THE NEW JERSEY

PRACTICE ACT OF 1903

AS SUPPLEMENTED AND SUPERSEDED
BY THE

PRACTICE ACT OF 1912,

AND

PRACTICE FORMS,

WITH

Supreme Court Rules relating to practice, and complete Notes of Decisions annotated through and including Pamphlet Laws 1916 and 97 Atlantic Reporter and 87 New Jersey Law Reports.

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NEWARK, N. J.
SONEY & SAGE.
1916.

Preface.

This book is merely intended as a ready reference work on New Jersey Practice as contained in the Practice Acts of 1903 and 1912 and the Supreme Court Rules and decisions. It is nowise a historical or original work, but a full, complete and reliable index and repository in concrete form of the law on New Jersey Law Practice.

The plan of the work follows as nearly as possible the original sectional numbers of the Practice Act of 1903, omitting the repealed sections and refers to the sections of the Act of 1912 and Rules of the Court which are intended to supersede the repealed sections.

The Practice Act of 1912 and Rules follow the Act of 1903 and are given arbitrary numbers carrying out a sectional number scheme.

Full credit is given for the valuable assistance I obtained from Mr. Wilbur A. Mott's work on the Practice Act of 1903, as well as the assistance and courtesy of the West Publishing Company in permitting the use of their editorial work in the New Jersey Compiled Statutes of 1910, American Digest Classification and Key Number Series.

JAMES M. SHEEN.

ATLANTIC CITY, N. J., November, 1916.

Table of Abbreviations.

A. ..... Atlantic Reporter.
C. D. ..... Century Digest.
C. J. ..... Corpus Juris.
C. S. ..... Compiled Statutes of New Jersey, 1910.
Cyc. ..... Cyclopedia of Law and Procedure.
D. D. ..... Decennial Edition, American Digest.
E. ..... New Jersey Equity Reports.
E. & A..... New Jersey Court of Errors and Appeals.
G. S. ..... General Statutes of New Jersey, 1895.
K. N. ..... Key Number—Sectional subdivisions of the Decennial Digest and other key numbered digests.
K. N. S..... Key No. Series, American Digest.
L. ..... New Jersey Law Reports.
L. J. ..... New Jersey Law Journal.
P. A. 1903..... Practice Act New Jersey, 1903, p. 537, 3 C. S. 4048.
P. A. 1912..... Practice Act New Jersey, 1912, p. 377.
P. A. R..... Practice Act New Jersey Rules, P. L. 1912, p. 384.
P. L. ..... Pamphlet Laws of New Jersey.
Pat. ..... Paterson's Laws.
R. S. ..... Revised Statutes 1846.
Rev. ..... Revision 1874.
Rev. 1820 ..... Revision 1820.
S. C. ..... Supreme Court of New Jersey.
S. C. R. 1868... Supreme Court Rules of 1868, published in Nixon's Digest, 1868, p. 1077.
S. C. R. 1913... Supreme Court Rules of June Term, 1913.
"1799" ..... "An Act to regulate the practice of the courts of law," passed Feb. 14, 1799. Revision 1820, p. 413; Paterson's Laws, p. 355.
"1855" ..... "An Act to simplify the pleading and practice in courts of law," approved Mar. 17, 1855. P. L. 1855, p. 288.

For other abbreviations used but not mentioned here, see table of abbreviations in American Digest, Decennial Edition, Shepard's Citations and Compiled Statutes.

Reference Tables.

Showing where the provisions of the Practice Act of 1912, Rules with supplements and amendments, and the Rules Supreme Court, 1913, will be found in this book.

Practice Act of 1912.

Section.	Section of Book.	Section.	Section of Book.	Section.	Section of Book.
1	260	13	273	25	285
2	261	14	274	26	286
3	262	15	275	27	287
4	263	16	276	28	288
5	264	17	277	29	289
6	265, 266	18	278	30	290
7	267	19	279	31	291
8	268	20	280	32	292
9	269	21	281	33	293
10	270	22	282	34	294
11	271	23	283		
12	272	24	284		

Rules Annexed to Practice Act, 1912.

Rule.	Section.	Rule.	Section.	Rule.	Section.
1	295	17	311	33	327
2	296	18	312	34	328
3	297	19	313	35	329
4	298	20	314	36	330
5	299	21	315	37	331
6	300	22	316	38	332
7	301	23	317	39	333
8	302	24	318	40	334
9	303	25	319	41	335
10	304	26	320	42	336
11	305	27	321	43	337
12	306	28	322	44	338
13	307	29	323	45	339
14	308	30	324	46	340
15	309	31	325	47	341
16	310	32	326	48	342

RULE.	SECTION.
49	313
50	344
51	345
52	346
53	347
54	348
55	349
56	350
57	351
58	352
59	353
60	354
61	356
62	357
63	358
64	359
65	360
66	361
67	363
68	367
69	369
70	370
71	371
72	380
73	381
74	391
75	392
76	393
77	395
78	396
79	397
80	398
81	399
82	400
83	401

SUPREME COURT RULES OF 1913.

RULE.	SECTION.
1–9	omitted
10	6n
11	6n
12	6n
13	5n
14	6n
15	13n
15 par. 1	14n
16	300
17	301
18	302
19	303
20	304
21	308
22	309
23	309a
24	no rule
25	no rule
26	4n
27	4n, 46n
28	no rule
29	no rule
30	310
31	311
31e	4n
32	312
33	313
34	314
35	315
36	316
37	317
38	318
39	319
40	320
41	321
42	322
43	323
44	324
45	325
46	326
47	327
48	328
49	no rule
50	no rule
51	329
52	330
53	331
54	203a
55	no rule
56	332
57	333
58	334
59	335
60	336
61	337
62	338
63	339
64	no rule
65	340
66	341
67	342
68	343
69	no rule
70	344
71	no rule
72	345
73	346
74	347
75	348
76	349
77	350
78	no rule
79	no rule
80	351
81	352
82	353
83	354
84	355
85	no rule
86	no rule
87	364
88	365
89	366
90	367
91	368
92	356
93	357

RULE.	SECTION.
94	358
95	359
96	360
97	361
98	362, 278n
99	372
100	373
101	374
102	375
103	376
104	abrogated
105	377
106	378
107	379
108	306
109	369
110	370
111	371
112	363
113	391
114	392
115	no rule
116	393
117	394
118	no rule
119	no rule
120	no rule
121	383
122	384
123	385
124	386
125	387
126	388
127	389
128	390
129	401
130	401
131	380
132	381
133	no rule
134	no rule
135	no rule
136	no rule
137	395
138	396
139	397
140	398
141	399
142	400
143	402
144	403
145	404
146	405
146a	405a
147	382
148	omitted
149	omitted
150	omitted
151	omitted
152	omitted
153	omitted
154	omitted
155	omitted
156	omitted
157	378n
158	omitted
159	omitted
160	omitted
161	no rule
162	no rule
163	omitted
164	omitted
165	omitted
166	omitted
167	omitted
168	omitted
169	omitted
170	omitted
171	omitted
172	no rule
173	no rule
174	no rule
175	no rule
176	omitted
177	omitted
178	omitted
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180	omitted
181	omitted
182	no rule
183	omitted
184	omitted
185	omitted
186	omitted
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189	omitted
190	no rule
191	omitted
192	omitted
193	omitted
194	omitted
195	omitted
196	no rule
197	no rule
198	no rule
199	no rule
200	no rule
201	omitted
202	omitted
203	omitted
204	305
205	8n
206	8n
207	no rule
208	411
209	412
210	no rule
211a	295
211b	307
212	298
213	296
214	omitted
215	omitted
216	omitted
217	297
218	299
219	406

Table of Contents.

PRACTICE ACT 1903.

I. ATTORNEYS.

1. Partners may appear in partnership name.
2. Attorneys suable.
3. Warrant of attorney; when necessary.
4. Attorney to declare whether summons was issued by his authority; also residence of plaintiff.
5. Malpractice; penalty; neglect or mismanagement of attorney; liability for damages.
6. Termination of authority: by death; removal from State.
7. Taxed bill of costs to be filed before issue of execution; penalty for failure to file.
8. Particulars of costs received to be furnished by attorney on demand; penalty for illegal charges.
9. Attorney, counsellors and solicitors may sue to recover fee; bill of fee, charges, etc., must be furnished client before suit.
10. When attorney cannot become surety.
11. Agreements out of court must be in writing.
12. Women may be attorneys.

II. TITLE OF ACTIONS.

13. Title of actions unchanged on appeal.
14. Names of state not to be made part of title.
15. Docket and index on appeal.

III. HOW TO PROSECUTE AND DEFEND.

16. Who may sue or defend.
17. Litigants must prosecute, etc., personally or by licensed attorney; exception of infants.
18. Guardian, etc., of infant may sue and defend; action not to be stayed until majority.

IV. PARTIES.

1. IN GENERAL.

19. Choses in action arising on contract assignable; suits by assignees; set-offs; assignments of sealed instruments.
20. Suits by assignee where assignor is dead. Defenses.
21. Actions by husband and wife for injuries; abatement.
22. Action not abated by marriage.
23. When married women may sue or be sued without jointure of husband. Repealed 1912, p. 384.
23a. Married woman may sue without jointure of husband in all tort actions.
23b. Action in tort may be prosecuted separately by married woman.
24. Executors or administrators considered as one; judgment and execution.
25. Qualified executors to act.
26. Substitution of assignee or trustee.
27. Parties to written instruments; initials; contraction of name; how designated.
28. Third person may sue on contract for his benefit.

2. ACTIONS ON BILLS AND NOTES.

29. Actions on bills and notes. Repealed 1912, p. 384.
30. Form of complaint on bills and notes. Repealed.
31. Judgment may be given for or against one or more of several plaintiffs. Repealed.
32. Verdict on set-off, etc. Repealed.
33. Judgment may pass against any party to bill or note. Repealed.
34. Application by party sued jointly for relief to which he would be entitled if sued separately.
35. Satisfaction of execution from property of parties primarily liable; order of liability; payment by defendant secondarily liable as satisfaction.

3. OBJECTION FOR NON-JOINDER OR MISJOINDER.

36. No action shall be defeated by non-joinder. Repealed.
37. Objection to joinder. Repealed.
38. Amendments of writs and declaration. Repealed.
39. Plea in abatement. Repealed.

4. SUITS AGAINST UNINCORPORATED ORGANIZATIONS.

40. Suits against unincorporated organizations by recognized name; abatement.
41. Execution against unincorporated associations.
42. Individual liability of members of associations.

5. WHEN DEFENDANT'S NAME IS UNKNOWN.

43. Designation by fictitious name; amendment when true name is known.

6. WHEN TAXPAYERS MAY INTERVENE.

44. Suits by taxpayers on failure of chosen freeholders to intervene.
45. Intervention by taxpayers in certain suits.

V. PROCESS.

1. FORM AND RETURN.

46. Courts open on weekdays for return of process.
47. Date of process; antedating forbidden; indorsements necessary.
48. Immaterial omissions; amendment.
49. Process in different counties.
50. Return made by Sheriff; amercement.
51. Record book of processes to be kept by Clerk.

2. SUMMONS; HOW SERVED.

52. Service of summons.
52a. Sheriff to set out on summons place of service.
52b. Sheriff may amend return.
53. New summons may be issued and served in case of error in issuance or service of original.

3. CAPIAS; HOW EXECUTED.

54. Service.

4. SCIRE FACIAS; HOW SERVED.

55. Service; publication.

VI. ARREST.

1. IN ACTION IN TORT.

56. Capias ad respondendum; affidavit to support; bail; grounds for issue of capias.

2. IN ACTIONS ON CONTRACT.

57. Capias ad respondendum; affidavit to support; bail; grounds for issue.
58. Arrest of one of several defendants; form of process.
59. Arrest of one of several defendants; procedure after return.
60. Proceedings on execution; liability of bail.

3. SETTING ASIDE WRIT AND ORDER FOR BAIL.

61. Who may set aside; abatement of action; discharge of defendant.
62. Proof of truth of affidavit for arrest, etc.; reference; discharge of defendant, etc.

4. REDUCTION OF BAIL.

63. Application; terms; effect.

5. FEMALES NOT TO BE ARRESTED.

64. Females not liable to arrest.

VII. BAIL.

1. COMMISSIONERS.

65. Supreme Court Commissioners; power as to oaths; bail, etc.

2. BAIL; HOW GIVEN.

66. Bail to, Sheriff abolished.
67. Declaration by the bye not allowed; process against defendant in custody.
68. Amount for which bail liable.
69. Release of defendant arrested in capias on giving bail in double the sum endorsed on the writ; affidavit; form of recognizance.
70. Qualifications of bail.
71. Defendant; produced to give bail. Fees of Sheriff, etc. Form of discharge.
72. Recognizance filed; bail piece.
73. Record book of recognizance kept by clerk of court.

3. EXCEPTIONS AND JUSTIFICATION.

74. Justification of bail.
75. Exceptions to bail, notice; approval.
76. Amercement of bail; in case of failure to appear on exceptions or to produce defendant.

4. RENDER IN DISCHARGE.

77. Rendition of defendant in discharge of bail.
78. Minute of render and commitment; exoneretur entered.

5. PROCEEDINGS AGAINST.

79. Plaintiff may proceed against bail.
80. Stay when writ of error brought.
81. Judgment paid by bail not satisfaction; execution for benefit of bail.

6. DEPOSIT IN LIEU OF BAIL.

82. Deposit in lieu of bail; repayment of deposit.

7. BAIL BY SURETY COMPANY.

83. Bail by surety companies in civil actions.

VIII. ATTACHMENT.

84. When an action may be commenced by attachment.
85. Writ ordered upon proof; bond and sureties.
86. Proceedings on writ same as in cases on non-resident debtors, etc.
87. Attachment against unknown heirs.
88. Attachments against separate and joint estates.
89. Issuance of writ beginning of action; no summons necessary; pleading and procedure.
90. Property as security; special execution; sale; action by Sheriff, etc.
91. Special execution where resident defendant does not appear; general judgment against non-resident who appears, etc.
92. Release of property by giving bond.

IX. PLEADING.

1. WHEN FILED OR SERVED.

93. Declaration, when to be filed. Repealed.
94. Plea, when to be filed. Repealed.
95. Serving of declaration and summons. Repealed.
96. Declaration, how served. Repealed.
97. Affidavit of merits; notice. Repealed.
98. Time for filing further pleadings. Repealed.

2. WHEN FILED OUT OF TIME.

99. Parties need not plead to pleadings filed out of time unless ruled.
100. Waiver of right to take advantage of failure to plead in time.

3. AFFIDAVITS WITH PLEA OR DEMURRER.

101. Defendant to file affidavit with plea, etc. Repealed.

4. PARTICULARS OF DEMAND.

102. Bill of particulars annexed to declaration; set-off. Repealed.
103. Fees for copies.

5. GENERAL ISSUE AND NOTICE OF SPECIAL MATTER.

104. Specification of defenses. Repealed.

6. FAILURE OF CONSIDERATION AND RECOUPMENT.

105. Failure of consideration as defense. Repealed.

7. IN SPECIAL CASES.

106. Pleading in libel or slander suits.
107. Breaches assigned in action on bond.
108. Pleadings in action by township upon collector's bond.
109. Pleading right by virtue of private way.

8. STRIKING OUT PLEA OR DEMURRER.

110. Defective pleading stricken out. Repealed.
111. Frivolous pleas stricken out. Repealed.

9. NEGLECT OF ATTORNEY.

112. Failure of attorney to file pleadings; opening judgment.

10. GENERAL PROVISIONS.

113. Records kept together; notice taken of pleadings filed.
114. Express color and special traverse not necessary; issue joined. Repealed.
115. Superfluous counts; consolidation of actions.
116. Right to plead all defenses; cost to follow judgment on that issue.
117. Dilatory pleas. Repealed.
118. Performance of condition precedent may be averred generally; specific pleading by opposite party.
119. Copy of writing annexed cures defects in pleading same. Repealed.
120. Pleading usury or illegality.
121. Pleas puis darrein continuance. Repealed.
122. Set-off considered cross action. Repealed.

11. AMENDMENT AND VARIANCE.

123. Amendment of course before answer, etc.
124. Amendment after answer by leave of court; time to plead to amended pleading.
125. Amendments to avoid variance, etc.
126. Amendment of defects as to form.

12. DEMURRERS.

127. Special demurrers. Repealed.
128. Joinder in demurrer. Repealed.
129. Issue of law first determined.
130. Notice of argument of demurrer. Repealed.
131. Form of demurrer. Repealed.
132 Amendment of pleadings, demurrer to. Repealed.

X. JUDGMENT BY DEFAULT AND ASSESSMENT OF DAMAGES.

133. Default judgment entered in term or vacation as of course.
134. Grant of further time to plead on filing affidavits of merits.
135. Opening or setting aside default judgment; terms.
136. Damages assessed on judgment by default.
137. Plaintiff may enter rule for writ of inquiry; defendant must file affidavit.
138. Notice of writs of inquiry.
139. Final judgment; entry.

XI. DISCOVERY BEFORE TRIAL.

1. UPON INTERROGATORIES.

140. Written interrogatories served on adverse party; answers; oath; amendment.

2. ADMISSION OR EXECUTION OF PAPERS.

141. Demand to admit execution of writings. Repealed.

3. INSPECTION OF BOOKS, ETC.

142. Inspection, etc., of books, etc., on terms; contempt.
143. Application for inspection of books, etc.; counter-affidavits; examination of witnesses.

4. EXAMINATION OF ADVERSE PARTY BEFORE TRIAL.

144. Party to action examined as witness by adverse party; notice; subpœna.
145. Attendance of resident and non-resident witnesses.
146. Testimony taken at examination reduced to writing, etc.; compelling party to answer.
147. Fees of party examined and examiners.
148. Fees paid by party examining and taxed as costs, etc.

XII. TRIAL.

1. WHEN ACTION TO BE TRIED; NOTICE OF TRIAL.

149. Notice of trial for first day of term, etc.; action non-prossed for failure to notice.
150. Notice of trial by defendant; notice in case of set-off.
151. Service of notice of trial; time; short notice.
152. Time for countermand of notice of trial; costs on failure to countermand.
153. Notice of trial filed with clerk; arrangement of list; endorsement on notice, date of issuing summons; no endorsement; listed according to date of filing.

2. PROCEEDINGS AT THE TRIAL.

154. Trial of issue by court. Repealed.
155. Reference of account; report of referee; exceptions to report; reservation of trial by jury.
156. Reference of accounts by Supreme Court justice; postea; confirmation; reservation of trial by jury.
157. Allowance to referee.

158. Taking papers in evidence by jury; jurors as witnesses.
159. General verdict not compelled, but may be received.
160. Delivery of verdict.
161. Verdict on declaration containing good and bad counts.
162. Writs of inquiry in detinue.
163. Motion for new trial to precede motion in arrest of judgment.
164. Consolidation of actions; apportionment of costs, etc.
165. Special verdicts.
166. Preliminary hearing as to fraud in contract to determine whether defendant shall be held to bail.

XIII. JUDGMENT.

167. Inspection of judgment and process not necessary; judgment roll need not be made up.
168. Book of abstracts of judgment; contents.
169. Transcript of record of judgment as evidence; cancellation of record.
170. Record of judgment in full; removal of record; cancellation in the different records.
171. Judgments signed by judge or clerk.
172. Index to judgments; fees.
173. Minutes as evidence.

XIV. EXECUTION.

1. IN GENERAL.

174. Execution on judgment; no execution against executor, etc., except in case of false pleading.
175. Indorsements.
176. Return in term time or vacation.
177. Judgments in Supreme Court; stay.
178. Division of money in controversy between execution creditors.
179. Property of principal to be exhausted before execution against surety.
180. Stay of execution on judgment, in action on judgment pending writ of error.
181. Time for issuance of execution.
182. Execution by survivors in case of death.
183. Execution in name of executors, etc.
184. Substituted administrator may issue execution, etc.
185. Trustee in bankruptcy or assignee for creditors may issue execution.

186. Execution may issue against goods, etc., of deceased defendant in case of no administration, etc.; notice.
187. Execution against survivors in case of death of defendants.
188. Sheriff, etc., to return statement of amount of money collected; no fee until statement filed.
188a. Execution against the body of minor, etc.

2. CAPIAS AD SATISFACIENDUM.

189. Grounds for issuance of capias ad satisfaciendum; exception of contempt proceedings.

XV. MISCELLANEOUS PROVISIONS.

1. NOTICE.

190. Notice of motion.
191. Motion to strike out pleadings.
192. Fees for noticing trial.
193. Service of notice.
194. Publication of notices.
195. Court to fix mode, etc., of notices when law does not provide therefor.

2. AFFIDAVITS.

196. Notice of taking affidavits; both parties may take affidavits on leave to either.
197. Testimony; how taken.

3. HABEAS CORPUS CUM CAUSA.

198. Removal of suits to Supreme Court; bond.
199. Proceedings on return.
200. Second removal of cause barred if remanded after removal.

4. VENUE.

201. Local actions; order for trial before Supreme Court.
202. Transitory actions.
203. Change of venue; rule; stay of proceedings.
203a. Venue.

5. SECURITY FOR COSTS.

204. Non-resident to give or make deposit.
205. Demand for security.
206. Affidavits of security; exceptions to sureties.

6. CIRCUIT RECORD; POSTEA AND JUDGMENT.

207. Trial of Supreme Court issue at circuit; transcript.
208. Trial by consent in Circuit Court or Common Pleas.
209. Return of transcript by court trying Supreme Court issue; postea.
210. Judgment on postea; relicta.

7. BILLS OF EXCEPTIONS AND RULES TO SHOW CAUSE.

211. Bills of exceptions shall be settled and sealed by justice. Repealed.
212. Death of judge without sealing exceptions. Repealed.
213. Contents of bill of exceptions. Repealed.
214. Rule to show cause a waiver of bills of exception except on points reserved. Repealed.

8. CASE CERTIFIED.

215. Case certified to Supreme Court.
216. Certificate filed.
217. Error assigned on certified opinion.

9. PENALTIES AND DAMAGES; HOW RECOVERED.

218. Recovery of damages or penalty.

10. SUITS BY COMMON INFORMERS.

219. Indorsement of special note on information in an action by informers; process; etc.
220. Defendant's plea.
221. Recovery by covin no bar; prosecutor liable for proportion of penalty in certain cases.
222. Costs to be paid by informer on non-suit, etc.
223. Exceptions in application of act.

11. EXCEPTIONS TO JUDGE.

224. Disqualification of judge.
225. Challenges; making and trial.
226. Judge not to act as clerk.

12. AID TO POOR SUITORS.

227. Process without costs; counsel assigned; costs.

13. SUPREME COURT EXAMINERS.

228. Supreme Court examiners; powers, etc.

XVI. COSTS.

229. Rights of plaintiff and defendants as to; parties to pay costs on arrest of judgment.
230. Costs not recoverable in Supreme Court actioon if recovery less than two hundred dollars; exceptions.
231. Costs in trespass actions involving title.
232. Costs on removal of action by habeas corpus.
233. Costs in personal actions in Circuit Court.
234. Costs in cases in Circuit Court cognizable before small cause court.
235. Recovery reduced by failure of consideration, recoupment, etc., certificate of reasonable grounds.
236. Costs in actions of tort cognizable in justice's court.
237. One bill of costs in suits on same paper.
238. Costs on scire facias.
239. Costs in assaults, libel, etc.
240. One of several defendants may have costs.
241. Costs on demurrer. Repealed.
242. Costs for or against State.
243. Taxing costs.
244. Retaxation; expense of.
245. Order for payment of costs of printing, etc.

XVII. POWER OF THE COURT OR A JUDGE.

246. Protection of property pending suit; contempt.
247. Orders, etc., of judge in vacation or term time.
248. Motions to set aside judgment, etc., when made.
249. Rule to show cause against setting aside fraudulent judgment; grant in vacation.
250. Rule in vacation to show cause why mandamus or quo warranto should not issue; grant in vacation.
251. Hearing argument in Supreme Court at chambers in vacation or term time.
252. Reference of motion to Supreme Court.
253. Rules for expediting business.
254. Powers of court to make rules regulating pleadings, etc., Circuit Court rules.

XVIII. CONSTRUCTION.

255. Application of singular number and masculine gender; term "lands" construed.
256. Act concerning small causes not affected except in certain cases.

257. Formal notices may be given by attorney.
258. Precedence of municipal cases in appellate courts; advancement on list; determined promptly; decision within thirty days.
259. Return of writs in municipal cases; review of cause; hearing appeals; time to take appeal in municipal cases.

PRACTICE ACT OF 1912.

260. Short title and construction.
261. Definitions.
262. Single form of action.
263. Parties.
264. Parties; when plaintiff made defendant.
265. Parties; who made defendant.
266. Parties; executor, etc., may sue or be sued without joining beneficiary.
267. Separate action.
268. Parties; court may direct others brought into court.
269. Non-joinder, misjoinder.
270. Saving clause; changes made by court not to impair.
271. Joinder of causes of action; causes may be joined.
272. Counter-claim.
273. Failure of consideration.
274. Default in pleading.
275. Summary judgment; defense must be sincere.
276. Summary judgment; if answer struck out.
277. Preliminary reference.
278. Admissions of certain facts.
279. Reserving questions of law; submitting case in alternative.
280. Judgment; execution.
281. Forms of judgment.
282. Judgment without pleadings; judgment final.
283. Amendments; writs, etc., may be amended.
284. Amendments; new cause alleged.
285. Bills of exception and writs of error abolished; appeals may be taken; error in final judgment.
286. Appeals; effect of.
287. Reversal or new trial on merits.
288. Additional evidence on appeal; new evidence admissible.
289. Practice in the Court of Errors.
290. Costs.
291. Orders by a judge.

292. Supreme Court to prescribe rules.
293. Actions pending when this act takes effect; proviso.
294. Repealer.

SCHEDULE A.

RULES OF COURT UNDER THE PRACTICE ACT (1912).

I. GENERAL RULES.

295. Definitions.
296. Orders by a judge.
297. Extending time, when.
298. Forms.
299. Rules may be suspended, when.

II. JOINDER OF PARTIES AND CAUSES OF ACTION.

300. Personal representatives; in case co-contractor be dead; proviso.
301. Persons severally liable.
302. Parties in alternative.
303. When assignor and assignee may join.
304. Assignment pending suit.
305. Costs of defendant; protection of defendant.
306. Separate trials.
307. "Transactions" explained.
308. Joinder of causes of action.
309. Objection for misjoinder; waiver.
309a. Several causes of action, answer thereto; judgment; execution.

III. PLEADINGS.

1. PLEADINGS GENERALLY.

310. Order of pleadings.
311. Form of pleadings; plain statement.
312. Bills of particulars.
313. Untrue statements.
314. Statements not denied are admitted.
315. Pleading according to legal effect; adverse party apprised of state of facts.
316. Joinder of issue; denial a joinder.
317. Annexing copies of documents.
318. Inconsistent counts and defenses.
319. Objectionable pleadings.

320. Demurrers abolished.
321. Objections to pleadings; objections made on motion.
322. Objections to pleadings.
323. Motions; grounds of motion specified.
324. Matters arising after suit begun; supplemental pleadings.
325. Oyer; copies of documents served on adverse party.
326. Evasive denials not permitted.
327. Certainty; plain statements.
328. Demands for relief.

2. THE COMPLAINT.

329. The complaint.
330. Counts and paragraphs; counts numbered.
331. Alternative relief.

3. THE ANSWER.

332. Dilatory pleas; certain pleas abolished; objection on motion.
333. Several defenses; defenses separately stated.
334. General and special denial.
335. Tender; payment into court; effect of tender of money.
336. Payment into court by defendant an admission.
337. Payment into court; acceptance by plaintiff.
338. Payment into court by plaintiff on counter-claim.
339. Payment into court; jury not informed.

4. COUNTER-CLAIM.

340. Counter-claim.
341. Cross action.
342. Amount of recovery; judgment for excess.
343. Counter-claim; copy to co-defendant.

5. REPLY.

344. Reply.

6. ACTIONS TO RECOVER PERSONALTY.

345. Special property; facts showing to be pleaded.
346. Unlawful taking and detainer.
347. Defense by answer.

7. TIME FOR FILING PLEADINGS.

348. Complaint annexed to summons.
349. Answer filed; time.
350. Affidavits of merits; action on contract; proviso.

IV. SUMMARY JUDGMENT.

351. Answer may be struck out and judgment final entered.
352. Motion made on affidavit.
353. Partial judgment.
354. Terms of defense.
355. No summary judgment entered without order of judge.

V. PRELIMINARY REFERENCES.

356. Supreme Court Commissioners.
357. Summons; how served; time.
358. Order by commissioner upon return of summons.
359. Two days' notice; motions.
360. Plaintiff, when non-pressed.

VI. DISCOVERY OF DOCUMENTS AND ADMISSION OF EXECUTION OF PAPERS.

361. Production of books, etc.
362. Admissions made five days after service of notice.

VII. DAMAGES.

363. Damages determined to time of trial.
364. Assessment of damages; clerk makes assessment; itemized statement annexed; amount.
365. Assessment of damages on book account; original book produced; affidavit.
366. Assessment of damages on negotiable instrument; instrument produced; affidavit.
367. Assessment of damages; writ of inquiry.
368. Assessment before justice and by jury; postea; entry of final judgment; writs of inquiry, when returnable.

VIII. TRIALS; JURY'S FINDINGS.

369. Plaintiff and defendant to open case.
370. Answers to written questions; in rule to show cause, statement of case filed.
371. Preparation of statement.
372. Trial by referee; force of award as verdict.
373. Account reference to referee; confirmation on notice.
374. Cause referred; entry of rule of reference; report filed; exceptions to report, etc.

375. Precedence of causes on trial and argument at bar and circuit.
376. Plaintiff fails to move cause—non-suited; review of order.
377. Clerk at circuit to list causes; correction of list; listing by opposite party.
378. Jury trials; counsel limited to one hour; proviso.
379. One counsel shall examine or cross-examine witness.

IX. NEW TRIAL AS TO PART.

380. Questions on new trial.
381. New trial as to damages only.
382. Rules 131 and 132 (Secs. 380, 381) applicable to appeals, when.
383. New trial when jury disregards binding instructions.
384. Application for new trial to trial judge; discretion of judge; rule to take testimony.
385. Application for rule to show cause ex parte made within six days after verdict; failure to make in time bar; exception.
386. Motion for new trial; time to make.
387. Rule to show cause; reasons served; time; argument on.
388. Rule to show cause; state of case on; service of; objection to case; settlement of case by judge.
389. On motion for rule to show cause one counsel a side can be heard.
390. Judgment on rule entered nunc pro tunc; time.

X. FINDINGS OF FACT BY COURT.

391. Findings by court.
392. Effect of general finding.

XI. JUDGMENT.

393. Filing postea; staying execution.
394. Failure to file postea, waiver of verdict or finding.

XII. APPEALS.

395. Time of notice; taking appeals.
396. No severance; all parties served notice.
397. Grounds of appeal.
398. Cross appeals.

399. Statement of case; rules applicable to appeals.
400. Security on appeal; notice of appeal to stay execution, when.
401. Effect of granting rule to show cause.
402. Reversal of judgment as to some appellants and affirmance as to others.
403. Objection to evidence; record must show grounds of objection stated to and adverse ruling by trial judge.
404. Reasons for reversal filed in appeals from District Court; time.
405. Appeals from District Court to be perfected before listed for argument; if not perfected clerk to notify attorneys.
405a. Motions to dismiss appeals from District Court.
406. Supreme Court rules applicable to Circuit Courts, when.

TRANSFER OF CAUSES ACT (1912).

407. Causes transferred to proper court.
408. When transfer made; entry of decree in proper court.
409. Rules.
410. Appellation.
411. Transfer of causes to Court of Chancery only on order of court or a judge.
412. Clerk to give receipt and take receipt for papers when cause is transferred from or to Court of Chancery.

Forms, see index of Forms.

NEW JERSEY

PRACTICE ACT

An Act to regulate the Practice of Courts of Law (Revision of 1903), approved April 14, 1903, P. L. 1903, p. 537, with amendments and supplements, including the Practice Act of 1912, approved March 28, 1912, P. L. 1912, p. 377.

The provisions of the Practice Act do not relate to the court of equity, its operations being limited to courts of law. Lawless v. Fleming, 56 E. 815, 40 A. 638.

SCOPE NOTE.

INCLUDES the practice of the New Jersey Law courts of original jurisdiction as contained in the Practice Act of 1903, with the amendments and supplements thereto, including the Practice Act of 1912 and correlated acts; the rules of the Supreme Court, as contained in the Practice Act of 1912, as revised by that court in the June term, 1913; the decisions of the Supreme Court and Court of Errors on practice generally as well as construing the particular sections of the acts and rules.

EXCLUDES Practice in Chancery, see Kocher's Chancery Practice. 1 C. S. 408. The Chancery Act (1915), P. L., p. 185.

In District Court, see District Court, 2 C. S. 1947. Erwin's District Court Practice.

In Orphans' Court, see 3 C. S. 3809. Kocher's Probate Law and Practice, 1916.

In Justice Court, see Justice Court, 3 C. S. 2979.

On appeal to Supreme Court and Court of Errors, see Supreme Court Rules.

Court of Errors and Appeals Rules; Writs of Error, 2 C. S. 2207; Criminal Procedure, 2 C. S. 1816.

I. ATTORNEYS.

See Admission of, rules.....S. C. R. 1913, R. 2–14.
Name and address to be endorsed on process, etc.....S. C. R. 1913, R. 26, § 4n.
Liable to court officers for fees, except sheriff's execution fees..S. C. R. 1913, R. 205, § 8n.
Clerk shall receive fees due to State from .....S. C. R. 1913, R. 206, § 8n.
Clerk shall not permit attorney in default to file papers, or enter rules, etc.....S. C. R. 1913, R. 206, § 8n.

1. Partners may Appear in Partnership Name.

Attorneys who are partners may, in their partnership name, appear and prosecute or defend any action in any court of this state. (P. L. 1903, p. 537; 3 C. S. 4053; Rev., sec. 1; 1855, sec. 2.)

HISTORICAL.—History of legislation. In re Branch, 70 L. 537; 57 A. 431. At common law attorneys could not appear as partnership. Wilson *v.* Wilson, 5 L. 928, *792.

SIGNATURES FOR CO-PARTNERS.—When one counsel signs for his firm, authority will be presumed to exist for the signature of all the members. Hampton *v.* Codington, 1 L. J. 8.

LITIGANT LIMITED TO ONE SOLICITOR.—A party litigant can have only one solicitor of record, who may be an individual practitioner or a firm of practitioners, who, as such, are regarded as a single entity. In re Stewart, 95 A. 739.

2. Attorneys Suable.

Attorneys-at-law may be sued as other persons. (P. L. 1903, p. 537; 3 C. S. 4053; Rev., sec. 2, Incorporated in Revision of 1874 from Justice's Court Act of 1818; 1818, p. 56, sec. 50.)

HISTORICAL.—Practice on bill of privilege to sue attorney. Bennington Iron Co. *v.* Rutherford, 18 L. 105; Id., 18 L. 158. Anonymous, 20 L. 494.

3. Warrant of Attorney: When Necessary.

No warrant of attorney or copy thereof need be filed in any action, except in cases of judgment by confession in actions not commenced by process. (P. L. 1903, p. 537; 3 C. S. 4053; Rev., sec. 3; 1855, sec. 8.)

PRESUMPTION OF AUTHORITY.—The authority of an attorney-at-law to appear will be presumed. Norris *v.* Dougless, 5 L. *818, 960; Price *v.* Ward, 25 L. 225; Easton *v.* Greenwich, 25 E. 565; Dey *v.* Hathaway, etc., Co., 41 E. 419; 4 A. 675; Mutual Life Ins. *v.* Pinner, 43 E. 52; 10 A. 184. Acknowledgment of service of summons by attorney presumed to have been authorized by defendant until overcome by affirmative evidence. Purcell *v.* Bennet, 68 L. 519; 53 A. 235. Defendant may disprove authority of attorney to appear for him. Hess *v.* Cole, 23 L. 116. Objection of want of authority should be made by motion to dismiss. Camden Safe, etc., Co. *v.* Bullitt, 19 L. J. 61; Brunswick *v.* Booream, 10 L. 257. Attorney not authorized to compromise client's claim without special authority. Trenton St. Ry. Co. *v.* Lawlor, 71 A. 234; 74 E. 828.

4. Attorney to Declare Whether Summons was Issued by his Authority: also Residence of Plaintiff.

Any attorney whose name is endorsed on a summons or capias ad respondendum shall, on demand in writing made by or on behalf of any defendant, declare forthwith in writing whether such writ was issued by him or by his authority and also the place of abode of the plaintiff; and if such attorney shall declare that the writ was not issued by him or by his authority, or shall refuse to declare the place of abode of the plaintiff, then no further proceedings shall be taken in the action without leave of the court. (P. L. 1903, p. 537; 3 C. S. 4053; Rev., sec. 4; 1855, sec. 4.)

SUPREME COURT RULES, 1913. RULE 26.—All writs and process issuing out of this court shall be written by pen or type, or printed, or partly written and partly printed; and there shall be endorsed on such writs and process, under the title of the action,

the name and office address in this State of the attorney who shall sue out the same, or the name and residence of the party, if he shall sue out the same himself.

Unless otherwise required by statute or order, it shall be sufficient service of any paper in the cause to leave the same at such office or residence between the hours of ten A. M. and four P. M., until notice of removal to another office or residence is received.

The first paper filed in the cause for any defendant shall be likewise endorsed with the name and office address in this State of the attorney or with the name and residence of the party, and such endorsement shall have the same effect with regard to the service of subsequent papers in the cause. (Rule 14, 1905.)

SUPREME COURT RULES, 1913. RULE 27.—All writs of error shall be sealed with the official seal of this court, and signed by the clerk, or his assistant, personally; and shall be made returnable within twenty days from the time of issuing the same. (Rule 91, November 3, 1909.)

SEE SUPREME COURT RULES, 1913. RULE 31 (*e*).—The first pleading filed by any party shall state his place of residence. (Rule 17, P. A. 1912; P. L. 1912, p. 388, post sec. 311.)

COMPELLING DISCLOSURE OF ATTORNEY'S AUTHORITY.—Court or party to suit can call for proof of attorney's authority. Hess *v.* Cole, 23 L. 116. For method of proceeding where the attorney of record denies that he is the attorney, see Anonymous, 16 L. 396; Martinis *v.* Johnston, 21 L. 239; Harwood *v.* Smethurst, 30 L. 230.

COMPELLING DISCLOSURE OF RESIDENCE OR ADDRESS OF CLIENT.—If the attorney of record neglects or refuses to state his client's place of residence, the other party may have a rule to show cause why security for costs should not be filed. Mulford *v.* Geschchiat, 16 L. 272. Such demand does not stay the running of the defendant's time to plead. Whitney *v.* Bank, 40 L. 481. If plaintiff's attorney refuse to declare the place of abode, or so long omit that his failure amounts to a refusal, the plaintiff can proceed no further in the action without leave of the court. Id.

5. Malpractice: Penalty: Neglect or Mismanagement of Attorney: Liability for Damages.

If any counsellor, solicitor or attorney shall be guilty of malpractice in any court he shall be put out of the roll and never after permittted to practice as such, unless he shall obtain a new license

and be again enrolled; and if a solicitor or attorney shall neglect or mismanage any cause in which he is employed, he shall be liable for all damages sustained by his client. (P. L. 1903, p. 538; 3 C. S. 4054; Rev., secs. 5, 7; R. S. 929, secs. 3, 6; 1799, secs. 3, 6.)

SUPREME COURT RULES, 1913. RULE 13.—Affidavits presented to the court for the purpose of obtaining a rule to show cause why the name of an attorney should not be stricken from the roll shall not be filed without an order of the court; and no such rule to show cause, if allowed, shall be actually entered until the court by special order so directs; and whenever such a rule, not entered, shall be discharged, no entry thereof shall be made and no papers shall be filed.

MALPRACTICE — DISBARMENT. HISTORICAL.—Appointment of solicitors and power to disbar. In re Raisch, 83 E. 82; 90 A. 12. Criminal courts have inherent power to suspend attorneys pending their indictment. In re Simpson, 21 L. J. 109; In re Raisch, supra. For a statement of the causes which will justify the disbarment or disciplining of an attorney or solicitor, see In re Cahill, 66 L. 527; 50 A. 119; In re Wartman (N. J.), 31 A. 1040; In re Lantz, 65 L. 134; 46 A. 761; In re Young, 75 L. 83; 67 A. 717; In re Simpson (N. J.), 82 A. 507; In re Bedle (N. J.), 87 A. 100; In re H. C., Jr., 81 E. 8; 85 A. 336; In re Hahn, 94 A. 953; 84 E. 523; 96 A. 589; In re Smith, 94 A. 39; 84 E. 252; In re Rosenkrans, 94 A. 42; 84 E. 232; In re Bredit, 94 A. 214; 84 E. 222; In re Coyer, 94 A. 29; 84 E. 449; In re Eaton, 94 A. 31; 84 E. 379; In re Cosey, 94 A. 54; 84 E. 343; 96 A. 595. An attorney may be struck off the roll for breach of the rules of the court or official duties. Anonymous, 7 L. 162, 164. Where alleged misconduct involves a criminal offense, the court will not disbar an attorney in advance of a conviction unless the evidence is clear and convincing. In re Noonan & Simpson, 65 L. 142; 46 A. 570. A counsellor who is unfaithful to the instructions of his client, fails to render them services and retains money received from them, should be disbarred. In re McDermit, 63 L. 476; 43 A. 685. Where attorney renders a bill to client, which is fraudulently untrue, including items for services not rendered, inflated beyond what the services are worth, and with retainer amounts to more than sum recovered of defendant, court may proceed summarily against him for his misconduct. Tate *v.* Field, 60 E. 42; 46 A. 952.

NEGLIGENCE—MISCONDUCT; LIABILITY TO CLIENT.—Negligence of attorney in conducting case is attributable to client (Leo *v.* Green, 52 E. 1; 28 A. 904), excepting where client is a municipal corporation. Lewis *v.* Elizabeth, 25 E. 298. Attorney must see that judgment obtained for his client is properly entered. Griggs *v.* Drake, 21 L. 169, 173. Attorney employed to draw a building contract not bound to file it and is not liable for failure so to do. Fenaille *v.* Cougert, 44 L. 286. Liability for unauthorized appearance. Hendrickson *v.* Hendrickson, 15 L. 102; Price *v.* Ward, 25 L. 225. Attorneys and solicitors may be dealt with summarily for breaches of duty and privileges on their part in dealing with their clients. Crane *v.* Gurnee, 71 A. 338; 75 E. 104; Bullock *v.* Angleman (Ch.), 87 A. 627; Monday *v.* Strong, 52 E. 833; 31 A. 611. Client may maintain an action for damages against attorney for neglect of his case. Tichanor *v.* Hayes, 41 L. 193; French *v.* Armstrong, 76 A. 336; 80 L. 152. Bill in equity will not lie against an attorney for damages for his negligence, as client has remedy at law. Nancrede *v.* Voorhis, 32 E. 524.

6. Termination of Authority: by Death: Removal from State.

If a solicitor or attorney shall die or remove out of this state or be put out of the roll, his client shall be notified to appoint another in his stead, and if he fails to do so the adverse party may proceed in the action. (P. L. 1903, p. 538; 3 C. S. 4054; Rev., sec. 6; R. S. 929, sec. 4; 1799, sec. 4.)

SUPREME COURT RULES, 1913. RULE 10.—No attorney of this court, not actually residing in this state, shall appear or act as attorney of record in any case in any of the courts of this state. (Rule 10, 1905.)

SUPREME COURT RULES, 1913. RULE 11.—No attorney or other person not residing in this state, or person not regularly licensed and enrolled, shall practice in the name of any attorney of this court, nor shall any attorney thereof permit another so to practice, on pain of being struck off the roll. (Rule 11, 1905.)

SUPREME COURT RULES, 1913. RULE 12.—The clerk of this court, or any person acting for him or in his behalf, shall not practice as an attorney or counsellor in this court. (Rule 12, 1905.)

SUPREME COURT RULES, 1913. RULE 14.—(*a*) No person who shall be disbarred or suspended as an attorney-at-law shall, during the period of such disability, be permitted to practice as a counsellor-at-law.

(*b*) The rule disbarring or suspending an attorney may provide that such attorney shall not, during the period of such disability, act as a Supreme Court commissioner or examiner.

DEATH.—The relation of attorney and client is terminated by the client's death. Wood *v.* Hopkins, 3 L. *689, 263.

REMOVAL FROM STATE.—An attorney of the Supreme Court who removes from the state does not cease to represent his client in actions previously commenced until another has been substituted in his place. Faughnan *v.* Elizabeth, 58 L. 309; 33 A. 212.

7. Taxed Bill of Costs to be Filed Before Issue of Execution: Penalty for Failure to File.

Every attorney before he issues execution shall file the taxed bill of costs or a copy thereof in the office of the clerk of the court out of which the same is to issue; and if he fails so to do he shall forfeit ten dollars to the party aggrieved. (P. L. 1903, p. 538; 3 C. S. 4054; Rev., sec. 8; R. S. 929, sec. 7; 1799, sec. 7.)

8. Particulars of Costs Received to be Furnished by Attorney on Demand: Penalty for Illegal Charges.

If a solicitor or attorney shall receive the costs accruing on any action he shall, when required by the party at the time of payment or at any time within six months afterwards, draw up and deliver the bill of particulars thereof with a receipt to the party paying the same; and if he fail so to do he shall forfeit ten dollars to the party aggrieved; if a solicitor or attorney shall charge in his bill of costs for services not actually done or for services not allowed by law or shall take any greater fee or reward for any service than is allowed by law, he shall forfeit to the party aggrieved thirty

dollars. (P. L. 1903, p. 538; 3 C. S. 4054; Rev., sec. 9, 10; R. S. 929, secs. 8, 9; 1799, secs. 8, 9.)

SUPREME COURT RULES, 1913. RULE 205.—The attorneys of record in every cause in the court, respectively, shall be answerable to the officer thereof for all lawful fees which shall become due to him in the conducting of such cause, sheriff's execution fees excepted. (Rule 73, 1905.)

SUPREME COURT RULES, 1913. RULE 206.—The clerk of the court shall be authorized to receive from the attorneys thereof, respectively, all such fees as shall become due to the state; and in order to enforce the punctual payment thereof by the said attorneys, the clerk shall forbear to enter, or suffer to be entered in the minutes of this court or in the clerk's book, or to be filed in his office, any rule or rules, paper or papers, until the fees due to the state therefor shall have been paid. (Rule 74, 1905, modified.)

EXTENT OF PENALTY.—The penalty prescribed is for all the overcharges included in one bill of costs, and not thirty dollars for each excessive item. Tanner *v.* Croxall, 17 L. 332.

The statute regulating fees does not control the charges which attorneys, solicitors and counsel may make against their clients. Mundy *v.* Strong, 52 E. 833; 31 A. 611. Where attorney is a party to action and obtains judgment, he is entitled to the same taxable costs as other litigants. State, Drake, *v.* Berry, 42 L. 60; Board *v.* State Bank, 38 E. 36.

Client is entitled, as against his solicitor, to costs taxed in the case, as costs are recoverable by a party as compensation to him. Solicitor is entitled only to lien on them for the repayment of money expended by him in the suit. Ely *v.* Peet, 52 E. 734; 29 A. 817. Attorney's fee, not taxable, cannot be included in the costs. Holmes *v.* Sinnickson, 15 L. 313.

9. Attorneys, Counsellors, and Solicitors may Sue to Recover Fees: Bill of Fees, Charges and Disbursements must be Furnished Client before Suit.

Every solicitor, attorney and counsellor may commence and maintain an action for the recovery of any reasonable fees, charges or disbursements, in equity or at law, against his client or his legal representative, provided he shall have first delivered to such client or his legal representative or left for him at his usual place of abode, a copy of

his bill of such fees, charges and disbursements. (P. L. 1903, p. 538; 3 C. S. 4054, as amended by P. L. 1911, p. 412; Rev., sec. 12; R. S. 929, sec. 11; 1799, sec. 11.)

After the service of a summons and complaint in any action at law, or the filing of a bill of complaint or petition in the Court of Chancery, or the service of an answer containing a counter-claim in any action at law, the attorney, solicitor or counsellor-at-law who shall appear in said cause for such party instituting the action at law, or suit, or filing the petition or counter-claim, shall have a lien for compensation, upon his client's cause of action, suit, claim or counter-claim, which shall contain and attach to a verdict, report, decision, decree, award, judgment or final order in his client's favor, and the proceeds thereof in whosoever hands they may come; and the lien shall not be affected by any settlement between the parties before or after judgment or final order or decree. The court in which such action, suit or other proceeding is pending, upon the petition of the attorney, solicitor or counsellor-at-law, may determine and enforce the lien. (P. L. 1914, p. 410.)

PROVISIONS MANDATORY.—Service of bill of costs, fees and disbursements are conditions precedent to suit by attorney and must be alleged in the complaint and proved as part of the plaintiff's case. Perkins *v.* McBride, 92 A. 395; 83 E. 653; Bentley *v.* Fidelity Co., 75 L. 828; 69 A. 202; McCrea *v.* Stierman, 76 L. 394; 69 A. 1008; Brown *v.* Harriot, 81 L. 484; 80 A. 479; Truitt *v.* Darnell, 65 E. 221; 55 A. 692. Not necessary where services consist in the examination or preparation of papers not connected with any pending litigation. Wescott *v.* Baker, 85 A. 315; 83 L. 460; Brown *v.* Harriot, 81 L. 484; 80 A. 479.

RECOVERY OF COUNSEL FEE.—Action at law will not lie against a husband by solicitor for services to wife in defending divorce suit. Westcott *v.* Hinckley, 56 L. 343; 29 A. 154.

CITED.—Roberson *v.* Crichfield, 94 A. 583; Munday *v.* Schantz, 52 E. 744; 30 A. 322; Strong *v.* Munday, 52 E. 833; 31 A. 611. Before act of 1911 counsel fees could not be recovered unless there was an express contract. Seeley *v.* Crane, 15 L. 35; Shaver *v.* Norris, 3 L. *912, 470; Vanatta *v.* McKinney, 16 L. 235; see Hyer *v.* Little, 20 E. 443, 460; Hopper *v.* Ludlum, 41 L. 182; Blake *v.* Elizabeth, 2 L. J. 328; Gilbert *v.* Thomas, 21 L. J. 57.

ATTORNEY'S LIEN ON COSTS AND JUDGMENT FOR FEE.—An attorney has a lien for his costs and compensation upon the judg-

ment recovered by him. Newman *v.* Shipman, 15 L. J. 83. Attorney has a lien on the taxed bill of costs for repayment of money expended by him. Ely *v.* Peet, 52 E. 734; 29 A. 817. Attorney's lien for costs exists only where he has received money upon the judgment or has arrested it in transitu or where defendant has paid the judgment after receiving notice of attorney's claim. Braden *v.* Ward, 42 L. 518. The attorney of the plaintiff has a claim upon the plaintiff's judgment for his taxable costs and court charges which is entitled to be preferred to the defendant's right to offset the judgment held by him against the plaintiff. Pride *v.* Smalley, 66 L. 578; 52 A. 955.

WHEN INAPPLICABLE.—This section does not apply to a suit brought to recover the amount of a bill of costs in a proceeding to try the right to personal property in a justice's court. Cole *v.* Lunger, 42 L. 381.

CONTRACTS FOR COMPENSATION.—A contract of an attorney-at-law for a certain remuneration for his services is legal and can be enforced by suit, such an officer not standing on the same footing as an advocate. Schomp *v.* Schenck, 40 L. 195. The law of maintenance and champerty does not prevail in this State. Id.; Shreve *v.* Freeman, 44 L. 78; Terney *v.* Wilson, 45 L. 282. Counsel fees can be recovered by action where an agreement has been made to pay a specific sum for services as counsel. Zabriskie *v.* Woodruff, 48 L. 610; 7 A. 336.

10. When Attorney Cannot become Surety.

No practicing attorney shall be surety on a bond as security for costs or a replevin bond or a bond given to obtain a certiorari; and any such bond signed by a practicing attorney as surety shall be insufficient. (P. L. 1903, p. 538; 3 C. S. 4054; Rev., sec. 13; Rev. of 1874; Supreme Court Rule 80.)

11. Agreements out of Court must be in Writing.

No admissions, consents or agreements made out of court by the parties or their attorneys or counsellors, with respect to the conducting of any action, shall be taken notice of by the court, unless the same be in writing. (P. L. 1903, p. 539; 3 C. S. 4054; Rev., sec. 14; Rev. of 1874; Supreme Court Rule 55.)

Any agreement between solicitors must be reduced to writing, signed and filed. Caldwell *v.* Estell, 20 L. 326; Wilson *v.* King, 23 E. 150; Locomotive, etc., Co. *v.* Erie R. R., 37 L. 23, 27; Welsh *v.* Blackwell, 14 L. 344, 345. Stipulation of counsel which deprives client of valuable legal rights will not be enforced. Howe *v.* Lawrence, 22 L. 99. Stipulation prepared by one side cannot be used if counsel on the other side does not consent to it. Van Waggoner *v.* Coe, 25 L. 197. Stipulation agreed upon by counsel does not bind until filed in court. Until then it may be altered or revoked by either party. Gray *v.* Robinson, February, 1876. An admission of counsel made several months after trial, and after he has ceased to represent client, is not evidence against the latter. Janeway *v.* Skerritt, 30 L. 97. Stipulation made by counsel binding on client. State, Butler, *v.* Kitchen, 41 L. 229; Lewis *v.* Weir, 14 L. 353, 355; Dayton *v.* Burnet, 8 L. 253; Paterson *v.* Read, 43 E. 18; 10 A. 807; Taylor Prov. Co. *v.* Adams Express Co., 71 L. 523; 59 A. 10.

STIPULATIONS—CONCLUSIVENESS.—A stipulation, made in open court, is binding upon the parties thereto, and the trial judge is justified in charging the jury in accordance therewith. Decker *v.* George W. Smith & Co., 96 A. 915.

12. Women may be Attorneys.

No person shall be denied admission to examination or be refused recommendation to the governor for license to practice law as an attorney or counsellor on account of sex. (P. L. 1903, p. 539; 3 C. S. 4055; P. L. 1895, p. 366.)

II. TITLE OF ACTION.

See Single Form of Action, P. A. 1912, p. 378, § 3, post, § 262.

13. Title of Action Unchanged on Appeal.

Upon the removal of any action to a court of appellate jurisdiction, the title of the action as originally instituted shall be retained, the character in which the parties appear in the writ or other proceeding for removal being described after their

names respectively. (P. L. 1903, p. 539; 3 C. S. 4055; P. L. 1900, p. 72, sec. 1.)

SUPREME COURT RULES, 1913. RULE 15.—In entitling causes the following rules shall be observed:

The name of the state shall not be used merely because of the nature of the writ or proceeding; but, in stead, the name of the party in interest shall be used.

In notices of trial or argument, in printed cases, points and briefs, and in opinions filed and reported, the party instituting the original suit or proceeding shall be named first, although the other party may be the mover of the particular trial or argument noticed, or may be appellant or plaintiff in error. On appeals, writs of error or certiorari, the character in which the parties appear shall be stated after their names, respectively. (Rule 15, 1905.)

14. Name of State not to be made Part of Title.

The name of the state shall not be made a part of the title of any action merely because of the nature of the writ or proceeding by which it is taken into court. (P. L. 1903, p. 539; 3 C. S. 4055; P. L. 1900, p. 72, sec. 2.)

SUPREME COURT RULES, 1913. RULE 15. PAR. 1.—The name of the state shall not be used merely because of the nature of the writ or proceeding; but, instead, the name of the party in interest shall be used. (Rule 15, 1905.)

CITED.—Anderson *v.* Myers, 77 L. 186; 71 A. 139.

15. Docket and Index on Appeal.

The clerks of the various courts of appellate jurisdiction shall enter, docket and index all actions and keep a record thereof in conformity with the above provisions, and if the parties fail to comply therewith, said clerks shall re-entitle such actions and notify the parties. (P. L. 1903, p. 539; 3 C. S. 4055; P. L. 1900, p. 72, sec. 3.)

III. HOW TO PROSECUTE AND DEFEND.

16. Who may Sue or Defend.

Every person of full age and sound mind may prosecute or defend any action in any court, in person or by his solicitor or attorney. (P. L. 1903, p. 539; 3 C. S. 4055; Rev., sec. 15; R. S. 929, sec. 1; 1799, sec. 1.)

Pleading in Suits by Insane Persons.—If a complainant appear upon the face of the bill filed to be a lunatic, and no next friend or committee named in the bill, the objection may be raised by motion to take the bill from the files. Norcom *v.* Rogers, 16 E. 484. A bill exhibited by a person of unsound mind should be taken from the files. Id. The bill in this cause having been filed by a lunatic, and the defendant having demurred, leave was given to withdraw the demurrer, and bill ordered to be taken from the files. Id.

Parties to Suits by and Against Insane Persons.—A lunatic having an interest in the case must be made a party. Harrison *v.* Rowan, 4 Wash. C. C. 202, 207; Fed. Cas. No. 6, 143. The guardian of a party defendant, declared a lunatic after the bill was filed, should be made a party to the suit. Search *v.* Search, 26 E. 110. A mere stranger to an alleged idiot cannot appear for her. Rorback *v.* Van Blarcom, 20 E. 461.

Appearance for Insane Persons.—Idiots and lunatics must sue by their guardians. Dorsheimer *v.* Roorbak, 18 E. 438. A bill filed in the name of an idiot by a volunteer, styling himself her next friend, not appointed upon inquisition found nor authorized by the court to file the bill as her next friend, will be dismissed on motion of the defendant. Id. An idiot must appear before the court in person. A lunatic may appear by attorney. Covenhoven's Case, 1 E. 19. A lunatic can sue only by his committee or guardian, who is responsible for the conduct of the suit, or by the attorney-general or next friend, where the interests of the guardian clash with those of the lunatic. Norcom *v.* Rogers, 16 E. 484.

Practice in Suit Against Insane Persons.—The common law rule that lunatics should defend in the same manner as other persons has been adopted in this state. The proper practice is by rule of court for the appointment of an attorney, after notifying the guardian of such application. In such case the court will appoint the attorney. Van Horn *v.* Hann, 39 L. 207. In

attachment against the estate of a lunatic he need not appear and be defended by his next friend. Weber *v.* Weitling, 18 E. 441. Where the attorney of the lunatic ceases to act, the notice to substitute another attorney must be served upon his committee. Den *v.* Folger, 20 L. 115.

CITED.—In re Raisch, 90 A. 12; 83 E. 82; In re Harris, 95 A. 761. A party litigant can have only one solicitor of record, who may be an individual practitioner or a firm of practitioners, who, as such, are regarded as a single entity. In re Stewart (Ch.), 95 A. 739.

17. Litigants must Prosecute, Etc., Personally or by Licensed Attorney: Exception of Infant.

No person except in his own case or in the case of an infant shall be permitted to appear and prosecute or defend any action in any court, unless he is a licensed attorney-at-law of the supreme court of this state, who shall be under the direction of the court in which he acts. (P. L. 1903, p. 539; 3 C. S. 4055; Rev., sec. 16; R. S. 929, sec. 2; 1799, sec. 2; 1899, p. 423.)

Any person or persons engaging in the practice of law in this state without being duly licensed therefor as provided by law, shall be guilty of a misdemeanor. P. L. 1913, p. 358.

CITED.—In re Raisch, 90 A. 12; 83 E. 82; In re Harris, 95 A. 761; In re Sewart, 95 A. 739; supra, sec. 16.

18. Guardian, Etc., of Infant may Sue and Defend: Action not to be Stayed until Majority.

If an infant is entitled to an action or if an action is brought against him, his guardian duly appointed or specially admitted for that purpose shall be permitted to prosecute or defend; but in no case shall the action be stayed until the infant arrives at full age. (P. L. 1903, p. 539; 3 C. S. 4055; Rev., sec. 18; R. S. 929, sec. 5; 1799, sec. 5.)

RIGHTS OF PARENTS.—A father has the first and best right to act as the next friend of his infant, in any litigation necessary for the protection of his child's rights. Rue *v.* Meirs, 43 E. 377; 12 A. 369.

IV. PARTIES.

1. In General.

See post.

All persons claiming an interest in subject of action may be plaintiffs ..... P. A. 1912, sec. 4; § 263.

Executors, etc., beneficiary of contract may sue or be sued..... P. A. 1912, sec. 7; § 267.

Personal representatives may be plaintiffs ..... P. A. 1912, R. 6; S. C. R. 1913, R. 16, § 300.

Assignor and assignee may join as plaintiffs ..... P. A. 1912, R. 9; S. C. R. 1913, R. 19, § 303.

Assignee pending suit may join as plaintiff ..... P. A. 1912, R. 10; S. C. R. 1913, R. 20, § 304.

Plaintiff declining to join may be made defendant ..... P. A. 1912, sec. 5; § 264.

Personal representatives may be joined as defendants ..... P. A. 1912, R. 6; S. C. R. 1913, R. 16, § 300.

Persons severally liable may be joined as defendants..... P. A. 1912, R. 7; S. C. R. 1913, R. 17, § 301.

Parties in the alternative..... P. A. 1912, R. 8; S. C. R. 1913, R. 18, § 302.

All persons claiming an interest in the subject of the action may be joined as defendants..... P. A. 1912, sec. 6; §§ 265, 266.

Court may determine controversy between any parties..... P. A. 1912, sec. 8; § 268.

Non-joinder or mis-joinder of parties ..... P. A. 1912, sec. 9; § 269.

Change of parties does not affect security ..... P. A. 1912, sec. 10; § 270.

Judgment for or against several parties ..... P. A. 1912, sec. 20; § 280.

Separate trials between parties... P. A. 1912, sec. 12, R. 12; 1913, R. 108, § 306.

Third parties ..... P. A. 1912, sec. 12, R. 46; 1913, R. 65, § 340.

Joinder of causes of action.....P. A. 1912, secs. 6, 11, R. 14; 1913, R. 21, § 308.
Objection for mis-joinder of.....P. A. 1912, R. 15; 1913, R. 22, § 309.
Shall not deprive defendant of any lawful defense.....S. C. R. 1913, R. 23, § 309a.

19. Choses in Action Arising on Contract Assignable: Suit by Assignees: Set-Offs: Assignments of Sealed Instruments.

All contracts for the sale and conveyance of lands and all judgments and decrees recovered in any court of this or any other state or of the United States, or of any territory of the United States, or of the District of Columbia, and all choses in action arising on contract shall be assignable at law and the assignee may sue thereon in his own name, but in such action there shall be allowed all set-offs, discounts and defenses not only against the plaintiff but against the assignor before notice of such assignment shall be given to the defendant; the assignment of a sealed instrument by writing not under seal shall be as valid as if under seal. (P. L. 1903, p. 540; 3 C. S. 4056; Rev., secs. 19, 20; R. S. 801, sec. 2. "An act concerning obligations and to enable mutual dealers to discount," passed 1797, sec. 2; Rev. 1820, 305; Pat. 254; 1863, p. 267, sec. 1; 1867, p. 486; 1890, p. 24.)

See notes under section 102, post.
See following section of Practice Act 1912, post.
P. L. 1912, p. 386, rule 9; S. C. R. 1913, rule 19; post, § 303.
P. L. 1912, p. 386, rule 10; S. C. R. 1913, rule 20; post, § 304.
P. L. 1912, p. 386, rule 8; S. C. R. 1913, rule 18; post, § 302.
P. L. 1912, p. 378, sec. 4; post, § 263.
P. L. 1912, p. 378, sec. 5; post, § 264.
P. L. 1912, p. 378, sec. 6; post, §§ 265, 266.

HISTORICAL.—The history of assignments of choses in action under the statutes of this state and antecedent thereto discussed. Sullivan *v.* Visconti, 68 L. 543; 53 A. 598.

RETROACTIVE OPERATION.—The statute applies to judgments previously recorded. Clark *v.* Willet, 59 L. 308; 35 A. 1052; Willett *v.* Clark, 61 L. 696; 44 A. 515. The act is not retroactive. Wooley *v.* Moore, 61 L. 16; 38 A. 758.

CONSTRUCTION AND OPERATION IN GENERAL.—The statute formerly included only obligations by which one party binds himself to pay money to another, and did not apply to contracts of indemnity cases and other agreements where either party was bound to perform other distinct and independent acts, or where the payment of money by one party depended upon the performance of some act by the other. Ruckman *v.* Outwater, 28 L. 572; Richardson *v.* Beaumont; 20 L. 578.

This act of 1890 does not authorize a person to whom a judgment has previously been assigned to bring suit upon the judgment in his own name. Lydecker *v.* Babcock, 55 L. 394; 26 A. 925. The nineteenth section of the Practice Act, as amended by P. L. 1890, p. 24, sec. 1, superseded by this act, did not make assignable a part of a contract, chose in action or other matter covered by its terms, so that the assignee of such part may sue thereon in his own name at law, at least without the consent of the other contracting party. Otis *v.* Adams, 56 L. 38; 27 A. 1092.

DISTINCTION BETWEEN LEGAL AND EQUITABLE ASSIGNMENTS.—Whether there exist any distinction between a legal and equitable assignment of a chose in action, quære. Sullivan *v.* Visconti, 68 L. 543; 53 A. 598.

SUFFICIENCY OF ASSIGNMENT IN GENERAL.—The form of the assignment is immaterial. It may be by writing under seal, by writing without seal, or by mere delivery for value. Winfield *v.* Hudson, 28 L. 255, 264, Green, C. J. An assignment of a bond or other specialty need not be by deed or in writing, in order to enable the assignee to sue in his own name. Allen *v.* Pancoast, 20 L. 68. Where an instrument is made assignable by statute, but not in any specified mode, and by the terms of the contract it is made assignable by indorsement, the holder may in that mode acquire title to the instrument, and a right to maintain an action thereon in his own name. Winfield *v.* Hudson, 28 L. 255. An assignment does not necessarily imply or require writing. Hutchings *v.* Low, 13 L. 247, Drake, J. Securities may be transferred under the provisions of a trust deed, by delivery. Vreeland *v.* Van Horn, 17 E. 137. It is not necessary that the assignment of a bond, when made under seal, should show any consideration. Gregory *v.* Freeman, 22 L. 405.

NOT NECESSARY TO SUE IN ASSIGNEE'S NAME.—The statute does not require that suit be in the name of the assignee, and where the plaintiff institutes suit against defendant, and, pending the suit, assigned his right of action, his assignee was entitled to continue the suit in plaintiff's name, though the suit was not commenced for the benefit of any person other than the plaintiff. Elsberg *v.* Honeck, 76 L. 181; 68 A. 1090.

RIGHT OF ASSIGNEE UNDER WAGERING AGREEMENT.—The right to recover money deposited in pursuance of a wagering agreement upon a rise or fall in the price of stocks is a chose in action arising on an implied contract, and therefore is assignable at law, so that the assignee may sue for it in his own name. Van Pelt *v.* Schauble, 68 L. 638; 54 A. 437.

RIGHTS AND LIABILITIES OF ASSIGNEE.—If the holder of a bond assign it for more than is due upon it, he is liable to the assignee for the deficiency. Decker *v.* Adams, 28 L. 511. Assignment of a bond implies no guarantee. Garretsie *v.* Van Ness, 2 L. 20; Davenport *v.* Barnes, 2 L. 211; Dilts *v.* Trimmer, 3 L. 951. The assignee takes it subject to all equities which existed at the time of the assignment between the original parties. Barrow *v.* Bispham, 11 L. 110; Shannon *v.* Marselis, 1 E. 413; Van Hook *v.* Somerville Co., 5 E. 137, 633; Cornish *v.* Bryan, 10 E. 146.

EVIDENCE OF CONSIDERATION.—An assignment of a bond and mortgage duly executed is prima facie evidence that the consideration was paid. Westervelt *v.* Scott, 11 E. 80.

PLACE OF PAYMENT.—An agreement by the assignee of a bond and mortgage that he would call at the office of the obligor for the interest does not make that office ever after that the only legal place of payment, and is not in form or legal effect an agreement, so as to affect the bond. McCotter *v.* DeGroot, 19 E. 72; reversed, 19 E. 531.

ASSIGNMENT OF INSURANCE POLICY.—The assignee of the assured in a policy of fire insurance may sue thereon in his own name. Marts *v.* Insurance Co., 44 L. 478. The assignee's suit must be of the same style as that of the assured should have been if there had been no assignment. Id.

ASSIGNMENT OF BOND.—A bond with a warrant to confess judgment may be assigned. Reed *v.* Bainbridge, 4 L. 351. Bond for prison limits cannot be assigned before breach. Tunison *v.* Cramer, 5 L. 498. One of several obligees in a bond may not assign it, nor may he do so, in the name of himself and co-obligees, unless specially authorized to do so. Stevens *v.* Bowers, 16 L. 16; Terril *v.* Craig, April, 1825.

EFFECT OF ASSIGNMENT OF CHECK.—A check is not an assignment by the drawer to the payee of a debt or chose in action

under this section, which will authorize the holder or assignee to sue in his own name, therefore the payee of a check has no right of action for its dishonor against the banker on whom it is drawn. Creveling *v.* Bank, 46 L. 259.

RIGHT OF ASSIGNEE TO SUE ON GUARANTY.—The assignee may maintain an action on a guaranty in his own name, when the assignment was made prior to the amendment of the Practice Act by the act of March 4th, 1890, by the original terms of said section 19. Wooley *v.* Moore, 61 L. 16; 38 A. 758.

ASSIGNMENT OF PART OF CHOSE OF ACTION.—This section does not extend to a case where a part of a chose in action is attempted to be assigned. Sternberg & Co. *v.* L. R. R. Co., 78 L. 277; 73 A. 39.

PARTNERSHIP PROPERTY.—One partner may assign a bond given to the partnership. Galway *v.* Fullerton, 17 E. 389. A chose in action accruing to a partnership from a transaction in the ordinary course of its business may be transferred by a single member of the firm, and the assignee may sue thereon in his own name. Geril *v.* Manufacturing Co., 57 L. 432; 31 A. 401; 30 L. R. A. 61; 51 Am. St. Rep. 611. Two partners purchased a business from the defendant and obtained from him a covenant "to refrain from engaging in or carrying on a beer bottling business within the limits of the city of Newark for a period of one year, and also not to assist anyone else so engaged in said beer bottling business for said period in said city." After the delivery of the above covenant, the plaintiff's partner retired from the firm and sold and transferred "my entire interest in the beer bottling business, * * * including my right and title to the chattels, stock, license and whatever right of tenance I may possess." Held, that, when plaintiff's partner assigned to him his entire interest in the business, he parted with his interest in the covenant, and that the instrument of transfer to the plaintiff was a sufficient assignment of the covenant to enable the assignee by virtue of this statute to sue in his own name without joining the other covenantee. Trowbridge *v.* Denning, 77 A. 1068.

A claim by a firm contracting to sell goods for damages for the buyer's refusal to receive the goods is a chose in action arising on contract, and may be transferred by a single member of the firm. Geril *v.* Manufacturing Co., 57 L. 432; 31 A. 401; 30 L. R. A. 61; 51 Am. St. Rep. 611.

SUIT FOR CONVERSION.—A declaration in trover alleged that chattels were mortgaged to a trustee in possession, who lost, and defendants found, them; that the Court of Chancery discharged such trustee and appointed the plaintiff instead and directed assignment to him of the mortgage, which was assigned accord-

ingly; and that, before the plaintiff succeeded to the trust, defendants converted and disposed of the chattels to their own use. Held, on demurrer, that the action could not be maintained. Gaskill *v.* Barbour, 62 L. 530; 41 A. 700.

TESTIMONY AGAINST DECEDENT.—The right to exclude the testimony of the assignor of a claim against a deceased person in a suit by the assignee against the representative of the deceased is not a defense preserved to the defendant, under this section. Cullen *v.* Woolverton, 65 L. 279; 47 A. 626.

CITED.—King *v.* Holbrook, 58 L. 369; 33 A. 965; Miller *v.* Insurance Co., 71 L. 175; 58 A. 98; Emley *v.* Perrine, 58 L. 472; 33 A. 951; Turner *v.* Wells, 64 L. 269; 45 A. 641; Tufts *v.* Bank, 59 L. 380; 35 A. 792; S. E. Crowley Co. *v.* Myers, 69 L. 245; 55 A. 305; Naylor *v.* Smith, 63 L. 596; 44 A. 649; Hudson Milling Co. *v.* Higgins, 88 A. 1079; 85 L. 268. See Weitz *v.* Quigley, 97 A. 254, syl. 3.

20. Suits by Assignees where Assignor is Dead: Defenses.

The assignee for a valuable consideration of any choses in action, if the assignor be dead, may sue for and recover the same in his own name; and the defendant in any such action may set up any defense thereto arising before he shall have received notice of such assignment in the same manner and with like effect as if the assignor had been living and the action had been brought in his name. (P. L. 1903, p. 540; 3 C. S. 4057; Rev., sec. 21; 1855, sec. 22.)

HISTORY OF LEGISLATION.—See Sullivan *v.* Visconti, 68 L. 543; 53 A. 598.

CONSTRUCTION AND OPERATION IN GENERAL.—On an express covenant as to the quantity of land conveyed, an assignee may sue after the death of the assignor, by showing that she is an assignee for valuable consideration. Andrews *v.* Rue, 34 L. 402. It seems that the assignment must be in writing, and also that the assignor be dead, or the suit must be in the name of the original promisee. Morrow *v.* Vernon, 35 L. 490, 492.

CITED.—Gaskill *v.* Barbour, 62 L. 530; 41 A. 700.

21. Actions by Husband and Wife for Injuries. Abatement.

In an action by a husband and wife for any injury done to the wife in respect of which she is necessarily joined as co-plaintiff, the husband may add thereto claims in his own right arising ex delicto, and separate actions brought in respect to such claims may by order of the court or a judge be consolidated; provided, in the case of death of either plaintiff, such action shall abate only so far as relates to the cause or causes of action, if any, which do not survive. (P. L. 1903, p. 540; 3 C. S. 4057; Rev., sec. 22; 1855, sec. 13.)

HISTORICAL.—The provisions of this section were taken from section 40 of the English Common Law Procedure act of 1852, with the exception that the English act permits a husband to add to the joint action claims in his own right generally, but this section limits the claim the husband may add to the joint action to those arising ex delicto. Both acts contain a provision that separate actions brought with respect to such claims (that is, claims of husband and wife, in the right of the wife, and claims of the husband, in his own right) might be consolidated. Traction Co. *v.* Whelan, 60 L. 154; 37 A. 1106.

SECTION NOT REPEALED.—The act of 1906 (P. L. 525) does not repeal or supersede this section, and it is still permissible for a married woman to sue jointly with her husband in actions ex delicto as at common law, and to add claims by the husband in his own right as permitted by that section. Davis *v.* Corporation, 77 L. 275; 72 A. 82.

CONTRIBUTORY NEGLIGENCE OF HUSBAND.—In an action by husband and wife for personal injury to the wife, his contributory negligence will defeat the suit. Railroad Co. *v.* Goodenough, 55 L. 577; 28 A. 3; 22 L. R. A. 460.

NATURE OF HUSBAND'S INTEREST.—In all instances except where the feme covert is living in a state of separation from her husband, he retains his common law power of control over and interest in the action. The husband has not a mere power to sue for the wife, but he has the power coupled with an interest in the suit. Railroad Co. *v.* Goodenough, 55 L. 577; 28 A. 3; 22 L. R. A. 460..

NO ABATEMENT OF SUIT BY HUSBAND'S DEATH.—Before March 25th, 1852, an action brought by a husband against an administrator to recover his wife's share, would not be abated

by the death of the husband after verdict and before judgment. Teneick *v.* Flagg, 29 L. 25.

DAMAGES RECOVERABLE BY THE WIFE.—A married woman can recover damages only for her personal injury and suffering. The loss of income from her incapacity, and the expenses of her cure, must be recovered by the husband. Klein *v.* Jewett, 26 E. 474; Id., 27 E. 550.

PLEADING.—Under this section a count for personal injuries to the husband and his property may be joined with the counts for personal injuries to the wife and for consequential damages to the husband therefrom. Ackerman *v.* Railway Co., 65 L. 369; 47 A. 585.

In actions brought by husband and wife for injury done to the wife, if the husband desire to add thereto claims in his own right arising ex delicto, the better practice is to present his claim by a separate count, designating the damages sought by him. The verdict should assess the damages on each claim, and the judgment should distinguish them accordingly. Traction Co. *v.* Whelan, 60 L. 154; 37 A. 1106.

DEFECTIVE VERDICT.—A jury returned a single sum as damages when the declaration contained a claim by the husband in his own right added to a claim of the husband and wife for an injury to the wife. Held, that, because the sum found cannot be applied to either claim or apportioned between them, the court, on application of the plaintiff, on the return of the postea, will award a writ of venire de novo. Spencer *v.* Haines, 73 L. 325; 62 A. 1009.

Where a husband and wife brought an action for an assault on the wife, and the husband added a count for injury in his own right, and the jury assessed the damages generally in favor of both plaintiffs, the judgment should be set aside, since, the joinder being by statutory authority, it is necessary the damages should be assessed separately. Ruebeck *v.* Hallinger, 47 A. 56.

APPLICATION.—Applies to suit against townships. South *v.* West Windsor Township, 82 L. 262.

CITED.—Karnuff *v.* Kelch, 69 L. 499; 55 A. 163; Weinberger *v.* Agricultural Ins. Co., 81 L. 127; 79 A. 542.

22. Action not to Abate by Marriage.

No action wherein a female is a party shall abate by reason of her marriage after suit brought; but the action shall proceed to final judgment in the name of such female as plaintiff or defendant, as the case may be notwithstanding such marriage.

(P. L. 1903, p. 540; 3 C. S. 4058; Rev., sec. 23; 1869, p. 1152.)

23. When Married Woman may Sue or be Sued Without Joindure of Husband.

A married woman may sue, or be sued, without joining her husband, in any case whatsoever in which he would be an unnecessary party if he were not her husband. (P. L. 1912, p. 416.)

Section 23 of act of 1903, p. 541; 3 C. S. 4058 (Rev., § 24; 1867, p. 959), was repealed by P. L. 1912, p. 384; by its provisions a married woman living separate from her husband might sue in some cases as if she were a feme sole. Its operation was limited. See Crane *v.* Ketchem, 84 A. 1052; 83 L. 327; Sims *v.* Sims, 76 A. 1063; 79 L. 577; Stephens *v.* Schmidt, 76 A. 332; Hodge *v.* Wetzler, 69 L. 490; 55 A. 49.

23a. Married Woman may Sue Without Joindure of Husband in all Tort Actions.

Any married woman may maintain an action in her own name without joining her husband therein for all torts committed against her, or her separate property, in the same manner as she lawfully might if a feme sole; provided, however, that the husband of such married woman may join in such action his claim for any damages he may have sustained in connection with or growing out of the injury for which his wife brings her action, but his failure to join shall not prevent his right to maintain a separate action therefor; provided further, that this act shall not be so construed as to interfere with or take away any right of action at law or in equity now provided for the torts above mentioned. (P. L. 1906, p. 525, as amended P. L. 1909, p. 210; 3 C. S. 3236, sec. 12a.)

CONSTRUCTION AND OPERATION IN GENERAL.—A married woman could not, at common law, maintain an action for enticing away the husband and for the alienation of his affections;

nor is such a right of action conferred by this act. Hodges *v.* Wetzler, 69 L. 490; 55 A. 49.

The act does not repeal or supersede section 21 of the Practice Act (P. L. 1903, p. 540), and it is still permissible for a married woman to sue jointly with her husband in actions ex delicto as at common law, and to add claims by the husband in his own right as permitted by that section. Davis *v.* Corporation. 77 L. 275; 72 A. 82.

This act held to confer upon a married woman the right to maintain an action in her own name, and without joining her husband therein, to recover damages for a tort committed against her. Sims *v.* Sims, 79 L. 577; 76 A. 1063; 29 L. R. A. (N. S.) 842; reversing, 77 L. 251; 72 A. 424.

The alienation of the affections of the husband of a married woman is a tort committed against her, to recover damages for which she may maintain an action in her own name, and without joining her husband therein. Sims *v.* Sims, 79 L. 577; 76 A. 1063; 29 L. R. A. (N. S.) 842; reversing, 77 L. 251; 72 A. 424.

The release of the husband of all damages to himself and wife, which are the subject of the action of the wife, is not admissible as a bar to her suit. A husband cannot control the wife in any degree in the enforcement of her claim for damages of tort against her person or property, and therefore the husband cannot release her claim, for that would most effectively control its enforcement. Stephens *v.* Schmidt, 76 A. 332.

OPERATION OF PROVISO.—The proviso only saves to the husband and wife their joint right of action for any tort committed against the wife previous to the enactment, and is therefore not repugnant to the preceding part of the section. Long *v.* Railroad Co., 149 Fed. 598.

Under this section, as construed in connection with section 1, where an action is brought after the passage of the act for a tort committed against a married woman, her husband is an improper party thereto. Long *v.* Railroad Co., 149 Fed. 598.

IMPROPER JOINDER.—After a demurrer to a joint declaration by husband and wife for an injury to the wife has been sustained on the ground of an improper joinder of parties plaintiff and actions, the court may separate the causes and order that they proceed as separate causes thereafter. Davis *v.* Corporation, 77 L. 275; 72 A. 82.

The filing of a demurrer in such a case operates as a general appearance to both counts of the declaration, and the plaintiffs may, upon order by the court, proceed separately and file separate declarations without the issuance of new process. Davis *v.* Corporation, 77 L. 275; 72 A. 82.

The declaration by a husband and wife, jointly, to recover damages occasioned by defendant's negligence in two counts, claiming damages for injuries to the husband's automobile, for dislocation of the wife's shoulder and other personal injuries to her, for deprivation of the husband and wife's society and services, and for expenditures made by him in effecting the wife's cure, containing a single ad damnum clause jointly claiming damages to the amount of $3,000, was fatally defective, as claiming joint damages for two separate causes of action. Bracket *v.* Fallon, 76 A. 558.

CITED.—Horandt *v.* Railroad Co., 78 L. 190; 73 A. 93.

23b. Action in Tort may be Prosecuted Separately by Married Woman.

Any action brought in accordance with the provisions of this act may be prosecuted by such married woman separately in her own name, and the non-joinder of her husband shall not be pleaded in such action. (P. L. 1906, p. 525, 3 C. S. 3237, sec. 12b.)

24. Executors or Administrators Considered as One: Judgment and Execution.

In actions against several executors or administrators all executors or administrators representing the testator or intestate shall be considered as one person and such of the executors or administrators as the sheriff shall return served shall answer to the plaintiff; and in case judgment shall pass for the plaintiff he shall have his judgment and execution against all the executors or administrators named in the writ to be made of the goods and chattels of the deceased. (P. L. 1903, p. 541; 3 C. S. 4058; Rev., sec. 25; R. S. 350, sec. 6; "Act concerning executors, administrators," etc., passed 1795, sec. 6; Rev. 1820, 174; Pat. 153.)

SCOPE AND OPERATION IN GENERAL.—When executors have all taken out letters, they are co-executors of the will, and must sue and be sued jointly, in the same manner as if they had all

proved the will at the same time and before the same officer. Coursen's Case, 4 E. 408. In actions against executors, only those who have proved the will need be joined. Cole *v.* Smalley, 25 L. 374, 380.

25. Qualified Executors to Act.

The executor or executors who qualify may maintain an action without joining any executor who has renounced or failed to qualify. (P. L. 1903, p. 541; 3 C. S. 4058; Rev., sec. 26; 1871, p. 59.)

See P. L. 1912, p. 385, rule 6; S. C. R. 1913, rule 16, sec. 300, post.

26. Substitution of Assignee or Trustee.

If a plaintiff shall become bankrupt or make an assignment for the equal benefit of his creditors, the trustee in bankruptcy or the assignee may by order of the court or judge be substituted as plaintiff and the action shall be continued in his name; provided, the defendant shall be entitled to the same defenses and set-offs as if the action had been continued in the name of the original plaintiff. (P. L. 1903, p. 541; 3 C. S. 4059; Rev., sec. 27; Rev. of 1874.)

27. Parties to Written Instruments: Initials: Contraction of Name: how Designated.

In actions upon bills of exchange, promissory notes or other written instruments any of the parties to which are designated therein by the initial letter or letters or some contraction of the Christian or first name, it shall be sufficient in every affidavit to hold to bail and in the process, declaration and other proceedings to designate such party by the same initial letter or letters or contraction. (P. L. 1903, p. 541; 3 C. S. 4059; Rev., sec. 28; 1870, p. 59.)

WHEN FULL NAME NECESSARY.—Initials cannot be used for Christian names of parties to actions, except in cases of parties described by initial letters in bills of exchange, promissory notes or other written instruments. Elberson *v.* Richards, 42 L. 69. The omission to give the full name is fatal, except in actions mentioned in this section. Powder Co. *v.* Leon, 42 L. 540. See Kearsley *v.* Gibbs, 44 L. 169; Schaffer *v.* Levenson Wrecking Co., 81 A. 434; 82 L. 61.

28. Third Person may Sue on Contract for his Benefit.

Any person for whose benefit a contract is made, whether such contract be under seal or not, may maintain an action thereon in any court and may use the same as matter of defense in any action brought against him notwithstanding the consideration of such contract did not move from him. (P. L. 1903, p. 541; 3 C. S. 4059; 1898, p. 481.)

See sec. 7, P. A. 1912, p. 378, sec. 267.

CONSTRUCTION AND OPERATION IN GENERAL.—Where a contract is made between two parties for the benefit of a third, the beneficiary may either sue in his own name or bring an action in the name of the nominal party for his use. Holt *v.* Insurance Co., 76 L. 585; 72 A. 301; 21 L. R. A. (N. S.) 691.

Any person for whose benefit a contract is made may maintain an action thereon either at law or in equity. Edwards *v.* Association, 68 A. 800.

After plaintiff recovered judgment, his judgment debtor transferred her interest in a factory to defendant company under sealed agreement by defendant company to pay any claim of plaintiff for which suit had already been brought. Held, that plaintiff had a right of action against defendant company under the contract. Chambers *v.* Pickling Co., 75 A. 159.

Where an injury to the plaintiff arises out of the failure of the defendant to perform a contract with a third person, the defendant, in the absence of positive duty apart from the duty to perform the contract, is not liable to the plaintiff, where the duty of a third person intervenes between the neglect of the defendant and the injury to the plaintiff. Styles *v.* Long Co., 70 L. 301; 57 A. 448.

Where a contract is made by a public corporation for the construction of a public work, and incidentally contains stipulations intended for the safety of the public, an individual, who sustains personal injuries by reason of the non-performance of such stipu-

lations, does not bear such a relation to the contractor as will support an action of tort against the latter, based upon the mere violation of the contractual duty. The injured party is remitted to his action for breach of such duty (if any) as may be imposed upon the defendant aside from the contract. Styles *v.* Long Co., 67 L. 413; 51 A. 710.

The rule with respect to simple contracts extends to contracts under seal, so as to enable a third person for whose benefit a contract is made to maintain an action thereon in his own name, although the consideration did not move from him. This rule is limited to those for whose benefit the contract was made, and is not extended to third parties who only indirectly and incidentally would be advantaged by its performance. Id.

In order that one not a party to a contract may maintain an action thereon, it must appear that the contract is made for him. It is not sufficient that he may be benefited by its performance. Styles *v.* Long Co., 70 L. 301; 57 A. 448.

Broker may maintain an action for commission on a provision in a contract not executed by him if provision was made for his benefit. Tapscott *v.* McVey, 81 A. 348; 82 L. 35; affirmed, 85 A. 344; 83 L. 747.

RIGHTS OF STOCKHOLDERS.—The minutes of a corporation recited an offer to a board of directors by one of its members to purchase its real estate, and also stated the terms of payment. The offer was accepted by resolution, but before the deed was delivered the purchaser was informed of the terms adopted by the directors, which were that the purchaser should pay all the debts of the company and to the stockholders the par value of their stock, to which the purchaser agreed and promised to pay accordingly, and for that consideration was given, and accepted, a deed in which the consideration stated equaled the debts and stock. Held, that, when the deed was accepted the purchaser became liable to each stockholder to pay the value of his stock as on a contract made for the benefit of each stockholder, within this section. Fleming *v.* Reed, 77 L. 563; 72 A. 299.

CONTROL OF STREET RAILROADS.—A writ of mandamus should not issue at the instance of a municipal corporation to compel a street railway company to give transfers to its passengers within the municipality, when the obligation of the company to do so arises wholly from its assent to certain municipal ordinances, which of themselves have no legislative force. Newark *v.* Railway Co., 73 L. 265; 62 A. 1003.

CITED.—Alpern *v.* Klein, 76 L. 53; 68 A. 799; Bank *v.* Weidinger, 73 L. 433; 64 A. 179; Thomas Maddock Sons Co. *v.* Biardot, 81 E. 233; 87 A. 66; Rugarber *v.* Potter, 90 A. 1020; 86 L. 177.

2. Actions on Bills and Notes.

29. Action on Bills and Notes.

(P. L. 1903, p. 542; 3 C. S. 4060; Rev., sec. 29; 1855, sec. 14.)

REPEALED.—P. L. 1912, p. 384, sec. 34, § 294, post. See secs. 4, 5, 6, 7, P. A. 1912; S. C. R. 1913, R. 17; secs., post, 263, 264, 265, 266, 267.

REPEALED SECTION CITED.—Craft *v.* Smith, 35 L. 302; Lowry *v.* Tivy, 69 L. 94; 54 A. 521; Mackintosh *v.* Gibbs, 74 A. 708; 79 L. 40.

30. Form of Complaint on Bills and Notes.

(P. L. 1903, p. 542; 3 C. S. 4060; Rev., sec. 30; 1855, sec. 15.)

REPEALED.—P. L. 1912, p. 384, sec. 34, § 294, post.
See secs., post.
Rules (P. A. 1912) 17, 35, 36, 37.
S. C. R. 1913, rules 31, 51, 52, 53, §§ 311, 329, 330, 331.
Forms 6, 7, P. A. 1912, p. 401, post.

REPEALED SECTION CITED.—Polhemus *v.* Corporation, 74 L. 570; 67 A. 303; Schneider *v.* Muller, 81 A. 863; 82 L. 503. See Marine Trust Co. *v.* St. James Church, 85 L. 272; 88 A. 1075.

31. Judgment may be Given For or Against One or More of Several Plaintiffs or Defendants: Etc.

(P. L. 1903, p. 542; 3 C. S. 4060; Rev., sec. 13; 1855, sec. 16.)

REPEALED.—P. L. 1912, p. 384, sec. 34, sec 294, post. See P. A. 1912, sec. 20, post, § 280.

CITATIONS.—Martin *v.* Estates Co., 72 E. 416; 65 A. 881; Bank *v.* Hewitt, 59 L. 57; 34 A. 988; Potts *v.* Barlow, 18 L. J. 246; Saunders *v.* Express Co., 71 L. 270; 57 A. 899; 71 L. 520; 58 A. 1101; 136 Fed. 494; Edgeworth *v.* Wood, 58 L. 463; 33 A. 940; Provision Co. *v.* Express Co., 71 L. 523; 59 A. 10; Railroad *v.* Guarantors, 59 L. 328; 35 A. 796; Bank *v.* Association, 63 L. 5; 42 A. 761; Grand Lodge *v.* Germania, 56 E. 63; 38 A. 341; Mayer *v.* Association, 47 E. 520; 20 A. 492.

32. Verdict on Set-Offs: Ultimate Rights of Parties on Each Side to be Determined: Defendant to Have Affirmative Relief.

See P. L. 1912, p. 381, sec. 20, infra, § 280; also P. L. 1912, p. 379, sec. 12, post, § 272.

ORIGINAL SECTION.—P. L. 1903, p. 542; 3 C. S. 4061; Rev., § 32; 1855, § 17.

REPEALED.—P. L. 1912, p. 384, sec. 34, § 294.

33. Judgment may Pass Against any Party to Bill or Note.

See P. L. 1912, p. 381, sec. 20, post, § 280.

ORIGINAL SECTION.—P. L. 1903, p. 542; 3 C. S. 4061; Rev., § 34; 1855, § 19.

REPEALED.—P. L. 1912, p. 384, sec. 34, § 294.

CITATION BEARING ON ORIGINAL SECTION.—Bank *v.* Hewitt, 59 L. 57; 34 A. 988.

34. Application by Party Sued Jointly for Relief to Which He Would be Entitled if Sued Separately.

Any party to a bill or note who shall be sued with any other party thereto may apply to the court or a judge for any order or relief to which he would be entitled if he had been separately sued, and the court or a judge may grant him such order or relief as would be granted to such party if separately sued; and the rights and responsibilities of the several parties to a bill or note as between themselves shall remain as heretofore, saving only the rights of the plaintiff so far as they may have been determined by the judgment. (P. L. 1903, p. 543; 3 C. S. 4061; Rev., secs. 33, 35; 1855, secs. 18, 20.)

35. Satisfaction of Execution from Property of Parties Primarily Liable: Order of Liability: Payment by Defendant Secondarily Liable as Satisfaction.

If an execution against goods or against goods and lands shall issue in any such action, the sheriff or other officer after making a levy upon the prop-

erty liable to the execution shall make the money out of the property of the defendant or defendants primarily liable as between themselves for its payment according to the terms of the bill or note, if it can be done, before selling the property of any person secondarily liable; and for the information of such officer, the plaintiff shall indorse on the execution the order in which the defendants according to the terms of the bill or note are liable as between themselves for its payment; and if such indorsement be omitted or be untruly made, the court or a judge shall set aside the execution as irregular; if the judgment be paid by a defendant secondarily liable, it shall not be considered satisfied as against any defendant liable over on the bill or note to the defendant making such payment, but he shall have on application to the court or a judge on notice to the other parties to the judgment and upon terms, the full benefit and control of such judgment for the purpose of compelling repayment from any defendant liable to him for such repayment, and on such application the court or a judge may order an issue to try the question in controversy. (P. L. 1903, p. 543; 3 C. S. 4061; Rev., sec. 36; 1855, sec. 21.)

See P. L. 1912, p. 381, sec. 20, post.

JUDGMENT ON NOTE.—A separate judgment entered against the maker of a note is security in the hands of the judgment creditor for the debt due by the maker and indorser, and the latter on paying a judgment entered against him for the amount of the note, is entitled to an assignment of the judgment against the maker. McKenna *v.* Corcoran, 70 E. 627; 61 A. 1026.

CONTROL OF JUDGMENT.—Upon application by a co-defendant for control of a judgment paid by him, whereon he was secondarily liable under this section, it was ordered, on disputed facts of indebtedness, that he have the full benefit and control of the judgment and execution, with stay of same after levy, and that an issue should be made and joined to try the question in controversy between the defendants. Durand *v.* Trusdell, 44 L. 597. See Railroad Co. *v.* Iron Co., 38 E. 153.

CITED.—Ludlow *v.* Strong, 53 E. 326; 31 A. 409.

3. Objection for Nonjoinder or Misjoinder.

36. No Action shall be Defeated by the Nonjoinder or Misjoinder of Parties.

(P. L. 1903, p. 544; 3 C. S. 4062; Rev., sec. 37; 1855, sec. 9.)

REPEALED.—P. L. 1912, p. 384, sec. 34, post, sec. 294.

See P. L. 1912, p. 379, sec. 9, post, sec. 269; Baldauf *v.* Nathan Russell, Inc., 96 A. 96.

CITATIONS.—King *v.* Holbrook, 58 L. 369; 33 A. 665; Bouvier *v.* Railroad Co., 67 L. 281; 51 A. 781; 60 L. R. A. 750; Karnuff *v.* Kelch, 69 L. 499; 55 A. 163; Ricardo *v.* Pub. Co., 73 L. 143; 62 A. 301. For other cases, see 3 C. S. 4062, sec. 36, notes.

37. Objection to Joinder of too many Defendants.

See P. L. 1912, p. 389, rules 27, 28, 29; S. C. R. 1913, rules 41, 42, 43, post, §§ 321, 322, 323.

ORIGINAL SECTION.—P. L. 1903, p. 544; 3 C. S. 4063; Rev., § 38; 1855, § 10.

REPEALED by P. L. 1912, p. 384, sec. 34, § 294.

CITATION BEARING ON SCOPE OF ORIGINAL SECTION.—Lowry *v.* Tivy, 69 L. 94; 54 A. 521; Coles *v.* McKenna, 76 A. 344; 80 L. 48; Fairchild *v.* Llewellyn Realty Co., 82 A. 924; 82 L. 423. For other cases, see 3 C. S. 4063, sec. 37, notes.

38. Amendment of Writ and Declaration without Order on Plea in Abatement.

See P. L. 1912, p. 381, secs. 23, 24, post, §§ 283, 284.

ORIGINAL SECTION.—P. L. 1903, p. 545; 3 C. S. 4063; Rev., § 39; 1855, § 11.

REPEALED by P. L. 1912, p. 384, sec. 34, § 294.

CITATION BEARING ON SCOPE OF ORIGINAL SECTION.—Jordan *v.* Reed, 77 L. 584; 71 A. 280; Blessing *v.* McLinden, 81 L. 379; 79 A. 347, 349.

39. Plea in Abatement Abolished.

(P. L. 1903, p. 545; 3 C. S. 4064; Rev., sec. 40; 1855, sec. 12.)

REPEALED.—P. L. 1912, p. 384, sec. 34, post, sec. 294.

See P. L. 1912, p. 391, rule 38; S. C. R. 1913, rule 56, post, sec. 332; Baldauf *v.* Nathan Russell, Inc., 96 A. 96; Marine Trust Co. *v.* Church, 88 A. 1075; 85 L. 272.

4. Suit Against Unincorporated Organizations.

40. Suits Against Unincorporated Organizations by Recognized Name: Abatement.

Any unincorporated organization, consisting of seven or more persons and having a recognized name, may be sued by such name in any action affecting the common property, rights and liabilities of such organization; all process, pleadings and other papers in such action may be served on the president or any other officer for the time being or the agent or manager or person in charge of the business of such organization; such action shall have the same force and effect as regards the common property, rights and liabilities of such organization as if it were prosecuted against all the members thereof; and such action shall not abate by reason of the death, resignation, removal or legal incapacity of any officer of such organization or by reason of any change in the membership thereof. (P. L. 1903, p. 545; 3 C. S. 4064; 1885, p. 26; 1890, p. 353.)

Under this act an unincorporated association can be sued by its recognized name; but no provision having been enacted to authorize voluntary associations to prosecute actions by their adopted names, it is necessary that the members should sue in their individual names for any infringement of any alleged right of the society. Mayer *v.* Journeymen Stonecutters' Assn., 47 E. 519, 520; 20 A. 492. This section does not apply to a corporate entity empowered to sue and be sued in the name of designated officers. Edgewood *v.* Wood, 58 L. 463; 33 A. 940. As to manner in which summons should be served, see Camden, etc., R. R. Co. *v.* Guarantors, 59 L. 328; 35 A. 796. The provisions of this section are remedial and should receive a liberal construction.

The expression "in any action affecting the common property" should be construed to mean "in any action legally capable of affecting the common property," whether through execution or by establishing a debt which ought in equity to be paid out of the common property. Bank of Toronto *v.* Manufacturers' and Merchants' Fire Assn., 63 L. 5, 12; 42 A. 761. Service of process on an agent of the organization is sufficient, although such agent is not the general agent in charge of its whole business. Saunders *v.* Adams Express Co., 71 L. 270; 57 A. 899; 58 A. 1101; 71 L. 520.

41. Execution Against Unincorporated Associations.

If judgment shall pass against the defendant in such action, execution may issue thereon in the same manner that executions now issue upon judgments against corporations; and the sheriff or other officer may by virtue of such execution levy upon and expose to sale all the common property whether the same be held in the name of such organization or by the directors, stockholders or trustees thereof. (P. L. 1903, p. 546; 3 C. S. 4064; see sec. 40, ante.)

42. Individual Liability of Members of Association.

Nothing in this act contained shall prevent any person having a cause of action against any such organization, for which the members thereof or any of them are personally liable from proceeding against such members as heretofore; nor shall a judgment obtained against any such organization after execution issued thereon and returned in whole or in part unsatisfied, be a bar to an action to recover the residue thereof against such members as may be personally liable therefor; nor shall anything in this act give such organization any of the powers or liabilities of corporations except as herein set out. (P. L. 1903, p. 546; 3 C. S. 4064; see sec. 40, ante.)

5. When Defendant's Name is Unknown.

43. Designation by Fictitious Name: Amendment when True Name is Known.

If the plaintiff is ignorant of the name or part of the name of a defendant, he may designate such defendant in any process, pleading or other proceeding by a fictitious name or by as much of his name as is known, adding a description identifying or tending to identify him, and the person intended shall thereupon be considered as a defendant in the action and as sufficiently described for all purposes, including service of process; when the name or the remainder of the name of the person becomes known, an order shall be made by the court or a judge upon such notice and terms as the court or a judge shall prescribe, that the proceedings already taken shall be amended by the insertion of the true name in place of the fictitious name or part of the name, and all subsequent proceedings shall be taken under the true name. (P. L. 1903, p. 546; 3 C. S. 4064; 1891, p. 477.)

RIGHT TO AMEND.—Defendant was summoned before a justice's court by his proper surname, which was preceded by the initial letter of his Christian name. On the return day no regular appearance was entered, but his attorney appeared for him, and objected to the summons, and moved to set it aside, because, as he stated, the first or Christian name of the defendant was not inserted therein. The justice denied the motion, and thereupon amended the summons by inserting the proper Christian name of the defendant. It was held on review that the justice had power to amend. Abrahams *v.* Jacoby, 69 L. 178; 54 A. 525. Proceedings in attachment are statutory and amendment under this section cannot be made after appearance entered by defendant. Garrison *v.* Seckendorff, 74 A. 311, 312; 79 L. 203.

6. When Taxpayers may Intervene.

44. Suits by Taxpayers on Failure of Chosen Freeholder, Etc., to do so.

If the board of chosen freeholders of any county or the governing body of any township or municipality shall fail to prosecute any claim or demand of such county, township or municipality, any court in which any action on such claim or demand is cognizable or a judge may upon terms allow any taxpayer of such county, township or municipality (being also a resident therein) to institute and prosecute an action upon such claim or demand in the name of and on behalf of such county, township or municipality, if in the opinion of the court or judge the interests of said county, township or municipality would be promoted thereby. (P. L. 1903, p. 547; 3 C. S. 4064; 1880, p. 140.)

REQUISITE OF COMPLAINT.—Where a complaint in an action by a taxpayer on behalf of the board of freeholders of a county on the official bond of a county clerk failed to allege that authority had been conferred on him to sue, it was demurrable. Allen *v.* Humphrey, 74 L. 255; 65 A. 881; Green *v.* Pifer, 80 E. 288; 84 A. 194.

45. Intervention of Taxpayers in Certain Suits.

In any action by or against any county, township or municipality the court or a judge may upon terms allow any taxpayer of such county, township or municipality (being also a resident therein) to intervene in such action on behalf of said county, township or municipality and prosecute or defend the same in the name of such county, township or municipality, if in the opinion of the court or judge the interests of such county, township or municipality would be promoted thereby. (P. L. 1903, p. 547; 3 C. S. 4065; see sec. 44, ante.)

V. PROCESS.

1. Form and Return.

46. Courts Open on Week-Days for Return of Process.

Courts of law shall always (except on Sundays) be open for the return of all process in civil actions and for the service of writs of error, certiorari, and mandamus. (P. L. 1903, p. 547; 3 C. S. 4065; Rev., secs. 41, 42, 224; Rev. of 1874; 1855, p. 259; 1857, p. 296, sec. 13.) See S. C. R. 27, supra, sec. 4.

SUMMONS ISSUED ON HOLIDAY.—A summons will not be quashed nor will its service be set aside, because it was issued, tested and served by the sheriff on a legal holiday. Glenn *v.* Eddy, 51 L. 255; 17 A. 145; 14 Am. St. Rep. 684.

SUMMONS RETURNABLE ON SUNDAY.—A summons inadvertently made returnable on Sunday may be amended so as to make it returnable on the Monday following. Colony *v.* Surety Co., 70 L. 589; 57 A. 390. Service of process on Sunday void; person so serving liable for damages. 4 C. S. 5715, sec. 5. In Supreme Court every day except Sunday is a return day. P. L. 1900, p. 350, sec. 7; 2 C. S. 1711, sec. 26. Service of writ of ne exeat on Sunday is void. Jewett *v.* Bowman, 27 E. 275.

DATE OF RETURN.—An objection that a capias ad respondendum was returnable on a day in term and not at the next stated term of that court after the teste of such writ was unavailing. Logan *v.* Lawshe, 62 L. 567; 41 A. 751.

47. Date of Process: Antedating Forbidden: Indorsements Necessary.

Every process shall bear date on the day on which the same shall be issued, and the date shall be prima facie evidence that it was issued on that day, but such date may be disproved whenever the same shall come in question; if any person shall antedate any process, he shall forfeit one hundred dollars to the party aggrieved and also be liable to him for all damages which he may sustain thereby; every process shall before the serv-

ice or execution thereof be endorsed with the name and office address of the attorney or the name and residence of the party suing out the same; and if an action is prosecuted by the plaintiff in person, there shall be endorsed on the original process a statement that such process is sued out by the plaintiff in person. (P. L. 1903, p. 548; 3 C. S. 4065; Rev., secs. 17, 43, 45; R. S. 929, sec. 18; 1855, secs. 1, 3; 1799, sec. 19.)

CONSTRUCTION AND OPERATION IN GENERAL.—A writ dated in February, and returnable the second Tuesday of May, without expressing the year, would be void. Pullen *v.* Boney, 4 L. 125, 129. "Witness, etc., at Trenton, the Tuesday of," etc., without designating which Tuesday, is bad. Sayres *v.* Ridgway, 8 L. 373.

The sheriff may alter the return day to suit his convenience in making service. Kloepping *ads.* Stellmacher, 36 L. 176, 178. Depue, J. The teste of a writ is not conclusive evidence of the time of commencing a suit. Wambough *v.* Schenck, 2 L. 214; Crosby *v.* Stone, 3 L. 988. The mere production of a writ bearing teste prior to the cause of action does not prove that it was actually issued before the cause of action arose. Allen *v.* Smith, 12 L. 159.

PROVISION DIRECTORY.—The provision requiring that all writs and process shall bear date on the day on which the same shall issue, seems to be directory. They may not be antedated, but if postdated it is not fatal. Canal Co. *v.* Mitchell, 31 L. 99.

COMMENCEMENT OF SUIT.—A suit is begun when process, duly tested and issued, has been put in motion to be served. County *v.* Borax Co., 67 L. 48; 50 A. 906.

A suit is actually commenced as soon as the writ is sealed and issued out of the office, in good faith, for the purpose of being served or proceeded on, and that purpose is not afterwards abandoned. Whitaker *v.* Turnbull, 18 L. 172. The making and sealing of a summons by the plaintiff's attorney, in good faith, for the purpose of having it served, was the commencement of the suit, although it was not delivered to the officer before the time when the action would be barred by the statute of limitations. Updike *v.* Ten Broeck, 32 L. 105. A suit is not commenced by the signing and sealing of a summons which has been retained in the attorney's office without any purpose of immediate service. Lynch *v.* Railroad Co., 57 L. 4; 30 A. 187.

METHOD OF QUESTIONING REGULARITY OF COMMENCEMENT OF SUIT.—The question of due commencement of suit under the Death act is properly raised by a plea in bar. County *v.* Borax Co., 67 L. 48; 50 A. 906.

EFFECT ON LIMITATIONS OF FAILURE TO SERVE SUMMONS.—The failure of the sheriff to serve a summons before the original return day, and a subsequent alteration by him, extending the time of return, after the action was barred by the statute of limitations, will not defeat the suit if the defendant has appeared and pleaded, without objection, and the writ was tested and delivered to the sheriff before the statute became a bar. McCracken *v.* Richardson, 46 L. 50.

VALIDITY OF TYPEWRITTEN INDORSEMENT.—Application to set aside a summons on the ground that the name of the attorney was in typewriting and not written by hand, refused in Essex Circuit. Strauss *v.* Isaac, 17 N. J. L. J. 91.

CITED.—Colony *v.* Surety Co., 70 L. 589; 57 A. 390.

48. Immaterial Omissions: Amendment.

If the plaintiff shall omit to insert in or endorse on any process any of the matters required to be inserted or endorsed, such process shall not on that account be held void but may be set aside as irregular or amended; and such amendment may be ordered by the court or a judge upon terms on application to set aside the process. (P. L. 1903, p. 548; 3 C. S. 4066; Rev., sec. 46; 1855, sec. 7.)

OMISSIONS AMENDABLE.—An omission of plaintiff's attorney to indorse on the back of a capias ad respondendum the name of the county in which the writ was to be served and the address of the attorneys issuing the writ, as required by a rule of court, was amendable where the omission occasioned no injury to defendant. Kryn *v.* Kahn, 54 A. 870.

49. Process in Different Counties.

If the defendants in an action in the supreme court reside in different counties, original process may issue at the same time to each county in which any of the defendants reside; the names of all the defendants shall be inserted in each process and the proper officer shall serve the same upon

such defendants as he can find in his county. (P. L. 1903, p. 548; 3 C. S. 4066; Rev., sec. 44; 1855, sec. 6.)

50. Return made by Sheriff: Amercement.

The sheriff or officer to whom any process is directed or delivered for service shall return the same at the time and place therein mentioned, or, if no time or place be mentioned, he shall forthwith serve and return the same. In default of so doing, he may be amerced by the court in any sum not exceeding the plaintiff's debt or demand, to and for the use of the plaintiff. The return of the officer serving any process may, in the same action, be shown to be untrue by either of the parties. (P. L. 1903, p. 548; 3 C. S. 4066 as amended by P. L. 1912, p. 468. Rev., secs. 47, 48; R. S. 929, sec. 19; 1799, sec. 20; 1855, sec. 5.)

RULE DIRECTING RETURN IMPROVIDENTLY ALLOWED.—A summons tested July 28th, 1906, and returnable August 10th, 1906, was served on the defendant on August 2d, 1906. On September 10th, 1907, the writ not having been returned, a rule, upon an ex parte application, was entered directing that the writ be returned, and that the plaintiff have leave to file a declaration, to which the defendant was required to plead or demur within twenty days. Held, that this rule should be vacated as improvidently allowed. Bowden *v.* T. A. Gillispie Co., 75 L. 296; 68 A. 238.

AMOUNT OF AMERCEMENT.—The amercement is merely for a discretionary sum "not exceeding the plaintiff's debt or demand." The rule is general, that unless there be a penalty or sums fixed to be paid, in exact words, for dereliction of duty, the recovery must be limited to the actual loss sustained. Stout *v.* Keeler, 11 N. J. L. J. 171.

SUFFICIENCY AND CONCLUSIVENESS OF RETURN.—The return is an answer to the writ, and whatever the sheriff has so answered, whether in a statement annexed to the writ, or upon it, is a return as far as it goes. The admissibility of the copy of the execution and levy, does not depend on the sufficiency of the return. Dean *v.* Thatcher, 32 L. 470. A recital in a scire facias that the writ was duly served on the garnishee, and the judgment by default, are conclusive against him. Young *v.* Railroad Co.,

38 L. 502. The plaintiff's attorney may prove the time of issuing the original declaration in ejectment, without producing the paper, the question in dispute being merely as to time, and not involving the contents of the paper. Den *v.* Hamilton, 12 L. 109. See Chapman *v.* Cumming, 17 L. 11; Browning *v.* Flanigan, 22 L. 567; Castner *v.* Styer, 23 L. 236; Contra, in equity; Ewald *v.* Ortyasky, 75 A. 577; 77 E. 76; affirmed, 79 A. 270; 78 E. 527. Return of officer not conclusive. Sweeney *v.* Miner, 95 A. 1014.

EVIDENCE AS TO REGULARITY OF LEVY.—The return of a marshal that he had levied on lands by virtue of his warrant is prima facie evidence that the levy was not irregular by reason of the existence of goods and chattels of defendant subject to levy. Murray *v.* Land Co., 18 How. 272; 15 L. Ed. 372.

CITED.—Beebe *v.* George H. Beebe Co., 64 L. 497; 46 A. 168.

51. Record Book of Processes to be Kept by Sheriff.

The sheriff of each county shall keep in his office a book in which he shall cause to be entered the return made by him to every process that shall come to his hands for service; such book shall be at all times available for the inspection of any of the parties to any such process or their respective attorneys, and on the death of said sheriff or expiration of his term of office said book shall be deposited and kept in the custody of the clerk of his county, and the record of any such return so made by such sheriff or a transcript thereof certified by such sheriff or clerk, as the case may be, shall be prima facie evidence in any court of the return made to any such process. (P. L. 1903, p. 548; 3 C. S. 4066; 1876, p. 61.)

2. Summons: How Served.

52. Service of Summons.

The first process in personal actions in cases where the plaintiff is not entitled to bail shall be a summons, a copy whereof shall be served on the defendant in person, or left at his usual place

of abode. Said service shall be made forthwith after the process is delivered to the sheriff or other officer for service. If the defendant be a corporation, the summons shall be served as provided in the act entitled "An act concerning corporations (Revision of 1896)," except that the service shall be made in such case forthwith after delivery of the summons to the sheriff. If the defendant be the board of chosen freeholders of any county or municipal corporation, or a township, the summons shall be served on the clerk or presiding officer of said board, or on the clerk of the municipality or township, or on the mayor or presiding officer of the governing body forthwith after it is delivered to the sheriff or other officer for service. And when the sheriff or other officer shall return the same "served," the party shall be considered as in court, and be proceeded against accordingly; provided, if the defendant be the board of chosen freeholders of a county or a municipal corporation or a township, the sheriff or other officer shall in his return state on whom the summons was served. (P. L. 1903, p. 549; 3 C. S. 4067, as amended by P. L. 1912, pp. 468, 469; Rev., sec. 49; R. S., secs. 17, 21; 1799, secs. 18, 21; 1820, p. 80, sec. 1; Rev. 1820, 691.)

Service on Corporation, see P. L. 1916, p. 410.

REPEALING EFFECT.—Quære. Whether the provision of the act of 1846, to incorporate chosen freeholders, etc., ante, Chosen Freeholders, sec. 3, requiring that the service of a summons issued against a board of chosen freeholders shall be made "at least thirty days before the session of court to which such process is returnable," was not impliedly repealed by this section. Palmer *v.* Board, 77 L. 143; 71 A. 285.

This section and sections 56 and 189 do not change the English practice as it existed prior to the Revolution, whereby a capias ad satisfaciendum on a judgment in an action of tort issued as a matter of course and without a judge's order. Kintzel *v.* Olsen, 73 A. 962.

PRACTICE WHEN PLAINTIFF NOT ENTITLED TO BAIL.—In cases where the plaintiff is not entitled to bail, the plaintiff must proceed by summons, and not by capias. Beatty *v.* Ivins, 3 L. 628; Addis *v.* Evans, 2 L. 142, note; Brookfield *v.* Jones, 8 L. 311, 312. See Attorney-General *v.* Railroad Co., 38 L. 282; Sooy *ads.* State, Id. 328.

EXEMPTION FROM SERVICE.—A party to a suit, while necessarily going to, staying at, or returning from the court, is equally privileged from the service of a summons as of a capias. Halsey *v.* Stewart, 4 L. 367.

If a party upon whom a summons is served is induced to come into this state by a deception practiced upon him by the plaintiff for the purpose of serving the summons, such service is not good, and the court will set aside the writ on the application of the defendant. Williams *ads.* Reed, 29 L. 385. A party to a suit in Chancery, who resides in another state and comes into this state to give testimony in his own behalf before a master, is, while necessarily attending before the master and going to and returning from the place where such examination is held, privileged from the service of a summons in a civil cause, without any subpœna ad testificandum being served. Dungan *ads.* Miller, 37 L. 182. Service of a summons upon a person non-resident in this state while going to, attending or returning from a trial here, as a witness or party, will be set aside. Massey *v.* Colville, 45 L. 119; Graham *v.* Sharp, 2 N. J. L. J. 156. The vice president of a foreign corporation, who comes into this state to give testimony before a Supreme Court commissioner, is privileged from the service of a summons in another action against such corporation while he is so in attendance as a witness. Mulhearn *v.* Publishing Co., 53 L. 153; 20 A. 760. Service upon a resident witness or a party is not a nullity. But the court will control the service, and either set it aside or change the venue arising from such service, or otherwise remedy any special disadvantage which such service entails upon the defendant. Massey *v.* Colville, 45 L. 119. If the first arrest of the defendant be unlawful, he cannot be served with other bailable process, at the suit of the same plaintiff, while in custody upon that illegal arrest. Banking Co. *v.* Peltier, 14 L. 391.

FAILURE TO SERVE BY RETURN DAY.—A writ not served is dead, after the return day passes, and the cause is out of court. Matthews *v.* Warne, 11 L. 295; State *v.* Kennedy, 18 L. 22; State, Van Cleef, *v.* Commissioners, 37 L. 394.

SERVICE ON MUNICIPAL CORPORATION.—Fifteen days must intervene between the day of service and the return day of a summons, in an action against a municipal corporation. McNeal *v.* Gloucester City, 51 L. 441; 18 A. 112.

Service of the summons on the clerk and three members of council of Cape May Point is sufficient service, there being no mayor; the service being made fifteen days before the return day, in accordance with the common law practice. Cooper *v.* Cape May Point, 67 L. 437; 51 A. 511.

There is no statutory provision concerning the service of a summons against a municipal corporation. In such a case the common law must therefore prevail, and that requires that fifteen days shall intervene between the day of service and the return day of the summons. McNeal *v.* Gloucester City, 51 L. 444; 18 A. 112.

SERVICE ON A TOWNSHIP.—For mode of service, where a township is defendant, see Phillipsburg *ads.* Raub, 37 L. 48.

WHERE DEFENDANT HAS SEVERAL RESIDENCES.—Where a person has several residences which he permanently maintains, occupying one at one period of the year and another at another period, a summons must be served on him at the dwelling-house in which he is living at the time of the service. It does not affect the legality of the service that he is temporarily away from such dwelling while his family remains in it. Trust Co. *v.* Barbour, 66 L. 103; 48 A. 1008.

WHAT CONSTITUTES DWELLING-HOUSE OR PLACE OF ABODE.—The dwelling-house or usual place of abode of a defendant, within the meaning of the statute, is the place where he is actually living at the time when the service is made. Mygatt *v.* Coe, 63 L. 510; 44 A. 198. Usual place of abode of defendant, as used in P. L. 1912, p. 469, is the place where he is actually living at the time when the service is made, and when a defendant has a general place of abode in this state, but closes it, and is absent from the state, he has no usual place of abode in this state, and service at such place during his absence is invalid. Sweeney *v.* Miner, 95 A. 1014; Feighand *v.* Sobers, 87 A. 636; 84 L. 575; affirmed, 91 A. 1068; 86 L. 356. Need not be defendant's permanent domicile, hence father's home, where student was living while on a vacation from college in another state, is his usual place of abode. Nussell *v.* Hayes, 85 A. 818; 84 L. 196.

CITED.—Watson *v.* Moblett, 65 L. 506; 47 A. 438; Smith *v.* Colloty, 69 L. 365; 55 A. 805; Kane *v.* Church, 72 L. 442; 60 A. 1099.

52a. Sheriff to set out on Summons Place of Service.

In all suits begun by summons in the Supreme Court or in the Circuit Courts of the counties of this state against any individual or individuals,

or a partnership firm or any individual or individuals in addition to a partnership firm, it shall be the duty of the sheriff of the county serving such process to set out at length, as a part of the return or written evidence of service, the place at which such service was made. No appearance will be required of, nor can any judgment be taken against any individual or partnership firm, upon failure on the part of the sheriff to so indicate the place of such service, unless a judge of the court wherein said action is commenced shall otherwise direct. (P. L. 1911, p. 97, sec. 1.)

52b. Sheriff may Amend Return.

If any sheriff shall fail to set out in his return the place of service as herein required, he may thereafter file an amended or additional return, in order to comply with the requirements of this act. (P. L. 1911, p. 97, sec. 2.)

53. New Summons may be Issued and Served in Case of Error in Issuance or Service of Original.

If error is made in the issuing or service of a summons, the court or a judge may order a new summons to be issued and served; and said summons and service thereof shall be as valid and effectual as if it had been originally issued and served. (P. L. 1903, p. 549; 3 C. S. 4068; Rev., sec. 50; 1867, p. 26.)

TIME FOR SERVING NEW SUMMONS.—Where the service of a summons on a lien claim was defective, and a new summons was issued more than a year after the furnishing of the labor and materials, held, the service of the new summons was valid and effectual, and the claim good. Insurance Co. *v.* Rowand, 26 E. 389.

WHEN AMENDMENTS LIE.—Amendments may be made only when the service has been defective or insufficient, but after defendant has been brought in the writ cannot be amended by substituting the name of another person. Maitland *v.* Worthington,

59 L. 114; 35 A. 759. After plea of misnomer plaintiff may amend. Jefferson *v.* Hotel Cape May, 81 A. 349; 82 L. 32. A new party defendant cannot be made so by amendment and substitution in open court against his protest. Hubbard *v.* Montross Metal Shingle Co., 74 A. 254; 79 L. 208.

APPEAL FROM DIRECTION OF NEW SUMMONS.—Action of court in directing issuing and service of new summons under this section not reviewable by certiorari, but only by appeal after final judgment. Gaskill *v.* Foulks, 84 A. 1057; 85 L. 375.

3. Capias: How Executed.

54. Service.

The sheriff or other officer shall execute the writ of capias ad respondendum by taking the body of the defendant and serving on him a copy of the writ, and shall return thereon that has taken the body into custody; and thereupon the defendant shall be considered as in court and the plaintiff shall declare against him as if he had been brought into court by a summons. (P. L. 1903, p. 549; 3 C. S. 4068; Rev., sec. 51; R. S. 929, sec. 21; 1799, sec. 22.)

CONCLUSIVENESS OF RETURN.—The return made by a sheriff upon a capias is conclusive upon him, and also, in the cause, upon parties, except on an application to amend it or set it aside. Loewenthal *v.* Wagner, 68 L. 214; 52 A. 298.

INTEREST IN DEPOSIT TO PROCURE RELEASE.—The sheriff having returned upon a capias that he had the defendant in custody, the plaintiff has no interest in money said to have been deposited with the sheriff on his releasing the defendant. Loewenthal *v.* Wagner, 68 L. 214; 52 A. 298.

4. Scire Facias: How Served.

55. Service: Publication.

A writ of scire facias shall be served by the sheriff or other officer to whom the writ is directed in the same manner as a summons may be served; provided, if the defendant has removed out of the

jurisdiction of the court issuing such process or cannot be found by the sheriff or other officer, the plaintiff may cause the writ to be published four successive weeks in a newspaper printed in this state as near the last residence of the defendant as can be conveniently ascertained, and mail a copy thereof to the defendant, if his post office address can be ascertained, at least six days before its return, or cause a copy of the writ to be served on the defendant at any place either in or out of this state at least six days before its return; and such publication or service shall in such case constitute due service of such writ. (P. L. 1903, p. 550; 3 C. S. 4068; Rev., secs. 208, 209; R. S. 929, secs. 104, 105; 1820, p. 80, secs. 5, 6; Rev., 1820, 691.)

Judgment cannot now be rendered, as at common law, upon a return of nihil to two writs of scire facias, but only upon an actual service or publication of the writ. 3 Zab. 236. Publication is not required in case of a special scire facias, issued to show cause why lands levied on by a deceased sheriff should not be sold. R. S. 833, sec. 35; Haight *v.* Spader, 3 Hal. 132. In Reed *v.* Bainbridge, 1 South. 351, after a personal service on defendant out of the state and a rule for appearance judgment was entered.

VI. ARREST.

1. In Actions in Tort.

56. Capias ad Respondendum: Affidavit to Support: Bail: Grounds for Issue of Capias.

The writ of capias ad respondendum shall not be issued in any action founded upon a tort, except upon proof by affidavit or otherwise to the satisfaction of the court in which the action is about to be commenced or to a judge or supreme court commissioner, of the grounds upon which bail is required, and thereupon the court, judge or commis-

sioner shall make an order for bail in such sum as he shall under the circumstances of the case think proper, and such sum shall be endorsed on the capias in words at length. On filing the proof and said order a capias ad respondendum shall be issued; but no such order shall be made unless:

First. Such action is founded upon a seduction or an outrageous battery or mayhem; or,

Second. Such action is for the recovery of damages for the misconduct or neglect of a public officer; or,

Third. The proof establishes special cause as heretofore for holding the defendant to bail. (P. L. 1903, p. 550; 3 C. S. 4068; Rev., sec. 55; R. S. 950, secs. 1, 4; "An act respecting bail in civil actions." Passed 1799, secs. 1, 4; Rev., 1820, 404; Pat. 348.) See notes under sec. 52, repealing effect.

HISTORICAL.—This is substantially identical with P. L. 1842, p. 130, except that the former act omitted the fraudulent contracting of the debt or incurring of the demand as a cause for arrest, and did not include the provision found in section 3 of an act respecting imprisonment for debt in cases of fraud. R. S. 1847, p. 322; Austrian *v.* Laubheim, 78 L. 178; 73 A. 226.

WHO MAY TAKE AFFIDAVIT.—An affidavit may be taken before any person authorized to administer an oath, as, in a foreign country, before a consul of the United States. Seidel *v.* Peckshaw, 27 L. 427. It is not necessary that the affidavit be made before the commissioner who grants the order. Id.; McKernan *v.* McDonald, 27 L. 542.

A capias cannot be issued without an affidavit, although the plaintiff waive bail. Beatty *v.* Ivins, Pen. 628; Addis *v.* Evans, Pen. 630, note. The affidavit is necessary where, in a penal action, an arrest is authorized by the statute. Champion *v.* Pierce, 6 Hal. 196. Supplemental affidavits cannot be taken to cure defects in the originals. Parker *v.* Ogden, Pen. 146, 151. Affidavits for bail need not be entitled in the court in which they are filed. Peltier *v.* Washington Bank, 2 Gr. 257; Parker *v.* Ogden, Pen. 146. If sufficient facts to constitute a good cause of action are stated in the affidavit, it is no objection that the statement commences with the words "for that," but if commenced with

the words "for that whereas," it will be by way of recital and will not be sufficient. Benson *ads.* Bennett, 1 Dutch. 166. To obtain an order, the plaintiff's oath or affirmation is admissible, and is sufficient of itself to prove as well the facts constituting the fraud as the indebtedness. Painter *v.* Houston, 4 Dutch. 121. See Hill *ads.* Hunt, Spenc. 476. Query, whether it may be made by the attorney of the plaintiff. Stevens *v.* Meguire, 1 Hal. 152. As to stating the place of taking it, see Provost *v.* Bank of North America, July, 1828; Peltier *v.* Washington Bank, 2 Gr. 257. It is not necessary to the validity of an affidavit for bail that the residence or place of abode of the deponent should be stated in it, or that it should show the town or county where it was taken. The rule applies to actions of tort as well as upon contracts. Benson *v.* Bennett, 1 Dutch. 166; Peltier *v.* Washington Bank, 2 Gr. 257. Where there are several suits against a defendant, and an affidavit made in each, the court will not look beyond one affidavit, and supply its defects by statements made in another; each affidavit must stand by itself. Benson *v.* Bennett, 1 Dutch. 166.

It may be taken before any person authorized to administer an oath, as, in a foreign country, before a consul of the United States. Seidel *v.* Peckshaw, 3 Dutch. 427. It is not necessary that the affidavit be made before the commissioner who grants the order. Id.; McKernan *v.* McDonald, 3 Dutch. 542.

The affidavit must disclose the true cause of action. Kinney *v.* Muloch, 2 Har. 334, 337. There must be a positive affidavit of the debt and the amount due. VanKirk *ads.* Staats, 4 Zab. 121. The statement that the plaintiff believes he will be unable to make the defendant answer for the alleged injury and damages unless he be held to bail without showing any reason for that belief, is insufficient. Benson *ads.* Bennett, 1 Dutch. 166. See Kennedy *v.* Chumar, 2 Dutch. 305. It must be shown that the debt is actually due at the time of making the affidavit. Parker *v.* Ogden, Pen. 146. The affidavit for bail need not be as specific and particular as a declaration, but it must contain such facts as show, if true, that the plaintiff has a present, subsisting cause of action; it must show how indebted and for what; it should disclose the character in which the defendant is a party to the instrument, so that his liability may appear to the court; it should be express, certain, explicit and intelligible. An affidavit for bail, setting forth that the defendant is "indebted in a certain amount on his promissory note, and on a balance of account against him, on the books of the banking company," is insufficient, and the defendant will be discharged on common bail. Peltier *v.* Washington Bank, 2 Gr. 257. The affidavit to hold to bail for money due on articles of agreement

must state the breach of the articles of agreement, or the defendant will be discharged on common bail. Stevens *v.* Meguire, 1 Hal. 152. The facts must be sworn to; that a debtor has "unlawfully and unjustly" refused to apply the money in his hands to the satisfaction of a debt due by him, is a legal proposition to be deduced from the evidence. Ex parte Clark, Spenc. 648. An affidavit to hold an agent to bail for misappropriating the avails of acceptances, stated the number of bills, by whom drawn, to whose order and how indorsed, by whom accepted, the amount of each and when they matured, respectively, but did not state the precise date of the bills. Held, that the description was sufficient. Seidel *v.* Peckshaw, 3 Dutch. 427.

REQUISITES OF ORDER.—This statute should be construed as requiring the same requisites in order to hold to bail in tort actions as in contract actions, so that the order must show on its face that the judge exercised his judicial discretion in issuing it, and that the proof of the particular facts necessary to authorize the order was satisfactory. Hufty *v.* Wilson, 78 L. 241; 74 A. 137.

ARREST IN SUIT FOR SEDUCTION.—Affidavits setting out, as plaintiff's cause of action, the seduction of his daughter, who was under the age of sixteen, were sufficient to warrant an order of arrest, without disclosing any special cause for such order. Logan *v.* Lawshe, 62 L. 567; 41 A. 751.

CITED.—Kintzel *v.* Olsen, 73 A. 962; Hisor *v.* Vandiver, 85 A. 181; 83 L. 433.

2. In Actions on Contract.

57. Capias ad Respondendum: Affidavit to Support: Grounds for Issue: Bail.

The writ of capias ad respondendum shall not issue in any action founded upon contract, except upon proof by affidavit or otherwise to the satisfaction of the court in which the action is about to be commenced or to a judge or supreme court commissioner, that there is a debt or demand founded upon contract, express or implied, due to the plaintiff from the defendant, specifying the nature and particulars of said debt or demand, and establishing one or more of the following particulars:

First. That the defendant is about to remove any of his property out of the jurisdiction of the court in which an action is about to be commenced with intent to defraud his creditors; or,

Second. That he has property or rights in action which he fraudulently conceals; or,

Third. That he has assigned, removed or disposed of, or is about to assign, remove or dispose of, any of his property with intent to defraud his creditors; or,

Fourth. That he fraudulently contracted the debt or incurred the demand.

Upon such proof being made the court, judge or commissioner shall make an order to hold the defendant to bail in such sum as shall be shown by the proof to be due to the plaintiff from the defendant, and such sum shall be endorsed on the writ in words at length; on filing the proof and said order a capias ad respondendum shall be issued; provided, this section shall not apply to proceedings as for contempt to enforce civil remedies; provided further, in actions on promises to marry and actions for the recovery of moneys due from a public officer, the court, judge or commissioner shall order the defendant to be held to bail in such sum as he shall under the circumstances of the case think proper. (P. L. 1903, p. 551; 3 C. S. 4069; Rev., sec. 58; R. S. 321, sec. 1; 1842, p. 130.)

HISTORICAL.—History of legislation, see Austrian *v.* Laubheim, 78 L. 178; 73 A. 226.

CONSTRUCTION AND OPERATION IN GENERAL.—Commissioners to take bail and affidavits are authorized to make an order for the award of a capias under the act of the 9th of March, 1842. Wire *v.* Browning, 20 L. 364. Under the English statutes respecting bail, it is held that the power of arrest emanates not from the affidavit but from the capias. But the statute of this state abolishing imprisonment for debt in certain cases makes

the judge's order the foundation of the capias. Without the order, the proceeding is not only irregular but the writ itself is illegal. State *v.* Dunn, 25 L. 214. There must be a special order, formally adjudging that there is fraud, shown to the satisfaction of the court or officer ordering the arrest. Perry *v.* Orr, 35 L. 295.

POWER AND DUTY OF JUDGE OR COMMISSIONER.—The proof of the circumstances necessary to authorize the award of a ca. sa. is to be to the satisfaction of the judge or commissioner. The legality of the evidence received by him, and its applicability, may be reviewed, but its weight and credibility rest with the commissioner. Wire *v.* Browning, 20 L. 364. The officer who makes the order to hold a debtor to bail, on the ground of fraud, is the exclusive judge of the weight of the evidence, and this court will not review or set aside his order upon the weight of evidence: but when there was no evidence before him of any legal fraud, they will review it. Van Wagenen *v.* Coe, 22 L. 531. It is not sufficient for the commissioner to decide that there was proof, to his satisfaction, that the defendant had rights or credits, moneys or effects, either in his own possession or in the possession of some other persons; in the words of the act, he should specify by means of which of the several things mentioned the fraud was committed. Browne *v.* Titus, 30 L. 340. The order made by the justice or commissioner must show, upon its face, that he has considered and decided upon the evidence of fraud submitted to him and that the proof was to his satisfaction. Hill *ads.* Hunt, 20 L. 476.

NECESSITY FOR ORDER.—In a penal action the plaintiff must obtain an order, unless the statute expressly provides otherwise. Brookfield *v.* Jones, 8 L. 311; Champion *v.* Pierce, 11 L. 196.

SUBJECTS OF ARREST.—If a man promises to marry a woman, and, at the same time, or afterwards, seduces her by the influence of such promise, and then seeks to avoid performance by attempting to run away, with intent to abandon her, and refuses to marry her, his original promise was a fraud, for which he can be held to bail. Perry *v.* Orr, 35 L. 295. Fraudulently inducing his creditors to accept a worthless security for a former debt is such fraud in contracting the last debt as will authorize an arrest. Van Wagenen *v.* Coe, 22 L. 531.

TIME FOR FILING AFFIDAVITS AND ORDER.—Where a capias ad respondendum is issued in trover and conversion, the fact that the affidavits and order were not filed in the clerk's office until the day succeeding the issuance of the writ and the making of the arrest was no ground for quashing the writ. Kryn *v.* Kahn, 54 A. 870.

SUFFICIENCY OF PLEADING.—An allegation from mere hearsay that the indorsement on a note given for goods sold is a forgery, without averring or proving that the defendant knew it or committed it, is not sufficient. McKernan v. McDonald, 27 L. 541.

PROOF OF FRAUD.—In an ex parte affidavit made for the purpose of holding a defendant to bail, statements to which the affiant could not lawfully testify in open court are not competent evidence of fraud. Truax *ads.* Railroad Co., 56 L. 277.

The witness must swear to the facts or circumstances which constitute the fraud, and they must amount to such evidence as would justify a jury in finding a verdict against the defendant for fraud. Kipp *v.* Chamberlain, 20 L. 656. See Gill *v.* Watman, 39 L. J. 10, and notes.

FRAUDULENT TRANSACTION.—Unjustly and unlawfully refusing to apply money or property in the hands of the defendant or of another, for defendant's use and under his control, to the satisfaction of a judgment or execution, is a fraud within the meaning of the constitution. Ex parte Clark, 20 L. 648.

EVIDENCE OF FRAUDULENT INTENT.—Plaintiff's affidavit that defendant told her he was about to leave the state, and intended to take his property and effects with him, does not show intent to defraud creditors by the removal of the property. Innes *v.* Innes, 53 A. 1041.

In order to warrant an order to hold to bail for the fraudulent contracting of a debt, there must be some proof of such fraudulent intention at the time of contracting. A subsequent refusal to pay an account will not warrant an inference of fraud in contracting. Van Kirk *ads.* Staats, 24 L. 121. A statement that defendant made certain representations to plaintiff, and that he had discovered recently that they were false, is not sufficient evidence that the debt was fraudulently contracted. Bowne *ads.* Titus, 30 L. 340. False and deceitful representations, made by way of inducement to contract or surrender one's rights, are evidence of fraud. Painter *v.* Houston, 28 L. 121. Proof by subsequent affidavits, showing fraudulent transactions since the service of the writ, is incompetent. Id.

INSUFFICIENT SHOWING OF DEMAND.—Plaintiff's affidavit that she was awarded alimony by a decree of a court of another state, and that a certain amount is due thereunder, is insufficient, the only competent proof of such decree being an exemplified or sworn copy of the record. Innes *v.* Innes, 53 A. 1041.

FRAUD UNNECESSARY BEFORE STATUTE WAS ENACTED.—Imprisonment for debt previous to this statute was in force, irrespective of fraud. Austrian *v.* Laubheim, 78 L. 178; 73 A. 226.

58. Arrest of one of Several Defendants: Form of Process.

In an action against two or more defendants if the proof is sufficient for ordering a capias ad respondendum against one or more of the defendants but not against all the defendants, the court, judge or commissioner may make an order for the holding to bail of the defendants against whom sufficient cause for arrest is shown; and in such case process shall issue against all the defendants in the action, but in form shall command the sheriff or other officer to whom it is directed to take the bodies of the defendants against whom the order for bail may be made and to summon the other defendants; and the process shall be executed and served accordingly. (P. L. 1903, p. 552; 3 C. S. 4070; Rev., sec. 59; Rev. of 1874.)

59. Arrest of one of Several Defendants: Procedure after Return.

When such a process shall be duly returned, the pleadings, practice and proceedings thereafter to the final judgment shall be the same as if all the defendants were brought into court in the same manner; and if judgment shall pass for the plaintiff the execution shall be special to the effect that the sheriff or other officer to whom the same is directed, shall make the debt or damages and costs of the goods and lands of the defendants, and for want of sufficient goods and lands shall take the bodies of the defendants against whom such order for bail has been made. (P. L. 1903, p. 552; 3 C. S. 4070; Rev., sec. 60; Rev. of 1874.)

60. Proceedings on Execution: Liability of Bail.

The sheriff or other officer by virtue of such an execution may seize and levy on the goods and lands of all the defendants in his county, and take

the bodies of such of them as he is commanded by said writ, in satisfaction of such judgment; or the sheriff or other officer after such levy may, by the direction of the plaintiff, return the execution non est inventus in order to fix the bail, and thereupon the plaintiff may proceed against the bail as in other cases; but the bail shall only be liable for what may remain unpaid on the judgment after applying thereon the amount made out of the goods and lands levied on, and shall be entitled on satisfying such deficiency to an assignment of the judgment, whereby to obtain indemnity for such payment by execution thereon, out of the property of any of the defendants which may not have been levied on or of which any of the defendants may have become seized or possessed; and the bail may render the defendants as in other cases, and the proceedings for and effect of such render shall in all respects be the same as if such action had been prosecuted against such defendants only. (P. L. 1903, p. 552; 3 C. S. 4071; Rev., sec. 61; Rev. of 1874.)

3. Setting Aside Writ and Orders for Bail.

61. Who may Set Aside: Abatement of Action: Discharge of Defendants.

Any justice of the supreme court or judge of the court out of which a capias ad respondendum shall issue may on notice to the plaintiff determine upon the legality of orders for bail and discharge persons illegally arrested in civil actions whether bail has been given or not; and upon such application the justice or judge shall consider and determine the sufficiency, in fact as well as in law, of the proof upon which the order for bail was founded; if an order for bail is set aside, the action shall not abate but the defendant shall be dis-

charged from arrest and his bail discharged and the action shall proceed as if commenced by summons, unless otherwise ordered by the court or a judge. (P. L. 1903, p. 553; 3 C. S. 4071; Rev., secs. 62, 63; 1853, p. 406; 1855, sec. 83.)

CITED in Hisor v. Vandiver, 82 A. 526; 82 L. 303; 85 A. 181; 83 L. 433.

62. Proof of Truth of Affidavits for Arrest, Etc.: Reference: Discharge of Defendant, Etc.

In actions commenced by writ of capias ad respondendum at any time within thirty days after a defendant shall have been arrested, a judge of the court out of which said writ issued may on the application of such defendant and on notice to the plaintiff make an order for the taking of testimony concerning the truth of the proofs upon which the order for bail was made, which testimony may be taken orally before said judge or in writing before any supreme court commissioner or examiner or master in chancery that the judge shall designate, and such testimony when taken in writing shall be filed; if from the testimony so taken the judge shall be of the opinion that the order for bail should not have been made against any defendant he shall upon terms make such order for his discharge from arrest and the discharge of his bail as the nature of the case may require; and the giving of bail shall be no waiver of the right to apply for an order to take such testimony. (P. L. 1903, p. 553; 3 C. S. 4071; Rev., secs. 64, 65; 1861, p. 312.)

RELATIONSHIP TO OTHER STATUTES.—In 1859 it was held that counter-affidavits tending to show no indebtedness or absence of fraud were not admissible, but that the original affidavits were to be taken as true. This produced the amendment of P. L. 1861, p. 312, substantially re-enacted in this section;

but no such provision is contained in the act of 1893 (P. L., p. 181) and it is not possible to apply the provisions of this section to the act of 1893. Bank *v.* Bank, 58 L. 300; 33 A. 474.

WHEN PROPER TO DISCHARGE ON COMMON BAIL.—Where an order of a commissioner or judge to hold to bail, regular on its face is set aside, and there is no evidence of abuse of the process of the court, the practice is to discharge on common bail, not to quash the writ. Van Kirk *ads.* Staats, 24 L. 122; Stiles *v.* Vandewater, 46 L. 69.

QUESTION OF DISCHARGE, HOW DETERMINED.—Counter-affidavits to show no indebtedness, or to show a rectitude of dealing, and a total absence of any fraud on the part of defendant, or to contradict the facts as sworn to in the original affidavits, cannot be admitted at the hearing. But the facts, as sworn to in the original affidavits must be taken as true, and upon these, and these only, the question of discharge is to be determined. Painter *v.* Houston, 28 L. 121.

REVIEW ON HABEAS CORPUS.—If the affidavits upon which an order for bail is made fairly present the question whether the case is a proper one for a capias, then the determination of the judge or commissioner upon their sufficiency cannot be reviewed by means of the writ of habeas corpus. Selz *v.* Presburger, 49 L. 396; 8 A. 118.

WHEN NOT ENTITLED TO DISCHARGE.—A party in custody upon a capias ad respondendum issued by a justice of the supreme court will not be discharged, where, upon his own application, an order was made to take testimony, under which witnesses were examined concerning the truth of the affidavits and proof upon which the fiat for the writ was made, unless it clearly be shown, by the evidence, that the writ should not have been issued. Tyler *v.* Allen, 31 L. 441.

DEFECTS IN WRIT OR ORDER FOR BAIL.—The proper practice, where there are infirmities in the writ of capias or the order for bail, is to apply for further time for filing special bail which may be granted on terms either that special bail may be filed without waiver of objections to the preliminary proceedings, or allowing further time to file such bail; the provision that the filing of special bail shall be no waiver relating only to an application for an order to take testimony concerning the truth of the affidavits on which the order for bail was made. Logan *v.* Lawshe, 62 L. 567; 41 A. 751.

CITED.—Watson *v.* Noblett, 65 L. 506; 47 A. 438.

4. Reduction of Bail.

63. Application: Terms: Effect.

The court or a judge may at any time on application made on notice to the plaintiff and upon terms reduce the amount of the bail required in any action to any sum that under the circumstance of the case shall seem just, and on such application affidavits may be read and filed by either party; if bail shall be so reduced, the sum fixed shall for all purposes in all subsequent proceedings in the action be considered the amount of bail required in the action the same as if such sum had been originally fixed and endorsed on the writ. (P. L. 1903, p. 554; 3 C. S. 4072; Rev. of 1903.)

5. Females not to be Arrested.

64. Females not Liable to Arrest.

No female shall be arrested or imprisoned by virtue of any mesne process or process of execution in any civil action. (P. L. 1903, p. 554; 3 C. S. 4072; Rev., sec. 54; R. S. 323; 1818, p. 53, sec. 6.)

CONSTRUCTION AND OPERATION IN GENERAL.—A female cannot be arrested. Blight *v.* Mecker, 7 L. 97. In an action against a husband and wife for a tort committed by the wife with the encouragement of the husband, an order may be made to hold them both to bail, but the husband only can be arrested. A bond given to the sheriff by both cannot be set aside by the court. Damiano *v.* Corello, 16 N. J. L. J. 376. See Van Emburgh *v.* Pullenger, 16 L. 352, 457. But this privilege does not exempt her from an attachment for contempt for non-payment of costs. Clark *ads.* Grant, 38 L. 257.

VII. BAIL.

1. Commissioners.

65. Supreme Court Commissioners: Power as to Oaths: Bail, Etc.

The justices of the supreme court or any two of them, of whom the chief justice shall be one, may commission under the seal of the court from time to time, as many persons as they shall think necessary in the several counties as supreme court commissioners, who shall have the same power and authority to administer an oath or to take any deposition, to make an order to hold a defendant to bail in a civil action and to take recognizances of bail in such actions as justices of the supreme court. (P. L. 1903, p. 554; 3 C. S. 4072; Rev., secs. 57, 66, 67; R. S. 856, sec. 1; 1861, p. 312, sec. 2; 1866, p. 419. Act authorizing the appointment of commissioners to take special bail, etc. Passed 1794; Rev., 1820, 135; Pat. 124.)

2. Bail: How Given.

66. Bail to Sheriff Abolished.

Bail to the sheriff and the practice relating thereto are abolished. (P. L. 1903, p. 554; 3 C. S. 4072; Rev. of 1903.)

An assignment of a bail bond by a sheriff, under his hand and seal, in the presence of two persons who actually witnessed the transaction, is a compliance with the statute, although only one of such persons subscribes his name as a witness. Bleiodrey *v.* Keppler, 4 Vr. 140.

A plaintiff having obtained an assignment of the bail bond given to the sheriff by the defendant on his arrest, must bring his action on the bond in the same court in which the original action was pending, unless some special circumstances exist to warrant a departure from this rule. Florence *v.* Shumar, 5 Vr. 455. See Hughes *v.* Hughes, Pen. 577, Pennington, J. A suit on a recog-

nizance of bail may be instituted in a court other than that in which the recognizance was taken. In such suit, the process must be to answer to a plea of debt, "upon recognizance," in order to apprise them of their situation and protect them from surprise, otherwise the defendant will not be bound to accept a declaration upon a recognizance of bail. Van Winkle *v.* Alling, 2 Har. 446. The assignee of the sheriff may bring suit on the bail bond in his own name; it is not necessary that he should be styled assignee in the writ. Hunt *v.* Allen, 2 Zab. 533. In an action on a bail bond, it is not necessary to aver in the declaration that an affidavit of the cause of action had been made and filed before issuing the capias in the suit in which the bond was given. And if the declaration contains no such averment, a plea that no such affidavit had been made and filed is bad. Hunt *v.* Allen, 2 Zab. 533; 3 Id. 616. The sheriff, having arrested the defendant by virtue of a capias ad respondendum, and taken a bond for his appearance to the action, may refuse to accept a surrender of the body of the defendant; but if the defendant voluntarily surrenders himself to the sheriff before the return day of the writ, the sheriff may accept such surrender. By such surrender and acceptance the bail are discharged; and if the plaintiff obtains an assignment of the bail bond, and brings an action on it, the court will stay proceedings and order the bond to be canceled. Florence *v.* Shumar, 5 Vr. 455. Judgment must be entered for the penalty of the bond. Hunt *v.* Allen, 2 Zab. 533. Upon a bail bond for an amount greater than the sum sworn to, the debt, interest and costs may be collected, although they exceed the sum sworn to. Allen *v.* Hunt, 3 Zab. 376. If a suit on a bail bond is instituted in another court, and no objection is interposed by the sureties, they cannot obtain relief from paying the full amount of the penalty. Simmons *ads.* Kelly, 10 Vr. 438. Bail are entitled to relief when the surrender of the principal is made impossible by the act of the law, where the plaintiff loses nothing by the omission of any act which it is in the power of the bail to perform. Steelman *v.* Mattix, 9 Vr. 247. When a defendant who had been arrested under a capias ad respondendum in a civil suit, and has given bail to the sheriff, is afterward, and before the return day of the process arrested on a criminal charge, and is afterward indicted and convicted and sentenced to the state prison, the bail to the sheriff may obtain an exoneration of their liability on the bail bond by first filing special bail and then surrendering the principal by means of a habeas corpus, while the principal is in jail under commitment upon a criminal charge, or by motion after he is put under the sentence. Atkinson *v.* Prine, 17 Vr. 28. Bail to the sheriff who have been misled by

proceedings in court for their exoneration irregularly taken without special bail being filed, and the principal being brought into court by habeas corpus for the purpose of a surrender, may obtain relief, by an application to the court under this section. Id. A writ of error will lie upon an order of the court made in a cause setting aside proceedings against bail and exonerating them from liability on the bail bond. Id.

Irregularity in the proceedings on a bail bond may be taken advantage of by a summary application to the court to set aside the proceedings. Florence *v.* Shumar, 5 Vr. 455. If a surrender, after the return day, be accepted by the sheriff, the court will stay any proceeding on the bail bond and order it to be canceled. Florence *v.* Shumar, 5 Vr. 460. The want of a ca. sa. against the principal cannot be taken advantage of by the bail, on motion; it is a matter of substance and must be pleaded. Cockran *v.* Drake, 3 Har. 9. Bail can take advantage of an irregularity in issuing a ca. sa. against the original defendants, as it is in the nature of a notice to them. It is the settled practice in this state that the ca. sa. should be in the hands of the officer four days before the return thereof. Boggs *v.* Chichester, 1 Gr. 209; Armstrong *v.* Davis, Coxe 110. Where the court was satisfied that the defendant and his bail were insolvent, they refused to order a scire facias. State *v.* Anonymous, 1 Har. 437. This court may, by virtue of the incidental powers appertaining to its constitution and jurisdiction, grant relief to bail, on petition, when not restrained by public justice, where the default of the principal was occasioned by sickness or death. The death of the principal after forfeiture of his recognizance cannot be pleaded to a scire facias. The remedy is by petition to the court for relief. State *v.* McNeal, 3 Har. 333; Armstrong *v.* Davis, Coxe 110. If the principal died before the recognizance was forfeited, it must be so pleaded. State *v.* Crane, 2 Har. 191. The court may interfere in a summary way to prevent an improper use of its own records, or to protect bail. Solomon *ads.* Gregory, 4 Har. 112, 115, Whitehead, J.

67. Declaration by the Bye not Allowed: Process Against Defendant in Custody.

Neither the plaintiff nor any other person shall be permitted to declare by the bye against the defendant in any action; but if a defendant on a capias ad respondendum be in custody, the plaintiff if he have any other cause of action or any

other person having cause of action against such defendant may issue process against him as if he were not in custody; and on such process when served the like proceedings shall be had as in other cases. (P. L. 1903, p. 554; 3 C. S. 4072; Rev., secs. 68, 69; R. S. 929, secs. 58, 60; 1799, secs. 57, 59.)

68. Amount for which Bail Liable.

If the plaintiff shall declare for or recover a greater sum than is expressed in the capias ad respondendum, the bail shall not thereby be discharged but shall remain liable for the amount of bail required in the action. (P. L. 1903, p. 555; 3 C. S. 4072; Rev., sec. 71; R. S. 929, sec. 47; 1799, sec. 48.)

69. Release of Defendant Arrested in Capias on Giving Bail in Double the Sum Endorsed on the Writ: Approval: Form of Recognizance.

A defendant arrested on a capias ad respondendum shall be released from custody upon his entering into a recognizance of bail to the plaintiff in double the sum endorsed on the writ with surety to be approved by the court or a judge or a supreme court commissioner, which approval shall be endorsed on the recognizance, and the recognizance shall be to the effect following:

A.B. against C.D. On contract (or as the action may be), New Jersey, County, to wit:

Be it remembered, that on the day of nineteen hundred and C.D., E.F., and G.H., of the county of , personally appeared before me, J.K., one of the justices of the supreme court of the State of New Jersey (or one of the judges of the circuit court or

court of common pleas in and for said county of or one of the supreme court commissioners, as the case may be), and severally acknowledged themselves to owe unto A.B. the sum of (double the sum indorsed on the writ) each, to be levied upon their several goods and lands, upon condition that if the defendant, C.D., shall be condemned in this action at the suit of A.B., the plaintiff, he shall pay the costs and condemnation of the court, or render himself into the custody of the sheriff of said county for the same, or if he fail so to do, that the said E.F. and G.H. will pay the costs and condemnation for him or render him into the custody of the sheriff of the said county.

Taken and acknowledged the day and year above written, before me, J.K.

(P. L. 1903, p. 555; 3 C. S. 4072; Rev., sec. 75; R. S. 929, sec. 32; 1799, sec. 33.)

Bond given under this section not void because it varies from the statutory form; and surety is estopped from objecting to its validity. Emanuel *v.* McNeil, 94 A. 616. A provision in such a bond, in addition to the statutory requirements, is mere surplusage and does not void it. Unger *v.* Paukuck, 82 A. 874; 82 L. 750.

70. Qualifications of Bail.

No person shall be permitted to be bail in any action unless he is a freeholder and resident in this state and of sufficient property; and no attorney-at-law, sheriff, sheriff's deputy or other person concerned in the execution of process shall be permitted to be bail in any action. (P. L. 1903, p. 556; 3 C. S. 4073; Rev., secs. 73, 74; R. S. 950, secs. 2, 3; An act respecting bail in civil actions. Passed 1799, secs. 2, 3; Rev. 1820, 404; Pat. 348.)

71. Defendant Produced to Give Bail: Fees of Sheriff, Etc.: Form of Discharge.

The sheriff or other officer who executes a writ of capias ad respondendum shall at the time of the arrest or at any time thereafter before judgment in the action, if requested so to do, produce the defendant before an officer authorized to take recognizances of bail in order that he may give bail and for so doing the sheriff or other officer shall be entitled to two dollars and no more; the court or officer upon approving the recognizance of bail, shall execute and deliver to the sheriff or other officer having the defendant in custody a certificate of discharge to the following effect:

"A.B. against C.D. On contract (or as the action may be). To the sheriff (or other officer) of the county of : C.D., the defendant, having been arrested on a capias ad respondendum at the suit of A.B., plaintiff, and the said C.D. having, on this day of , nineteen hundred and , duly entered into a recognizance of bail to said A.B., which has been approved by me, you are hereby authorized and directed forthwith to discharge the said C.D. from custody and for so doing this shall be your sufficient warrant.

J.K."

(P. L. 1903, p. 556; 3 C. S. 4073; Rev. of 1903.)

72. Recognizance Filed: Bail Piece.

Every recognizance of bail shall be filed in the office of the clerk of the court in which the action is pending by the officer before whom the same is taken within two days after the approval of the bail, and thereupon the clerk shall under his hand and the seal of the said court execute and deliver to the bail a bail piece, which shall be to the effect following, to wit:

New Jersey supreme court (or circuit court or court of common pleas); of the term of nineteen hundred and , C.D., of the county of , is delivered on bail unto E.F., of the of , in the county of , and G.H. of the of , in the county , at the suit of A.B. in an action on contract (or as the action may be).

L.M. Attorney for defendant.

(P. L. 1903, p. 556; 3 C. S. 4073; Rev. of 1903; see Rev., sec. 75; see also sec. 69, ante.)

73. Record Book of Recognizances Kept by Clerk of Court.

The clerk of the court in which the action is pending shall keep in his office a book for recording abstracts of recognizances of bail, which books shall be properly indexed, and to which any person shall have free access at all proper times; such abstracts shall contain a statement of the name of the court and the style of the action, the names of the plaintiff and the defendant and of the bail, the residence of the bail and the amount of such bail; the clerk shall be entitled to ten cents for making such entry. (P. L. 1903, p. 557; 3 C. S. 4073; 1878, p. 385.)

3. Exceptions and Justifications.

74. Justification of Bail.

The bail shall at the time of executing the recognizance justify by affidavit made before the court or officer taking the recognizance, which affidavit shall be endorsed on the recognizance and be filed therewith, and shall set forth that the bail are freeholders and residents in this state, stating particularly the place of residence, and that they are respectively worth so much (mentioning the

sum for which they are bail) after all their debts are paid. (P. L. 1903, p. 557; 3 C. S. 4074; Rev. of 1903; see Rev., sec. 86.)

REQUISITES AND SUFFICIENCY OF AFFIDAVIT.—The affidavit for bail need not be as specific and particular as a declaration, but it must contain such facts as show, if true, that the plaintiff has a present subsisting cause of action; it must show how indebted and for what; it should disclose the character in which the defendant is a party to the instrument, so that his liability may appear to the court; it should be express, certain, explicit and intelligible. An affidavit for bail, setting forth that the defendant "is indebted in a certain amount on his promissory note, and on a balance of account against him, on the books of the banking company," is insufficient, and the defendant will be discharged on common bail. Banking Co. *v.* Peltier, 14 L. 257.

The affidavit to hold to bail for money due on articles of agreement must state the breach of the articles of agreement, or the defendant will be discharged on common bail. Stevens *v.* Meguire, 6 L. 152.

An affidavit to hold an agent to bail for misappropriating the avails of acceptances, stating the number of bills, by whom drawn, to whose order and how indorsed, by whom accepted, the amount of each, and when they matured, respectively, but did not state the precise date of the bills. Held, that the description was sufficient. Seidel *v.* Peschkaw, 27 L. 427.

75. Exceptions to Bail: Notice, Approval.

After bail has been approved exceptions thereto may be taken and entered in the clerk's book within twenty days after bail filed, and notice of such exception shall be given the bail personally or by leaving the same at the stated residence of the bail; and in such case the bail shall within ten days after such notice on notice to the plaintiff appear before the court or a judge or a supreme court commissioner, who shall examine the bail touching the value of their respective estates, and approve the bail or order new or additional bail to be put in and approved on notice within such time as the

court or officer may prescribe. (P. L. 1903, p. 557; 3 C. S. 4074; Rev. of 1903; see Rev., sec. 81.)

CITED.—Strong *v.* Mundy, 53 E. 833; 31 A. 611.

76. Amercement of Bail in Case of Failure to Appear on Exceptions or to Produce Defendant.

If on exceptions to bail, the bail shall not appear and be approved as aforesaid, or if new or additional bail shall be ordered and shall not be put in and approved within the time prescribed, the court or a judge shall rule the bail to bring in the body of the defendant at a certain time in said rule specified, and if the bail fail to do so they shall be amerced by the court in any sum not exceeding the plaintiff's debt or demand with costs; such amercement shall have the force and effect of a judgment whereupon an execution in the name and for the use of the plaintiff may on motion be awarded and issued against the goods and lands of the bail so amerced, or in lieu of such amercement the court or a judge may issue a warrant for the arrest and commitment of the defendant as if upon a capias; provided, the bail may to protect themselves cause such new or additional bail to be put in and approved at any time before such amercement, and in such case the bail shall be excused from bringing in the body and no amercement shall be entered against them on said rule. (P. L. 1903, p. 557; 3 C. S. 4074; Rev., 1903; see Rev., sec. 77.)

A sheriff, who, in answer to a rule to bring in the body of a defendant, returns that he discharged the defendant from custody upon his giving bond and complying with the requirements of the insolvent debtors act, will not be amerced. Louis *v.* Kaskel, 20 Vr. 158. Where the object of the defendant is to add new bail as well as to justify, a notice that he merely intends to perfect bail is not sufficient. Brown *v.* Williamson, 3 Hal. 363.

4. Render in Discharge.

77. Rendition of Defendant in Discharge of Bail.

Subsequent to the return of the capias ad respondendum the defendant may on notice to the plaintiff render himself or be rendered in discharge of his bail, either before or after judgment, to the court in which the action was brought or to a judge; provided, such render be made within twenty days after the return day of the scire facias against the bail or of the process in an action on the recognizance of bail and not after, unless for good cause further time be granted by the court or a judge; but in either case the bail shall pay the costs of the scire facias or action and judgment for the same may be entered against them. (P. L. 1903, p. 558; 3 C. S. 4075; Rev., sec. 87; R. S. 929, sec. 42; 1857, p. 296, sec. 9; 1799, sec. 43.)

IN GENERAL.—Courts in England as well as in this country have gone further to protect and relieve bail than they formerly did. Van Winkle *v.* Alling, 17 L. 446. Habeas corpus allowed to enable bail to surrender his principal, already in custody on a ca. sa. in another suit. Anonymous, 2 L. 391. A defendant may be rendered in discharge of his bail, notwithstanding exceptions to them have been entered. Anonymous, 9 L. 25. Surety not deprived of his right under this section to render his principal in discharge of bail because of omission to that effect in the bond. Emanuel *v.* McNeil, 94 A. 616; 87 L. 499.

78. Minute of Render and Commitment: Exoneretur Entered.

The court or a judge before whom the render is made shall make an entry or minute of such render and commitment; and thereupon the defendant shall be committed to the custody of the sheriff or jailer of the county in which the capias was served; and on such render and commitment if done in open court, or on the same being certified to the

clerk by the judge if not done in open court, the clerk shall enter an exoneretur on the recognizance of bail, and thereupon the bail shall be discharged. At any time before judgment in the action a defendant who has been rendered in discharge of bail or arrested on a warrant as aforesaid may be released on giving bail duly approved on notice to the plaintiff in the manner above prescribed. (P. L. 1903, p. 558; 3 C. S. 4075; Rev., secs. 88, 89; R. S. 929, secs. 44, 45; 1799, secs. 45, 46.)

5. Proceedings Against.

79. Plaintiff may Proceed Against Bail.

After a capias ad satisfaciendum shall have been returned non est inventus, the plaintiff may proceed against the bail upon their recognizance. (P. L. 1903, p. 559; 3 C. S. 4075; Rev., sec. 90; R. S. 929, sec. 81; 1799, sec. 80.)

IN GENERAL.—The Supreme Court follows the rules of the king's bench in regard to matters of bail. Armstrong *v.* Davis, 1 L. 110; Parker *v.* Ogden, 2 L. 146; Kinney *v.* Muloch, 17 L. 335; Van Winkle *v.* Alling, 17 L. 446; Banking Co. *v.* Peltier, 14 L. 259, 394.

In order to fix the bail on a recognizance, the sheriff may be instructed to return a ca. sa. non est inventus (although he might have served it on the defendant) unless he be in his custody, in which case he cannot make such return. Van Winkle *v.* Alling, 17 L. 446.

The bail as well as his principal is bound to take notice where the venue is laid, and should search for a ca. sa. in the office of the sheriff of that county, to know whether the plaintiff intends to proceed by execution against the defendant's body. Cockran *v.* Drake, 18 L. 9.

80. Stay when Writ of Error Brought.

If a writ of error is brought by the defendant and the bail apply within the time limited for rendering the defendant, the court in which the

proceedings against the bail are pending or a judge may stay the proceedings against such bail if they enter into recognizance to the plaintiff in double the sum recovered, to pay the condemnation money or render the defendant into custody of the sheriff within twenty days after the determination of the writ of error, if it be in favor of the defendant in error. (P. L. 1903, p. 559; 3 C. S. 4075; Rev., secs. 91, 92; R. S. 929, secs. 82, 83; 1799, secs. 81, 82.)

81. Judgment Paid by Bail not Satisfaction: Execution for Benefit of Bail.

If the bail are compelled to pay the judgment recovered against the defendant, the court wherein the judgment was recovered on proof of payment thereof by the bail and on notice to the plaintiff and the defendant may rule that such judgment remain in force for the benefit of the bail so far as to enable them to recover the money paid by them as bail out of the property of the defendant, and thereafter execution may issue on such judgment against the property of the defendant notwithstanding such payment in the name of the plaintiff, but for the benefit of the bail; and after the entry of such rule satisfaction of such judgment shall not be entered of record without the consent in writing of the bail or rule therefor. (P. L. 1903, p. 559; 3 C. S. 4075; Rev., sec. 93; Rev. of 1874.)

6. Deposit in Lieu of Bail.

82. Depcsit in Lieu of Bail: Repayment of Deposit.

Any defendant may, in lieu of giving or renewing bail if rendered by his bail, make deposit in court of the sum for which bail was ordered together with thirty dollars to answer for costs, and thereupon he shall be discharged from custody:

the making of such deposit shall not prevent the defendant making application to set aside the order for bail; if the order for bail shall be set aside, the money so deposited shall by rule be repaid to the defendant, but otherwise shall remain subject to the order of the court, and if the plaintiff recover in the action, shall be applied in satisfaction in whole or in part as the case may be of the judgment recovered; if the plaintiff shall recover a sum exceeding the amount of such deposit, he shall be entitled to a writ of capias ad satisfaciendum and may collect thereon the balance remaining due on the judgment; but if the defendant recover judgment in the action the sum so deposited shall be repaid to him. (P. L. 1903, p. 559; 3 C. S. 4076; Rev., secs. 100, 101, 102; Rev. of 1874.)

7. Bail by Surety Companies.

83. Bail by Surety Companies in Civil Action.

The foregoing provisions of this act relating to the qualifications, justification and exceptions to bail shall apply only to bail given by individuals, and nothing in this act shall be construed to prevent any surety company having a certificate of authority to do business in this state from the commissioner of banking and insurance of this state from acting as bail in any civil action in the manner and with the effect provided by law. (P. L. 1903, p. 560; 3 C. S. 4076; Rev. of 1903.)

VIII. ATTACHMENT.

See P. L. 1901, p. 158; 1 C. S. 132. Attachment Act 1901. The provisions of the Revision of 1903, relative to attachment, are based upon the following acts: 1853, p. 243; 1878, p. 141; 1893, p. 181; 1894, p. 261; 1895, p. 103; 1895, p. 380. As to the effect of service of summons by publication in personal actions, see Penoyer *v.* Neff, 95 U. S. 714.

84. When an Action may be Commenced by Attachment.

An action may be commenced by attachment against the property, real and personal, of any person, corporation or organization against whom a writ of summons might issue, upon proof by affidavit or otherwise to the satisfaction of the court in which an action is about to be commenced or to a judge or a supreme court commissioner, establishing:

First. The facts on which the plaintiff would be entitled to an order to hold a defendant to bail under the provisions of this act; if the defendant be a female, a corporation or an organization, an attachment may issue as if such defendant were liable to arrest in a civil action; but in actions in tort no attachment shall issue hereunder against a corporation upon which a summons can be served; or,

Second. That the plaintiff has a cause of action the nature and particulars of which he shall specify, and that the defendant absconds from his creditors or is not a resident of this state, and that summons cannot be served; but no attachment shall issue hereunder against the rolling stock of a common carrier of another state or against the goods of a non-resident in transit in custody of a common carrier of this or another state; or,

Third. That a cause of action existed against a decedent which survives against his heirs or devisees, and that such heirs or devisees, or some of them, are unknown or non-resident, and that there is property in this state which is by law liable to answer such cause of action. (P. L. 1903, p. 560, as amended by P. L. 1907, p. 273; 3 C. S. 4076; Rev. of 1903; see 1894, p. 261.)

REPEAL OF ACT.—That portion of the revised attachment act (P. L. 1901, p. 158, sec. 1) which authorizes the issuance of an

attachment against the property of absconding and non-resident debtors upon the filing of an affidavit is not impliedly repealed by this section. Realty Corp. *v.* Stafford, 70 L. 528; 57 A. 145.

RIGHT TO ISSUE—PROOF.—Under subdivision two there must be proof of facts sufficient to establish such particulars and not mere belief or conclusions of the witness. Hanford *v.* Duchastel, 93 A. 586; 87 L. 205. In tort action where special cause relied on is that defendant is non-resident and cannot be served with summons, proof of such facts is jurisdictional and lack of it vitiates entire proceedings. Hisor *v.* Vandiver, 85 A. 181; 83 L. 433.

PROCEDURE.—Attachment begun under this section must follow procedure provided in practice act and not attachment act of 1901, or it is void. Barrett Manufacturing Co. *v.* Ketchell, 86 A. 396; 84 L. 326.

REVIEW.—Refusal to quash a levy made by virtue of a writ of attachment issued under this section is reviewable by certiorari. Hisor *v.* Vandiver, 82 A. 526; 82 L. 303.

CITED.—Title Guaranty Land Co. *v.* Paterson, 74 A. 794; 76 E. 539.

85. Writ Ordered upon Proof: Bond and Sureties.

Upon such proof being made, the court, judge or commissioner shall make an order awarding the plaintiff a writ of attachment against the goods and lands, rights and credits, moneys and effects, belonging to the defendant in this state, or if action is brought against the defendant in a representative capacity under his control and custody, which order shall prescribe the amount of the bond to be given on behalf of the plaintiff to the defendant with sufficient sureties to indemnify the defendant for all damages resulting from the attachment and taxed costs of suit, if the suit shall be discontinued or dismissed or if judgment therein shall be for defendant; such order shall direct that the writ shall issue in actions on contract for such sum as shall be established by the proofs to be due to the plaintiff, and in actions in tort for such sum as the officer shall under all the circumstances think proper; in case an attachment shall

issue an order for bail shall not be made. (P. L. 1903, p. 561; 3 C. S. 4077; Rev. of 1903.)

GROUNDS FOR QUASHING WRIT.—After a general appearance to an attachment, the writ will not be quashed because of insufficiency of the proof to support the order for it. Watson *v.* Noblett, 65 L. 506; 47 A. 438.

CONCLUSIVENESS OF AFFIDAVIT FOR ORDER.—The act does not make provision for a contest as to the truth of the affidavits whereon an order awarding an attachment against a debtor has been made. If such affidavits are sufficient to support an order, it cannot be questioned by counter-affidavits tending to show their falsity. Bank *v.* Bank, 58 L. 300; 33 A. 474.

PROOF REQUIRED.—The facts set forth in an affidavit for an attachment must be proved by competent evidence, such as would be sufficient to go before a jury to prove fraud. Carpet Co. *v.* Hamilton, 17 N. J. L. J. 16. See Hisor *v.* Vandiver, 83 L. 133; 85 A. 181.

RIGHT TO ALIAS WRIT.—After a general appearance to an attachment, no alias writ can issue. Watson *v.* Noblett, 65 L. 506; 47 A. 438.

CITED.—Realty Corporation *v.* Stafford, 70 L. 528; 57 A. 145.

86. Proceeding on Writ Same as in Case of Non-Resident Debtors, Etc.

Upon filing with the clerk of a court out of which a writ of attachment may issue the order awarding such writ and the proof upon which the same is founded, and the bond approved by the court, judge or commissioner, such clerk shall issue to the sheriff or other officer a writ of attachment for the sum directed, and the practice and procedure in relation to the said writ, its effect, levy and return, and in relation to the custody and sale of personal property attached, shall be the same as in cases of attachment against non-resident debtors, and in relation to the vacation thereof when improperly issued, the same as for setting aside an order for bail. (P. L. 1903, p. 561; 3 C. S. 4077; Rev. of 1903.)

See Hisor *v.* Vandiver, 85 A. 181; 83 L. 433; same, 82 A. 526; 82 L. 303; Barrett Mfg. Co. *v.* Ketchell, 86 A. 396; 84 L. 326.

87. Attachment Against Unknown Heirs.

If the writ is awarded under the third subdivision of section eighty-four the plaintiff shall in the writ and in his declaration and rule to plead and in all subsequent proceedings in the action, designate such of the heirs or devisees as are known by name, and such of them as are unknown by the designation of "unknown heirs or devisees" of such decedent: and such designation shall have the same force and effect as if all the heirs and devisees who are proper parties defendant had been named in the writ and other proceedings. (P. L. 1903, p. 562; 3 C. S. 4077; Rev. of 1903.)

See note under section 5, Attachment act 1901; 1 C. S. 136.
Attachment against non-resident devisees. Jordan *v.* Moore, 82 A. 850; 82 L. 552.

88. Attachments Against Separate and Joint Estate.

Attachments may issue against the separate and joint estate of joint debtors or any of them, either by their name or name of the partnership or by whatsoever name they may be generally distinguished, or against the heirs, executors or administrators of them or any of them; and the estate so attached, whether separate or joint, may be sold or assigned for the payment of the joint debt; and in case of fraud by one of several joint debtors which accrues to the benefit of all the joint debtors, an attachment may issue against the separate estate of such joint debtor or against the joint property of all. (P. L. 1903, p. 562; 3 C. S. 4077; Rev. of 1903.)

See notes under section 3, Attachment act 1901; 1 C. S. 135.

89. Issuance of Writ Beginning of Action, no Summons Necessary: Pleading and Procedure.

The issuing of such writ of attachment shall be the beginning of an action at law and no summons shall be necessary to bring the defendant into court and the plaintiff shall file his declaration within thirty days after the return day of the writ, and shall rule the defendant to plead thereto, which rule shall be served personally on the defendant either in or out of this state, or shall be served or published as the court or a judge may direct, and in default of a plea as required by such rule, judgment interlocutory may be entered against the defendant, and the practice and procedure thereon and generally in the action shall be the same as if the action had been begun by summons, except as herein otherwise provided. (P. L. 1903, p. 562; 3 C. S. 4077; Rev. of 1903.)

Procedure provided by this section must be followed in attachments under Practice act. Barrett Mfg. Co. *v.* Ketchell, 86 A. 396; 84 L. 326.

90. Property as Security: Special Execution: Sale: Action by Sheriff, Etc.

The property attached, unless released as otherwise provided, shall remain during the pendency of the action as security for any judgment which the plaintiff may recover, and upon the recovery of final judgment special execution shall issue against such of the attached property as may be liable to be levied upon and sold under the execution laws of this state, and the proceedings thereon shall be in conformity therewith; but in case the property attached or any part thereof shall be such as it is not liable to be levied upon and sold under the execution laws of this state, then the sheriff or other officer to whom the execution shall

have been issued shall in his own name as such sheriff or other officer realize upon the said property and choses in action by sale, collection or otherwise and to that end he may bring an action in his own name as sheriff or other officer for the recovery of any moneys due thereon, and he shall account therefor to the court out of which the said execution issued; for his services in realizing upon the property and choses in action attached which are not liable to be levied upon and sold under the execution laws of this state, the sheriff or other officer shall by order of the court or a judge be allowed his expenses and such reasonable compensation as the court or judge may fix. (P. L. 1903, p. 563; 3 C. S. 4078; Rev. of 1903.)

CITED in Hisor *v.* Vandiver, 82 A. 526; 82 L. 303.

91. Special Execution where Resident Defendant does not Appear: General Judgment Against Non-Resident who Appears, Etc.

If the defendant be a resident, then in case he does not appear the judgment and execution shall be special against the property attached only, but in case he does appear the judgment and execution shall be against him generally; if the defendant be a non-resident, he may appear specially or generally; in case he does not appear or shall enter a special appearance, the judgment and execution shall be special against the property attached only, but in case he enters a general appearance the judgment and execution shall be against him generally. (P. L. 1903, p. 563; 3 C. S. 4078; Rev. of 1903.)

CITED in Hisor *v.* Vandiver, 82 A. 536; 82 L. 303; same, 85 A. 181; 83 L. 433.

92. Release of Property by Giving Bond.

The property so attached may by order of the court or a judge be released from the lien of the said writ upon the defendant giving bond to the plaintiff with sufficient surety to be approved by the court or a judge in double the amount of the plaintiff's claim or cause of action, or in double the value of the property so attached, or if action is founded upon a tort in such sum as the court or a judge shall under the circumstances deem reasonable, conditioned for the payment of any judgment which may be recovered in the action. (P. L. 1903, p. 563; 3 C. S. 4078; Rev. of 1903.)

CITED in Hisor *v.* Vandiver, 85 A. 181; 83 L. 433.

IX. PLEADING.

1. When Filed or Served.

93. Declaration, When to be Filed.

P. L. 1903, p. 564; 3 C. S. 4078; Rev., sec. 103; R. S. 929, sec. 50; 1799, sec. 51; 1820, p. 80, sec. 2.

REPEALED.—P. L. 1912, p. 384, § 34, § 294, post.

See P. L. 1912, p. 378, sec. 3, § 262, p. 594, rules 54, 55; S. C. R. 1913, rules 75, 76; post, §§ 348, 349.

REPEALED SECTION CITED in Brown *v.* Daws, 23 L. 483; Ricard *v.* New Providence Township, 5 Fed. 433; Ogden *v.* Gibbons, 5 L. 518, 532; Lowenthal *v.* Wagner, 69 L. 129; 54 A. 252; Zeek *v.* Rockaway Rolling Mill, 74 A. 442; 79 L. 123.

94. Plea, When to be Filed.

P. L. 1903, p. 564; 3 C. S. 4079; Rev., sec. 104; R. S. 929, sec. 51; 1799, sec. 52; 1820, p. 80.

REPEALED.—P. L. 1912, p. 384, sec. 34, § 294.

See P. L. 1912, p. 390, etc., rules 31, 38, 39, 55; S. C. R. 1913, rules 45, 56, 57, 76; post, §§ 325, 332, 333, 349.

REPEALED SECTION CITED in Lucke *v.* Kierman, 53 A. 566; 68 L. 281; Camden *v.* Greenwald, 66 L. 186; 48 A. 1009; Welsh *v.* Blackwell, 14 L. 344; Insurance Co. *v.* Hodges, 24 L. 673; Sassenburgh *v.* Shaver, 7 L. 170; Johnson *ads.* Rowan, 16 L. 266; Hoguet *v.* Wallace, 28 L. 523; Beebe *v.* George H. Beebe Co., 64 L. 497; 46 A. 168; Hunter *v.* Budd, 5 L. 718; Sneidiker *v.* Tuick, 13 L. 245; Harwood *v.* Smethurst, 31 L. 502; *ads.* Dill, 6 L. 168; Halsey *ads.* Miller, 16 L. 63; Brown *v.* Daws, 3 Zab. 483; Berry *v.* Cohanan, 7 L. 135; Anonymous, 16 L. 396; Camburn *v.* P. R. R., 82 A. 307; 82 L. 236.

95. Serving of Declaration and Summons.

P. L. 1903, p. 564; 3 C. S. 4079; Rev., secs. 105, 106; 1855, sec. 35; 1857, p. 296, sec. 7; 1884, p. 267.

REPEALED by P. L. 1912, p. 384, sec. 34, § 294.

See P. L. 1912, p. 394, rules 54, 55; S. C. R. 1913, rules 75, 76; post, §§ 348, 349.

REPEALED SECTION CITED in Kane *v.* Church, 72 L. 442; 60 A. 1099; Palmer *v.* Board, 77 L. 143; 71 A. 285; Coursen *v.* Snell, 73 L. 550; 64 A. 118; Dock *v.* Elizabethtown Co., 34 L. 312; McMurtrie *ads.* Doughten, 24 L. 252; Stehr *v.* Ollbermann, 49 L. 633; 10 A. 547; Cooper *v.* Cape May Point, 67 L. 437; 51 A. 511; Hunt *v.* O'Neill, 44 L. 564; Blessing *v.* McLinden, 79 A. 347; 81 L. 379; Camburn *v.* P. R. R., 82 A. 307; 82 L. 236.

96. Declaration, How Served: Costs.

P. L. 1903, p. 565; 3 C. S. 4080; Rev., sec. 106; 1872, p. 37.

REPEALED by P. L. 1912, p. 384, sec. 34, § 294.

See P. L. 1912, p. 394, rule 54; S. C. R. 1913, rule 75; post, § 348

REPEALED SECTION CITED in Cooper *v.* Cape May Point, 67 L. 437; 51 A. 511; Coursen *v.* Snell, 73 L. 550; 64 A. 118.

97. Affidavit of Merits: Notice on Declaration.

P. L. 1903, p. 565, as amended by P. L. 1906, p. 677; 3 C. S. 4080; 1889, p. 334.

REPEALED by P. L. 1912, p. 384, § 34, § 294, post.

See P. L. 1912, p. 394, rule 56; S. C. R. 1913, rule 77; post, § 350.

REPEALED SECTION CITED in Laufman & Co. *v.* Manufacturing Co., 54 L. 70; 23 A. 305; Van Dyke *v.* Oliphant, 13 N. J. L. J. 45; McMurtrie *v.* Doughten, 24 L. 52; Stehr *v.* Ollbermann, 49 L. 633; 10 A. 547; Leonard *v.* Levingard, 13 N. J. L. J. 148; Keim *v.* Eble, 13 N. J. L. J. 239; McKnight *v.* Romaine, 14 N. J. L. J. 204; Camburn *v.* P. R. R., 82 A. 307; 82 L. 236; Coursen *v.* Snell, 73 L. 550; 64 A. 188.

SUFFICIENCY OF AFFIDAVIT OF MERITS.—An affidavit of merits, stating that the defendant has a good and substantial defense instead of "a just and legal" defense, is insufficient. Woodruff *v.* McGarigle, 12 N. J. L. J. 384. A court has no authority to extend the time within which the affidavit of merits may be filed. Id.

98. Time for Filing Further Pleadings.

P. L. 1903, p. 566; 3 C. S. 4081; Rev., sec. 107; R. S. 929, sec. 51; 1799, sec. 52.

REPEALED by P. L. 1912, p. 284, § 34, § 294, post.

See P. L. 1912, p. 394, rule 55; S. C. R. 1913, rule 76; post, § 349.

REPEALED SECTION CITED in Estell *v.* Franklin, 29 L. 264.

2. When Filed out of Time.

99. Parties need not Plead to Pleadings Filed out of Time Unless Ruled.

If a party shall file his pleading after the expiration of the time limited or granted, the adverse party shall not be required to plead or reply thereto until ruled so to do, and no subsequent pleading shall be required in a shorter time than twenty days from the time of the service of a rule to plead or reply thereto. (P. L. 1903, p. 566; 3 C. S. 4081; Rev., secs. 110, 111; R. S. 929, secs. 44, 45; 1820, p. 80, secs. 3, 4; Rev., 1820, 691.)

VALIDITY OF PLEADINGS FILED OUT OF TIME.—If pleadings are filed after the time allowed by the practice act have expired (although notice is given of the time of filing same) they may be treated as nullities. Anonymous, 7 L. 39.

100. Waiver of Right to Take Advantage of Failure to Plead in Time.

If a party would take advantage of the failure of the adverse party to file any pleading within the time limited or granted, he shall do so before or at the term next after such failure, and if he fail to do so, it shall be considered as a waiver of his right and he shall not afterwards have such judgment, unless he shall rule the party to plead. (P. L. 1903, p. 566; 3 C. S. 4082; Rev., sec. 113; Rev. of 1874; Supreme Court Rule, 20.)

PLAINTIFF'S RIGHT TO JUDGMENT BY DEFAULT.—If the plaintiff does not take judgment by default, before or during the term next after the defendant's failure to plead, he cannot thereafter have such judgment, unless he first rule the defendant to plead. Whitney *v.* Bank, 40 L. 481; see Keim *v.* Elble, 13 N. J. L. J. 239. Zeek *v.* Rockaway Rolling Mill, 74 A. 442; 79 L. 123.

CITED.—Ricard *v.* New Providence Tp., 5 Fed. 433. Failure to file declaration one year after return of summons amounts to an abandonment of the action. Wolf *v.* Watson Co., 75 A. 436; 79 L. 284. See Bowden *v.* Gillespie Co., 75 L. 296; 68 A. 238. Defendant must take advantage of the plaintiff's failure to file his complaint within the time before or at the term next after such failure; if he fail to do so, defendant cannot afterwards have judgment of non pros. unless he shall rule the plaintiff to plead. Joseph Marrone Cont. Co. *v.* Monahan, 95 A. 984.

3. Affidavit with Plea or Demurrer.

101. Defendant to File Affidavit with Plea or Demurrer.

P. L. 1903, p. 566; 3 C. S. 4082; Rev., sec. 114; 1855, sec. 35; 1886, p. 33; 1894, p. 126.

REPEALED by P. L. 1912, p. 384, § 34, § 294, post.
See P. L. 1912, p. 394, rules 26, 56; S. C. R. 1913, rules 40, 77; post, §§ 320, 350.
REPEALED SECTION CITED in Robert *v.* Moore, 62 L. 618; 43 A. 582; Mattix *ads.* Steelman, 35 L. 467; McTague *v.* Railroad Co., 44 L. 62; Cooper *v.* Cape May Point, 67 L. 437; 51 A. 511; Lyons *v.* Allen, 76 L. 931; 69 A. 642.

4. Particulars of Demand.

102. Bill of Particulars Annexed to Declaration: Set-Off.

P. L. 1903, p. 567; 3 C. S. 4082; Rev., secs. 236, 237; 1857, p. 296, secs. 3, 4.

REPEALED by P. L. 1912, p. 384, § 34, § 294, post.
See P. L. 1912, p. 379, etc., sec. 12, rule 18; S. C. R. 1913, rule 32, post, §§ 272, 312.
For citations on bill of particulars, see notes under sec. 312, post.
For citations on set-off, see notes under sec. 272, post.
See notes, sec. 102, 3 C. S. 4082.

103. Fees for Copies.

The attorney for each copy of the bill of particulars or of a record or writing shall be allowed eight cents per folio, and the clerk for copying the same in the record, six cents per folio. (P. L. 1903, p. 567; 3 C. S. 4083; Rev., sec. 238; 1857, p. 296, sec. 5.)

5. General Issue and Notice of Special Matter.

104. Specification of Defenses: Failure to Specify.

P. L. 1903, p. 567; 3 C. S. 4083; Rev., secs. 116, 117; Rev. of 1874; R. S. 951, sec. 2. Act to facilitate pleadings. Passed 1799, sec. 2; Rev. 1820, 403; Pat. 347.

REPEALED by P. L. 1912, p. 384, § 34, § 294, post.
See P. L. 1912, p. 388, etc., rules 19, 20, 32, 39, 40; post, §§ 313, 314, 326, 333, 334.

REPEALED SECTION CITED in McGlade *v.* Insurance Co., 71 L. 40; 59 A. 628; Hann *v.* Lloyd, 50 L. 5; 11 A. 346; Little *v.* Bolles, 12 L. 171; Tillou *v.* Britton, 9 L. 120; Turner *v.* Wells, 64 L. 269; 45 A. 641; Ackerman *v.* Shelp, 8 L. 125; Miller *v.* Halsey, 14 L. 48; Stevenson *v.* Skank, 3 L. 434; Axel *v.* Kraemer, 75 L. 688; 70 A. 367; Parisen *v.* Railroad Co., 65 L. 413; 47 A. 477; Roofing Co. *v.* Leather Co., 67 L. 566; 52 A. 389; Story *v.* Baird, 14 L. 262; Beale *v.* Berryman, 30 L. 216; Smith *v.* Compton, 67 L. 548; 52 A. 386; 58 L. R. A. 480; Ruskin *v.* Armn, 81 A. 342; 82 L. 72.

6. Failure of Consideration and Recoupment.

105. Failure of Consideration as Defense.

P. L. 1903, p. 568; 3 C. S. 4084; Rev., sec. 129; Rev. of 1874; 1871, p. 8; 1896, p. 185.

REPEALED by P. L. 1912, p. 384, § 34, § 294.

See P. L. 1912, p. 379, sec. 13; post, § 273.

REPEALED SECTION CITED in Winter *v.* Schoenfeld, 78 L. 92; 73 A. 42; Norton *v.* Sinkhorn, 63 E. 313; 50 A. 506, reversing 61 E. 508; 48 A. 822; Kinney *v.* Laundry Co., 75 L. 497; 68 A. 111; Price *v.* Reynolds, 39 L. 171; Hunter *v.* Reiley, 43 L. 480; Babbitt *v.* Moore, 51 L. 229; 17 A. 99; see Wakeman *v.* Illingsworth, 40 L. 434; Trotter *v.* Heckscher, 40 E. 657; 4 A. 83; Alpaugh *v.* Wood, 45 E. 157; 16 A. 676; Manufacturing Co. *v.* Devlin, 127 Fed. 71; 62 C. C. A. 53; Bozarth *v.* Dudley, 44 L. 304; Paul Gerli & Co. *v.* Mistletoe Silk Mills, 76 A. 335; 80 L. 128; United Globe Rubber Mfg. Co. *v.* Coward, 80 L. 286; 78 A. 203; Murphy *v.* Patten, 85 A. 56; Mayer Ice Co. *v.* Van Voorhis, 95 A. 735; Woodward *v.* Emmons, 61 L. 281; 39 A. 703; Water Co. *v.* Whiting Co., 64 L. 240; 45 A. 692; 49 L. R. A. 572; 81 Am. St. Rep. 467; Welch *v.* Woodworking Co., 61 L. 57; 38 A. 824.

7. In Special Cases.

106. Pleading in Libel or Slander Suits.

In an action founded on a libel or slander, the plaintiff may aver that the words or matter complained of were used in a defamatory sense, specifying such defamatory sense, without any prefa-

tory averment to show how such words or matter were used in that sense, and such averment shall be put in issue by the denial of the alleged libel or slander; and if the words or matter set forth with or without the alleged meaning show cause of action, the declaration shall be sufficient. (P. L. 1903, p. 568; 3 C. S. 4085; Rev., sec. 124; 1855, sec. 26.)

CONSTRUCTION AND OPERATION IN GENERAL.—By the provisions of this section an alteration in the rules of pleading in civil actions for libel and slander was effected, by which the necessity of the prefatory averments of extrinsic facts, showing the defamatory sense attributable to the written or spoken words, is dispensed with. In such pleadings, it is now sufficient to aver that the words were used in a specified defamatory sense. State *v.* Mott, 45 L. 495.

Where a declaration for slander states a cause of action, and by innuendo therein alleges that the words set out in the declaration were uttered in a defamatory sense concerning plaintiff, it is sufficient, under this section. Ely *v.* Ely, 56 A. 1.

A count, which charges that the defendant spoke or published certain words concerning the plaintiff, and that he spoke them meaning that the plaintiff was guilty of certain specified fraudulent conduct, is within this section. Separator Co. *v.* Supply Co., 75 L. 207; 67 A. 711.

APPLICABLE TO SLANDER OF TITLE.—In actions for slander of title this section is applicable, so that any meaning deemed advisable by the plaintiff, may be imputed to the words. Andrew *v.* Deshler, 43 L. 16.

ESSENTIALS OF DECLARATION.—A declaration is defective which does not contain the statutory averment that the words were spoken in a defamatory sense. Miller *v.* Beebe, 2 N. J. L. J. 50.

The plaintiff must so state his complaint, that supposing all the allegations to be true, it will appear from the declaration that he has been charged with a crime. Cole *v.* Grant, 18 L. 327, 330.

SEPARATE COUNTS.—Under this provision, where the matter sued on is actionable per se, and plaintiff by innuendo puts a construction on it different from what it would mean without the innuendo, the declaration should be read as though it contained two counts, one with the innuendo and the other without it. Allen *v.* Oppenheimer, 166 F. 826.

ADMISSION BY DEMURRER.—A demurrer to a declaration is unavailing to question the propriety of the imputed meaning for the imputed meaning of the words is admitted by the demurrer. Ink Co. *v.* Pomery, 76 A. 326; 80 L. 224.

PLEADER'S CONSTRUCTION OF DEFAMATORY SENSE.—A pleader may aver that the words set forth were used in any defamatory sense he may see fit to attribute to them. Hand *v.* Winton, 38 L. 122; Curley *v.* Fenney, 62 L. 70; 40 A. 678.

A plaintiff, under this section, may set out the words complained of, and put on them, by innuendo or specified defamatory sense, any construction that he may see fit, without showing, by colloquium or other explanatory matter, how the words contained a defamatory charge. Allen *v.* Oppenheimer, 166 Fed. 826.

OFFICE OF INNUENDO.—In an action for slander an innuendo cannot be used to enlarge or extend the meaning of the words spoken; it can only explain them, by connecting them with the inducement or colloquium previously averred. The slander must appear substantially from the colloquium or inducement and the words alleged, and, unless it can be collected from them, it cannot be created by an allegation in the innuendo; it must appear by the natural meaning of the words in the conversation and circumstances in which their use is alleged. Joralemon *v.* Pomeroy, 22 L. 271.

CITED.—Freisinger *v.* Moore, 65 L. 286; 47 A. 432; Ramsdell *v.* P. R. R., 75 A. 444; 79 L. 379; Watkins *v.* Cope, 86 A. 545; 84 L. 143.

107. Breaches Assigned in Action on Bond.

In an action upon a bond with a condition the plaintiff shall state the condition and assign breaches thereof in his declaration, and no evidence shall be given of any breach not so assigned. (P. L. 1903, p. 569; 3 C. S. 4086; Rev., sec. 125; 1855, sec. 28.)

OPERATION AND EFFECT IN GENERAL.—This section, it seems, applies to official bonds, as that of a constable. Jersey City *v.* Chase, 30 L. 233, 234. In an action founded on an ordinary money bond, in violation of the express direction of this section neither its condition nor breach was assigned in the declaration. Held, on demurrer, that a copy of the instrument sued on will not be noticed unless it is made a part of the declaration by being mentioned therein. Brown *v.* Warden, 44 L. 177.

SEVERAL BREACHES OF CONDITION IN ONE ASSIGNMENT.—In declaring on a bond with condition, it is not permissible to include in one assignment several distinct breaches of such condition. The remedy against such a defect is not by general demurrer, but by motion to strike out the assignment. Ordinary *v.* Barnes, 67 L. 80; 50 A. 903.

108. Pleading in Action by Township upon Collector's Bond.

In an action by the inhabitants of a township in their corporate capacity upon the bond of a township collector, there may be included all claims of such township in its own right or in the right of another person or corporation for public moneys which have come to the hand of such collector for any purpose whatever and with which he is legally chargeable. (P. L. 1903, p. 569; 3 C. S. 4086; 1878, p. 193.)

109. Pleading Right by Virtue of Private Way.

A right by virtue of a private way may be pleaded generally in the same manner as in pleading a public way. (P. L. 1903, p. 569; 3 C. S. 4086; Rev., sec. 128; 1855, sec. 30.)

CITED in Camden *v.* Greenwald, 65 L. 458; 47 A. 458.

8. Striking out Plea or Demurrer.

110. Defective Pleading Stricken out on Notice.

P. L. 1903, p. 569; 3 C. S. 4086; Rev., sec. 132; 1855, sec. 24; 1857, p. 296, sec. 1.

REPEALED by P. L. 1912, p. 384, § 34, § 294.

See Practice Act 1912, rules 25, 27, 28; S. C. R. 1913, rules 39, 41, 42; post, §§ 319, 321, 322.

REPEALED SECTION CITED in Cemetery Co. *v.* Railroad Co., 74 L. 100; 65 A. 192; Dredging Co. *v.* Hess, 71 L. 327; 60 A. 362; Malberti *v.* Electric Co., 69 L. 55; 54 A. 251; Voorhees *v.* Barr, 59 L. 123; 35 A. 651; King *v.* Morris, 74 L. 810; 68 A. 162; Association *v.* Williams, 78 L. 720; 75 A. 927; Sautter *v.*

Insurance Co., 73 L. 455; 63 A. 994; Brown *v.* Warden, 44 L. 177; Cooper *v.* Vanderveer, 47 L. 178; Association *v.* Warden, 55 L. 600; 27 A. 932; Mershon *v.* Castree, 57 L. 484; 31 A. 602; Leland *v.* Neilson, 3 N. J. L. J. 156; Hubbard *v.* Montross Co., 74 A. 254; 79 L. 208; State Mutual *v.* Williams, 75 A. 927; 78 L. 720; Blessing *v.* McLinden, 79 L. 347; 81 L. 379; Dayton *v.* Boettner, 81 A. 726; 82 L. 421; Karpenski *v.* South River, 85 A. 639; 83 L. 149; Ulman *v.* Greenwood, 86 A. 411; 84 L. 284; Karnuff *v.* Kelch, 69 L. 499; 35 A. 163; Vail *v.* Insurance Co., 67 L. 422; 51 A. 929; King *v.* Morris, 73 L. 279; 62 A. 1006.

111. Frivolous Pleas Stricken out.

P. L. 1903, p. 469; 3 C. S. 4087; Rev., sec. 133; Rev. of 1874; 1882, p. 111.

REPEALED by P. L. 1912, p. 384, § 34, § 294, post.

See Practice Act 1912, secs. 15, 16, rules 57–60; S. C. R. 1913, rules 80–83; post, §§ 275, 276, 351–354.

REPEALED SECTION CITED in Baracliff *v.* Griscom, 1 L. 165; Dunlap *v.* Kinney, Id., note; Dickinson *v.* Brick, 3 L. 694, 696; Coryell *v.* Croxall, 5 L. 764; Allen *v.* Wheeler, 21 L. 93; Hogencamp *v.* Ackerman, 24 L. 133; Hill *v.* Craig, 14 L. 577; North Brunswick *v.* Booream, 7 L. 160; Coxe *v.* Higbee, 11 L. 395; Richards *v.* Canal Co., 18 L. 250; Copperthwait *v.* Dummer, 18 L. 258; Dewees *v.* Insurance Co., 34 L. 244, 251; Shuff *v.* Stillwell, 11 L. 282, 284; Hawk *v.* Seagraves, 34 L. 355. But see State *v.* Covenhoven, 6 L. 396, 403; Riggs *v.* Quick, 16 L. 160; Coykendall *v.* Robinson, 39 L. 98; Little *v.* Bolles, 12 L. 171; State Bank *v.* Chetwood, 8 L. 1; Tillou *v.* Britton, 9 L. 120; Mershon *v.* Castree, 57 L. 484; 31 A. 602; Key *v.* Paul, 61 L. 133; 38 A. 823; King *v.* Morris, 74 L. 810; 68 A. 162; State Mutual *v.* Williams, 75 A. 927; 78 L. 720; Blessing *v.* McLinden, 79 L. 347; 81 L. 379; Hubbard *v.* Montross Co., 79 L. 208; 74 A. 254; Brady *v.* Carteret Co., 90 A. 257; 82 E. 620.

9. Neglect of Attorney.

112. Failure of Attorney to File Pleadings: Opening Judgment.

If in any action judgment shall pass against either party by reason of the failure of the attorney of such party to file any proper pleading,

the court or a judge shall on application within one year after the entry of such judgment open said judgment and permit a proper pleading to be filed upon terms, if in the opinion of the court or judge injury or wrong has resulted or may result from such failure. (P. L. 1903, p. 569; 3 C. S. 4087; 1893, p. 290; 1895, p. 712.)

See section 5, ante, for malpractice, neglect or mismanagement of attorney.

JUDICIAL DISCRETION.—A motion made in the supreme court to open one of its judgments regularly entered by default is addressed to the discretion of the court, and its determination thereon cannot be reviewed by writ of error. Smith *v.* Livesey, 67 L. 269; 51 A. 453.

WHEN DEFAULT JUDGMENT PROPERLY OPENED.—Where, from neglect, fault, error or mistake, the attorney of a defendant has failed to file a plea, and by reason thereof judgment by default has been entered against him, and injury or wrong has resulted to him therefrom, the judgment will be opened. Lenz *v.* Rowe, 66 L. 131; 48 A. 525.

This section does not apply to mechanic lien cases in District Court. Levine *v.* Schwartz, 92 A. 274; 86 L. 476.

CITED.—Compton *v.* Calvert, 77 L. 358; 72 A. 29.

10. General Provisions.

113. Records Kept Together: Notice Taken of Pleadings Filed.

The pleadings and papers filed in each action shall be kept together in the office of the clerk of the court; parties shall take notice of the filing of all pleadings within the time limited without service of a copy or notice of the filing. (P. L. 1903, p. 570; 3 C. S. 4088; Rev., secs. 109, 112; R. S. 929, secs. 53, 76; 1799, secs. 56, 57.)

114. Express Color and Special Traverse not Necessary: Issue Joined.

P. L. 1903, p. 570; 3 C. S. 4088; Rev., secs. 122, 127; 1855, sec. 29; 1857, p. 288, sec. 37.

REPEALED by P. L. 1912, p. 384, § 34, § 294.

See Practice Act 1912, rule 22; S. C. R. 1913, rule 36; post, § 316.

REPEALED SECTION CITED in Rix *v.* Railroad Co., 67 L. 503; 51 A. 924; McWilliams *v.* King, 32 L. 21.

115. Superfluous Counts: Consolidation of Actions.

The defendant at any time before issue joined may move to strike out superfluous counts in the declaration and may at any time move to consolidate several actions which are capable of being consolidated. (P. L. 1903, p. 570; 3 C. S. 4088; Rev., sec. 121; R. S. 929, sec. 59; 1799, sec. 58.)

WHEN CONSOLIDATION PROPER.—The court will order a consolidation of several actions of ejectment where there is the same question and defense involved in all of them. Den *v.* Kemble, 9 L. 335. The court will not consolidate two actions brought against the same person, by the same plaintiffs, upon promisory notes drawn at different dates and payable at different times, where it does not appear that the defense is the same in both. Worley *ads.* Glentworth, 10 L. 241.

Two several writ of scire facias, to revive two several executions by the same plaintiff against the same defendant, cannot be consolidated. Mickle *v.* Brewer, 8 L. 85.

SUITS BETWEEN SAME PARTIES ON SEVERAL DEBTS.—Where separate actions are brought by the same plaintiff against the same defendant, on several certificates of indebtedness, for the same consideration, maturing at the same time, or all due when the writs are commenced, they will be consolidated in one suit. Lee *v.* Kearny Tp., 42 L. 513.

SEVERAL SUITS FOR CONTINUOUS INJURY.—The appropriate relief against successive suits by the same plaintiff for damages arising from an injury which is continuous is by application for the consolidation of action or for a stay of proceedings, and not by bill in chancery, unless the right in controversy has once been determined adversely to the plaintiff. Railroad Co. *v.* McFarlan, 31 E. 730.

ENTRY OF RULE WITHOUT AUTHORITY.—The court will not relieve a party from the consequences of a rule to consolidate, although he denies that the rule was entered by his authority he must seek redress, if any, from his attorney. Den, Hendrickson *v.* Hendrickson, 15 L. 102.

FORM OF RULE.—See Den *v.* Kimble, 9 L. 335, 338.

116. Right to Plead all Defenses: Cost to Follow Judgment on that Issue.

Either party in any action may plead in answer to any pleading of the adverse party as many several matters as he shall think necessary; provided, the costs of any issue either in fact or law shall follow the finding or judgment upon such issue, whatever may be the result of other issues. (P. L. 1903, p. 570; 3 C. S. 4088; Rev., secs. 118, 120; R. S. 951, sec. 1. Act to facilitate pleadings, passed 1799, sec. 1; Rev. 1820, 403; Pat. 347; 1857, p. 296, sec. 2; 1885, p. 25.)

CONSTRUCTION AND OPERATION IN GENERAL.—A defendant cannot plead specially and give notice of the same subject-matter, but the court will put him to his election, either to abide by his plea or notice. Brocaw *v.* Marlatt, 8 L. 89; State Bank *v.* Chetwood, 8 L. 1; Camp *v.* Allen, 12 L. 1. The pleader ought to state that the additional pleas are filed "by leave of the court" although such leave is never, in fact, asked. Copperthwait *v.* Dummer, 18 L. 258, 260; Parks *v.* McClellan, 44 L. 552. It is not necessary to add "according to the form of the statute in such case made and provided." Conover *v.* Tindall, 20 L. 513; affirmed, 21 L. 651.

In point of fact, there is no issue joined without a similiter, though the want of a similiter is amendable after verdict. Dickerson *v.* Stoll, 24 L. 550. The addition of "&c" after a tender of issue, will not be taken to mean "and the plaintiff" or defendant "doth likewise." At most, its office in pleading is to supply matter that ought to be expressed in the pleading of which it is a part. Id.

RIGHT TO PLEAD DIFFERENT GROUNDS.—In general, a defendant will be allowed to plead, in different pleas, as many substantially different grounds of defense as may be thought necessary, although they appear to be contradictory and inconsistent. The court, in allowing or disallowing such pleas, are controlled entirely by the consideration whether such pleading will hinder, delay or embarrass a fair trial. Parks *v.* McClellan, 44 L. 552.

PLEAS IN ABATEMENT.—With respect to strict pleas in abatement which are dilatory pleas, and tend to delay a trial on the merits, the court will not grant leave to plead several pleas of this class, or to plead such a plea with a plea in bar. Parks *v.*

McClellan, 44 L. 552. A plea in abatement cannot be joined with a plea in bar to the same demand. Kerr *v.* Willetts, 48 L. 78; 2 A. 789.

PLEAS IN TRESPASS.—A defendant may, to a count in trespass, plead not guilty, and also a justification and the plea of a justification is not evidence to justify a finding for the plaintiff on the plea of not guilty. Shallcross *v.* Railroad Co., 75 L. 395; 67 A. 931.

In an action of trespass q. c. f., the defendants pleaded (1) not guilty, and (2) lib. ten. with a justification; the jury found the defendants guilty under the first plea, and not guilty under the second. Held, that the findings were inconsistent; that no judgment could be rendered thereon, and a new trial was awarded. Turner *v.* Beatty, 24 L. 644.

DEFENSE TO QUO WARRANTO.—To an information in the nature of a quo warranto, the defendant can plead but one plea. State *v.* Roe, 26 L. 215.

EFFECT OF FAILURE TO FIND ON SPECIAL ISSUE.—Where, upon a general and special plea pleaded, and issue joined on both, a verdict is found generally for the plaintiff, and the special plea is such that, if it were true, a verdict ought not to be found for the plaintiff, the omission to find upon the special plea is matter of form only. Browning *v.* Skillman, 24 L. 352.

117. Dilatory Pleas.

P. L. 1903, p. 570; 3 C. S. 4089; Rev., sec. 115; Rev. of 1874; Supreme Court Rule 19.

REPEALED by P. L. 1912, p. 384, § 34, § 294, post.

See Practice Act 1912, rule 38; S. C. R. 1913, rule 56; post, § 332.

REPEALED SECTION CITED in Parks *v.* McClellan, 44 L. 552; Mayhew *v.* Ford, 61 L. 532; 39 A. 914; Hixon *v.* Schooley, 26 L. 461, 462; Bank *v.* Wallace, 9 L. 83; Lyons *v.* Allen, 76 L. 391; 69 A. 642; Wheatman *v.* Andrews, 89 A. 285; 85 L. 107.

118. Performance of Conditions Precedent may be Averred Generally: Specific Pleading by Opposite Party.

Either party to an action may aver performance of conditions precedent generally; and the opposite party shall not deny such averment generally, but shall specify in his pleading the con-

dition precedent, the performance of which he intends to contest. (P. L. 1903, p. 570; 3 C. S. 4089; Rev., sec. 126; 1855, sec. 25.)

A general averment of performance by the plaintiff is sufficient. Vreeland *v.* Beekman, 36 L. 13. See, also, Ridgway *v.* Forsyth, 7 L. 98; Rice *v.* Porter, 16 L. 440; Patten *v.* Heustis, 26 L. 293; Hecht *v.* Taubel, 55 L. 421; 26 A. 902.

Where a declaration avers generally performance of all the conditions of a contract, defendant cannot set up in defense the non-performance of any condition which he has not specified in his plea. Ottawa Tribe, No. 15, *v.* Munter, 60 L. 459; 38 A. 696.

Actions of assumpsit are not excluded either from the privilege or the restriction of this section, which applies to all actions. A plea of non-assumpsit will not sustain a defense of non-performance, where the declaration contains such an averment. Dimick *v.* Insurance Co., 67 L. 367; 51 A. 692.

On the trial of an issue of fact, if performance of conditions precedent be averred generally in a pleading in the cause, non-performance of any such condition, though appearing in evidence, will not be effectual per se to defeat the right asserted, unless there be specified in the answering pleading an intention to contest its performance. Dimick *v.* Insurance Co., 67 L. 367; 51 A. 692.

Where the performance of a condition precedent is alleged in the declaration, the defendant, instead of pleading the general issue, may deny the alleged performance, and put himself on the country; but, where the condition and its performance are not alleged in the declaration, the defendant may set up non-compliance with the condition, and conclude with a verification. Dewees *v.* Insurance Co., 34 L. 244.

The change in the forms of pleading prescribed by this section does not change the burden of proof. That remains with the plaintiff to show performance as at common law. Forwarding Co. *v.* Surety Co., 77 L. 749; 73 A. 541.

DEFENSE OF NON-PAYMENT.—Defense of non-payment of a death assessment must be specially pleaded. Society *v.* McDonald, 59 L. 248; 35 A. 1061.

SUFFICIENCY OF ALLEGATION.—The bill alleged that plaintiff furnished materials to a contractor erecting two houses for defendant, and received from him an order on defendant for the amount due, which defendant refused to accept. The material conditions of the contract were set forth in the bill, which alleged that said contractor "had wholly completed the erection

and construction of said buildings, and in all ways kept and performed the covenants and agreements contained in said contract," and had provided the certificate of the architect required, and that by reason thereof such final payment became due and payable. Held, that the allegation of performance of the contract, though in a bill in equity, was sufficient under such act, especially as against a general demurrer, which does not reach matters of mere form. Goldengay *v.* Smith, 52 A. 1116.

Allegation not sufficient under this section is not cured by answer under section 104. McClade *v.* Insurance Co., 59 A. 628; 71 L. 40.

Where a pleader confines himself to a general averment of the performance of conditions precedent, he is not required to particularly recite the conditions themselves. The section has the effect of imposing upon the opposite party, if he intends to contest the performance of a condition precedent, the duty of setting forth the condition, as well as the duty of denying its performance. Vail *v.* Insurance Co., 67 L. 422; 51 A. 929.

SUIT ON INSURANCE POLICY.—Where a policy of insurance requires that satisfactory proof of loss shall have been received by the insurer a specified time before the loss shall become payable, a general averment, in the declaration in a suit for a loss covered by such policy, of performance of conditions precedent, will embrace such condition of time, as well as that of receipt. Vail *v.* Insurance Co., 67 L. 66; 50 A. 671.

DEFENSE AVAILABLE UNDER GENERAL ISSUE.—A defense of forfeiture of a benefit certificate for non-payment of assessments within the time required was not available under the general issue. Van Alstyne *v.* Council No. 41, 68 L. 15; 54 A. 564.

BURDEN OF PROOF UNDER PLEA.—In a suit on a benefit certificate issued by an incorporated fraternal order, the plaintiff's declaration averred generally performance of all conditions precedent to recovery, and the defendant's pleading specified compliance with a law of the order, alleged to have been enacted after the issuing of the certificate as a condition precedent, the performance of which it intended to contest. Held, that the burden of proving the enactment of such a law was on the defendant. Herman *v.* Supreme Lodge, 66 L. 77; 48 A. 1000.

CITED.—Dimick v. Insurance Co., 69 L. 384; 55 A. 291; 62 L. R. A. 774; Van Alstyne *v.* Council, 69 L. 672; 58 A. 818; affirming, 69 L. 15; 54 A. 564; Delaware River Co. *v.* Freeholders, 90 A. 1023; 86 L. 294; Mick *v.* Royal Assurance, 91 A. 102.

119. Copy of Writing Annexed Cures Defects in Pleading Same.

P. L. 1903, p. 570; 3 C. S. 4090; Rev., sec. 123; 1857, p. 296, sec. 6.

REPEALED by P. L. 1912, p. 384, § 34, § 294, post.

See Practice Act 1912, rules 23, 31; S. C. R. 1913, rules 37, 45; post, §§ 317, 325.

REPEALED SECTION CITED in Dick *v.* McPherson, 72 L. 332; 62 A. 383; Harper *v.* Commission, 73 L. 1; 62 A. 384; Shelmardine *v.* Lippincott, 69 L. 82; 54 A. 237; Harrison *v.* Vreeland, 38 L. 366; Metzger *v.* System Co., 59 L. 340; 36 A. 661; Tillou *v.* Hutchinson, 15 L. 178; Seebass *v.* Association, 82 Fed. 792; Loeb *v.* Barris, 50 L. 382; 13 A. 602; Hill *v.* Smalley, 25 L. 374.

CITED in Marshon *v.* Williams, 63 L. 398; 44 A. 211; Johnston *v.* Bowers, 69 L. 544; 55 A. 230; Lowry *v.* Tivy, 69 L. 94; 54 A. 521; Bridgeton *v.* Fidelity and Deposit Co., 96 A. 918.

120. Pleading Usury or Illegality.

In an action on contract made in another state the defendant shall not set up as a defense usury or illegality in the consideration under the provisions of any statute of such state, unless he plead such statute specially and annex to such plea a note of the time when the same was passed. (P. L. 1903, p. 571; 3 C. S. 4090; Rev., sec. 130; Rev. of 1874.)

IN GENERAL.—The defense of usury arising under the law of another state must, by force of this section, be specially pleaded. Kirk *v.* Rickerson, 46 L. 13. In such plea, the contract alleged to be usurious must be correctly stated, and if not proved as laid, the defense will not avail. Id.

121. Pleas Puis Darrein Continuance.

P. L. 1903, p. 571; 3 C. S. 4090; Rev., sec. 131; Rev. of 1874.

REPEALED.—P. L. 1912, p. 384, sec. 34, § 294, post.

See Practice Act 1912, rule 30; S. C. R. 1913, rule 44; post. § 324.

CITED in Price *v.* Sanderson, 18 L. 426.

122. Set-Off Considered Cross-Action.

P. L. 1903, p. 571; 3 C. S. 4090; Rev., sec. 134; Rev. of 1874.

REPEALED.—P. L. 1912, p. 384, sec. 34, § 294, post.

See Practice Act 1912, sec. 12, rules 46, 47, 48, 49; S. C. R. 1913, rules 65–68; post, §§ 272, 340–343.

REPEALED SECTION CITED in Norton *v.* Sinkhorn, 63 E. 313; 50 A. 506; reversing, 61 E. 508; 48 A. 822; Emson *v.* Allen, 62 L. 491; 41 A. 703.

11. Amendment and Variance.

123. Amendment of Course before Answer, Etc.

Any pleading may be amended as of course without costs and without prejudice to the proceedings already had, at any time before a pleading in answer thereto has been filed; and in such case a copy of the amended pleading shall be served on the adverse party within five days after filing the same, who shall plead thereto in twenty days after such service. (P. L. 1903, p. 571; 3 C. S. 4091; Rev., sec. 135; 1855, sec. 45.)

RIGHT TO ADD PLEA WITHOUT LEAVE.—When the defendant's plea has concluded to the country, and a transcript of the pleadings with a similiter added, has been sent to the circuit for trial, it is too late for the defendant to add another plea without application to the court. Rix *v.* Railroad Co., 67 L. 503; 51 A. 924.

124. Amendment after Answer by Leave of Court: Time to Plead to Amended Pleading.

If either party amend his pleading after the pleading in answer thereto has been filed, the adverse party shall have twenty days to plead to the amended pleading; but all such amendments shall be made by leave of the court or a judge and upon terms. (P. L. 1903, p. 571; 3 C. S. 4091; Rev., sec. 108; R. S. 929, sec. 61; 1799, sec. 60.)

At least twenty days shall be given from the time when a party is ruled to plead. Vanderbilt *v.* Point Pleasant Tr. Co., 79 A. 85.

125. Amendments to Avoid Variance, Etc.

If at the trial of an action there appears a variance between any pleading and the proof thereunder which would not mislead the adverse party to his prejudice, the court may order an immediate amendment of the pleading to avoid such variance; if the variance be one that might mislead the adverse party, the court may order the pleading to be amended upon terms. (P. L. 1903, p. 571; 3 C. S. 4091; Rev., secs. 136, 137; 1855, secs. 33, 34.)

CONSTRUCTION AND OPERATION IN GENERAL.—There can be permitted no substantial variance between the case declared upon and the case proven, but a recovery must be secundum allegata et probata. When a declaration sets up a contract growing out of commercial paper and entered into by defendant alone, proof of a contract of a different nature entered into by the defendant and others will not sustain the declaration unamended, for thereby the defendant would be denied an opportunity to plead the nonjoinder in abatement. Neither can the declaration be amended on error to conform to the proofs, because thereby the defendant would be bound by a verdict upon a matter which he had not expected or intended to try. Jordan *v.* Reed, 77 L. 584; 71 A. 280.

If the variance between a particular and the evidence offered under it is such as would naturally mislead the party, the evidence ought to be rejected; otherwise the party objecting ought to satisfy the court by affidavit that he has been misled by the particular. Bunting *ads.* Allen, 18 L. 299; Stothoff *v.* Dunham, 19 L. 181.

MATERIALITY OF VARIANCE.—A variance between the pleading and proof is immaterial, unless the party is misled and prejudiced by it. Hallock *v.* Insurance Co., 26 L. 268; Ashmore *v.* Evans, 11 E. 151.

Common pleas court on appeal from judgment in small cause court may permit an amendment to the pleading by adding an omitted partner as a party plaintiff. Harrison *v.* Dickerson, 93 A. 718.

CITED.—Stone Co. *v.* Mooney, 60 L. 323; 38 A. 835; Hanrahan *v.* Insurance Co., 72 L. 504; 63 A. 280.

126. Amendment of Defects as to Form.

In order to prevent the failure of justice by reason of mistakes and objections of form, the court or a judge at all times may amend all defects and errors in any proceeding in civil actions whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not, and all such amendments may be made with or without costs and upon terms; and all such amendments as may be necessary for the purpose of determining in the existing action the real question in controversy between the parties shall be so made. (P. L. 1903, p. 572; 3 C. S. 4091; Rev., sec. 138; 1855, sec. 45.)

CONSTRUCTION AND OPERATION IN GENERAL.—The effect of the statutory provisions authorizing amendments is that every error in form, no matter how radical, can be corrected at any stage of the suit, in all civil causes, whenever such correction becomes necessary to enable the parties to try the matters which they contemplated to try, or to sustain the decision resulting from such trial. Price *v.* Railroad Co., 31 L. 229.

Where the plea of the pendency of a former action has only annexed the affidavits of merits under section 101, ante, such plea will be stricken out on motion; but, under this section, the court or a judge thereof, may grant leave to amend by filing a new plea with the affidavit of the truth thereof, as provided by the statute, or by filing a new affidavit to the plea, and such amended plea cannot be treated as a nullity, and interlocutory judgment be entered thereon, with a rule for a writ of inquiry for the assessment of damages, without the special leave of the court or some judge thereof. Robert *v.* Moore, 62 L. 618; 43 A. 582.

Where amendment will institute an entirely new and different cause of action, it will not be made. Doran *v.* Thomsen, 74 A. 267; 79 L. 99.

NOT LIMITED TO ISSUES ON RECORD.—The power to amend pleadings extends to the introduction of matters which the parties hoped and intended to try in the cause, and is not limited to matters within the issue upon the record. Mayor *v.* Gear, 27 L. 265.

AMENDING SUMMONS BY INSERTING NAME.—The defendant in this case was summoned before a justice's court by his proper surname which was preceded by the initial letter of his Christian name. On the return day no regular appearance was entered, but his attorney at law appeared for him, and objected to the summons, and moved to set it aside, because, as he stated, the first or Christian name of the defendant was not inserted therein. The justice denied the motion, and thereupon amended the summons by inserting the proper Christian name of the defendant. It was held on review that the justice had power to amend. Abrahams *v.* Jacoby, 69 L. 178; 54 A. 525.

RIGHT TO ADD SPECIAL COUNT.—If an objection was technically valid, the plaintiff would have been permitted to amend his declaration by adding a special count upon the written agreement; and what the court below might have done to prevent the failure of justice this court will, under the statute, consider as done, the case having been tried on both sides with special reference to the agreement. Willis *v.* Fernald, 33 L. 206.

SUBSTITUTION OF PARTIES PLAINTIFF.—After an action has been commenced by the father as such, and declaration has been filed, to which a demurrer has been presented, an amendment to the summons and declaration, substituting the personal representative of the deceased party as plaintiff in the action under the death act, will not be allowed, because it would be the institution of a new action between the different parties and raising new questions, and would be vexatious, especially if it appear that the statutory period in which the new action could have been brought has expired. By such an amendment the defendant would be deprived of a plea, which it could have if the action was commenced in the name of the personal representative of the deceased. Fitzhenry *v.* Traction Co., 63 L. 142; 42 A. 416.

Where a declaration was based on a statute of Pennsylvania and sought to recover damages for the death of plaintiff's intestate in that state, occasioned by defendant's negligence and upon demurrer it was held bad because it disclosed that plaintiff was the widow of deceased, and that by the law of Pennsylvania the action could not be maintained by a personal representative under such circumstances, this section did not require the court to permit plaintiff to amend the petition, so that the action may appear to have been brought by her as widow. Lower *v.* Segal, 60 L. 99; 36 A. 777.

The power to amend extends to the amending the record at the trial, and, after a motion to non-suit by striking out the name of the plaintiff wherever it occurs in the process and pleadings, and inserting the name of another person as plaintiff.

Farrier *v.* Schroeder, 40 L. 601; Quimby *v.* King, 43 L. 454; Hasbrouck *v.* Winkler, 48 L. 431; 6 A. 22.

AMENDMENT OF PLEA IN SUIT ON LIFE POLICY.—In an action on a life policy, defendant pleaded that the assured had warranted that he had not within 15 years been under the care of any physician, and that the statement warranted was false; the proof was of a warranty that the last attendance by a physician was 15 years before. Held, that the plea is amendable. Hanrahan *v.* Insurance Co., 72 L. 504; 63 A. 280.

AMENDMENT DISCRETIONARY.—The granting or refusal of amendment to pleadings is in the discretion of the trial court, and is not assignable for error. Esberg *v.* Honeck, 76 L. 181; 68 A. 1090.

Amendments are now entirely in the sound discretion of the court, and will be allowed whenever the advancement of justice requires it. Each case must depend upon its own particular circumstances. Ten Eyck *v.* Canal Co., 19 L. 5.

POWER TO AMEND.—A judge at the circuit court cannot order an amendment in the circuit record. Den, Van Arsdalen *v.* Hull, 9 L. 277. See Potts *v.* Clarke, 20 L. 36. The power of amendment conferred by this section extends to the court of errors, and in cases where no injury had been done to the party complaining by or through error of mere form it is incumbent on this court, in the interest of justice, to exercise the power. Insurance Co. *v.* Day, 39 L. 89; Blackford *v.* Gaslight Co., 43 L. 438; Redstrake *v.* Insurance Co., 44 L. 294; Finegan *v.* Moore, 46 L. 602; Association *v.* Warren, 55 L. 598; 27 A. 932; Vunk *v.* Railroad Co., 56 L. 399; 28 A. 593.

TIME FOR AMENDMENT.—A motion for amendment may be heard at any time, and at almost any stage in the cause. Den, Hoover *v.* Franklin, 5 L. 850; Reed *v.* Barker, 30 L. 379; Haines, J. The application ought to be made within a reasonable time. Van Dyke *v.* Van Dyke, 19 L. 1. An amendment was allowed, after an argument traversing the fact of an appearance having been entered. Harrison *v.* Rowan, Pet. C. C.; 489 Fed. Cas. No. 6, 140. After the testimony was closed. Joslin *v.* Car Spring Co., 36 L. 146. After a non-suit. Den. Hoover *v.* Franklin, 5 L. 850. After a trial and verdict. Price *v.* Railroad Co., 31 L. 229. After plea filed, rule of reference, award of referees and rule for judgment nisi, and reasons filed against the report. Smith *v.* Minor, 1 L. 146. After argument of a general demurrer to several pleas. Ten Eyck *v.* Canal Co., 19 L. 5; Hale *v.* Lawrence, 22 L. 72. After argument in the court of errors. Apgar *v.* Hiler, 24 L. 808. After verdict and judgment in supreme court and affirmance in the court of errors. Den *v.* Snow-

hill, 13 L. 23. After the cause has been removed to the court of errors, judgment reversed, a new trial ordered and the record remitted. Rogers *v.* Phinney, 13 L. 1. Amendment refused after a non-suit, where the motion to amend included a motion to set aside the non-suit. Den, Van Arsdalen *v.* Hull, 9 L. 390.

It is too late to move for an amendment by the court below two terms after the return of the writ, when the cause has been set down for argument and the plaintiff in error has been in no laches. Apgar *v.* Hiler, 24 L. 808.

After the death of a party, the pleadings will not be amended to meet the exigency of the case and bring it within the act. Dickerson *v.* Stoll, 24 L. 550.

AMENDMENT DURING TRIAL.—Where an amendment is allowed by the court, at the trial, on motion to set aside the verdict, both surprise and substantial merits should be shown. Joslin *v.* Spring Co., 36 L. 142.

WHEN AMENDMENT EFFECTIVE.—The amendment will be considered as made whenever the objection is taken. Den, Inskeep *v.* Lecony, 1 L. 111; Coxe *v.* Field, 13 L. 216; Price *v.* Railroad Co., 31 L. 229; Willis *v.* Fernald, 33 L. 207.

AMENDMENT OF EXECUTION.—An amendment of an execution will not be allowed to carry the date of its issue back four terms, to a period when plaintiff was alive. Morgan *v.* Taylor, 38 L. 317.

DETERMINATION AS TO QUESTION IN CONTROVERSY.—It is the question which the parties hoped and intended to try, not the question at issue upon the record, which determines the real question in controversy. Hoboken *v.* Gear, 27 L. 273; followed, Miller *v.* Railroad Co., 76 L. 282; 70 A. 175.

AMENDMENT DOES NOT PRECLUDE OBJECTION.—The allowance of an amendment to a declaration does not preclude the defendant from objection to its sufficiency. Canal Co. *v.* Van Vorst, 19 L. 9.

AMENDMENT OF VERDICT.—Where the amendment is in the form of the verdict only, and not in substance, it may be made by the court in banc without the postea being amended by the circuit judge. Phillips *v.* Kent, 23 L. 155. A court can put in legal form a verdict if it be not changed in substance. Humphreys *v.* Mayor, 48 L. 588; 7 A. 301.

AMENDMENT OF BILL OF EXCEPTIONS.—The bill of exceptions is correctible as all other procedures in a suit are correctible. Even if such power of rectification were not inherent in the general rules of judicial practice, it would be necessarily held to have been introduced into our legal methods by the provisions of this section. Lefferts *v.* State, 49 L. 26; 6 A. 521.

AMENDMENT AFTER DEFAULT JUDGMENT.—After a judgment by default, the party applying to amend must give the other party time to plead. Boudinot *v.* Lewis, 3 L. 512.

The judgment and execution, although stayed, were ordered to stand as security for the plaintiff's claim. Halsey *ads.* Van Wagenen, 16 L. 351.

DEFECTIVE WRIT OF INQUIRY.—That a writ of inquiry was executed after its return day is a nullity by the statute, but a want of such writ is aided on error. Young *v.* Railroad Co., 38 L. 502.

RIGHT TO AMEND ON REVIEW.—Amendments in matters of form that have not affected the fair trial and determination of the real question in controversy may be allowed in the court of review. Holt *v.* Trust Co., 76 L. 585; 72 A. 301; 21 L. R. A. (N. S.) 691.

Where the issue as made up on the pleadings and bill of particulars has been fully tried and correctly settled, no amendment having been applied for in the court below, the court of review will not permit the plaintiff in error to amend the bill of particulars in order to bring about a reversal of the judgment and a new trial upon a different issue. Kent *v.* Metal Co., 69 L. 532; 55 A. 256.

Where a judgment has passed in favor of the defendant on a plea of nul tiel record, the supreme court will not allow the plaintiffs to so amend their declaration, as to make it conform to the record produced. Gulick *v.* Loder, 15 L. 416.

If a remittitur is filed in the supreme court on the last day of their term, concurrent with that of the court of errors, in which the judgment is given, without the knowledge of the attorney of the defendant's in error, he will not be in laches in not applying at that term for leave to amend. Hale *v.* Lawrence, 22 L. 73.

If the real question in controversy between the parties to an action appears to have been fully and fairly tried and correctly settled, the court of errors will not reverse for an objection which may be avoided by an amendment of the pleadings, but in such case will exercise the power of amendment. Ware *v.* Insurance Co., 45 L. 177; Electric Co. *v.* Sweet, 57 L. 224; 30 A. 553; Milk Co. *v.* Bradenburgh, 40 L. 11; Wills *v.* Shinn, 42 L. 138.

REVIEW OF JUDGMENT ON DEMURRER.—When a judgment on demurrer is reviewed in a court of error, the judgment given should be the same as they decide ought to have been given by the court below—that is, a judgment in the cause for the plaintiff or defendant; but the court of error, after reversing a

judgment, may grant leave to amend, instead of ordering such a judgment as ought to be given. Hale *v.* Lawrence, 22 L. 73.

LIABILITY FOR COSTS.—The party applying to amend must pay costs. Condit *v.* Neighbor, 12 L. 320; Den *v.* Seagrave, 16 L. 357; Den *v.* Ganoe, 16 L. 439; Hall *v.* Snowhill, 14 L. 9; Mayor *v.* Davis, 18 L. 22; Condit *v.* Gregory, 21 L. 431; Weart *v.* Hoagland, 22 L. 521; Lanning *v.* Shute, 5 L. 778; Rogers *v.* Phinney, 13 L. 1; Wood *v.* Leslie, 35 L. 474. A plaintiff will be allowed to amend his writ and declaration, without the payment of costs, when the practice and law have been unsettled. Williamson *v.* Updike, 14 L. 270; Somers *ads.* Sloan, 18 L. 49. See Perrine *v.* Applegate, 14 E. 532. Where both parties are wrong, each should pay his own costs. Cox *v.* Bennett, 13 L. 172.

Where the defendant has pleaded nul tiel record, the plaintiff been put to two demurrers and subjected to much delay by the pleas overruled (a former amendment having been permitted), the defendant will not be permitted to amend, except upon the payment of costs, affidavit of a meritorious defense under the plea or pleas sought to be amended, election to abide by the amended pleas, a withdrawal of the plea of nul tiel record, and a filing of the amended pleas during the present term. Moulin *v.* Insurance Co., 24 L. 252.

CITED.—Bocchino *v.* Cook, 67 L. 467; 51 A. 487; McCall Co. *v.* Merritt, 66 L. 502; 49 A. 466; Stone Co. *v.* Mooney, 60 L. 323; 38 A. 835; W. J. & H. R. R. *v.* Am. Electrical Works, 81 A. 989; 82 L. 391; Ridgley *v.* Walker, 82 A. 861; 82 L. 341; Harrison *v.* Dickerson, 93 A. 718.

12. Demurrers.

See Demurrers abolished, post, sec. 320.
Issue of law raised by motion or in pleadings, post, sec. 320.
Preliminary reference to try issue of law, etc., post, §§ 356–360.

127. Special Demurrers.

P. L. 1903, p. 572; 3 C. S. 4093; Rev., sec. 139; 1855, sec. 23.

REPEALED.—P. L. 1912, p. 384, § 34, § 294, post.
See Practice Act 1912, p. 389, rule 26; S. C. R. 40, post, § 320.

REPEALED SECTION CITED in Crawford *v.* Railroad Co., 28 L. 480; Reed *v.* Wilson, 41 L. 29; Mehrhof *v.* Railroad Co., 51 L. 56; 16 A. 12; Karnuff *v.* Kelch, 69 L. 499; 55 A. 163; Malberti *v.* Electric Co., 69 L. 55; 54 A. 251; Jurnick *v.* Optical Co., 66 L. 380; 49 A. 681; Ordinary *v.* Barries, 67 L. 80; 50 A. 903; Harper *v.* Commission, 73 L. 1; 62 A. 384; Sautter *v.* Insurance Co., 73 L. 455; 63 A. 994.

128. Joinder in Demurrer.

P. L. 1903, p. 572; 3 C. S. 4094; Rev. of 1893.

REPEALED by P. L. 1912, p. 384, § 34, § 294, post.

129. Issue of Law First Determined.

If there are several issues in law and in fact, the issue in law shall be first determined before the issue in fact shall be tried. (P. L. 1903, p. 572; 3 C. S. 4094; Rev., sec. 141; R. S. 929, sec. 62; 1799, sec. 63.)

CITED.—Chambers *v.* Phila. Pickling Co., 79 A. 273; 81 L. 388.

130. Notice of Argument of Demurrer.

P. L. 1903, p. 572; 3 C. S. 4094; Rev., secs. 142, 143; R. S. 929, sec. 63; 1799, sec. 62; Rev. of 1874.

REPEALED by P. L. 1912, p. 384, § 34, § 294.
REPEALED SECTION CITED in Anonymous, 19 N. J. L. J. 16; Barney *v.* Scottish Union, etc., Ins. Co., 87 A. 117; 84 L. 572.

131 Form of Demurrer.

P. L. 1903, p. 572; 3 C. S. 4094; see 1882, p. 124, sec. 1; Rev. 1903.

REPEALED.—P. L. 1912, p. 384, sec. 34; post, sec. 294.
CITED.—Trust Co. *v.* Weidinger, 73 L. 433; 64 A. 179; Edwards *v.* Nat. Window Glass Ass'n, 68 A. 800; French *v.* Armstrong, 76 A. 366; 80 L. 152; Blain *v.* Trust Co., 88 A. 379; 81 E. 38.

132. Amendment of Pleadings, Demurrer to.

P. L. 1903, p. 573; 3 C. S. 4094; 1882, p. 124, sec. 2.

REPEALED.—P. L. 1912, p. 384, sec. 34; post, sec. 294.

X. JUDGMENT BY DEFAULT AND ASSESSMENT OF DAMAGES.

See Default.

Judgment by, in dower, waste, partition ..... S. C. R. 1913, rules 180, 181.
In actions of ejectment, writ of inquiry may issue..... S. C. R. 1913, rule 189.
Assessment of damages..... Post, secs. 364–368.
Statement of account to be made out ..... Post, sec. 364.
On default judgment..... Post, sec. 367.
Damages, determined as of trial, etc. ..... Post, sec. 363.
To be made and signed by justice or clerk ..... Post, sec. 364.
Entries in book of accounts, how proved ..... Post, sec. 365.
Bills and notes, how proved.. Post, sec. 366.
Writ of inquiry may issue for ..... Post, secs. 367, 368.
By jury from general panel, when ..... Post, sec. 367.
When postea required ..... Post, sec. 368.
In continuing causes of action ..... Post, sec. 371.
Of mesne profits in ejectment ..... S. C. R. 1913, rule 189.
Writ of inquiry may issue for ..... S. C. R. 1913, rule 189.
Summary judgment ..... Post, secs. 351–355.

133. Default Judgment Entered in Term or Vacation as of Course.

If either party shall fail to file any necessary pleading within the time limited or granted, the adverse party may enter as of course either in term

time or vacation in the minutes such rule for judgment by default, either interlocutory or final, as he would have been entitled to if such rule were applied for in open court, expressing in such rule the true date of the actual entry thereof; and such rule when lawfully entered shall have the same force and effect as if entered by order of the court, and if unlawfully entered shall be utterly void. (P. L. 1903, p. 573; 3 C. S. 4094; Rev., secs. 144, 148; 1851, p. 317, sec. 2; Supreme Court Rule 106, November Term, 1871.)

CONSTRUCTION AND OPERATION IN GENERAL.—If judgment by default for want of a plea be recorded and signed, it will stand until reversed or set aside, and, although premature, will preclude a plea in the action. If such a judgment be vacated on the plaintiff's motion, as improvident, a new judgment cannot lawfully be entered until the defendant shall have been ruled to plead, and shall have made default. Hoey *v.* Aspell & Co., 62 L. 200; 40 A. 776.

134. Grant of Further Time to Plead on Filing Affidavits of Merits.

P. L. 1903, p. 573; 3 C. S. 4095; Rev., sec. 145; 1851, p. 317, sec. 3.

REPEALED by P. L. 1912, p. 384, § 34, § 294, post.

REPEALED SECTION CITED in Rogers *v.* Brundred, 16 L. 159; Beatty *v.* Ivins, 3 L. 628; Jersey City *v.* Chase, 30 L. 233; White *v.* Hunt, 6 L. 330; Williamson *v.* Snook, 10 L. 65; Ordinary *v.* Barcalow, 36 L. 15; Lucke *v.* Kiernan, 68 L. 281; 53 A. 566.

135. Opening or Setting Aside Default Judgment: Terms.

If a judgment by default is entered for want of a plea, the court or a judge on four days' notice, upon proof that such judgment was improvidently or fraudulently entered, or that the defendant has a just and legal defense to the action, may order that such judgment be set aside or opened to let the

defendant in to plead; provided, if such judgment shall have been regularly obtained and without fraud, the order shall be that the defendant be permitted to plead on such terms as may be equitable, and the lien acquired by such judgment and the execution thereon shall remain as security for the satisfaction of any judgment the plaintiff may recover in the action. (P. L. 1903, p. 574; 3 C. S. 4095; Rev., sec. 147; 1851, p. 317, sec. 5; 1853, p. 402, sec. 1.)

CONSTRUCTION AND OPERATION IN GENERAL.—An affidavit of the defendant showing that he had expected to compromise the suit before the entry of the judgment is sufficient. Crane *v.* Condit, 16 L. 349. So, when the defendant, after filing a plea and subpœnaing his witnesses, was prevented from attending the trial by his confinement for contempt of another court. Truax *v.* Roberts, 4 L. 288. So when by accident defendant was prevented from retaining an attorney to defend. Abrams *v.* Wood, 4 L. 30.

So where the grantor of a defendant in ejectment (who intended to defend) was prevented by the illness and death of a daughter. Den, Riker *v.* Ball, 3 L. 974.

A judgment by default cannot be set aside because the assessment of damages was wrong. Creamer *v.* Dikeman, 39 L. 195.

Nor on the ground of surprise, where no merits are shown. Hendrickson *ads.* Herbert, 38 L. 296, 299.

FRAUD OR SURPRISE AS GROUND.—A judgment obtained by fraud or surprise will be set aside. Binesse *v.* Barker, 13 L. 263; Alderman *v.* Diament, 6 L. 197, 199, note.

JUDGMENT AGAINST TWO ON CONFESSION BY ONE.—A judgment may be opened, where rendered against two joint debtors, on the confession of one; the other having had no opportunity to plead an insolvent discharge. Mills *v.* Sleght, 5 L. 565.

JUDGMENT FOR WANT OF AFFIDAVIT OF MERITS.—A judgment entered by default in an action on notes for want of an affidavit of merits may be opened, where the evidence taken on such motion, if uncontradicted and unexplained, establishes a good defense to the notes, though Act May 3, 1889, provides that a plaintiff in an action on contract shall be entitled to judgment on his complaint, unless defendant file an affidavit of merits within ten days from service of the declaration. Shawger *v.* Granard, 64 L. 219; 45 A. 979.

PLEADING LOST IN MAILS.—Where a plea was prepared and verified and duly mailed to the clerk of the supreme court, in time for filing within the time limited by law, and was undoubtedly lost in the mails, and the plaintiff entered a judgment by default, and it appearing that defendants had a defense which should be passed on by a jury, the judgment will be opened to let defendants in to plead, the lien of the judgment to remain as security for the satisfaction of any judgment the plaintiff may recover. Boyd *v.* Williams, 70 L. 185, 56 A. 135.

WHEN JUDGMENT MAY BE OPENED.—Judgment opened after the lapse of a year, on affidavit of defendant that he believes the indorsement of his name on the note, upon which judgment was entered, to be a forgery; that his information inducing such belief was obtained since the last term of court; and that he has been refused an inspection of said indorsement by plaintiff's attorney. Bell *ads.* Kelly, 17 L. 270. If founded on merits, a motion to open a judgment may be made at any time while the cause is within the power and under the control of the court, provided the party embraces the first opportunity of presenting his case; and provided the plaintiff's rights are not thereby endangered. Id. After execution issues, the court will open a judgment and let in a real defense. Den, Lee *v.* Evaul, 1 L. 201. If a trial has not been lost, regular judgments by default are set aside in all cases, on affidavit of defense. Id.

After judgment, execution and money paid over to the plaintiff thereon, the court will hardly interfere to set aside the judgment. Query, Could the defendant have any remedy for the return of his money, if the court did not set aside the judgment in such case? Id.

WHO ENTITLED TO REMEDY.—This court will not open a judgment at the instance of a plaintiff in attachment against the same defendant. He is not a creditor in legal contemplation, but may or may not turn out to be such. None but a judgment creditor, or one whose claim is judicially established is entitled to the aid of the court in opening a judgment or ordering an issue on the fairness of it between the parties. Even a judgment creditor must have tried all other legal means of obtaining satisfaction of his judgment, and failing therein, before he can ask of the court their aid in such a proceeding. Melville *v.* Brown, 16 L. 363.

WAIVER OF OBJECTIONS.—This court will not set aside a judgment rendered at a former term, after solemn argument on a legal objection which might have been raised against said judgment on the former argument, but was omitted by counsel. Fox *v.* Lambson, 8 L. 368.

If a defendant suffers a term to elapse after a judgment regularly obtained against him, the court will not interfere summarily to set aside the judgment unless such delay is very satisfactorily accounted for. Cooper *ads.* Galbraith, 24 L. 219; Miller *ads.* Alexander, 1 L. 400.

NECESSITY FOR AFFIDAVIT OF DEFENSE.—The court requires an affidavit that there is a real defense, detailing the circumstances, before it will open a regular judgment by default. Miller *ads.* Alexander, 1 L. 400.

LIEN OF JUDGMENT RETAINED.—The lien of the judgment is retained. Richards *v.* Canal Co., 20 L. 36; Crane *v.* Condit, 16 L. 349; Halsey *v.* Van Wagonen, 16 L. 350.

136. Damages Assessed on Judgment by Default.

If interlocutory judgment in an action on contract is entered by default, where the damages or sum recoverable are a mere matter of calculation or can readily be ascertained, the plaintiff may have his damages assessed by the court, or if the court is not actually in session, by a judge or the clerk, unless a rule shall be entered for a writ of inquiry or an order be made for assessment of damages in open court. (P. L. 1903, p. 574; 3 C. S. 4096; Rev., secs. 149, 150; R. S. 929, sec. 71; 1799, sec. 70; 1851, p. 317, sec. 4; 1871, p. 123.)

ASSESSMENT OF DAMAGES BY CLERK OF COURT.—Where judgment by default is entered on a bail bond given in an action upon contract for an uncertain sum, not a mere matter of calculation or readily ascertained, a writ of inquiry must be issued to assess damages. An assessment by the clerk of the court, for the amount of the judge's order for bail, will be set aside. Simmons *ads.* Kelly, 39 L. 438.

ACTION OF ASSUMPSIT.—Only applies to actions of assumpsit. Peacock *v.* Haney, 37 L. 179. The court may assess the damages in assumpsit, debt and covenant independently of the statute. Id.

See sec. 363 to 368, post.

137. Plaintiff may Enter Rule for Writ of Inquiry: Defendant must File Affidavit.

The plaintiff may enter a rule for a writ of inquiry in term time or vacation as of course; but the defendant shall not enter such a rule in cases where the plaintiff is entitled to have his damages assessed by the court or a judge or the clerk, unless he shall enter such rule before the expiration of the time for pleading and shall at the time of entering such rule file with the clerk an affidavit that the amount claimed to be due to the plaintiff in the bill of particulars or some part thereof is not due from the defendant to the plaintiff, specifying what amount, if anything, is due, and that the rule is not intended for the purpose of delay, but only to have the amount due to the plaintiff correctly ascertained; which affidavit shall be made by the defendant or in his absence by his attorney or agent; and in case such affidavit shall specify any sum to be due to the plaintiff, the plaintiff may forthwith enter final judgment therefor, which shall operate as a waiver of the residue of his claim as set forth in his bill of particulars; provided, the court or a judge may on application by the defendant before final judgment is entered, order that the damages be assessed in open court. (P. L. 1903, p. 574; 3 C. S. 4096; Rev., sec. 151; 1858, p. 106.)

138. Notice of Writs of Inquiry.

The same notice shall be given of executing writs of inquiry and of countermand as is required for the trial of issues of fact; if the plaintiff shall not execute the writ of inquiry according to notice or countermand such notice in due time, the defendant shall be entitled to costs. (P. L.

1903, p. 575; 3 C. S. 4096; Rev., secs. 152, 153; R. S. 929, secs. 72, 73; 1799, secs. 71, 72.)

See §§ 367, 368, post.

139. Final Judgment: Entry.

If the damages are assessed by a writ of inquiry, no rule for final judgment shall be entered, except by order of the court or a judge on notice to the defendant; but if the damages are assessed by the court or a judge or the clerk, a rule for final judgment may be entered upon filing such assessment as of course, which judgment shall be signed and take effect as of the day when such rule is actually entered. (P. L. 1903, p. 575; 3 C. S. 4097; Rev., sec. 154; Rev. of 1874.)

XI. DISCOVERY BEFORE TRIAL.

See Discovery of documents, etc., post, sec. 361.
Time within which to answer notice, etc., post, sec. 362.

1. Upon Interrogatories.

140. Written Interrogatories Served on Adverse Party: Answers: Oath: Amendments.

After an action is at issue either party may serve on the adverse party, whether such party be a natural person or body corporate, written interrogatories upon any matter material to the issue, and written answers to the same under oath shall be served in ten days after service; the answers shall be strictly responsive, and in case of a body corporate shall be under the oath of such of the officers, agents or employees of the corporation as have personal knowledge of the facts or custody of the books, records or papers a discovery of which is sought; the court or a judge may for the

purpose of compelling an answer attach for contempt, suppress the defense or stay or dismiss the proceedings; the answer shall be evidence in the action if offered by the party proposing the interrogatories, but not otherwise; provided, the court or a judge may for good cause and on notice to the adverse party order any of the interrogatories to be stricken out or amended or new ones to be added or grant further time for answering or order or permit the answers to be amended. (P. L. 1903, p. 575; 3 C. S. 4097; Rev., sec. 155; 1855, sec. 5; 1880, p. 288; 1890, p. 210.)

SCOPE OF INTERROGATORIES.—Interrogatories should relate to the case of the party presenting them, and not be used for the mere purpose of prying into the case of his adversary. Wolters *v.* Trust Co., 65 L. 130; 46 A. 627.

Interrogatories presented to a corporate adversary should not ordinarily extend beyond corporate transactions, transactions which must have been conducted by some corporate agent on behalf of the corporation, and of which, therefore, the agent must have original, not simply derivative, knowledge. Id.

Interrogatories should be directed to some matter material to the issue. They should be of such character that, with responsive answers thereto, they will constitute relevant and competent evidence for the party propounding them. Interrogatories intended merely to obtain the names of witnesses are improper. They should not be made to perform the function of a demand for particulars. Watkins *v.* Cope, 86 A. 545; 84 L. 143.

EFFECT OF FAILURE TO ANSWER.—Where interrogatories served by a party are not answered within the time required by law, the party serving them is not bound to receive the answer; but if he receives the answer without objection after the time has expired and permits the case to proceed to trial, he cannot afterwards object on that ground. Voorhees *v.* Jones, 29 L. 271. If a party fails to answer interrogatories served on him within the time required by law, it does not prevent him from being a witness in his own behalf. Id.

EFFECT OF ANSWER AS EVIDENCE.—The introduction in evidence of an answer to an interrogatory under this section is not conclusive on plaintiff as to the matters of fact covered by such answer. Goodman *v.* Lehigh Valley R. R. Co., 81 A. 848; 82 L. 450.

ADMISSION OF ONE OF SEVERAL ANSWERS.—Action of a trial judge in permitting the answer to one of several interrogatories to be offered and read in evidence without admitting the answers to the remaining interrogatories cannot be said to be erroneous when there was no showing nor offer to show, either in the trial court or in the reviewing court, that the remaining answers were material to the issue, or that they tended to explain, qualify or limit the answer admitted. Cetofonte *v.* Coke Co., 78 L. 662; 75 A. 913; 27 L. R. A. (N. S.) 1058; Beakley *v.* Freeholders, 80 A. 457; 81 L. 637.

FEDERAL PRACTICE.—This section is inapplicable to federal courts sitting in New Jersey. Smith *v.* Mercantile Co., 154 Fed. 786.

Where interrogatories were served on defendant, to be used in a federal court, defendant was not required to wait until the answers were offered in evidence before objecting thereto, but was entitled to raise the question of their regularity by a motion to strike. Smith *v.* Mercantile Co., 154 Fed. 786.

CITED.—Cunningham *v.* Association, 72 L. 175; 60 A. 307; Campbell *v.* Hough, 73 E. 601; 68 A. 759; Wallace, Muller & Co. *v.* Leber, 69 L. 312; 55 A. 475.

2. Admission or Execution of Papers.

See Admission of facts, post, sec. 278.

141. Demand to Admit Execution of Writings : Costs

P. L. 1903, p. 576; 3 C. S. 4097; Rev., sec. 156; 1855, sec. 38.

REPEALED by P. L. 1912, p. 384, § 34, § 294, post.

See Practice Act 1912, p. 380, sec. 18; post, § 278; S. C. R. 1913, rule 98; post, § 362.

3. Inspection of Books, Etc.

See Production of books, post, sec. 361.

Time within which to answer notice to produce, post, sec. 362.

142. Inspection, Etc., of Books, Etc., on Terms: Contempt.

The court in which an action is pending or a judge may on four days' notice and upon terms

order either party to give to the other within a specified time an inspection and copy or permission to take a copy of any books, papers or documents in his possession or under his control, containing evidence relating to the merits of the action or the defense thereto, and if compliance with the order be refused, such books, papers or documents shall not be given in evidence in such action, and the court may punish the party so refusing as for contempt. (P. L. 1903, p. 576; 3 C. S. 4098; Rev., sec. 157; 1855, p. 688, sec. 6.)

FEDERAL PRACTICE.—Although the practice which prevails in the highest courts of the state obtains in the federal courts, yet, where congress has legislated upon a matter of practice, such legislation becomes the sole and supreme guide, to the exclusion of the state code. Where, therefore, a party moved for examination of books and papers, before trial, both under this section and section 724, Rev. St. (U. S. Comp. St. 1901, p. 583), held, that the latter section alone controlled the practice as to discovery of books and papers in the federal courts. United States *v.* Lead Co., 75 F. 94.

NOT APPLICABLE IN EQUITY.—This section does not apply to a court of equity. Lawless *v.* Fleming, 56 E. 815; 40 A. 638.

CONSTRUCTION AND OPERATION IN GENERAL.—Defendant pleaded payments, alleging "For which he has vouchers ready to be produced and proved," whereupon complainant, ignorant of the existence of such vouchers, procured an order requiring defendant to produce "the receipts, vouchers and other evidence in writing of the payment" of the sums as set forth in the answer. Defendant produced a consolidated receipt, purporting to be for four separate payments, covered by separate receipts, but did not produce a certain separate receipt that he then had. Held, that he could not afterwards use the separate receipt as evidence, in view of the provision of this act that a paper shall not be given in evidence where a party has refused to comply with the order to produce it. Flemming *v.* Lawless, 56 E. 138; 38 A. 864.

CITED.—Vail *v.* Insurance Co., 67 L. 422; 51 A. 929; Wolters *v.* Trust Co., 65 L. 130; 46 A. 627.

143. Application for Inspection of Books, Etc.: Counter-Affidavits: Examination of Witnesses.

Every such application shall be in writing and shall state the grounds upon which it is made, verified by the oath of the party or his attorney or agent; the affidavit of the adverse party or his attorney or agent may be read in opposition to such application without notice of the taking of such affidavit or either party or any other witness may on such application be examined in relation thereto. (P. L. 1903, p. 576; 3 C. S. 4098; Rev., sec. 158; 1855, p. 688, sec. 7.)

CONSTRUCTION AND OPERATION IN GENERAL.—At common law, and independent of recent statutes, courts of law had the power to order inspection of papers which, by the pleadings or by being used in evidence, came within the control of the court. Hilyard *v.* Harrison, 37 L. 170. See Bell *ads.* Kelly, 17 L. 270. But the court, in exercising this control over papers, will merely grant inspection and examination by the party and his witnesses, either in open court or before an officer of the court, or in the presence of the party producing them, or his attorney, and will not take them from the latter and deliver them into the possession of the other side. Id.

REQUISITES OF APPLICATION.—On an application for an order granting permission to take a copy of books, papers or documents in possession of the opposite party, the petition should state that the book, paper or document, of which discovery is sought, contains evidence relating to the merits of the action or proceeding, or of the defense, and should also state some facts or circumstances from which the court can judge of the materiality of the evidence and the propriety of ordering a discovery. Condit *v.* Wood, 25 L. 319; Anonymous, 3 L. 513.

RIGHT TO COSTS.—Costs will be allowed the applicant, provided he had, before making such application, requested copies of the documents and was refused. Condit *v.* Wood, 25 L. 319; Anonymous, 3 L. 513.

4. Examination of Adverse Party before Trial.

144. Party to Action Examined as Witness by Adverse Party: Notice: Subpœna.

Any party to an action may be examined as a witness at the instance of the adverse party or of any one of several adverse parties after issue joined and before trial. Such examination may be before any master in Chancery, Supreme Court commissioner or examiner without any order entered for the purpose, on two days' notice to the party to be examined. And the officers of any corporation may be examined as aforesaid in any action to which such corporation shall be a party.

The service of a subpœna, with the fees prescribed by law, shall be sufficient summons and notice to the party named therein to attend before the officer therein named, and such examination may be enforced in the same manner as answer to interrogatories.

Subpœnas for the purpose aforesaid may be issued in the same manner and with like effect as if issued for the procuring of the attendance of witnesses at trial. (P. L. 1903, p. 577; 3 C. S. 4098, as amended by P. L. 1914, p. 151; Rev., secs. 159, 161, 164; 1869, p. 1229, secs. 1, 3, 6.)

EXAMINATION OF OFFICERS OF CORPORATION.—Where a corporation is a party to the record, neither the president, secretary, the individual directors nor stockholders are parties to the action, and cannot be examined after issue joined and before the trial of said action, under section 159 of the practice act. Apperson *v.* Insurance Co., 38 L. 272; Bank *v.* Dodge, 42 L. 322.

CITED.—Campbell *v.* Hough, 73 E. 601; 68 A. 759.

145. Attendance of Resident and Non-Resident Witnesses.

No party who shall reside in this state shall be compelled to attend and testify in any other county than that where he resides, but any party residing

out of this state may be compelled to attend and testify in any county named in the order or in the state or country where he reside; a non-resident party may be served out of this state with personal notice to attend such examination. (P. L. 1903, p. 577; 3 C. S. 4091; Rev., sec. 160; 1869, p. 1229, sec. 2.)

146. Testimony taken at Examination Reduced to Writing, Etc.: Compelling Party to Answer.

The examination and cross-examination shall be reduced to writing and shall be signed by the party so examined and certified by the court, judge or officer, and filed with the clerk of the county where the cause is to be tried, and said examination may be used by either party at the trial; where the examination is made before the court or a judge, such court or judge may authorize the same to be reduced to writing by the clerk of any circuit court or by any attorney or counsellor; any question may be objected to and the answer taken subject to the objection; if the party refuse to answer, the court or a judge shall compel the party to answer, if the party examining is legally entitled to have an answer; the examination thus taken shall not be conclusive, but may be rebutted at the trial. (P. L. 1903, p. 577; 3 C. S. 4099; Rev., secs. 162, 163; 1869, p. 1229, secs. 4, 5.)

CITED.—Campbell *v.* Hough, 73 E. 601; 68 A. 758.

147. Fees of Party Examined and Examiner.

The party examined shall receive the same fee as if subpœnaed and attending as a witness on the trial of an action, and the commissioner or examiner taking the testimony shall receive the same fees for his services as are allowed by law to a master in chancery for taking testimony in a

cause. (P. L. 1903, p. 578; 3 C. S. 4099; Rev., sec. 165; 1869, p. 1229, sec. 7.)

148. Fees Paid by Party Examining and Taxed as Costs, Etc.

The party examining shall in the first instance pay the witness fees and all the costs and expenses of the examination, unless the court or a judge otherwise order, and shall tax therefor in his bill of costs only such sum as the court or a judge shall certify to be reasonable and proper. (P. L. 1903, p. 578; 3 C. S. 4099; Rev., sec. 166; 1869, p. 1229, sec. 8.)

XII. TRIAL.

See opening case by defendant.—P. A. 1912, p. 397, rule 69; S. C. R. 1913, rule 109, § 369.

Submitting questions to jury.—P. A. 1912, p. 397, rule 70; S. C. R. 1913, rule 110, § 370.

By the court.—P. A. 1912, p. 398, rule 74; S. C. R. 1913, rule 113, § 391.

Order of calling on.—S. C. R. 1913, rule 102, § 375.

Reference to referee for trial.—S. C. R. 1913, rule 101, § 374.

If not brought on, dismissal or judgment for opposite party.—S. C. R. 1913, rule 102, § 375.

If not moved, judgment of non-suit may be ordered.—S. C. R. 1913, rule 103, § 376.

Clerk to make list of causes noticed.—S. C. R. 1913, rule 105, § 377.

Time given counsel on jury trials.—S. C. R. 1913, rules 106, 157, § 378.

New trial as to part.—P. A. 1912, p. 397, rule 72; S. C. R. 1913, rules 131, 147, §§ 380, 382.

New trial as to damages.—P. A. 1912, p. 397, rule 73; S. C. R. 1913, rules 132, 147, §§ 381, 382.

Reserving question of law.—P. A. 1912, p. 380, sec. 19, § 279.

Submitting to jury alternative propositions.—P. A. 1912, p. 380, sec. 19, § 279.

Separate trial may be ordered.—P. A. 1912, p. 379, sec. 12, § 272; S. C. R. 1913, rule 108, § 306.

1. When Action to be Tried: Notice of Trial.

149. Notice of Trial for First Day of Term, Etc.: Action Nonprossed for Failure to Notice.

The plaintiff shall notice his action for trial at the first day of every term after issue joined; provided, if issue be joined less than twenty days before the next succeeding term, the notice shall be given for one of the first twenty days of the term; either party may notice an action for trial at a day in the term wherein issue is joined; if the plaintiff fail to give the required notice of trial or to move the action according to notice of trial given by either party, the court or a judge may order that he be nonprossed. (P. L. 1903, p. 578; 3 C. S. 4099; Rev., secs. 167, 168, 169; R. S. 929, sec. 65; 1799, sec. 64; 1865, p. 232, sec. 2; 1885, p. 22.)

APPLIES TO REPLEVIN.—This section applies to action of replevin. Ames *v.* Broderick, 18 L. 297, distinguished; Stein *v.* Goodenough, 73 L. 812; 64 A. 961.

WAIVER OF OBJECTION.—Advantage must be taken of an adversary's first failure. Bacon *v.* Den, Shepherd, 8 L. 84.

RIGHT TO NON-SUIT.—A non-suit against the plaintiff, directed at circuit, for failure to bring on his case for trial, pursuant to his own notice, was proper, although the plaintiff had not filed his replication. Stein *v.* Goodenough, 73 L. 812; 64 A. 961.

NECESSITY OF NOTICE.—The plaintiff who fails to bring his cause to trial at any circuit court after it is at issue is liable to a judgment against him, as in case of a non-suit; but, unless the motion for such judgment is made at the term next after the first failure, there must be two days' notice of the intention to make it. Shaw *ads.* Railroad Co., 32 L. 293; see Lawrence *v.* Hale, 33 L. 43.

EFFECT OF COMMISSION TO TAKE DEPOSITIONS.—A commission to take depositions is not a suspension of a cause, so as to prevent a notice of trial thereof, before the return of the commission, or without leave of the court. Stokes *v.* Garr. 17 L. 451.

150. Notice of Trial by Defendant: Notice in Case of Set-Off, Etc.

The defendant may give to the plaintiff the same notice of trial as the plaintiff is required to give to the defendant; if the defendant has filed a set-off or notice of recoupment, he may move the action and proceed to trial according to notice given by either party. (P. L. 1903, p. 578; 3 C. S. 4100; Rev., sec. 170; R. S. 929, sec. 69; 1799, sec. 68.)

TRIAL BY PROVISO.—Under Rev. March 27, 1874, sec. 170, superseded by this act, it was held that, where defendant files a set-off, he may have a trial by proviso, in the event of the plaintiff's laches. Estell *adm.* Franklin, 29 L. 264; see Anonymous, Pet. C. C., 1 Fed. Cas. No. 468. The plaintiff may move to change the venue after the defendant has obtained a rule for a trial by proviso. Den, Lee *v.* Evaul, 1 L. 283.

151. Service of Notice of Trial: Time: Short Notice.

Notice of trial shall be given to the attorney of the defendant or to the defendant if he appear in person, or to the sheriff or keeper of the jail if the defendant is in custody, at least fifteen days before such intended trial; the sheriff or jailer shall deliver without delay the said notice to the defendant therein named, and in default thereof, he shall be liable to the defendant for all damages occasioned thereby; short notice of trial, when directed by the court, shall be given five days before the trial. (P. L. 1903, p. 578; 3 C. S. 4100; Rev., secs. 171, 174; R. S. 929, secs. 66, 68; 1799, secs. 65, 67.)

SUFFICIENCY OF NOTICE.—After a lapse of several years, notice of trial was given by the plaintiff's counsel in the name of the attorney on record to the attorney for the defendant; the latter having become, and then being clerk of the county. After objection made at the trial, held, no cause for a new trial, it not appearing that the defendant had been misled or surprised by such notice. Martins *v.* Johnston, 21 L. 239; see Anonymous, 16 L. 396.

SERVICE OF NOTICE.—Proof of service of notice of trial may be made either at the circuit or at bar. Boqua *v.* Ware, 6 L. 151; see McCourry *v.* Suydam, 10 L. 245. Service on the plaintiff in replevin and at the office of his attorney, who was beyond the seas, held good. Harwood *ads.* Smethurst, 30 L. 230.

152. Time for Countermand of Notice of Trial: Costs on Failure to Countermand.

Every countermand of notice of trial shall be given at least seven days before such intended trial, and on failure thereof, costs shall be awarded in like manner as if notice had not been countermanded. (P. L. 1903, p. 579; 3 C. S. 4100; Rev., sec. 173; R. S. 929, sec. 67; 1799, sec. 66.)

153. Notice of Trial Filed with Clerk: Arrangement of List: Endorsement on Notice, Date of Issuing Summons: no Endorsement, Listed According to Date of Filing.

All notices of trial given for the first day of the term shall be filed with the clerk at least ten days before the opening day of the term, who shall furnish the court on the first day of every term with a list of the actions to be tried; it shall be the duty of attorneys, before filing said notices of trial in cases or actions which were instituted before the fourth day of July, one thousand nine hundred and twelve, to endorse on said notices of trial the return day of the summons issued in the action and in all actions which were instituted on and after the said fourth day of July, one thousand nine hundred and twelve, or which may hereafter be instituted, to endorse thereon the date of the issuing of the summons in said action; and the clerk of the court shall list and arrange said cases or actions on said list according to the priority of the dates shown by said endorsement; provided, however, that whenever notices of trial shall be filed with the clerk without said endorsement the clerk

shall list and arrange same, after listing the cases and actions noticed with said endorsement according to the date of filing notice of trial thereof with him. (P. L. 1903, p. 579, as amended by P. L. 1908, p. 145; 3 C. S. 4100, as amended by P. L. 1913, p. 642; Rev., sec. 175; R. S. 929, sec. 70; 1799, sec. 69.)

IN GENERAL.—This regulation is for the convenience of the clerk alone. Kennedy *v.* Kennedy, 16 L. 51.

2. Proceedings at the Trial.

See cross-references under XII.

See P. A. 1912, p. 381, secs. 22, 25; post, rules 74, 75, p. 398; S. C. R. 1913, rules 113, 114, post, §§ 282, 285, 391, 392.

154. Trial of Issue by Court.

P. L. 1903, p. 579; 3 C. S. 4100; Rev., sec. 176; 1855, sec. 80.

REPEALED by P. L. 1912, p. 384, § 34, § 294, post.

REPEALED SECTION CITED in Bridge Co. *v.* Geisse, 38 L. 39. 580; Elizabeth *v.* Hill, 39 L. 555; Blackford *v.* Gaslight Co., 43 L. 440; Railway Co. *v.* Kelly, 57 L. 675; 32 A. 223; Person *v.* Herring, 63 L. 599; 44 A. 753; Mills *v.* Mott, 59 L. 15; 34 A. 947; Brewster *v.* Banta, 66 L. 367; 49 A. 718; Webster *v.* Freeholders, 86 L. 256; 90 A. 1110.

155. Reference of Accounts: Report of Referee: Exceptions to Report: Reservation of Trial by Jury.

All actions in which matters of account are in controversy may by rule be referred to some competent person or persons, to state and report an account between the parties and the amount that may be due from either party to the other, which report signed by the referee or a majority of the referees, when confirmed by the court, shall be final and conclusive between the parties and judgment may be entered thereon and execution issued in

the manner provided by law; but either party may at the time of ordering such reference enter in the minutes his reservation of a right to trial by jury, and at the same term in which the report is filed may demand a trial by jury, in which case the action shall be tried by jury, the costs of the reference to abide the result; on such trial the report of the referee or referees shall be prima facie evidence of all the facts therein found and reported; the party demanding a trial by jury shall file his exceptions to the report in twenty days after notice that the same is filed, and no other exceptions shall be considered on the trial; if no such reservation has been entered or if the party fails so to demand a trial by jury or to file exceptions, the report may be confirmed on motion of either party on ten days' notice. (P. L. 1903, p. 579; 3 C. S. 4101; Rev., secs. 177, 178, 181; 1855, sec. 81; Rev. of 1874; Supreme Court Rule 46.)

CONSTRUCTION AND OPERATION IN GENERAL.—Where there is a statutory provision for reference to one referee, the action cannot be referred to three referees, by consent of the parties. Paulison *ads.* Halsey, 37 L. 205; Id., 38 L. 488. The language of this section is comprehensive, giving power to refer "all actions in which matters of account are in controversy." Gospill *v.* Hervey, 34 L. 135. It is the character of the plaintiff's claim, and not the issue made upon it, that is to determine whether the case is within the act. If the finding of such issue in favor of the plaintiff will involve the necessity of settling matters of account, a reference is proper. Id.

SUITS SUBJECT TO REFERENCE.—A suit to recover of a bank moneys paid by it on a forged indorsement of bills, checks, etc., where the only question is as to the forged indorsements, cannot be referred under this section. Saw Co. *v.* Bank, 58 L. 438; 34 A. 1.

To hold that the section authorized such a reference would make it violative of Const., art. 1, sec. 7. Id.

An action for breach of warranty, in which unliquidated damages are sought to be recovered, is not a cause in which matters of account are in controversy, and cannot be referred by the court ex mero motu. Tunison *v.* Snover, 56 L. 41; 28 A. 310.

NO RIGHT TO REFER ISSUE OF FORGERY.—Where the sole question is with respect to certain forgeries, there cannot be a compulsory reference ordered by the court by virtue of the statute authorizing such references when the controversy relates to accounts. Such an issue is not within the terms of the act giving to them their legal signification. Nor could the legislature authorize such a course, as it would impair the right of trial by jury. Bank *v.* Saw Co., 34 A. 1.

MECHANIC'S LIEN SUIT PROPERLY REFERRED.—A suit to enforce a mechanic's lien claim may be referred. Ceiling Co. *v.* Kiernan, 73 L. 763; 65 A. 444; Taylor *v.* Thornton, 81 L. 7; 79 A. 330.

REFERENCE OF DISTINCT ACTIONS.—Where a reference is intended to be made of distinct actions which are pending, there must be separate rules of reference, and separate reports; or they must be first united, and then referred; or in one of them a rule of reference must be entered, with a submission of all matters in dispute between the parties. Craig *v.* Craig, 9 L. 198.

WITHDRAWAL OF CAUSE AFTER REFERENCE.—A court of equity, after reference, dissent, report, exceptions, and demand for trial by jury, can withdraw the cause from the law court for determination in a court of equity, provided that the issues arising out of the exceptions are so numerous and so distinct and the evidence to sustain them so variant, technical and voluminous, that a jury is incompetent intelligently to deal with them and come to a just conclusion. Cranford *v.* Watters, 61 E. 284; 48 A. 316.

EFFECT OF DEATH OF ONE OF SEVERAL PLAINTIFFS.—The death of one of several plaintiffs in a cause referred by rule of court to referees, is not a revocation of the authority of the referees. A suggestion of such death may be entered upon the record. Freeborn *v.* Denman, 8 L. 116.

VARIANCE BETWEEN RULE AND COPY PRESENTED TO REFEREES.—A variance between the original rule of reference and the copy presented to the referees, the former submitting "all matters in difference in the said cause," and the latter submitting "all matter in difference between the parties in said cause" will not vitiate the report, if it appear that the referees really went into an examination only of the matters in difference in the cause. Wescott *v.* Somers, 9 L. 99.

DISCHARGE OF RULE.—A rule of reference once entered cannot be discharged on motion of one party, without due notice to the other. Seamans *v.* Pharo, 4 L. 123. The refusal of one of the referees to act, duly substantiated, would be good ground to discharge the rule. Id.

NATURE OF AWARD.—Where a supreme court issue is referred by consent at the circuit, with no statement in the rule of reference that the award is to have the effect of an arbitration, the award is treated as a verdict. Machine Co. *v.* Sinclair, 76 L. 99; 68 A. 890.

APPLICATION TO SET ASIDE AWARD.—Either party may apply to this court to set aside the award and grant a new trial without first applying to the judge or justice of the court which ordered the reference. Machine Co. *v.* Sinclair, 76 L. 99; 68 A. 890.

SUFFICIENCY OF EXCEPTIONS TO REPORT.—A referee reported generally that he found for the plaintiff and against the defendant on all the issues. The statement of account in his report was a mere copy of the plaintiff's bill of particulars, which was a claim for a single specified sum as the contract price of certain work. To this report the defendant excepted, because it was contrary to law and to the evidence. The plaintiff brought on the trial before a jury and rested after offering the referee's report in evidence. The trial judge refused to allow defendant to produce witnesses, upon the ground that no matter of fact was raised by the exceptions which could be laid before the jury. Held that, while the exception was very general, it was a sufficient exception to a report in the general terms used in this case. Ceiling Co. *v.* Kiernan, 73 L. 763; 65 A. 444.

WEIGHT OF REPORT.—The report of a referee is entitled to the same weight as the verdict of a jury upon the facts in the case. Id. Where a reference is ordered by the court, with the consent of the parties, the report of the referee will be controlled as the verdict of a jury would be, and set aside if unsupported by the evidence. Lining Co. *ads.* Potts, 36 L. 301; Beattie *v.* David, 40 L. 102.

Where a reference is made by consent of the parties, the order or reference being general in form, the report must be treated as the verdict of a jury. Association *v.* Hall, 47 L. 152.

VACATION OF REPORT.—If the report of a referee is unsupported by the evidence before him, or if the referee must have contravened some rule of law in reaching his conclusion, the report should be set aside; but if it is not against the evidence in the cause, and no rule of law has been violated, it should stand. Fitch *v.* Archibald, 29 L. 160.

EFFECT OF REPORT ON NEW TRIAL.—On reference of a cause involving accounts the referee reported a sum due the defendant. After exceptions to the report, a trial was had, at which the report was put in evidence, and on the strength of it the defendant recovered a judgment. On error, this judgment was

reversed, for reasons not relating to the legal effect of the report as evidence. Held, that on a new trial the report was still entitled to its statutory force as prima facie evidence. Boody *v.* Pratt, 68 L. 295; 53 A. 470.

REPORT CONCERNING TITLE TO LAND.—A report of referees will not be set aside because the referees report the title to land to be in the lessors of the plaintiff, instead of in the defendant; nor because the referees report that the lessors of the plaintiff are tenants in common of the whole premises, although the declaration contains no joint demise of the whole, but three separate demises for entire parcels of land. Den *v.* Brands, 15 L. 465.

PROCEEDINGS ON EXCEPTIONS TO REPORT.—After a reference and exceptions to the report of the referee, the issues to be tried by the jury are those raised by the pleadings. The report of the referee is only evidence, and the exceptions merely restrict the testimony to be offered against the report. Id., 38 L. 488.

Where the case is regularly noticed for trial at the succeeding circuit, but not moved, and he does not show sufficient reason for not proceeding with the trial before the circuit, the true practice is to dismiss the exceptions, vacate the rule for a venire, confirm the report and enter a judgment de novo the same as when a rule to show cause has been dismissed in an ordinary case. Dean *v.* Susade, 37 L. 50.

Exceptions cannot be taken to the decision of the court on motion to confirm the report. The only remedy for erroneous decisions of the referee is by motion to set aside the report and grant a new trial. Dean *v.* Susade, 37 L. 50; Runyon *v.* Hodges, 46 L. 339; Clayton *v.* Levy, 49 L. 577; 9 A. 755; Railway Co. *v.* Kelly, 57 L. 676; 32 A. 223.

RIGHT TO COSTS.—Where no damages are found by referees nor costs mentioned, no costs are allowed. Anderson *v.* Exton, 4 L. 173.

REVIEW OF PROCEEDINGS.—When a case is taken to the circuit, and a reference there ordered, the proper place to enter a dissent is in the circuit minutes. After that the facts of the reference and the dissent, together with the findings of the referee, should be embodied in the postea, and it, together with the original report, returned to the supreme court. Halsey *v.* Paulison, 36 L. 406. A confirmation can be moved for at bar, subject to a demand for a trial by jury at the same term in which the report is filed; or such motion can be made before the circuit justice if no demand for a trial by jury has been made. Id. The demand for a trial by jury must be actually made of the court, and not by a mere entry in the minutes. Id. The re-

port of the referee is not to be treated as filed until the postea is also filed. Id.

REPORT OF REFEREE, SCOPE AND CONTENTS.—The report of a referee to whom a cause has been referred and the depositions and evidence taken before such referee form no part of the record upon which error can be assigned, unless a bill of exceptions be asked for and sealed. Del., etc., R. R. Co. *v.* Joseph English Co., 82 L. 113; 81 A. 436.

WAIVER.—Where a cause is referred under this section and a party desires to reserve his right to trial by jury, a dissent filed after the reference has been suggested but a day in advance of the formal order of reference, is not premature. Adams *v.* Bd. of Education, 83 L. 489; 83 A. 868.

FORM OF RULE, REPORT AND JUDGMENT.—Forms of rule, report and judgment. Craig *v.* Craig, 9 L. 198.

Right to restrain action at law, see Crane *v.* Ely, 37 E. 564.

156. Reference of Accounts by Supreme Court Justice: Postea: Confirmation: Reservation of Trial by Jury.

Any justice of the supreme court holding the circuit may refer any action in which matters of account are in controversy pending in the supreme court, and coming on for trial at the circuit, and may confirm the report of the referee or referees, and order judgment to be entered thereon, subject however to all the provisions of the preceding section; and the postea shall be framed accordingly; but no such confirmation and order shall be made where either party shall have entered in the circuit minutes a reservation pursuant to the preceding section. (P. L. 1903, p. 580; 3 C. S. 4102; Rev., sec. 179; 1862, p. 58, sec. 1.)

IN GENERAL.—Upon a motion for judgment on a postea which shows an issue sent for trial to the circuit, a reference thereof by the circuit judge in a manner which gives to the report the force of a verdict of a jury, pursuant to rule 84, a report of the referee in favor of the plaintiff, and its confirmation by the circuit justice on notice, held, such confirmation must be presumed to have been made on notice of the filing of the report, pursuant to this section, and that the entry of judgment on the postea could not be opposed on the ground that the

referee erred in the legal principles adopted by him in making up his finding. Clayton *v.* Levy, 49 L. 577; 9 A. 755.

CITED.—Machine Co. *v.* Sinclair, 76 L. 99; 68 A. 890.

157. Allowance to Referee.

The court or justice referring an action shall by rule make just allowance to the referee for his services to be paid in the manner and by the party in said rule directed. (P. L. 1903, p. 580; 3 C. S. 4103; Rev., sec. 180; 1862, p. 58, sec. 2.)

158. Taking Papers in Evidence by Jury: Jurors as Witnesses.

Papers read in evidence, though not under seal, may be carried from the bar by the jury; jurors who know anything relative to the point in issue shall during the trial disclose the same in open court, if called as witnesses. (P. L. 1903, p. 580; 3 C. S. 4103; Rev., secs. 182, 183; R. S. 929, secs. 36, 37; An act relative to jurors and verdicts, passed 1797, secs. 19, 20; Rev. 1820, 310; Pat. 259.)

OPERATION AND EFFECT, IN GENERAL.—It is error for the court to refuse to allow the jury to take with them from the bar the exhibits read in evidence at the trial. State *v.* Raymond, 53 L. 260; 21 A. 328. See Wright *v.* Rogers, 3 L. 547.

EVIDENCE OF JURORS.—A juror is not allowed to give evidence to his fellow-jurors without being sworn. Anderson *v.* Barnes, 1 L. 203. See Den *v.* McCallister, 7 L. 46.

CITED.—State *v.* MacQueen, 69 L. 522; 55 A. 1006; Long Dock Co. *v.* State Bd. of Assessors, 86 L. 592; 92 A. 439.

159. General Verdict not Compelled, but may be Received.

No jury shall in any case be compelled to give a general verdict, so that they find a special verdict and show the truth of the fact and require the aid of the court; but if of their own will they give a general verdict, the same shall be received. (P. L. 1903, p. 580; 3 C. S. 4103; Rev., sec. 184;

R. S. 929, sec. 35; An act relative to jurors and verdicts, sec. 18; see sec. 158, ante.)

POWER TO RECOMMEND SPECIAL VERDICT.—The court may recommend the jury to find a special verdict against the consent of either or both the parties. Watkins *v.* Pintard, 1 L. 378. See Springer *v.* Reeves, 4 L. 207.

RIGHT TO AMEND VERDICT.—Where the jury, by their verdict, say "we find the full amount of the plaintiff's claim," and it appears that there was one amount claimed in the bill of particulars and another on the trial before the jury, the verdict is not informally expressed, but is ambiguous and uncertain, and cannot be amended by the court. Gerhab *v.* White, 40 L. 243. See Stewart *v.* Fitch, 31 L. 17; Railroad Co. *v.* Toffey, 38 L. 525.

ADMISSIBILITY OF JURORS' TESTIMONY.—The testimony of jurors is admissible to prove that, by mere inadvertence, their foreman misstated in open court the verdict upon which they had agreed, and if the mistake be indubitably established it will be corrected. Peters *v.* Fogarty, 55 L. 386; 26 A. 855.

160. Delivery of Verdict.

It shall not be necessary to call the plaintiff when the jury returns to the bar to deliver their verdict; the plaintiff shall have no right to submit to a nonsuit after the jury have gone from the bar to consider of their verdict; and the court may direct that the verdict be taken by the clerk in open court in the absence of the judge and may order that the court remain open for that purpose. (P. L. 1903, p. 580; 3 C. S. 4103; Rev., secs. 185, 288; Rev. of 1874; Supreme Court Rule 81.)

RIGHT TO SUFFER NON-SUIT.—The rule that a plaintiff has a right to suffer a non-suit, on his own motion, at any time before the jury have retired to consider of their verdict is applicable in the district courts. Greenfield *v.* Cary, 70 L. 613; 57 A. 269.

A plaintiff has a right to suffer a non-suit, on his own motion, at any time before the jury have retired to consider of their verdict. Bauman *v.* Whiteley, 57 L. 487; 31 A. 982; George J. Wolf Co. *v.* Fulton Realty Co., 83 L. 344; 84 A. 1041.

EFFECT OF NON-SUIT AFTER SUBMISSION.—Reversible error is apparent in any judgment record where an entry would indicate that the plaintiff below had suffered a voluntary non-suit after the case was given to the jury and the jury had retired. But, if that be the only error complained of, and the course of the trial, as shown by the evidence and ruling sent up with the bill of exceptions, should further indicate that the entry is untrue, an amendment in the lower court might be permitted. Mumma *v.* Railroad Co., 73 L. 653; 65 A. 208.

RIGHT TO NON-SUIT AFTER DIRECTION OF VERDICT.—Plaintiff is not entitled, as a matter of right, to the granting of a motion for a voluntary non-suit after the court, at defendant's instance, has instructed the jury to render a verdict for defendant. Dobkin *v.* Dittmers, 76 L. 235; 69 A. 1013.

RIGHT TO NON-SUIT BECAUSE OF PLAINTIFF'S ABSENCE.—Under this section the court cannot enter a non-suit because the plaintiff did not appear when the jury returned into court and delivered their verdict. O'Brien *v.* Crowley, 85 L. 383; 88 A. 1061; Rollins *v.* Atlantic City R. R., 70 L. 664; 58 A. 344.

COMMON LAW MODIFIED.—The strict rule of the common law is modified by the provision which permits the court to order the clerk to take a verdict, unless such order is dissented from by counsel. Davis *v.* Delaware Twp., 41 L. 57.

161. Verdict on Declaration Containing Good and Bad Counts.

If there are in a declaration several counts, some of which are faulty or bad and others not, and entire damages are given, the verdict shall be good; but the defendant may apply to the court to instruct the jury to disregard such faulty or bad counts. (P. L. 1903, p. 581; 3 C. S. 4103; Rev., sec. 186; R. S. 929, sec. 38. An act relative to jurors and verdicts, sec. 21; see note, sec. 158, ante.)

CONSTRUCTION AND OPERATION IN GENERAL.—Where the declaration exhibited three counts, one of which will support the verdict, a judgment entered thereon is good. Hansen *v.* De Vita, 76 L. 96; 68 A. 1062.

Where, in a single count of a declaration, there be joined together several causes of action, or several grounds of special damages, some of which are sustainable, but others not, if there be a verdict for the plaintiff, with entire damages, the verdict

and consequent judgment thereon will be sustained by the presumption that the trial judge directed the jury not to find damages upon the defective allegations. Karnuff *v.* Kelch, 69 L. 499; 55 A. 163.

Under this section, where some of the counts in the declaration are bad and others are good, a verdict for entire damages is good. The remedy of the defendant in such case is to apply to the judge at the trial to disregard such of the counts as are faulty or bad. Railroad Co. *v.* Salmon, 39 L. 301.

MISJOINDER OF CAUSES OF ACTION.—A verdict is bad where the counts amount to a misjoinder. Potts *v.* Clarke, 20 L. 536. Where, in one suit, there are several distinct causes of action, it is proper to direct the jury to find the issues separately, and to assess the damages for each matter separately. Ward *v.* Ward, 22 L. 699.

CITED.—Spencer *v.* Haines, 73 L. 325; 62 A. 1009; Stout *v.* Stevenson, 4 L. 178, 182; Harrison *v.* Newkirk, 20 L. 176; Browning *v.* Skillman, 24 L. 351; Stewart *v.* Fitch, 31 L. 17; Karnuff *v.* Kelch, 71 L. 558; 60 A. 364.

162. Writ of Inquiry in Detinue.

If in an action for the recovery of goods unlawfully detained, formerly styled detinue, the verdict shall omit price or value, the court may at any time award a writ of inquiry to ascertain the same; and if in any such action on an issue concerning several things in one count, no verdict be found for part of them, it shall not be error; but the plaintiff shall be barred of his title to the things omitted. (P. L. 1903, p. 581; 3 C. S. 4104; Rev., secs. 187, 188; R. S. 929, secs. 39, 40; Act relative to jurors and verdicts, secs. 22, 23; see sec. 158, ante.)

163. Motion for New Trial to Precede Motion in Arrest of Judgment.

The party against whom a verdict has passed may first move for a new trial; and if it be denied, may then move in arrest of judgment; but he shall not be permitted to move for a new trial after he has moved in arrest of judgment and failed; a new

trial may be granted after the expiration of the term in which the verdict is rendered, or the postea filed. (P. L. 1903, p. 581; 3 C. S. 4104; Rev., sec. 189; R. S. 929, sec. 25; 1799, sec. 24; 1855, p. 71.)

TIME FOR APPLICATION FOR NEW TRIAL.—The time within which an application for a new trial may be made to a court of law is coextensive with that within which such an application may be made to a court of equity. Wolcott *v.* Jackson, 52 E. 387; 28 A. 1045.

EQUITY JURISDICTION.—A court of equity will decline to exercise its jurisdiction in respect to new trials when the relief sought may be obtained by an application to the court of law. Hayes *v.* Phonograph Co., 65 E. 5; 55 A. 84.

ARREST OF JUDGMENT.—Judgment will be arrested where the defendant has a verdict on a notice of set-off improperly pleaded against the plaintiff's demand. Potts *v.* Barlow and Marsh, 18 N. J. L. J. 246.

CITED.—Spencer *v.* Haines, 73 L. 325; 62 A. 1009; Defiance Fruit Co. *v.* Fox, 76 L. 482; 70 A. 460.

164. Consolidation of Actions: Apportionment of Costs, Etc.

If several actions between the same parties in which the same or similar matters of controversy are involved, or if cross-actions between the same parties with respect to the same transaction, which are triable in the same manner and may be conveniently tried together, are pending in the same court, the court or a judge may, on application of either party or on its or his own motion, order that such actions be consolidated for the purpose of trial; and in case of the consolidation of cross-actions, the court or a judge shall make such order for the trial and for the apportionment of the costs as shall be just and equitable. (P. L. 1903, p. 581; 3 C. S. 4104; Rev., sec. 289; Rev. of 1874.)

IN GENERAL.—The court will not consolidate two actions brought against the same person, by the same plaintiffs, upon promissory notes drawn at different dates and payable at differ-

ent times, where it does not appear that the defense is the same in each. Worley *ads.* Glentworth, 10 L. 241.

Two several writs of scire facias to revive two several executions by the same plaintiff against the same defendant cannot be consolidated. Mickle *v.* Brewer, 8 L. 85; Form of rule, Den *v.* Kimble, 9 L. 335, 338.

CITED.—Morehouse *v.* Kissam, 58 E. 364; 43 A. 891.

165. Special Verdicts.

Every special verdict and demurrer to evidence shall be entered on the minutes or embodied in the postea, after which either party may move the court to assign a day for argument. (P. L. 1903, p. 581; 3 C. S. 4104; Rev., sec. 190; R. S. 929, sec. 94; 1799, sec. 90.)

166. Preliminary Hearing as to Fraud in Contract to Determine Whteher Defendant shall be Held to Bail.

If a defendant in an action on contract has been held to bail upon the ground of fraud in the inception of the contract, it shall be lawful on the trial of the action to inquire into the fact of said fraud; and if the judge on the trial shall determine from the evidence and certify upon the record that there was no such fraud, then the defendant's bail shall be discharged or he shall be released from custody and no capias ad satisfaciendum shall issue against him. (P. L. 1903, p. 581; 3 C. S. 4104; 1877, p. 112.)

DETERMINATION OF ISSUE OF FRAUD.—An issue of fraud is for the determination of the judge, and the burden is on the defendant of proving the absence of fraud. Austrian *v.* Laubheim, 78 L. 178; 73 A. 226.

XIII. JUDGMENT.

See P. A. 1912, secs. 14, 15, 16, 20, 21, 22, rules 57, 58, 59, 60, 76; S. C. R. 1913, rules 80, 81, 82, 83, 116, post, §§ 274-276, 280-282, 351-354, 393.

May be entered on the several issues in case of joinder.—S. C. R. 1913, rule 23, § 309a.

Summary entered only on order of court or a justice.—S. C. R. 1913, rule 84, § 355.

Four days' notice required.—S. C. R. 1913, rule 84, § 355.

Ex parte affidavits may be used to show plea sham or frivolous.—S. C. R. 1913, rule 84, § 355.

Opposite party entitled to, if trial or argument not moved.—S. C. R. 1913, rule 102, § 375.

Of non-suit shall be entered, when.—S. C. R. 1913, rule 103, § 376.

Entered immediately upon filing postea after relicta or verdict.—P. A. 1912, p. 398, rule 76; S. C. R. 1913, rule 116, § 393.

Rule to show cause in arrest of.—S. C. R. 1913, rule 125, § 387.

Entered nunc pro tunc where rule to show cause is discharged.—S. C. R. 1913, rule 128, § 390.

Certified by writ of certiorari may be vacated.—S. C. R. 1913, rule 170.

By default in dower, waste and partition.—S. C. R. 1913, rules 180, 181.

By default in ejectment, writ of inquiry.—S. C. R. 1913, rule 189.

To contain nominal costs only, when.—S. C. R. 1913, rule 201.

For or against several parties.—P. A. 1912, p. 381, sec. 20, § 280.

Against one joint contractor.—P. A. 1912, p. 381, sec. 20, § 280.

One execution on several judgments.—P. A. 1912, p. 381, sec. 20, § 280.

Form of.—P. A. 1912, p. 381, sec. 21, § 281.

Without pleadings.—P. A. 1912, p. 381; sec 22, § 282.

Not reversed unless substantial right affected.—P. A. 1912, p. 382, sec. 27, § 287.

Summary judgments.—P. A. 1912, p. 382, secs. 15, 16, rules 57-60; S. C. R. 1913, rules 80-84, §§ 275, 276, 351-354.

Forms.—See index Forms, Judgments.

167. Inspection of Judgment and Process not Necessary: Judgment Roll need not be Made Up.

The inspection of judgment and process shall not be necessary, and no judgment roll shall be made up in any action. (P. L. 1903, p. 582; 3 C. S. 4105; Rev., secs. 191, 192; R. S. 929, secs. 78, 79; 1799, secs. 77, 78.)

168. Book of Abstract of Judgment: Contents.

When in any civil action a rule for final judgment for a sum of money only shall be entered in the minutes, the clerk shall, unless otherwise directed by one of the parties, enter in a well-bound book an abstract of such judgment, containing:

I. The title of the court, the names at length of all the parties to such judgment, designating particularly against whom it is rendered, and the firm name of all copartnerships, if such appear in the pleadings;

II. The style of the action and the amount of debt, damages and costs recovered, which shall be entered in figures and words at length;

III. The date of the actual entry of such judgment. (P. L. 1903, p. 582; 3 C. S. 4105; see Rev., sec. 192; 1876, p. 95, sec. 1; Rev. of 1903.)

ENTRY OF JUDGMENT.—Judgment cannot be entered until after the postea is filed. Dansen *ads.* Johnson, 13 L. 265.

A judgment by cognovit, after process has been served, may be entered in vacation, without a judge's or commissioner's order, and without affidavits. Stewart *v.* Walters, 38 L. 274.

The judgments of the courts of New Jersey must always be entered in the current money of the state. Warder *v.* Whitall, 1 L. 84.

What constitutes a sufficient entry of a judgment by the common pleas. Den, Pearson *v.* Hopkins, 2 L. 195, 203.

The entry of the judgment being substantially correct is not vitiated because unnecessarily preceded by copies of the rules from the minutes. Griggs *v.* Drake, 21 L. 169.

After a judgment has been actually signed, no addition can be made to it by the insertion of the costs or the filling up of the in toto attingunt clause, nor can the costs be rightly put in the execution, unless they actually formed a part of the judgment. Den *v.* Morse, 12 L. 331; Camman *v.* Traphagen, 1 E. 230. Such irregularity is to be corrected when directly questioned, and not collaterally. Camman *v.* Traphagen, 1 E. 230, 231. The exact time of entry may be proved, as matter dehors the record, by competent evidence. Hunt *v.* Swayze, 55 L. 33; 25 A. 850.

All the precedents, in debt, assumpsit, etc., include the costs with the sum recovered, and form one entire judgment. Hay *v.* Imley, 3 L. 832, 836.

The court will not give judgment on the postea after a trial, when it appears that, in truth and fact, no pleas have ever been filed in the cause, unless it is with the consent of the party against whom the verdict may be. Caldwell *v.* Estell, 20 L. 326.

NUNC PRO TUNC ENTRY OF JUDGMENT.—A final judgment cannot properly be entered nunc pro tunc, without the special order of the court. Railway Co. *v.* Ackerson, 33 L. 33.

If judgment be continued by curia advisare vult, and be not given until the term succeeding that at which the verdict was rendered, the judgment must be entered and signed as of such succeeding term. Thorpe *v.* Corwin, 20 L. 311; see Jones *v.* Oliver, 8 L. 86.

Where a rule to show cause has been obtained by a defendant who died before an argument of the rule could be had, judgment, if in favor of the plaintiff, may be entered nunc pro tunc, as of the term of return of the postea. Den *v.* Tomlin, 18 L. 14; Corlies *v.* Little, 14 L. 373, 382.

When a delay in giving judgment, caused by the court, affects the rights of the parties, the court, when necessary to justice, will order the judgment to be entered nunc pro tunc, as of the term when the matter was submitted to them. Hess *v.* Cole, 23 L. 116; Tenerck *ads.* Flagg, 29 L. 25, 35; see Ruckman *v.* Decker, 27 E. 244.

FINAL AND INTERLOCUTORY JUDGMENTS DISTINGUISHED.—Distinction between judgments final and interlocutory. State *v.* Wood, 23 L. 561.

JUDGMENT NISI.—What is called a judgment nisi is nothing more than a rule to show cause why judgment should not be rendered. Young *v.* McPherson, 3 L. 895, 897.

FEDERAL PRACTICE.—The clerk of the United States circuit court of New Jersey is entitled to collect from plaintiff, in an action at law fees for recording the proceedings and judgments

therein in favor of plaintiff, as Rev. St. U. S., sec. 914 (Comp. St. U. S. 1901, p. 684) provides that the pleadings and forms and modes of proceedings in civil causes, other than equity and admiralty in the circuit and district courts of the United States, shall conform as nearly as may be to the forms and modes of procedure in like causes in the states where such courts are held. Morrison *v.* Bernards Tp., 35 F. 400.

CITED.—Lewis *v.* Lewis, 66 L. 251; 49 A. 453; Stein *v.* Goodenough, 69 L. 635; 56 A. 701.

169. Transcript of Record of Judgment as Evidence: Cancellation of Record.

Said entry shall constitute the record of the judgment, and a transcript thereof, duly certified by the clerk of the court, shall be plenary evidence of such judgment; upon payment or satisfaction of a judgment so entered, the record thereof may be cancelled in the manner provided by law. (P. L. 1903, p. 582; 3 C. S. 4105; Rev. of 1903.)

EVIDENCE OF JUDGMENT.—While the verdict or rule for judgment entered in the minutes of the common pleas, until the judgment record is made up, can only be evidence of the judgment when offered as such in a suit in the same court where it is entered, it may, by consent of the parties, be lawfully admitted in evidence in another court. When offered in such other court, failure to object is equivalent to consent. Such objection, if not made at the trial, will, on review, be regarded as waived. Rosenberg *v.* Stover, 67 L. 506; 51 A. 931.

170. Record of Judgments in Full: Removal of Record: Cancellation in the Different Records.

In all actions where the judgment is not for a sum of money only, and whenever in any other action any party thereto shall direct the judgment to be recorded in full, or whenever any writ or other proceeding shall require the removal of the record of any judgment to any other court, the clerk shall record the judgment and the proceedings in the action in full by entering the warrants of attorney, process and return, pleadings, pro-

ceedings and judgment, so as to make a complete record thereof, in separate books to be kept for that purpose, which entry shall constitute the record, and in each case, if the short entry above provided for has been made, the clerk shall enter on the margin thereof the date and place where the same judgment is recorded in full; and in case of a satisfaction and cancellation of said judgment on one of said record, the clerk shall also enter at the foot of the other of said records a statement of the fact of the cancellation and satisfaction of the other record with the date thereof; the cancellation and satisfaction of said judgment on one of such records shall be a cancellation and satisfaction of the other. (P. L. 1903, p. 582; 3 C. S. 4106; see Rev., sec. 192; 1872, p. 95, sec. 2; Rev. of 1903.)

CITED.—Stein *v.* Goodenough, 69 L. 635; 56 A. 701; Tomilson *v.* Armour & Co., 75 L. 748; 70 A. 314; 19 L. R. A. (N. S.) 923.

171. Judgments Signed by Judge or Clerk.

The record of judgments shall be signed by a judge (or the clerk) of the court as of the day on which such judgments were entered, and judgments signed by a judge in office, though not in office at the time of entering such judgments, shall be as good and effectual in law, as if such judgments had been signed by a judge who was in office at the time of rendering and recording the same. (P. L. 1903, p. 583; 3 C. S. 4106, as amended by P. L. 1912, p. 470; Rev., sec. 193; 1847, p. 56.)

172. Index to Judgments: Fees.

The clerk shall make a complete alphabetical index to the books in which the record of judgments is made, and for entering a judgment in full he shall be allowed one dollar, and for making the

short record fifty cents. (P. L. 1903, p. 583; 3 C. S. 4106; Rev. 1903.)

173. Minutes as Evidence.

In any action which has been finally determined, until the clerk shall enter the record of the judgment, the verdict or rule for judgment entered in the minutes shall be held and taken in the court in which the same is obtained to be the record of the judgment in such action and shall be received in evidence in said court as such judgment, as fully as if the record had been made up and signed. (P. L. 1903, p. 583; 3 C. S. 4106; Rev., sec. 194; 1863, p. 10.)

CONSTRUCTION AND OPERATION IN GENERAL.—This statute does not dispense with the making of the record, nor prevent the successful party from including the costs of it in his bill of costs, recoverable against the other party. It only makes the minute entry of the proceedings and the judgment effective as such for all purposes of execution, and evidence in the court itself for the intervening period between the rendering of the judgment and the making up of the record. Morrison *v.* Bernards Twp., 35 Fed. 400.

This section does not require the court of errors and appeals to treat a rule for judgment as the final adjudication of the cause, so as to obviate its actual entry as a prerequisite to a writ of error. Stein *v.* Goodenough, 69 L. 635; 56 A. 701.

XIV. EXECUTION.

1. In General.

See one writ on several judgments, P. A. 1912, p. 381, sec. 20, § 280.

Shall conform to judgment on the several issues in case of joinder. S. C. R. 1913, rule 23, § 309a.

Trial judge may stay. P. A. 1912, p. 398, rule 76; S. C. R. 1913, rule 116, § 393.

Call for interest from date of judgment nisi when rule to show cause is discharged. S. C. R. 1913, rule 128, § 390.

May issue to collect mesne profits in ejectment. S. C. R. 1913, rule 189.

Supplementary proceedings in aid of. P. L. 1915, p. 470; 2 C. S. 2249; P. L. 1916, p. 242.

174. Execution on Judgment: no Execution Against Executor: Etc., Except in case of False Pleading.

Upon judgment for debt, damages and costs, the party recovering the same may have such execution as he is entitled to against the body or against the goods, or against the goods and lands, of the party against whom such judgment is recovered; but no execution shall be issued against the proper goods and lands of any executor, administrator, heir or devisee unless he shall have made his estate liable by false pleading or otherwise. (P. L. 1903, p. 583; 3 C. S. 4106; Rev., sec. 195; R. S. 976, sec. 1; An act making lands liable to be sold for the payment of debts, passed 1799, sec. 5; Rev. 1820, 430; Pat. 369.)

TIME FOR RECORDING EXECUTION.—No execution can be sealed or recorded until the rule for judgment is actually entered on the minutes. Smith *v.* Falls Co., 20 L. 116.

RULE TO SHOW CAUSE.—Execution may be issued immediately after the return of the postea and the entry of a rule for judgment nisi; but, if a rule is allowed to show cause why there should not be a new trial, the execution becomes a nullity. Railroad Co. *v.* Ackerson, 33 L. 34.

It is irregular to take out execution pending a motion to show cause why execution should not issue. Stille *v.* Wood, 1 L. 162.

DEATH OF PLAINTIFF.—The supreme court will set aside an execution which has been issued after the death of the plaintiff. Harwood *v.* Murphy, 13 L. 193. See Quigley *v.* Middleton, 10 L. 293; Den *v.* Manning, 20 L. 612; Wade *v.* Scudder, 5 L. 681.

Where the plaintiff dies after the entry of the judgment, his administrators cannot be substituted plaintiffs in order to issue a testatum. Warwick *v.* , 20 L. 116. If an execution be tested in the defendant's lifetime, it may be taken out and executed after his death. Den, Rickey *v.* Hillman, 7 L. 180.

EXECUTION AGAINST EXECUTOR OR ADMINISTRATOR.—If an executor or administrator plead payment with notice of set-off under the statute, and obtain a verdict for the balance due to his testator or intestate, he may have judgment and execution thereon, with costs, if the plaintiff sued in his own right; but if he sued as executor or administrator, no judgment can therein be entered against him for such balance, but it becomes a debt of record, the truth of which cannot be questioned, and which can be enforced only by action of debt or by scire facias, and which must be responded to according to the laws regulating the administration of estates. Shinn *v.* Paterson, 17 L. 322.

EXECUTION AGAINST BANKRUPT.—On an application for leave to issue execution against a certified bankrupt, on a judgment, obtained before his discharge, upon allegation of fraudulent preference of creditors, the court can and will, in a proper case, order an issue to try the facts. Ogden *v.* Harrison, 22 L. 540.

175. Indorsements.

The party at whose instance a writ of execution shall be issued shall endorse thereon before it is delivered to the sheriff or other officer the debt, damages and costs really due and to be made; and if the writ be a capias ad satisfaciendum, such endorsement shall be in words at length. (P. L. 1903, p. 584; 3 C. S. 4107; Rev., secs. 196, 215; R. S. 976, sec. 2; Act making lands liable to be sold for the payment of debts, sec. 7 (see sec. 174, ante); R. S. 929, sec. 80; 1799, sec. 79.)

ENDORSEMENTS IN GENERAL.—On a bond payable in installments judgment was obtained and execution had issued thereon endorsed for the whole sum. Held, that the execution was right, but the endorsement wrong. Griffith *v.* Jones, 3 L. 932. The practice is to endorse upon the execution the sum or installments actually due and make the levy for that amount only. Warwick *v.* Matlack, 7 L. 165, 167. If the endorsements are erroneous, they may be corrected, on motion. Horner *v.* Canal Co., 16 L. 265.

When judgment on a verdict is entered for six cents damages, with costs, which are afterwards taxed at $110.94, and a ca. sa. is issued, endorsed "amount due, one hundred and eleven dollars; damages and costs, $111," the writ will not be set aside,

although the endorsement is not in strict conformity with the statute, which requires the plaintiff to endorse upon every such writ the real debt or damages due and claimed by him, and the costs of suit, in words at length. Ferguson *ads.* State, Reeves, 31 L. 283. If the statute is imperative and not merely directory, the departure from it is too small to be fatal to the writ. Id.

176. Return in Term Time or Vacation.

Executions may be made returnable and returned either in term or in vacation, and upon such return being made in vacation the like proceedings may follow and be had thereon as if the same were made at a regular term of the court. (P. L. 1903, p. 584; 3 C. S. 4107; Rev., sec. 197; 1871, p. 7.)

177. Judgments in Supreme Court: Stay.

Upon all judgments recovered or docketed in the supreme court, executions may issue at the same time to any county without any suggestion of the issuing of a prior execution to the county in which the venue may be laid; if more than one execution be levied at the same time, there shall not be any sale made of the property of the person against whom such executions are issued under more than one of them, except to satisfy a deficiency remaining after a sale under that one; if any sale be made contrary to this provision, the party at whose instance such executions are issued and his attorney shall be liable to the adverse party as trespassers for all damages he may sustain thereby; the court or a judge may for good cause stay the proceedings on any one or more of such executions, or direct under which a sale shall first be made, or order the proceeds of any sale to be paid into court. (P. L. 1903, p. 584; 3 C. S. 4107; Rev., sec. 198; 1855, sec. 41.)

178. Division of Money in Controversy between Execution Creditors.

If a controversy shall arise between execution creditors as to the application of the money realized from the sale of the property of a defendant under executions issued out of different courts, a justice of the supreme court may by order direct into which of the said courts the moneys so made shall be paid; and the court into which such payment shall be directed to be made shall thereby obtain jurisdiction to hear and decide the whole controversy; the justice may at the time of making such order or at any time thereafter grant a rule to show cause before the said court in such form as will present for decision the matter in controversy, and may make an order for taking testimony to be used on the argument of such rule. (P. L. 1903, p. 584; 3 C. S. 4107; Rev., sec. 293; Rev. of 1874.)

179. Property of Principal to be Exhausted before Execution against Surety.

In actions against a principal and surety, if an execution has been issued, the court or a judge may on application of any surety and notice to the principal and to the plaintiff direct the sheriff or other officer, after making a levy upon the property liable to the execution, to make the money out of the property of the principal, if it can be done, before selling the property of the surety; if the judgment be paid by a surety, it shall not be considered satisfied, except as to such surety; and he on like application and like notice and upon terms, shall have the full benefit and control of the judgment for the purpose of compelling repayment from the principal or contribution from his co-surety, and on this application the court or a judge may order an issue to try the questions in

controversy. (P. L. 1903, p. 585; 3 C. S. 4108; Rev., sec. 199; 1855, sec. 40.)

See Brown *v.* White, 29 L. 514, reversing Id. 307; Paulin *v.* Kain, 29 L. 480; Irick *v.* Black, 17 E. 189.

180. Stay of Execution on Judgment, in Action on Judgment Pending Writ of Error.

If the defendant bring a writ of error and the plaintiff bring an action on the judgment and recover, execution shall not issue on the second judgment till the writ of error is determined. (P. L. 1903, p. 585; 3 C. S. 4108; Rev., sec. 200; R. S. 929, sec. 84; 1799, sec. 83.)

181. Time for Issuance of Execution.

Execution may issue without a revival of the judgment by scire facias, at any time within twenty years from its recovery. (P. L. 1903, p. 585; 3 C. S. 4108; Rev., sec. 201; 1855, sec. 42.)

OPERATION AND EFFECT IN GENERAL.—A special order is not required before issuing an alias, where an execution has been issued within a year after the recovery of the judgment, and returned unsatisfied. Claflin *v.* Voorhees, 35 L. 484.

An application to the Orphans' Court will not bar a scire facias issued to revive a judgment entered before the application was made, nor prevent the issuing of execution upon such judgment when revived. Howell *v.* Potts, 20 L. 1.

A motion to issue a scire facias is of course, and no notice need be given to the opposite party. Pears *v.* Bache, 1 L. 206.

A scire facias may issue where an execution has been partly satisfied. Stille *v.* Wood, 1 L. 118. That a scire facias may be amended, see Condit *v.* Gregory, 21 L. 429.

182. Execution by Survivors in Case of Death.

If one or more of several parties in whose favor a judgment has passed shall die after judgment and before execution issued, execution may be issued in the name of the survivor or survivors,

such death being suggested on the record. (P. L. 1903, p. 585; 3 C. S. 4108; Rev., sec. 203; Rev. of 1874; see 1855, sec. 62.)

183. Execution in Name of Executor, Etc.

If a sole party in whose favor a judgment has passed shall die after judgment, the court in which such judgment was recovered or a judge, on application of the executor or administrator of the deceased, may make an order that such death and the fact of the grant of letters testamentary or of administration, be entered upon the record; and thereupon execution may issue on such judgment in the name of the executor or administrator, without the judgment being revived by scire facias. (P. L. 1903, p. 585; 3 C. S. 4108; Rev., sec. 104; Rev. of 1874; see 1855, sec. 64.)

IN GENERAL.—In 1871 the plaintiff recovered a judgment against the defendants, an execution was issued and returned unsatisfied; in 1872 the plaintiff died, but the fact of his death was unknown to his attorney; in 1873 an alias execution was issued, and property of defendants levied on. On motion to quash the writ, held, that, prior to the passing of the amended practice act, upon the death of a sole plaintiff after final judgment, an execution could only properly issue in the name of the plaintiff's personal representatives, and no other method but the proceeding by scire facias would serve to bring them into court. Morgan *v.* Taylor, 38 L. 317. The fact that the plaintiff's attorney, who caused the alias writ to be issued, was, at the time of its issue, uninformed of the plaintiff's death will in no way affect the case. Id.

Under S. C. R. 1913, rule 128, providing for the entry of judgment final, nunc pro tunc and this section, it was proper for the court to order that the death of the plaintiff after judgment and pending a rule to show cause, and after the grant of administration, be entered upon the record, whereupon execution might issue in the name of the administrator without the judgment being revived by scire facias. Pushcart *v.* N. Y. Shipbuilding Co., 86 L. 444; 92 A. 81.

184. Substituted Administrator may Issue Execution, Etc.

If a judgment shall be had in the name of any executor or administrator and substitutionary administration shall afterwards be granted, such substituted administrator may by order of the court or a judge suggest such grant of administration on the record and have execution on such judgment in his own name or issue a scire facias to revive the same. (P. L. 1903, p. 586; 3 C. S. 4109; Rev., sec. 205; R. S. 350, sec. 5; Act concerning executors, administrators, etc., passed 1795, sec. 5; 1820, 174; Pat. 153.)

185. Trustee in Bankruptcy or Assignee for Creditors may Issue Execution.

If a party in whose favor a judgment has passed shall become bankrupt or make an assignment for the equal benefit of his creditors, the trustee in bankruptcy or the assignee may suggest such bankruptcy or assignment upon the record, and prosecute or issue execution upon such judgment in his own name. (P. L. 1903, p. 586; 3 C. S. 4109; Rev., sec. 207; Rev. 1874.)

186. Execution may Issue against Goods, Etc., of Deceased Defendant in Case of no Administration, Etc.: Notice.

If a defendant against whom a judgment has passed shall die after judgment and the judgment remains in whole or in part unsatisfied, and no will of such deceased defendant shall have been proved, and no letters of administration shall have been granted upon his estate within six months after his death, execution may be issued in the original title of the action against the goods and lands of such deceased defendant with the like effect as if such death had not occurred; provided, the court or a judge shall so order on ten days' notice given

in such manner as the court or judge may direct. (P. L. 1903, p. 586; 3 C. S. 4109; 1881, p. 174; 1889, p. 423.)

187. Execution against Survivors in Case of Death of Defendants.

If one or more of several parties against whom a judgment has passed shall die after judgment, execution may be issued against such parties as if such death had not occurred, but such execution shall be operative against the persons and property of the survivors only. (P. L. 1903, p. 586; 3 C. S. 4109; Rev., sec. 206; see 1855, sec. 69.)

188. Sheriff, Etc., to Return Statement of Amount of Money Collected: no Fee until Statement is Filed.

The sheriff or other officer to whom an execution shall be delivered shall without fee or reward, when he returns said execution, return and file therewith in the office of the clerk of the court out of which the execution issued, a statement specifying the amount of money, if any, and the time when collected by him and the balance due thereon, and also the items of his bill of costs, or execution fees, verified by his oath annexed to or indorsed on said statement; such statement shall not be conclusive against any person other than the officer making the same; and the sheriff or other officer shall not be entitled to receive or collect of the plaintiff any fees or costs on such execution, until he shall have returned such verified statement. (P. L. 1903, p. 586; 3 C. S. 4109; Rev., sec. 210; 1863, p. 469.)

188a. Execution against the Body of Minors, Etc.

No execution shall be issued against the body of any judgment debtor who is under the age

of sixteen years, and, where the judgment debtor is above the age of sixteen years and under the age of twenty-one years, it shall be within the discretion of the judge, before whom application for such execution is made, after ascertaining the age of such judgment debtor and the nature of the offense or action complained of, whether such execution against such judgment debtor shall issue. (P. L. 1910, p. 256; 3 C. S. 4109, sec. 1.)

2. Capias ad Satisfaciendum.

189. Grounds for Issuance of Capias ad Satisfaciendum: Exception of Contempt Proceedings.

The writ of capias ad satisfaciendum shall not be issued upon any judgment founded upon contract, express or implied, except:

First. Where an order to hold the defendant to bail has been made and remains in force; or,

Second. Upon proof being made to judge of the court or a supreme court commissioner, to be certified by such judge or commissioner and filed in the office of the clerk of the court wherein such judgment was recovered, establishing:

A. The facts on which the plaintiff would be entitled to an order to held the defendant to bail under the provisions of this act; or,

B. That the defendant has rights or credits, moneys or effects either in his own possession or in the possession of any other person to his use, of the value of fifty dollars or over which he unlawfully refuses to apply in payment of such judgment.

Nothing in this section shall apply to proceedings as for contempt to enforce civil remedies. (P. L. 1903, p. 587; 3 C. S. 4109; Rev., secs. 211, 213, 214; R. S. 321, secs. 2, 3, 7; 1842, p. 130, secs. 2, 7.)

See notes under section 52, ante. Repealing effect.

IN GENERAL.—A ca. sa. must be directed to the sheriff of the county in which the venue is laid, although the defendant was arrested in another county, and entered into recognizance of bail with condition that he pay, etc., or render himself to the sheriff of said county where the arrest was made. Cockran *ads.* Drake, 18 L. 9. The bail, as well as his principal, is bound to take notice where the venue is laid, and should search for a ca. sa. in the office of the sheriff of that county, to know whether the plaintiff intends to proceed by execution against the defendant's body. Id.

In order to fix the bail on a recognizance, the sheriff may be instructed to return a ca. sa. "non est inventus," although he might have served it on the defendant. But, if the defendant be in the sheriff's custody, such a return cannot be made. Van Winkle *v.* Alling, 17 L. 446. The sheriff is not bound to arrest the defendant upon a ca. sa. lodged with him for fixing the bail, even if he can arrest him as well as not. Id.

This section, together with sections 52 and 56, do not change the English practice as it existed prior to the Revolution, whereby a capias ad satisfaciendum on a judgment in an action of tort issued as a matter of course and without a judge's order. Kintzel *v.* Olsen, 73 A. 962; Breithecker *v.* Dallas, 94 A. 307.

To warrant a capias ad satisfaciendum in an action on contract, proof must be made to the judge or commissioner, he must certify it and file it in the clerk's office, and the proof must be of facts which would entitle the plaintiff to an order to hold to bail. Breithecker *v.* Dallas, 94 A. 307.

FRAUD, IN GENERAL.—The fraud which by the constitution of this state may subject a debtor to arrest and imprisonment is not confined to fraud in the creation of the debt, but extends to subsequent fraudulent conduct of the debtor for the purpose of defeating his creditor in the recovery of the debt by due course of law. Ex parte Clark, 20 L. 648. The clause in the constitution prohibiting imprisonment for debt, except in cases of fraud, is not incompatible with any of the provisions of the act of 1842 abolishing imprisonment for debt. Id.

A ca. sa. cannot be issued pending proceedings under the act to prevent fraudulent trusts and assignments. Bowne *ads.* Titus, 30 L. 340.

EVIDENCE.—The proof of the circumstances necessary to authorize the award of a ca. sa. is to be to the satisfaction of the judge or commissioner. The legality of the evidence received by him, and its applicability, may be reviewed; but its weight

and credibility rest with the commissioner. Wire *v.* Browning, 20 L. 364.

The officer who makes the order to hold a debtor to bail on the ground of fraud is the exclusive judge of the weight of the evidence, and this court will not review or set aside his order upon the weight of the evidence; but when there was no evidence before him of any legal fraud they will review it. Van Wagenen *v.* Coe, 22 L. 531. It is not sufficient for the commissioner to decide that there was proof, to his satisfaction, that the defendant had rights or credits, moneys or effects, either in his own possession or in the possession of some other persons; in the words of the act, he should specify by means of which of the several things mentioned the fraud was committed. Bowne *v.* Titus, 30 L. 340.

ORDER.—The order made by the justice or commissioner must show, upon its face, that he has considered and decided upon the evidence of fraud submitted to him, and that the proof was to his satisfaction. Hill *ads.* Hunt, 20 L. 476.

ALIAS CAPIAS AD SATISFACIENDUM.—An alias capias ad satisfaciendum may be issued against a defendant who, on his arrest under the original capias ad satisfaciendum, gave bond to the sheriff, under the Insolvent Debtor's act, and was released from custody, and was afterwards refused a discharge by the court on the hearing of his application for the benefit of the Insolvent law. The plaintiff, in such case, is not restricted to an action on the bond. He may sue on the bond, or have an alias ca. sa., or issue execution against goods or lands, or bring an action on the judgment. David *v.* Blundell, 40 L. 373. Such alias ca. sa. may be sued out at the instance of the surety on the insolvent bond, who, after forfeiture of the bond, has paid the plaintiff and taken an assignment of the judgment. Id.

CITED.—Austrian *v.* Laubheim, 78 L. 178; 73 A. 226, 227.

XV. MISCELLANEOUS PROVISIONS.

1. Notice.

See Notice, of intention to take bar examination .....S. C. R. 1913, rule 4.
of removal of attorney or party required (sec. 4, notes, supra) .....S. C. R. 1913, rule 26, § 4n.

See Notice, for affidavits upon application to enter judgment over sham plea.....S. C. R. 1913, rule 84, § 355.
to be given on filing referee's report .....S. C. R. 1913, rule 100, § 373.
of objection to state of case..S. C. R. 1913, rule 126, § 388.
that judge will settle state of case .....S. C. R. 1913, rule 126, § 388.
of argument, 10 days, required for list of causes..S. C. R. 1913, rule 150.
of argument, shall be for first day of term .....S. C. R. 1913, rule 150.
of argument, filed 4 days before .....S. C. R. 1913, rule 150.
of argument, have priority according to time of filing .....S. C. R. 1913, rule 150.
of motion for restitution on certiorari .....S. C. R. 1913, rule 167.
of allowance and set-off for permanent improvements in ejectment .....S. C. R. 1913, rule 188.
of taking depositions, 4 days, unless otherwise ordered .....S. C. R. 1913, rule 191.
of trial, 10 days.....S. C. R. 1913, rule 195, § 151.
both parties may take depositions on notice given by either .....S. C. R. 1913, rule 195.
of re-taxation of costs, to be given .....S. C. R. 1913, rule 202.

190. Notice of Motion.

Whenever notice is required in any matter of practice, two days' notice shall be sufficient, unless otherwise specially directed; provided, if the exigency of the case be such as not to admit of such notice, the court or a judge may dispense with such notice and make such order as the ends of justice may require. (P. L. 1903, p. 587; 3 C. S. 4110; Rev., sec. 216; Rev. of 1874; Supreme Court Rule 21.)

NECESSITY OF NOTICE IN GENERAL.—No notice is necessary to issue a scire facias. Pears *v.* Bache, 1 L. 206. Notice of taking affidavits must be given to the opposite party, although he has not appeared. Warford *v.* Smith, 25 L. 212; State *v.* Justices, 1 L. 244, 245; State *v.* Lyon, 1 L. 403, 409.

No notice is necessary of affidavit to obtain a rule to show cause. Crane *ads.* Condit, 16 L. 349; Halsey *ads.* Van Wagenen, 1 Har. 350. Notice must be given of an application to discharge a defendant on common bail. Morris *ads.* Geiger, 10 L. 331. Notice of a motion given to the administrator of the attorney ten years after his death is insufficient. Waddle *v.* Dayton, 8 L. 174. Whether notice of a motion for a certiorari need be given, see State *v.* Giberson, 14 L. 388; State *v.* Canal Co., 12 L. 365; State *v.* New Brunswick, 1 L. 393.

FORM AND SUFFICIENCY OF NOTICE IN GENERAL.—A notice of an application to reinstate an action should be written and not verbal. Hunt *v.* Langstroth, 9 L. 223. All notices in matter of practice in this court, whether required by the Practice act or by the rules of this court, must be in writing, unless otherwise expressed in the act of assembly, or in the rule of this court, requiring the same. Tillou *v.* Hutchinson, 15 L. 178.

A notice which states that a motion will be made on Friday the seventh, when Friday is the eighth of the month, is bad. Brown *v.* Williamson, 8 L. 363.

SERVICE OF NOTICE.—Proof of the service of a notice of taking affidavits to be used on the argument of a cause may be made, viva voce, at the bar of the court where the affidavits are offered to be read. Anonymous, 12 L. 94. See McCourry *v.* Suydam, 10 L. 245.

A notice to assess damages upon a judgment entered upon a sheriff's bond is properly served upon the sheriff and his sureties, and need not be served upon the attorney who appeared for

the defendants in the suit on the bond. State *v.* Hamilton, 10 L. 190.

The notice of taking affidavits, to be used on the argument of a rule to show cause, should be given to the attorney, and not to the party. Den *v.* Geiger, 9 L. 225.

SPECIAL NOTICE.—Where a motion is made on behalf of a defendant in confinement after sentence, to take up his case out of its turn, special notice to the attorney-general must be proved. Stone *v.* State, 20 L. 404. So, a motion to quash a certiorari because improvidently issued. State *v.* Road, 3 L. 949. Also a motion for a rule to show cause. Crane *ads.* Condit, 16 L. 349; Halsey *ads.* Van Wagenen, Id. 350.

EXTENT OF NOTICE.—On all special motions, the other party is entitled to two days' notice. Den *v.* Matlack, 17 L. 354.

NOTICE OF RULE TO PLEAD.—Where a rule to plead has been obtained without notice, the burden of proving the service of the rule is upon the party seeking to avail himself of the fact of its service. Hoffman *v.* Lowell, 58 L. 553; 34 A. 750.

REVOCATION OF EXTENSION OF TIME TO PLEAD.—A rule extending defendant's time to plead may be revoked upon good cause shown; but such revocation should not be ordered, except upon notice, unless the exigency of the case be such as not to admit of it. Lucke *v.* Kiernan, 68 L. 281; 53 A. 566.

191. Motion to Strike out Pleadings.

The notice of a motion to strike out any pleading or any part thereof shall contain a particular statement of the defects in or objections to such pleading on which the party giving notice intends to rely and matters not specified in the notice shall not be considered upon the hearing. (P. L. 1903, p. 587; 3 C. S. 4111; 1882, p. 124, sec. 3.)

192. Fees for Noticing Trial.

A fee of one dollar shall be paid to the clerk of the county by the party noticing a cause for trial at every term the same shall be noticed, which fee shall be included in the taxed bill of costs, and the clerk shall pay such fees at the end of every term to the county collector of said county. (P. L. 1903, p. 588; 3 C. S. 4111; 1871, p. 92, sec. 3.)

193. Service of Notices.

All notices required to be given by this act shall be in writing and shall be served upon the attorney when the party appears by attorney, unless otherwise specially provided. (P. L. 1903, p. 588; 3 C. S. 4111; Rev., sec. 217; Rev. of 1874; Supreme Court Rule 79.)

See note under section 190, ante, Form and Sufficiency of Notice in General.

SERVICE OF NOTICE IN GENERAL.—The notice of taking affidavits to found thereon an application for an attachment is properly served on the party and need not be served on his attorney. Flommerfelt *v.* Zellers, 7 L. 31; State *v.* Edsall, 10 L. 190, 191.

Proof of mailing to a sheriff a capias and a notice of amercement, and that he has served and returned the capias, is presumptive proof that he received the notice, but not that he received it ten days before the first day of the term. Melvin *v.* Purdy, 17 L. 162.

Proof of putting a letter containing a notice into the post office, directed to the opposite attorney, is not sufficient proof of the service of such notice to found thereon an application in the attorney's absence. Anonymous, 11 L. 94. Where the attorney of a lunatic ceases to act, the notice to substitute another attorney must be served upon his committee. Den *v.* Folger, 20 L. 115.

194. Publication of Notices.

Where advertisement or notice of any matter is required to be published in any newspaper, the court or a judge may, whenever the circumstances of the case shall in the opinion of the court or judge require a more extensive publication either in or out of this state, order such publication. (P. L. 1903, p. 588; 3 C. S. 4111; Rev., sec. 218; R. S. 957, sec. 2; 1830, p. 110, sec. 2.)

195. Court to fix Mode, Etc., of Notices when Law does not Provide Therefor.

When it shall be necessary to give notice of any application to any court or judge and no provision

is made by law for the mode, time or duration of such notice, the court or judge may upon ex parte application fix and determine the mode, time and duration of such notice, either in or out of this state; and such notice thus given shall be due and legal notice of such application. (P. L. 1903, p. 588; 3 C. S. 4111; 1873, p. 51; 1889, p. 294.)

2. Affidavits.

Use of, on motion for summary judgment, S. C. R. 1913, rule 80, sec. 351, post.

On application to enter judgment over sham or frivolous plea, S. C. R. 1913, rule 84, § 355.

To verify account on assessment of damages, S. C. R. 1913, rule 89, § 366.

Rule for, to amend return to certiorari, what to set forth, S. C. R. 1913, rule 164.

On application for allowance of certiorari, S. C. R. 1913, rule 168.

Verified bill for printing case and briefs to be filed, rule 203.

196. Notice of Taking Affidavits: Both Parties may take Affidavits on Leave to Either.

Affidavits taken in pursuance of any rule of court shall be taken on four days' notice of the time and place of taking the same; when leave is granted by rule to either party to take affidavits, both parties may take affidavits within the purview of such rule without further leave or rule; and on notice of the taking of affidavits given by either party both parties may take affidavits, but the officer shall if required first take the affidavits of the party giving the notice. (P. L. 1903, p. 588; 3 C. S. 4111; Rev., secs. 219, 220; Rev. of 1874; Supreme Court Rules 65, 68, 69.)

RULE TO TAKE AFFIDAVITS IN GENERAL.—A rule to take affidavits only authorizes the taking of legal and competent evidence,

and should specify the purpose for which the affidavits are to be taken. Scott *v.* Beatty, 23 L. 256, 260.

A rule to take affidavits does not expire at the next term after it is taken, but stands until the cause is argued. Rogers *v.* Chadwick, 10 L. 59. When a general rule is obtained by one party to take affidavits for a specific purpose, both parties have leave, by virtue of the rule. Anonymous, 9 L. 224.

EX PARTE AFFIDAVITS.—An ex parte affidavit taken without notice in the absence of the opposite party and of his attorney cannot be read. Dare *v.* Ogden, 1 L. 91; Cooper *v.* Galbraith, 24 L. 219; Layton *v.* Cooper, 3 L. 65. See Vandervere *v.* Reading, 9 E. 446; State *v.* Green, 15 L. 88. An ex parte affidavit allowed to be read on the motion to set aside verdict. Harwood *v.* Smethurst, 30 L. 230. See Lummis *v.* Stratton, 2 L. 245.

Ex parte affidavits upon which a rule to show cause has been allowed cannot be used in the argument of the rule. The character of the depositions taken must be such as to show the facts necessary to a proper judicial determination of the questions arising upon the rule. Klein *v.* Express Co., 61 L. 530; 40 A. 445.

Ex parte affidavits may be used for the purpose of obtaining a rule to show cause, but are not competent to prove the facts necessary to support a motion out of court, or to be read on the hearing of the rule to show cause depending on facts extrinsic to the record; such facts can only be brought before the court by depositions taken on notice. Baldwin *v.* Flagg, 43 L. 495.

The practice of taking affidavits ex parte, to be used on the argument of a motion, is peculiar to the court of chancery, and has never been adopted in the courts of law. Id.; Peer *v.* Bloxham, 81 A. 659; 82 L. 288.

An application for an order setting aside proceedings on a bail bond, etc., cannot be heard on ex parte affidavits served instead of depositions taken on notice. Atkinson *v.* Prine, 46 L. 33.

FILING.—The affidavits on which a rule to show cause is made must be filed as a basis for the rule upon entering it. Peer *v.* Bloxham, supra.

EVIDENCE TO SUPPORT.—Affidavits on which a rule to show cause was founded cannot be used after the rule is made, to support a motion not of course, or be read on hearing of rule to show cause defending extrinsic facts; proof by depositions taken on notice to interested parties being necessary after the granting of the rule to show cause. Peer *v.* Bloxham, 81 A. 659; 82 L. 288.

197. Testimony: How Taken.

The party producing the witness shall first examine him without interruption, and then the adverse party may cross-examine; the testimony shall be reduced to writing by the officer himself, or by the deponent and shall be signed by the deponent, or the testimony may be taken by a stenographer who shall be sworn to take the same truly, and the officer shall certify that the same has been correctly taken and transcribed, in which case signatures shall not be necessary. (P. L. 1903, p. 588; 3 C. S. 4112; Rev., sec. 221; Rev. of 1874; Supreme Court Rule 66.)

See note under section 196.
CITED.—Peer *v.* Bloxham, 82 L. 288; 81 A. 659.

3. Habeas Corpus Cum Causa.

198. Removal of Suits to Supreme Court: Bond.

Any action commenced in any circuit court or court of common pleas, where the debt, damages or matter in controversy shall exceed two hundred dollars may be removed into the supreme court at any time before issue joined upon matter of fact or law by writ of habeas corpus duly allowed by one of the justices of the supreme court; provided, the defendant shall at or before the allowance of said writ, enter into a bond to the plaintiff with sufficient sureties approved by the justice in double the sum demanded conditioned for the payment of the condemnation money and costs, in case judgment shall pass against him; which bond shall be filed with said writ and returned with the same to the supreme court, and in default thereof said action shall not be removed nor said writ returned. (P. L. 1903, p. 589; 3 C. S. 4112; Rev., secs. 222, 225; R. S. 929, secs. 86, 87; R. S. 200, sec.

7; An act to prevent suit under a certain sum being brought in the Supreme Court, passed 1797, secs. 2, 3; Rev. 1820, 309; Pat. 258; 1838, p. 61, sec. 8.)

PROPRIETY OF WRIT.—A habeas corpus is the proper writ to remove a civil action from the common pleas into the supreme court. Chandler *v.* Monmouth Bank, 9 L. 101.

BOND.—On removing a cause by habeas corpus, bail must be put in, even by a corporation according to the statute, if required by the plaintiff. Canal Co. *ads.* Vanatta, 17 L. 159; Marcellis *v.* Hamburg Co., 3 L. 948.

On habeas corpus the defendant will not be permitted to file common bail, although bail below was not required, where the cause removed was commenced by summons. Anonymous, 3 L. 641.

Where the defendants were administrators, the court ordered common bail to be filed, on removing the cause from the common pleas. Sneed *ads.* Wallen, 5 L. 682; Anonymous, 3 L. 539. Nor will a plaintiff be permitted to file a waiver of bail, on habeas corpus, in order that the cause might be continued and tried in the supreme court. Craig *v.* Berry, 5 L. 852.

Where no bail is filed nor waiver of it entered, the practice is for the plaintiff to have his option, either by proceeding in the supreme court or taking a procedendo. Canal Co. *ads.* Vanatta, 17 L. 159; Dickinson *ads.* Bank, 16 L. 354. See Craig *v.* Berry, 5 L. 582; Marcellis *v.* Hamburg Co., 3 L. 948.

On habeas corpus, where the defendant had not filed bail, no bail being required below, the supreme court granted leave to take 10 days to file recognizance. Marcellis *v.* Hamburg Co., 3 L. 948. So, the plaintiff, in order to prevent delay, may rule defendant to put in bail in 20 days, or sitting the court and at the same time take a rule to plead. Hughes *v.* Hughes, 1 L. 209.

TIME FOR REMOVAL OF CAUSE.—After arbitrators have been appointed and met, it is too late to remove a cause by habeas corpus. A habeas corpus is too late after interlocutory judgment. Bickham *v.* Denny, 1 L. 12; Sharp *v.* Sinnickson, 1 L. 46. See Chandler *v.* Bank, 9 L. 101, 104. If improperly brought, a procedendo will be ordered. Sharp *v.* Sinnickson, 1 L. 46; Austin *v.* Nelson, 6 L. 381.

199. **Proceedings on Return.**

Upon the return of the habeas corpus, the plaintiff shall be deemed to be in court and the pleadings of the parties shall be filed as in other actions; or else the plaintiff shall be nonprossed or judgment be entered against the defendant. (P. L. 1903, p. 589; 3 C. S. 4113; Rev., sec. 228; R. S. 929, sec. 93; 1799, sec. 89.)

200. Second Removal of Cause Barred if Remanded after Removal.

If an action be removed by writ of habeas corpus and afterwards be remanded by writ of procedendo or other writ, the same action shall not again be so removed; if a writ of habeas corpus for the removal of an action shall be issued out of the supreme court contrary to the true intent and meaning of this act, the court to which such writ shall be directed or offered shall proceed in the action as though no such writ had been issued or offered. (P. L. 1903, p. 589; 3 C. S. 4113; Rev., secs. 226, 227; R. S. 929, secs. 88, 89; Act to prevent suits under a certain sum being brought in the Supreme Court, secs. 4, 5; see sec. 198, ante.)

4. Venue.

See S. C. R. 1913, rule 54, § 203a. Complaint must lay venue or be stricken from files.

201. Local Actions: Order for Trial before Supreme Court.

Every local action shall be tried in the county where the lands in question are situate or the cause of action arose, unless the supreme court in actions pending therein shall order the trial to be at the bar of the supreme court, which shall only be done if the matter or property in dispute shall be of the value of three thousand dollars; if the party who shall obtain a rule for a trial at bar

shall not recover to the amount of the said sum, he shall be entitled to no more costs than if the cause had been tried at the circuit. (P. L. 1903, p. 589; 3 C. S. 4113; Rev., sec. 229; R. S. 196, sec. 4; An act relative to the Supreme and Circuit Courts, passed 1799, sec. 3; Rev. 1820, 453; Pat. 393.)

CONSTRUCTION AND OPERATION IN GENERAL.—An action for nuisance to lands by overflowing them with back water raised by a dam is local, and must be tried in the county where the lands lie or the cause of action arose. Deacon *v.* Shreve, 23 L. 204.

An action of trespass quare clausum fregit, being local, must be laid in the county in which the locus in quo is situated at the time the trespass is alleged to have been committed. Champion *v.* Doughty, 18 L. 3. The creation of a new county, including the land trespassed upon, prior to bringing the suit, but after the trespass complained of, does not warrant charging the act to have been done in the new county. Id.; Jenkins *v.* Crevier, 50 L. 351; 13 A. 28. See Anonymous, 16 L. 393.

Where a deputy sheriff of the county of A. is sued in the county of B. for an act done in the course of his official duty in the county of A., the court will, upon affidavit of this fact, change the venue from B to A. Dennis *ads.* Ford, 7 L. 200.

The venue, in an action for damages occasioned by negligence to property, both real and personal, was erroneously laid in a different county from that in which the real property was situate. No steps were taken to compel correction of the error, and the cause was carried down for trial to the county in which the venue was laid No motion to non-suit, because of the erroneous venue, was made. Held, that the trial judge was right in refusing to direct a verdict for defendant, or to withdraw from the consideration of the jury the damages to the real estate and in submitting to the jury the whole matter covered by the issue. Blackford *v.* Railroad Co., 53 L. 56; 20 A. 735.

ACTION AGAINST CORPORATION.—In a suit brought against a corporation, the venue should be laid in the county where their principal office is located; that being considered their place of residence. The rule applies to railroad companies where their road runs through and their franchises are exercised in different counties. Thorn *v.* Railroad Co., 26 L. 121; Bank *v.* Hedenberg, 16 L. 352.

CONSOLIDATION OF ACTIONS.—An order consolidating local action, the effect of which is to change the venue in one of the

actions from that county where the lands in question are situate, or the cause of action arose, to another county, is not within the discretion of the court, affects the substantial rights of the party, and is reviewable on error. Fruit Co. *v.* Fox, 76 L. 482; 70 A. 460.

RIGHT TO TRIAL AT BAR OF SUPREME COURT.—Unless the supreme court, on motion in behalf of the state, if the state be interested, shall order trial at the bar of that court, defendants charged with manslaughter were not entitled, on their application, to a trial at the bar of the supreme court. State *v.* Young, 69 L. 592; 55 A. 91.

CITED.—See State *v.* Kelsey, 64 L. 1; 44 A. 884.

202. Transitory Actions.

An action merely transitory shall at the discretion of the court be tried in the county in which the cause of action arose, or the plaintiff or defendant resides at the time of instituting such action, or if the defendant be a non-resident, in the county in which process was served upon him. (P. L. 1903, p. 590; 3 C. S. 4113; Rev., sec. 230; R. S. 196, sec. 5; Act relative to the Supreme and Circuit Courts, sec. 4; see sec. 201, ante.)

CONSTRUCTION AND OPERATION IN GENERAL.—When it is deemed necessary or expedient to state where the cause of action actually arose, and the place thus stated is out of the county in which the venue is laid, it is necessary to lay the venue under a videlicet. In all other cases, the introduction of the videlicet in stating the venue is neither necessary or useful. Duyckinck *v.* Ins. Co., 23 L. 279.

This section establishes the practice as to venue and place of trial in all actions merely transitory, and it must be followed, and the court will not interfere with its directions, unless upon proof of special circumstances moving the court to exercise its discretion otherwise. Schmehl *v.* Transportation Co., 63 L. 141; 41 A. 385.

The cause of action in this case arose in New York. The plaintiff is a non-resident corporation. The defendant is a domestic corporation with its principal office and agent to receive service of process in Morris county, where the process was served. Held, that the venue should have been laid in Morris county,

and not in Hudson county. Railroad Co. *v.* Ice Co., 65 L. 524; 47 A. 471.

Where there are several defendants, all of whom, except one, reside in this state, a service of process upon such non-resident, who is temporarily in this state, will not entitle the plaintiff to lay the venue in the county where the non-resident is served with summons. Paper Co. *v.* Ridson, 62 L. 579; 41 A. 706.

In actions merely transitory, the venue may be laid at the discretion of the plaintiff, first, in the county in which the cause of action arose; second, if the plaintiff resided in the state when the action was commenced, he may lay the venue in the county in which he then resided; third, if the defendant resided in the state when the suit was instituted, the venue may be laid in the county in which the defendant then lived; and fourth, if the defendant shall not be an inhabitant of this state, it may be laid in the county in which process shall have been served upon him. If the plaintiff has laid the venue in one of the places thus designated by law, it cannot, upon the common affidavit, be changed to any other of the specified counties, or to any other county in the state, though under special circumstances the court will change the venue from one to another of the designated counties. Bell *v.* Canal Co., 15 L. 63.

Under this section the venue may be laid by the plaintiff in any one of the four counties according to the fact, but, if one only of the contemplated situations in fact exists, the venue must be laid accordingly, which will be the place of trial unless changed by the court under section 203. Venue may be laid either in (1) the county in which the plaintiff resides, (2) in which the defendant resides, (3) in which the cause of action arose, or (4) in which process was served on a non-resident defendant. Chancellor *v.* Morris, 81 A. 347; 82 L. 14.

PARTCIULAR CAUSES OF ACTION.—An action of debt for an escape is a transitory action, and plaintiff may lay the venue in any county he pleases. Jones *v.* Pemberton, 7 L. 350.

Where both parties to an action for slander reside in the county where the cause of action arose, the action should be brought in that county. Kelly *v.* Haugh, 60 L. 124; 37 A. 435.

An action upon the third section of the act of February 25th, 1820, P. L., p. 689, "for restraining the plaintiff from navigating the waters between the ancient shores of New York and New Jersey," is not a local but a transitory action. Gibbons *v.* Ogden, 6 L. 285.

In an action for tort to the person, committed in another state, the venue may be laid in the county in which the defend-

ants were served with process. Ackerson *v.* Railway Co., 31 L. 309.

An action by a lessor against his lessee for damages for breaches of covenants contained in the lease is a transitory action, in which the venue may be laid by the plaintiff as in other transitory actions. Clement *v.* Stanger, 75 L. 287; 68 A. 97.

CHANGE OF VENUE IN GENERAL.—In a transitory action, if the plaintiff reside out of the state, and the venue is not laid in the county where the cause of action arose, or where the defendant resides, the court will, on motion, and without affidavit of defense, change the venue to the county where the defendant resides. Worley *v.* Scudder, 10 L. 231; Dauchy *v.* Taylor, 9 L. 96. So, where an appearance was endorsed on the writ, the plaintiff being a non-resident. McMenomy *v.* Williamson, 11 L. 316.

The court will not change the venue on the ground of inconvenience, upon any nice balancing of circumstances of mere accommodation to the parties. Over these the legal right of the plaintiff must prevail. Simanton *v.* Moore, 65 L. 530; 51 A. 621.

In an action for breach of covenant of seizin and warranty the court will not change the venue to the county where the lands lie, without an affidavit stating special circumstances. Ward *v.* Holmes, 7 L. 171.

Court has the power under special circumstances to change the venue in an action of debt on a bond. Meldrum *v.* Sarvis, 1 L. 203; contra, Shotwell *v.* Clark, Id. 205.

VENUE MAY BE CHANGED IN EJECTMENT.—Coxe's Case, Id. 203; Parvin *v.* Miller, Id. 206; contra, Deacon *v.* Shreve, 23 L. 204.

The court will order the venue changed, even when laid in the proper county, if it appears that a fair trial cannot be had there. Murray *v.* Railroad Co., 23 L. 63. In order to warrant a change of venue, it must appear that a fair trial cannot be had in the county where it is laid, by positive evidence or facts, and not by the mere opinion of witnesses. Id. Nor upon their belief. Meldrum *v.* Sarvis, 1 L. 203, 206.

Hearsay evidence not sufficient to support a motion to change the venue. Den, Lee *v.* Evaul, 1 L. 283. In local actions the venue may be changed, but it must be on clear proof that an impartial trial cannot otherwise be had. Id. When the plaintiff is desirous of changing the venue, he must move to amend, and a suggestion must be entered on the record. Id.

A motion to change the venue on the common affidavit must be before plea filed; if a special ground is laid, the venue may

be changed after plea pleaded. Wildes *v.* Meires, 11 L. 320. Where a special ground is laid, and circumstances are brought before the court, by which it is shown that the defendant may be exposed to unnecessary difficulty, or the fair administration of justice be interrupted, the venue may be changed after plea pleaded. Bell *v.* Canal Co., 15 L. 63. Venue may be changed after issue joined. Wistar *v.* Johnson, 1 L. 260; Snowden *v.* Johnson, 3 L. 469, 471. Change of venue on common affidavit refused. Kerr *v.* Whitaker, Id. 514; In re Hall, 5 L. 718.

An affidavit taken without notice to the adverse party cannot be read in support of a motion to change the venue. Parker *v.* Bank, 8 L. 160.

A motion to change the venue to M., when the cause of action did not arise there, was refused; there being no proof that the witnesses of either party resided there. Abrams *v.* Wood, 4 L. 30; Dauchy *v.* Taylor, 9 L. 96; McMenomy *v.* Williamson, 11 L. 316.

Where the defendant was a bank corporation, and the transaction out of which the suit arose occurred at the bank, and all the books, etc., of the bank were necessary evidence, and could not be removed without great inconvenience and loss, the venue was changed to the county where the bank was situated. Kerr *v.* Bank, 4 L. 363. See Bank *v.* Hedenberg, 16 L. 352.

In transitory actions, the court will not change the venue on the ground of inconvenience upon any nice balancing of circumstances of mere accommodation to the parties. Over these the legal right of the plaintiff must prevail. Demarest *v.* Hurd, 46 L. 471.

PRESUMPTIONS AS TO RESIDENCE.—The plaintiff's residence will be presumed to be where he alleges it to be, unless the contrary appear. Dabaghian *v.* Kaffafian, 71 L. 115; 58 A. 106.

CITED.—Fruit Co. *v.* Fox, 76 L. 482; 70 A. 460.

203. Change of Venue: Rule: Stay of Proceedings.

In actions pending in the supreme court, a justice in vacation on application of any party on notice and for good cause may grant a rule to show cause at the next term why the venue should not be changed to some other county than that in which it is laid in the declaration, and for the taking of depositions to be used on the argument of such rule, which rule shall be granted with or without a stay of proceedings, as such justice may

direct. (P. L. 1903, p. 590; 3 C. S. 4115; Rev., sec. 231; Rev. of 1874; 1855, p. 30.)

CITED in opinion by Minturn, for reversal. Case affirmed by divided court. McCarter *v.* Oyster Co., 78 L. 394; 75 A. 211.

203a. Venue.

Every complaint shall lay the venue, or in default thereof, may, in the discretion of the court or a judge, be stricken from the files. (S. C. Rule 54, June, 1916.)

5. Security for Costs.

204. Non-Resident to Give or Make Deposit.

If the plaintiff reside out of this state he shall, if required at any time before notice of trial, give bond to the defendant in one hundred dollars, with sufficient sureties resident in this state, with condition to prosecute his action with effect and to pay costs if he discontinue, be non-suited or a judgment pass against him; which bond shall be filed in the clerk's office of the court in which such action is pending; or in lieu of such bond the plaintiff may deposit the sum named with the clerk as security to the defendant for costs. (P. L. 1903, p. 590; 3 C. S. 4115; Rev., secs. 232, 233; R. S. 929, sec. 74; 1799, sec. 73; 1887, p. 50; 1890, p. 487; Rev. of 1874.)

OPERATION AND EFFECT IN GENERAL.—The right of a defendant in equity to require from the complainant, who is resident abroad, security for costs does not rest alone on the provisions of the statute. It is an ancient and well-established rule that if the complainant is resident abroad the court, on the application of the defendant, will order him to give security for costs, and in the meantime will direct all proceedings to be stayed. Newman *v.* Landrine, 14 E. 291. Nor is it necessary that the complainant should reside out of the state at the time of filing his bill, to entitle the defendant to the order. Id. It

will be granted if the complainant goes abroad to reside after the commencement of the suit. Id.

The defendant in ejectment will not be compelled to enter security for costs on the ground that he had removed out of the state after entering into the common rule. Den *v.* Inslee, 6 L. 475.

Where the defendant was unable to find who or where the plaintiff is, or his place of residence, the court granted a rule that the plaintiff file security for costs. Mulford *v.* Geschiat, 16 L. 272.

The court will not annex to a rule for a trial at bar the condition that the plaintiffs give security for costs, though the plaintiffs are an insolvent and irresponsible corporation. Bank *v.* Evans, 14 L. 298.

The court will not impose upon a party applying for a commission to examine witnesses out of the state the terms of payment of costs to his adversary. Roumage *v.* Insurance Co., 12 L. 95.

A non-resident prosecutor of an administration bond shall give security for costs, if required. Governor *v.* Sureties, 3 L. 754.

Rule to stay proceedings till security for costs is filed, refused when some of the plaintiffs were non-residents. Anonymous, 3 L. 886.

This court will not order the plaintiffs to give security for costs upon the ground that but one of the plaintiffs reside in this state, and that he had, several years before the commencement of the suit, taken the benefit of the insolvent laws. Den *v.* Boqua, 10 L. 192; Bank *v.* Evans, 17 E. 298, 300.

WHO ARE NON-RESIDENTS.—A corporation created by the law of this state, and for purposes to be carried on within its jurisdiction, although it has no property within the state, is not a non-resident, within the meaning of the statute respecting security for costs. Boat Co. *v.* Andrews, 8 L. 177.

ACTIONS BY INFANTS.—Infant plaintiffs residing in this state are not required to give security. Cotheal *ads.* Moorehouse, 21 L. 335. Where an infant plaintiff residing out of this state sues by a prochein ami residing in the state, the defendant by the statute is entitled to security for costs. Where the prochein ami is irresponsible, the court may order security, or appoint one responsible. Id.

CERTIORARI PROCEEDINGS.—Plaintiffs in certiorari, residing out of the state, will be required, on motion and affidavit to that effect, to give security for costs, and proceedings will be stayed till such security be given. Scull *v.* Assignees, 15 L. 430.

A plaintiff who resides in this state, and brings a certiorari to remove a judgment rendered against him in an action of forcible entry and detainer, will not be required to file security for costs, though it is proved that he is unable to pay the costs, if the decision be against him. Smith *v.* Williamson, 11 L. 315.

HABEAS CORPUS PROCEEDINGS.—The prosecutor in a writ of habeas corpus need not enter security. State *v.* Lyon, 1 L. 403.

AFFIDAVIT OF NON-RESIDENCE.—The affidavit of non-residence to obtain security for costs, may be made by a party in the cause. May *v.* Morton, 8 L. 177.

TIME FOR APPLICATION FOR SECURITY.—Rule for security for costs in ejectment may be granted after issue joined. Den *v.* Wilson, 5 L. 680.

Where the plaintiffs (a foreign corporation) filed their declaration in season, the court refused an application to require them to file security for costs made by the defendants at the term next after the return of the writ, who offered no excuse for neglecting to make an earlier application, nor any affidavit of merits. Bank *v.* Goodwin, 14 L. 439.

WAIVER OF SECURITY.—If, after knowledge of the non-residence defendant takes any step in the cause before applying for the order, he thereby waives security for costs. When the defendant's affidavit or application for security fails to show clearly that the defendant did not know of the complainant's removal before taking the last step in the cause, the application will be denied. Newman *v.* Landrine, 14 E. 291.

CITED.—Kienzle *v.* Gardner, 73 L. 258; 63 A. 10.

205. Demand for Security.

When a defendant is entitled to security for costs, he shall give notice to the plaintiff that he requires such security and thereupon all proceedings shall be stayed until such security is filed or deposit made, and the plaintiff upon filing such security or making such deposit shall give notice thereof to the defendant, with the names and residences of the sureties; after such notice the defendant shall have the same time to plead that he had at the service of the notice requiring security. (P. L. 1903, p. 590; 3 C. S. 4116; Rev., sec. 234; Rev. of 1874; Supreme Court Rules 76, 77.)

CONSTRUCTION AND OPERATION IN GENERAL.—The demand of residence under section 4, ante, is not, in contemplation of law, merely ancillary to the demand of security for costs. There are other purposes which the statute providing for it was intended to accomplish, and it is of use in other cases than where the plaintiff is a non-resident. The purview of this section, which stays the running of time to plead on the service of a notice requiring security of a non-resident plaintiff, is not extended to a notice which may, with equal propriety and efficacy, be served on a resident plaintiff. Whitney *v.* Bank, 40 L. 482.

Demand of security for costs may be made after obtaining a rule extending the time to plead, and, if made before issue joined, it operates as a stay of proceedings. Obtaining a rule to extend time to plead is no waiver of the right to demand security for costs. Rommel *v.* Kirk, 4 N. J. L. J. 216.

Our statute authorizing demand for security for costs does not abrogate the common law rule which allows application to the court for security to be made in certain cases even after issue joined. Id. After issue joined, application may be made to the court upon notice for security for costs. Code *v.* Williams, 5 N. J. L. J. 218.

CITED.—Kienzle *v.* Gardner, 73 L. 258; 63 A. 10.

206. Affidavits of Sureties: Exceptions to Sureties.

The plaintiff may at the time of filing his bond for costs file therewith an affidavit of each surety, that he is a resident of this state and is worth two hundred dollars after all his debts are paid, or an approval of the sureties indorsed on said bond by a judge of the court or a supreme court commissioner; in case no such affidavit or approval is filed, the defendant may within ten days after notice of filing security give notice that he excepts to the sureties, in which case the plaintiff shall file such affidavit or a new bond with such affidavit of the sureties thereto annexed; the defendant shall have the same time to plead after notice of filing such affidavit or new bond as he had at the service of the notice of exceptions; the plaintiff may file such bond and affidavit or approval and give notice thereof before security is required.

(P. L. 1903, p. 591; 3 C. S. 4116; Rev., sec. 235; Rev. of 1874; Supreme Court Rule 78.)

CITED.—Kienzle *v.* Gardner, 73 L. 258; 63 A. 10.

6. Circuit Record: Postea and Judgment.

See filing postea, P. A. 1912, rule 76; S. C. R. 1913, rule 116, § 393.

Failure to file postea, a waiver of finding or verdict, when, S. C. R. 1913, rule 117, § 394.

Finding included in postea, when, P. A. 1912, rule 74; S. C. R. 1913, rule 113, § 391.

207. Trial of Supreme Court Issue at Circuit: Transcript.

When an issue in the supreme court is to be tried at a circuit, a transcript of the pleadings in the action with a proper placita shall be sent to the circuit which shall be a sufficient warrant for the latter to proceed upon, hear and determine the action; either party may have such transcript if required. (P. L. 1903, p. 591; 3 C. S. 4116; Rev., sec. 239; R. S. 196, sec. 8; An act relative to the Supreme and Circuit Courts, passed 1799, sec. 8; Rev. 1820, 453; Pat. 396.)

TRANSCRIPT AVAILABLE ON TRIAL AT FUTURE TERMS.—The transcript, when once sealed and certified by the clerk, need not in ordinary cases, be altered in date or resealed, though the trial does not take place at the first circuit after the transcript is made out and certified; but the same certificate will answer for the trial of the cause at any future term. Mickle *ads.* Dunham, 10 L. 150.

Clerk may authorize preparation and authentication of transcript. The clerk may permit the attorney to make out a transcript of the pleadings in the cause, and affix the signature of the clerk and the seal of this court to the certificate required by law, when, in fact, such pleadings are on file. Caldwell *v.* Estell, 20 L. 326.

NECESSITY OF TRANSCRIPT.—It is plain that the party must procure the circuit record in the first instance and present it

to the trial judge before he can have his trial. Parker, J., in Weinberger *v.* Erie R. R. Co., 86 L. 259; 90 A. 1013.

VARIANCE BETWEEN RECORD AND COPY OF DECLARATION.—It does not constitute a variance that the circuit record differs from a copy of the declaration furnished defendant by plaintiff's attorney; he should obtain a copy from the files of the court, made by the clerk. Ogden *v.* Gibbons, 5 L. 518, 532.

208. Trial by Consent in Circuit Court or Common Pleas.

By consent of parties a supreme court issue may be sent by the justice of the circuit to be tried in the circuit court or court of common pleas of the county wherein the venue is laid, and in relation to such trial the judge holding said circuit or common pleas shall have the same power as a justice of the supreme court, including power to amend, to sign the postea, to settle and seal exceptions and to grant a rule to show cause for a new trial. (P. L. 1903, p. 591; 3 C. S. 4116; Rev. of 1903.)

209. Return of Transcript by Court Trying Supreme Court Issue: Postea.

The court before whom a supreme court issue shall be tried shall return the transcript with the verdict and other proceedings had thereon to the supreme court at the next term, and the supreme court shall receive and file the same, and give judgment thereon according to law; if the justice or judge shall die before signing the postea the supreme court may order judgment to be entered in accordance with the proceedings of the trial court on the production of the circuit court record with the postea annexed, signed by the clerk and under the seal of the said court, which certification the clerk of said court shall make; and in such case all questions as to form of the postea shall be determined by the supreme court and the postea may be amended as to matter of form by said court. (P. L. 1903, p. 591; 3 C. S. 4117; Rev.,

sec. 240; R. S. 196, sec. 13; Act relative to the Supreme and Circuit Courts, sec. 13; see sec. 207, ante; 1892, p. 313.)

AMENDMENT OF POSTEA.—The right to amend a postea is unquestionable. It may be corrected by the judge's notes, or by entries or memoranda of the clerk of the circuit, or by other evidence. Ferguson *ads.* State, 31 L. 283. An application to amend a postea should be made to the trial judge, and the court in banc should not entertain such a motion unless the matter is referred to the court by the judge. Peters *v.* Fogarty, 55 L. 386; 26 A. 855. When an application is made to amend a postea, on the ground that it does not correctly state the verdict actually delivered by the jury in open court, the testimony of the jurors is admissible to show what verdict they did deliver. Id.

210. Judgment on Postea: Relicta.

P. L. 1903, p. 592; 3 C. S. 4117; Rev., sec. 241; 1855, sec. 39; 1857, p. 298, sec. 8.

REPEALED by P. A. 1912, p. 384, § 34, § 294.

See P. A. 1912, rule 76; S. C. R. 1913, rule 116; post, § 393.

REPEALED SECTION CITED in; power of special judge. A judge of the circuit court, specially appointed, may not sign an order for judgment in the supreme court. A justice of the supreme court only may make such an order. McConnell *v.* Cement Co., 74 L. 727; 67 A. 346.

7. Bills of Exceptions and Rules to Show Cause.

See bill of exceptions abolished, P. A. 1912, p. 382, sec. 25; as amended, P. L. 1916, p. 109; post, § 285.

New trial.

Not granted unless substantial error, P. A. 1912, p. 382, sec. 27; post, § 287.

Use of new evidence on application for, P. A. 1912, p. 382, sec. 28; post, § 288.

Questions considered as grounds for, P. A. 1912, p. 397, rule 72; S. C. R. 1913, rule 131, § 380.

As to damages only, P. A. 1912, p. 379, rule 73; S. C. R. 1913, rule 132, § 381.

Statement of case for, P. A. 1912, p. 379, rule 70; S. C. R. 1913, rule 110, § 370.

Statement of case for preparation, P. A. 1912, p. 397, rule 71; S. C. R. 1913, rule 111, § 371.

Verdict or finding waived unless postea filed within 10 days after first day of next term, S. C. R. 1913, rule 117, § 394.

Judge at circuit may order a new trial where the jury disregard an instruction to find a verdict, S. C. R. 1913, rule 121, § 383.

Motion for, to be made at term when postea returned or succeeding term, S. C. R. 1913, rule 124, § 386.

Rule to show cause.

Effect to bar an appeal except on point expressly reserved, P. A. 1912, p. 399, rule 83; S. C. R. 1913, rule 129, § 401.

May be special, question considered, P. A. 1912, p. 399, rule 83; S. C. R. 1913, rule 130, § 401.

Application for, shall first be made before the judge before whom the trial took place, S. C. R. 1913, rule 122, § 384.

Such application to be made ex parte and six days after verdict, S. C. R. 1913, rule 123, § 385.

Party entering rule shall file and serve reasons for new trial, S. C. R. 1913, rule 125, § 387.

Argument shall be brought on at next term after entry of rule, S. C. R. 1913, rule 125, § 387.

State of case, how settled, S. C. R. 1913, rule 126, § 388.

Only one counsel to be heard on motion for rule, S. C. R. 1913, rule 127, § 389.

If rule discharged, judgment final shall be entered as of time when judgment nisi was taken, S. C. R. 1913, rule 128, § 390.

211. Bills of Exceptions shall be Settled and Sealed by Justice.

P. L. 1903, p. 592; 3 C. S. 4117; Rev., secs. 242, 245; R. S. 980, sec. 1; An act directing bills of exceptions to be sealed, passed 1797; Rev. 1820, 293; Pat. 245; Rev. of 1874; Supreme Court Rule 83; 1888, p. 237.

REPEALED by P. L. 1912, p. 384, § 34, § 294.

REPEALED SECTION CITED in Mann *v.* Glover, 14 L. 195. See Bellon *v.* Gibbon, 12 L. 76, 78; Associates *v.* Davison, 29 L. 415, 417; Coxe *v.* Field, 13 L. 215, 218; Ford *v.* Potts, 6 L. 388, 392; Furman *v.* Applegate, 23 L. 28, 33; Railroad Co.

v. Moore, 24 L. 824; Apgar *v.* Hiler, 24 L. 812, 817; Newton *ads.* Gloucester, 6 L. 405; Van Waggoner *v.* Coe, 25 L. 197; Roston *v.* Morris, 25 L. 173, 176; Johnson *v.* State, 26 L. 314; Brand *v.* Longstreet, 4 L. 325, 328; In re Carle, 60 L. 83; 37 A. 608; State *v.* Holmes, 36 L. 62; Donnelly *v.* State, 26 L. 465; State *v.* Holmes, 36 L. 62; Agnew *v.* Campbell, 17 L. 291; Wilson *ads.* Moore, 19 L. 186; Anonymous, 2 L. 664; Moore *v.* Hamilton, 24 L. 532; Clarke *v.* Fulse, 2 L. 263; Martin *v.* Thompson, 10 L. 142; Williams *v.* Sheppard, 13 L. 76; Lefferts *v.* State, 47 L. 26; 6 A. 521; Lutes *v.* Alpaugh, 23 L. 165; Cory *v.* Freeholders, 44 L. 445; Driscoll *v.* Carlin, 50 L. 28; 11 A. 482; Robbins *v.* Vanderbeck, 55 L. 364; 26 A. 919; Cohen *v.* Gartner, 52 L. 111; 18 A. 691; Fruit Co. *v.* Fox, 76 L. 482; 70 A. 460; State *v.* Mangano, 77 L. 544; 72 A. 366; Loper *v.* Somers, 71 L. 657; 61 A. 85.

212. Death of Judge Without Sealing Exceptions.

P. L. 1903, p. 592; 3 C. S. 4118; Rev., sec. 243; 1865, p. 776; 1889, p. 92.

REPEALED by P. L. 1912, p. 384, § 34, § 294.

213. Contents of Bill of Exceptions.

P. L. 1903, p. 592; 3 C. S. 4118; Rev., sec. 244; Rev. of 1874; Supreme Court Rule 82.

REPEALED by P. L. 1912, p. 384, § 34, § 294.

REPEALED SECTION CITED in Donnelly *v.* State, 26 L. 465; Associates *v.* Davison, 29 L. 415; Packard *v.* Railway Co., 54 L. 229; 23 A. 722; Moran *v.* Green, 21 L. 562; Oliver *v.* Phelps, 21 L. 597; Id., 20 L. 180; Petre *ads.* State, 35 L. 64; Dodge *v.* State, 24 L. 456. See Budd *v.* Crea, 6 L. 370, 373; Moore *v.* Hamilton, 24 L. 532; Gibbons *v.* Ogden, 5 L. 853, 854.

214. Rule to Show Cause a Waiver of Bills of Exceptions Except on Points Reserved.

P. L. 1903, p. 593; 3 C. S. 4119; Rev., sec. 246; Rev. of 1874; Supreme Court Rule 42.

REPEALED by P. L. 1912, p. 384, § 34, § 294.

See P. L. 1912, p. 399, rule 83; S. C. R. 1913, rule 129; post, § 401.

REPEALED SECTION CITED in Traction Co. *v.* Whelan, 60 L. 154; 37 A. 1106; Wilson *ads.* Moore, 19 L. 186; Finley *v.* Handley, 50 L. 503; 14 A. 585; Meeker *v.* Boylan, 27 L. 262; Mann *v.* Glover, 14 L. 195; Ogden *v.* Gibbons, 5 L. 853; Bunting *ads.* Allen, 18 L. 299; Paulison *ads.* Halsey, 37 L. 205; 38 L. 488; Haden *v.* Manufacturing Co., 73 L. 308; 63 A. 7; Karl *v.* Diamond, 77 L. 167; 71 A. 46.

8. Case Certified.

215. Case Certified to Supreme Court.

The circuit court may upon terms state and certify any question of doubt or difficulty to be argued at the bar of the supreme court; which court shall hear the same, and after opinion given therein certify the same to the said circuit court, which court shall render judgment therein in conformity to such opinion. (P. L. 1903, p. 593; 3 C. S. 4119; Rev., sec. 247; R. S. 200, sec. 5; 1838, p. 61, sec. 6.)

CONSTRUCTION AND OPERATION IN GENERAL.—Under our Practice act the circuit court is required to settle all disputed facts before it can send a case to the supreme court for its advisory opinion. Destefano *v.* Calandriello, 57 L. 483; 31 A. 385; Bunn *v.* Railway Co., 65 L. 372; 47 A. 440; Wilson *v.* Railroad Co., 64 L. 44; 44 A. 850.

In cases certified by circuit courts for advice, the supreme court deals with questions of law only. Lumber Co. *v.* Burroughs, 62 L. 469; 41 A. 695.

The supreme court, on a rule to show cause why a new trial should not be granted of an issue tried at the circuit, will not consider questions embraced in exceptions reserved in the rule, and therefore it will not give its advisory opinion to a circuit court on questions embraced in exceptions reserved in a rule to show cause why a new trial should not be granted of an issue tried in that circuit. Holler *v.* Ross, 67 L. 60; 50 A. 342.

This section permits the certification of fundamental questions only, a decision of which disposes of the case. McDonald *v.* Central R. R. Co., 95 A. 734; Von Novelly *v.* Carpenter, 97 A. 779.

QUESTIONS NOT PROPERLY CERTIFIED.—Under section 254, post, rules of practice settled by judicial decision in the supreme court extend to the circuit courts. Therefore, such questions are not pending, and do not present a case of doubt and difficulty to be certified under this section. Holler *v.* Ross, 67 L. 60; 50 A. 342.

Whether a verdict was contrary to the weight of the evidence, and the damages excessive, are not questions properly certified. Murray *v.* Railway Co., 61 L. 301; 39 A. 648.

The question whether, on the whole case, there was evidence on the question of fraud which should have been submitted to the jury is not such a fundamental question as may be certified under this section, since its decision would not control the decision. McDonald *v.* Central R. R. Co., 95 A. 734. Under this section all matters of fact must be settled in the circuit court, and only questions of law can be certified to the supreme court. Id.

MATTER ARISING IN ELECTIONS.—The supreme court cannot express an advisory opinion except in cases falling within the operation of this section, and a justice of the supreme court, sitting under the act regulating elections, approved May 28th, 1890, to decide, in a summary way, upon the fairness and legality of certain elections, cannot call upon the supreme court for its advisory opinion touching any matter in the course of such proceedings. In re Margarum, 55 L. 12; 25 A. 702.

CITED.—Welch *v.* Woodworking Co., 61 L. 57; 38 A. 824; Mendles *v.* Danish, 74 L. 333; 65 A. 888; Kehoe *v.* Stagmeier, 70 L. 175; 56 A. 252.

216. Certificate Filed, Etc.

When a question is so certified the clerk shall file the certificate, enter a rule as of course setting the cause down for argument and place the same on the paper giving it priority according to the date of the filing the certificate. (P. L. 1903, p. 593; 3 C. S. 4120; Rev., sec. 248; Rev. of 1874; Supreme Court Rule 36.)

217. Error Assigned on Certified Opinion.

Where judgment shall be rendered by any circuit court in conformity to the certified opinion of the supreme court upon a question so certified and a writ of error shall be brought to reverse such judgment, such certified opinion shall be returned with the writ of error as part of the record and error may be assigned thereon; if error be found therein the judgment may be reversed. (P. L. 1903, p. 593; 3 C. S. 4120; Rev., sec. 249; 1855, sec. 86.)

ERRORS IN ADVISORY OPINION NOT ASSIGNABLE ON ERROR. —When a motion for a new trial is certified by the circuit court to the supreme court for its advisory opinion, errors in such advisory opinion cannot be assigned on error in the court of errors. Railroad Co. *v.* Nevelle, 51 L. 332; 17 A. 836; 19 A. 538.

CITED.—De Baun *v.* Brand, 61 L. 624; 41 A. 958.

9. Penalties and Damages: How Recovered.

218. Recovery of Damages or Penalty.

Whenever in this act it is provided that any person shall be liable for any damages or penalty for the doing or not doing of any act, such damages or penalty may be recovered with costs by the party aggrieved by an action on contract in any court of competent jurisdiction, and every action for the recovery of a penalty imposed by this act shall be instituted within one year after the liability was incurred. (P. L. 1903, p. 593; 3 C. S. 4120; Rev. of 1893; Rev., sec. 11; R. S. 929, sec. 10; 1799, sec. 10.)

By this section an action arising out of the violation of the act of 1884, page 339, providing a penalty for refusing admission into a theatre to a negro may be brought on contract. Miller *v.* Stampul, 83 L. 278; 84 A. 201.

10. Suits by Common Informers.

219. Indorsement of Special Note on Information in an Action by Informers: Process: Etc.

In every action instituted by an informer on a penal statute, a special note shall be endorsed on the information of the very day, month, and year of its institution, and such action shall be of record from that time and not before; and upon every process in such action to compel the appearance of the defendant shall be endorsed the name of the party who prosecutes and the title of the statute upon which the action is founded; any clerk issuing process contrary to this provision shall forfeit to the party against whom such process is issued ten dollars for every offense. (P. L. 1903, p. 594; 3 C. S. 4120; Rev., secs. 253, 254; R. S. 919, secs. 1, 2; An act relative to suits instituted by common informers, passed 1799, secs. 1, 2; Rev. 1820, 405; Pat. 348.)

CONSTRUCTION AND OPERATION IN GENERAL.—In an action by a common informer to recover a penalty, the justice must make a special note in his docket of the day, month and year of its institution. Ackerson *v.* Zabriskie, 7 L. 167. Merely stating the time of the commencement of the action, and the amount of the penalty, without stating what the penalty was for, or under what statute it accrued, is not sufficient. Id. What is an insufficient state of demand to recover a penalty under the "act regulating traveling on public and turnpike roads in this state." Id.

TIME AND SUFFICIENCY OF ENTRY.—This note should be made at the time or on the day of the commencement of the suit; and if the justice omits to make the entry until the return of the summons, the judgment will be reversed. Griffith *v.* West, 10 L. 301. Although it would be convenient and proper to make the entry more special, yet where the nature of the action appears from the subsequent proceedings, and the act is in terms complied with, it is sufficient. Dallas *v.* Hendry, 3 L. 973.

An entry in the clerk's docket, giving the return day of the summons and not the day of issue, is insufficient. An endorse-

ment on the summons referring to the act of March 8th, 1877, and not to the amended act of May 1st, 1894, is insufficient. Corlies *v.* Machine Co., 17 N. J. L. J. 285.

NECESSITY FOR ENDORSEMENT.—In a qui tam action the note of the commencement of the action and the endorsement of the summons are necessary to give the court jurisdiction, and a motion to set aside the process as defective in this respect, may be made even after an appearance for the purpose of a collateral motion. Corlies *v.* Machine Co., 17 N. J. L. J. 285.

The title of the statute and the name of the prosecutor must be endorsed on the writ. Miller *v.* Stoy, 5 L. 476; Oliver *v.* Larzaleer, 5 L. 513. On an information for profanity the title of the statute on which the complaint is made, or the name of the prosecutor, need not be endorsed on the process. Johnson *v.* Barclay, 16 L. 1.

EFFECT OF FAILURE TO ENDORSE.—Error in not endorsing the summons in a penal action as required by this section, is a mere irregularity and does not deprive a justice of the peace of jurisdiction. Hageman *v.* Van Doren, 6 N. J. L. J. 310. The omission is an irregularity which, if properly objected to, would defeat the process, but which does not, in the absence of objection, deprive the justice of the right to proceed. Id. See Williamson *v.* Common Pleas, 42 L. 386.

SUIT FOR VIOLATING CHILD LABOR LAW.—An action brought by a state official by virtue of his office for the penalty for the violation of the first section of the Child Labor law is not within the provisions of this section. Bryant *v.* Hardware Co., 76 L. 45; 69 A. 23.

FAILURE TO ENDORSE NOT JURISDICTIONAL DEFECT.—The failure to endorse upon the process in a penal action the title of the statute is an irregularity that will, upon objection, defeat the process; it is not a jurisdictional defect. Hayes *v.* Storms, 64 L. 514; 45 A. 809; 23 N. J. L. J. 150.

SUIT AGAINST RAILROAD COMPANY FOR PENALTY.—In a qui tam action to recover from a railroad company a penalty under section 38 of "An act respecting railroads and canals," it is necessary to endorse on the process, not only the title of such statute, but also the title of act March 11th, 1880 (P. L., p. 203), alleged violation of which is the foundation of the action. Hunter *v.* Railroad Co., 70 L. 101; 56 A. 139.

CITED.—See Minard *v.* Gas Co., 76 L. 132; 68 A. 910.

SUITS FOR REFUSAL OF ADMISSION TO NEGRO.—This section does not apply to an action brought under the act of 1884, page 339, for refusal of admission to negro into a theatre. Miller *v.* Stampul, 83 L. 278; 84 A. 201.

SUITS TO RECOVER PENALTY UNDER TIMBER ACT.—To recover a penalty under the Timber act (4 C. S. 5396), the action must be in contract as prescribed by section 219. Lott *v.* Leventhal, 80 L. 216; 76 A. 328.

220. Defendant's Plea.

The defendant in every such action may plead the general issue and give in evidence any special matter which, if pleaded, would be a bar to the action, giving notice with the plea of the matter so intended to be given in evidence. (P. L. 1903, p. 594; 3 C. S. 4121; Rev., sec. 255; R. S. 919, sec. 3; Act relative to suits instituted by common informers, sec. 3; see sec. 219, ante.)

221. Recovery by Covin no Bar: Prosecutor Liable for Proportion of Penalty in Certain Cases.

No recovery by verdict or otherwise obtained by covin or collusion in any such action shall be a bar to any other action prosecuted in good faith; and if the prosecutor of an action for the recovery of any penalty not wholly appropriated to the use of such prosecutor shall compound with the defendant to direct such action to be discontinued, unless it be by leave of the court, then such prosecutor shall be liable for so much of the penalty to the state or any other person than the prosecutor, as the state or such other person would have been entitled to if the defendant had been convicted. (P. L. 1903, p. 594; 3 C. S. 4121; Rev., secs. 256, 257; R. S. 919, secs. 4, 5; Act relative to suits instituted by common informers, secs. 4, 5; see sec. 219, ante.)

222. Costs to be Paid by Informer on Non-Suit, Etc.

Every informer on a penal statute shall pay costs to the defendant if he discontinue, be nonsuited or judgment pass against him, for which

costs the defendant shall have execution against the goods and body of such informer. (P. L. 1903, p. 594; 3 C. S. 4121; Rev., sec. 258; R. S. 919, sec. 6; Act relative to suits instituted by common informers, sec. 6; see sec. 219, ante.)

223. Exceptions in Application of Act.

Nothing in the four preceding sections shall apply to any certain person, body politic or corporate, to whom or to whose use any forfeiture, penalty or action is or shall be specially limited or granted by any statute, but every such certain person, body politic or corporate, may in such case sue, prosecute or inform as he or they might have done if this act had not been passed. (P. L. 1903, p. 595; 3 C. S. 4121; Rev., sec. 259; R. S. 919, sec. 7; Act relative to suits instituted by common informers, sec. 7; see sec. 219, ante.)

CITED.—Bryant *v.* Hardware Co., 76 L. 45; 69 A. 23.

11. Exceptions to Judges.

224. Disqualification of Judge.

No judge of any court who shall be related in the third degree to any of the parties to an action pending in such court, or be interested in the event of such action, or shall have been attorney of record or counsel for any party to the action, or shall have given his opinion upon the matter in question in such action, shall nominate or strike the jury or sit on the trial or argument of any point in controversy in such action; the degrees of kindred in such case shall be calculated according to the common-law manner of computation; provided, nothing herein shall be construed to prevent any judge from sitting on the trial or argument of any point in controversy in an action be-

cause he may have given his opinion in another action wherein the same matter in controversy shall have come in question, or because he may have given his opinion on any question in controversy in the same action in the course of the previous proceedings therein, or because the board of chosen freeholders of any county, or any township or municipality, in which he is an inhabitant or liable to be taxed, are or may be parties to the record or otherwise interested. (P. L. 1903, p. 595; 3 C. S. 4121; Rev., secs. 260, 261, 264; R. S. 992, secs. 1, 2; 1820, p. 90, secs. 1, 2; 1849, p. 129.)

CONSTRUCTION AND OPERATION IN GENERAL.—When the legislature provides for the exercise of judicial functions it cannot change their essential nature, and authorize a judgment in violation of the maxim that no person can be a judge in his own case. That maxim is founded in natural justice and fundamental law, and is inherent in, and part of the nature of judicial action. State, Winans, *v.* Cranford, 36 L. 394. See Schroder *v.* Ehlers, 31 L. 44. The assessment in this case was set aside, because three of the commissioners who made it were owners of the land to be assessed, and therefore judges in their own cases. Id.; State, Kingsland, *v.* Union, 37 L. 268.

RELATIONSHIPS WHICH DISQUALIFY.—It is good ground of challenge to a judge that he had married a sister of the plaintiff's wife and that the justice's wife was deceased, leaving issue. Vannoy *v.* Givens, 23 L. 201, 202. If one of the justices making an order of filiation is a cousin of the mother, the proceedings will be quashed. State, Stoll, *v.* Gariss, 38 L. 200.

DISQUALIFICATION THROUGH DISSENT.—Where a new trial was ordered, the chief justice, who dissented, was held incompetent to sit at the new trial at the circuit because of having expressed an opinion. Den, Snedelers *v.* Allen, 2 L. 35, 51, note.

TRIAL JUDGE NOT DISQUALIFIED ON MOTION FOR NEW TRIAL.—In the supreme court, on motion for a new trial, a challenge to a judge because he had tried the cause below was overruled. Den, Pearson *v.* Hopkins, 2 L. 195.

TRIAL JUDGES NOT TO SIT ON REVIEW.—The judges who concurred in the judgment below are excluded from sitting on the review, in the court of errors and appeals, although there had been no argument below, and no formal opinion delivered.

Gardner *v.* State, 21 L. 557. But this does not exclude them from voting or expressing opinions on preliminary and collateral motions. The exclusion only applies to the hearing of the cause. Engle *v.* Cromlin, Id. 561.

CONSTITUTIONAL LAW.—A law is unconstitutional which provides that no judgment of the supreme court shall be reversed by the court of errors unless a majority of those members of the court who are competent to sit on the hearing and decision of the case shall concur in such reversal. Clapp *v.* Ely, 27 L. 622.

PROCEEDINGS TO ESTABLISH ROAD.—A judge is not incompetent to appoint commissioners to review the damages on laying out a road because he has once been a member of the town committee: nor because he was once employed as surveyor by the opponents of the road; nor because he has expressed an opinion that the road was unnecessary. These are matters unconnected with the question of the damages sustained. Readington *v.* Dilley, 24 L. 209.

225. Challenges: Making and Trial.

All challenges to a judge for the causes aforesaid shall be made previous to the trial or argument, and the court may try such challenges or appoint three indifferent persons triors for that purpose at the discretion of the court, and the finding of a majority of such triors shall be received as the determination of such triors. (P. L. 1903, p. 595; 3 C. S. 4122; Rev., sec. 262; R. S. 992, sec. 3; 1820, p. 90, sec. 3.)

CONSTRUCTION AND OPERATION IN GENERAL.—Form of challenge and trial. Den, Pearson *v.* Hopkins, 2 L. 195. On a challenge to a justice of the peace three triors were appointed. Their determination of the facts was held to be conclusive, under the statute. Davis *v.* Mahany, 38 L. 104. A challenge to a justice for relationship must show how he is related, and to whom. Stevenson *v.* Stiles, 3 L. 740.

226. Judge not to act as Clerk.

No judge of any court shall act as clerk of the court of which he is judge. (P. L. 1903, p. 595; 3 C. S. 4122; Rev., sec. 263; R. S. 992, sec. 4; 1820, p. 90, sec. 4.)

12. Aid to Poor Suitors.

227. Process Without Costs: Counsel Assigned: Costs.

Every poor person who shall have a cause of action shall have at the discretion of the court before which he would sue, any process accorded to the nature of his case without paying for the same, and the court shall at its discretion assign to such poor person counsel, attorneys and other officers requisite to prosecute the said action, who shall perform their respective duties therein without fee or reward; every such poor person, being plaintiff in any such action, shall not be compelled to pay costs. (P. L. 1903, p. 596; 3 C. S. 4122; An act to assist poor persons in the prosecution of their suits, passed 1799; R. S. 901; Rev. 1820, 393; Pat. 339.)

EFFECT OF AGREEMENT FOR COMPENSATION.—The fact that counsel has been so assigned will not debar him from enforcing an agreement for compensation, dependent upon success, in establishing the right, by which success the suitor will be provided with the means of remuneration. Hassell *v.* Van Houten, 39 E. 105.

13. Supreme Court Examiners.

228. Supreme Court Examiners: Powers: Etc.

The justices of the supreme court or any two of them, of whom the chief justice shall be one, may commission under the seal of said court from time to time as many persons as they shall think necessary in the several counties as supreme court examiners, who shall have the same powers to administer an oath or to take any deposition in any action for use in any court of law as a justice of the supreme court, and any oath or affidavit that may be taken before a supreme court commissioner may be taken before a supreme court examiner, and for all services rendered said examiner shall be

entitled to receive the same compensation as supreme court commissioners. (P. L. 1903, p. 596; 3 C. S. 4122; 1898, p. 62.)

PROCEEDINGS SUPPLEMENTAL TO EXECUTION.—A supreme court examiner may take the deposition of a judgment defendant under an order directing him to make discovery in proceedings supplemental to execution, though technically an "affidavit" is taken ex parte, and though a "deposition" is technically taken on notice so that the testimony taken under an order for discovery is technically a "deposition," but the words "deposition and affidavits" may be synonymous. Hershenstein *v.* Hahn, 77 L. 39; 71 A. 105.

XVI. COSTS.

See fees, costs and taxation, P. L. 1911, pp. 742, 756. See P. L. 1916, pp. 156, 159.

Disallowed at discretion of court, P. A. 1912, p. 383, sec. 30; post, § 290.

Allowed when certiorari dismissed for want of prosecution, S. C. R. 1913, rule 166.

On certiorari of assessment, may be apportioned, S. C. R. 1913, rule 171.

Nominal, unless taxed on or before the first day of second term after judgment, S. C. R. 1913, rule 201.

Notice of retaxation, S. C. R. 1913, rule 202.

Of printing state of case and brief may be taxed, S. C. R. 1913, rule 203.

Of defendant unnecessarily sued, S. C. R. 1913, rule 204, § 305.

Attorney liable for, except sheriff's execution fees, S. C. R. 1913, rule 205, § 8n.

Clerk to collect for state and enforce payment by attorneys, S. C. R. 1913, rule 206, § 8n.

Clerk not to file papers or enter orders until cost paid, S. C. R. 1913, rule 206, § 8n.

229. Rights of Plaintiffs and Defendants as to: Parties to pay Costs on Arrest of Judgment.

If the plaintiff in any action shall recover debt or damages, he shall have judgment to recover his costs against the defendant to be taxed in the man-

ner prescribed by law, which shall be levied and collected by execution together with the debt or damages; in any action wherein the plaintiff on a judgment in his favor would be entitled to recover costs, the defendant if the plaintiff shall be non-prossed or non-suited or a judgment shall pass for the defendant shall have judgment to recover his costs against the plaintiff (except against executors or administrators prosecuting in the right of their testators or intestates) to be taxed as aforesaid, and have such execution as the plaintiff might have had against him if judgment had been given in such action for the plaintiff; if judgment shall be arrested, each party shall pay his own costs. (P. L. 1903, p. 596; 3 C. S. 4123; Rev., secs. 265-267; R. S. 449, secs. 1, 2; An act concerning costs, passed 1795, secs. 1, 2; Rev. 1820, 168; Pat. 149; 1855 sec. 85.)

HISTORICAL.—History of allowance of costs. Aller *v.* Shurts, 17 L. 188.

CONSTRUCTION AND OPERATION IN GENERAL.—Plaintiff cannot recover costs of copies or exemplifications of records used as evidence on the trial. Den *v.* Johnson, 30 L. 156.

If, after suit brought, the defendant pay in full the debt or damages due the plaintiff, judgment cannot be rendered for costs. Van Horn *v.* Collins, 12 N. J. L. J. 78.

On setting aside an irregular proceeding, the party against whom it has been taken is not liable to costs. Boggs *v.* Chichester, 13 L. 209.

Costs are not recoverable against an administrator prosecuting in the right of his intestate. Bell *v.* Samuels, 60 L. 370; 37 A. 613.

It is a general principle that the prevailing party in suits in all courts of law is entitled to costs. Hann *v.* McCormick, 4 L. 109, 111; Reeve *ads.* Eft, 31 L. 139, 141; State *v.* Blake, 36 L. 433. See Stires *v.* Stires, 20 L. 52, 56.

Costs are given where the plaintiff recovers damages. Reed *v.* Chegary, 20 L. 616, 617.

There is no provision in the fee bill for revenue stamps, and there is no more authority to charge for stamps than for stationery or copies of deeds. Ferguson *ads.* State, 31 L. 289.

Where a defendant puts on a cause on affidavit, he will not be compelled to pay costs of a jury struck by the plaintiff. Kennedy *v.* Dixon, 6 L. 159.

Where the plaintiff has omitted to enter judgment for costs, he cannot recover costs below. Hunt *v.* Allen, 22 L. 537.

If the defendant was entitled to costs, and none were given to him, the plaintiff could not complain. Crawford *v.* Woodruff, 2 L. 276.

A party who fails to pursue his notice of a motion or proceeding in this court is liable for costs. Reeves *ads.* Eft, 31 L. 139.

The plaintiffs moved for leave to discontinue, which was granted on payment of costs. Peltier *v.* Pennington, 14 L. 312, 313.

Where the defendant moved the plaintiff's non-suit for not trying his cause at circuit when he offered to proceed, but was prevented by the court, because he did not produce a paper he had promised to produce for the defendant's use, costs were denied the defendant. Anonymous, 3 L. 513.

If a trial goes on, on account of a defect or mistake of the judge or sheriff in making out the panel of a struck jury, the plaintiff is not obliged to pay costs. Gibbons *ads.* Ogden, 7 L. 122.

Costs were allowed to a defendant who had succeeded on the motion to retax a bill of costs. State *v.* Allen, 26 L. 147; Reeves *ads.* Eft, 31 L. 139, 141.

ITEMS TAXABLE.—In taxing costs, the only services rendered in a cause, for which charges can be taxed and allowed, are those specifically provided for in the fee bill. Anonymous, 20 L. 112. Services are frequently rendered for which no specific provision is made and for which there ought to be reasonable compensation; but costs are given by statute and the court and taxing officers cannot extend the provisions of the statute to meet such case. Id.

Upon entering judgment the defendant is entitled to tax the costs of all proceedings subsequent to the filing of the postea and report of the referee. Dean *v.* Susade, 37 L. 50.

BOTH PARTIES PARTLY SUCCESSFUL.—Where each party succeeds in part, no costs are allowed. Dewees *v.* Insurance Co., 34 L. 253. Where both parties are wrong, each should pay his own costs. Cox *v.* Bennett, 13 L. 165.

On report of referees, where no damages or costs were found for the plaintiff, the defendant must pay an equal moiety of the costs. Den *v.* Exton, 4 L. 173; Anonymous, 2 L. 228.

LEGISLATIVE POWER.—Until judgment pronounced, the right to costs does not become vested, and it may be altered by the legislature pendente lite. Rader *v.* Road District, 36 L. 273.

ATTORNEY'S FEES.—The attorney of the plaintiff has a claim upon the plaintiff's judgment for his taxable costs and court charges, which is entitled to be preferred to the defendant's right to offset the judgment held by him against the plaintiff. Pride *v.* Smalley, 66 L. 578; 52 A. 955.

The attorney of a plaintiff, who has recovered a judgment in this court, has a claim upon it for his taxable costs and charges which is preferred to the defendant's right to offset a judgment held by him against the plaintiff. Phillips *v.* MacKay, 54 L. 319; 23 A. 941.

In the taxed bill of costs on a rule for restitution, attorney and counsel's argument fee allowed. McChesney *v.* Rogers, 8 L. 272.

COSTS IN PARTICULAR PROCEEDINGS.—Upon an appeal from an award of commissioners as to the value of lands taken by a city, the court, having no power to enter judgment, cannot give costs. Beebe *v.* Newark, 24 L. 47, 50.

Where a defendant removes an indictment into the supreme court and carries it down to the circuit for trial, the attorney for the state cannot tax his costs as in a civil action, but is entitled only to his regular fees as in criminal cases. State *v.* Reed, 8 L. 178.

Costs cannot be awarded on a successful motion to set aside a return of surveyors laying out a road. There is no statute in settled practice to authorize it. In re Highway, 22 L. 293.

CITED.—Import Co. *v.* Paschall, 60 L. 137; 37 A. 454; Walton *v.* Taylor, 78 E. 266; 79 A. 457.

230. Costs not Recoverable in Supreme Court Action if Recovery less then Two Hundred Dollars: Exceptions.

If in an action commenced in the supreme court the plaintiff shall not recover above two hundred dollars exclusive of costs he shall not be entitled to costs; but this section shall not extend to any action in which the title to lands may in any wise come in question nor to any action in which the amount recovered exclusive of costs exceeds one hundred dollars, if any defendant does not reside in the same county as the plaintiff. (P. L. 1903, p.

597; 3 C. S. 4124; Rev., sec. 268; R. S. 449, sec. 4; An act to prevent suits under a certain sum to be brought in the Supreme Court, passed 1797, sec. 1; 1820, 309; Pat. 258; 1884, p. 29.)

HISTORICAL.—History of legislation. Brown *v.* Howell, 68 L. 292; 53 A. 459.

CONSTRUCTION AND OPERATION IN GENERAL.—This section is not limited to cases where both parties reside in this state, and applies to a recovery by a foreign corporation. Import Co. *v.* Paschall, 60 L. 137; 37 A. 454.

In a suit commenced in the supreme court against two defendants, the plaintiff is entitled to costs by virtue of this act, where he receives less than $200 and more than $100, provided the defendants do not reside in the same county. Bank *v.* Beekman, 50 L. 344; 13 A. 169.

COSTS IN PARTICULAR ACTIONS OR PROCEEDINGS.—In an action for overflowing his lands to the permanent damage to the freehold, the plaintiff is entitled to full costs, though he recovers no more than $5 damages. Dixon *v.* Scott, 18 L. 430.

In an action of trespass on the case for overflowing lands, brought in the supreme court, if the title is actually brought in question by the evidence of the defendant, the plaintiff, though he recovers less than $200, will be entitled to full costs. Hunt *v.* Morris, 12 L. 175.

Where the declaration in the supreme court is for the same trespass as that in the suit commenced in the justice's court and the plaintiff new assigns and damages under $200 are assessed upon a plea of guilty as to part of the newly-assigned trespass, the plaintiff will recover costs. Van Pelt *v.* Phillips, 24 L. 560.

In a suit in which the right to a pew comes in question, plaintiff in circuit is entitled to full costs, though verdict for less than $100. Church *v.* Andruss, 21 L. 325.

If it appear, on inquiry, that the production of the plaintiff's title was necessary to enable him to maintain his action, he is entitled to his costs. Dickerson *v.* Wadsworth, 33 L. 357. The inquiry may be made by affidavits, or by the examination of witnesses ore tenus. Id.

Plaintiffs complaining of injuries not exceeding $100 are compelled in many cases, at the hazard of losing their costs, to institute suits in a justice's court, notwithstanding the title to land may come in question. Tindall *ads.* Tindall, 20 L. 146, 148.

The plaintiff is not entitled to costs in the supreme court, on a motion in arrest of judgment, where the verdict is for less sum than $200. Stille *v.* Jenkins, 15 L. 302.

Affidavit that debt exceeds $60 does not entitle plaintiff to costs in supreme court, on a judgment under $200. Boudinot *v.* Lewis, 3 L. 566. If suit on a replevin bond is brought in a superior court, and judgment for less than $60, no costs are allowed. Hughes *v.* Hughes, 3 L. 577.

Full costs allowed on judgment for $44.86 in a cause removed by habeas corpus, as the affidavit for bail exceeded $100. White *v.* Cooke, 3 L. 898. On a judgment for less than fifty pounds, in the supreme court, no costs are allowed. Vote *v.* Covenhoven, September, 1791, 1 L. 137.

An action upon a record is not within the provisions of the act. Barracliff *v.* Griscom, 1 L. 193. Semble, that in the supreme court in case of verdict for the plaintiff, if the value of the property in dispute exceeds $200, the plaintiff, under the statute, is entitled to costs. Hunt *v.* Chambers, 21 L. 620; Id., 20 L. 109. For that purpose the value of the property in replevin may be inquired into, but the amount at which it was appraised will be taken to be the value until the contrary is shown. Id.

In an action at the circuit on an appeal bond, in the penal sum of $150, the sum really due was less than $100, judgment was entered for the penalty of the bond, and the real debt was to be endorsed on the execution. Held, the plaintiff was not entitled to costs. Harrison *v.* Hill, 3 N. J. L. J. 380.

Upon a verdict for less than $200 in an action for libel in this court, costs cannot be included in the judgment. Hart *v.* Goodman, 42 L. 573. A plaintiff who sues upon an official bond of a justice and obtains a judgment in the supreme court for the penalty ($500) and the damages assessed are $36, is not entitled to costs. The amount recovered, within the meaning of section 268 of the Practice act, is $36, and not $500. Meyer *v.* Arnold, 43 L. 144.

EFFECT OF PLEA LIBERUM TENEMENTUM.—The plea liberum tenementum puts the title in question, and where a verdict of six cents damages was rendered for the plaintiff, he was entitled to costs. Budd *v.* Stille, 16 L. 263.

To a declaration, which was general, the defendant pleaded liberum tenementum; the plaintiff new assigned, describing the close as Chambers' lane in both counts of the declaration; to one count of the new assignment no new plea was filed, and to the other the defendant pleaded a public and common highway; a verdict was rendered for plaintiff for $4 damages. Held, that

the plea of public highway was not a plea of title to lands, and that the plaintiff could not recover costs. Chambers *v.* Wambough, 28 L. 531

CITED.—Brown *v.* Howell, 68 L. 292; 53 A. 459.

231. Costs in Trespass Actions Involving Title.

In all actions in the supreme court founded upon a tresspass upon lands wherein the justice at the trial shall find and certify upon the record that the title to lands came in question on the trial of said action, if the plaintiff shall recover any damages he shall recover full costs. (P. L. 1903, p. 597; 3 C. S. 4125; Rev., sec. 269; R. S. 449, sec. 5; 1820, p. 42, sec. 1.)

CONSTRUCTION AND OPERATION IN GENERAL.—Query, whether the certificate may be given at any time. Budd *v.* Stille, 16 L. 263. Query, whether an oral statement is sufficient. Hunt *v.* Morris, 12 L. 175, 177. This section relates only to actions of trespass. Id.

Where an action of trespass quare clausum fregit is brought in a justice's court and title pleaded, and a suit for the same trespass brought in the supreme court thereupon, although the suit in the court below is not referred to in the pleadings, the supreme court will take notice of that fact upon the plea being produced, countersigned by the parties, so as to enable them to award costs. Van Pelt *v.* Phillips, 24 L. 560. Costs cannot be recovered without the certificate. Chambers *v.* Wambough, 28 L. 530, 532. See Dickerson *v.* Wadsworth, 33 L. 357, 359.

232. Costs on Removal of Action by Habeas Corpus.

If an action be removed by writ of habeas corpus into the supreme court by the defendant and the plaintiff shall recover in the supreme court, he shall recover full costs in case he would have been entitled to recover costs had the action remained and been tried in the circuit court or court of common pleas. (P. L. 1903, p. 597; 3 C. S. 4125; Rev., sec. 270; R. S. 449, sec. 6; 1820, p. 42, sec. 2.)

SUITS INVOLVING TITLE TO LAND.—If an action wherein the title to the land must come in question be commenced in the common pleas, and be removed by the defendant into the supreme court, the plaintiff shall recover full costs, although the judgment in his favor be less than $200. Hankinson *v.* Baird, 6 L. 130.

233. Costs in Personal Actions in Circuit Court.

The same costs and fees shall be allowed in all personal actions brought in the circuit courts, as are allowed by law in the courts of common pleas for like services and shall be recoverable in like manner. (P. L. 1903, p. 597; 3 C. S. 4125; Rev., sec. 271; R. S. 200, sec. 9; 1838, p. 61, sec. 10.)

234. Costs in Cases in Circuit Court Cognizable before Small Cause Court.

If any person shall institute an action in the circuit court or court of common pleas for any cause of action cognizable before the small cause court or the district court and obtain judgment therein for any sum which without costs shall not exceed one hundred dollars, then such person shall not recover any costs, except as hereinafter provided. (P. L. 1903, p. 597; 3 C. S. 4125; Rev., sec. 272; R. S. 229, sec. 63; Justice's Court Act of 1818; 1818, p. 64, sec. 43; Rev. 1820, 629.)

235. Recovery Reduced by Failure of Consideration, Recoupment, Etc., Certificate of Reasonable Grounds.

If in an action on contract the plaintiff shall recover, but the amount of the debt or damages recovered shall be reduced below the sum which would entitle the plaintiff to costs in the court in which the action is brought by allowance made to the defendant for a partial failure of the consideration of the contract sued on, or abatement by way or recoupment of damages, the plaintiff shall

be entitled to his costs, if the judge before whom such action is tried shall immediately after verdict found certify that in his judgment the plaintiff had reasonable grounds for bringing his action in such court. (P. L. 1903, p. 597; 3 C. S. 4125; Rev., sec. 273; Rev. of 1874.)

236. Costs in Actions of Tort Cognizable in Justice's Court.

If an action to recover damages for a tort which is cognizable before the small cause court or the district court shall be brought in the circuit court or court of common pleas, the plaintiff shall be entitled to recover his costs notwithstanding that he shall not recover a sum exceeding one hundred dollars, if the judge before whom such action is tried shall immediately after verdict found certify that in his judgment the action should have been brought in the circuit court. (P. L. 1903, p. 598; 3 C. S. 4125; Rev., sec. 274; Rev. of 1874.)

237. One Bill of Costs in Suits on same Paper.

In case of several actions on the same instrument, bond or note where several are bound, or against the drawer, maker, indorser or acceptor of any bill or note, there shall be a recovery of the attorney and counsel fees taxable in one of the said actions only at the election of the plaintiff; and no fees for attorney or counsel shall be taxed in any bill of costs in any action brought on the same instrument, bond, bill or note against any party thereto, other than the one in which the election is made. (P. L. 1903, p. 598; 3 C. S. 4125; Rev., sec. 275; R. S. 449, sec. 7; An act to prevent unnecessary costs, 1819, p. 17; Rev. 1820, 657.)

238. Costs on Scire Facias.

In a proceeding by scire facias if the plaintiff shall obtain judgment or award of execution after

plea filed or demurrer joined therein, he shall recover his costs; if the plaintiff shall become nonsuited or be nonprossed or a judgment shall pass against him, the defendant shall recover his costs. (P. L. 1903, p. 598; 3 C. S. 4125; Rev., sec. 276; R. S. 449, sec. 8; Act concerning costs, passed 1795, sec. 7; Rev. 1820, 168; Pat. 149.)

ACTIONS ON BONDS.—Where judgment has been obtained for the penalty of a bond for non-performance of covenants or agreements, and execution is awarded on scire facias setting up further breaches, costs will be taxed. State *v.* Franke, 51 L. 410; 17 A. 1078.

239. Costs in Assaults, Libel, Etc.

In actions for assault, battery or imprisonment or for slander or libel, if the plaintiff shall not recover damages to the amount of fifty dollars, he shall recover no more costs than damages. (P. L. 1903, p. 598; 3 C. S. 4126; Rev., sec. 277; 1855, sec. 85.)

CONSTRUCTION AND OPERATION IN GENERAL.—In an action of trespass, if plaintiff recovers less than fifty pounds damages, he shall not recover costs. White *v.* Hunt, 6 L. 415. The rule is the same, whether the damages are assessed by a jury on the trial or on a writ of inquiry. Id. Upon a verdict for less than $200, in an action for libel, in this court, costs cannot be included in the judgment. Hart *v.* Goodman, 42 L. 573.

240. One of Several Defendants may have Costs.

If several persons are made defendants to an action in tort, replevin or ejectment and one or more of them shall be upon the trial acquitted by verdict, every defendant so acquitted shall recover his costs in like manner as if all the defendants had been acquitted, unless the judge before whom such action shall be tried shall immediately after the trial in open court certify upon the record or in the minutes that there was a reasonable cause

for making such person a defendant in such action. (P. L. 1903, p. 598; 3 C. S. 4126; Rev., sec. 278; R. S. 449, sec. 9; Act concerning costs, passed 1795, sec. 8; Rev. 1820, 168; Pat. 149.)

CITED.—Abrams *ads.* Flatt, 5 L. 544.

241. Costs on Demurrer.

P. L. 1903, p. 599; 3 C. S. 4126; Rev., secs. 279, 280; R. S. 449, sec. 10; Act concerning costs, sec. 9; see sec. 240, note; Rev. of 1874

REPEALED by P. L. 1912, p. 384, § 34, § 294.

REPEALED SECTION CITED in Garr *v.* Stokes, 16 L. 403, 410; Hopper *v.* Freeholders, 52 L. 313; 19 A. 383; Condit *v.* Neighbor, 12 L. 320; Den *v.* Seagrave, 16 L. 357; Den *v.* Ganoe, Id. 439; Hall *v.* Snowhill, 14 L. 9; Mayor *v.* Davis, 18 L. 22; Condit *v.* Gregory, 21 L. 431; Weart *v.* Hoagland, 22 L. 521; Lanning *v.* Shute, 5 L. 778; Rogers *v.* Phinney, 13 L. 1; Wood *v.* Leslie, 35 L. 474; Williamson *v.* Updyke, 14 L. 270; Sommers *ads.* Sloan, 18 L. 49; Perrine *v.* Applegate, 14 E. 532; Cox *v.* Bennet, 13 L. 172.

242. Costs For or Against State.

In actions brought by the state or the governor or any person for the use of the state, the state or other plaintiff shall recover costs as any other plaintiff; but if the plaintiff in such action shall be non-suited or a judgment shall pass against the plaintiff, the defendant shall not recover any costs against such plaintiff; provided, nothing in this action shall extend to any popular action nor to any action prosecuted by any person in behalf of himself and the state on a penal statute. (P. L. 1903, p. 599; 3 C. S. 4126; Rev., sec. 281; R. S. 449, secs. 16-18; Act concerning costs, secs. 15-17; see sec. 240, ante.)

This section applies to district courts as provided by section 68 of District Court act. 2 C. S. 1977. Board *v.* Schlechter, 83 L. 88; 83 A. 783.

243. Taxing Costs.

The clerk shall tax and subscribe his name to all bills of costs in any civil action in his court agreeably to the fees allowed by law, and shall in no case allow any item or charge unless the service in his opinion shall have been necessary in regularly conducting the action and shall have actually been performed and shall so appear on the minutes or files of the court, and he shall in such bills class and set together distributively the fees which belong to the court or justices or judge, clerk, attorney, and counsellor, sheriff and other persons. (P. L. 1903, p. 599; 3 C. S. 4126; Rev., secs. 282, 283; R. S. 455, secs. 4, 9; Act to regulate fees, passed 1799, sec. 3; Rev. 1820, 481; Pat. 418.)

CONSTRUCTION AND OPERATION IN GENERAL.—Statement of items proper for taxing in a bill of costs. Ordinary *v.* Allen, 26 L. 145; Andrews *v.* Ford, 6 E. 488.

On scire facias to revive a judgment the question of illegally taxing costs cannot be raised on motion. Phillips *v.* Hunt, 1 L. 137.

There is no practice in New Jersey to refer to a master to tax as between solicitor and client, costs and charges for general services, outside of the fee bill, rendered his client in the cause, for the purpose of suit against his client. Prout *v.* Sayler, 21 N. J. L. J. 347.

PRESUMPTIONS.—Costs as taxed are presumed to be legal. Romaine *v.* Norris, 8 L. 80, 83. See Phillips *v.* Hunt, 1 L. 137. The rule does not prevent the clerk from inserting in the record the whole amount of costs, if the bill has been taxed and filed at the time of making up the record, notwithstanding such bill may not have been taxed and filed within the period mentioned in the rule. Bruere *v.* Britton, 20 L. 268.

CITED.—Troth *v.* Board, 60 L. 190; 37 A. 1017.

244. Retaxation: Expense of.

Any party aggrieved by a bill of costs may apply to the court in which the action is pending or to a judge to have the same retaxed according to law,

whose decision shall be final; if any charge is contained in such bill as taxed for services not actually rendered or any item therein is charged higher than is allowed by law, the court or judge shall order that the expense of retaxation shall be paid by the attorney who drew said bill or by the clerk who taxed the same, as the court or judge may direct; but if the court or judge shall find said bill to be taxed according to law, the applicant shall pay the expense of retaxation. (P. L. 1903, p. 599; 3 C. S. 4127; Rev., sec. 284; R. S. 455, sec. 8; Act to regulate fees, sec. 5; see sec. 243, ante.)

PROPRIETY OF REMEDY.—An action will not lie to recover an unreasonable amount of costs, which have been taxed and paid; the proper remedy is by retaxation. Allen *v.* Hickson, 6 L. 409.

PROCEDURE IN GENERAL.—The party obtaining the taxation of a bill of costs must, upon a retaxation, prove the items objected to. But the party moving for a retaxation must give his adversary notice, and state the particulars of the bill of costs to which he objects and the nature of his objection. Hays *ads.* Williams, 19 L. 383.

TIME FOR APPLICATION.—The application to the court to retax a bill of costs must be made at the next term after the bill is taxed by the clerk and payment thereon demanded. But the retaxation may be made after that or any subsequent term, according to circumstances. Den *v.* Chapman, 8 L. 176.

COSTS OF RETAXATION.—Where, on appeal by a demandant in dower from the clerk's taxation, several items were deducted, the demandant was held liable for the costs of the retaxation. Anonymous, 20 L. 112, 114.

245. Order for Payment of Costs of Printing, Etc.

The supreme court and the court of errors and appeals may by general rule or by a special rule in any action pending in said courts, make such order for the payment of the costs of printing and other disbursements by either party and the taxation and allowance thereof in the bill of costs,

as said courts may deem just. (P. L. 1903, p. 600; 3 C. S. 4127; Rev., sec. 285; 1873, p. 65.)

See S. C. R. 1913, rule 203.

XVII. POWERS OF THE COURT OR A JUDGE.

See orders by a judge, P. A. 1912, p. 383, sec. 31; p. 384, rule 2; S. C. R. 1913, rule 213; post, §§ 291, 296.

Order by a judge extending time, P. A. 1912, p. 385, rule 3; S. C. R. 1913, rule 217; post, § 297.

May set aside verdict, S. C. R. 1913, rule 121; post, § 383.

Trial judge may grant new trial, S. C. R. 1913, rule 122, § 384.

Application to trial judge for new trial within six days after verdict, S. C. R. 1913, rule 123, § 385.

Designation of bank as depository of money paid into court, S. C. R. 1913, rule 216.

246. Protection of Property Pending Suit: Contempt.

In any action in which the right to lands or to goods and chattels is in controversy, the court or a judge may make an order for the protection of the property in controversy from waste, destruction or removal beyond the jurisdiction of the court, upon satisfactory proof being made of the necessity for such order and enforce such order by an attachment for contempt. (P. L. 1903, p. 600; 3 C. S. 4127; Rev., sec. 286; 1855, sec. 84.)

HISTORICAL.—Such rules were granted before the passage of this statute. Harker *v.* Christy, 5 L. 717; Flommerfelt *v.* Zellers, 7 L. 31.

NO POWER TO APPOINT RECEIVER.—The supreme court has no power under this section to appoint a receiver to take charge of the rents of the premises pending an action of ejectment. Oehme *v.* Rucklehaus, 50 L. 84; 11 A. 145. See Kircher *v.* Schalk, 39 L. 339.

EJECTMENT, POWER TO PREVENT WASTE.—Pending an action of ejectment the supreme court may interfere by injunction to restrain waste and to protect and preserve the property involved. Herman *v.* Mexican Co., 96 A. 492.

247. Orders, Etc., of Judge in Vacation or Term Time.

Whenever it is provided by this act that application for any rule or order may be made to or anything may be done by a justice or a judge as distinguished from the court, such application shall be made before or such thing may be done by any justice or judge of the court in which the action is pending in vacation or term time. (P. L. 1903, p. 600; 3 C. S. 4127; Rev., sec. 290; 1855, sec. 88.)

248. Motions to set aside Judgment, Etc.: when Made.

Any justice of the supreme court or judge of the circuit court or court of common pleas may in vacation grant any rule or make any order that may be necessary or proper in any action pending in said courts, and may direct the taking of testimony to be used on the application for such rule or order; provided, this power shall not extend to the final hearing of motions to set aside judgments or to the appropriation of moneys between judgment creditors, except by consent; nor to any matter which by the rules or practice of the supreme court is required to be placed on the argument list of said court. (P. L. 1903, p. 600; 3 C. S. 4127; Rev., sec. 291; Rev. of 1874; Supreme Court Rule 100.)

249. Rule to show Cause against Setting Aside Fraudulent Judgment: Grant in Vacation.

Any justice of the supreme court may in vacation upon affidavit showing that any judgment entered in the supreme court by confession or otherwise was confessed or obtained for the purpose of defrauding the creditors of the defendant, grant a rule to show cause before the supreme court at the next term why such judgment should not be set aside so far as it affects other judgment

creditors of the defendant and stay the execution issued thereon; and may also order that testimony be taken to be used at the hearing. (P. L. 1903, p. 600; 3 C. S. 4127; Rev., sec. 292; Rev. of 1874.)

250. Rule in Vacation to show Cause why Mandamus or Quo Warranto should not Issue: Grant in Vacation.

Any justice of the supreme court in vacation may grant rules to show cause why writs of mandamus should not issue and may direct the issue of alternative writs of mandamus and may also grant leave to file informations in the nature of quo warranto. (P. L. 1903, p. 601; 3 C. S. 4128; see Rev. 294; Rev. of 1903.)

251. Hearing Argument in Supreme Court at Chambers in Vacation or Term Time.

The argument of any matter in the supreme court which by the rules and practice of the court is cognizable before the branch of the supreme court, sitting for the hearing and deciding of common business, may by consent be heard before one or more of the justices of the supreme court at chambers either in term or vacation, whose decisions and judgments shall be as good and effectual as if they had been rendered at the bar of said court. (P. L. 1903, p. 601; 3 C. S. 4128; Rev., sec. 295; Rev. of 1874.)

IN GENERAL.—A rule made by a justice of the supreme court in vacation, discharging a rule to show cause why a writ of attachment issued out of the supreme court should not be quashed, cannot be reviewed by the court upon motion. Such proceeding was either nugatory, in which case the rule to show cause has not been heard, or else the single justice heard the rule to show cause by consent, for the practice branch of the court, under this section, in which case his decision is not subject to review. Garbett *v.* Mountford, 70 L. 577; 57 A. 257.

CITED.—Kinmouth *v.* Braentigan, 65 L. 165; 46 A. 769; Freeman *v.* Board, 76 L. 83; 67 A. 713; Defiance Fruit Co. *v.* Fox, 76 L. 482; 70 A. 460, 465; Dubelbeiss *v.* West Hoboken, 81 L. 98; 79 A. 290, 291.

252. Reference of Motion to Supreme Court.

Any justice of the supreme court or judge of the circuit court to whom application may be made for any rule or order by virtue of this act may refer the same to the supreme court and make such order for the taking of testimony and for stay of proceedings as may be equitable. (P. L. 1903, p. 601; 3 C. S. 4128; Rev., sec. 296; Rev. of 1874.)

CITED.—Defiance Fruit Co. *v.* Fox, 76 L. 482; 70 A. 460, 465; Von Novelly *v.* Carpenter, 97 A. 779.

253. Rules for Expediting Business.

The justices of the supreme court and the judges of the circuit courts and courts of common pleas shall make such rules and regulations for expediting and conducting actions and the management of business in their respective courts as they shall from time to time judge proper. (P. L. 1903, p. 601; 3 C. S. 4128; Rev., sec. 297; Rev. of 1894.)

254. Powers of Court to make Rules Regulating Pleadings, Etc., Circuit Court Rules.

The justices of the supreme court may provide by general rules for the hearing and argument of any litigated or unlitigated motions before any one of the justices of said court whenever in their judgment it may be expedient so to do under such regulations as they may prescribe, and for fixing the costs to be allowed for and in respect of the matters herein contained and the performance thereof where said costs are not fixed by law, and for apportioning the costs of issues; and they shall make all such rules and regulations as may be nec-

essary to obviate any difficulties that may arise in the practice of the courts of law by reason of any omissions or defects in the same, and to regulate the pleadings and practice in the said courts so as to render the practice and proceedings therein more efficient, expeditious and simple and for that purpose they shall have power to change and regulate such pleadings and practice; and they shall adopt uniform rules of practice in all matter not regulated by law for the government of the circuit courts and the same from time to time alter, repeal and modify as occasion may require. (P. L. 1903, p. 601; 3 C. S. 4128; Rev., secs. 298, 299; R. S. 929, sec. 7; 1799, sec. 101; 1851, p. 317, sec. 10; 1855, sec. 87; R. S. 200, sec. 8; 1838, sec. 9; see notes under sec. 215, ante.)

XVIII. CONSTRUCTION.

255. Application of Singular Number and Masculine Gender: Term "Lands" Construed.

Whenever in describing or referring to any person, party, matter or thing any word importing the singular number or masculine gender is used in this act, the same shall include and shall apply to several persons and parties, as well as one person or party, and females as well as males, and bodies corporate as well as individuals, and several matters and things as well as one matter or thing, unless it be otherwise provided or there be something in the subject or context repugnant to such construction, and the word lands shall include lands, tenements and hereditaments or any interest therein, and freehold security shall include corporate security. (P. L. 1903, p. 602; 3 C. S. 4128; Rev., sec. 300; 1855, sec. 89.)

CITED.—Dock *v.* Manufacturing Co., 34 L. 312, 313; McNeal *v.* Gloucester City, 51 L. 444; 18 A. 112; Cooper *v.* Cape May Point, 67 L. 437; 51 A. 511.

256. Act Concerning Small Causes not Affected Except in Certain Cases.

Nothing in this act contained except as herein specially provided shall in any way affect any proceedings by virtue of the act entitled "An act constituting courts for the trial of small causes," except that the provisions of this act relating to variances and amendments of pleadings (as modified by the act above referred to) and also the provisions of section seventeen of this act, shall apply to actions in the small cause courts, and in the several courts of common pleas on appeals from said courts. (P. L. 1903, p. 602; 3 C. S. 4129; Rev., sec. 301; 1855, sec. 91.)

CITED.—Cole *v.* Williams, 3 L. 558, 559; Schuyler *v.* McCrea, 16 L. 248, 251; Craft *v.* Smith, 35 L. 302, 306; Butts *v.* French, 42 L. 400; Harrison *v.* Dickerson, 87 L. 92; 93 A. 718.

257. Formal Notices may be Given by Attorney.

Whenever it is in this act provided that a party to an action shall give any notice, or receive any notice which does not require action by the party himself, or may make any endorsement on or insert any matter or thing in any process or pleading, such notice may be given or received and such endorsement may be made, or such matter or thing may be inserted by the attorney of the party. (P. L. 1903, p. 602; 3 C. S. 4129; Rev. of 1903.)

258. Precedence of Municipal Cases in Appellate Courts: Advancement on List: Determined Promptly: Decision within Thirty Days.

Cases now or that hereafter may be pending in the Court of Errors and Appeals, Supreme Court, or in any Circuit Court or Court of Common Pleas, wherein there shall be in anywise involved the

question of the validity of any municipal ordinance or proceeding providing for the issue of bonds or for the construction of any public work, and all suits in which any municipality shall be the complaining party, in this act called municipal cases, shall be advanced on the list for argument, hearing or trial, and shall have precedence over all other causes, except as hereinafter provided; and such municipal cases shall be printed by the clerk at the head of the trial or argument list on notice to the clerk that the cause is a municipal case; and if any said case is not so printed on an advanced place on the list, the same shall be advanced on motion of either side. All said municipal cases shall be decided and determined by the court as promptly as the convenience of the court may permit, and within thirty days after the close of the argument; provided, no such municipal case shall have precedence over a cause moved to be advanced by the Attorney General or any prosecutor of the pleas; and provided further, that if any municipal case be submitted on briefs, the decision thereof may take the usual course. Any municipal case pending in any said court and which has been argued orally by counsel, and at the time of the passage of this act awaits decision, shall be decided by the court within thirty days from and after this act shall take effect. (P. L. 1913, p. 621, sec. 1.)

QUARE.—Whether this act impairs jurisdiction of appellate court when it compels decision in 30 days. See such cases as Green *v.* Heritage, 64 L. 567; 46 A. 634.

259. Return of Writs in Municipal Cases: Review of Cause: Hearing Appeals: Time to take Appeal in Municipal Cases.

Justices of the Supeme Court in allowing writs of certiorari or other writs in municipal cases may

impose terms that the same shall be returnable at a short day and be argued before himself or any other justice of the Supreme Court to be named unless the defendant municipality shall object; and further, that in case a review is sought the cause, if appealed and unless the municipality object, shall be argued and disposed of at the next term of the court of errors to be held after the decision of the Supreme Court shall have been announced. Municipal cases, including appeals in the Court of Errors and Appeals, shall be heard on five days' notice, and may be noticed for the first or any subsequent day in term. Appeals from the Supreme Court to the Court of Errors and Appeals, in municipal cases, shall be taken by a prosecutor or other litigant against a municipal corporation within ten days after notice of the opinion or decision of the supreme court and not thereafter. (P. L. 1913, p. 622, sec. 2.)

CONSTITUTIONALTY OF LIMITATION ON TIME TO TAKE APPEAL.—See State Council *v.* Nat. Council, 79 E. 139; 69 A. 975; Traphagen *v.* West Hoboken, 39 L. 232, 237; Rogers *v.* P. R. R., 78 A. 664; 81 L. 40.

APPEAL TAKEN WITHIN LIMITATION JURISDICTIONAL.—Decon *v.* Parry, 69 L. 186; 52 A. 628; State *v.* Holmes, 36 L. 62; Von De Plac *v.* Weller, 64 L. 155; 44 A. 874; Hoit *v.* Hoit, 40 E. 551; 5 A. 103; Mount *v.* Van Ness, 34 E. 523, 526; Hillyer *v.* Schenck, 15 E. 398; Newark, etc., Co. *v.* Elmer, 9 E. 754; Seiter *v.* Simpson, 76 L. 450; 69 L. 971; Franz-Milton Co. *v.* Hall, 73 L. 96; 62 A. 279; Loftus *v.* Freeholders, 43 L. 354; Feeney *v.* Rutgers, 57 L. 358; Wykes *v.* Smarak, 87 A. 333.

Practice Act, 1912.

A supplement to an act entitled "An act to regulate the practice of courts of law. (Revision of 1903.)" (P. L. 1912, p. 377.)

CITED.—Butterhof *v.* Butterhof, 84 L. 285, 286; 86 A. 394; Bohles *v.* Insurance Co., 84 L. 315, 316; 86 A. 438; Dallas *v.* Sea Isle City, 84 L. 679, 680; 87 A. 467; D'Aloia *v.* Unione Fratellanza, 84 L. 683; 87 A. 472; Sun Dredging Co. *v.* Ottens, 84 L. 740, 746; 87 A. 1003; Watkins *v.* Cope, 84 L. 143; 86 A. 545; Wilson *v.* Howland, 93 A. 688, 690. Article on the Practice Act and the District Court, 37 N. J. L. J. 289; article on New Practice Act, 35 N. J. L. J. 170, 228, 269.

260. Short Title and Construction.

Sec. 1. The short title of this act is "The Practice Act (1912)." It shall be liberally construed, to the end that legal controversies may be speedily and finally determined according to the substantive rights of the parties. The rule that statutes in derogation of the common law must be strictly construed shall not apply to this act. (P. L. 1912, p. 377.)

261. Definitions.

Sec. 2. The following terms, for the purposes of this act, have the following meanings: The word "may" is not mandatory; the term "Practice Act" refers to the act to which this is a supplement; the "rules" herein mentioned are rules of court. (P. L. 1912, p. 377.)

262. Single Form of Action.

Sec. 3. There shall be but one form of civil action in the courts of common law, which shall be denominated an "Action at Law," but this shall not apply to proceedings upon Prerogative Writs; provided, that subject to rules, a writ of mandamus may be awarded in such an action. The process and pleadings in all actions shall be according to rules of court. (P. L. 1912, p. 378.)

CITED.—Titus *v.* P. R. R. Co., 92 A. 944, 946; 87 L. 157, 161, 162.

263. Parties.

Sec. 4. Subject to rules, all persons claiming an interest in the subject of the action and in obtaining the judgment demanded, either jointly, severally or in the alternative, may join as plaintiffs, except as otherwise herein provided. And persons interested in separate causes of action may join if the causes of action have a common question of law or fact and arose out of the same transaction or series of transactions. (P. L. 1912, p. 378.)

CITED.—Strecher *v.* State Board, 95 A. 623-625; Baldauf *v.* Nathan Russell Co., 96 A. 96.

264. Parties. When Plaintiff Made Defendant.

Sec. 5. If one who may join as plaintiff declines to do so, he may be made a defendant, the reason therefor being stated in the complaint. (P. L. 1912, p. 378.)

265. Parties: Who Made Defendant.

Sec. 6, ¶ 1. Subject to rules, any person may be made a defendant, who, either jointly, severally or in the alternative, is alleged to have or claim an interest in the controversy, or in any part thereof, adverse to the plaintiff, or whom it is necessary to make a party for the complete determination or settlement of any question involved therein. (P. L. 1912, p. 378.)

In suit against the defendants in the alternative, if liability of one defendant implies non-liability of the others, and vice versa, and verdict pass against one defendant, rule to show cause for new trial should be directed to the other defendant as well as the plaintiff. Crouse *v.* Perth Amboy, 85 L. 476; 89 A. 1003.

QUARE.—Whether a single cause of action may be sued against the same person in the alternative as an individual and a personal representative. Pfeifer *v.* Bradenhof, 86 L. 492; 92 A. 273.

266. Separate Actions.

Sec. 6, ¶ 2. The plaintiff may join separate causes of action against several defendants if the causes of action have a common question of law or fact and arose out of the same transaction or series of transactions. (P. L. 1912, p. 378; see sec. 7.)

SEPARATE CAUSES OF ACTION.—Causes of action against a landlord for breach of covenant of the lease and causes against the landlord and a third person for wrongful distress in the collection of rent under the lease may be joined. Murphy *v.* Patten, 85 A. 56.

267. Parties: Executor, etc., May Sue or Be Sued Without Joining Beneficiary.

Sec. 7. An executor, administrator or trustee, of an express trust (including one with whom a contract is made for the benefit of another) may sue or be sued without joining the person beneficially interested in the suit. (P. L. 1912, p. 378; see sec. 28.)

268. Parties: Court May Direct Others Brought Into Suit.

Sec. 8. The court may determine the controversy as between the parties before it, where it can do so without prejudice to the rights of others; but where a complete determination cannot be had without the presence of other parties, the court may direct them to be brought in. Where a person, not a party, has an interest or title which the judgment will affect, the court, on his application, shall direct him to be made a party. (P. L. 1912, p. 378.)

Where a person, not a party to a suit, has an interest or title which the judgment will affect, the court on his application should direct him to be made a party. Jos. Marrone Cont. Co. *v.* Monahan, 95 A. 984, 985.

269. Non-Joinder, Misjoinder.

Sec. 9. No action shall be defeated by the non-joinder or misjoinder of parties. New parties may be added and parties misjoined may be dropped, by order of the court, at any stage of the cause, as the ends of justice may require. (P. L. 1912, p. 379; see sec. 36.)

Defense that the plaintiff is a fictitious person attacks the capacity of the plaintiff to commence or continue suit; proper judgment is to quash the writ. Baldauf *v.* Nathan, 96 A. 96.

270. Saving Clause: Changes Made by Court Not to Impair.

Sec. 10. No change in parties, made by order of court, shall impair any previous attachment of the estate or body of any person remaining a defendant in the action; nor impair bonds or recognizances of any person remaining a party, either as against himself or his sureties; nor impair receipts to an officer for property attached; and, when parties are changed, the court may order new bonds if such new bonds are deemed necessary. Orders of court concerning change in parties may be upon terms at the discretion of the court. (P. L. 1912, p. 379.)

271. Joinder of Causes of Action: Causes May Be Joined.

Sec. 11. Subject to rules, the plaintiff may join any causes of action. (P. L. 1912, p. 379; see rules 6 to 15 inclusive.

CITED.—Murphy *v.* Patten, 85 A. 56.

272. Counter-claim.

Sec. 12. Subject to rules, the defendant may counter-claim or set off any cause of action. He may, and when required by the court shall, issue

summons against any third party necessary to be brought in; but, in the discretion of the court, separate trials may be ordered, or if the counter-claim cannot be conveniently disposed of in the pending action, the court may strike it out. (P. L. 1912, p. 379.)

IN GENERAL.—In an action where several counter-claims are filed by the defendant, any one of them may be stricken out which the court finds cannot be conveniently tried with the other causes of action joined in the same suit. Kelley *v.* Steel Co., 87 L. 567. Where a defendant in one of several counter-claims sought to recover against the plaintiff, who was suing on a contract, an affirmative judgment for unliquidated damages for a tort committed by the plaintiff's assignor, and thereby raised an issue which was separate and distinct from those raised by the plaintiff's claim and the defendant's other counter-claims, the court may strike out the counter-claim as not being convenient to try with the other causes of action joined in the same suit. Id.

Any right of set-off rests on statute. Roseville Trust Co. *v.* Barney, 96 A. 69.

This section not essentially different from the general statute of set-off. 4 C. S. 4836; Reveruzzi *v.* Caruso, 91 A. 1022.

273. Failure of Consideration.

Sec. 13. In an action upon a contract, whether under seal or not, the defendant may set up in abatement of the debt or damages claimed, a defect in, or partial failure of the consideration of the contract sued on. (P. L. 1912, p. 379; see sec. 105, supra.)

In an action on a bond given as a part of the purchase price of lands when the sale, having been executed, has not been rescinded, false representations inducing such sale may be shown as evidence of a partial failure of consideration of such bond and in abatement of the debt claimed in such action. Schmidt *v.* Frey, 86 L. 215, 218; 90 A. 1123.

274. Default in Pleading.

Sec. 14. Judgment of non-suit or by default may be entered against plaintiff or defendant respectively for failure to plead according to the rules. (P. L. 1912, p. 379.)

275. Summary Judgment: Defense Must Be Sincere.

Sec. 15. Subject to rules, any frivolous or sham defense to the whole or to any part of the complaint may be struck out; or, if it appear probable that the defense is frivolous or sham, defendant may be allowed to defend on terms. Defendant, after final judgment, may appeal from any order made against him under this section. (P. L. 1912, p. 380.)

Where the defendant's answer to a complaint is neither false nor frivolous as to the averments of fact contained in the plaintiff's pleading, it is error to strike it out and render summary judgment for the plaintiff upon a different state of facts from that disclosed in the complaint, disclosed for the first time upon the hearing of the motion to strike out. Smith *v.* Hoffing, 95 A. 993.

276. Summary Judgment: If Answer Struck Out.

Sec. 16. If the answer as filed, or after any part thereof shall be struck out, leaves a part of the plaintiff's claim uncontested, judgment interlocutory or final may be entered for such part as is not contested and the cause may proceed to trial as to the residue. (P. L. 1912, p. 380.)

277. Preliminary Reference.

Sec. 17. The court may, under such conditions as it may fix, require any or all motions preliminary to trial to be heard and determined by Supreme Court Commissioners designated by the court, and may fix their fees which shall be costs in the cause. (P. L. 1912, p. 380.)

278. Admissions of Certain Facts.

Sec. 18. Any party may call upon any other party, by written notice to admit (but only for the purposes of the cause) the existence, due execution, signing or mailing of any document; and to admit any other specific facts relevant to the issue mentioned in the notice. In case of refusal or neglect to make such admission within such time as may be fixed by rules or special order, the reasonable expense of proving the same (to be taxed by the court) shall be paid by the party so notified, whatever the result of the trial may be, unless the trial judge shall certify that the neglect or refusal was reasonable. But the court may allow any party to amend or withdraw such admission on terms. (P. L. 1912, p. 380.)

The time within which the admissions provided in section 18 of the Practice act, 1912, should be made, is hereby fixed at five days after service of the notice mentioned in said section, unless such time is extended by order of the court or a judge. S. C. R. 1913, rule 98. (See Practice act, 1903, section 141, repealed.)

279. Reserving Questions of Law: Submitting Case in Alternative.

Sec. 19. The court may reserve any question of law and may submit the case to the jury upon alternative propositions of law in respect to the right to relief or damages. In either of such cases judgment shall be entered, (and if appealed shall be dealt with) according to the right as it shall be finally determined. (P. L. 1912, p. 380.)

280. Judgment: Execution.

Sec. 20. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and the court

may determine the ultimate rights of the parties on each side as between themselves, and grant to the defendant any affirmative relief to which he may be entitled; and when a complaint or a cause of action is sustained in favor of, or against, only a part of the parties thereto, judgment (interlocutory or final) may be rendered in favor of or against such parties respectively at any stage of the proceedings. But an unsatisfied judgment against one, or some, of several joint contractors, shall not discharge the other joint contractors from liability on the contract. The court shall control the proceeding so that the plaintiff shall receive but one satisfaction. One writ of execution may issue upon one or more judgments entered in the same cause. (P. L. 1912, p. 381.)

281. Forms of Judgment.

Sec. 21. Judgment may be entered in such form as may be required by the nature of the case and by the recovery or relief awarded. (P. L. 1912, p. 381.)

282. Judgment Without Pleading: Judgment Final.

Sec. 22. Subject to rules, judgment final may be entered, without process or pleadings, upon a statement of the right in controversy and an agreed statement of facts, or a stipulation agreeing upon certain facts and submitting other issues in the case for trial. In either case, subject to rules, the parties may, at their option, agree upon the judge who shall hear and determine the case, and the judgment of the court may enter upon his findings. (P. L. 1912, p. 381.)

See section 154.
See section 25, P. A. 1912, rules 74, 75.

283. Amendments: Writs, etc., May Be Amended.

Sec. 23. No civil suit or proceeding in any court of common law shall fail or be dismissed on the ground that the plaintiff or any party therein has mistaken the remedy or procedure, if the court in which the matter is pending shall have jurisdiction to grant the proper remedy by any procedure; but in such case, the court shall, upon terms, order the writs, pleadings and other proceedings to be so amended, or new writs, pleadings or other proceedings to be respectively so issued, filed or taken, that the court may completely and finally hear and determine the whole matter in controversy between the parties and grant the proper remedy. (P. L. 1912, p. 381.)

Where the prosecutor mistakes his remedy and brings certiorari instead of quo warranto, the writ may be amended in the proper case under this section. Martin *v.* Freeholders, 85 L. 151, 153; 88 A. 857.

Where appellant mistakenly seeks to review a judgment by certiorari instead of by appeal, the defect if procedure will be disregarded under this section, and the case will be treated as an appeal. Higgins *v.* Egg, 85 L. 56; 88 A. 845.

Where certiorari, and not quo warranto, is the proper form of action, the court in a proper case will change the action to certiorari under this section. Young *v.* Stafford, 86 L. 422, 423; 92 A. 286.

284. Amendment: New Cause Alleged.

Sec. 24. In addition to the present powers of amendment, the court may, upon terms, permit, before or at the trial, the statement of a new or different cause of action in the complaint or counterclaim. (P. L. 1912, p. 382.)

285. Bills of Exception and Writs of Error Abolished: Appeals May Be Taken: Error in Final Judgment.

Sec. 25. Bills of exceptions and writs of error in civil cases are abolished. In lieu of a writ of error,

an appeal may be taken in any case in which the appellant would, heretofore, have been entitled to that writ. Subject to rules, such appeal shall be in the nature of a rehearing upon any question of law involved in any ruling, order, or judgment below. Where causes are submitted to the court to be heard without a jury, any error made by the court in giving final judgment in the cause shall be subject to change, modification or reversal without the grounds of objection having been specifically submitted to the court. (P. L. 1912, p. 382, sec. 25, as amended by P. L. 1916, p. 109.)

See sec. 102, and notes; 3 C. S. 4082; 154, and notes.

APPEALS.—An appeal under this section is in the nature of a rehearing upon any question of law involved in any ruling below. This provision is broad enough to draw under review the ruling of the court below refusing to direct a verdict for the defendant. Butterhof *v.* Butterhof. 84 L. 285, 287; 86 A. 394.

An order striking out the complaint as against one of several defendants is not appealable until after final judgment disposing of the case, either at common law or under the New Practice act. Young *v.* Board, 84 L. 770; 87 A. 347.

BILLS OF EXCEPTIONS.—The abolition of bills of exceptions by this section does away with the requirement that exceptions be signed and sealed by the trial judge, but does not abrogate the general rule that no ruling relating to the reception or rejection of evidence will be reviewed unless the record discloses that an objection to such ruling was duly made or such ruling otherwise challenged at the time of the ruling. Kargman *v.* Carlo, 85 L. 632, 636; 90 A. 292.

This section does not relieve a party from pointing out at the trial to the judge the portion of the charge to which he objects as heretofore, nor from making objection to a refusal to charge on request, if it is intended to make them the basis of an appeal. The only change made by this section in that regard is that bills of exceptions are no longer necessary. Miller *v.* Delaware Trans. Co., 85 L. 700, 703; 90 A. 288; Hayes *v.* Kluge, 86 L. 657, 661; 92 A. 358.

The Practice act of 1912, and rules in pursuance thereof, have made no change in the fundamental rules for review of actions at law as in error, that there must be some ruling in the court below, that it must be adverse to the appellant and that

the trial court must, through the instrumentality of a formal challenge of that ruling, have an opportunity to reconsider and modify or change it. Webster *v.* Freeholders, 86 L. 256, 257; 90 A. 1110.

APPEAL AND ERROR. RESERVATION OF GROUNDS OF REVIEW. —A judgment will not be reversed because of the appointment of an incompetent stenographer in the trial court, where without objection the court considered and decided the cause without the aid of the stenographer's notes and settled a state of the case to which no objection had been taken. Clinton Amusement and Improvement Co. *v.* Dranlow, 96 A. 893.

286. Appeals: Effect Of.

Sec. 26. An appeal is a step in the cause, and is deemed to remove to the appellate court the entire record of the cause and all orders, proceedings and documents made, taken or filed therein, whether or not they are actually included in the transcript of the record sent to that court. (P. L. 1912, p. 382.)

287. Reversal or New Trial on Merits.

Sec. 27. No judgment shall be reversed, or new trial granted on the ground of misdirection, or improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party. (P. L. 1912, p. 382.)

Under this section the appellate court cannot reverse the judgment for any misdirection if the same verdict ought, as matter of law, to have been directed by the court. Butterhof *v.* Butterhof, 84 L. 285, 287; 86 A. 394. A judgment for the defendant in ejectment entered upon the verdict of the jury will not be reversed for error in the charge if the same verdict ought to have been directed upon the ground that ejectment will not lie. Id.

WHEN SUBSTANTIAL RIGHTS NOT INJURIOUSLY AFFECTED.—Under this section the substantial rights of the defendants were not injuriously affected by the refusal of the trial court to admit

proof of the condition of shore blocks and guy ropes, by means of which a piece of machinery was fastened to a flat car for the purpose of transportation, where the method of such fastening had been fully described by the witness and the defense was rested upon the theory that the machinery, as fastened to the car at the point of delivery, made it absolutely impossible for the machinery to be injured in transit, and that therefore the injury existed prior to shipment. Wickes Bros. *v.* Lamp Co., 85 L. 322, 324; 88 A. 1068.

The expression a "high degree of care" is not the legal equivalent of reasonable care, and an instruction that the former must be exercised when the duty of the defendant was to use the latter is technical error, which is, however, harmless in the case of the handling of violent explosives, where reasonable care is necessarily a high degree of care. Gillatty *v.* Central R. R., 86 L. 416, 418; 92 A. 279.

Under this section the supreme court will not, on a rule to show cause, set aside a verdict for a slip that did not really misinstruct the jury or substantially affect any right of the defendant. Id.

The appellate court will not consider alleged errors where it appears on the whole case that the errors did not injuriously affect the substantial rights of the appellant. Ridgeley *v.* Walker, 86 L. 590, 591; 92 A. 394.

CITED.—Higgins *v.* Egg, 93 A. 593, 594; Mallery *v.* Erie R. R., 86 L. 210, 212; 92 A 371; Murphy *v.* Marrone, 86 L. 663, 668; 92 A. 366; Sun Dredging Co. *v.* Ottens, 84 L. 740, 746; 87 A. 1003; Marine Trust Co. *v.* Church, 85 L. 272, 275; 88 A. 1037; Neff *v.* Hannan, 85 L. 382; 88 A. 1075; Kargmann *v.* Carlo, 85 L. 632, 638; Soulier *v.* Daab, 86 L. 681, 684; 90 A. 266.

288. Additional Evidence on Appeal: New Evidence Admissible.

Sec. 28. Upon appeal, or on application for a new trial, the court in which the appeal or application shall be pending may, in its discretion, take additional evidence by affidavit or deposition, or by reference; provided, that the error complained of is lack of proof of some matter capable of proof by record or other incontrovertible evidence, defective certification, or failure to lay the proper foundation for evidence which can, in fact, with-

out involving some question for a jury, be shown to be competent. (P. L. 1912, p. 382.)

289. Practice in the Court of Errors.

Sec. 29. Subject to rules to be made by the court of errors and appeals the practice in that court upon appeals from the supreme court or circuit court shall be the same as the practice upon appeals in the supreme court. (P. L. 1912, p. 383.)

See S. C. R. 1913, rules 113, 131, 147; post, secs. 391, 380, 382.

Under this section, and rules 131 and 147, Supreme Court Rules 1913, if a judgment in ejectment is right as to part of the premises claimed and erroneous as to the remainder, the court of errors will reverse it only as to the part with respect to which there was error. Camden *v.* McAndrews Co., 85 L. 260, 268; 88 A. 1034

Rule 113, Supreme Court Rules 1913, is made applicable to the court of errors and appeals by section 29. Webster *v.* Freeholders, 86 L. 256, 258; 90 A. 1110.

290. Costs.

Sec. 30. Subject to rules or special order, costs in all cases may be disallowed in the discretion of the court. (P. L. 1912, p. 383.)

291. Orders By a Judge.

Sec. 31. Subject to rules, any order or leave herein authorized to be made or given by the court, may be made or given by a judge of the court in which the action is pending. (P. L. 1912, p. 383.)

See rule 2, S. C. R. 213, post, sec. 296.

292. Supreme Court to Prescribe Rules.

Sec. 32. In addition to the powers given in sections two hundred and fifty-three and two hundred and fifty-four of the Practice Act, the Supreme Court shall prescribe rules for that court

and for the Circuit Courts and Courts of Common Pleas to give effect to the provisions of this act and to otherwise simplify judicial procedure. Such rules shall supersede (so far as they conflict with) statutory and common law regulations heretofore existing. Until such rules shall be made, the rules hereto annexed in Schedule "A" shall be deemed to be the rules of court, subject to suspension and amendment in any part thereof, by the court, as experience shall show to be expedient. (P. L. 1912, p. 383.)

293. Actions Pending When This Act Takes Effect. Proviso.

Sec. 33. Sections twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, and thirty-two, and the rules in Schedule A under Division I, "General Rules," and under Division XII, "Appeals" (and no other sections or rules), shall apply to causes commenced before this act shall take effect; provided, that the sections and rules above mentioned shall not apply to any writ of error or the proceedings thereon which shall have been issued or taken before this act shall take effect. (P. L. 1912, p. 383, as amended by P. L. 1912, p. 844.)

294. Repealer.

Sec. 34. All acts and parts of acts inconsistent with this act and the following sections of the Practice Act be and the same are hereby repealed, but nothing in this repealer shall impair or affect any suit commenced before this act shall have taken effect; secs. 23, 29, 30, 31, 32, 33, 36, 37, 38, 39, 93, 94, 95, 96, 97, 98, 101, 102, 104, 105, 110, 111, 114, 117, 119, 121, 122, 127, 128, 130, 131, 132, 134, 141, 154, 210, 211, 212, 213, 214 and 241.

CITED.—Wheatman *v.* Andrews, 85 L. 107, 108; 89 A. 285.

SCHEDULE A.

Rules of Court Under the Practice Act (1912).

Schedule of Subjects.

I. General Rules.
II. Joinder of Parties and Causes of Action.
III. Pleadings.
(1) Pleadings Generally.
(2) Complaint.
(3) Answer.
(4) Counter-Claim.
(5) Reply.
(6) Actions to Recover Personalty.
(7) Time for Filing Pleadings.
IV. Summary Judgment.
V. Preliminary Reference.
VI. Discovery of Documents.
VII. Damages.
VIII. Trials: Jury's Findings.
IX. New Trial as to Part.
X. Findings of Fact by Court.
XI. Judgment.
XII. Appeals.

I. General Rules.

295. Definitions.

Sec. 1. The word "may" as used in these rules is not mandatory. (P. L. 1912, p. 384, rule 1; S. C. R. 1913, rule 211a.

296. Orders By a Judge.

Sec. 2. Any order or leave herein authorized to be made or given by the court may be made or given by one justice or judge thereof. (P. L. 1912, p. 384, rule 2; S. C. R. 1913, rule 213.)

See P. A. 1912, sec. 31, sec. 291, supra.

297. Extending Time, When.

Sec. 3. The time limited in these rules for the doing of any act may, for good cause, be extended (either before or after the expiration of the time) by order of the court or a justice or judge thereof. P. L. 1912, p. 385, rule 3; S. C. R. 1913, rule 217.)

298. Forms.

Sec. 4. The forms appended in Schedule "B" or like forms, shall be used so far as they are applicable. (P. L. 1912, p. 385, rule 4; S. C. R. 1913, rule 212.)

See Schedule "B," Forms, infra.

299. Rules May Be Suspended, When.

Sec. 5. These rules shall be considered as general rules for the government of the court and the conducting of causes; and as the design of them is to facilitate business and advance justice, they may be relaxed or dispensed with by the court in any case where it shall be manifest to the court that a strict adherence to them will work surprise or injustice. (P. L. 1912, p. 385, rule 5; S. C. R. 1913, rule 218.)

CITED.—Titus *v.* P. R. R. Co., 85 L. 157; 92 A. 944.

II. Joinder of Parties and Causes of Action.

See action against Joint Debtors, 3 C. S. 3776.

300. Personal Representatives: In Case Co-contractor be Dead: Proviso.

Sec. 6. In suits on a joint contract, whether partnership or otherwise, the personal representatives of a deceased co-contractor may join, as plaintiffs, and be joined, as defendants, with the survivors or survivor; provided, that, where the estate of the decedent is in settlement in this state,

as an insolvent estate, his personal representatives cannot be joined as defendants. (P. L. 1912, p. 385, rule 6; S. C. R. 1913, rule 16.)

See sec. 25, ante; P. A. 1912, secs. 4-12; supra, secs. 263-272.

301. Persons Severally Liable.

Sec. 7. Persons severally and immediately liable on the same obligation or instrument, including parties to bills of exchange and promissory notes; also indorsers, guarantors, and sureties, whether on the same or by a separate instrument, may all, or any of them, be joined as defendants, and a joint judgment may be rendered against those so joined. But where the cause of action against one person is not complete until after judgment against another, such person cannot be joined as defendant. Nothing herein contained shall impair the provisions of sections thirty-four and thirty-five of the Practice Act of one thousand nine hundred and three. (P. L. 1912, p. 385, rule 7; S. C. R. 1913, rule 17.)

See P. A. 1912, sec. 6; supra, secs. 265, 266.
CITED.—Murphy *v.* Potter, 85 A. 56.

302. Parties in Alternative.

Sec. 8. Persons may be joined as defendants against whom the right to relief is alleged to exist in the alternative, although a right to relief against one may be inconsistent with a right to relief against the other. (P. L. 1912, p. 386, rule 8; S. C. R. 1913, rule 18.)

See Forms, 12, 13.
P. A. 1912, secs. 4, 6; supra, secs. 263, 265, 266.
Sec. 29, ante.
CITED.—Murphy *v.* Potter, 85 A. 56.

303. When Assignor and Assignee May Join.

Sec. 9. If a part interest in a contract obligation be assigned, the assignor (retaining the remaining interest) and assignee may join as plaintiffs. (P. L. 1912, p. 386, rule 9; S. C. R. 1913, rule 19.)

304. Assignment Pending Suit.

Sec. 10. If, pending the action, the plaintiff assign the cause of action, the assignee, on his written application, may either be joined as co-plaintiff or substituted as a sole plaintiff, as the court may order; provided, the same shall in no manner prejudice the defense of the action as it stood before such change of parties. (P. L. 1912, p. 386, rule 10; S. C. R. 1913, rule 20.)

305. Costs of Defendant: Protection of Defendant.

Sec. 11. In all cases where there are several defendants, the court may make such order as it may deem just, to prevent any defendant from being embarrassed or put to expense by being required to attend any proceedings in the action in which he may have no interest; and no costs shall be taxed against any defendant with which he is not justly chargeable. (P. L. 1912, p. 386, rule 11; S. C. R. 1913, rule 204.)

306. Separate Trials.

Sec. 12. The court may, upon motion, order a separate trial between the plaintiff, or one or more of several plaintiffs, and the defendant, or one or more of several defendants, or between co-defendants. (P. L. 1912, p. 386, rule 12; S. C. R. 1913, rule 108.)

307. "Transactions" Explained.

Sec. 13. The transactions referred to in sections four and six of the Practice Act (1912) include any transactions which grew out of the subject matter in regard to which the controversy has arisen; as, for instance, the failure of a bailee to use the goods bailed for the purpose agreed, and also an injury to them by his fault or neglect; the breach of a covenant for quiet enjoyment, by the entry of the lessor, and also a trespass to goods committed in the course of the entry; or several torts committed simultaneously as a battery accompanied by slander. (P. L. 1912, p. 386, rule 13; S. C. R. 1913, rule 211b.)

CITED.—Murphy *v.* Potter, 85 A. 56.

308. Joinder of Causes of Action.

Sec. 14. (a) In actions for the recovery of lands, no cause of action shall be joined (without leave of court) except for mesne profits, or damages for breach of any contract under which the property, or any part thereof, was held, or for injury to the property.

(b) Claims by a trustee in bankruptcy, as such, must not, except by leave of court, be joined with any claim by him in any other capacity.

(c) Claims by or against any executor or administrator, as such, must not (without leave of court) be joined with claims by or against him personally, unless the latter claims arose with reference to the estate of his testator or intestate.

(d) Claims by plaintiffs jointly, may be joined with claims by them, or any of them, separately, against the same defendant.

(e) Claims by or against husband and wife may be joined with claims by or against either of them separately.

(f) The court may strike out causes of action which cannot be conveniently tried with other causes of action joined in the same suit. (P. L. 1912, p. 387, rule 14; S. C. R. 1913, rule 21; see P. A. 1912, secs. 6, 11; secs., supra, 265, 266, 271.)

CITED.—Murphy *v.* Potter, 85 A. 56; Kelley *v.* Iron Co., 87 L. 567, 570; 94 A. 802.

309. Objection for Misjoinder: Waiver.

Sec. 15. Objection for misjoinder of causes of action is waived unless made on motion, before answer or reply respectively. (P. L. 1912, p. 387, rule 15; S. C. R. 1913, rule 22.)

309a. Several Causes of Action, Answer Thereto: Judgment: Execution.

When causes of action are joined, the defendant may answer to the several counts the same answers he might make thereto if such counts had not been joined, and the subsequent pleadings and the entry of judgment on the several issues shall be in conformity therewith; and the execution in such suit shall be in conformity with the judgment entered therein. (S. C. R. 1913, rule 23.)

III. Pleadings.

(1) Pleadings Generally.

310. Order of Pleadings.

Sec. 16. The order of pleadings shall be:

1. Complaint;
2. Motion addressed to the complaint;
3. Answer;
4. Motion addressed to answer;
5. Reply.

Further pleadings may be had, if necessary, until issue is joined. Unless otherwise ordered by the court pleadings must be filed, and motions made, in the order mentioned above. (P. L. 1912, p. 387, rule 16; S. C. R. 1913, rule 30.)

See P. A. 1912, sec. 3, § 262.
Time for filing, rules 54, 55; S. C. R. 1913, rules 75, 76; supra, secs. 348, 349.
Article in 36 N. J. L. J. 233.

311. Form of Pleadings: Plain Statement.

Sec. 17. (a) All pleadings must contain a plain and concise statement of the issuable facts on which the pleader relies (and no others) but not of the evidence by which they are to be proved.

(b) The statement must be divided into paragraphs numbered consecutively, each containing, as nearly as may be, a separate allegation.

(c) Dates, sums and numbers, must be in figures.

(d) If any pleadings be insufficient, the court may order a fuller or more particular statement; and if the pleadings do not sufficiently define the issues the court may order other issues prepared; and may settle the issues if the parties differ.

(e) The first pleading filed by any party shall state his place of residence. (P. L. 1912, p. 388, rule 17; S. C. R. 1913, rule 31.)

See Forms, 3-22, post.
See P. A. 1903, sec. 126.
This rule 17 (a) means the facts to be put in issue and not all the facts surrounding the case. Schwartz Bros. Co. *v.* Evening News, 84 L. 486, 487; 87 A. 148.
The object of the New Practice act was to do away with the technicalities of common law pleading and requires a plain, intelligible statement of the real point involved, and to do away with the blind method which had grown up by which, for ex-

ample, under a plea of not guilty in an action of libel almost any defense could be interposed. Id.

In drawing pleadings, where such books as Bullen & Leake's Precedents of Pleading are not available, the safest course is to utilize the special forms contained in the old form books which, when stripped of their verbiage, will usually be found to answer the purpose admirably. Adapted from Parker, J., in Marine Trust Co. *v.* Church, 85 L. 272, 274; 88 A. 1037.

See Paul *v.* Haber, 96 A. 41, 42. Use of common counts questioned.

312. Bills of Particulars.

Sec. 18. Bills of Particulars may be ordered as heretofore. (P. L. 1912, p. 388, rule 18; S. C. R. 1913, rule 32.

See sec. 102, supra; 3 C. S. 4082.

CONSTRUCTION AND OPERATION IN GENERAL.—Where a suit is brought by the assignee of a chose in action in his own name, and a demand is made by the defendant, before pleading, for a bill of particulars, and for a copy of any bond, note, contract, deed, record or writing, on which the declaration is founded, plaintiff must furnish the defendant with a copy of the assignment of such chose in action, in addition to such other writing as constitutes the foundation of the action, or be barred from all claim under the declaration. Cullen *v.* Woolverton, 63 L. 644; 44 A. 646.

The admission of such an assignment in evidence over defendant's objection after such demand made and failure to furnish a copy of the same, held, under the circumstances of the present case, to be reversible error. Id.

A party is not bound to furnish his adversary with a copy of any record or writing which is not the foundation of his suit or claim. Marrycott *v.* Young, 33 L. 336.

The plaintiff is only required to furnish the defendant with notice of the particular subject-matter, in relation to which the covenant or agreement has been broken, and not the items or particular facts constituting such breach and necessary to be proved on the trial. Van Voorst *v.* Canal Co., 20 L. 200.

A bill of particulars annexed to a declaration or delivered pursuant to demand limits, for the purposes of the trial, the generality of the pleading. Kent *v.* Metal Co., 69 L. 532: 55 A. 256.

NOTICE.—Bill of particulars being delivered, no proof is requisite that notice requiring it was given. Clinton *v.* Lyon, 3 L. 1036.

TIME FOR DELIVERY.—Bill of particulars, when required, must be delivered before a plea. In a charge for money had, it should name the person from whom received. Whitall *v.* Vaughn, 3 L. 636.

TIME TO PLEAD.—The defendant has the same time to plead after receiving the bill of particulars that he had at the time of demanding it. Anonymous, 16 L. 346.

SUFFICIENCY OF BILL OF PARTICULARS.—If a bill of particulars fully and substantially apprise the opposite party of the matter intended to be given in evidence, it will be sufficient, although it is not as minute and specific as it might have been, unless it shall appear, by affidavit or otherwise, to the satisfaction of the court, that the party has been misled or surprised by the bill, or is in great danger of being prejudiced for want of a better particular. Stothoff *v.* Dunham, 19 L. 181; Tillou *v.* Hutchinson, 15 L. 178.

On application for a more specific bill of particulars, the principle which governs the court is, that the party who avers matters which he must prove on the trial, should so far apprise his opponent concerning them that he can intelligently prepare his pleadings and defenses. The particulars need not be the manner of proof, but only the matters themselves upon competent proof of which he proposes to rest his claim. Heppard *v.* Carr & Smith, 12 N. J. L. J. 186.

RIGHT TO AMEND BILL OF PARTICULARS ON REVIEW.—Where the issue as made up on the pleadings and bill of particulars has been fully tried and correctly settled, no amendment having been applied for in the court below, the court of review will not permit the plaintiff in error to amend the bill of particulars in order to bring about a reversal of the judgment and a new trial upon a different issue. Kent *v.* Metal Co., 69 L. 532; 55 A. 256.

VARIANCE.—A bill of particulars served forms no part of the record; and it is not error that the name and style of the defendant below, as set forth in said bill of particulars, do not entirely correspond with the name given in the record, especially when such variance has not been assigned for error. Church *v.* Gordan, 31 L. 264.

It is no variance from the bill of particulars rendered if the book of accounts charge to A. B., overseer of the poor, etc., items which in the bill are rendered as charged to A. B. Bay *v.* Cook, 22 L. 343.

CITED.—Bower *v.* Bower, 78 L. 387; 74 A. 522; Vail *v.* Insurance Co., 67 L. 422; 51 A. 929; Johnston *v.* Bowers, 69 L. 544; 55 A. 230; Sautter *v.* Insurance Co., 73 L. 455; 63 A. 994.

313. Untrue Statements.

Sec. 19. Allegations or denials, made without reasonable cause, and found untrue, shall subject the party pleading the same to the payment of such reasonable expenses, to be taxed by the court, as may have been necessarily incurred by the other party, by reason of such untrue pleading. (P. L. 1912, p. 388, rule 19; S. C. R. 1913, rule 33.)

314. Statements Not Denied Are Admitted.

Sec. 20. Every material allegation of fact in a pleading, which is not denied by the adverse party, is deemed to be admitted, unless the latter avers that he has no knowledge or information thereof sufficient to form a belief. (P. L. 1912, p. 388, rule 20; S. C. R. 1913, rule 34.)

315. Pleading According to Legal Effect: Adverse Party Apprised of State of Facts.

Sec. 21. Acts and contracts may be stated according to their legal effect, but, in so doing, the pleading should be such as fairly to apprise the adverse party of the state of facts which it is intended to prove; thus, an act or promise of a principal (other than a corporation), if, in fact, proceeding from an agent known to the pleader, should be so stated; and the obligation of a husband to pay for necessaries furnished to his wife, whom he has driven from his house, should be stated according to the facts. (P. L. 1912, p. 388, rule 21; S. C. R. 1913, rule 35.)

CITED.—Titus *v.* P. R. R. Co., 85 L. 157; 92 A. 944.

316. Joinder of Issue: Denial a Joinder.

Sec. 22. The denial of any material allegation shall constitute an issue; no other joinder of issue is necessary. (P. L. 1912, p. 389, rule 22; S. C. R. 1913, rule 36.)

See sec. 114.

317. Annexing Copies of Documents.

Sec. 23. In pleading any document, a copy thereof may be annexed to the pleading, and referred to therein, with like effect as if it were recited at length. (P. L. 1912, p. 389, rule 23; S. C. R. 1913, rule 37.)

See sec. 119.

PLEADINGS—EXHIBITS—SUFFICIENCY.—A complaint pleading a bond and its condition, but omitting a clause of the condition, is sufficient to invoke Supreme Court Rule 37, authorizing a copy to be annexed to the pleading and referred to therein with like effect as if recited at length. City of Bridgeton *v.* Fidelity and Deposit Co. of Maryland, 96 A. 918.

318. Inconsistent Counts and Defenses.

Sec. 24. Inconsistent counts in the complaint or counter-claim, and inconsistent defenses in the answer, are not objectionable. (P. L. 1912, p. 389, rule 24; S. C. R. 1913, rule 38.)

CITED.—Meyer *v.* Nickelsburg, 37 N. J. L. J. 38.

319. Objectionable Pleadings.

Sec. 25. Unnecessary repetition, prolixity, scandal, impertinence, obscurity and uncertainty, and other violations of the rules of pleading, are respectively objectionable; also any pleading which is irregular, defective or so framed as to embarrass or delay a fair trial. (P. L. 1912, p. 389, rule 25; S. C. R. 1913, rule 39.)

A motion to strike out the plaintiff's complaint admits the truth of the plaintiff's allegations and any inference of fact which can be legitimately drawn therefrom. Crawford *v.* Winterbottom, 96 A. 497.

CITED.—Schwartz Bros. Co. *v.* Evening News, 84 L. 486; 87 A. 148; Murphy *v.* Potter, 85 A. 56; Young *v.* Board, 84 L. 770, 771; 87 A. 347.

320. Demurrers Abolished.

Sec. 26. Demurrers are abolished. Any pleadings may be struck out on motion on the ground that it discloses no cause of action, defense or counter-claim respectively. The order made upon such motion is appealable after final judgment. In lieu of a motion to strike out, the same objection, and any point of law (other than a question of pleading or practice) may be raised in the answering pleadings, and may be disposed of at, or after, the trial; but the court, on motion of either party, may determine the question so raised before trial, and if the decision be decisive of the whole case the court may give judgment for the successful party or make such order as may be just. (P. L. 1912, p. 389, rule 26; S. C. R. 1913, rule 40.)

See secs. 101, 127.

S. C. R. 1913, rules 92-96, sec., post, 356-360.

CITED.—Murphy *v.* Potter, 85 A. 56; Young *v.* Stafford, 86 L. 422, 423; 92 A. 286.

321. Objections to Pleadings. Objections Made on Motion.

Sec. 27. Objections to pleadings other than those provided for in rule 26, above, shall be made by motion. The action of the court thereon is appealable after final judgment. (P. L. 1912, p. 389, rule 27; S. C. R. 1913, rule 41.)

See secs. 110, 111.

CITED.—Murphy *v.* Potter, 85 A. 56; Butterhof *v.* Butterhof, 84 L. 285; 86 A. 394.

322. Objections to Pleadings.

Sec. 28. Every motion addressed to a pleading must present every cause of objection then existing. (P. L. 1912, p. 389, rule 28; S. C. R. 1913, rule 42.)

See sec. 110.
Complaint, striking out, misfeasance of municipal corporation, 38 N. J. L. J. 53.
CITED.—Murphy *v.* Potter, 85 A. 56.

323. Motions. Grounds of Motion Specified.

Sec. 29. Every notice of any motion addressed to a pleading shall specify the grounds thereof. (P. L. 1912, p. 389, rule 29; S. C. R. 1913, rule 43.)

See sec. 110.
CITED.—Murphy *v.* Potter, 85 A. 56.

324. Matters Arising After Suit Begun. Supplemental Pleadings.

Sec. 30. Supplemental pleadings, showing matters arising since the original pleadings or suit begun may be filed by either party, by leave of court, and upon terms. (P. L. 1912, p. 389, rule 30; S. C. R. 1913, rule 44.)

See sec. 121.

325. Oyer. Copies of Documents Served on Adverse Party.

Sec. 31. When an express agreement or any document is referred to in a pleading, and is not annexed to the pleading or recited verbatim therein, a copy of the document or of the agreement (if it be in writing) must be served on the adverse party within five days after service of written

demand for the same. (P. L. 1912, p. 390, rule 31; S. C. R. 1913, rule 45.)

See sec. 119.

326. Evasive Denials Not Permitted.

Sec. 32. A denial must not be evasive, but must fairly meet the substance of the allegation denied. Thus, if payment of a certain sum be alleged when, in fact, less was paid, the pleader must not deny payment generally, but must state how much was paid; and where any fact is alleged with divers circumstances, some of which are untruly stated, the denial must not be of the fact as alleged, but so much as is true and material must be admitted and the rest only denied. (P. L. 1912, p. 390, rule 32; S. C. R. 1913, rule 46.)

See sec. 94.

327. Certainty: Plain Statements.

Sec. 33. Express admissions and denials must be direct, precise, specific, and not argumentative, hypothetical, or in the alternative; accordingly, when a pleader wishes expressly to admit or deny a portion only of a paragraph he must recite that portion; except, that where a recited portion of a paragraph has been either admitted or denied, the remainder of the paragraph may be denied or admitted, without recital. Admissions or denials of allegations identified only by a summary or generalization thereof, or by describing the facts alleged as "consistent" or "inconsistent" with other facts recited or referred to, are improper. (P. L. 1912, p. 390, rule 33; S. C. R. 1913, rule 47.)

See sec. 94.

CITED.—Schwartz Bros. Co. *v.* Evening News, 84 L. 486, 487; 87 A. 148.

328. Demands for Relief.

Sec. 34. A demand for relief in the complaint, or counter-claim, which the allegations thereof do not sustain, may be objected to, on motion, or in the answering pleading, although the allegations may entitle the plaintiff, or counter-claimant respectively, to some other relief. (P. L. 1912, p. 390, rule 34; S. C. R. 1913, rule 48.)

(2) The Complaint.

329. The Complaint.

Sec. 35. The first pleading by the plaintiff shall be the complaint. It must contain a statement of the facts constituting the cause of action, in accordance with these rules, and a demand for relief. (P. L. 1912, p. 390, rule 35; S. C. R. 1913, rule 51.)

See Forms, 3-13. See sec. 93.

330. Counts and Paragraphs: Counts Numbered.

Sec. 36. When separate and distinct causes of action (as distinguished from separate claims for relief founded on the same cause of action or transaction) are joined, the statement of the second shall be prefixed with the words "second count" and so on for the others; and the several paragraphs of each shall be numbered separately. (P. L. 1912, p. 391, rule 36; S. C. R. 1913, rule 52.)

See sec. 93.

331. Alternative Relief.

Sec. 37. Plaintiff may claim alternative relief based upon an alternative construction or ascertainment of his cause of action. (P. L. 1912, p. 391, rule 37; S. C. R. 1913, rule 53.)

See sec. 93.

(3) The Answer.

332. Dilatory Pleas: Certain Pleas Abolished: Objections on Motion.

Sec. 38. Pleas to the jurisdiction and pleas in abatement are abolished. In lieu thereof objection shall be made on motion. The evidence necessary to determine the question may be taken by depositions, or as the court may direct. The action of the court upon such motion may be reviewed on appeal after final judgment. (P. L. 1912, p. 391, rule 38; S. C. R. 1913, rule 56.)

See secs. 94, 117.

Under this section an answer corresponding to a plea in abatement is improper, as matters formerly cognizable under such plea must be settled by motion. Marine Trust Co. *v.* Church, 85 L. 272; 88 A. 1075.

CITED.—Wheatman *v.* Andrews, 85 L. 107, 108; 89 A. 285; Baldauf *v.* Nathan Russell, 96 A. 96; Dominion Fertilizer Co. *v.* White, 96 A. 1069.

333. Several Defenses. Defenses Separately Stated.

Sec. 39. Where several defenses are pleaded, each must refer to the cause of action which it is intended to answer, and must be separately stated and designated as a separate defense; thus: First defense, second defense, etc. Where the complaint is for more than one cause of action, set forth in several counts each separate matter of defense, should be preceded by a designation of the cause of action which it is intended to meet, in this manner: First defense to first count, second defense to first count, first defense to second count, and so on. Any statement of a matter of defense, raised in part upon facts pleaded in any preceding statement in the same answer, may refer to those facts as thus recited, without otherwise repeating them. (P. L. 1912, p. 391, rule 39; S. C. R. 1913, rule 57.)

See Form 18. See sec. 94.

Defense of contributory negligence. Levitt *v.* Windsor, 28 N. J. L. J. 3, note; Gaffney *v.* Illingworth, 38 N. J. L. J. 75, 76; 36 N. J. L. J. 233. Condition precedent failure to plead bar. See Delaware River, etc., Co. *v.* Board Freeholders, 90 A. 1023, 1024.

334. General and Special Denial.

Sec. 40. The answer must specially deny such allegations of fact in the complaint as defendant intends to controvert, unless he intends in good faith to controvert all the allegations; in that case he may deny them generally. It must specially state any defense which is consistent with the truth of the material allegations of the complaint, and any defense which, if not stated, would be likely to cause surprise, or would raise issues not arising out of the complaint. For instance, the statute of frauds, or of limitations, release, payment, performance, fraud or facts showing illegality, or contributory negligence. (P. L. 1912, p. 391; rule 40; S. C. R. 1913, rule 58.)

See sec. 94.

Where the provision of a contract requires the performance of a condition precedent, the defendant to avail himself of the condition, as a defense to an action on the contract must specially plead it and if he fails to do so the question is eliminated from controversy in the case. Delaware River Trans. Co. *v.* Freeholders, 86 L. 294, 296; 90 A. 1023, 1024.

In a suit based on an order given to a manufacturer to make and furnish one double cast iron split gear, as per blue-print and drawing furnished, in which the answer denies that the gear as agreed was made and states that it was defective and not according to contract, it is error for the court to charge the jury that there is no warranty in such a case. The Practice Act, 1912, rule 40, requires that such a defense must be pleaded. A. H. Brown Co. *v.* Pardee, 95 A. 976.

CITED.—Titus *v.* P. R. R. Co., 85 L. 157; 92 A. 944; Watkins *v.* Cope, 84 L. 143, 146; 86 A. 545.

335. Tender. Payment Into Court. Effect of Tender of Money.

Sec. 41. Any party upon whom a claim for debt or damages (liquidated or unliquidated) is made, may tender to the claimant a sum of money in payment thereof, which tender may be pleaded, and in all respect shall be as effectual as a tender in case of a claim for debt has heretofore been. (P. L. 1912, p. 392, rule 41; S. C. R. 1913, rule 59.)

See sec. 94.

336. Payment Into Court by Defendant an Admission.

Sec. 42. Payment into court by defendant upon plaintiff's claim, shall be an admission of the cause of action in respect to which it is made; but not so, if the answer denies the cause of action. The payment shall be pleaded or (if made after answer filed) notice thereof shall be given to the plaintiff. (P. L. 1912, p. 392, rule 42; S. C. R. 1913, rule 60.)

337. Payment Into Court: Acceptance by Plaintiff.

Sec. 43. If the plaintiff accept such payment before judgment, it shall be in satisfaction of the cause of action in respect to which the payment was made, except as to costs. If the plaintiff do not so accept, the money shall be paid to the defendant if he recover judgment; but, if plaintiff recover, it shall be applied upon his judgment to the extent thereof, and the surplus, if any, shall be paid to the defendant. (P. L. 1912, p. 392, rule 43; S. C. R. 1913, rule 61.)

338. Payment Into Court by Plaintiff on Counter-Claim.

Sec. 44. Plaintiff, in reply to a counter-claim, may pay money into court in satisfaction thereof, subject to the like conditions as to costs and other-

wise as upon such payment by a defendant. (P. L. 1912, p. 392, rule 44; S. C. R. 1913, rule 62.)

339. Payment Into Court, Jury Not Informed.

Sec. 45. Neither tender nor payment into court shall be made known to the jury. (P. L. 1912, p. 392, rule 45; S. C. R. 1913, rule 63.)

(4) Counter-Claim.

See P. A. 1912, sec. 12; supra, sec. 272.

340. Counter-Claims.

Sec. 46. A counter-claim may be stated in the answer, being introduced substantially thus: "By way of counter-claim against" (stating the parties against whom the counter-claim is made, and designating as "third parties" those not made parties in the complaint.) (P. L. 1912, p. 392, rule 46; S. C. R. 1913, rule 65.)

341. Cross Action.

Sec. 47. A counter-claim is deemed to be a cross action, and the rules respecting the form and manner of pleading the complaint, apply to the counter-claim. (P. L. 1912, p. 393, rule 47; S. C. R. 1913, rule 66.)

CITED.—Kelley *v.* Iron Co., 87 L. 567, 570; 94 A.

342. Amount of Recovery. Judgment for Excess.

Sec. 48. If the amount found due on the counter-claim to the defendant exceeds the amount found due to the plaintiff, the defendant shall have judgment for the excess. (P. L. 1912, p. 393, rule 48; S. C. R. 1913, rule 67.)

343. Counter-Claim. Copy to Co-Defendant.

Sec. 49. Where a co-defendant is made a party to a counter-claim, a copy thereof shall be delivered to him or his attorney within five days after the same is filed. (P. L. 1912, p. 393, rule 49; S. C. R. 1913, rule 68.)

(5) Reply.

344. Reply.

Sec. 50. A reply may contain two or more distinct avoidances of the same defense or counterclaim, but they must be separately stated and numbered, and the rules respecting the form and manner of pleading in the answer apply to the reply. (P. L. 1912, p. 393, rule 50; S. C. R. 1913, rule 70.)

(6) Actions to Recover Personalty.

345. Special Property: Facts Showing to be Pleaded.

Sec. 51. In actions to recover personalty, title (in plaintiff or defendant) which rests on a special property must be pleaded by stating the facts constituting the special property. (P. L. 1912, p. 393, rule 51; S. C. R. 1913, rule 72.)

346. Unlawful Taking and Detainer.

Sec. 52. When the taking was wrongful, a general statement of unlawful taking is sufficient, but when the action is for a wrongful detainer only, a demand and refusal of possession, before beginning the action (or serving the writ) must be alleged. (P. L. 1912, p. 393, rule 52; S. C. R. 1913, rule 73.)

347. Defense by Answer.

Sec. 53. All defenses, including those in the nature of avowry, cognizance, and disclaimer, shall

be made by answer. If the defense be title in defendant or in a third person, the answer must state it according to the fact. If defendant claims a return of the goods or damages, he must make the claim by counter-claim. (P. L. 1912, p. 393, rule 53; S. C. R. 1913, rule 74.)

(7) Time for Filing Pleadings.

348. Complaint Annexed to Summons.

Sec. 54. The complaint shall be annexed to the summons or capias ad respondendum and returned therewith; and a copy thereof shall be served with the summons or capias. (P. L. 1912, p. 394, rule 54; S. C. R. 1913, rule 75.)

349. Answer Filed: Time.

Sec. 55. The answer or counter-claim shall be filed within twenty (20) days after service of the summons (or capias) and complaint. If further pleadings be necessary, they shall be filed within twenty (20) days, each after the other. (P. L. 1912, p. 394, rule 55; S. C. R. 1913, rule 76.)

350. Affidavit of Merits: Action on Contract: Proviso.

Sec. 56. In actions on contract plaintiff may enter judgment unless the defendant or his agent or attorney shall, within ten days after personal service of complaint, file an affidavit of merits, stating that the affiant believes that the defendant has a just and legal defense to the action on the merits of the case; provided, a notice be endorsed on the complaint and on the copy served that if defendant intends to make a defense he must file an affidavit of merits within ten days of such service and an answer within twenty days therefrom; and that in default thereof judgment will

be entered against him. Lawful service upon a corporation shall be deemed personal service for the purpose of this rule. (P. L. 1912, p. 394, rule 56; S. C. R. 1913, rule 77.)

IV. Summary Judgment.

See P. A. 1912, sec. 15; supra, sec. 275.

351. Answer May Be Struck Out and Judgment Final Entered.

Sec. 57. When an answer is filed in an action brought to recover a debt or liquidated demand arising:

(a) Upon contract express or implied, sealed or not sealed; or,

(b) Upon a judgment for a stated sum; or,

(c) Upon a statute;

the answer may be struck out and judgment final may be entered upon motion and affidavit as hereinafter provided, unless the defendant by affidavit or other proofs shall show such facts as may be deemed, by the judge hearing the motion, sufficient to entitle him to defend. (P. L. 1912, p. 394, rule 57; S. C. R. 1913, rule 80.)

What the defendant must show is that he has a bona fide defense, one which he may be able to establish, a plausible ground of defense, something fairly arguable and of a substantial character. The question is, on a motion for judgment over answer, whether the answer exhibits a possible and plausible defense. Meyer *v.* Nickelsburg Bros. Co., 37 N. J. L. J. 36. See Smith *v.* Hoffing, 95 A. 993.

352. Motion Made on Affidavit.

Sec. 58. The motion to strike out shall be made upon affidavit of the plaintiff or that of any other person cognizant of the facts, verifying the cause of action, and stating the amount claimed and

his belief that there is no defense to the action. (P. L. 1912, p. 394, rule 58; S. C. R. 1913, rule 81.)

WHAT CONSTITUTES A SUFFICIENT VERIFICATION.—Affidavit must state such facts as are necessary to establish a good cause of action; it will not be sufficient if it verified only a portion of the cause of action, leaving out some essential part of it. Meyer *v.* Nickelsburg Bros. Co., 37 N. J. L. J. 39.

353. Partial Judgment.

Sec. 59. If it appear that such defense applies only to part of plaintiff's claim, or that any part is admitted, the plaintiff may have final judgment forthwith for so much of his claim as the defense does not apply to or as is admitted, subject to such terms as may be deemed just. (P. L. 1912, p. 395, rule 59; S. C. R. 1913, rule 82.)

354. Terms of Defense.

Sec. 60. Leave to defend may be given unconditionally, or upon such terms as to giving security, or time or mode of trial, or otherwise, as may be deemed just. (P. L. 1912, p. 395, rule 60; S. C. R. 1913, rule 83.)

CITED.—Meyer *v.* Nickelsburg Bros. Co., 37 N. J. L. J. 43.

355. No Summary Judgment Entered Without Order of Judge.

No summary judgment shall be entered except by virtue of an order of the court or a justice at chambers, and the application for such judgment may be made on ex parte affidavits, and shall be made on four days' notice unless the court or the justice, for special reasons, shall order shorter notice. (S. C. R. 1913, rule 84.)

V. Preliminary References.

See P. A. 1912, sec. 17; supra, sec. 277.

356. Supreme Court Commissioners.

Sec. 61. The Supreme Court may designate for each county one of the Supreme Court Commissioners (and if necessary, more than one), removable at pleasure, who shall have the authority herein given. (P. L. 1912, p. 395, rule 61; S. C. R. 1913, rule 92.)

357. Summons: How Served: Time.

Sec. 62. At any time after service of the complaint, either party may take out a summons substantially in the form in Schedule B, and serve the same upon the opposite party or his attorney, at least four days before the return day. The summons need not be served upon a party who is in default. The taking out of such summons by a defendant shall be deemed an appearance in the cause, if he shall not previously have appeared therein. The court may, on its own motion, at any time, order the preliminary reference herein provided for. (P. L. 1912, p. 395, rule 62, as modified by S. C. R. 1913, rule 93.)

See Form No. 1, post.

358. Order by Commissioner Upon Return of Summons.

Sec. 63. Upon the return of the summons or at any adjournment of the matter, the commissioner, after hearing the parties or their attorneys (but not their evidence), shall, on the application of any party, make such order as the court might make and as may be just in respect to the following matters, subject to an appeal within five days to a judge of the court in which the action is pending:

Objections to pleadings (other than those provided for in rule 26, sec. 320 and rule 38, sec. 322), amendments thereof, and leave for additional pleadings;

Settlement of issues;

Bills of particulars;

Admissions;

Interrogatories;

Discovery of, and inspection of books, papers or other documents;

Examination of parties before trial;

Any other interlocutory matter preliminary to, and in preparation for, trial, but not including postponement of trial;

The order of the commissioner shall be deemed the order of the court until reversed.

All motions in respect of any of the foregoing matters, whether made before or after issuing the commissioner's summons, may be heard and determined by the commissioner subject to appeal as aforesaid.

The commissioner's order shall be as nearly as practical in the form stated in Schedule "B." (P. L. 1912, p. 395, rule 63; S. C. R. 1913, rule 94; see Form 33.)

359. Two Days' Notice: Motions.

Sec. 64. Prior or subsequent applications or motions in the cause before trial may be made to the commissioner on two days' notice. (P. L. 1912, p. 396, rule 64; S. C. R. 1913, rule 95.)

360. Plaintiff When Non-prossed.

Sec. 65. If plaintiff fails to take out and proceed upon the summons as herein directed, when so ordered, he may become non-prossed. If defendant fail to appear he shall not appeal from the order except by leave of the commissioner or the court. (P. L. 1912, p. 396, rule 65; S. C. R. 1913, rule 96.)

VI. Discovery of Documents, and Admission of Execution of Papers.

361. Production of Books, etc.

Sec. 66. Any party may, without affidavit, apply for an order directing any other party to make discovery on oath of the books, papers or other documents, which are, or have been, in his possession or under his control relating to any matter in question in the cause. The granting of the order shall be discretionary, as to the whole or any part of the discovery applied for. (P. L. 1912, p. 396, rule 66; S. C. R. 1913, rule 97.)

362. Admissions Made Five Days After Service of Notice.

The time within which the admissions provided in section 18 of the Practice Act 1912, sec. 278, should be made, is hereby fixed at five days after service of the notice mentioned in said section unless such time is extended by order of the court or a judge. (S. C. R. 1913, rule 98.)

VII. Damages.

363. Damages Determined to Time of Trial.

Sec. 67. Where damages are to be determined in respect of any continuing cause of action, they shall be determined to the time of assessment or trial. (P. L. 1912, p. 396, rule 67; S. C. R. 1913, rule 112.)

364. Assessment of Damages: Clerk Makes Assessment: Itemized Statement Annexed. Amount.

On motion for assessment of damages, in all cases where the court or the clerk is authorized by law to assess the same, the party shall make out a particular statement of his account or demand,

containing all the items thereof with their dates, to which he shall annex, or endorse thereon, a calculation in figures, showing the amount of interest, the payments or credits, if any, and the sum total due thereon; and the same, after an assessment shall be made thereon and signed by the justice or officer making the same, shall be filed with the clerk, there to remain; and all amercements of sheriffs and others having the return of executions, and all assessments on judgments on sheriff's bonds shall be made in conformity to the same rule. (S. C. R. 1913, rule 87.)

365. Assessment of Damages on Book Account: Original Book Produced: Affidavit.

In all cases of assessment of damages to be made by the court, or any justice thereof, or by the clerk, when the nature of the account or demand of the plaintiff or plaintiffs is such that the book of account of original entries of the plaintiff or plaintiffs is competent and legal evidence of such account or demand, the said book shall be produced before the court or officer with due proof thereof, or there shall be produced a copy of the entry or entries in such book with an affidavit that the book from which the said copy was taken is the book of account of original entries of the plaintiff or plaintiffs, and that the copy produced has been truly taken therefrom; and that the money demanded therein is justly due and owing, and the said copy and affidavit, with the assessment to be made, shall be filed with the clerk. (S. C. R. 1913, rule 88.)

366. Assessment of Damages on Negotiable Instruments: Instrument Produced: Affidavit.

In all cases of assessment of damages to be made by the court, or any justice thereof, or by the clerk, when the demand of the plaintiff or

plaintiffs is founded upon a bill or bills of exchange or a promissory note or notes, or both, a copy thereof shall be included in the assessment, and the original or the originals thereof shall be produced before the court or officer making such assessment, or there shall be produced an affidavit that the original or originals have been lost or destroyed and that the copy set forth in the assessment is a true copy. (S. C. R. 1913, rule 89.)

367. Assessment of Damages: Writ of Inquiry.

Sec. 68. The party entering judgment by default, in lieu of taking out a writ of inquiry, may, at his option, give fifteen days' notice that damages will be assessed by a jury drawn from the general panel; and upon serving and filing the notice the damages shall be assessed by such jury during its attendance at the circuit, under the direction of a justice or judge. And all writs of inquiry shall, on application of either party, be executed under the directions of a justice or judge, or a Supreme Court commissioner to be designated by a judge or justice. (P. L. 1912, p. 396, rule 68; S. C. R. 1913, rule 90.)

368. Assessment Before Justice and by Jury: Postea: Entry of Final Judgment: Writs of Inquiry When Returnable.

Whenever the damages are assessed before a justice or a judge by a jury drawn from the general panel, if the action be pending in this court, the plaintiff shall present to the trial judge a suitable circuit court record as in other cases of trial at circuit, which shall be returned into court with a proper postea setting forth the ascertainment of damages on notice in the manner above provided, and final judgment may be entered thereon forthwith by order of the court or a justice. If the ac-

tion be pending in an inferior court, no such transcript shall be required, and judgment final shall be entered upon the verdict of the jury by order of a judge of said court.

All writs of inquiry may be made returnable and be returned in term or vacation. (S. C. R. 1913, rule 91.)

VIII. Trials: Jury's Finding.

See S. C. R. 1913, rules 101-114, inclusive; post, 374-392.

369. Plaintiff and Defendant to Open Case.

Sec. 69. At trials, immediately after the plaintiff's opening, and before any evidence taken, defendant's counsel shall open his case to the jury to the extent, at least, of the statement of his answer. (P. L. 1912, p. 397, rule 69; S. C. R. 1913, rule 109.)

370. Answers to Written Questions: In Rule to Show Cause, Statement of Case Filed.

Sec. 70. The court may request the jury to return answers to written questions embracing the disputed facts in issue and the amount of damages. The questions and answers shall be entered upon the minutes and the court may enter a general verdict. In case a rule to show cause for a new trial, or an appeal, a statement of the case, including the questions and answers, shall be prepared and filed and shall have the effect of a special verdict. In considering the case upon review the court may draw inferences of fact. (P. L. 1912, p. 397, rule 70; S. C. R. 1913, rule 110.)

Either party is not restricted to the service of a single set of interrogatories. Reeves *v.* Jonom, 37 N. J. L. J. 70.

371. Preparation of Statement.

Sec. 71. The statement of the case shall be prepared by the moving party and served on the adverse party. Objections thereto (if any) must be made within five days from service, and in that event the statement of the case shall be settled by the trial judge. (P. L. 1912, p. 397, rule 71; S. C. R. 1913, rule 111.)

372. Trial by Referee. Force of Award as Verdict.

All rules of reference entered by consent of parties in this court, or in the circuit, may state whether the award of the referee is to have the effect of a finding of arbitrators, or merely the force of a verdict, and in the absence of such statement the award shall be treated as a verdict. (S. C. R. 1913, rule 99.)

373. Account Reference to Referee: Confirmation on Notice: Exception: Time.

In all cases in which matters of account shall be referred by the court or justice to a referee, the party moving for a confirmation of the report shall give notice in writing of the filing thereof; and the opposite party shall have the time limited in the statute for filing exceptions thereto after the receipt of such notice. (S. C. R. 1913, rule 100.)

374. Cause Referred: Entry of Rule of Reference: Report Filed: Exceptions to Report, etc.

When a cause in the Supreme Court is referred to a referee or referees pursuant to sections 155 and 156 of the Practice Act of 1903, the rule of reference shall be entered in the minutes of this court, and the original report filed in the clerk's office of this court; and in case of reservation of trial by jury and of exceptions to the report, a

copy of the reservation and the original exceptions shall be likewise filed in said clerk's office. (S. C. R. 1913, rule 101.)

375. Precedence of Causes on Trial and Argument at Bar and Circuit.

In the calling on of all trials and arguments at the bar of this court, and at the circuits in the counties, issues of fact triable by jury shall be preferred to arguments on matters of law; of issues of fact, those to be tried by a jury from a different county from that in which the court sits, shall be preferred; and next to these, issues to be tried by a struck jury shall have precedence, but on all issues in fact as well as on all arguments in law, whether the cause be of a civil or criminal nature, those in which the State is really a party and in interest shall always have the preference; subject to the above rule, the court as well at bar as at the circuits, will call the causes according to their standing on the list; and if the party noticing shall not bring on the trial or argument of the cause so called, the opposite party shall be entitled to the dismissal of the proceeding or to judgment in his favor, unless the court shall order otherwise. (S. C. R. 1913, rule 102.)

376. Plaintiff Fails to Move Cause—Non-Suited. Review of Order.

When an issue joined in this court is duly noticed for trial at the circuit, and the plaintiff fails to move the same when regularly called for trial, the justice of this court holding the circuit, or the judge to whom such issue has been referred for trial, may consider the reasons, if any, alleged by the plaintiff for such failure; and if no reason be alleged, or those alleged be insufficient to excuse the default, said justice or judge may order that

the plaintiff be non-suited, and on the filing of his order a judgment of non-suit shall be entered. Such order, or the refusal of the justice or judge to make such an order, shall be subject to review at the next term of this court. (S. C. R. 1913, rule 103.)

377. Clerk at Circuit to List Causes: Correction of List: Listing by Opposite Party.

The clerk of the circuit court shall set down the causes noticed for trial, at every term, on a list which shall contain the names of the parties and their attorneys, the nature and style of the action, when noticed and the date of the issue; and shall furnish the court with one copy of the list, and keep another upon his table for the use of the bar, or furnish printed copies of the same when ordered pursuant to the statute. Any party may apply to the court to have the said list corrected during the first day of the term, but not after. After a cause has been noticed for trial, the party receiving the notice may, if he thinks proper, file a copy or abstract of the notice, and the date of the issue, with the clerk of the circuit, at least six days before the term, and the clerk shall set down the cause on his list, in the like order as if the same had been filed by the party giving the notice for trial. (S. C. R. 1913, rule 105.)

378. Jury Trials: Counsel Limited to One Hour: Proviso.

On the trial of all jury causes at the circuit, and at the over and terminer and quarter sessions, the counsel of the respective parties shall be limited to a time not exceeding one hour a side, unless permission be given for an enlargement of such time before the argument is commenced; provided, that nothing in this rule shall prevent the said courts

from limiting the time of counsel as heretofore. (S. C. R. 1913, rule 106; see rule 157.)

Only two counsel on each side permitted to speak in succession.

379. One Counsel Shall Examine or Cross-examine Witness.

On the trial of causes, one counsel only shall examine or cross-examine a witness. (S. C. R. 1913, rule 107.)

IX. New Trial as to Part.

380. Questions on New Trial.

Sec. 72. In case a new trial is granted it shall only be a new trial of the question or questions with respect to which the verdict or decision is found to be wrong, if separable. (P. L. 1912, p. 397, rule 72; S. C. R. 1913, rule 131.)

Applicable also to appeals. See rule 147, sec. 382.

Under this section, where, upon an appeal from a judgment against two defendants, it appears that the only question with respect to which the decision is wrong and requires a new trial is one involving the liability of one of the defendants only, and that it is entirely separable from the question upon which the liability of the other depends, which was decided correctly, the judgment against the latter will be affirmed, and a reversal and new trial granted in favor of the former defendant only. Moersdorf *v.* N. Y. Tel. Co., 84 L. 747, 754; 87 A. 473.

Under this rule and supreme court rule 147, post, 382, if a judgment in ejectment is right as to part of the premises claimed and erroneous as to the remainder, it will be reversed only as to the part with respect to which there was error. Camden *v.* McAndrews Co., 85 L. 260, 268; 88 A. 1034.

In an action against joint tort-feasors, the questions as to the liability of each defendant are separable, and the verdict and decision thereon is subject to the provisions of this section. Under this section, where judgment has been recovered against three joint tort-feasors, and the judgment against two is wrong, but as to the other correct, the judgment, so far as it is correct, will be affirmed, and the granting of a new trial, limited to such of the defendants against whom the judgment was wrong. Hagy *v.* Hafner, 86 L. 502, 504; 94 A. 48.

That (1) the verdict is against the evidence; (2) that it is against the weight of the evidence; (3) that it is contrary to the charge of the court, are questions peculiarly the subject of a rule to show cause, and not the subject of exceptions. Christy *v.* N. Y. C. & H. R. R., 37 N. J. L. J. 350.

381. New Trial as to Damages Only.

Sec. 73. When a new trial is ordered because the damages are excessive or inadequate, and for no other reason, the verdict shall be set aside only in respect of damages, and shall stand good in all other respects. (P. L. 1912, p. 397, rule 73; S. C. R. 1913, rule 132.)

New trial—criticism of rule—article in 38 N. J. L. J. 38, 98.

382. Rule 131 and 132 Applicable to Appeals When.

Rules 131 (§ 380) and 132 (§ 381) shall apply to appeals in which a venire de novo is directed. (S. C. R. 1913, rule 147.)

CITED.—By this rule provisions of rules 72 and 73, P. A. 1912, applies to appeals as well as to motions for new trials. Camden *v.* McAndrews, 85 L. 260, 268; 88 A. 1034.

383. New Trial When Jury Disregards Binding Instructions.

When on a trial at the circuit of an issue out of this court the jury shall disregard the instructions of the judge holding such circuit to find a verdict for either of the parties as on matters of law, such judge shall have the power to set aside forthwith such verdict and grant a new trial, if he shall deen it advisable so to do. (S. C. R. 1913, rule 121.)

384. Application for New Trial Made to Trial Judge: Discretion of Judge: Rule to Take Testimony.

Where either of the parties to a trial at the circuit shall desire a rule to show cause why a new

trial shall not be granted, he shall apply to the judge before whom the trial took place for such rule. The judge to whom such application is made shall exercise the same discretion in granting such rule as is now exercised by the court, and shall prescribe the terms; and if the case in his opinion requires it, he may grant a rule to take testimony or any other rule proper for expediting the cause. (S. C. R. 1913, rule 122.)

385. Application for Rule to Show Cause Ex Parte Made Within Six Days After Verdict. Failure to Make in Time Bar. Exception.

Such application shall be made ex parte, and within six days after the verdict or finding. The rule when granted shall be forthwith entered by the clerk of this court and proceeded in and brought to hearing in the same manner as heretofore. In default of compliance with the foregoing requirement, no application for a rule to show cause by the party so failing shall be heard by the court, except upon matters which were not known to the party before the expiration of six days after trial. If such rule rule shall be refused, applications may be made to the court as heretofore. This rule shall not be applied to causes tried ex parte. (S. C. R. 1913, rule 123.)

386. Motion for New Trial: Time to Make.

All motions for new trial in causes tried at bar shall be made within the term in which the trial is had, and all motions for new trial in causes tried at the circuits, and all motions for setting aside inquisitions, awards and reports of referees, shall be made within the term to which the postea, or the award or the report of referees, shall be returned, and not afterwards, provided the same be returned within the first two days of the term; if

not so returned, the same shall be made before the end of the succeeding term. (S. C. R. 1913, rule 124.)

387. Rule to Show Cause—Reasons Served, Time, Argument On.

On all rules to show cause for new trials, in arrest of judgment, or to set aside inquisitions, awards and reports of referees, the party entering such rule shall write down the reasons upon which he rests such motion with such particularity as is now required in stating grounds of appeal, and shall cause the same to be filed and a copy thereof to be served on the opposite party within thirty days after the entry of the said rule, and the argument thereof shall be brought on at the next term after the entry of such rule, or the same shall be discharged, unless for special cause shown. (S. C. R. 1913, rule 125.)

388. Rule to Show Cause: State of Case on: Service of: Objection to Case: Settlement of Case by Judge.

The party obtaining a rule to show cause why a new trial should not be granted shall, within thirty days after obtaining such rule, prepare and deliver to the adverse party a state of the case on which such motion is intended to be argued. And if the party to whom the same has been delivered shall not make written objections thereto for the space of twenty days, he shall be considered as consenting to the case as stated. But if the party served with such state of case, shall, within twenty days after receiving the same, serve a written notice on the opposite party of his disagreement thereto, specifying the particular matters to or on account of which he dissents, then the party obtaining such rule shall forthwith make application to the justice or judge before whom

the trial was had to settle the state of case; and the justice or judge shall, upon such notice as he shall direct to be given to the adverse party, and at such time and place as he shall appoint, proceed to settle and determine the state of case on which the cause shall be argued. (S. C. R. 1913, rule 126.)

389. On Motion for Rule to Show Cause, One Counsel a Side Can Be Heard.

On motions for rules to show cause, but one counsel shall be heard in opposition to the rule, and the same counsel that made the motion shall reply if any reply shall be made. (S. C. R. 1913, rule 127.)

390. Judgment on Rule Entered Nunc Pro Tunc. Time.

If a rule to show cause why the verdict of a jury or finding of a justice should not be set aside and a new trial granted shall be discharged, the party entitled to the judgment shall be allowed to enter judgment final nunc pro tunc as of the time when judgment nisi was taken, and the execution thereon shall be endorsed to the effect that interest thereon shall be reckoned as from the date of the judgment nisi, but the date of the actual entry of the rule for final judgment shall be expressed therein. (S. C. R. 1913, rule 128.)

X. Findings of Fact by Court.

391. Findings by Court.

Sec. 74. In trial without a jury, a finding of the facts in issue, signed by the trial judge, shall be filed and entered on the record. In actions in the Supreme Court the findings shall be included in the postea. Upon request of any party, the rulings

of the court upon any point of law involved in the decision or judgment shall be stated in the findings. (P. L. 1912, p. 398, rule 74; S. C. R. 1913, rule 113.)

See P. A. 1912, secs. 22, 25; supra, secs. 282, 285.

The only reason for stating the ruling of the court in the findings is to make them the foundation for review. The fundamental rules of review on error, that there must be a ruling, that it must be adverse, and that the trial court must, through the instrumentality of a formal challenge, have an opportunity to reconsider and modify or change it, have not been nullified or emasculated by anything contained in the New Practice Act or the rule made in pursuance thereof. Webster *v.* Freeholders, 86 L. 256, 258; 90 A. 1110.

392. Effect of General Finding.

Sec. 75. A general finding in favor of the plaintiff or defendant, respectively, is deemed to be a finding in his favor of all material allegations put in issue.

Where only part of the material allegations put in issue are found for the prevailing party, the finding must indicate the particular facts that are found. (P. L. 1912, p. 398, rule 75; S. C. R. 1913, rule 114.)

See Webster *v.* Freeholders, 86 L. 256; 90 A. 1110.

XI. Judgment.

393. Filing Postea: Staying Execution.

Sec. 76. In actions in the Supreme Court, the postea may be filed immediately after relicta given or verdict obtained and judgment shall be entered forthwith. But the trial judge of the court, or any justice thereof, may stay execution pending an application for a new trial. (P. L. 1912, p. 398. rule 76; S. C. R. 1913, rule 116.)

394. Failure to File Postea, Waiver of Verdict or Finding.

Unless the postea be filed within ten days after the first day of the term next after the trial, such failure shall be considered, at the option of the opposite party, a waiver of the verdict or finding, unless the court, in its discretion, shall order otherwise. (S. C. R. 1913, rule 117.)

The provisions of section 209, Practice act, 1903, requiring courts trying supreme court issues to return the circuit record, verdict, etc., to the supreme court, at the next term, are directory and not mandatory. Notwithstanding this section (209), the supreme court, in its discretion, pursuant to rule 117, formerly rule 36, may permit the filing of the transcript and postea, and entry of judgment at a late time. Weinberger *v.* Erie R. Co., 90 A. 1013; 86 L. 259.

XII. Appeals.

See P. A. 1912, secs. 25-29; supra, secs. 285-289; Forms 36, 37.

395. Time of Notice. Taking Appeals. Transcript.

Sec. 77. Appeals shall be taken by notice, which shall be served on the adverse party and filed within the time limited for bringing writs of error, and at least thirty days before the appeal is argued.

The notice shall be entitled in the court from which, and shall state the court to which, the appeal is taken, and shall be filed with the clerk of the former court who shall forthwith transmit to the appellate court a transcript of everything required to be removed under section 26 of the Practice Act (1912, sec. 286), together with a certified copy of the notice of appeal. (P. L. 1912, p. 398, rule 77, as modified by S. C. R. 1913, rule 137.)

CITED.—Sentliffer *v.* Jacobs, 86 A. 929, 930.

396. No Severance. All Parties Served Notice.

Sec. 78. No severance of parties is necessary, but any party entitled, and refusing to join in the appeal, shall be served with notice of appeal. (P. L. 1912, p. 398, rule 78; S. C. R. 1913, rule 138.)

397. Grounds of Appeal.

Sec. 79. The notice of appeals shall state the part of the judgment appealed from, if less than the whole, and (in lieu of an assignment of errors) may state the grounds of appeal. No petition of appeal shall be used. The grounds of appeal (if not stated in said notice) shall be served and filed within thirty days after filing notice of appeal. (P. L. 1912, p. 398, rule 79; S. C. R. 1913, rule 139.)

There is no provision in the New Practice act for appeals from interlocutory order, nor is there, as already stated, any authority for such appeals at common law. Young *v.* Board, 84 L. 770, 771; 87 A. 347; Sentliffer *v.* Jacobs, 84 L. 128, 130; 86 A. 929.

398. Cross Appeals.

Sec. 80. Any respondent may appeal from the judgment by giving notice of cross appeal, which shall be governed by the rule applying to notice of appeals, except that it shall be served on the adverse party and filed not more than fifteen days after service of the notice of appeal. (P. L. 1912, p. 399, rule 80; S. C. R. 1913, rule 140.)

399. Statement of Case: Rules Applicable to Appeals.

Sec. 81. The rules of court respecting the preparation and service of the statement of the case upon writs of error shall apply to appeals taken under Practice Act of 1912. The statement of the case shall include the notice of appeal, the record of the case, and so much of the evidence taken and

documents filed in the cause as shall be necessary to present the questions raised upon the appeal. (P. L. 1912, p. 399, rule 81; S. C. R. 1913, rule 141.)

400. Security on Appeal: Notice of Appeal to Stay Execution, When.

Sec. 82. The service and filing of a notice of appeal shall stay execution on the judgment appealed from, but only upon giving security in the manner and for the purposes prescribed in the "Act respecting writs of error," Revision, approved March twenty-seventh, one thousand eight hundred and seventy-four, and the acts amendatory thereof and supplementary thereto. (P. L. 1912, p. 399, rule 82; S. C. R. 1913, rule 142.)

401. Effect of Granting Rule to Show Cause.

Sec. 83. Granting to a party a rule to show cause why a new trial shall not be granted, shall be a bar against him to taking or prosecuting an appeal, except on points expressly reserved in said rule. A rule to show cause why a new trial should not be granted may, in the discretion of the court, be special, and then the question shall be heard and decided on the grounds upon which the rule was allowed. (P. L. 1912, p. 399, rule 83; S. C. R. 1913, rules 129, 130.)

402. Reversal of Judgment as to Some Appellants and Affirmance as to Others.

In cases where there are joint appellants or joint respondents and error requiring a reversal or modication of the judgment below appears as respects one or more of said appellants or respondents, but not as respects all of them, the judgment may, in the discretion of the court, be affirmed as to the appellants or respondents not injured by such error. (S. C. R. 1913, rule 143.)

403. Objection to Evidence: Record Must Show Grounds of Objection Stated to and Adverse Ruling by Trial Judge.

In order that an objection to evidence may be available on appeal, the record must show that the ground of objection was stated to the trial judge and that he ruled thereon adversely to the appellant. (S. C. R. 1913, rule 144.)

404. Reasons for Reversal Filed in Appeals From District Court: Time.

In all appeals taken from judgments rendered in District Courts, the appellant shall, at least ten days before the opening day of the next term of the Supreme Court following the taking of said appeal, unless otherwise ordered by this court, or a judge thereof, file with the clerk of the supreme court a brief specification of the determinations or directions of the District Court with respect to which he is dissatisfied in point of law, a copy of which shall, upon the argument of the appeal, be furnished to the court with the state of the case and the copy of the judgment record, and the appeal shall be heard and determined solely upon the points of law so specified. (S. C. R. 1913, rule 145, amended June, 1916.)

405. Appeals From District Court to be Perfected Before Listed for Argument: If Not Perfected Clerk to Notify Attorneys.

No District Court appeal shall be placed upon the calendar for argument unless the appeal has been duly perfected in the manner required by law and the rules of this court; and in cases where such appeal has manifestly not been so perfected at the time of the clerk's receiving notice of argument in the cause, such notice shall be returned to

the attorney of the appellant without filing, and the clerk shall also notify the attorney of appellee of such return. (S. C. R. 1913, rule 146.)

405a. Motions to Dismiss Appeals from District Courts.

Motions to dismiss appeals from district courts may be made at a regular term, or in vacation before a single justice of this court; and it shall be the duty of the moving party to submit upon such motion a certificate of the clerk of this court as to the state of the appellate proceedings in this court, including the dates of filing papers, and the contents thereof, when such contents are material to the motion. (S. C. R. 1913, rule 146a, June, 1916.)

406. Supreme Court Rule Applicable to Circuit Courts: When.

The foregoing rules shall, so far as appropriate, be applicable to the practice of the Several Circuit Courts. (S. C. R. 1913, rule 219.)

An act to provide for the transfer of causes by and between the Court of Chancery and the Supreme Court, or Circuit Courts, or Courts of Common Pleas; and for the practice upon appeal where no such transfer has been made. (P. L. 1912, p. 417, as amended by P. L. 1915, p. 39.)

407. Causes Transferred to Proper Court.

Sec. 1. No civil cause or matter, hereafter pending in any court mentioned in the above title, which has not jurisdiction of the subject matter, shall be dismissed for that cause only, but the cause or matter shall be transferred with the record thereof and all papers filed in the cause, for hearing and determination to the proper court,

which shall thereupon proceed therein as if the cause or matter had been originally commenced in that court. The record shall, when necessary, include a transcript of all entries and proceedings in the cause. (P. L. 1912, p. 417.)

This act permits a transfer from the court of chancery to a law court only when the chancery court has not jurisdiction of the subject-matter. Commonwealth Roofing Co. *v.* Riccio, 87 A. 114, 115; 81 E. 486. Action instituted at law by assignee of wife against her husband to recover money loaned transferred to court of chancery as contract sued on was between husband and wife over which a court of law no jurisdiction. Dunham *v.* Adams, 88 A. 696, 697; 82 E. 625. See Smith *v.* Morrons, 93 A. 695, 697.

Where court of errors and appeals held court of chancery wrongfully assumed jurisdiction, hence, reversed the decree and remanded cause directing the court of chancery to transfer the cause to the court of law under this act. See Throff *v.* Public Service, 93 A. 693, 694.

Before the issuing of process, a cause is not "pending" in chancery, so as to make it the subject of removal into the law courts, under this act. Herman *v.* Mexican Pet. Co., 96 A. 492, 493.

408. When Transfer Made. Entry of Decree in Proper Court.

Sec. 2. Such transfer may be made at any stage of the proceedings and upon, or without, application, and subject to rules, or the special orders of court; and upon an appeal being taken in any such cause that had been so transferred the appellate court may, subject to rules, hear and decide such appeal and direct the appropriate decree or judgment pronounced thereon to be entered in the court to which such cause ought to have been transferred. (P. L. 1912, p. 417, as amended by P. L. 1915, p. 39, sec. 2.)

409. Rules.

Sec. 3. Rules for such transfer from the Court of Chancery shall be made by that court; rules for such transfer from the other courts shall be made by the Supreme Court; and rules for the transfer of causes after decision on appeal in cases where such transfer ought to have been previously made, shall be made by the Court of Chancery and the Supreme Court respectively. (P. L. 1912, p. 417, as amended by P. L. 1915, p. 39, sec. 3.)

410. Appellation.

Sec. 4. This act may be referred as "The Transfer of Causes Act (1912)." (P. L. 1912, p. 417, sec. 4.)

411. Transfer of Causes to Court of Chancery, Only on Order of Court or a Justice.

No cause or matter shall be transferred to the court of chancery from this court or from any of the inferior courts of common law, without the order of court or a judge. (S. C. R. 1913, rule 208.)

412. Clerk to Give Receipt and Take Receipt for Papers When Causes Transferred From or to Court of Chancery.

The clerk of a court to which a cause is transferred from the Court of Chancery shall give a receipt in writing, describing the papers received; and shall take a similar receipt from the clerk in chancery when a cause is transferred from his court to the Court of Chancery. (S. C. R. 1913, rule 209.)

Forms.

Schedule B. Annexed to Practice Act, 1912.—Forms.

No. 1. Writ of Summons.

The State of New Jersey to John Doe.

[L. S.] You are summoned to answer the annexed complaint of Richard Roe in an action at law in the Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, *within twenty days* after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this .....day of....., nineteen hundred and.....

....., Wm. Riker, Jr.,

Attorney. *Clerk.*

Note: *All writs issuing out of the Circuit Court or Court of Common Pleas should be attested in the name of a Judge of the Court from which the writ issues.*

No. 2. Writ of Replevin.

[L. S.] The State of New Jersey, to the Sheriff (or ..... one of the coroners) of the County of .....

Greeting: We command you that if John Doe shall make you secure, you cause to be taken and delivered to him, one bay horse (*describe sufficiently all the goods in question*) which said Richard Roe took and unjustly detains as is said; and that you summon the said Richard Roe to answer the annexed complaint of John Doe in an action at law in the Supreme Court. And that you notify him that unless he file his answer to said com-

plaint with the Clerk of the Supreme Court, at Trenton, *within twenty days* after service upon him of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against him.

(*Attestation clause as in No. 1.*)

(NOTE: *See Note to Form No. 1 above.*)

No. 2a. SUMMONS IN EJECTMENT.

The State of New Jersey to John Doe.

[L. S.] You are summoned to answer the annexed complaint of Richard Roe in an action at law in the Supreme Court wherein said Richard Roe demands of you the possession of (the equal undivided one-fourth part of) a tract of land with the appurtenances situate in the township of A in the county of B and particularly described in said complaint. And take notice that unless you file your answer to said complaint with the Clerk of the Supreme Court, at Trenton, within twenty days after service upon you of this writ and of the annexed complaint, judgment will be entered against you and you will be turned out of possession of said land.

Witness, &c.

No. 3. COMMENCEMENT OF COMPLAINT.

Supreme Court of New Jersey.

Hudson County.

John Doe,
Plaintiff,
vs.
Richard Roe and George Jones, Executor of the Will of Thomas Brown,
Defendants.
} Complaint.

(*State in the title the names of all the parties and the character in which they appear.*)

Plaintiff (*state residence*) says that (*to be filled up in accordance with the following forms*):

The plaintiff demands (*as in the following forms*):

(Signed)

.....,

Attorney for Plaintiff.

No. 4. ON BOOK ACCOUNT.

1. He sues for the price of goods sold and delivered to the defendant upon a book account, of which a copy is attached hereto, and the whole of which is due and unpaid.

Plaintiff demands, as damages, the amount due thereon, being $500 with interest from .....

No. 5. ANOTHER FORM OF THE SAME.

1. He, being a merchant doing business in Trenton, did, between July 1, 1911, and October 1, 1911, sell and deliver to the defendant sundry goods, under an agreement between the parties, that plaintiff should charge defendant a reasonable price for the goods so sold.

2. The amount due on the account on October 1, 1911, charged in conformity with said agreement, was, and still is, $500.

3. Defendant has not paid the same.

Plaintiff demands, as damages, $500 with interest from .....

No. 6. ON A NOTE OR OTHER WRITTEN INSTRUMENT FOR PAYMENT OF MONEY.

1. He sues for the amount of a promissory note for $1,000 made by the defendant, Richard Roe, to plaintiff, a copy of which is hereto annexed.

2. Plaintiff still owns said note. It has not been paid.

Plaintiff demands, as damages, $1,000 with interest from .....

No. 7. ANOTHER FORM FOR THE SAME AGAINST MAKER AND INDORSER.

1. On August 1, 1911, the defendant, Richard Roe, made and delivered to plaintiff his note of that date for $1,000 payable to Thomas Brown, or order, 3 months from date at the..... Bank of Trenton.

2. The payee afterwards endorsed said note to the plaintiff.

3. On the day the same fell due it was presented for payment at the place where it was payable, but was not paid (*or state facts excusing presentment*).

4. Notice thereof was duly given to said Brown.

5. Said note is now the property of plaintiff and is unpaid.

Plaintiff demands, as damages, $1,000 with interest from .....

No. 8. FOR MONEY LENT.

First Count:

1. Plaintiff on January 1, 1912, lent to defendant $200 to be repaid 30 days thereafter.

2. Defendant has not paid the same though the 30 days have elapsed.

Second Count:

1. Plaintiff on January 10, 1912, lent to defendant $100 to be repaid on demand.

2. On January 20, 1912, plaintiff demanded of the defendant payment thereof.

3. Defendant has not paid said sum.

Plaintiff claims, as damages, $300 with interest from.....

No. 9. TO RECOVER SALARY.

1. On July 1, 1910, defendant hired plaintiff as a salesman at a salary of $1,000 per year, payable quarterly.

2. From that day until July 1, 1911, plaintiff served defendant as such salesman.

3. Defendant has paid on account of said salary only $500, leaving due a balance of $500.

Plaintiff claims, as damages, $500 with interest from.....

No. 10. FOR RENT.

First Count:

1. On January 1, 1911, plaintiff and defendant executed a lease (under seal) of the premises No. 20.....street, Trenton, of which a copy is annexed hereto.

2. A half year's rent of $200 due July 1, 1911, is unpaid.

Plaintiff demands—

1. As damages $200 and interest from.....on the first count.

No. 11. BY PURCHASER OF A BUSINESS AGAINST A SELLER FOR DAMAGES.

1. On July 1, 1910, defendant was a physician practicing in the town of ....., and plaintiff was also a physician.

2. On that day, in consideration that plaintiff would purchase of defendant the good-will of his practice for $1,000, he agreed with plaintiff that he would not practice medicine or in any manner do business as a physician in said town for a period of ten years after that date.

3. Plaintiff on that day purchased from defendant the good will of his practice for the price and on the terms aforesaid.

4. Plaintiff, on or about that time, opened, and has since maintained an office in said town, as a practicing physician.

5. Defendant, in violation of said agreement, on January 1, 1912, opened an office in said town, and commenced, and still continues, to practice medicine, and do business as a physician in said town.

6. Plaintiff's professional income has been much lessened thereby.

Plaintiff demands—

1. $5,000 damages.

NO. 12. PLAINTIFFS IN ALTERNATIVE; ACTION AGAINST COMMON CARRIER FOR LOSS OF GOODS. (Act 1912, § 4.)

Supreme Court of New Jersey.

Hudson County.

A. B. and in the alternative C. D.,
Plaintiffs,
vs.
Erie Railroad Company,
Defendant.
} Complaint.

Plaintiffs (*state residence*) say that:

1. The plaintiff, A. B., being a manufacturer of silk, doing business in Paterson, on January 1, 1912, contracted in writing to sell ten bales of silk of the value of $1,000 to the plaintiff, C. D., who was a merchant doing business in Buffalo. A copy of the contract is hereto annexed.

2. By the terms of said contract, A. B. agreed to ship said goods from Paterson, via Erie Railroad, to C. D., at Buffalo.

3. The terms of the contract were such as to make it uncertain whether the title to the goods so sold passed to the buyer on delivery of the goods to said railroad company for transportation at Paterson, or on delivery of said goods to the buyer at Buffalo.

4. On January 5th, 1912, A. B. delivered said goods to the defendant (being then a common carrier) at Paterson. Said company received the same and agreed, in consideration of freight charges to be paid on delivery of the goods, to transport and deliver them to C. D. at Buffalo.

5. On January 6th, 1912, said goods were destroyed by fire at .....while in possession of the defendant under said agreement of transportation.

6. Plaintiff claims that either A. B. or, in the alternative, C. D., is entitled to damages from the defendant for loss of said goods.

Plaintiffs, in the alternative, demand $1,000 damages.

Plaintiffs pray that the court may determine which one of them is entitled, under the contract between themselves, to recover from the defendant.

No. 13. DEFENDANTS IN ALTERNATIVE; ACTION ON A CONTRACT OF SALE. (Act 1912, § 6; Rule 18.)

Supreme Court of New Jersey.

Hudson County.

A. B., Plaintiff,

vs.

C. D., and in the alternative, E. F., Defendants.

} Complaint.

Plaintiff (*state residence*) says that:

1. On January 2, 1912, defendant, C. D., represented to plaintiff that he (C. D.) was the agent of defendant, E. F., authorized to sell the securities hereinafter mentioned of said E. F.

2. On the same day, by written agreement, plaintiff, relying on the said representations, agreed to buy, and said C. D. agreed to sell, for account of said E. F., 100 shares of the capital stock of the .....company, for the price of $10,000; delivery to be made and the price paid on the then next day. A copy of said agreement is annexed.

3. Neither of said defendants delivered said stock at the time agreed, nor at all, and both of them still refuse to deliver it.

4. Said C. D. still insists that he was duly authorized by said E. F. to make said contract; but said E. F. denies that he had so authorized C. D., and he repudiates the contract. Plaintiff does not know whether or not said C. D. was so authorized.

Plaintiff demands against the defendant, E. F., or, in the alternative, against the defendant, C. D., $3,000 damages.

No. 13a. COMPLAINT IN EJECTMENT AGAINST THE DEFENDANT NAMED IN THE SUMMONS.

(Title as in Form 3.)

Plaintiff (*state residence*) demands of C. D., the defendant herein, the possession of the equal undivided one-fourth part of

a tract of land, with the appurtenances, situated in the township of ....., in said county, containing ..... acres, more or less, bounded on the north by lands of E. F., on the south by lands of G. H., on the east by lands of I. K., on the west by lands of L. M. And the plaintiff says that his right to the possession of the same accrued on the .....day of ....., eighteen hundred and....., and that the defendant wrongfully deprives him of the possession thereof, to his damage .....dollars.

....,
Attorney of Plaintiff.

No. 13b. COMPLAINT IN EJECTMENT WHERE THE LANDLORD, OR OTHER PERSON, IS ADMITTED TO DEFEND.

(Title as above.)

Plaintiff (*state residence*) demands of C. D. and R. S., the defendants herein (the summons having been issued against the said C. D. and the said R. S. having been admitted to defend), (continue as in form 13a to the end).

Answers and Counter-Claim.

No. 14. COMMENCEMENT OF ANSWER.

Supreme Court of New Jersey.

Hudson County.

A. B. and others, Plaintiffs,
vs.
C. D. and others, Defendants.
} Answer.

Defendants (*state residence*) say that:

(*To be filled up in accordance with the following forms.*)

(Signed)

....,
Attorney for Defendant.

COUNTER-CLAIM.

(Title.)

Defendant says, by way of counter-claim, that:

(*Fill up in accordance with the following forms.*)

(Signed)

.....,

Attorney for Defendant.

No. 15. ANSWER AND COUNTER-CLAIM.

(Title.)

Defendant says that:

1. He admits the first paragraph;

2. He denies the second paragraph.

3. (*To be filled up.*)

4. By way of counter-claim against the plaintiff and against X. Y., a third party, the defendant says that:

1. He repeats the statements in paragraph 3 above.

2. (*To be filled up.*)

The defendant counter-claims $.....damages.

(Signed)

.....,

Attorney for Defendant.

No. 16. GENERAL DENIAL.

1. He denies the truth of the matters contained in the complaint.

No. 17. GENERAL DENIAL WITH NEW MATTER.

1. He denies the truth of the matters contained in the complaint.

2. On March 1, 1911, plaintiff executed and delivered to defendant a release, under seal, discharging all demands then existing in favor of plaintiff against defendant.

No. 18. SEVERAL DEFENSES.

First Defense to First Count:

1. On May 1, 1911, defendant assigned and delivered to plaintiff a due bill of John Doe for $500, which plaintiff accepted as a full satisfaction of the demand set up in the first count of the complaint.

Second Defense to First Count:

2. On July 1, 1911, plaintiff signed, sealed and delivered to defendant a release of all demands of plaintiff against defendant to that date.

Defense to Second Count:

1. He denies the first paragraph of this count.

2. As to the statements in the second paragraph, defendant has not any knowledge or information thereof sufficient to form a belief.

3. He denies the fourth paragraph of this count except so far as admitted in the following statement:

The plaintiff received (*etc., stating the facts as set up by defendant*).

Reply.

No. 19. GENERAL DENIAL.

(Title.)

Plaintiff denies every allegation in the answer.

(Signed)

....., *Attorney for Plaintiff.*

No. 20. PARTIAL DENIAL.

Plaintiff denies the second paragraph of the answer.

No. 21. DURESS.

Plaintiff replies that the release mentioned in the answer was extorted from him by defendant by threats that, if not given, defendant would beat and maim the plaintiff.

Postea.

No. 22.

This case was tried before Justice (*or* Judge) A. B. with a jury at the .....Circuit, on December 10, 1911.

The jury renedered a general verdict against the defendant and in favor of the plaintiff for $5,000. (*State amount in words and figures.*)

(Signed)

A. B.,

J.

No. 22a. ANSWER IN EJECTMENT BY TENANT IN POSSESSION WHERE HE DEFENDS FOR THE WHOLE PREMISES CLAIMED.

(Title.)

Defendant says that:

1. He denies the truth of the matters contained in the complaint.

No. 22b. ANSWER BY TENANT IN POSSESSION DEFENDING FOR ONLY A PART OF THE PREMISES.

(Title.)

Defendant says that:

1. He defends this action as to a part of the premises claimed in the complaint, to wit (*description*), as to which part he denies the truth of the matters contained in the complaint.

No. 22c. ANSWER BY LANDLORD OR OTHER PERSON ADMITTED TO DEFEND, AND DEFENDING SEPARATELY.

(Title.)

1. Defendant, R. S., who is admitted as landlord (*or*, as a proper person, as the case may be) to defend this action, says (as in 22a or 22b, according to the circumstances of the case).

No. 22d. ANSWER BY LANDLORD OR OTHER PERSON ADMITTED TO DEFEND, WHEN DEFENDING JOINTLY WITH THE TENANT IN POSSESSION.

(Title.)

1. Defendant, C. D., together with R. S., who is admitted as (landlord, or a proper person, as the case may be) to defend this action, say (as in 22a or 22b, according to circumstances of the case).

Judgments. (Pr. Act, 1912, s. 20).

(NOTE: *When the following forms of judgment are used the postea may be omitted from the judgment record.*)

No. 23. JUDGMENT FOR PLAINTIFF.

This action was tried before Justice (*or* Judge) A. B. with (*or without*) a jury, at the ..... Circuit, on December 10, 1911.

The cause having been heard and submitted to the jury, they return their verdict as follows: (*If a general verdict be found by the jury or entered by order of the court upon answers of the jury to the court's questions, copy the verdict at this point. If a special verdict be rendered, copy that at this point.*)

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of $..... and his costs, which are taxed

at the sum of $....., making in the whole the sum of $..... (*State amounts in words and figures.*)

Judgment entered December ....., 1911.

NOTE: *If the cause be tried without a jury, the findings of the court should be substituted in the above form for the verdict.*

No. 24. JUDGMENT FOR DEFENDANT.

(*Follow the foregoing form to and including the verdict or court's findings; then continue thus:*)

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and that the defendant recover of the plaintiff his costs, which are taxed at $.....

(*Add date of entry.*)

No. 25. JUDGMENT OF NON-SUIT.

This action came regularly on for trial on the..... day of April, 1912, and when called for trial the defendant appeared, but the plaintiff did not appear to prosecute his action.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed, and that the defendant recover of the plaintiff his costs, which are taxed at $.....

(*Add date of entry.*)

No. 26. JUDGMENT FOR PLAINTIFF OF ONE COUNT AND FOR DEFENDANT ON ANOTHER, AND FOR A SET-OFF AFTER TRIAL BY THE COURT.

(*Follow the first paragraph of Form 19, and continue thus:*)

The Court, having heard the parties, finds the issues for the plaintiff upon the first count and that $500 is due him thereon; and also finds the issues for the plaintiff upon the second count and that $1,000 is due him thereon; and finds the issues for the defendant upon both defenses to the third count, and further

finds his defense of set-off true, and that $1,040 is due him thereon.

Whereupon it is adjudged, that the plaintiff recover of the defendant five hundred and twenty dollars ($520) and his costs, which are taxed at $....., making in the whole the sum of $.....

(*Add date of entry.*)

No. 28. JUDGMENT RECORD.

In the Supreme Court of New Jersey
(*Or,* in the Hudson County Circuit Court).

A. B.
vs. } Judgment Record.
C. D.

C. D., the defendant in this cause, was summoned (*or* taken on capias ad respondendum) to answer unto A. B., the plaintiff therein, in an action at law upon the following complaint: (*Copy complaint, including signature of attorney.*)

The defendant answered as follows: (*Copy the answer, including signature of attorney; copy also further pleadings, if any. If supplemental pleadings be added under order giving leave, insert the words "By leave of the Court the plaintiff further complained," or "The defendant further answered," as the case may be.*)

(*Add the judgment. See Form No. 23.*)

NOTE: *If any other documents filed in the cause be necessary to present a question raised on an appeal, they may be printed in the statement of the case.*

If any pleading be amended, copy it in the amended form only, unless an appeal raises a question upon the right to amend; in that case the original pleading should be copied in the record and the amendment complained of should then be copied, introduced thus: "By leave of the Court the plaintiff was allowed to amend the said complaint," (*or,* "The defendant was allowed to amend the said answer) by adding (or striking out) the following." (*Then copy the amendment.*)

No. 29. AFFIDAVIT FOR SUMMARY JUDGMENT. (Pr. Act, § 15, Rule 80.)

(Title) } An Application for Summary Judgment. Affidavit.

NEW JERSEY, } *ss.*
MERCER COUNTY, }

A. B., being duly sworn, on his oath says: I am the plaintiff in the above-stated cause. I sold to defendant the goods mentioned in the complaint, upon his order, and delivered the same to him. The prices charged for the same, and stated in the complaint, were, and are, reasonable prices. No specific prices were agreed upon between us. The full amount of prices for which said goods were sold is $..... and the said amount is unpaid and due. I believe that there is no defense to the action.

(*Jurat.*)

NOTE: *If the affidavit is not made by the plaintiff, it should show that the affiant is in a position to be cognizant of the facts stated.*

No. 30. ORDER FOR SUMMARY JUDGMENT. (Pr. Act, § 15, Rule 80.)

(Title) Order for Summary Judgment.

It appearing by affidavit filed in the cause that the defense made by defendant's answer is sham (or frivolous) and the defendant, after due notice, having failed to show such facts as entitle him to defend;

It is ordered, that the defense be struck out and that final judgment be entered for plaintiff for the sum of $..... and costs.

(Signed) X. Y.,
Justice (or Judge).

No. 31. ORDER FOR LEAVE TO DEFEND ON TERMS. (Pr. Act, § 15, Rule 60.)

(Title) Leave to Defend on Terms.

It appearing probable by affidavit filed in the cause that the defense is sham (or frivolous), but the defendant having shown such facts as entitle him to this order;

It is ordered, that defendant have leave to defend, on condition that (*state terms; for instance*):

1. The cause be put on the list at the present term without notice of trial (*or,* the cause be tried without notice of trial on the ..... day of .....instant or such later day as may be hereafter ordered);

2. The following facts and documents be admitted:

(*State uncontested facts and documents not admitted in pleadings:*)

3. The defendant, within ..... days, make to the plaintiff, and file in the cause, a bond of himself and a surety company authorized to do business in this State, in the sum of $....., conditioned to pay such judgment, if any, as plaintiff may recover against him in this action.

(*Or,* pay into court the sum of $....., as security for such judgment as plaintiff may recover against him in this action.)

No. 32. PRELIMINARY REFERENCE. COMMISSIONER'S SUMMONS.

(Title) Commissioner's Summons (Rule 93).

To ....., Defendant:

On motion of plaintiff, you are hereby notified that on the 10th day of January, instant, at 10 o'clock A. M., at my office, No. 10 ..... street, Trenton, I will hear any motions that may be made by either party in the above-stated cause respecting the pleadings, issues, evidence, or any other matter preliminary to, and in preparation for, trial; and will make

such order respecting the same as the parties respectively may be entitled to.

Dated January 4, 1912.

.....,
Supreme Court Commissioner.

No. 33. COMMISSIONER'S ORDER. (Rule 94.)

(Title) Commissioner's Order.

Having heard the parties (*or,* having heard the plaintiff, the defendant not appearing, though duly summoned), it is ordered that:

1. PLEADINGS. Complaint be amended by stating where the contract therein stated was made.

2. ISSUES. The issue to be tried upon the first count is whether or not the letter dated June 1, 1911, written by plaintiff to defendant, accepting defendant's offer to sell, was mailed within a reasonable time after receipt of that offer.

3. PARTICULARS. Plaintiff, within ten days, serve fuller particulars as to the items of his claim under the second count.

4. ADMISSIONS. It is admitted that (*State relevant facts which are not disputed, other than those admitted in the pleadings*).

5. INTERROGATORIES. The first, fifth, seventh and tenth are struck out. All others allowed.

6. DISCOVERY OF DOCUMENTS. Plaintiff, within 5 days, serve a list under oath of all documents under his control which are relevant to any issue in the cause, except his personal diaries and his books of account.

7. (*Continue as to other matter, if any.*)

Dated January 10, 1912.

(Signed) .....,
Supreme Court Commissioner.

No. 34. JUDGMENT WITHOUT PLEADING. (Pr. Act, § 22.)

(Title.) Statement of case for judgment without pleadings.

The parties submit the following case for judgment without pleadings:

1. On January 1, 1911, at Trenton, by written agreement (a copy of which is annexed), defendant employed plaintiff for an indefinite period at a salary of $500 a month, to act as manager of defendant's manufacturing business.

2. Under said agreement, plaintiff acted as manager of said business from January 1, 1911, to January 1, 1912, when he was discharged from said employment by defendant, without notice.

3. Plaintiff claims:

(*a*) That he fully performed all his duties under said agreement in an efficient manner and gave no cause for said discharge.

(*b*) That under the terms of said agreement, he could not be lawfully discharged without 30 days' prior notice.

(*c*) That he is entitled to $500 damages.

4. Defendant claims:

(*a*) That plaintiff acted negligently in the performance of his duties under said agreement, in that he neglected to make prompt shipment of goods to customers upon the orders named, and on the dates stated, in the annexed list.

(*b*) That for the causes aforesaid plaintiff was, under the terms of the said agreement, liable to discharge without notice.

(*c*) That, by the proper construction of said agreement, plaintiff was not entitled to notice of discharge in any case.

5. The above issues are submitted for trial without a jury.

6. The Honorable ....., Justice of the Supreme Court (*or* Judge of the Circuit Court), is agreed upon as the Judge who shall hear and determine this case.

7. No appeal shall be taken from the judgment entered on his findings.

Dated February 10, 1912.

(Signed) E. F.,
Attorney of Plaintiff.
G. H.,
Attorney of Defendant.

NOTE: *Paragraphs 6 and 7 may, or may not, be used, according to the agreement of the parties.*

No. 35. FINDINGS OF THE COURT. (Rule 113.)

(Title) Findings.

This case was tried before Justice (*or* Judge) ..... without a jury at the ..... Circuit on December 10, 1911.

After hearing the evidence and counsel for plaintiff and for defendant, the court finds:

1. The statements in paragraph 1 of the first count of the complaint are supported by the evidence.

2. The statements in the second count are not supported by the evidence.

(*Continue statement of findings, dealing with each paragraph of the complaint or answer separately, unless a finding upon part of them is conclusive of the case.*)

3. The court rules that the letter from plaintiff to defendant, dated .....(Exhibit P-2), and defendant's reply, dated ..... (Exhibit P-3), constitute a memorandum in writing within the meaning of the statute of frauds.

4. The court rules that the third count of the complaint discloses no cause of action, because it states no special damage.

5. The court finds for the plaintiff and against the defendant upon the first count, and in favor of the defendant and against the plaintiff on the second and third counts of the complaint.

6. The damages of plaintiff on the first count are assessed at $.....

(Signed)

....., *J.*

No. 36. STATEMENT OF THE CASE ON APPEAL. (Pr. Act, § 26, Rules 110, 111, 141.)

(*See also Form 28, Note.*)

(Title.) { On Appeal. / Statement of the Case.

1. (*Insert here copy of the notice of appeal.*)

2. (*Insert here record of the case; see Form 28.*)

3. (*Insert transcript of the stenographer's notes of the evidence with the exhibits; or a statement of the evidence in the following form:*)

No. 37. APPEAL. (Pr. Act, Sec. 26, Rules 72, 74.)

Court of Errors and Appeals.

(Title.) Notice of Appeal.

To....., *Attorney of Plaintiff:*

Take notice, that the defendant appeals from the whole of the judgment entered in this cause (*or,* from so much of the judgment entered in this cause as adjudges that: (*state the part of the judgment appealed from*) on the following grounds:

1. The first count of the complaint discloses no cause of action. It fails to show that (*specify the particulars in which the statement of the cause of action is deficient*).

2. The letter dated .....written by plaintiff to defendant was excluded from evidence.

3. The deed dated .....made by L. M. to S. T. was admitted in evidence.

The following questions were overruled:

4. To the witness B. C. (*Copy the questions.*)

5. To the witness C. D. (*Copy the questions.*)

The following questions were admitted:

6. To the witness G. H. (*Copy the question.*)

7. The court charged the jury. (*Copy the parts of the charge claimed to be erroneous.*)

(Signed)

X. Y.,
Attorney of Appellant.

Approved March 28, 1912.

Schedule C. General Forms.

No. 38. SUMMONS ON MECHANIC LIEN.

Essex County Circuit Court.

(Title.)

You, William E. Gilmore, builder and owner, are summoned to answer the annexed complaint of E. M. Waldron & Co., a corporation, in an action at law in the Circuit Court in and for the County of Essex, in which said E. M. Waldron & Co., a corporation, claims a building lien on a certain building and lands of said William E. Gilmore, described in said complaint.

And take notice that unless you file your answer to said complaint with the Clerk of said court, at Newark, within twenty days after service upon you of this writ, and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness: Frederic Adams, Esq., Judge of the said Circuit Court, at Newark, this twenty-eighth day of December, nineteen hundred and twelve.

JOSEPH MCDONOUGH,
Clerk.

FRANK E. BRADNER,
Attorney.

NOTE: *Filed in E. M. Waldron & Co. v. Gilmore, 95 A. 129.*

No. 39. WRIT OF REPLEVIN.

THE STATE OF NEW JERSEY, to the Sheriff of the
[L. S.] County of Essex, greeting:

We command you, that if Royal Indemnity Company, a New York corporation, duly authorized to do business in the State of New Jersey, shall make you secure, you cause to be taken and delivered to Joseph Marrone Contracting Company, a corporation, check for sixteen thousand two hundred and eighty-four dollars and sixty-nine cents ($16,284.69), which said James A. Rowe, Auditor of the City of Newark, and John F. Monahan, Sheriff of the County of Essex, took and unjustly detains as is said; and that you summon the said James A. Rowe and John F. Monahan to answer the complaint of Joseph Marrone Contracting Company, a corporation, in an action at law in the Essex County Circuit Court. And that you notify them that unless they file an answer to said complaint with the Clerk of the Essex Circuit Court, at Newark, within twenty days after service upon them of this writ and the complaint, the plaintiff may proceed in the suit and judgment may be entered against them.

Witness, Hon. Frederic Adams, a Judge of our said Circuit Court, at Newark aforesaid, the sixteenth day of June, nineteen hundred and fourteen.

JOSEPH MCDONOUGH,
Clerk.

JOHN A. BERNHARD,
Attorney.

NOTE: *Used in Marrone* v. *Monahan, 95 A. 984.*

No. 40. AGREED STATEMENT OF FACTS REGARDLESS OF PLEADINGS.

(Title.)

1. The parties to this cause, plaintiff and defendant, by their several attorneys, hereby agree that the following facts are admitted, and shall constitute a special case agreed between the parties without trial, regardless of the issues raised by the plead-

ings on file in the above cause, and shall be argued and submitted to the determination of the New Jersey Supreme Court upon said facts.

2. And it is further agreed that if, upon the facts so admitted and agreed to, the court shall be of the opinion that the defendant, as executrix of Benajah D. Andrews, deceased, is entitled to hold, exempt and free from the claim of the plaintiff in the declaration set forth, the proceeds, less the surrender value thereof, of testator's life insurance policies herein after mentioned, payable to his executors, administrators and assigns, in the New England Mutual Life Insurance Company of Boston, and in the Reserve Loan Life Insurance Company of Indianapolis, Indiana, then judgment final as to the whole case shall be entered for the defendant, with costs of suit; but if, upon the facts so admitted and agreed to, the court shall be of the opinion that the defendant, as executrix of Benajah D. Andrews, deceased, is not entitled to hold the proceeds of said policies, less the surrender value thereof, exempt and free from said claim of the plaintiff, then judgment final as to the whole case, and for the sum of ten thousand two hundred and fifty dollars ($10,250.00), with interest as claimed in his declaration, and costs of suit, shall be entered for the plaintiff; the right to turn said case into a special verdict or to take any other steps that may be advisable for purposes of review and the right to review the judgment thereon by appeal, writ of error, or other appropriate proceeding being reserved to each party, plaintiff and defendant. It is further stipulated and agreed by the attorneys for the respective parties that all rights, if any, to equitable relief in the Court of Chancery of New Jersey, in the matter of the collection of the plaintiff's claim herein mentioned, are reserved to the plaintiff to the extent that such rights, if any, are not lost by the prosecution of this suit in the Supreme Court, it being expressly stipulated that the defendant does not concede or recognize any such rights, and does not waive any defense either by way of statute of limitations, laches, or otherwise, which she may have to the assertion by the plaintiff of any such equitable claim.

NOTE: *Stipulation filed in Nix & Co. v. Andrews, 96 A. 12.*

No. 41. AGREED STATEMENT OF CASE FOR JUDGMENT WITHOUT PLEADINGS.

Passaic County Circuit Court.

(Title.)

The parties submit the following case for judgment without pleading:

First. The Funk & Wagnalls Company is a corporation organized and existing under the laws of the State of West Virginia, having its principal office in New York City, New York, where its executive officers reside and exercise their respective functions.

It has a branch office in London, England, and one in Toronto, Canada, but has no office in any state of the United States except its said principal office and place of business in New York.

Its business is that of a "publisher;" it publishes several weekly and monthly periodicals, such as "The Literary Digest" and "The Homiletic Review;" it also manufactures and publishes books of various kinds, some to be sold singly, and some in "sets," such as "The Standard Dictionary," "The Standard Encyclopedia," "The Jewish Encyclopedia," and many others; these are sold both at wholesale and retail, and also "by subscription," either on the installment plan or for cash. It also sells books which are manufactured, printed and published by other publishers or book makers.

All of its publications, whether periodicals or books, are manufactured either in the State of New York or in Great Britain.

In the conduct of its business, it employes local or traveling agents, whose duties are to procure and forward to the company at its office in New York City, from persons in a specific territory, on blanks furnished by it, subscriptions for its various publications—both books and periodicals. Some of the agents are paid by a fixed salary; some are paid only a commission on the number and amount of subscriptions or orders taken, and some are paid a fixed salary, with a commission in addition thereto, provided the business done by such agent reaches or exceeds a certain amount. In the case at bar, the agent hereinafter named resides in New York City, is attached to the New York office, and is paid for his services solely on a commission basis.

Said company also does a large business in all the states of the United States and in foreign countries, as a result of advertising its products in various newspapers and periodicals, and also as a result of sending circular letters descriptive of its various books and periodicals through the United States mails. Such orders when received from patrons in any of the states of the United States, no matter by what means procured, are always filled by being sent, either by mail, express or freight, from the office and place of business in New York City.

Second. Prior to June 5th, 1908, plaintiff sent to many persons throughout the various states of the United States a four-page circular descriptive of "The Jewish Encyclopedia," which offered to its recipient who would return, signed, a self-addressed postal card containing a printed request therefor, "a replica of the Holy Shekel of Israel and a vellum copy of Washington's Address to the Hebrew Congregation at Newport," and sample pages of "The Jewish Encyclopedia." Among the persons to whom such matter was sent was the defendant herein.

On or about June 6th, 1908, the plaintiff received from defendant the said postal card, duly stamped and addressed and duly signed by him, dated June 5th, 1908, and post-marked at Paterson, New Jersey, on the same date at 7 o'clock P. M. The said postal card contained the following matter:

Washington's Address
to the Hebrew
Congregation at Newport.

"Please send me free of cost, a replica of the Holy Shekel of Israel and a vellum copy of Washington's Address to the Hebrew Congregation at Newport; also send me sample pages of The Jewish Encyclopedia, prices, terms of payment, etc. I do not own the Encyclopedia and I am over 21 years of age.

Name, M. Stamm.
Residence Address, 77 Graham Ave.
Business Address, Franklin and Summer Streets.
Town, Paterson, N. J."
Date, June 5th, 1908.

N. B. So much of the foregoing matter contained on said postal card as is typewritten herein without underscoring was printed by the plaintiff in said card before mailing it to said defendant. The name, residence address, business address, date and city of defendant's residence were written by the said defendant, and in the above-mentioned copy are underscored.

Said postal card was addressed to the plaintiff at its principal place of business in the City of New York.

Thereafter, on or about July 30th, the plaintiff sent Jacob A. Einstein, one of its agents, from the City of New York to the City of Paterson, who delivered to said defendant a replica of the Holy Shekel of Israel and a vellum copy of Washington's Address. And the said agent thereupon showed said defendant sample pages of "The Jewish Encyclopedia;" gave the said defendant full information in regard to said Encyclopedia and took his order for the same upon a printed blank, in the form copy of which is annexed to the complaint herein.

At the same time, the said defendant gave to the said Einstein (plaintiff's agent) his check, No. 4318, for $5.00, drawn on the Hamilton Trust Company of Paterson, New Jersey, in favor of this plaintiff. On the day following, plaintiff's agent, the said Einstein, returned to New York and delivered to plaintiff the said order as set out in said complaint, together with said check for $5.00, and on said day, being the 31st of July, 1908, plaintiff acknowledged receipt of said order from its New York office, and thereafter printed on the outside of the front cover of each volume of said Encyclopedia, in gold letters of the size and style of type selected by said defendant, and known by plaintiff as No. 45, the said defendant's name, and caused a title page in the first volume of said set to be engrossed as follows:

"This set of The Jewish Encyclopedia
has been especially prepared for
MAX STAMM
and presented to his wife
Bertha
and children
Judith, Harold, Grace and Berthram,
(on this) (day of)
Nineteen hundred and eight
(signed) Isaac K. Funk."

Said set of books, known as the Jewish Encyclopedia, consisting of twelve (12) volumes, together with a bookcase, was shipped by plaintiff from New York City to said defendant in Paterson, New Jersey, on August 4th, 1908, in accordance with the agreement, copy of which is annexed to the complaint herein.

In addition to the $5.00 received from said defendant at the time of giving said order to said Einstein, the defendant has made to the plaintiff the following payments, and none other:

9/8/08	$5.00
12/12/08	15.00
4/1/09	15.00
8/9/09	20.00
12/12/09	20.00

Plaintiff admits that it has not obtained a certificate from the Secretary of State of New Jersey, to do business in the State of New Jersey, as required by Sec. 97 of an "Act concerning corporations" (Revision of 1896).

Third. Plaintiff admits that it previously did, and still does, business in the State of New Jersey; that the contract here sued upon was made in the State of New Jersey, but denies that its business is of such a character as to be subject to the regulations of the Legislature of the State of New Jersey, under section 97, &c., of an act entitled "An act concerning corporations (Rev. of 1896);" said plaintiff claiming that its said business is interstate in character and not such as is contemplated by said sec-

tions of said act; or, if contemplated, to be regulated by said act, then such act is unconstitutional and in violation of said plaintiff's rights under the commerce clause of the Constitution of the United States.

Fourth. The above issues are submitted for trial without a jury.

Fifth. Each party reserves the right to appeal from the rulings of the court upon questions of law in this case.

Sixth. The defendant abandons and withdraws the second and third clauses set forth in his answer.

(Signed) FREEMAN AND WESTERHOFF,
Attorneys of Plaintiff.

(Signed) BENJAMIN L. STEIN,
Attorney of Defendant.

NOTE: *From case of Funk & Wagnalls Co. v. Stamm, 88 A. 1050. Judgment for plaintiff affirmed by Court of Errors.*

No. 42. CERTIFICATE TO TRANSCRIPT. (See Rule 137, sec. 395, page 256.)

(Title.)

The answer of George S. Silzer, Esquire, Judge of the Circuit Court holden in and for the County of Bergen and within named, the record and proceedings of the plaint whereof mention is within made of all things touching the same, I send to the Justices of our Supreme Court of Judicature, at Trenton, N. J., at the day and year within contained, in a certain appeal to this writ annexed as within I am commanded.

GEO. S. SILZER,
Judge.

NOTE: *Used in Daly v. Case, 95 A. 973.*

No. 43. CLERK'S CERTIFICATE.

(Title.)

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal, and also a copy of the judgment entered in the above-stated cause, as the same remains on file and of record in my office.

In testimony whereof, I have set my hand and the seal of said court, at Trenton, this 22d day of September, A. D. 1915.

WILLIAM C. GEBHARDT,
Clerk.

No. 44. DECISION ON ORDER TO SHOW CAUSE.

Hudson County Circuit Court.

(Title.)

Herbert Clark Gilson, Esq., Atty. of Plaintiff.

Marshall Van Winkle, Esq., Atty. of Defendant.

The motion to set aside the summons in this cause is granted under the authority of and holdings of Mygatt *v.* Coe et al., 63 N. J. L. 510.

An order to that effect may accordingly be taken.

Dated March 17, 1915.

LUTHER A. CAMPBELL,
Judge.

NOTE: *Filed in Sweeney* v. *Miner, 95 A. 1014.*

No. 45. FINDINGS OF FACT AND POSTEA.

New Jersey Supreme Court.

(Title.)

This case was tried before Judge William H. Speer, without a jury, by consent of both of the parties thereto, at the Union Circuit, on November 11th, 1914.

After hearing the evidence and the counsel for plaintiff and for defendant, the court finds the facts in issue to be as follows:

First. That the crossing of Terrill Road over the tracks of the defendant in the Township of Fanwood, Union County, New Jersey, on the 26th day of November, 1913, was in bad order and repair and was not a safe, good and sufficient passageway over said tracks, in that the roadway between the rails had been allowed to become depressed, so that the rails extended from three and one-half to four inches above the bottom of the ruts or depressions between the rails.

Second. That the ruts or depressions between the rails at said crossing had existed a considerable period of time prior to said 26th day of November, 1913, and that notice thereof had been given previous to said date, to the section foreman employed by the defendant in charge of the repair of defendant's roadbed in this locality, and that said ruts or depressions had existed for a length of time which would require the defendant, in the exercise of reasonable care, to have discovered them and to have taken measures to remedy such defects.

Third. That said ruts and depressions operated to render the passageway over the said tracks out of repair unsafe and insufficient for the passage of automobiles and other vehicles, and the general use of the public over said highway, and that defendant was guilty of negligence in allowing said ruts and depressions to exist at the date aforesaid.

Fourth. That the plaintiff operated an automobile owned by him, on November 26th, 1913, over Terrill Road, and upon the said defendant's railroad crossing, where it was stopped by the depressions between the rails of the eastbound passenger track in a position of danger, and became stalled, and its engine stopped; that the unsafe and insufficient condition of said crossing and the negligence of the defendant with relation thereto, was a proximate cause of the stoppage of said automobile on said railroad track, and of the collision with the locomotive of the defendant which subsequently took place.

Fifth. That an eastbound passenger train of the defendant drawn by a locomotive was operated on the track on which the plaintiff's automobile containing the plaintiff was stalled, and collided with said automobile and injured it and caused injuries to the person of the plaintiff; that said track was straight and

practically level for several miles to the west of said crossing; that said train was operated at high rate of speed, but in a negligent manner as to the control thereof by the engineer in charge of the locomotive drawing said train, in that he could have seen and distinguished the plaintiff's automobile as stalled on said crossing in time and at such a distance away, with the exercise of reasonable care, to have stopped said locomotive and train before colliding with said automobile, and that he did not exercise such reasonable care and did not stop such locomotive and train as he might have done, and that in attempting to stop said locomotive and train, the service brake was applied in the first instance instead of the emergency brake; that the fact that said automobile was standing and continued standing on the track for such length of time after it came into view of the engineer, was notice to him that it was stalled on the track and that such notice came to him in time and at such a distance to have stopped the engine and train by the exercise of reasonable care, before colliding with said automobile.

Sixth. That the negligent conduct of the defendant's engineman in charge of said locomotive, in the operation thereof, was a proximate cause of the collision with the plaintiff and his automobile and of the injuries resulting therefrom.

Seventh. That the plaintiff was not guilty of contributory negligence in driving said automobile upon the defendant's tracks; that at the time said automobile was driven on the tracks the defendant's train was at such a distance away and not in the view or hearing of the plaintiff, that the plaintiff, who at that time had no warning by engine bell or whistle or from the crossing signal, of the approach of the train, and who looked and listened for such signals before crossing, was justified, as a reasonably prudent man, in attempting to cross said tracks, and would have crossed in safety if he had not been stopped by the negligent condition of defendant's crossing. That there were no temporary obstructions to vision, nor unusual noises at the time of approaching said tracks.

Eighth. That the plaintiff operated his said automobile in a reasonably careful manner, and was not negligent because the

engine and locomotion of said automobile stopped on the tracks of the defendant.

Ninth. That the defendant's servants had knowledge and notice of the exposure to risk of the plaintiff and by the exercise of ordinary care would have avoided the injury complained of, but failed to exercise such care.

Tenth. That the conduct of the plaintiff under the circumstances of the evidence with regard to his remaining in said automobile was that of a reasonable prudent man, and the plaintiff exercised due and reasonable care, and was not guilty of negligence contributing to the accident. That the plaintiff first endeavored to start the automobile by means of its mechanism, which failed to operate; that he then told his female companion occupying the front seat with him to get out of the car; that she arose to get out and then fainted and fell over on the plaintiff, who, with the burden of her weight upon him and being behind the driving wheel, could not get out of the automobile, and the collision thereafter occurred in a short space of time.

Eleventh. That the plaintiff sustained damages as the proximate result of said collision and the negligence of the defendant to the amount of three thousand dollars.

Twelfth. The court finds for the plaintiff and against the defendant for the sum of three thousand dollars.

WILLIAM H. SPEER,
Judge.

NOTE: *Finding of facts in Stamler v. Lehigh Valley R. R., 94 A. 566. Judgment for plaintiff affirmed by Court of Errors.*

No. 46. FINDINGS ON AGREED STATE OF CASE.

Passaic County Circuit Court.

(Title.)

This case was tried before Judge Charles C. Black, without a jury, at the Passaic Circuit on the tenth day of March, 1913.

After hearing the agreed state of the case and counsel for plaintiff and counsel for defendant, the court finds:

"It appears that this case is submitted upon a signed statement of facts, agreed upon by the parties and filed with the clerk of the court.

"Upon hearing counsel, judgment will be rendered in this case for the plaintiff for the sum of forty dollars. This is based upon the decision in the case of International Text Book Co. *v.* Pigg, in the United States Supreme Court (30 Supreme Court Reporter, p. 481, reported in 27 L. R. A., n. s., p. 493) and on the cases of International Text Book Company *v.* Peterson and Lynch, decided in the Supreme Court of the United States, on November 9, 1910, reaffirming its former decision in International Text Book Co. *v.* Pigg (supra).

"On the authority of these cases judgment is given in this case for the plaintiff and against the defendant in the sum of forty dollars."

The damages of plaintiff are assessed at forty dollars.

CHARLES C. BLACK,
Judge.

NOTE: *From Funk & Wagnalls Co.* v. *Stamm*, 88 A. 1059, *Court of Errors.*

No. 17. GROUNDS OF APPEAL—GRANTING OF NONSUIT.

New Jersey Court of Errors and Appeals.

(Title.)

The appellant states the following ground of appeal in this cause:

Because the court granted the defendant's motion for a nonsuit upon the evidence given at the trial.

Dated November 3, 1913.

EDWARDS & SMITH,
Attorneys of Plaintiff-Appellant.

NOTE: *From Corduan* v. *McCloud*, 93 A. 724.

No. 48. GROUNDS OF APPEAL—DIRECTION OF VERDICT FOR PLAINTIFF.

New Jersey Court of Errors and Appeals.

(Title.)

The above-named defendant-appellant, Amy B. Rawlins, assigns the following grounds of appeal from the judgment of the New Jersey Supreme Court, in above case:

Because the trial judge, upon the trial of said cause, directed a verdict in favor of the plaintiff and against the defendant, over the objection of the said defendant, whereas said trial judge should have submitted the case to the jury for its verdict.

Dated December 12, 1914.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant-Appellant.

NOTE: *Filed in Fanshawe* v. *Rawlins*, *94 A. 582; 98 A. 439.*

No. 49. JUDGMENT.

(Entered April 3, 1915.)

	Whereupon it is adjudged that the plaintiff recover of the defendant the sum of one
$1,337.18	thousand three hundred and thirty-seven dol-
47.38	lars and eighteen cents and its costs which are
———	taxed at forty-seven dollars and thirty-eight
$1,384.56	cents, making in the whole the sum of one thou-
	sand three hundred and eighty-four dollars and
	fifty-six cents.

Judgment entered April 3, 1915.

WILLIAM S. GUMMERE,
C. J.

NOTE: *Judgment entered in Oliver Bros.* v. *P. R. R.*, *96 A. 582.*

No. 50. JUDGMENT AND POSTEA.

(Title.)

This action was tried before Judge Luther A. Campbell, with a jury, at the Hudson Circuit, July 28, 1915.

The cause having been heard and submitted to the jury, they returned their verdict as follows:

They say they find for the plaintiff and against the defendants, and they assess the damages of the plaintiff on occasion of the premises at the sum of two hundred and fifty dollars ($250.00).

Whereupon it is adjudged that the plaintiff recover of the defendants the sum of two hundred and fifty dollars, damages and his costs, which are taxed at fifty-nine dollars and eighty-two cents ($59.82), making in the whole the sum of three hundred and nine dollars and eighty-two cents ($309.82).

Judgment was entered this July 28, 1915.

LUTHER A. CAMPBELL,
Judge.

Attest:

JOHN J. McGOVERN,
Clerk.

[SEAL.]

NOTE: *Judgment entered in Andre* v. *Mertens*, 96 *A.* 893.

No. 51. JUDGMENT AND POSTEA; MECHANIC LIEN; PRIORITY OF MORTGAGE TO LIEN, EXTENT OF.

Hudson County Circuit Court.

(Title.)

This action was tried before Judge William H. Speer, with a jury, at the Hudson Circuit, on January 30, 1913.

The cause having been heard and submitted to the jury, they return their verdict as follows: They say they find the defendants, Laura Dalio and Joseph Dalio, guilty as in the plaintiff's complaint is charged upon it, and they assess the damages of the plaintiff on occasion of the premises at the sum of two

hundred and sixty-seven ($267.00) dollars. The Highland Trust Company's mortgage is prior to the lien to the extent of five thousand eight hundred and forty-two ($5,842.00) dollars and the mortgage of Julius Belte is prior to the lien to the extent of eleven hundred and sixty ($1,160.00) dollars.

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of two hundred and sixty-seven ($267.00) dollars and his costs, which are taxed at the sum of sixty-four dollars and twenty-four cents ($64.24), making in the whole the sum of three hundred and thirty-one dollars and twenty-four cents ($331.24).

Judgment entered this February 3, 1913.

WILLIAM H. SPEER,
Judge.

NOTE: *Filed in Turck* v. *Allard, 94 A. 583.*

No. 52. JUDGMENT BY DEFAULT.

(Title.)

Judgment in the above-stated cause was entered by default August twelfth, nineteen hundred and thirteen, for the sum of eighteen thousand five hundred and sixty-five dollars and fifty-seven cents, damages and costs of suit.

NOTE: *From Nen* v. *Rogge, 95 A. 632, Court of Errors.*

No. 53. JUDGMENT FOR PLAINTIFF AGAINST DEFENDANT.

New Jersey Supreme Court.

(Title.)

It is ordered that judgment of five hundred and sixty-one dollars and thirty-four cents ($561.34), be and the same hereby is

entered in favor of the plaintiff and against the defendant with costs to be taxed nisi.

Entered January 19, 1915.

On motion of

LUM, TAMBLYN & COLYER,

Attorneys.

NOTE: *Filed in Kelley* v. *Faitoute Iron and Steel Co., 94 A. 802.*

No. 54. JUDGMENT OF AFFIRMANCE.

This case was heard before our Supreme Court at the February Term, 1915, and judgment of affirmance was rendered in favor of the plaintiff on May 14, 1915.

Whereupon it is adjudged that the said plaintiff-appellee, Columbia Brewing Company, recover of the said defendant-appellant, Philip Tumulty, Jr., the sum of two hundred and one dollars and three cents, debt and costs below, with interest hereon from November 27, 1914; and also the sum of twenty-four dollars and twenty-five cents costs in Supreme Court.

Judgment entered May 14, 1915.

WILLIAM S. GUMMERE, *C. J.*

NOTE: *Judgment entered in Columbia Brewing Co.* v. *Tumulty, 96 A. 885.*

No 55. JUDGMENT OF AFFIRMANCE.

This cause having been duly argued at the November Term of this court by Adolph L. Engelke, of counsel for the plaintiff-appellant, and Randolph C. Barrett, of counsel for the defendants-appellees, and the court having considered the same, and being of the opinion that the judgment for the defendants, entered in the East Orange District Court, should be modified by

entering judgment to quash the original writ, issued out of the said court in this cause:

It is thereupon ordered and adjudged that the judgment of the East Orange District Court, from which an appeal was taken in this cause, be and the same is hereby modified by entering judgment to quash the original writ, issued out of the said court in this cause, and that the said judgment as so modified be and is hereby affirmed, with costs to the defendants-appellees, and said record is hereby remitted to the court below to be proceeded with according to law and the practice of said court.

On motion of

BARRETT & BARRETT,

Attorneys for Defendants-Appellees.

NOTE: *Rule for judgment filed in case of Baldauf* v. *Nathan Russell, 96 A. 96.*

No. 56. JUDGMENT OF SUPREME COURT AFFIRMING JUDGMENT OF STATE BOARD OF ASSESSORS.

New Jersey Supreme Court.

(Title.) On Certiorari.

Order of Affirmance of Judgment.

This cause having been duly argued at the November Term of this court by B. & C., of counsel for the prosecutor, and J. W. W., Attorney-General, of counsel for the State Board of Assessors, T. W. S., of counsel for defendants, etc. (*name all other counsel and for whom they appear*), and the court having considered the same and finding no error in the judgment and assessment of the State Board of Assessors:

It is, thereupon, ordered and adjudged that the judgment and assessment of the State Board of Assessors removed by writ of certiorari in this cause be affirmed with costs; and that the record be remitted to the State Board of Assessors to be pro-

ceeded with in accordance with this judgment and the practice in such case made and provided.

On motion of

T. W. S.,

Dated April 7, 1916. *Of Counsel with Defendants.*

Let the above order be entered upon the minutes.

THOMAS W. TRENCHARD, *J. S. C.*,
For the Court.

NOTE: *Above judgment was used in case of Atl. City and Shore R. R.* v. *State Board of Assessors et al., 96 A. 568, reversing 93 A. 82, 87 L. 137.*

No. 57. JUDGMENT OF SUPREME COURT AFFIRMING JUDGMENT OF BOARD OF COMMISSIONERS OF MUNICIPALITY IN DISCHARGING EMPLOYEE.

New Jersey Supreme Court.

(Title.)

This cause having been argued at the November Term of this Court by B. & C., of counsel for prosecutor, and T. W. S., of counsel for the defendant, and the court having considered the same and finding no error in the record or proceedings of the Board of Commissioners of the city of Atlantic City:

It is, thereupon, ordered and adjudged that the judgment and proceedings of the Board of Commissioners of Atlantic City, removed by writ of certiorari in this cause, be affirmed with costs.

On motion of

T. W. S.,

Dated April 9, 1915. *Of Counsel for Defendant.*

Let the above order be entered on the minutes.

SAMUEL KALISCH, *J. S. C.*

No. 58. JUDGMENT RECORD ON POSTEA IN ACTION AT LAW. JUDGMENT OF NONSUIT.

New Jersey Supreme Court.

(Title.) Judgment Record.

On Postea, T. W. S., Attorney.

Board of Water Commissioners of Atlantic City, the defendant in this cause, was summoned to answer unto the West Jersey and Seashore Railroad Company, the plaintiff, in an action at law, upon the following complaint:

(*Copy the complaint including exhibits, etc., followed by answer and exhibits, if any, then*):

This case was tried before Circuit Court Judge C. L. C. with a jury, at the Atlantic County Circuit Court on January 23, 1913; and after the plaintiff had given its evidence and rested its case, and the judge being of the opinion such evidence did not establish a cause of action against the said defendant, Board of Water Commissioners of Atlantic City, ordered that the plaintiff be nonsuited.

Whereupon it is adjudged that so much of the complaint herein set forth which has been answered by the said defendant, be dismissed and that the defendant recover of the plaintiff its cost., which are taxed at the sum of $39.00.

Judgment entered January 14, 1914.

WM. S. GUMMERE, *C. J.*

NOTE: *Above judgment taken from case of West Jersey and S. R. R. Co. v. Board of Water Commissioners of Atl. City. 92 A. 369.*

No. 59. JUDGMENT ON MOTION TO STRIKE OUT COMPLAINT; STRIKING.

New Jersey Supreme Court.

(Title.)

This cause coming on to be heard on the motion of the defendant to strike out the plaintiff's complaint on the ground that same disclosed no cause of action, and the court having heard the arguments of counsel for the respective parties, and

being of opinion that said complaint is not sufficient in law and having ordered that same be stricken out:

It is ordered that judgment final be and hereby is entered in favor of the defendant and against the plaintiff, with costs to be taxed. Entered May 8, 1913.

On motion of

HOWARD M. COOPER,
Atty.

NOTE: *Filed in McAndrews & Forbes Co. v. Camden Nat. Bank, 94 A. 627.*

No. 60. JUDGMENT ON NONSUIT.

(Title.)

This cause being regularly on the calendar, at the present April term, nineteen hundred and fifteen, and the case having been called, and the parties having appeared, and the plaintiff having moved his case, and the jury having been impaneled and sworn, and the evidence of the plaintiff having been given, and the defendant having moved for a nonsuit, and the court having heard the argument of the respective counsel, and having considered the matter, and being of the opinion that the motion of the defendant should be granted and the plaintiff nonsuited:

It is, on this fifteenth day of April, one thousand nine hundred and fifteen, ordered that judgment of nonsuit be entered in favor of the defendant, George B. Case, and against the plaintiff, John Daley, besides costs of suit to be taxed.

On motion of

MARSHALL VAN WINKLE,
Attorney of Defendant

Rule actually entered April 17th, 1915.

NOTE: *Used in Daly v. Case, 95 A. 973.*

No. 61. JUDGMENT ON SCIRE FACIAS AGAINST BAIL ON RECOGNIZANCE.

(Title.)

This action was tried before Judge , with a jury, at the County Circuit, on day of .

The cause having been heard and submitted to the jury, they returned their verdict in favor of the said plaintiff and against the said defendants.

Whereupon, it is adjudged that judgment final be entered against the said R. D., R. B. and C. A., defendants, and in favor of the said State of New Jersey, plaintiff, for the sum of $8,000, mentioned in the recognizance upon which the said writ of scire facias was founded, besides costs of suit to be taxed.

Judgment entered .

Judge.

NOTE: *Form of above judgment approved by Court of Errors in State* v. *Delaney, 70 A. 311; 76 L. 547.*

No. 62. JUDGMENT WHERE PLAINTIFF ACCEPTS AN AMOUNT LESS THAN JURY'S VERDICT.

Hudson County Circuit Court.

(Title.)

This action was tried before Judge Benjamin A. Vail, with a jury, at the Hudson Circuit Court, on October 1st, A. D. 1913.

And the cause having been heard and submitted to the jury, they returned their verdict as follows: They say they find the defendant guilty as in the plaintiff's complaint is charged upon it, and they assess the damages of the plaintiff, on occasion of the premises, at the sum of nine thousand six hundred and twenty-five ($9,625.00) dollars.

And the plaintiff having thereupon by her consent, by her attorney, Alexander Simpson, and duly filed, consented to accept the sum of three thousand five hundred ($3,500.00) dollars instead of the sum of nine thousand six hundred and twenty-

five ($9,625.00) dollars as aforesaid found, for the plaintiff and against the defendant, is upon this day

Ordered, judgment to be entered in favor of the plaintiff for the sum of three thousand five hundred ($3,500.00) dollars, besides costs of suit to be taxed, which amount to sixty-one dollars and eleven cents ($61.11), making in the whole the sum of three thousand five hundred and sixty-one dollars and eleven cents ($3,561.11).

Judgment entered this twenty-third day of December, A. D. 1913.

BENJAMIN A. VAIL,
Judge.

NOTE: *From Materka* v. *Erie R. R., 95 A. 612.*

No. 63. NOTICE OF APPEAL AND GROUNDS.

New Jersey Supreme Court.

Notice of Appeal from Judgment of
Supreme Court on Certiorari.
(Title.)

To J. W. W., Attorney of Defendants:

TAKE NOTICE, that the prosecutor appeals to the Court of Errors and Appeals from the whole of the judgment entered in the above stated cause, on the following grounds:

1. Because the supplement entitled "A supplement to an act entitled 'An act for the taxation of the property and franchises of street railroads corporations using or occupying public streets, highways, roads, lanes or other public places in this state,' approved May twenty-third, one thousand nine hundred and six, and by such supplement providing for the assessment and collection of a franchise tax in cases where street railways systems are operated by steam railroads companies or operated over and upon the tracks of steam railroad companies," approved April 3d, 1913, is unconstitutional.

2. Because the object of the act of April 3d, 1913, above mentioned is not expressed in its title.

3. (*Set forth all the reasons for reversal.*)

. . . . . .

Attorney for and of Counsel With Appellant.

NOTE: *Above notice taken from case of Atl. City and Shore R. R. v. State Board of Assessors, 96 A. 568; reversing 93 A. 82; 87 L. 137.*

No. 64. NOTICE OF APPEAL AND GROUNDS.

New Jersey Supreme Court.

(Title.)

To Messrs. Lazarus & Brenner, Attorneys for Appellees:

TAKE NOTICE, that the appellant, The Central Railroad Company of New Jersey, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey from the whole of the judgment entered in this cause on the following grounds:

(1) That the Supreme Court affirmed the judgment of the District Court of the City of Bayonne, although there was error in doing so.

(2) Because the Supreme Court affirmed the refusal of the District Court of the City of Bayonne to grant a nonsuit at the close of the case of plaintiff below, although it was error so to do.

(3) Because the Supreme Court affirmed the judgment of the District Court of the City of Bayonne although there was no evidence to support said judgment.

(4) Because the Supreme Court affirmed the judgment of the District Court of the City of Bayonne, although there was no evidence of negligence on the part of this appellant.

(5) Because the Supreme Court affirmed the judgment of the District Court of the City of Bayonne, although there was no proof of any agreement on the part of this appellant to carry the goods, for the loss of which appellees sued to recover.

(6) Because the Supreme Court affirmed the judgment of the District Court of the City of Bayonne, although there was no evidence tending to show that the goods, for the loss of which the judgment was rendered, had ever been delivered to this appellant.

(7) Because the Supreme Court affirmed the judgment of the District Court of the City of Bayonne, although there was no evidence of any breach of duty on the part of this appellant.

GEORGE HOLMES,
Attorney of Appellant.

NOTE: *Filed in Blumenthal* v. *Central R. R., 95 A. 973.*

NO. 65. NOTICE AND GROUNDS OF APPEAL DIRECTING JUDGMENT OF NONSUIT.

(Title.)

To Marshall Van Winkle, Esq., Attorney of Defendant:

TAKE NOTICE, that the plaintiff appeals to the Court of Errors and Appeals of the State of New Jersey, from the whole of the judgment entered in this case, upon the following ground:

The Trial Court directed a judgment of nonsuit against the plaintiff and in favor of the defendant when thereunto moved by counsel for the defendant, whereas said court should have denied said motion and should have submitted to the jury for decision the questions involved in the issues.

COLLINS & CORBIN,
Attorneys of Appellant.

NOTE: *Used in Daly* v. *Case, 95 A. 973.*

No. 66. NOTICE OF MOTION TO STRIKE OUT COMPLAINT AND REASONS.

Gloucester County Circuit Court.

(Title.)

Sir:

Take notice that I shall apply to his Honor, Clarence L. Cole, Judge of the Gloucester Circuit Court, at his chambers, in the Law building, in the City of Atlantic City, on Monday, the fifteenth day of February next, at ten-thirty o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order to strike out the complaint, by you filed in the above stated cause, for the following reasons, viz.:

First, the said complaint charges that the sum of two hundred dollars per year was paid to the defendant as and for a salary as township clerk, during the years 1902 to 1910, inclusive, and that such payments were illegal and unauthorized because the salary of the said defendant as clerk of said township was provided for by a resolution of the said township and was not provided for and authorized by an ordinance of said township. (*a*) The said payments on the part of the township committee were voluntary and cannot be recovered back. (*b*) The said payments having been made by the township committee under and by virtue of said resolution and accepted by the defendant in good faith, the said payments cannot be attacked in this collateral proceedings, except by direct attack upon the legality of the said resolution.

Second, the said complaint charges that moneys were paid to the said defendant as township clerk, on bills presented by said clerk which were not itemized or sworn to in compliance with the statutes of the state. (*a*) The payments were voluntary payments and cannot be recovered back. (*b*) It does not appear from the statements of the said complaint that any or either of the payments made to the said defendant as township clerk were not legally due to the said defendant or that the money paid to him was not actually due and owing from the said township to the said defendant. (*c*) Because the said complaint does not specify

what bills of those mentioned in the schedule annexed to the said complaint, were not itemized or did not contain the affidavit required by statute, and the defendant is therefore in utter ignorance as to what items it is charged, were not presented in the manner required by law.

To HARVEY F. CARR, ESQ.,
Attorney of Plaintiff.

DAVID O. WATKINS,
Attorney of Defendant.

NOTE: *Complaint stricken and judgment thereon affirmed by Court of Errors, Twp. Franklin* v. *Jones, 90 A. 1011.*

No. 67. NOTICE OF MOTION TO STRIKE OUT COMPLAINT.

New Jersey Supreme Court.
Passaic County.

(Title.)

To J. Willard DeYoe, Esq., Attorney of Plaintiff:

Take notice that on the fifteenth day of February, instant, at ten o'clock in the forenoon, at No. 630 Hudson street, Hoboken, New Jersey, before the Honorable James F. Minturn, Justice of the above-stated court, I shall move to strike out the complaint filed in this cause, upon the ground that it discloses no cause of action, to wit:

Although said complaint alleges that it was the duty of the said defendant to keep an account of all such fees and moneys received by him for the use of the county of Passaic, and on or before the fifteenth day of each month to make a full itemized statement and return verified by oath to the collector of the county of Passaic of all such fees, costs, allowances, percentages and perquisites; and that the said defendant has neglected and refused to make such account and pay over said moneys to the County Collector, as required by law, to wit, the moneys in said complaint mentioned.

Yet, it was not the duty of the said defendant to make such account and pay over said moneys to the County Collector.

Dated Paterson, N. J., Feb. 1, A. D. 1913.

WILLIAM I. LEWIS,
Attorney of Defendant.

NOTE: *From Chosen Freeholders of Passaic* v. *Slater* (*Supreme Court*), *83 A. 213; E. & A., 90 A. 377.*

No. 68. NOTICE TO STRIKE OUT PARTS OF ANSWER.

Hudson County Circuit Court.

(Title.)

To that above-named Defendant, or Griggs & Harding, Esquires, its Attorneys:

Please take notice, that on Friday, the 14th day of February, 1913, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, I shall apply to the Honorable William H. Speer, Judge of the Hudson County Circuit Court, at the County Court House, in the city of Jersey City, for an order striking out the following allegations from the answer interposed by the defendant in the above-entitled action:

1. In paragraph 2 of that part of said paragraph which reads as follows:

"That at the close of business on the said 20th day of April, 1912, one M. L. Parsons was the holder of record of 135 shares of the capital stock of said company."

2. That part of paragraph 2 which reads as follows:

"The defendant alleges that the said M. L. Parsons was not the owner or holder of record of the last-named shares of stock at the close of business on the said 20th day of April, 1912. The defendant alleges that for a long time prior to the said 20th day of April, 1912, to wit, several years prior thereto, the said M. L. Parsons had sold, assigned and conveyed all her right, title and interest in and to said shares of stock, and since said sale and assignment and conveyance thereof, had not held any

interest therein whatever, or at any time thereafter, and that the said M. L. Parsons was not at any time entitled to subscribe for any shares of the increase of the capital stock of said company, upon the terms and conditions of said offer."

3. That part of paragraph 3 which reads as follows:

"The defendant denies that the said M. L. Parsons was the owner or holder of record or had any interest whatever in said 135 shares, or any or either of them, at any time after said offer to subscribe was made, and defendant alleges that said Parsons had not had any such interest since her said sale, assignment and conveyance thereof as aforesaid."

4. That part of paragraph 3 which reads as follows:

"The defendant further alleges that said Parsons had no right to transfer or assign the right to subscribe for said shares of the increased capital stock of said company, or any or either of said shares."

5. That part of paragraph 3 which reads as follows:

"And the defendant denies that the said Levy Brothers, by reason of said assignment, or otherwise, became entitled to subscribe for said 3,375 shares of the increased capital stock of said company, or of any share or part thereof."

6. That part of paragraph 7 which reads as follows:

"Defendant alleges that said Levy Brothers did not, on the 6th day of December, 1912, or at any other time, own or have any right, title or interest in or to the said 135 shares of said stock, formerly owned by said Parsons, and had no right to transfer or assign the same, or any interest therein, to George W. C. Schmidt, the plaintiff."

7. That part of paragraph 7 which reads as follows:

"Defendant denies that said plaintiff had any right, title or interest whatever in and to said 135 shares of said stock, or had any right whatever to subscribe for said 3,375 shares of said increase, or any share or part thereof."

8. That part of paragraph 8 which reads as follows:

"Defendant further alleges that the said offer made by this defendant to its stockholders to subscribe for said new stock was, by its terms, made only to the owners and holders of record of

said stock at the close of business on April 20th, 1912, and to persons to whom such holders or owners of record had assigned shares, upon presentation of a duly-executed written assignment thereof."

9. That part of paragraph 8 which reads as follows:

"The defendant avers that the said Levy Brothers were neither holders or owners of record of said 135 shares of said stock, or any part thereof."

10. In paragraph 8 the word "owner" in the 11th line of said paragraph.

11. That part of paragraph 8 which reads as follows:

"And that the said Levy Brothers never gave, or offered to, the defendant or its registered agent any reasonable or satisfactory proof or evidence that the said 135 shares of stock, or any share or part thereof, was held or owned by the said Parsons on the 20th day of April, 1912, or at any other time since said Parsons sold and assigned and transferred his stock as aforesaid."

12. That part of paragraph 8 which reads as follows:

"And the said Levy Brothers failed and refused to submit to the defendant any certificate or certificates for said 135 shares, or any share or part thereof, assigned from any owner or holder thereof, although requested so to do by the plaintiff."

For the following reasons, namely:

That each and every part of the defendant's answer hereinabove objected to is untrue, impertinent, irrelevant, states a conclusion of law, is not germane to the issue, and is so framed as to embarrass and delay a fair trial of this cause.

Respectfully yours,

AARON A. MELNIKER,
Attorney of Plaintiff.

NOTE: *From Schmidt* v. *Marconi Wireless Tel. Co., 90 A. 1017.*

No. 69. ORDER DISMISSING RULE TO SHOW CAUSE.

Hudson County Circuit Court.

(Title.)

A rule to show cause having been entered in this cause on the twenty-first day of January, nineteen hundred and thirteen, and this cause having been argued by J. Philip Dippel, of counsel for the plaintiff, and John Warren, of counsel for the defendant, and the court having considered the same and finding no cause for making the rule absolute:

It is thereupon, on this seventeenth day of September, nineteen hundred and thirteen, on motion of J. Philip Dippel, ordered that the said rule to show cause be, and the same is, hereby dismissed with costs, and the judgment is hereby confirmed.

WM. H. SPEER,
Judge.

NOTE: *Filed in Turck* v. *Allard, 94 A. 583.*

No. 70. ORDER ON REVERSAL OF JUDGMENT.

New Jersey Supreme Court.

(Title.) Hudson County.

This cause having been duly submitted on briefs at the February Term, 1914, of this court by Collins & Corbin and George S. Hobart, of counsel for the appellant, and Alexander Simpson, of counsel for the respondent, and the court having inspected the record and judgment below, and considered the causes assigned for error and the grounds of appeal therein:

It is thereupon, on this 6th day of March, 1915, ordered that the judgment of the said Hudson County Circuit Court be in all things reversed, set aside and for nothing holden, and that the record and proceedings be remitted to the said Hudson County Circuit Court to be proceeded with in accordance with this judgment and the practice of the said court.

Entered March 6, 1915, on motion of

COLLINS & CORBIN,
Attorneys of Appellant.

NOTE: *From Materka* v. *Erie R. R., 95 A. 612.*

No. 71. ORDER SETTING ASIDE SERVICE OF SUMMONS.

Hudson County Circuit Court.

Application being made by Marshall Van Winkle, attorney appearing specially for the defendant, Anne E. Miner, pursuant to order to show cause heretofore granted, dated March 2, 1915, and Herbert Clark Gilson, attorney of the plaintiff, having been heard; and it appearing to the court by proof, being depositions taken under the rule to show cause heretofore granted, which depositions have been filed, that the summons and complaint in the above-stated action were not served upon the defendant and that the return of service should be set aside and for nothing holden, and that the defendant should be discharged from the alleged service endorsed on the said summons and complaint: it is, on this twenty-third day of March, one thousand nine hundred and fifteen, ordered, that the return of service on the defendant endorsed on the summons and complaint be set aside and for nothing holden, and that the defendant be discharged from the alleged service endorsed on the said summons and complaint.

LUTHER A. CAMPBELL,

Judge.

Rule actually entered March 23, 1915. On motion of Marshall Van Winkle, attorney appearing specially for the defendant, Anne E. Miner.

NOTE: *Filed in Sweeney* v. *Miner, 95 A. 1014.*

No. 72. ORDER STRIKING OUT COMPLAINT.

New Jersey Supreme Court.

Defendant having moved to strike out the complaint in the above matter on the ground that it disclosed no cause of action, and arguments for plaintiff and defendant, by their respective counsel, having been duly heard:

It is, this 6th day of May, 1913, on motion of Howard M. Cooper, attorney for defendant, ordered that the said complaint be stricken out on the ground that it discloses no cause of action.

C. G. GARRISON,
Justice of the Supreme Court.

NOTE: *Filed in McAndrews & Forbes Co.* v. *Camden Nat. B'k, 94 A. 627.*

No. 73. ORDER STRIKING OUT SECOND DEFENSE IN ANSWER.

(Title.)

Due notice having been given to the above-named defendant of a motion to strike out the second defense as set forth in paragraph 3 of the amended answer, and the same coming on for argument in the presence of Richard Doherty, attorney of the plaintiff, and Vredenburgh, Wall & Carey, attorneys of defendants, and it appearing to the court that the matters set forth in said paragraph 3 are impertinent, disclose no defense to the said action, on motion of the said attorney of the plaintiff it is on this thirty-first day of January, A. D. 1913:

Ordered that the said second defense as set forth in paragraph 3 of the amended answer be struck out on the said grounds.

WM. H. SPEER,
Judge.

NOTE: *Filed in McNally* v. *P. R. R., 95 A. 975.*

No. 74. ORDER TO SHOW CAUSE.

Hudson County Circuit Court.

(Title.)

Upon filing the affidavits of Joseph S. Veit and Anne E. Miner:

It is ORDERED that the plaintiff show cause before this court on the thirteenth day of March, one thousand nine hundred and fifteen, at the County Court House in Jersey City, at 10 o'clock in the forenoon, or as soon thereafter as the matter can be heard

by this court, why the return of service on the defendant endorsed on the summons and complaint should not be set aside and for nothing holden and why the said defendant should not be discharged from the alleged service endorsed on the said summons and complaint.

AND IT IS FURTHER ORDERED, that the parties have leave to take depositions for use on the hearing under this order on four days' notice before any Supreme Court commissioner.

Dated March 2d, 1915.

LUTHER A. CAMPBELL,
Judge.

On motion of
MARSHALL VAN WINKLE,
Attorney appearing specially and only for purpose of moving to set aside service of Summons and Complaint.

NOTE: *Filed in Sweeney* v. *Miner, 95 A. 1014.*

No. 75. POSTEA.

This case was tried before Judge William H. Speer, with a jury at the Hudson Circuit on March 24th, 1915.

The jury rendered a general verdict against the defendant and in favor of the plaintiff for one thousand three hundred and thirty-seven ($1,337.00) dollars and eighteen (.18) cents.

WILLIAM H. SPEER,
Judge.

NOTE: *Postea filed in Oliver Bros.* v. *P. R. R., 96 A. 582.*

No. 76. POSTEA AND JUDGMENT.

(Title.)

This case was tried before Judge Lloyd without a jury, at the Camden Circuit, on September 21st, 1914.

The court rendered a general verdict against the plaintiff and in favor of the defendant.

Whereupon, it is adjudged that the complaint of the plaintiff be dismissed, and that the defendant recover of the plaintiff his costs, which are taxed at thirty-nine dollars and ten cents.

Judgment entered September 30th, 1914.

WILLIAM S. GUMMERE,
C. J.

No. 77. POSTEA ON DIRECTION OF VERDICT.

New Jersey Supreme Court,
Monmouth County.

(Title.)

This case was tried before Hon. Nelson Y. Dungan, Circuit Court Judge, with a jury at the Monmouth Circuit, on October the twenty-third, nine hundred and fourteen.

The said judge directed the jury to return a verdict against the defendant and in favor of the plaintiff for one thousand five hundred and fifty-two dollars and thirty-eight cents ($1,552.38), and the jury did accordingly return a verdict against the defendant and in favor of the plaintiff for the said sum of one thousand five hundred and fifty-two dollars and thirty-eight cents ($1,552.38).

NOTE: *Filed in Fanshawe* v. *Rawlins, 94 A. 582; 98 A. 439.*

No. 78. RECOUPMENT—FAILURE TO DELIVER COAL AS PER CONTRACT, WHEREBY DEFENDANT WAS COMPELLED TO GO IN OPEN MARKET AND PURCHASE AT HIGHER PRICE.

District Court of the City of Elizabeth.

(Title.)

The above-named defendant says that by reason of plaintiff's delay and default in shipments of coal under the contract set forth in plaintiff's state of demand, defendant was obliged to

purchase coal from other parties and at a higher price than that fixed in the contract between plaintiff and defendant, whereby defendant has been damaged to the sum of five hundred dollars.

Defendant will ask for judgment against the plaintiff for three hundred and thirty dollars and sixty-six cents ($330.66), together with interest thereon from March 30, 1912, and defendant's costs of suit.

McDERMOTT & ENRIGHT,
Attorneys of Defendant.

NOTE: *Filed in Clark Bros. Coal Mining Co.* v. *Royal Mfg. Co., 95 A. 610.*

No. 79. REJOINDER DENYING PLAINTIFF'S REPLY.

Supreme Court of New Jersey.

(Title.)

The defendants, George Bohlen and Henning Bohlen, answering separately, say by way of rejoinder to plaintiff's reply, that:

1. They admit the truth of the matter contained in paragraph (1) of plaintiff's reply.

2. The defendant's say further that they admit the truth of the matter contained in paragraph (2) of the plaintiff's reply, except that plaintiff acquired any lien or interest in the said goods, wares and merchandise referred to in paragraph (2) of plaintiff's complaint. This the defendants deny.

3. As to the matter alleged in paragraph (3) of plaintiff's reply, the defendants lack sufficient knowledge and information to form a belief.

4. The defendant, George Bohlen, admits the truth of the allegations contained in paragraph (4) of plaintiff's reply.

5. Defendant, Henning Bohlen, lacks sufficient knowledge and information to form a belief as to the matter contained in paragraph (4) of plaintiff's reply.

6. The defendants, George Bohlen and Henning Bohlen, admit the truth of the matter alleged in paragraph (5) of plaintiff's reply, except the allegation that the said goods, wares and merchandise described in paragraph 2 of plaintiff's complaint, were

in the possession of George Bohlen at the time levy and execution pursuant to plaintiff's judgment were made. This the defendants deny.

7. The defendants, George Bohlen and Henning Bohlen, deny the truth of the matter set forth in paragraph (6) of plaintiff's reply.

8. The defendant, George Bohlen, admits the truth of the matter contained in paragraph (7) of the plaintiff's reply.

9. The defendant, Henning Bohlen, says that as to the matter contained in paragraph (7) of plaintiff's reply, he lacks sufficient knowledge and information to form a belief.

10. The defendants, George Bohlen and Henning Bohlen, further admit that the execution of the chattel mortgage referred to in paragraph (4) of the defendant's answer and in paragraph (8) of the plaintiff's reply, was not accompanied by the immediate delivery and by the actual change of possession of the said goods, wares and merchandise described therein and conveyed thereby, but the said defendants deny the truth of the allegations set forth in subdivisions 1, 2, 3 and 4 of paragraph (8) of plaintiff's reply.

11. The defendants, George Bohlen and Henning Bohlen, deny the truth of the matter contained in paragraph (9) of plaintiff's reply.

12. The defendants admit the allegation set forth in paragraph (10) of the plaintiff's reply.

JAY & GLUECKFIELD,
Attorneys of Defendants.

NOTE: *Rejoinder filed in Wilkinson, Gaddis & Co.* v. *Bohlen, 97 A. 279.*

No. 80. REPLY DENYING CONTRIBUTORY NEGLIGENCE ON PLAINTIFF'S PART.

New Jersey Supreme Court.

(Title.)

The plaintiff, in reply to the answer of the defendant filed herein, says:

1. Plaintiff denies that he exposed himself to any risk of an accident and neglected to take proper precaution or exercise care to guard and protect himself, and denies that he was in any way guilty of contributory negligence or in any way by his acts contributed to the injury which he sustained, as is alleged in the third defense in the answer.

FORT & FORT,
Attorneys for Plaintiff.

NOTE: *Filed in Jennings* v. *Okin, 97 A. 249.*

No. 81. REPLY TO ANSWER IN REPLEVIN ALLEGING DEFENDANT'S CHATTEL MORTGAGE TO BE VOID.

Supreme Court of New Jersey.

(Title.)

Plaintiff, replying to defendant's answer, says that

1. On and from the 11th day of November, 1913, plaintiff was a creditor of George Bohlen in the amount of $392.70, and being such creditor plaintiff obtained a judgment on said indebtedness, which judgment is the judgment referred to in paragraph 1 of the complaint.

2. On November 26, 1913, levy under said judgment was made upon the goods, wares, and merchandise described in paragraph 2 of the complaint, as stated in paragraph 2 of the complaint, and that by virtue of said levy plaintiff acquired a lien on and an interest in said property.

3. Paragraph 4 of the complaint is made paragraph 3 of this reply.

4. The said defendant George Bohlen from the date of said sale remained indebted to the plaintiff in the sum of $291.86, being the balance remaining due on said judgment, and still remains so indebted.

5. The goods, wares and merchandise described in paragraph 2 of said complaint and levied upon under said execution, as aforesaid, at and before the 11th day of November, 1913, and

from thence until said levy under said execution was made, were in the possession of George Bohlen.

6. The said defendant Henning Bohlen did not by the said paper purporting to be a chattel mortgage, set up in paragraph 4 of defendants' answer, or by any foreclosure or sale thereunder, or by virtue thereof, acquire any property, title, claim, demand, encumbrance, right or possession in or to any of the goods, wares, and merchandise referred to in paragraph 2 of the complaint in the above action.

7. Plaintiff was from the 11th day of November, 1913, a creditor of the said George Bohlen and has remained such from thence to the present time.

8. Plaintiff says that said paper purporting to be a chattel mortgage was void as against the plaintiff in that the execution and delivery of said paper purporting to be a chattel mortgage, referred to in paragraph 4 of the defendant's answer, was not accompanied by an immediate delivery and followed by an actual and continued change of possession of said goods, wares and merchandise described therein and alleged to be conveyed thereby, for the reasons:

(1) Said paper purporting to be a chattel mortgage did not have annexed to it an affidavit or affirmation made and subscribed by Henning Bohlen, the holder thereof, or by his agent or attorney, stating the consideration of said alleged mortgage.

(2) Said paper purporting to be a chattel mortgage did not have annexed to it an affidavit or affirmation made and subscribed by the said Henning Bohlen, the holder thereof, his agent or attorney, stating as nearly as possible the amount due and to grow due thereon.

(3) Said chattel mortgage was not immediately after its execution recorded.

(4) There was no consideration for said alleged chattel mortgage.

9. Plaintiff denies that there was any foreclosure or sale under or by virtue of said alleged chattel mortgage.

10. Plaintiff admits, as stated in paragraph 5 of defendant's answer, that said sale under said judgment, execution and levy

by this plaintiff in the action against George Bohlen, wherein this plaintiff recovered judgment against said George Bohlen in the First District Court of the city of Newark, was had on December 1, 1913, but plaintiff denies that said levy was made on said date, and says that said levy was made on the 27th day of November, 1913, and this plaintiff denies the balance of paragraph 5.

11. Plaintiff admits, as stated in paragraph 6 of defendants' answer, that defendant Henning Bohlen was served with said notice, but plaintiff denies the balance of said paragraph.

12. Plaintiff denies paragraph 7 of defendants' answer.

13. Plaintiff denies paragraph 8 of defendants' answer.

14. Plaintiff denies paragraph 10 of defendants' answer.

COULT & SMITH,
Attorneys of Plaintiff.

NOTE: *Reply filed in Wilkinson, Gaddis & Co. v. Bohlen, 97 A. 279.*

NO. 82. REPLY TO ANSWER SETTING UP WANT OF CONSIDERATION AS DEFENSE TO SUIT ON PROMISSORY NOTE.

(Title.)

Plaintiff said:

He denies that said notes were delivered to Morris B. Van Valen without any consideration therefor, and he denies that said notes were delivered to Morris B. Van Valen under any agreement made between the defendant herein and the said Morris B. Van Valen and William V. A. Keeler that said notes should not become valid or used or negotiated unless and until the amount represented by each note either in cash or its equivalent should be paid to defendant; he denies that the defendant never received any consideration for any of said notes from the said Morris B. Van Valen or from the said William V. A. Keeler, or from anyone else; he denies that he did not pay the consideration for said notes and he denies that he obtained possession of said notes with full knowledge that said notes were not to become valid or used or delivered or negotiated until the consider-

ation therefor had been paid to defendant, and with full knowledge that no consideration had ever been paid to the maker of said notes.

WENDELL J. WRIGHT,
Attorney for Plaintiff.

NOTE: *Filed in McCormack* v. *Williams, 95 A. 978.*

No. 83. RULE DISMISSING COMPLAINT.

New Jersey Supreme Court.

(Title.)

The answer of defendant having been withdrawn, and application for this purpose having been made, and argument of the counsel of the respective parties having been heard and considered, and it appearing to the court that the complaint does not state nor set forth a legal cause of action cognizable in this court, and that the grounds of objection to the plaintiff's complaint made by defendant are well founded:

It is therefore on this twelfth day of January, nineteen hundred and fifteen, on motion of Louis H. Miller and Edgar R. Jones, attorneys of defendant, ordered that the complaint herein be dismissed, and that the defendant recover of plaintiff his costs of this suit to be taxed.

CHAS. C. BLACK,
J. S. C.

Approved,
HOWARD CARROW.

NOTE: *Filed in Terrone* v. *Harrison, 94 A. 600.*

No. 84. RULE TO SHOW CAUSE, RESERVING EXCEPTIONS.

Hudson County Circuit Court.

(Title.)

On application, made within six days after the rendering of the verdict herein:

It is, on this thirty-first day of January, A. D. nineteen hundred and thirteen, on motion of George J. McEwan, attorney of the defendants, Jasper S. Allard and the Highland Trust Company of New Jersey, and Julius Belte, ordered that the defendants show cause before this court, on Friday, the twenty-first day of February, A. D. nineteen hundred and thirteen, why the verdict in this case should not be set aside and a new trial granted to the said defendants.

And it is further ordered, that the said defendants be permitted to reserve the exception taken at the trial as to the question whether an architect can maintain a lien for drawing plans, and if not, whether the entirety of the contract for his services would not destroy his right of lien for a part thereof, and that this rule will not preclude the taking of an appeal by the said defendants.

WM. H. SPEER,
Judge.

NOTE: *Filed in Turck* v. *Allard, 94 A. 583.*

No. 85. SET-OFF SETTING UP USURY TO SUIT ON PROMISSORY NOTE.

(Title.)

Defendant demands of the plaintiff the sum of five hundred dollars, for that whereas, heretofore, to wit, between the first day of October, 1910, and the fifth day of August, 1913, the above named plaintiff had and received from one James H. Quigley, various sums of money, aggregating four hundred and fourteen dollars and thirty-eight ($414.38) cents, in and about the discount and purchase by the plaintiff from the said James H. Quigley, at usurious and excessive rates of interest, and in pursuance of a usurious and corrupt agreement, certain various promissory notes made by the defendant for the accommodation of the said James H. Quigley, and known to the plaintiff so to be made, and that by force of the statute in such case made and provided, the said James H. Quigley did on the said fifth day of August, 1913, have a certain cause of action or right to recover back, by

suit, the said moneys so paid as aforesaid, or to set-off as against any claim or credit against said James H. Quigley, existing in favor of the plaintiff, the said sum of money so paid for excessive and usurious rates of interest, and that heretofore and on the eighth day of September, 1913, the above named James H. Quigley, being then and there the owner of such cause of action and right to recover the said moneys aforesaid, did assign such cause of action to the above named defendant by a certain assignment in writing, dated on that day, and that defendant is now the owner and holder of said claim, a schedule of which is hereunto annexed, marked Exhibit A, and by this reference made part of this demand of set-off.

Judgment will be claimed by the defendant against the plaintiff, for the said sum of four hundred and fourteen dollars and thirty-eight ($414.38) cents, with lawful interest thereon, besides the costs of suit.

GEORGE EDWARD QUIGLEY,
Attorney for Defendant.

NOTE: *Set-off in Weitz* v. *Quigley, 97 A. 254. Judgment for defendant affirmed by Court of Errors.*

No. 86. SPECIFICATION OF DEFENSES.

District Court of the City of Elizabeth.

(Title.)

The above-named defendant specifies the following as its defenses to the above-entitled action:

(1) The coal received by defendant from the plaintiff was not of the same quality as that theretofore supplied in accordance with the requirements of the contract set forth in the state of demand.

(2) The coal ordered from plaintiff by defendant was not delivered to the defendant in accordance with the terms of the contract.

(3) The coal actually delivered by plaintiff to defendant was

not delivered at the times and in the quantities specified in the bill of particulars annexed to plaintiff's state of demand.

(4) Defendant admits the making and execution of the contract set forth in the plaintiff's state of demand.

NOTE: *Filed in Clark Bros., etc., Co.* v. *Royal Mfg. Co., 95 A. 610.*

No. 87. SPECIFICATION OF DEFENCES SETTING UP USURY TO ACTION IN DISTRICT COURT.

(Title.)

PLEASE TO TAKE NOTICE, that in pursuance of the demand for specification of defences, served with the summons and state of demand in the above-entitled cause, the above-named defendant specifies the defences to the cause of action set forth in said state of demand as follows:

First. That defendant made the said note mentioned in said state of demand for the accommodation of the payee therein named of which plaintiff had due notice.

Second. That the said note is without consideration.

Third. That the said note has been paid.

Fourth. That the said note was received by plaintiff from the payee therein named and discounted at a usurious rate of interest for such payee, in pursuance of a corrupt and usurious agreement or contract between such payee and such plaintiff.

Fifth. That the above-named plaintiff charged, demanded and received from the payee named in said note, a greater sum than that fixed by law as the legal rate of interest for the discount of such note.

Sixth. That plaintiff is not the holder of said note for value.

Yours, etc.,

(Signed) GEORGE EDWARD QUIGLEY,
Attorney for Defendant,
144 Berganline Avenue,
Town of Union, N. J.

NOTE: *Filed in Weitz* v. *Quigley, 97 A. 254.*

No. 88. STATE OF DEMAND; ACTION FOR PRICE OF COAL DELIVERED UNDER WRITTEN AGREEMENT.

District Court of the City of Elizabeth.

(Title.)

The plaintiff above named demands of the defendant above named the sum of four hundred and fifty dollars, for that, on the eighth day of September, nineteen hundred and eleven, the defendant and plaintiff entered into a certain contract, in writing, in the words and figures following:

"Clark Brothers Coal Mining Co.,
Commonwealth Trust Building,
Philadelphia, Pa.

September 8, 1911.

"Clark Brothers Coal Mining Co. hereby agrees to sell, and the Royal Manufacturing Company, Rahway, N. J., agrees to buy, up to 1,000 tons of Falcon bituminous coal, for one year, beginning September 8th, 1911, and ending September 8, 1912. Upon the following terms and subject to the conditions printed on the back and made a part hereof. Place of delivery F. O. B. cars, Rahway, N. J. Price, $1.10 per gross ton, F. O. B. cars at mines.

Terms, Net Cash, 30 days from date of invoice.

Upon failure of the buyer to meet the above requirement, this contract shall be subject to cancellation by the seller.

Remarks: This coal is to be the same quality as heretofore supplied.

CLARK BROTHERS COAL MINING CO.
By S. L. CLARK,
Treasurer.

Royal Manufacturing Co.,
S. EISEMAN,
Vice Prest."

(On back of Contract.)

"Conditions of the Sale and Delivery of Coal Under the Foregoing Contract.

"(1) This contract is entered into with the distinct understanding that the buyer agrees absolutely to take all of his requirements of bituminous coal up to the said amount from the seller during the period of this contract.

"(2) If at any time during the terms of this contract the operations or business of the seller at the mines, or on the railroads, wharves or vessels by which it transports coal to any place where delivery is agreed to be made, are interrupted by floods, breaks, accidents, or strikes among miners, wharf-men, boatmen, coal-handlers, or others, or from their refusal to work from any cause whatsoever, the obligations of the seller to deliver coal under this contract may, at its option, be canceled, to the extent of the duration of such interruption, and no liability shall be incurred by the seller for damages resulting therefrom.

"(3) If at any time during the term of this contract there should be a shortage of cars, lack of inefficiency of transportation facilities, shipments hereunder shall be prorated from time to time in fair proportion to all orders or contracts which the seller then has outstanding.

"(4) All possible dispatch will be given in loading, but no claims will be allowed for demurrage.

"(5) This contract is not transferable without the written consent of the seller.

"(6) All settlements to be based on R. R. weights.

"(7) All coal must be shipped the purchaser in as nearly equal monthly quantities as possible; any portion not shipped on the date of the expiration of the contract to be canceled; and when delivered on board of vessels, boats or barges at the point of shipment, it is to be in all respects at risk of purchasers. Bill of lading, or other testimony of shipment, to be proof of delivery, both as to time and quantity.

"(8) The within price for coal delivered is based upon the present rate paid for mining, and it is understood and agreed between the parties hereto that any increase or decrease in the cost of mining will, after due notice to purchasers, be added or deducted from the price herein named."

That hereafter, pursuant to the foregoing contract, and on receipt of orders thereunto from the defendant, the plaintiff did

sell and deliver to the defendant certain quantities of coal on the days and in the amounts set forth in the bill of particulars hereunto annexed. The defendant has never paid for the said coal, though often requested so to do, to the damage of the plaintiff, four hundred and fifty dollars.

The plaintiff further demands of the defendant the sum of four hundred and fifty dollars for divers quantities of coal sold and delivered by the plaintiff to the defendant at its request in accordance with the bill of particulars hereunto annexed. The defendant has not paid the said sum, or any part thereof, though often requested so to do, to the damage of the plaintiff four hundred and fifty dollars.

McCARTER & ENGLISH,
Attorneys of the Plaintiff.

NOTE: *State of demand filed in Clark Bros., etc., Co. v. Royal Mfg. Co., 95 A. 610; judgment for plaintiff affirmed by Court of Errors.*

No. 89. STATE OF DEMAND. ACTION FOR USE AND OCCUPATION BY OWNER UNDER TAX TITLE AND IN ALTERNATIVE AGAINST AGENT FOR RENTS COLLECTED.

(Title.)

The plaintiff demands of the defendants five hundred dollars ($500) in an action upon contract and for a cause of action says:

1. That on the first day of October, nineteen hundred and thirteen, the collector of taxes of the town of Bloomfield sold at public vendue to the plaintiff certain lands and premises in the said town of Bloomfield, Essex county, this state, and known and designated as lots twenty-nine (29) and thirty-two (32), block twenty-six B (26B); that said lands and premises were sold to the plaintiff in fee simple.

2. That on the tenth day of October, nineteen hundred and thirteen, the said collector of taxes did by his two certain certificates, each bearing the date last aforesaid, grant and convey the above-mentioned lands and premises to the plaintiff in fee simple

subject to be redeemed by the persons entitled by law to do so; that said lands and premises have not been redeemed.

3. That the plaintiff recorded each of the said two certificates of sale so as aforesaid given by the said collector of taxes conveying said lands and premises to the plaintiff, as mortgages, in the Essex county register's office on the thirteenth day of October, A. D. nineteen hundred and thirteen.

4. That on and prior to the first day of October, A. D. nineteen hundred and thirteen, and from thence hitherto, the defendant, Alice M. Tucker, was in the possession and occupation of the above-mentioned lands and premises as a tenant thereof and under a letting wherein she agreed to pay for the use and occupation of the said lands and premises the monthly rental of forty-five dollars ($45.00) on the first day of each and every month during the said term.

5. That prior to the first day of October, aforesaid, the owner of said premises appointed Nathan Russell, Inc., a corporation of this state, its agent to collect the said monthly rent from the said defendant, Alice M. Tucker, the tenant in possession of the said lands and premises; that since the first day of October aforesaid, and monthly thereafter, until the commencement of this suit, the said defendant Nathan Russell, Inc., did collect from the defendant, Alice M. Tucker, the said monthly rental and now holds the same in its possession and refuses to pay the same or any part thereof to the plaintiff.

6. That the said plaintiff under the statute in such case made and provided and from and after the date of the said certificates of sale of the said tax collector became and was entitled to the immediate possession and to all the rents and profits of the property sold and described in the said certificates for the term of the sale or until redemption, of all of which the said defendant Alice M. Tucker and the said defendant Nathan Russell, Inc., had notice.

7. Plaintiff says that the said defendant Alice M. Tucker was liable to her for the rent of the said lands and premises above mentioned from the date of the said certificates of sale to the commencement of this suit, and has refused, failed and neglected to pay the same to the plaintiff.

8. Plaintiff further says that the said Nathan Russell, Inc., collected the rents from the said Alice M. Tucker, tenant as aforesaid, for the months of October, November and December, A. D. nineteen hundred and thirteen, and January, February and March, nineteen hundred and fourteen, and had and received the moneys so collected for the use and benefit of the said plaintiff, which although often requested so to do, the said defendant Nathan Russell, Inc., has refused, failed and neglected to pay the same to the plaintiff.

9. Judgment will be demanded against the defendant Alice M. Tucker for the sum of three hundred and fifteen dollars ($315.00), or in the alternative against the defendant Nathan Russel, Inc., for the said sum of three hundred and fifteen dollars ($315.00), all to the damage of the said plaintiff five hundred dollars ($500.00), and therefore she brings her suit, etc.

HARRY J. BROCKHURST,
Attorney for Plaintiff.

NOTE: *State of demand filed in Baldauf v. Nathan Russell, 96 A. 96. Judgment for plaintiff affirmed by Court of Errors.*

NO. 90. STATE OF DEMAND IN REPLEVIN FOR LICENSE CERTIFICATE.

(Title.)

1. On July 21, 1913, defendant owed plaintiff $500, evidenced by his note payable to the order of plaintiff on demand, dated on said day.

2. On that day at Jersey City, defendant made and delivered to plaintiff a power of attorney to transfer the license issued to him by the board of excise commissioners of Jersey City, to sell spirituous, vinous, malt and brewed liquors at 234 Wayne street, in said city, and a petition to the board of excise commissioners for the transfer of said license; that said power of attorney and petition were given by the defendant to plaintiff as security for payment of said note.

3. On said day plaintiff allowed defendant to retain possession of the said license certificate and agreed that defendant should retain possession thereof so long as he paid plaintiff $10 per week each week on account of his said note.

4. On November 24, 1913, defendant defaulted in the payment of $10 due on said date and has not since said date made any payments on account of his said note; on said date plaintiff demanded payment of said note and defendant has not paid same; thereupon plaintiff became absolute owner of said license certificate and was entitled to possession thereof.

5. On January 6, 1914, and before serving the writ in this action plaintiff demanded of defendant the delivery to it of said liquor license certificate.

6. Defendant then and there wrongfully refused to deliver said license certificate to plaintiff and then and there, in the premises, 234 Wayne street, Jersey City, wrongfully detained and still wrongfully detains the same; defendant has wrongfully detained said certificate from plaintiff since November 24, 1912.

Plaintiff demands possession of said license certificate and $150 damages for its detention.

D. EUGENE BLANKENHORN,
Plaintiff's Attorney.

NOTE: *State of demand filed in Columbia Brewing Co. v. Tumulty, 96 A. 885. Judgment for plaintiff affirmed by Court of Errors.*

ANSWERS.

No. 91. ANSWER. GENERAL FORM.

New Jersey Supreme Court.
Union County.

(Title.)

The defendant, residing at Roselle, in the county of Union and State of New Jersey, answering the said plaintiff, says:

1. He admits the first paragraph.
2. He admits the second paragraph.

3. He admits the third paragraph, except that he says that he was not the sole promoter of the companies therein referred to.

4. He neither admits nor denies the allegations contained in the fourth paragraph, but as to the same puts the plaintiff upon his proof.

5. He denies the truth of the matters contained in paragraph five.

6. He denies the truth of the matters contained in paragraph six, except that it is true that the plaintiff did purchase fifteen thousand (15,000) shares of stock of the Gem Dredging Company, and paid therefor to said company the sum of twenty-two hundred and fifty dollars ($2,250.00).

7. He denies the truth of the matters contained in paragraph seven.

8. He denies the truth of the matters contained in paragraph eight, except that the circular and letter therein described were issued and circulated as charged.

9. He denies the truth of the matters contained in paragraph nine, except that it is true that the said plaintiff did sell his shares in the said Gem Dredging Company in exchange for shares in the Gem Exploration Company.

10. He denies the truth of the matters contained in paragraph ten, except that it is true that the Gem Dredging Company is insolvent.

NOTE: *From Lams* v. *Fish, 90 A. 1105. Judgment of nonsuit affirmed by Court of Errors.*

No. 92. ANSWER AND COUNTER-CLAIM TO ACTION FOR BOARDING HORSES—NEGLECT OF BAILEE WHEREBY HORSES WERE INJURED.

New Jersey Supreme Court.
Monmouth County.

(Title.)

This defendant, residing in the village of Shrewsbury, in said county, says:

1. She admits that at the time designated in the complaint, said plaintiff did, at her request, take for board and hire the horses of this defendant, and that she agreed to pay said plaintiff a reasonable consideration for the proper food, shelter and care of said horses.

This defendant denies that said plaintiff provided said horses with proper food, shelter and care, and says that the said plaintiff, by his servants and agents, took so little and such bad care and afforded so little and such bad shelter to this defendant's mare, "Marshmallow," that by reason of plaintiff's lack of shelter and care, said mare died on or about the 28th day of June, 1914, while in charge of said plaintiff, and became a complete loss to this defendant, to this defendant's damage twenty-five hundred dollars ($2,500); and this defendant, by way of counter-claim, asks that said damages for said mare shall be awarded and paid to her.

2. This defendant admits paragraph 2 of the complaint.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

NOTE: *Filed in Fanshawe* v. *Rawlins, 94 A. 582; 98 A. 439.*

No. 93. ANSWER AND COUNTER-CLAIM TO ACTION BY LANDLORD AGAINST TENANT FOR REMOVAL OF FIXTURES AND DAMAGE TO PREMISES. COUNTER-CLAIM FOR REPAIRS MADE TO PREMISES UNDER VERBAL AGREEMENT AFTER EXECUTION OF LEASE.

Hudson County Circuit Court.

(Title.)

The defendant answered as follows:

Defendant residing at No. 722 Hudson street, Hoboken, Hudson county, New Jersey, says, that:

DEFENSE TO FIRST COUNT.

1. He admits the first paragraph.
2. He admits the second paragraph.

3. He admits the third paragraph.

4. He denies the fourth paragraph.

5. He denies the fifth paragraph. As to the statements in the fifth paragraph defendant says that the fixtures removed by him from said premises were the property of the defendant, and that he was lawfully entitled thereto.

6. He denies the sixth paragraph. As to the statements in the sixth paragraph defendant admits that on the first day of May the plaintiffs demanded of the defendant the return of certain fixtures mentioned and described in a certain demand in writing served upon the defendant, and that the defendant has refused to return the same. That the fixtures mentioned in the notice or demand in writing served upon the defendant by the plaintiffs were not in and upon said demised premises at the time of the making of said lease, but were subsequently placed therein by the defendant, and were the property of the defendant.

DEFENSE TO SECOND COUNT.

1. He admits the first paragraph.

2. He admits the second paragraph.

3. He admits the third paragraph.

4. He denies the fourth paragraph. As to the statements in the fourth paragraph defendant admits that he removed cherry partition with stained glass top; cherry door leading to rathskeller; the bar, the back bar, back fixtures, wine closet, working bar, lunch counter, partition dividing store; partition and door from ladies' toilet; door in back of bar; all back bar plumbing; brass rails to rathskeller and to toilet; dish washing tubs, and says that the said fixtures, goods and chattels so removed by him were not the property of the plaintiffs and were not in the said demised property at the time of the making of the said lease, but were purchased by the defendant and paid for by him, and placed in and upon said premises after he entered into possession of said premises under said lease, and were the property of the defendant at the time he removed the same. He denies that he disconnected the steam pipes and disconnected and removed the plumbing in the toilets.

DEFENSE TO THIRD COUNT.

1. He admits the first paragraph.

2. He admits the second paragraph.

3. He admits the third paragraph.

4. He denies the fourth paragraph. As to the statements in the fourth paragraph defendant says that the fixtures removed from said demised premises by him were the property of defendant.

DEFENSE OF FOURTH COUNT.

1. He admits the first paragraph.

2. He admits the second paragraph.

3. He denies the third paragraph except so far as admitted in the following statement; that the defendant did place in said building the fixtures mentioned and described therein, but he denies that said fixtures were placed in said buildings and annexed to the same so that the same became part of the realty.

4. He denies the fourth paragraph except so far as admitted in the following statement; the defendant removed from said premises all of the fixtures mentioned in paragraph three excepting the steam pipes and radiators. He says that said fixtures removed by him were not torn up but were carefully removed from said premises without damage to the realty. That all the goods and chattels removed by defendant from said demised premises were the property of the defendant.

By way of counter-claim against the plaintiffs, the defendant says:

FIRST COUNT.

1. That on February 7, 1907, by lease in writing, a copy of which is annexed to complaint, plaintiffs let and rented to the defendant all that certain first floor on the premises known and designated as number seventy-seven (77) Hudson street, in the city of Hoboken, county of Hudson, and State of New Jersey, being the northeast corner of Hudson Place and Hudson street, in said city, county and state aforesaid, and the front part of basement for the term of five (5) years, to commence on the first day of May, A. D. 1907.

2. Defendant hired said premises for the purpose of conducting therein a cafe or saloon and restaurant.

3. After the making and execution of said lease, in writing, the plaintiffs by verbal agreements made and entered into with the defendant agreed that in consideration of the defendant paying one-half the cost thereof, that they the said plaintiffs would make the following additions, alterations and improvements to the said demised premises, to wit:

(*a*) Excavate the basement of said demised premises and all necessary mason and cement work to make this basement water tight and ready to be fitted up and used as a rathskeller.

(*b*) Installation of steam-heating plant.

(*c*) Iron work, consisting of stairs, beams, ventilator and doors.

(*d*) Painting ceilings in bar and sitting-room and gilding same with gold leaf, gilding pipes and painting radiators and pipes.

(*e*) Lay Terazzo floor.

(*f*) Extension to store front in front of hall door on Hudson street; new doors, extend metallic glass dome, extend store cornice with cresting and gutter, painting marble platform and risers, embossed cut glass, four bronze kick plates for doors.

4. That defendant, in consideration of the plaintiffs making said additions, alterations and improvements mentioned in the foregoing paragraph, agreed with plaintiffs to pay one-half of the cost thereof.

5. That the entire cost of said additions, alterations and improvements was the sum of $3,640.74.

6. That by the terms of said agreement the plaintiffs should have paid the sum of $1,820.37, being one-half of the cost of said additions, alterations and improvements.

7. That plaintiffs paid on account of the said sum $1,820.37 the sum of $231.12, and the remainder of said sum of $1,820.37, to wit, the sum of $1,589.25 was paid out and expended by the defendant for the use of the plaintiffs at their request.

8. That there is due from plaintiffs to defendant the sum of $1,820.37.

9. Plaintiffs have not paid the same.

SECOND COUNT.

1. Defendant paid for the use of plaintiffs at the plaintiffs' request, the sum of $153.00 for work and labor done and performed and materials furnished by C. Riegers Sons on building of the plaintiffs, known as No. 77 Hudson street, Hoboken, New Jersey.

2. There is due from plaintiffs to defendant said sum of $153.00.

3. Plaintiffs have not paid the same.

THIRD COUNT.

1. That on February 7th, 1907, by lease in writing, a copy of which is annexed to complaint, plaintiffs let and rented to the defendant all that certain first floor on the premises known and designated as number seventy-seven (77) Hudson street, in the city of Hoboken, county of Hudson and State of New Jersey, being the northeast corner of Hudson Place and Hudson street, in the said city, county and state aforesaid, and the front part of basement for the term of five (5) years, to commence on the first day of May, A. D. 1907.

2. Defendant hired said premises for the purpose of conducting therein a cafe or saloon and restaurant.

3. After the making and execution of said lease, in writing, the plaintiffs by verbal agreement made and entered into with defendant, agreed that in consideration of the defendant paying one-half the cost thereof, that they the said plaintiffs would excavate the basement of the said demised premises, and furnish and provide the necessary labor and materials for the mason and cement work to make said cellar water tight, so that the same could be used by the defendant for the purpose of conducting a rathskeller in conjunction with his saloon and restaurant business.

4. By the terms of said agreement plaintiffs agreed that said excavating and mason work would be completed and said basement ready to be used as a rathskeller by the defendant on or before the first day of June, 1907.

5. That defendant, in consideration of the plaintiffs providing said materials and performing said work, agreed with plaintiffs to pay one-half the cost thereof.

6. That plaintiffs did not on or before the first day of June, 1907, or at any time, provide the materials or perform the work to make said basement water tight, so that the same could be used by the defendant for the purpose of conducting therein a rathskeller in conjunction with his saloon and restaurant business.

7. That said water work was so carelessly and negligently performed by the said plaintiffs and their agents that the basement of said premises was not made water tight, so that defendant might use the same as a rathskeller, but that the said basement leaked and permitted large quantities of water to come into the same during storms and whenever the tide would change.

8. That defendant laid out and expended divers large sums of money, to wit, the sum of $2,000.00, for such excavating and cement work under said agreement.

9. That defendant laid out and expended divers other large sums of money, to wit, the sum of $1,000.00, in fitting up said basement as a rathskeller, and that by reason of the failure of the plaintiffs to make said basement water tight, defendant was unable to use said basement for the purpose of conducting therein said rathskeller.

DEFENDANT COUNTER-CLAIMS.

1. $2,500.00 damages on the first count of this counter-claim.
2. $200.00 damages on the second count of this counter-claim.
3. $5,000.00 damages on the third count of this counter-claim.

NOTE: *From Soulier v. Daab, 90 A. 266. Judgment for defendant on set-off affirmed by Court of Errors.*

No. 94. ANSWER AND COUNTER-CLAIM IN MECHANIC LIEN ACTION.

Essex County Circuit Court.

(Title.)

The defendant, residing in East Orange, New Jersey, says:

1. He admits the first paragraph.

2. He admits the second pragraph, but says that under article 1 of said agreement that said agreement should have been supplemented by the application and permit of the building department of the city of Newark, a copy of which is annexed hereto and made part hereof.

3. He denies the third paragraph.

4. He denies the fourth paragraph.

5. He denies the fifth paragraph.

6. He admits that he has not paid said plaintiff, but denies that he owes said plaintiff anything, but, on the contrary, says that by reason of the plaintiff's non-performance of their contract, lack of proper workmanship and attendance to the performance of said contract, and of unlawful neglect thereof, that the building is still untenantable and will require several thousand dollars to be made tenantable in accordance with the agreement entered into between the parties, and that the defendant is losing rent for said building at the rate of one thousand dollars a month, and he has been unable to sell said premises by reason of such neglect, &c.

7. He denies the seventh paragraph.

8. He denies the eighth paragraph.

9. By way of counter-claim against the plaintiff, and against John H. & Wilson C. Ely, third parties, architects, the defendant says that—

1. He repeats the statement in paragraph six above.

2. That the said John H. & Wilson C. Ely, the third parties, architects aforesaid, did not properly supervise said work, and neglected to carry out their contract and were notified not to issue any certificates to the said contractor.

FIRST DEFENSE.

That said plaintiffs did not comply with the terms of said contract, in that they did not "replace and repair everything that was destroyed by fire, water or otherwise."

SECOND DEFENSE.

That said plaintiffs did not comply with the terms of the "permit from the different city departments necessary to carry out said contract."

THIRD DEFENSE.

That said plaintiffs did not "in all cases comply with all city ordinances and regulations necessary to restore the building to its original conditions."

FOURTH DEFENSE.

That said building cannot now be used as lofts, as originally intended under said plans and specifications.

FIFTH DEFENSE.

That said plaintiffs did not "remove all partitions and debris from the premises, except the partitions around stairs, elevators, toilets and hallways," and that the entire first story cannot now be used as a store.

SIXTH DEFENSE.

That said building cannot now be used or rented for lofts or store, as it was formerly used and rented, prior to said fire.

SEVENTH DEFENSE.

That under articles 3, 8, 9 and 12 of said contract, the architects' certificates are not final or conclusive evidence that the work has been done satisfactorily.

EIGHTH DEFENSE.

That the said plaintiffs did not comply with articles 4, 8 and 9 of said contract.

NINTH DEFENSE.

That said plaintiffs have never presented architects' certificates to the defendant, and have never delivered possession of said premises to the owner thereof, and still refuse possession.

TENTH DEFENSE.

That said plaintiffs were and are in default on said contract.

ELEVENTH DEFENSE.

That if said building had been restored to its former condition as it was before said fire, as agreed by said plaintiffs, it would have been rentable and salable; but in its present condition it cannot be rented nor sold, and that said premises rents for $1,000 monthly and defendant could have sold said premises at a large profit.

TWELFTH DEFENSE.

That said plaintiffs did not carry out said contract in a workmanlike manner.

THIRTEENTH DEFENSE.

That said defendant has as yet been unable to ascertain the amount of money necessary to carry out said contract, as he has been denied entrance to said premises by said plaintiffs, but believes it will cost at least $5,000 to properly carry out same.

FOURTEENTH DEFENSE.

That the architects John H. & Wilson C. Ely, third parties, maliciously intending to injure and defraud said defendant and by collusion with said plaintiffs, issued their said certificates, as alleged, against the written notice and protest of said defendant.

Therefore the defendant counter-claims fifteen thousand ($15,000) dollars damages.

MATHEW J. READY,
Attorney for Defendant.

NOTE: *Filed in E. M. Waldron & Co.* v. *Gilmore, 95 A. 129.*

NO. 95. ANSWER AND COUNTER-CLAIM TO ACTION. REPLEVIN WHERE GOODS WERE IN CUSTODY OF RAILROAD FOR SHIPMENT.

Hudson County Circuit Court.

(Title.)

The defendant, Central Leather Company, a corporation of the State of New Jersey, having its principal office at No. 15 Exchange Place, Jersey City, says in answer to the complaint of James L. O'Neill:

1. Paragraph one of the complaint is denied.
2. Paragraph two of the complaint is denied.
3. Paragraph three of the complaint is denied.
4. Paragraph four of the complaint is admitted.

By way of counter-claim:

1. This defendant at the time of the alleged taking was and still is the owner of so much of the goods and chattels mentioned in the complaint as were taken by the sheriff of Hudson county, under the writ of replevin herein, and was entitled at that time to the immediate possession thereof, subject only to the rights of its bailee, the Pennsylvania Railroad Company, to whom it had delivered the same for shipment to various points. This defendant demands possession of the said goods and chattels and ten thousand dollars ($10,000) damages.

EDWARDS & SMITH,
Attorneys of Defendant,
Central Leather Company.

NOTE: *Answer and counter-claim in O'Neill* v. *Central Leather Co., 94 A. 789; 96 A. 1102; 87 L. 552.*

No. 96. ANSWER BY CARRIER OF GOODS DENYING LIABILITY UNDER PROVISION OF BILL OF LADING.

Supreme Court of New Jersey,
Hudson County.

(Title.)

Defendant, a body corporate, organized under the laws of the State of Pennsylvania, having a place of business and office at No. 26 Exchange Place, Jersey City, Hudson county, New Jersey, says that:

FIRST DEFENSE.

1. It denies the truth of the matters contained in the complaint and each and every count thereof.

SECOND DEFENSE.

1. Defendant without admitting that the goods and property were delivered to it and accepted by it to be transported in the manner averred in the complaint, avers that if such property did come to the hands of the defendant for the purpose of the transportation thereof, it did so as to each and every count of said complaint, under the terms and conditions of a certain bill of lading, issued to said plaintiff by the initial carrier of said property, pursuant to the provisions of the act of Congress of June 20th, 1906 (34 Stat. at Large, p. 584, chap. 3591; U. S. Comp. Stat., Supp. 1911, p. 1288), and the supplements thereto and amendments thereof, commonly designated as the Inter-State Commerce act, constituting an express agreement between the plaintiff and the defendant, whereby the defendant was to be relieved from any and all liability for damage to the said goods and property resulting from delay in the transportation and delivery thereof, if such delay was caused by a strike or strikes among defendant's employees; and defendant asserts that a strike did take place among its employees, and continued from the ninth day of July, nineteen hundred and twelve, to the thirty-first day of July, nineteen hundred and twelve, which strike was the cause of the alleged delay if any delay at all occurred as alleged in said complaint.

THIRD DEFENSE.

1. Defendant, without admitting that the goods and property were delivered to it and accepted by it to be transported in the manner averred in the complaint, avers that if such property did come to the hands of the defendant for the purpose of the transportation thereof, it did so as to each and every count of said complaint under the terms and conditions of a certain bill of lading issued to said plaintiff by the initial carrier of said property, pursuant to the provisions of the act of Congress of June 20th, 1906 (34 Stat. at Large, p. 584, chap. 3591; U. S. Comp. Stat., Supp. 1911, p. 1288), and the supplements thereto and amendments thereof, commonly designated as the Inter-State Commerce act, constituting an express agreement between the plaintiff and the defendant, whereby the defendant was to be relieved from any and all liability for damage to the said goods and property resulting from or occasioned by an accumulation of freight at any point, or to any other causes over which the defendant had no control; and defendant asserts that an accumulation of freight did occur at Jersey City, New Jersey, the point to which the shipments mentioned in the complaint were consigned, and at which they were to be delivered, and continued from the ninth day of July, nineteen hundred and twelve, to the thirty-first day of July, nineteen hundred and twelve, over which accumulation the defendant had no control, and which accumulation was the cause of the alleged delay if any delay at all occurred as alleged in said complaint.

FOURTH DEFENSE.

1. Defendant, without admitting that the goods and property were delivered to it and accepted by it to be transported in the manner averred in the complaint, avers that if such property did come to the hands of the defendant for the purpose of the transportation thereof, it did so as to each and every count of said complaint under the terms and conditions of a certain bill of lading issued to said plaintiff by the initial carrier of said property, pursuant to the provisions of the Act of Congress of June 20th, 1906 (34 Stat. at Large, p. 584, chap. 3591; U. S.

Comp. Stat., Supp. 1911, p. 1288), and the supplements thereto and amendments thereof, commonly designated as the Inter-State Commerce act, constituting an express agreement between the plaintiff and the defendant whereby the defendant was to be relieved from any and all liability for damage to the said goods and property resulting from or occasioned by any cause over which the defendant had no control; and defendant asserts that a strike took place among its employees and continued from the ninth day of July, nineteen hundred and twelve, to the thirty-first day of July, nineteen hundred and twelve, over which strike the defendant had no control, and which strike was the cause of the alleged delay, if any delay at all occurred as alleged in said complaint.

FIFTH DEFENSE.

2. No claim for the loss or damage to the goods or property mentioned in the complaint was made in writing to the agent of the defendant at the point of delivery or consignment of said goods and property by said plaintiff within ten days after the delivery of said property, or after due time for the delivery thereof, by the defendant to the plaintiff, although at the time when said goods and property were delivered to and accepted by the defendant for transportation in the manner averred in the complaint, if ever delivered to or accepted by said defendant for the purpose aforesaid, it was expressly agreed between the plaintiff and defendant that in case of loss or damage to said property, claim therefor should be so made within the time and at the place and in the manner mentioned.

SIXTH DEFENSE.

1. No claim for the loss or damage to the goods or property mentioned in the complaint was made in writing to the defendant at the point of delivery or at the point of origin of said goods and property by said plaintiff within four months after the delivery of said property, or after a reasonable time of delivery thereof had elapsed by the defendant to the plaintiff, although at the time when said goods or property were delivered to and accepted by the defendant for transportation in the manner

averred in the complaint, if ever delivered to or accepted by said defendant for the purpose aforesaid, it was expressly agreed between the plaintiff and defendant that in case of loss or damage to said property, claim therefor should be made within the time and at the place and in the manner mentioned, or that, if not so made, the defendant should not be liable for such loss or damage.

SEVENTH DEFENSE.

1. No claim for the loss or damage to the goods or property mentioned in the complaint was made in writing to the agent of the defendant at the point of delivery or consignment of said goods and property by said plaintiff, within thirty days after the delivery of said property, or after due time for the delivery thereof by the defendant to the plaintiff, although at the time when said goods and property were delivered to and accepted by the defendant for transportation in the manner averred in the complaint, if ever delivered to or accepted by said defendant for the purpose aforesaid, it was expressly agreed between the plaintiff and defendant that, in case of loss or damage to said property, claim therefor should be so made within the time, at the place and in the manner mentioned.

VREDENBURGH, WALL & CAREY,
Attorneys for Defendant.

NOTE: *Answer filed in Oliver Bros. v. P. R. R., 96 A. 582. Court of Errors reversed judgment for plaintiff and ordered new trial.*

No. 97. ANSWER BY CORPORATION TO SUIT BY ASSIGNEE OF ALLEGED STOCKHOLDER FOR FAILURE TO DELIVER STOCK.

Hudson County Circuit Court.

(Title.)

Defendant, a corporation organized under the laws of New Jersey, whose principal office is at Jersey City, in the county of Hudson and State of New Jersey, says that:

(1) Defendant admits the first, second and third paragraphs of the complaint filed in the above-stated action.

(2) Defendant denies the fourth paragraph of said complaint wherein it is alleged that at the close of business on the said 20th day of April, 1912, one M. L. Parsons was the holder of record of 135 shares of the capital stock of said company, and by virtue thereof became entitled to subscribe for 3,375 shares of the increase of capital stock of said company upon the terms and conditions of said offer in paragraph three of said complaint set forth. The defendant alleges that said M. L. Parsons was not the owner and holder of record of said last-named shares of stock at the close of business on said 20th day of April, 1912, and defendant alleges that for a long time prior to the said 20th day of April, 1912, to wit, several years prior thereto, the said M. L. Parsons had sold, assigned and conveyed all her right, title and interest in and to said shares of stock and, since said sale and assignment and conveyance thereof, had not held any interest whatever therein at any time thereafter and that the said M. L. Parsons was not at any time entitled to subscribe for any shares of the increase of capital stock of said company upon the terms and conditions of said offer.

(3) As to the statement made in the fifth paragraph of said complaint, that on May 1, 1912, said M. L. Parsons for good and valuable consideration, by instrument in writing, transferred and assigned the right to subscribe for the shares of the increased capital stock of said company attaching to said 135 shares to Herbert Levy, Guy W. Levy and C. Sedgwick Levy, partners, trading as Levy Brothers, defendant has not any knowledge and information thereof sufficient to form a belief, and defendant denies that the said M. L. Parsons was the owner or holder of record or had any interest whatever in said 135 shares or any or either of them at any time after said offer to subscribe was made and defendant alleges that said Parsons had not had any such interest since her said sale, assignment and conveyance thereof as aforesaid; and defendant further alleges that the said Parsons had no right to transfer or assign the right to subscribe for the said shares of increased capital stock of said company or any or either of said shares, and defendant denies that the said Levy Brothers by reason of said assignment or otherwise

became entitled to subscribe for 3,375 shares of the increased capital stock of said company or of any share or part thereof.

(4) As to the statements in the sixth and seventh paragraphs of said complaint wherein it is alleged that said Levy Brothers on May 3, 1912, accepted said offer and subscribed to said 3,375 shares of the increased capital stock of said company and delivered said subscription agreement together with the sum of $6,750.00 at the office of the registered agent of defendant and that the same were received by said defendant, and that on June 10, 1912, said Levy Brothers paid to the company the sum of $10,250.00, the balance due upon said subscription, which was received by this defendant, this defendant alleges that neither the said registered agent of this defendant nor this defendant either received said subscription agreement or said sums of money or either of them under or by virtue of any agreement of this defendant or its said registered agent that the same should be received or taken for said 3,375 shares of said increased stock or any share or part thereof. And defendant alleges that neither this defendant, nor its said registered agent, ever in anywise agreed that said Levy Brothers should subscribe for said increased capital stock, and never recognized any right on the part of the said Levy Brothers to make said subscription and this defendant alleges that any subscription agreement or any sum or sums of money received by this defendant or its registered agent from said Levy Brothers, as alleged in said paragraphs six and seven of said complaint, was deposited only temporarily with said registered agent and this defendant, pending the action which should thereafter be taken by the defendant with reference to said subscription; and the defendant further alleges that the defendant rejected said Levy Brothers' offer to subscribe to said stock, refused and still refuses to deliver to said Levy Brothers said shares of said increase; and the defendant at the time of such refusal returned to said Levy Brothers any money and papers temporarily left with the defendant or its registered agent for the purpose of such subscription.

(5) Defendant admits the eighth paragraph of said complaint.

(6) Defendant denies the ninth paragraph of said complaint.

(7) As to the statement in the tenth paragraph of said complaint the defendant has not any knowledge or information sufficient to form a belief, but defendant alleges that said Levy Brothers did not on the 6th day of December, 1912, or any other time own or have any right, title or interest in or to said 135 shares of said stock formerly owned by said Parsons and had no right to transfer or assign the same or any interest therein to George W. C. Schmidt, the plaintiff, and the defendant denies that the said plaintiff had any right, title or interest whatever in and to said 135 shares of said stock or had any right whatever to subscribe for said 3,375 shares of said increase or any share or part thereof. Defendant denies that either said Levy Brothers or plaintiff has been deprived of any right or opportunity to which he is entitled, or sustained any damages whatever for which defendant is liable.

(8) The defendant further alleges that said offer made by this defendant to its stockholders to subscribe for said new stock was by its terms made only to the owners and holders of record of said stock at the close of business on April 20, 1912, and to persons to whom such holders and owners of record had assigned shares upon presentation of a duly executed written assignment thereof. And the defendant avers that the said Levy Brothers were neither holders or owners of record of said 135 shares of said stock or any part thereof nor did they hold the same or any part thereof by assignment from the holder of record and owner of said stock who held the same until the time of said assignment, and that the said Levy Brothers never gave or offered to the defendant or its registered agent any reasonable or satisfactory proof or evidence that the said 135 shares of stock or any share or part thereof was held or owned by the said Parsons on the 20th day of April, 1912, or at any other time since said Parsons sold and assigned and transferred her stock as aforesaid, and the said Levy Brothers failed and refused to produce or submit to the defendant any certificate or certificates for said 135 shares or any share or part thereof assigned from any owner or holder of record thereof although requested so to do by the plaintiff.

(9) And defendant alleges that plaintiff's said complaint does not allege or disclose any cause of action against the defendant and defendant hereby and herein sets up and raises the objection that said plaintiff does not allege or disclose any cause of action against defendant.

GRIGGS & HARDING,
Attorneys of Defendant.

NOTE: *From Schmidt* v. *Marconi Wireless Tel. Co., 90 A. 1017.*

No. 97a. ANSWER IN ACTION FOR FALSE ARREST AGAINST JUSTICE OF PEACE.

(Title.)

The defendant, who resides at Clementon, in the county of Camden, State of New Jersey, says that:

1. Defendant admits that in March, 1912, proceedings were instituted against the plaintiff by agents of the New Jersey Society for the Prevention of Cruelty to Animals, said proceedings being instituted before this defendant as a duly constituted justice of the peace; that the judgment rendered by the defendant in said proceedings was subsequently reversed upon certiorari proceedings instituted by the plaintiff.

2. Defendant admits that upon the institution of said proceedings before him, on the sixth day of March, 1912, after the complaint had been sworn to, a warrant was issued by this defendant for the arrest of the plaintiff; that said warrant was not served or exhibited to the plaintiff until the hearing upon said complaint, which took place on the eighth day of March, 1912; that said plaintiff had been placed under arrest on the sixth day of March by agents of said society for violation of the statute relating to the prevention of cruelty to animals, but was not brought before the defendant by said agents on the sixth day of March, 1912, because of his own request that said hearing should be postponed until the eighth day of March, 1912; that on said eighth day of March, 1912, the plaintiff appeared and was given a hearing and was adjudged guilty of the charge con-

tained in said complaint, and a fine having been imposed by said defendant, carrying with it certain costs, said plaintiff immediately paid the same and was released from custody; that said defendant acted in entire good faith and had full and complete jurisdiction of the subject-matter of said complaint.

3. Defendant denies that the plaintiff's liberty was unlawfully interfered with by him; that the plaintiff's reputation was damaged by him, and that the plaintiff was subjected to degradation, indignity and other losses by this defendant.

4. Defendant will object that the complaint discloses no cause of action, as defendant would not be liable for holding the plaintiff in custody until the fine and costs were paid in the action described in said complaint while acting as a duly qualified justice of the peace, in good faith, in a proceeding over which the defendant was given complete jurisdiction by the statute of the state.

GREY & ARCHER,
Attorneys for Defendant.

NOTE: *Answer in Porter* v. *Neitling, 97 A. 264. Judgment for defendant affirmed by Court of Errors.*

No. 98. ANSWER IN ACTION OF NEGLIGENCE DENYING ALLEGATION OF DEFENDANTS' NEGLIGENCE AND SETTING UP CONTRIBUTORY NEGLIGENCE ON PLAINTIFF'S PART.

Hudson County Circuit Court.

(Title.)

The defendants, Frederick Mertens, who resides at No. 231 Bayview avenue, in the city of Jersey City, Hudson county, and State of New Jersey, and Hattie Mertens, who resides at No. 168 Wegman Place, in the city of Jersey City aforesaid, answering the complaint of the plaintiff, say:

1. They admit that on the 27th day of October, A. D. 1914, at the city of Jersey City, they kept certain premises known as the Apolla Theatre, at the corner of Jackson and Wilkinson avenues, Jersey City, used as a place of amusement and say

that they have no knowledge whether the plaintiff was invited by the payment of the sum of money which she paid, and then entered into said place of amusement; they say, however, that they kept a place of amusement there in which the public generally was invited upon the payment of an entrance fee. They say they do not know whether plaintiff was in said place of amusement on the 27th day of October, A.. D. 1914, or not, but deny that while endeavoring to leave said theatre and while using due care for her safety, and by reason of the negligence of the defendants, she was hurt by falling down and injuring herself.

2. Defendants admit that they maintained a moving-picture theatre, but deny that it was kept dark and say that it was at that time and at all other times perfectly lighted; they admit that there was a stairway in said theatre necessary for said plaintiff to use in going from the balcony to the first floor, provided she was in the balcony, of which fact defendants have no knowledge; they deny that they did use reasonable care to light said stairway and deny that they were under any obligation to supply a person to direct the plaintiff how to leave the premises. They also deny that while attempting to leave said place of amusement, and while descending a certain stairway the plaintiff by reason of the darkness and the bad construction of the stairway, or by reason of the fact that no person had been instructed to warn or warned the plaintiff of any danger in using said stairway, or by reason that said stairway was extremely steep or that by reason of the nature of the construction of said stairway, or by reason of the fact that no person had instructed or warned the plaintiff of any danger, she fell and injured her leg and knees; they also deny that there was any danger in using said stairway or that it was extremely steep, or that there was any platform in said stairway which by reason of the construction thereof would lead a person using reasonable care to believe that he or she was at the bottom of said stairway. They also say that they have no knowledge whether plaintiff injured her leg or not, but say that if she did fall and injure herself, it was the fault of her own negligence. They deny that the plaintiff expended for medical expenses $100.

FIRST SEPARATE DEFENCE.

The plaintiff was guilty of contributory negligence.

WELLER & LICHTENSTEIN,
Attorneys for Defendants.

NOTE: *Answer filed in Andre v. Mertens, 96 A. 893.*

No. 99. ANSWER TO ACTION AGAINST DEVISEE OF LANDS, DENYING LIABILITY OF DECEASED ANCESTOR FOR DEBT AND CONFESSING DEVISE OF LAND TO HER BY THE DECEASED DEBTOR.

New Jersey Supreme Court,
Cumberland County.

(Title.)

Defendant, Maude E. Frome, of the city and county of Camden, State of New Jersey, devisee under the last will and testament of William Shillingsburg, Sr., deceased, and one of the executors of the will of said William Shillingsburg, Sr., deceased, answering, says:

FIRST DEFENSE.

1. The note for two thousand dollars sued upon was made and delivered to the plaintiff by William Shillingsburg, Jr., and the said William Shillingsburg, Jr., had no authority to make or deliver the said note for William Shillingsburg, Sr., and this defendant and the estate of the said William Shillingsburg, Sr., are not liable thereon.

2. The plaintiff had notice of the lack of authority of the defendant, William Shillingsburg, Jr.

SECOND DEFENSE.

1. The note for five thousand dollars sued upon was made and delivered to the plaintiff by William Shillingsburg, Jr., and signed by the said William Shillingsburg, Jr., for himself and as attorney for William Shillingsburg, but the said William Shillingsburg, Jr., had no authority to make or deliver the said

note and this defendant and the estate of the said William Shillingsburg, Sr., are not liable thereon.

2. The plaintiff had notice of the lack of authority of the defendant, William Shillingsburg, Jr.

THIRD DEFENSE.

1. William Shillingsburg, Jr., was the maker of the note for five thousand dollars sued upon and is liable primarily thereon and this defendant, or the estate of the said William Shillingsburg, Sr., deceased, if liable at all thereon, liable secondarily only.

FOURTH DEFENSE.

1. That the notes sued upon were for the benefit of the defendant, William Shillingsburg, Jr., and this defendant or the estate of the said William Shillingsburg, Sr., if liable thereon, liable secondarily only.

FIFTH DEFENSE.

1. That the only real estate devised to this defendant by the will of said decedent was devised by the following portions thereof:

2. That the only real estate devised to the defendant, William Shillingsburg, Jr., by the said decedent, was devised by the foregoing paragraph third of said will and by a codicil to his last will, by the following provision thereof:

3. That if this defendant is liable at all on said notes, she is liable only to the extent of the lands devised to her as aforesaid.

4. That the lands so devised to this defendant should respond for the liability on said notes, if liable at all, only in that proportion which the value of the real estate devised to her bears to the value of the real estate devised to the defendant, William Shillingsburg, Jr.

5. That if the estate of said William Shillingsburg, Sr., is liable at all on said notes it is liable primarily as to this defendant, and this defendant, if liable at all thereon, is liable secondarily as to said estate.

OTT & CARR,
Attorneys of Defendant.

NOTE: *Answer in Cumberland Nat. B'k* v. *Frome, 94 A. 625. Judgment for plaintiff under this answer must be special, that the debt be made out of the lands devised, and not general.*

NO. 100. ANSWER TO ACTION AGAINST OWNER OF AUTOMOBILE FOR PERSONAL INJURIES. DENYING DRIVER WAS DEFENDANT'S SERVANT, AND SETTING UP CONTRIBUTORY NEGLIGENCE.

New Jersey Supreme Court, Essex County.

(Title.)

Joseph Okin, a resident of the city of Newark, county of Essex, and State of New Jersey, the defendant herein, answers the plaintiff's complaint in this action as follows:

1. The defendant admits that on the ninth day of January, in the year nineteen hundred and fourteen, he was the owner of a certain automobile; the defendant has no knowledge, information or belief sufficient to form an opinion as to whether the plaintiff was lawfully crossing Market street, in the city of Newark, from the south side of said street to the north side thereof at or near the point where Washington street of said city intercepts Market street.

2. The defendant denies all the allegations contained in paragraph 2 of the complaint herein.

3. The defendant denies that the plaintiff sustained any injuries on account of the negligence of the defendant and his agents; the defendant has no knowledge, information or belief sufficient to form an opinion as to whether the plaintiff did sustain the injuries complained of in paragraph 3 of the complaint herein, nor whether the said plaintiff was obliged to spend a considerable amount of time in the hospital, nor whether he was confined to his home for a long time, nor whether he is still able to work and carry on his business, nor whether said plaintiff has expended money and how much in order to recover from his injuries; and the said defendant insists, as aforesaid, that whatever injuries or loss or damage said plaintiff did sustain were not sustained through the negligence of the said defendant or through the negligence of his agents.

FIRST DEFENSE.

The defendant was not guilty of negligence.

SECOND DEFENSE.

The agents of the defendant were not guilty of negligence.

THIRD DEFENSE.

The defendant was not present at the time of the occurrence of the accident, nor were his servants or agents present; neither the defendant or his servants or agents caused the said accident, nor did they contribute in any extent whatever to the occurrence of said accident; and whoever was guilty of the negligence which caused said accident, or contributed to the occurrence thereof, the plaintiff was guilty of contributory negligence, of which the particulars are as follows:

Whatever damages and injuries were sustained by the plaintiff, Richard P. Jennings, at the time and place mentioned in the complaint, were caused and contributed to by his negligence in that he negligently and carelessly exposed himself to the risk of such an accident and neglected to take precaution or to exercise care to guard and protect himself against such an accident; moreover at the time and place mentioned in the complaint he was conducting himself in a careless, negligent and reckless manner, and was not exercising care or taking proper precautions.

Wherefore the defendant demands judgment that the complaint herein be dismissed with the costs and disbursements in this action.

McCARTER & ENGLISH,
Attorneys of Defendants.

NOTE: *Filed in Jennings v. Okin, 97 A. 249.*

No. 101. ANSWER TO ACTION BY PUBLIC OFFICER FOR SALARY. DEFENSE PLAINTIFF AN INTRUDER, AND HENCE NOT ENTITLED TO PAY.

(Title.)

The defendant, Atlantic City, a municipal corporation of the county of Atlantic and State of New Jersey, says that—

1. It admits paragraph one, two, three, four, six and seven of the plaintiff's complaint.

2. It admits the allegations of paragraph five concerning the call, election, canvass and qualification and assumption of duties of the plaintiff as recorder of Atlantic City, but denies that the resolution of the Board of Commissioners of Atlantic City, adopted December 31, 1914 (a copy of which is annexed hereto and made a part hereof), installed the plaintiff in the office of recorder of Atlantic City. Further answering said paragraph, defendant says that said call, election, canvass, qualification and assumption of duties of office of recorder of Atlantic City were without color of law, and hence void and did not therefore confer any legal right or title to the office of recorder of Atlantic City upon the plaintiff. That all the other allegations in said paragraph are hereby denied.

3. It denies that plaintiff is entitled to the sum claimed in paragraph eight, or any other sum.

DEFENSES.

4. That the said call, election, canvass, qualification and assumption of office by plaintiff were without color of law, and hence void, and did not therefore confer any lawful right or title to the office of recorder of Atlantic City upon the plaintiff, and that the plaintiff is not legally entitled to the salary for said office for said time.

5. That the plaintiff is a mere volunteer in the office of recorder of Atlantic City for the time alleged in the complaint, and is not therefore entitled to any salary, even though he did perform the duties of the said office.

6. That at the time of the election of plaintiff, as alleged in his complaint, and at the time he took his office, there was a

legally qualified encumbent entitled to the said office, all of which the said plaintiff had knowledge of.

7. That at the time of the demand by the plaintiff upon this defendant for the salary sued for, and at the time of the institution of the suit therefor by him, he had knowledge that Marten E. Keffer was, during all the time claimed in his complaint, to wit, from January 1, 1915, to July 22, 1915, the legal incumbent and recorder of Atlantic City, entitled to perform the duties of the office. That, therefore, the defendant is not liable to pay plaintiff for any such services as alleged in his complaint.

8. That Martin E. Keffer instituted proceedings in quo warranto in the Supreme Court of New Jersey against the plaintiff for the term from January 1, 1915, to July 22, 1915, and obtained a judgment of ouster against him in September, 1915.

9. That there is now pending and undetermined an action in the Supreme Court of New Jersey by the said Martin E. Keffer against this defendant for the same amount and salary as is involved in this suit.

C. L. COLE,
Attorney for Atlantic City.

NOTE: *Answer from Gaskill v. Atlantic City. Judgment for defendant affirmed by Court of Errors, 98 A. 385.*

No. 102. ANSWER TO ACTION FOR BROKER'S COMMISSION; FAILURE OF PURCHASER TO BUY PREMISES.

Essex County Circuit Court.

(Title.)

Defendant, who resides in the city of Newark, county of Essex and State of New Jersey, says:

(1) That he believes that the allegations of paragraph one of the complaint are true.

(2) First defense: That it is not true that the plaintiff sold the premises in question for the defendant, Charles M. Hop-

ping, as trustee, to Charles A. Terrill, for forty-five thousand dollars.

(3) Second defense: This defendant admits that he signed a paper, a copy of which is annexed to the complaint purporting to be an agreement of sale made by and between this defendant and the said Charles A. Terrill, for the sale of the premises in question. This defendant says that the plaintiff was present at the time when the said Charles A. Terrill executed said agreement, and that at that time the said Charles A. Terrill signed the agreement, with the intention not to pay the consideration named or take title to the property described therein; and that at the same time the said Charles A. Terrill was neither able nor willing to purchase the property in question in accordance with the terms of said agreement, and since that time has not been able or willing to pay the consideration aforesaid, or take title to the premises in question, and never has paid such consideration or taken title to the property, all of which was known to the plaintiff.

CECIL H. MACMAHON,
Attorney for Defendant.

NOTE: *Filed in Smith* v. *Hopping, 95 A. 993. Order striking out answer as frivolous reversed by Court of Errors.*

NO. 103. ANSWER TO ACTION FOR INJURIES AT CROSSING. LOCUS IN QUO WAS PRIVATE WAY AND PLAINTIFF WAS A TRESPASSER THEREON.

New Jersey Supreme Court.
Hudson County.

(Title.)

The answer of the Central Railroad Company of New Jersey, a corporation of the State of New Jersey, having its principal office for the transaction of business in the city of Jersey City, county of Hudson, and State of New Jersey, says:

1. It admits that on, and for a long time prior to December 11, 1913, it was a body corporate and was engaged as a com-

mon carrier of passengers and merchandise for hire, but it denies that it operated and controlled in connection with its business any buildings leased to tenants. It admits that it controls and operates a steam ferry on the North River, but it denies that its steam ferry is at or near the foot of Johnston avenue in Jersey City, Hudson county, and State of New Jersey. It denies that it maintained in connection with the buildings mentioned in the complaint a street or highway. It admits that it owned and maintained a certain private passageway for use in connection with its business, which said passageway was and is private property of this defendant and which has never been dedicated or relinquished to the public use. It admits that said passageway was used by persons having business in connection with this defendant and admits that said private passageway was the sole means of ingress and egress to and from the ferry mentioned in the complaint from and to the public streets of Jersey City.

2. It denies each and every allegation contained in paragraph two of the complaint.

3. It has no knowledge or information sufficient to form a belief as to the matters and things alleged in paragraph three of the complaint.

4. It denies each and every allegation contained in paragraphs four and five of the complaint.

5. It has no knowledge or information sufficient to form a belief as to the matters and things contained in paragraphs six and seven of the complaint, but it alleges that plaintiff sustained no injuries, loss or damage by reason of any negligence on the part of this defendant, its servants, agents or employes.

As a separate defense this defendant says, that at the time the accident mentioned in the complaint happened, plaintiff was a trespasser on its private property and he therefore cannot recover against the company because no unlawful or wanton injury is alleged.

As a separate defense, this defendant says that at the time of the happening of the accident plaintiff failed to exercise reasonable care for his safety in that he failed to observe the vehicle

which it is alleged struck him although the same was in plain view and defendant alleges, therefore, that plaintiff was guilty of contributory negligence barring recovery.

GEORGE HOLMES,
Attorney of Defendant.

NOTE: *From Reaney* v. *Central R. R., 98 A. 258.*

No. 104. ANSWER TO ACTION IN REPLEVIN, CLAIMING PROPERTY UNDER CHATTEL MORTGAGE.

Supreme Court of New Jersey.
Essex County.

(Title.)

Defendants, George Bohlen, Henry Bohlen, Henning Bohlen and Henry L. C. Kirchner, residing in the city of Newark, Essex county, New Jersey, say that:

1. They admit the truth of the matter contained in paragraph one of the complaint.

2. The defendants, George Bohlen, Henry Bohlen, Henry L. C. Kirchner, answering separately, say they disclaim all right to the property described in the complaint.

3. The defendant, Henning Bohlen, denies the truth of the second paragraph.

4. The defendant, Henning Bohlen, further says, that on November 24, 1913, he caused a certain chattel mortgage encumbering the goods and chattels mentioned in the complaint —which mortgage was open of record in the register's office in the county of Essex, aforesaid—to be foreclosed by John McNellen, sergeant-at-arms, of the First District Court of the City of Newark, and a sale of the said goods was conducted in legal manner by the said John McNellen; that upon such sale on the said twenty-fourth day of November, this defendant, Henning Bohlen, purchased the said goods and chattels, he being the highest bidder therefor.

5. The defendants, George Bohlen and Henning Bohlen, say further, that when the levy and sale on the judgment mentioned

in the complaint by said plaintiff was had on the first day of December, nineteen hundred and thirteen, the said George Bohlen was no longer the owner of said goods, and that the said Henning was then the legal owner thereof.

6. Defendant Henning Bohlen says further that he was served with a demand as stated in paragraph six of the complaint, but that he was not compelled to comply under the circumstances.

7. Defendant, Henning Bohlen, says further that he became, on the twenty-fourth day of November, and still is, the rightful owner of the said goods, and entitled to the immediate possession thereof.

8. Defendant, Henning Bohlen, denies further that he has wrongfully detained said goods as alleged in paragraph seven of the complaint.

9. Paragraphs three and four of the complaint are admitted.

10. Defendant, Henning Bohlen, demands possession of the said goods and chattels and two hundred dollars ($200.00) damages.

Attorneys of Defendants.

NOTE: *Answer filed in Wilkinson, Gaddis & Co. v. Bohlen, 97 A. 279.*

No. 105. ANSWER TO ACTION ON PROMISSORY NOTES SETTING UP WANT OF CONSIDERATION.

(Title.)

Defendant, residing at No. 303 Roseland avenue, Essex Fells, New Jersey, says:

(1) He denies the truth of the matters contained in the complaint, except so far as admitted in the following statement: Defendant admits the making of the promissory notes set forth in said complaint, and says that said notes were delivered to Morris B. Van Valen without any consideration therefor, and under an agreement made between the defendant herein and the said Morris B. Van Valen and William V. A. Keeler that said notes should not become valid or used or delivered or negotiated unless and until the amount represented by each note, either in cash or its equivalent, should be paid to defendant; that

defendant never received any consideration for any of said notes from the said Morris B. Van Valen or from the said William V. A. Keeler, or from anyone else; that plaintiff did not pay any consideration for said notes, and that plaintiff obtained possession of said notes with full knowledge; that said notes were not to become valid, or used, or delivered or negotiated until the consideration therefor had been paid to defendant, and with full knowledge that no consideration had ever been paid to the maker of said notes.

BENJAMIN F. JONES,
Attorney for Defendant.

NOTE: *Filed in McCormack* v. *Williams, 95 A. 978.*

No. 106. ANSWER TO ACTION TO ENFORCE AGREEMENT TO ASSUME CERTAIN MECHANICS' LIENS. DEFENSE LIENS, ACTION BROUGHT FOR, NOT LEGAL LIENS.

Monmouth Circuit Court.

(Title.)

Frederick F. Coleman, one of the defendants in the above-entitled cause, residing in the city of Asbury Park, Monmouth county, New Jersey, says: He denies the truth of the matters contained in the plaintiff's complaint.

Defense to first count: Defendant has no knowledge that plaintiff sues for labor performed or materials furnished in the alterations of the Criterion Theatre at Asbury Park, New Jersey, save that as he is informed in plaintiff's complaint; and he denies that he is in any way responsible for any labor performed or materials furnished by the plaintiff in this behalf.

Defense to second count: This defendant has no knowledge that Ellis G. Potter is the person who contracted any debt for labor or materials with the defendant on said building save as he is informed by his complaint.

Defense to third count: This defendant denies that he assumed plaintiff's debt in writing or agreed to pay the same.

Further defense: Defendant says that he made no contract with plaintiff whatsoever for any purpose; no contractual relations whatsoever with plaintiff and this defendant ever existed as stated in said complaint. That he did not agree to pay for any labor or materials used in the erection or alteration of the theatre building mentioned in plaintiff's complaint or assume to pay plaintiff anything therefor; that plaintiff never had nor has he now a lien against the building and lands mentioned in said complaint or against this defendant.

Further defense: Defendant says that the alleged agreement between one Potter and himself attached to plaintiff's complaint is not legally enforceable against this defendant; there is no privity of contract between plaintiff and defendant; that said alleged agreement was not made for the benefit of plaintiff; that whatever remedy plaintiff has, if any, lies solely between plaintiff and the person that contracted with this plaintiff for any labor or materials in this behalf.

Further defense: The alleged agreement on the part of this defendant and Ellis G. Potter by and under which plaintiff claims defendant assumed legal, enforceable and valid mechanics' liens for labor and materials used in the alteration and construction of said theatre building, so far as the defendant is concerned is wholly without consideration and void in law.

Further defense: Plaintiff never had any legal, valid and enforceable mechanics' liens for labor and materials used in the addition or alteration of the theatre building mentioned in his complaint against this defendant.

Further defense: That the alleged agreement between one Potter and this defendant is void in that Potter has failed to perform his agreement with defendant, and that said alleged agreement is void and of no legal effect whatsoever, and especially of no legal effect or benefit to the plaintiff.

Further defense: Plaintiff cannot maintain any action at law under said alleged agreement annexed to his complaint.

Further defense: Plaintiff in law cannot claim any benefit arising through said alleged agreement.

Further defense: The alleged agreement attached to plaintiff's

declaration is not a correct copy of any agreement which the defendant signed.

Further defense: The alleged contract attached to plaintiff's declaration is not the contract of this defendant.

Further defense: Plaintiff has no legal right or status under said agreement against this defendant either at law or in equity.

Further defense: Said alleged agreement was not designed or intended for the benefit of plaintiff, and plaintiff cannot maintain any action against this defendant thereunder.

CHARLES E. COOK,
Attorney for Defendant
Frederick F. Coleman.

NOTE: *From Rugarber* v. *Potter, 90 A. 1021. Judgment for defendant affirmed by Court of Errors.*

No. 107. ANSWER TO ACTION UNDER DEATH ACT—SETTING UP CONTRIBUTORY NEGLIGENCE OF DECEASED.

Hudson County Circuit Court.

(Title.)

The defendant corporation answers as follows:

Defendant, Erie Railroad Company, a corporation of the State of New York, having its principal office and place of business in New Jersey, at the foot of Pavonia avenue, Jersey City, Hudson county, New Jersey, says that:

1. It denies the truth of the matters contained in the complaint, except that it admits the allegations of paragraphs one, two and three thereof; and also admits the allegations in paragraph four that the plaintiff's intestate while crossing the said highway was killed by a train operated by the defendant.

2. The accident alleged in the complaint was due directly to contributory negligence on the part of the plaintiff's intestate.

COLLINS & CORBIN,
Attorneys of Defendant.

NOTE: *From Materka* v. *Erie R. R., 95 A. 612.*

No. 108. ANSWER TO DAMAGE SUIT SETTING UP CONTRIBUTORY NEGLIGENCE, INDEPENDENT CONTRACTOR AND NEGLIGENCE OF FELLOW SERVANT AS DEFENSES.

Essex County Circuit Court.

(Title.)

The answer of the defendant, a corporation, having an office and place of business at No. 355 Central avenue, Newark, New Jersey, to the complaint of the plaintiff says:

FIRST DEFENSE.

1. It admits that on December 21st, 1912, it had the possession, control and management of a certain building in the rear of the premises known and designated as No. 355–365 Central avenue, in the city of Newark, but this defendant denies that then and there, by its servants and employees, it was engaged in altering, changing and making additions to said building, and altering and changing the foundations and supports thereof, and excavating thereunder, and says that whatever work was done in altering, changing or making additions to the building, was done by an independent contractor, one Antonio LaConte, and not by this defendant.

2. It admits the statements of the second paragraph of the complaint.

3. It denies each and every of the statements of the third paragraph of the complaint.

4. It has no knowledge sufficient to form a belief as to the injuries suffered and sustained by the plaintiff, if any.

SECOND DEFENSE.

The defendant is not guilty of the negligence charged in the complaint.

THIRD DEFENSE.

The defendant violated no duty which it owed to the plaintiff.

FOURTH DEFENSE.

The work of altering, changing and making additions to the building of the defendant was done by an independent contractor, one Antonio LaConte.

FIFTH DEFENSE.

The injuries sustained, if any, by the plaintiff, were due to the negligence of the fellow-servants of the plaintiff employed by the said Antonio LaConte.

McCARTER & ENGLISH,
Attorneys of Defendant.

NOTE: *From De Vincenzo* v. *John Sommer Faucet Co., 94 A. 573.*

No. 109. ANSWER SETTING UP THAT PLAINTIFF, BEING A FOREIGN CORPORATION AND NOT HAVING AUTHORITY TO DO BUSINESS IN STATE, CANNOT MAINTAIN ACTION.

Passaic County Circuit Court.

(Title.)

The defendant, Max Stamm, of the city of Paterson, in the county of Passaic and State of New Jersey, says that—

First defense: The plaintiff is a foreign corporation doing business in the State of New Jersey, without having first obtained a certificate from the Secretary of State of New Jersey authorizing it to transact business in this state, as required by section 97 of "An act concerning corporations" (Revision of 1896), and is prohibited from maintaining an action on a contract made in this state by section 98 of "An act concerning corporations" (Revision of 1896). The contract on which this suit is brought was made in the State of New Jersey.

Second defense: At the time of the making of the contract between plaintiff and defendant the plaintiff agreed to forward defendant certain bookcases of the value of twenty dollars, which it has failed to do. The defendant claims the sum of twenty dollars by way of counter-claim against plaintiff.

Third defense: At the time of the making of the contract between plaintiff and defendant the plaintiff agreed to allow the defendant the sum of twenty dollars discount on the final payment, which it has failed to do.

(Signed) BENJAMIN L. STEIN,
Attorney for Defendant.

NOTE: *From Funk & Wagnalls Co. v. Stamm, 88 A. 1050.*

COMPLAINTS.

No. 110. COMPLAINT. ALIENATION OF AFFECTION OF PLAINTIFF'S HUSBAND.

Hudson County Circuit Court.

(Title.)

Plaintiff, Alice Sweeney, residing in Jersey City, Hudson county, New Jersey, says that—

1. Eugene Sweeney was, at the times hereinafter mentioned, the husband of the plaintiff.

2. Between the months of February and September, 1914, the plaintiff and her husband were living happily together as man and wife, in Bayonne and Jersey City, New Jersey.

3. During that time the defendant, contriving and wrongfully intending to injure the plaintiff and to deprive her of the comfort, society and aid of Eugene Sweeney, the husband of the plaintiff, alienated and destroyed his affection for the plaintiff, and thereby the affections of the said Eugene Sweeney for the plaintiff were lost.

4. As a result of the defendant's said actions, and by her influence and persuation, the said Eugene Sweeney neglected and ill-treated the plaintiff, and remained away from his home for several days on divers occasions between the months of February, 1914, and January, 1915.

5. That on divers days, between the months of February, 1914, and January, 1915, the defendant debauched and carnally knew the said Eugene Sweeney, husband of the plaintiff.

6. And, as a result of the defendant's actions, and by her influence and persuation, the said Eugene Sweeney caused the plaintiff to leave him and her home, to wit, on January 2d, 1915.

7. By reason of the premises the plaintiff has been, and is still, deprived by the defendant of the comfort, society and aid of her husband, and has been put to great trouble and expense in endeavoring to regain the affections of her husband, and has suffered great distress of body and mind to her damage, $25,000.00.

Wherefore, plaintiff demands $25,000.00 damages.

HERBERT CLARK GILSON,
Attorney for Plaintiff.

NOTE: *Complaint in Sweeney* v. *Miner*, 95 *A. 1014. Judgment making absolute rule to show cause why process should not be set aside for want of due service, affirmed by Court of Errors.*

No. 111. COMPLAINT ON ACTION BY WIFE FOR ALIENATION OF HUSBAND'S AFFECTIONS. TWO COUNTS.

New Jersey Supreme Court, Essex County.

(Title.)

Plaintiff, residing at Newark, New Jersey, says that—

1. On June 29, 1903, at Newark, in county of Essex, she became the wife of E. S., and she and her husband lived happily thereafter as man and wife, at Newark aforesaid.

2. That thereupon the defendants, W. S. S., J. S., G. W., and J. W., her husband, contriving and maliciously intending to aggrieve and injure the plaintiff and to deprive her of the comfort, company and fellowship of her said husband, the said E. S., then and now the husband of the plaintiff, and of her support from him and aid and assistance in domestic affairs and her character as a lawful wife, did shortly after said marriage and from thence daily until May 26 last past, at Newark aforesaid, wrongfully, injuriously, maliciously and with intent as aforesaid entice, instigate, persuade, aid and procure the said E. S., hus-

band of the plaintiff, unlawfully and against the will of the plaintiff to desert her and depart, absent and separate himself from her and to continue so absent, separate and apart from her against her consent.

3. That by means of which malicious enticement, instigation, procurement, aid and action of the defendants, the said E. S., the husband of the plaintiff, afterwards on the day last aforesaid, at Newark aforesaid, against plaintiff's consent and secretly, deserted her, his said wife, the plaintiff, and hath continued absent, separate from her in some place fixed by the defendants and which they refuse to reveal.

4. That by reason of the premises the said plaintiff, wife of the said E. S., hath been deprived and wholly lost the comfort, company and fellowship of her said husband and his aid and assistance and support in her domestic affairs which she, during that time, ought and would have had and enjoyed with her said husband.

5. Plaintiff claims as damages ten thousand dollars ($10,000.00).

COUNT 2.

1. On June 29, 1903, at Newark, in the county of Essex, the plaintiff was joined in lawful matrimony to and became the wife of E. L. S.

2. That soon after the said marriage of plaintiff with the said E. L. S., and while they were living happily together as man and wife, the defendants, W. S. S., J. S., G. W., and J. W., her husband, wrongfully contriving and intending to deprive her of the comfort, society and aid of her husband, did maliciously and by numerous conversations and letters attack, asperse, slur and run down the character, habits and behaviour and actions of the plaintiff, with the intent maliciously to persuade the said E. S. that she was not a good, true and loving wife to him, with the purpose of causing the said E. L. S. to abandon the plaintiff and with the malicious intent to destroy the affection existing between the plaintiff and said E. L. S., and to excite ill-will and hatred on his part toward her.

3. That she, the plaintiff, has always been a good, true and loving wife to the said E. L. S., as was known to the defend-

ants, and the said defendants so conspiring with said intent threatened that if the said E. L. S. remained with the plaintiff he should have no more to do with them, the defendants being the father, stepmother, sister and brother-in-law of the said E. L. S., and the defendants procured said E. L. S. to leave his wife, the plaintiff, and promised to find him work if he would leave her and pay his expenses away from her.

4. On or about April 30, 1908, the E. L. S., in consequence of the said actions of defendants, becoming dissatisfied and discontented with his wife, the plaintiff, and in pursuance of the wishes of said defendants and with their monetary and other aid, suddenly and without notice or warning abandoned his wife, the plaintiff, and went to Chicago.

5. On or about May 16, 1908, said E. L. S. returned to his wife, the plaintiff, and once again plaintiff and E. L. S. lived happily as man and wife at Newark aforesaid.

6. That plaintiff's husband had scarcely arrived home with the plaintiff when said defendants, maliciously contriving and conspiring as aforesaid, renewed their said malicious endeavors, persuasions, threats and promises in order to make said E. L. S. abandon the plaintiff.

7. Finally on or about May 26, 1908, in consequence thereof, said defendants, conspiring and intending wrongfully and maliciously, and with intent as aforesaid, enticed the said E. L. S. away from the plaintiff and have ever since detained him and harbored him, against the consent of the plaintiff, and in opposition to her utmost peaceable efforts to obtain him from the custody, control and influence of the defendants, and refuse even to let the plaintiff know where he is or his post-office address.

8. By reason of the premises the plaintiff has been and still is wrongfully deprived by the defendants of the care, love, confidence, protection, help, support, comfort and society of her husband, said E. L. S.; that by reason of said wrongful enticement and detention of her husband, plaintiff has been forced to go and live with her father and has been deprived of her home and of the social intercourse and confidence of her friends and is doubted by those who do not know her, and has suffered great mental pain and her reputation hurt in the community, and has

been put to great trouble and expense in endeavoring to find her husband in order to re-establish happy relations between them.

9. Plaintiff claims as damages ten thousand ($10,000.00) dollars.

.....

Attorneys of Plaintiff.

NOTE: *Above complaint is adapted to meet requirements of new Practice act from declaration from office of Cortlandt & Wayne Parker, held good on demurrer in case of Sims* v. *Sims, 79 L. 577, 76 Atl. 1063, 29 L. R. A. (N. S.) 842.*

No. 112. COMPLAINT. ACTION FOR BOARD OF HORSES.

New Jersey Supreme Court, Monmouth County.

Plaintiff, residing at the village of Shrewsbury, county of Monmouth and State of New Jersey, says that:

1. At and during the times hereinafter designated in (*lay venue*) the said plaintiff did at the request of the said defendant take for board and hire, the horses of said defendant and did cause said horses to be pastured upon the lands of said plaintiff, and did provide them with proper food. shelter and care for a reasonable consideration, which the said defendant did agree to pay therefor.

2. Defendant has not paid the same.

Plaintiff demands, as damages, $1,526.95 with interest thereon from July 10th, 1914.

JOHN S. APPLEGATE & SON,
Attorneys of Plaintiff.

NOTE: *Complaint in Fanshawe* v. *Rawlins, 94 A. 582, 98 A. 439. Judgment for plaintiff reversed and new trial granted by Court of Errors.*

NO. 113. COMPLAINT. ACTION OF NEGLIGENCE AGAINST RAILROAD COMPANY FOR FRIGHTENING HORSE ON PUBLIC STREET, CAUSING IT TO RUN AWAY AND INJURE PLAINTIFF.

New Jersey Supreme Court, Atlantic County.

(Title.)

Plaintiff, residing (etc.), says that:

1. On or about the 21st day of April, 1907, defendant was a corporation incorporated under the General Railroad act of the State of New Jersey and was operating its engine and cars longitudinally on Atlantic avenue, a public highway in Atlantic City, Atlantic county, to wit, at Mays Landing, in the county aforesaid.

2. It then and there became and was the duty of the defendant to use reasonable care to protect persons who might be in the lawful use of said highway.

3. On said day plaintiff was driving on and along said Atlantic avenue near North Carolina, when a locomotive of defendant company, in charge of one of its servants, was stopped on said Atlantic avenue at the North Carolina avenue crossing and at time plaintiff, while so driving and in the exercise of care, was invited by the agent of said defendant in charge of said engine to cross from the northerly to the southerly side of said Atlantic avenue in the rear of said locomotive.

4. While in the act of crossing in the rear of said engine, pursuant to said invitation, the agent in charge of defendant's engine carelessly and negligently backed said locomotive so near the horse, and in plaintiff's efforts to guide the horse away from said engine and prevent the horse and plaintiff from being run over, the carriage in which he was driving was upset and he was thrown out.

5. Plaintiff thereby sustained serious and permanent injury to his head, arms, shoulders, legs and spinal column, causing plaintiff to be confined to his bed for a long space of time during all of which he suffered physical pain and mental anguish, losing his salary, causing him to expend a large sum of money for board, nurse hire, doctor's bills, medicine and so injuring him as to permanently incapacitate him from future work, involving him in future pain and suffering.

Plaintiff demands as damages $5,000.

NOTE: *Above complaint founded upon declaration filed in case of Carmany v. West Jersey & S. R. R. Co. Judgment for plaintiff for $2,500 affirmed by Court of Errors. 74 A. 656, 78 L. 552.*

No. 114. COMPLAINT. ACTION AGAINST STREET RAILWAY COMPANY FOR FRIGHTENING HORSE BY NEGLIGENT OPERATION OF CARS.

Atlantic County Circuit Court.

(Title.)

Plaintiff residing, etc., says that:

1. On or about the 18th day of January, 1902, the defendant operated, on Atlantic avenue, in Atlantic City, to wit, at Mays Landing, in said county, trolley cars, and was bound to operate them in a prudent and reasonably safe manner.

2. The plaintiff, at the time aforesaid, was carefully and lawfully driving a horse and wagon along said avenue.

3. The defendant's agents, disregarding their duty as aforesaid, negligently and carelessly propelled one of its said trolley cars in such a negligent manner and with such speed and noise as to cause plaintiff's horse to become unmanageable and to run away and to throw plaintiff upon the ground.

4. The plaintiff was thereby cut, bruised, maimed and permanently disabled and caused to suffer great pain of body and mind, and expend large sums of money in his efforts to be cured of such injuries.

The plaintiff demands as damages $10,000.

.....

Attorney of Plaintiff.

NOTE: *Above complaint is adopted from declaration filed in case of Applegate v. West Jersey & S. R. R., 65 A. 127, 73 L. 722. Judgment for plaintiff, $3,800, affirmed by Court of Errors.*

No. 115. COMPLAINT FOR TAKING AND IMPOUNDING PLAINTIFF'S DOG.

(Title.)

Plaintiff, residing, etc., says that:

1. On or about the day of at (*lay venue*), the defendant, T. G., with force and arms took, seized and forcibly carried and dragged away a certain dog of the plaintiff, and being of the value of $50, and impounded and caused and procured the same to be impounded, and to be kept and detained and so impounded for two days and until the plaintiff was forced and obliged to pay and did pay the sum of $10 to have his dog redeemed and restored to him.

2. Plaintiff demands as damages $.

Attorney.

No. 116. COMPLAINT FOR INJURIES BY THE BITE OF A VICIOUS DOG OWNED BY DEFENDANT.

Union County Circuit Court.

(Title.)

Plaintiff, C. M., residing at , says that:

1. Upon the thirteenth day of January, nineteen hundred and six, at the city of Elizabeth, in the county of Union, and State of New Jersey, the said defendant, was the owner and proprietor of a certain public house in the said city of Elizabeth, and that as such said owner and proprietor of the said public house or saloon, open and maintained for the public at large, it then and there became and was the duty of the said defendant to see that his said patrons, so in his said public house, should suffer no harm in their persons or property by or through any negligent acts of the said defendant, or by maintaining or keeping on said premises any dangerous animals, known to him as likely to cause injury to his said patrons.

2. Nevertheless, the said defendant, well knowing his duty in that behalf, did upon that day and year in question, suffer and allow two certain dogs of his, and known to the said defendant to be of vicious and ill propensities, to run at large in and about his said public house or barroom aforesaid, in said city, so that while he, the said plaintiff, was lawfully in and about the

said public house or saloon upon the said thirteenth day of January, nineteen hundred and six, that the said vicious dogs of him, the said defendant, known to him to be vicious as aforesaid, and free to run about as aforesaid, did then and there open an attack upon him, the said plaintiff, with great force and violence, so that he, the said plaintiff, without giving the said animals any provocation, was then and there bitten and wounded by them in and about his body and limbs.

3. Whereby and by means of the premises, he, the said plaintiff, was greatly injured in and about the body and limbs, that he underwent great pain and suffering, and by reason of the permanency of said hurts, will undergo great pain and suffering for the remainder of his life; that he has been forced and obliged to lay out divers large sums of money to heal and cure himself of said hurts and wounds, and by reason of the permanency of said injuries will be obliged to lay out divers large sums of money in the future for the same purpose; that he has been deprived of divers great earnings in his business by means of the said hurts and wounds, and by reason of the permanency of said injuries he will be deprived of divers great gains in the future from the same source from his inability properly to attend to his affairs and business; that he is crippled in and about his body and limbs by means of the said biting and wounding, and will remain so for the remainder of his life.

4. Plaintiff demands as damages $3,000 and costs of suit.

NOTE: *Adopted from declaration in Mayer v. Kloepfer, 69 A. 182. Nonsuit set aside and new trial granted by Court of Errors.*

No. 117. COMPLAINT FOR ASSAULT, BEATING PLAINTIFF WITH STICKS, ETC., WHEREBY PLAINTIFF'S EYESIGHT WAS DESTROYED.

(Title.)

Plaintiff, residing at, etc., says that:

1. On or about the day of , the defendant, T. E., with force and arms, with sticks, fists and knives made

an assault upon the plaintiff and beat, bruised, wounded and ill-treated him, giving and striking the plaintiff many severe and grievious blows in, upon, over and across his head, face, skull, eyes, nose, forehead, shoulders and other parts of his body and thereby greatly wounded, cut and bruised plaintiff's head, face and eyes.

2. By means of the said several blows, strokes, cuts, bruises and wounds the plaintiff has not only suffered great pain, anguish and torture, both of mind and body, but he has been from thence hitherto in a great measure deprived of the sight of his left eye and is very likely to be wholly deprived of the sight thereof.

3. Plaintiff demands as damages the sum of $

Attorney.

No. 118. COMPLAINT—ACTION OF SLANDER BY ATTORNEY FOR WORDS SPOKEN BY ANOTHER ATTORNEY DURING TRIAL OF CAUSE.

Hudson County Circuit Court.

(Title.)

The plaintiff residing in the city of Hoboken, in the county of Hudson and State of New Jersey, says:

FIRST COUNT.

1. The plaintiff is and for a long time has been a resident of the city of Hoboken, in the county of Hudson and State of New Jersey and is and was at the time of the speaking of the words hereinafter mentioned an attorney at law licensed to practice in the State of New Jersey and was at such times aforesaid and is practicing his profession in the city of Hoboken, in the county of Hudson and State of New Jersey, and had before the speaking of the said words hereinafter mentioned enjoyed a good reputation among his fellow citizens and enjoyed a good reputation as an attorney-at-law.

2. That upon the 18th day of August, 1914, in a room in the City Hall in the city of Hoboken, in the county of Hudson, in which the Recorders' Court is held the said Clement De R. Leonard before Recorder McGovern, clerk of the court, John

Callahan, a Mrs. Jordan, Jacob Gimberg, Salvatore Rinaldi and many others whose names are unknown to the plaintiff and too numerous to refer to herein, falsely and maliciously and for the purpose of injuring the plaintiff in his good name, fame and credit, both as an individual and as an attorney-at-law, spoke of and concerning the said plaintiff as follows:

"You (referring to the said plaintiff) are a vermin."

And as follows: "You (referring to the said plaintiff) are a disgrace to the bar and are starting out in the wrong way as a young lawyer."

And as follows: "This (referring to certain action taken by the said plaintiff) will give you a black eye."

And as follows: "You and your client committed perjury:" meaning thereby that the said plaintiff had committed the crime of perjury.

And as follows: "You (referring to the said plaintiff) suborned your client," meaning thereby that the said plaintiff had committed the crime of perjury.

3. That by reason of the speaking of the said remarks in the presence of the said several people among whom were clients of the said plaintiff, the said plaintiff has been and is greatly injured in his good name, character and reputation and brought into public scandal, infamy and disgrace, and become liable to be prosecuted for the crime of perjury and subornation of perjury, and has been injured in his profession as an attorney-at-law, having been deprived of retainers which otherwise he might have received.

SECOND COUNT.

The plaintiff says that on the day aforesaid the said defendant likewise spoke of and concerning the said plaintiff, in the city of Hoboken, county of Hudson, and State of New Jersey, before divers persons the names of whom are unknown to said plaintiff and who are so numerous that it is impracticable to name them, the following false and malicious words of and concerning the said plaintiff, both as an individual and as an attorney-at-law, to wit, as follows:

"You (referring to the said plaintiff) are a vermin."

And as follows: "You (referring to the said plaintiff) are a disgrace to the bar and are starting out in the wrong way as a young lawyer."

And as follows: "This (referring to certain action taken by the said plaintiff) will give you a black eye."

And as follows: "You and your client committed perjury," meaning thereby that the said plaintiff had committed the crime of perjury.

2. That such words were false and malicious and the statements were made for the purpose of injuring the said plaintiff in his good name, fame and credit both as an individual and as an attorney-at-law.

3. That by reason of the speaking of the said remarks in the presence of the said several people, among whom were clients of the said plaintiff, the said plaintiff has been and is greatly injured in his good name, character and reputation and brought into public scandal, infamy and disgrace and become liable to be prosecuted for the crime of perjury and subornation of perjury, and has been injured in his profession as an attorney-at-law, having been deprived of retainers which otherwise he might have received.

Plaintiff demands on the first count, $5,000, and on the second count, $5,000 damages.

MERRITT LANE,
Attorney for the Plaintiff.

NOTE: *Complaint in La Porta* v. *Leonard, 97 A. 251. Judgment for plaintiff reversed by Court of Errors and new trial granted on grounds of refusal to charge as requested.*

No. 119. COMPLAINT FOR WORDS DISHONESTLY SPOKEN OF AN ATTORNEY IN HIS PROFESSION, WHEREBY HE LOST HIS CLIENTS.

New Jersey Supreme Court.
Atlantic County.

(Title.)

Plaintiff, residing in Atlantic City, New Jersey, says that:

FIRST COUNT.

1. Before and at the time of speaking and publishing of the several false, scandalous and defamatory words hereinafter mentioned, plaintiff had been and was an attorney-at-law of the State of New Jersey, and had always demeaned and conducted himself in his profession as such attorney with great fairness and integrity, and till the time of the speaking and publishing of the said several words, had never been suspected to have been guilty of any kind of fraud, knavery, or malpractice, but on the contrary thereof during all the time aforesaid had been, and at the time of the speaking and publishing of the said words, was in great reputation and esteem amongst all his neighbors and acquaintances, and was then daily and honorably acquiring great profits and emoluments from his said profession, at Atlantic City, to wit, at Mays Landing, in the county of Atlantic, aforesaid.

2. A short time before the speaking and publishing of the several words in this complaint mentioned, the plaintiff, in his profession, had been employed to convene a meeting of creditors of one Peter Brown, who was then insolvent, and for that purpose plaintiff had written and sent letters to such creditors. The plaintiff thereupon being retained and directed to prepare, and had accordingly prepared, a certain deed, purporting to be an assignment from the said Peter Brown to Richard Dowling, one of his said creditors, of certain of his property and effects, as trustee for the purpose of making fair and ratable distribution of the money to arise from such property and effects amongst the creditors of the said Peter Brown, who should come in and execute the same and thereby accept the benefit provided for such creditors as a composition for and in full discharge of their respective demands, which said deed had been duly executed by divers creditors of the said Peter Brown.

3. The defendant, who was a creditor of the said Peter Brown, entitled to come into such composition, and thereupon to have an equal benefit in proportion to his debt with the other creditors under said assignment, but no greater or other benefit whatsoever, well knowing the premises, but contriving and maliciously intending wrongful and injustly to hurt and injure

the plaintiff, not only in his reputation, but also in his aforesaid profession, and to cause him to be suspected of dishonest, corrupt, knavish and fraudulent practices therein, on the third day of February, 1916, at Atlantic City, to wit, at Mays Landing, aforesaid, in a certain discourse which defendant had with certain persons, the defendant falsely and maliciously said, spoke and published in the presence and hearing of those persons of and concerning the said composition and deed of assignment, and of and concerning the plaintiff, and his conduct respecting the same, and also of and respecting the debt due to defendant from the said Peter Brown these false, scandalous and defamatory words, following, that is to say: "Dickinson (meaning this plaintiff) offered, in case I (meaning himself the defendant) would give him (meaning the plaintiff) fifty dollars, and sign the deed (meaning aforesaid assignment) that he (meaning plaintiff) would procure for me (meaning defendant) the whole of my money (meaning the whole of his said debt), and I (meaning himself, defendant) have got it (meaning the whole of his said debt) in consequence" (meaning by the said several words that this plaintiff had for his own private gain colluded with the defendant to procure him a fraudulent preference in respect to his debt over the other creditors of the said Peter Brown coming in under the said deed).

SECOND COUNT.

1. On the day and year last aforesaid, at Atlantic City, to wit, at Mays Landing, aforesaid, in a certain other discourse which the said defendant then and there had with divers other persons, he the said defendant then and there falsely and maliciously said, spoke, and published in the presence and hearing of those persons, of and concerning the said composition and deed of assignment, and of and concerning this plaintiff, and his conduct respecting the same, and of and concerning the debt so due from the said Peter Brown to the defendant, these other false, scandalous and defamatory words following, that is to say: "Dickinson (meaning the plaintiff) offered to procure me (meaning defendant) the whole of my money (meaning the whole of his said debt) if I (meaning the defendant) would give him

(meaning the plaintiff) fifty dollars, and execute the deed (meaning aforesaid assignment), for that he (meaning plaintiff) had the power in his (meaning plaintiff) own hands, and I (meaning defendant) have by that means (meaning by means of having given such sum of money to plaintiff) got all that was due to me" (again meaning himself, the defendant, and also meaning and insinuating by the said words, that the plaintiff had assisted the defendant in procuring a fraudulent preference in respect to his debt over the other creditors executing the said deed).

THIRD COUNT.

1. On the day and year aforesaid, at Atlantic City, to wit, Mays Landing, aforesaid, in a certain other discourse which the defendant then and there had with divers other persons, he the defendant, then and there falsely and maliciously said, spoke and published of and concerning this plaintiff in his profession and practice aforesaid of an attorney-at-law, in the presence and hearing of those persons, these other false, scandalous and defamatory words following, that is to say: "His (meaning plaintiff) conduct has been such, as to put it in my (meaning the defendant's) power to get him (meaning plaintiff) disbarred" (meaning by the last-mentioned words, that this plaintiff had been guilty of malpractice in his aforesaid profession, for which he, the defendant, might cause him to be struck off the roll of attorneys of the State of New Jersey).

By means of the speaking and publishing of said several false, scandalous and defamatory words, this plaintiff is not greatly injured in his reputation, and also in his profession aforesaid, and brought into public scandal, infamy and disgrace with and amongst all his neighbors and acquaintances, and suspected of dishonest, corrupt, knavish and fraudulent practices in his said profession, but also, one A. B. and one C. D. and one E. F., who before the speaking and publishing of the said words, had severally employed this plaintiff in the way of his aforesaid profession, and would have continued to have done so had not such words been spoken, and in consequence of the speaking and publishing thereof and on no other account whatsoever, ceased to employ the plaintiff in such profession, and respectively

wholly refused to have any further concern with him, the plaintiff, whereby the plaintiff has lost and been deprived of all such profits and emoluments as would have accrued to him from continuing to be employed as an attorney by the said A. B., C. D. and E. F., respectively, and is also, by means of the premises, otherwise greatly injured and damnified.

Plaintiff demands as damages $50,000.00.

No. 120. COMPLAINT FOR PENALTY CONTAINED IN PARTNERSHIP AGREEMENT BETWEEN TWO ATTORNEYS.

Court.

(Title.)

Plaintiff, residing at , says that—

1. By certain articles of agreement made on June 1, 1915, at Atlantic City, in the county of Atlantic and State of New Jersey, between the plaintiff, an attorney-at-law of the State of New Jersey, of the one part, and the defendant, also an attorney-at-law of said state, of the other (a copy of which said agreement is hereto annexed and made a part hereof), plaintiff and defendant formed a co-partnership for the practice of law.

2. Said co-partnership commenced on the date of the making thereof and continued until the seventh day of November, 1915, when plaintiff gave notice in writing to the defendant of his, plaintiff's, intention to dissolve said partnership thirty days from thence next following, and thereupon, to wit, on December 7, 1915, said partnership ceased and determined, according to the form and effect of said articles.

3. After said partnership ceased and determined, to wit, on December 7, 1915, and on divers other days and times between that day and the date of the filing of this complaint, the defendant did settle, carry on and transact business as an attorney-at-law and solicitor in Chancery, with divers persons within twenty-five miles of Atlantic City, to wit, at Atlantic City aforesaid, contrary to the form and effect of the said agreement and of the said covenant of the defendant so made in that behalf as aforesaid.

4. By reason whereof the plaintiff is entitled to receive of the defendant the sum of $10,000.00, the sum mentioned in said agreement for a breach thereof. The plaintiff demanded the said sum of money of the defendant, but he has refused and neglected and still refuses and neglects to pay the same.

Plaintiff demands as damages $10,000.

No. 121. COMPLAINT AGAINST OWNER OF AUTOMOBILE DRIVEN BY HIS SON FOR INJURIES SUSTAINED BY NEGLIGENCE OF DRIVER.

New Jersey Supreme Court.
Essex County.

(Title.)

The plaintiff, a resident of the city of Newark, county of Essex and State of New Jersey, says:

1. On or about the ninth day of January, nineteen hundred and fourteen, and for a long time prior thereto, the defendant was the owner of a certain automobile. On or about the said date, the plaintiff was lawfully crossing Market street, in the city of Newark, Essex county aforesaid, from the south side of said street to the north side thereof, at or near the point where Washington street, of said city, intersects Market street.

2. On or about the said time, the defendant, by his agents and servants, did operate and drive his said automobile along Market street, in an easterly direction, and the said defendant, by his agents and servants, at said time, did drive the said automobile at a high and excessive rate of speed, and without warning did negligently and carelessly strike and run over the plaintiff, who was lawfully crossing said Market street as aforesaid. The driver of the said car was about the said defendant's business and was authorized to drive said automobile at the said time by defendant.

3. Because of the negligence of the defendant and his said agents the said plaintiff sustained severe injuries, to wit, the plaintiff had concussion of the brain, three fractures of the pelvic bone in his hip, which resulted in the shortening of his

left leg, and other severe injuries were inflicted upon him, and he was obliged to spend a considerable length of time in hospitals and was confined to his home for a long period of time, and is unable to work, and was, and now is, unable to carry on his business. The plaintiff has further expended large sums of money in efforts to recover from his injuries. Plaintiff demands the sum of twenty-five thousand dollars damages.

FORT & FORT,
Attorneys for Plaintiff.

NOTE: *Complaint filed in Jennings v. Okin, 97 A. 249. Judgment for plaintiff reversed by Court of Errors for rejection of evidence.*

No. 122. COMPLAINT FOR PERSONAL INJURIES BY PASSENGER IN AUTO AGAINST OWNER OF CAR WHOSE DRIVER'S NEGLIGENCE CAUSED THE INJURIES.

Hudson County Circuit Court.

(Title.)

Plaintiff says that—

1. Defendant, Clinton Auto and Garage Company, is a corporation existing under the laws of the State of New Jersey, and was such corporation on the 6th day of July, 1911.

2. On July 6, 1911, defendant kept and maintained a garage on the Hudson Boulevard, in the town of West Hoboken, in the county of Hudson and State of New Jersey, and let out automobiles provided with auto drivers, or chauffeurs, to all persons who applied therefor, and on the day aforesaid let an automobile with a driver, or chauffeur, named Frederick Ellermann, to one Walter Buhler, for hire or reward paid or agreed to be paid by the said Buhler to the said defendant, for the purpose of conveying him, the said Buhler, Christina Reutlinger and her son and the plaintiff herein to the office of Weller & Lichtenstein, in Hoboken, where the said plaintiff had been previously requested by the said Buhler to accompany him and introduce him to the said Weller & Lichtenstein, which was known to the said defendant, its agents, servants and employes; that said

Buhler had previously agreed to meet the said plaintiff at 600 Summit avenue, in the town of West Hoboken, and the said chauffeur and said automobile, containing said Buhler, Christina Reutlinger and her son, went to 600 Summit avenue aforesaid, where plaintiff was invited into the said automobile by the said Buhler and the said chauffeur.

3. After the plaintiff had taken his seat in said automobile, the said chauffeur drove said automobile to the city of Hoboken, and there so negligently, carelessly and unskillfully operated the said automobile in which the said plaintiff was then and there riding, that he ran said automobile foul of and against a moving van on Hudson street, in the city of Hoboken, with great force and violence, and said plaintiff was thereby greatly hurt, cut, wounded, bruised and injured, and his nose was thereby broken, and his face cut and scarred, and his eye was greatly injured, which scars and injuries are of a permanent and lasting nature.

4. Said plaintiff was not guilty of negligence that in any way contributed to his aforesaid injuries.

5. Said plaintiff, by reason of said injuries, lost a great quantity of blood, and became and was sick, sore, lame and disordered, and has suffered from the results of said injuries ever since that time.

6. By reason of said injuries said plaintiff has suffered and undergone great pain and torment, both of body and mind, and still suffers therefrom.

7. By reason of said injuries said plaintiff was forced and obliged to pay out a large sum of money for medicines and doctor's bills in endeavoring to be healed and cured of his injuries received as aforesaid.

8. By reason of the injuries so received by the plaintiff as aforesaid, he has been hindered and prevented from carrying on and transacting his necessary affairs and business most of the time from the date of said injuries to the present date.

9. Plaintiff demands against the defendant, Clinton Auto and Garage Company, $10,000 damages.

WELLER & LICHTENSTEIN,
Attorneys for Plaintiff.

NOTE: *Complaint in Rodenburg* v. *Clinton Auto and Garage Co., 87 A. 71; 84 L. 545. Judgment for plaintiff affirmed by Court of Appeals, memo. decision, 91 A. 1070.*

No. 123. COMPLAINT; ACTION FOR PERSONAL INJURIES; AUTO STRIKING HORSE AND WAGON DRIVEN BY PLAINTIFF.

Bergen County Circuit Court.

(Title.)

George B. Case, the defendant in this cause, was summoned to answer unto John Daley, the plaintiff therein, in an action at law upon the following complaint:

Plaintiff, John Daley, residing at 35 Prospect street, in the city of Englewood, in the county of Bergen and State of New Jersey, says:

1. On December 24, 1913, plaintiff was driving a wagon belonging to his employer, one Philip A. Weidig, along Dana Place, in the city of Englewood, in the county of Bergen and State of New Jersey, going in a northerly direction; and after having given the proper signals in accordance with the traffic regulations of the city of Englewood, said plaintiff turned his horse in a westerly direction, in order to enter the driveway of one of the customers of the said Philip A. Weidig.

2. On that day the defendant, George B. Case, while driving an automobile along the same highway, and in the same direction, but in the rear of the wagon driven by the said plaintiff, negligently and carelessly drove and operated his said automobile so that it ran into and against the wagon in which the said plaintiff was riding and driving, and thereby caused said wagon to turn over.

3. The defendant was negligent in this, that he drove his said automobile at an excessive rate of speed, thereby losing proper control thereof; also said defendant was negligent in this, that he failed to give any warning of his approach to said plaintiff by blowing a horn, or otherwise; and also said defendant was negligent in this, that he disregarded the signals given by the said plaintiff in accordance with the traffic regulations of the

said city of Englewood; and by reason of these divers acts of negligence of the defendant the collision aforesaid occurred.

4. As a result of said collision, plaintiff was thrown out and under said wagon; his hip and the ligaments thereof were sprained and injured, his legs and body were cut and bruised, and he received other bodily injuries, underwent great pain and suffering, and has been permanently injured; he suffered great shock to his nervous system, and has been from thence hitherto, prevented from transacting his ordinary business, and has been forced to pay out large sums of money for medical attendance and other expenses incident upon his injuries.

Plaintiff demands $10,000 damages.

COLLINS & CORBIN,
Attorneys of Plaintiff.

NOTE: *Complaint in Daly* v. *Case, 95 A. 973. Judgment for defendant reversed by Court of Errors.*

NO. 124. COMPLAINT FOR NEGLIGENCE IN OPERATING AN AUTOMOBILE ON THE WRONG SIDE OF THE ROAD, WHEREBY IT COLLIDED WITH PLAINTIFF'S WAGON, THROWING HIM OUT AND INJURING HIM.

Bergen County Circuit Court.

(Title.)

Plaintiff, C. H. S., residing at ————, says that—

COUNT 1.

1. On the twenty-eighth day of April, nineteen hundred and nine, the said defendant was the owner and operator of a certain automobile and was operating the same along a certain public street in Ridgewood, in the county of Bergen and State of New Jersey, known as Ridgewood avenue, and while operating the said automobile it became the duty of the said defendant to move and operate the said automobile with reasonable and proper care and caution and in such a manner as to avoid running into and injuring persons driving vehicles without negligence on their

part along the said highway known as Ridgewood avenue as aforesaid.

2. Defendant, disregarding his duty as aforesaid, did on the twenty-eighth day of April, nineteen hundred and nine, so carelessly and negligently run and operate the said automobile along the said highway known as Ridgewood avenue, and on the wrong side thereof, that as a direct and approximate cause of said carelessness and negligence, the said automobile was with great force and violence run into and driven against the wagon which the plaintiff was then and there driving with reasonable and ordinary care and caution along said public street known as Ridgewood avenue.

3. By means of which said premises the said wagon was violently pushed and rammed and the said plaintiff was violently thrown over the dashboard to the ground, and his ribs were broken, his knee affected, his legs and ribs bruised and he was otherwise injured so that he has suffered and still suffers from nervous shock resulting from the violence of the injuries, which nervous shock has produced lack of sleep, headache and dizziness and other injuries of a technical nature which the plaintiff is unable to explain, whereby and by means of the premises the plaintiff was kept from attending to his business for a long time and prevented from making profits which he otherwise would have made.

COUNT 2.

4. On the twenty-eighth day of April, nineteen hundred and nine, the said defendant was the owner and operator of a certain automobile and as such was operating the said automobile on a public highway known as Ridgewood avenue in the village of Ridgewood, county of Bergen and State of New Jersey, so that it then became and was the duty of the said defendant while operating and moving the said automobile to keep a proper lookout and to have his automobile under control so as to avoid running into and injuring persons driving other vehicles on the said highway without negligence on their part.

5. Yet the defendant disregarded his duty as aforesaid, and did, on the said twenty-eighth day of April, nineteen hundred and nine, while moving and operating the said automobile so

carelessly and negligently failed to keep a proper lookout and have his automobile under proper control, that as a direct and approximate result of such carelessness and negligence the said automobile was with great force and violence run into and against the wagon which the plaintiff was then and there driving with reasonable care and caution along the said highway, known as Ridgewood avenue, by means of which said premises the said wagon was violently pushed and rammed and the plaintiff was then and there violently thrown over the dashboard of the wagon and thrown to the ground and his ribs were broken, his knee affected, his legs and ribs bruised and he was otherwise injured so that he has suffered and still suffers from nervous shock resulting from the violence of the injuries, which nervous shock has produced lack of sleep, headache and dizziness, and other injuries of a technical nature, which the plaintiff is unable to explain, whereby and by means of the premises the plaintiff was kept from attending to his business for a long time and prevented from making profits which he otherwise would have made. And by reason thereof the plaintiff was forced to expend a large sum of money, a sum not yet calculated by plaintiff, in and about endeavoring to be cured, and during all of which time he underwent and suffered great pain, and still undergoes and suffers great pain, and will be compelled to expend divers large sums of money endeavoring to be cured.

Plaintiff demands as damages, $5,000 and cost of suit.

NOTE: *Adapted from declaration in Smith* v. *Barnard, 81 A. 734; 82 L. 468. Nonsuit set aside and new trial granted by Court of Errors.*

No. 125. COMPLAINT—RAILROAD CROSSING ACCIDENT. AUTOMOBILE STRUCK BY TRAIN, PLAINTIFF BEING A PASSENGER IN THE AUTO.

Supreme Court of New Jersey,
Union County.

(Title.)

The plaintiff, Anastasia Taylor, residing at number 21 Elmwood Place, Plainfield, Union county, New Jersey, says that—

(1) Defendant, on November 26th, 1913, was and still is a corporation organized under the laws of the State of New Jersey; and was then also, and still is a common carrier of passengers and freight by steam railroad operated and controlled by it through the State of New Jersey.

(2) The course of the road owned, used, operated and controlled by the defendant is through the township of Fanwood, in the county of Union and State of New Jersey, and through divers other places in said state.

(3) Through the township of Fanwood, aforesaid, certain of the tracks of the defendant are laid at grade, and on a level with the public streets, roads and highways, and at those certain streets, roads, highways and grade crossings the defendant maintains automatic bells and signals to announce and warn of the approach of its trains.

(4) Such a grade crossing exists at Terrill road in the township of Fanwood, aforesaid, where the tracks of the defendant, running in an easterly and westerly direction, cross approximately at right angles to Terrill road, a public highway which runs in a northerly and southerly direction.

FIRST COUNT.

(1) On the twenty-sixth day of November, aforesaid, at (*lay venue*) the plaintiff, Anastasia Taylor, while riding by invitation with one Alexander Stamler, in a northerly direction on the said Terrill road in the township of Fanwood, aforesaid, approached the tracks of the defendant on Terrill road at the same grade crossing at a time when no warning was given by the defendant either by bell, whistle or other means, of the approach of a train in either direction.

(2) Because of the negligence on the part of the defendant and the servants of the defendant in failing to give warning of the approach of a train, as it was its duty to do, the said Alexander Stamler proceeded in his automobile to cross the tracks of the defendant and the automobile of the said Alexander Stamler was then and there, while on the tracks of the defendant, struck by a passenger train of the defendant running in an easterly direction at a great and excessive rate of speed.

(3) By force of the collision the plaintiff was hurled out of the automobile, and severely and painfully injured, sustaining injuries of a serious and permanent character.

SECOND COUNT.

(1) On the twenty-sixth day of November, 1913, aforesaid, at (*lay venue*) the plaintiff, Anastasia Taylor, while riding by invitation with one Alexander Stamler in an automobile owned and driven by the said Alexander Stamler in a northerly direction on the said Terrill road in the township of Fanwood, aforesaid, approached the tracks of the defendant on Terrill road at the said grade crossing. The said Alexander Stamler was running his automobile at a moderate rate of speed, and started to cross the tracks of the defendant at the said crossing.

(2) The road at the side of the tracks and between the tracks at the said crossing had been allowed by the defendant to become and was depressed, so that the tracks projected above the level of the road, so that the said crossing was out of repair.

(3) While the said automobile was on the tracks of the defendant and proceeding across from the southerly to the northerly side the wheels of the automobile sank into the depression between the tracks and the sudden jar given to the automobile when the wheels dropped into the depression stopped the engine and locomotion of the automobile. When the said automobile was thus suddenly stopped on the tracks of the defendant at the said crossing it was struck by a passenger train of the defendant running at a rapid and excessive rate of speed on the eastbound track.

(4) By force of the collision the said Anastasia Taylor was hurled out of the automobile and severely and painfully injured, sustaining injuries of a serious and permanent character.

THIRD COUNT.

(1) On the twenty-sixth day of November, 1913, aforesaid, at (*lay venue*) the plaintiff while riding by invitation with one Alexander Stamler in an automobile owned and driven by the said Alexander Stamler in a northerly direction on the said

Terrill road in the township of Fanwood, aforesaid, approached the tracks of the defendant on Terrill road, aforesaid, at the said grade crossing. The automobile of the said Alexander Stamler stopped while it was on the tracks of the defendant, and while the said Alexander Stamler was endeavoring to adjust the machinery of the automobile to get off the tracks of the defendant the said automobile was struck by a passenger train of the defendant running at a rapid and excessive rate of speed on the eastbound track, although at the time the said automobile stopped on the track of the defendant, the train of the defendant which struck the automobile was a long distance away from the said automobile and the said grade crossing, and was approaching on a straight track and at such a distance as would have given the engineer of the said train sufficient time and opportunity to slow down and stop his train, and to avoid striking the said automobile, which it was his duty to do and which he negligently failed to do.

(2) By force of the collision the said Anastasia Taylor was hurled out of the automobile and was severely and painfully injured, sustaining injuries of a serious and permanent character.

FOURTH COUNT.

(1) On the 26th day of November, 1913, aforesaid, at (*lay venuc*) the plaintiff, Anastasia Taylor, while riding by invitation with one Alexander Stamler, in an automobile owned and driven by the said Alexander Stamler in a northerly direction on the said Terrill road in the township of Fanwood, aforesaid, approached the tracks of the defendant on Terrill road at the said grade crossing at a time when no warning was given by the defendant, by bell, whistle or otherwise, of the approach of a train in either direction, and at a time when the road beside and between the tracks of the defendant was out of repair, due to the failure of the defendant to keep the passageway over its tracks in good condition as the defendant is by law required to do.

(2) Because of the failure of the defendant to give any warning of the approach of a train, the said Alexander Stamler proceeded to cross the tracks of the defendant at the said crossing.

and because of the failure of the defendant to keep the road beside and between the tracks in repair the said automobile sank into a depression between the tracks, and was struck by a passenger train of the defendant running at a rapid and excessive rate of speed, although at the time when the said automobile dropped into the depression between the tracks and stopped, the train of the defendant which struck the said automobile was a long distance away from the automobile and from the said crossing, approaching on a straight track and at such a distance as would have given the engineer of the said train sufficient time and opportunity to slow down and stop his train, and to avoid striking the automobile, which it was his duty to do, and which he negligently failed to do.

(3) By force of the collision, which was caused by the negligence of the defendant, its servants and agents, in failing to keep the road beside and between the tracks in repair and in good condition, in failing to give sufficient warning of the approach of the train, and in failing to stop the train in time to avoid the collision, the said Anastasia Taylor was hurled out of the automobile and severely injured, sustaining a compound fracture of the hip, and other painful injuries of a serious and permanent character.

By reason of said injuries the said Anastasia Taylor was prevented for a long time from attending to her business, and thereby lost her earnings for a long time, and incurred large expense for nursing and medical attendance, and has suffered great and permanent damage in addition.

The plaintiff therefore demands from the defendant twenty thousand dollars ($20,000.00).

C. McK. WHITTEMORE,
Attorney for Plaintiff.

NOTE: *Complaint in Taylor v. Lehigh Valley R. R., 94 A. 566. Judgment for plaintiff affirmed by Court of Errors.*

NO. 126. COMPLAINT. ACTION OF NEGLIGENCE IN CAUSING THE BURNING OF AN AUTOMOBILE.

New Jersey Supreme Court, Atlantic County.

(Title.)

Plaintiff, residing at Atlantic City, says that:

1. On August 29, 1909, plaintiff was the owner of and in possession of a certain seven passenger Thomas automobile, propelled by gasoline, the fuel for which was safely stored in a tank attached to and forming a part of said automobile, of great value, to wit, of the value of $5,000, which said automobile on said date plaintiff used in and about his business of carrying passengers for hire, said automobile being driven by plaintiff's servant, skilled in the driving of automobiles in general and skilled in the Thomas automobile in particular.

2. On said day defendant hired said automobile from plaintiff to carry defendant to Greenbank, Atlantic county, New Jersey, and return, and plaintiff, by his servant, carefully and skillfully conveyed and carried defendant from Atlantic City to a point at or near Greenbank.

3. At said point, to wit, at Mays Landing, in said county, defendant negligently and carelessly interfered and took hold of the steering wheel of said automobile while in motion, said automobile being guided at the time by plaintiff's said servant, and thereby caused it to run into a ditch or depression along the side of the public road at or near Greenbank, aforesaid, and thereby caused the gasoline to leak and escape from plaintiff's said automobile.

4. Defendant thereupon negligently, carelessly and without authority from plaintiff, and in the absence of plaintiff and his servant, requested certain men to remove said automobile from said ditch; the said men, servants of the defendant, on the evening of said day, at said point, to wit, at Mays Landing, in said county, did thereupon negligently and carelessly endeavor to remove said automobile from the ditch aforesaid, and did negligently and carelessly bring and carry in close proximity to said automobile a lighted lantern, by reason of which negligence

and want of care of said defendant and his servants, and without any negligence or want of care of plaintiff or his servant, the gasoline in plaintiff's said car became ignited and said car was thereupon entirely consumed, destroyed and ruined.

The plaintiff demands as damages $10,000.00.

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Attorney of Plaintiff.

NOTE: *The above complaint is based on the declaration filed in the case of Brown* v. *Freeman, 86 A. 884; 84 L. 360. Judgment for the plaintiff was affirmed by the Court of Errors.*

No. 127. COMPLAINT ON PROMISSORY NOTES BY HOLDER AGAINST MAKER.

(Title.)

Plaintiff, residing in the Borough of Demarest, in the County of Bergen and State of New Jersey, says:

FIRST COUNT.

(1) He sues for the amount of a promissory note for one hundred dollars made by the defendant Sylvester H. Williams to the order of William V. A. Keeler, and by the said William V. A. Keeler and others subsequently endorsed to plaintiff, a copy of which note is hereto annexed, and which note was payable by the terms thereof January second, 1914.

(2) Said note is now the property of plaintiff and is unpaid.

Plaintiff demands as damages the sum of one hundred dollars with interest from January second, 1914.

SECOND COUNT.

(1) He sues for the amount of a promissory note for one hundred dollars made by the defendant Sylvester H. Williams to the order of William V. A. Keeler, and by the said William V. A. Keeler and others subsequently endorsed to plaintiff, a

copy of which note is hereto annexed, and which note was payable by the terms thereof February second, 1914.

(2) Said note is now the property of plaintiff and is unpaid.

Plaintiff demands as damages the sum of one hundred dollars with interest from February 2, 1914.

THIRD COUNT.

(1) He sues for the amount of a promissory note for one hundred dollars made by the defendant Sylvester H. Williams to the order of William V. A. Keeler, and by the said William V. A. Keeler and others subsequently endorsed to plaintiff, a copy of which note is hereto annexed, and which note was payable by the terms thereof March second, 1914.

(2) Said note is now the property of plaintiff and is unpaid.

Plaintiff demands as damages the sum of one hundred dollars with interest from March second, 1914.

FOURTH COUNT.

(1) He sues for the amount of a promissory note for one hundred dollars made by the defendant Sylvester H. Williams to the order of William V. A. Keeler, and by the said William V. A. Keeler and others subsequently endorsed to plaintiff, a copy of which note is hereto annexed, and which note was payable by the terms thereof April second, 1914.

(2) Said note is now the property of plaintiff and is unpaid.

Plaintiff demands as damages the sum of one hundred dollars with interest from April second, 1914.

FIFTH COUNT.

(1) He sues for the amount of a promissory note for one hundred dollars made by the defendant Sylvester H. Williams to the order of William V. A. Keeler, and by the said William V. A. Keeler and others subsequently endorsed to plaintiff, a copy of which note is hereto annexed, and which note was payable by the terms thereof May second, 1914.

(2) Said note is now the property of plaintiff and is unpaid.

Plaintiff demands as damages the sum of one hundred dollars with interest from May second, 1914.

SIXTH COUNT.

(1) He sues for the amount of a promissory note for one hundred dollars made by the defendant Sylvester H. Williams to the order of William V. A. Keeler, and by the said William V. A. Keeler and others subsequently endorsed to plaintiff, a copy of which note is hereto annexed, and which note was payable by the terms thereof June second, 1914.

(2) Said note is now the property of plaintiff and is unpaid.

Plaintiff demands as damages the sum of one hundred dollars with interest from June second, 1914.

SEVENTH COUNT.

(1) He sues for the amount of a promissory note for one hundred dollars made by the defendant Sylvester H. Williams to the order of William V. A. Keeler, and by the said William V. A. Keeler and others subsequently endorsed to plaintiff, a copy of which note is hereto annexed, and which note was payable by the terms thereof July second, 1914.

(2) Said note is now the property of plaintiff and is unpaid.

Plaintiff demands as damages the sum of one hundred dollars with interest from July second, 1914.

EIGHTH COUNT.

(1) He sues for the amount of a promissory note for one hundred dollars made by the defendant Sylvester H. Williams to the order of William V. A. Keeler, and by the said William V. A. Keeler and others subsequently endorsed to plaintiff, a copy of which note is hereto annexed, and which note was payable by the terms thereof August second, 1914.

(2) Said note is now the property of plaintiff and is unpaid.

Plaintiff demands as damages the sum of one hundred dollars with interest from August second, 1914.

NINTH COUNT.

(1) He sues for the amount of a promissory note for one hundred dollars made by the defendant Sylvester H. Williams to the order of William V. A. Keeler, and by the said William V. A. Keeler and others subsequently endorsed to plaintiff, a copy of which note is hereto annexed, and which note was payable by the terms thereof September second, 1914.

(2) Said note is now the property of plaintiff and is unpaid.

Plaintiff demands as damages the sum of one hundred dollars with interest from September second, 1914.

TENTH COUNT.

(1) He sues for the amount of a promissory note for one hundred dollars made by the defendant Sylvester H. Williams to the order of William V. A. Keeler, and by the said William V. A. Keeler and others subsequently endorsed to plaintiff, a copy of which note is hereto annexed, and which note was payable by the terms thereof October second, 1914.

(2) Said note is now the property of plaintiff and is unpaid.

Plaintiff demands as damages the sum of one hundred dollars with interest from October second, 1914.

ELEVENTH COUNT.

(1) He sues for the amount of a promissory note for one hundred dollars made by the defendant Sylvester H. Williams to the order of William V. A. Keeler, and by the said William V. A. Keeler and others subsequently endorsed to plaintiff, a copy of which note is hereto annexed, and which note was payable by the terms thereof November 2d, 1914.

(2) Said note is now the property of plaintiff and is unpaid.

Plaintiff demands as damages the sum of one hundred dollars with interest from November second, 1914.

WENDELL J. WRIGHT,
Attorney for Plaintiff.

NOTE: *Complaint in McCormack* v. *Williams, 95 A. 978. Judgment for defendant reversed and new trial granted by Court of Errors.*

No. 128. COMPLAINT UPON PROMISSORY NOTES AGAINST ENDORSER AND DEVISEES OF MAKER AND EXECUTOR. ACTION AGAINST DEVISEE OF LAND UNDER ACT 3 C. S. 2739.

New Jersey Supreme Court, Cumberland County.

(Title.)

Plaintiff, a corporation organized under the national banking laws of the United States and having its banking house and principal place of business in the city of Bridgeton, county of Cumberland and State of New Jersey, says:

1. On November 11, 1912, at (*venue*) and in his lifetime, William Shillingsburg made and delivered to the said William Shillingsburg, Jr., his certain promissory note for $2,000, payable four months after the date thereof to the order of the said William Shillingsburg, Jr., a copy of which last-mentioned note is annexed hereto as Exhibit A and made a part hereof, which note was duly endorsed by the said William Shillingsburg, Jr.

2. On December 26, 1912, and in his lifetime the said William Shillingsburg made and delivered to the said William Shillingsburg, Jr., his certain promissory note for $5,000, payable four months after the date thereof to the order of the said William Shillingsburg, Jr., a copy of which last-mentioned note is annexed hereto as Exhibit B and made a part thereof, which last-mentioned note was duly endorsed by the said William Shillingsburg, Jr.

3. Thereafter, to wit, on or about the dates of each of the said two notes respectively set forth in paragraphs 1 and 2 herein, the said William Shillingsburg, Jr., endorsed and delivered each of the same to the plaintiff, which in each instance then and there discounted said two notes for said William Shillingsburg, Jr., for full face value less only the usual and customary discount charges, bona fide, in the usual course of busi-

ness and without notice or knowledge of a defense, if any, existing to either thereof.

4. On the date of the maturity of each of said notes respectively the same were each duly presented for payment in accordance with the terms thereof and payment then and there demanded and refused, and immediately notice of such demand and non-payment respecting each of said notes was forthwith given to the endorser thereof, the said William Shillingsburg, Jr., and the costs of protest of each of said notes, to wit, $1.54, on each were paid by plaintiff.

5. On or about February 7, 1913, the said William Shillingsburg died leaving a will, in which he appointed said William Shillingsburg, Jr., and Maude E. Frome, his executors.

6. On February 18, 1913, said will was admitted to probate by the surrogate of Camden county and letters testamentary were issued to said William Shillingsburg, Jr., and Maude E. Frome, who each accepted the same.

7. That the said William Shillingsburg, Jr., and Maude E. Frome are devisees of lands and tenements in and by the last will and testament of said William Shillingsburg, deceased.

8. The said notes have been ever since their endorsement and delivery to plaintiff as aforesaid and still are the property of the plaintiff and in its possession as holder thereof for full face value as aforesaid, and neither of said notes has been paid.

9. Plaintiff claims of the defendants the sum of $2,001.54, with interest thereon from March 11, 1913, and the further sum of $5,001.54, with interest thereon from April 26, 1913.

GEORGE HAMPTON,
Attorney for Plaintiff.

NOTE: *Complaint in Cumberland Nat. B'k* v. *Frome, 94 A. 625. Judgment for plaintiff affirmed by Court of Errors.*

NO. 129. COMPLAINT. ACTION ON BOND AGAINST SURETY FOR LOSS OCCASIONED BY REASON OF PRINCIPAL'S ABANDONING CONTRACT.

Supreme Court of New Jersey, Cumberland County.

(Title.)

Plaintiff, a municipal corporation of the State of New Jersey, situate in the county of Cumberland, in said state, says that:

1. The defendant, Fidelity and Deposit Company of Maryland, is a corporation organized under the laws of the State of Maryland and duly authorized by the laws of the State of New Jersey to execute bonds for suretyship, and was at all times hereinafter mentioned engaged in the business of furnishing surety bonds and acting as surety.

2. On May 26, 1910, at Bridgeton, Cumberland county, defendant and Hudson Terminal Construction Company, by their obligation in writing dated on that day, bound themselves under their respective corporate seals to the plaintiff in the penal sum of $80,864.00, with the condition thereunder written that if the said Hudson Terminal Construction Company, its heirs, executors, administrators, successors or assigns, should and would in all respects duly and fully observe and perform all and singular the covenants, conditions and agreements of the said Hudson Terminal Construction Company in and by a certain contract made by said Hudson Termial Construction Company with plaintiff, dated May 26th, 1910, for furnishing and delivering supplies and constructing sewers, which supplies and construction work were more particularly designated in the specifications annexed to said contract, and according to the true intent and meaning of said contract and specifications, and would indemnify and save harmless said plaintiff from and against all suits, claims, demands or actions, for any injury or damages sustained or alleged to have been sustained by any party or parties by or from causes under the control of the said Hudson Terminal Construction Company in the construction of the work or any part thereof, or any neglect in protecting the same, then the said obligation should be void and of no effect, otherwise to remain in full force and virtue. A true copy of

said above recited obligation is hereto annexed and made a part of this complaint.

3. That in and by said contract the said Hudson Terminal Construction Company agreed, inter alia, that if the work to be done under said contract should be abandoned, the said plaintiff should have the right and power to notify the said Hudson Terminal Construction Company to discontinue all work or any part thereof, under said contract, and thereupon said Hudson Terminal Construction Company should discontinue said work or such part thereof as the plaintiff might designate, and plaintiff should have power, by contract or otherwise, as it might determine, to complete the work to be done under said contract or such part of it as plaintiff might deem necessary, in such manner as plaintiff saw fit, and to charge the expense incurred by plaintiff in so doing to said Hudson Terminal Construction Company, and the expense so charged should be deducted and paid by said plaintiff out of such moneys as might be either due, or which might at any time thereafter become due, to said Hudson Terminal Construction Company under said contract or any part thereof, and in case such expense was greater than the sum which would have been payable to said Construction Company under said contract, then the said Construction Company should remit the amount of such excess to the plaintiff on notice from the plaintiff of the excess due.

4. That after the execution of said bond, the said Hudson Terminal Construction Company commenced the execution of said contract and the specifications forming a part thereof hereinbefore referred to, and partially furnished and delivered supplies therefor and partially performed said construction work thereunder until on or about December 12, 1910, on which said date the said Hudson Terminal Construction Company abandoned the construction of the sewerage system and sewage disposal works, specified in said contract, and thereafter performed no more work and furnished no more material and supplies, which said Hudson Terminal Construction Company had covenanted and agreed in and by said contract to perform and furnish in accordance with the conditions and requirements of said contract and specifications forming a part thereof.

5. Thereafter, on or about January 9, 1911, at Bridgeton, Cumberland county, aforesaid, plaintiff notified the said Hudson Terminal Construction Company and the defendant in writing, that inasmuch as the said Hudson Terminal Construction Company had abandoned all work under said contract, the said Construction Company should discontinue all work under said contract and that plaintiff would complete the work remaining to be done under said contract either itself or by new contracts.

6. Plaintiff thereafter through its proper officers, servants and employes completed or had completed the work remaining to be done under said contract, a part of said work being done by the officers, servants and employes of the said plaintiff, and the remainder thereof being let by contract by the said plaintiff, at a total expense to the said plaintiff for the completion of said work of $24,379.29, which said last-mentioned sum the said plaintiff was obligated to pay and did pay to its officers, servants and employes and to the person or persons who completed the remainder of the said work by contract.

7. That said sum of $24,379.29 so paid by the plaintiff exceeded any and all moneys in plaintiff's hands retained from moneys due the said Hudson Terminal Construction Company and was greater than the sum which would have been payable to said Hudson Terminal Construction Company under said contract, if it had completely performed the same, to the extent of $4,178.24 and which excess the plaintiff was compelled to pay and did pay as aforesaid, all by reason of the default and neglect of the said Hudson Terminal Construction Company to perform said contract, and for which said defendant is liable to this plaintiff by reason of said bond to the extent of $4,178.24 and interest.

8. After the completion of the work remaining to be done under said contract and as soon as the excess cost aforesaid was ascertained, and on or about April 18, 1912, plaintiff gave notice to the said Hudson Terminal Construction Company and to the defendant of the said excess due plaintiff, and demanded payment thereof, all of which both the said Hudson Terminal Construction Company and the said defendant have refused to

pay and still refuse to pay, and there is now due and owing to the plaintiff upon the said bond, the full sum of $4,178.24 and interest thereon from April 18, 1912, besides the costs of this action.

Plaintiff demands as damages from the said defendant the sum of $4,178.24 with interest from April 18, 1912.

FRANCIS A. STANGER, JR.,
Attorney for Plaintiff.

NOTE: *Complaint taken from case of Bridgeton* v. *Fidelity and Deposit Co. Judgment for plaintiff affirmed by Court of Errors. 96 A. 918.*

NO. 130. COMPLAINT FOR DEFICIENCY JUDGMENT ON BOND AFTER FORECLOSURE OF ACCOMPANYING MORTGAGE, WITH ALLEGATION OF NOTICE OF ENTRY OF ACTION UNDER ACT OF 1907, P. 563, 3 C. S., P. 3423, SEC. 51.

New Jersey Supreme Court.
County.

(Title.)

Plaintiff, A. N., residing at ....., says that—

1. On April 1, 1911, at (*venue*), the defendant, W. R., executed his bond of that date to W. H. in the penal sum of $70,000, conditioned to pay $35,000 with interest at 6 per cent.

2. To secure said bond defendant, W. R., executed a mortgage of the same date to W. H. upon certain lands and premises whereof the said defendant was seized in fee situate in (*description of premises*).

3. On May 1, 1911, said W. H. assigned said bond and mortgage to C. F. as collateral security for the payment of any and all promissory notes theretofore made or which thereafter might be made by said W. H. to C. F.

4. On June 1, 1911, the defendant, W. R., conveyed said lands, by deed of that date, to the defendant, J. B., in fee; which deed was on June 3, 1911, recorded in the clerk's office of county, in Book of Deeds, pages

5. Said defendant, J. B., by a provision in said deed assumed the payment of the principal and interest of said bond and mortgage and agreed to pay off the same as a part of the consideration in said deed expressed.

6. On December 14, 1912, a final decree for the sale of the said land and premises and the foreclosure of the said mortgage was made in the Court of Chancery of New Jersey in a suit brought for that purpose by the said C. F. against these defendants and others; and said decree adjudged that there was then due upon said bond and mortgage the sum of $29,351.78 and directed that a writ of fieri facias be issued to the sheriff of the county of for the sale of said mortgaged premises to make the said sum with lawful interest from December 12, 1912, and complainant's costs in that suit, which were thereupon taxed at the sum of $209.93.

7. On February 11, 1913, and within six months of the commencement of this action, the said sheriff, by virtue of said writ of execution, duly sold said premises, according to the law of public vendue, to the said C. F., he being the highest bidder at said sale, for the sum of $12,000.

8. The sheriff's lawful fees and disbursements upon said execution amounted to $127.96, which were thereupon paid by the said C. F. to said sheriff, all of which appears upon the said writ of execution which was duly returned into court.

9. After crediting upon the said decree and execution the amount of the proceeds of said sale, there remained due to the said C. F., upon the same a deficiency of the amount of $17,989.10.

10. The said sum of $17,989.10 has not been paid nor has any part thereof.

11. On June 21, 1913, by writing bearing that date, the said C. F. assigned to plaintiff said bond and the money due and to grow due thereon, with the interest and all his right, title and interest of, in and to the same

12. On June 22, 1913, and within six months after the said sheriff's sale and prior to the institution of this action and the entry of judgment hereunder, plaintiff filed in the office of the clerk of Common Pleas in and for the county of

(or in the office of the register of deeds and mortgages of the county of), being the county in which said mortgaged premises are situate, a written notice of this proposed action setting forth the court in which it was proposed to begin such action, the names of the parties to such bond and action, the book and page of the record of the said mortgage, together with a description of the mortgaged premises, according to the statute in such case made and provided, a copy of which said notice is hereto annexed and made a part hereof.

13. Plaintiff's action against said defendants was commenced within six months from the date of the sale of said mortgaged premises.

14. Plaintiff demands $17,989.10 with interest from February 12, 1913.

NOTE: *See Neu* v. *Rogge, 95 A. 632, Court of Errors; Marcus* v. *Penn. Co., For Insurance of Lives, etc. November term, Court of Errors, 1916.*

No. 131. COMPLAINT FOR BREACH OF PROMISE OF MARRIAGE.

New Jersey Supreme Court.

(Title.)

Plaintiff, who resides in the town of Kearny, in Hudson county, New Jersey, says that:

1. Plaintiff was on and prior to July 4, 1908, and has ever since been, sole and unmarried.

2. Defendant likewise was then and there, and still is unmarried.

3. On the said July 4, 1908, at (*venue*), defendant requested plaintiff to marry him and take him as her husband, and then and there promised and undertook to marry her and take her for his wife.

4. Plaintiff thereupon likewise undertook and promised to marry defendant and to take him for her husband.

5. At various times subsequently thereto defendant repeated and renewed to plaintiff his said promise of marriage.

6. Relying on said promise and undertaking of defendant, plaintiff has always from hence hitherto, remained, and still continues, sole and unmarried; and has at all times been and still is ready and willing to marry defendant.

7. Defendant nevertheless has at all times since neglected and refused, and still refuses to performe his undertaking, although frequently requested thereto by plaintiff, and although a reasonable time has for that purpose long since elapsed.

Plaintiff demands as damages the sum of fifty thousand dollars ($50,000).

EDWARDS & SMITH,
Attorneys of Plaintiff.

NOTE: *From Corduan* v. *McCloud, 93 A. 724.*

No. 132. COMPLAINT. ACTION FOR BROKER'S COMMISSION.
Essex County Circuit Court.

(Title.)

The plaintiff, Sidney S. Smith, of the city of Newark, county of Essex, and State of New Jersey, being a real estate broker, says that:

(1) On August twelfth, 1912, the defendant duly authorized him, by a written agreement, a copy of which is hereunto annexed, to sell for $45,000 the premises in the said city of Newark known as Nos. 18, 20 and 22 Lafayette street, agreeing to pay to plaintiff the usual brokerage of 2½ per cent. on said price for such sale.

(2) On September twelfth, 1912, plaintiff duly sold said premises for defendant to one Charles A. Terrill for said price and defendant agreed in writing to all the terms of said sale and accepted a payment on account of the purchase price, as appears by the copy of agreement hereunto annexed.

(3) Thereafter plaintiff demanded of defendant the agreed brokerage.

(4) Defendant has not paid the same.

Plaintiff demands, as damages, the amount due, $1,225, with interest from September 12, 1912.

G. ROWLAND MUNROE,
Attorney for Plaintiff.

NOTE: *Filed in Smith* v. *Hopping, 95 A. 993.*

No. 133. COMPLAINT BY REAL ESTATE BROKER FOR COMMISSIONS WHERE HE FOUND BUYER AND DEFENDANT REFUSED TO SELL.

Hudson County Circuit Court.

(Title.)

Plaintiff, T. R., residing at , says that—

1. On the twenty-fifth day of July, one thousand nine hundred and six, at Jersey City, Hudson county, New Jersey, Magdalon Minningham, the said defendant, authorized the said plaintiff, by writing, to sell certain premises situated in Jersey City and described in said writing, at the price and upon the terms thereon named, and agreed to pay two and one-half per cent. of the gross amount on the sale, which authorization in writing was then delivered on the day and date aforesaid to the said Thomas A. Ryer, and a copy of said authorization is hereunto annexed and marked Schedule "A."

2. Plaintiff, on the seventh day of March, in the year one thousand nine hundred and seven, did sell said premises described in said authorization in writing for the price and upon the terms therein named, to a person ready, willing and able to purchase said premises for the sum of twenty-five thousand dollars.

3. Defendant became indebted to the said plaintiff in the sum of six hundred and twenty-five dollars, being two and one-half per cent. commission of the gross amount of said sale, and thereafter the said plaintiff demanded of the said defendant the said sum of six hundred and twenty-five dollars; yet the said defendant disregarded her promise and agreement to pay the said plaintiff the said sum of six hundred and twenty-five dollars,

contrary to the form and effect of the said agreement and all other promises of undertaking.

Plaintiff demands as damages $1.000.

NOTE: *Adopted from declaration in Ryer* v. *Minningham, 75 A. 890; 78 L. 742. Judgment for plaintiff affirmed by Court of Errors.*

No. 134. COMPLAINT BY BROKER TO RECOVER COMMISSIONS UPON SALES OF REAL ESTATE AGAINST AGENT OF OWNER OF LAND, AGENT HAVING MADE HIMSELF PERSONALLY RESPONSIBLE.

New Jersey Supreme Court.
Hudson County.

(Title.)

Plaintiff, B. S., residing at , says that—

1. On the eighth day of April, A. D. 1907, in the city and State of New York, to wit, at Jersey City, in the county of Hudson and State of New Jersey, the said plaintiff entered into a written agreement with the said defendant (a copy of which said agreement is hereto annexed and made a part hereof) whereby the said plaintiff agreed to devote his entire time from the date of said agreement for a period ten weeks thereafter, to the sale of certain real property situated at Portaupeck and Deal, Monmouth county, New Jersey, said property being then and there owned by Portaupeck Realty Company, a corporation of New Jersey, for which the said defendant agreed to pay the said plaintiff the sum of $100 per week, and twenty-five per cent. of the purchase price of all the said property so owned as aforesaid by Portaupeck Realty Company, which the said plaintiff sold, caused to sell or secured purchasers for.

2. Plaintiff did devote his entire time from the eighth day of April, 1907, for a period of ten weeks, thereafter to the sale of the said property so situated as aforesaid at Portaupeck and Deal, Monmouth county aforesaid, in pursuance of said contract and did sell, and secure purchasers for, divers lots of said property.

3. Defendant has failed and refused and still refuses to pay unto the said plaintiff the amount due him, to wit, the sum of one thousand nine hundred dollars ($1,900.00), the same being twenty-five per cent. (25%) of the purchase price of the property sold as aforesaid for the said defendant and owned by said Portaupeck Realty Company as aforesaid.

Plaintiff demands as damages $5,000.

NOTE: *Adopted from declaration in Sadler* v. *Young, 78 A. 890; 78 L. 594. Nonsuit reversed by Court of Errors and new trial granted.*

NO. 135. COMPLAINT AGAINST CARRIER OF GOODS FOR NEGLECT TO TRANSPORT GOODS WITHIN REASONABLE TIME, WHEREBY SAME WERE DESTROYED.

New Jersey Supreme Court.
Hudson County.

(Title.)

The plaintiffs, Isaac W. Carr and Fannie C. Estes, partners doing business as Isaac W. Carr & Co., who reside in the city, county and State of New York, say that:

FIRST COUNT.

1. On July 16, 1912, at Statesboro in the State of Georgia, the plaintiffs caused to be delivered to the defendant, which was a common carrier of goods for hire, from Statesboro aforesaid to Jersey City, Hudson county, in this state, one carload of watermelons of the value of $500, in car S. A. L. 16240, which the defendant then and there received and accepted, as such common carrier, and agreed to transport the same carefully and within a reasonable time to the plaintiffs at Jersey City aforesaid, for reward.

2. The defendant, at (*lay venue*), in violation of its agreement, failed and neglected to carefully transport the said watermelons from Statesboro aforesaid to Jersey City aforesaid and failed and neglected to transport the same within a reasonable

time; and by reason thereof a large number of said watermelons was wholly lost to the plaintiffs and the remainder was delivered to the plaintiffs at Jersey City in a bad and damaged condition.

SECOND COUNT.

1. On July 16, 1912, at Fuman in the State of South Carolina, the plaintiffs caused to be delivered to the defendant, which was a common carrier of goods for hire, from Fuman aforesaid, to Jersey City in this state, one carload of watermelons of the value of $500, in car Sou. 39213, which the defendant then and there received and accepted, as such common carrier, and agreed to transport the same carefully and within a reasonable time to the plaintiffs at Jersey City aforesaid, for reward.

2. The defendant, at (*lay venue*), in violation of its agreement, failed and neglected to carefully transport the said watermelons from Fuman aforesaid to Jersey City aforesaid and failed and neglected to transport the same within a reasonable time; and by reason thereof a large number of said watermelons was wholly lost to the plaintiffs and the remainder was delivered to the plaintiffs at Jersey City in a bad and damaged condition.

THIRD COUNT.

1. On July 16, 1912, at Stilson in the State of Georgia, the plaintiffs caused to be delivered to the defendant, which was a common carrier of goods for hire, from Stilson aforesaid to Jersey City in this state, one carload of watermelons of the value of $500, in car C. of Ga. 6865, which the defendant then and there received and accepted, as such common carrier, and agreed to transport the same carefully and within a reasonable time to the plaintiffs at Jersey City aforesaid, for reward.

2. The defendant, at (*lay venue*), in violation of its agreement, failed and neglected to carefully transport the said watermelons from Stilson aforesaid to Jersey City aforesaid and failed and neglected to transport the same within a reasonable time; and by reason thereof a large number of said watermelons was wholly lost to the plaintiffs and the remainder was delivered to the plaintiffs at Jersey City in a bad and damaged condition.

FOURTH COUNT.

1. On or about July 16, 1912, at Ivanhoe in the State of Georgia, the plaintiffs caused to be delivered to the defendant, which was a common carrier of goods for hire, from Ivanhoe aforesaid to Jersey City in this state, one carload of watermelons of the value of $500, in car A. C. L. 32852, which the defendant then and there received and accepted, as such common carrier, and agreed to transport the same carefully and within a reasonable time to the plaintiffs at Jersey City aforesaid, for reward.

2. The defendant, at (*lay venue*), in violation of its agreement, failed and neglected to carefully transport the said watermelons from Ivanhoe aforesaid to Jersey City aforesaid and failed and neglected to transport the same within a reasonable time; and by reason thereof a large number of said watermelons was wholly lost to the plaintiffs and the remainder was delivered to the plaintiffs at Jersey City in a bad and damaged condition.

FIFTH COUNT.

1. On July 22, 1912, at Statesboro in the State of Georgia, the plaintiffs caused to be delivered to the defendant, which was a common carrier of goods for hire, from Statesboro aforesaid to Jersey city in this state, one carload of watermelons of the value of $500, in car A. C. L. 31057, which the defendant then and there received and accepted, as such common carrier, and agreed to transport the same carefully and within a reasonable time to the plaintiffs at Jersey City aforesaid, for reward.

2. The defendant, at (*lay venue*), in violation of its agreement, failed and neglected to carefully transport the said watermelons from Statesboro aforesaid to Jersey City aforesaid and failed and neglected to transport the same within a reasonable time; and by reason thereof a large number of said watermelons was wholly lost to the plaintiffs and the remainder was delivered to the plaintiffs at Jersey City in a bad and damaged condition.

SIXTH COUNT.

1. On July 25, 1912, at Statesboro in the State of Georgia, the plaintiffs caused to be delivered to the defendant, which was

a common carrier of goods for hire, from Statesboro aforesaid to Jersey City in this state, one carload of watermelons of the value of $500, in car A. C. L. 21143, which the defendant then and there received and accepted, as such common carrier, and agreed to transport the same carefully and within a reasonable time to the plaintiffs at Jersey City aforesaid, for reward.

2. The defendant, at (*lay venue*), in violation of its agreement, failed and neglected to carefully transport the said watermelons from Statesboro aforesaid to Jersey City aforesaid and failed and neglected to transport the same within a reasonable time; and by reason thereof a large number of said watermelons was wholly lost to the plaintiffs and the remainder was delivered to the plaintiffs at Jersey City in a bad and damaged condition.

SEVENTH COUNT.

1. On July 25, 1912, at Statesboro in the State of Georgia, the plaintiffs caused to be delivered to the defendant, which was a common carrier of goods for hire, from Statesboro aforesaid to Jersey City in this state, one carload of watermelons of the value of $500, in car S. A. L. 22576, which the defendant then and there received and accepted, as such common carrier, and agreed to transport the same carefully and within a reasonable time to the plaintiffs at Jersey City aforesaid, for reward.

2. The defendant, at (*lay venue*), in violation of its agreement, failed and neglected to carefully transport the said watermelons from Statesboro aforesaid to Jersey City aforesaid and failed and neglected to transport the same within a reasonable time; and by reason thereof a large number of said watermelons was wholly lost to the plaintiffs and the remainder was delivered to the plaintiffs at Jersey City in a bad and damaged condition.

Plaintiffs demand $500 damages on each count.

QUEEN & STOUT,
Attorneys of Plaintiffs.

NOTE: *Complaint in Carr* v. *P. R. R., 96 A. 588. Judgment for plaintiffs affirmed by Court of Errors.*

No. 136. COMPLAINT. ACTION OF NEGLIGENCE BY PASSENGER AGAINST RAILROAD FOR THROWING PLAINTIFF OUT OF SEAT BY SUDDEN STOPPING OF TRAIN.

New Jersey Supreme Court,
Atlantic County.

Plaintiff, W. T., residing in Atlantic City, says that—

1. On or about December 27th, 1907, the defendant was a corporation of the State of New Jersey, incorporated under the act concerning railroads, and was a common carrier of passengers between Atlantic City, in the State of New Jersey, and Camden in the State of New Jersey.

2. On said day plaintiff was a passenger on cars of said company with a ticket entitling him to ride between said points, and that while plaintiff was riding between said points the train in which he was riding stopped at a point on what is known as the elevated tracks in the city of Camden, to wit, at Mays Landing, in the county of Atlantic aforesaid.

3. While being so stopped said defendant, through the negligence and carelessness of its servants in charge of a train in the rear, ran said train into and against the train in which plaintiff was riding and threw him from the seat in the rear of the car to a point in the front of the car.

4. Plaintiff thereby became and was permanently injured in his head, spine and limbs, in consequence of which he, the plaintiff, has been from that time to this extremely nervous and will be so for the remainder of his life, whereby plaintiff has been damaged in pain and suffering, in expenses of medicines and doctor's bills, and in the loss in his business by reason of being unable to attend to it, and in the loss which will accrue in the future by reason of his inability to attend to his usual calling.

Plaintiff demands as damages $20,000.

NOTE: *Above complaint is founded upon declaration filed in case of Townsend* v. *West Jersey and S. R. R.*

No. 137. COMPLAINT FOR INJURY TO PLAINTIFF WHILE STANDING ON RAILROAD PLATFORM BY BEING DRAWN BY SUCTION TO A TRAIN PASSING AT A HIGH RATE OF SPEED.

New Jersey Supreme Court,
Passaic County.

(Title.)

The plaintiff, Marie Schulz, as administratrix of the estate of Carl Schulz, by Ward & McGinnis, her attorneys, complains of the defendant, the New York, Susquehanna and Western Railroad, and alleges—

1. That on the 13th day of May, 1912, she was by the surrogate of the county of Bergen appointed administratrix of all and singular, the goods and chattels, rights and credits, moneys and effects of Carl Schulz, deceased.

2. That the plaintiff is administratrix as aforesaid and was at the time of the committing of the grievances hereinafter mentioned, and is a resident of Ridgefield Park, in the county of Bergen and State of New Jersey.

3. That before and at the time of the committing of the grievance hereinafter mentioned, the defendant was a corporation, organized under the laws of the State of New Jersey, and was a steam railroad, engaged as a common carrier of passengers and freight.

4. The plaintiff avers, that at the time of the committing of the grievances hereinafter mentioned, the defendant was the owner of a certain steam railroad, which extended from the West End, in the county of Hudson and through the county of Bergen in the State of New Jersey, through a village in said county of Bergen, known as Ridgefield Park, at which place the said railroad extended in a generally northerly and southerly direction, and at said point consisted of two tracks of two rails each, the more easterly of which tracks was known as the northbound track, and the other of said tracks was known as the southbound track.

5. Plaintiff avers that at the time of the committing of the grievances hereinafter mentioned, to wit, the seventeenth day of February, nineteen hundred and twelve, in (*lay venue*)

there was erected at Ridgefield Park a certain railroad station owned and maintained by the defendant used by it as a passenger and freight station, which station was situated on the easterly side of said railroad and close to the track known as the northbound track, which said station was known and designated as the "Little Ferry Station." That between said station and a point near the more easterly rail of said northbound track was a platform, which platform was at a level with said railroad tracks of the said defendant. That said platform was used by passengers boarding or leaving trains of the defendant, and by persons entering to and from and through said station.

6. Plaintiff avers, that the said Carl Schulz, in the nighttime of the 17th day of February, 1912, in (*lay venue*) was then and there standing upon said platform near the westerly edge thereof of said northbound track, and in the nighttime and at the invitation and request and permission of the said defendant.

7. Plaintiff avers that while said Carl Schulz was then and there standing upon said platform as aforesaid, a certain passenger train of the defendant, in charge of its servants and employees and drawn by a steam locomotive approached said station, and going in a westerly direction carelessly, negligently and improperly at a righ rate of speed, and without ringing any bell or blowing any whistle or giving any other warning of its approach, and the said defendant well knowing the said Carl Schulz was standing upon said platfrom, as aforesaid, and that passengers might be standing upon said platform, along the westerly edge thereof, carelessly, negligently and improperly failed to give any warning of the approach of said train, or to slacken the speed thereof, or to warn said Carl Schulz of the approach of said train, or of the danger of standing upon said platform near the westerly edge thereof, and by reason of the premises, said train which was of such width as to strike any person standing near the edge of said platfrom, did with great force and violence strike, draw to it and drag along, the said Carl Schulz and inflicted such injuries that he, the said Carl Schulz, instantly died.

8. And the plaintiff avers that the said Carl Schulz left surviving his widow, Marie Schulz and his children, Charles Schulz and Otto Schulz.

9. Wherefore the plaintiff demands for relief a judgment for the sum of $30,000.00.

WARD & MCGINNIS,
Attorneys of Plaintiff.

NOTE: *Complaint filed in Schultz v. N. Y., S. & W. R. Co., 94 A. 579, held to show cause of action, by Court of Errors and Appeals.*

No. 137a. COMPLAINT. INJURIES TO PERSON ON RAILROAD PLATFORM; SUCTION OF PASSING TRAIN.

New Jersey Supreme Court, Mercer County.

(Title.)

The plaintiff herein, Ernest Crotshin, a resident of the town of Cashmere, in the county of Monroe, and State of West Virginia, says that:

1. On and prior to the 24th day of October, 1912, defendant was, and ever since has been, and still is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, and a resident and citizen of the State of Pennsylvania, and was during all the time aforementioned and still is a common carrier, engaged, amongst other things, in the business of carrying passengers for hire between the city of Trenton, county of Mercer, and State of New Jersey, and the town of Stroudsburg, in the State of Pennsylvania, and operated a railroad line and trains for the carriage of passengers between said last-mentioned two points; and also operated and maintained in connection therewith a certain depot or station, including waiting rooms, passageways and platforms, in said city of Trenton, for the use of its passengers in alighting from, boarding and awaiting the arrival and departure of its passengers trains aforesaid.

2. On said 24th day of October, 1912, plaintiff had purchased and obtained and received from defendant a ticket entitling

him to be carried on that day, in one of defendant's passenger trains, from Trenton, aforesaid, to Stroudsburg, aforesaid, and was then and there a passenger of defendant.

3. Plaintiff being such passenger, as aforesaid, on the day aforesaid, while awaiting in defendant's waiting room and station, as he then lawfully might, the arrival of defendant's train to carry him to Stroudsburg aforesaid, was informed by defendant, through its station master, usher, or other servant or agent, that said train was about to arrive to said station, and invited him to and he did leave said waiting room and proceed to one of defendant's platforms aforesaid, being the platform provided by defendant for the use, amongst others, of its passengers from Trenton to Stroudsburg, in boarding the train aforesaid.

4. While plaintiff was standing on said platform awaiting his said train, and in the exercise of reasonable care, defendant caused or permitted another of the trains operated and controlled by it, being a through train not stopping at Trenton aforesaid, to pass along its said tracks adjacent to said platform, at an excessive rate of speed, creating and carrying with it a great and powerful suction or rush of air, which caught plaintiff and threw him to the concrete or stone floor of said platform with great force and violence, thereby greatly injuring, wounding and bruising him, so that he became and was, and from thence hitherto has been, and in the future will always continue to be, so long as he lives, sick, sore, wounded, disabled and permanently injured.

5. Plaintiff's injuries were caused by the negligence of the defendant, which negligence consisted in this: It was then and there the duty of the defendant to use the great care which a reasonably prudent man under the circumstances would have used, to provide defendant with a safe and proper platform or other place where plaintiff might safely await the arrival of his train aforesaid, and to provide its said platform with railings, enclosures or other guards or means of protection to prevent plaintiff from being struck or otherwise injured by the trains running upon the tracks operated by it; and to warn plaintiff of the danger of being struck or otherwise injured by said trains

while he was standing upon said platforms; and to avoid and refrain from inviting or permitting plaintiff to enter and come upon the platform until after the passage of the train which caused the injuries to plaintiff; and to avoid and refrain from causing or permitting any of its trains to pass along said platform whereon said plaintiff was standing, as aforesaid, at a high and excessive rate of speed, and to provide separate tracks or other accommodations, so that its through trains should not pass along adjacent to the platform on which plaintiff was standing as aforesaid; but the defendant carelessly and negligently disregarded its duty in each of said particulars, and negligently failed to provide separate tracks or other accommodations that its through trains should not pass along adjacent to the platform whereon plaintiff was standing as aforesaid; and negligently caused and permitted one of its through trains to pass along said platform whereon plaintiff was standing as aforesaid, at a high and excessive rate of speed as aforesaid; and negligently failed to provide for plaintiff a safe and proper platform or other place whereon to await the arrival of his train; and negligently failed to provide the platform whereon it invited him to await the arrival of the train with proper railings, enclosures or other guards or means of protection to prevent him from being struck or otherwise injured by its trains; and negligently invited and permitted him to come upon said platform before its said through train had passed, knowing the danger to which it was subjecting plaintiff, and knowing that said platform was not provided with proper guards for plaintiff's safety and negligently failed to warn him of the danger aforesaid, or of the approach of its said through train; so that plaintiff was injured as aforesaid.

6. By reason of plaintiff's injuries as aforesaid, he has been, and in the future will continue to be, caused great pain and suffering and partial permanent disablement from earning his livelihood, and has suffered great and permanent loss of earning capacity, and has been, and will continue to be, caused to expend large sums of money in and about endeavoring to have his said injuries cured or alleviated.

7. Plaintiff has been damaged, as above set forth, to the extent of $25,000.00, and demands as damages against the defendant the sum of $25,000.00.

JAMES AND MALCOLM G. BUCHANAN,
Attorneys for Plaintiff.

NOTE: *From Crotshin* v. *Penn. R. R., 93 A. 110. Verdict for plaintiff, $7,000; affirmed, Supreme Court.*

No. 138. COMPLAINT. PREMATURE START OF STREET CAR, THEREBY THROWING PLAINTIFF OFF CAR AND INJURING HIM.

New Jersey Supreme Court, Essex County.

(Title.)

The plaintiff, ..., residing at ....., says that:

1. On the twenty-sixth day of December, nineteen hundred and seven, the said defendant, by its servants, was operating, running and propelling a certain passenger car along Broad street, a public street in the city of Newark, in the county of Essex aforesaid, for the carriage and conveyance of passengers in and along said street and other public streets in said city of Newark.

2. On the day and year aforesaid the said car came nearly to a standstill, at the instance and request of the said plaintiff, upon notice given by the said plaintiff to the said defendant, by its servants operating said car on said Broad street, and the said defendant by its servants then and there requested him, the said plaintiff, to board and enter said car to become a passenger in said car to be safely and securely carried by the said defendant, in the said car upon and along said Broad street, for hire and reward to be paid by the said plaintiff to the said defendant in that behalf.

3. Plaintiff avers that while he, the said plaintiff, was then and there lawfully attempting to board and enter said car in pursuance to said request of the said defendant by its servants, the said defendant having then and there slackened and slowed down the speed of said car almost to a standstill for the pur-

pose of permitting the said plaintiff to board and enter said car safely, the said defendant by its servants then and there carelessly, negligently and improperly suddenly accelerated the speed of said car, without then and there giving any notice or warning to the said plaintiff, thereby dragging and throwing the plaintiff violently to the ground and then and there seriously and painfully injuring him.

4. By means of the premises the plaintiff became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, during all of which time the said plaintiff suffered and underwent great pain and was hindered and prevented from transacting and attending to his necessary and lawful affairs, by him during all that time to be performed and transacted, and lost and was deprived of divers great gains, profits and advantages which he might and otherwise would have derived and acquired, and thereby also the said plaintiff was forced and obliged to lay out and expend divers large sums of money, amounting in all to the sum of two hundred dollars, in and about endeavoring to be cured of the wounds, bruises and injuries so received as aforesaid, to wit, at Newark, in the county of Essex aforesaid.

5. Plaintiff demands as damages the amount of five thousand dollars.

.....

Attorney of Plaintiff.

NOTE: *Complaint founded upon declaration in Hess* v. *Public Service Ry. Co. held good on demurrer by Court of Errors. 86 A. 951, 84 L. 329.*

No. 139. COMPLAINT. ACTION BY MANUFACTURER ON SALE OF MANUFACTURED ARTICLE.

(Title.)

Plaintiff, residing at Third Street and Port Avenue, Elizabeth, New Jersey, says that on the 17th day of July, 1913, at (*lay venue*) the defendant ordered in writing from the plaintiff one

double helical cast iron split gear as per a blue print and drawing furnished to the plaintiff by the defendant, it being understood that the plaintiff was to work day and night so as to ship said gear to the defendant as soon as possible; the plaintiff to charge a reasonable price therefor, which order was accepted by the plaintiff. That the plaintiff did make a gear as per said blue print furnished by the defendant, and upon completion of the same on the 2d day of August, 1913, shipped said gear to the defendant, which gear was received, accepted and used by the defendant. That the reasonable price and value of said gear is the sum of $1,684.95 as per book account hereto annexed and made a part hereof. That no part of said bill has been paid, and there is due to the plaintiff from the defendant $1,684.95, with interest thereon from September 2d, 1913.

(A copy of said book account is attached thereto.)

Plaintiff demands as damages $1,684.95 with interest thereon from September 2d, 1913.

SAMUEL KOESTLER,
Attorney for Plaintiff.

(Here follows itemized copy of book account.)

NOTE: *Complaint in A. & F. Brown Co. v. C. Pardee Works, 95 A. 976. Judgment for plaintiff affirmed by Court of Errors.*

NO. 140. COMPLAINT BY SCHOOLMASTER ON SPECIAL AGREEMENT TO TEACH DEFENDANT'S DAUGHTER, AVERRING THAT HE TAUGHT HER PART OF THE TERM AND WAS READY AND WILLING TO CONTINUE HIS INSTRUCTION, BUT DEFENDANT TOOK HIS DAUGHTER AWAY.

Atlantic County Circuit Court.

(Title.)

Plaintiff, residing at , says that:

1. On the first day of September, 1915, at Atlantic City, to wit, at Mays Landing, Atlantic County, New Jersey, it was agreed by and between the plaintiff and the defendant, that the plaintiff should teach and instruct Mary, the daughter of the de-

fendant, in reading, writing and good manners, and other accomplishments and qualifications, for a certain time, to wit, for the space of one term, from September 1, 1915, to January 1, 1916, and that the defendant in consideration thereof should pay to the plaintiff for the same the sum of one hundred dollars, whenever he should be thereafter requested.

2. Plaintiff in pursuance of said agreement, on the date first aforesaid, at Atlantic City, to wit, at Mays Landing, Atlantic County, aforesaid, did proceed to teach and instruct the said Mary according to the terms of the said agreement, and did then and there continue to teach and instruct her until November 15, 1915.

3. On the day last aforesaid the defendant took away his daughter Mary from plaintiff, without just cause, and dispensed with the further duty and attendance of the plaintiff, although he, the plaintiff, was then and there willing, and tendered and offered to continue to teach and instruct the said Mary for the residue of the term according to the terms of said agreement.

4. On January 1, 1916, at the expiration of said term, at Atlantic City, to wit, at Mays Landing, Atlantic County, aforesaid, plaintiff demanded the said sum of $100 of the defendant, but the defendant refused and neglected to pay the same.

Plaintiff demands as damages the sum of $200.

No. 141. COMPLAINT. ACTION FOR BALANCE DUE ON WRITTEN CONTRACT, ALLEGING PERFORMANCE GENERALLY.

New Jersey Supreme Court,
Hudson County.

Plaintiff, who resides at 29 Madison Avenue, Jersey City, New Jersey, says:

1. Defendant and one David E. Kennedy, Inc., a corporation of New York, entered into an agreement dated April 2d, 1912, at (*lay venue*) (a true copy of which is hereto attached marked "Schedule No. 1"), whereby said David E. Kennedy, Inc., agreed to furnish all cork tiling required under the terms of a

contract between the defendant and the trustees of Princeton University, for the sum of $3,600.00, which defendant agreed to pay to David E. Kennedy, Inc. Said David E. Kennedy, Inc., did and performed all things required to be done and performed by it and was paid by the defendant the sum of $3,242.40, leaving a balance due on March 1st, 1914, of $357.60.

2. David E. Kennedy, Inc., assigned by instrument in writing (a true copy of which is hereto annexed marked "Schedule No. 2") its right, title and interest in said sum.

Plaintiff demands judgment for $357.60 and interest from March 1, 1914.

J. EMIL WALSCHEID,
Attorney of Plaintiff.

NOTE: *Complaint in Decker* v. *Geo. W. Smith & Co., 96 A. 915. Judgment for plaintiff affirmed by Court of Errors.*

No. 142. COMPLAINT FOR GOODS SOLD AND DELIVERED.

Passaic County Circuit Court.

(Title.)

Plaintiff, a corporation of the State of West Virginia, having its principal place of business at No. 44 East 23d Street, in the City of New York, says that:

1. It sues for the price of goods sold and delivered to the defendant under a written agreement, a copy of which is hereto annexed and made part hereof.

2. Defendant has paid on account of said agreement only $80, leaving due a balance of $40.

Plaintiff demands as damages, the amount still due on said agreement, being $40, with interest from June 29, 1910.

(Signed) FREEMAN & WESTERHOFF,
Attorneys for Plaintiff.

NOTE: *From Funk & Wagnalls Co.* v. *Stamm, 88 A. 1050.*

No. 143. COMPLAINT. ACTION ON WRITTEN CONTRACT BY ASSIGNEE OF CONSIGNOR AGAINST CONSIGNEE FOR GOODS SOLD.

New Jersey Supreme Court, Essex County.

(Title.)

The plaintiff, Frank S. Kelley, residing in the Borough of Chatham, New Jersey, says that:

1. On or before October 3d, 1911, at (*lay venue*) William Atkins & Co., Limited, a corporation, organized and existing under and by virtue of the laws of Great Britain, entered into a contract in writing with the defendant whereby the said company agreed to consign to the defendant certain shipments of steel to remain the property of the said company until sold by the defendant, and whereby the defendant on the 15th day of each calendar month was to send to the said company a full statement of all the stock sold during the preceding month, and at the same time send a sight draft on London for the stock sold at the rates and prices mentioned in said agreement, less a discount of five per cent. plus the net amount of duties paid by the said company on said steel.

2. On or before April 24th, 1913, the said company, in accordance with the terms of said contract, gave to the defendant six calendar months' notice in writing addressed to the defendant at its usual place of business of said company's intention and election to terminate said contract, and the said contract was, pursuant to and in accordance with the terms thereof terminated in the month of October, 1913.

3. At the time of the termination of said contract the defendant had sold a portion of said steel consigned to it by the said company amounting to the sum of $614.38.

4. The defendant, by its statement in writing dated November 8th, 1913, headed Tool Steel Statement of Account, Faitoute Iron & Steel Co. with Wm. Atkins & Co., Ltd., admitted that the balance per inventory of stock on October sales showed the sum of $614.38 due to said company by the defendant.

5. The said company demanded of the defendant the said sum of $614.38, which the defendant refused to pay.

6. On January 16th, 1914, the said William Atkins & Co., Limited, assigned its claim against the Faitoute Iron & Steel Company for the sum of $614.38 to the plaintiff herein.

Plaintiff demands as damages the sum of $614.38, and interest.

LUM, TAMBLYN & COLYER,
Attorneys for Plaintiff.

NOTE: *Complaint in Kelley* v. *Faitoute Iron & Steel Co., 94 A. 802. Judgment for plaintiff affirmed by Court of Errors.*

No. 144. COMPLAINT. ACTION ON CONTRACT TO RECOVER CONTRACT PRICE OF WORK, AVERRING PERFORMANCE GENERALLY.

New Jersey Supreme Court.
Atlantic County.

(Title.)

Plaintiffs, N. R., G. R., E. R. and F. R., trading as N. R. & Sons, residing at Atlantic City, N. J., say that—

1. On April 1, 1903, at Ocean City, Cape May county, New Jersey, to wit, at Mays Landing, Atlantic county, New Jersey, plaintiffs agreed, in writing under seal, with the defendant, a corporation of the State of New Jersey, that they would furnish all necessary labor, materials, appurtenances, tools and superintendance for the construction of the fill on the property of the defendant in a thorough and workmanlike manner, in accordance with the plans and specifications of L. & T. Co., describing the same, a copy of which said agreement, specification and plans is attached hereto and made a part hereof.

2. Plaintiffs have in all things performed the said contract according to its terms, and the terms of the specifications and plans, and have filled the property of the said defendant referred to in said contract, to the amount of 104,916 cubic yards of fill.

3. Plaintiffs are entitled to receive for said fill the sum of 13½ cents per cubic yard, in all, the sum of $14,163.66, in addition to the sum of $1,000 for settlement, as provided by said

contract, or in all the sum of $15,163.66, which defendant has refused, neglected and failed to pay, although demanded so to do.

Plaintiffs demand as damages $15,163.66.

.....

Attorney of Plaintiffs.

NOTE: *Above complaint is based on declaration filed in case of Risley v. Ocean City Development Co., in which judgment for plaintiff was affirmed by Court of Errors. 69 A. 192; 75 L. 840.*

No. 145. COMPLAINT TO RECOVER ON CONTRACT OF SUBSCRIPTION TO STOCK IN PLAINTIFF COMPANY.

New Jersey Supreme Court.

Ocean County.

(Title.)

Plaintiff, Island Heights and Seaside Park Bridge Company, a corporation of the State of New Jersey, having its principal and registered office in Toms River, in said state, says:

1. That the defendant, The Brooks & Brooks Corporation, is a corporation of the State of New York, authorized to transact business in the State of New Jersey, and having its principal office in this State at No. 304 Newark avenue, Jersey City, and that it is engaged in the business of developing certain lands located in the township of Dover, in the county of Ocean and State of New Jersey, near Island Heights, and selling the same in building lots.

2. That on or about October 28th, 1911, George H. Holman, Caleb Falkenburgh, George C. Van Hise, Edwin H. Berry, Adolph Ernst, Fred. G. Stanwood, Edwin J. Schoettle, Henry C. Lippincott, F. P. Larkin, Thomas Y. Nelson, George E. Cummings, Albert W. Atkinson, J. Milton Slim, Charles L. McKeehan, Jacob C. McClenahan, Frank Tilton, Thomas A. Mathis, Jesse P. Evernham, Henry H. Davis and W. Scott Jackson associated themselves together under the name of the Organization Committee of the Island Heights and Seaside Park Turnpike Company, as a committee for the obtaining of

subscriptions to the capital stock of the plaintiff company, by whatever name it should be incorporated, and the incorporation and organization of said company.

3. That on September 12th, 1912, plaintiff was duly incorporated under and by virtue of the provisions of an act of the Legislature of the State of New Jersey entitled "An act to authorize the formation of toll bridge companies and to regulate the same," passed April 12th, 1912, for the construction and operation of a toll bridge in Ocean county, New Jersey.

4. That on November 23d, 1912, plaintiff was duly organized and then and thereupon adopted and ratified all of the acts of said Organization Committee, and succeeded to all of the rights of said committee, and thereafter promptly surveyed and located a right of way for said toll bridge, beginning in the borough of Seaside Heights, Ocean county, New Jersey, at the intersection of the middle line of Hamilton avenue with the bulkhead along the easterly shore of Barnegat bay, and running thence westward over and across Barnegat bay and Pelican Island to a point at the intersection of the middle line of Washington street, in the township of Dover, county of Ocean and State of New Jersey, with the mean high-water mark on the westerly shore of Barnegat bay, and is now constructing said toll bridge thereon.

5. That the construction and operation of said toll bridge is a work necessary and useful in the business of the defendant company, and that the defendant company is duly authorized by the laws of the State of New York to purchase, acquire and hold the stock of plaintiff company.

6. That on July 18th, 1913, in the city of New York, at (*lay venue*), in the State of New York, the defendant, by I. B. Brooks, its president, an officer duly authorized to that end, executed a certain written subscription agreement, a true copy of which agreement is annexed hereto and made a part hereof, and thereby subscribed for ten shares of the capital stock of plaintiff company, of the par value of fifty dollars each, and agreed to pay for the same in the manner therein set forth.

7. That thereupon, in said city and state, said subscription was accepted on behalf of plaintiff by Maja Leon Berry, its agent, duly authorized for that purpose.

8. That on December 4th, 1913, shares of stock in plaintiff company of a par value of $80,000 were subscribed, and on December 13th, 1913, notice was duly mailed by the secretary of plaintiff company to defendant, at the address appearing on said subscription agreement, that shares to said par value had been subscribed, and that the first installment of defendant's subscription would fall due on December 23d, 1913, being ten days after such notification.

9. That on January 5, 1914, defendant was notified that the second installment of its subscription would fall due on January 15, 1914, being more than 30 days after the date of the notice in reference to the first installment.

10. That on December 9th, 1913, the Board of Directors of plaintiff, at a meeting duly convened, passed a resolution calling for the balance of said subscription in the following installments:

$5.00 per share, payable February 15, 1914.
$10.00 per share, payable March 15, 1914.
$10.00 per share, payable April 15, 1914, of which defendant had due notice.

11. That there became due from defendant to plaintiff, on said agreement of subscription, and in accordance with the terms thereof, $10.00 per share, amounting to $100, on December 23, 1913; $15 per share, amounting to $150, on January 15, 1914; $5 per share, amounting to $50, on February 15, 1914; $10 per share, amounting to $100, on March 15, 1914; and $10 per share, amounting to $100, on April 15, 1914; no part of which has been paid.

12. That there has accrued on each of said sums interest from the date upon which it became due, all of which, together with the principal thereof, amounting to $500, is now due and owing from defendant to plaintiff.

Plaintiff demands $1,000 damages and costs.

BERRY & RIGGINS,
Attorneys of Plaintiff.

NOTE: *Complaint in Island Heights and Seaside Park Bridge Co.* v. *Brooks & Brooks, 97 A. 267. Judgment for defendant reversed by Court of Errors.*

No. 146. COMPLAINT AGAINST CORPORATION FOR FAILURE TO DELIVER STOCK SUBSCRIBED FOR BY STOCKHOLDER AND ASSIGNED TO PLAINTIFF.

Hudson County Circuit Court.

(Title.)

The plaintiff, residing at No. 586 Newark avenue, Jersey City, New Jersey, says:

1. That the defendant, the Marconi Wireless Telegraph Company of America, is a corporation organized and existing under the laws of the State of New Jersey, with its registered office in the city of Jersey City, county aforesaid.

2. That on or about the 18th of April, 1912, the stockholders of said company, at a meeting regularly called and held, authorized the increase of the capital stock of said company, from $1,662,500.00 to $10,000,000.00.

3. That on or about the said 18th day of April, 1912, by virtue of the authority vested in them, the directors of said company offered to stockholders of record at the close of business on April 20, 1912, the right and privilege to subscribe for twenty-five shares of said new stock, at par value ($5.00), for every share held by them respectively, upon the following terms, to wit:

(1) Subscriptions may be paid in full on or before May 6, 1912, and thereafter, as soon as they can be prepared, certificates of stock will be issued for the same as of that date.

(2) If not paid, in full as above, the subscription shall be paid in installments as follows: 40 per cent., that is, $2.00 per share, to be paid at the time of making the subscription, or on or before May 6, 1912; 60 per cent., that is, $3.00 per share, to be paid on or before June 10, 1912.

(3) Receipts will be given as partial payments are made, and shall be endorsed and surrendered when the certificates of stock are issued.

(4) Rights to subscribe belonging to any number of shares may be assigned, and the subscription may be made by the holder, but only upon presentation of a duly executed written assignment.

(5) The right to subscribe will cease on May 6, 1912; subscriptions upon which said first payment is not then made will be declared forfeited. Any portion of the new issue of $7,000,000.00 not subscribed for on or before May 6, will be disposed of as the board of directors shall determine.

All subscriptions and payments for the new issue of stock must be made to the Corporation Trust Company, the registered agent, at No. 15 Exchange Place, Jersey City, New Jersey. And that annexed hereto is a copy of the notice of said offer, sent out by said board of directors which is made a part hereof and marked Exhibit "A."

4. That at the close of business on said 20th day of April, 1912, one M. L. Parsons, was the holder of record of 135 shares of the capital stock of said company, and by virtue thereof, became entitled to subscribe for 3,375 shares of the increased capital stock of said company, upon the terms and conditions of said offer, hereinbefore in paragraph 3 set forh.

5. That on May 1, 1912, said M. L. Parsons, for good and valuable consideration, by instrument in writing, a true copy of which is herenuto annexed and made a part hereof, and marked Exhibit "B," transferred and assigned the right to subscribe for the shares of the increased capital stock of said company, attaching to said 135 shares, to Herbert Levy, Guy W. Levy and C. Sedgwick Levy, partners, trading as Levy Brothers, and that the said Levy Brothers thereby became entitled to subscribe for 3,375 shares of the increased capital stock of said company.

6. That the said Levy Brothers thereupon, on May 3, 1912, accepted said offer and subscribed for said 3,375 shares of the increased stock of said company, and delivered said subscription agreement or acceptance, a true copy of which is hereto annexed and made a part hereof, and marked Exhibit "C," together with the sum of $6,750.00, in accordance with the terms of said offer, at the office of the registered agent of said company, at No. 15 Exchange Place, Jersey City, N. J., which said subscription agreement and said sum of $6,750.00 was received by said company.

7. That on June 10, 1912, said Levy Brothers paid to said company the sum of $10,125.00, being the balance due upon said subscription, which sum was received by said company.

8. That thereafter, and ever since, said company has refused and still refuses to deliver to said Levy Brothers said 3,375 shares of said increase, although often requested so to do.

9. That by reason of the failure of said defendant company to deliver said stock to the said Levy Brothers, the said Levy Brothers have sustained damage in the sum of $47,250.00.

10. That on December 6, 1912, said Levy Brothers, for good and valuable consideration, transferred and assigned their said claim against said defendant company, to George W. C. Schmidt, by instrument in writing, a true copy of which is hereto annexed and made a part hereof, and marked Exhibit "D."

Plaintiff demands, as damages, the sum of $47,250.00, with interest.

A. A. MELNIKER,
Attorney of Plaintiff.

NOTE: *From Schmidt* v. *Marconi Wireless Tel. Co., 90 A. 1017.*

No. 147. COMPLAINT. DECEIT FOR MISREPRESENTATIONS IN SALE OF CORPORATE STOCK.

New Jersey Supreme Court, Union County.

(Title.)

The plaintiff, Elizabeth W. McMillan, residing at 438 East 57th Street, in the City, County and State of New York, says that:

FIRST COUNT.

1. That on the 11th day of February, 1905, in the City of Bayonne, County of Hudson, and State of New Jersey, the plaintiff purchased from the defendant 40 shares of the capital stock of Independent Producers Union Pipe Line Company, a corporation incorporated under the laws of the District of Columbia, and shortly thereafter a certificate of stock therefor was

issued to her by the said Alexander Dallas at the City of Bayonne aforesaid.

2. The consideration for the said sale was the sum of $2,000.00, for which this plaintiff made and executed to the said Alexander Dallas, her certain promissory note, bearing date on or about the 11th day of February, 1905, payable in three months from the date thereof, with interest thereon, which said note was by the said Dallas discounted at a certain bank in the City of Bayonne, County of Hudson, New Jersey.

3. That plaintiff, from time to time, reduced the principal of said note, and executed renewals thereof, and on the 11th day of August, 1909, there was due upon the last renewal of said note, the sum of $880, this plaintiff having paid on account of the original indebtedness the sum of $1,120.00 and interest at 6 per cent. on the unpaid balances.

4. At the time of the purchase and sale of the said stock as aforesaid, the said Alexander Dallas falsely, fraudulently and deceitfully stated and represented to her, the plaintiff, that one George Carragan, was the secretary and treasurer of the Independent Producers Union Pipe Line Company, and that Ross Vanderhoven was the vice-president thereof, and that both were stockholders therein; that said Independent Producers Union Pipe Line Company had actually begun the construction of a pipe line for carrying oil from Coalinga to Alvizo in the State of California, a distance of 132 miles; that the company had a contract with the Caledonian Oil Company or Caledonian Crude Oil Company to purchase all the latter company's oil product and had contracts with several other oil companies doing business in the State of California, which contracts would be very profitable to Independent Producers Union Pipe Line Company; that the business of the Independent Producers Union Pipe Line Company was prosperous and would in a short time yield large dividends and profits to the stockholders; that all of the stock of said Independent Producers Union Pipe Line Company had been sold for cash and at par; that the proceeds of the sale of stock to the plaintiff would be put into the corporate treasury and the money used for the prosecution of the work of constructing said pipe line.

5. At the time of the statements and representations aforesaid, made by the said Dallas, this plaintiff was acquainted with the said George Carragan, knew him to be a banker of great ability and success, and of excellent standing in the community in which he lived and did business, and a man enjoying the confidence of many people, all of which was well known to the said Dallas, and this plaintiff knew from the statements and representations of said Dallas that said Ross Vanderhoven was a person of large means, business capacity and success, and of excellent standing, and likewise enjoying the confidence of many people.

6. The plaintiff believed the statements and representations made to her by the said Dallas, and each of them, to be true, and the said Dallas knew that she, the said plaintiff, believed said representations, and each of them, to be true, and intended that she should believe them, and each of them, and relying upon the truth of said statements and each of them, the plaintiff purchased the shares of stock aforesaid and paid on account thereof the aforesaid various sums of money.

7. The plaintiff has recently learned that the representations so as aforesaid made by the said Dallas, and each of them were false and is false and untrue, and alleges that at no time was the said George Carragan or the said Ross Vanderhoven a stockholder in the said Independent Producers Union Pipe Line Company, and the secretary and treasurer or vice president thereof, respectively, nor did they or either of them hold any office in said company, and that the construction of a pipe line by said company from Coalinga to Alvizo in said State of California, was never begun; that said company never had any contract with the Caledonian Oil Company or Caledonian Crude Oil Company, nor with any other company, to purchase its oil products; that the business of said Independent Producers Union Pipe Line Company was not prosperous at the time of making said representations, and never was prosperous; never had and never would yield large dividends and profits to stockholders; all of which was and is well known to the defendant Alexander Dallas; and that said stock so sold to this plaintiff

was the property of the said Alexander Dallas, issued to him without consideration, and the proceeds of said sale he used and applied for his own uses and purposes, and that said moneys were never turned into the corporate treasury, nor were they used, nor did the said Dallas intend that they be used to provide funds to further the construction of said pipe line, and that much of the stock of said company had been sold for less than par.

8. The plaintiff alleges that at the time of the purchase by her of said shares of stock, and ever since, the same have been of no worth or value, and have yielded no profits and dividends, and the said Dallas well knew the worthlessness of said stock at the time of the purchase and sale thereof as aforesaid.

9. On the 29th day of December, 1907, the said Alexander Dallas and his wife left the State of New Jersey and took up their place of residence and abode in the State of California, and resided in said State until the 25th day of September, 1909, when they returned to the State of New Jersey, and took up their residence.

10. That from the said 29th day of December, 1907, to the 25th day of September, 1909, the said Alexander Dallas was at no time within the State of New Jersey, nor did he have any residence, place of abode, or place where process might be served upon him in said State of New Jersey.

The plaintiff says that she has been damaged by the false and fraudulent representations of the said Alexander Dallas, made as aforesaid, and therefore demands of the defendant Alexander Dallas, $3,000.00 damages.

SECOND COUNT.

1. That on or about the 15th day of August, 1905, in the City of Bayonne, County of Hudson, and State of New Jersey, the plaintiff purchased from the defendant, for the sum of $700.00, which she then and there paid to the defendant, seven more shares of the capital stock of Independent Producers Union Pipe Line Company, a corporation incorporated under the laws of the District of Columbia, and thereafter, certificates of stock there-

for were delivered to her by the said defendant, at the City of Bayonne aforesaid.

2. The plaintiff repeats the matters and things and allegations set forth in paragraph 4 of the first count of this complaint.

3. The plaintiff repeats the allegations and matters and things set forth in paragraph 5 of the first count of this complaint.

4. The plaintiff repeats the allegations and matters and things set forth in paragraph 6 of the first count of this complaint.

5. The plaintiff repeats the allegations and matters and things set forth in paragraph 7 of the first count of this complaint.

6. The plaintiff repeats the allegations and matters and things set forth in paragraph 8 of the first count of this complaint.

7. The plaintiff repeats the allegations and matters and things set forth in paragraph 9 of the first count of this complaint.

8. The plaintiff repeats the allegations and matters and things set forth in paragraph 10 of the first count of this complaint.

The plaintiff says that she has been damaged by false and fraudulent representations of the said Alexander Dallas, as above in this count set forth, and therefore demands of the defendant the sum of $1,500.00 as damages.

SIDNEY W. ELDRIDGE,
Attorney for Plaintiff.

NOTE: *Complaint filed in McMillan* v. *Dallas, 96 A. 1005. Judgment of nonsuit reversed and new trial granted by Court of Errors.*

No. 148. COMPLAINT UPON COVENANT BY THE PARTY FOR WHOSE BENEFIT IT WAS MADE, WHEREBY DEFENDANT PROMISED COVENANTEE TO PAY PLAINTIFF'S CLAIM.

New Jersey Supreme Court, Cape May County.

(Title.)

Plaintiff, W. C., etc., residing at , says that:

1. On or about the nineteenth day of September, nineteen hundred and seven, Sallie Whittenberg was engaged in busi-

ness at Eldora, in said county, and carried the same on under the name and style and designation of Philadelphia Pickling Company; that she there and then employed the said Walter Chambers to work for her in and about her factory at said Eldora; that, while so working, by the negligence of the said Sallie Whittenberg, said Walter Chambers was injured; that afterwards said Walter Chambers brought suit against said Philadelphia Pickling Company, in the Supreme Court of New Jersey; that said Sallie Whittenberg defended the same and that said Walter Chambers procured in said suit a judgment for four thousand dollars against the said Philadelphia Pickling Company, which judgment remains in whole unpaid.

2. On or about the seventh day of September, nineteen hundred and eight, the said Sallie Whittenberg, her husband Louis, and Maurice Sloan presented a certificate to the governor of the State of Pennsylvania and obtained a charter incorporating said Philadelphia Pickling Company, which corporation subsequently obtained permission to do business in the State of New Jersey, and have since done business in said state, at Eldora, as had been done theretofore.

3. On or about the seventh day of November, nineteen hundred and eight (*venue*), the said Sallie Whittenberg, trading as the Philadelphia Pickling Company, entered into an agreement, under seal, with the Philadelphia Pickling Company, incorporated as aforesaid, copy of which is attached to this declaration and forms a part thereof, by which the said Philadelphia Pickling Company, incorporated as aforesaid, inter alia, for valuable consideration, agreed to pay "any claim now existing or hereafter to be made by Walter Chambers, suit for which has already been brought in the State of New Jersey," and that the said Sallie Whittenberg, in consideration of the above and other considerations, conveyed and sold to the said Philadelphia Pickling Company, incorporated as aforesaid, all the real and personal property belonging to her and used by her, at said Eldora or elsewhere, at the time said Walter Chambers was injured as aforesaid and all real and personal property acquired by her between then and the seventh day of November, nineteen hundred and eight.

4. That the said Philadelphia Pickling Company, incorporated as aforesaid, has refused and still does refuse to pay said claim or judgment of said Walter Chambers, obtained as aforesaid.

Plaintiff demands as damages, $8,000.

NOTE: *Above complaint adopted from declaration in Chambers* v. *Phila. Pickling Co., 83 A. 890; 83 L. 543. Judgment for plaintiff affirmed by Court of Errors.*

No. 149. COMPLAINT FOR CRIM. CON. WITH PLAINTIFF'S WIFE.

New Jersey Supreme Court, ... County.

(Title.)

Plaintiff residing, etc., ... says that:

1. On or about the ..... day of ....., the defendant, I. L., with force and arms made an assault upon E. H., the wife of the plaintiff, at ....., to wit, at (*lay venue*) ..... and did ravish, lie with, debauch, and carnally know the said E. H., whereby the said plaintiff lost and was deprived of the comfort, fellowship and society of his said wife, to the great damage of the said plaintiff.

Plaintiff demands as damages the sum of $10,000.

.....

Attorney.

No. 150. COMPLAINT UNDER DEATH ACT (2 C. S. 1904) BY ADMINISTRATRIX OF DECEASED AGAINST PHYSICIAN FOR NEGLIGENTLY PERFORMING OPERATION.

New Jersey Supreme Court, Union County.

(Title.)

Plaintiff, Katherine Coleman, administratrix of all and singular the goods and chattels, rights and effects, which were of Clarence W. Coleman, deceased, residing at ....., says that:

1. Before the committing of the grievances hereinafter mentioned, to wit, at Elizabeth, in the county of Union, aforesaid,

the said Clarence W. Coleman was a patient of and under treatment by the defendant, a practising physician and surgeon in the said city of Elizabeth for a certain reward for a certain complaint and disorder under which he, the said Clarence W. Coleman, deceased, then suffered from and labored.

2. The said defendant being a physician and surgeon as aforesaid, to wit, on the fifteenth day of September, nineteen hundred and ten, at Elizabeth, aforesaid, undertook to, and did, perform an operation upon the said plaintiff in an endeavor to cure him of the said complaint and disorder from which he suffered and under which he labored.

3. It then and there became and was the duty of the said defendant to perform the said operation in a careful, skillful and proper manner, and to use due and proper care and diligence in and about endeavoring to cure the said Clarence W. Coleman, deceased, of the said complaint and disorder from which he, the said Clarence W. Coleman, deceased, suffered and labored.

4. The said defendant, not regarding his duty in that behalf, but wrongfully intending to injure the said Clarence W. Coleman, deceased, did not nor would not perform the said operation in a careful, skillful and proper manner, but wholly refused and neglected so to do, but on the contrary so carelessly, negligently, unskillfully and improperly performed the said operation and so carelessly, negligently, unskillfully and improperly treated the said Clarence W. Coleman, deceased, and in so careless and negligent a manner that the said Clarence W. Coleman, deceased, did not nor could recover from the effects of said operation, and by reason of said careless, negligent, unskillful and improper treatment of the said Clarence W. Coleman, deceased, by the said defendant, he, the said Clarence W. Coleman, deceased, was seized with a mortal illness from which he lingered and languished until, to wit, the third day of October, nineteen hundred and ten, when he then and there died thereof, to wit, at Elizabeth, in the county of Union aforesaid.

5. The said Clarence W. Coleman was forty-one years of age at the time of his death and left him surviving Katherine Cole-

man, his wife, administratrix and the plaintiff herein, and two children, Ruth, aged eight years, and Katherine, aged five years, and that they are his next of kin and that they have sustained great pecuniary loss, damage and injury for and by reason of the death of the said Clarence W. Coleman, whereby and by force of the statute in such case made and provided an action hath accrued to the said plaintiff, as administratrix of the said Clarence W. Coleman, deceased, to demand and have from the said defendant the sum of twenty-five thousand dollars.

6. Plaintiff's action against the said defendant was commenced within twenty-four calendar months from the date of the decease of the said Clarence W. Coleman.

7. Plaintiff brings into court here letters of administration granted on the estate of the said Clarence W. Coleman, by George T. Parrot, surrogate of the county of Union, on the twenty-eighth day of November, nineteen hundred and ten, whereby it fully appears to the said court, that the said plaintiff is administratrix of the said Clarence W. Coleman, deceased, &c.

Plaintiff demands as damages $25,000.

NOTE: *Adapted from declaration in Coleman* v. *Wilson, 88 A. 1059.*

No. 151. COMPLAINT. ACTION BY ADMINISTRATOR FOR DAMAGES FOR DEATH OF HIS INTESTATE CAUSED BY FALLING FROM A BALCONY IN DEFENDANT'S BUILDING, DECEDENT BEING THERE ON BUSINESS.

Hudson County Circuit Court.

(Title.)

Plaintiff, Magdalena Sefler, administratrix of the estate of Vincenty Sefler, deceased, residing in Jersey City, Hudson county, New Jersey, says—

1. At the times herein stated, defendant was and still is a corporation of the State of New Jersey, and possessed and managed a lumber yard in Jersey City where it was engaged in the lumber business.

2. On December 29th, 1914, plaintiff's intestate, Vincenty Sefler, entered the said lumber yard for the purpose of buying lumber from the defendant.

3. On that day a servant and agent of the defendant conducted plaintiff's intestate to a certain building or shed in the said lumber yard to select certain lumber.

4. The banister and hand-rail along the stairs and platform of said building or shed was negligently and improperly constructed and maintained, and by reason thereof the said banister or hand-rail gave way and fell off while plaintiff's intestate had his hand on it, thereby causing plaintiff's intestate to fall to the ground, and injuring him so severely that he died as a result thereof.

5. Said decedent left him surviving, Magdalena Sefler, his widow, and the following children: Edwin, five years of age; Helen, three years of age, and Jennie, fourteen months of age; who are his only next of kin and who have suffered pecuniary loss by reason of his death.

6. On January 6th, 1915, letters of administration were granted upon the estate of said Vincenty Sefler, by the surrogate of Hudson county, aforesaid, to plaintiff, and were accepted by her.

7. This action is commenced within twenty-four calendar months after death of plaintiff's intestate.

By reason of the premises, plaintiff, as administratrix as aforesaid, demands $10,000.00 damages.

.....

Attorney of Plaintiff.

NOTE: *Complaint filed in Sefler* v. *Vanderbeek & Sons, 96 A. 1009. Judgment for plaintiff affirmed by Court of Errors. See Seitter* v. *R. R., 75 A. 435, authority for Par. 7.*

NO. 152. COMPLAINT TO RECOVER DAMAGES FOR DEATH OF TENANT ATTRIBUTABLE TO DEFENDANT'S LANDLORD'S NEGLIGENCE IN FAILING TO PROVIDE FIRE ESCAPES FOR HIS TENEMENT HOUSE AS PROVIDED BY SECTION 126, TENEMENT HOUSE ACT.

Hudson County Circuit Court.

(Title.)

The plaintiff residing in the city of Jersey City, Hudson county, State of New Jersey, says that—

1. On the 11th day of November, 1912, the defendant became and from thence hitherto has been and now is owner in fee of lands and premises, situate, lying and being in the city of Jersey City, Hudson county, New Jersey, and known as No. 126 Sussex street, Jersey City, and more particularly described as follows:

2. That at the time of the defendant becoming such owner as aforesaid there was and from thence hitherto has been erected upon the said lands a three story and basement brick, non-fireproof tenement house, the walls of which adjoined the street and building line.

3. That the said tenement house at all of said times was more than three stories in height and occupied as the home or residence of three or more families, living independently of each other and doing their cooking upon the premises.

4. That it became and was the duty of the said defendant to have fire escapes located and constructed upon the said tenement house of the said defendant according to the provisions of an act of the legislature of the State of New Jersey entitled, "An act to improve the condition of tenement houses in this state, and to establish a State Board of Tenement House Supervision," approved March 25th, 1904, and the several acts supplemental thereto and amendatory thereof.

5. That it also became and was the duty of said defendant to keep and maintain a proper light in the public hallways, near the stairs of said tenement house, upon the entrance floor; and also such a light also burning upon the second floor above the entrance floor every night throughout the entire year, and also upon all other floors of such tenement house from sunset each

day until ten o'clock each evening and which lights should be so arranged as to effectually guard against fire, according to the provisions of said act of legislature, approved March 4th, 1904, and the several acts supplemental and amendatory thereof.

6. That the said plaintiff's intestate on the 28th day of December, 1912, was a tenant and occupant of the said tenement house of the said defendant for the reward to the defendant paid, was entitled to all the rights and privileges of a tenant of the said defendant in the said tenement house aforesaid and likewise was entitled to be safely and securely lodged in the tenement house aforesaid.

7. That it then and there became and was the duty of the said defendant to use due and proper care so that the said plaintiff's intestate should be reasonably, safely and securely lodged as a tenant in the tenement house aforesaid and to use due and proper care to have fire escapes located and constructed on and upon said tenement house as provided by the said statute.

8. That it then and there became and was the duty of the said defendant to use due and proper care so that the said plaintiff's intestate should be reasonably, safely and securely lodged as a tenant in the tenement house aforesaid and to use due and proper care to have said lights specified in section 6 of this complaint, located and maintained and kept burning in said halls of said tenement house as provided by said statute.

9. That the said defendant not regarding her duty in that behalf did not use due and proper care that the said plaintiff's intestate should be safely and securely lodged as aforesaid, and did not use due and proper care to have fire escapes located and constructed upon the said tenement house, but wholly neglected to do so and suffered and permitted the said tenement house of the said defendant to take fire on the 28th day of December, 1912.

10. That the said defendant not regarding her duty in that behalf did not use due and proper care so that the said plaintiff's intestate should be safely and securely lodged as aforesaid, and did not use due and proper care to have said lights specified in section 6 in this complaint, located and maintained and kept burning in said halls of tenement house, but wholly neglected

to do so and suffered and permitted the said tenement house of the said defendant to take fire the 28th day of December, 1912.

11. That the said defendant carelessly and negligently neglected her duty in that behalf and did not have fire escapes located and constructed upon the said tenement house of the said defendant according to the provisions of the act of the legislature of the State of New Jersey, or any fire escapes located thereon.

12. That the said defendant carelessly and negligently neglected her duty in, that behalf and did not have said lights specified in section 6 of this complaint, located, maintained and kept burning in said halls of said tenement house, but wholly neglected to do so and suffered and permitted the said tenement house of the said defendant to take fire on the 28th day of December, 1912.

13. That by reason thereof, on the day and year last aforesaid, while the said plaintiff's intestate occupied and was within the said tenement house as a tenant of the defendant, a fire started in said tenement house and the said tenement house then and there became and was filled with smoke, poisonous gases and flames and then and there was burned.

14. That by reason of the negligence of the said defendant in neglecting to have fire escapes located and constructed upon the said tenement house as provided by the statute aforesaid, the plaintiff's intestate was unable to escape from said building and from the smoke, gases and flames aforesaid, in consequence whereof the said plaintiff's intestate was caused to suffer and receive and did suffer and receive injuries, from which injuries he died on the 30th day of December.

15. That the said plaintiff's intestate left him surviving the plaintiff, his son, as his sole next of kin and who has suffered pecuniary loss by reason of his death in the sum of $15,000.

16. That the plaintiff as such administrator for the benefit of said next of kin is vested by virtue of the statute in usch case made and provided, with a cause of action for negligently causing the death of said plaintiff's intestate and which action is commenced within two years after said death.

17. That the said plaintiff brings here into court letters of administration of the goods and chattels, right and credits, moneys and effects of the said William Evers, granted to him by the surrogate of the county of Hudson, State of New Jersey, on January 6th, 1913.

18. The plaintiff demands damages, $15,000.

NOTE: *Complaint in Evers* v. *Davis, 90 A. 677.*

No. 153. COMPLAINT UNDER DEATH ACT AGAINST RAILROAD FOR NEGLIGENCE IN FAILING TO SOUND STATUTORY SIGNAL IN APPROACHING CROSSING.

Hudson County Circuit Court.

(Title.)

The plaintiff above named who resides at No. 415 Spring street, West Hoboken, in the county of Hudson, says:

1. That the defendant is now and was at all times hereinafter mentioned a foreign corporation.

2. That the defendant on the 6th of September, 1912, operated a railroad over a public highway in the town of Rutherford, in the county of Bergen.

3. That the said railroad was operated level with the public highway and across the same at grade.

4. That the intestate of the plaintiff while crossing the said highway was killed by a train operated by the defendant company, by reason of the negligence of the defendant company.

5. That the negligence of the defendant company was that it did not give the statutory signal of the approach of the train, and that although it had a watchman at the crossing and safety gates, and although the train which killed the plaintiff's intestate was approaching at great speed, yet the gates were not lowered, and the defendant at the time that the train was approaching which killed plaintiff's intestate, and before he was struck by said train, and while he was crossing the said crossing, operating two local trains, one east and one west, which said local

trains prevented the plaintiff's intestate from seeing the train approaching which killed him.

6. That the plaintiff is the administratrix of the estate of Ferdinand Materka, deceased, and letters of administration have been issued to her by the surrogate of the county of Hudson, which letters she here and now brings into court.

7. That the plaintiff's intestate left him surviving the plaintiff, his widow, and the following named next of kin: Mary McCartney, daughter; Tillie Laufenberg, daughter; Annie Blackman, daughter; Emma Lewis, daughter; Beatrice Materka, daughter; Fred Materka, son, and Arthur Materka, son, who have suffered pecuniary injury because of his death.

8. Plaintiff's action against the said defendant was commenced within 24 calendar months from the date of the decease of the said Ferdinand Materka.

The plaintiff demands $20,000 damages.

NOTE: *Complaint from Materka* v. *Erie R. R.*, *95 A. 612.*

No. 154. COMPLAINT FOR DEATH CAUSED BY SHOCK FROM LIVE ELECTRIC WIRE FALLING.

New Jersey Supreme Court,
Hudson County.

(Title.)

The plaintiff, residing, at , says that:

1. On or about the tenth day of June, 1911, at Jersey City, in the county of Hudson aforesaid, the said defendant was the owner and possessor, and had the control, management and use of a certain electric light wire, which said electric light wire said defendant fastened or caused to be fastened and attached to certain poles and to be extended along certain public streets of the said city of Jersey City, by means of said poles, and which said electric light wire was used by said defendant company in transmitting dangerous and deadly currents of electricity in the conduct of said defendant's business, and which said electric light wire, unless insulated or properly and carefully protected

by other means, was dangerous to the life of any person coming in contact with said wire.

2. It became and was the duty of the said defendant to use reasonable care that the said electric light wire should be of reasonably safe and sound material and of sufficient strength and should be erected, maintained and protected in a reasonably careful and proper manner so that the electric fluid transmitted by the said defendant upon and through said wire should not be dangerous to life or limb.

3. The said defendant, not regarding its duty in that behalf, by its agents and servants, negligently failed to use reasonable care that the said electric wire should be of reasonably safe and sound material, and that it should be of sufficient strength and erected, maintained and protected in a reasonably safe and proper condition so as not to become dangerous to the lives and limbs of persons lawfully using said streets of the city of Jersey City, but on the contrary thereof, the said defendant, on the day and year aforesaid, to wit, the tenth day of June, 1911, at or about the corner of Sackett street and Clinton avenue, in the said city of Jersey City, in the county aforesaid, by its agents and servants, did negligently suffer and permit said electric light wire to be and remain, without being properly insulated and securely maintained, erected and protected, and without being of sufficient strength and to be erected and maintained through and against tree tops, without proper insulation and support, and to be and remain in an unsafe and unsound condition, and upon short and improper poles, and did negligently suffer and permit said electric light wire to be and remain in a dangerous and broken condition and to drop down to or over the sidewalk of said Clinton avenue at or near the corner of Sackett street.

4. While said electric light wire was so hanging down to or over said sidewalk, the defendant, by its agents and servants, did then and there improperly and negligently transmit dangerous and deadly currents of electricity upon said wire, to the great danger of the lives of persons lawfully in and upon said public street, so that the said David T. Clark, who was then and there lawfully in and upon said street, and who came in

contact with the said electric light wire, received from said wire an electric shock, of which shock he, the said David T. Clark, then and there instantly died, to wit, on the tenth day of June, 1911, at Jersey City, in the county of Hudson aforesaid.

5. The said defendant, by its agents and servants, had notice of the improper erection and condition of said wire and poles.

6. The said David T. Clark, deceased, at the time of his death, was married and of the age of twenty-seven years, and that he left him surviving his widow, Minnie V. Clark, and four children, as follows: Bessie Bertram Clark, aged nine years; Arthur Clark, aged five years; Samuel Clark, aged two and one-half years, and Ethel Clark, aged one year, and that they are his next of kin, and that they have sustained great pecuniary damage, loss and injury from and by reason of the death of the said David T. Clark, to wit, the amount of twenty-five thousand dollars ($25,000.00).

7. Whereby and by force of the statute in such case made and provided, an action hath accrued to the said plaintiff as administrator of the goods, chattels, rights and credits of the said David T. Clark, deceased, for and on behalf of said widow and next of kin, to demand and have of and from the said defendant the damages aforesaid.

8. Plaintiff's action against said defendant was commenced within 24 calendar months of the decease of said David T. Clark.

NOTE: *Adapted from declaration in Clark* v. *Public Service Electric Co., 92 A. 83, 86 L. 114. Judgment for defendant reversed by Court of Errors.*

NO. 155. COMPLAINT. ACTION FOR BREACH OF WARRANTY IN DEED. PUBLIC HIGHWAY OVER LAND.

New Jersey Supreme Court, Camden County.

(Title.)

The plaintiff, a corporation organized under the laws of the State of New Jersey and doing business at Camden, in said State, says that:

1. Prior to the 24th day of April, 1886, the Manufacturers Land and Improvement Company, a corporation organized under the laws of the State of New Jersey, owned a large tract of land in the southern part of the City of Camden, County of Camden and State of New Jersey.

2. On April 24th, 1886, the said Manufacturers Land and Improvement Company sold and conveyed to the Keystone Chemical Company all that certain lot or piece of land and land under tidewater situate in the Eighth Ward of the City of Camden, in the County of Camden and State of New Jersey, more particularly described as follows: (*Description by metes and bounds*); all of which will appear by a deed dated the 24th day of April, 1886, made by the said Manufacturers Land and Improvement Company to the Keystone Chemical Company, duly recorded in the office of the Register of Deeds of the County of Camden, in book 124, page 58, etc.

3. The said lands and premises described in paragraph 2 hereof and the interest of the Keystone Chemical Company therein were sold according to law by David Baird, Sheriff of the County of Camden, to the Camden National Bank, by deed dated the 23d day of December, 1898, recorded in the Register's Office of Camden, in Book 233 of Deeds, page 598, by virtue whereof the said Camden National Bank became the owner of said lands and premises, and possessed of all the estate, right, title, interest, claims and demands of the said The Keystone Chemical Company therein.

4. On March 14th, 1902, the Camden National Bank, then being the owner of the said lands and premises described in the second paragraph hereof, by deed dated March 14th, 1902, recorded in the Register's Office of Camden County, in Book 260 of Deeds, page 519, and as party of the first part, granted and conveyed the said lands and premises to Nonpareil Cork Manufacturing Company, a corporation of the State of New Jersey, party of the second part, together with all and singular the improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances to the same belonging or in anywise appertaining, and reversion and reversions, remainder and re-

mainders, rents, issues, and profits thereof and every part and parcel thereof; and also the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity of the said party of the first part of, in and to the said premises and every part thereof, with the appurtenances. To have and to hold the said premises above described with all and singular the hereditaments and appurtenances unto the said party of the second part, its successors and assigns, to the only proper use, benefit and behoof of the said party of the second part, its successors and assigns forever.

5. And by the deed last mentioned, dated March 14th, 1902, the said Camden National Bank did covenant, claim and agree with the said Nonpareil Cork Manufacturing Company, its successors, all and singular the hereditaments and premises described in said deed and granted or mentioned and intended so to be, with the appurtenances, unto the said Nonpareil Cork Manufacturing Company, its successors and assigns, against it, the said Camden National Bank, and its successors, and against all and every other person or persons whomsoever lawfully claiming or to claim the same or any part thereof, should and would warrant and forever defend.

6. On January 27th, 1903, the Nonpareil Cork Manufacturing Company sold and conveyed to the plaintiff, by deed dated January 27th, 1903, recorded in the Register's office of Camden County, in Book 271 of Deeds, page 309.

All that tract of land situate in the City of Camden in the State of New Jersey, being a portion of the land set forth in paragraph two, and described as follows: (*Description by metes and bounds.*)

7. The deed dated March 14th, 1902, above mentioned, made by the Camden National Bank, was executed under its corporate seal; and the said defendant, Camden National Bank, became and was liable upon its covenant of warranty contained therein.

8. By the conveyance of said lands and premises last mentioned to the plaintiff, the latter became vested with all the rights and privileges of the Nonpareil Cork Manufacturing Company, grantee in the deed, executed by the said defendant, in the lands

and premises therein described, and has possessed and now has and possesses the power and authority to enforce the covenant of warranty contained therein.

9. Some time in the early part of 1908 the City of Camden demanded that the plaintiff vacate a portion of the lands and premises described in the deed last mentioned, being a strip of land to the width of sixty feet between the extended lines of Jefferson Street in said city, running westward to the river Delaware from a point 596 feet westward from the westerly line of Third Street, the demand of said city being based upon the claim that the Manufacturers Land and Improvement Company had dedicated said strip of land 60 feet wide as a public highway prior to the conveyance to the Keystone Chemical Company, by deed above mentioned.

10. The title of the plaintiff in and to said lands being disputed by said city, the plaintiff, on the 20th day of April, 1908, filed in the Court of Chancery of New Jersey its bill to quiet the title to the lands and premises acquired by it from the Nonpareil Cork Manufacturing Company as above set forth; and upon an answer filed by said city, a decree was made in said cause directing that an issue at law be framed in the Supreme Court of this state and tried in the ordinary manner between the said City of Camden as plaintiff and this defendant as defendant, by a jury of the said County of Camden, to try the validity of said claim of said city and inquire, ascertain and determine whether there was an easement or right of way in the public to have and use as a public highway or street a strip of land to the width of 60 feet between the extended lines of Jefferson Street in said city running westward to the Delaware River and across the lands and premises of the said plaintiff acquired from the said Nonpareil Cork Manufacturing Company.

11. Pursuant to the terms of said decree, said issue so framed as aforesaid was tried before a jury in the County of Camden, and said jury found that said public highway known as Jefferson Street did not extend over and across the plaintiff's lands or any part thereof, after which an application was made to the Court of Chancery, according to the statute in such case made

and provided to set aside the verdict of the jury in said framed issue and direct that a new trial be had; and on the 7th day of September, 1909, the said motion to set aside the verdict of the jury and for a new trial was denied; whereupon the said City of Camden appealed to the Court of Errors and Appeals of New Jersey; and said Court, by decree regularly entered, reversed the order of the said Court of Chancery and directed that a new trial of said framed issue be granted.

12. The issue framed by said decree was again tried before a jury in the County of Camden, and said jury returned a verdict in favor of the said city, and found that there was an easement or right of way in the public to have and use as a public highway or street a strip of land to the width of sixty feet, between the extended lines of Jefferson Street, in said city, running westward to the Delaware River and across the lands and premises acquired by the plaintiff from the Nonpareil Cork Manufacturing Company; and such proceedings were had upon said verdict that, on the twenty-seventh day of February, nineteen hundred and twelve, a final decree was entered in said cause, whereby Mahlon Pitney, the Chancellor of the State of New Jersey, did order, adjudge and decree that the City of Camden had an estate and interest in and incumbrance upon the lands and premises hereinbefore described, and that there was and is an easement or right of way in the public to have and use said public highway or street sixty feet wide between the extended lines of Jefferson Street, running westward to the Delaware River, and across the lands of said plaintiff, and that a public highway, known as Jefferson Street or Jefferson Avenue, existed in the City and County of Camden and State of New Jersey to the width of sixty feet, extending westward from a point distant five hundred and ninety-six feet west from the westerly line of Third Street to the Delaware River, and across the lands and premises described as aforesaid, the title of the City of Camden in and to the same and every part thereof as a public highway, known as Jefferson Street, theretofore dedicated to public use, of the width of sixty feet, extending from Third Street aforesaid west-

wardly to the Delaware River, was, by said decree, determined, fixed, and settled and declared to be good and valid.

13. Of all said proceedings in the Court of Chancery and the trials of the said issue in the Supreme Court of the County of Camden, and the final decree entered therein, the Camden National Bank had notice, and is bound thereby.

14. That the decree aforesaid and the determination thereby that said strip of land sixty feet wide between the extended lines of Jefferson Street was a public highway was based upon an alleged dedication thereof by the Manufacturers Land and Improvement Company prior to the twenty-fourth of April, eighteen hundred and eighty-six, and the claim of the said city was that the rights of the plaintiff in the same, existing by reason of the conveyance from the Nonpareil Cork Manufacturing Company, were acquired by the said plaintiff subject to the dedication by the said Manufacturers Land and Improvement Company.

15. That the said Camden National Bank did not, pursuant to the covenant and warranty contained in its said deeds, fully warrant and forever defend the said plaintiff and its ownership in the lands and premises involved in said Chancery proceedings as aforesaid; and in consequence of the breach of said covenant and agreement of the said Camden National Bank, the said plaintiff was disturbed, dispossessed and ousted from the said lands and premises; and a right of action has accrued in favor of the plaintiff to recover from the said Camden National Bank, damages by reason of the breach of its covenant as aforesaid, which shall cover and include the value of said lands out of the possession of which the plaintiff was ousted and interest thereon for the period of six years, together with such costs and expenses as the said plaintiff has sustained by reason of the defense of said proceedings, with reference to the title to said lands, and the said plaintiff is entitled to recover from the said Camden National Bank the amount of said damages, interest, costs and expenses, and for that purpose this suit is brought.

16. The plaintiff has done and performed every act, matter

or thing required of it to assert and protect against the claim of the said City of Camden, the title to the said lands and premises acquired under the deed from the Nonpareil Cork Manufacturing Company as aforesaid, and has done and performed every matter and thing required of it to be performed by reason of the covenants entered into by the Camden National Bank, as aforesaid.

The plaintiff demands as damages the sum of $20,000.

LEWIS STARR,
Plaintiff's Attorney.

NOTE: *Complaint in McAndrews & Forbes Co. v. Camden National Bank, 94 A. 627. Judgment striking complaint reversed and new trial granted by Court of Errors.*

No. 156. COMPLAINT. ACTION FOR BREACH OF WARRANTY IN DEED. MORTGAGE ON PREMISES.

Atlantic County Circuit Court.

(Title.)

1. Plaintiff, Harper B. Smith, whose residence is 11 Fralinger Apartments, in the city of Atlantic City, State of New Jersey, complains of the defendants, Charles F. Wahl and Martha F. Wahl, who reside at 815 Pacific avenue, in the city of Atlantic City, and State of New Jersey, that on the 25th day of February, 1902, the said defendants by their certain deed of bargain and sale, sealed with their seals, and to the court now here shown, the date whereof is the day, month and year aforesaid, in consideration of twenty-five hundred dollars, paid to them by the said plaintiff upon the sealing and delivery of the said deed, receipt whereof was thereby acknowledged, granted, sold, aliened, enfeoffed, released, conveyed and confirmed unto the said plaintiff, his heirs and assigns, forever, the real estate hereinafter described and the appurtenances, situate in the city of Atlantic City, county of Atlantic and State of New Jersey, bounded and described as follows:

2. And the said defendants, by the said deed, for themselves, for their heirs, executors, and administrators, did covenant with the said plaintiff, his heirs and assigns, to warrant and forever defend the title of the said parcel of land and appurtenances against the said defendants and against all and any other person or persons whomsoever, lawfully claiming or to claim the same or any part thereof, as by the said deed, reference being thereunto had, will more fully and at large appear.

3. And although the said plaintiff has always from the time of making the said deed thereby well and truly performed, fulfilled and kept all things therein contained, on his part to be done, fulfilled and kept, according to the tenor and effect, true intent and meaning thereof; yet the said plaintiff in fact saith that at the time of making the said deed a certain John H. Ringe, Sr., was entitled to and had a mortgage lien upon the said land and appurtenances for the just sum of eight hundred and forty-five dollars by a good title, older and better than the title of the said plaintiff, and that in consequence and by reason thereof the said plaintiff has been disturbed in and evicted from possession and enjoyment of the said land and appurtenances described and conveyed in and by the said deed; all of which the said defendants afterwards had notice.

4. And so the said plaintiff now complains that the said defendants, though often requested so to do, have not kept the said covenants so made by them for themselves and their heirs as aforesaid, with the said plaintiff, in manner and form aforesaid, but have broken the same and have hitherto wholly refused and still does refuse to the damage of the said plaintiff of two thousand dollars, and therefore he brings his suit and claims damages in said sum of two thousand dollars.

CHANDLER & ROBERTSON,
Attorneys for Plaintiff.

NOTE: *Complaint in Smith* v. *Wahl, 97 A. 261. Judgment for plaintiff affirmed by Court of Errors.*

No. 157. COMPLAINT FOR BREACH OF COVENANT AGAINST ENCUMBRANCES, THERE BEING A MORTGAGE UPON PREMISES WHICH SHOULD HAVE BEEN FREE FROM ALL ENCUMBRANCES.

Bergen County Circuit Court.

(Title.)

Plaintiff, C. H., residing at ....., says that:

1. On the first day of July, in the year of our Lord one thousand eight hundred and seventy-three, in the city of Hoboken, to wit, at Hackensack, in the county of Bergen aforesaid, and within the jurisdiction of this court, by a certain deed made by the said Anna Mohmking, then Anna Mahler, and Michael Mahler, her husband, now deceased, on the one part, and Margarethe Hasselbusch, now deceased, and Claus Hasselbusch, her husband, the plaintiffs herein on the other, which said deed the said defendant and Michael Mahler, her husband now deceased, signed, sealed and delivered to the said Margarethe Hasselbusch, deceased, and the said plaintiff, and which said deed the plaintiff now brings into court, and a copy of which is hereto annexed and reference thereto had for greater certainty, the date whereof is the day and year last aforesaid, the defendant for the consideration therein mentioned did grant, bargain, sell, alien, remise, release, convey and confirm unto the said Margarethe Hasselbusch, now deceased, and Claus Hasselbusch, her husband, the plaintiff herein, their heirs and assigns, certain premises particularly mentioned and described in said deed.

2. Defendant, Anna Mohmking, formerly Anna Mahler, for herself, her heirs, executors and administrators, did covenant, promise and agree to and with the said Margarethe Hasselbusch, now deceased, and Claus Hasselbusch, her husband, the plaintiffs herein, their heirs and assigns (among other things), that the same were free from, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and encumbrances of what kind and nature soever, as by said deed reference being thereto had will more fully and at large appear.

3. Said Margarethe Hasselbusch, now deceased, and Claus Hasselbusch, her husband, have always from the time of making of the said deed until the death of said Margarethe Hasselbusch

and since her decease, said plaintiff has well and truly performed, fulfilled and kept all things in said will contained on their part and behalf to be performed, fulfilled and kept.

4. At and before the enscaling and delivery of the said deed, the said Margarethe Hasselbusch, now deceased, and said plaintiff, did pay the consideration therein called for, according to the true tenor and effect, true intent and meaning of the said deed.

5. Defendant did not keep, fulfill and perform the things on her part to be kept, fulfilled and performed.

6. On the first day of July, nineteen hundred and four, the said Margarethe Hasselbusch, now deceased, and said plaintiff, made an agreement to sell the said premises to John Boglioli and Stella, his wife, and that a search of the records in the office of the register of the county of Hudson, made at this time, showed that at the time the said defendant made the aforesaid covenant, promise and agreement to and with them, a certain mortgage made by Frederick Grasmuck to Bernard McClosky, bearing date the twenty-second day of September, eighteen hundred and sixty-nine, given to secure the sum of three hundred and fifty dollars ($350), and recorded therein in Book 68 of Mortgages for Hudson county, on pages 561, &c., remained an encumbrance against the said premises, contrary to the true tenor and effect, true intent and meaning of the defendant's covenant in said deed in that behalf so made as aforesaid, and said plaintiff avers that the next of kin of the said Bernard McClosky did demand payment of the said mortgage from them, whereupon the said Margarethe Hasselbusch, now deceased, and said plaintiff were compelled to bring suit in the Court of Chancery of New Jersey to quiet title to the said premises and were compelled to pay and did pay, a large sum of money, to wit, the sum of two hundred dollars ($200), the expense of the said suit to quiet title.

COUNT 2.

7. On the first day of July, in the year of our Lord, one thousand eight hundred and seventy-three, in the city of Hoboken, to wit, at Hackensack, in the county of Bergen, and within the jurisdiction of this court, by a certain deed made by Anna Mohmking, then Anna Mahler, and Michael Mahler, her husband, now

deceased, on the one part, and Margarethe Hasselbusch, now deceased, and Claus Hasselbusch, her husband, the plaintiff herein, on the other, which said deed the defendant signed, sealed and delivered to the said Margarethe Hasselbusch, now deceased, and the said plaintiff, and which deed the plaintiff brings into court, a copy of which is hereto annexed and reference thereto made for greater certainty, the date whereof is the day and year last aforesaid, the defendant and Michael Mahler, her husband, now deceased, for the consideration therein mentioned, did grant, bargain, sell, alien, remise, release, convey and confirm unto the said Margarethe Hasselbusch, now deceased, and the said plaintiff, their heirs and assigns, certain premises particularly mentioned and described in said deed.

8. The defendant for herself, her heirs, executors and administrators, did covenant, promise and agree to and with the said Margarethe Hasselbusch, now deceased, and the said plaintiff, their heirs and assigns (among other things), that the same were free from, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and encumbrances, of what kind and nature soever, as by the said deed reference being thereto had will more fully and at large appear.

9. Said Margarethe Hasselbusch, now deceased, and the said plaintiff have always from the time of making of the said deed until the death of the said Margarethe Hasselbusch, and since her decease said plaintiff has well and truly kept, performed and fulfilled all things in said deed on their part and behalf to be performed, fulfilled and kept.

10. At and before the ensealing and delivery of the said deed the said Margarethe Hasselbusch, now deceased, and the said plaintiff did pay the consideration therein called for according to the true tenor and effect, true intent and meaning of the said deed.

11. Said defendant did not keep, fulfill and perform the things on her part to be kept, fulfilled and performed.

12. The defendant had notice of a certain mortgage given by Frederick Grasmuck to Bernard McClosky, bearing date the twenty-second day of September, eighteen hundred and sixty-

nine, given to secure the sum of three hundred and fifty dollars ($350) recorded in Book 68 of Mortgages, on pages 561, &c., in the office of the register (formerly clerk) of the county of Hudson, which remained an encumbrance against said premises; and of the intention of the next of kin of said Bernard McClosky to assert his validity; that said defendant requested said Margarethe Hasselbusch, now deceased, and the said plaintiff to quiet title to the said premises and did promise to pay said Margarethe Hasselbusch, now deceased, and said plaintiff by reason of the covenant aforesaid, so much money as the expenses thereof should cost them.

13. Said Margarethe Hasselbusch and the said plaintiff did proceed with such suit to quiet title to the said premises and did pay as expense therefor a large sum of money, to wit, the sum of two hundred dollars, and that the said defendant refused and still refuses to reimburse them for the moneys so expended, on the day and year last aforesaid, to wit, at Hackensack, aforesaid.

COUNT 3.

14. On the first day of July, in the year of our Lord, one thousand eight hundred and seventy-three, in the city of Hoboken, in the county of Bergen, and within the jurisdiction of this court, by a certain deed made by Anna Mohmking, then Anna Mahler, and Michael Mahler, her husband, now deceased, on the one part, and Margarethe Hasselbusch, now deceased, and Claus Hasselbusch, her husband, the plaintiff herein, on the other, which said deed the defendant signed, sealed and delivered to the said Margarethe Hasselbusch, now deceased, and the said plaintiff, and which deed the plaintiff now brings into court, a copy of which is hereto annexed and reference thereto made for greater certainty, and date whereof is the day and year last aforesaid, the defendant and Michael Mahler, her husband, now deceased, for the consideration therein mentioned did grant, bargain, sell, alien, remise, release, convey and confirm unto the said Margarethe Hasselbusch, now deceased, and Claus Hasselbusch, her husband, the plaintiff herein, their heirs and assigns, certain premises particularly mentioned and described in said deed.

15. The defendant, for herself, her heirs, executors and administrators did covenant, promise and agree to and with the said Margarethe Hasselbusch, now deceased, and Claus Hasselbusch, her husband, the plaintiff herein, their heirs and assigns (among other things) that the same were free from, clear, discharged and unencumbered of and from all former and other grants, titles and charges, estates, judgments, taxes, assessments and encumbrances of what kind and nature soever, as by said deed, reference being had thereto will more fully and at large appear.

16. Said Margarethe Hasselbusch, now deceased, and the said plaintiff have always from the time of making of said deed until the death of said Margarethe Hasselbusch and since then the plaintiff has well and truly kept, performed and fulfilled all things in said deed on their part and behalf to be kept, performed and fulfilled.

17. At and before the ensealing and delivery of the said deed that said Margarethe Hasselbusch, now deceased, and the said plaintiff did pay the consideration therein called for according to the true tenor and effect, true intent and meaning of the said deed.

18. The defendant did not keep, fulfill and perform the things on her part to be kept, fulfilled and performed.

19. A certain mortgage given by Frederick Grasmuck to Bernard McClosky, bearing date the twenty-second day of September, eighteen hundred and sixty-nine, given to secure the sum of three hundred and fifty dollars ($350) and recorded in the register's (formerly clerk's) office of the county of Hudson in Book 68 of Mortgages, on pages 561, &c., remained open of record and was an encumbrance upon the said premises; and to remove this encumbrance from the said premises the said Margarethe Hasselbusch, now deceased, and the said plaintiff were compelled to pay, and did pay, a large sum of money, to wit, the sum of two hundred dollars ($200) on the day and year last aforesaid, at Hackensack aforesaid.

Plaintiff demands as damages $1,000 besides costs of suit.

NOTE: *Above complaint adopted from declaration in Hasselbusch v. Mohmking, 73 A. 961, 76 L. 691. Nonsuit set aside and new trial granted by Court of Errors.*

No. 158. COMPLAINT. ACTION FOR DESTRUCTION OF TREES CAUSED BY GAS ESCAPING THROUGH NEGLIGENCE FROM DEFENDANT'S MAINS.

New Jersey Supreme Court.
Cumberland County.

(Title.)

The plaintiff, of Port Norris, in the township of Commercial, county of Cumberland and State of New Jersey, says that:

1. The plaintiff was, at the time of the grievance hereinafter mentioned, owner and possessor of certain lands and premises, situated in the township of Commercial, county of Cumberland and State of New Jersey, bounded and described as follows:

All those tracts of land and premises, situate in the township of Commercial, county of Cumberland and State of New Jersey, bounded and described as follows: (*Description by metes and bounds.*)

2. The defendant, a corporation organized under the laws of the State of New Jersey at the time of the grievance hereinafter mentioned, was the owner and possessor of a line of pipes along the main road running through Port Norris, in the said township of Commercial, which pipes were used by the said defendant in distributing gas to its consumers living along the said public highway and the said pipes were laid and located under the said highway and under the lands owned by the plaintiff; and it thereupon became and was the duty of the defendant to so carefully lay, construct and maintain said line of pipes that the joints of the same be tight and preclude the leakage of said gas, by which the trees on the property of the plaintiff could be harmed.

3. The defendant, at (*lay venue*) not regarding its duty, did so carelessly and negligently lay, construct and maintain its said line of pipes that gas was permitted to escape from the said

pipes or joints, through the soil around the said pipes and joints, which escaping gas came in contact, through the said soil with the roots of six certain shade trees standing upon the lands owned and possessed by the plaintiff, and caused the same to be greatly injured, or to die, on or about the first day of July, nineteen hundred and thirteen, whereby the lands of the plaintiff were damaged.

4. It was the duty of the said defendant to inspect and examine the pipes and joints of the said pipe line, from time to time and at frequent intervals, in order to discover any leakage of gas from the said pipe line by which the trees of the plaintiff could be harmed, and to take necessary steps to stop said leakage.

5. The defendant, at (*lay venue*) not regarding its duty carelessly and negligently neglected and failed to inspect and examine the pipes and joints of the said pipe line, and gas was thereby permitted to escape from the said pipe line into the soil around the same, and to come in contact with the roots of six shade trees standing upon the lands owned and possessed by the plaintiff, for such length of time as to cause the same to die on or about the above-mentioned date, whereby the lands of the plaintiff were damaged by the destruction of the said trees.

6. The said defendant, at (*lay venue*) not regarding its duty, so carelessly and negligently laid, constructed and maintained its said line of pipes that gas was permitted to escape from the said pipes, or joints, through the soil around the said pipes and joints, of which the said defendant had notice, which escaping gas came in contact, through the said soil, with the roots of six shade trees standing upon the lands owned and possessed by the plaintiff, and caused the same to die on or about the above-mentioned date, whereby the lands of the plaintiff were damaged by the destruction of the said trees.

The plaintiff demands damages to the amount of $2,400.

E. C. WADDINGTON,
Attorney of Plaintiff.

NOTE: *Complaint in Chew* v. *Commercial Gas Co., 94 A. 578. Judgment for plaintiff affirmed by Court of Errors.*

No. 159. COMPLAINT FOR NEGLIGENTLY OPERATING A BRICK FACTORY WHEREBY THE FUMES AND GASES THEREFROM DESTROYED PLAINTIFF'S CROPS AND TREES.

New Jersey Supreme Court.
Atlantic County.

(Title.)

Plaintiff, W. H., residing at , says that—

1. On the different days of the months of May, June, July, August, September and October, in the year nineteen hundred, the said defendant, to wit, at (*venue*) so carelessly, recklessly, negligently and improperly manufactured and produced burned clay bricks and used and operated improper, inefficient, defective and unfit machinery and appliances, apparatus in the production and manufacture of said burned clay bricks, that by and through the carelessness, recklessness, negligence and improper conduct of the said defendant, by its servants in that behalf, vast quantities of obnoxious, destructive, poisonous, unhealthful and foul vapors, gases, fumes, smoke and matters were permitted, allowed and did escape and flew and were blown from the said works or plant of the defendant, to and over and upon the lands and premises of the said plaintiff and upon the spinach, kale, peas, onions, beets, beans, apples, peaches, pears, shade and ornamental trees and bushes and fruit trees thereon growing, so as aforesaid planted by the plaintiff and his property, and by means of the premises, the said fruit, vegetables, shade, fruit and ornamental trees and bushes were utterly and entirely scorched, killed, destroyed and rendered unfit for use and sale and were a total loss to the plaintiff.

Plaintiff demands as damages $————.

NOTE: *Count from declaration in Hinmon* v. *Somers Brick Co., 70 A. 166; 75 L. 869. Judgment for plaintiff affirmed by Court of Errors.*

NO. 160. COMPLAINT. ACTION UNDER TIMBER ACT FOR UNLAWFULLY DESTROYING PLAINTIFF'S TREES.

New Jersey Supreme Court, Cumberland County.

(Title.)

1. The plaintiff, of the County of Cumberland and State of New Jersey, was the owner and possessor of the following described property: (*Description by metes and bounds.*)

2. On the land above described, which the plaintiff purchased, stood growing 350 trees and saplings, all of which trees and saplings were of great value to the plaintiff.

3. The defendant, at (*lay venue*) on or about the 1st day of April, 1914, and at a subsequent date thereto, being on or about the 10th day of April, 1914, did cut, fell, work up and carry away, box, bore and destroyed about 350 trees and saplings on the property of the plaintiff, above described, without leave first had and obtained from the owner of the said property, the plaintiff: the same having been cut knowing that the said trees and saplings belonged to and were the property of the said plaintiff; and that the defendant did not have any legal right to go upon the said property of the plaintiff to cut, fell, work up, carry away, box, bore or destroy the said trees and saplings, to the plaintiff's great damage.

4. By an act of the Legislature (Compiled Statutes, volume 4, page 5396), it is enacted:

"That if any person or persons whatsoever, shall, at any time hereafter, cut, fell, work up, carry away, box, bore or destroy any tree, sapling or pole, standing or lying on any land within this State, to which such person or persons hath not or have not any right and title, without leave first had and obtained of the owner or owners of the said land for that purpose, every such person or persons so offending, shall forfeit and pay for each tree, sapling or pole so cut, felled, worked up, carried away, boxed, bored, or destroyed, as aforesaid, the sum of eight dollars; one half to the owner or owners of the land, and the other half to the person or persons who shall sue for and prosecute the same to effect, at any time within eighteen months from the cutting, felling, working up, carrying away, boxing, boring, or

destroying of any such tree, sapling or pole; and that whenever any person or persons within this State shall be sued or prosecuted before any justice of the peace within the same, it shall and may be lawful for such justice of the peace to proceed, whenever the penalty demanded shall not exceed one hundred dollars, notwithstanding any claim the defendant or defendants may offer to make to the land whereon and from which the said tree, sapling, or pole may be cut, felled, worked up, boxed, bored, destroyed or carried away, and to issue execution for the same, with costs of suit, unless the defendant or defendants shall immediately enter into bond to the plaintiff or plaintiffs with one or more sufficient securities or surety, being freeholders, in double the sum so demanded, with a sufficiency for costs of suit, conditioned for his or their appearance at the next court where the same may be cognizable, in an action of trespass, and to pay damages found against him, her or them, with costs of suit, any law, usage, or custom to the contrary notwithstanding."

Under the above section of the laws of the State of New Jersey, the plaintiff is entitled as a penalty, for the injury done to his property, the sum of $8.00 per tree; the act providing that one-half goes to the owner of the property and one-half to the party making the complaint, which, in this particular instance, is the plaintiff, the owner of the property.

5. This action is brought within eighteen months after the injury to the plaintiff's property was committed.

6. The plaintiff, therefore, demands of the defendant the sum of $8.00 per tree, for the 350 trees and saplings cut off of the plaintiff's property, making a total sum of $2.800, which the plaintiff demands.

E. C. WADDDINGTON,
Attorney for Plaintiff.

NOTE: *Complaint in Terrone* v. *Harrison, 94 A. 600. Judgment striking complaint reversed by Court of Errors.*

No. 161. COMPLAINT BY TENANT AGAINST LANDLORD FOR MAKING AN UNREASONABLE AND EXCESSIVE DISTRESS ON PLAINTIFF'S GOODS CONTRARY TO SECTION 1, DISTRESS ACT, 3 C. S. 1939.

(Title.)

Plaintiff, residing, etc., says that—

1. Before and at the time of the committing of the grievances hereinafter mentioned, the plaintiff held and enjoyed certain premises, known as (*describe them*), with the appurtenances, as tenant thereof of the defendant at and under a certain rent payable by the plaintiff to the defendant for the same.

2. On ....., at (*venue*) the defendant, not regarding the statute in such case made and provided whereby no person can lawfully be distrained of his goods and chattels for any cause excepting by a reasonable distress, but wrongfully and maliciously contriving and intending to injure and oppress the plaintiff, did unreasonably and excessively take and distrain and cause and proceure to be taken and distrained, certain goods and chattels of the plaintiff, to wit: (*specify property distrained*), of the value of $.....

3. Defendant so distrained said goods and chattels for $..... rent, supposed to be then due and in arrears from the plaintiff to the defendant for said premises (whereas in truth only the sum of $..... rent and no more was due and in arrears).

4. The said goods and chattels so taken and distrained were of much greater value than the amount of rent due and in arrears.

5. Defendant, at the time of the said distress, kenw it to be unreasonable and excessive and that one-third of the said goods and chattels would have been a reasonable and sufficient distress for the amount of rent in arrears, and all the costs and charges attending the same and of the appraisement and sale thereof.

6. By means of the premises, the plaintiff is not only greatly injured and has since the taking of the said distress, wholly lost and been deprived of the use of the said goods and chattels, but has been forced and obliged to lay out the sum of $....., in

providing and procuring others for the use of himself and family in lieu thereof.

Plaintiff demands as damages the sum of $.....

.....

Attorney.

NOTE: *Where there is a dispute as to the amount of rent in arrears, add a count alleging that plaintiff tendered a reasonable sum to defendant who refused to accept it.*

No. 162. COMPLAINT BY TENANT AGAINST LANDLORD FOR DISTRAINING WHEN NO RENT WAS DUE, TO RECOVER DAMAGES FOR INJURY TO PLAINTIFF'S BUSINESS. See *Luce* v. *Jones*, *39 L. 707*.

(Title.)

Plaintiff, residing at, etc., says that—

1. On the ..... day of ..... and on divers other days and times between that date and the date of the filing of this complaint, the defendant, R. D., being the landlord of the plaintiff, with force and arms broke and entered the premises and buildings of the plaintiff, the tenant of the said defendant, situate ....., and county of ....., to wit, at (*lay venue*), and then and there, with his feet in walking, trod down, trampled upon, consumed and spoiled the grass, clover and corn and grain of the plaintiff, growing and being in the said premises of the value of $.....

2. Defendant, then and there took, seized and distrained as and for a distres for rent pretended and claimed by him to be due and in arrears from the plaintiff to the defendant, divers goods and chattels of the plaintiff, that is to say (*itemize goods taken*), of the value of $.....

3. Defendant led, drove and carried away the said goods and chattels so as aforesaid seized, taken and distrained, and sold, converted and disposed of them, and the moneys arising therefrom to his own use.

4. In truth and fact, there was no rent due and in arrear from the plaintiff to the defendant at the time of the taking and sale of the said goods and chattels as aforesaid.

5. By reason of the said premises, the plaintiff has been deprived of the use, benefit and advantage of the said goods and chattels and has for want thereof, been prevented and hindered from carrying on his business and occupation of ....., and has thereby lost and been deprived of divers great gains, profits and advantages which he would have otherwise received and enjoyed, and has otherwise been greatly injured and prejudiced by reason thereof.

6. Plaintiff demands as damages the sum of $.....

.....

Attorney.

NOTE: *Count for injury to business and count for double value of goods distrained under section 11, Distress act (2 C. S., 1942), cannot be joined. Hugill* v. *Read, 49 L. 300; 8 A. 287.*

No. 163. COMPLAINT BY TENANT AGAINST LANDLORD FOR DOUBLE VALUE OF GOODS UNLAWFULLY DISTRAINED AND SOLD. Under section 11, Distress act, *3 C. S. 1942.*

(Title.)

Plaintiff, residing, etc., says that—

1. After the approval of a certain act of the legislature of the State of New Jersey, entitled "An act concerning distress," and before the committing of the grievances by the defendant as hereinafter mentioned, the plaintiff held and enjoyed certain premises, with the appurtenances, as tenant thereof to the defendant at and under the rent of $..... per annum.

2. Defendant, not regarding the statute in such case made and provided, but contriving and wrongfully and injuriously intending to harass, oppress and injure the plaintiff, did on (*the day of the distress, or about it*), at (*lay venue*) wrongfully and injuriously seize, take and distrain, in and upon the said prem-

ises, divers goods and chattels of the plaintiff, that is to say (*specify the goods distrained*), of the value of $.....

3. Defendant, afterwards and on the ..... day of ..... (*date of sale*), at (*lay venue*) sold the said goods and chattels so as aforesaid distrained by color of said act, for certain rent, to wit, the sum of $....., then and there pretended by the defendant to be in arrears and due to the said defendant from the plaintiff for the said demised premises.

4. In truth and fact, at the time of the making of the said distress, and the sale, as aforesaid, no rent was in arrears or due to the defendant from the plaintiff for or in respect of the said premises.

5. The said taking, seizing, distraint and sale of the plaintiff's said goods and chattels by the defendant was contrary to the form of statute in that case made and provided, whereby an action has accrued to the plaintiff to recover of the defendant double the value of the goods and chattels so wrongfully distrained and sold.

6. Plaintiff demands as damages the sum of $.....

.....

Attorney.

NOTE: *The verdict should be for the value of the goods distrained and judgment should be entered for double that amount. Hugill* v. *Read, 49 L. 300; 8 A. 287.*

NO. 164. COMPLAINT FOR INJURIES FROM NEGLIGENCE IN OPERATING FERRY.

Hudson County Circuit Court, Hudson County.

(Title.)

Plaintiff, E. B., residing at , says that:

1. Before and at the time of committing the grievance hereinafter mentioned the defendant corporation, existing under and by virtue of the laws of the State of Pennsylvania, was possessed of and operating and managing certain steam ferryboats for the transportation of passengers, horses, wagons and other

vehicles from a point in the City and State of New York, at or near the foot of Cortland Street in said city, across the Hudson River to a point in the city of Jersey City, County of Hudson aforesaid, at or near the foot of Exchange Place in said city, for certain fare and reward in that behalf charged and received, and was then and there possessed of, operating and managing, at or near the foot of Exchange Place aforesaid, a certain ferryhouse with entrance gates, driveways, bridge-chains, bridges, slips and other appliances for embarking and disembarking passengers, horses, wagons and other vehicles upon and from the said steam ferryboats.

2. On the sixteenth day of March, nineteen hundred and twelve, at (*lay venue*) the said plaintiff, while riding upon a certain wagon, drawn by horses, at the special instance and request of the said defendant, and after the said plaintiff had paid, at the entrance gates aforesaid, the usual fare and reward to the said defendant in that behalf, was received by the said defendant into the said ferryhouse as a passenger, with the said horse and wagon, to be transported by one of the steam ferryboats aforesaid from the ferryhouse in the City of Jersey City to the City of New York aforesaid, at the foot of Cortland Street in said city.

3. It then and there became the duty of the said defendant to use proper care in the operation and management of the said ferryhouse, its entrance gates, driveways, bridge, bridge-chains, slips and other appliances aforesaid for the proper safety of the plaintiff while embarking upon the steam ferryboat of the defendant to be transported as aforesaid.

4. The said defendant, not regarding its duty in that behalf, did not use due and proper care in the operation and management of the said ferryhouse, entrance gates, driveways, bridge-chains, bridges, slips and other appliances aforesaid, for the proper safety of the said plaintiff while the said plaintiff was riding on the said wagon from the ferry slip aforesaid and embarking on the steam ferryboat of the defendant to be transported as aforesaid, but, on the contrary, the said defendant, by its servants and agents, so carelessly and negligently operated

and managed the same that while the said plaintiff was embarking on the said ferryboat as aforesaid the bridge in the said ferry slip, by reason of the negligence of the servants and agents of the defendant, was not placed at a level with the driveway of the steam ferryboat aforesaid, and that the deck of the said steam ferryboat, provided by the defendant for the use of horses and wagons being transported, was then and there a great distance above the level of the bridge and the ferry slip aforesaid over which the said plaintiff was about to embark on the said ferryboat, and by reason thereof the said wagon upon which the plaintiff was riding collided with the deck of the said steam ferryboat with great force and violence, and threw the said plaintiff from the wagon upon which he was riding to the floor of the bridge in the said ferry slip.

5. Plaintiff was greatly injured and damaged and became sick, sore, lame and disabled, and so continued and remained for a long space of time, to wit, from thence hitherto, at the City of Jersey City aforesaid, and by reason thereof the plaintiff was forced to lay out and expend, and did necessarily lay out and expend large sums of money, in and about endeavoring to be cured of said injuries so received as aforesaid.

Plaintiff demands as damages $10,000.

NOTE: *Adapted from declaration in Bunce v. Pennsylvania Railroad Co., 88 A. 1078. Judgment for plaintiff affirmed by Court of Errors.*

No. 165. COMPLAINT FOR FALSE IMPRISONMENT. PLAINTIFF BEING TAKEN FROM RAILROAD TRAIN AND ARRESTED AND IMPRISONED, HE HAVING PROCEEDED BEYOND THE POINT CALLED FOR BY HIS TICKET.

New Jersey Supreme Court, Passaic County.

(Title.)

The plaintiff, F. M., residing at , says that:

1. On or about the eighteenth day of October, nineteen hundred and eleven, in the City of Paterson, County of Passaic and

State of New Jersey, the defendant was, through its agents and servants operating a steam railroad and engaged as a common carrier of passengers in said state and thereabouts.

2. At the time and place first aforesaid, the said agents and servants of the defendant, to wit, the conductor and collector of fares and tickets while actually engaged in the performance of their duties and acting within the scope of their authority, then and there during the time the said plaintiff was a passenger of said defendant, a common carrier of passengers as aforesaid, with force and arms assaulted the plaintiff and then seized and laid hold of the plaintiff, and with great force and violence pulled and dragged him about, and also then imprisoned the plaintiff and kept and detained him in prison for a long time, to wit, four hours or thereabouts, and forced and compelled the plaintiff to go to court and forcibly conveyed him in custody in and along divers public streets and highways to a certain police station and there imprisoned the plaintiff and kept and detained him in prison without any reasonable or probable cause whatsoever for a long space of time, to wit, for the space of two hours, contrary to law and under a false and unreasonable assertion, color and charge that the plaintiff had committed an offense punishable by law, to wit, that he had committed an act in violation of Section 59 of an act entitled "An act concerning railroads," Revision of 1903, approved April 14th, 1903, and had knowingly and willfully been carried by the said defendant, the said common carrier of passengers, to a point north of his destination, the City of Passaic, to wit, to the City of Paterson, with the intention to defeat and defraud the defendant in the payment of his fare.

3. Whereby the plaintiff was greatly hurt and suffered great anguish and pain of mind and body and was prevented from attending to his lawful affairs and was also thereby then greatly exposed and injured in his credit, reputation and circumstances, and was subjected and put to divers expenses, to wit, in the sum of one hundred dollars, in order to obtain and in obtaining his liberation from said imprisonment, and thereby also sustained other wrongs.

Plaintiff demands as damages $5,000.

NOTE: *Adapted from declaration in Mallery v. Erie Railroad, 92 A. 371. Judgment for plaintiff affirmed by Court of Errors.*

No. 166. COMPLAINT AGAINST MEAT PACKER FOR NEGLIGENTLY PUTTING UP IN CANS AND VENDING DISEASED MEAT, WHICH PLAINTIFF BOUGHT AND ATE, WHEREBY SHE WAS STRICKEN WITH PTOMAINE POISONING.

New Jersey Supreme Court.
Cumberland County.

(Title.)

Plaintiff, S. T., residing at ....., says that:

1. Defendant, from August first, nineteen hundred and four, to April fourth, nineteen hundred and five, was engaged in the business of putting up in tin cans or vessels and vending meats or ham for food and domestic use, at Chicago, in the State of Illinois, to wit, at Bridgeton, in the county of Cumberland and State of New Jersey.

2. It then and there became its duty to put up and can said ham from healthy, wholesome and edible pork.

3. Some time between the periods above named, the defendants put up a certain can of ham for food and domestic use in the city of New York and State of New York, to wit, at Bridgeton, in the county of Cumberland aforesaid, to be sold to customers and patrons.

4. On April fourth, nineteen hundred and five, in the city of New York, aforesaid, to wit, at Bridgeton, aforesaid, the plaintiff, for a certain charge then and there paid to said retail dealer, purchased said certain can of ham for food and domestic use.

5. Nevertheless, the said defendant, not regarding its duty in that behalf, did, to wit, between August first, nineteen hundred and four, and April fourth, nineteen hundred and five, at New York City aforesaid, to wit, at Bridgeton aforesaid, so carelessly, negligently, recklessly and improperly put up in said certain can of ham, diseased, unfit and unwholesome pork or ham which was deleterious, dangerous and poisonous to the human body and health; that the said plaintiff, on April fourth,

nineteen hundred and five, at New York City aforesaid, to wit, at Bridgeton aforesaid, after purchasing said certain can of ham, and without any fault or negligence on her part, then and there ate a piece of ham taken from said certain can of ham purchased by her as aforesaid, and immediately thereafter, and as the immediate and direct consequence thereof, became, was and still is diseased, disordered, poisoned, sick, sore and diseased with ptomaine poison, and so remains and continues for a long space, to wit, from thence hitherto, and has suffered and undergone great pain and agony of body and mind, and has been unable to attend to her ordinary affairs and business, and without any fault or negligence on her part, and has been obliged to lay out and expend, and has necessarily laid out and expended divers large sums of money in and about endeavoring to be healed and cured of her said disease and disorders and injuries as aforesaid, and for providing for herself in her sick and helpless condition.

Plaintiff demands as damages, $20,000, and costs of suit.

NOTE: *Adapted from declaration in Tomlinson* v. *Armour & Co., 70 A. 314, 75 L. 748. Held good by Court of Errors and Appeals.*

No. 167. COMPLAINT ON FOREIGN JUDGMENT.

Essex County Circuit Court.

(Title.)

The plaintiff residing in the city of New York, county of New York and State of New York, says that:

1. He sues for the amount of a judgment recovered by him as receiver of the People's Bank of Philadelphia against said defendant, Joseph Marrone, in the Supreme Court of New York, a court of record of general jurisdiction, on May 5, 1899, for $1,696.93, a copy of the exemplification of which records and proceedings is hereto annexed and made a part hereof.

2. The amount due on said judgment is the sum of $1,696.93, with interest from May 5, 1899, together with costs and disbursements accruing and chargeable against said defendant

since the entry of said judgment, amounting to upwards of one hundred dollars.

3. The plaintiff is still the owner and holder of said judgment and said judgment still remains in full force and effect not in any way reversed, paid, satisfied, annulled or otherwise vacated.

Plaintiff demands as damages the sum of $7,600.

TEMPLE & UNGER,
Attorneys for Plaintiff.

NOTE: *Complaint filed in Barlow* v. *Marrone, 95 A. 985. Judgment for plaintiff affirmed by Court of Errors.*

No. 168. COMPLAINT ON WRITTEN AGREEMENT GUARANTEEING PAYMENT OF SUM OF MONEY.

(Title.)

The plaintiff, P. G. Co., a corporation of ....., says that:

1. On or about the twenty-eighth day of July, nineteen hundred and nine, and for a long period of time prior thereto, at the borough of Manhattan, in the city and State of New York, to wit, at Newark, in the county aforesaid, the said defendant was a large stockholder in the E. R. Ramsey Company, a corporation of the said State of New York, and was also, during all the time aforesaid a member of the board of directors of said company.

2. On the day and year last aforesaid the said defendant represented to the plaintiff that said E. R. Ramsey Company was desirous of purchasing from the plaintiff certain land and premises owned by the plaintiff, situate in the State of New York and hereafter referred to, and that he, the said defendant, was duly authorized by said E. R. Ramsey Company to negotiate with the plaintiff on behalf of said company for the purchase of said land and premises, and he, the said defendant, then and there requested the said plaintiff to enter into a certain agreement in writing with said E. R. Ramsey Company for the sale by the plaintiff to said E. R. Ramsey Company of

said land and premises, upon certain terms and conditions then and there stated by the defendant, being on same terms and conditions hereinafter set out.

3. Thereupon the said plaintiff, relying upon the said representations so made as aforesaid by the defendant and upon his solicitation and request, on the day and year last aforesaid, at the city of New York aforesaid, to wit, at Newark aforesaid, entered into a certain agreement in writing with said E. R. Ramsey Company, bearing date the day and year last aforesaid, and sealed with the respective corporate seals of the plaintiff and said E. R. Ramsey Company, wherein and whereby the plaintiff, in consideration of the premises and of the agreement made by the defendant as hereinafter mentioned, bargained and agreed to sell and convey unto the said E. R. Ramsey Company, and the said E. R. Ramsey Company bargained and agreed to purchase of and from the plaintiff the land and premises aforesaid, and in said agreement particularly described, for the sum of forty-three thousand dollars, upon certain terms and conditions therein particularly set forth (being the same terms and conditions stated to the plaintiff by the defendant as aforesaid), that is to say, the sum of three thousand dollars paid by the E. R. Ramsey Company to the plaintiff on the execution of said agreement, the receipt whereof by the plaintiff was thereby acknowledged and the payment of the further sum of seven thousand dollars by said E. R. Ramsey Company to the plaintiff in cash on the twentieth day of October, nineteen hundred and nine, and the balance of said purchase price, to wit, the the sum of thirty-three thousand dollars, to be secured by the bond of said E. R. Ramsey Company together with its mortgage upon said land and premises, to the plaintiff, whereupon and upon receiving said payments and said bond and mortgage, to wit, on the day and year last aforesaid, at twelve o'clock noon on said day, at the office of the plaintiff in said city of New York, the plaintiff was, according to the terms and conditions of said agreement, to deliver its deed to said E. R. Ramsey Company, conveying to it the fee simple of the lands and premises in said agreement described; that a copy of said agreement is hereto annexed and made part hereof.

4. Defendant was present at the execution and delivery of said agreement by the plaintiff and said E. R. Ramsey Company, and at the time of such execution and delivery knew the terms and conditions thereof and at said time and place, and as an inducement to the plaintiff to execute and deliver the same, the said defendant represented to the plaintiff that J. Howard Hart, who executed and delivered said agreement as the secretary and treasurer of said E. R. Ramsey Company, and on behalf of said company and who affixed said company's corporate seal to said agreement, was duly authorized to affix said seal and to execute and deliver the same by the board of directors of said E. R. Ramsey Company.

5. On or about the twenty-eighth day of July, nineteen hundred and nine, at said city of New York, to wit, at Newark aforesaid, the said defendant, in consideration of the execution by the plaintiff of the agreement above mentioned and simultaneously therewith, did then and there enter into a certain other agreement in writing with the plaintiff, signed by said defendant and endorsed upon said agreement made between the plaintiff and said E. R. Ramsey Company, wherein and whereby the said defendant did guarantee and promise the payment by said E. R. Ramsey Company to the plaintiff of said sum of seven thousand dollars on the twentieth day of October, nineteen hundred and nine, according to the terms and conditions of the agreement first above mentioned, a copy of which agreement so made by the defendant, is hereto annexed and made part hereof.

6. Plaintiff, on the twentieth day of October, nineteen hundred and nine, at the hour and place mentioned in its said agreement with said E. R. Ramsey Company was ready and willing to deliver to said E. R. Ramsey Company its said (plaintiff's) deed, conveying to said E. R. Ramsey Company the fee simple of the land and premises in said agreement mentioned and on the day and year last aforesaid offered and tendered its said deed to said E. R. Ramsey Company and requested it to pay to the plaintiff the said sum of seven thousand dollars of said purchase price and to deliver to the plaintiff the said bond and mortgage to secure the payment of the sum of thirty-

three thousand dollars according to the terms and conditions of said agreement, yet the said E. R. Ramsey Company, not regarding its said agreement, or its promises and undertakings in that behalf, did not nor would, on said twentieth day of October, nineteen hundred and nine, or at any other time, pay or cause to be paid to the plaintiff said sum of seven thousand dollars, or any part thereof, but wholly neglected and refused so to do, of all of which the said defendant had notice, and thereupon it became the duty of the defendant, according to his promise and undertaking in that behalf, to pay to the plaintiff the said sum of seven thousand dollars on demand.

7. Defendant, not regarding his said promises and undertakings, did not and would not pay said sum of seven thousand dollars, or any part thereof, to the plaintiff, alhough frequently requested so to do, but has wholly neglected and refused and still neglects and refuses to pay the same to the plaintiff.

Plaintiff demands as damages $10,000 and costs of suit.

NOTE: *Complaint adopted from declaration in Perkins-Goodwin Co. v. Hart, 83 A. 877, 88 L. 471. Judgment for plaintiff affirmed by Court of Errors.*

No. 169. COMPLAINT FOR DAMAGES TO PLAINTIFFS' PROPERTY BY ERECTION OF CONCRETE WALL UPON A PUBLIC HIGHWAY, THEREBY CLOSING UP HIGHWAY AND INGRESS AND EGRESS TO PLAINTIFFS' PROPERTY.

New Jersey Supreme Court.

County.

(Title.)

The plaintiff Edna Dickinson, residing at West Livingston, N. J., and the plaintiff Gustave F. Lowe, residing at Morristown, N. J., say:

1. That the defendant, at (*venue*) Delaware, Lackawanna and Western Railroad Company, is and at all times hereinafter mentioned was a foreign corporation organized and existing under and by virtue of the laws of the State of Pennsylvania.

2. That the defendant borough of Chatham is and at all times hereinafter mentioned was a municipal corporation created by the state or under the laws of the State of New Jersey.

3. That the said defendant Delaware, Lackawanna and Western Railroad Company maintains and operates and at all times hereinafter mentioned did maintain and operate a certain line of steam railroad, running, in part, through the borough of Chatham, N. J.

4. That Passaic avenue is and at all times hereinafter mentioned was a public highway in the borough of Chatham aforesaid.

5. That a certain other unnamed street in said borough running about at right angles with said Passaic avenue and running from Passaic avenue to Bowers lane, another public highway in said borough, is and at all times hereinafter mentioned was also a public highway in said borough.

6. That the plaintiff Edna Dickinson is and at all times hereinafter mentioned was seized in fee-simple of certain land with the building or the buildings thereon situated in the said borough of Chatham, and upon the corner formed by the intersection of the easterly line of Passaic avenue aforesaid, with the northerly line of the said certain other unnamed public highway, such land and buildings having a large frontage upon both said public highways.

7. That the said building was, and, in so far as the defendants' acts and omissions have left possible, is devoted to and used in part as a public automobile garage, and in part as offices and rooms for various purposes, said building having in part two floors.

8. That said building had, prior to the acts or omissions of the defendants, entrances upon both of said public highways, the second floor thereof having no other entrance than that upon and from the said certain unnamed public highway, running from Passaic avenue to Bowers lane.

9. That the part of said building used as a garage was, prior to the acts or omissions of the defendants, specially valuable as such, particularly, and otherwise, generally, by reason of its being equipped with two driving entrances or exits, one upon

said Passaic avenue and the other upon the said other public highway.

10. That the plaintiff Edna Dickinson is engaged in a real estate business, and has her offices in the corner of said building, on the ground floor thereof, fronting on both said Passaic avenue and the said other public highway, and as she is engaged largely in the sale of country property and maintains and operates an automobile for the conveyance of clients, it was and would be of great advantage that vehicles might stop immediately in front of her said offices.

11. That the building, as a whole, was specially valuable by reason of its location upon the corner of the said two public highways, and the consequent access of light and air, and by reason of its accessibility from either of the two said public highways and indirectly, by way of the certain unnamed public highway, from Bowers lane.

12. That, heretofore, at (*venue*) and during the month of June, 1913, or thereabouts, the defendant Delaware, Lackawanna and Western Railroad Company took possession of the said public highway leading from Passaic avenue to Bowers lane and constructed fences or other obstructions about or across it in such manner that all access to such unnamed public highway was and is prevented, also preventing all access to the premises of the plaintiff Edna Dickinson, by way of such unnamed public highway.

13. That thereupon the defendant Delaware, Lackawanna and Western Railroad Company did proceed to construct, and is now constructing, a high wall and an embankment upon and through said unnamed public highway, such wall and embankment being practically parallel with plaintiff Edna Dickinson's line and distant only one or two feet therefrom, and from her said building. That said unnamed public highway is, at the present time, wholly occupied by said construction and wall, and all access to plaintiff Edna Dickinson's said property, and to the part thereof occupied by the plaintiff Gustave F. Lowe, by way of said unnamed public highway, is permanently prevented.

14. That as a result of such acts of the defendant Delaware, Lackawanna and Western Railroad Company, access of light and

air have been and will be permanently excluded in whole or in part from plaintiff Edna Dickinson's said building from said unnamed public highway, and the upper floor of said building has been rendered valueless by reason of its only access being thereby permanently obstructed.

15. That the defendant Delaware, Lackawanna and Western Railroad Company has erected in said Passaic avenue a fence or fences or other obstructions at or near the curb of said public highway and adjacent to the property of the plaintiff Edna Dickinson, or a part thereof, in such manner that access to said garage has been rendered most difficult, and it has become impossible for a vehicle to come to the corner of said building, or near thereto, wherein are the offices of the plaintiff Edna Dickinson, on said Passaic avenue.

16. That the defendant borough of Chatham on or about the seventh day of June, 1913, and before the commencement of the work constituting the acts made the basis of this suit, entered into and made an agreement or contract with the defendant Delaware, Lackawanna and Western Railroad Company and others, whereby the defendant borough of Chatham expressly authorized and directed the defendant Delaware, Lackawanna and Western Railroad Company, as its agent, servant or employe, to perform the aforesaid acts complained of and made the basis of this suit.

17. That by the terms of said contract, the said borough of Chatham agreed to become jointly liable, at least, with the defendant Delaware, Lackawanna and Western Railroad Company for all damages which might be lawfully awarded to or recovered by these plaintiffs.

18. That the defendant borough of Chatham has failed and refused, and still fails and refuses, to institute and prosecute all procedure according to the statute in such case made and provided, to the vacating or to the alteration of the said certain unnamed public highway from Passaic avenue to Bowers lane, and has failed and refused, and still fails and refuses, to compensate these plaintiffs for the injuries sustained by them by reason of the defendants' aforesaid acts or omissions.

19. That the plaintiff Gustave F. Lowe holds and occupies a portion of the plaintiff Edna Dickinson's said property under a lease thereof and conducts, and at all time hereinafter mentioned or hereinbefore mentioned, did conduct a general garage, supply and automobile repair business therein.

20. That, by reason of the peculiar adaptability of the said premises to such business, and largely by reason of its having had the two entrances or exits before set forth, the plaintiff Gustave F. Lowe had built up a very lucrative business in said premises from which he was deriving, and might reasonably have been expected to derive in the future, large profits and gain.

21. That wholly as a result of the aforesaid acts and omissions of the defendants, the aforesaid property of the plaintiff Edna Dickinson has been, is, and permanently will be, greatly damaged, and its value both in land and building vastly depreciated, and her said business has been, is, and will be, greatly damaged by reason thereof.

22. That wholly as a result of the aforesaid acts and omissions of the defendants, the business of the plaintiff Gustave F. Lowe has been, is, and permanently will be, either ruined or greatly damaged, whereby he has lost, and will lose, great profit and gain.

Judgment will be claimed by the plaintiff Edna Dickinson for $10,000.00, and by the plaintiff Gustave F. Lowe for $5,000.00.

HENRY M. LUMMIS,
Attorney of Plaintiffs.

NOTE: *Complaint in Dickinson v. Del., L. & W. R. R., 93 A. 703. Judgment for plaintiff affirmed by Court of Errors. Defendant borough of Chatham stricken out on motion.*

No. 170. COMPLAINT BY NEXT FRIEND OF INFANT FOR INJURIES FROM FALLING FROM ROOF WHILE WORKING FOR CONTRACTOR EMPLOYED BY DEFENDANT.

Essex County Circuit Court.

(Title.)

Plaintiff, Nicola DeVincenzo, who is an infant under the age of twenty-one years, residing at the City of Newark, County of Essex and State of New Jersey, with Angelo Valvano, who is admitted by the court here to prosecute as the next friend of the said Nicola DeVincenzo, by his next friend, says:

1. On, before and after December 21, 1912, the said defendant had the possession, control and management of a certain building on the rear portion of the premises known and designated as numbers 355 to 365 Central Avenue, in the said City of Newark, and was then and there, by its servants and employees, engaged in altering, changing and making additions in and to said building, altering and changing the foundation and supports thereof and excavating thereunder.

2. On or about December 21, 1912, said plaintiff was then and there lawfully on the said premises under the said building engaged in the work and labor of digging and shoveling dirt and earth, as an employee of one Antonio LeConte, who was then and there engaged in the performance of a certain contract with the said defendant for doing the said work of excavating under the said building for the said defendant, and said plaintiff was not engaged as an employee of the said defendant.

3. Defendant, by its servants and employees, wrongfully, carelessly and negligently supervised, controlled, managed and carried on the said work of altering, changing and making additions in and to said building, and altering and changing the foundation and supports thereof, and did not use due and proper care to sufficiently or properly support, brace or shore up the said building while making the aforesaid alterations, changes and additions and excavating thereunder as aforesaid, so as to prevent the said building and its supports, bracing and shoring from becoming weak, unstable and dangerous to the plaintiff and

other persons lawfully on the said premises, but on the contrary negligently, carelessly and wrongfully caused, suffered and permitted the said work of altering, changing and making additions in and to said building, altering and changing the foundation and supports thereof and of supporting the said building while so doing, to be negligently and improperly done, and to become, be, and remain in so defective and dangerous a condition that by reason of the said wrongful, careless and negligent conduct of the said defendant, its servants and employees and their failure to use due and proper care as aforesaid, and without any negligence on the part of said plaintiff, the said building, with its supports, bracing and shoring then and there collapsed, fell upon and struck the said plaintiff with great force and violence and a large spike or nail was thereby forced into the flesh and bone of his left arm at or near the elbow joint, and he was otherwise greatly bruised, cut, hurt and injured.

4. By means of the premises the said plaintiff suffered and sustained divers painful and permanent external and internal injuries, and his nervous system was greatly shocked and shattered, and he became and was sick, sore, maimed, disabled and disfigured, and so remained and continued from thence hitherto, and will in the future so remain and continue, and during all that time suffered and underwent, and will in the future suffer and undergo great physical and mental pain and suffering, and his said left arm was rendered stiff and wholly useless, and he was and is and in the future will be hindered, incapacitated and prevented from transacting and attending to his necessary and lawful business and affairs and work by him to be performed, transacted and attended to, and was deprived of divers great gains, profits and advantages which he otherwise would have earned and gained; and by means of the premises the said plaintiff did necessarily pay, lay out and expend a large sum of money, to wit, the sum of two hundred dollars, and in the future will be obliged to pay, lay out and expend divers other large sums of money for medicine, care and attendance in and about endeavoring to be cured of his said sickness, soreness and dis-

orders, and of his said hurts, injuries and nervous shock occasioned as aforesaid.

Plaintiff demands $10,000 damages.

BEECHER & BEDFORD,
Attorneys of Plaintiff.

NOTE: *From DeVincenzo* v. *John Sommer Faucet Co., 94 A. 573. Judgment for plaintiff affirmed by Court of Errors.*

No. 171. COMPLAINT FOR INJURIES TO CHILD CAUSED BY NEGLIGENCE OF DEFENDANT IN OMITTING TO EXTINGUISH AND GUARD FIRE HE STARTED IN STREET, WHEREBY CHILD PLAYING IN STREET WAS BURNED.

New Jersey Supreme Court.
Essex County.

(Title.)

The plaintiff, residing at No. 297 South Clinton Street, in the City of East Orange, in the County of Essex, and State of New Jersey, complains of the defendant and alleges:

That heretofore, namely, on or about the fourth day of November, nineteen hundred and eleven, (*venue*) this defendant, (*who is also a resident of the said County of Essex, State of New Jersey*), having gathered together a large quantity of leaves, garbage and inflammable material in one of the streets of the said City of East Orange, namely, at or near premises numbered 196 South Clinton Street and 197 South Clinton Street, in the City of East Orange, ignited the same, or caused the same to be ignited, in so negligent and heedless a manner, although he had heretofore been duly warned against the danger from such fires and against such carelessness and negligence and heedlessness on defendant's part, so that a great and dangerous fire arose from such heap of leaves and rubbish, and after causing said fire and blaze, defendant neglected and failed to guard the same, or to prevent the flames from spreading, that this plaintiff, without any carelessness or negligence on his part, and

solely by reason of the said negligence and carelessness and heedlessness of the said defendant, was so badly burned and suffocated by the said fire and flames, that by reason thereof the plaintiff became sick, sore, lame and disabled, and continued so to be for a long time, and still so continues and has suffered and suffers great and permanent injuries from the wounds and burns and contusions inflicted upon him by the said fire and flames so negligently caused and left unguarded by the defendant, to plaintiff's damages in the sum of ten thousand ($10,000.00) dollars.

2. That solely by reason of the defendant's said negligence, plaintiff was injured, bruised and wounded, so that he became sick, sore and disabled and so remains and has ever since been, and will for a long time to come be, prevented from attending to his education, duties and business, and be unable to work, or labor, and has necessarily expended large sums of money, namely, the sum of seven hundred and fifty ($750.00) dollars endeavoring to be cured of his said injuries, all to the plaintiff's damages in the sum of ten thousand seven hundred and fifty ($10,750.00) dollars.

Wherefore, deponent demands judgment against the defendant for the sum of ten thousand seven hundred and fifty ($10,750.00) dollars, with interest thereon from the first day of December, nineteen hundred and eleven, together with the costs and disbursements of this action.

TERRY PARKER,
Attorney for Plaintiff,
25 North Walnut Street, East Orange, N. J.

NOTE: *Complaint in Davenport* v. *McClellan, 96 A. 921. Judgment for defendant reversed by Court of Errors.*

No. 172. COMPLAINT BY PARENT FOR INJURY TO CHILD CAUSED BY NEGLIGENCE OF A LANDLORD IN NEGLECTING TO REPAIR DUMB-WAITER IN HIS APARTMENT, WHEREBY IT FELL AND INJURED THE CHILD WHILE HE WAS DELIVERING ICE TO A TENANT.

New Jersey Supreme Court.
Essex County.

(Title.)

Plaintiff, G. B., residing at , says:

1. Plaintiff, George Battschinger, at all the times hereinafter mentioned was and is the father of Otto Battschinger, an infant, about the age of 19 years, with whom said infant resides, and as such father he is entitled to services and earnings of said infant, Otto Battschinger, until the said infant becomes twenty-one years of age.

2. That at all the times herein named, the defendants, Rebecca V. Robinson and Frank A. Dean, were, and still are, the owners in fee and tenants in common, each possessed of an equal and undivided one-half interest, and both in possession, management and control of a certain apartment-house on North Ninth street, near Sixth avenue, Newark, New Jersey, and the premises upon which the same is situated, which premises are situate in the city of Newark, Essex county, New Jersey, beginning (*describe premises*).

3. That said defendants at all the times herein named, and for a number of months prior thereto, maintained in said apartment-house a dumb-waiter, intended mainly for the use of tenants, and tradesmen who customers were tenants of said apartment-house.

4. That at all the times herein named, the infant, Otto Battschinger, was in the employ of an iceman, whose customers included several of the tenants of said apartment-house, and at all times herein named, it was the duty of said infant, as such employe, to deliver ice to said tenants by placing the same upon the dumb-waiter in said apartment-house, and by hoisting the same by means of said dumb-waiter to the apartments of the several tenants. That at all times said infant, Otto Battschinger, was permitted, allowed and invited by defendants to use said dumb-

waiter for that purpose; that at all times herein named said infant was lawfully using the said dumb-waiter in accordance with the permission, consent and invitation of the defendants.

5. That at all times herein named, it was the duty of defendants to maintain in said apartment-house a properly and safely constructed dumb-waiter, properly tested and properly inspected; that it was their duty at all the times herein named to inspect the same and keep the same in proper and safe running order, to use proper wire or other safe ropes and running gear and pulleys and to keep the same in safe condition.

6. That the dumb-waiter was not for the exclusive private use of any one tenant, but was for the benefit of all the tenants in the building and intended for their use and their tradesmen, and was so commonly used.

7. That on the fifth day of August, nineteen hundred and ten, at the city of Newark, Essex county aforesaid, the said infant, Otto Battschinger, while engaged in the performance of his duties, and while upon said premises and in said apartment-house, and while using said dumb-waiter, all by the consent, permission and invitation of defendants, for the purpose of delivering ice to defendants' tenants, placed upon said dumb-waiter a piece of ice weighing about fifty pounds (the capacity of said dumb-waiter being very much greater than that), which said piece of ice constituted a very light weight for said dumb-waiter, and proceeded to hoist the said dumb-waiter with the piece of ice thereupon to one of defendants' tenants, a customer of said infant's employer; that he did hoist said dumb-waiter several floors above the basement and several floors above the place where he was standing, and that thereupon, and without any warning, the rope used to hoist said dumb-waiter broke and said dumb-waiter crashed down from the upper floor to the basement where said infant was standing, and violently struck said infant, and particularly infant's left hand, thereby violently crushing the same and so injuring his said left hand and crushing the same, that it was necessary to amputate the thumb of said left hand, and so that the said infant's fingers have been rendered totally stiff upon said hand, and said hand has become totally useless to said infant.

8. That said infant not only lost his left thumb thereby, and not only lost the use of his fingers, but, by reason of said accident, gangrene and blood poisoning set in, several operations have been necessary, he suffered, and still suffers, intense pain and shock, and the injuries above outlined are permanent and said infant has been laid up and incapacitated from his occupation as an iceman and from any other occupation from thence hitherto, and will be laid up and incapacitated in the future, and plaintiff, his father, has paid, laid out and expended, and will pay, lay out and expend, large sums of money, to wit, five hundred dollars or more for medical attendance, medicine, bandages and appliances, surgical operations and employment of help to take his place.

9. That said accident was caused by the fact that one of the ropes by which said dumb-waiter was hoisted, which said rope was provided by said defendants, was an improper and unsafe rope, and was then, and had been for a long time, worn, frayed and rotten and in a dangerous condition, liable at any moment to break.

10. That a reasonable inspection of said rope at any time within the few months preceding the accident would have shown its dangerous condition; that defendants knew that it was in that condition for several months prior to the happening of the accident, and defendants neglected their duty toward said infant, as well as toward other persons lawfully using said dumb-waiter, in that they failed to provide a proper rope made of wire or other suitable material, and failed to inspect the same, and failed to keep the ropes by which it was hoisted, and particularly the said rope which broke, in a safe and proper condition, notwithstanding the fact that they were duly notified of the dangerous condition of said ropes.

11. That the said accident happened wholly without the negligence of the said infant or of plaintiff, and solely by the negligence and failure of duty on the part of the defendants.

12. That by reason of all the foregoing, the plaintiff has lost the services and earnings of said infant from the date of said accident hitherto, and will, in the future and until said infant becomes twenty-one years of age, lose his said earnings, and has

paid, laid out, expended and incurred for medicine, surgery, nurses and appliances aforesaid, the sum of five hundred dollars ($500).

Plaintiff demands as damages $5,000 and costs of suit.

NOTE: *Above complaint is founded on declaration in Battschinger* v. *Robinson, 85 A. 317; 83 L. 739. Judgment for plaintiff was affirmed by Court of Errors.*

No. 173. COMPLAINT AGAINST FIRE INSURANCE COMPANY FOR AMOUNT OF LOSS UNDER POLICY.

New Jersey Supreme Court.

Monmouth County.

(Title.)

Plaintiff, W. F., residing at , says that:

1. On the twenty-first day of October, nineteen hundred and nine (*venue*), the said defendant caused to be made a certain policy of insurance in writing, purporting thereby, and containing therein, that in consideration of the payment of nine dollars premium, to be paid by said plaintiff, the receipt whereof the said defendant thereby acknowledged, the said defendant undertook and promised the said plaintiff that it, the said defendant, would insure the said plaintiff against loss or damage by fire, to the amount of twelve hundred dollars, and would make good to the said plaintiff, his executors, administrators and assigns, any such loss or damage as should happen by fire, not exceeding the last named amount of twelve hundred dollars for the term of three years, from the fifteenth day of November, nineteen hundred and nine, at noon, to the fifteenth day of November, nineteen hundred and twelve at noon, on and in respect of certain premises then and ever since the property of the said plaintiff, in the said policy described as one frame building, occupied as a barn, situate in the rear of the dwelling house owned by said plaintiff on the east side of Norwood Avenue, Long Branch, New Jersey, and all extensions and additions attached thereto, foundations and stoops, including decorations and frescos on

walls and ceilings, plate and stained glass in doors and windows, plumbing and heating and lighting fixtures and all connections thereto, and all permanent fixtures contained in or attached to said building, extensions and additions including awnings and sidewalks in front of same or on premises; the said loss or damage to be estimated according to the actual cash value of the said property at the time the same shall happen, and to be paid by the said defendant, within sixty days after due notice and proof of such loss or damage, made by the said plaintiff, in conformity to the conditions of the said policy, should have been received at the office of the said defendant, unless the said defendant should have given notice of its intention to repair the damaged premises, or unless the said property be replaced by property of equal value and goodness; and in the said policy sundry provisos, conditions, prohibitions and stipulations were and are contained, and were and are thereto annexed; as by the said policy, reference being thereto had, will more fully appear.

2. At the time of the making of said policy of insurance by the said defendant, and at all times since, and now, the said plaintiff was and is interested in the said insured premises and property, in the said policy mentioned and described as aforesaid, to a large amount, to wit, to the amount of twelve hundred dollars, and that the said premises and property (*describing the property insured and destroyed*) in the said policy mentioned, and thereby intended to be insured, after the making of the said policy, and within the three years aforesaid, to wit, on the eleventh day of May, nineteen hundred and eleven, were burned down and consumed and destroyed by fire, which did not happen by means of or during any invasion, insurrection, riot, or civil commotion, or of any military or usurped power, or by any loss by theft at or after a fire, whereby the said plaintiff then sustained damage and loss to a large amount, to wit, to the amount of said sum of twelve hundred dollars, so assured on the said premises and property so burned and consumed.

3. The said premises and property, in the said policy mentioned, and intended to be thereby assured, at the time of making the said policy were not nor at any time since have been insured in any other office or company.

4. The said premises and property, in the said policy mentioned, were duly described in the said plaintiff's application for insurance and in the said policy, and not otherwise than they really were, or, as to cause the said insurance to be effected upon a lower premium than ought to have been.

5. Plaintiff did forthwith, after the said loss and damage, to wit, on the twenty-ninth day of June, nineteen hundred and eleven, give notice in writing and make the due proof of the same to the said defendant, at the office of the said defendant in Philadelphia; and also on the same day that the said premises and property described in said policy as one frame building occupied as a barn, situate in the rear of the dwelling house owned by said plaintiff on the east side of Norwood Avenue, Long Branch, N. J., and also by serving a copy of the proof of loss upon Victor Emanuel, the agent of the said Pennsylvania Fire Insurance Company of Philadelphia, at his office on Broadway, Long Branch, N. J., by showing him the original, making known to him the contents thereof and tendering him a copy of the same; and did deliver to the said defendant, according to the stipulations of the said policy, as particular an account of his damage as the nature of the case would admit, signed by the said plaintiff and accompanied by his oath, declaring the said account to be true and just, showing the ownership of the property insured; what other insurance existed on the same property, with a copy of the written portion of each such policy; what was the whole cash value of the subject insured; what was the plaintiff's interest therein; in what general manner (*as to trade, merchandise, manufactory or otherwise*) the said premises insured, and the several parts thereof, were occupied at the time of the loss, and who were the occupants of such building; and when and how the fire originated, so far as the said plaintiff knew or believed.

6. Plaintiff produced to the said defendant a certificate under the hand and seal of George Newkirk, Justice of the Peace, a magistrate, most contiguous to the place of the fire, and not concerned in the loss as a creditor or otherwise, related to the said plaintiff, stating that he, the said George Newkirk, had

examined the circumstances attending the fire, loss and damage by the said plaintiff sustained, that he was acquainted with the character and circumstances of the said plaintiff, and that he verily believed that he had by misfortune, and without fraud and evil practice, sustained loss and damage on the premises and property aforesaid, to the amount of twelve hundred dollars.

7. Plaintiff was ready and willing to submit to an examination or examinations under oath, by any person appointed by the said defendant, and to subscribe to such examination or examinations when reduced to writing.

8. Plaintiff in all other particulars complied with, performed and observed all other, the conditions, provisos, restrictions, prohibitions and stipulations of the said policy, and of the application aforesaid, on his part to be complied with, performed and observed, according to the form and effect of the said policy and of the said application.

9. Although two months have elapsed since due notice and proof as aforesaid was given and made to the said defendant as aforesaid, of the said burning and destruction by fire of the said premises and property, and of the loss and damage aforesaid, thereby occasioned to the said plaintiff, yet the said defendant has neither replaced the said property by property of equal value and goodness, nor has it given notice of its intention to repair the damaged premises, nor has it paid or made good to the said plaintiff, the said loss and damage of twelve hundred dollars, or any part thereof, but the same and every part thereof are wholly unpaid and unsatisfied to him, contrary to the force and effect of the said policy.

10. Defendant, although often requested, has not kept with the said plaintiff the agreement aforesaid, contained in the said policy made between the said defendant and the said plaintiff in that behalf as aforesaid, but that the said defendant hath broken the same, and to keep the same with the said plaintiff has hitherto wholly refused, and still doth refuse.

Plaintiff demands as damages $1,200 with interest from and costs of suit.

NOTE: *Adapted from declaration in Fritz* v. *Pennsylvania Fire Ins. Co., 88 A. 1065. Judgment for plaintiff affirmed by Court of Errors.*

No. 174. COMPLAINT BY LANDLORD AGAINST TENANT FOR REMOVAL OF FIXTURES AND DAMAGES TO PREMISES.

Hudson County Circuit Court.

(Title.)

The defendant in this cause was summoned to answer unto Henry P. Soulier and Jennie A. Soulier, plaintiffs, therein in an action at law upon the following complaint:

Plaintiffs, residing at Seabright, in the county of Monmouth, State of New Jersey, say that:

FIRST COUNT.

1. Plaintiffs being the owners of the lands and premises known as No. 77 Hudson street, in the city of Hoboken, county of Hudson and State of New Jersey, and situate on the northeast corner of Hudson place and Hudson street, in said city, on February 7th, 1907, let and rented to the defendant, the first floor and the front parlor and the basement of said premises, by a lease in writing for the term of five (5) years from the first day of May, 1907; a copy of said lease is hereto annexed.

2. That by the terms of said lease it was agreed that the parties of the first part, plaintiffs in this suit, were to have all fixtures then in said premises and also that no changes were to be made in the premises without the consent of the parties of the first part, these plaintiffs.

3. That after the making of the said lease, the defendant went into possession of said premises described therein and continued in such possession until the thirtieth day of April, 1912, when he quit and surrendered the said premises and his tenancy under said lease.

4. That at the time of the making of said lease there were on the premises certain fixtures of the reasonable value of four thousand ($4,000.00) dollars.

5. That when the said defendant quit and surrendered said premises he removed said fixtures from said building and converted the same to his own use.

6. That upon the first day of May, 1912, the plaintiffs demanded of the said defendant the return of said fixtures. That the defendant has refused to return the same.

SECOND COUNT.

1. Plaintiffs, being the owners of the lands and premises known as No. 77 Hudson street, in the city of Hoboken, county of Hudson, and State of New Jersey, and situate on the northeast corner of Hudson place and Hudson street in said city, on February 7th, 1907, let and rented to the defendant the first floor and the front parlor and the basement of said premises by a lease in writing for the term of five (5) years from the first day of May, 1907; a copy of said lease is hereto annexed.

2. That by the terms of said lease it was agreed that the parties of the first part, plaintiffs in this suit, were to have all fixtures then in said premises and also that no changes were to be made in the premises without the consent of the parties of the first part, these plaintiffs.

3. That after the making of the said lease, the defendant went into possession of said premises described therein and continued in such possession until the thirtieth day of April, 1912, when he quit and surrendered the said premises and his tenancy under said lease.

4. That the defendant, after the making of said lease and before the termination thereof, made certain changes in the said premises without the consent of these plaintiffs in the following particulars; cherry partition with stained glass top was removed; cherry door leading to rathskeller was removed; the bar, back bar, back fixtures, wine closet, working bar, lunch counter, were removed; partition dividing store was removed; partition and door from ladies' toilet was taken down and removed; door in back of bar was removed; all back bar plumbing was removed; brass rails to rathskeller and to toilet were removed; steam pipes

and radiators were disconnected; all plumbing in toilets was disconnected and removed; dishwashing tubs were disconnected and removed.

THIRD COUNT.

1. Plaintiffs, being the owners of the lands and premises known as No. 77 Hudson street, in the city of Hoboken, county of Hudson and State of New Jersey, and situate on the northeast corner of Hudson place and Hudson street in said city, on February 7th, 1907, let and rented to the defendant, the first floor and the front parlor and the basement of said premises, by a lease in writing for the term of five (5) years from the first day of May, 1907; a copy of said lease is hereto annexed.

2. That by the terms of said lease it was agreed that the parties of the first part, plaintiffs in this suit, were to have all fixtures then in said premises and also that no changes were to be made in the premises without the consent of the parties of the first part, these plaintiffs.

3. That after the making of the said lease, the defendant went into possession of said premises described therein and continued in such possession until the thirtieth day of April, 1912, when he quit and surrendered the said premises and his tenancy under said lease.

4. That the said defendant injured and destroyed the walls, floors, ceilings, woodwork and metal work of said building and destroyed one of the pillars or columns in said store; and that the defendant quit the said premises and removed therefrom, he removed certain of the fixtures which were in said premises, and injured, damaged and destroyed the walls, floor, ceilings, woodwork and metalwork of said building; destroyed and removed the toilets, tubs, bar and other plumbing, steam pipes and radiators, and injured, damaged and destroyed the water, waste, gas, steam and other pipes, and the walls, floors, woodwork and other parts of said building, and that by reason thereof, the said plaintiffs were forced to expend large sums of money and will in the future be forced to expend large sums of money in the repairing of the same.

FOURTH COUNT.

1. Plaintiffs, being the owners of the lands and premises known as No. 77 Hudson street, in the city of Hoboken, county of Hudson and State of New Jersey, and situate on the northeast corner of Hudson place and Hudson street, in said city, on February 7th, 1907, let and rented to the defendant, the first floor and the front parlor and the basement of said premises, by a lease in writing for the term of five (5) years from the first day of May, 1907; a copy of said lease is hereto annexed.

2. That after the making of the said lease the defendant went into possession of said premises described therein and continued in such possession until the thirtieth day of April, 1912, when he quit and surrendered the said premises and his tenancy under said lease.

3. That after the making of said lease, the said defendant placed in said buildings and annexed to the same so that the same became part of the realty, the following fixtures: Cherry partition, stained glass top leading to rathskeller, cherry door to rathskeller, cherry door at stairs, bar, back bar and fixtures, working bar, cigar counter and glass box, show case, lunch counter, back fixtures, wine closet, partition dividing store, partition for ladies' toilets, door in back of bar, brass rails to rathskeller and toilet, three doors at toilets, toilets, dish washing tubs, steam pipes and radiators.

4. That before the defendant quit and surrendered said premises, said defendant tore up and removed said fixtures.

PLAINTIFFS' DEMANDS.

1. As damages, four thousand dollars on the first count.
2. As damages, four thousand dollars on the second count.
3. As damages, four thousand dollars on the third count.
4. As damages, four thousand dollars on the fourth count.

EBERHARD & SHERIDAN,
Attorneys for Plaintiffs.

NOTE: *From Soulier* v. *Daab, 90 A. 266.*

No. 175. COMPLAINT. ACTION TO RECOVER DAMAGES FOR REFUSAL OF LANDLORD TO PERMIT TENANT TO OCCUPY PREMISES, BREAKING AND DESTROYING PLAINTIFF'S PROPERTY AND FOR PROFITS WHICH WOULD HAVE BEEN MADE BY USE OF PREMISES AND PROPERTY.

New Jersey Supreme Court.

Cumberland County.

(Title.)

Plaintiff, S. A. & M. Co., a corporation of the State of New Jersey, having its principal office at , in the county of , says that:

1. On March 24, 1906, at Bridgeton, in the county of Cumberland aforesaid, the plaintiff and defendant entered into an agreement, in writing, a copy of which is hereto annexed and made a part hereof, wherein and whereby the defendant let and rented to plaintiff, for amusement purposes, for the term of two years from said date, a certain building located at .

2. Pursuant to said letting, and terms of said agreement, plaintiff entered into possession of said premises and installed therein 29 automatic machines, 4 bowling alleys and appliances, upwards of two hundred pairs of rolling skates, and expended the sum of $1,000 in furnishing and equipping and providing a stage, scenery and appliances for the conducting and carrying on in said premises of vaudeville performances and other amusements.

3. Plaintiff, from said date and until on or about April 25, 1907, lawfully used, occupied and enjoyed said premises and property, and had and held possession thereof and conducted and carried on its said business therein and therewith and got great gain and profit thereby, and was on the day last aforesaid in title, and ever since hitherto, has been lawfully and of right in title to use, hold, occupy and enjoy the same.

4. The defendant, well knowing the premises, and fraudulently intending to injure the plaintiff in its said business, and to deprive it of the use of its said premises and property, and of the profit and advantages to be gained thereby, and to appropriate the same to his own use, knowingly, willfully and unlawfully refused to permit the said plaintiff to occupy said premises

or to make use thereof or of its said property from the said 25th day of April, 1907, until the date of the commencement of this suit.

5. The defendant, during all the time last aforesaid, did himself use said premises and said stage and scenery and appropriate the profits to his own use, and on the said 25th of April, 1907, did tear down, break up, damage and destroy said bowling alleys and automatic machines, and did throw the same out of said building and render them valueless to the plaintiff, and did deprive the plaintiff of the use, benefit and advantage of same from thence hitherto, and did prevent the plaintiff from making the profits which it would otherwise have made, by the use and occupancy of said premises and the use of said property.

6. Plaintiff demands as damages $15,000.

NOTE: *Above complaint is based on declaration filed in case of Standard Amusement Co.* v. *Champion, 72 A. 92; 76 L. 771. Judgment for plaintiff was affirmed by Court of Errors.*

No. 176. COMPLAINT BY TENANT AGAINST LANDLORD OF APARTMENT FOR INJURIES FROM THE FALLING OF THE CEILING CAUSED BY IT HAVING BECOME MOIST FROM WATER LEAKING THROUGH ROOF.

Essex County Circuit Court.

(Title.)

The plaintiffs, residing in the city of Newark, in the county of Essex and State of New Jersey, complain:

1. That the said defendant, Nathan T. Levy, was the owner, proprietor or lessee of certain land and tenements, located and known and designated as number 383 Springfield avenue, in the city of Newark, in the county of Essex and State of New Jersey, consisting of one tenement-house, being divided into six apartments.

2. That the said plaintiffs were one of the tenants, occupying one of the apartments on the top floor of the said building, and that the said plaintiffs were the tenants of said defendant,

Nathan T. Levy, by virtue of letting the said apartments by the defendant to the plaintiffs.

3. That the said defendant, Nathan T. Levy, retained possession and was in control and charge of the halls, roof and stairway of the said building, whereby it became and it was the duty of the said plaintiff to use due and proper care to keep and maintain the said building, which was arranged for six apartments, and commonly known as a tenement-house, so that the same should not become dangerous to the tenants of the said building and to the public who shall or might have occasion to use said premises.

4. That the roof of the said building, on or about the 6th day of August, 1913, and for a long time prior thereto, became out of order and dilapidated and in a dangerous condition and out of repair, of which the said defendant, Nathan T. Levy, had notice thereof, and it thereby became and was the duty of the said defendant to keep and maintain the said house and roof of the said building in a proper condition and not permit it to become dangerous, so as to put the said tenants, occupants and the public who might have occasion to come in and upon said premises in danger.

5. That the said defendant did attempt to repair the said roof, and did so in a careless and negligent manner, and through his carelessness and negligence in his endeavor to repair the ruinous condition of the said roof, the rain came through the said roof, and thereby came through the ceilings of the apartment occupied by the plaintiffs, as tenant of the said defendant, and thereby the ceiling broke and came down, striking the said plaintiff Lottie Perry on the head, shoulder, breast, arms and other divers parts of her body, greatly and permanently wounding and injuring her, all through the carelessness and negligence on the part of the said defendant, Nathan T. Levy, the owner or lessee of said land and premises.

6. That the said plaintiff Lottie Perry thereby became permanently injured, and did undergo and suffer great pain and agony, and will in the future suffer great pain and agony, through the carelessness and misconduct on the part of the said defendant.

7. That by reason of the injuries sustained by the said plaintiff Lottie Perry she, the said Lottie Perry, one of the plaintiffs, was prevented from and unable to attend to her lawful, necessary and domestic affairs, as she otherwise could and would have done, and that by reason of all of the aforesaid premises she, the said Lottie Perry, one of the plaintiffs, saith that she hath sustained damages in the sum of $5,000.

8. And the said John Perry, her husband, by reason of the said carelessness and negligence on the part of the said defendant, was therefore obliged to, and did, expend divers large sums of money for doctors, nurses and medicines in endeavoring to cure the said plaintiff Lottie Perry, this plaintiff's wife, of the said injuries, bruises and wounds sustained by her, through the said carelessness and negligence on the part of the said defendant, and will in the future be obliged to expend divers large sums of money to cure the said Lottie Perry, his wife, and one of the plaintiffs herein, of her wounds and injuries sustained as aforesaid.

9. And that by reason of the injuries sustained by the said Lottie Perry, one of the plaintiffs herein, the said John Perry, her husband, was deprived of her society and comfort as he would have otherwise and will in the future be deprived of her society, all through the carelessness and negligence on the part of the said defendant, Nathan T. Levy, in allowing and maintaining the said roof of the said tenement-house as aforesaid in a dangerous and dilapidated condition.

10. By reason of all of the aforesaid premises, the plaintiffs say that they have sustained damages in the total sum of $7,000, and therefore they bring this suit.

WM. GREENFIELD,
Attorney of Plaintiffs.

NOTE: *Complaint in Perry* v. *Levy, 94 A. 569. Judgment for plaintiff affirmed by Court of Errors.*

NO. 177. COMPLAINT IN ACTION FOR DAMAGES FOR INJURIES SUSTAINED BY REASON OF DEFENDANT'S NEGLIGENCE IN FAILING TO COMPLY WITH SECTION 126, TENEMENT HOUSE ACT, 4 C. S. 5341.

Hudson County Circuit Court.

(Title.) Action at Law. Complaint.

Plaintiff, residing in the city of (Jersey City), says that:

1. The defendant, on or about the (fourth day of December, 1911), at Hoboken, in county aforesaid, was in possession of certain premises under a lease for years, which premises are known as (No. 55 First street, Hoboken, N. J.).

2. Said building described in paragraph 1 of this complaint was on the (fourth day of December, 1911) and still is a tenement house, being four stories high and occupied by four tenants.

3. That in compliance with Sec. 126, page 126, laws of 1904, known as the Tenement House act, defendant was required to furnish a proper light in the public halls of said building from sunset each day till ten o'clock each evening.

4. On the said (fourth of December, 1911), defendant has negligently failed to comply with Sec. 126 of the laws of 1904, and negligently failed to furnish light in the public hallways of said building, mentioned in par. 1 of this complaint, in direct violation of the above statute.

5. That on (December 4, 1914), a certain stairway located on said premises, leading from the top floor to the third story, was in total darkness, through the negligence of said defendant in failing to provide lights after sunset in the said hallway.

6. On (December 4, 1911), at Hoboken, in county aforesaid, about one hour after sunset, plaintiff was lawfully using said stairway, having delivered certain goods to one of the tenants of the defendant on said aforementioned premises, and was about to descend the stairway, leading from the top floor to the third floor, when without any negligence on his part he fell on the winding part of the said stairway, which was unlighted, by reason of the darkness thereon, and broke his leg.

7. Plaintiff claims as damages (ten thousand dollars) for his pain and suffering, medical attendance and loss of earnings.

.....

Attorney for Plaintiff.

NOTE: *The above complaint is taken from the case of Pesin v. Jugovich, 88 A. 1101.*

No. 178. COMPLAINT. ACTION OF NEGLIGENCE FOR FAILURE TO LIGHT HALLWAYS OF TENEMENT HOUSE IN VIOLATION OF SEC. 126, ACT 1904, P. 126, 4 C. S. 5341, THEREBY OCCASIONING INJURY TO PLAINTIFF.

(Title.)

The plaintiffs residing at No. 95 Goerck street, in the borough of Manhattan, city, county and State of New York, says:

1. That the defendant, Antonio Carlo, at the times hereinafter mentioned was the owner and had control of a building and premises known as No. 40 West Twenty-fifth street, in the city of Bayonne, county of Hudson, and State of New Jersey, portions of which building consisting of separate apartments were rented out by defendant to various persons as places of abode; that defendant reserved to himself control of the hallways, lobbies and staircases of said building and used in common as the sole means of access to and egress from the upper apartments in said building from and to the adjoining street.

2. That the said building was a tenement house having two flats or apartments on each floor, and at the times hereinafter mentioned was rented, leased, let or hired out to be occupied and was occupied as the home or residence of at least three families living independently of each other and doing their washing and cooking upon the premises.

3. That the said defendant was bound and expected to keep a proper light burning in the public hallways, near the stairs, upon the entrance floor, and to keep a light burning upon the second floor above the entrance floor of such house, every night throughout the entire year, and upon all other floors of such

[illegible] from eight each day until 11 o'clock each evening.

4. That the defendant omitted the duty of providing necessary and sufficient light in said hallway with his tenants, in order that they might be permitted to pass along said stairs safely.

5. That, at the times hereinafter mentioned, the defendant negligently and carelessly maintained said hallway in a darkened and unlighted condition, and failed and wholly omitted to and did not provide and maintain any lights in said hallway.

6. That, on or about the 21st day of December, 1912, Sarah Kargman, one of the plaintiffs herein, while passing through the public hallway leading to the street, was caused to fall and did fall while passing down said stairs at the first floor thereof, by reason of the absence of any lights therein and its darkened and unlighted condition, and this without any fault or negligence on the part of the said Sarah Kargman.

7. That as a result of said fall the said Sarah Kargman was severely wounded, bruised, and injured in and about her body, arms and limbs, her nervous system shocked, and she became sick, sore and disabled and was confined to her bed and her house for some time, and was obliged to and did employ medical aid and attendance.

The plaintiff Sarah Kargman demands as damages the sum of $5,000.00.

For a separate and distinct cause of action, the plaintiff Meyer Kargman further alleges:

8. That prior to the commencement of this action and at times hereinafter mentioned, the said Sarah Kargman was and still continues to be plaintiff's wife, and as such wife has lived and cohabited with the plaintiff, her husband, in New York City in the State of New York.

9. That plaintiff herein then was and ever since has been a householder in said city, and was and ever since has been supporting and providing for his said wife; and that prior to the times hereinafter mentioned she was in good health and fully capable of performing and actually did perform all the duties

of housekeeper in their dwelling for the plaintiff, her said husband.

10. That in consequence of the injuries sustained by his wife, Sarah Kargman, as referred to in paragraph "seven" of this complaint, she has been unable to perform her household duties in the same manner as prior to her said injuries.

11. That in consequence of said injuries plaintiff has been deprived of the services of his said wife and his comfort and happiness has been impaired, and was obliged to and did expend moneys for his said wife for medical aid and attendance.

The plaintiff Meyer Kargman demands as damages the sum of $1,000.00.

DAVID LISNOW,
Attorney for Plaintiff.

NOTE: *Complaint held good in Kargman* v. *Carlo, 90 A. 292. Judgment for plaintiff affirmed by Court of Errors.*

No. 179. COMPLAINT BY PEDESTRIAN AGAINST OWNER OF PREMISES FOR INJURIES FROM THE SPRINGING OF A DEFECTIVE CELLAR DOOR ON WHICH HE STEPPED.

Hudson County Circuit Court.

(Title.)

The plaintiff, Joseph I. Kelly, residing at No. 126 Bostwick avenue, Jersey City, New Jersey, says that—

1. Defendant, Lembeck & Betz Eagle Brewing Company, is a corporation of the State of New Jersey, and was such on January 28th, 1913. Said corporation on said date was the owner of the brick building and lot known as 341 Jackson avenue, Jersey City, New Jersey; prior to said date, said defendant leased the store floor of said brick building to defendant, Henry Behrmann, for six years, commencing May 1st, 1909; said store floor is now in the possession of the defendant, Gus. A. Gminder, and was in possession of said Gus. A. Gminder on January 28th, 1913.

2. In the street in front of said store floor of said building, forming a part thereof and level therewith, there was, on January

28th, 1913, an opening about six feet long and about five feet wide, leading into the cellar of said building, which opening was covered by a pair of metal doors to prevent pedestrians from falling therein when passing over the same, along said street.

3. The said opening was used and maintained by the defendants as an entrance to, and an exit from the cellar of said building aforesaid.

4. On January 28th, 1913, the said defendants, carelessly and negligently permitted and allowed said pair of metal doors to become worn, slippery and out of repair, so that when said plaintiff was walking along said street and stepped on said doors he slipped, fell and was precipitated to the ground with great force and violence.

5. As a result thereof, plaintiff's knee cap was broken and pushed more than twelve inches from its proper place, necessitating a severe and painful operation for the purpose of having same reset, and thereafter and up to the time of bringing this suit, the plaintiff has undergone and is undergoing great pain and suffering, and will in the future suffer great pain from said injury resulting from said fall; said injury is permanent, and the plaintiff's said leg will always be stiff at the knee, so that he will be unable to bend the same.

By reason of said injury the plaintiff has been unable to perform his usual work as a brakeman and has suffered loss of wages amounting to the sum of one hundred and fifteen dollars per month and has also been obliged to expend large sums of money for medicines and medical attention; because of the permanent character of said injury he will be unable at any time in the future to resume his said occupation as brakeman and will continue to suffer loss of wages, and will be obliged to continue for a long time to come payment for medicines and for medical attention.

Plaintiff demands twenty thousand dollars damages.

COLLINS & CORBIN,
Attorneys of Plaintiff.

NOTE: *From Kelly* v. *Lembeck & Betz, etc., Co., 92 A. 282; affirmed, Court of Errors, 94 A. 1102.*

No. 180. COMPLAINT. SLANDER OF TITLE IN ASSERTING THAT PLAINTIFF'S TITLE WAS NOT GOOD AND MARKETABLE, WHEREBY PLAINTIFF LOST THE SALE OF HIS LAND.

(Title.)

Plaintiff, residing at, etc., says that—

1. Before and at the time of the committing of the grievances by the defendant hereinafter mentioned, the plaintiff was seized in fee, free from all incumbrances with a good and marketable title of and in certain land and premises situate in the ..... of ....., county of ....., and State of New Jersey, bounded and described as follows (*description*), with appurtenances.

2. Being desirous of selling the same, the plaintiff for that purpose, heretofore, to wit, on the ..... day of ....., 19..., at (*venue*) put up and exposed the same for sale by one H. H. & Co., real estate brokers in the county aforesaid, in order that the said land might be sold for the plaintiff.

3. At the time and place last aforesaid, after expending a great sum of money and trouble, the said H. H. & Co. procured one I. K. to purchase the said land of the plaintiff for the sum of $....., and were about to execute the agreement of sale, when the defendant, well knowing the premises, but contriving and falsely and fraudulently intending to injure the plaintiff, and to cause it to be suspected and believed that the plaintiff did not have a good and marketable title free from all incumbrances of and in the said lands, and to hinder and prevent the plaintiff from selling or disposing of his said lands to the said I. K. or to any other person, and to cause and procure the plaintiff to sustain and be put to divers great expenses attending the exposure for sale of his property and to vex, harass, oppress and injure the plaintiff, did on the ..... day of ....., aforesaid, at (*venue*) aforesaid, wrongfully, injuriously, falsely, fraudulently and maliciously assert and represent to the said I. K. and in the presence and hearing of several persons there present, of and concerning the said lands and the title, estate and interest of the plaintiff therein, that the plaintiff's grantor was insane at the time of the execution of the deed, and further that the premises were so restricted that it was impossible to

build a factory thereon, meaning thereby that the plaintiff's title to said lands was not good and marketable and free from incumbrances (*or as the facts may be, stating the words with the appropriate innuendoes*).

4. By reason of the speaking of the said several false and malicious words by the defendant as aforesaid the title of the plaintiff in and to the said lands and premises, with the appurtenances was and is brought into great disrepute.

5. And thereby not only was the said I. K., who otherwise would have purchased the said premises, prevented from so doing and from thence declined to purchase the same, but many other persons, who were willing to deal and would have otherwise dealt with the plaintiff and his agents the said H. H. & Co. for the sale thereof, have been deterred and prevented from doing the same and have wholly desisted therefrom, and the said plaintiff has been thereby hindered and prevented from selling and disposing of his said land and premises, and has thereby not only lost and been deprived of all the advantages and emoluments which he might and would have derived and acquired from the sale thereof, but has been forced and obliged to pay the sum of $..... in and about the said exposure to sale, and the expenses incidental thereto.

.....

Attorney.

NOTE: *See section 106, page 83, supra.*

No. 181. COMPLAINT. MECHANIC'S LIEN. ACTION BY ARCHITECT AGAINST BUILDER, OWNER AND MORTGAGEES.

Hudson County Circuit Court.

(Title.)

Plaintiff, who resides in the town of West New York, in the county of Hudson and State of New Jersey, says that—

1. On the tenth day of July, nineteen hundred and eleven, at West New York, N. J., the plaintiff, Joseph Turck, entered into a written contract with the defendants, Joseph Dalio and

Laura Dalio, to furnish them with general working plans and specifications for the proposed buildings to be erected on lots numbered one hundred and fourteen (114) and one hundred and fifteen (115) Willow avenue, in the township of North Bergen, and also to do the necessary superintendence of the work; a copy of which contract is hereto annexed and made a part hereof.

2. By the terms of said contract said plaintiff agreed to furnish working plans and superintend the work in the erection and completion of said buildings for the price of two hundred and seventy-eight dollars, and the said defendants agreed to pay the said plaintiff for doing said work the said sum of two hundred and seventy-eight dollars in the manner provided for said payments in said contract; that the said plaintiff had become entitled to such payments by reason of having done all the work and superintendence as required by said contract.

3. On the twenty-second of May, nineteen hundred and twelve (*lay venue*), the said plaintiff completed and finished the entire work under said contract and thereupon applied to the said owners for the amount due under said contract and the same was refused.

4. On May 15th, 1912, the said Laura Dalio and Joseph Dalio, her husband, conveyed said premises to one Jasper S. Allard for the benefit of certain creditors who refrained from commencing lien claim suits thereon, and the said plaintiff applied to the said Jaspar S. Allard for the amount due to said plaintiff and the same was refused.

5. The said plaintiff avers and in fact says that said debt is by virtue of an act of the legislature entitled "An act to secure to mechanics and others payment for their labor and materials in erecting any building," approved June 14th, 1898, and the several supplements thereto and amendments thereof, a lien on certain buildings and curtilages described as follows:

6. The said buildings are two two-story brick dwelling houses on a lot or curtilage situate on the northwest corner of Willow Avenue and Van Buren Place, in the Township of North Bergen, in the County of Hudson and State of New Jersey, and which on a certain map entitled "Supplementary Map to Map 'C'

Property belonging to James H. Symes, at New Durham, Township of North Bergen, Hudson County, N. J., lying in County Block No. 2305, Thomas H. McCann, Civil Engineer," are marked, known and designated as lots numbered one hundred and fourteen (114) and one hundred and fifteen (115) in block numbered six (6), and being of the size and dimensions as shown on said map, and each of said buildings and the lot or curtilage whereon the same is erected and upon which this lien is claimed may be described as follows, viz.:

7. The first building is a two-story two-family brick dwelling on a lot or curtilage situated in the Township of North Bergen, in the County of Hudson and State of New Jersey, and more particularly described as follows: (*Description of premises by metes and bounds.*)

8. The second building is a two-story two-family brick dwelling on a lot or curtilage situated in the township of North Bergen, in the county of Hudson and State of New Jersey, and more particularly described as follows: (*Description of premises by metes and bounds.*)

9. And the said Joseph Turck, claimant, does hereby divide and apportion the same among the said buildings in proportion to the value of the materials furnished to, and the labor performed for each of said buildings, and does state the amount so apportioned to each of such buildings as follows, viz.: To the first building and its lot or curtilage above described the sum of one hundred and thirty-nine ($139.00) dollars; to the second building and its lot or curtilage above described the sum of one hundred and thirty-nine ($139.00) dollars.

DIPPEL & DIPPEL,
Attorneys for Plaintiff.

NOTE: *Complaint in Turck* v. *Allard, 94 A. 583. Judgment for plaintiff affirmed by Court of Errors.*

No. 182. COMPLAINT. MECHANIC'S LIEN SUIT AGAINST BUILDER AND OWNER.

Essex County Circuit Court.

(Title.)

The plaintiff, E. M. Waldron & Co., a corporation, with its principal office at Newark, Essex County, New Jersey, says:

1. At the times hereinafter stated, defendant was the owner of a plot of land upon which there was a certain building, which said building the said defendant was then about to repair, which land is described as follows:

All those certain tracts or parcels of land and premises situate, lying and being in the City of Newark, County of Essex and State of New Jersey: (*Description by metes and bounds.*)

2. On March 21, 1912, plaintiff and defendant executed an agreement for the necessary repairing of the building on said land, a copy of which agreement is hereto annexed, and made a part hereof.

3. On May 31, 1912, plaintiff received from the architects a certificate that plaintiff was entitled to a payment of $5,000.00 by the terms of contract, and that thereupon a payment of $5,000.00 then became due from defendant to plaintiff.

4. The defendant waived strict performance of the contract at the time specified, and plaintiff finished the entire work on October 28, 1912.

5. On November 15, 1912, plaintiff received from the architects a certificate that plaintiff was entitled to a payment of $6,060.00 by the terms of said contract, and a further payment of $6,060.00 then became due from defendant to plaintiff.

6. Defendant has not paid either of said payments, or any part thereof, and defendant still owes the whole amount of said contract, that is, $11,060.00, to said plaintiff with interest as hereinafter demanded.

7. Plaintiff has performed all the terms and conditions of said contract on its part, except as to completing the work at the time specified in said contract, which said time was extended and strict performance waived by the defendant.

8. Said debt is a lien upon said building and land by virtue of the provisions of an act entitled "An act to secure to me-

chanics and others payment for their labor and materials in erecting any building."

Plaintiff demands as damages $5,000.00 with interest from May 31, 1912, and $6,060.00 with interest from December 1, 1912.

FRANK E. BRADNER,
Attorney of Plaintiff.

NOTE: *Complaint filed in E. M. Waldron & Co. v. Gilmore, 95 A. 129. Judgment for plaintiff affirmed by Court of Errors.*

No. 183. COMPLAINT. ACTION FOR INJURIES SUSTAINED IN FALLING DOWN STAIRS OF MOVING PICTURE THEATRE.

Hudson Circuit Court.

(Title.)

The plaintiff who resides at No. 141 Jackson avenue, Jersey City, in the county of Hudson, says that—

1. The plaintiff on the 27th day of October, 1914, at the city of Jersey City, was by the defendants invited into a certain close or premises known as the Apolla Theatre, corner of Jackson avenue and Wilkinson avenue, Jersey City, used by the defendant as a place of amusement, into which place of amusement the plaintiff was invited to go by the defendants upon the payment of a sum of money, which she paid and then entered the said place of amusement, and while she was in the said place of amusement, upon said invitation of the defendants as aforesaid and while endeavoring to leave the same, and while using due care for her safety, by reason of the negligence of the defendants she was hurt by falling down and injured as hereinafter set forth.

2. The negligence of the defendants consisted in this, that although they maintained a moving picture theatre which was kept dark, and although there was a stairway in the place which it was necessary for the plaintiff to use to leave the said place, yet the defendants did not use reasonable care to supply a person to direct the plaintiff how to leave the premises, although it

was necessary in the exercise of reasonable care that they should do so, but on the contrary did not afford the plaintiff any assistance in leaving the said place, and while attempting to leave the said place and descending a certain stairway, by reason of the darkness and by reason of the fact that the stairway was constructed in such a manner that it was extremely steep and was interrupted in descent by a platform, which by the nature of its construction would lead a person using reasonable care to believe that it was the bottom of the stairway, but the said stairway did not end on this platform, but continued beyond it, and was so maintained in darkness by the defendants at all times mentioned herein, and by reason of the fact that no person had instructed or warned her of the danger and she was unaware of the said danger and by reason of the facts before set forth, without fault on her part, she fell and received injuries to her knee and leg.

The plaintiff expended for medical expenses $100.00.

The plaintiff demands $10,000.00 damages.

ALEX. SIMPSON,
Attorney of Plaintiff.

NOTE: *Complaint from Andre* v. *Mertens, 96 A. 893. Judgment for plaintiff affirmed by Court of Errors.*

No. 184. COMPLAINT FOR MONEY LOANED TO DEFENDANT ON CERTIFICATES OF INDEBTEDNESS, THE MONEY TO BE USED IN MAKING A MUNICIPAL IMPROVEMENT.

Supreme Court of New Jersey.
Bergen County.

(Title.)

The plaintiff having its place of business in the borough of Carlstadt in said county of Bergen, says:

1. On the following date, to wit, the 17th day of June, in the year 1908, at (*lay venue*), Alonzo Chamberlain, Charles Boesch, George Kiel, Henry J. Von Glahn, William W. McKenzie, Fletcher W. Hatfield, William J. Schweickert, Edward W. Wil-

helm, William J. Zuber, S. V. Morris, Herman F. Lemmermann, Walter E. Baker, Jesse A. Powelson and George Elwood, being ten and more citizens of this state, presented in open court, to the Court of Common Pleas of the county of Bergen, their duly verified petition in writing, in which they set forth that they deemed it necessary for the public health that the marsh, swamp, bog, meadow, or low or wet lands lying partly in the borough of Hasbrouck Heights and partly in the township of Lodi, in the county of Bergen and State of New Jersey, and described as bounded * * * be drained in the manner contemplated by, and according to the provisions of the statute in such case made and provided, to wit, an act entitled "An act to provide for the drainage of any pond, artificial reservoir, marsh, swamp, bog, meadow, low or wet lands where the same is necessary for the public health." Approved March 31st, 1903 (being chapter 93 of the laws of 1903), and the several supplements thereto and amendments thereof.

2. In which petition they further set forth the names of all owners of lands likely to be affected by the proceedings, so far as to them known, and prayed for the appointment of three commissioners for the purposes and with the powers set forth in the statute aforesaid, in such case made and provided.

3. Of which said application and of the day on which the same was intended to be made, notice was duly given by advertisements in writing, under the hands of at least two of said petitioners, set up in three of the most public places in each municipality in which any of the premises proposed to be drained are situate.

4. And thereupon, the said Court of Common Pleas, on due proof made that the advertisements aforesaid had been set up according to law, and being satisfied that said petition was in due form, appointed Frank Campbell, William J. Zuber and Charles H. Koster, three persons who were freeholders in said county, who were not interested in said premises or any of them, and one of them, to wit, Frank Campbell, was a civil engineer or surveyor, commissioners to hear and determine first whether the drainage petitioned for is necessary to the public health, and second, through what lands it is necessary in order to drain

the premises in question, that a ditch or ditches, or other channels for the free passage of water should be constructed or opened, and to take such further and other steps with reference thereto, as in and by the said statute in such case made and provided, are provided for.

5. And thereupon afterwards, the said commissioners, having made, subscribed and filed with the clerk of the said Court of Common Pleas, each an oath that he would faithfully discharge the duties of his office to the best of his knowledge and ability, met and organized, by appointing one of their number chairman and another as treasurer.

6. And thereupon afterwards, the said commissioners, after five days' notice in writing to the said petitioners, and the parties named in said petition, given by mailing the same in a post-paid wrapper to the last known post-office address of the said respective parties, proceeded by personal view of the premises, examination of witnesses under oath and otherwise, to determine whether the drainage petitioned for was necessary to the public health, and on the following day, to wit, the 24th day of July, 1908, at Little Ferry, to wit, Hackensack, in said county of Bergen, did determine that the said drainage petitioned for was necessary to the public health.

7. And thereupon afterwards, the said commissioners caused to be made an accurate survey of the lands and premises, which might be affected by said drainage, and a map thereof, showing all the lands and premises to be drained and which might be specially benefited thereby, the number of acres in each separate tract, the names of the owners and occupants thereof, so far as ascertainable, the relative levels of each tract, and the width, depth and slope of the sides, shape and course of such ditch or ditches or other channels for the free passage of water as they deemed necessary for the drainage of said lands and premises.

8. And thereupon afterwards, to wit, on the 25th day of April, in the year 1909, the said commissioners filed in the office of the clerk of the said Court of Common Pleas, their determination aforesaid, signed by them and a copy of said map and survey, and gave due notice of such filing to all whom it might concern by publishing such notice once a week for at least two

successive weeks in a newspaper published in this state and circulating in the municipalities where said premises are situated.

9. And thereupon afterwards, after the expiration of the time limited for appeals, no party having appealed from said determination, the said commissioners proceeded, with due diligence, to drain the said lands and premises mentioned and described in said petition and in the commissioners' said report of their said determination, and, to that end, did proceed to construct, alter, deepen, widen, and straighten drains, ditches, and other channels for the free passage of water, in accordance with the plans by the said commissioners adopted as aforesaid.

10. And thereupon, in order to raise funds for the construction of said ditches, drains, and channels, as well as to pay damages and awards, which said funds it was necessary to raise before any assessment therefor could be made and collected, the said commissioners, on the following date, to wit, the 27th day of April, in the year 1909, with the approval of the said Court of Common Pleas, borrowed of the plaintiff the sum of $5,000 upon their five certain certificates of indebtedness, each dated the 27th day of April, in the year 1909, and certifying that said commissioners were indebted to the plaintiff in the sum of $1,000, payable with interest from date, on the 27th day of April, in the year 1910, which said certificates were all of the tenor of the copy of one of them which is hereto annexed and marked "A," and is hereby referred to, and made part of this complaint, and for the purposes aforesaid, under the like necessity, and with the like approval, aforesaid, said commissioners, on the following date, to wit, on the 27th day of July, in the year 1909, borrowed of the plaintiff the further sum of $5,000 upon their five certain other certificates of indebtedness, all of the tenor of the copy of one of them which is hereto annexed and marked "B," and is hereby referred to and made part of this complaint; and for the purposes aforesaid, under the like necessity, and with the like approval, aforesaid, said commissioners on the following date, to wit, the 30th day of November, in the year 1909, borrowed of the plaintiff, the further sum of $5,000 upon their five certain other certificates of indebtedness, all of the tenor of the copy of one of them which is hereto

annexed and marked "C," and is hereby referred to and made part of this complaint.

11. And thereupon afterwards, to wit, on the 27th day of April, in the year 1910, upon the surrender by the plaintiff, of said first above-mentioned five certificates of indebtedness "A," the said commissioners paid to the plaintiff the interest then due and accrued thereon, and with the approval of said Court of Common Pleas, for further securing the principal debt of $5,000 aforesaid, issued to the five certain other renewal certificates of indebtedness, all of the tenor of the copy of one of them which is hereto annexed and marked "DEFGH," and is hereby referred to and made part of this complaint; and also afterwards, to wit, on the 27th day of July, in the year 1910, upon the surrender by the plaintiff of the secondly above-mentioned five certificates "B" of indebtedness, the said commissioners, with the approval of said Court of Common Pleas, for further securing the said principal debt and the interest due thereon, amounting to the sum of $5,300 in the whole, issued to the plaintiff six certain renewal certificates of indebtedness, five of the tenor of the copy of one of them which is hereto annexed and marked "IJKLM" and one of the tenor of the copy thereof which is hereto annexed and marked "N," and which are hereby referred to and made part of this complaint; and also afterwards, to wit, on the 30th day of November, in the year 1910, upon the surrender by the plaintiff of the five certificates of indebtedness "C," thirdly above mentioned, the said commissioners, with the approval of said Court of Common Pleas, for further securing the said principal debt and the interest due thereon, amounting in the whole to the sum of $5,300, issued to the plaintiff six certain other renewal certificates of indebtedness, five of the tenor of the copy of one of them which is hereto annexed and marked "OPQRS," and one of the tenor of the copy thereof which is hereto annexed and marked "T," and which are hereby referred to and made part of this complaint.

12. And, as the plaintiff avers, the said seventeen certificates of indebtedness lastly above mentioned (and herein designated by the letters D to T inclusive) were issued by said commis-

sioners as aforesaid, for the purpose of providing for the payment of the costs, damages and expenses of the drainage undertaken by them, as aforesaid, under the provisions of the act entitled, "An act to provide for the drainage of any pond, artificial reservoir, marsh, swamp, bog, meadow, low or wet lands, where the same is necessary for the public health," approved March 31st, 1903, and the various supplements and amendments thereto; the said commissioners were appointed as aforesaid under said act; the said renewal certificates of indebtedness, and all and singular the same, and the indebtedness secured thereby, together with interest thereon, became due and payable to the plaintiff on the following date, to wit, on the first day of December last past, and were not then paid in whole or in part, nor have at any time since been paid, in whole or in part; the said drained district lies partly within the territorial limits of the borough of Little Ferry, and partly within the territorial limits of other municipalities within said county of Bergen, and, in character and extent, was and is such that the drainage thereof, so as aforesaid undertaken by said commissioners, was and is a public enterprise, beneficial to the said borough of Little Ferry and to the said other municipalities; the moneys, so as aforesaid, loaned by the plaintiff to said commissioners, the payment whereof, with interest, was secured, and intended to be secured, by the said certificates of indebtedness, so as aforesaid issued by the said commissioners to the plaintiff, were loaned for the purpose of being expended and were expended, in the said enterprise of draining said district; and, by reason of the premises, and of the statute in such case made and provided, the said several renewal certificates of indebtedness and the indebtedness evidenced, and intended to be secured, thereby became and were the lawful indebtedness of the said defendant, and, upon and by virtue of the same, the said defendant, on the following date, to wit, the first day of December, in the year 1911, at Little Ferry, to wit, Hackensack in said county of Bergen, became and was lawfully indebted to the plaintiff for such proportion of the said indebtedness and the said several sums, so as aforesaid loaned by the plaintiff to said commissioners, and of the interest thereon, as the total of the

taxable ratables of the borough of Little Ferry bears to the total taxable ratables both of said borough of Little Ferry and of said other municipalities, as the said ratables in each case appear upon the list of ratables for each of said municipalities, made for the purpose of taxation therein in the year 1910, which said proportion of said indebtedness and of said several sums and interest amounting to in the whole, to a large sum, to wit, to the sum of $20,000 on the day and year last aforesaid.

13. The following is the bill of particulars of the plaintiff's demand showing the amount for which judgment will be claimed:

* * * * * * * * * *

14. Of the above total amount, when ascertained by the calculation of interest to the date of verdict, the plaintiff claims a verdict for such proportion, as the total of net taxable ratables, aforesaid, of Little Ferry, bears to the total of net taxable ratables of Little Ferry and the other benefited municipalities combined, as per tax lists of the year 1910.

15. The defendant has not paid the plaintiff the amount claimed, as aforesaid, or any part thereof.

16. The plaintiff demands as damages the sum of $15,610 with interest, as above in said statement of particulars mentioned, or so much of the total amount thereof as may in the manner aforesaid be ascertained to be due.

E. J. LUCE & W. A. KIPP,
Plaintiff's Attorneys.

NOTE: *Complaint in Carlstadt Nat. B'k* v. *Borough of Little Ferry, 94 A. 786. Judgment for plaintiff affirmed by Court of Errors.*

No. 185. COMPLAINT AGAINST MUNICIPALITY BY PUBLIC OFFICER FOR COMPENSATION AND REIMBURSEMENT UNDER STATUTE ALLOWING RECOVERY.

New Jersey Supreme Court.
Morris County.

(Title.)

Plaintiff, residing in Morristown, Morris county, New Jersey, says that:

1. By an act of the legislature of the State of New Jersey, entitled "An act providing for compensation and reimbursement of persons returned as elected to be members of boards of chosen freeholders in any county of this State, and to whom certificates of election as such were issued, the title to whose office has been adjudged against such persons in appropriate legal proceedings, or where their title to such office has been adversely affected by judicial decision against other persons similarly situated with reference to membership in any such like board of chosen freeholders, by a court of competent jurisdiction within one year last past, and providing for the payment of the expenses incurred by any such persons in litigation in which their title to such office aforesaid was involved, in those cases where legal proceedings concerning such title were actually conducted, and also providing for compensation to be made to persons appointed or elected to office or position by persons returned and certified as elected to be members of boards of chosen freeholders as aforesaid, and acting or assuming to act as such boards," chapter No. 5, of the special laws of 1913, provision was made for the payment to the officers therein mentioned.

2. That said plaintiff was returned as elected to be a member of the board of chosen freeholders of the county of Morris in this State; that the certificate of election, as such, was issued to him; the title to whose office was adjudged against the plaintiff in appropriate legal proceedings by a court of competent jurisdiction within one year last past.

3. That as such member of the board of chosen freeholders of the county of Morris, in the said State of New Jersey, he the said plaintiff, together with the other members returned as elected to be members of board of chosen freeholders of the

county of Morris, organized its said board on January 1, and January 6, 1913. The plaintiff's title to said office was adjudicated to be invalid on the twelfth day of March, 1913.

4. That the legislature of the State of New Jersey had fixed the annual salary of said plaintiff as such member of the board of chosen freeholders of the county of Morris, at the sum of $1,500.00 per year.

5. That the plaintiff returned as elected to be a member of the board of chosen freeholders of the county of Morris, and to whom a certificate of election as such was issued incurred expenses in and about procuring his election as a member of such board amounting to the sum of $184.20, according to his statement under oath filed by him according to law.

6. That there was incurred by plaintiff and by the others elected as members of the board of chosen freeholders of the county of Morris, expenses in the litigation to which their title to such office aforesaid was involved, and in which instance the legal proceedings concerning such title was actually conducted, the sum of $397.50, which sum includes reasonable counsel fees.

7. That by the act first herein mentioned, it became and was the duty of the defendant as one of the boards of chosen freeholders in the counties of this State affected by said act to forthwith provide for and pay the salary and expenses herein mentioned.

8. Whereby by force of the statute, said defendant became and was liable to an action by the plaintiff for the pro rata proportion of the annual salary provided for in the act of the legislature creating or purporting to create such boards of chosen freeholders to which this plaintiff was returned and certified as elected to be a member thereof, and it then and there became and was the duty of the said defendant to pay to the said plaintiff the compensation and expenses provided for in said act.

9. That the defendant well knowing the premises did not regard its duty in this behalf, nor the statute in such case made and provided, but contriving and wrongfully intending to deceive and defraud the plaintiff in this respect of the damages accrued to him, contrary to the statute, would not and did not pay the plaintiff the said sum.

Plaintiff demands the sum of $856.60 with interest from March 12, 1913, until date of payment.

KING & VOGT,
Attorneys of Plaintiff.

NOTE: *From Lyons* v. *Board of Freeholders of Morris, 90 A. 1111. Judgment for plaintiff affirmed by Court of Errors.*

No. 186. COMPLAINT BY MUNICIPALITY TO RECOVER COST OF ELECTRICITY FURNISHED DEFENDANT WHICH BY MISTAKE HAD NOT BEEN CHARGED FOR IN CURRENT BILLS.

Cumberland County Circuit Court.

(Title.)

The plaintiff, the Mayor and Council of the Borough of Vineland, a municipal corporation of the county of Cumberland, in the State of New Jersey, says that:

1. At and before the year nineteen hundred and ten, and since that time, the plaintiff has been engaged in business in furnishing the electric current for lighting and manufacturing purposes, in and near the borough of Vineland, in the county of Cumberland, and State of New Jersey.

2. From the first day of June, nineteen hundred and ten, until the first day of June, nineteen hundred and twelve, the plaintiff furnished electric current to the defendant, The Fowler Waste Manufacturing Company, a corporation of the State of New Jersey, at its plant in or near the said borough of Vineland.

3. By error and mistake of the reading of the meter or meters used to measure the current furnished by the plaintiff to the defendant, bills were rendered for only a portion of the current used by the defendant, as appears by the schedule or bill of particulars hereto annexed and intended to be made a part thereof.

4. Plaintiff demanded payment of the amount due from the defendant to the plaintiff for the use of the said current in addition to the amount paid by the defendant to the plaintiff, and

that the defendant has failed, refused and neglected to pay the same; the amount being the sum of three thousand five hundred and eighty-eight dollars and twenty-seven cents ($3,588.27). The plaintiff demands of the defendant the sum of three thousand and five hundred and eighty-eight dollars and twenty-seven cents ($3,588.27), as damages.

NOTE: *Adapted from complaint filed in Mayor, etc., of Vineland,* v. *Fowler Waste Mfg. Co., 90 A. 1054. Judgment for plaintiff affirmed by Court of Errors.*

No. 187. COMPLAINT TO RECOVER BACK MONEY ILLEGALLY OBTAINED FROM MUNICIPALITY.

New Jersey Supreme Court.
Atlantic County.

(Title.)

Plaintiff, a municipal corporation of the county of Atlantic and State of New Jersey, says that:

1. On August 29, 1912, at (*lay venue*), D. R. B. was the comptroller of the plaintiff.

2. On said date and at said place said comptroller issued his warrant on the treasurer of plaintiff to the order of defendant for the sum of $21,681.72, which warrant was endorsed by defendant and by it deposited with Atlantic City National Bank, a depository of plaintiff, and said amount was collected by said defendant from plaintiff's funds on deposit in said bank by virtue of said warrant and has since been retained by defendant.

3. At the time of the delivery of said warrant by said comptroller to said defendant, plaintiff was not indebted to said defendant in said sum of money or in any sum of money, nor has it since become indebted to defendant in any sum of money.

4. At the time of the delivery of said warrant by said comptroller to said defendant, plaintiff was in nowise obligated for any reason to pay said defendant said sum of money or any sum of money nor has it since become obligated to pay any sum of money to defendant.

5. Said comptroller was without authority in law and in fact to issue and deliver said warrant, and said defendant was without right to receive the same and collect the amount thereof, and that the issuance and delivery of the same and the collection of said money by defendant was without the knowledge, authority or consent of plaintiff.

6. Defendant has refused to refund said sum; wherefore plaintiff prays judgment for the sum of $21,681.72, together with interest from August 29, 1912, and costs of suit.

NOTE: *Complaint filed in case of Atlantic City* v. *W. J. & S. R. R. Co.*

No. 188. COMPLAINT TO RECOVER MONEY ILLEGALLY OBTAINED FROM MUNICIPALITY BY DURESS.

(Title.)

The plaintiff, a municipal corporation of the County of ..... and State of New Jersey, says that:

1. Plaintiff is, and at all times mentioned hereinafter was, a municipal corporation incorporated under the laws of the State of New Jersey.

2. In July, 1893, at (*lay venue*) J. R. D. was president and N. B. S., E. R., A. S. and P. V. T. were trustees of the village of ....., and were acting as such president and trustees of said village, and that prior thereto, the said president and trustees had organized and were acting as a Board of Water Commissioners, under and by virtue of an act entitled "....." being Chapter .... of the Laws of 1875 of the State of New Jersey, and the several acts amendatory thereof and supplemental thereto.

3. Said Board of Water Commissioners, under and by virtue of the authority vested in them by said act, duly issued $..... of Water Bonds of the Village of ....., for the purpose of constructing a system of water works for said village.

4. On or about July 20, 1893, at ..... aforesaid, the said Board of Water Commissioners, desiring to sell the said

bonds, entered into in writing with the defendant for the sale of $50,000 of said bonds, a copy of which contract is annexed hereto and made a part hereof, and marked "Schedule A."

5. Said contract entered into as aforesaid between the said Board of Water Commissioners and the defendant, was, as the defendant well knew, illegal, unlawful and void.

6. After July 20, 1893, and prior to August 4, 1893, the law firm of ..... of ..... City, mentioned in said Schedule A, disapproved of the regularity and validity of said bonds in writing, and so informed the defendant and the Board of Water Commissioners of the village of .....

7. On or about August 4, 1893, at ..... aforesaid, the said Board of Water Commissioners, being desirous of disposing of the said bonds, and being in great need of the money, and in great distress for the want thereof, entered into negotiations with the Comptroller of the State of New Jersey, by which the said Comptroller agreed to purchase the said bonds and to pay a premium therefor, and to pay the accrued interest thereon, and to take the bonds, which were 4 per cent. bonds, so that the village of ..... should, in reality, pay only 3½ per cent. interest on the said bonds.

8. The said $50,000 of water bonds were to be delivered to the Comptroller on August 4, 1893, in pursuance of which arrangement and agreement the president of said board went to Trenton to deliver the bonds and to obtain the proceeds thereof for the Board of Water Commissioners aforesaid.

9. The defendant, ..., appeared at the Comptroller's office before the bonds were delivered or paid for, and demanded the bonds by virtue of the contract set forth in Schedule A, and the Comptroller refused to take the bonds unless the said defendant was got out of the way or settled with.

10. The Board of Water Commissioners, at the time and place aforesaid, were in great and urgent need of funds and were in distress for the want thereof and were in danger of being sued upon their contract for the construction of the water works, and their want of the proceeds of these bonds was most urgent and immediate; that the terms upon which the Comptroller proposed to take the bonds, as hereinbefore stated, were highly advan-

tageous to the said village of .....; that the Comptroller insisted the said defendant's claim should be disposed of or that he should be got out of the way, and the said defendant refused to waive his right to the said bonds, when in fact he had none (which fact both he and the Comptroller well knew), unless he was paid the sum of $1,750; that thereupon a new agreement and contract was made and entered into between the said defendant and the said Board of Water Commissioners, which second contract is annexed hereto, made a part hereof and marked "Schedule B."

11. The said second contract was illegal, unlawful and void, as the defendant well knew; was obtained by duress and without consideration.

12. Upon the execution of the said second contract the Comptroller took the said $50,000 in bonds as he had previously agreed to do, and the said Board of Water Commissioners unlawfully paid to the defendant the sum of $1,750.

13. The payment so made by the said Board of Water Commissioners to the said defendant was without authority in law, the defendant having no right to demand the said sum, and the board having no right to pay the same, and the said sum of $1,750 was unlawfully paid to the defendant out of the moneys of the plaintiff, and to the damage and injury to plaintiff of $1,750.

14. By reason of the above facts the defendant is indebted to the plaintiff in the sum of $1,750 with interest.

Plaintiff demands as damages the sum of $1,750 with interest from August 10, 1893, and costs of suit.

.....

Attorney of Plaintiff.

NOTE: *Above complaint is based on complaint filed in case of Village of Fort Edward* v. *Wilbur W. Fish, 50 N. E. 973. Judgment for plaintiff was affirmed by New York Court of Appeals.*

No. 189. COMPLAINT BY MUNICIPALITY TO RECOVER FEES COLLECTED BY CLERK IN PERFORMANCE OF HIS DUTIES.

New Jersey Supreme Court.

Passaic County.

(Title.)

The plaintiff, a body politic and corporate in law of the State of New Jersey, says that—

(1) The defendant, John J. Slater, resides in the city of Passaic, in the county of Passaic and State of New Jersey;

(2) That the defendant, John J. Slater, is County Clerk of the county of Passaic and State of New Jersey, and has been continuously County Clerk of the county of Passaic since the thirteenth day of November, nineteen hundred and six;

(3) That by virtue of his office as County Clerk as aforesaid, he is Clerk of the Court of Common Pleas of the county of Passaic;

(4) That as clerk of said court from the thirteenth day of November, nineteen hundred and six, to the thirty-first day of December, nineteen hundred and twelve, he has collected fees, costs, allowances and other perquisites, which by law he received as such Clerk of the Court of Common Pleas, in the exercise of its jurisdiction in naturalization cases, the sum of $6,796.50, after deducting the amount remitted by him to the Secretary of the Department of Commerce and Labor;

(5) That it was the duty of the said defendant to keep an account of all such fees and moneys received by him for the use of the county of Passaic, and on or before the fifteenth day of each month to make a full itemized statement and return verified by oath to the collector of the county of Passaic all of such fees, costs, allowances, perquisites and percentages;

(6) That the said defendant has neglected and refused to make such account and pay over said moneys to the County Collector as required by law.

The plaintiff demands the said sum of $6,796.50, with interest thereon from the time said fees were paid to him, making in all the sum of $10,000.00.

J. W. DEYOE,
Attorney of Plaintiff.

NOTE: *Complaint from Freeholders of Passaic* v. *Slater (held good by Court of Errors), 90 A. 377; reversing, Supreme Court, 84 L. 589; 88 A. 313.*

No. 190. COMPLAINT. ACTION BY HUSBAND FOR VALUE OF WIFE'S SERVICES AS NURSE FOR DECEASED.

Essex County Circuit Court.

(Title.)

1. Plaintiff, residing at 54 Parrow street, Orange, New Jersey, says, that from March 1, 1909, to December 10, 1913, at (*lay venue*) plaintiff rendered services to Mary Eagan, deceased, in her lifetime, at her request, being nursing and household services, according to the bill of particulars hereto annexed.

2. For said services said Mary Eagan, deceased, in her lifetime, undertook and promised to pay plaintiff what the services were reasonably worth.

3. The same were reasonably worth one thousand eight hundred and sixty dollars.

4. The said Mary Eagan, deceased, in her lifetime, paid the plaintiff fifty dollars, which he has credited against the amount herein claimed.

5. The said Mary Eagan is dead and the defendant has been appointed administratrix of her estate by the Surrogate of Essex county.

6. Plaintiff duly presented his claim with said defendant, who disputes it.

Plaintiff demands as damages $1,860.00, with interest thereon from December 10, 1913.

ARTHUR B. SEYMOUR,
Attorney of Plaintiff.

NOTE: *Complaint from Wooster* v. *Egan, 97 A. 291. Judgment for plaintiff affirmed by Court of Errors.*

No. 191. COMPLAINT AGAINST EXECUTOR FOR COMPENSATION FOR SERVICES RENDERED DECEASED.

Hudson County Circuit Court.

Hudson County.

(Title.)

The defendant was summoned to answer unto said plaintiff therein in an action at law upon the following complaint:

Plaintiff, Julia E. Frean, of the city of Bayonne, Hudson county, New Jersey, says that—

FIRST COUNT.

From September 27th, 1907, to September 27th, 1913 (*venue*), plaintiff rendered services to the defendant's testatrix at her request, as her housekeeper and companion.

2. For said services, defendant's testatrix undertook to pay plaintiff what the same were reasonably worth.

3. The same were reasonably worth $1,800.00, which sum was due for the same on the day last mentioned.

4. Defendant's testatrix has not paid the same.

5. On or about September 27th, 1913, Cornelia A. B. Hudson died, having first made and executed her last will and testament, which was duly proved before the Surrogate of Hudson county, wherein and whereby she appointed the defendant, Edward J. Hudson, her executor.

6. Plaintiff, by her attorney, R. Lewis Kennedy, presented a verified claim to said executor on or about November 24th, which claim has been disputed by said executor by notice served December 5th, 1913.

7. Said defendant has not paid the same.

SECOND COUNT.

1. From June 18th, 1910, to September 27th, 1913 (*venue*), plaintiff rendered services to defendant's testatrix, at her request, as nurse during her last illness.

2. For said services defendant's testatrix undertook to pay plaintiff what the same were reasonably worth.

3. The same were reasonably worth $2,359.18, which sum was due for the same on the date last mentioned.

4. Defendant's testatrix has not paid the same.

5. On or about September 27th, 1913, Cornelia A. B. Hudson died, having first made and executed her last will and testament, which was duly proved before the Surrogate of Hudson county, wherein and whereby she appointed the defendant, Edward J. Hudson, her executor.

6. Plaintiff, by her attorney, R. Lewis Kennedy, presented a verified claim to said executor on or about November 24th, which claim has been disputed by said executor by notice served December 5th, 1913.

7. Said defendant has not paid the same.

Said two claims mentioned in the first count and the second count were included in one bill covering both items, a copy of which, together with the notice of dispute of claim, are hereto annexed.

Plaintiff demands:

1. On the first count, $1,800.00, with interest from September 27th, 1913.

2. On the second count, $2,359.18, with interest thereon from September 27th, 1913.

R. LEWIS KENNEDY,
Attorney for Plaintiff.

NOTE: *From Frean* v. *Hudson, 93 A. 582. Judgment for plaintiff affirmed by Court of Errors.*

NO. 192. COMPLAINT. ACTION FOR DAMAGES AGAINST PHYSICIAN FOR THE NEGLIGENT PERFORMANCE OF A SURGICAL OPERATION, LEAVING A GAUZE SPONGE IN PLAINTIFF'S ABDOMEN.

(Title.)

Plaintiffs, Sadie E. Niebel and John P. Niebel, her husband, of Vineland, Cumberland county, New Jersey, says:

FIRST COUNT.

1. At the time herein stated, defendant, John H. Winslow, was a physician and surgeon, practicing in Vineland, Cumberland county, New Jersey.

2. In October, 1913, at (*lay venue*), plaintiff, Sadie E. Niebel, being then sick, plaintiffs employed defendant as a physician and surgeon to perform a surgical operation upon the plaintiff, Sadie E. Niebel, and to attend her and cure her, and for that purpose, defendant for reward, undertook, as a physician and surgeon, to perform said service for plaintiffs.

3. Defendant did not use due and proper care or skill in performing said surgical operation upon said Sadie E. Niebel, or in the cure of her sickness in this, that the defendant so negligently and unskillfully conducted himself in performing said surgical operation, that he negligently left a sponge which had been used in performing said operation, in the abdomen of said Sadie E. Niebel and negligently permitted said sponge to remain therein for several weeks causing said Sadie E. Niebel to become very ill, sick, sore and disordered, and to remain sick, sore and disordered.

That by reason of defendant's negligence, as aforesaid, said Sadie E. Niebel was obliged to undergo other surgical operations.

4. That during Sadie E. Niebel's said sickness, while she was under defendant's care, as aforesaid, defendant curetted the cavity of her uterus, and so unskillfully and negligently performed said curetting that in so doing, defendant punctured her said uterus, causing said Sadie E. Niebel to suffer great pain and injury.

5. By reason of the premises, the plaintiff was injured in her health and constitution; she suffered great pain, was weakened in body, suffered great anguish of mind, and has been and still is sick, sore and disordered and disabled from properly performing her duties as a wife.

SECOND COUNT.

1. By reason of the premises, the plaintiff, John P. Niebel, was deprived of his said wife's services, during the time of her

said illness, and still is deprived to a great extent of his said wife's services, and also was put to great expense for doctors' bills, nurses' bills, hospital bills and medicine bills, in endeavoring to bring about a cure of his said wife, Sadie E. Niebel, from her said sickness, which was prolonged and increased by said unskillful, negligent and improper conduct of defendant.

The plaintiff, Sadie E. Niebel, demands $8,000 damages on the first count, and the plaintiff, John P. Niebel, demands $2,000 damages on the second count.

CHARLES P. BREWER,
Attorney for Plaintiff.

NOTE: *Complaint from Niebel* v. *Winslow, 95 A. 995.*

No. 193. COMPLAINT. ACTION FOR DAMAGES FOR DESTRUCTION OF PLAINTIFF'S FACTORY AND CONTENTS SET AFIRE BY SPARKS FROM DEFENDANT'S PASSING LOCOMOTIVE.

New Jersey Supreme Court.
Cumberland County.

(Title.)

Plaintiff, a corporation of the State of New Jersey, having its principal office at Bridgeton, New Jersey, says that—

1. On July 4th, 1905, at Trenton, in the county of Mercer, to wit, at Bridgeton, in the county of Cumberland, aforesaid, plaintiff was lawfully seized and possessed of a certain tract of land in the city of Bridgeton, aforesaid, described as follows: (*description of land*).

2. There was erected at that time upon said lands certain buildings, to wit (*description of buildings*), all of great value, and which said property constituted a going plant for the manufacture of glassware, and was then and there being used and employed by the plaintiff in its business as a manufacture of glassware on a large scale and from which it derived great gain and profit.

3. The defendant was and still is a body corporate organized and existing under the laws of the State of New Jersey, engaged

in the conduct and operation of a steam railroad at said city of Bridgeton and was then and there the owner and possessor of a strip of land adjoining the said lands of the plaintiff, and extending along the easterly side of the plaintiff's said lands for the whole length thereof, upon and over which said strip of land there was constructed and laid a railroad track of the defendant and there used by it in operating its said steam railroad as aforesaid.

4. On the day and year last aforesaid, at the city of Bridgeton, aforesaid, the defendant owned and possessed certain locomotives which were then and there drawing railroad cars, under the care, government and control of certain of defendant's servants, who were running and directing said engines along and over defendant's tracks, near to and adjoining plaintiff's said buildings, factory, plant, premises, glassware, tools, machinery and appliances as aforesaid. The said engines then and there being propelled over said tracks by steam generated and produced by coal fires within the engines, which fires were then and there maintained by the defendant's servants.

5. It became and was the duty of the defendant, its servants, agents and employes then and there to so care for, manage, control, guard and maintain the said fires in said engines so that the fires, or sparks therefrom, would not escape from said engines and set fire to the said property of the plaintiff, and to keep and maintain upon said engines and provide them with a screen or screens, or covers on the smoke stack or smoke pipes, and such other necessary and proper appliances to prevent the escape of fire and sparks therefrom and from the smoke pipes or smoke stacks thereon, while said engines were being propelled over said railroad track by, near and adjacent to plaintiff's said lands, premises and property, so that fire or sparks of fire therefrom could not fall out, blow out, or escape from said locomotives upon the buildings, premises, plant and property of plaintiff along said track, or where said fire might, could or would spread to or run upon the plaintiff's premises and property and burn or endanger them. It was the duty of defendant to so manage its said engines and maintain them as to prevent the escape of fire and sparks therefrom as aforesaid, and to take and use all

practicable means to prevent the communication of fire from said engines while passing along and being upon said tracks adjacent to plaintiff's plant, property and premises.

6. The defendant disregarding its duty in this behalf, to wit, on the day last aforesaid, at the city of Bridgeton, aforesaid, not regarding the safety and preservation of the property of said plaintiff did so carelessly, negligently and improperly maintain, manage and control its said engines, and fail to provide proper screens or covers on the smoke stacks of said engines and did so fail to provide necessary and proper appliances for guarding against the escape of fire or sparks from its said engines, and did so carelessly and negligently fail to use all practicable means to prevent the escape of fire and to prevent the communication of fire from said locomotives so used by defendant as aforesaid, that fire and sparks or fire from the said fires of defendant, kept and maintained by it in said engines, did escape from said locomotives of defendant, while passing over said railroad track, near said plaintiff's said plant and property, and while so under the care, control and direction of defendant's said servants, and did fall upon and were cast, thrown and blown upon the said plant, property and premises aforesaid, and did set fire to, burn up and destroy (*description of property destroyed*) and other property of plaintiff all of great value.

7. By and through the carelessness, negligence and mismanagement of said defendant, its servants, agents and employees in not properly maintaining, managing and controlling its said locomotives, and in not caring for, guarding, controlling and properly managing said fires in said locomotives, and by carelessly and negligently failing to provide and maintain proper screens, covers, spark arresters and other proper and necessary and available appliances upon said locomotives, to prevent the escape of said fire or sparks therefrom, and in failing to use all practicable means to prevent the communication of fire from said locomotives, while being upon said tracks adjacent to plaintiff's said property, the aforesaid buildings, etc., and other property of the plaintiff were then and there totally burned, consumed, destroyed and lost to said plaintiff by the escape of fire and sparks from said engines as aforesaid.

Plaintiff demands as damages $250,000.

(*Add count setting up loss of personal property in factory, loss of profits on orders received, loss or profits during time rebuilding, etc.*)

No. 194. PARAGRAPH CLAIMING LOSS OF PROFITS AND COST OF REBUILDING.

By reason of defendant's negligence as aforesaid, and the consequent burning and destruction of plaintiff's premises and property as aforesaid, the plaintiff was and is deprived of the use of its said plant, and of the profits of the operation thereof, for a long space of time, to wit, from thence hitherto, and for a long space of time will lose and be deprived of the use and enjoyment, benefit, profits and advantages of its plant, premises, buildings and property, and will be obliged to expend large sums of money in the restoration and rebuilding of said plant and buildings.

No. 195. PARAGRAPH CLAIMING LOSS OF PROFITS ON ORDERS RECEIVED.

In and about said buildings and factory plaintiff had accumulated in the orderly course of its business, a large and valuable stock (*describing same*) suitable and necessary to keep on hand, and plaintiff was then and there engaged in its business, in the orderly course of trade and manufacture, from which said business it was then and there, and for a long time theretofore had been acquiring great gain and profit.

By reason of defendant's negligence as aforesaid, and the consequent burning and destruction of plaintiff's property, including all the stock on hand, which was rendered valueless for its intended purpose, plaintiff not only lost the sale thereof but will be put to great expense to fill orders therefor from its customers to whom the same had been sold, and plaintiff will be deprived of the use of the plant as a glass manufacturing plant for a long space of time and will be obliged to expend large sums of money to restore the same.

NOTE: *The above complaint and paragraphs are founded upon the declaration filed in the case of More-Jonas Glass Co. v. West Jersey & Seashore R. R., 72 A. 65; 76 L. 708; 76 L. 9; 69 A. 491. Judgment for plaintiff was affirmed by the Court of Errors.*

NO. 196. COMPLAINT. ACTION FOR PERSONAL INJURIES SUSTAINED BY EMPLOYEE OF ONE RAILROAD BY BEING STRUCK BY CARS OF ANOTHER ROAD USING FIRST COMPANY'S YARDS.

(Title.)

The complaint of John McNally, residing at 225 Third Street, Jersey City, Hudson County, New Jersey, shows:

1. August 20, 1912, the defendant, at (*lay venue*) Pennsylvania Railroad Company, a corporation of the State of Pennsylvania, was a common carrier, and as such was on said date the owner and operator of a certain drill engine and train of freight cars attached thereto, which by the defendant, Harvey Remsen, who then and hitherto was a citizen of the State of New Jersey, and resided at No. 252 Seventh Street, in Jersey City, Hudson County, and said State, as its engineer and servant, did on said date run, operate and propel, in and through various places in Jersey City, including the yard and premises of the Hudson & Manhattan Railroad Company, at the corner of First and Greene Streets.

2. At said time and place the said engine and train, under the control and direction of the defendant, Harvey Remsen, was standing at rest in and upon the said premises of the Hudson & Manhattan Railroad Company, upon a certain railroad track therein laid; and the plaintiff, John McNally, was also lawfully in and upon the said premises as a servant and employee of the said Hudson & Manhattan Railroad Company, and as such was lawfully upon the said railroad track and lawfully crossing same.

3. While so engaged in crossing said track, the defendant, the Pennsylvania Railroad Company, by its said servant, the defendant, Harvey Remsen, negligently and unlawfully drove and propelled the said engine against the plaintiff, injuring him as hereinafter set forth.

4. Said injury occurred through the negligent and careless conduct of the defendant, Pennsylvania Railroad Company, and its servant, the defendant, Harvey Remsen, in starting the said train without giving warning to the plaintiff of its intention so to do, in failing to exercise proper care and vigilance to ascertain the presence of the plaintiff on the said track, and in failing to have and maintain a sufficient and adequate crew to ascertain the presence of the plaintiff on the said track and to warn him of the intended movement of the said train.

5. Plaintiff was thereby severely crushed, bruised and wounded upon and about the head, body and legs, and thereby sustained a fracture of the pelvic bone, and has hitherto, and will for the remainder of his life undergo great pain and suffering, and has been compelled to lay out and expend large sums of money, to wit, the sum of $2,000.00 in and about being cured of his said injuries, and has hitherto and will in the future suffer the loss of great gains, which he would have otherwise made in and about his ordinary business, to wit, in all $5,000.00, and was otherwise greatly injured and damnified.

Plaintiff demands as damages the sum of $25,000.00.

RICHARD DOHERTY,
Attorney of Plaintiff.

NOTE: *Complaint in McNally* v. *Penna. R. R., 95 A. 975. Judgment for plaintiff affirmed by Court of Errors.*

No. 197. COMPLAINT—ACTION OF NEGLIGENCE AGAINST RAILROAD COMPANY—ACCIDENT AT CROSSING.

New Jersey Supreme Court.
Atlantic County.

(Title.)

Plaintiff, S. A. M., residing at says that:

1. The defendant before and at the time of the commission of the grievances hereinafter mentioned, was the owner, operator and manager of a certain steam railroad, extending from Atlantic City, in the county of Atlantic, New Jersey, to Camden, in the

county of Camden, New Jersey, and was in the possession of and used, managed and propelled along said railroad certain locomotives and cars for the carriage and conveyance of passengers and freight and for hire and reward.

2. At the time of the commission of said grievances there was and still is a common or public road, street or highway situate in the township of Galloway, in the county of Atlantic, New Jersey. The said steam railroad aforesaid crosses said public street or highway at grade at or near Germania, in the township, county and state last aforesaid, which said public road and crossing is for all persons to travel, pass and repass upon and along, on foot or with horses, carriages, wagons, automobiles and the like, at all time, safely and at their will.

3. Plaintiff on the 24th day of June, 1907, in the township of Galloway, to wit, at Mays Landing, Atlantic county, aforesaid, was seated in a certain wagon drawn by a horse and was riding in and along said public road and was lawfully, carefully and cautiously and without negligence crossing the tracks of the said defendant at the point where the tracks of the defendant company crosses the aforesaid public road.

4. Notwithstanding the duty of the defendant to give audible signal of the approach of its trains and locomotives by sounding a whistle or bell, and notwithstanding the duty of the defendant to keep said crossing free from all obstruction that would hinder, obstruct or prevent a view of the tracks of the defendant company and a view of the approaching trains, the defendant not regarding its duties in that behalf, caused and permitted buildings, cars, brush and shrubbery to grow upon its said roadway and obstruct and prevent a view of its tracks and approaching trains; and carelessly, recklessly, negligently and improperly drove, governed and directed a certain locomotive and train of cars on the said tracks, and recklessly, negligently, and improperly failed, refused and neglected to give audible signal of the approach of its said locomotive and cars by sounding a whistle or bell, or by giving other additional warning of said locomotive and train.

5. By and through said carelessness, recklessness and negligent conduct of the said defendant by its servants in that behalf,

the said plaintiff and the said horse and wagon in which the plaintiff was seated was then and there struck by said locomotive and train of cars with great force and violence, and the plaintiff was then and there thrown with great force and violence to and upon the ground, by means thereof the plaintiff became, was and still is, sick, sore, lame, diseased, distorted and permanently injured and so remains and continues for a long space of time, to wit, from thence hitherto, and has suffered and undergone great pain and agony, both of mind and body.

Plaintiff demands as damages, $25,000.

NOTE: *Above complaint is based upon declaration filed in case of Sarah Mittelsdorfer* v. *West Jersey and Seashore Railroad. Judgment for plaintiff for $7,000 affirmed by Court of Errors, 73 A. 538, 77 L. 698.*

No. 198. COMPLAINT IN REPLEVIN. GOODS WRONGFULLY ACQUIRED AND DETAINED.

(Title.)

Plaintiff, residing in the city of Newark, county of Essex, and State of New Jersey, says:

(1) That on or about the first day of June, nineteen hundred and fourteen, at (*lay venue*), plaintiff was, and ever since has been the owner of the goods and chattels shown on the schedule hereto annexed and marked "Schedule A."

(2) On the aforesaid date was, and ever since has been lawfully entitled to the possession of the same.

(3) On the aforesaid date, at Newark, New Jersey, the defendant did wrongfully take said goods and chattels in the possession of the plaintiff and have ever since wrongfully detained, and still detain the same.

(4) Plaintiff demands possession of the said goods and chattels, and damages for unlawfully retaining same.

Dated August , 1914.

JOHN A. BERNHARD,
Attorney for Plaintiff.

NOTE: *Complaint in Jos. Marrone Cont. Co. v. Monahan, 95 A. 984. Judgment for defendant reversed by Court of Errors. When defendant rightfully acquired possession of goods—a demand for possession is a condition precedent and should be alleged.*

No. 199. COMPLAINT—REPLEVIN FOUNDED UPON PURCHASE OF GOODS AT EXECUTION SALE.

Supreme Court of New Jersey.
Essex County.

(Title.)

Plaintiff, Wilkinson, Gaddis & Company, a corporation having its principal office at No. 866 Broad street, in the city of Newark, New Jersey, says that:

First. On November 25, 1913, the plaintiff, Wilkinson, Gaddis & Company, recovered a judgment in the First District Court, in the city of Newark, against George Bohlen for $393.61 damages, and $23.25 costs of suit.

Second. That on November 26, 1913, the above-named George Bohlen was the owner of the following list of goods, wares and merchanidse, to wit:

Two show cases, 3 scales, 1 coffee mill, 1 register, 500 cans peas, 100 boxes sardines, assorted; 50 cans lobster, assorted.

Twenty-five cans salmon, assorted; 12 cans shaker salt, 21 cans Campbell's soup, assorted; 10 cans Heinz baked beans, 26 boxes Jello, 10 cans Van Camp's spaghetti, all bottled catsup, vinegar, blueing, sweet oil, jellies, all polish, blacking, and all other goods and chattels in said store, No. 217 Mulberry street, Newark, N. J.

Third. That on November 25, 1913, execution was issued on said judgment at the said court to Edgar A. Hartdorn, sergeant-at-arms of said court. That levy was made under said execution by said sergeant-at-arms on the said goods, wares and merchandise on November 26, 1913.

Fourth. That on December 1, 1913, sale was made under said execution and levy of said goods, wares and merchanidse to the plaintiff for $125.00.

Fifth. That said defendants now have possession of said goods, wares and merchanidse.

Sixth. That on the day of in (*lay venue*), plaintiff made written demand of defendants for the return of said goods, wares and merchandise.

Seventh. Defendants then and there wrongfully refused to deliver the said goods, wares and merchandise to the plaintiff, then in said store, No. 217 Mulberry street, Newark, and then and now wrongfully detain the same.

Plaintiff demands possession of said goods, wares and merchandise, or, in case they cannot be returned to plaintiff, then $1,000 damages for said goods and $300 damages for their detention.

COULT & SMITH,
Attorneys of Plaintiff.

NOTE: *Complaint filed in Wilkinson, Gaddis & Co. v. Bohlen, 97 A. 279. Judgment for defendant reversed and new trial granted by Court of Errors.*

No. 200. COMPLAINT IN REPLEVIN. ACTION WHERE GOODS WERE IN CUSTODY OF RAILROAD FOR SHIPMENT.

Hudson County Circuit Court.

(Title.)

Plaintiff resides in the village of Hempstead, in the State of New York, and says that:

(1) On January 23d, 1914, plaintiff was and ever since has been the owner of the following goods and chattels, to wit: Consignment of hides received by the defendant Pennsylvania Railroad Company in lighters 432 and 424, being part of the cargo of the steamship El Oriente, of the value of $15,000.

(2) On said date the plaintiff was and ever since has been lawfully entitled to the immediate possession of the same.

(3) On said date at or near pier K, Harsimus Cove, and in the Pennsylvania Railroad Company's yards in the city of Jersey City, Hudson county, New Jersey, the defendants wrongfully took said goods and chattels from the possession of the plaintiff, and ever since have wrongfully detained and still wrongfully detains the same.

(4) On January 23d, 1914, the plaintiff demanded possession of said goods and chattels from the defendants, and said demand was refused.

Plaintiff demands possession of said goods and chattels and five thousand dollars damages for their detention.

MCDERMOTT & ENRIGHT,
Attorneys for Plaintiff.

NOTE: *Complaint in O'Neill* v. *Central Leather Co., 94 A. 789, 96 A. 1102, 87 L. 552.*

No. 201. COMPLAINT FOR NEGLIGENTLY PERMITTING SNOW TO MELT AND THE WATER THEREFROM RUN ON SIDEWALK AND FREEZE, WHEREBY PLAINTIFF, WALKING ON SIDEWALK, SLIPPED ON ICE SO FORMED, FELL AND WAS INJURED.

New Jersey Supreme Court.
Mercer County.

(Title.)

Plaintiff, residing at ....., says that:

1. On the 8th day of January, 1910, and for a long time prior thereto, to wit, one week, Mary E. Lee, now deceased, was the owner of a certain lot of land, with a dwelling house thereon erected, abutting upon and known and designated as No. 435 East State street, a public highway in the city of Trenton, in the county aforesaid.

2. In front of which premises the said Mary E. Lee, deceased, during all that time maintained on the sidewalk of said street a pavement of flagstones, the said pavement being of a certain width, to wit, ten feet, and contiguous to and adjoining the said

pavement maintained an open yard or lawn between the line of the said pavement and the front wall of the said house.

3. About a week prior to the date last above mentioned a snow storm occurred in the said city of Trenton, in the county aforesaid, as a result of which great quantities of snow fell and lodged on the said sidewalk or pavement in front of said premises, No. 435 East State street, in the city of Trenton, then owned by the said Mary E. Lee, now deceased, where it remained until the day next succeeding the said snow storm, when the said Mary E. Lee, now deceased, by her servants and agents in that behalf, removed the aforesaid large quantities of snow from the sidewalk in front of said premises, where it lodged in the said storm, and for her own convenience deposited the snow so removed from the said sidewalk upon the said yard or lawn in front of the said house, which said yard or lawn at that time was, and now is, contiguous to and abutting on the said sidewalk, and was situated between the said sidewalk and the front wall of the said house, and there permitted the said snow to remain for a long space of time, to wit, two weeks.

4. It then and there became and was the duty of the said Mary E. Lee, now deceased, to use due and proper care in the placing of sufficient guards and protection around the said snow, while it remained deposited on the said lawn or yard aforesaid, so that the water resulting from the melting of the said snow could not run along and upon the said sidewalk in front of said premises, and there congeal and harden into ice, and render the said sidewalk unsafe and insecure for the passage on foot of persons lawfully being in and upon the said highway and walking upon or crossing the said sidewalks.

5. The said Mary E. Lee, now deceased, not regarding her duty in that behalf, did not use due and proper care in the placing of sufficient guards or protection around the said snow, while it remained deposited on the said yard or lawn aforesaid, so that the water resulting from the melting of the said snow could not run along and upon the said sidewalk in front of said premises and there congeal into ice and render the said sidewalk unsafe and insecure for the passage on foot of persons lawfully being in and upon the said highway, and walking upon or cross-

ing the said sidewalk, but wholly failed and neglected so to do and carelessly, negligently and wrongfully, when the said snow melted as aforesaid, allowed and permitted the water resulting from the same to run along and upon the said sidewalk in front of said premises, and there permitted it to remain, and carelessly, negligently and wrongfully allowed and permitted the said water, while it remained upon the said sidewalk as aforesaid, to harden and congeal into ice, and carelessly, negligently and wrongfully allowed and permitted the said ice, when formed as aforesaid, to be and remain on the said sidewalk in front of said premises for a long space of time, to wit, two weeks.

6. By reason of the premises, she (the plaintiff), on the day and year last aforesaid, and at night time of said day, while lawfully and carefully walking upon the said sidewalk, and without any fault or negligence on her part, slipped on the ice congealed on the said sidewalk as aforesaid, lost her footing and fell, and with great force and violence was thrown to the ground.

7. By means whereof the said Elizabeth M. Aull, the plaintiff, sustained severe internal and external injuries and derangements of a permanent nature, one of her legs was fractured and broken, and she was then and there otherwise greatly bruised, wounded and injured, so that her life was then and there greatly despaired of; and also, by means of the premises, the said plaintiff, Elizabeth M. Aull, was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, from thence hitherto, during all of which time the said plaintiff suffered and underwent great pain, and in the future will suffer and undergo great pain, and will continue to be sick, sore, lame, wounded and disordered the rest of her natural life, whereby she has been deprived of great divers gains and profits, and in the future will lose and be deprived of great gains and profits, to wit, from thence hitherto, during the rest of her natural life; and also, by means of the premises, the said plaintiff was forced to expend large sums of money, to wit, one thousand dollars, for drugs, medicines, nursing and medical attendance and will be forced to expend large sums of money

in the future for drugs, medicines, nursing and medical attendance, in and about endeavoring to cure and heal herself of the injuries sustained as aforesaid, to wit, at Trenton, in the county of Mercer aforesaid.

8. The said Mary E. Lee died on the 8th day of September, 1910, at the city of Trenton, in the county aforesaid, leaving a last will and testament, which was duly probated before the surrogate of the county of Mercer, in and by the terms of which said last will and testament the said Mary E. Lee gave, devised and bequeathed all of her estate, both real and personal, to the said Albert W. Lee, the defendant herein, absolutely, and nominated, constituted and appointed him sole executor of the said last will and testament; that the said Albert W. Lee has duly qualified as such executor and assumed the burden of the administration of the said estate, and that letters testamentary were duly issued to him by the surrogate of the county of Mercer, a certified copy of which said last will and testament and letters testamentary issued thereon by said surrogate to the said Albert W. Lee, the said plaintiff now brings here into court, ready to be produced and proved.

9. At the time of her death, the said Mary E. Lee was seized in fee simple absolute of certain messuages, lands and tenements, including the lands and tenements hereinbefore mentioned, situate in the city of Trenton, in the county aforesaid, of great value, to wit, of the value of $25,000.00, all of which were devised absolutely by said last will and testament of the said Mary E. Lee to the said defendant, Albert W. Lee.

10. Plaintiff demands as damages the amount of $10,000.

.....

Attorney of Plaintiff.

NOTE: *Adapted from declaration in Aull* v. *Lee, 84 L. 155, 85 A. 1018, held good by Supreme Court. See Lightcap* v. *Lehigh Valley R. R., 94 A. 85, 87; 87 A. 64.*

No. 202. COMPLAINT IN TRESPASS FOR ENTRY UPON PLAINTIFF'S LANDS AND DESTROYING FENCE.

Camden County Circuit Court.

(Title.)

Plaintiff, residing at ....., says that—

1. On the tenth day of June, nineteen hundred and ten, and on divers other days and times between that day and the commencement of this suit, with force and arms broke and entered a certain close of the plaintiffs situate in the city and county of Camden and State of New Jersey and more fully described as follows:

2. Defendant then and there forced and broke open and broke to pieces, damaged and spoiled divers gates and fences of the plaintiffs of great value, to wit, of the value of ten thousand dollars, then standing and being in and upon the said close; and certain posts, locks, staples and hinges of the said plaintiffs of great value, to wit, the value of ten thousand dollars, respectively affixed to the said gates and fences and with which the same were then and there respectively locked and fastened, and with feet in walking thrust down, trampled upon, consumed and spoiled the grass and earth of the said plaintiffs of great value, to wit, the value of ten thousand dollars, then and there growing and being, and with certain beasts of burden and with the wheels of divers carts, wagons and other carriages, crushed, damaged and spoiled other grass and earth of the said plaintiffs of great value, to wit, of the value of ten thousand dollars, then and there growing and being, and with the feet of the said beasts of burden and the wheels of said carts, wagons and other carriages tore up, subverted, damaged and spoiled the earth and soil of the said close, to wit, from the day and year last aforesaid, hitherto and thereby and therewith during all the time aforeasid, greatly encumbered the said close respectively and hindered and prevented the plaintiffs from having the use, benefit and enjoyment thereof, in so large and ample a manner as they might and otherwise would have done, and many other wrongs then and there did to the damage of the plaintiffs.

Plaintiff demands as damages, $10,000.

NOTE: *Adapted from declaration in Schmidt* v. *Spaeth, 90 A. 1003; 82 L. 575; 83 A. 242.*

No. 203. COMPLAINT IN TRESPASS AGAINST PUBLIC OR INDIVIDUAL MEMBERS THEREOF TO EXCLUDE THEM FROM CERTAIN MEADOW OR MARSHLAND WASHED BY WATER OF RIVER.

New Jersey Supreme Court.

Salem County.

(Title.)

Plaintiff, W. P., residing at ....., says that—

1. The defendant on the second day of November, nineteen hundred and eleven, at Salem, in the county of Salem aforesaid, and within the jurisdiction of this court, with force and arms, &c., broke and entered the close of the plaintiff, to wit:

All that certain tract or meadow land or marsh, situate in the township of Lower Penn's Neck, county of Salem and State of New Jersey, lying and being within the bounds of what is known as the Supanna Meadow Bank Company, bounded on the south and west by Salem creek and Delaware river, on the north and east by upland of William M. Perrine, trustee, James Butcher, William Johnson, Millicant B. Taylor, and others, excepting, however, therefrom a piece or tract of land known as Hickory Island; ..... to wit, at Salem aforesaid, and that his feet in walking, trod down, consumed and spoiled the grass and herbage growing thereon of great value, to wit, of the value of one hundred dollars.

2. Defendant did then and there force and break open, break to pieces and damaged and spoiled divers gates and fences of the said plaintiff of great value, to wit, the value of one hundred dollars.

3. Defendant also did then and there put, place and erect and caused to be put, placed and erected, divers blinds and other structures in and upon said close and kept and continued said blinds and other structures so there put, placed and erected, without the leave or license and against the will of the said

plaintiff for a long space of time, to wit, from the said second day of November, nineteen hundred and eleven.

4. Defendant thereby and therewith during all the time aforesaid, greatly encumbered the said close aforesaid, and hindered and prevented the said plaintiff from having the use, benefit and enjoyment thereof, in so large and ample a manner as he might or otherwise would have done, to wit, at Salem aforesaid, and during all of said period last mentioned did remain in and upon said close and gun, hunt and fish thereon without the leave and license and against the will of the said plaintiff.

SECOND COUNT.

5. Defendant on the second day of November, nineteen hundred and eleven, at Salem, in the county of Salem, and within the jurisdiction of this court, with force and arms did break and enter certain lands and premises, situate in the township of Lower Penn's Neck, in the county of Salem aforesaid, of which the plaintiff was then and there the owner, occupant, lessee and licensee, to wit, the lands and premises more particularly described in the first count hereof, the same not being fresh meadow land.

6. Defendant did trespass on said lands and take with him and carry thereon a gun after public notice on the part of the plaintiff, as owner, occupant, lessee and licensee, of said lands, forbidding any trespass thereon, and without the leave and license and against the will of the said plaintiff.

7. Such notices were before that time posted conspicuously, adjacent to the highways bounding on said lands, and adjacent to all usual entrance ways to said lands.

Plaintiff demands as damages $100.00.

NOTE: *Complaint adapted from declaration in Perrine v. Warner, 93 A. 713. Judgment for plaintiff affirmed by Court of Errors.*

No. 204. COMPLAINT IN TROVER AND CONVERSION.

New Jersey Supreme Court.

Essex County.

(Title.)

Plaintiff, Corona Kid Company, a corporation organized and existing under and by virtue of the laws of Massachusetts, suing for the use of Corona Kid Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the State of Maine, says that—

1. On the seventh day of September, in the year nineteen hundred and five, at Newark, in the county of Essex aforesaid, was lawfully possessed as of its own property of certain goods and chattels, being hides or the skins of animals, or portions of the same, to wit, twenty-three thousand three hundred (23,300) pounds of grains from cordovan after tanning, of great value, to wit, of the value of twenty thousand dollars; two thousand four hundred and thirty-nine (2,439) dozen of shank splits, pickled, of great value, to wit, of the value of two thousand dollars; six hundred and forty-nine (649) pounds of pieces of dry tacked-out butt buffings from cordovan butts, of great value, to wit, of the value of eighty dollars.

2. Being so possessed, the said plaintiff afterwards, to wit, on the day and year aforesaid, at Newark aforesaid, casually lost the said goods and chattels out of his possession, and same afterwards, to wit, on the day and year aforesaid, at Newark, in the county aforesaid, came to the possession of said defendant by finding.

3. Yet the said defendant, well knowing the said goods and chattels to be the property of the said plaintiff, and of right to belong and pertain to it, but contriving and fraudulently intending craftily and subtly to deceive and defraud the said plaintiff in this behalf, hath not as yet delivered the said goods and chattels, or any or either of them, or any part thereof, to the said plaintiff, although often requested so to do, and hath heretofore wholly refused so to do.

4. Defendant afterwards, to wit, on the day last aforesaid, at Newark, in the county aforesaid, converted and disposed of the said goods and chattels to his own use to the damage of the said

plaintiff, twenty-three thousand dollars ($23,000); and the plaintiff saith that by reason of the premises, a cause of action arose to the said plaintiff to have of, and from the said defendant said sum of twenty-three thousand dollars ($23,000).

5. Thereafter, to wit, on the twentieth day of June, in the year nineteen hundred and ten, at Boston, in the State of Massachusetts, to wit, at Newark, in the county aforesaid, the said plaintiff did sell, assign, transfer and set over to the said Corona Kid Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the State of Maine aforesaid, its said cause of action against the said defendant.

6. Said defendant hath not as yet delivered the said goods and chattels, or any or either of them, or any part thereof, to said Corona Kid Manufacturing Company, a corporation organized and existing and by virtue of the laws of the State of Maine as aforesaid, although often requested so to do, and hath heretofore wholly refused so to do, whereby and by reason of the premises a cause of action hath accrued to the said plaintiff suing for the use of Corona Kid Manufacturing Company, a corporation organized and existing under and by virtue of the laws of the State of Maine as aforesaid, to have of and from the said defendant said sum of twenty-three thousand dollars ($23,000).

Plaintiff demands as damages $23,000.

NOTE: *Adapted from declaration in Corona Kid Co.* v. *Lichtman, 86 A. 371; 84 L. 363. Judgment for plaintiff affirmed by Court of Errors.*

No. 205. COMPLAINT BY VENDEE AGAINST VENDOR FOR DAMAGES FOR NON-PERFORMANCE OF AGREEMENT TO SELL LAND.

New Jersey Supreme Court.

Essex County.

(Title.)

Plaintiff, W. F., residing at , says that:

1. On August 19, 1909, at (*venue*), defendants made and entered into a certain contract in writing whereby the said defendants agreed to convey to the plaintiff, or his nominee, within

ten days from date of such agreement, three lots twenty-five feet by one hundred feet each, situate on the easterly side of North Brighton avenue, in the city of East Orange, New Jersey, in consideration of the delivery to them, the defendants, of a certain bond with the accompanying mortgage, in the sum of fifteen hundred dollars, made by one William M. Culbertson upon lands situate at Delaware Water Gap, Warren county, New Jersey, all as evidenced by said agreement, of which the following is a true copy:

August 19, 1909.

Received of William S. Fairchild, certain bond and mortgage made by Wm. M. Culbertson, conveying property at Delaware Water Gap, Warren county, New Jersey, said mortgage being for the sum of $1,500. In consideration of the delivery of the said mortgage, we hereby agree to convey to Wm. S. Fairchild, or his nominee, three lots 25 x 100 each, situate on the easterly side of North Brighton avenue, East Orange, N. J., begining about 110 feet North of Hilton street, said lots to be conveyed free and clear of incumbrances within ten days from above date.

LLEWELLYN REALTY COMPANY,
By R. J. FOARD, *Vice-President.*

FREDERICK R. HASSELMAN.

2. Upon the entering into of such contract aforesaid, to wit, on the day and year aforesaid, at Newark, in the county of Essex, aforesaid, he, the said plaintiff, paid unto the said defendants the consideration or purchase price for said lots, as evidenced by said agreement, to wit, by the delivery of a certain bond and accompanying mortgage made by William M. Culbertson, covering property at Delaware Water Gap, Warren county, New Jersey, said mortgage being in the sum of fifteen hundred dollars.

3. Thereupon the said plaintiff became and was the purchaser of said premises, and entitled to a good and lawful deed of conveyance to him of said premises according to the terms of such contract, and it thereupon became and was the duty of the said defendants to execute and deliver, or to cause to be executed

and delivered a good and lawful deed of conveyance to the said plaintiff, or his nominee, in accordance with the terms of such contract.

4. Thereupon, afterwards, to wit, on the day and year first aforesaid, at Newark, in the County of Essex, aforesaid, in consideration that the plaintiff at the special instance and request of the said defendants had then and there undertaken, and faithfully promised the said defendants to perform, and had performed all the agreements in the said contract or agreement of sale contained, on the said plaintiff's part and behalf, as such purchaser as aforesaid to be performed and fulfilled; they the said defendants undertook and faithfully promised to perform and fulfill all things in the said contract of sale contained, on the vendor's part and behalf to be performed and fulfilled.

5. Although he, the plaintiff, on the day and year first aforesaid, and until and upon the said twenty-seventh day of December, then next, at the City of Newark, in the County of Essex aforesaid, was ready and willing to perform and fulfill and in fact had performed and fulfilled all things in the said contract contained on his part and behalf, as such purchaser as aforesaid, to be performed and fulfilled to complete the said purchase, whereof the said defendants on the day and year last aforesaid had notice, and were then and there requested by the said plaintiff to make to him a good title to the said premises; yet the said defendants not regarding their promises and undertakings, but contriving and fraudulently intending to injure and defraud the said plaintiff in his behalf, did not nor would when they were so requested as aforesaid or at any time before or since, make or procure to be made to the said plaintiff a good title to the said premises, but hath hitherto wholly neglected and refused so to do, to wit, at Newark, in the County of Essex, aforesaid, contrary to the said contract or agreement of sale, and the said promise and undertakings of the said defendants.

6. By reason whereof he, the said plaintiff, hath been deprived of all the benefits and advantages which would have arisen from the completion of the said purchase, and hath been put to great expense, amounting in the whole to a large sum of money, to wit, the sum of three thousand dollars of like lawful money, in

endeavoring to procure such title as aforesaid, and to get said purchase completed, and hath lost all gains and profits which he might and would have otherwise made, and acquired for using and employing the said sums of money and bond and mortgage so paid as purchase price and duty as aforesaid, and other moneys provided and kept by him, the said plaintiff, for the completion of the purchase.

Plaintiff demands as damages $3,000.

NOTE: *Adapted from declaration in Fairchild* v. *Llewellyn Realty Co., 82 A. 924; 82 L. 423. Judgment for plaintiff affirmed by Court of Errors.*

No. 206. COMPLAINT FOR DAMAGES FROM OVERFLOW OF WATER COURSE.

New Jersey Supreme Court.

Essex County.

(Title.)

The plaintiff, Rocco Corbo, of the city of Newark, county of Essex and State of New Jersey, says that—

FIRST COUNT.

1. He is the owner of those certain tracts of land and premises, situate, lying and being in the city or township of Newark or Belleville, in the county of Essex and State of New Jersey, more particularly described as follows:

* * * * * * * * * *

2. That the defendant is the owner of lands and premises above described and to the westward of the plaintiff's lands as above described.

3. That prior to the 1st day of July, 1911, a small natural stream of water ran through the lands of both the plaintiff and defendant, originating on the land of the defendant and running from thence in a natural bed over and through the lands of the plaintiff on the extreme rear and along the northeasterly side of the plaintiff's aforesaid lots.

4. That on or about the first day of July, 1911, aforesaid, the said defendant enlarged the ditch or the bed of the aforementioned stream on the defendant's land thus causing an increased amount of water to accumulate in the said ditch and stream.

5. The defendant thereupon, without the knowledge or consent of the plaintiff came upon the lands of the plaintiff aforesaid, and through its agents, servants or representatives dug out and enlarged the ditch or bed of the aforementioned stream on the lands of the said plaintiff throughout its entire length on said lands of plaintiff, to the extent of from two to three and four times the original width and depth of the aforesaid stream. Thus causing damage to the lands of the plaintiff and increasing the volume of the flow of water thereover. All without the knowledge or consent of the plaintiff.

6. This increased flow of water over the lands of the plaintiff, caused by the defendant aforesaid, commenced on or about the first day of July, 1911, and has continued from thence hitherto. All without the consent and against the protest of the plaintiff.

7. Plaintiff's land has been much damaged thereby.

SECOND COUNT.

1. The plaintiff being the owner of the lands and premises above set out and described and in the manner above set out and described, the defendant, through its agents, servants or representatives, on or about the first day of July, 1911, and at divers other days and times from thence hitherto without the consent of the plaintiff, broke and entered the aforesaid lands and premises of the said plaintiff and then and there dug out a large quantity of the land of the said plaintiff of great value, to wit, the value of the sum of one thousand dollars, and took and carried away the same and converted and disposed thereof to its own use.

2. Plaintiff's land has been much damaged thereby.

THIRD COUNT.

1. The plaintiff being the owner of the lands and premises above set out and described and in the manner above set out and described, the defendant, through its agents, servants or representatives, on or about the first day of July, 1911, and at divers other days and times from thence hitherto without the consent of the plaintiff, broke and entered the lands and premises of the said plaintiff and with feet in walking trod down, trampled upon, consumed and spoiled the grass, shrubbage and land of the said plaintiff, of great value, to wit, of the value of one thousand dollars.

2. Plaintiff's land has been much damaged thereby.

Plaintiff demands as such damages, the sum of one thousand dollars ($1,000.00).

PEIRCE & HOOVER,
Attorneys of Plaintiff,
763 Broad St., Newark, N. J.

NOTE: *From Corbo v. East Orange and Ampere Land Co., 92 A. 345; 86 L. 563. Judgment for plaintiff affirmed by Court of Errors.*

No. 207. PETITION FOR COMPENSATION UNDER LIABILITY ACT.

PETITION.

Essex County Common Pleas.

(Title.)

To the Honorable Judges of the Court of Common Pleas:

Your petitioner, Julia Krauss, administratrix, respectfully shows:

1. That the said petitioner resides at 336 Central avenue, Newark, Essex county, New Jersey.

2. That she is the mother of James Henry O'Connor, deceased, who was employed as a helper on an automobile truck owned and controlled by the said respondent.

3. That the work of said decedent consisted of helping in and about said automobile truck delivering goods therefrom, in the county of Essex aforesaid; that on Wednesday, June 4th, 1913, while so engaged, he was killed by being run over by said automobile truck while in the performance of his duty; the injuries received by him at the time causing his death shortly thereafter, during which time the said decedent lingered in great pain and suffering.

4. That said decedent received medical attendance prior to his death, and at the time of the accident was earning eleven dollars weekly.

6. That by virtue of a provision of an act entitled "An act prescribing the liability of an employer to make compensation for injuries received by an employee in the course of employment, establishing an elective schedule of compensation and regulating procedure for the determination of liability and compensation thereunder," approved April 27, 1911, your petitioner, by reason of being the mother and administratrix of the said decedent, and by reason of the injuries to said decedent resulting in his death as aforesaid, is entitled to compensation from the said respondent, and that by virtue of said act the amount made payable periodically thereby as compensation to your petitioner by reason of said injury may be computed to one or more lump sum payments to the said petitioner.

Your petitioner therefore prays that your honor will determine the compensation to which she is entitled by reason of said injuries and death of said decedent, and will commute the said compensation into one lump sum, and will determine the compensation to which she is entitled as aforesaid, and reasonable medical services and medicine during the time of the injuries, to be paid by the said respondent to your petitioner, and that she may be awarded the costs of this proceeding.

And the said petitioner brings into court her letters of administration granted to the said petitioner by the Surrogate of

the County of Essex whereby it fully appears to the said court that the said petitioner is the administratrix of the said James Henry O'Connor, deceased.

JOHN E. HELM,
MATHEW J. READY,
Attorneys for Petitioner.

STATE OF NEW JERSEY, } ss.
COUNTY OF ESSEX, }

Julia Krauss, of full age, being duly sworn according to law on her oath saith: that she is the petitioner in the within petition named, and that the matters and things therein set forth are true to the best of her knowledge and belief.

Her
JULIA X KRAUSS.
Mark

Sworn to and subscribed before me, this 26th day of August, 1913, at Newark, N. J.

WM. E. DAVENPORT,
Notary Public of N. J.

NOTE: *From Krauss v. Fritz, 93 A. 578. Judgment for petitioner affirmed by Court of Errors.*

NO. 208. ANSWER TO PETITION FOR COMPENSATION UNDER LIABILITY ACT.

Essex County Court of Common Pleas.

(Title.)

The answer of the respondent, George H. Fritz & Sons, a corporation, to the petition of the petitioner, says:

1. That respondent has no knowledge of the alleged fact that said petitioner, Julia A. Krauss, was the mother of James Henry O'Connor, deceased, except as set forth in the petition, and for the purpose of putting the petitioner to proof thereon, the respondent denies that the said Julia A. Krauss was the mother of the said James Henry O'Connor, deceased.

2. The respondent admits that the said James Henry O'Connor, deceased, was killed on the 4th day of June, 1913, by being run over by an automobile truck, as alleged in the petition.

3. The respondent denies that part of paragraph 4 of the petition wherein it is alleged that prior to the said James Henry O'Connor's death, he was earning eleven dollars a week, and alleges that the said James Henry O'Connor, deceased, was earning the sum of six dollars a week as his weekly wages during the course of his employment with the respondent.

4. The respondent admits the allegations of paragraph 5 of the petition.

5. The respondent denies the allegations of paragraph 6 of the petition, and alleges that the said petitioner is not entitled to any compensation under the act by reason of the death of the said James Henry O'Connor, as the said respondent is informed and believes that the said petitioner was not actually dependent upon the said James Henry O'Connor, deceased, and for that reason is not entitled to any compensation.

6. The respondent alleges that it paid the sum of three dollars, which were the medical expenses as a result of the said accident.

Wherefore, the respondent submits that the said petition be dismissed with costs.

GEORGE P. LAIBLE,
Attorney of Respondent.

No. 209. ORDER QUASHING WRIT OF ATTACHMENT.

Supreme Court of New Jersey.

(Title.)

Application on behalf of the defendant in the above entitled cause being made to vacate and set aside the writ of attachment issued out of this Court on the order of Jacob L. Newman, a Supreme Court Commissioner, bearing date the 13th day of July, 1914, for the reason that the affidavit upon which said order was based does not set forth a cause of action at law and that the order of said attachment was improvidently and

improperly made, and due notice of said application having been given, and the argument of the respective counsel having been heard, and it appearing to the Court that the affidavit on which said order was made directing the issuing of said writ of attachment, did not and does not set forth a cause of action at law:

IT IS ORDERED, that the order of Jacob L. Newman, Supreme Court Commissioner, directing the issue of the writ of attachment in this cause, bearing date the 13th day of July, 1914, be and the same is hereby vacated, and the said writ of attachment be and the same is hereby discharged, vacated and set aside, together with the levy made thereunder.

Let the above rule be entered.

WILLIAM S. GUMMERE,
Chief Justice.

Dated August 3, 1914.

Entered August 6, 1914, on motion of

RULIFF V. LAWRENCE,
Attorney for Defendant.

NOTE: *From Hanford v. Duchastel, 93 A. 586. Held to be a final judgment and reversible by appeal.*

NO. 210. NOTICE OF MOTION TO QUASH WRIT OF ATTACHMENT.

(Title.)

Please take notice that I shall apply to his Honor, William S. Gummere, a Justice of the Supreme Court of the State of New Jersey, in the City of Newark and State of New Jersey, on Monday, the third day of August, next, at the hour of ten o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, for an order setting aside and vacating the attachment in the above entitled cause, as improvidently issued, because the order therefor was made upon a non-sufficient affidavit, and that it did not set forth a cause of action at law

against the said defendant, and therefore, did not under the statute authorize an order directing the issue of said attachment.

Dated July 27th, 1914.

Yours respectfully,
RULIFF V. LAWRENCE,
Attorney for Defendant,
appearing specially.

To
Howard Isherwood, Esq.,
Attorney for Plaintiff,
No. 738 Broad St.,
Newark, N. J.

NOTE: *From Hanford* v. *Duchastel, 93 A. 586.*

Index to Forms.

	FORM.	PAGE.
ADMINISTRATOR—		
complaint—action by, for wrongful death of intestate who fell from balcony in defendant's premises	151	442
complaints by; see DEATH, pp. 569, 573.		
AFFIDAVIT—		
for summary judgment	29	277
AGREED STATEMENT OF FACTS—		
regardless of pleadings	40	284
for judgment without pleadings	41	286
appeal	36	282
ALIENATION OF AFFECTIONS—		
complaint for, of plaintiff's husband	110	369
complaint by wife for, plainntiff's husband, two counts	111	370
ALTERNATIVE—		
state of demand—against tenant and agent who collected rents	89	329
complaint by plaintiff in alternative for loss of goods against carrier	12	268
complaint against defendants in alternative, in contract of sale	13	269

ANSWERS.

ANSWER—		
to action on promissory note—want of consideration	105	363
to action to enforce agreement to assume mechanic lien claims, not legal liens	106	364
to action under death act, contributing negligence of deceased	107	366
to damage suit; contributing negligence, independent contractor and fellow servant	108	367
setting up, plaintiff being a foreign corporation without authority to do business in state, cannot maintain action	109	368
in ejectment by tenant in possession defending as to whole of premises	22a	273
in ejectment by tenant in possession defending as to part of premises	22b	273
in ejectment by landlord defending separately,	22c	274
in ejectment by landlord defending jointly with tenant in possession	22d	274

	FORM.	PAGE.
ANSWER—*Continued*—		
in action of negligence—contributory negligence of plaintiff	98	352
order striking out defenses in	73	315
several defenses	18	272
to action against devisee, denying liability of ancestor for debt and confessing devise	99	354
to action against owner of automobile for injuries, denying driver was defendant's servant and alleging contributory negligence of plaintiff	100	356
to action by public officer for salary; alleging plaintiff to be an intruder and hence entitled to no pay	101	358
to action for broker's commissions, failure of purchaser to buy	102	359
to action for injuries at railroad crossing, locus in quo private way and plaintiff a trespasser	103	360
to action in replevin, claiming property under chattel mortgage	104	362
and counter-claim to action for boarding horses, neglect of bailee whereby horses were injured	92	333
and counter-claim, general form	15	271
and counter-claim to action by landlord against tenant for removal of fixtures and damages,	93	334
and counter-claim in mechanic lien action	94	340
and counter-claim in replevin action where goods were in custody of railroad for shipment	95	343
by carrier of goods denying liability under provisions in bill of lading	96	344
by corporation to suit by assignee of stockholder for failure to deliver stock	97	347
commencement of	14	270
general form	91	332
denial with new matter	17	271
denial	16	271
in action for false arrest against justice of peace	97a	351
ANIMALS—		
Board of Horses—		
complaint for reasonable price for	112	373
answer and counter-claim to, alleging neglect of bailee whereby horses sustained injuries	92	333
complaint for injuries by bite of vicious dog	116	376

	FORM.	PAGE.
APPEAL—		
grounds of, granting nonsuit	47	295
directing verdict for plaintiff	48	296
notice of, and grounds, act unconstitutional	63	305
notice of, and grounds	64	306
notice of, and grounds directing verdict of nonsuit	65	307
notice of, and grounds	37	282
statement of case on	36	282
ASSAULT AND BATTERY—		
complaint for, with sticks, &c., whereby plaintiff's eyesight destroyed	117	377
ATTACHMENT—		
order quashing writ	209	560
notice of motion to quash writ	210	561
ATTORNEYS—		
complaint by, against another for slander in open court	118	378
complaint by, against another, on partnership agreement	120	384
complaint by, for words spoken against	119	380
AUTOMOBILE—		
complaint, where auto stalled on railroad crossing and was struck, plaintiff being a passenger in auto	125	391
complaint, auto striking horse and wagon driven by plaintiff	123	388
complaint against owner of auto driven by his son for injuries sustained by negligence of son	121	385
complaint, negligently causing burning of auto,	126	396
complaint, by passenger in, against owner for negligence of driver	122	386
complaint, driving on wrong side of road and running into plaintiff	124	389
answer, to action of negligence, defendant denying son (driver of car) to be his agent and alleging contributory negligence	100	356
BILLS AND NOTES—		
complaint on, against maker by holder	127	397
payee	6	265
complaint on, against maker and indorser by holder	7	266
complaint on, against devisee, executor and indorser	128	401
answer to action on, want of consideration	105	363
answer to action on, by devisee, confessing devise, etc	99	354
specification of defenses, usury	87	326

	FORM.	PAGE.
BILLS AND NOTES—*Continued*—		
reply to answer to suit on	82	322
set-off in action in, usury	85	324
BOND—		
complaint, action on, against surety company, principal abandoned contract	129	403
complaint, for deficiency on, after foreclosure of accompanying mortgage	130	406
BOOK ACCOUNT—		
complaint on	4	265
BREACH OF PROMISE OF MARRIAGE—		
complaint on	131	408
BROKER'S COMMISSIONS—		
answer to action for, failure of vendee to buy,	102	359
complaint for, against agent of owner who made himself personally liable for	134	411
complaint for, where broker found buyer and defendant refused to sell	133	410
complaint for, where written agreement	132	409
CARRIER OF GOODS—		
answer of, denying liability under provision in bill of lading	96	344
complaint against, for loss of goods by plaintiff in alternative	12	268
complaint against, for neglect to transport goods within reasonable time whereby same were damaged	135	412
CARRIER OF PASSENGERS—		
complaint against, by passenger for sudden stopping of train whereby he was thrown from seat and injured	136	416
complaint against, for false arrest and imprisonment of passenger who rode passed his station	165	473
complaint against owner of auto whose driver's negligence caused injury to passenger	122	386
complaint against, by person on platform—suction of passing train	137, 137a	417, 419
CERTIFICATE—		
clerk's to, of record	43	291
to transcript under rule 137, sec. 395, p. 256.	42	290
CHATTEL MORTGAGE—		
rejoinder to reply alleging, to be void	79	318
reply alleging defendant's, to be void	81	320
answer in replevin—claiming goods under	104	362

COMPLAINTS.

NOTE.—HOW TO DRAW—"The safest course is to utilize the special counts contained in the old form books, which when stripped of their verbiage will usually be found to answer the purpose admirably." Parker J. in Marine Trust Co. v. Church, 85 L. 272; 88 A. 1075. In Supreme Court actions be sure to lay venue. Par. 203a, p 165.

COMPLAINTS—	FORM.	PAGE.
Alienation of affections, by wife for husband's	110	369
Alienation of affections, by wife for husband's, two counts	111	370
Animals—		
board of horses, for cost of	112	373
frightening horse, locomotive, causing it to run away and injure plaintiff	113	374
frightening horse, street car, causing it to run away and injure plaintiff	114	375
taking and impounding plaintiff's dog	115	376
vicious dog, for injuries from bite of	116	376
Assault and battery with sticks, &c., whereby plaintiff's eyesight was destroyed	117	377
Attorney—		
for slander of, by one against another in court	118	378
for slander of, whereby he lost clients	119	380
by one against another on agreement not to practice for damages for violation of,	120	384
Automobiles—		
against owner of, driven by his son, for injuries sustained by negligence of driver	121	385
for injuries to passenger in, against owner of	122	386
for injuries, plaintiff's horse and wagon struck by, throwing him out	123	388
for injuries, driven on wrong side of road,	124	389
for injuries, struck by train at railroad crossing	125	391
for negligence in causing burning of	126	396
Bills and Notes—		
against maker of, by holder	127	397
payee	6	265
against indorser, executor and devisee of maker	128	401
against indorser and maker by holder	7	266
Book account	4	265

COMPLAINTS—*Continued*—	FORM.	PAGE.
Bond—		
against surety company for loss, principal abandoned contract	129	403
for deficiency on, after foreclosure of accompanying mortgage	130	406
Breach of promise of marriage	131	408
Broker's commissions, on written agreement for	132	409
against agent of owner for, who made himself personally liable for	134	411
where owner refused to sell after broker got buyer	133	410
Carrier of Goods—		
for neglect to transport in reasonable time	135	412
for loss of goods, plaintiff in alternative	12	268
Carrier of Passengers—		
by passenger for sudden stopping of train whereby he was thrown from seat and injured	136	416
for injury to passenger standing on platform by suction of passing train traveling at high speed	137, 137a	417, 419
premature start of street car, plaintiff thrown from step	138	422
Contracts—		
by manufacturer on sale of manufactured article	139	423
by schoolmaster on, to teach daughter	140	424
for balance due on, alleging performance generally	141	425
for goods sold and delivered on	142	426
for sale of stock against defendants in alternative	13	269
on, by assignee of consignor against consignee for goods sold	143	427
on, to recover price of work done and materials furnished	144	428
Commencement of	3	264
Corporations, against for failure to deliver stock subscribed for	13, 145	269, 429
against, by assignee of stockholder for failure to deliver stock subscribed for	146	432
deceit for misrepresentation in sale of stock	147	434
Covenant—		
in deeds, see DEEDS, pp. 565, 573.		
action by beneficiary of, promise to pay money	148	438
Crim. Con. with plaintiff's wife	149	440

COMPLAINTS—*Continued*—	FORM.	PAGE.
Death—		
against physician for negligently performing operation whereby patient died,	150	440
against owner of building for negligence in failing to repair balcony whereby deceased fell	151	442
against landlord for death of tenant, failure to provide fire escapes	152	444
against railroad, failure to sound statutory signal in approaching crossing	153	447
against electric company, shocked to death touching fallen live wire	154	448
Deeds—		
for breach of warranty in, easement of public way over land	155	450
for breach of warranty in, mortgage on land	156	456
for breach of covenant against incumbrances, mortgage on land	157	458
Destruction of Trees, &c.—		
by negligently permitting escape of gas from mains	158	463
by negligently operating factory whereby fumes therefrom destroyed trees, crops, &c., on adjoining land	159	465
action for, under timber act	160	466
Distress—		
by tenant against landlord for making unreasonable	161	468
by tenant against landlord for distraining when no rent was due	162	469
by tenant against landlord for making unlawful, claiming double damages under sec. 11, Distress Act	163	470
Ejectment against defendant named in summons	13a	269
where landlord, &c., admitted to defend	13b	270
False Arrest and Imprisonment—		
by passenger against railroad for, rode passed station	165	473
Ferry, for injuries to passenger on, negligent operation of	164	471
FIRE, see p. 575.		
Food, putting up and selling diseased, which plaintiff bought and ate thereby getting ptomaine poisoning	166	475
Foreign judgment, action on	167	476
Guaranty, on written, for payment of debt of another, original promise	168	477

COMPLAINTS—*Continued*—	FORM.	PAGE.
Highway, against railroad for building wall (elevated road) in, thereby closing it and ingress and egress to land	169	480
Infants—		
action by next friend of, for injury to, from falling from roof while employed by defendant's contractor	170	485
action by next friend for injuries to, from defendant's failure to extinguish and guard fire started in street	171	487
action by parent of, for expenses in curing injuries to, caused by apartment house owner's neglect in failing to repair dumbwaiter	172	489
Insurance—		
for loss under fire insurance policy	173	492
Judgment on motion to strike out	59	302
Landlord and Tenant—		
DISTRESS IN, see pp. 569, 574.		
STATE OF DEMAND, see p. 583.		
by landlord vs. tenant for removal of fixtures and damages to premises	174	496
by tenant vs. landlord for refusal to permit tenant to occupy premises and destruction of tenant's property	175	500
by tenant vs. landlord for injuries from falling of ceiling which was out of repair	176	501
for injuries, failure to maintain light in hallway of apartment house in violation of section 126, Tenement House Act	177	504
for injuries, same	178	505
for injuries to pedestrian, for failure to repair cellar door cover opening on street	179	507
for rent	10	267
under tax title	89	329
Libel and Slander—		
for words spoken of an attorney	119	380
for words spoken of an attorney by another attorney in court	118	378
of title, asserting it to be bad whereby plaintiff lost sale of land	180	509
Mechanic's Lien—		
by an architect against builder and owner and mortgagee	181	510
by contractor against builder and owner	182	513
Money loaned, for	8	266

COMPLAINTS—*Continued*—	FORM.	PAGE.
for, on certificate of indebtedness against municipal corporations	184	515
Moving Picture Theatre—		
for injuries to patron of, by falling down unlighted stairs	183	514
Mortgage—		
for deficiency on, after foreclosure	130	406
Municipal Corporation—		
against, on certificate of indebtedness	184	515
by public officer for compensation,	185	522
by, to recover cost of electricity furnished defendant	186	524
by, to recover back money illegally obtained from	187	525
by, to recover back money obtained by duress	188	526
by, to recover back fees collected by clerk,	189	529
NEGLIGENCE, see p. 578.		
Nurse—		
by husband for value of wife's services as, for deceased	190	530
against executor for compensation for services rendered deceased	191	531
Order striking out	72	314
dismissing	83	323
Physician—		
against, for negligence in performing operation whereby patient died	150	440
against, for negligently leaving sponge in patient's abdomen	192	532
by purchaser of practice, damages for violation of agreement not to practice	11	268
RAILROADS, see p. 581.		
against, for setting fire to factory by sparks from locomotive	193	534
against, for injuries in yard, struck by cars	196	538
against, at crossing, failure to sound signal	197	539
NEGLIGENCE, see p. 578.		
Replevin—		
in, where goods wrongfully acquired	198	541
in, founded upon purchase of goods at execution sale	199	542
in, where goods in custody of railroad for shipment	200	543
Snow, negligently letting, melt and then freeze on sidewalk, etc.	201	544

COMPLAINTS—*Continued*—	FORM.	PAGE.
Trespass—		
for entry on plaintiff's lands and destroying fence	202	548
for entry on meadow land, to exclude public therefrom	203	549
Trover and Conversion	204	551
Vendor and Vendee—		
for damages for failure to convey land	205	552
Watercourse, overflow of, causing damage	206	555
CONSIDERATION—		
answer setting up want of	105	363
reply to answer setting up want of	82	322
CONTRACT—		
complaint on, for sale of goods, against defendants in alternative	12	268
complaint on, for balance due on, alleging performance generally	141	425
complaint on, for goods sold and delivered on,	142	426
complaint on, for goods sold, assignee of consignor against consignee	143	427
complaint on, by broker for commissions underwritten	132	409
complaint on, by manufacturer on sale of manufactured article	139	423
complaint on, in action on bond against surety,	129	403
partnership, between attorneys,	120	384
to recover stocks subscription	13	269
for teaching daughter	140	424
on building contract	182	513
complaint on, to recover price of work done and materials furnished under	144	428
CONTRIBUTORY NEGLIGENCE—		
answer, setting up, in action against owner of theatre	98	352
answer, setting up, in action against owner of auto	100	356
answer, setting up, independent contractor and fellow servant in damage suit	108	367
answer, setting up, of deceased to action under death act	107	366
reply, denying	80	319
CORPORATION—		
answer, alleging plaintiff a foreign corporation without authority to do business in New Jersey, hence cannot maintain action	109	368
answer by, to suit for failure to deliver stock,	97	347
complaint against, by stockholders' assignee for failure to deliver stock	146	432
complaint for misrepresentation in sale of stock of	147	434

	FORM.	PAGE.
COUNTER-CLAIM—		
answer and, for repairs made by tenant.....	93	334
in mechanic's lien action.....	94	340
in replevin	95	343
general form	15	271
to action for boarding horses...	92	333
commencement of	14b	271
COVENANTS—		
complaint for breach of, against encumbrances,	156, 157	456, 458
easement	155	450
to enforce, by beneficiary under....	148	438
CRIM. CON.—		
complaint for, with plaintiff's wife.....	149	440
DAMAGES—		
counts for loss of profits.....	194, 195	537
DEATH—		
answer, to action for contributory negligence of deceased	107	366
complaint for, against physician for negligently performing operation	150	440
complaint for, against railroad, failure to sound statutory signal at crossing.....	153	447
complaint for, failure to provide fire-escapes on apartment	152	444
complaint for, failing to repair balcony in house whereby plaintiff's intestate was killed	151	442
complaint for, against electric company, deceased electrocuted	154	448
DECEIT—		
complaint, for misrepresentations in sale of corporate stock	147	434
DECISION—		
on order to show cause.....	44	291
DEED—		
complaint, for breach of covenants of warranty in, encumbrance against premises...	156, 157	456, 458
complaint, for breach of covenants of warranty, in city street built through premises,	155	450
DEFAULT—		
judgment by	52	298
DESTRUCTION OF TREES—		
complaint for, by escaping gas from defendant's mains	158	463
complaint for, fumes from factory.....	159	465
complaint for, under Timber Act for, unlawful	160	466
DIRECTION OF VERDICT—		
notice of appeal and grounds on.....	77	317
judgment	65	307

	FORM.	PAGE.
DISTRESS—		
complaint for unlawful, to recover damages for injury to plaintiff's business	162	469
complaint for unlawful, by tenant against landlord for double value of goods distrained under Sec. 11, Distress Act, 3 C. S., 1942	163	470
complaint by tenant against landlord for unreasonable	161	468
DOG—		
complaint for injuries by bite of vicious	116	376
DURESS—		
complaint to recover back money obtained from municipality by	188	526
reply, setting up	21	273
EMPLOYER'S LIABILITY—		
petition	207	557
answer	208	559
EJECTMENT—		
answer in, by tenant in possession where he defends for the whole premises claimed	22a	273
answer in, by tenant in possession defending for only a part of the premises	22b	273
answer in, by landlord defending separately	22c	274
answer in, by landlord defending jointly with tenant in possession	22d	274
complaint in, against defendant named in the summons	13a	269
complaint in, where landlord or other person is admitted to defend	13b	270
summons in	2a	264
FACTS—		
finding of, and postea	45	291
on agreed case	46	294
by court	35	281
stipulation of, for trial of case	40	284
stipulation of, for trial of case without pleadings	41	286
stipulation of, for appeal	36	282
FALSE ARREST—		
answer to action for, against justice of peace,	97a	351
complaint, by passenger against railroad for riding past station	165	473
FALSE IMPRISONMENT—		
complaint for, against railroad by passenger who rode past station	165	473
FELLOW SERVANT—		
answer, setting up	108	367
FERRY—		
complaint for injuries by negligent operation of	164	471

	FORM.	PAGE.
FINDINGS—		
of fact and postea	45	291
on agreed case	46	294
by court	35	281
FIRE—		
complaint for death, failure to provide fire-escapes	152	444
complaint for destruction of factory by, from sparks from locomotive	193	534
FOOD—		
complaint for putting up and selling diseased, whereby plaintiff, who bought same, got poisoned	166	475
FOREIGN JUDGMENT—		
complaint on	167	476
GOODS SOLD AND DELIVERED—		
complaint for	142	426
on book account	4	265
reasonable value of	5	265
complaint by assignee of consignor against consignee of	143	427
GROUNDS OF APPEAL—		
and notice of appeal	63, 64, 65	305, 306, 307
direction of verdict for plaintiff	48	296
granting nonsuit	47	295
GUARANTY—		
complaint on, to pay sum of money	168	477
HEIRS AND DEVISEES—		
answer by devisee, confessing devise and denying liability of ancestor	99	354
complaint against devisee for debt (note) of ancestor	128	401
HIGHWAY—		
complaint against railroad for closing up and cutting off egress and ingress to plaintiff's property	169	480
HUSBAND AND WIFE—		
complaint for alienation of husband's affections	110	369
complaint for alienation, same, two counts	111	370
services as nurse for deceased	190	530
IMPOUNDING—		
complaint for taking and, plaintiff's dog	115	376
INDEPENDENT CONTRACTOR—		
answer setting up	108	367
INFANTS—		
complaints by, see COMPLAINTS, p. 570.		
INSURANCE—		
complaint for loss under fire policy	173	492

	FORM.	PAGE.
JUDGMENTS—		
and postea, on mechanic's lien, priority of mortgage	51	297
by default	52	298
for defendant	24	275
plaintiff against defendant	23, 49, 53	274, 296, 298
and postea	50	297
for plaintiff on one count and defendant on another	26	275
modifying and affirming judgment below	55	299
of affirmance	54	299
of Supreme Court affirming judgment of State Board of Assessors	56	300
of Supreme Court affirming judgment of Commissioners of municipality in discharging employee	57	301
on motion to strike out complaint, striking	59	302
nonsuit	25, 60	275, 303
scire facias against bail on recognizance	61	304
order on reversal of	70	313
record and postea, judgment of nonsuit	58	302
record	28	276
summary, affidavit on	29	277
order for	30	277
without pleadings	34	280
where plaintiff accepts an amount less than verdict	62	304
LANDLORD AND TENANT—		
answer and counter-claim by tenant to suit by landlord for taking fixtures and damage to premises; counter-claim for cost of repairs made by tenant	93	334
answer in ejectment by tenant in possession defending whole of premises	22a	273
answer in ejectment by tenant in possession as to part of premises	22b	273
answer in ejectment by landlord defending separately	22c	274
answer by landlord defending jointly with tenant	22d	274
complaint against landlord for death caused by failure to provide fire-escapes on an apartment	152	444
complaint against landlord for failure to repair dumb waiter whereby delivery boy was injured	172	489
complaint against landlord for failure to repair cellar door on street whereby pedestrian was injured	179	507
complaint for rent	10	267

	FORM.	PAGE.
LANDLORD AND TENANT—*Continued*—		
complaint by tenant against landlord for unlawful distress	162	469
complaint by tenant against landlord for double value of goods unlawfully distrained,	163	470
complaint by tenant against landlord for unreasonable distress	161	468
complaint by landlord against tenant for removal of fixtures and damage to premises..	174	496
complaint by tenant against landlord for injuries, for falling of ceiling out of repair..	176	501
complaint under section 126, Tenement House Act, failure to light hallways	177	504
complaint, same	178	505
complaint by tenant against landlord for refusal to permit tenant to occupy leased premises and destroying tenant's property—damages for loss of profits	175	500
state of demand by landlord for rent under tax title, &c	89	329
LIBEL AND SLANDER—		
complaint for words spoken by attorney concerning another attorney during trial of cause	118	378
complaint for words spoken of attorney whereby he was injured in his profession..	119	380
complaint for, of title asserting plaintiff's title was not good and marketable whereby he lost the sale of the property	180	509
MARRIAGE—		
complaint for breach of promise of	131	408
MECHANIC'S LIEN—		
answer and counter-claim in action of	94	340
answer to action by beneficiary to enforce, denial of validity of liens	106	364
complaint against owner and builder by contractor	182	513
complaint against owner, builder and mortgagees by architect	181	510
judgment and postea on	51	297
summons on	38	283
MONEY LOANED—		
complaint to recover on certificate of indebtedness against municipality	184	515
complaint for, two counts	8	266
MORTGAGE—		
complaint for deficiency after foreclosure of..	130	406
judgment on mechanic's lien establishing priority of	51	297

	FORM.	PAGE.
MOTION—		
notice of, see p. 580.		
judgment on to strike out complaint.....	59	302
MOVING PICTURE THEATER—		
complaint for injuries to patron of falling down unlighted stairs.....	183	514
MUNICIPAL CORPORATION—		
answer by, to action by public officer for salary; intruder	101	358
complaint against, for money loaned on certificate of indebtedness.....	184	515
complaint against, by public officer to recover salary	185	522
complaint by, against public officer to recover fees collected	189	529
complaint by, to recover back money illegally obtained from	187	525
complaint by, same where money was obtained by duress	188	526
complaint by, to recover for electricity furnished defendant	186	524
NEGLIGENCE—		
answer denying, see ANSWERS.....	98	352
complaint for, against railroad by passenger, sudden stopping of train.....	136	416
complaint for, in not extinguishing or guarding fire lighted in street whereby child was burned	171	487
complaint for, against owner of building in failing to properly secure, whereby it collapsed, injuring plaintiff.....	170	485
complaint for, of driver of auto in which plaintiff was passenger.....	125	391
complaint for, permitting vicious dog to run at large and bite plaintiff.....	116	376
complaint for, driving auto on wrong side of road and running into plaintiff.....	124	389
complaint for, putting up and selling diseased meats which plaintiff bought and ate getting poisoned	166	475
complaint for, against physician in performing operation whereby patient died.....	150	440
complaint for, against railroad for failure to sound statutory signal at crossing.....	153, 197	447, 539
complaint for, failure to provide fire-escapes in apartment whereby plaintiff's intestate was killed	152	444
complaint for, in operating ferry whereby passenger was injured.....	164	471

NEGLIGENCE—*Continued*—	FORM.	PAGE.
complaint for, in operating factory whereby fumes from chimney destroyed crops on an adjoining land	159	465
complaint for, against owner of an apartment house by tenant injured by falling ceiling..	176	501
complaint for, against gas company for allowing gas to escape and destroy plaintiff's trees	158	463
complaint for, against carrier for failure to transport goods safely	135	412
complaint for, against owner of buildings by licensee's failure to properly maintain it in repair	151	442
complaint for, against moving picture theatre owner, failure to properly light stairs whereby plaintiff fell down	183	514
complaint for, against physician in performing surgical operation, left sponge in abdomen	192	532
complaint for, against railroad by employe of another, struck by train	196	538
complaint for, against street railroad for premature start of car	138	422
complaint for, against railway, plaintiff standing on platform, suction of passing train caused injury	137, 137a	417, 419
complaint for, against railroad, frightening horse, causing it to run away	113, 114	374, 375
complaint for, against railroad for permitting sparks from engine to set fire and burn plaintiff's property	193	534
complaint for, in causing the burning of plaintiff's auto	126	396
complaint for, against railroad, failure to sound statutory signal at crossing	153, 197	447, 539
complaint for, against electric company, fallen live wire	154	448
complaint for, against owner of auto driven by his son	121	385
complaint for, against owner of auto driving at excessive speed	123	388
complaint for, failure to provide lights in hallways contrary to Sec. 126, Tenement House Act	177, 178	504, 505
complaint for, against landlord, failure to repair dumbwaiter	172	489
complaint for, against landlord, failure to repair cellar door, whereby pedestrian was injured	179	507
complaint for, letting snow freeze on sidewalk,	201	544

	FORM.	PAGE.
NON-DELIVERY ACCORDING TO CONTRACT—		
recoupment, setting up	78	317
specification of defences, setting up	86	325
NONSUIT—		
judgment on	25, 60	275, 307
postea on	60	303
NOTICE OF—		
appeal and grounds	37, 63, 64	282, 305, 306
appeal and grounds, direction of nonsuit	65	307
motion to strike complaint and reasons	66, 67	308, 309
motion to strike parts of answer	68	310
NURSE—		
complaint by husband for wife's services as, for deceased	190	530
complaint against executor for compensation for services rendered deceased	191	531
ORDER—		
decision on, to show cause	44	291
dismissing rule to show cause	69	313
dismissing complaint and ordering judgment for defendant for cost	83	323
for summary judgment	30	277
on summary judgment for leave to defend on terms	31	278
on summary judgment commissioners	33	279
reversal of judgment	70	313
striking defense and answer	73	315
complaint	72	314
setting aside service of summons	71	314
to show cause reserving exceptions	84	323
with leave to take depositions,	74	315
PHYSICIAN—		
complaint against, for negligence in performing surgical operation, patient died	150	440
complaint against, for negligence in performing operation	192	532
complaint by purchaser of business against seller for damages for practicing, in violation of agreement	11	267
POSTEA—		
in finding of fact by judge	45	291
on direction of verdict for plaintiff	77	317
on general verdict for plaintiff	22, 75	273, 316
and judgment	50	297
defendant and judgment,	76	316
in mechanic's lien	51	297

	FORM.	PAGE.
PRIVATE WAY—		
answer setting up that plaintiff was a trespasser on defendant's	103	360
PROFITS—		
count for	194, 195	537
PUBLIC OFFICER—		
answer to action by, for salary, defense, plaintiff an intruder	101	358
complaint by and against municipality to recover salary	185	522
complaint against, by municipality to recover fees collected	189	529
PURCHASER OF BUSINESS—		
complaint by, physician against seller for damages for doing business in violation of agreement	11	267
complaint by attorney against seller for damages for practicing law in violation of agreement	120	384
RAILROADS—		
complaint against, injuries to plaintiff on platform, being drawn into passing train by suction	137, 137a	417, 419
complaint against, for frightening horse, causing runaway	113, 114	374, 375
complaint against, for negligently permitting sparks from engine to set afire and burn plaintiff's property	193	534
complaint against, by passenger injured by sudden stopping of train	136	416
complaint against, by employe of another road, struck by train	196	538
complaint against, for failure to sound statutory signal on approaching crossing	153, 197	447, 539
complaint against, for erecting concrete wall (elevated roadbed) in highway, closing street and egress and ingress to plaintiff's property	169	480
complaint against, in replevin, where goods were in its custody for shipment	200	543
complaint against, for false imprisonment of passenger for riding past his station	165	473
complaint against, failure to sound statutory signal	197	539
complaint against, failure to sound statutory signal at crossing, whereby plaintiff's intestate was killed	153	447
answer in replevin, goods in custody of, for shipment	95	343

	FORM.	PAGE.
RAILROAD CROSSING—		
complaint against railroad for failure to sound statutory signal, whereby horse and wagon in which plaintiff was riding as a passenger was struck at a crossing and plaintiff injured	153, 197	447, 539
complaint against railroad, where auto stalled on crossing due to bad road, struck by train, plaintiff being passenger in auto	125	391
answer to action for injuries at, private way	103	360
RECORD—		
clerk's certificate of	43	291
certificate of transcript	42	290
judgment, on postea	58	302
judgment	28	276
RECOUPMENT—		
failure to deliver coal as per contract, whereby defendant was compelled to buy in open market at higher price	78	317
REJOINDER—		
denying plaintiff's reply alleging chattel mortgage to be void	79	318
RENT—		
complaint for	10	267
state of demand for, by owner under tax title and in alternative against agent for rents collected	89	329
REPLEVIN—		
answer in, claiming property under chattel mortgage and counter-claim in	104	362
complaint in, where goods wrongfully taken and detained by purchaser at execution sale where goods were taken under chattel mortgage	199	542
complaint in, where goods were in custody of railroad for shipment	200	543
answer in, goods in custody of railroad for shipment	95	343
reply in, alleging invalidity of chattel mortgage	81	320
state of demand for license certificate	90	331
writ of	2, 39	263, 284
REPLY—		
chattel mortgage void	81	320
denying contributory negligence	80	319
duress	21	273
general denial	19	272
partial denial	20	272
want of consideration, defense on promissory note	82	322

	FORM.	PAGE.
RULE TO SHOW CAUSE—		
decision on	44	291
order dismissing	59	302
reserving exceptions	84	323
with leave to take depositions	74	215
SALARY—		
answer to action by public officer for, intruder	101	358
complaint to recover by salesmen	9	266
public officer	185	522
SALE OF LAND—		
complaint for broker's commission on, see BROKER'S COMMISSIONS, pp. 566, 568.		
complaint by vendee against vendor for nonperformance of agreement	205	552
SCHOOL—		
complaint by school master against parent of pupil upon agreement of instruction	140	424
SCIRE FACIAS—		
judgment on, against bail on recognizance	61	304
SET-OFF—		
usury as defense to suit on note	85	324
judgment on	26	275
SLANDER OF TITLE—		
complaint for asserting plaintiff's title unmarketable whereby plaintiff lost sale of land	180	509
SPECIFICATIONS OF DEFENCES—		
non-delivery of coal as per contract	86	325
usury as defense to action on note	87	326
STATE OF DEMAND—		
action for use and occupation by owner under tax title and in alternative against agent for rent collected	89	329
for price of coal delivered under contract	88	327
in replevin for license certificate	90	331
STIPULATION—		
of facts for trial of case	40	284
without pleadings	41	286
STOCK—		
answer by corporation to suit for failure to deliver	97	347
complaint for misrepresentation in sale of	147	434
to recover on contract on subscription for	13, 145	269, 429
complaint to same by assignee of stockholder	146	432
STREET RAILWAY—		
complaint against premature start of car	138	422
complaint against frightening horse, causing runaway	113, 114	374, 375

	FORM.	PAGE.
STRIKING OUT—		
complaint, order for	72	314
defense in answer	73	315
SUMMARY JUDGMENT—		
affidavit for	29	277
commissioners' order on	33	279
order for	30	277
leave to defend on terms	31	278
preliminary reference on, commissioners' summons	32	278
SUMMONS—		
action at law	1	263
commissioners, on preliminary reference	32	278
in ejectment	2a	264
on mechanic's lien	38	283
order setting aside service of	71	314
TAX TITLE—		
complaint by owner under, for use and occupation of premises	89	329
TRANSCRIPT—		
certificate of, of record	42	290
TRESPASSER—		
answer setting up plaintiff a. on defendant's private way	103	369
complaint against, for entering premises and destroying fence	202	548
complaint against, to exclude public from meadow land	203	549
TROVER AND CONVERSION—		
complaint on	204	551
USURY—		
set-off of, in action on note	85	324
specifications of defences of	87	326
VENDOR AND VENDEE—		
BROKER'S COMMISSIONS, see pp. 566, 568.		
complaint by vendee against vendor for breach of agreement of sale	205	552
WARRANTY—		
complaint for breach of, in deed incumbrances against premises, easement	155	450
complaint for, same, mortgage	156, 157	456, 458
WATER COURSE—		
overflow of, causing damage	206	555
WRIT—		
of replevin	2, 39	263, 284

General Index.

	SEC.	PAGE.
ABATEMENT—		
action against unincorporated organizations..	40	33
by husband and wife.....	21	21
answer corresponding to plea in abatement, improper	332n	233
marriage of female, not to.....	22	22
on setting aside order for bail.....	61	55
pleas in, abolished.....	332	233
right to plead several.....	116n	90
ABSTRACT—		
of recognizances.....	72	65
ACCOUNT—		
entries in book account, how proved.....	365	244
to be made out for assessment of damages...	364	243
ACKNOWLEDGMENT—		
of service of summons, authority for of attorney presumed	3n	3
ACTIONS—		
adverse party may proceed, when.....	6	6
against infant not stayed until majority.....	18	14
unincorporated organizations	40	33
by assignee in own name.....	19, 19n	17, 16
commencement of, when	47n	38
consolidation of.....	115, 164	89, 131
husband and wife, by.....	21	21
in supreme court all defendants resident in different counties joined in one process.....	49	39
name of state not to be used, when.....	13n	12
party to be used, when.....	14	12
not to abate by reason of marriage of female..	22	22
not commenced by process, warrant of attorney to be filed.....	3	3
on appeal, docket, index.....	15	12
capias, time to test truth of affidavit.....	62	56
out of court where process not served, when..	52n	43
party for whose benefit contract made may maintain	28	27
party instituting, to be named in first papers,	13n	12
separate cause of action, what may be joined,	266n	206
title of, on appeal.....	13	11
when commenced by attachment.....	84	72
to be tried.....	149	118
stayed by default of attorney.....	4	3
who may prosecute or defend.....	16	13

	SEC.	PAGE.
ACTION AT LAW—		
but one form of action, exception	262	204
ACTIONS PENDING—		
when this act (Practice Act of 1912) effective	293	217
ACTIONS TO RECOVER PERSONALTY	345, 6, 7	237
ADDRESS—		
notice of change of, required	4n	4
of attorney or party to be endorsed on process,	4n	4
when sufficient service if left at	4n	4
ADMISSIONS	358	241
of certain facts	278, 278n	210
counsel after ceasing to represent client	11n	11
execution of papers	278	210
truth of allegation in complaint by motion to strike	319n	229
time to make, fixed	362	243
AFFIDAVIT OF MERITS	350	238
sufficiency of	97n	80
AFFIDAVITS—		
notice of taking	196	154
on application for capias, sufficiency	74n	66
reduction of bail	63	58
summary judgment, requisite	352n	240
to enter judgment over sham or frivolous plea or answer	351-355	239, 240
attachment—conclusiveness	85n	74
capias in contract	57	50
tort	56n	48, 49, 50
who may take	56n	48
sufficiency of	56n	48, 9, 50
validity of	56n	48, 9, 50
seduction	56n	50
time for filing	57n	52
use of ex parte	57n	53
counter, cannot be used	62	56
rule, both parties may take	196	154
to bar attorney, when filed	5n	5
take, in general	196n	154
show cause	196n	155
ex parte, use of	196n	155
procedure on taking	196, 7	154, 156
proof of truth of, for arrest	62	56
time to apply for	62	56
to verify account on assessment of damages	365, 366	244
AGREEMENTS—		
made out of court, must be in writing	11	10
may be revoked until filed	11n	11
not binding until filed	11n	11
wagering, right of assignee under	19n	18

	SEC.	PAGE.
ALTERNATIVE—		
new trial, where parties joined in	265n	205
parties in	263, 265, 302	205, 220
relief in	331	232
same party sued personally and as representative	265n	205
AMENDMENTS	283, 284	212
and variance	123	95
after default judgment	126n	101
judgment on demurrer	126n	101
pleading in reply	124	95
before pleading in reply	123	95
court may amend all defects and errors	126	97
discretionary	126n	99
during trial	126n	100
liability for costs on	126n	102
not limited to issues of record	126n	97
of bills of particulars, right to amend on review	312n	226
certiorari to quo warranto	283n	212
complaint, by substitution of new parties,	53n, 126n	46, 98
right to add special count	126n	98
execution	126n	100
plea in suit on life policy	126n	97
postea	209n	170
sheriff's return in suits against partnership,	52b	45
summons by inserting name	126n	98
when made	53n	45, 46
verdict	159n	128
writs of inquiry	126n	101
on demurrer	123	95
failure to make indorsement on process	48	39
misjoinder of plaintiff	36	32
non-joinder of plaintiff	36	32
plea of non-joinder of defendant	37	32
variance of proof	125	96
power to amend	126n	99
right to amend on review	126n	101
time for amendment	126n	99
to avoid variance, when allowed	125n	96
when effective	126n	100
allowed	126n	97
AMERCEMENT—		
amount of, not to exceed debt	50	40
of bail	76	67
sheriff, for failure to return process	50	40
AMOUNT—		
bail liable for, where plaintiff recovers sum in excess of capias	68	62
of bail in action of capias	69	62

	SEC.	PAGE.
ANSWER—		
corresponding to plea in abatement, improper..	332n	233
forms of, see index of forms, p. 563.		
general and special denials.....	334	234
not to be affected by joinder of actions.....	309a	223
several defenses	333	233
sham	351, 2, 3, 4, 5	239, 240
special defenses in.....	334	234
with counter-claim	340	236
APPEALS—		
character of parties to suit on, description...	13, 13n	11, 12
clerk to keep docket and index of cases on....	15	12
cross appeals.....	398	257
determined solely on points filed.....	404	259
findings of judge, necessity of challenge to...	391n	255
for new trial shall be brought on at next term, after entry of rule.....	387	253
forms—see index of, p. 563.		
from district court judgments.....	404, 5	259
order issuing new summons.....	53n	46
grounds of	397	257
objection to evidence must have been stated to trial judge.....	403	259
how far rule to show cause bars.....	401	258
in lieu of writ of error in civil cases.....	285	212
municipal cases, time to take.....	259	202
the nature of a re-hearing.....	285	212
is a step in the cause.....	286	214
jurisdictional to take in time.....	259n	203
judgment reversed on, for substantial error...	287	214
limitation on time to take, constitutionality...	259n	203
may result in favor of some and against other joint parties	402	258
new evidence upon.....	288	215
no severance of parties is necessary on.....	396	257
none from interlocutory order.....	397n	257
notice of.....	395, 396	256, 257
argument returned to attorney when appeal not perfected.....	405	259
to be entitled in the court from which taken and therein to be filed.....	395	256
to state court to which taken.....	395	256
order striking out complaint against one of several defendants, when appealable.....	285n	213, 4
parties starting the original proceeding to be named first.....	13n	12
placed on calendar only when perfected.....	405	259
practice in court of errors upon.....	289	216
reservation of grounds on review.....	285n	213, 4
rules 72 and 73 applicable to appeals.....	382n	251
security on	400	258

	SEC.	PAGE.
APPEALS—*Continued*—		
specification of points must be filed within 10 days	404	259
statement of case on	370, 371, 399	246, 7-257
title of action on	13	11
under new practice act, effect of	285n	213, 4
when may be used	285	212
what it removes	286	214
APPEARANCE—		
by attorney in courts	6n	6
unauthorized, liability for	5n	6
partnership not required to enter—unless sheriff's return to summons is proper	52a	45
APPLICATION—		
for reduction of bail	63	58
rule or order, to whom made	247	197
reference of	252	199
ARGUMENT—		
of causes before single justice	251	198
number of counsel and time given each	377, 8	249, 250
order of calling on	375	248
ARREST—		
defendant, when discharged from	61	55
released on giving bail	69	62
female not to be arrested	64	58
in action on contract	57	50
actions upon tort	56	47
of several defendants on capias—form of process	58	54
on breach of promise of marriage	57n	52
on inducing creditors to accept worthless security	57n	52
order for—necessity	57n	51
review of, by habeas corpus	62n	57
testimony as to truth of proof	62	56
when defendant discharged from	62	56
ASSESSMENT OF DAMAGES—		
bills and notes, how proved	366	244
by jury from general panel in lieu of writ of inquiry	367	245
entries in books of account, how proved	365	244
in continuing actions	363	243
statement of account to be made out	364	243
to be made and signed by justice or clerk	364	243
when postea required	368	245
writ of inquiry may issue for	367, 368	245
ASSIGNEE—		
assignment pending suit, assignee may sue	304	221
may be substituted as plaintiff	26	26
may be become plaintiff if assignment pending suit	304	221

	SEC.	PAGE.
ASSIGNEE—*Continued*—		
not necessary to sue in assignee's name.....	19n	18
of bail bond, of suit by.....	66n	60
chose in action may sue in his own name..	19, 20	16, 20
part of claim may join in suit.....	303	221
right and liabilities of assignee.....	19n	18
takes instrument subject to all equities, when,	19n	18
right to sue on guarantee.....	19n	19
of assignee under wagering agreement...	19n	18
suit by, against representative of decedent, testimony of assignor admissible.....	19n	20
suit on express covenant may be brought by, after assignor's death.....	20n	20
ASSIGNING—		
or attempting to assign property to defraud creditors as grounds for capias.....	57	51
ASSIGNMENT—		
by one of several obligees in bond valid.....	19n	18
check not an, by drawer to payee of debt.....	19n	18
distinction between legal and equitable.....	19n	17
for conversion, not assignable.....	19n	19
in writing of sealed instruments.....	19	16
when necessary.....	19n, 20n	17, 20
may be made by delivery.....	19n	17
of bond, no consideration need be shown.....	19n	17
to confess judgment.....	19n	18
for prison limits before breach.....	19n	18
guarantee, right of assignee to sue.....	19n	19
contract of indemnity.....	19n	17
insurance policy, suit by assignee.....	19n	18
partnership property.....	19n	19
breaches	107n	86
sealed instrument.....	19	16
part of contract not assignable.....	19n	17, 19
set-off, on after notice of.....	19	16
ATTACHMENT—		
act 1901 not repealed by Practice Act 1903...	84n	72
against estate of lunatic, appearance of.....	16n	13, 14
joint debtors.....	88	75
non-resident devisees.....	87n	75
affidavit for, conclusiveness of.....	85n	74
allowance to sheriff on.....	90	76
amount for which writ may issue.....	85	73
appearance, form and effect of.....	91	77
assessment of damages.....	136	108
bond on issuance of writ.....	85	73
release of attached property.....	92	78
execution on.....	90	76
when special.....	90, 91	76, 77
fraud by one of several joint debtors.....	88	75
issuance of, beginning of action at law.....	89	76

	SEC.	PAGE.
ATTACHMENT—*Continued*—		
joint debtors against	88	75
judgment, when special	91	77
order for, when issued	85	73
pleading in	89	76
practice and procedure on	86	74
proceedings on, must follow act began under,	84n, 89n	73, 76
proof required for	84, 84n, 85n	72, 73, 74
property attached to remain security for judgment	90	76
quashing writ, grounds	85n	74
refusal to quash writ reviewable by certiorari,	84n	73
release of attached property	92	78
rule to plead	89	76
right to alias writ	85n	74
summons unnecessary	89	76
unknown heirs and devisees, how designated	87	75
when action may be commenced by	84	72
writ of, when and how issued	86	74
ATTORNEY—		
affidavit on rule to disbar, when filed	5n	5
admission of	5n-6n	10-14
agreements made out of court to be in writing,	11	10
affidavit to disbar, when filed	5n	5
appearance by firm, as single entity	16n	14
appointment of, for lunatic	16n	13, 14
can sue for fees, charges and disbursements	9, 9n	8, 10
causes justifying discipling or disparing of	5n	5
clerk not to permit filing of papers until fees paid	8n	8
clerk of court not to practice as	6n	6
death or removal of	6	6
disbarment of	5n, 6n	5, 7
endorsement of name on process	47	37
failure to	47n	39
amendment	48	39
failure to declare plaintiff's residence, stays action	4	4
failure to declare whether writ was issued by him, stays action	4	4
fees on bill of particulars	103	82
females may be licensed as	12	11
formal notice given by	257	201
employed to draw contract, not bound to file it,	5n	6
judgment may be opened for neglect of	112	87
liability for unauthorized appearance	5n	6
to clerk for court cost	8n	8
licensed only, to act	17	14
lien for compensation on judgment	9n	9, 10
preference over set-off,	9n	10

	SEC.	PAGE.
ATTORNEY—*Continued*—		
may be sued	2	2
malpractice, penalty for	5	4
misdemeanor to practice law without license	17n	14
must be resident of state and enrolled	6n	6
enter judgment obtained for client	5n	6
name and address to be endorsed on process	4n, 47	4, 37
neglect of, attributable of, penalty	5	4
not to commence suits for costs, etc., till taxed bill is filed	9	8
not to be bail in civil actions	70	63
surety on bonds	10	10
permit others not licensed to practice in name of	6n	6
on receiving costs, to give bill of particulars therefor	8	7
papers not filed until costs paid	8n	8
partners as, may practice	1	1
penalty for illegal charges in bills of costs	8	7
removal from state terminates authority, when,	6n	7
power of criminal courts to suspend, pending indictment	5n	5
resident of plaintiff, when to declare	4	3
shall not permit another, unlicensed, to practice in his name	6n	6
signature for co-partnership	1n	2
striking from rolls	5n	6
affidavit not filed except on order	5n	5
suit for fees, charges and disbursements, service of bill condition precedent to	9n	9
suit, allegation in complaint	9n	9
summary proceedings against for misconduct,	5n	6
time to serve papers on, between 10 A. M. and 4 P. M.	4n	4
to file taxed bill of costs before execution issues,	7	7
under direction of court in which he acts	17	14
warrant of, when to be filed	3	3
who may prosecute suit and by whom	16	13
ATTORNEY-GENERAL—		
to appear for lunatic, when	16n	13
AUTHORITY—		
of attorney to sign for partnership presumed,	1	2
appear for client presumed	3n	3
compromise client's claim, none,	3n	3
want of, how proved	3n	3
AWARD—		
of reference may have effect of verdict	372	247
unless rule provides that it shall operate as finding of arbitrators	372	247

REFEREE'S REPORT, See p. 619.

BAIL—	SEC.	PAGE.
amercement of	76	67
amount for which liable	68	62
approval of recognizance	69	62
assignment of bail bond by sheriff, sufficiency,	66n	59
acting on	66n	60
judgment to	60	54
bail piece, form of	72	64
to sheriff abolished	66	59
by whom ordered	56, 57	47, 50
defendant if rendered, may give new bail	78	69
to whom committed	78	68
deposit in lieu of	82	70
determination of legality of orders for	61	55
discharge of, if ordered set aside	61	55
order should not have been made	62	56
execution on special process	59	54
examination as to sufficiency of	75	66
exceptions to	75	66
exoneretur, when entered	78	68
female not to be arrested	64	58
giving of, no waiver of right to take testimony,	62	56
in actions on promise to marry	57	51
to recover money from public officer,	57	51
insolvent, scire facias refused	66n	61
judgment paid by, to remain enforced	81	70
justification of	74	65
liability of, on special process	60	54
may put in new or additional	76	67
render defendant on special process	60	55
minute of render to be made	78	68
order for	56, 57	47, 50
may be made against some only of defendants	58	54
taking testimony as to truth of proof,	62	56
paying judgment to have execution	81	70
pleading and practice on special process	59	54
practice where proceedings on bail bond irregular,	66n	61
proceedings against, stayed on appeal	80	69
reduction of	63	58
recognizance, form of	69	62
approval of	69	62
record of	73	65
release, form of	71	64
render, in discharge of	77	68
supreme court commissioners may make order for	65	59
surety company may give	83	71
to fix, on recognizance	79n	69

	SEC.	PAGE.
CASE CERTIFIED—		
clerk to file certificate	216	174
error assignable on certified opinions	217	175
errors in advisory opinion not reviewable	217n	175
matters arising in election	215n	174
questions of doubt or difficulty	215	173
law only can be certified	215	173
not properly certified	215n	174
CERTIORARI—		
amendment of, to quo warranto, when	283n	212
attachment, refusal to quash, reviewable by,	84n	73
attorney cannot be surety on bond for	10	10
costs on	46	37
courts, when open for service of	46	37
order for issuing and service of new summons not reviewable by	53n	46
mode of entitling writs	13n	12
security for costs on	204n	165
CHALLENGES TO JUDGE—		
form of	225n	181
CHANCERY—		
transfer of causes to and from court of	411, 412	262
CHAMPERTY—		
law of, does not prevail in New Jersey	9n	10
CHECK—		
not assignment of debt by drawer to payee,	19n	18
CHOSES IN ACTION—		
assignable	19	16
partner may assign, given to firm	19n	19
CIRCUIT COURT—		
order of trial at, etc	377	249
supreme court rules applies to practice in	406	260
CIRCUIT RECORD AND POSTEA—		
postea, how made and signed	209	169
framed on reference	156	126
transcript	207	168
see p. 625.		
supreme court issues tried in circuit	208	169
when judgment on postea may be entered forthwith	210	170
CLERK—		
docket and index kept by	15	12
not to practice law	6n	6
file papers until fees are paid	8n	8
recognizance book kept by	73	65
to enforce payment of fees by attorney	8n	8
shall give or take receipt upon transfer of causes	412	262
to receive fees due state	8n	8
COMMENCEMENT OF SUIT—		
when process tested and issued, etc	47n	38

	SEC.	PAGE.
COMMISSIONERS—		
one to be appointed in each county for preliminary references	356, 7, 8, 9, 60	241, 242
powers of, in award of capias	57n	52
to administer oaths	65	59
hold to bail in civil actions	65	59
take bail, authorize to issue capias	57n	51
COMMON BAIL—		
discharge on where affidavit insufficient	56n	49, 50
when proper to discharge on in capias	62n	57
COMMON COUNTS—		
use of under new Practice Act, questioned,	311n	225
COMMON INFORMERS—		
costs on	222	178
indorsements on information	219	176
general issue, effect of	220	178
liability of prosecutor	221	178
recovery by covin	221	178
COMPENSATION—		
of attorney lien for on judgment	9n	9, 10
preference over set-off	9n	10
suit by condition precedent service of bill of charges	9n	9, 10
COMPLAINT—		
See DECLARATION, p. 601.		
PLEADINGS, p. 616.		
admission of truth of allegation in motion on,	319n	229
alternative relief	331	232
amendment of, right to add special count	126n	98
annexed to summons	348	238
FORMS, See index of, p. 563.		
forms of	329, 330	232
if one count can support verdict, it's valid	161n	129
motions addressed to	310	223
objection to the demand for relief	328	232
on suit by attorney for compensation, must allege service of bill of charges—exception,	9n	9
CONDITION PRECEDENT—		
burden of proof of	118n	93
failure to plead bar	333n, 334n	234
general averment sufficient	118n	92
sufficiency of allegation of	118n	92
CONFESSION—		
JUDGMENTS BY, See p. 608.		
warrant of attorney necessary,	3	3
CONSIDERATION—		
assignment duly executed prima facie evidence of	19n	18
failure of, as defense	273	208
in action on bond	273n	208

	SEC.	PAGE.
CONSOLIDATION OF ACTIONS—		
actions in same court	164	131
change of venue on	201n	159
cross-actions	164	131
entry of rule for, without authority	115n	89
form of rule	115n	89
of actions in general	164n	131
on motion of defendant	115	89
suits between same parties on several debts,	115n	89
several suits for continuous injury	115n	89
when proper	115n	89
CONSTRUCTION OF PRACTICE ACT, 1912,	260	204
CONTEMPT OF COURT—		
females subject to, for non-payment of tax cost	64n	58
CONTINGENT FEES—		
counsel can enforce an agreement for	227n	182
CONTRACTS—		
arrest in action on	57	50
assignment of	19, 19n	16, 17
capias in actions on, when issues	57	50, 51
CONTRIBUTORY NEGLIGENCE—		
as defense, how to plead	333n	234
CORPORATIONS—		
examination of officers of, before trial	144n	115
summons, how served on	52	41, 42
return to show upon whom served,	52	41, 42
venue in actions against	201n	159
COSTS—		
allowance to referee on reference	157	127
sheriff in attachment	90	76
apportionment of, on consolidation	164	131
attorney cannot be surety for, when	10	10
must serve bill of, before bringing suit for fees	9n	9
attorney's fees not taxable cannot be included in	8n	8
attorney's fee	229n	186
attorney liable to clerk for	8n	8
attorney's lien on judgment for	8n	8
attorney, penalty against, for illegal charges in bill of	8	7
attorney receiving, to give receipt and bill of particulars of—time	8	7
attorney liable for, except sheriff's execution fees	8n	8
clerk for recording judgment	172	137
clerks for recording recognizance	73	65
cost followed judgment	229	183
disallowance at discretion	290	216
expense of retaxation	244	194

COSTS—*Continued*—	SEC.	PAGE.
how retaxed	244	194
taxed	243	194
in actions for assault, etc., or libel or slander	239	192
in action on bonds	238n	192
circuit court	233	190
district court, in suits for or against state	242n	193
general, taxing	243n	194
general	229n	184
libel	238n	192
suits by poor suitors	227	182
particular actions	229n	186
several actions on same instruments	237	191
suits involving titles to lands	232n	190
supreme court	229n, 230	186, 187
when title to lands is involved	231	189
tort, replevin, or injectment	240	192
tort, on certificate of judge	236	191
trespass	231, 231n	189
items taxable	229n	185
legislative power as to	229n	186
on arrest of judgment	229	183
liability for, on amendment	126n	102
on application to inspect books	143n	114
bills of particulars	103	82
certiorari	10	10
examination of adverse party	147, 148	116, 117
failure of consideration	235	190
filing notice of trial	192	152
habeas corpus	232	189
printing, of	245	195
producing defendant to give bail	71	64
recoupment	235	190
scire facias	238	191
suit by common informer	222	178
presumption as to liability of taxed costs	243n	194
retaxation	244n	195
state to recover, but not to pay	242	193
security for in general	204, 204n	164
action by infants	204n	165
sheriff's execution fees, liability of attorney for	8n	8
sheriff's fees in taking bail on capias	71	64
statute regulating fees does not apply to attorney's fee with client	8n	8
taxed bill to be filed before execution issues,	7	7
order for payment of, of printing	245	195
of defendant necessarily sued	305	221
taxed bill, when to be served	9	8

	SEC.	PAGE.
COSTS—*Continued*—		
when action is cognizable before inferior courts	234	190
when bill of particulars of, must be given..	8	7
where recovery less than $200 in supreme court	230	186
COUNSELLOR—		
agreement between out of court to be written	11, 11n	10, 11
bill of charges served before suit brought..	9	8
can sue for fees, etc.	9	8
clerk not to practice as	6n	6
lien on judgment for compensation	9n	9
malpractice, see attorney	5	4
women may be	12	11
COUNSEL—		
admission of, as binding on client	11n	11
fees, suit for	9, 9n	9, 10
on trials of jury causes limited to one hour a side	378	249
only one shall examine a witness	379	250
in opposition heard on motion for rule to show cause	389	254
two may be heard on each side	378	250
stipulation made by, binding on client	11n	11
time of, may be enlarged or limited	378, 378n	249
COUNTIES—		
all defendants resident in, joined in same process	49	39
COUNTER CLAIM	340, 341, 2, 3	236, 7
See SET-OFFS, p. 622.		
several filed which cannot be tried together, some stricken out	272n	208
COURT OF ERRORS—		
practice in	289	216
COURTS—		
breaches of rules, attorney may be struck off rolls for	5n	5
contempt of, females liable for, when	64n	58
defendant in, on capias, when	54	46
exemption from service of process in going to or from	52n	43
jurisdiction of, impairment by statute compelling decision in 30 days	258n	202
not to take notice of agreements not in writing.	11	10
parties in, when	52	42
powers of, to appoint receiver to collect rents pending ejectment	246n	196
powers of, in ejectment to prevent waste, pending suit	246n	196

	SEC.	PAGE.
COURTS—*Continued*—		
to determine municipal cases in 30 days	258	201
when open	46	37
CREDITORS—		
defrauding, when capias issues	57	51
CRIMINAL COURTS—		
power to suspend attorney pending indictment,	5n	5
CRIME—		
to practice law without license	17n	14
CROSS ACTION—		
consolidation of	164	131
counter claim is a	341	236
notice or plea of set-off	122	95
DAMAGES—		
ASSESSMENT, See p. 589.		
action for, against attorney for neglect of cause	5n	6
assessment of, by clerk	136n	108
in assumpsit	136n	108
determined to time of trial	363	243
new trial as to	381	251
DATE—		
on process prima facie evidence of date of issue	47	37
process to be dated on day issued, penalty for antedating	47	37
DEATH—		
of attorney terminates relationship of attorney and client	6n	7
of attorney, client to appoint another, failure,	6	6
principal after forfeiture of bail bond cannot be pleaded to scire facias	66n	61
DECLARATION—		
See COMPLAINT, p. 597.		
by the bye not allowed	67	61
of bad counts in	161	129
when defendant in custody	67	61
DECREES—		
assignable—suits on by assignee	19	16
DEFAULT—		
JUDGMENT BY, See p. 608.		
plaintiff's right to	100n	81
when properly opened	112n	88
DEFENDANT—		
action against, in alternative, where rule to show cause	265n	205
in capias action, discharge of	61	55
release of	69	62
surrender of, when	66n	60
custody, process against	67	61, 62
different counties, all inserted in one process,	49	39

	SEC.	PAGE.
DEFENDANT—*Continued*—		
how infant, and idiot made	18	14
name and address endorsed on process	4n	4
new defendant cannot be joined by amendment and substitution in open court	53n	46
summons, service on, board of freeholders	52n	42
corporation	52n	43, 44
individual	52	41, 42
municipal corporation	52n	43, 44
partnership, return	52a	44
township	52n	44
where defendant has several residences	52n	44
DEFENSES—		
assignee takes subject to all, when	19n	18
affirmative, how pleaded	334	234
by party for whose benefit contract made	28	27
contributory negligence as	333n	234
not to be cut off by joinder of actions	309a	223
on assignment of chose in action	19, 20	16, 20
to application for summary judgment	351n	239
want of a ca. sa. against principal	66n	61
when several, how pleaded	333	233
DEFINITIONS	261	204
DEMURRERS—		
abolished	320	229
issue of law raised by motion or in pleadings	320	229
to evidence	165	132
DEPOSITIONS—		
AFFIDAVIT, See p. 586.		
DEVISEES—		
attachment against non-resident	87n	75
DILATORY PLEAS—		
abolished	332	233
DISBARMENT OF ATTORNEY—		
causes justifying	5, 5n, 6, 6n	5, 6, 7
DISCHARGE—		
of defendant in capias action	61, 62n	55, 56
form of	71	64
DISCOVERY	361, 362	243
after execution	228n	183
examination of corporation officers before trial,	144n	115
DISMISSAL—		
of cause, if trial or argument not moved	375	248
DISQUALIFICATION OF JUDGE	224n	181
DISTRICT COURT—		
appeal from judgment in	404, 5	259
must be perfected before placed on calendar	405	259
motion to dismiss appeal from	405a	260

	SEC.	PAGE.
DOCUMENTS—		
admission of existence, execution, signing and mailing	278, 362	210, 243
annexing copies to pleadings	317	228
effect of	317n	228
copies may be demanded	325	230
discovery of	361, 2	243
DWELLING—		
what constitutes for service of process	52n	44
EJECTMENT—		
change of venue in action of	202n	162
judgment in, reversed as to part	289n	216
power of supreme court to appoint receiver to collect rents pending action of	246n	196
to prevent waste	246n	196
ELECTIONS—		
case certified in question on	215n	174
ENDORSEMENTS	175	140
in general	175n	140
execution on judgment nunc pro tunc	390	254
on capias ad respondendum	48n	39
process, failure to endorse, amendment	48	39
summons of attorney's name and address	47, 47n	37, 38, 39
writs, processes, etc	4n	4
in suits by common informers	219n	177
EQUITY—		
jurisdiction on new trial	163n	131
EQUITABLE ASSIGNMENT	19n	17
ERROR—		
certified opinion to be returned with writ	217	175
mode of entitling cause on	13n	12
on writ of proceedings against bail stayed	80	69
when courts open for service of writ of	46	37
EVIDENCE—		
admission of counsel binding on client	11n	11
assignment of bond, prima facie evidence of payment of consideration	19n	18
court minutes as	173, 173n	138
jurors, may give	158n	127
admissibility to correct verdict	159n	128
of date of issuing process	47, 47n	37, 38
fraud, in affidavit on capias	57n	53
proof of divorce decree, exemplified copy record,	57n	53
regularity of sheriff's levy	50n	41
transcript of sheriff's books as	51,	41
when objection to, available on appeal	403	259
EXAMINATION OF ADVERSE PARTY—		
fees on	147	116
and costs, how paid	148	117
how conducted	146	116
not conclusive	146	116

	SEC.	PAGE.
EXAMINATION OF ADVERSE PARTY—*Continued*—		
of corporation officers before trial	144n	115
right to	144	115
when party to attend	145	115
EXCEPTIONS—		
BILL OF, See p. 594.		
to bail	75	66
in application of act 1903	223	179
to judge	224	179
cause for challenge	224	179
challenge to, how tried	225	181
grounds for, effect of disqualification	224n	180
not to act as clerk	226	181
referee's report, when to be filed	373	247
copy may be filed in clerk's office	374	247
EXECUTIONS—		
alias, special order for, when necessary	181n	143
against bankrupt	174n	140
body of infant	188a	146
executors and administrators	174, 174n	139, 140
principal and surety	179	142
property of deceased defendant	186	145
surviving defendant	187	146
unincorporated organizations	41	34
whom to issue	147	116
amendment of	126n	100
assignee may have	185	145
attorney to file taxed bill of costs before issuing	7	7
bail paying judgment to have	81	70
capias ad satisfaciendum	189	147
call for interest from date of judgment nisi when rule to show cause for new trial is discharged	390	254
form of, on special process on order for bail,	59	54
in name of executor or administrator	183, 183n	144
survivor	182	143
attachment	90	76
may be special	91	77
indorsement on	175	140
issued after death of plaintiff—void	174n	139
nullity after rule to show cause allowed	174n	139
on judgment in supreme court	174, 177	139, 141
second judgment when stayed	180	143
one writ on several judgments	280	210
payment of money into court	178	142
proceedings on, in actions on bills and notes,	35	30
return of sheriff	188	146
shall conform to judgment on the several issues in case of joinder	309a	223

	SEC.	PAGE.
EXECUTIONS—*Continued*—		
sheriff's fees on attorney not liable for	8n	8
special form, how executed	60	54
substituted administrator to have	184	145
supplemental proceedings after	228n	183
time for recording	174n	139
to be endorsed with name and address of attorney of party	47	38
trial judge may stay	393	255
when returnable	176	141
to issue	181	143
EXECUTORS AND ADMINISTRATORS—		
considered as one person	24	25
how served	24	25
defendant sued in alternative individually and as	265n	205
may be sued with or without joining beneficiary	19n	20
in suits by assignee against, assignor may testify	19n	20
qualified, may sue	25	26
substituted, may have execution	184	145
when to have execution against deceased defendant	183	144
execution against, false pleading by	174	139
EXEMPTIONS—		
from service of process while going to or from court	52n	43
of party from re-arrest where first arrest illegal	52n	43
EXONERATUR	66n, 78	60, 61, 68
FAILURE OF CONSIDERATION—		
as defense	273	208
FALSE IMPRISONMENT—		
COMPLAINT ON, form 165, p. 473.		
FEES—		
See COSTS, p. 598.		
FEMALES—		
attachment for contempt for non-payment of costs	64n	58
marriage of, not to abate action	22	22
may be attorneys	12	11
not to be arrested in civil process	64	58
FILING—		
of papers not allowed by attorney in default for fees	8n	8
postea, time for	393	255
FINDINGS OF FACT BY COURT	391	254
necessity of challenge to, for review	391n	255
general effect of	392	255

	SEC.	PAGE.
FORMS, see index of, p. 563, also "Schedule B"..	298	219, 263
of discharge of defendant in capias.....	71	64
recognizance or bail bond.....	69	62
rule for consolidation of actions.....	115n	89
FORM OF ACTION—		
does not apply to prerogative writs.....	262	204
how denominated	262	204
but one form.....	262	204
FRAUD—		
when fact to be inquired into on trial.....	166	132
as ground for capias.....	56n, 57, 57n 166n, 189n	48, 51, 52 132, 148
FREEHOLDERS—		
summons, how served on.....	52	42
must be served 30 days before return	52n	42
FRIVOLOUS ANSWER—		
SHAM DEFENSE OR ANSWER, See p. 622.		
GENERAL FINDING—		
effect of	392	255
GOODS AND CHATTELS—		
levy on in capias ad sa. procedure.....	60	54, 55
GROUNDS—		
for issue of capias.....	56	47
quashing writ of attachment.....	85n	74
of objection must be pointed out to trial judge	285n	213
right to pleas different.....	116n	90
GUARANTY—		
right of assignee to sue on.....	19n	19
GUARDIAN—		
insane person must appear by.....	16n	13
may prosecute or defend for infant.....	18	14
HABEAS CORPUS CUM CAUSA—		
action, how removed by.....	198	156
to be removed but once.....	200	158
bond required	198, 198n	156, 157
propriety of writ.....	62n	57
review of arrest by.....	62n	57
security for costs in proceeding by.....	198n	157
time for removal of cause by.....	198n	157
when plaintiff deemed in court.....	199	158
HOLIDAYS—		
process, issued, tested and served on, valid,	46n	37
HUSBAND—		
when not to control wife's action.....	23	23
HUSBAND AND WIFE—		
action by 21, 23, 23a, 23b		21, 23, 24, 25
IDIOTS—		
suits by and against—appearance.....	16n	13

	SEC.	PAGE.
ILLEGAL ARREST—		
discharge of defendant illegally arrested by capias	61	55
INDORSERS—		
on bills and notes, severally liable	301	220
INCONSISTENT COUNTS AND DEFENSES,	318	228
INFANTS—		
execution against body of	188a	146
how to prosecute and defend	17, 18	14
security for costs in action by	204n	165
INSANE PERSONS—		
how to prosecute and defend	16n	13, 14
INSPECTION OF BOOKS AND PAPERS	142, 143	112, 114
application for—requisites	142, 143, 143n	112, 114
costs on, right to	143n	114
failure to produce after demand, bars use of,	142n	113
federal practice	142n	113
INSURANCE—		
averment of condition precedent in suit on policy	118n	93
suits by assignee of policy of	19n	18
INTERROGATORIES	140	110
answer to, as evidence	140n	111
answer, admission of one of several	140n	112
failure to answer, effect of	140n	111
federal practice on	140n	112
scope of	140n	111
ISSUES—		
joinder of	316	228
settlement of	311	224
JOINDER OF CAUSES OF ACTION	309a	223
as to plaintiffs	300, 263, 271	219, 205, 207
defendants	300, 301, 302, 265, 6, 7	219, 220, 205, 6
by or against executors	308	222
husband and wife	308	222
in ejectment	308	222
joint claims with several claims	308	222
objection for misjoinder	309	223
shall not deprive defendant of any lawful defense	309a	223
the court may strike out	308	222, 223
See SEPARATE TRIALS, p. 621.		
JOINDER OF ISSUE	316	228
JOINDER OF PARTIES—		
See PARTIES, p. 614.		
JUDGE—		
application to him shall be made within 6 days after verdict	385	252

	SEC.	PAGE.
JUDGE—*Continued*—		
before whom cause tried may grant rule to show cause for a new trial	384	251
may set aside verdict	383	251
orders by	296, 291	218, 216
JUDGMENTS—		
affidavit of merits, opening, for want of	135n	106
against executors and administrators	24	25
one joint contractor	280	210
partnership, when cannot be entered, sheriff's return must be correct	52a	44, 45
persons severally liable on bills and notes	301	220
assessment of damages	136	108
assignable	19	16
assignment of, to bail	60	54
attorney's lien on, for compensation	9n	9, 10
preference over set-off	9n	10
attorney must enter, obtained for client	5n	6
by confession, opening	135n	106
on warrant of attorney	3	3
default	133	104
amendment after	126n	101
lien on, retained after opening	135n	108
plaintiff's right to	100n	81
new judgment, when entered	133n	105
failure to plead, for	274	209
opening, affidavit of defense, necessity of	135n	108
opening, fraud or surprise	135n	106
grounds for	135n	106
judicial description on	112n	88
waiver of objection	135n	107
want of affidavit of merits for	135n	106
when pleadings lost in mail	135n	107
when properly	135, 112n	105, 88
who entitled to open	135n	107
stands until set aside	133n	105
countermand of notice of writ of inquiry	138	109
entry of	168n	134
against bail	77	68
immediately upon filing postea after relicta or verdict	393	255
nunc pro tunc	168n	135
where rule to show cause discharged	390	254
evidence of	169n	136
execution on second, when stayed	180	143

JUDGMENTS—*Continued*—	SEC.	PAGE.
ex parte affidavits may be used to show plea to be sham or frivolous	355	240
federal practice on	168n	135
fees of clerk for recording	172	137
final, how recorded	168	134
signed	171	137
when recorded in full	170	136
and interlocutory distinguished	168n	135
fraudulent, rule to set aside	249	197
index to	172	137
inspection of	167	134
joint, against persons severally liable	301	220
may be entered on the several issues in case of joinder	309a	223
may be opened for neglect of attorney	112	87
special in attachment	91	77
motion in arrest of	163	130
nisi	168n	135
notice to set aside, when made	248	197
not reversed unless substantial rights affected	287	214
on capias, entered for penalty of bond	66n	60
of non-suit shall be entered, when	376	248
one execution on several	280	210
opposite party entitled to, if trial or argument not moved	375	248
form of	281	211
for or against several parties	280	210
on capias in tort actions, issues as of course,	52n	42
scire facias, service necessary	55n	47
notice of executing writ of inquiry	138	109
paid by bail to remain in force	81	70
reversed as to part only if right as to other part	289n	216
rule for final, on assessment of damages	139	110
when evidence	173	138
writ of inquiry	137	109
to set aside fraudulent	247	197
show cause in arrest of	387	253
SUMMARY JUDGMENT, See p. 623.		
entered only on order of court or a justice	355	240
four days' notice required	255	240
defense to, on application for	351n	239

	SEC.	PAGE.
JUDGMENTS—*Continued*—		
error to strike out answer on and render judgment on new state of facts	275n	209
what plaintiff's affidavit must show	352n	240
when bail entitled to assignment of	60	54
execution on second stayed	180	143
plaintiff is fictitious person	269n	207
writ of inquiry, rule for	137	109
without pleadings	282	211
JUDICIAL DESCRIPTION—		
in opening judgment entered by default	112n	88
JURY—		
general panel to assess damages in lieu of writ of inquiry	367	245
instructions to, on stipulation made in court,	11n	11
taking exhibits to jury room	158n	127
one juror, may give evidence, how	158n	127
juror's evidence admissible to correct verdict	159n	128
JUSTIFICATION—		
of bail	74	65
LIBEL AND SLANDER	106	83
admission by demurrer or motion to strike	106n	85
averment of special defamatory sense	106n	84
construction of defamatory sense	106n	85
essentials of complaint on	106n	84
FORMS, COMPLAINTS, See index of, p. 567.		
innuendo, office of	106n	85
pleading in	106	83
slander of title	106n	84
separate counts in complaint	106n	85
LICENSE—		
attorney must have to practice law	6n, 17n	6, 14
LIEN—		
of attorney on judgment for compensation	9n	9, 10
LIST OF CAUSES—		
clerk to prepare and provide copies for court and bar	377	249
containing names of parties, attorneys, style of actions, etc	377	249
may be corrected, when	377	249
order of hearing matters on	375	248
LITIGANT—		
can have only one solicitor of record	16n	14
how to prosecute and defend	17	14
MAILING—		
as service of notice	193n	153

	SEC.	PAGE.
MAINTENANCE—		
law of, does not prevail in N. J.	9n	10
MALPRACTICE—		
of attorney, see	5	4
MANDAMUS	262	204
courts, when open for service of	46	37
may be awarded in action at law	262	204
rule to show cause in vacation	250	198
MAYHEM—		
capias issues for, when	56	47, 48
MARRIAGE—		
action not to abate on	22	22
MARRIED WOMEN—		
action for alienation of affection of husband	23a	23, 24
by, without joinder of husband	23	23
in tort	23a, 23b	23, 25
COMPLAINTS BY, FOR ALIENATION OF HUSBAND'S AFFECTION, See forms 110, 111, pp. 369, 370.		
MERITS—		
affidavit of	350	238
sufficiency of	97n	80
judgment for want of, opened	135n	106
MECHANIC'S LIEN—		
reference of suit of, account	155n	123
MISCONDUCT—		
of attorney as grounds for disbarment	5n	6
public officer, when capias issues for	56	47, 48
MISJOINDER—		
of parties	269, 302	207, 220
verdict bad on	161n	130
See NON-JOINDER, p. 613.		
MISMANAGEMENT—		
of attorney, liability for damages	5	5
MOTIONS—		
addressed to complaint or answer	310	223
for new trial	386	252
to set aside judgments	248	197
in lieu of dilatory pleadings	332	233
notice of	190	151
must specify grounds	323	230
to dismiss appeals from District Court	405a	260
objections to pleadings	321, 322	229, 230
NEW TRIAL, See p. 625.		
MUNICIPAL CORPORATIONS—		
attorney's neglect not attributable to	5n	6
appeals in municipal cases, time to take	259	202
precedent of municipal cases on appeal	258	201
review of causes	259	202

	SEC.	PAGE.
MUNICIPAL CORPORATIONS—*Continued*—		
summons, how served on	52	41, 42
return to show upon whom served,	52	41, 42
served 15 days before return	52n	43, 44
NAMES—		
character of parties on appeal to appear	13	11
of all defendants in different counties inserted in original process	49	39
of party to be used instead of State	13n	12
State not to be used when	13n, 14	12
NEGLECT—		
of attorney, liability for damages	5	5
NEGLIGENCE—		
contributory, as a defense, how pleaded	333n	234
NEW TRIAL—		
application for rule to show cause shall first be made to judge who tried cause	384	251
argument brought on at next term after entry of rule	387	253
arrest of judgment on	163n	131
as to part of case	380	250
and affirmance as to part	380n	250
damages only	381	251
court may take new evidence	288	215
disqualification of judge	224n	180
equity jurisdiction	163n	131
if rule to show cause discharged, judgment final entered as of time when judgment nisi taken	390	254
judge at circuit may order, where jury disregarded instruction to find verdict	383	251
may be granted after expiration of term	163	130
motion for	163	130
in arrest of judgment	163	130
for, to be made at term postea filed or succeeding term	386	252
not granted if judgment sustainable on any grounds	287n	214, 215
not granted unless substantial error	287	214
on merits only	287, 287n	214, 215
only one counsel heard on motion for rule	389	254
questions subject to rule to show cause	380n	251
review of order refusing	251n	198
slip in instructing jury, as grounds for	287n	214, 5
state of case, how settled	388	253
statement of case for	370, 371	246, 7
such application to be made in 6 days after verdict	385	252
time to apply for in equity	163n	131
the party entering rule must file and serve reasons, when	387	253

	SEC.	PAGE.
NEW TRIAL—*Continued*—		
verdict of finding waived unless postea filed, when	394	256
when substantial rights not injuriously affected	287n	214, 5
defendants sued in alternative	265n	205
NONJOINDER—		
of parties	302, 269	220, 207
See MISJOINDER, p. 611.		
NON SUIT—		
for failure to file pleadings	274	209
notice cause for trial	149n	118
judgment of, may be ordered by justice or judge	376	248
right to suffer any time before verdict	160n	128
after direction of verdict	160n	129
submission, effect of after	160n	129
NOTICE—		
court may order more extensive	194	153
regulate mode, time and duration	195	153
fees on filing notice of trial	192	152
for affidavit upon application to enter judgment over sham or frivolous answer	355	240
of motions	190	151
form and sufficiency of	190n, 193n	151, 153
of objection to state of case, to be served	388	253
removal of attorney required	4n	4
exception to bail	75	66
pleadings, to be taken when filed	113	88
formal, may be given by attorney	257	201
of trial	149	118
deposition, commissioners to take —effect on cause	149n	118
non-suit for failure to notice	149n	118
necessity of	149n	118
sufficiency of	151n	119
service of	151n	120
on application for reduction of bail	63	58
scire facias, to issue	190n	151
rule to show cause, to obtain	190n	151
reduction of extension of time to plead	193n	153
service of	190n	151
special notice, extent of	190n	151
motions, notice of	190	151
to strike out pleading, what to contain	191	152
be in writing	193	153
served on attorney	193	153
given of filing referee's report	373	247
that justice or judge will settle state of case,	388	253
OATH—		
who may take, commissioners	65	59

	SEC.	PAGE.
OFFICERS—		
public, when capias issues for misconduct of,	56	48
OBJECTIONS—		
to state of case	388	253
See PLEADINGS, p. 616.		
See MOTIONS, p. 611.		
See COMPLAINT, p. 597.		
OPENING—		
JUDGMENT BY DEFAULT, See p. 608.		
to be made by counsel for defendant before evidence taken	369	246
ORDERS—		
by court or judge	296, 291	218, 216
for capias, illegal without	57n	51
proof necessary to obtain	57n	52
time for filing	57n	52
for setting aside, ground	61	55
equisits	56n	50
to take testimony	62	56
practice where order bar	62n	57
judgment of non-suit may be made by justice or judge at circuit	376	248
judgment of non-suit or the refusal thereof, subject to review	376	248
to protect property and prevent its removal,	246	196
PAPERS—		
See LIST OF CAUSES, p. 610.		
name and address of attorney or party to be endorsed on	4n	4
not filed until costs are paid	8n	8
service on attorney, time for, between 10 A. M. and 4 P. M. at office	4n	4
what is sufficient service	4n	4
PARENTS—		
right to act as infant's next friend, priority	18n	14
PARTIES—		
agreement made out of court to be in writing	11	10
application for relief by, sued jointly	34	30
assignee may be substituted as	26	26
attorney as, entitled to costs	8n	8
change of, does not affect security	270	207
character of, to appear on papers	13	11
court may determine controversy between any	268	206
defendant, how designated, when name unknown	43	35
defendant, how designated, when name contracted	27	26
examination of adverse	144	115

	SEC.	PAGE.
PARTIES—*Continued*—		
exemption from service of process on going to or from court	52n	43
insane person, how to appear	16n	13
in alternative, jointly or severally	263	205
court, when	52	41, 42
may show sheriff's return untrue	50	40
name of state not to be used, when	13n	12
and address, to be endorsed on papers,	47	37, 38
new parties cannot be joined by amendment	53n	46
nonjoinder or misjoinder	302, 269	220, 207
persons having interest may be made, how,	268n	206
plaintiff declining to join may be made defendant	264	205
pleading to state residence of, or attorney	4n	3
qualified executors may sue	25	26
rights of persons for whose benefit contract made	28	27
severally liable	301	220
separate causes, joinder of, on	263	205
trial between	272	207
judgment for or against several	280	210
substitution of plaintiff by amendment	126n	98
instituting suit to be first named	13n	12
when taxpayer may intervene	45	36
prosecute	44	36
who may be made defendants	300, 301, 264, 5	219, 220, 205, 206
plaintiffs	300, 303, 304, 263, 267	219, 220, 221, 205, 6
prosecute and defend	16	13
PARTICULARS—		
BILLS OF, See p. 594.		
PARTNERSHIP—		
action against, sheriff's return what to show	52a	44
appearance of attorney as, single entitle	16n	14
assignment by one member of	19n	19
attorney may appear as	1, 1n	2
no appearance or judgment by or against, unless sheriff's return proper	52b	45
PAYMENT—		
by bail of judgment	81	70
into court	336, 7, 8, 9	235, 6
non-payment must be specially pleaded	118n	92
PENALTIES—		
action for, violation of child law laws	219n	177
under timber act	219n	177
refusal of admission to negro	218n	175
by common informers, in general	219, 219n	176, 7

	SEC.	PAGE.
PENALTIES—*Continued*—		
for failure of attorney to file taxed bill of costs before issuing execution	7	7
for illegal charges in taxed bill of costs	8, 8n	7, 8
antedating process	47	37
failing to give bill of particulars of costs	8	7
how and when recoverable	218	175
judgment entered for, in suit on bail bond	61n	60
neglect or mismanagement	5	4
malpractice	5	4
on sheriff, failure to return process	50	40
not delivering notice of trial	151	119
PENDING ACTIONS—		
what part of act 1912 applies to	293	217
PLACE OF ABODE—		
what constitutes	52n	44
PLEADINGS—		
AMENDMENTS, See p. 587.		
ANSWER, See p. 588.		
BILLS OF PARTICULARS, See p. 594.		
REPLY, See p. 620.		
COMPLAINT, See p. 597.		
DECLARATION, See p. 601.		
DEMURRER, See p. 602.		
affidavit of merits	350	238
according to rules	262, 293	204, 217
to legal effect	315	227
annexing documents to, effect of	317, 317n	228
assignment of breaches	107	85
common counts, use of questioned	311n	225
condition precedent, how pleaded	118n	92
averment of	118	91
costs on issue of fact or law	116	90
court may order more particular or new pleadings	311	224
default in filing, non-suit or judgment	274	209
either party may plead several matters	116	90
failure of consideration	273	208
further pleadings, when filed	310	223
inconsistency, not objectionable	318	228
how to draw	311n	224, 5
non-payment, how to plead	118n	92
objectionable, effect of motion to strike as admission of	319n	229
objectionable	319	228
order of	310	223
objections to	321, 2	229, 30
on preliminary reference	358	241
certainty in	327	231
matters arising after suit begun	224	230
must not be evasive	326	231
form of	311	224

	SEC.	PAGE.
PLEADINGS—*Continued*—		
first pleading must state residence	311	224
pleading in libel and slander	106	83
upon bond of township collector	108	86
with a condition	107	85
private way	109	86
after reply	310	223
notice of filing of—taken	113	88
right to add plea without leave	123n	95
several pleas in abatement, right to plead	116n	90
quo warranto, right to plead	116n	91
trespass, right to plead	116n	90
defenses, right to plead	116n	90
shall conform to the several issues in cases of joinder	309a	223
special issue failure to find on	116n	91
statement in, admitted if not denied	314	227
supplemental	324	230
sufficiency of, in capias	57n	53
striking out sham or frivolous	351, 2, 3, 4, 275, 6	239, 240 209
superfluous counts	115	89
time for filing	348, 9	238
untrue statements in	313	227
usury or illegality under law of another state	120	94
how pleaded	120n	94
validity of, filed out of time	99n	81
when advantage taken of failure to plead	100n, 100	81
rule to plead required	99	80
PLAINTIFF—		
interests in money deposited with sheriff	54n	46
judgment where, is fictitious person	269n	207
may proceed against bail	79	69
residence of, declared by attorney on notice	4	3
substitution of, by amendment	126n	98
poor suitors, actions by	227	182
POSTEA—		
amendment of	209n	170
failure to file, a waiver of finding or verdict, when	394	256
filing, stay of execution	393	255
FORMS, See index of, p. 580.		
may be entered at later term, when	394n	256
PRELIMINARY REFERENCE	356, 7, 8, 9, 360, 277	241, 2, 209
PRACTICE—		
on appeals in Court of Errors same as in Supreme Court	289n	216
on capias, where writ or order bad	62n	57
proceedings on bail irregular,	66n	61
PRACTICE ACT 1903—		
sections repealed	294	217

	SEC.	PAGE.
PREFERRED CAUSES—		
order of calling on trial and arguments	375	248
municipal cases	258, 259	201, 202
PREROGATIVE WRITS—		
CERTIORARI, See p. 596.		
MANDAMUS, See p. 611.		
QUO WARRANTO, See p. 619.		
single form of action "action at law" not applicable to	262	204
PRIVATE WAY—		
how pleaded	109	86
PROCESS—		
against defendant in custody	67	61
amercement of sheriff for failure to return	50	40
as capias as to some, and summons as to others,	58	54
capias ad respondendum, how executed	54	46
cause not pending before issue of, in equity	407n	261
courts, when open for return of	46	37
date of, may be disproved	47	37
form, endorsement and service of to be according to rules	262	204
exemption from service of, going to and from court	52n	43
failure to make endorsements on	48	39
form of, when defendants reside in different counties	49	39
endorsements on	47	37
in actions by poor suitors	227	182
issued, tested and served on holiday, valid	47n	37
name and address of attorney or party endorsed on	4n	4
not fatal to post date	47n	38
penalty for antedating	47	37
pleading and practice on special form	59	54
proceedings on, against defendant in custody	67	61
record and return	51	41
return may be shown to be untrue	50	40
day, sheriff, may alter	47n	38
when to be made	50	40
returnable on Sunday, amendable	46n	37
scire facias, how served	55	46
service of, on Sunday void	46n	37
sheriff's return of, sufficiency and conclusiveness	50n	40
summons, how served, see	52, 52n	41, 2, 3
to be written, typewritten or printed	4n	3
when new summons may be issued and served	53	45
PROOF—		
burden of, on allegation of condition precedent,	118n	93
necessary for attachment	84n	73
of divorce decree, exemplified copy of record	57n	53

	SEC.	PAGE.
PROOF—*Continued*—		
of mailing letter as service of notice	193n	153
order to take, in capias	62	56
who may take	62	56
PUBLICATION—		
effect of service of summons by, in personal actions		71
service of scire facias by	55, 55n	46, 47
QUO WARRANTO—		
amendments of proceeding where relator mistakes his remedy	283n	212
several pleas, right to plead	116n	90
REASONS—		
for new trial shall be filed and served	387	253
RECOGNIZANCE—		
BAIL, See p. 593.		
CAPIAS, See p. 595.		
approval of	69	62
to be indorsed on	69	62
clerk to record	73	65
defendant released on giving	69	62
to be produced to give	71	64
form of	69	62
discharge on giving	71	64
justification to be endorsed on	74	65
when and where to be filed	72	64
records—of pleadings kept together	113	88
RECOUPMENT—		
COUNTER-CLAIM, See p. 600.		
SET-OFF, See p. 622.		
REFEREES—		
original report to be filed with clerk	374	247
exceptions to report to be filed with clerk	374	247
REFEREES' REPORT AND AWARDS	272, 3, 4	247
argument on rule to show cause to set aside, copy of reservation of trial by jury and the original exceptions to be filed with clerk	387 374	253 247
exceptions to	155n	124
notice to be given of filing	373	247
original report to be filed in clerk's office	374	247
report notes on in general	155a	124, 125
rule to show cause set aside	387	253
time allowed for exceptions	373	247
when Supreme Court cause referred under secs. 155 and 156 of Practice Act of 1903, rule to be entered in clerk's office	374	247
REFERENCE—		
account	155n	122
allowance to referee	157	127
by justice at circuit	156	126

	SEC.	PAGE.
REFERENCE—*Continued*—		
costs, right to	155n	125
entry of postea and judgment	156n	126
in matters of account	155	121
mechanic's lien suit	155n	123
review of proceedings	155n	125
rule of, may state effect of award	372	247
suits subject to	155n	122
withdrawal of cause after	155n	123
RELIEF IN ALTERNATIVE	330	232
REMOVAL—		
of attorney from state, termination of authority, when	6n	7
until notice of, what is sufficient service	4n	4
REPLEVIN	345, 6, 7	237
REPLY	310, 344	223, 237
RESIDENCE—		
attorneys must be resident of state to practice	6n	6
attorneys or parties, residence and name, endorsed on process	4n	4
defendant on notice	4	3
defendant's residents in different counties, how served	49	39
RETURN—		
to capias conclusive on sheriff	54n	46
ca. sa. must be in sheriff's hands, when	66n	61
procedure after	66	61
sheriff's, change by sheriff effect on statute of	47n	39
on amendment of	52b	45
on suits vs. partnership	52a	44
sheriff may alter	47n	38
shown untrue	50	40
sufficiency and conclusiveness	50n	40
writs of error, time	4n	4
REVIEW—		
of advisory opinion on case certified	217n	175
arrest on capias by habeas corpus	62n	57
of order refusing new trial	251n	198
setting aside proceeding against bail in capias	66n	61
right to amend on	126n	101
ROLL—		
attorney struck off	5, 5n, 6n	4, 5, 6
RULES—		
expediting business	253, 254	199
may be suspended in a particular case	299	219
of reference, what to contain	372	247
on transfer of causes, court to make	409	262
power of court to make and suspend	292	216

	SEC.	PAGE.
RULES—*Continued*—		
regulating pleading and practice	254	199
rules for circuit court	254	199
RULES AND ORDERS—		
in vacation	247	197
RULES TO SHOW CAUSE—		
affidavit to disbar attorney on, when filed	5n	5
bar to appeal, except on points reserved	401	258
why new trial should not be granted	384, 390, 401	251, 254, 258
special	401	258
See NEW TRIALS, p. 612; JUDGMENTS, p. 608.		
SATISFACTION—		
of judgment, when entered	81	70
SCIRE FACIAS—		
amendment of	181n	143
consolidation of writs	164n	132
death of principal as defense to suit on bond,	66n	61
how served	55	46
issues of course	181n	143
service of publication	55	46, 47
SECURITY—		
inducing creditors to accept worthless, as grounds, for capias	57n	52
SECURITY FOR COSTS—		
demand for	205n	167
stays proceedings	205	166
in general	204n	164
action by infants	204n	165
certiorari	204n	165
habeas corpus	204n	166
justification of surety	206	167
nonresident plaintiff must give	204	164
time to apply for	204n	166
waiver of	204n	166
who are nonresidents	204n	165
SEDUCTION—		
affidavit in sufficiency of	56n	50
arrest in suit for	56n	50
capias on	56	48
SEPARATE CAUSES OF ACTION—		
what may be proved	266n	206
SEPARATE TRIAL	272, 306	207, 221
SERVICE—		
of process against municipal corporation	52n	43
corporation	52	41, 42
township	52n	44
courts always open for, except Sundays	46	37
how made	52	41, 42

	SEC.	PAGE.
SERVICE—*Continued*—		
of process on capias arrest of several defendants	58	54
on holiday valid	46n	37
returned "served" party in court	52	41, 42
scire facias by publication	55	46
how served	55	46
out of state	55	46
dwelling house and place of abode, what constitutes	52n	44
reasons for new trial to be served on opposite party	387	253
SET-OFF—		
on assignment of chose in action	19-20	16, 20
on substitute of assignee	26	26
right of, rests on statute	272n	208
SEVERANCE—		
of parties on appeal not necessary	396	257
SHAM DEFENSE—		
judgment over, shall be entered only on notice and order	355	240
SHERIFF OR OFFICER—		
allowance to, in attachment	90	76
amercement for failure to return process	50	40
upon discharged defendant	76	67
assignment of bail bond by, sufficiency	66n	59
bail to, abolished	66	59
cannot be bail	70	63
death of, book	51	41
duty of, on receiving notice of trial	151	119
fee for producing defendant to give bail	71	64
fees in taking capias	71	64
execution, attorney not liable for	8n	8
how to execute writ of capias	54	46
levy, regulation of	50n	41
may alter return date of process	47n	38, 39
not to be bail in civil actions	70	63
procedure on execution in attachment	90	76
return to execution	188	146
in suits vs. partnership, requisites	52a	44
amendment	52b	44
upon capias conclusiveness	54n	46
sufficiency and conclusiveness	50n	41
right to release defendant on depositing money as capias	54n	46
to keep record of return to process	51	41
serve and return process forthwith	50	40
SINGLE FORM OF ACTION	262	204
small cause court not affected, exception	256	201
SOLICITOR—		
See ATTORNEY, p. 591.		

	SEC.	PAGE.
STATE—		
causes in which state is a party in interest shall have preference on arguments and trials...	375	248
name of, when not to be used in actions.....	13n	12, 14
STATE OF CASE—		
how settled on rule to show cause for new trial,	388	253
on rule to show cause to be served.....	388	253
objection to	388	253
STATEMENT OF CASE—		
in place of pleadings.....	282	211
STATUTE—		
how construed	255	200
STAY—		
action against infants not.....	18	14
of execution, on application for new trial.....	393	255
time to plead not stayed, when.....	4n	4
when writ of error brought.....	80	69, 70
STIPULATION—		
made by counsel binding a client.....	11n	11
not enforceable when.....	11n	11
in open court bind on parties.....	11n	11
out of court must be in writing.....	11, 11n	10, 11
may be withdrawn until filed.....	11n	11
SUFFICIENCY—		
of allegation of condition precedent.....	118n	92
affidavit of merits.....	97n	80
affidavit to hold to bail.....	61	55, 56
SUMMARY—		
proceeding vs. attorney for breach of duty....	5n	6
judgment, see p. 609.....351, 2, 3, 4, 5, 282, 275		239, 240, 211, 209
SUMMONS—		
amendment of	46n	37
annexed to complaint.....	348	238
drawing and sealing summons, commencement of suit.....	47n	38
exemption from service of on going to and from court	52n	43
how served	52	41
issued on attorney, declaration of authority...	4	3
order issue new summons, review of.....	53b	46
service of by publication in personal actions..		71
how made	52	41
in suits against partnership.....	52a, b	44, 45
scire facias.....	55	46
where defendant has several residences	52n	44
on corporation.....	52	41, 42
Bd. Freeholders 30 days before return	52n	42, 44
holiday valid.....	46n	37

	SEC.	PAGE.
SUMMONS—*Continued*—		
service on municipal corporation 15 days before return	52n	43, 44
Sunday void	46n	37
township	52n	42
when new summons may be issued and served,	53	45
SUNDAY—		
courts always open except on	46	37
service of summons on, void	46n	37
summons returnable on, amendment	46n	37
SUPREME COURT COMMISSIONERS—		
appointment and powers	228	182
See COMMISSIONERS, p. 597.		
SUPREME COURT EXAMINERS—		
appointment and powers	228	182
SURETY—		
attorney cannot be, when	10	10
exoneration of liability of in action on bail bond	66n	60, 61
relief on, in action on bail bond	66n	60, 61
want of ca. sa. against principal must be pleaded by	66n	61
SURETY COMPANY—		
bail by	83	71
TAXPAYER—		
may intervene in certain cases	45	36
prosecute in certain cases	44	36
TENDER	335-5-6-7-8-9	235-236
TESTIMONY—		
of assignor in suit by assignee vs. representatives of decedent admissible	19n	20
order to take in capias	62	56
how taken	197	156
See AFFIDAVIT, p. 586.		
See EVIDENCE, p. 603.		
order to take in capias	62	56
THEATRE—		
action for refusal of admission to negroes	218n	175
THIRD PARTIES	340-272	236-207
TIME—		
amendment, for	126n	99
during trial	126n	100
attorney to deliver bill of costs in	8	7
bail bond to be filed when	72	64
file pleading in time, effect	100n	81
for bail to apply for rendering of defendant	80	69, 70
for filing pleadings	348-9-50	238
may be extended by order	297	219
municipal cases, court to determine when,	258	201
to take appeal	258	201

	SEC.	PAGE.
TIME—*Continued*—		
of counsel on jury causes limited to one hour a side	378	249
to file postea	393	255
test truth of affidavit in capias	62	56
validity of pleading filed on and of	99n	81
writ of error, returnable	4n	4
TITLE—		
clerk to retitle cause when improperly entitled,	15	12
name of state not to form part of, when	13n	12
of action on appeal	13	11
when name of state not to be used	14	12
original to be retained, when	13n	12
TORT—		
action against husband and wife	56	47
capias when issues in action in ca. sa. issues as of course, judgment in	52n	42
married woman, action by in	23, 23a	23
cannot be arrested in	64, 64n	58
TOWNSHIP—		
summons how served on	52, 52n	41, 44
TRANSACTIONS—		
definition of	307	222
TRANSCRIPT	207	168
available at future trial	207n	168
may be filed at later term, when	394n	
necessity of	207n	168
not required for judgment on assessment of damages by jury in action in inferior court,	368	245
required for judgment on assessment of damages by jury in Supreme Court action	368	245
variance between record and copy of	207n	169
TRANSFER OF CAUSES—		
application of act	410	262
chancery, from when	411	262
clerk to give receipt for papers when causes transferred from Court of Chancery	412	262
clerk to take receipt for papers when cause transferred to Court of Chancery	412	262
rules on court to make	409	262
to Court of Chancery, only on order of court or a justice	411	262
transferred to proper court	407	260
when made, entry of degree in proper court	208	261
when permitted	407n	261
by Court of Errors	407n	261
TRESPASS—		
several pleas in right to plead	116n	91
TRIAL—		
action, when to be tried	149	118
amendment during	126n	100

	SEC.	PAGE.
TRIAL—*Continued*—		
arrest of judgment, motion for	163	130
by proviso	150n	119
the court	391	254
clerk may take verdict	160	128
consolidation of action	164	131
damages determined to time of	363	243
defendant's opening	369	246
fraud, fact of, when to be inquired into	166	132
if not brought on, dismissal or judgment for opposite party	375	248
if not moved, judgment of nonsuit may be ordered	376	248
justice at circuit may refer	156	126
jurors as witnesses	158	127
jury may take papers	158	127
new trial as to party	380	250
damages	381	251
motion for	163	130
nonsuit, when defendant cannot submit to	160	128
notice of, by plaintiff	149	118
defendant	150	119
countermand of	152	120
to whom given	151	119
short notice of	151	119
when filed	153	120
order of calling on	375	248
references in matters of account	155	121
reserving question of law	279	210
separate	306	221
short notice of	151	119
special verdict	159	127
submitting to jury alternative propositions	279	210
verdict in detinue	162	130
verdict when some counts are bad	161	129
TROVER—		
capias may issue, when	57n	52
suits for not assignable	19n	19
UNINCORPORATED ORGANIZATIONS—		
execution, how issued and served	41	34
liability of members	42	34
may be sued	40	33
UNKNOWN DEFENDANTS—		
how designated	43	35
USURY—		
must be specially pleaded	120n	94
or illegality of foreign contract	120	94
VARIANCE—		
on bill of particulars	312n	226
amendment to avoid, when allowed	125n	96
materiality of	125n	96

	SEC.	PAGE.
VENIRE DE NOVO—		
See NEW TRIAL, p. 612.		
VENUE—		
bail to take notice where laid	79	69
change of in general	201n, 202n	160, 162
ejectment	202n	162
complaint must lay or be stricken	203a	165
actions vs. corporation	201n	159
in consolidation of actions	201n	159
local actions in general	201, 201n	158, 159
particular causes of action	202n	161
transitory actions in general	202, 202n	160
presumption as to residence	202n	163
right to trial at bar	201n	160
rule to show cause for change of	203	163
VERDICT—		
amendment of	159n, 126n	128, 100
application for rule to show cause why new trial should not be granted to be made within six days after	385	252
bad, where misjoinder of actions	161n	129
correction of, admissibility of jurors' testimony,	159n	128
in detinue	162	130
may be taken by clerk	160	128
presence of plaintiff not necessary on delivery of	160	128
right to nonsuit of direction of	160n	129
before	160n	128
special	159	127
power to compel or recommend	159n	128
waived if postea be not filed within first ten days of the next term	394	256
when award of referee shall have effect of	372	247
judge at circuit may set aside	383	251
some counts are bad	161	129
valid, if one count supports	161n	129
WARRANT—		
may be issued in lieu of amercement	76	67
of attorney when necessary	3	3
WAY, PRIVATE—		
how pleaded	109	86
WITNESSES—		
only one counsel shall examine or cross-examine	379	250
attendance in court exemption from service of process on	52n	43
assignor may be, in suit by assignee vs. representative of decedent	19n	19

	SEC.	PAGE.
WORDS OR PHRASES—		
dwelling house	52n	44
place of abode	52n	44
"may"	261, 295	204, 218
practice act	261, 295	204, 218
rules	261, 295	204, 218
high degree of care	287n	
WRITS—		
endorsements on	46	37
courts always open for service and return of	4n	4
returnable in term or vacation	368	245
service of at attorney's office, time	4n	4
validity of	47n	38
WRITS OF ERROR—		
abolished in civil cases	285	212
brought by defendant	80	69, 70
lies upon order setting aside proceeding against bail	66n	61
mode of entitling	13n	12
returnable in 20 days of issue	4n	4
sealed and signed by clerk	4n	4
WRITS OF INQUIRY	364, 5, 6, 7, 7	243, 4, 5
amendment of	126n	101
award of, in detinue	162	130
countermand of	138	109
notice of executing	138	109
rule for	137	109
final judgment on, how entered	139	110