No one, that I know of.

Q. Was anybody present except yourself and Justice McCunn when the order was signed? A. I think there was quite a number in the court room.

Q. And nobody appeared in this case? A. No, sir.

Q. Then the intimation that Gano would be receiver was Judge McCunn himself? A. As far as I recollect, sir.

Q. Did you see the receiver afterward in this matter? A. Yes, sir.

Q. Whereabouts? A. I am not positive whether I served that order upon him or not, but if I did I saw him at his office on

Twenty-fourth street; but I am certain that afterward I saw him in possession of the house.

Q. What house? A. No. 54 West Twenty-fourth street; in possession of the furniture of that house.

Q. That was the house occupied by the defendant as sub-tenant of the plaintiff? A. Yes, sir.

Q. Was he there as receiver under this appointment, do you know? A. I don't concede exactly that he was receiver under that appointment, for that only orders him to collect rents; if he was in possession of the house he was extra of that order.

Q. Beyond the scope of that order? A. Yes, sir.

Q. Do you know whether he did any thing under this order by way of collection of board bills from boarders in that house? A. Yes, sir.

Q. Did you ever see anybody there with him? A. Yes, sir; there was a young man who took the part of assistant; I believe they called him a deputy-receiver.

Q. Did you ever see anybody else with him? A. No, sir; I think not.

Q. Then I understand you to say, that after procuring the appointment of receiver in this case, you threw it up and had nothing more to do with it? A. No, sir; nothing more whatever; however, I will say this, that there was an attorney who appeared and demurred to the complaint, and he asked for an extension of time, which he gave.

Q. Nothing more was done in court in regard to that suit? A. No, sir.

Q. There has been no accounting by the receiver so far as you know? A. No, sir.

Q. There has been no order discharging this order, or discharging this receiver from his liabilities? A. No, sir; not that I have had any notice of.

Q. Have you had any notice of application for leave to sue the receiver in this case? A. No, sir.

By Mr. PERRY:

Q. What was the name of this deputy receiver? A. I think the name was Conklin, sir.

Mr. HARRISON—We offer in evidence the complaint in this case, and we merely call the attention of the Senate to two features of it. The one that the plaintiff recites that the house which was held by the defendant as her sub-tenant, is the house No. 54 West Twenty-

fourth street; and that, unless the plaintiff could collect from the defendant the moneys mentioned in this complaint, the plaintiff would be unable to pay her own superior landlord.

Mr. D. P. Wood — May I ask you whether those papers have been authenticated by Mr. Boese?

Mr. Harrison — This is an original paper, produced from the files of the court, and brought by the clerk of the court.

Q. Who was the superior landlord of these premises? A. Judge McCunn; at least I always understood so; I believe it was well understood; if I thought of it at all at the time, I understood he was.

By Mr. Bowen:

Q. Was this brought to Judge McCunn's attention? A. He looked over papers as a judge usually does when you present papers; whether he read them or not is more than I can say.

By Mr. Perry:

Q. Do you know who your client paid rent to? A. Well, I can say that I do, sir; though I think it was well understood that Judge McCunn was the superior landlord, sir.

Mr. Harrison — We expect to prove by the next witness, Mr. President and Senators, that Justice McCunn was present upon the premises with the receiver almost as soon as the receiver himself got there.

By Mr. Harrison:

Q. Was there not an injunction applied for at the time you applied for an order appointing a receiver? A. Yes, sir.

Q. Judge McCunn granted your order of injunction? A. Yes, sir.

Mr. Harrison — That paper we will put in evidence as soon as we can lay our hands upon it. We shall hand to the clerk, in a moment, all the papers upon which the order appointing a receiver was made. We now have the original here. This which I hold in my hand is a copy merely, but I now produce an order of injunction to which I referred, granted by Judge McCunn on the 10th of December, 1869, being the original order produced from the files of the court by the clerk, which is in these words as appears in the injunction order, marked Exhibit No. 36: "It appearing satisfactorily to me by the affidavit of C. C. Cox, on behalf of, and the sworn complaint of the plaintiff, that sufficient ground for an injunc-

tion exists," to the end of the order. This shows that the number of the house was indicated in the order of injunction.

By Mr. MURPHY:

Q. Whose handwriting is that order in? A. This order was made in my office.

By Mr. HARRISON:

Q. Do you recognize the signature as that? A. That is the signature of Judge McCunn.

Q. That is the original order of injunction? A. Yes, sir.

The order of injunction was here marked as Exhibit 36.

Lewis Henry Gutlaous Erhardt, a witness called on behalf of the prosecution, being duly sworn, testified as follows:

By Mr. HARRISON:

Q. What is your occupation, Mr. Erhardt? A. Physician.

Q. Where do you reside? A. New York city.

Q. How long have you resided there? A. For five years.

Q. Do you know either parties to the suit of *Elliott* v. *Butler*? A. I know Mrs. Elliott; I know both parties.

Q. Have you any relationship to either of the parties to that suit? A. Mrs. Butler is my mother-in-law.

Q. Where did you reside in December, 1869? A. In the house No. 54 West Twenty-fourth street.

Q. That was a boarding-house kept by Mrs. Butler, was it not? A. Yes, sir.

Q. Do you know James F. Morgan? A. I do.

Q. Did you ever see him at your house? A. Several times.

Q. Did you see him at your house during December, 1869? A. Yes, sir.

Q. What were the circumstances of his presence at that time? A. He came there one evening and was introduced by Judge McCunn as receiver of the premises, as I understood.

Q. How long did he remain there? A. He didn't remain long, though he came from time to time through the day and evening; he appointed another man; I don't know whether he or Judge McCunn appointed him; it was a man named Conklin.

Q. What was his full name? A. I don't know; I don't remember; I never was told, only I heard it accidentally.

Q. Was Judge McCunn there with him? A. I don't know whether they came together; when I saw them both Judge McCunn was with him at the house.

Q. What did Judge McCunn say in reference to the matter? A. He told me that a receiver was appointed; he spoke to me as having charge of Mrs. Butler's things there, and told me that he had appointed a receiver and would not allow any one to remove any thing from there — any of the boarders — unless they paid him or the receiver.

Q. Paid what? A. The rent that was due Mrs. Butler; he even called a policeman to prevent any one going out.

Q. Judge McCunn did? A. Yes, sir; he went out and came back with a policeman; I then told him I certainly would not allow a policeman in there, where there was no cause for it; and after a while he told the policeman to go away.

Q. The policeman did so? A. Yes, sir.

Q. Did you ever have occasion after that to see Judge McCunn in reference to the receivership at all? A. Yes, sir, several times; I went several times to him to induce him to let some trunks go which belonged to a gentleman named Pinkhurst; to allow him to have them, as he had paid me; several of the boarders had paid me.

Q. When had he paid you? A. Several days before the receiver was appointed; two days before.

Q. He had paid up to that time? A. He was owing a couple of days' board, which he was willing to pay, but the receiver wanted two months' or six weeks' board.

Q. Do you mean he demanded that? A. Yes, sir; at least, I don't know whether it is true; Mr. Pinkhurst told me that by paying Judge McCunn—

Q. Nothing except what occurred in Judge McCunn's presence? A. Judge McCunn said he would not let the things go; after seeing him several times he gave me a verbal order to the receiver to let the things go.

Q. To allow Mr. Pinkhurst's trunks to leave the house? A. Yes, sir; that order I gave to Mr. Conklin and Mr. Gano; they both said, all right; in the evening I came there, and there was Judge McCunn, and he said he would not let the trunks go; that is, not unless the amount was paid over again; even if he had paid me, he should pay the money over again, and whenever the thing was decided he should have the money back.

Q. How long was Pinkhurst detained there by the custody of his trunks? A. About a week, or longer.

Q. Have you ever had any conversation with Gano in reference to this case? A. I have; I have asked him several times what dis-

position was made of the money, and told him that Mrs. Butler would get done before long with the suit, and he said, "it is no use," you will get along with it; it is Judge McCunn's matter, and he, of course, will keep it.

Q. Do you know on what terms Mr. Pinkhurst finally got his trunks? A. I am not sure of it.

Q. You have no knowledge of it yourself? A. No, sir; I understood he paid $50.

Mr. VAN COTT — Not what you understood, Mr. Erhardt.

WITNESS — I do not know, then; by hearsay.

By Mr. HARRISON:

Q. Did you ever see Judge McCunn at the Superior Court? A. Yes, sir; several times I went there.

Q. In this matter? A. Yes, sir.

Q. What occurred there at that time with him? A. He would promise me in the evening, or in the morning, when I saw him there, that he would have every thing; that every one who wanted to go could retire, and all the trunks would be delivered; he retained Mrs. Butler's trunks, and every thing, more than a week, and would not let them go out of the house; at last he used to take me in his carriage from his chamber to the house; from the chamber of the Supreme Court.

Q. Superior Court, you mean? A. Superior Court.

Q. He would take you in his carriage to the house, No. 54 West Twenty-fourth? A. Yes, sir; he would give an order to Conklin or Mr. Gano, to let the trunks go out of the house, and when I would have a man there to take the trunks out, there would be an order not to have them go, and so it went for a week, and finally I got them.

Q. Do you know whether or not the judge was the owner of that house? A. I do.

Q. Did Judge McCunn offer to rent that house to you? A. Yes, sir.

JAMES M. GANO recalled.

By Mr. HARRISON:

Q. Did you act as receiver in the case of *Elliott* v. *Butler*? A. I did.

Q. I understood you to say, during your previous examination, that you acted as the agent of Justice McCunn in collecting his rents? A. I did.

Q. Do you know who was the owner, in December, 1869, of the house No. 54 West Twenty-fourth street? A. I always understood it was he.

Q. Have you been in the habit of collecting the rents due for that house, for Justice McCunn? A. I have.

Q. Did you enter upon the discharge of your duties under the order appointing you receiver in the case of *Elliott* v. *Butler?* A. I did.

Q. Did you collect board bills due by boarders in the house? A. Some of them.

Q. What became of the moneys that you collected as receiver in that case? A. I paid some of them to Mr. Conklin, the deputy or assistant receiver; I paid the servants in the house, not all of them, but all that called upon me; and the sheriff attached the balance, and I paid it over.

Q. How do you know that the sheriff attached the balance? A. There was an attachment served on me, signed "James O'Brien, sheriff," and I handed over the moneys.

Q. You handed over the moneys to whom? A. To the man who presented the warrant of attachment.

Q. Who was he? A. He was a deputy sheriff, I understood; I do not remember his name.

Q. How do you understand that he was a deputy sheriff? A. From his bringing the warrant.

Q. Had you ever had any acquaintance with that person before? A. Not to my knowledge.

Q. And you have no knowledge that he was a deputy sheriff, except from the fact that he presented you that warrant of attachment? A. I have not.

Q. Who was the plaintiff in that suit in which the warrant of attachment was issued? A. That I do not remember.

Q. Don't you remember that that was the suit of *John H. McCunn* v. *Anna M. Elliott?* A. No, I do not; I have forgotten the title of it entirely.

Q. Did not you know who got those moneys ultimately? A. No, sir; the sheriff, I understood, ate them up as a fee; there was not very much.

Q. Was there an order of the Superior Court to authorize you, as an officer of that court, to pay over moneys to the sheriff? A. I think there was an order of the Supreme Court.

Q. Where is that order? A. I do not know.

Q. How do you know there was any such order? A. I just

indistinctly remember it; I do not know positively that there was such an order, but it occurs to me that there was.

Q. In what court was that suit brought in which there was an attachment issued? A. I have just stated that I think it was the Supreme Court, but I am not positive.

Q. Have you ever filed any accounting of your receivership in that case? A. I have not.

Q. And you have no knowledge as to what became of those moneys, except that you paid them over to a man who handed you what he said was a warrant of attachment? A. That was all.

Q. Where were you when this person called upon you? A. I think I was at my office, but my assistant, Mr. Conklin, was in the building, 54 West Twenty-fourth street.

Q. Where was your office? A. 40 West Twenty-fourth street.

Q. In what shape did you pay over this money upon that paper which you call a warrant of attachment; in bills, or by a check, or how? A. That I do not remember.

Q. When did you pay it over? A. The time that the attachment was served; I do not remember the time, but it was some two or three weeks after I took possession.

Q. Then it was probably in January, 1870? A. I do not know exactly when it was.

Q. Have either of the parties to that suit, or any of the attorneys, ever conferred with you about your right to pay over money under those circumstances? A. I think not; I think the matter was settled; I simply obeyed the sheriff's order; I do not know whether I did right or wrong.

Q. Has Judge McCunn ever said any thing to you in regard to your paying it over? A. I think not.

Q. Were you not examined before the assembly committee in the Fifth Avenue Hotel, with reference to this matter? A. I was.

Q. Do you recollect that Justice McCunn was present during your examination? A. He was.

Q. Don't you remember that he there stated that that suit in which the warrant of attachment issued was a suit in which he was plaintiff and Mrs. Elliott was defendant? A. I have forgotten that.

Q. Don't you remember it now? A. I do not.

Q. Do you remember that he stated that he sued Mrs. Elliott to collect his own rent which she owed him? A. I do not.

Q. Is not that a fact? A. I do not know.

Q. Is not Mrs. Elliott in debt to Judge McCunn for rent of that house? A. She is, I believe, to this day.

Q. What steps had there been taken to collect it? A. She was sued, but the matter was eventually settled at considerable loss to us; $500 or $600 a month; the house stood idle.

Q. You say she was eventually sued; by whom; you or Judge McCunn? A. I think it was by me.

Q. Do you mean to say that you, as agent, began a suit against Mrs. Elliott for rent, when Judge McCunn himself was in town? A. I very often —

By Mr. Benedict:

Q. In whose name was she sued? A. I am not positive that I commenced any suit in that matter; we have some twenty-five houses, and out of that number I presume I commence proceedings as often as twenty times a year.

Q. In your own name? A. In my own name, as agent for Judge McCunn.

By Mr. Harrison:

Q. In your own name as plaintiff, or as an agent instructed to bring the actions? A. I do not understand enough of law to know how to answer that question.

Q. Don't you mean that you, as agent of Judge McCunn, instituted proceedings to dispossess persons who are in possession of premises under leases? A. I do.

Q. That is all? A. I don't know whether there is any more or not; I have a power of attorney to sign his name in all matters; to sign notes or any thing of that kind; I have a full power of attorney.

Q. And the proceedings which you speak of are the proceedings which you institute against tenants of Judge McCunn; you acting under that power of attorney as his agent? A. Yes, sir.

Q. Don't you remember testimony of this sort that you gave before the committee of the Assembly? (No answer.)

Q. You say that you were appointed receiver because you had been Judge McCunn's agent for collecting the rent? A. I didn't say so.

Q. You presume that was the reason? A. Mr. Van Wyck selected me; I don't know why.

Q. Was a copy of the attachment that you have mentioned delivered to you in the suit of *McCunn* v. *Elliott?* A. It was.

Q. Where is that? A. I don't know.

Q. Is it anywhere? A. It must be among my papers.

Q. Will you swear that one was delivered to you? A. I will, positively.

Q. Do you remember that testimony? A. Well, I presume I made a mistake there as to whether it was the suit of *McCunn* v. *Elliott;* that I don't know; I simply referred to an attachment; I remember an attachment, but I don't know whether it was in *McCunn* v. *Elliott* or not, though I am under the impression that it was.

Q. Do you know of any suit brought by anybody else against Mrs. Elliott, in which an attachment was served upon you? A. I heard of one.

Q. One in which an attachment was served upon you? A. Not upon me; upon the furniture; I would like to state here, that Judge McCunn did not go with me to the house when I took possession; nobody went but Mr. Conklin and myself, and probably Mr. Van Wyck's brother, who, I think, brought the order to me; I think Judge McCunn was not in the house within four or five days or a week; but I sent for him and he did come.

Q. You sent for him and he did come? A. Yes; he told me "for God's sake to settle it;" that was his expression; said he, "I didn't read all the papers, and I didn't know that this was my house and for God's sake settle it, or you will get me into trouble."

Q. Settle what? A. Settle up the case.

Q. What case? A. Settle up my receivership.

Q. Did you do any thing in obedience to that direction? A. I tried to make arrangements with Mrs. Elliott to pay the rent.

Q. That is to say, to have her pay that rent to you, as Judge McCunn's agent? A. No, sir; I did not understand that that money was hers at all.

Q. Well, what arrangement did you try to make with Mrs. Elliott? A. It was rather with Mrs. Cox, Mrs. Elliott's sister-in-law; I believe Mrs. Elliott was not in town; but it amounted to nothing, and I had nothing more to do with it.

Q. At the time that Judge McCunn made that remark to you, had you collected any of the board bills due upon the premises? A. I had.

Q. All that you could get, up to that time? A. Yes, sir; I think so.

Q. Was it after that that the attachment in the suit which you supposed to have been the suit of *McCunn* v. *Elliott*, was served upon you? A. I think it was.

Q. You have no moneys of that receivership in your possession

now? A. I have not; I think I stated there that I had retained the money, but I remembered afterward that the deputy sheriff took it from me; attached it.

Mr. HARRISON—We put in an official return from the sheriff's office, signed by James O'Brien, late sheriff, made in answer to a requisition upon him, which appears as part of the exhibit. The paper was marked Exhibit No. 37, and is as follows:

EXHIBIT No. 37.

Please search for warrants of attachment against Elliott at the suit of John H. McCunn, from December 1st, 1869, to January 1st, 1871, and certify the result to

April 1st, 1872.

DAVID B. OGDEN,
187 *Fulton street.*

December 17th, 1869. *John H. McCunn* v. *Elliott.* War. S. C., $500. No return.

December 17th, 1869. *John H. McCunn* v. *Elliott.* War. S. C., $5,000. No return.

I hereby certify that the above are all the warrants of attachment found on my books from December 1st, 1869, to January 1st, 1871, against Elliott at the suit of John H. McCunn.

JAMES O'BRIEN,
Late Sheriff.

Indorsed: Sheriff's search. David B. Ogden, 187 Fulton st. Exhibit No. 37. C. R. D.

By Mr. PERRY:

Q. Do you know the name of the deputy sheriff that called for this money? A. No, sir; I do not.

Q. Would you recognize him if you saw him? A. No, sir; I don't think I should.

Q. You stated, I think, that you did not know how you paid that money, whether by a check or in money? A. I do not.

Q. Do you know the amount you paid? A. I do not; I have forgotten that.

Q. Have you any means by which you can state the amount; have you any account or record of it? A. No, sir; I have not; I had but—

Q. Have you ever rendered an account as receiver in this case? A. No, sir.

Q. Do you ever propose or intend to? A. I don't see how I can, unless Mr. Conklin has the book.

Q. According to your present testimony you cannot render any account as receiver? A. No, sir.

By Mr. HARRISON:

Q. Is this Mr. Conklin one of the same persons who acted as your deputies in the case of *Corey* v. *Long*? A. Yes, sir.

Q. Who is Mr. Conklin? A. He is simply an acquaintance; a trustworthy young man, as I thought; one that I could rely on.

Q. An acquaintance of yours, or of Judge McCunn's? A. Of mine.

Q. Also of Judge McCunn? A. I don't think that Judge McCunn knew him at that time.

Q. He knows him now, though; is he in the habit of meeting him since? A. He has seen him, but I don't know whether he would know him by name or not.

Q. Did you take the advice of counsel in that suit of *Elliott* v. *Butler*? A. I don't remember that I had counsel.

Q. You acted merely under the directions of Judge McCunn? A. No, sir.

Q. What other directions did you have except those given you by Judge McCunn? A. I acted under the directions of the order.

Q. What order; the order issued by Judge McCunn, under which you were appointed? A. I would like to say here that I never received any fees in the matter as receiver.

By Mr. PERRY:

Q. When you paid the money to the sheriff, did you take any receipt or voucher for it? A. I am not positive; I don't think I did.

By Mr. MADDEN:

Q. Did you charge it to Judge McCunn? A. No, sir; I did not understand that he had any control of it whatever.

Q. What was the actual rent of those premises? A. $6,000 a year; $500 a month.

Q. My question is, whether you kept any books, as a rule, in relation to these moneys that you collected for Judge McCunn, and whether, when you paid him, you took receipts? A. Yes, sir; I misunderstood you.

Q. Did you do that in the case of the money that you paid over to the deputy sheriff; did you charge it to him, so that you have some memorandum of the amount? A. No, sir.

Q. How did you account to Judge McCunn for that money that you received? A. I guess I don't understand you.

Q. You collected certain moneys for Judge McCunn in this case, as receiver, and in other cases as agent, as I understand you? A. I don't think I did collect any money as receiver for Judge McCunn.

Q. We understood you to say that you had moneys in your hands which you paid over to the sheriff? A. I did pay that money to the sheriff, but I did not collect it for Judge McCunn or pay it to him, as I understood; I understood that the sheriff had a superior right, and I let him take the money.

Q. Well, how did you account for that money to Judge McCunn or to the plaintiff in the case? A. I did not account to anybody; I have not been asked to.

By Mr. HARRISON:

Q. Did you know before the sheriff got there that there was to be any such proceeding as that? A. No, sir.

Q. Had nobody ever told you to pay over that money to the sheriff when he would come there? A. No, sir.

Q. You had no knowledge except that a person turned up there and handed you a warrant of attachment, as he called it? A. No, sir.

Q. And you gave him the money without further question? A Yes, sir.

Q. And you never accounted for it to anybody? A. No, sir.

By Mr. MADDEN:

Q. And you don't remember the amount? A. No, sir.

By Mr. HARRISON:

Q. Had you ever seen warrants of attachment before that time? A. I think I had.

Q. In what case had you ever seen a warrant of attachment before that time? A. I can't remember.

By Mr. MADDEN:

Q. Did you consult with counsel or with Judge McCunn, or with any other person before you paid over the money to the sheriff's agents? A. No, sir; with nobody at all.

Q. And you say you had no recollection of the amount? A. It seems to me that it was something over a hundred dollars; I am not positive, but there was about $300 collected, and I think there was about $105 or $106 paid to the deputy receiver for fees; and then

there was sixty odd dollars paid to the servants; I don't know that I should have paid them, but they said they had not been paid.

By Mr. HARRISON:

Q How much did you pay to the deputy receiver? A. $105 or $106.

Mr. STICKNEY — Before we go on with the next witness, I merely wish to call attention to the fact that, in the appointment of a receiver in the case of *Corey* v. *Long*, and also in the case of *Elliott* v. *Butler*, there was no bond or security whatever exacted from the receiver for the faithful discharge of his duties, or that he should account for the moneys. The order appointing the receiver did not in either case require any bond from him at all.

Joseph Larocque testified:

By Mr. STICKNEY:

Q. Do you remember the suit of *John O'Mahony* v. *August Belmont and others?* A. I do.

Q. At what time did that suit commence? On the 30th of June, 1869.

Q. It was in the Superior Court of the city of New York? A. Yes.

Q. What was your connection with that suit? A. I was one of the ordinary attorneys and counsel for the firm of A. Belmont & Co., and, on that day, I think (June 30, 1869), copies of a summons, complaint, affidavit, and an order to show cause why a receiver should not be appointed, were placed in my hands by Mr. Belmont's partner, Mr. Lucke.

Mr. STICKNEY —We produce from the files of the court the original summons and complaint.

The papers were marked Exhibit No. 38, and are as follows:

EXHIBIT No. 38.

SUPERIOR COURT OF THE CITY OF NEW YORK.

JOHN O'MAHONY, Plaintiff,
agst.
AUGUST BELMONT AND ERNST B. LUCKE, Defendants.
} *Summons for Relief.*

To the Defendants:

You are hereby summoned and required to answer the complaint in this action, of which a copy is herewith served upon you, and to

serve a copy of your answer to the said complaint on the subscriber at his office No. 7 Murray street, New York, within twenty days after the service hereof, exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated *June 29th*, 1869.

ROGER J. PAGE,
Plaintiff's Attorney.

N. Y. SUPERIOR COURT.

JOHN O'MAHONY, Plaintiff,
agst.
AUGUST BELMONT and ERNST B. LUCKE,
Defendants.

The plaintiff, complaining by Roger J. Page, his attorney, against the defendants, alleges: That during the several times hereinafter mentioned the defendants were, and are now, copartners and bankers, doing business in the city of New York under the name and firm of August Belmont & Company.

That heretofore, and on the 1st, 12th and 19th days of September, one thousand eight hundred and sixty-five, at the city of New York, the plaintiff deposited with the aforesaid firm sundry sums of gold, amounting in all to nineteen thousand five hundred and ninety-two dollars and forty-four cents ($19,592.44) in gold of the United States, or thereabouts, his money and gold; and at his special instance and request, and for him, the aforesaid August Belmont & Company drew in their said name, and became the drawers of four certain bills of exchange, as follows: One dated first of September, one thousand eight hundred and sixty-five, for one thousand pounds sterling; another dated eighth of September, one thousand eight hundred and sixty-five, for one thousand pounds sterling; another dated the twelfth day of September, one thousand eight hundred and sixty-five, for one thousand pounds sterling, and the other dated the nineteenth day of September, one thousand eight hundred and sixty-five, for one thousand four hundred and eight pounds six shillings and two pence sterling, all addressed to N. M. Rothschild & Sons, London, payable to the order of John O'Leary sixty days after sight thereof, at the respective dates, and there delivered the said bills of exchange to the plaintiff.

The plaintiff further states that the said several bills of exchange, and each of them, were drawn by said August Belmont & Company

at his, the plaintiff's special instance and request; that he paid and delivered to said August Belmont & Company his money to the amount represented by said several bills of exchange, in consideration, each and all, of and for the same, and that said bills of exchange were delivered to him, the plaintiff, for said valuable consideration, and that he is the real owner thereof.

The plaintiff further states that, after said bills of exchange came into his possession as aforesaid, he endeavored to transmit the same by mail to said John O'Leary, who was the mere agent of the plaintiff, and without any interest, ownership or other consideration in said bills; that said bills or parts of each set of the same were abstracted from the mail, by some person or persons to the plaintiff unknown, or destroyed and never came into the possession of said John O'Leary, were never presented for payment and still remain unpaid. That the defendants were duly notified of such abstraction and the loss of the aforesaid bills of exchange, immediately upon the discovery of the same, and the plaintiff then and there countermanded and stopped the payment thereof by the defendants and their agents. That the plaintiff further says, on information and belief, the said August Belmont & Company have withdrawn the funds or moneys placed to the credit of said bills of exchange with said N. M. Rothschilds & Sons, and now hold the same. That the plaintiff has duly demanded of defendants the return of the moneys so paid for the consideration of the said bills.

And the plaintiff further states to the court that he, at the special instance and request of the said August Belmont & Company, and according to the statute in such cases made and provided, did execute a bond, in double the amount represented by said several bills of exchange, to well and truly indemnify and save harmless the obligees above named, and each of their heirs, executors and administrators, and also the drawers of said bills of exchange, their and each of their heirs, executors and administrators, against and from the said several bills of exchange and each and every of them, and all claims, demands, damages, suits, actions, costs, charges and expenses based upon or arising out of or in any way connected with the said bills of exchange and each and every of them, on the part of any and all sovereigns, corporations, persons or firms whomsoever. That the plaintiff tendered said bond, with good and sufficient sureties, to said August Belmont & Company.

That they refused to receive the same, and to pay to the plaintiff said sums of money represented by said several bills of exchange or any part thereof, or to receive any other bond of like nature, unless

the sureties thereto were worth at least the sum of $500,000; and that such bond and security so required by the defendants are excessive and exorbitant, and more than required in such cases by the statutes, and that August Belmont & Company unlawfully withholds the said sums of money represented by said several bills of exchange and have wholly failed to pay the same or any part thereof to the great damage of the plaintiff, to wit: in the sums hereinbefore stated, with the interest thereon. And the plaintiff for a further and separate cause of action states that, on or about the 1st day of June, 1869, at the city of New York, the defendants were indebted to the plaintiff in the sum of nineteen thousand five hundred and ninety-two dollars and forty-four cents ($19,592.44), in gold of the United States, or thirty-one thousand six hundred and nine dollars and thirteen cents ($31,609.13), or thereabouts, in currency of the United States, for so much money before that time, had and received by the defendants, and at sundry times, between August 31, 1865, and September 20, 1865, and to and for the use of the plaintiff.

That thereafter and before the commencement of this action the plaintiff demanded payment of such sums of the defendants, and that no part thereof has been paid. Wherefore the plaintiff prays judgment in this action against the defendants, for the damages aforesaid, to wit: the sum of $19,592.44 in gold, or its equivalent in the currency of the United States, together with the interest thereon from the 20th day of September, 1865; that the said sum in gold be paid and deposited, by defendants, into this court. That an order be made herein by this court, appointing a receiver to take charge of and receive the gold or money aforesaid, with full power to discharge the defendants from the payment of the said bills of exchange, and each of them and all obligations thereof upon the defendants paying over and depositing with such receiver the amount of gold or the money aforesaid. That the aforesaid bills of exchange, when found or discovered, be delivered up and the payment thereof canceled. And that the plaintiff have such other and further relief in the premises as to this honorable court may seem just and equitable.

ROGER J. PAGE,
Plaintiff's Attorney, No. 7 Murray street.

City and County of New York, *ss.:*

John O'Mahony, being duly sworn, deposes and says, that he is the plaintiff named in the above action; that he has read the foregoing complaint therein, and knows the contents thereof, and that

the same is true of his own knowledge except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

JOHN O'MAHONY.

Sworn to before me, this 30th day of June, 1869,

DAVID I. CHATFIELD,
Notary Public in and for N. Y. City and County.

Indorsed: N. Y. Superior Court. No. 2. *John O'Mahony* v. *August Belmont et al.* Roger J. Page, plaintiff's attorney, No. 7 Murray street, N. Y. Exhibit No. 38. C. R. D. Filed July 17, 1860. Original.

Mr. STICKNEY — We produce also from the files of the court the affidavit of Roger J. Page, and the original order to show cause granted by Mr. Justice McCunn, dated June 30, 1869. The papers were marked Exhibit No. 39, and are as follows:

EXHIBIT No. 39.

N. Y. SUPERIOR COURT.

JOHN O'MAHONY, Plaintiff,
agst.
AUGUST BELMONT and ERNST B. LUCKE, Defendants.

CITY AND COUNTY OF NEW YORK, *ss.:*

Roger J. Page, being duly sworn, deposes and says, that he is the attorney for the plaintiff in this action, that he has read the complaint therein and knows the contents thereof, and that the same is true; that all the material allegations of said complaint are within the personal knowledge of this deponent, and that his knowledge is derived from the admissions of the defendants to this deponent, as hereinafter set forth. And this deponent further says that the defendants admitted to this deponent that the plaintiff deposited with the said firm the moneys and considerations paid for the aforesaid bills of exchange, and such bills were drawn, as in the complaint mentioned, at the instance and request of the plaintiff; that the said bills have never been paid; payment thereof was countermanded and stopped by the plaintiff for the reason such bills of exchange had been lost or destroyed; and that the defendant Lucke further admitted to deponent that the funds or moneys placed to the credit of said bills with the said N. M. Rothschild & Son, the

drawers, had been withdrawn by the defendants, and such moneys were now in defendants' possession.

And this deponent further says that nearly four years have elapsed since such bills were lost or destroyed, and within the time aforesaid, and even then, the same have never been presented for payment or heard of by this deponent or the plaintiff, and this deponent verily believes such bills are destroyed, etc., before coming into notice or possession of said O'Leary. That the allegations in respect to the bond and sureties in the complaint stated, each and all of the same are true and within the personal knowledge of this deponent; that he caused to be executed or presented to the defendants the said bond and sureties, and tendered the same to them, and the same were refused by the defendants; and that the bond and sureties required by the defendants for identifying them and the drawers against the said bills, the same is excessive and more than required by law in such cases made and provided.

ROGER J. PAGE.

Sworn to before me, this 30th day of June, 1860,

DOUGLAS A. LEVIEN, Jr., *Notary Public, N. Y. Co.*

N. Y. SUPERIOR COURT.

JOHN O'MAHONY, Plaintiff,
agst.
AUGUST B. BELMONT and ERNST B. LUCKE, Defendants.

Order, etc.

Upon the verified complaint in this action; also on reading the affidavit of the plaintiff's attorney therein, and also upon the service of this order upon the defendants therein:

On motion of H. E. Tallmadge, of counsel for the plaintiff, it is ordered that the defendants in the said action show cause before me at chambers of this court, court-house, at the city of New York, on the 2d day of July, 1869, at ten o'clock, A. M., why a receiver herein should not be appointed to take charge of and receive the gold or moneys deposited by the plaintiff with the defendants in considera tion of the bills of exchange mentioned, such bills alleged to be lost or destroyed, with full power to discharge the defendants from the same, and the payment thereof, upon the defendants paying into this court, or to such receiver, the amount of gold so deposited with them, or its equivalent in the currency of the United States; that

such receiver be so appointed with usual powers and directions, and that the plaintiff have such other further order and relief in the premises as may be just and proper.

Dated *June 30th*, 1869.

JOHN H. McCUNN,
Justice Superior Court.

Indorsed: No. 1. N. Y. Superior Court. *John O'Mahony* v. *August Belmont et al.* Affidavit, order, etc.; "original." R. J. Page, pl'ff's att'y. H. E. Tallmadge, of counsel for pl'ff, No. 7 Murray street. Filed July 31, 1869. Exhibit No. 39. C. R. D. Motion for a receiver granted. See opin. J. McCUNN.

Q. Did the complaint show any thing else, or upon the hearing of this motion was any thing else stated to the court, as the ground for the receivership, than that the plaintiff had paid for certain bills of exchange, which were drawn by the defendants, Belmont & Co., which were not drawn to the plaintiff's order, which had never been indorsed to him, and which had never yet been presented for payment to the defendants? A. The claim was that the plaintiff, John O'Mahony, had purchased of A. Belmont & Co., certain bills of exchange, described in the complaint, and that he had paid the consideration for those bills; that the bills had been drawn to the order of one John O'Leary; that O'Leary was really not the owner, but was a servant or representative of the plaintiff, and had no interest in the bills, and that the bills, or some part of them, while in course of transmission to O'Leary, had either been lost, mislaid or destroyed. The suit was to recover the consideration paid for those bills of exchange.

Q. So far as appeared by the papers, were Belmont & Co. still liable on those bills to the holder? A. There was no allegation of any presentation or demand for payment on the drawees, or that any of the ordinary steps had been taken to charge the drawer of the bills.

Q. And was there any tender of security under the statute on the motion papers, or in the complaint? A. The complaint alleged that a bond had been tendered.

Q. Did it still make that tender? A. It did not; there was no tender of a new or further bond upon the application for a receivership.

Q. Was there any thing appearing in the papers, or was the statement made at any time, that Messrs. Belmont & Co. were not

responsible for this amount of money, or that the fund was at all insecure? A. No, sir.

Q. How long have you known that firm yourself? A. I have known Mr. Belmont since about 1849.

Q. Do you consider him and all his firm responsible for $26,000? A. I have always so considered them.

Q. State what took place on the 2d of July, and before what justice this order was returnable? A. On the 2d of July, the day when this order to show cause was made returnable (the papers having been served late on the 30th of June), I attended at the Superior Court, Judge McCunn holding the court, and applied to him for a postponement of the time for showing cause, upon the ground that I had had no opportunity of procuring the necessary affidavits upon which to oppose the motion, or of conferring with counsel about the course to be pursued.

Q. That was how many days after the date of the order? A. Two days; I won't be certain about the days of the week, but I have running in my mind that the 1st of July was Sunday.

Q. State what Justice McCunn said? A. He insisted that the matter should be considered as before *him;* he said that we should have reasonable time and opportunity to present papers, and to be heard to our hearts' content, but that the plaintiff should submit his papers to him, so that the case would be considered as on before him; I had presented an affidavit on the application for postponement; and, finally, this order which I hold in my hand was drafted by me in conformity with the direction which Judge McCunn had given to the matter.

Mr. Stickney — This is the original order, produced from the files of the court, made on the 2d of July, allowing the motion to stand over to the 9th of July, with liberty to the defendants to put in other affidavits, and to be heard in showing cause why the relief asked for by the plaintiff should not be granted. We do not put it (the order) in evidence.

Q. State what took place on the 9th of July? A. On the 9th of July I attended, in company with my partner, Mr. McFarland; no papers had been served on Mr. Belmont, he actually being out of the country; the only person served was Mr. Lucke, his then partner.

Q. Had Mr. Lucke been Mr. Belmont's partner at the time those bills were drawn? A. The answer of Lucke denied that partnership; personally I, of course, do not know.

Q. Was that fact shown by papers laid before Justice McCunn on

the hearing of the motion? A. I will not be sure of that; the papers appear on the record; on the 9th of July we read an affidavit of Lucke's, in opposition to this motion for a receiver; Mr. Tallmadge appeared as counsel for the plaintiff; Mr. Page was the attorney for the plaintiff, and my recollection is that both he and Mr. Tallmadge were present; after the reading of our affidavit Mr. Tallmadge applied to have the motion stand over, on the ground that he wished to introduce additional affidavits in answer to what was claimed to be new matter set up in our affidavit, they claiming that they were taken by surprise, if I recollect right; it was then agreed by counsel, in the presence of the court, that the motion should stand over, that the plaintiff should have liberty to introduce additional affidavits, copies of which were to be first served upon us, that we should have an opportunity to reply, that he should also furnish us with a copy of the points that he proposed to submit, and that we should have a reasonable time to reply to those points before the motion should be submitted to the court; my recollection is that additional affidavits were furnished us some days afterward, but that no points were ever received by us, and therefore our time to reply never arrived.

Mr. STICKNEY — We produce from the files of the court, and put in evidence the original affidavit of Ernst B. Lucke, one of the defendants, which was read at the hearing on the 9th of July before Judge McCunn. The paper was marked Exhibit No. 39½, and is as follows:

EXHIBIT No. 39½.

SUPREME COURT.

JOHN O'MAHONY
agt.
AUGUST BELMONT AND ANOTHER.

Ernst B. Lucke, one of the defendants in the above-entitled action, being duly sworn, says:

That he has read a copy of the affidavit of Roger J. Page, made in this action and sworn to on the thirtieth day of June last.

And deponent says that he never stated or admitted to the said Page or any other person that the plaintiff ever deposited with the firm of August Belmont & Co., or with either of the defendants, the moneys or consideration paid for the bills of exchange mentioned in the complaint, or that such bills or any or either of them were or was drawn at the instance or request of the plaintiff, or that payment of the said bills had been countermanded or stopped by the

plaintiff for the reason that the same had been lost or destroyed, or made any statement or admission in relation thereto of the tenor or effect stated in said affidavit.

And this defendant expressly denies that he ever stated or admitted to said Page that the funds or moneys placed to the credit of said bills with the said N. M. Rothschild & Sons had been withdrawn by the defendants or either of them, or that said moneys were in the possession of the defendants or either of them. This deponent further says, that said moneys have not been withdrawn and are not now in the possession of the defendants or either of them.

This deponent says, that the facts in regard to the alleged tender of a bond of indemnity were as follows:

Shortly prior to the commencement of this action, J. J. Marvin, Esq., attorney and counselor at law, called upon the defendant Belmont in respect to the said bills of exchange, and was referred by the said Belmont to his counsel.

That, subsequently, Mr. Page called upon the defendants at their place of business several times and had several interviews with this deponent, said Belmont being present on one or two occasions. That said Page expressed a desire that some arrangement might be made by which the plaintiff in said action might get control of the fund represented by the bills of exchange mentioned in the complaint, without the production and surrender of the bills which he admitted were not in the plaintiff's possession. That said Belmont, without acknowledging or admitting any liability upon the said bills or either of them, expressed a desire that whoever was entitled to the moneys represented by the bills should have them, but at the same time advised said Page that he would not be willing to pay the same to any one without ample security against the claims of all other persons, the form of which must be approved by his counsel.

A bond was subsequently prepared by Mr. Belmont's counsel, and submitted to Mr. Page, who was requested to furnish the names of the sureties they proposed to give. Mr. Page at first objected to giving the bond, but finally approved of the bond submitted. He subsequently furnished the names of the proposed sureties, but upon investigation such sureties were not found to be persons of sufficient responsibility and standing to warrant their acceptance, and thereupon the said Page was notified that they would not be accepted. Thereupon Mr. Page proposed to give a bond executed by a number of persons, no one of whom, as deponent believes, was worth the amount mentioned in the bond, which proposition was declined by this deponent, acting as the agent of Mr. Belmont. Mr. Page was

informed by deponent that nothing could be done unless the bond should be executed by two persons, each of whom must be men of sufficient responsibility and standing to make them undoubted security for the whole amount of the bond, and that nothing further was heard from Mr. Page or the plaintiff on the subject until the service of the papers in this suit.

Deponent further says that he was personally present at the interviews had by the said Page with the defendant Belmont, who is now absent in Europe, and never in the presence of the deponent did the said August Belmont make any or either of the admissions to the said Page alleged in the said affidavit of the said Page, or any like admissions.

Deponent further says that the defendant, August Belmont, sailed for Europe on the day of last, before the commencement of this suit, and has not been served with any of the papers therein.

ERNST B. LUCKE.

Sworn and subscribed before me, }
this 9th day of July, 1869, }

JOHN W. WEED, *Notary Public, N. Y. Co.*

Indorsed: Superior No. 3. *John O'Mahony* v. *August Belmont and another.* Affidavit of defendant Ernst B. Lucke. Bowdoin, Larocque & Barlow, attorneys for said defendant Lucke, 35 William street. Exhibit 39½a. C. R. D. Filed July 17, 1869.

Q. What was the next proceeding that you had notice of? A. The next thing that occurred was a demand made at the office of Messrs. Belmont & Co., by Mr. Thomas J. Barr, as receiver.

Q. A demand made upon whom? A. Upon Mr. Lucke, I believe; I was not present at the time that demand was made, but in the history of the case the papers show it.

Q. Since the stipulation made in open court that the plaintiff should have time to serve upon you his affidavits and brief, and that you should have time to serve upon him affidavits in reply, had there been any notice given to you of any further application in the matter? A. No, sir.

Q. Did you have any letter from the plaintiff's counsel in relation to that matter, from Mr. Tallmadge? A. In reference to which matter?

Q. In reference to the fact of this stipulation having been made in court, and his having made no further application for this order for a receiver? A. I think we had such a letter.

Q. Have you a copy of it? A. No, I have not it here; my recollection is that it is attached to the papers in the report of Mr. Tallmadge; we received a letter from Mr. Roger J. Page, the attorney for the plaintiffs, the letter being dated, apparently, June 17th, but the real date was July 17th.

Q. Had the action been commenced on the 17th of June? A. No, sir.

Mr. STICKNEY read the letter in evidence.

Mr. STICKNEY — Now, I will read in evidence the original order appointing Mr. Barr receiver, dated July 16th, the day before the date of this letter from Mr. Page; the paper was marked Exhibit No. 40, and is as follows:

EXHIBIT No. 40.

At a Special Term of the Superior Court of the city of New York, held in the new County Court House in said city of New York, on the 16th day of July, 1869.

Present — HON. JOHN H. MCCUNN, *Justice.*

JOHN O'MAHONY, Plaintiff,
agst.
AUGUST BELMONT and ERNST B. LUCKE, Defendants.

Upon the summons and complaint duly verified in this action, and on reading and filing affidavits of Thomas N. Dwyer, Roger J. Page, Michael Cavanaugh, William M. Curry and of the plaintiff in this action, all sworn to on the 9th day of July, 1869, and used on a motion made by the plaintiff in said action, to have a receiver appointed, and after hearing E. H. Tallmadge, Esq., of counsel for the plaintiff, and on reading and filing affidavit of Ernst B. Lucke, one of the defendants, sworn to on July 9, 1869, and after hearing Bowdoin, Larocque & Barlow, Esquires, for the defendants, in opposition thereto, now it is hereby ordered, that Hon. Thomas J. Barr, of the city of New York, counselor at law, be and hereby is appointed receiver of the moneys and funds, or gold mentioned in the said complaint, and deposited for said bills of exchange by the plaintiff with the defendants, under the firm name of August Belmont & Co.

It is further ordered that upon said receiver's executing, acknowledging and filing with the clerk of this court a bond in the usual form, to the people of the State of New York, in the penalty of fifty thousand dollars ($50,000), with sufficient sureties, freeholders

of said city and county of New York, to be approved as to its form and manner of its execution by a justice of this court, that the said receiver shall be vested with the usual rights and powers of receivers under this court, that the defendants, August Belmont and Ernst B. Lucke, pay over and deliver to the said receiver the amount in gold coin of the United States, or its equivalent in currency of the United States, upon his demand.

And it is further ordered that the aforesaid moneys, funds or gold, remain with and in possession of the receiver above named and mentioned, until the final determination of this action, except so much thereof as shall be drawn therefrom before that time, under the direction of the court, or a justice thereof, for the purposes of counsel fees, expenses and disbursements therein.

(Enter.) J. McC.

Indorsed: No. 4. New York Superior Court. *John O'Mahony* v. *August Belmont et al.* Order appointing a receiver. Exhibit 40. June 27. C. R. D. Judgment, Feb. 16, 1869. Filed July 17, 1869.

Mr. STICKNEY — We now produce from the files of the court the stipulation entered into by the attorneys for both sides on the 17th of July, the next day after the foregoing order was entered.

The paper was marked Exhibit No. 41, and read in evidence, as follows:

EXHIBIT No. 41.

SUPERIOR COURT.

JOHN O'MAHONY
agst.
AUGUST BELMONT and ERNST B. LUCKE.

The order in this action appointing a receiver and directing the payment of money therein mentioned to such receiver by said defendants, having been entered by mistake and contrary to the stipulations of the attorneys for the respective parties, it is hereby agreed that the said order be set aside, and that the further hearing of the said motion upon which said order was entered be and is hereby adjourned to Thursday the 22d inst., at 11 o'clock.

NEW YORK, 17*th May*, 1869.

ROGER J. PAGE,
Plaintiff's Attorney.
BOWDOIN, LAROCQUE & BARLOW,
Attorneys for Defendants.

By Mr. STICKNEY:

Q. You notice that the date on that paper is the 17th of May, 1869; is that correct, or is it a clerical error? A. It should be July; that paper is in the handwriting of my late partner, Mr. Geo. J. W. Bowdoin, now deceased.

Mr. STICKNEY — We now read in evidence the order granted by Justice McCunn on the 17th of July.

The paper was marked Exhibit No. 42, and is as follows:

EXHIBIT No. 42.

NEW YORK SUPERIOR COURT.

JOHN O'MAHONY
agst.
AUGUST BELMONT and ERNST B. LUCKE.

CITY AND COUNTY OF NEW YORK, *ss.:*

Thomas J. Barr, being duly sworn, says:

I. That by an order of this court made at a special term thereof at the court-house in said city of New York, on the 16th day of July, 1869, and filed with the clerk of this court on the 17th day of July, 1869, deponent was appointed receiver of the moneys, funds or gold mentioned in the complaint in this action and deposited for said bills of exchange by the plaintiff with August Belmont and Ernst B. Lucke, under the firm name of August Belmont & Company.

II. That, pursuant to said order, deponent duly filed approved security and entered upon his trust as such receiver.

III. That in and by said order, among other things, the said August Belmont and Ernst B. Lucke are directed to pay over and deliver to the said receiver the amount, in gold of the United States, or its equivalent in currency of the United States.

IV. That on the 17th day of July, 1867, deponent served an official copy of said order, duly certified by the clerk of this court, personally on the defendant, Ernst B. Lucke, one of the defendants above named, and one of the firm of August Belmont & Company, and at the same time served a written notice to the officer that deponent had fully complied with said order to entitle him to receive the money and property therein mentioned, and at the same time demanded that the same be delivered to this deponent pursuant to said order.

V. That the said Ernst B. Lucke then and there admitted to deponent the possession and custody of such money, funds or gold.

VI. That the said Ernst B. Lucke has refused and still refuses to pay over and deliver to said receiver such moneys, funds or gold, or any part thereof, or to comply with said order.

THOMAS J. BARR.

Sworn to before me, this 17th day of July, 1867,

I. M. DIXON,
Notary Public.

NEW YORK SUPERIOR COURT.

JOHN O'MAHONY
agst.
AUGUST BELMONT AND ERNST B. LUCKE.

Upon the papers and proceedings in the above-entitled action, and on the affidavit of Thomas J. Barr, hereto annexed, of which a copy is herewith served, ordered that August Belmont and Ernst B. Lucke, the defendants above named, show cause before one of the justices of this court, at a special term thereof to be held in the court-house in the city of New York on the 20th day of July, 1869, at twelve o'clock, noon, or as soon thereafter as counsel can be heard, why the said August Belmont and Ernst B. Lucke should not be punished for their disobedience to the order appointing a receiver herein and requiring said defendants to pay over and deliver to such receiver the moneys, funds or gold or property therein mentioned, and for such other or further order as may be just, and in the mean time, and until the further order of the court, let all proceedings on the part of the defendants or their attorneys in this action be stayed (except to answer or demur to the complaint herein) not exceeding twenty days.

Dated NEW YORK, *July 17th*, 1869.

JOHN H. McCUNN,
Justice.

HENDERSON & CANFIELD,
Attorneys for Receiver, 195 *Broadway, New York City.*

Indorsed: No. 5. New York Superior Court. *John O'Mahony* v. *August Belmont & Company.* Order to show cause. Henderson & Canfield, attorneys and counselors, 195 Broadway, New York. Exhibit 42. June 7. C. R. D. Filed July 20, 1869.

By Mr. STICKNEY:

Q. That order to show cause, which I have just read, requires

Mr. Belmont, among others, to show cause why he should not be punished for contempt. Mr. Belmont was then in Europe, I understand you? A. It so appears.

Q. And he had never been served with any of the papers? A. He had not.

Q. State what next took place? A. From my position as one of the attorneys of record, and from having connection with this business, I know as to what occurred between that time and the time when the subsequent order was made, but I was out of town myself, and not present either at Mr. Belmont's office, when the demand was made, or in court when Judge McCunn directed the drawing of the check in the court room. Mr. Tallmadge, who was present in court, I believe, and who acted as counsel for the plaintiff, can probably testify as to these matters.

Q. State whether or not you gave a statement as to what did happen on that occasion in court, in the presence of Mr. Justice McCunn, before the Assembly committee, and whether he then admitted that that statement was correct? A. I was examined as a witness before the Assembly committee, in the presence of Mr. Justice McCunn, and, being asked about these matters, I then said that I was not personally present on these two occasions, at Mr. Belmont's office and in court, when the check was ordered drawn, but that, if the accused saw no objection, I would state the facts as they afterward came to me. He said he was quite content that I should make the statement, and I then proceeded, by authority of the committee. He did not seem to object to it at all; on the contrary, I understood that he was anxious to have the statement made.

Mr. Stickney — We shall prove by the original order exactly what was done, but, if the Senate make no objection, I will simply ask the witness to give a statement of it now, so as to spread it upon the record.

To the Witness:

Q. Just state what took place? A. As I was informed on my return a day or two afterward, and as appeared from the order which came to my knowledge then, an order to show cause had been granted by Judge McCunn, requiring the defendants to show cause why they should not be punished for contempt, for not paying this money to Mr. Barr as receiver. Upon the return of that order my partner, Mr. Macfarland, appeared and proposed to discuss the question; but the judge declined to hear any thing on the subject until Mr. Lucke personally should attend before the court, and he then

declared (as I was informed) that he, Mr. Lucke, must draw a check for the amount of money claimed and pay it to the receiver there, or be punished for contempt.

Mr. VAN COTT: A gold check?

The WITNESS: I don't recollect that.

By Mr. STICKNEY:

Q. This was three days after the stipulation between the attorneys on both sides, setting aside the order? A. Yes; the check was drawn and the proceeding to punish for contempt dropped after the payment of the money.

Mr. STICKNEY—We produce from the files of the court Justice McCunn's order of the 20th of July, three days after the stipulation between the attorneys of both parties.

The paper was marked Exhibit No. 43, and was read in evidence as follows:

EXHIBIT No. 43.

At a Special Term of the Superior Court of the city of New York, held at the Court-house in said city, on the 20th day of July, 1869.

Present — Hon. JOHN H. McCUNN, *Justice*.

JOHN O'MAHONY
agst.
AUGUST BELMONT and ERNST B. LUCKE.

On reading and filing the affidavit of Thomas J. Barr, the receiver in this action, showing due personal service on the defendant, Ernst B. Lucke, of the order made at Special Term of this court on the 16th day of July, 1869, requiring the said Ernst B. Lucke and August Belmont to pay over and deliver certain personal property therein specified to such receiver, and also showing an account of said property of the said defendants, and their neglect and refusal to deliver the same, or any part thereof, and, on motion of James Henderson, Esq., counsel for the receiver, to punish said defendants for disobedience of said order; now, after hearing Wm. W. Macfarland, Esq., of counsel for the defendants, and Roger J. Page, Esq., for the plaintiff, it is hereby ordered that, upon said defendants forthwith complying with the order made by this court on the 16th day of July, 1869, appointing a receiver herein, by paying to said receiver the sum of $16,738.70, in gold coin of the United States, that the said defendants be purged of and from all contempt herein.

And the said receiver is hereby directed to pay the sum of $2,500 in United States currency to the defendants' attorneys herein out of said fund, as counsel fees and disbursements incurred herein.

And that, in default thereof, on the part of the defendants, said Ernst B. Lucke stand committed to the common jail of the county of New York until the said sum be paid to said receiver, and that a warrant issue to carry this order into effect.

(Entered.) J. H. McC.

Indorsed: No. 7. New York Superior Court. *John O'Mahony* v. *August Belmont and Ernst B. Lucke.* Order directing defendants to pay over funds. James Henderson, of counsel for the receiver, Thomas J. Barr. Exhibit No. 43, June 27. C. R. D. Filed July 20, 1869.

By Mr. D. P. Wood:

Q. Had Judge McCunn knowledge of that stipulation between the attorney, setting aside the order? A. As I am advised, his attention was directed to it on the occasion of the return of this order to show cause why Lucke should not be punished for contempt, but he refused to hear any thing on the subject until the money should be paid, and would not give any effect to the stipulation.

By Mr. Lewis:

Q. Is this the same statement you made before the House committee? A. Well, whether it is exactly the same or not, I cannot be positive; there are some facts which have come to my recollection since that time, and which were not then stated.

Q. Was any thing said before the House committee as to Judge McCunn's knowledge of the stipulation? A. I think not, sir.

Mr. Lewis — Then I don't think it proper that it should be stated here.

The Witness—It was only in answer to the Senator's question that I stated it.

Mr. Stickney—We shall prove it; we now produce from the files of the court an order made on the same day, the 20th of July, signed by Judge McCunn.

The paper was marked Exhibit No. 44, and put in evidence, as follows:

EXHIBIT No. 44.

At a special motion term of the Superior Court of the city of New York, held at the Court-house in the city of New York, on the 20th day of July, 1869.

Present — Hon. JOHN H. McCUNN, *Justice, etc.*

NEW YORK SUPERIOR COURT.

JOHN O'MAHONY, Plaintiff,
agst.
AUGUST BELMONT and ERNST B. LUCKE,
Defendants.

Upon all the papers, affidavits and pleadings in this action, and on motion of Roger J. Page, the attorney for the plaintiff in the above-entitled action, and after hearing Mr. W. W. Macfarland, of counsel for the defendants herein:

It is ordered that Thomas J. Barr, Esq., the receiver appointed in this action, pay over to Mr. Roger J. Page, the said plaintiff's attorney herein, the sum of one thousand dollars, as and for the expenses and disbursements in the said action, and also pay to said attorney of the plaintiff the further sum of one thousand and five hundred dollars, as and for counsel fees; that such expenses, disbursements and counsel fees be paid by such receiver out of and from the funds and moneys with him as such receiver, and the same be charged to the credit of such funds and moneys in his hands, and to the credit of the same herein.

(Entered.) J. H. McC.

Indorsed: New York Superior Court. *John O'Mahony* v. *August Belmont et al.* Order, etc. Exhibit No. 44. C. R. D. Roger J. Page, plaintiff's attorney, No. 7 Murray street. Filed July 29th, 1869.

By Mr. STICKNEY:

Q. Did you ever have notice of an application for that order?

A. None, to my recollection.

By Mr. PERRY:

Q. To whom was the second sum paid; the $1,500? A. Both sums were paid to the same person, Roger J. Page.

Q. You took an appeal from that order? A. We did; we took appeal from all these orders; first from the order appointing a

receiver; secondly, from the order directing the payment of the money by Lucke, or that he stand committed; and thirdly, from the order to pay the money to Mr. Page.

Mr. STICKNEY — We produce an order of the General Term, made on the 14th of November, 1870, reversing all these other orders.

The paper was marked Exhibit No. 45, and is as follows:

EXHIBIT No. 45.

At a General Term of the Superior Court of the city of New York, held at the Court-house in the city and county of New York, on the 14th day of November, A. D. 1870.

Present — Hon. J. M. BARBOUR, *Chief Justice.*
C. L. MONELL, J. J. FREEDMAN, *Justices.*

JOHN O'MAHONY
agst.
AUGUST BELMONT and ERNST B. LUCKE.

The appeals taken by the defendant, Ernst B. Lucke, to the general term of this court, from the following orders made in this action, that is to say: Firstly, An order made and entered on the 16th day of July, 1869, appointing a receiver in this action. Secondly, An order entered in this action on the 20th day of July, 1869, ordering the payment of certain moneys by the said defendant to the receiver herein. Thirdly, An order made in this action, dated the 20th day of July, in the year 1869, and entered on the 29th day of July, 1869, directing the payment by the receiver to Roger J. Page, the attorney for the plaintiff, of $2,500; having been this day called on for an argument, and no one appearing to oppose; now, on reading and filing notice of argument of said appeals for this term, with admission of due service, signed by H. E. Tallmadge, Esq., attorney for the plaintiff, and on motion of W. W. Macfarland, Esq., of counsel for the defendant, Ernst B. Lucke, it is now ordered and adjudged that the said orders appealed from, each and every of them, be and the same are hereby reversed and vacated, with ten dollars costs of said appeals to the appellant.

(Entered.) J. M. B.

Indorsed: No. 17. New York Superior Court. *John O'Mahony* v. *August Belmont and Ernst B. Lucke.* Order of General Term reversing order appointing receiver and other orders. Bowdoin, Larocque & Barlow, attorneys for defendant Lucke, 35 William street. Filed Nov. 14, 1870. Exhibit No. 45. C. R. D.

Mr. STICKNEY — We now produce a further order made on the 16th of December, 1870, also at general term, denying the motion of the receiver to open and set aside that last order which I have just read. The counsel for the receiver moved to set aside the order of the general term reversing these orders, and the general term denied his motion, on the ground that he had no right to come into court at all in the matter. I will read the order of the general term to that effect.

The paper was marked Exhibit 46, and was read as follows:

EXHIBIT No. 46.

At a General Term of the Superior Court of the city of New York, held at the Court-house in the city of New York on the 16th day of December, A. D. 1870.

Present: — Hon. J. M. BARBOUR, *Chief Justice.*

SAMUEL JONES, JOHN H. McCUNN, *Justices.*

JOHN O'MAHONY
agst.
AUGUST BELMONT and ERNST B. LUCKE.

On reading and filing notice of motion, on part of the defendant, bank receiver herein, to vacate and set aside the order of the general term, entered therein on the 14th day of November last, vacating and reversing these orders of the special term, and Mr. Henderson, of counsel for the defendant Barr, receiver, etc., now presenting himself and desiring to bring on this motion, the court declined to hear him, or to allow them to make the motion, and thereupon dismiss the motion, on the ground that the receiver has no standing in court to make the motion.

(Enter.) S. JONES, *Judge.*

Indorsed: No. 35. New York Superior Court. *John O'Mahony* v. *August Belmont and others.* Order denying motion to vacate orders of General Term. Bowdoin, Larocque & Barlow, attorneys for defendant Lucke. Exhibit No. 46. June 7. C. R. D. Filed December 16, 1870.

Q. State whether an application was made to the court to make the receiver a party to the action? A. On the 27th of July, 1869, there was an order made upon the application of Mr. Barr, the receiver, making him a party defendant to the action in his capacity as receiver.

Mr. STICKNEY — We produce Judge McCunn's order of the 27th of July, making the receiver a party defendant to the action, marked Exhibit No. 47.

EXHIBIT No. 47.

SUPERIOR COURT.

JOHN O'MAHONY
agst.
AUGUST BELMONT AND OTHERS.

CITY AND COUNTY OF NEW YORK, *ss.:*

Thomas J. Barr being duly sworn says, that he is the receiver herein, and that he has duly qualified and entered upon his duties as such receiver.

That after his appointment as such receiver, H. E. Tallmadge, one of the counsel for the plaintiff herein, called at the office of this deponent and stated to this deponent, in effect, that he would resist and prevent the funds, mentioned in the complaint herein, coming into this deponent's hands as receiver, and would discontinue the action and commence another in the Supreme Court, unless this deponent would distribute said funds as he, said Tallmadge, might desire; and that, although Mr. Page's name was used as attorney for the plaintiff, he, Tallmadge, had drawn all the papers and had all to do with the matter, and that he could contract the same. Deponent further says, that several suits have been commenced against him and others, and are still pending for said fund.

THOS. J. BARR.

Sworn to before me this 21st day of July, 1867,

J. M. DIXON, *Notary Public N. Y. Co.*

SUPERIOR COURT OF THE CITY OF NEW YORK.

JOHN O'MAHONY
agst.
AUGUST BELMONT AND ERNST B. LUCKE.

CITY AND COUNTY OF NEW YORK, *ss.:*

Thomas J. Barr of said city, being duly sworn, says, that by an order of this court made at special term thereof at the court-house in said city, on the 16th day of July instant, he was duly appointed receiver of the moneys, funds or gold mentioned in the complaint in this action.

That pursuant to said order, deponent duly filed approved security, and entered upon his trust as such receiver, and has received the sum of $16,738.70 in gold coin, less $2,500 in currency deducted therefrom.

That in order to protect his rights as such receiver, and for the protection of such trust funds, he has been informed by James Henderson, his counsel, that he the said receiver, should be made a party defendant in this action.

THOS. J. BARR.

Sworn to before me this 21st day of July, 1869.

J. M. Dixon, *Notary Public N. Y. Co.*

SUPERIOR COURT OF THE CITY OF NEW YORK

John O'Mahony
agst.
August Belmont and Ernst B. Lucke.

Upon the foregoing affidavit of Thomas J. Barr, and such other papers as may be served, and on all the papers and proceedings in the above entitled action, let the attorneys for the respective parties in said action show cause before one of the justices of this court, at a special term thereof, to be held at the court-house in the city of New York, on the 27th day of July, 1869, at 12 o'clock noon, why said Thomas J. Barr should not be made a party defendant to this action, and allowed to answer therein, if he may be so advised, and why he should not have notice of all proceedings in said action, and for such further or different relief in the premises that the court should be competent to grant, and in the meantime, and until the hearing and decision of this motion, let all proceedings in this action be stayed, not exceeding twenty days.

Dated New York, *July* 21, 1867.

JOHN H. McCUNN, *Judge.*
JAMES HENDERSON,
Counsel for the Receiver.

Indorsed: C. 334. New York Superior Court. *John O'Mahony* v. *August Belmont and Ernst B. Lucke.* Affidavit and order to show cause why receiver should not be made a party to the action. James Henderson, counsel for receiver, 195 Broadway, New York.

At a Special Term of the Superior Court of the city of New York, held at the Court-house, in said city of New York, on the 27th day of July, 1869.

Present—Hon. JOHN H. MCCUNN, *Justice.*

JOHN O'MAHONY
agst.
AUGUST BELMONT and ERNST B. LUCKE.

Upon reading and filing affidavit of Thomas J. Barr, and order to show cause founded thereon, dated July 21, 1869, and on reading the pleadings and proceedings in this cause, on motion of James Henderson, Esq., of counsel for the receiver, Thomas J. Barr, after hearing Roger J. Page, Esq., counsel for the plaintiff, and Wm. W. Macfarland, Esq., counsel for the defendants;

Ordered, that Thomas J. Barr, the receiver in the above entitled action, be made a party defendant herein, and that all papers in this action be served upon him or his attorney, James Henderson, by the plaintiff's attorney herein, within ten day after the service of this order.

(Enter.) J. McC.

Indorsed: No. 8. New York Superior Court. *John O'Mahony* v. *August Belmont and Ernst B. Lucke.* Order making the receiver a party defendant in this action. Henderson & Canfield, attorneys and counselors, 195 Broadway, New York. Exhibit No. 47, June 27. C. R. D. Filed Aug. 2, 1869.

Q. The appeal was taken from that order? A. Yes, sir.

Q. That was reversed? A. Yes, sir.

Q. Did Henderson appear to oppose that? A. Yes, sir.

Q. What did the court decide on the point? A. Said that the order was in substance something unheard of from the fact of a man being receiver, and a man being made a party being a receiver; there was no opinion.

Q. State what the judge said orally? A. I don't know that I can say any thing more; the fact was, they directed the order to be reversed, and it was reversed, and either on this occasion or on the hearing of some of the other appeals, when Mr. Henderson claimed the right to be heard, the court declared the receiver had no right to appear, or to be heard upon any of the questions affecting the rights of parties litigant to the suit; we produce the order of the general term reversing this order of Justice McCunn's, bringing the receiver

in as a party defendant; this order of the court was filed January 13, 1871, and entered on that day.

Q. And on any of these papers, the application for the appointment of receiver, and on any of these appeals from the orders appointing Mr. Barr as receiver, directing the payment of money, or the order making the receiver a party, did the counsel for the plaintiff make any opposition to this reversal? A. None whatever.

Q. The counsel for neither party wished these things done, nor asked for them at any time? A. The counsel for the plaintiff, in the first place, asked for the appointment of a receiver; from the time that motion was ordered to stand over, if I recollect right, all these proceedings were had upon the application of the receiver himself, and against the wishes of the counsel for the plaintiff as well as the defendant.

Q. The court decided they had no power to move or take action in the premises, as I understand it? A. Yes, sir.

By Mr. PERRY:

Q. Do I understand you, that the order appointing the receiver, was reversed? A. Yes, sir.

Mr. STICKNEY—Mr. President: I introduce in evidence the order of the general term of the Superior Court, dated January 3, 1871, marked Exhibit No. 48.

EXHIBIT No. 48.

At a General Term of the Supreme Court of the city of New York, held at the Court-house in the city and county of New York, on the 13th day of January, A. D. 1871.

Present—Hon. C. L. Monell, Samuel Jones, James C. Spencer, *Justices.*

JOHN O'MAHONY
agst.
AUGUST BELMONT, ERNST B. LUCKE and THOMAS J. BARR, Receiver, etc.

The appeal taken by the defendant Ernst B. Lucke, from the order made in this action, bearing date the 27th day of July, A. D. 1869, making Thomas J. Barr, theretofore appointed a receiver in this action, a party defendant herein, coming on to be heard, after hearing Mr. Larocque of counsel for the said appellant and Mr.

Henderson of counsel for the said Thomas J. Barr, receiver and defendant, respondent; it is now ordered and adjudged that the said order appealed from, making the said receiver a party defendant to this action, be and the same is in all things reversed and vacated.

(Enter.) C. L. M.

Indorsed: No. 42. N. Y. Superior Court. *John O'Mahony* v. *August Belmont and ors.* Order of General Term reversing order making receiver a party. Bowdoin, Larocque & Barlow, att'ys for defendant Lucke, Exhibit No. 48. 5, 27, 72. C. R. D. Filed January 13, 1871.

Q. Did you subsequently take any steps to recover back the money? A. I made an application to the Superior Court for an order to pass the accounts of the receiver, and such an order was made, reserving all other questions until the coming in of that account; under that order proceedings were had before Mr. Calvin, as referee, and the account of the receiver was presented and litigated before the referee; the referee subsequently made a report, to which exceptions were filed on the part of Lucke, the defendant; those exceptions were heard before Justice Sedgwick shortly before the commencement of this investigation, and no decision has been rendered yet by him on that report; the money has never yet been returned.

By Mr. Bowen:

Q. What has become of the case; has it gone to judgment? A. It is also in the hands of Mr. Barr, the receiver, or it was deposited by him in the Bowling Green Savings Bank as he testified; whether he has it does not appear; in the suit itself an answer was interposed on the part of Lucke, who was the only party served or that appeared; the plaintiff failed to appear when the case was reached and we took a dismissal of the complaint, and it was after that the order was entered directing the receiver to account.

Mr. D. P. Wood:

Q. Those two sums ordered paid by the order of Judge McCunn to the plaintiff's attorney, were they paid before the orders were reversed? A. It is alleged that they were paid, and whether they were paid or not, of my own knowledge I don't know.

Q. They appear in the receiver's account as paid? A. Yes, sir.

Q. Do you remember the suit of *Bailey* v. *O'Mahony?* A. After the appointment of Mr. Barr as receiver in the case of O'Ma-

hony against some one, a suit was commenced by a person by the name of Bailey, *Wm. H. Bailey* v. *John O'Mahony, Thomas J. Barr, August Belmont and Ernst B. Lucke,* and on the 4th of August, 1869, an order was made by Justice McCunn appointing Thomas J. Barr, who was a defendant as receiver in the other action, receiver in the case of *Bailey* v. *O'Mahony et al.*

Q. This was within a month? A. This was on the fourth of August of the same year; the other orders were in July.

Q. Here is the original order? A. I have a copy of it.

Q. Appointing him receiver of what?

Mr. BENEDICT—Is this the same charge?

Mr. STICKNEY — There is not a specific charge in relation to this suit, but we put this in evidence to show the intent of the justice in making the other orders in the suits which we charge were corruptly made. We offer this in evidence under the same charge.

The WITNESS — He was appointed receiver, as the order expressed it, "of all the moneys and funds placed in the hands of August Belmont & Co. by John O'Mahony, and derived from the sale of Fenian bonds, and also all the funds and money deposited in the hands of Peter B. Sweeney, the city chamberlain of New York city in a certain action in the Supreme Court in which said O'Mahony is a party, claiming to be entitled to receive said funds, and also all the funds and money wheresoever situated and in whosoever hands the same may be, which were derived and accumulated by the said O'Mahony by the sale of said Fenian bonds, mentioned and described in this complaint in this action, and in the affidavit of the plaintiff in this action." The order further directs that "Sweeney, the city chamberlain of New York city, is hereby ordered and directed to pay over to said receiver, upon due notice of this order, the sum of $18,893.05, now in his hands as aforesaid, deposited in an action in the Supreme Court, on the 20th of July, 1869, in which John Lawless is named as plaintiff and August Belmont is named as defendant."

Mr. STICKNEY: We will put in evidence the original summons and complaint and injunction, from the files of the court.

The paper was marked Exhibit No. 49, and reads as follows:

EXHIBIT No. 49.

SUPERIOR COURT OF THE CITY OF NEW YORK.

WILLIAM H. BAILEY
agst.
JOHN O'MAHONY, THOMAS J. BARR, AUGUST BELMONT and ERNST B. LUCKE.
} *Injunction.*

It appearing from the complaint in this action, duly verified, that the plaintiff is entitled to the relief demanded in the complaint herein, and that such relief consists in restraining John O'Mahony from obtaining certain funds in the hands of Thomas J. Barr, or any part thereof, until after the payment of the bonds or certificates mentioned in the complaint, so far as the same will apply, and that the defendant, Thomas J. Barr, should be restrained from paying over to said O'Mahony, or to any other person or persons, said funds or any part thereof.

Now, therefore, in consideration of the premises, I do hereby command and strictly enjoin and restrain the said John O'Mahony, his attorneys and agents, and all other persons acting in aid or assistance of him, and each and every of them, under the penalties by law prescribed, to absolutely desist and refrain from obtaining certain funds in the hands of Thomas J. Barr and August Belmont and Ernst B. Lucke, or any part thereof, until after the payment of the bonds or certificates mentioned in the complaint, so far as said funds will apply, and that the defendant, Thomas J. Barr, be restrained from paying over to said O'Mahony, or to any other person or persons, said funds or any part thereof, until the further order of this court.

JOHN H. McCUNN, *Justice.*

Dated *July* 21*st*, 1869.

Indorsed: Superior Court. *William H. Bailey* v. *John O'Mahony, Thomas J. Barr, August Belmont and Ernst B. Lucke.* Injunction order. R. S. Guernsey, plaintiff's att'y, 151 Broadway.

SUPERIOR COURT OF THE CITY OF NEW YORK.

WILLIAM H. BAILEY, Plaintiff, *agst.* JOHN O'MAHONY, THOMAS J. BARR, AUGUST BELMONT and ERNST B. LUCKE, Defendants.	*Summons for relief—Com. served.*

To the Defendants:

You are hereby summoned and required to answer the complaint in this action, a copy of which is herewith served, and to serve a copy of your answer to the said complaint on the subscriber, at his office, No. 151 Broadway, New York city, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated *July* 21*st*, 1869.

R. S. GUERNSEY,
Plaintiff's Attorney.

SUPERIOR COURT OF THE CITY OF NEW YORK.

WILLIAM H. BAILEY *agst.* JOHN O'MAHONY, THOMAS J. BARR, AUGUST BELMONT and ERNST B. LUCKE.	*Complaint.*

The plaintiff herein shows to this court for a complaint in his own behalf as well as on behalf of all other bondholders and persons similarly situated, in the enterprise known as the "Fenian movement," to establish the "Irish Republic," of which the defendant John O'Mahony, claimed to be the agent, and received money as alleged agent for said "Irish Republic."

First. That the plaintiff is a *bona fide* owner and holder of certain bonds or certificates (a copy of one of which is hereunto annexed), amounting in the aggregate to one hundred dollars, and that said sums remain unpaid thereon.

Second. That on or about the 17th day of March, 1866, the said defendant, O'Mahony, received from a large number of persons large sums of money, and gave in return therefor at the par value therof, in certificates of ten dollars each, signed by said O'Mahony as aforesaid, said bonds or certificates and similar ones before referred to, payable to bearer.

Third. That no such nation or government was then known or existed as the "Irish Republic" at the time of receiving said money and giving said certificates or bonds therefore as aforesaid, and none has existed since that time; and at the time said money was obtained as aforesaid, the said O'Mahony well knew that no state of facts existed to cause the said O'Mahony to have any probable reason or belief that the said proposed attempt to establish an "Irish Republic" in Ireland against the wishes of the English government would be a success.

Fourth. That said money so received as aforesaid by said O'Mahony, was upon his own and his agent, representations and assurances that the same was in good faith to be used by him in behalf of the "Irish Republic" in the struggle of the Irish people for independence as a nation.

Fifth. That said defendant, O'Mahony, thereby obtained large sums of money from various persons for the said purposes claimed by him as aforesaid, amounting to many hundreds of thousands of dollars, as this plaintiff has been informed and believes to be true.

Sixth. That the said enterprise to establish said "Irish Republic," in Ireland, has been entirely abandoned by said O'Mahony and his associates, as this plaintiff has been informed and verily believes to be true.

Seventh. That a portion of said money, so obtained as aforesaid, by said O'Mahony, in the hands of August Belmont and Ernst B. Lucke, in New York city subject to the order of said O'Mahony.

Eighth. That in an action in the Superior Court of the city of New York, in which said O'Mahony is plaintiff, and said Belmont and Lucke were defendants, such proceedings were had therein that the defendant, Thomas J. Barr, was duly appointed a receiver therein, as will more fully appear by the order of said court and all the papers in said action. That under and by virtue of said order said Thomas J. Barr has received a portion of said sum of money, amounting to about $16,738, in gold coin of the United States, being some of the funds and proceeds thereof obtained by said O'Mahony, as aforesaid, and belonging to what is commonly known as the "Fenian fund," and were derived from persons paying money in exchange for said bonds or certificates. Wherefore the plaintiff demands judgment, as well in his own behalf as in behalf of all other bondholders and persons similarly situated, that an injunction issue to restrain said defendant, O'Mahony, from obtaining said funds or any part thereof, and that said bonds or certificates be paid out of said funds in the hands of said receiver, so far as the same will apply, and that the

defendant, Thomas J. Barr, be restrained from paying over to said O'Mahony or to any other person or persons said moneys, or any part thereof until after such application, as aforesaid, and that the plaintiff have such further or other or different relief in the premises as the court shall be competent to grant, together with the costs of this action, payable out of said funds in the receiver's hands.

R. S. GUERNSEY,
Plaintiff's Attorney.

CITY AND COUNTY OF NEW YORK, *ss.:*

William H. Bailey, being duly sworn, says that he is the plaintiff above named, that the foregoing complaint is true, of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

WM. H. BAILEY.

Sworn to before me this 21st day of July, 1869.
J. M. GREENE, *Notary Public New York Co.*

(Copy Bond.)

No. 1665. No. 836 E.
$10. $10.

It is hereby certified that the Irish Republic is indebted unto ———, or bearer, in the sum of ten dollars, redeemable six months after the acknowledgment of the independence of the Irish nation, with interest from the date hereof inclusive, at six per cent per annum, payable on presentation of this bond at the treasury of the Irish Republic.

March 17, 1866.

JOHN O'MAHONY,
Agent for the Irish Republic.

Office of the Secretary of the Treasury. [L. S.]

Indorsed: Superior Court. No. 1. *William H. Bailey* v. *John O'Mahony, Thomas J. Barr, August Belmont and Ernst B. Lucke.* Complaint and injunction. R. S. Guernsey, plaintiff's att'y, 151 Broadway. Exhibit No. 49. Filed July 26, 1869.

By Mr. STICKNEY:

And we also offer in evidence the original order of the 4th of August, 1869, with Justice McCunn's signature.

The paper was marked Exhibit No. 50, and reads as follows:

EXHIBIT No. 50.

At a Special Term of the Superior Court of the city of New York, held in the Court-house in said city, on the 4th day of August, 1869.

Present — Hon. JOHN H. MCCUNN, *Justice Presiding.*

WILLIAM H. BAILEY
agst.
JOHN O'MAHONY, THOMAS J. BARR, AUGUST BELMONT and ERNST B. LUCKE.

Order Appointing Receiver.

Upon reading the verified complaint in this action, and on reading and filing the affidavit of the plaintiff herein, and all the papers and proceedings mentioned in said affidavit, and after hearing R. S. Guernsey, of counsel for plaintiff, on a motion to appoint a receiver in this action, and after hearing Roger J. Page, Esq., of counsel for the defendant O'Mahony, in opposision thereto, and James Henderson, Esq., appearing as counsel for defendant Barr, and Wm. M. Macfarland, Esq., appearing as counsel for defendants Belmont and Lucke, and due deliberation having been had thereon;

Now, it is hereby ordered that Hon. Thomas J. Barr, of the city and county of New York, be and is hereby appointed a receiver of all the moneys and funds placed in the hands of August Belmont & Co. by John O'Mahony, and derived from the sale of Fenian bonds; and also all the funds and moneys deposited in the hands of Peter B. Sweeney, the city chamberlain of New York city, in a certain action in the Supreme Court, in which said O'Mahony is a party claiming to be entitled to receive said funds, and also all the funds and money, wheresoever situated and in whosesoever hands the same may be, which were derived and accumulated by the said O'Mahony of the sale of said Fenian bonds mentioned and described in the complaint in this action and in the affidavit of the plaintiff in this action.

It is further ordered, that said Thomas J. Barr, before entering upon his said trust, shall execute and file with the clerk of this court a bond, in the usual form given by receivers, to the people of the State of New York, in the penalty of $50,000, with sufficient sureties, freeholders of said city and county of New York, to be approved as to its form and manner of execution by a justice of this court; and that said Thomas J. Barr, upon filing such bond as aforesaid, shall be invested with all the rights and powers of receivers according to law.

And the said Peter B. Sweeney, Esq., the city chamberlain of New York city, is hereby ordered and directed to pay over to said receiver, upon due notice of this order, the sum of $18,893.05, now in his hands, as aforesaid, deposited in an action in the Supreme Court on the 20th day of July, 1869, in which John Lawless is named as plaintiff and August Belmont is named as defendant.

(Enter.) J. McC.

Indorsed: No. 2. Superior Court. *William H. Bailey* v. *John O'Mahony, Thomas J. Barr, August Belmont and Ernst B. Lucke.* Order appointing receiver. R. S. Guernsey, plff's att'y. E. Filed August 12, 1869. Exhibit No. 50. C. R. D.

By Mr. STICKENY:

Q. Had you appeared on the hearing of this motion? A. Personally I had not.

HIRAM E. TALLMADGE, being duly sworn on behalf of the prosecution, testified as follows:

Examined by Mr. STICKNEY:

Q. You are a counselor at law in the city of New York? A. Yes, sir.

Q. Have been so how long? A. Some eight years.

Q. Do you remember this case in the Superior Court of the city of New York, of *O'Mahony* v. *Belmont?* A. I was an attorney and counsel for the plaintiff, O'Mahony.

Q. Do you remember the motion before Judge McCunn, on the motion of the receiver, on the 2d of July, 1869? A. I do.

Q. The motion was adjourned to what day? A. I remember it as stated by Larocque; I heard his testimony and what he stated is substantially true, in reference to the adjournment.

Q. Were you present in court before Justice McCunn on the 20th day of July, when Lucke, one of the defendants, was brought before Judge McCunn on the charge of contempt? A. I wasn't.

Q. Do you remember the stipulation which has been put in evidence here of the 17th of July, that the order appointing the receiver be set aside? A. I do; I saw it signed; directed it.

Q. Had you made any application? A. I was going to say I wrote the note referred to there.

Q. Which has also been put in evidence? A. Yes, sir.

Q. Had you made any application to Judge McCunn for that

order appointing the receiver? A. None; I received a note from Henderson stating that the receiver had been appointed, and Henderson presented me an order, and I told him I should not consent to it; didn't want one.

Q. What connection had Henderson with the receiver? A. Seemed to be the counsel.

Q. Had he at any time been Mr. Barr's partner in business, as far as you know? A. They had offices together.

Q. At that time? A. Yes, sir.

Q. Did you, after that consent on the 17th of July, which has been put in evidence; the consent to set aside and vacate that order of the receivership; did you take any proceedings at any time, or were any proceedings taken at any time, as far as you know, on the part of the plaintiff, for the appointment of receiver, or to enforce the proceedings for the payment of that money? A. None at all.

Q. Who was the moving party all through that? A. It seemed to be Mr. Henderson, the counsel for Mr. Barr.

Q. No party to the action, unless the receiver, moved those proceedings at all? A. I wasn't there at the contempt proceedings; I don't know any thing about them; I wasn't present.

Q. You know whether you had given notice of any application, or given any order to show cause? A. I hadn't; the order wasn't obtained from the plaintiff on the part of the receiver.

Q. You remember, as has appeared by the papers, the fact of the appeal being taken from the order appointing Mr. Barr receiver, and the order directing the payment of the money to him? A. Yes, sir.

Q. Did you make any opposition, or was there any opposition made on the part of the plaintiff to the reversal of those orders at the general term? A. None at all.

Q. Do you remember the orders produced here making Mr. Barr, the receiver, a party to the action? A. I do.

Q. Was that order granted upon your motion? A. Not at all.

Q. Do you remember the appeal from that order, making the receiver a party, which has been put in evidence here? A. Yes, sir.

Q. Did you oppose the order of the General Term, reversing that order making him a party? A. On the contrary, I moved to have him stricken out as a party; that is, I assisted the defendant in so doing.

Q. At any time after the 17th of July, was any opposition made by the plaintiff to these proceedings, on the part of the defendant,

looking to the reversal of all these orders about receivership? A. None at all.

Q. Or did the plaintiff make any application to the court, or motion to the court, for relief in the matter in question? A. No.

Q. Did the plaintiff make any opposition to the dismissal of the complaint in the action? A. No; we had agreed to stop the action.

Q. He wished to get out of court? A. Yes, sir.

Q. Did you go to Belmont's office at any time in relation to the payment of this money to the receiver? A. I did.

Q. What for? A. To forbid the receiver taking the money, for the matter had been settled.

Q. You told Belmont that? A. Told the receiver and his counsel.

Q. What did he say? A. They said they couldn't help it; they were going to have the money.

Q. So that the demand for the money made on Lucke was made after or before the stipulation between the attorneys, setting aside the order and settling the whole matter? A. It was after I had notified Henderson; refused to have the order, and I told him we should not enter it contrary to stipulations we had made; that they had made arrangements to settle; something of that kind; I had made them, with Mr. Macfarland; Mr. Macfarland was one of firm of the attorneys for Lucke.

Q. It was after that that the remark of Mr. Barr, the receiver. was made, that they would have the money? A. Yes, sir.

Mr. Stickney — Mr. President: As to the sixth charge in the case of *Norbury Hicks* v. *Peter W. Bishop*, the charge is, that in a case wherein the plaintiff showed there was no cause of action on its face against the defendant, and, at most, there was no claim for more than the $1,500, Judge McCunn granted an order of arrest, holding the defendant to bail in the sum of $40,000, and then, on the order to show cause, which was returnable before him, an order was made to show cause, which came on for hearing before Judge McCunn. The order required the plaintiff to show cause why the order of arrest should not be set aside and the bail reduced to the ordinary amount; we produce Justice McCunn's order denying the motion.

Mr. Perry — Have you got the order ordering the arrest?

Mr. Stickney — I have a copy of the order of arrest; I had it in these papers and it appears to be mislaid now, but these facts all appear on the motion papers, which were laid before Judge McCunn on the hearing. I have the original bail bond, which I will put in

evidence; we will put in evidence the original undertaking upon arrest.

The paper was marked Exhibit No. 51.

EXHIBIT No. 51.

NEW YORK SUPERIOR COURT.

NORBURY HICKS, Plaintiff,
agst.
P. W. BISHOP, Defendant.
} *Undertaking upon Arrest.*

The above named defendant, P. W. Bishop, having been arrested by James O'Brien, the sheriff of the city and county of New York, upon an order to arrest granted by the Hon. J. H. McCunn, in a certain action commenced in the above named court, by the above named plaintiff against the above named defendant.

We, P. W. Bishop, of Troy, in the State of New York, by occupation lawyer, and Joseph P. Brandy, of No. 131 South Oxford street, in the city of Brooklyn, by occupation merchant, and Albert B. Gibbs, of No. 227 Henry street, in the city of Brooklyn, by occupapation manufacturer, and Marcus Ball, of Troy, in the State of New York, by occupation farmer, hereby undertake in the sum of forty thousand dollars ($40,000) 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.

P. W. BISHOP,
J. P. BRANDY,
A. B. GIBBS,
M. BALL.

Delivered in presence of
W. R. W. CHAMBERS.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } *ss.:*

On this thirteenth day of July, in the year one thousand eight hundred and sixty-nine, before me personally came P. W. Bishop, Joseph P. Brandy, and Albert B. Gibbs, to me known to be the same persons described in and who executed the foregoing undertaking, and thereupon they severally acknowledged to me that they executed the same.

W. R. W. CHAMBERS,
Commissioner of Deeds.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } *ss.:*

On this thirteenth day of July, in the year one thousand eight hundred and sixty-nine, before me personally came M. Ball, to me known to be the same person described in and who executed the foregoing undertaking, and thereupon they severally acknowledged to me that they executed the same.

W. R. W. CHAMBERS,
Commissioner of Deeds.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } *ss.:*

Joseph P. Brandy, one of the within named sureties, being duly sworn, says that he is a resident of the State of New York, and a freeholder therein, and is worth the amount specified in the within undertaking, over all his debts and liabilities, exclusive of property exempt from execution; owns saw-mill and timber land in Essex county, State of New York, valued at $60,000, mortgage $500; also one vacant lot at Glen's Falls, value $1,000, free and clear of incumbrance.

J. P. BRANDY.

Sworn to before me this 30th day of July, 1869.
W. R. W. CHAMBERS, *Commissioner of Deeds.*

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } *ss.:*

Albert B. Gibbs, one of the within named sureties, being duly sworn, says that he is a resident of the State of New York, and a householder therein, and is worth the amount specified in the within undertaking, over all his debts and liabilities, exclusive of property exempt from execution; owns personal property free and clear from all incumbrance, valued at $30,000.

A. B. GIBBS.

Sworn to before me this 30th day of July, 1869,
W. R. W. CHAMBERS, *Commissioner of Deeds.*

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } *ss.:*

Marcus Ball, one of the within named sureties, being duly sworn, says that he is a resident of the State of New York, and a freeholder therein, and is worth the amount specified in the within

undertaking over all his debts and liabilities, exclusive of property exempt from execution; owns a farm one mile from the city of Troy, valued at $25,000, mortgage of $2,500; owns land in St. Lawrence county, free and unincumbered, valued at $80,000.

M. BALL.

Sworn to before me this 30th day of July, 1869.

W. R. W. CHAMBERS, *Commissioner of Deeds.*

Indorsed: C. L. Halberstadt. John H. Hand, 7 Nassau street. 1140. C. New York Superior Court. *Norbury Hicks* v. *P. W. Bishop.* Undertaking upon arrest. $40,000. I certify that the defendant in this action has been held to bail by me pursuant to the order of arrest issued herein; and I further certify that the within is a true copy of the undertaking of the bail taken by me, under the said order. Exhibit 51. C. R. D. Filed August 17, 1869. C. B. S. July 30. Within undertaking approved. C. L. Halberstadt, plaintiff's attorney.

Mr. STICKNEY — We then put in evidence an order to show cause, granted by Justice Freedman, requiring the plaintiff to show cause on the 31st July, 1869, why the order of arrest should not be vacated and the bail reduced, with the affidavits upon which the order to show cause was granted, and the affidavits read in rebuttal on that motion; affidavit to show cause is the affidavit of Philetus Bishop, the defendant, and Justice Freedman's order to show cause.

The paper was marked Exhibit No. 52.

EXHIBIT No. 52.

SUPERIOR COURT OF THE CITY OF NEW YORK.

NORBURY HICKS
agst.
P. W. BISHOP.

CITY AND COUNTY OF NEW YORK, *ss.:*

Philetus W. Bishop, the defendant, being duly sworn says, that the plaintiff has no cause of action against him whatever.

Deponent further says, that on or about March 1st, 1868, he was not the owner of "Jones' Discovery" for cleaning and glazing steam boilers, but that it was owned by the Manhattan Steam Boiler Cleaning and Glazing Company, from about September, 1867; that said company was regularly organized and is now in full operation. That deponent was the owner of some of its stock; that deponent

never realized any profit upon the sale of said article. Deponent further says, that the costs and expenses of the company were much larger than the amount of profits received by the company. That the company were always in debt to deponent from the time of its organization down to the present time. That no dividend was ever made upon the stock, for the reason that no profits were ever realized sufficient for that purpose. That the affairs and business of said company were fairly and honestly conducted in the best interest of its shareholders.

Deponent further says, that on or about the 24th day of March, 1868, he gave to the plaintiff the shares of said stock (fifty dollars per share), and that the plaintiff never gave or paid him to the amount of one cent therefor; that on or about the 24th of May, 1868, deponent gave to the plaintiff the further amount of twenty shares of said stock, for which the plaintiff has never paid one cent. That the plaintiff never paid one cent for all the stock he how holds. Deponent further says that no factory was ever built, nor any machinery ever puchased by the proceeds of the sale of the capital stock. That the factory and machinery spoken of in the affidavit did not cost to exceed the sum of seventy-five dollars, and actually cost a less sum than seventy-five dollars.

That all the profits of said company, down to the 23d of April, 1869, had not been sufficient to pay the necessary reasonable expenses. That, on said 23d of April, 1869, deponent sold all his stock and all his interest in said company, and since that time has had no interest whatever in the same or any connection therewith, and no knowledge of its affairs except from mere hearsay.

Deponent further says that it is not true that he ever appropriated any money or moneys belonging to said company or to its stockholders.

Deponent further says that the affairs of said company were fairly and honestly conducted during all the time he had any connection with it, but that it was never able to pay any dividend.

Deponent further says that, on or about the 2d of March, 1869, he sold to Mr. Payn and Mr. Bonell and Mr. Johnson two thousand shares each of said stock, but did not sell them any thing else, nor transfer to them any thing else. The sale and delivery of said stock was the entire transaction, and that deponent did not receive from them or either of them any consideration for any thing except for said shares of stock.

Deponent further says that it is not true that the plaintiff, or any other stockholder, ever was defrauded by him out of the amount of

one cent; and deponent further says that it is not true that he ever appropriated to his own use $25,000, or any other sums belonging to said company or its stockholders. And deponent further says that he has not defrauded the plaintiff in any way or manner whatever out of one cent.

Deponent further says that he has not purchased any real estate in Troy, within the last year, and that his wife is not now the owner or holder of any real estate, and has not been within the last fifteen years.

Deponent further says that this action was brought against him for the sole purpose of harassing and annoying him, away from his home and among strangers, and for extorting money from him unlawfully, and for no honest purpose whatever.

That deponent is not in any way whatever lawfully indebted to the plaintiffs for any amount whatever.

Deponent further says that he is now under arrest and in the custody of the sheriff of New York.

Deponent prays that said order may be vacated, or the bail reduced to a nominal amount.

P. W. BISHOP.

Sworn to before me, this 29th day of July, A. D. 1860.

JOHN H. HAND, *Notary Public, N. Y.*

On the foregoing affidavit let the plaintiff or his attorney show cause before me at the court room at the City Hall, on the 31st day of July, 1869, at 12 o'clock M., why the order of arrest should not be vacated or the bail reduced to a nominal sum.

JOHN J. FREEDMAN,
J. Supr. Ct.

Indorsed: Charge 6, C. Superior Court. No. 3. *Norbury Hicks* v. *P. W. Bishop.* Affidavit and order to show cause. Exhibit 52. C. R. D. Jno. H. Hand, counsel for defendant. Filed August 10, 1869.

Exhibit 53 is the affidavit of Norbury Hicks, plaintiff.

Exhibit No. 53.

NEW YORK SUPERIOR COURT.

Norbury Hicks
agst.
P. W. Bishop.

City and County of New York, *ss.:*

Norbury Hicks, being duly sworn, says that he has a sufficient cause of action against the above named defendant arising out of the following facts, to wit:

That heretofore, and on or about March 1, 1868, the above named defendant was the owner of a certain preparation known as "Jones' Discovery" for cleaning and glazing steam boilers; that the said preparation is and has been, since its introduction, a success, and is highly recommended by the owners and engineers of steam boilers; that the cost of manufacturing the aforesaid preparation is very small, and the defendant realized a very large profit upon the sale of the aforesaid article.

That on or about the time aforesaid the above named defendant organized a joint-stock company, under the laws of the State of New York, for the purpose of manufacturing and selling the aforesaid article, under the name of the Manhattan Steam Boiler Cleaning and Glazing Company; that, after the organization of said company, the defendant issued certificates of stock of said company, signed by defendant as president.

That, on or about March 24th and May 24th, 1868, at the city of New York, the above named defendant delivered to deponent, for value, two certain certificates of stock of the aforesaid company, by which certificates deponent became the owner and holder of thirty shares of the capital stock of said company, of the value of $1,500; that the said certificates of stock were duly signed by the defendant as president, and said defendant caused to be affixed to each of said certificates a United States internal revenue stamp of the value of twenty-five cents, and duly canceled the same and delivered the certificates as aforesaid to deponent, who then became the sole owner and holder of said stock, with all benefit and advantage accrued and to accrue from the profits realized upon the sale of the aforesaid preparation, according to the amount of stock held by deponent.

That out of the money realized from the sale of the capital stock

issued as aforesaid, the defendant caused to be built a factory, and purchased machinery for the manufacture of the aforesaid preparation, and the defendant thereupon commenced the making and selling of the said preparation, and the defendant manufactured and sold said preparation from the time aforesaid until on or about March 2d, 1869, during which time the business had been largely profitable, and the defendant sold large quantities of said preparation and realized a very large amount of money upon the sale of said article; that the cost of making the aforesaid preparation is about twenty-eight cents per gallon, and sells in market for five dollars per gallon.

Deponent further says, that the defendant has, at no time, paid to him, deponent, any money whatever out of the proceeds of the aforesaid sales, although deponent is entitled to a share of said moneys in proportion to the stock held by deponent; that, as deponent is informed and believes, the defendant has at no time paid to any stockholder of said company any moneys out of the profits of said sales, but said defendant, on the contrary, appropriated the aforesaid moneys belonging to deponent and the other persons holding the said stock, to his own use, in violation and fraud of their rights as stockholders.

That on or about March 2d, 1869, at the city of New York, the said defendant, with the intent and for the purpose of cheating and defrauding deponent and the other stockholders of said company, and without giving deponent or any person notice, sold and transferred to J. T. Johnson and F. F. Borrell all the stock on hand, factory and machinery and every thing belonging to said company, and the property of the stockholders, and received from the said J. T. Johnson and F. F. Borrell about the sum of $25,000, which amount the said defendant appropriated to his own use, and refused, and still refuses, to account for the same or any part thereof.

That deponent and the stockholders of said company have been defrauded, by reason of the acts of said defendant, in the sum of about $35,000.

That the defendant is a non-resident, and is a resident of Troy, New York, and that as deponent is informed and believes, the defendant has expended the money realized as aforesaid in the purchase of property in Troy, and that the title and deeds of said property have been given in the name of defendant's wife.

Deponent prays that said defendant may be arrested and held to bail, according to the statute in such case made and provided.

NORBURY HICKS.

Sworn and subscribed before me this 30th day of June, 1869.

A. H. REAVEY, *Notary Public.*

Indorsed: No. 1. New York Superior Court. *Norbury Hicks* v. *P. W. Bishop.* Affidavit. Charles L. Halberstadt, plaintiff's attorney, 7 Murray street. Exhibit E, 53. C. R. D. Filed August 2, 1869.

We put in evidence Justice McCunn's order of the 16th of August, 1869, denying it, with $10 costs, with Judge McCunn's signature.

EXHIBIT No. 54.

At a Special Term of the Superior Court of the city of New York, held at the County Court-house on the 16th day of August, A. D. 1869.

Present — Hon. JOHN H. McCUNN, *Justice.*

NORBURY HICKS
agst.
P. W. BISHOP.

Upon reading and filing the annexed affidavits and order to show cause, and after hearing counsel for the respective parties, ordered, that the motion to vacate the order of arrest granted herein, or to reduce the bail to a nominal sum, be and the same hereby is denied, with ten dollars cost.

(Enter.) J. H. McC.

Indorsed: N. Y. Superior Court. *Norbury Hicks* v. *P. W. Bishop.* Order denying motion. Exhibit 54. C. R. D. Filed August 16, 1869. No paper filed. T. E. B.

We produce the order of Justice Jones, entered on the 30th October, 1869, dismissing the summons, with an affidavit of John H. Hand, upon which the same was granted.

The paper was marked Exhibit 55.

Exhibit No. 55.

NEW YORK SUPERIOR COURT.

At a Special Term of the Superior Court of the city of New York, held at the City Hall, on the 30th day of October, A. D 1869.

Present — Hon. Samuel Jones, *Justice.*

Norbury Hicks
agst.
P. W. Bishop.

The motion to dismiss the summons herein coming on to be heard, and on reading and filing the affidavit of John H. Hand, and order to show cause and proof of service, and on hearing John H. Hand, Esq., counsel for the defendant, it is hereby ordered the summons in this action be and the same is hereby dismissed, with costs. It is further ordered, that the bond given by the defendant to the sheriff to release him from the arrest, be delivered to the defendant, or his attorney, to be canceled.

(Enter.) S. JONES,
Justice.

Indorsed: Superior Court. No. 4. *Norbury Hicks* v. *P. W. Bishop.* Affidavit and order dismissing summons. John H. Hand, attorney for defendant. Filed October 30, 1869.

SUPERIOR COURT.

Norbury Hicks
agst.
P. W. Bishop.

City and County of New York, *ss.:*

John H. Hand, being duly sworn, says that he is attorney for the defendant, in the above entitled action.

Deponent further says that on the 24th day of August, 1869, he served a notice of appearance and demand for complaint on the plaintiff's attorney personally, in his office in New York, and received from him an admission in writing of the due service of such notice and demand on that day. That more than twenty days have elapsed since the service of said notice of appearance and demand for complaint, and that no copy of a complaint has been served on deponent or received at his office.

Deponent further says that more than ten days have elapsed since he met the plaintiff's attorney in the street and informed said attorney of his failure to serve any complaint, and said attorney told deponent that he did not know where his client was, and that he should take no further trouble in the matter. Deponent then told him that deponent should obtain an order dismissing the summons.

JOHN H. HAND.

Sworn to before me this 15th day of November, A. D. 1869.

EDWARD F. BROWN, *Notary Public in N. Y. City.*

NEW YORK SUPERIOR COURT.

NORBURY HICKS
agst.
P. W. BISHOP.

On the foregoing affidavit, and the admission of due service of notice and demand for complaint, and on the affidavits used on the motion to vacate the order of arrest, let the plaintiff or his attorney show cause before one of the justices of this court, at special term, in the new City Hall in the city of New York, on the 25th day of October, 1869, at 12 o'clock M., why the summons in this action should not be dismissed with costs, and the bond executed and delivered to the sheriff, to release the defendant from arrest, should not be delivered up to be canceled, and why such other or further order should not be made as shall be just.

S. JONES, *Justice.*

October 19, 1869.

CITY AND COUNTY OF NEW YORK, *ss :*

John H. Hand, being duly sworn, says that on the twentieth day of October, A. D. 1869, he personally served the foregoing affidavit and order upon Charles Halberstadt, the plaintiff's attorney in this action, by delivering copies thereof to a person in and having charge of said attorney's office, in said city, and showing him the above original order, said attorney being absent from his office at the time of said service.

JOHN H. HAND.

Sworn to before me this 20th day of October, A. D. 1869.

EDWARD F. BROWN, *Notary Public in N. Y. City.*

Indorsed: Within motion adjourned to Saturday, the 30th inst., at ten o'clock A. M. S. Jones, Justice. October 25, 1869. Exhibit 55. C. R. D.

Mr. PARSONS — Mr. President: That brings the testimony in the case to a close.

Mr. PERRY — Mr. President: I would like to inquire what was the order introduced in this case under the sixth charge?

Mr. STICKNEY — If the Senate will allow us to read that in evidence we desire to do so. The order was in my possession, and appears to be lost or mislaid in some way.

Mr. PERRY — As I understand you, you have not got before the court the order directing the arrest?

Mr. STICKNEY — Not the order of arrest, but all the facts on the motion appear in the motion papers, and the opposing papers read on a hearing of the motion. But still we will ask, under the circumstances, to be allowed to read from the record which is before the senate, the printed copy of that order of arrest which was admitted in evidence before the committee without objection. I refer to the record transmitted to the Senate by the Governor, in the testimony and exhibits taken before the Assembly committee.

Mr. D. P. WOOD — Have you laid the foundation by showing the loss of the paper? On what ground do you base your application to read this copy?

Mr. STICKNEY — I make the statement that I had a copy of the order, and that I cannot now find it; copy of the original order.

Mr. BENEDICT — This is an offer to put in secondary evidence.

Mr. STICKNEY — Yes, sir.

Mr. BENEDICT — The best evidence being lost.

Mr. ROBERTSON — I don't understand it to be on that ground.

Mr. PARSONS — The question is, whether the Senate will receive a copy of the original order of arrest upon the authentication furnished by the transmission of that copy by the Governor to the Senate. There has been here, during the progress of the investigation, a copy which was served upon the defendant, as I understand, but it was laid among our papers, and Mr. Stickney is unwilling to prove the fact of its loss by himself, as he is reluctant to be examined as a witness. It might be proper that I should say in regard to the matter, that the papers on the motion to discharge the order of arrest stated the fact of the order of arrest, and the amount of bail, so that fact sufficiently appears before the Senate without the order being actually here, and the bail bond itself is put in evidence.

Mr. PERRY — Do those papers contain a copy of that order of arrest?

Mr. PARSONS — Not an exact copy; no, sir.

The PRESIDENT — The question is, whether so much of the record as shows this order of arrest shall be read in evidence?

The question was put, and declared carried. It was read as follows, at page 61 of the Exhibits.

EXHIBIT B.

SUPREME COURT OF THE CITY OF NEW YORK.

NORBURY HICKS, plaintiff,
agst.
P. W. BISHOP, defendant.

To the Sheriff of the City and County of New York:

It having been made to appear to me by affidavit that Norbury Hicks, the plaintiff, has a sufficient cause of action against P. W. Bishop, the defendant, it being one of the cases mentioned in section 179 of the Code of Procedure, you are required forthwith to arrest P. W. Bishop, the defendant in this action, for the cause aforesaid, and hold him to bail.

Mr. PERRY — Mr. President: I would like to make a motion to reconsider the vote by which the last evidence was admitted, with a view of making a foundation for secondary evidence; to reconsider by which the Senate decide to receive evidence in reference to this order of arrest from the record sent to the Senate by the Governor.

Mr. PERRY's motion was put and declared carried.

Mr. PERRY — If there is no objection I would like to examine Mr. Stickney a moment; Mr. Stickney will you take the stand?

Mr. STICKNEY — Mr. President and Senators: If the Senate choose to call me upon their own motion, as a witness, of course I shall not refuse; I cannot refuse; we would prefer very much to abandon the charge rather than that either of the counsel that appear in behalf of the prosecution should be examined and give testimony. We shall submit, of course, to the order of the Senate in the matter.

Mr. PERRY — I wish to say, if they abandon the charge, that disposes of that charge; I was going to examine Mr. Stickney in reference to the order, and that he has searched for it and cannot find it, for the purpose of introducing this as secondary evidence of that order, and if they abandon the charge, that is the end of it.

Mr. PARSONS — I presume the order is in the Senate room, and if, before the case is finally disposed of, it shall be found among the papers, I presume the Senate will allow it to be put in, and we

leave it in that condition; the charge to be abandoned unless that testimony is supplied.

Mr. D. P. Wood — Mr. President: In what position is the matter now before the Senate?

The President — The motion is pending, the reconsideration having been carried. The motion to admit the evidence —

Mr. D. P. Wood — Mr. President: I move —

Mr. Murphy — The offer is withdrawn.

Mr. D. P. Wood — I don't so understand it; I understand the counsel for the prosecution propose to withdraw this article of the charges, unless, before the case is finally closed, the original order is not produced and placed on the files among the Exhibits.

Mr. Stickney — Or unless the Senate will receive the printed copy as it appears in the record transmitted by the Governor, in either of those cases; and we suppose the last method is still open to the consideration of the Senate.

Mr. D. P. Wood — Mr. President: I move that the prosecution be allowed to furnish this original paper, if they find it among their papers, and place it among the evidence. In the failure to produce the original paper, that the testimony be disallowed, or order that the article be considered withdrawn.

Mr. Allen — Mr. President: I would like to inquire whether the printed order of arrest has not already been admitted in evidence, and whether it does not now stand in the evidence as recorded, and whether the question is not to reconsider that action, and now is whether the Senate shall receive that or not?

Mr. D. P. Wood — That has been reconsidered.

The President — The motion to reconsider was carried.

Mr. D. P. Wood — Is the question whether they will now receive this?

The President — The question is on the adoption of that resolution, it having been reconsidered, unless the Senate by unanimous consent entertain the proposition of the senator from the twenty-second.

Mr. D. P. Wood — I suppose my proposition could be received as an amendment to the original motion to receive the evidence? I offer it in that view.

The President — It could be so offered; the question is on the motion of the senator from the twenty-second.

Mr. Benedict — That order having been read in evidence, reconsideration cannot effect any thing, unless you move to strike it out.

Mr. D. P. Wood — Mr. President: I understand the effect of my

motion to be to strike it out, and the charge with it, unless the original is produced. The effect of it is to strike it out; the motion being that, unless the original is produced, the article be stricken out, and, of course, that neutralizes the evidence, whatever it is, whether secondary or otherwise.

Mr. STICKNEY — Will the Senate allow me to make a suggestion? The charges come before you from the Governor; we appear here, and have examined witnesses who have attended pursuant to subpœnas of your body. But on further reflection, we concede we have no power over the charges laid before you by the Governor; that it does not lie with us to abandon them at all. If your body decide not to receive the evidence from the printed report, we can simply leave the matter where it stands, for such action as you may deem fit.

Mr. ALLEN — As an amendment to the motion of the senator from the twenty-second, I move to strike out the evidence last received; the printed evidence read by the counsel for the prosecution.

The question was put on Mr. Allen's motion, and was carried.

The PRESIDENT — The question then will be upon the amendment offered by the gentleman from the twenty-second.

Mr. D. P. WOOD — Mr. President: I understand the motion of the gentleman from the thirty-second was adopted to amend the motion I made.

The PRESIDENT — The Chair so understood it.

Mr. D. P. WOOD — Amended so that this evidence that had been received shall be stricken out. I would inquire of the senator if he intends that as an entire substitute for my motion, or as an amendment to be added to it, and then my motion be put to the Senate, to decide whether the case shall be held open for the putting in of his original order when found.

Mr. ALLEN — Mr. President: I made my motion as an amendment, intending thereby to cover the whole motion made by the senator from the twenty-second. But I have no objection to his original motion, or any subsequent motion he might make to authorize the introduction of his evidence, if presented afterward.

Mr. MURPHY — Mr. President: The motion of the senator from the twenty-second, I suppose, was entirely superseded by the amendment or motion of the senator from the thirty-second. I voted for it in that view, and inasmuch as they propose to abandon the charge, we have nothing to do with that now; we vote upon the charge and it is entered. Whether it is proven or not proven, we are not now to strike out a charge, and for that reason I suppose the amend-

ment of the senator was a substitute, and therefore I hope the matter will lie there.

Mr. D. P. Wood — I agree with the senator from the third, and I think as it stands now it is better.

The President — Then the matter is disposed of; what course do the counsel for the prosecution desire to take in reference to summing up?

Mr. Parsons — The course the counsel for the prosecution desire to take is, that we shall not be heard. We think it quite unnecessary any thing should be said in support of this testimony. If, however, the evidence, much of which has come in in documentary form, needs any explanation, it will be a part of our duty to make that explanation. We should prefer, Mr. President, to be guided by the wishes of the Senate in the matter.

Mr. Murphy — Mr. President: I would like to inquire when we are likely to have the documentary evidence printed and before us.

The President — The Clerk informs the Chair the printers are at work upon it with all their force, and probably will not be able to get it done before to-morrow morning.

Mr. Murphy — I move the Senate adjourn until to-morrow morning.

Mr. D. P. Wood — Mr. President: I move the Senate go into private consultation.

The question was put on Mr. D. P. Wood's motion and declared carried.

In Senate — Albany, *July 2d*, 1872.

Senate met pursuant to adjournment.

The Clerk called the roll, when the following senators were found to be present:

Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lord, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Ticmann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood and Woodin.

The President — The order of the Senate is that the matter of the charges against Judge McCunn be considered at ten o'clock.

Mr. Robertson — I believe the motion was that we adjourn until this morning at ten o'clock; that the counsel then be heard if they so desire. I move they now be heard if they desire to be heard.

The President — Do the counsel desire to be heard?

Mr. Parsons — Mr. President and Senators: The counsel who appear to present the charges would have been very glad of any expression from the Senate which would have relieved them of any further duty in the prosecution; the action of the Senate, the resolution to which attention has been called, however, is such that in the event of any adverse result, we feel that, perhaps, we can scarcely be excused by those we represent, if we fail briefly to call the attention of the Senate to what we suppose the testimony establishes, and it is in deference to that feeling of duty on our part that we attend this morning at no great length to call your attention to what we believe to be established by the evidence to which I think very nearly all the senators now present have listened; this case has assimilated very nearly to an impeachment trial; every right which the accused judge could claim, if he were here with articles of impeachment pending against him, has been conceded to him, and we think that the Senate have gone even beyond what the accused judge could claim if he were here to answer articles of impeachment, and that privileges have been accorded to him which in that case he could scarcely insist upon as a matter of strict right. Considered as an impeachment trial, this case differs from every other impeachment trial of which I know, in this: the accused judge was present during the first day that testimony was taken against him; he did not come here again; his counsel continued through the second day, and while a witness was under examination by them, that witness necessarily called by us, but a witness who properly should be placed upon the stand by and on behalf of the accused judge, his counsel presented to the Senate a letter which can mean nothing other than this; which does mean simply this: that they recognize the impossibility of meeting the charges and are unwilling to share the responsibility of the result; the letter to which I allude — very guardedly drawn; very carefully prepared; unique; no such letter can be found in the history of any such proceeding — contains this expression: "before undertaking your defense, we were entirely satisfied of your innocence of any *intentional* wrong in the transactions on which were based the charges against you." I wish that it might be my privilege to ask the distinguished counsel, whose names appear to that letter, what was meant by that expression, "before undertaking your defense, we were entirely satisfied," satisfied by what? Satisfied by information communicated by witnesses who were to be called on behalf of the accused judge; why are no such witnesses here? Satisfied by statements made to his counsel by the accused judge; why is

there no such evidence here to sustain any such statements? Satisfied by an examination of the testimony taken by the committee of the Assembly; why do not the counsel who signed that letter continue through this trial, that they may here produce the witnesses whose testimony was then taken on behalf of the accused judge; taken, senators, with such results (I feel authorized to state) that the counsel could not read that testimony and be willing to assume the responsibility of again putting upon the stand witnesses whose cross-examination completed the picture then drawn by the evidence for the prosecution? But listen again to the statement from this letter, "before undertaking your defense we were entirely satisfied of your innocence of *intentional* wrong." Intentional wrong; not satisfied by any thing that was said to them by the judge himself; not satisfied by statements furnished by witnesses who could be placed upon the stand for the accused judge; not satisfied by statements furnished by these men, Morgan, Gano and others, his friends, that the judge had not been guilty of wrong; but satisfied that the wrong perpetrated by him was unintentional on his part; let me again say that I wish it were my privilege to ask the counsel why, when they put upon this record the statement that they are satisfied of the innocence of the accused judge of intentional wrong, they are not here by testimony or in such way as is possible, to explain that the wrong which they concede, was unintentional; again I must be permitted to call attention to another statement in this remarkable letter commenting upon and criticising the action and ruling of the Senate, which of course concerns senators, not me; action of this Senate, whose jurisdiction they had adopted; the counsel, referring to the Senate, say (I quote the last paragraph of the letter): "If their judgment should be against you — which we earnestly desire may not be the case — the jurisdictional question," etc.; that is to say, this letter is sent here with the expectation that the minds and judgment of senators may be influenced on the subject of the judge's guilt, and I wish to know why it is that counsel so shrewd, so sagacious, so distinguished, are not here by testimony or argument, or in any way available to them to assist the Senate in coming to that conclusion which they say they earnestly desire, of the innocence of Judge McCunn. Senators, I think in what occurred here can be found the motive which led the counsel to adopt this course without any regard to whether the testimony established the particular charges, without any reference to the particular cases in support of which evidence was furnished. There was left on the mind of every person present, disgust at the

character and conduct of the accused as exhibited by the testimony; and that feeling was shared by his counsel. There is to be found the reason why this course, so entirely without precedent, was adopted. The case was a nasty case. It had not even those circumstances to give it an appearance of dignity which are found, and which impose upon the public mind when a man of great talent has been guilty of correspondingly great wrong. This man, who had procured himself to be placed in the position of judge, as represented by this testimony, is a low, mean, sneaking man, crawling into a house at the dead of night to perpetrate his miserable villainies, and eminent counsel like Judge Selden and his associates were not willing to see such a case through to the end. Of course, where there has been such a procedure, it can scarcely be desirable, certainly cannot be expected, that we, at the close of the trial, shall present the case in any such elaborate manner as would be appropriate were we meeting arguments from the other side, or were we discussing the case upon testimony furnished first in support of the charges, and then testimony opposed to or in explanation of them. All that my associates and myself have deemed suitable is to assist the investigation by senators who were not present during the entire trial, by grouping somewhat the facts established by the testimony, and then to ask the senators — to ask you, Mr. President — whether the charges upon which Judge McCunn now stands arraigned have not been sustained, and more than sustained, and whether senators are not called upon to relieve the city of New York, and to relieve that profession to which I and some of you belong, of such a scandal and reproach as is this man McCunn. The first case, one which in some of its features possesses perhaps more dramatic interest than any of the others, is that based upon Judge McCunn's action in the suit of *Clarke* v. *Binninger*.

I am at a loss to know what single outrage upon justice could be perpetrated by a judge of which Judge McCunn is not guilty, according to the testimony, in that case, with this single exception, that possibly the testimony stops short of tracing money directly into his pockets, as the reward of his judicial action. If it be not necessary, and of course I need scarcely make the suggestion that it is not necessary, to show corruption in the sense of pecuniary corruption, money actually paid to a judge for his decision, I think I can satisfy senators that the testimony of what occurred in this case shows this judge to have committed every offense necessary for his removal, which his position made possible. The firm of A. Binninger & Co. had been established in business in the city of New York for a great

many years, the time is immaterial, but I think the testimony shows that before Judge McCunn thrust his hand into the affairs of the firm it had been doing business for some ninety years. In the month of November, 1869, their affairs were in this situation: They had in round numbers about $500,000 of property, all of which, with the exception of about $200,000, consisted of real estate; there was belonging to the firm a stock of valuable and costly wines and liquors amounting in value to some $120,000, and some $50,000 or $60,000 in notes, mortgages, and securities of that character. Differences had arisen between Mr. Binninger and Mr. Clarke; senators listened with great patience to an examination by Judge McCunn's counsel of Mr. Clarke's son, at considerable length, for the purpose of showing — as if that could justify illegal acts by the judge — that there was a want of harmony, that there was unfriendly feeling between Mr. Binninger and his partner. And here permit me to observe, Mr. President, that there is not a single rule of evidence which counsel for Judge McCunn have insisted should be observed by the prosecution, which was not disregarded by themselves without remonstrance on our part. Mr. Binninger, on the 4th of November, had given notice, under power reserved in the articles, that, at the expiration of fifteen days, he would terminate the copartnership; and that notice, in effect, fixed midnight of the 18th of November — twelve o'clock of the 18th of November — as the time when the partnership came to an end. It is claimed that there is some justification for the action of Judge McCunn, in that there was an intention on the part of Mr. Binninger to take action corresponding to that taken by Mr. Clarke. Such is not the case. There is no testimony to establish that there was ever any intention of that kind on the part of Mr. Binninger. It does not matter whether it was so or not. Permit me, Mr. President, to observe that what is complained of in Judge McCunn's action in this suit is not that he appointed a receiver in a partnership case. No senator has ever heard us deny the power of his court to appoint a receiver in such a case; the court has the amplest power, jurisdiction almost as extensive as that of the Court of Chancery of Great Britain. We complain of the circumstances under which the appointment was made, and of the circumstances which surround and follow upon the appointment. It must be perfectly apparent to senators that where there are sitting, as in the Superior Court of the city of New York, at all times six judges, there must be some arrangement of business between the judges. It never will answer, a judge being assigned to grant special term and chamber orders, that parties shall

be at liberty at will to apply to a judge assigned to the trial term, or to the general term, for orders proper to be granted at chambers, thus selecting a special term. In the month of November, 1869, the judge assigned to hold chambers, and holding chambers, was Judge Fithian, an associate justice of Judge McCunn; and unless there was some reason creating a necessity or propriety for making the application to some other judge, Judge Fithian was the person who should be asked for an order of the kind which Judge McCunn made. And nobody knew this better than Judge McCunn. No one was called upon when the application was made to him at twelve o'clock at night in his own house, to ask why it was that this application had not been made to Judge Fithian. We all know from the testimony why the application was made to Judge McCunn. We obtained a little information from Mr. Compton, just as little as Mr. Compton could give us. Mr. Compton came here as the determined friend of the judge, with his mouth sealed so far as he could, to prevent the disclosure of circumstances which might criminate the judge. But we did get from Mr. Compton this fact; first, that he had a talk with Hanrahan (Hanrahan in such close relation to the judge, the successor to his business, the partner of his brother-in-law), and in this conversation Hanrahan said: "If you will apply to Judge McCunn, he will appoint me (Hanrahan) receiver." And Compton says: "I didn't go to Judge Fithian, because if I had called upon Judge Fithian he would not have appointed Hanrahan, and the result would have been that I would not have made so good a speculation." That is his language; the speculation consisting in the arrangement he had made with Hanrahan to divide his fees as receiver.

Of course, the certainty with which Hanrahan assured Compton that Judge McCunn would appoint him, resulted from something which had transpired between Judge McCunn and himself; resulted, to a certain extent, from the fact as disclosed by this testimony, that in other cases, in earlier cases, the same course had been adopted, and an application for the appointment of a receiver being made to McCunn, without suggestion of a name from anybody, he had appointed Hanrahan. But it is necessary that the judge should be forewarned of the call he is to receive, and at about nine o'clock in the morning Compton calls upon Judge McCunn, and Judge McCunn enters into an arrangement with him that at twelve o'clock at night he will be at his house, prepared to receive Compton and his clients, that the application may be made for this order, and ready to grant it; and at twelve o'clock at night they did go. Mr.

President, can there be any better appreciation of the esteem in which Justice McCunn is held in the city of New York than that this man Compton and these clients of his would venture at that hour in the night to go to Judge McCunn's house and to take with them two bottles of wine which were to smooth the way to the granting of this order? Does Judge McCunn remonstrate? Oh, no. A feeble joke came from our opponents that Judge McCunn simply drank enough of the wine to exercise his functions as judge of its quality! This wine was taken because it was supposed it would be acceptable to the judge. What high-toned man would not have resented such an insult? This man, McCunn, who I have described as a low, mean man, made no remonstrance; he permitted Mr. Clarke, at the close of the interview, to leave one bottle of wine behind! Poor, miserable, feeble bribe, which he received for the service which he had rendered!

Now, Mr. President, what is it which we insist cannot be excused or palliated in the conduct of Judge McCunn on that occasion? Why, on papers which showed the value of the property of this concern to be $400,000 to $500,000, with no order to show cause—the poorest and least protection of the rights which Judge McCunn invaded—without notice to Mr. Binninger, he appointed a man whom he afterward himself describes as a drunken vagabond and scoundrel—he appoints him receiver of this $400,000 or $500,000 worth of property. There is no possible excuse upon the ground of ignorance; that he did not know the value of the property; that he did not know the loss that would result from his act; there is no suggestion of the propriety of notice to Mr. Binninger, who is in possession, before he can make this appointment. No; he grants the order putting the whole of that property in the hands of this drunken vagabond and scoundrel, Hanrahan, and all that he exacts for the protection of Mr. Binninger is a bond from Hanrahan, a man without responsibility, in the sum of $1,000. I shall show senators before I finish, that the loss entailed upon this firm by that appointment was between $100,000 and $150,000; and against that loss Judge McCunn, who knew his man, who knew that what he was looking to was the benefit of Morgan, his partner, indirectly his own benefit—all that Judge McCunn did was to take a bond in the penalty of $1,000, conditioned for the performance by this receiver of his duties. The next morning, when Morgan took the bond for $1,000, to be approved, McCunn was not so shameless as that he did not suggest that the penalty be increased to $10,000; $10,000 as all the security required from a worthless vagabond,

upon which he should be put in entire possession and control of from $400,000 to $500,000 worth of property; and so careless is this judge in the examination of this bond, which his own order called upon him to approve, and which he did by his order on the back of it, approve — so careless or indifferent was he that for the bond, a blank for a bond on the appointment of a receiver for a judgment debtor was used, not at all applicable to this case, so that the bond was not worth any thing as protection to Mr. Binninger, from whom the property was thus taken. What did Judge McCunn say about this man Hanrahan — say almost at the time — say a very few days after this occurrence, when he makes one of his earlier visits to Mr. Clarke's house? He says: "Hanrahan is one of my boys — one of my boys." He was "one of his boys!" He had succeeded to his business; he was a partner of his brother-in-law; he had been managing clerk of the office which had been his own office, and he assures Mr. Clarke that he is one of his boys, and that he, a new receiver, will take care that Mr. Clarke gets his rights. We know from the whole progress of the case what was meant by Mr. Clarke getting his rights. It meant that Mr. Clarke should be benefited at the expense of Mr. Binninger, when bankruptcy proceedings should ultimately be originated; that Mr. Clarke should be benefited at the expense of the creditors of the firm. It is in this connection that he assures Mr. Clarke that Hanrahan is one of his boys. Think of it Mr President, it is a judge — a judge of a court having the same jurisdiction as the Supreme Court of this State — assuring a party to this action, pending in his own court, a suit before himself, that he has put in possession as receiver of the property of this firm, a man who is "one of his own boys," and that he can, therefore, give the assurance that the rights, at all events, of that party shall be taken care of. On the 27th of November, 1869, was the first proceeding in retaliation, or rather in the protection of the rights of Mr. Binninger, a motion to set aside this order; an order which should have been set aside, having reference to the circumstances which surrounded it, and which was practically set aside by Judge Fithian. That motion, of course, was on behalf of Mr. Binninger, was controlled by his lawyers, and, therefore, was regularly brought on at the special term, being held by Judge Fithian, who was the judge to whom should have been made the application for the order appointing a receiver. I ask you, senators and Mr. President, whether you ever before heard of such a thing as that, a motion of this kind coming on before an associate justice of the court, the justice who had originally acted in the proceedings should

suggest to the plaintiff, "This motion comes before Judge Fithian; you had better go and employ, as your counsel, Mr. Clarke, Judge Fithian's partner?" Why? Mr. Clarke had his own lawyer, Mr. Compton. Why did Judge McCunn think that the only person who could suitably represent upon that application the side of Mr. Clarke was a person who stood in this relation to Judge Fithian, before whom the application was to be made? Mr. President, it indicates the low moral sense of this man, that he could suppose that an honorable, upright judge, like Judge Fithian, would be affected by a consideration of this kind. It shows that character of the man, which displays itself through this whole testimony, and which characterizes every proceeding on his part. "Go and employ Mr. Clarke," a stranger to the plaintiff in the suit, "to resist this application; he was a partner of the judge before whom the application is to be made." And as showing the guilty purpose of this man, consider two or three other facts, which the testimony has developed. While Judge Jones held court, a motion in this case was to be made before him, and for that motion Mr. Albright, who was a partner of Judge Jones, was employed. Where did the suggestion come from, that led to the employment of Mr. Albright, if not from Judge McCunn, in his same capacity as counsel for Mr. Clarke, in which he suggested the employment of Judge Fithian's partner? Bankruptcy proceedings were commenced, in which motions were made before Judge Blatchford and Judge Woodruff of the United States court, in the city of New York; and if senators will examine the records that have been put in evidence by Judge McCunn's counsel, they will find that when bankruptcy proceedings were to come on before so distinguished, so faithful a judge as Judge Woodruff, of the Circuit Court of the United States, the person to represent Mr. Clarke was Mr. Sandford, well known as having been the partner of Judge Woodruff.

I stand here for the bar of the city of New York, to call upon you, senators, by your interference, to elevate, beyond the reach of influence or temptations like these, the standard of professional honor, applicable as well to the practice of my profession as to the performance by the judges of the city of New York of their duties.

Again, it is desirable to secure the assistance and co-operation of the sheriff and the power of his office to aid and effectuate the control which this man McCunn has obtained of the assets of this firm. And then comes the same suggestion from Judge McCunn: "The person to be employed is Mr. Vanderpoel; he has influence with the sheriff." The sheriff had declined to interfere, had declined to

recognize the process which Judge McCunn had sent him, and the person to be employed in that case, according to Judge McCunn, is Mr. Vanderpoel, the sheriff's lawyer, because he has so much influence with the sheriff. Observe what was running through the mind of this man McCunn; it was that by influence illegal, possession of this property should be kept from Mr. Binninger, and from the creditors of his firm, that certain benefits should be secured to Mr. Clarke, of whose cause he had taken charge, to which the law did not entitle him, and that he and his proteges should secure the advantages, which they proceeded to realize.

And here let me say a single word in reference to one item of testimony which has received more attention perhaps than its merits have deserved. The motion before Judge Fithian was to be heard on the 27th of November, 1869. On the 23d of November this man Hanrahan writes a letter to Compton, the plaintiff's attorney, arranging an interview with Judge McCunn, and according to the appointment thus made the interview takes place. This man Hanrahan's relations with Judge McCunn already appear in testimony. He was a participant in a common scheme on the part of Judge McCunn, for their own advantage to wrong that firm, and the creditors of that firm, and yet it has been insisted that the letter which makes the appointment is not competent testimony in a proceeding of inquiry like this. Judge Fithian held, this being a partnership case, that there was a right to appoint a receiver. But he directed Mr. Barr to become co-receiver with Hanrahan, and to give security in the amount of $50,000. That was the order which he made, and of course the result of the motion made before him was to secure an amount of security for future transactions somewhat adequate. Meantime what happens to Mr. Binninger? His counsel came to the conclusion, that with Judge McCunn as Clarke's counsel, and with this suit in Judge McCunn's court, with the declaration which Hanrahan had made, and which has been verified on several occasions, that all he needed was to apply to Judge McCunn, who would give any order that he desired; Mr. Binninger and his counsel came to the conclusion that the better course was to invoke a higher jurisdiction. The firm was insolvent, that is to say, insolvent in the sense of being unable to reach its property in time to pay its debts. And, therefore, creditors, The Bank of America, Ives, Beecher & Co., Harvey, Blake & Co., take proceedings for the appointment of an assignee in bankruptcy of the firm, and those proceedings go so far that John S. Beecher is appointed, and he

calls upon Hanrahan and claims possession of the assets that he may go on and administer the estate.

It seems to me, then, when we have shown what is then done by Judge McCunn, we have shown all that we are called upon to establish the charge.

On the 4th of December, and again on the 6th of December, 1869, he issues so-called orders to the sheriff of the city and county of New York, which he signs with his own name, adding to his name his seal, why, I cannot think, except that this man is as ignorant as he is bad. By these orders, he directs the sheriff to assist the receiver in getting and holding possession of the property against the assignee in bankruptcy; one of these orders he takes, himself, to Mr. Joel O. Stevens, then and for many years previous undersheriff of the city and county of New York. The utter lawlessness of the proceeding is best illustrated by the answer which Mr. Stevens gave to Judge McCunn himself: "You might just as well tell me to go out into the street and to assassinate the first person I meet, as to expect me to execute that order;" and was it not so? Did those senators, who are lawyers, or did any one ever hear of a process of that kind, directed against a person who was not a party to the suit, but an officer of the bankruptcy court? Then what happens? The sheriff declines to execute this order. Is Judge McCunn satisfied? No? He has three men, Hickey, McGowan and Delmar, then holding the position of deputy-sheriffs, but not acting as deputy-sheriffs in this proceeding; he has them brought up to his own house; Hanrahan is there; and there, from Judge McCunn, they receive directions to go down and assist Hanrahan in keeping possession of this property. And subsequently there is performed by this man, McCunn, an almost unparalleled feat. He knew that Hickey and McGowan had been up to his house to receive their instructions from him; he knew that the sheriff had declined to deputize these men under his process, and that all their authority came from him, and yet, in the month of May, 1870, an application is made to him, in the name of the sheriff, but without any proved action of the sheriff, through the office of the sheriff's counsel (whom Judge McCunn had himself suggested to be employed), to tax fees to these men, and he allows them something over $4,000, to be paid Hanrahan, as receiver; the order directing this money to be paid to the sheriff, and assuming that it was an application on behalf of the sheriff, although, of course, Judge McCunn knew perfectly well that such was not the case. This carries the proceeding on to the month of March. By that time Mr. Binninger had enough of this

kind of litigation. Hanrahan was a true prophet. Every order, however illegal or baseless, could be obtained from Judge McCunn, and Mr. Binninger could not further stand up against a lawsuit fought in that way. But there was another person who was satisfied. Mr. Clarke began to have his eyes opened about the same time. He began to realize that this intervention of Judge McCunn did not result in his interest, or for his benefit, and, therefore, the lawyers on both sides arranged the terms of a settlement, which, if it had been carried into effect, would have saved to that firm at least $100,000. But Mr. Clarke says: "I have received so much kindness from Judge McCunn in this matter, I have been the subject of so many kindnesses from him in this proceeding, that I must see what he has to say about this settlement." So McCunn is invited to Clarke's house, and, after being made aware of the settlement, what he says is: "If you sign this settlement it will be your death warrant;" so that he, himself, breaks up an arrangement which was perfectly acceptable to the parties on both sides, and to the lawyers as well. Why does he do it? I think it is not very difficult to discover the motive. What happened the very next morning? Down to this time, by the action of Judge Fithian, and by an order which had been obtained from Judge Jones, this man Hanrahan had been prevented from making any other than ordinary retail sales in the conduct of the business; but from the first there was the intention on the part of Judge McCunn that his brother-in-law, Morgan, and that Hanrahan should be largely benefited from this receivership, and it was necessary that money should be obtained, in order that there might be something to steal. Therefore, the very next morning 111 barrels of whisky are sold, and something over $8,000 goes into Hanrahan's hands, and never leaves them, and a sale is announced to come off on March 31, 1870, of all the rest of the stock. $22,000 was the amount, in all, received by Hanrahan, and every cent went to pay the expenses of this receivership, as they are called. $11,000 of it went into the hands of Morgan; how much Hanrahan himself took we do not know. On the 30th of March, on the application of Mr. Binninger, Judge Jones stays the sale proposed by Hanrahan. Mr. Binninger thoroughly understood that if this stock was turned into money, it would be the last he would see of it, and he was right. He made an application to Judge Jones, the judge who is then regularly holding this branch of the court, for a stay of Hanrahan's proceedings, pending an application for his removal. The next day the sale takes place. Nobody knows how. A few days afterward

Mr. Titus makes application to punish Hanrahan for going on with the sale in violation of Judge Jones' order, and then for the first time learns that on the same day that Judge Jones gave the stay, Morgan went up to McCunn and applied for and obtained an order vacating it. This is the same Morgan who says that he realized the impropriety of any application by him to Judge McCunn, Judge McCunn being his brother-in-law, and that he never did call upon him for orders except in the case of *Clarke* v. *Binninger*. But in that case Morgan does apply to Judge McCunn to vacate Judge Jones' order on the same day that it is granted, and this pliant, weak, miserable tool, gives an order which he knew Judge Jones, if any one, was the judge to grant, which vacates Judge Jones' stay of proceedings, and the sale takes place, putting $11,000 or $12,000 more into the possession of Hanrahan, of which, when Hanrahan came to account, there was left a little over $4,000, and the account was squared by Morgan putting that amount into his pocket, where it remains to the present day. This man Morgan, whom the counsel on the other side undertook to show to be a lawyer of practice, character and responsibility, and whose own testimony shows that his largest gains from his profession for any one year up to that time were his one-third of $16,000 — this man, in the short time from the 19th of November, 1869, to the 26th of April, 1870, when Hanrahan was finally removed through the order of Judge Monell; this man in that short interval plundered this estate in the amount of $11,000. Fees to himself as counsel for the receiver, he calls it; when the only thing in court he ever did, was on one occasion to read some affidavits. Wherever any counsel service was to be rendered, counsel were employed. Mr. Pryor received his $2,500 for services as counsel, Mr. Albright his fees, and so with other counsel.

I have said nearly all that I propose to say about this case, except to state Judge McCunn's proceedings against Mr. Beecher; a mere statement of that is the strongest possible argument. Is it conceivable that any thing further need be said, when the Senate of the State of New York shall know the use to which this man McCunn prostituted the power of his court in his action toward Mr. Beecher? Mr. Beecher was no party to any litigation before Judge McCunn. He was the assignee in bankruptcy appointed by the District Court of the United States, of the firm of A. Binninger & Co. He called at their store, saw the receiver, informed him, or somebody there of his appointment, and, without doing any thing toward taking possession, he communicated his opinion that his right was superior to

that of Hanrahan, the receiver. Immediately, on the 19th of January, 1870, an order is issued again by Judge McCunn — Judge McCunn not holding the chambers branch of the court — enjoining all action on Mr. Beecher's part. What right had Judge McCunn to issue any order affecting Mr. Beecher at all, Mr. Beecher not being a party to any suit or proceeding in Judge McCunn's court? But this order was issued, and on the same day — so hasty is relief when before Judge McCunn suits are presented by Messrs. Morgan & Hanrahan — an order is again granted by McCunn, requiring Mr. Beecher to show cause, on the 25th of January, 1870, why he should not be punished for contempt for calling on Hanrahan and informing him of his appointment as assignee. On the 25th Mr. Beecher did not attend. I think he intended to be there. I think there was some mistake about the hour; but at all events he was not there at the time appointed. Young Mr. Bangs, however, the junior member of the firm which acted for Mr. Beecher, was present. Mr. Beecher is called in court, and there is no response; and then, in his mightiness, Judge McCunn calls an officer of his court and sends him down to arrest Mr. Beecher. Is there any process? No; Judge McCunn does not recognize the necessity of process. Any procedure or form looking to the protection of the rights of Mr. Beecher? No, nothing of the kind. An officer is sent down to arrest him, and he tells his errand. It is one man against one man, and Mr. Beecher will not come. The officer returns to the court, and then, in the hearing of Mr. Francis W. Bangs, the senior member of the firm, who has by that time reached Judge McCunn's court, the judge says, "take two officers down and bring Mr. Beecher here." When the first officer calls, Mr. Beecher asks him for his warrant. The man communicates this to Judge McCunn, and McCunn says, "go and bring him; that is your warrant." Now, Mr. President and Senators, I wish to know whether the rights of citizens are to be treated in this way — whether their liberties are to be at the beck and nod of a man such as this man McCunn is, because he happens to have been elected a judge? Mr. Beecher is taken from Wall street and brought to McCunn's court, and when he gets there McCunn finds that he has caught a tartar, for Mr. Bangs is there and he knows what Mr. Beecher's rights are, and finally Judge McCunn is obliged to crawl out of the position in which he has placed himself, by telling Mr. Beecher that he can either go to the bosom of his family, or go to Ludlow street jail, an exceedingly suitable remark for a judge sitting on the bench to make to a man whom he had caused to be

illegally arrested and brought before him. And in the short interval of a month, according to the testimony of Morgan, Judge McCunn grants six different orders enjoining the bankruptcy petitioning creditors. Does he do it on notice? Not in a single case; from beginning to end every proceeding on the part of Judge McCunn is *ex parte* — the mischief of course following the act, with no possibility of redress. This man, Morgan, in his exceeding zeal to assist his brother-in-law and friend, discloses two significant circumstances. One is that no other judge of the Superior Court would grant these orders. If the orders were legal there could be no objection by any other judge to grant them; the reason given by Morgan is that the other judges were not sufficiently informed of the comity relations between the State and the federal courts, whatever that may mean; that Judge McCunn had investigated that subject, and that, therefore, he, Morgan, notwithstanding his sense of the impropriety, applied to Judge McCunn, and that Judge McCunn, though also aware of the impropriety, overcame his scruples and granted the orders; the other circumstance is this; Morgan tells it, apparently regarding it as a circumstance creditable to Judge McCunn, viz.: that for years he, Morgan, has been in the daily habit of receiving applications from other lawyers to apply to Judge McCunn for *ex parte* orders; senators, what feeling toward Judge McCunn is entertained by the bar of the city of New York particularly by such members who do it no credit, if this man, Morgan, can truthfully state such a fact — that Judge McCunn is generally esteemed to be such a judge that applications made to him by Morgan, his brother-in-law, will be entertained and granted when the same application made by other competent lawyers will be denied.

What is the result of this whole case? It is two-fold; in the first place during these three or four months Morgan receives anywhere from $11,000 upward; eleven thousand and some hundreds he concedes, but how much more he received we do not know. At all events, this man who says at the beginning of this case he was worth $20,000 (and he furnishes rather a slim description of property to make it up), is able at the close to buy a house from Judge McCunn himself, and pay $14,000 for it. Thus it appears that this money which came from the estate of Clarke & Binninger went into the pocket of Judge McCunn himself. I don't care under what pretext, it went into his pocket. That money bought that house from him; whether the house was worth what was paid for it, or whether it was worth much less, we do not know. Morgan had

been paying $900 rent for the house; he got this receivership to bleed, and the result was that he was able to pay $14,000 to his brother-in-law, Judge McCunn, for the house.

My senior associate (Mr. Van Cott) suggests this other position in connection with this case. Of course, the suit between Clarke and Binninger was simply a suit to adjust partnership rights as between themselves, and was therefore entirely subordinate to the rights of creditors; and when the firm was put into bankruptcy, the controversy between the partners should have been, and in law was, overridden by the proceedings in the interest of creditors. The next case about which I have a few words to say is that of *Elliott* v. *Butler*. Mrs. Butler was the occupant of a house belonging to Judge McCunn, and there is no escape from the conclusion that McCunn knew that the house, the rent of which was to go into the hands of the receiver to be appointed by him in that suit, was his own. The house was rented by him to Mrs. Elliott, and by her it was rented to Mrs. Butler; Mrs. Elliott filed her complaint for the collection of the rent due her, setting forth that it was the only source from which she could obtain the rent to pay the superior landlord (Judge McCunn). Was there ever such a thing heard of in any other case as the appointment of a receiver in a suit for the enforcement of an ordinary debt?

Mr. MURPHY — I understood you to say that it was stated in the complaint that the only way of paying Judge McCunn was by getting the money from Mrs. Butler; on what page is that statement?

Mr. PARSONS — I do not mean that Judge McCunn's name is mentioned; but the number of the house is stated; he of course knew that he owned the house and that Mrs. Elliott was his tenant, and therefore he knew that the receivership was to be of rent which was to go to himself. The complaint of Mrs. Elliott does allege that the only means of paying the superior landlord (who was Judge McCunn) was by this suit against Mrs. Butler.

Judge McCunn appoints Gano, his own brother-in-law, receiver of that rent. Gano is McCunn's agent to collect rent from that very house; and on the evening of the day that appointment is made, Gano attends at the house to take possession, and Judge McCunn is there to assist Gano; it is he who sends out to employ a policeman to prevent the baggage of the occupants of the house from being removed; and Mr. Elhardt, the representative of Mrs. Butler, is in constant communication with McCunn down to the close of the transaction. In the end, when all the rent which can be collected has been received by Gano, McCunn tells Gano that he had better

get out of the transaction as soon as he can; but not until every cent which the receiver could collect had been obtained, did Judge McCunn come to the conclusion that he was in a wrong position in the transaction. The appointment of this receiver was on the 10th of December, 1869. On the 17th of December, Judge McCunn issues an attachment in a suit against Mrs. Elliott for the collection of the rent due him. The sheriff goes to Gano, who has retained the money in his hands until it can be attached, and Gano pays it over, and in that way it goes to Judge McCunn. From the very beginning it was the intention of McCunn, by the proceedings, to collect his own rent. He knew that the parties, his servants, were not responsible; the complaint so informed him, but by putting this money into the hands of Gano, his brother-in-law and agent, he placed it where he could get his hand upon it when he wished; and the result was that it was turned over to him finally, with the exception of such leaks as occurred in the process, which, however, were so considerable that McCunn got but little in the end.

The next case to which I call your attention is that of *Van Ness* v. *Taliaferro*. The facts are in a small compass, and the case is a very aggravated one. There was pending a reference before a very respectable attorney in the city of New York, Mr. Edsall; the contest being about a fund of $3,000, in the possession of a firm of auctioneers, of New York, Messrs. Leeds & Minor, a perfectly respectable and responsible firm.

Mr. D. P. Wood — Under which charge does this case come?

Mr. Parsons — It comes under the 7th charge, and the testimony relating to it will be found commencing at page 403. I have stated that this fund of $3,000 was in the hands of Leeds & Minor, a responsible firm of auctioneers in the city of New York; they were willing to pay interest for it, pending this litigation, and the reference before Mr. Edsall had proceeded so far that the plaintiff had rested his case, and the defendants were called upon to introduce their testimony, when one of the parties to the suit made a motion before Judge McCunn to vacate the order of reference, upon the grounds that the case was not referable, and that the consent given was not that of the party, but only the consent of the attorney, unauthorized by the party; really, the result of this case is laughable; senators, you must not think that these are isolated cases which we have succeeded in bringing before you; we cannot bring here the mass of cases which are exemplified and illustrated by those with which we have felt justified in occupying the attention of the Senate; in this case, as I have said, a motion was made before Judge

McCunn to vacate the order of reference, on the ground that the case was not a referable one; Judge McCunn vacated the reference — all that he was asked to do by the parties appearing or by the motion papers; but, by the same decision, he who thus held that the order of reference before Edsall should be vacated upon the ground I have stated, ordered another reference and appointed Wm. M. Tweed, Jr., referee; we all know why that was done; but that is not all; by the same order Judge McCunn appointed Mr. Thomas J. Barr receiver of the amount in controversy; no such motion was pending; no party applied for a receiver; and the consequence was that the parties were subjected to a further litigation, extending over many months, and were obliged to pay receiver's fees and referee's fees, in addition to the referee's fees previously incurred, and to enable Judge McCunn to purchase political support and assistance. This was immediately preceding his nomination to his present term of office, and indicates the extent to which he holds his seat by the will of the people.

I next allude to the case of *Brandon* v. *Buck*. The charge is number four. The order in that case will be found on page 417. The circumstances were these: An act of the Legislature had been passed looking to the incorporation of, or providing for the incorporation of a Hansom cab company, in the city of New York, and a fund of about $12,000 had been subscribed by persons who proposed to take stock when the company should be incorporated, and that money had been put into the hands of Messrs. Duncan, Sherman & Co., and was, I suppose, as safe in their hands as in any place in which it could be deposited. The president of the company, or the man who proposed to be president when the company should be incorporated, was Edward W. Brandon, and he had a claim against the inchoate company, and, to recover the money, commenced an action against Jerome Buck and others, subscribers to the company, and the firm of Duncan, Sherman & Co., and applied to Judge McCunn, who, without notice to Duncan, Sherman & Co., appointed Mr. Hanrahan receiver of the fund. The fund was described in the order to Duncan, Sherman & Co. as "being the fund described in the complaint." It was not the intention of Hanrahan, or of Morgan, who appeared as his counsel, to inform the parties upon whom the order was served of the nature of the case, so as to facilitate vacating the order, and, therefore, no complaint or other papers were served with the order. Duncan, Sherman & Co. could not tell what the fund was of which Hanrahan claimed to be receiver; they sent for Mr. Larocque, their counsel; he was as much mystified

as were his clients. Morgan and Hanrahan were compelled to arrange to send the papers or copies of them to Duncan, Sherman & Co., or to Mr. Larocque, so that he might be able to advise his clients; this gave Mr. Larocque time to discover that Dubois Smith was the attorney for the plaintiff in the case; he called upon him and learned that he had nothing to do with the appointment of Hanrahan; Mr. Morgan was subsequently examined in regard to the transaction, and said that Smith wished a man named Murphy appointed receiver; Judge McCunn would not appoint him, but desired Hanrahan, and it was against Smith's will that Hanrahan was appointed receiver, or took any step in the proceeding. As soon as Mr. Larocque saw Mr. Smith, they arranged a discontinuance of the suit, and that terminated the receivership; he should have terminated it. The order appointing Hanrahan was dated the 23d of February, 1870. The consent discontinuing the suit and vacating the receivership was on the 24th of February, the succeeding day. On the 21st of March, nearly a month after, Duncan, Sherman & Co. were again greatly surprised by receiving another order appointing Joseph Meeks, the assistant clerk of the Superior Court, receiver of this same fund, and it then transpires that, by some arrangement between Hanrahan, Meeks and Morgan, and through the instrumentality and by the action of Judge McCunn, Hanrahan had given a consent in this discontinued suit that, upon the payment to him of $500, Meeks be appointed receiver in his place, and Judge McCunn had granted an *ex parte* order appointing him, on condition that he paid Hanrahan $500, allowed to him as receiver's fees. One of the senators asked for what the $500 was granted to Hanrahan; he had never taken possession of any thing, had been receiver only one day? Yet, for calling on Duncan, Sherman & Co. on that occasion, Judge McCunn directed $500 to be paid him as a suitable sum for his receiver's fees; not to cover the expenses of this receivership, but $500 on condition that the receivership be renewed and continued in the person of Mr. Meeks, who would have the same right to the fees of his receivership as had Hanrahan.

The next case is that of *Corey* v. *Long*. That makes the second charge. It might be supposed by senators that the point of that case was lost when the fact transpired that Judge McCunn making the original appointment of Gano, his brother-in-law, as receiver, Judge Barbour subsequently vacated that order, but such is not at all the fact. The suit was brought by a man named Corey, who had some time previously been in partnership with Walter P. Long, for a settlement of partnership differences, which was claimed to

exist between them. Long, it appears, had bought out Corey, and was in possession; Corey went to a lawyer who was an intimate friend of Judge McCunn, and that lawyer called upon Judge McCunn to obtain an order to show cause why a receiver should not be appointed, without any suggestion from him. Judge McCunn himself, in his own handwriting, changed that order to an absolute order appointing Gano receiver of the $8,000 worth of property; and he made it not only in violation of all propriety, but in direct violation of an established rule of his own court, not to appoint a relative in such a case; a rule which compelled Judge Barbour, when subsequently it transpired that Gano was the brother-in-law of Judge McCunn, to vacate that order. No sooner had Judge Barbour thus vacated the appointment of Gano than Judge McCunn procured him to re-appoint the same man. What happened? We insist, senators, that Judge McCunn is responsible for the results of his own action; and one result in this case of his action was, that whereas Long had been in possession of this property, Corey the plaintiff was immediately appointed deputy receiver by Gano, and Long was thrown out of possession by Judge McCunn, and Corey put into possession; and they ran the establishment for awhile until Judge McCunn by his own order was compelled to admit the larger and superior right of the assignee in bankruptcy; but before what was left of the proceeds could be put into the hands of the assignee in bankruptcy, $3,880 had gone as expenses of the receivership; $350, by the order of Judge McCunn, being paid or directed to be paid to his own intimate friend Roger A. Pryor, who was the plaintiff's attorney. It is a great disappointment that Mr. Pryor was compelled to leave and could not be examined on our behalf, in support of a portion of Mr. Harrison's opening, to prove who wrote Judge McCunn's opinions. After the counsel for judge McCunn had abandoned the case, and when Mr. Gano was examined, in his desire to assist Judge McCunn so far as he could, senators may remember that he took the stand a second time to make an explanation, and that explanation was that the funds which came into his hands as receiver, in that case of *Corey* v. *Long*, were not deposited by him in bank to the credit of the account kept by himself as receiver, but that he deposited those funds in his general bank account, which was his account of the moneys received by him as the agent of Judge McCunn, and it therefore appears that this very $8,000, which came into his hands as receiver in the case of *Corey* v. *Long*, he immediately put to Judge McCunn's credit in his own bank account. We do not

mean to say that Judge McCunn was not perfectly responsible to make good that amount, but it is very convenient at times to have a full bank account, and $8,000 to his credit in the bank was so much money which could be used by Judge McCunn until the exigencies of the case should require the money to be paid over.

Before mentioning the last case, let me say a word about that of *Hicks* v. *Bishop*. Senators will remember that, in that case, we introduced an affidavit upon which, on a claim of $1,500, Judge McCunn issued an order of arrest, requiring bail to be exacted of the defendant in the sum of $40,000. We also introduced the order made on an application to reduce the amount of bail, or discharge the order of arrest. Judge McCunn denying the motion, an objection was taken that we had not proved the original order of arrest. We were unable to find the original order, and we have been unable to find the original order to this day; it has become mislaid in some way. What we urge is this: That, by the affidavit on the motion to discharge the order, and by the order of Judge McCunn denying the application, there is sufficiently supplied the fact of the original order of arrest to justify action on the part of the Senate in this case. Of course, we leave that to such action as the Senate shall think suitable.

The case of *O'Mahony* v. *Belmont* was this: On the 30th day of June, 1869, an order to show cause was granted, returnable on the 2d day of July, 1869, why a receiver should not be appointed of a fund claimed to be in the possession of the firm of Belmont & Co., and amounting to the sum of $19,592.44. It is not necessary for me to state the circumstances upon which the claim was based, except to assert (and senators will easily satisfy themselves that such was the fact if they examine the complaint), that it was no case in which to appoint a receiver. Belmont & Co. were responsible parties. This suit was a suit against them to recover the amount of certain bills of exchange claimed to have been lost. It was an ordinary common-law action, and of course there was no right, either by the practice or the rules of court, for the appointment of a receiver. On the 30th of June, 1869, Judge McCunn issued an order to show cause, on the 2d of July, why a receiver should not be appointed of the amount claimed to be due from Belmont & Co. to the plaintiff. Judges are assigned, in the city of New York, to hold court month by month, and just at that time the judge holding chambers would be reaching the close of his monthly term, and another judge was about to succeed to that branch of the court. And, therefore, when, on the 2d of July, counsel for Belmont & Co.

appeared and asked a postponement, Judge McCunn said "yes, but on condition that these proceedings must be considered as before me." Belmont & Co. could only procure a postponement by acquiescing. On the 9th of July, they attended to resist the application, and Mr. Lucke, the partner of Mr. Belmont, interposed, by way of objection to the appointment of a receiver, that Mr. Belmont was in Europe; that he had not been served with the papers, and was no party to the suit, and that Mr. Lucke was not a partner of the firm when this cause of action arose, and that, therefore, there was no liability on his part. That was conceded to be a good objection; so conceded by the plaintiff's attorney. He asked a delay, that he might meet the objection which had been taken, and, at the plaintiff's request, there was an adjournment of the motion. On the 16th of July, within the time covered by the adjournment, and before the adjourned day, Mr. Thomas J. Barr called upon Belmont & Co. and said: "I have been appointed receiver of the amount in controversy." Of course it seemed incredible; counsel were sent for, and it then was discovered that in the interim of this adjournment, in violation of the compact between counsel, on the application of no one, Judge McCunn had appointed Mr. Barr as receiver. The plaintiff's counsel was acting in good faith, and he did what he was called upon to do under the circumstances. The appointment of Barr being on the 16th of July, on the 17th of July that appointment was vacated by consent of counsel. On the same day, Barr, the receiver, obtained from Judge McCunn an order to show cause, returnable a few days ahead, why Belmont & Co. should not be punished for their contempt in not paying him the money when he had called upon them for it. That order was returnable on the 20th of July. Then, in spite of all attempts at resistance by both the plaintiff's counsel and the counsel of Belmont & Co., Judge McCunn, through his power to punish Mr. Lucke for contempt, forced him to draw his check in court, transferring that money to Barr. In the same order compelling Mr. Lucke to transfer this fund to Barr the receiver, Judge McCunn directs $2,500 to be paid to the counsel for Belmont & Co., who were resisting the proceedings, of course, that they might not, by appeal, take the steps they did take, and which resulted in the reversal of the order. On the 20th of July, the same day, out of this fund of $19,000, Judge McCunn again made an order (and I think it drew from one of the senators the remark that he was almost tempted to come down to the city of New York and practice law), that Mr. Paige, the plaintiff's attorney in the suit, be paid $2,500. Thus, at the very

threshold of the suit, on the return of the proceedings for the appointment of a receiver, the order was made by Judge McCunn, without solicitation, that Mr. Belmont's counsel be paid $2,500, fifteen per cent of the whole fund, and he then ordered a corresponding sum to be paid to Mr. Paige. That was paid. On the 14th of November, 1870, all those orders were reversed by the general term of the Superior Court, reversed on the application of Mr. Belmont's counsel, and, it appears, reversed without opposition by Mr. Paige, who had received his $2,500, and whose interest in the suit seems thus to have become exhausted. Some one then made a suggestion, upon which a man named Bailey, who held, or claimed to hold, one bond for $100, issued by the Fenian Brotherhood, made an application to Judge McCunn, and procured an order appointing Barr receiver of the entire $19,000, it being insisted that the money belonged to that organization, and, of course, when the first receivership failed, there was a second ready to take the place. He could not very well retain the fund as receiver in the first suit, with no right to be recognized in court, against the consent of the attorneys on both sides to vacate the order of his appointment, and, therefore, he (Barr) made a special application to be let in as a party defendant to that suit. Judge Jones, on another motion, held that he had no right even to be heard in the suit, but Judge McCunn, on July 27th, 1860, made an order permitting him to be a party. That order was also appealed from and reversed.

And now, Mr. President and Senators, with this new statement of the case, without argument in support of the prosecution, which would be suitable were there opposition, all that remains is, that we shall ask you whether we, who live in the city of New York, shall be compelled further to live under the disgrace, and to submit to the infliction of this man. Judge McCunn stands here charged by the unanimous action of the Assembly with mal and corrupt conduct in office. By the recommendation of the Governor, he is charged with mal aud corrupt conduct in office. If he has done what the testimony establishes, is there doubt that the conduct of which he has been guilty is mal and corrupt?

Mr. MURPHY — Before the counsel sits down I would like to ask him whether he has any thing to say in regard to the power of a court to grant receiverships without notice.

Mr. PARSONS — Mr. Senator: That such power does exist in the court we shall not dispute, and I meant to be understood to make that concession by my statement that the complaint against McCunn for the appointment of Hanrahan receiver in the suit of *Binninger*

v. *Clarke*, did not depend upon the fact of the appointment, but upon the circumstances under which it was made. The fact that it was Hanrahan who was appointed; that there was no reason why notice was not given, and no notice was given; that the application was made at midnight, the parties taking with them the bottles of wine; the receivership was a deed of such a large amount of property on a bond of only $1,000.

Mr. Lewis—I would like to ask the counsel one question, whether the counsel speaks of the subsequent orders made by Judge McCunn in the case of the arrest — of the $40,000 — do those orders or the proceedings show that Judge McCunn made the order?

Mr. Parsons—They do. Every fact necessary to complete that case appears by the papers, with the exception that the particulars of the order of arrest must be obtained from the proceedings to set it aside, we not having the order of arrest here.

Mr. Lewis—I move that we go into private consultation.

Mr. Lewis' motion was put and declared carried.

Upon re-opening the doors at 12.10 P. M., the President said, the Clerk will read the first charge against the respondent.

The clerk read the first charge, in the following words:

Charge First.

That said John H. McCunn, at divers times between the 17th day of November, 1869, and on the 1st day of July, 1870, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as a justice of said court, in an action then pending in said court, wherein Abraham B. Clarke was plaintiff, and Abraham Binninger was defendant, in this: That said John H. McCunn continually, while said action was pending in said court of which he was a justice, acted as counsel of the plaintiff in said action, and in sundry actions growing out of it, wherein the said plaintiff was plaintiff, and in relation to the matters therein involved, not being himself a party to the actions or to either of them. That he so acted as counsel in and about sundry and various motions then pending, or, with his advice, about to be brought before him as such justice aforesaid. That said John H. McCunn conspired with Daniel H. Hanrahan, James F. Morgan, and other persons unknown, to prevent and obstruct justice, and the due administration of the laws in regard to said action; and falsely to maintain said actions before mentioned, and thereby to deprive the parties thereto of their property without due process of law.

That, in order to effect the object of said conspiracy, the said John H. McCunn, at his own private residence, a few minutes after midnight on the 18th, and on the 19th day of November, 1869, illegally granted an *ex parte* order in said action, whereby he summarily appointed said Hanrahan receiver of, and ordered him to sell the partnership property (amounting to many thousands of dollars in value) of said plaintiff and defendant, without requiring any security in any due or legal form, or in any sufficient amount from said Hanrahan, though well knowing him to be a man without pecuniary responsibility, of bad habits, and utterly unfit for such a trust. The said John H. McCunn thereafter gave written and verbal directions to certain deputy sheriffs of the city and county of New York, that they should take possession of said partnership property: and conspired with, instigated and procured them to do so, without any process or authority known to the laws of the State of New York, but falsely representing themselves to be acting therein as deputy sheriffs, under directions of the sheriff, and with process from said Superior Court. That said John H. McCunn, as said justice, thereafter, in said action, made an order allowing to the sheriff of the city and county of New York fees to a large amount exceeding $4,000, which said justice ordered should be paid to said sheriff by the receiver out of the said partnership property, no process ever having been issued to said sheriff in the action, and no legal or lawful services having ever been performed by him therein. That said John H. McCunn, in a proceeding in said action brought before himself, by his own advice and direction, wrongfully and illegally caused one John S. Beecher to be arrested and brought before him, said justice, and deprived of his liberty without any process whatever, and without any charge against said Beecher which would warrant said arrest. That said John H. McCunn, as said justice in said action, when an order had been regularly, for good cause, and duly made therein on the 30th March, 1870, by Hon. Samuel Jones, a justice of said court (who was then holding the special term of said court, where an application for such an order should, according to the rules and practice of said court, be made), staying and enjoining the sale of said partnership property, illegally and corruptly granted an order, purporting to modify said order of Hon. Samuel Jones, justice, but really annulling and vacating it, and thereby directed said sale to proceed in disobedience of said order of injunction. That said John H. McCunn granted said last-mentioned order without notice to any of the parties to said action, without just cause, upon no other papers than those upon which the order it vacated had been granted,

and contrary to law. That by another order granted in said action, said John H. McCunn enjoined and prevented John S. Beecher and Paul J. Armour, assignees in bankruptcy of said Clarke and Binninger, duly appointed by the United States district court for the southern district of New York, from performing their duties as such assignees. That he granted such order without any authority and contrary to law, no facts being in evidence before him on which said order could be granted, and said assignees never having been served with summons or process in said action.

That all such acts, orders and proceedings, and others in said action were done, made and had by said John H. McCunn, as justice aforesaid, with the intent and effect to accomplish the objects of said conspiracy. And, in consequence thereof, said plaintiff and defendant and their just creditors suffered damage, and were wrongfully and illegally deprived of their property, to an amount exceeding $200,000.

The PRESIDENT then proposed to each senator, "Senator, how say you, is the first item of the charge preferred against the accused proven?" when each senator rose in his place and responded as follows:

As proven—Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Tieman, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin. Ayes—27.

Mr. LORD—I ask to be excused from voting; it is well understood by every senator here that I have not had the opportunity of hearing the testimony taken, neither have I had the opportunity of reading it; therefore I cannot vote understandingly upon the question and ask to be excused from voting.

The question was put by the President and it was declared carried.

The Clerk then read the second charge preferred against the accused as follows:

CHARGE SECOND.

That said John H. McCunn, at divers times between the 17th day of January, 1870, and the 1st day of January, 1872, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as such justice, in this: That in an action pending in said court, wherein one Albert B. Corey was plaintiff, and Walter B. Long was defendant, the said

John H. McCunn illegally, corruptly, and with the intent and effect of thereby enabling one James M. Gano, who was a brother-in-law of said justice, to make himself large gains and profits, did on the 18th day of January, 1870, conspire with said Gano and other persons unknown, to injure and defraud the defendant and others of their property and just rights by making and entering an *ex parte* summary order, falsely purporting to be an order of the said Superior Court, appointing said James M. Gano receiver of all the partnership property (of many thousands of dollars in value) of said Corey and Long — though no appointment of a receiver by said Justice had been applied for, and though the only application in the action therefor made to said justice was for a mere judge's order, returnable before the court, to show cause why a receiver should not on the return day of the order, be appointed by the court after hearing the parties. That said justice so appointed said Gano such receiver without requiring any security to be given by him, though said justice well knew said Gano to be a man without pecuniary responsibility and unfit for such trust, and dependent upon said justice for support for himself and family. That the only bond even purporting to be given by said Gano as such receiver for the faithful performance of his duties, was executed by the obligors and was approved by said justice before the said receiver was appointed, to wit: on the 17th day of January, 1870. That said John H. McCunn, as a justice as aforesaid, illegally, and without jurisdiction granted orders for the payment of a fee to the counsel for the plaintiff in said action, and of other fees to persons unknown by said receiver, out of the fund in his custody, and such fees were thereupon so paid by such receiver to persons unknown. That all said acts of said justice were wrongful, illegal and corrupt, and were done with the intent and effect thereby to deprive the plaintiff and defendant in said action, and their creditors, of their property, without due process of law, contrary to the laws of the State of New York.

The PRESIDENT then proposed to each senator the question: "Senator, how say you, is the second item of the charges preferred against the accused proven?" when each senator arose in his place and responded as follows:

As proven — Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lowery, McGowan, Madden, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin. Ayes — 26.

As substantially proven — Mr. Murphy.

Mr. ROBERTSON — I didn't understand that the senator from the twenty-eighth was excused, except from voting on the one charge.

Mr. LORD — I intended it to be in both cases.

The PRESIDENT — The senator's name will be called.

Mr. ROBERTSON — I don't desire it to be called.

Mr. LORD — I intended it for all the charges. It will apply as on the first charge.

Mr. ROBERTSON — I suppose the excuse should be made and granted upon each charge as it is called. I don't see that the senator should be excused from voting on any other question not then before the Senate. I have no objection to his being excused if done in that way.

Mr. LORD — I had intended, in my excuse, it should apply to all the charges, and supposed it could be done in that way.

The PRESIDENT — The application only relates to one charge.

Mr. LORD — Mr. President: I now ask to be excused from voting upon any of the charges, for the reasons that I have given.

Mr. ROBINSON — I should prefer that an excuse should be made to each charge, and the senator should be excused on each charge. There may be some charge upon which we may desire that he vote.

The PRESIDENT — Does the senator make that application.

Mr. LORD — Mr. President: I made the application to be excused, and intended to make it to be excused from voting upon any of the charges; nothing beyond that; I don't ask to be excused upon any other action, whatever it may be.

Mr. MADDEN — I move that he be excused from voting under the second charge.

The question was put on Mr. Madden's motion, and it was declared carried.

The CLERK then read the third charge preferred against the accused, as follows:

CHARGE THIRD.

That said John H. McCunn, at divers times between the 10th day of December, 1869, and the 1st day of January, 1871, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as justice as aforesaid, in this: That, in an action pending in said court, wherein Anna M. Elliott was plaintiff, and Mary P. Butler was defendant, the said plaintiff being then a tenant of said John H. McCunn, hiring from

him the premises No. 54 West Twenty-fourth street, in the city of New York, sought to recover, by proceedings before said justice, the rent alleged to be due for said premises from the defendant Butler as sub-tenant to the plaintiff Elliott. That, in and by the complaint in said action, it appeared that the said plaintiff was dependent on the rents to be received from the said defendant for said premises to make the payment of the rents due from the said plaintiff to said John H. McCunn, her superior landlord. That said John H. McCunn, being a justice as aforesaid, and being so interested in the result of said action, well knowing all the facts of the case, made and entered, on the 10th day of December, 1869, an *ex parte* order, falsely purporting to be an order of the court, whereby he summarily appointed James M. Gano, who was a brother-in-law of said John H. McCunn, and the agent of said John H. McCunn for the collection of the rents of said premises, receiver, to collect, receive and hold all money due or to become due from the boarders of said defendant, on said premises No. 54 West Twenty-fourth street. That said order was made and entered by said justice illegally, without jurisdiction and with the corrupt intent, and with the effect thereby to enable said Gano to receive the moneys due to said defendant, and deprive said defendant of the same without due process of law, and to thereby secure the said moneys to the said John H. McCunn himself, through his said agent, and in pursuance of a conspiracy made and entered into by said John H. McCunn, said Gano and other persons unknown, to deprive said defendant of her property and illegally obtain possession of the same; in all of which said John H. McCunn thereby succeeded, to his own personal profit and gain, and to the great injury of both the plaintiff and defendant.

The PRESIDENT then proposed to each senator the question: "Senator, how say you, is the third item of the charges preferred against the accused proven?" when each senator arose in his place and responded as follows:

As proven — Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lowery, McGowan, Madden, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin. Ayes — 26.

As substantially proven — Mr. Murphy.

Mr. MURPHY — Mr. President: I make this qualification, because

I am not satisfied in regard to the point of conspiracy set forth in this as in other charges.

The CLERK then read the fourth charge preferred against the accused, as follows:

CHARGE FOURTH.

That the said John H. McCunn, at divers times between the 20th day of February, 1870, and the 25th day of March, 1870, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as justice as aforesaid, in an action then pending in said court, wherein Edward W. Brandon was plaintiff, and Jerome Buck and William Butler Duncan, and other members of the firm of Duncan, Sherman & Company, and others, were defendants, in this: That the said John H. McCunn, as a justice as aforesaid, in said action did, on or about the 21st day of February, 1870, make and enter an order falsely purporting to be an order of the court, summarily appointing Daniel H. Hanrahan receiver of a fund of twelve thousand dollars, more or less, then in the hands of said Duncan, Sherman & Company, as bankers, on deposit. That by the papers on which said order was granted, it clearly appeared that there was no fund or property in the hands of said Duncan, Sherman & Company, in which the plaintiff had any interest, legal or equitable. That said order was so made and entered gratuitously, not upon motion of the plaintiff or of any of the defendants in said action, in opposition to the wishes of them all, and without notice to any of them. That, though the said justice then well knew said Hanrahan to be a man without pecuniary responsibility and unfit for such trust, no legal or sufficient security was exacted from him for the faithful performance of his duties as such receiver. That said action was immediately and on or about the 23d day of February, 1870, discontinued, without costs, by an order of the court, duly entered upon the consent of all the parties, and the said order appointing said receiver was thereupon vacated and set aside by an order of the court upon such consent. That, thereafter, on the 21st day of March, 1870, said John H. McCunn, as a justice as aforesaid, gratuitously and without notice to any of the parties in interest, and well knowing the premises, nevertheless made and entered a further order, falsely purporting to be an order of the court, summarily appointing one Joseph Meeks receiver in the same action of the same money, and directing said firm of Duncan, Sherman & Company to pay said money to said receiver. That said orders were granted by said John H. McCunn corruptly and without any jurisdiction or authority to

grant them, and with the corrupt intent and with the effect thereby to wrongfully oppress and harass the members of said firm of Duncan, Sherman & Company and the other defendants, and to put them to great and unnecessary expense, and to deprive them of their property without due process of law, contrary to the laws of the State of New York, and with the intent thereby to enable said receivers and their respective counsel to secure large gains and profits to themselves illegally.

The PRESIDENT then proposed to each senator the question: "Senator, how say you, is the fourth item of the charges preferred against the accused proven?" when each senator arose in his place and responded as follows:

As proven — Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin — 27.

Mr. LORD — I ask to be excused from voting.

The question was put upon motion and it was declared carried.

The CLERK then read the fifth charge preferred against the accused, as follows:

CHARGE FIFTH.

That said John H. McCunn, at divers times between the 20th day of June, 1869, and the 1st day of January, 1872, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his said office, in an action pending in said Superior Court, wherein John O'Mahony was plaintiff, and August Belmont and others were defendants, and in certain other actions connected therewith, in this: That said John H. McCunn, as a justice as aforesaid, wrongfully and illegally made and entered an order in said action, on the 16th day of July, 1869, whereby he appointed Thomas J. Barr receiver of certain moneys, amounting to $16,000, more or less, in gold coin of the United States, and ordered, directed and required the defendants, August Belmont and Ernest Lucke, to pay over to said receiver an amount, in current moneys, equivalent to said sum in gold. That it clearly appeared to said justice, by the papers then before him, that there was no fund or property in the hands of either of the defendants, whereof a receiver could be lawfully appointed, and that there was no fund whatever in the hands of the defendants or of either of them, to which the

plaintiff had any claim. That said John H. McCunn, as said justice, on or about the 18th day of July, 1869, illegally ordered and compelled one of said defendants, said Ernest Lucke, to pay said sum of money to said receiver. That he so compelled said payment by threats of illegal imprisonment. That said justice so compelled such payment, well knowing that he had no power to issue any warrant or any other process for the imprisonment of said Lucke in the premises. That said justice granted said order, appointing said receiver, of his own motion, and not on the motion of any party to the action, and against the wishes and express stipulations, in writing of the respective counsel of both the plaintiff and the defendants, and with the corrupt intent and with the effect thereby to enable said Barr to make for himself large gains and profits thereby, and with the corrupt intent and with the effect to thereby deprive the said defendants of their property without due process of law. That the said John H. McCunn, as a justice as aforesaid, thereafter with the corrupt intent, and with the effect aforesaid made and entered divers illegal orders in the premises, well knowing that they were illegal. That all such orders and proceedings were so had and made in collusion and conspiracy with said receiver and other persons unknown, with the intent and effect to thereby wrongfully oppress and harass said defendants, Belmont and Lucke, and to put them to unnecessary expense, and to make illegal gains to said receiver and other persons, who had no claim whatever to the moneys to which said actions related.

The PRESIDENT then proposed to each senator the question: "Senator, how say you, is the fifth item of the charges preferred against the accused proven?" when each senator arose in his place and responded as follows:

As proven — Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lowery, McGowan, Madden, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin.

As substantially proven — Mr. Murphy — 27.

Mr. LORD — I ask to be excused from voting.

The question was put upon motion, and declared carried.

The CLERK then read the sixth charge preferred against the accused, as follows:

CHARGE SIXTH.

That said John H. McCunn, in the months of July and August, 1869, then being a justice of the Superior Court, of the city of New York, was guilty of mal and corrupt conduct in his office of a justice of said court, in an action then pending in said court, wherein Norbury Hicks was plaintiff, and P. W. Bishop was defendant, in this: That he, John H. McCunn, on or about the 30th of July, 1869, did, in said action, grant an order directing and compelling the sheriff of the city and county of New York to arrest said defendant Hicks, and hold him to bail in the sum of $40,000. That it clearly appeared by the papers then before said justice, and on which said order of arrest was granted, that the plaintiff had no cause of action against the defendant. That thereafter a motion was made and heard before said John H. McCunn, as such justice, to vacate the said order of arrest, or reduce the amount of said bail, upon affidavits and papers that showed conclusively that the court had no discretion to refuse the applications on the merits. That said motion was denied by said justice, nevertheless. That said John H. McCunn granted said order of arrest, and denied said motion to vacate the same, corruptly, and with the intent and effect thereby illegally and wrongfully to deprive the said defendant of his liberty; and fixed the amount of his bail at an excessive and exorbitant amount, with the wrongful and corrupt intent, and with the effect aforesaid, contrary to the constitution and laws of the State of New York, and in pursuance of a conspiracy in the premises by said justice, entered into and carried out with said plaintiff and other persons unknown.

The PRESIDENT then proposed to each senator the question: "Senator, how say you, is the sixth item of the charges preferred against the accused proven?" when each senator arose in his place and responded as follows:

As proven — Messrs. Benedict, Johnson, Madden, Tiemann — 4.

As not proven — Messrs. Adams, Allen, Baker, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower Lewis, Lowery, McGowan, Murphy, Palmer, Perry, Robertson, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin — 23.

Mr. BENEDICT — Mr. President: I ask to be excused from voting, for the purpose of making a remark. The senate will have remembered, perhaps, that I always insisted that the testimony fowarded

us by the Governor was before us, to avail whatever it might avail. It appears on the 168th page of that testimony that, when this order of arrest was offered in evidence, Judge McCunn said, "I admit all the papers in evidence."

Mr. PERRY — I rise to a point of order, as I understand we are now governed by the rules which we have adopted in these proceedings, and they do not admit of explanation on a request to be excused from voting.

The PRESIDENT — So far as the chair is informed, there is no rule on this express point, and, there being none, the Chair will hold that the ordinary rules prevail, and that a senator asking to be excused may state his reason; therefore the Chair rules the point of order is not well taken.

Mr. PERRY — Mr. President: Is the decision made?

The PRESIDENT — It is.

Mr. PERRY — I will call the attention of the President to the rule; the rule provides that the evidence shall be taken; the answer should be given, proven, or not proven without explanation.

The PRESIDENT — Will the senator call the attention of the Chair to the rule which so requires.

Mr. BENEDICT — Mr. President: We have excused one senator five times already.

Mr. PERRY — Rule 7, that is all the rule there is on the subject: "The final vote of the Senate upon the charges preferred shall be taken by the President of the Senate, who, upon each one of the charges, as it shall be separately read by the Clerk, shall, with its number, propose to each Senator, in the order in which his name stands upon the division list, the question, 'Senator, how say you, is the first (or second or whatever) item of the charges preferred against the accused proven?' Each senator, when so questioned, shall rise in his place and answer 'Proven,' or 'Not proven,' and when the division list of the Senate shall have been gone through with upon each charge, the result upon each charge shall be announced, and shall be entered upon the records of the Senate. If a majority shall agree on the finding 'proven' upon any one or more of the items of said charges, the President shall in the same manner put, and the senators shall in the same manner answer, the further question, 'Shall —— —— be removed from his office of ———, for the cause stated in the item (or items) of the charges preferred against him, which you have found proven?' And the final judgment of the Senate shall be certified by the Governor, by the President and Clerk of the Senate."

The PRESIDENT — The Chair will hold under that rule, as he has held before, that the senator can give his reasons.

Mr. BENEDICT — Mr. President: I have shown that order was put in evidence by the express consent of Judge McCunn; that order is found on page 61 of the exhibits, holding the party to bail to the sum of $40,000, and the proceedings to set it aside and show the man was held to bail in the sum of $40,000. I withdraw may request and vote "Proven."

Mr. LORD — Mr. President: I ask to be excused from voting.

The question was put on said motion, and it was declared carried.

Mr. J. WOOD — Mr. President: I asked to be excused from voting; the senator from the fifth, in giving his reasons to be excused from voting and afterward withdrawing them, states that in a book, which he held up here, he read that Judge McCunn admitted that he had made such an order; but it was not proved before this body that he had made any such admission, nor was the order produced, nor was there any evidence before the Senate that Judge McCunn made such an order. The senator says the Senate had deliberately decided that testimony taken before the Judiciary Committee of the House and printed, and now in the hands of some of the senators, was not evidence upon which to base a decision of the charges contained therein, and I suppose that is binding upon this court. It seems to me, Mr. President, there is a failure of proof here in regard to the making of this order, and there being a failure of the proof I withdraw my request to be excused from voting, and vote "not proven."

The CLERK read the 7th charge, as follows:

CHARGE SEVENTH.

That said John H. McCunn, on the 9th day of July, 1869, then being a justice of the Superior Court of the city of New York, was guilty of mal and corrupt conduct in his office as a justice aforesaid, in this: That in an action then pending in said court, wherein Edward Van Ness was plaintiff and Henry Leeds and others were defendants, an order had been made and entered by said court, upon consent of all the parties, referring the issues therein to Thomas H. Edsall, Esq., as sole referee to hear and determine, and the hearings before said referee had proceeded, all the parties had appeared before the referee, the plaintiff had rested his case and large expenses had been incurred therein. That, on a motion thereafter brought on before said justice, by one of the defendants, for an order vacating and setting

aside the said order of reference, and restoring the cause to the calendar, to be tried at a regular term of the court in due course, upon the grounds and allegations that the consent to the reference of said moving defendant was insufficient, and that the action was not, under the statute, referable without consent of all the parties, an order was made and entered by said justice, granting the motion on said grounds made, but arbitrarily and illegally referring the issues to William M. Tweed, Jr., as sole referee to hear and determine, and summarily appointing one Thomas J. Barr receiver of the fund and property concerning which the litigation had arisen. That said order, so made and entered by said justice, was not drawn or submitted by or for either of the parties to the action, or the attorney or counsel of either of them. That no reference to said Tweed, or to any person other than said Edsall, as referee, had ever been applied for by either of the parties. That neither of the parties had applied for the appointment of a receiver of the fund and property in question, which were then in the hands of the firm of "Leeds & Miner," where all the parties desired, and had so expressed themselves, that it should remain, pending judgment in the action, and with regard to which firm it was not alleged or pretended that the fund and property were in any danger of injury, waste or loss, while in their custody. That said order was so made and entered by said justice illegally, without jurisdiction, and with the corrupt intent, and with the effect, thereby to enable said Barr to receive and take possession of said fund and property to his own use, and to wrongfully oppress and harass the members of said firm of "Leeds & Miner," and said other parties to the action, put them to great and unnecessary expense, and deprive them of their property without due process of law, contrary to the laws of the State of New York, pursuant to a conspiracy between said justice and said Barr, Tweed and others unknown, and with the intent and effect thereby to enable said Barr, receiver, and said Tweed, referee, and their respective counsel, to secure large gains and profits to themselves illegally, to the personal advantage of said justice.

The PRESIDENT then put to each senator the question: "How say you, is the seventh charge against the accused proven?" To which each senator arose in his place, and responded with the following results:

Proven — Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis,

Lowery, McGowan, Madden, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, S. Wood, Woodin.

Substantially proven — Murphy — 27.

When Mr. LORD's name was called, he arose and said: "Mr. President: I ask to be excused from voting."

The question was put on said motion, and it was declared carried.

The CLERK read the eighth charge as follows:

CHARGE EIGHTH.

That the said John H. McCunn, a justice as aforesaid, by his said and manifold other wrongful and illegal and corrupt acts, has repeatedly oppressed and harassed citizens of the State of New York, and deprived them of their liberty and property without any or due process of law, but to his own personal gain and advantage, pecuniary and other, and has thereby brought the administration of justice into contempt, and caused deep-seated and general distrust and fear in regard to proceedings in the courts of this State.

The PRESIDENT then proposed to each senator the question: "Senator, how say you, is the eighth item of the charges preferred against the accused proven?" To which each senator arose in his place and responded with the following result:

As proven — Messrs. Adams, Allen, Baker, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson, Lewis, Lowery, McGowan, Madden, Murphy, Robertson, Tiemann, Wagner, Weismann, Winslow, Woodin.

Essentially proven — Mr. D. P. Wood.

Substantially proven — Messrs. James Wood, Perry.

Not proven — Messrs. Benedict, Bowen, Palmer.

When Mr. LORD's name was called he arose and said: "Mr. President: I asked to be excused from voting."

The question was put on said motion, and it was declared carried.

When Mr. MURPHY's name was called, he arose and said: "Mr. President, I ask to be excused from voting for the purpose of making an explanation. This charge is, that 'the said John H. McCunn, by his said and manifold other wrongful and illegal and corrupt acts, has repeatedly oppressed and harassed citizens of the State of New York.' The first part of that is proved, 'by his said

wrongful and illegal acts;" but we have not had other wrongful and illegal and corrupt acts proven; I withdraw my excuse, and therefore say, as I said before, 'substantially proven.'"

When Mr. PALMER's name was called, he said: "Mr. President, I asked to be excused from voting; I have hesitated a good deal about my vote on this charge; I think some portions of the charge have been proven, and perhaps the last part of the charge is rather too strong, and I feel in great doubt how to vote. I therefore withdraw my excuse, and vote 'not proven.' I want to give the accused the benefit of the doubt."

When Mr. D. P. WOOD's name was call, he arose and said, "Mr. President: I asked to be excused from voting. In the vote that I shall give I wish to be understood that it is confined to the first proposition in the charge, that is, 'by his wrongful and illegal and corrupt acts.' I don't regard that the other branch of the charge has been proven at all; but the first branch of the charge has been proven, as we voted on all the other charges. I therefore withdraw my motion to be excused, and will vote 'essentially proven,' covering only the first branch."

The PRESIDENT — Senators: Shall John H. McCunn be removed from the office of justice of the superior court of the city of New York, for the causes stated in the charges preferred against him, which you have found proven?

The CLERK then called the roll, and each senator responded as follows: Ayes — Messrs. Adams, Allen, Baker, Benedict, Bowen, Chatfield, Cock, Dickinson, Foster, Graham, Harrower, Johnson.

Mr. LEWIS — Mr. President: I asked to be excused from voting. Upon the question whether the Senate had jurisdiction over this question, I voted in the negative, believing that the governor had not made the recommendation in the language of the constitution. But thinking or believing that the accused judge can, if a majority of the constitutional number vote in favor of removing him from office, review our action upon this question, I am disposed to vote in the affirmative. If I should vote in the negative and it should turn out that a majority of the Senate voted against it, and we should fail to get the requisite number, if I am wrong upon this proposition, then there would be no remedy. Having voted that he is guilty of all the charges except the sixth, I withdraw my request to be excused and vote aye.

Mr. LORD — Mr. President: From the evidence that I have had presented to me since I have been in the Senate that it is the judgment of the senators here who have sat through this trial and have

heard all of the testimony, I feel that I have evidence enough to warrant me in voting for the removal of Judge McCunn. I vote aye.

Messrs. Lowery, McGowan, Madden, Murphy, Palmer, Perry, Robertson, Tiemann, Wagner, Weismann, Winslow, D. P. Wood, J. Wood, Woodin — 28.

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