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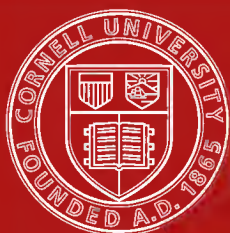
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FORMS  
OF  
CIVIL PROCEDURE

ADAPTED TO PRACTICE AND PLEADING UNDER THE CODE  
OF CIVIL PROCEDURE OF THE STATE OF NEW  
YORK, AND UNDER THE CODES OF  
OTHER STATES HAVING  
SIMILAR CODES,

WITH FULL NOTES AND REFERENCES TO AUTHORITIES.

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By WILLIAM LANSING

COUNSELOR-AT-LAW.

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• VOLUME II.  
REVISED EDITION OF 1896.

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# FORMS OF CIVIL PROCEDURE.

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- TITLE III. Forms relating to proceedings to punish a contempt of court, other than a criminal contempt.
- TITLE IV. Forms relating to proceedings to collect a fine.
- TITLE V. Forms relating to proceedings to discover the death of a tenant for life.
- TITLE VI. Forms relating to proceedings for the appointment of a committee of the person and the property of a lunatic, idiot or habitual drunkard, and to general powers and duties of the committee.
- TITLE VII. Forms relating to proceedings for the disposition of the real property of an infant, lunatic, idiot or habitual drunkard.
- TITLE VIII. Forms relating to arbitrations.
- TITLE IX. Forms relating to proceedings to foreclose a mortgage by advertisement.
- TITLE X. Forms relating to proceedings to change the name of an individual.
- TITLE XI. Forms relating to proceedings for the voluntary dissolution of a corporation.
- TITLE XII. Forms relating to proceedings supplementary to an execution against property.

TITLE I.

*Forms relating to insolvent debtors and to prisoners.*

ARTICLE FIRST.

*Forms relating to proceedings for discharge of an insolvent from his debts.*

(Code Civ. Pro., Ch. 17, Tit. 1, Art. 1.)

- No. 1111. Petition for discharge of insolvent debtor.

- No. 1112.** Consent of creditor to discharge, to be annexed to petition with affidavit thereto.
1113. Schedule to be annexed to petition of insolvent debtor.
1114. Affidavit of debtor to be annexed to his schedule.
1115. Order to show cause why petitioner should not be discharged from his debts.
- ✓ 1116. Affidavit of service of order to show cause.
1117. Affidavit of publication pursuant to order.
1118. Specification by creditor of objections, and demand of jury.
1119. Order directing trial by jury of questions of fact.
1120. Affidavit to procure order for petitioner to produce his non-resident wife.
1121. Order requiring the petitioner to bring his wife before the court as a witness.
1122. Order directing the execution of an assignment by an insolvent debtor.
1123. Assignment by debtor to trustees pursuant to order.
1124. Certificate of trustee that assignment has been made.
1125. Certificate of county clerk of recording of assignment.
1126. Order granting discharge of insolvent debtor.
1127. Discharge of insolvent debtor.
1128. Affidavit upon refusal of trustee to give certificate, etc.
1129. Order to show cause upon affidavit, No. 1128.
1130. Order upon return of order to show cause, No. 1129.
1131. Affidavit to move for order directing judgment to be cancelled, etc.
1132. Notice of application for cancellation and discharge of judgment.
1133. Order for cancellation and discharge of judgment.

## ARTICLE SECOND.

*Forms relating to exemption from arrest or discharge from imprisonment of an insolvent debtor.*

(Code Civ. Pro., Ch. 17, Tit. 1, Art. 2.)

- No. 1134.** Petition for exemption from arrest and discharge from imprisonment of insolvent debtor.
1135. Affidavit to be annexed to schedule.
1136. Order to show cause upon petition, No. 1134.
1137. Order directing assignment by debtor.
1138. Assignment by debtor pursuant to order.
1139. Order for discharge of debtor.
1140. Exemption and discharge of debtor.

## ARTICLE THIRD.

*Forms relating to discharge of an imprisoned judgment debtor from imprisonment.*

(Code Civ. Pro., Ch. 17, Tit. 1, Art. 3.)

- No. 1141.** Petition for discharge of person imprisoned by virtue of an execution.
1142. Notice to creditors of presentation of petition, etc.
1143. Order upon presentation of petition.

- No. 1144.** Order directing assignment by debtor imprisoned under execution.  
**1145.** Assignment by debtor imprisoned under execution.  
**1146.** Order discharging debtor imprisoned under execution.  
**1147.** Notice by creditor to debtor to apply for discharge.

## ARTICLE FOURTH.

*Forms relating to care of the property of a person confined for crime.*

(Code Civ. Pro., Ch. 17, Tit. 1, Art. 4.)

- No. 1148.** Petition for appointment of trustees to take charge of property of person imprisoned for crime.  
**1149.** Order upon presentation of petition.  
**1150.** Order upon the return of order to show cause, No. 1149.

## TITLE II.

*Forms relating to summary proceedings to recover the possession of real property.*

(Code Civ. Pro., Ch. 17, Tit. 2.)

- No. 1151.** Petition by landlord, etc., under subdivision 1 of section 2231 of Code Civil Procedure.  
**1152.** Same petition, under subdivision 2 of section 2231 of Code Civil Procedure.  
**1153.** Same petition, under subdivision 3 of section 2231 of Code Civil Procedure.  
**1154.** Same petition, under subdivision 4 of section 2231 of Code Civil Procedure.  
**1155.** Same petition, under subdivision 5 of section 2231 of Code Civil Procedure.  
**1156.** Notice to pay rent or to surrender possession of premises.  
**1157.** Notice to pay taxes or assessments, or to surrender possession of premises.  
**1158.** Petition by person entitled to possession of real property, under subdivision 1 of section 2232 of Code Civil Procedure.  
**1159.** Same petition, under subdivision 2 of section 2232 of Code Civil Procedure.  
**1160.** Same petition, under subdivision 3 of section 2232 of Code Civil Procedure.  
**1161.** Same petition, under subdivision 4 of section 2232 of Code Civil Procedure.  
**1162.** Petition for removal of a person for forcible entry or detainer.  
**1163.** Notice to tenant at will or at sufferance to remove.  
**1164.** Notice in cases specified in section 2232 of Code Civil Procedure.  
**1165.** Notice to landlord or owner of premises occupied as a bawdy-house, etc.  
**1166.** Petition by one in the neighborhood of bawdy-house, etc., for removal of occupant.  
**1167.** Precept upon presentation of petition.  
**1168.** Affidavit of service of precept.

- No. 1169. Answer to petition upon return of the precept.  
 1170. Final order upon return of the precept or upon trial.  
 1171. Warrant to dispossess tenant, etc.  
 1172. Return of officer to warrant.  
 1173. Undertaking to effect stay, under subdivision 1 of section 2254 of Code Civil Procedure.  
 1174. Same, under subdivision 2 of section 2254 of Code Civil Procedure.  
 1175. Same, under subdivision 3 of section 2254 of Code Civil Procedure.  
 1176. Affidavit to be made, under subdivision 3 of section 2254 of Code Civil Procedure, to obtain stay.  
 1177. Notice by creditor of lessee of his intention to redeem.  
 1178. Petition of person redeeming premises.  
 1179. Order to show cause upon petition, No. 1178.  
 1180. Final order upon the return of order to show cause, No. 1179.  
 1181. Notice of appeal from final order, under title 2 of chapter 17 of Code Civil Procedure.  
 1182. Undertaking on appeal from final order, under section 2262 of Code Civil Procedure.  
 1183. Order of reversal of final order.  
 1184. Complaint in action for recovery of damages sustained by dispossession, where final order is reversed on appeal.

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 TITLE III.

*Forms relating to proceedings to punish a contempt of court other than a criminal contempt.*

(Code Civ. Pro., Ch. 17, Tit. 3.)

- No. 1185. Affidavit on which to procure warrant, or order to show cause in contempt proceedings.  
 1186. Order for warrant for contempt of court issued without notice.  
 1187. Warrant to commit for contempt of court issued without notice.  
 1188. Order to show cause why the accused should not be punished for the alleged offense.  
 1189. Order directing warrant of attachment to issue for contempt of court.  
 1190. Warrant of attachment in proceedings for contempt of court.  
 1191. Notice to sheriff, etc., to return execution or show cause, etc.  
 1192. Proof of service of notice to return execution.  
 1193. Affidavit of delivery of execution to sheriff.  
 1194. Clerk's certificate of search for execution and not finding same.  
 1195. Affidavit of search for mandate.  
 1196. Order upon decision of motion to compel return of mandate by sheriff.  
 1197. Undertaking to procure discharge.  
 1198. Affidavit in proceedings for contempt where the accused is in the custody of sheriff, etc.  
 1199. Writ of habeas corpus in contempt proceedings.  
 1200. Return to writ of habeas corpus in contempt proceedings.

- 1201. Return to warrant of attachment in contempt proceedings.
- 1202. Order directing interrogatories to be filed.
- 1203. Interrogatories to accused in contempt proceedings.
- 1204. Answer of accused to interrogatories.
- 1205. Order convincing defendant of the contempt charged and directing his punishment.
- 1206. Warrant of commitment, pursuant to order.
- 1207. Affidavit to obtain release of offender.
- 1208. Notice of application for discharge of offender.
- 1209. Order discharging offender from imprisonment.
- 1210. Order when accused does not appear.
- 1211. Complaint on undertaking given for appearance of offender.

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TITLE IV.

*Forms relating to proceedings to collect a fine.*

(Code Civ. Pro., Ch. 17, Tit. 4.)

- No. 1212. Warrant for collection of fines imposed by court of record.

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TITLE V.

*Forms relating to proceedings to discover the death of a tenant for life of real property.*

(Code Civ. Pro., Ch. 17, Tit. 5.)

- No. 1213. Petition for production of tenant for life of real property.
1214. Notice of presentation of petition.
1215. Order upon presentation of petition.
1216. Affidavit to procure writ of habeas corpus for prisoner, etc.
1217. Referee's report in these proceedings.
1218. Order dismissing the petition when the original order has been complied with.
1219. Petition of person evicted for restoration to possession of real property.
1220. Complaint in action by person evicted under order for rents and profits.

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TITLE VI.

*Forms relating to proceedings for the appointment of a committee of the person and of the property of a lunatic, idiot or habitual drunkard, and to the general powers and duties of the committee.*

(Code Civ. Pro., Ch. 17, Tit. 6.)

- No. 1221. Petition for appointment of committee of person incompetent to manage himself or his affairs, in consequence of lunacy, etc.
1222. Affidavit to be annexed to petition.
1223. Petition by overseers of the poor for appointment of committee.
1224. Notice of presentation of petition.

- No. 1225.** Order for commission or for jury trial.  
**1226.** Commission to inquire as to lunacy, etc.  
**1227.** Oath of commissioners.  
**1228.** Precept to sheriff to summon jury.  
**1229.** Sheriff's return to precept.  
**1230.** Oath to jurors.  
**1231.** Oath to witnesses.  
**1232.** Subpœna for witnesses.  
**1233.** Notice to lunatic, etc., of execution of commission.  
**1234.** Notice to produce lunatic, etc.  
**1235.** Inquisition.  
**1236.** Notice of application to confirm finding of jury.  
**1237.** Final order on return of commission.  
**1238.** Bond of committee.  
**1239.** Commission to committee.  
**1240.** Complaint in action by committee of lunatic, etc.  
**1241.** Complaint in action against committee.  
**1242.** Petition by lunatic, etc., discharge of committee, etc., on his recovery.  
**1243.** Affidavits annexed to petition for discharge of committee.  
**1244.** Order discharging committee.  
**1245.** Inventory and account of committee to be rendered annually.  
**1246.** Order for inventory or account, or for further inventory, etc., by committee.

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 TITLE VII.

*Forms relating to proceedings for the disposition of the real property of an infant, lunatic, idiot or habitual drunkard.*

(Code Civ. Pro., Ch. 17, Tit. 7.)

- No. 1247.** Complaint in action to compel infant or lunatic, etc., trustee to convey.  
**1248.** Complaint in action to compel specific performance of contract by infant, etc.  
**1249.** Order for judgment that infant, etc., trustee convey.  
**1250.** Order for judgment for specific performance of contract by infant, etc.  
**1251.** Petition for sale of real property of infant.  
**1252.** Petition by committee of lunatic, idiot or habitual drunkard for sale of his real estate to pay debts.  
**1253.** Order upon petition appointing special guardian of infant.  
**1254.** Bond of committee or special guardian.  
**1255.** Order to show cause why committee should not file bond.  
**1256.** Order upon return of order to show cause, No. 1255.  
**1257.** Order appointing referee to inquire into merits of application.  
**1258.** Referee's report.  
**1259.** Final order upon referee's report.  
**1260.** Report of special guardian or committee of agreement to sell.  
**1261.** Order confirming guardian's (etc.) report, and directing a conveyance.

- No. 1262. Another form of order of confirmation, where proceeds are retained by guardian, etc.
1263. Another form of order of confirmation, where the amount of the proceeds exceeds five hundred dollars and no real security has been given by the guardian.
1264. Deed by special guardian, etc.
1265. Release of widow's right of dower.
1266. Final report of special guardian.
1267. Order confirming final report of special guardian.
1268. Consent of owner of dower estate, etc., to receive a gross sum in satisfaction thereof.
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## TITLE VIII.

*Forms relating to arbitrations.*

(Code Civ. Pro., Ch. 17, Tit. 8.)

- No. 1269. Submission of controversies to arbitration, short general form.
1270. General submission, full form.
1271. Special submission of a controversy.
1272. Appointment by arbitrators of time and place of hearing, and notice to parties.
1273. Oaths of arbitrators.
1274. Subpœna to appear before arbitrators as a witness.
1275. Oath to witness before arbitrators.
1276. Award by arbitrators.
1277. Award by arbitrators, another form.
1278. Notice of motion to confirm award.
1279. Order upon motion confirming award.
1280. Notice of motion to vacate or modify the award.
1281. Order vacating, etc., the award.
1282. Judgment upon award.
1283. Affidavit in case of the death of, or the appointment of a committee for a party, after filing or delivering of the award.
1284. Order extending time within which motion to vacate, etc., award must be made.
1285. Revocation of submission.
1286. Notice to opposite party of revocation.
1287. Complaint against a party revoking a submission to arbitration.
1288. Arbitration bond.
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## TITLE IX.

*Forms relating to proceedings to foreclose a mortgage by advertisement.*

(Code Civ. Pro., Ch. 17, Tit. 9.)

- No. 1289. Notice of sale in foreclosure by advertisement.
1290. Notice of postponement of sale.
1291. Affidavit of sale.
1292. Affidavit of publication of notice of sale and postponement.



- No. 1293.** Affidavit of affixing notice at or near entrance to court house.  
**1294.** Affidavit of affixing copy of notice by county clerk in book kept by him.  
**1295.** Affidavit of service of notice of sale.  
**1296.** Note by clerk upon margin of record of mortgage.  
**1297.** Bill of costs on foreclosure by advertisement.  
**1298.** Petition for surplus moneys arising upon sale.  
**1299.** Notice of application for surplus.  
**1300.** Order of reference upon the application.  
**1301.** Report of referee as to priority of liens, etc.  
**1302.** Order upon report of referee.

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TITLE X.

*Forms relating to proceedings to change the name of an individual.*

(Code Civ. Pro., Ch. 17, Tit. 10.)

- No. 1302a.** Petition by corporation for leave to assume another corporate name.  
**1303.** Petition by person of full age for leave to assume another name.  
**1304.** Order upon petition granting such leave, provided, etc.  
**1304a.** Order upon petition of a corporation, form No. 1302a.  
**1304b.** Notice of presentation of petition of corporation, form No. 1304a, for leave to assume another name.  
**1305.** Petition by infant for change of name.  
**1306.** Affidavit of publication of order.

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TITLE XI.

*Forms relating to the voluntary dissolution of a corporation,*

(Code Civ. Pro., Ch. 17, Tit. 11.)

- No. 1307.** Petition by majority of trustees, etc., for dissolution of a corporation.  
**1308.** Petition for dissolution of corporation in case the directors, etc., are equally divided respecting its management.  
**1309.** Order to show cause on presentation of petition.  
**1310.** Schedule to be annexed to the petition.  
**1311.** Referee's report.  
**1312.** Notice of appearance to make persons appearing, parties to the proceeding  
**1313.** Notice of motion for final order.  
**1314.** Final order dissolving corporation, etc.

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TITLE XII.

*Forms relating to proceedings supplementary to an execution against property.*

(Code Civ. Pro., Ch. 17, Tit. 12 )

ARTICLE FIRST.

*Forms relating to proceedings to compel an examination of the judgment debtor, and of his debtor or bailee.*

(Code Civ. Pro., Ch. 17, Tit. 1, Art. 1.)

- No. 1315.** Affidavit to obtain order to examine judgment debtor after return of execution against property issued out of a court of record.

- 1316. Affidavit to procure order for examination after the issuing and before the return of an execution.
- 1317. Order for examination of judgment debtor after return of execution.
- 1318. Affidavit to procure warrant for arrest of judgment debtor.
- 1319. Warrant for arrest of judgment debtor.
- 1320. Undertaking of judgment debtor to obtain his discharge from arrest.
- 1321. Warrant upon failure to comply with the order directing undertaking to be given.
- 1322. Affidavit to obtain order for examination of person or officer of corporation having property, etc., of judgment debtor.
- 1323. Order to examine person having property, etc., of judgment debtor.
- 1324. Referee's return pursuant to order.
- 1325. Oath of referee.
- 1326. Affidavit to obtain order permitting payment of debt to sheriff.
- 1327. Notice of application for order permitting payment to sheriff by person indebted to judgment debtor.
- 1328. Order permitting person to pay debt to sheriff.
- 1329. Notice of application for order that debtor pay over money, etc.
- 1330. Order requiring delivery of money or property to sheriff or receiver by judgment debtor.
- 1331. Order directing the payment or application of money or property by sheriff.
- 1332. Order directing balance, etc., to be paid to judgment debtor in certain cases.
- 1333. Affidavit of service of injunction order and order requiring debtor's attendance for examination.
- 1334. Sheriff's return of arrest pursuant to warrant.
- 1335. Order dismissing or discontinuing proceeding.
- 1336. Order directing payment of costs to judgment creditor.
- 1337. Order directing payment of costs to judgment debtor.
- 1338. Affidavit to obtain examination of judgment debtor, etc., when execution has been issued pursuant to section 1941 of the Code of Civil Procedure.

## ARTICLE SECOND.

*Forms relating to the receiver.*

(Code Civ. Pro., Ch. 17, Tit. 12, Art. 2.)

- No. 1339. Notice of application for appointment of receiver.
- 1340. Order appointing receiver.

## TITLE XIII.

*Forms relating to proceedings to compel delivery of books and papers to public officers.*

(Code Civ. Pro., Ch. 17, Tit. 13.)

- No. 1338a. Complaint to compel delivery of books, etc.
- 1338b. Order to show cause granted upon complaint, form No. 1338a.
- 1338c. Affidavit of delivery of books, etc.
- 1338d. Order discharging defendant on return of order to show cause.
- 1338e. Warrant to commit person withholding.
- 1338f. Search warrant for such books and papers withheld.

## CHAPTER XVIII.

*FORMS RELATING TO SURROGATES COURTS AND PROCEEDINGS THEREIN.*

(Code Civ. Pro., Ch. 18.)

- TITLE I.** Forms relating to the organization, jurisdiction and powers of the court; duties, powers and disabilities of the surrogate and to miscellaneous provisions.
- TITLE II.** Forms relating to provisions relating generally to the proceedings in surrogates courts, and to appeals from those courts.
- TITLE III.** Forms relating to granting and revoking probate; to letters testamentary and letters of administration; to foreign wills and ancillary letters.
- TITLE IV.** Forms relating to proceedings by or against an executor or administrator, touching the administration and settlement of the estate.
- TITLE V.** Forms relating to disposition of the decedent's real property, for the payment of debts and funeral expenses, and to distribution of the proceeds.
- TITLE VI.** Forms relating to provisions relating to a testamentary trustee.
- TITLE VII.** Forms relating to provisions relating to a guardian.

## TITLE I.

## ARTICLE FIRST.

*Forms relating to the jurisdiction of the court and authority of the surrogate.*

(Code Civ. Pro., Ch. 18, Tit. 1, Art. 1.)

No. 1341. Subpœna in surrogate's court.

## ARTICLE SECOND.

*Forms relating to the general duties and disabilities of the surrogate or temporary surrogate.*

(Code Civ. Pro., Ch. 18, Tit. 1, Art. 2.)

- No. 1342. Certificate of surrogate of his disqualification to act in a particular matter.
1343. Petition for order of General Term upon disqualification, etc., of surrogate.
1344. Order of General Term upon petition (form No. 1343).

## TITLE II.

## ARTICLE FIRST.

*Forms relating to process, and service thereof; appearance and joinder of issue, and miscellaneous regulations of practice.*

(Code Civ. Pro., Ch. 18, Tit. 2, Art. 1.)

- No. 1345. General form of citation issued by surrogate.

- No. 1346. Affidavit of personal service of citation.  
 1347. Affidavit to procure order for service of citation upon a resident of the State by publication.  
 1348. Order directing service of citation on resident of the State by publication.  
 1349. Order for service by publication in cases provided for by sections 2522, 2523 of the Code of Civil Procedure.  
 1350. Affidavit of service of citation without the State, and of publication and deposit in the post-office.  
 1351. Affidavit of service of citation upon infant under fourteen, lunatic, etc. or upon a corporation.  
 1352. Order for additional service in case of infant, etc.  
 1353. Notice of appearance in surrogate's court.  
 1354. Order appointing special guardian of infant or lunatic, etc.  
 1355. Consent of special guardian to his appointment.  
 1356. Notice of application for appointment of special guardian for infant, etc.  
 1357. Proof of service of citation, subpœna, etc.  
 1358. Verification of written pleadings, etc., in surrogate's court.

## ARTICLE SECOND.

*Forms relating to hearing, including trial by jury and reference.*

(Code Civ. Pro., Ch. 18. Tit. 2, Art. 2.)

- No. 1359. Petition to surrogate to take examination of an aged, sick or infirm witness.  
 1360. Order for examination of a witness in another county.  
 1361. Order appointing referee to take testimony of sick, etc., witness.  
 1362. Return of surrogate of another county of examination of witness before him.  
 1363. Decision of surrogate upon a trial by him of an issue of fact.  
 1364. Notice of exceptions to surrogate's decision.  
 1365. Order appointing referee on accounting.  
 1366. Referee's report on accounting.  
 1367. Order of surrogate for trial by jury.

## ARTICLE THIRD.

*Forms relating to decrees and orders of the surrogate's court and the enforcement thereof.*

(Code Civ. Pro., Ch. 18, Tit. 2, Art. 3.)

- No. 1368. Transcript of surrogate's decree directing payment of sum of money.  
 1369. Execution upon surrogate's decree directing payment of sum of money.  
 1370. Affidavit in proceedings for contempt, in not obeying surrogate's decree directing payment of sum of money.  
 1371. Affidavit of appraisers as to days occupied, and expenses in making appraisal and inventory.

## ARTICLE FOURTH.

*Forms relating to appeals from decree or order of surrogate's court.*

(Code Civ. Pro., Ch. 18, Tit. 2, Art. 4.)

- No. 1372. Affidavit by person appealing, not a party to the special proceeding.  
 1373. Notice of entry of surrogate's, etc., decree, or order to limit time of appeal therefrom.  
 1374. Notice of appeal from decree or order of surrogate or surrogate's court.  
 1375. Undertaking on appeal from surrogate's, etc., decree or order, in cases under sections 2577, 2578, Code of Civil Procedure.  
 1376. Judgment or order upon appeal from surrogate's, etc., decree.  
 1377. Order awarding jury trial upon reversal of surrogate's decree in probate cases.

## ARTICLE FIFTH.

*Forms relating to provisions relating generally to letters, and generally to executors, administrators, guardians and testamentary trustees.*

(Code Civ. Pro., Ch. 18, Tit. 2, Art. 5.)

- No. 1378. Official oath of executor, administrator or guardian.  
 1379. Order directing deposit of security with surrogate or with trust company.  
 1380. Order authorizing withdrawal, etc., of security from county treasurer or trust company by executor, etc.  
 1381. Petition for new bond or new sureties to be given by executor, etc.  
 1382. Order that citation issue to executor, etc., to show cause why prayer of petition (No. 1381) should not be granted.  
 1383. Citation to executor, etc., to show cause why the prayer of petition (No. 1381) should not be granted.  
 1384. Order upon return of citation (No. 1383).  
 1385. Decree after expiration of time fixed for filing new bond, etc., allowed by order.  
 1386. Petition of sureties in a bond for their relief from responsibility.  
 1387. Order that citation issue to executor, etc., pursuant to petition (form No. 1386).  
 1388. Citation requiring executor, etc., to show cause, pursuant to petition (form No. 1386).  
 1389. Decree on return of citation (form No. 1388).  
 1390. Order directing as to custody of property, when co-executors, etc., disagree.  
 1391. Complaint in action upon official bond of administrator, etc.  
 1392. Complaint by successor of administrator, etc., upon his official bond, after revocation of letters.

## TITLE III.

## ARTICLE FIRST.

*Forms relating to the probate of a will and grant of letters thereon.*

(Code Civ. Pro., Ch. 18, Tit. 3, Art. 1.)

- No. 1393. Petition for the probate of a will.  
 1394. Order that citation issue for probate of will.  
 1395. Citation to attend probate of a will.  
 1396. Notice requiring the examination of all the subscribing witnesses, etc., to a written will.  
 1397. Answer to petition for probate of will.  
 1398. Deposition of subscribing witnesses to will.  
 1399. Proof of handwriting in case of death or absence from the State, of either of the subscribing witnesses.  
 1400. Interrogatories to be annexed to commission for examination of subscribing witness to will.  
 1401. Proof of custody of will.  
 1402. Decree admitting will to probate and record.  
 1403. Petition for proof of lost or destroyed will.  
 1404. Decree admitting lost or destroyed will to probate.  
 1405. Decree setting aside a will.  
 1406. Surrogate's certificate of probate of will.  
 1407. Affidavit stating objections to granting letters.  
 1408. Order that executor appear to attend inquiry.  
 1409. Order that objector proceed with the inquiry.  
 1410. Objections to issuing of letters to an executor named in the will.  
 1411. Decree upon objections.  
 1412. Letters testamentary upon will.  
 1413. Bond of executor or administrator.  
 1414. Renunciation by executor.  
 1415. Retraction of renunciation by executor.  
 1416. Instrument selecting person as executor under a power contained in a will.  
 1417. Petition for order requiring an executor named in will to qualify or renounce.  
 1418. Order requiring executor named in will to qualify or renounce.  
 1419. Order in case of failure of executor to qualify, pursuant to order (form No. 1418).  
 1420. Petition for appointment of administrator, with the will annexed.  
 1421. Renunciation by person having prior right to administer.  
 1422. Letters of administration with the will annexed.

## ARTICLE SECOND.

*Forms relating to revocation of probate.*

(Code Civ. Pro., Ch. 18, Tit. 3, Art. 2.)

- No. 1423. Petition for revocation of probate of will.  
 1424. Citation upon petition for revocation of probate of will.

- No. 1425. Decree revoking probate, or confirming probate and dismissing petition.  
 1426. Notice of revocation of probate.

## ARTICLE THIRD.

*Forms relating to probate of heirship.*

(Code Civ. Pro., Ch. 18, Tit. 3, Art. 3.)

- No. 1427. Petition for probate of heirship.  
 1428. Citation to attend probate of heirship.  
 1429. Decree establishing the right of inheritance.  
 1430. Petition to vacate or modify the decree establishing the right of inheritance.  
 1431. Citation upon petition (form No. 1430).

## ARTICLE FOURTH.

*Forms relating to grant of letters of administration.*

(Code Civ. Pro., Ch. 18, Tit. 3, Art. 4.)

- No. 1432. Petition for letters of administration.  
 1433. Citation on petition for letters of administration.  
 1434. Renunciation of right to administer.  
 1435. Appearance by creditor, etc.  
 1436. Decree awarding administration.  
 1437. Bond of administrator.  
 1438. Oath of administrator.  
 1439. Letters of administration.

## ARTICLE FIFTH.

*Forms relating to temporary administration.*

(Code Civ. Pro., Ch. 18, Tit. 3, Art. 5.)

- No. 1440. Petition for temporary administration.  
 1441. Notice of application for order appointing temporary administrator.  
 1442. Order appointing temporary administrator.  
 1443. Letters of temporary administration.  
 1444. Petition for payment of debt by temporary administrator.  
 1445. Oath of temporary administrator.  
 1446. Bond of temporary administrator.  
 1447. Petition that temporary administrator deposit money or show cause, etc.  
 1448. Order that temporary administrator make deposit or show cause why a warrant of attachment should not issue against him.

## ARTICLE SIXTH.

*Forms relating to revocation of letters testamentary and letters of administration.*

(Code Civ. Pro., Ch. 18, Tit. 3, Art. 6.)

- No. 1449. Petition by person interested for revocation of letters.

- No. 1450. Citation upon petition (form No. 1449).  
 1451. Order upon return of citation (form No. 1450).  
 1452. Decree revoking letters on failure to give bond.  
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## ADDENDA.\*

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Form No. 761, page 639, insert in fifth line, after word "is" and before word "entitled," the word "lawfully."

Form No. 334, note 2, page 244, for "ed. 1861, page 96," read "ed. 1896, page 61."

Heading of page 622a should be "other real actions" and not "Action for nuisance."

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\*Please note opposite the forms.



# FORMS OF CIVIL PROCEDURE.

## CHAPTER XV.

**FORMS RELATING TO SPECIAL PROVISIONS OF CHAPTER FIFTEEN OF THE CODE OF CIVIL PROCEDURE, REGULATING PARTICULAR ACTIONS AND RIGHTS OF ACTION AND ACTIONS BY AND AGAINST PARTICULAR PARTIES.**

- TITLE I.** Forms relating to matrimonial actions.
- TITLE II.** Forms relating to actions relating to corporations.
- TITLE III.** Forms relating to actions relating to the estate of a decedent.
- TITLE IV.** Forms relating to other special actions and rights of action.
- TITLE V.** Forms relating to other actions by or against particular parties.

### TITLE I.

#### FORMS RELATING TO MATRIMONIAL ACTIONS.

##### ARTICLE FIRST.

#### FORMS RELATING TO ACTIONS TO ANNUL A VOID OR VOIDABLE MARRIAGE.

(Code Civ. Pro., Ch. 16, Tit. 1, Art. 1.)

- No. 790.** Complaint in action by woman to declare marriage contract void, entered into by her when under age of fourteen years.
- 791.** Complaint in action to annul a marriage contracted by party under age of legal consent.
- 792.** Complaint in action to annul marriage on the ground that former husband or wife was living.
- 793.** Complaint in action to annul marriage of idiot.
- 794.** Complaint by lunatic at time of marriage to annul marriage after restoration to sound mind.
- 795.** Complaint by relative of lunatic to annul marriage on the ground of lunacy.
- 796.** Complaint in action to annul marriage on the ground of fraud in obtaining consent.
- 797.** Complaint in action to annul marriage on ground of physical incapacity.
- 798.** Affidavit to obtain order of reference in suit to annul marriage on the ground of non-age.
- 799.** Affidavit for reference in suit to annul marriage on the ground that consent was obtained by force, fraud or duress.
- 800.** Affidavit for reference in suit to annul marriage on ground of lunacy.

- No. 801. Order of reference in action to annul marriage.  
 802. Order of reference in action to dissolve marriage on ground of physical incapacity.  
 803. Report of referee in action to annul marriage.  
 804. Final judgment in action to annul marriage on ground of non-age, lunacy or idiocy.  
 805. Petition for appointment of next friend for infant, idiot or lunatic.  
 806. Order appointing next friend to bring such action.

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No. 790.

**Complaint in Action by Woman to Declare Marriage Contract Void, Entered into by her when under Age of Fourteen Years.**

(Code Civ. Pro., § 1742.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows:

[That the plaintiff is an infant under the age of twenty-one years; that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said G. H. was appointed, upon application duly made in her behalf, as guardian *ad litem* of said plaintiff, by the \_\_\_\_\_ court (*or* by Hon. A. O., a judge of this court; *or* by Hon. C. P., county judge of \_\_\_\_\_ county), by order duly entered, for the purposes of this action.<sup>1</sup>]

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the plaintiff and defendant were married at \_\_\_\_\_.

That at the time of such marriage the plaintiff had not attained the age of sixteen years, she being then of the age of \_\_\_\_\_ years; and that at the time of such marriage her father [*or* mother, *or* guardian] had the legal charge of the person of the plaintiff, and that such marriage took place without the consent of her said father [*or* mother, *or* guardian].

That such marriage has not been followed by consummation or cohabitation of the plaintiff and defendant, and has not been ratified by any mutual assent of the plaintiff and defendant after the plaintiff had attained the age of sixteen years.<sup>2</sup>

<sup>1</sup> That these allegations are necessary in the case of suit in behalf of an infant plaintiff, see *Grantman v. Thrall* (44 Barb., 173); *Hulbert v. Young* (13 How. Pr., 413). See also *Secor v. Pendleton* (47 Hun, 281); *Schillinger Fire Proof Cement Co. v. Arnott* (14 N. Y. Supp., 326).

<sup>2</sup> Section 1742, Code Civ. Pro., was amended by ch. 22 of Laws of 1887, by substituting "sixteen" for "fourteen" in subdivisions 1 and 3. By ch. 24 of laws of that year the age of legal consent for contracting marriage by females is fixed at sixteen years, and by males at eighteen years.

And plaintiff further shows that she is desirous that the said marriage contract should be declared void, and that said marriage should be annulled, and prays judgment declaring said marriage contract void and annulling said marriage, and for such other relief as may be just, and for her costs of this action.

M. N., *Plaintiff's Attorney.*

[Office address.<sup>1</sup>]

[Verification as in forms Nos. 151, etc.]

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No. 791.

**Complaint in Action to Annul a Marriage Contracted by Party under Age of Legal Consent.**

(Code Civ. Pro., §§ 1743 [subd. 1], 1744.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that he is the father [*or she is the mother, or that he (or she) is the guardian of the person, or that he (or she) has been duly appointed by order of the ——— Court, made and entered on the ——— day of ———, 18—, the next friend, for the purposes of this action*] of I. F., above named.<sup>2</sup>

That said I. F. is an infant under the age of twenty-one years.

That said I. F. was married to the defendant, on the ——— day of ———, 18—, he [*or she*] being at that time of the age of [state exact age], and was not of the age when he [*or she*] could legally consent to such marriage.

That the said I. F. has not, since he [*or she*] attained the age of eighteen [*or sixteen*]<sup>3</sup> years, freely cohabited with the defendant as his wife [*or as her husband*].

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<sup>1</sup> See note 2 to form No. 122.

<sup>2</sup> If the suit is brought by the infant make same allegations as to appointment of guardian as in form No. 790, and where name of infant occurs say "plaintiff" instead of naming infant.

For proceedings for appointment of next friend, see section 1755, Code Civ. Pro., and forms Nos. 805, 806.

<sup>3</sup> The age of consent is fixed by the common-law at fourteen in males and twelve in females. (2 Kent's Com., 78; Co. Litt., 33 a, 39 b.) The Revised Statutes originally contained a provision making the marriageable age of the male seventeen and of the female fourteen, but this section was repealed by chapter 320, § 24, Laws of 1830. See also note 2 to form No. 790.

Wherefore the plaintiff prays the judgment of this court annulling said marriage and declaring said marriage contract void, pursuant to the statute in such case provided, and that said defendant is not entitled to dower in any portion of the real estate of the said I. F., or to any interest or distributive share in the personal estate of said I. F., in case of his [or her] death intestate,<sup>1</sup> and that plaintiff may have his [or her] costs of this action, and such other and further relief as may be just.

M. N., *Plaintiff's Attorney.*  
[Office address.<sup>2</sup>]

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No. 792.

**Complaint in Action to Annul Marriage, on the Ground that Former Husband or Wife was Living.**

(Code Civ. Pro., §§ 1743 [subd. 2], 1745.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the plaintiff and defendant were married.

That, at the time of such marriage, the said defendant was the husband [or wife] of one P. F., and that said P. F., was then living, and that the marriage of said defendant, with said P. F., was then in force.

And plaintiff further alleges, that the said marriage between plaintiff and defendant was contracted by said plaintiff [or by said plaintiff and defendant] in good faith, and with the full belief that said P. F. was dead [or without any knowledge on the part of said plaintiff, of such former marriage].<sup>3</sup>

That one child, a boy [or girl], named \_\_\_\_\_, the issue of such marriage between the plaintiff and defendant, was born on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and is now living.

Wherefore, etc. [same prayer for relief as in last form]

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<sup>1</sup> This clause as to property rights, should only be inserted when the suit is brought by the husband or his guardian, etc.

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> See section 1745, Code Civ. Pro., and *Davis v. Davis* (2 Misc., 549); *Safford v. Safford* (31 Abb. N. C., 73).



No 791, adding (when children have been born), as follows : that the said issue of the marriage between plaintiff and defendant (*or* between plaintiff and said M. G.), may be adjudged, for all purposes, the legitimate child of the said plaintiff and entitled to succeed as such, in the same manner as other legitimate children, to the real and personal estate of said plaintiff, and that the plaintiff may be awarded the care and custody thereof].

M. N., *Plaintiff's Attorney.*

[Office address.¹]

[Verification as in forms Nos. 151, etc.]

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No. 793.

**Complaint in Action to Annul Marriage of Idiot.**

(Code Civ. Pro., §§ 1743 [subd. 3], 1746.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, [†] that M. R. and E. J., who are both living [*or* allege according to the fact],² were married on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

That, at the time of said marriage, the said E. J. was an idiot. [\*].

That the plaintiff is the [state relationship], of the defendant, having an interest to avoid such marriage by reason of his said relationship, and his being entitled to succeed to the property of the said E. J., in the event of his death, as his heir-at-law and next of kin.³

Wherefore the plaintiff prays, etc. [prayer for judgment as in form No. 791].

M. N., *Plaintiff's Attorney.*

[Office address.⁴]

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¹ See note 2 to form No. 122.

² The suit may be brought by a relative having an interest to avoid the marriage, at any time during the life-time of either party. (Code Civ. Pro., § 1746.)

³ Or the court may allow the action

to be brought by any person as next friend of the idiot, at any time during the life-time of both parties to the marriage where no relative brings it. (Code Civ. Pro., § 1748.)

⁴ See note 2 to form No. 122 ; and see *Forman v. Forman* (53 State Rep., 639).

## No. 794.

**Complaint by Lunatic at time of Marriage to Annul Marriage after Restoration to Sound Mind.**

(Code Civ. Pro., §§ 1743 [subd. 3], 1747.)

As in form No. 793 to [†], and from thence as follows: That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the plaintiff and defendant were married.

That, at the time of such marriage, the plaintiff was a lunatic.

That on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, said plaintiff was restored to sound mind, and has been ever since, and is now of sound mind.

That said plaintiff and defendant have not freely cohabited as husband and wife, since the said plaintiff has been restored to a sound mind.

Wherefore the plaintiff prays judgment [prayer for judgment as in form No. 791].<sup>1</sup>

M. N., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

## No. 795.

**Complaint by Relative of Lunatic to Annul Marriage on the Ground of Lunacy.**

(Code Civ. Pro., §§ 1743 [subd. 3], 1747.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, M. F., the defendant, and B. H. were married. [†]

That, at the time of such marriage, said B. H. was, and that he still is, a lunatic [*or* and that he (*or* she) continued to be such lunatic at the time of his (*or* her) death, which occurred on the \_\_\_\_\_ day of \_\_\_\_\_, 18—].

[Continue as in form No. 793 from (\*) to the end thereof.<sup>3</sup>]

M. N., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> See *Banker v. Banker* (63 N. Y., 409; aff'g S. C., 4 Hun, 259).

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> See notes to form No. 793, and note

No. 796.

**Complaint in Action to Annul Marriage on the Ground of Fraud in Obtaining Consent.**

(Code Civ. Pro., §§ 1743 [subd. 4], 1750.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that on the ——— day of ———, 18—, the plaintiff and defendant [*or* R. F. and defendant] were married.

That the consent of the said plaintiff [*or* of said R. F.] to said marriage was obtained by fraud, the defendant for the purpose of obtaining said consent having fraudulently represented to the plaintiff [*or* to said R. F.], prior to said marriage, that [here state facts constituting the fraudulent representations], which representations the plaintiff [*or* said R. F.] believed to be true and was induced thereby to consent to said marriage, and entered into said marriage relying upon such representations, which representations plaintiff [*or* said R. F.], after said marriage, discovered to be wholly untrue.

[*Or* that the consent of the said plaintiff (*or* of said R. F.) to said marriage was obtained by force (*or* by duress, and state facts in regard to force or duress, *e. g.*) in that before and at the time the said marriage took place the said plaintiff (*or* the said R. F.) was imprisoned by the said defendant (and others in collusion with him), and then and there continued so imprisoned until the said plaintiff (*or* the said R. F.), through the force and restraint of that imprisonment, there consented to said marriage with the said defendant.]

That the said plaintiff and defendant [*or* said R. F. and the defendant] have not, at any time before the commencement of this action [with a full knowledge of the facts constituting the said fraud], voluntarily cohabited as husband and wife.<sup>1</sup>

1 to last form No. 794. This action may also be brought by a next friend of the lunatic, appointed by the court for that purpose, when the suit is not brought by a relative of the lunatic; but this suit by a next friend cannot be brought, where the marriage might

have been annulled at the suit of the lunatic after restoration to reason. Code Civ. Pro., § 1748.) As to allegation of appointment in suit brought by next friend, see form No. 791.

<sup>1</sup> See section 1750, Code Civ. Pro.

[And the plaintiff further alleges, that he (*or* she) is the father (*or* mother, *or* guardian of the person) of the said R. F. (*or* that he, *or* she), is the (state relationship) of the said R. F., and has an interest to avoid the said marriage, by reason of his (*or* her) being the heir-at-law and next of kin of the said R. F.<sup>1</sup>]

Wherefore the plaintiff prays judgment that said marriage be annulled and said marriage contract be declared void, pursuant to the statute in such case made and provided [and that the custody of the children of said marriage be awarded to the said plaintiff], and that the court will make such provision for the education and maintenance of the said children out of the property of the said defendant as may be necessary and proper,<sup>2</sup> and that the plaintiff may recover the costs of this action and have such other and further relief as may be proper.<sup>3</sup>

M. N., *Plaintiff's Attorney.*  
[Office address.<sup>4</sup>]

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No. 797.

### Complaint in Action to Annul Marriage on Ground of Physical Incapacity.

(Code Civ. Pro., 1743, subd. 5.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that on the ——— day of ———, 18—, the plaintiff and the defendant were married.<sup>5</sup>

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<sup>1</sup> See section 1750, Code Civ. Pro.

<sup>2</sup> Where there are children of the marriage, the same allegations should be made in regard to them as in form No. 792. See, as to this relief, section 1751, Code Civ. Pro.

<sup>3</sup> The fraud which enables the injured party to have the marriage annulled, under section 1743 of Code Civ. Pro., is not false representations to the plaintiff as to the character and property of the defendant; and where in such an action the plaintiff alleges in her complaint that her consent was obtained by fraud, and the defendant makes default, she cannot have the marriage dissolved on the ground that defendant represented it as, and that she supposed it to be, only a betrothal, and that it has never been consummated. (*Klein v. Wolfsohn*, 1 Abb. N. C., 134.) See *Keyes v. Keyes* (6

Misc., 355); *King v. Brewer* (8 id., 587); *Riley v. Riley* (73 Hun, 575); *Anderson v. Anderson* (74 id., 56); *Sherman v. Sherman* (47 State Rep., 404); *Fisk v. Fisk* (12 Misc., 466); *Moot v. Moot* (37 Hun, 288); *Barth v. Barth* (5 Month. L. Bul., 87); *Muller v. Muller* (21 W. Dig., 287); *Tait v. Tait* (3 Misc. 218).

<sup>4</sup> See note 2 to form No. 122.

<sup>5</sup> The fact that the marriage occurred more than two years before the commencement of the action (2 R. S., 143, § 33; Code Civ. Pro., § 1752) must be pleaded by the defendant as an affirmative defense, in like manner as other statutes of limitation. It does not, of itself, defeat the plaintiff's case, when such fact appears by the testimony on the default of the defendant. (*Kaiser v. Kaiser*, 16 Hun, 602.) Section 1752, Code Civ. Pro., was amended by ch.

That, at the time of the said marriage, the plaintiff believed the defendant, from [her] dress, appearance and representations, to be a [woman] capable of entering into the marriage state, and of performing all the duties and relations of a [wife].

That [he] took [her] to his residence [or that she took up her residence with him], and for the space of [six months] endeavored to cohabit with [her] as his [wife], until [he] ascertained, both from [his] own knowledge and from [her] own admissions and confessions, that [she] was, and ever had been, physically incapable of cohabitation or sexual intercourse, or of entering into the marriage state by reason of [here state nature of incapacity].<sup>1</sup>

And plaintiff alleges, upon information and belief, that the said defendant was, at the time of such marriage, physically incapable of entering into the marriage state, and that such incapacity still continues and is incurable.

Wherefore the plaintiff prays judgment that the said marriage contract may be declared void, and that said marriage may be annulled pursuant to the statute in such case made and provided [and that the plaintiff may have (her) costs of this action], and such other and further relief as may be proper.

M. N., *Plaintiff's Attorney.*

[Office address.]

[Verification as in forms Nos. 151, etc.]

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No. 798.

**Affidavit to Obtain Order of Reference in Suit to Annul Marriage on the Ground of Non-age.**

(Code Civ. Pro., § 1753; Gen. Rules of Practice, No. 74.)

[Title of cause.]

— COUNTY, ss.:

A. B., being duly sworn, says, that he is [the plaintiff in the above entitled action].

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809 of Laws of 1895, so as to read as follows:

§ 1752. An action to annul a marriage, on the ground that one of the parties was physically incapable of entering into the marriage state, may be maintained by the injured party against the party whose incapacity is alleged; or such an action may be maintained by the party who was in-

capable against the other party, provided the incapable party was unaware of the incapacity at the time of marriage, or if aware of such incapacity, did not know it was incurable. Such an action must be commenced before five years have expired since the marriage.

A note on Divorce for Impotence will be found in 8 Abb. N. C., 187.

<sup>1</sup>The allegations in this paragraph

That the complaint in said action seeks to annul the marriage between [plaintiff and defendant], [\*] on the ground that the [plaintiff] was under the age of legal consent at the time such marriage was contracted.

That [plaintiff] is now of the age of \_\_\_\_\_ years.

That [the parties to said action] have not freely cohabited for any time as husband and wife, after [the plaintiff] had attained the age of consent, to wit: the age of \_\_\_\_\_ years.<sup>3</sup>

A. B.

[Jurat as in form No. 46.]

No. 799.

**Affidavit for Reference in Suit to Annul Marriage on the Ground that Consent was Obtained by Force, Fraud or Duress.**

(Code Civ. Pro., § 1753; Gen. Rules of Practice, No. 74.)

As in form No. 798 to [\*], and from thence as follows: On the ground that the [plaintiff's] consent thereto was obtained by force [*or* fraud, *or* duress].

That there has been no voluntary cohabitation between the parties to such marriage as man and wife [with full knowledge of the facts constituting the fraud].<sup>4</sup>

A. B.

[Jurat as in form No. 46.]

No. 800.

**Affidavit to Obtain Order of Reference in Suit to Annul Marriage on Ground of Lunacy.**

(Code Civ. Pro., § 1753; Gen. Rules of Prac., No. 74.)

As in form No. 798 to [\*], and from thence as follows: On the ground that the plaintiff was a lunatic at the time such marriage was contracted.

That the said lunacy still continues [*or* that the parties

are substantially from the bill of complaint in *Devenbagh v. Devenbagh* (5 Paige, 554).

<sup>3</sup> See note 2 to form No. 122.

<sup>4</sup> Eighteen in males, sixteen in fe-

males. See note 3 to form No. 791 and note therein referred to.

<sup>4</sup> See Code Civ. Pro., § 1750. *Anderson v. Anderson* (74 Hun, 56); *Chambers v. Chambers* (66 St. R. 653).

have not cohabited as husband and wife, after the plaintiff was restored to his reason].

A. B.

[Jurat as in form No. 46.]

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No. 801.

**Order of Reference in Action to Annul Marriage.**

(Code Civ. Pro., § 1753; Gen. Rules of Prac., No. 74.)

[At, etc., as in form No. 80.]

[Title of cause.]

On reading and filing affidavit showing [recite briefly contents of affidavit, under rule 74], and it appearing that the summons herein was served upon the defendant more than twenty days since, and that the defendant has not appeared [or has not answered the complaint herein]:

It is hereby ordered, that it be referred to I. J., of ———, as referee, [\*] to take proof of the facts alleged in the complaint in this action, and to take the examination of the plaintiff specially as to the fact that the parties have not freely cohabited for any time as husband and wife after the plaintiff had attained the age of consent [or as to the other facts on which his examination is required by rule 74 in the different cases], and that he report thereon to this court and file the proofs taken by him with his report.

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No. 802.

**Order of Reference in Action to Dissolve Marriage on Ground of Physical Incapacity.**

(Code Civ. Pro., § 1743, subd. 5.)

As in form No. 801 to [\*], and from thence as follows: To take proof of the material facts charged in the complaint in this action, and to report such proof to the court, with his opinion thereon.

And it is further ordered, that the said referee inquire and report whether the defendant, at the time of the marriage with plaintiff, alleged in the complaint, was physically

incapable of entering into the marriage state, and whether the said incapacity still continues and is incurable.

That the said defendant be examined upon oath upon such reference as to the several matters alleged in said complaint, and that the defendant submit herself to such surgical examination and to such examination by matrons as the said referee may think proper to direct, for the purpose of ascertaining the fact of her alleged incapacity; but that no person shall be present at any such examination, except the surgeons and matrons who may be selected by the referee for that purpose, unless with her consent, and that in the selection of surgeons and matrons for that purpose the said referee have a due regard to the feelings and wishes of the said defendant.

And it is further ordered, that no person shall be permitted to be present before the referee, on the said reference, except the parties to this suit and their counsel and witnesses, and such of the friends of either of the parties as they, or either of them, may request to attend upon such reference.

And it is further ordered, that the said master do return the proofs taken before him, in a schedule to his report.

[And that the plaintiff, under the directions of the referee, furnish the necessary funds to pay the expenses of the surgical examination of the defendant, if a sufficient and satisfactory examination has not already been made.]<sup>1</sup>

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No. 803.

**Report of Referee in Action to Annul Marriage.**

(Code Civ. Pro., § 1753; Gen. Rules of Prac., No. 74.)

[Title of cause.]

*To the ——— Court :*

In pursuance of an order of this court, made and entered in the above entitled action on the ——— day of ———, 18—, by which it was referred to me [\*] to take proof of the facts alleged in the complaint in this action, and to take the examination of the plaintiff specially as to the fact that

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<sup>1</sup> This form is given in *Devanbagh v. Devanbagh* (5 Paige, 558).



[as stated in order], and to report thereon with the proofs taken by me, I, the said referee, do hereby report :

That I have taken proofs and examinations in this action, on the part of the plaintiff, as required by said order, which proofs and examinations are annexed to this my report, and form part thereof.

And I further report that, in my opinion, the facts alleged in the complaint are true, and have been fully proved and established before me.

That the said A. B. was under the age of legal consent at the time of the marriage alleged in the complaint, which I find took place on the \_\_\_\_\_ day of \_\_\_\_\_, as alleged in said complaint [*or that the said A. B. was a lunatic at the time, etc.; or otherwise, as the case may be.*]

Dated \_\_\_\_\_, 18—.

I. J., *Referee.*

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No. 804.

**Final Judgment in Action to Annul Marriage on Ground of Non-age, Lunacy or Idiocy, etc.**

(Code Civ. Pro., § 1753.)

[At, etc., as in form No. 80.]

[Title of cause.]

Upon reading and filing the report of I. J., referee, appointed herein by order of this court, dated \_\_\_\_\_, 18— [and notice of motion for confirmation thereof and for final judgment thereupon, at this term, with proof of due service thereof upon defendant's attorney], and on reading [name opposing papers] :

It is hereby ordered, on motion of R. C., attorney for the plaintiff [after hearing J. F., for the defendant (*or no one appearing to oppose*)], that the said report be and the same is hereby, in all things, confirmed.

And it is further ordered and adjudged, that the marriage contract between the plaintiff, A. B., and the defendant, C. B., be and the same is hereby declared void, and that the marriage between said plaintiff and the said defendant be and the same is hereby annulled from the date of this

judgment,<sup>1</sup> because [\*] the plaintiff had not attained the age of legal consent, at the time of such marriage, and that the parties, plaintiff and defendant, are free from the obligations of marriage with each other.

And it is further ordered and adjudged [state any judgment made as to costs].

[Or in case of lunacy or idiocy, or physical incapacity, as above to (\*), and from thence as follows: The plaintiff was a lunatic (or idiot, or the defendant was physically incapable of entering into the marriage state) at the time of such marriage, and that the parties, plaintiff and defendant, are free from the obligations of marriage with each other.

(In cases of lunacy or idiocy, where there are children of the marriage, add:)

And it is adjudged that E. B. and F. B., the children of said marriage, are entitled to succeed to the real and personal estate of the said defendant.

And it is further adjudged (state any judgment made as to costs-.)

[Or in case of existing former marriage, as above to (\*), and from thence as follows: A former husband (or wife) of the defendant, to wit (name former husband or wife), was living at the commencement of this action, and the marriage of defendant with said former husband (or wife) was then in force, and that the parties, plaintiff and defendant, are free from the obligation of marriage with each other.

And it is further adjudged and determined, that the said subsequent marriage, between the plaintiff and the defendant, was contracted by the plaintiff (and defendant) in good faith, and with the full belief that said former husband (or wife) was dead (or without any knowledge on the part of the plaintiff of such former marriage), and that E. B. and F. B., the children of said marriage between plaintiff and defendant, are, for all purposes, the legitimate children of said plaintiff, and are entitled to succeed, as such, in the same manner as other legitimate children to the real and personal estate of said plaintiff; and the custody of said

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<sup>1</sup>Such marriage is void from the time its nullity shall be declared by a court of competent authority. (See *Chambers v. Chambers* (66 State Rep., 155); *Day v. Day* (4 Misc., 235).  
R. S. [7th ed.], p. 2332, 2 R. S. 139,

E. B. and F. B. is hereby awarded to the said plaintiff,<sup>1</sup> and that the defendant is not entitled to dower in the real estate of the plaintiff, nor to any distributive share or interest in his personal estate in case of his death intestate.

(Add any provisions as to costs.)]

[*Or* in case of force, duress or fraud, as above to (\*), and from thence as follows: The consent of the plaintiff to said marriage contract was obtained by force (*or* by duress, *or* by fraud), and that the parties, plaintiff and defendant, are free from the obligations of marriage with each other.

And it is further adjudged, that the custody of E. B. and F. B., the children of said plaintiff and defendant, be and is hereby awarded to the plaintiff; and that the said defendant pay to the said plaintiff the sum of ——— dollars yearly, in semi-annual payments, for the education and maintenance of said children, until the said children shall arrive at the age of twenty-one years, or until the further order of this court, and give security therefor to the clerk of this court, to be approved by a justice of this court.<sup>2</sup>

And it is further adjudged, that the defendant pay to the plaintiff ——— dollars, hereby adjudged as the costs of this action.]

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No. 805.

**Petition for Appointment of Next Friend for Infant, Idiot or Lunatic to Bring Action to Annul Marriage.**

(Code Civ. Pro., § 1755.)

*To the ——— Court:*

The petition of G. H. respectfully shows:

That he is a friend [*or* state relationship] of A. B., of  
\_\_\_\_\_.

That said A. B. is an infant under the age of twenty-one years, and of the age of \_\_\_\_\_ years and upwards [*or* an idiot, *or* a lunatic].

That a marriage has been contracted by said A. B. with C. D., on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

That at the time of such marriage said A. B. had not at-

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<sup>1</sup>See section 1745, Code Civ. Pro.; Abb. N. C., 73).  
and see, also, Safford v. Safford (31      <sup>2</sup>See section 1751, Code Civ. Pro.

tained the age of legal consent to such marriage [*or* was an idiot (*or* was and still is a lunatic)].

That both said A. B. and C. D. are still living, and that as your petitioner is informed and believes they have not freely cohabited together for any time after said plaintiff had attained the age of legal consent.

And your petitioner prays that he [*or* that I. F., of ———] may be appointed the next friend of said A. B. for the purpose of bringing an action to have such marriage declared void and annulling said marriage.

Dated ———, 18—.

G. H.

[Verification as in form No. 52.]

#### CONSENT OF NEXT FRIEND.

I, I. F., of ———, hereby consent to be appointed the next friend of A. B. for the purpose of bringing the action mentioned in the foregoing petition.

Dated ———, 18—.

I. F.

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No. 806.

### Order Appointing Next Friend to Bring Action to Annul Marriage Contract on Behalf of Infant, etc.

(Code Civ. Pro., § 1755.)

[Title of application.]

On reading and filing the petition of G. H., dated ———, praying for his appointment [*or* for the appointment of I. F.] as the next friend of A. B., an infant [*or* a lunatic, *or* an idiot], for the purpose of bringing an action to have declared void the marriage contract between said A. B. and C. D., and to annul said marriage [with the written consent of said I. F. to accept said appointment]:

Now, on motion of K. L., counsel for said G. H., it is hereby ordered, that the said G. H. be and he is hereby authorized, as the next friend of said A. B., to maintain an action against said C. D. for the purpose of declaring void said marriage contract and of annulling said marriage.

## ARTICLE SECOND.

## FORMS RELATING TO ACTION FOR A DIVORCE.

(Code Civ. Pro., Ch. 15, Tit. 1, Art. 2.)

- No. 807. Complaint in action to dissolve marriage contract.  
 808. Answer in suit for dissolution of marriage contract.  
 809. Order of reference in suit to dissolve marriage.  
 810. Referee's report in action to dissolve marriage.  
 811. Final judgment dissolving marriage on default of the defendant, or where the marriage does not deny the adultery.  
 812. Final judgment dissolving marriage after the trial of a feigned issue.

## No. 807.

**Complaint in Action to Dissolve Marriage Contract.**

(Code Civ. Pro., § 1756.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that on the ——— day of ———, 18—, the plaintiff and defendant were married at ———, in the State of New York [*or state other jurisdictional facts as to residence required by section 1756*].

And plaintiff further states upon information and belief, that since the said marriage was contracted, and on or about the ——— day of ———, 18—, the defendant, at the ——— of ———, in the State of ———, committed adultery with one I. M., at [state, as nearly as possible, the locality of the offense; *e. g.*, at the house of C. R.].

That on or about the ——— day of ———, 18— [*or some time in the month of ———, in the year 18—*], the defendant committed adultery with one F. P., at the ——— hotel, in the ——— of ———, in the State of ———, and that the defendant, at various other times in the year 18—, committed adultery with various other [women] whose names are unknown to the plaintiff, at certain other places in said [city] to the plaintiff unknown.<sup>1</sup>

<sup>1</sup> The general principle by which the sufficiency of a pleading in actions of this character is to be tested is, that the charge should be stated with such definiteness and certainty as will be sufficient to enable the defendant to know

what he will be required to meet by proof at the trial.

The name of the person with whom the place where and the time when the adultery was committed should, as a general rule, be set forth in the com-

That the said acts of adultery charged were committed without the consent, connivance, privity or procurement of the plaintiff.

That five years have not elapsed since the discovery of the fact that such adultery had been committed by the defendant, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery.<sup>1</sup>

And plaintiff further alleges that as [she] is informed and believes, the said defendant has been living in adulterous intercourse with one E. F. [or with the said \_\_\_\_\_], at \_\_\_\_\_.

That five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff,<sup>1</sup> and that such adulterous intercourse between the defendant and the said E. F. was begun and is continued without the consent, connivance, privity or procurement of the plaintiff, and that plaintiff has not voluntarily cohabited with the defendant since the discovery thereof.

That the plaintiff has no property of her own, but that the defendant is seized and possessed of real and personal estate to the amount of \_\_\_\_\_ dollars, and that his annual income is at least \_\_\_\_\_ dollars.<sup>2</sup>

plaint. This rule, however, is liable to exceptions and modifications to any extent required by the exigencies of the action, provided the above principle is not infringed. (*Pragmagiori v. Pragmagiori*, 7 Robt., 302.)

Where the complaint avers the commission of the offense with a person whose name is unknown to plaintiff, at times between specified dates and in a town or city named, with the further averment that plaintiff is unable to state more particularly the times and places, it is sufficient to authorize evidence in proof of the offense so charged, and if it be proved, to sustain the action, although no proof be given of offenses particularly charged. (*Mitchell v. Mitchell*, 61 N. Y., 398.)

See, also, *Codd v. Codd* (2 J. Ch., 224); *Germond v. Germond* (6 J. Ch., 347); *Wood v. Wood* (2 Paige, 113); *Bokel v. Bokel* (3 Edw. Ch., 376); *Heyde v. Heyde* (4 Sandf. Ch., 692); *Strong v. Strong* (3 Robt., 719), and *Tim v. Tim* (47 How., 253), which cases are considered and distinguished in *Mitchell v. Mitchell* (*supra*); and see, also, as to complaint, *De Carrillo*

*v. Carrillo* (53 Hun, 359); *Gridley v. Gridley* (7 Civ. Pro. Rep., 215); *Stevens v. Stevens* (54 Hun, 490); *Halsted v. Halsted* (7 Misc., 23); *Bullock v. Bullock* (85 Hun, 373); *Van Benthuyssen v. Benthuyssen* (17 State Rep., 978); *Becker v. Becker* (N. Y. Daily Reg., Jany. 27, 1887); *Dickinson v. Dickinson* (63 Hun, 516).

Where the complaint alleged that the defendant, from the first day of November, 1876, up to the time of the verification of the complaint, went to, visited and at various houses and places of prostitution or assignation in the city of New York (which times and places the plaintiff could not particularize), committed adultery and had carnal connection with a person therein named: *held*, that the allegation should be rendered more definite and certain as to the place at which the adultery was committed. (*Cardwell v. Cardwell*, 12 Hun, 92.)

<sup>1</sup> See rule 72 of Gen. Rules of Prac., *Church v. Church* (7 State Rep., 177).

<sup>2</sup> See Code Civ. Pro., § 1759, subd. 3, as amended by ch. 728 of Laws of 1894, taking effect Sept. 1, 1894.

That ——— children have been born of the marriage of said plaintiff and defendant, one a boy named F., aged ——— years, on the ——— day of ———, 18—, and the other a girl named H., aged ——— years, on the ——— day of ———, 18—<sup>1</sup> [but plaintiff alleges that he is not the father of the said H., she being illegitimate].<sup>2</sup>

Wherefore the plaintiff prays judgment divorcing the said plaintiff and defendant and dissolving the said marriage, and that the plaintiff may be awarded the custody of said children [and that the court may require the defendant to provide suitably for the education and maintenance of the said children, and for the support of the plaintiff, and that the plaintiff may have temporary alimony and the costs of this action],<sup>3</sup> and that the said H. may be adjudged to be illegitimate and that plaintiff may have such other and further relief as may be proper.

M. N., *Plaintiff's Attorney.*

[Office address.]

[Verification as in forms Nos. 151, etc.]

No. 808.

### Answer in Suit for Dissolution of the Marriage Contract.

(Code Civ. Pro., § 1758.)

[Title of cause.]

The defendant, answering the complaint of the plaintiff in this action :

*First.* Admits the marriage of the plaintiff and defendant, as alleged in the complaint.

*Second.* Denies each and every other allegation contained in said complaint, relative to her having committed adultery

<sup>1</sup> The legitimacy of a child born or begotten before the commission of the offense charged, in an action brought by the husband, is not affected by a judgment dissolving the marriage; but the legitimacy of any other child of the wife may be determined, as one of the issues in the action. In the absence of proof to the contrary the legitimacy of

all the children, begotten before the commencement of the action, must be presumed. (Code Civ. Pro., § 1760, subd. 1.) See, as to question of legitimacy in suit brought by wife, Code Civ. Pro., § 1759, subd. 1.

<sup>2</sup> See rule 76 of Gen. Rules of Prac.

<sup>3</sup> See section 1769, Code Civ. Pro.

<sup>4</sup> See note 2 to form No. 122.

with the persons named in said complaint, or either of them.

*Third.* And for a further defense alleges, that the acts of adultery alleged in the complaint were committed by the procurement and with the connivance of the plaintiff.

*Fourth.* And for a further defense alleges, that the offenses charged in the complaint have been forgiven by the plaintiff.

*Fifth.* And for a further defense alleges, that this action was not commenced within five years after the discovery by the plaintiff of the offenses charged, or any of them, or of the commencement of the alleged adulterous intercourse.

*Sixth.* And for a further defense alleges, that the plaintiff has also been guilty of adultery since the said marriage between the parties, to wit: at divers times and places, and especially, that on, etc. [allege the commission of specific acts, and the times and places, substantially as in complaint, form No. 807], which said several acts of adultery defendant alleges were committed without the procurement, connivance, privity or consent of the defendant,<sup>1</sup> and the defendant sets up the same as a counterclaim,<sup>2</sup> and prays judgment that the said marriage between the plaintiff and defendant be dissolved, and a divorce adjudged in favor of the defendant, and that said defendant be allowed her costs of this action, and such other and further relief as may be proper.<sup>3</sup>

M. N., *Defendant's Attorney.*

[Verification as in forms Nos. 151, etc.]

<sup>1</sup>See *Morrell v. Morrell* (3 Barb., 236; S. C., 1 id., 318); *Leseuer v. Leseuer* (31 Barb., 330); *Smith v. Smith* (4 Paige, 432).

<sup>2</sup>See section 1770, Code Civ. Pro.

<sup>3</sup>Where a defendant, in his answer, denies, upon oath, that he has been guilty of the adultery charged in the complainant's bill, he may, in the same answer, set up the adultery of the complainant as a defense to the suit, or any other matter which will be pertinent, if the complainant should succeed in proving the allegations

contained in the bill. (*Hopper v. Hopper*, 11 Paige, 46, 47; citing *Wood v. Wood*, 2 id., 108; *Dillon v. Dillon*, 3 Curt. Eccl. Rep., 30; see, also, *Hollenbeck v. Ciow*, 9 How., 289.) See, also, *Vincent v. Vincent* (16 Daly, 534); *Huntley v. Huntley* (73 Hun, 261); *Kelly v. Kelly* (12 Misc., 457); *McCarthy v. McCarthy* (143 N. Y., 235); *Peck v. Peck* (44 Hun, 290).

<sup>4</sup>It is not necessary to verify the answer, notwithstanding the verification of the complaint. (Code Civ. Pro., 1757.)



No. 809.

**Order of Reference in Suit to Dissolve Marriage.**

(Code Civ. Pro., § 1757; Gen. Rules of Prac., No. 73.)

[At, etc., as in form No. 80.]

[Title of cause.]

The summons, with a copy of the complaint in this action, having been personally served upon the defendant, more than twenty days since, and the defendant having made default in appearing [*or in pleading*] [*or not having by (his) answer put in issue the allegations of adultery made by the complaint*], and on reading [*name opposing papers*], and on motion of R. G. for the plaintiff, after hearing P. F. for the defendant [*or due notice of this motion having been given to the defendant's attorney and no one appearing to oppose*]:

It is hereby ordered, that it be referred to G. H., of ———, to take proof of all the material facts alleged in the said complaint [and upon the question of the legitimacy of M. B., one of the children mentioned in the complaint],<sup>1</sup> and to report such proof to the court, with his opinion thereon; and that the plaintiff be examined, on oath, upon such reference as to whether the adultery charged was committed without the consent, connivance, privity or procurement of the plaintiff; and as to whether five years have not elapsed since the discovery of the fact that such adultery was committed; and as to whether the plaintiff has not voluntarily cohabited with the defendant since such discovery, and if it shall appear that at the time of the offense charged the defendant was living in adulterous intercourse with the person with whom the offense is alleged to have been committed; that plaintiff be further examined, on oath, as to whether five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff;<sup>2</sup> and that he also inquire and report whether there is any judgment or decree in any court of the State of competent jurisdiction against the plaintiff in favor of the defendant for a divorce upon the ground of adultery.<sup>3</sup>

<sup>1</sup> See rule 75 of Gen. Rules of Prac. 80 Hun, 136, rev'g on this point S. C.,

<sup>2</sup> See Gen. Rules of Prac., No. 72. 7 Misc., 328). See, also, as to compliance with this rule, *Burgess v. Burgess* (52 Super. Ct., 545).

This rule has no application to contested cases, so far as it relates to the appointment of referees (*Ives v. Ives*,

And that proof be taken by said referee upon the question of the legitimacy of M. B.

[And it is further ordered, that said referee inquire into the situation and value of the real property of the defendant, and as to what would be a reasonable and proper sum to be allowed to the plaintiff for alimony and for her support and maintenance during her life, and for the support and maintenance and education of her children (naming them) until they shall have arrived at the age of twenty-one years respectively.<sup>1</sup>]

[And that said referee inquire and report in regard to the ages and circumstances of said children, and as to who would be the proper person to take the care and custody of such children, with such other facts in regard thereto as the parties claiming the custody of said children shall bring before said referee and as to him shall seem pertinent and proper.<sup>1</sup>]

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No. 810.

### **Referee's Report in Action to Dissolve Marriage Contract.**

(Code Civ. Pro., § 1757.)

As in form No. 803 to [\*], and from thence as follows: To take proof of all the material facts alleged in the complaint in this action, and to report such proof to the court with my opinion thereon, and to make the examinations required by said order, I, the subscriber, do hereby certify and report as follows:

That I have taken proofs in this action on the part of the plaintiff, and that such proofs are hereto subjoined and made a part of my report.

And I do further certify and report, as required by the said order, that, in my opinion, all the material facts alleged in the complaint in this action are true, and have been sufficiently proved before me; and that the said defendant has [†] committed the several acts of adultery alleged in the said complaint to have been committed by him [*or her*].

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<sup>1</sup> These provisions may be properly inserted when required, although not called for by the rule, and will avoid the necessity of a further reference upon these subjects, on the application for final judgment.

And I do further certify and report, that I am of the opinion that all the children of the defendant named in the said complaint are legitimate, except M. B., and that said M. B. is not the child of the plaintiff, but is illegitimate.

And I further report, that the plaintiff has been examined before me, on oath, upon such reference, as to the matters and things as to which said order directed [his] examination, and it has appeared from [his] said examination that the said acts of adultery charged were committed without the consent, connivance, privity or procurement of the plaintiff, and that five years have not elapsed since the discovery by said plaintiff of the fact that such adultery was committed, and that the plaintiff has not voluntarily cohabited with the defendant since such discovery; and it having appeared that, at the time of the offense charged, the defendant was living in adulterous intercourse with F. P., I further report that I have required the plaintiff to be examined upon oath, as to whether five years have not elapsed since the commencement of the said adulterous intercourse was discovered by the plaintiff, and that it appears from such examination that five years have not elapsed since such discovery.<sup>1</sup>

And I further report, that there is no judgment or decree rendered in any court of this State of competent jurisdiction against the plaintiff, and in favor of the defendant, for a divorce upon the ground of adultery.<sup>2</sup>

[Add report as to alimony, etc., if required by the order.]  
All of which is respectfully submitted.

Dated ———, 18—.

G. H., *Referee.*

#### TESTIMONY ANNEXED TO REPORT.

[Title of cause.]

*Testimony taken this ——— day of ———, 18—, in the above action, on the part and behalf of the plaintiff, before G. H., Referee.*

M. N. appears as counsel for the plaintiff, no one appearing for the defendant.

<sup>1</sup> See rule 72 of Gen. Rules of Prac., v. Paul (11 State Rep., 71).  
and see note 2 to form No. 809; Glick

<sup>2</sup> See section 1757, Code Civ. Pro.

v. Glick (5 Month. Law Bul., 62); Paul

F. P., being sworn as a witness for the plaintiff, deposes as follows [here insert testimony].

F. P.

Subscribed and sworn to before me, }  
 this —— day of ——, 18—. }

\_\_\_\_\_

I certify the foregoing to be the testimony and other proceedings taken and had before me, as referee, upon the reference in the above entitled action and referred to in my report herein, dated \_\_\_\_\_, 18—.<sup>1</sup>

G. H., *Referee.*

No. 811.

**Final Judgment Dissolving Marriage on Default of the Defendant, or where the Answer does not Deny the Adultery.**

(Code Civ. Pro., § 1757.)

[At, etc., as in form No. 80.]

[Title of cause.]

The summons and complaint in this action having been personally served upon the defendant more than twenty days since, and the defendant having made default in appearing [*or* in pleading (*or* the answer of defendant not having put in issue the allegations of adultery made by the complaint)], and on filing the report of I. J., the referee appointed herein, by order of this court made and entered on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, which report bears date on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, by which report it appears that the material allegations of the complaint are true, and that the defendant has been guilty of the several acts of adultery therein charged, and that there is no judgment or decree in any court of the State of competent jurisdiction against the plaintiff in favor of the defendant for a divorce upon the ground of adultery, and that \_\_\_\_\_, the daughter of the said defendant, is not the child of the plaintiff, but is illegitimate, and on reading [name any opposing papers], and on motion of F. B. of counsel for said plaintiff [after hearing C. P. for the defendant (*or* due notice of this

<sup>1</sup> See section 1229, Code Civ. Pro.

application having been given to defendant's attorney and no one appearing to oppose]):

It is adjudged and decreed, [\*] and this court, by virtue of the power and authority therein vested, and in pursuance of the statute in such case made and provided doth adjudge and decree, that the said report be confirmed and that said marriage between the said plaintiff, A. B., and the said defendant, C. B., be and it is hereby dissolved, and that the said parties be and they are hereby divorced, and the said parties are and each of them is freed from the obligations of said marriage.

And it is further adjudged and decreed, that the said plaintiff may marry again during the life-time of the defendant, but the said defendant shall not marry again until the death of the plaintiff; but the remarriage of the parties to this action is not hereby prohibited.<sup>1</sup>

And it is further adjudged and decreed, that the said ———, the daughter of the said defendant, is not the child of the plaintiff, but she is hereby declared to be illegitimate.<sup>2</sup>

And the defendant is hereby required to pay to the plaintiff the sum of ——— dollars per annum, payable [semi-annually] from the date hereof, for the support and maintenance of the said ———, the son of the marriage of said plaintiff and defendant, until said ——— shall attain the age of twenty-one years, and the sum of ——— dollars per annum, payable [semi-annually], for the support of the plaintiff, so long as she shall live, and that he give

<sup>1</sup> See Code Civ. Pro., § 1761, and see *Van Voorhis v. Brintnall* (86 N. Y., 18, rev'g S. C., 23 Hun, 254), *Moore v. Hegeman* (27 Hun, 68), *Thorp v. Thorp* (90 N. Y., 60), that a remarriage without the State is valid, notwithstanding the prohibition, if valid where contracted. See, also, *Roberts v. Ogdensburgh & Lake Champlain R. Co.* (21 W. D., 63; S. C., 34 Hun, 324).

Where a judgment dissolving a marriage, and permitting the wife to marry again, is rendered by a court of competent jurisdiction, in an action brought by her, and she marries again, her second husband cannot maintain an action to have the judgment in the former action cancelled, as procured by fraud and collusion, and his own marriage annulled on the ground that she had another husband. (*Rutger v. Heckel*, 85 N. Y., 483; aff'g S. C., 21

*Hun* (19 Week. Dig., 234), that a third person, not a party to a divorce suit, cannot intervene or apply by petition to have the decree vacated, on the ground of fraud and collusion in obtaining it. See, also, *Hall v. Hall* (6 State R., 92), *Bailey v. Bailey* (45 Hun, 278). In *re Faylis estate* (22 State R., 542), *Robertson v. Robertson* (9 Daly, 44), *Washburn v. Catlin* (97 N. Y., 623), *Johnson v. Johnson* (12 Daly, 232), *Kerr v. Kerr* (9 Daly, 517), *Fox v. Fox* (7 State Rep., 271), *Ryerson v. Ryerson* (55 Hun, 191), *Moller v. Moller* (115 N. Y., 466), *Rigney v. Rigney* (127 N. Y., 408), *Smith v. Smith* (7 Misc., 305), *Huntley v. Huntley* (73 Hun, 261), *McIntyre v. McIntyre* (9 Misc., 252). Laws of 1894, ch. 378; amending § 1769, Code Civ. Pro.; *Matter of Strong* (86 Hun, 390), *Munson v. Munson* (60 id., 189).

<sup>2</sup> See Code Civ. Pro., § 1760, subd. 1.

security for the payment of said sums to the clerk of this court in the county of \_\_\_\_\_, to be approved by one of the justices of this court, for the payment of said sums.

And it is further adjudged and decreed, that the plaintiff have the care, custody and education of the said \_\_\_\_\_.<sup>2</sup>

And it is further adjudged and decreed, that the defendant pay to the plaintiff, or her attorney, the sum of \_\_\_\_\_ dollars, for her costs in this action.<sup>3</sup>

J. L., *Clerk.*

No. 812.

### Final Judgment Dissolving Marriage after the Trial of a Feigned Issue.

(Code Civ. Pro., § 1757.)

[At, etc., as in form No. 80.]

[Title of cause.]

The answer of the defendant in this action having put in

<sup>1</sup> See Code Civ. Pro., § 1772.

<sup>2</sup> The provisions of 2 R. S., 148, § 59, allowing the modification of the decree made in divorce as to custody of the children, have no application to the case of a divorce obtained by the husband for adultery. (*Crimmins v. Crimmins*, 28 Hun, 200; S. C., 64 How. Pr., 103; 15 Week. Dig., 346; see, also, Code Civ. Pro., § 1771, as amended by ch. 891 of Laws of 1895, and the cases cited in note 1 to form No. 816, *post.*)

<sup>3</sup> For another form of judgment of absolute divorce, see form No. 483; and for notice of motion for confirmation of referee's report and for judgment thereupon, see forms Nos. 480, 481.

Insert in form No. 483 the words, "but the remarriage of the parties to this action is not hereby prohibited," at the end of the paragraph relating to prohibitions to marry. They should properly be contained in the judgment under section 1761 of Code Civ. Pro., which changes the rule in that respect from the former Revised Statutes (2 R. S., 146, § 49,

This section (49) was twice amended in 1879 by chapters 164 and 321, by which amendment the words were added: "Unless the court in which the judgment of divorce was rendered shall, in that respect, modify such judgment, which modification shall only be made upon satisfactory proof that the complainant has remarried, that five years have elapsed since the decree of divorce was rendered, and that the conduct of the defendant since the dissolution of said marriage has been uniformly good," and the provisions were made applicable to judgments previously rendered, the section standing otherwise as before the amendments. As thus amended, section 49 is still in force, not having been repealed by the general repealing act, chapter 245 of 1880.

As to proof required under chapter 321 of 1879, upon application for leave to marry again, see *Waas v. Waas* (5 Month. L. Bul., 59), and see forms Nos. 823, 824, and notes. See, also, *Moore v. Hegeman* (92 N. Y., 521).

issue the allegation of adultery made by the complaint, and the court having, by its order, directed the trial, by a jury, of that issue, and the questions to be tried having been prepared and settled as prescribed in section 970 of the Code of Civil Procedure,<sup>1</sup> and the jury empanelled to try said feigned issue having found, by their verdict upon said trial, that the said defendant, C. B., has committed the several acts of adultery alleged in the complaint [and the court having tried the remaining issues of fact in said action (*or* the report of ———, referee, appointed to hear and determine the other issues of fact in said action, hereby been duly made in writing and filed)],<sup>2</sup> and on motion of T. R. of counsel for the plaintiff, after hearing H. P. of counsel for the defendant:

It is adjudged and decreed [conclude as in form No. 811 from (\*)].

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### ARTICLE THIRD.

#### FORMS RELATING TO ACTION FOR A SEPARATION.

(Code Civ. Pro., Ch. 15, Tit. 1, Art. 3.)

- No. 813. Complaint in action for a separation
- 814. Order of reference in action for a separation.
- 815. Referee's report in action for separation.
- 816. Final judgment in action for separation.
- 817. Petition by parties to action for revocation of judgment.
- 818. Order revoking judgment of separation, pursuant to joint application of the parties.

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### No. 813.

#### Complaint in Action for a Separation.

(Code Civ. Pro., § 1762.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that on or about the ——— day of ———, 18—, the plaintiff and defendant were married at the ——— of ———, in the State of New York, and that both plaintiff and defendant are and were, at the commencement of this action, residents of said State [*or* allege other jurisdictional

<sup>1</sup> See forms Nos. 352-356.

<sup>2</sup> See section 972, Code Civ. Pro.; also, see notes to last form, No. 811.

facts as to residence, as required by section 1763 of the Code of Civil Procedure].

That the plaintiff continued to reside with the defendant, as his wife, until about the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

That during the time she lived and cohabited with said defendant as aforesaid, she had two children by him, to wit: F., who was born on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and is now of the age of \_\_\_\_\_ years and upwards, and G., who was born on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and is now of the age of \_\_\_\_\_ years and upwards, and that during all that time she conducted herself with propriety, managed the household affairs of her said husband with prudence and economy, and at all times treated her said husband with kindness and forbearance; but that the said defendant, disregarding the solemnity of his marriage vow, and his obligation to treat the plaintiff with kindness and attention, within about a year after their said marriage, commenced a course of unkind, harsh and tyrannical conduct towards her, which continued with very slight intermissions, until she finally separated from him about three months since.

And the plaintiff further shows, that on divers occasions, while the said plaintiff lived with the said defendant, as aforesaid, he was guilty of cruel and inhuman treatment of her, and of such conduct towards her as rendered it unsafe and improper for her to cohabit with him.

That on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at the house No. — \_\_\_\_\_ street, in the city of \_\_\_\_\_, where they then resided, as the plaintiff was sitting by the fire, the said defendant came home, and pulled her chair from under her, throwing her violently upon the hearth, and dragged her across the floor, in a manner and under circumstances which showed an utter disregard for her health, if not for her life.

That on another occasion [specify the several acts of cruel and inhuman treatment, giving the time, place and circumstances of each act complained of with reasonable certainty].<sup>1</sup>

And the plaintiff further shows, that the said defendant is a man of violent passions, and of ungovernable temper;

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<sup>1</sup> See Code Civ. Pro., § 1764.



and that on many occasions, during the time the plaintiff lived with him, the said defendant addressed to her the most opprobrious epithets and threats of personal violence, and that he repeatedly threatened to take her life, and that in consequence of the cruel and inhuman treatment above mentioned, together with the threats aforesaid, and such brutal and outrageous conduct towards her as rendered it unsafe for her to live with him, or to remain within reach of his violence, she was, on or about the ——— day of ———, 18—, obliged to leave the house of the said defendant and to go to her friends, since which time she has not dared to return to his said house or to live with him.

And the plaintiff further shows, that since she so left the house of the said defendant, he has refused to provide for her support and maintenance, and that she has been, and is now, entirely dependent upon her own labor and the charity of her friends for her support; that she is now very destitute and in great want, and that she is indebted, to a considerable amount, for board and necessary clothing.

And the plaintiff further shows, that within about a year after their said marriage, the said plaintiff received about ——— dollars as the distributive share of her father's estate, the whole of which the said defendant has applied and converted to his own use; and that the said defendant, as plaintiff is informed and believes, is seized and possessed of real and personal estate to the amount of ——— dollars, and that his annual income is about ——— dollars.

Wherefore the plaintiff prays judgment that the defendant and the plaintiff be separated from bed and board forever, and that defendant make a proper and suitable provision for the support and maintenance of the plaintiff and her said children, and that plaintiff may have the care and custody of the said children, and may have her costs of this action, and such other and further relief as may be just and proper.<sup>1</sup>

M. N., *Plaintiff's Attorney.*

[Office address.]

[Verification as in forms Nos. 151, etc.]

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<sup>1</sup> As to complaint in action for separation, and what allegations will be stricken out on motion, see *Allen v. Allen* (19 Week. Dig., 212), and fur-

## No. 814.

**Order of Reference on Default in Action for a Separation.**

(Gen. Rules of Prac., No. 73.)

[At, etc., as in form No. 80.]

[Title of cause.]

The summons, with a copy of the complaint in this action, having been personally served upon the defendant, more than twenty days since, and the defendant having made default in appearing [*or* answering]:

Now, on motion of F. R. of counsel for the plaintiff [after hearing M. P., counsel for the defendant]:

It is hereby ordered, that it be referred to P. R., of \_\_\_\_\_, to take proof of the material facts alleged in the complaint in this action, and that he make his report, with all convenient speed, and return the same with the evidence taken by him upon the hearing of such reference.<sup>1</sup>

[Add directions as to taking evidence as to alimony, etc., as in form No. 809, when necessary.]

## No. 815.

**Referee's Report in Action for Separation.**

As in form No. 809 to [†], and from thence as follows: Has been guilty of the cruel and inhuman treatment of the defendant, as alleged in the complaint, and of such conduct

ther, as to what conduct constitutes cruel and inhuman treatment under the statute, see *Kennedy v. Kennedy* (73 N. Y., 369, dismissing appeal from S. C., 47 N. Y. Super. Ct., 56), *Doe v. Roe* (23 Hun, 19), *Ruckman v. Ruckman* (58 How. Pr., 278), *Appleby v. Appleby* (2 Civ. Pro. Rep. [McCarty], 422), *Williams v. Williams* (130 N. Y., 193), *De Meli v. De Meli* (120 id., 485), *Fowler v. Fowler* (33 State Rep., 746), *O'Keefe v. O'Keefe* (34 id., 493), *Murray v. Murray* (41 id., 428), *Straus v. Straus* (67 Hun, 491), *Adams v. Adams* (49 State Rep., 641), *McCahill v. McCahill* (71 Hun, 224), *Burke v. Burke* (75 id., 412), *Taylor v. Taylor* (74 id., 639), *Woodrick v. Woodrick* (141 N. Y., 457), *Atherton v. Atherton* (82 Hun, 179), *Anonymous* (17 Abb. N. C., 231), *McBride v. McBride* (5 N. Y. Supp., 68).

The action cannot be maintained where the marriage took place out of the State, and the wife had not resided in the State one year before bringing the action. (*Ramsden v. Ramsden*, 28 Hun, 285; *aff'd* S. C., 91 N. Y., 281, on other points.) See, also, *Atherton v. Atherton* (82 id., 179).

As to what is sufficient proof of the marriage, see *Davis v. Davis* (7 Daly, 308; *aff'g* S. C., 1 Abb. N. C., 140).

The continuance of cohabitation, though barring absolute divorce, is not conclusive against plaintiff, in action for limited divorce. *Reynolds v. Reynolds* (4 Abb. Ct. of App. Dec., 35).

<sup>2</sup> See note 2 to form No. 122.

<sup>1</sup> As to what proof will be required on application for order of reference, and who will be appointed referee, see Gen. Rules of Prac., No. 72; *Ives v. Ives* (80 Hun, 136).

towards her as to render it unsafe and improper for her to cohabit with him.

Dated \_\_\_\_\_, 18—.

R. F., *Referee.*

[Add testimony and certificate thereto as in form No. 809.]

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No. 816.

**Final Judgment in Action for Separation.**

(Code Civ. Pro., § 1766.)

[At, etc., as in form No. 80.]

[Title of cause.]

The summons, with a copy of the complaint in this action, having been personally served upon the defendant, more than twenty days since, and the defendant having made default in appearing [*or* in answering], and the report, dated \_\_\_\_\_, 18—, of F. M., the referee duly appointed herein, by order of this court, made and entered on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, having been duly made and filed, and it appearing to the court that the defendant has been guilty of cruel and inhuman treatment of the plaintiff and of such conduct towards her as to render it unsafe and improper for her to cohabit with him :

Now, on motion of P. R. of counsel for the plaintiff, and after hearing F. G. of counsel for the defendant [*or* due notice of this application having been served upon the attorney for the defendant, and no one appearing to oppose] :

It is ordered, adjudged and decreed, and this court, by virtue of its power and authority and of the statute in such case made and provided, doth order, adjudge and decree, that the said plaintiff and defendant be and they are hereby separated from bed and board forever ; provided, however, that the said parties may, at any time hereafter, by their joint petition, apply to this court to have this judgment modified or discharged ; and that neither of the said parties shall be at liberty to marry any other person during the life of the other party.

And it is further ordered and decreed, that the defendant pay to the plaintiff the sum of \_\_\_\_\_ dollars per annum

from the date of this judgment, in semi-annual payments, for the support and maintenance of the plaintiff and the children of the marriage named in the said complaint, and that he give security to the clerk of this court in the county of \_\_\_\_\_, to be approved by a judge of this court, for the payment thereof.

And it is further ordered and adjudged, that the said plaintiff have the care, custody and education of the said children of the marriage, until the further order of this court.

And it is further ordered and adjudged, that the defendant pay to the said plaintiff, or her attorney, \_\_\_\_\_ dollars as the costs of this suit, and that she have execution therefor.<sup>1</sup>

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No. 817.

**Petition by Parties to Action for Separation for Revocation of Judgment.**

(Code Civ. Pro., § 1767.)

[Title of cause.]

To the \_\_\_\_\_ Court :

The petition of A. B. and C. D. respectfully shows to this

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<sup>1</sup> For another form of judgment of separation, see form No. 482, and for notice of motion for confirmation of referee's report, etc., see forms Nos. 480, 481.

The court has no power, after the entry of a decree of separation containing no provisions for alimony, to make an order directing its payment. But under 2 R. S., 147, § 59, the court might make an order providing for the support and education of the children after the entry of a judgment making no provision therefor. (Erkenbrach v. Erkenbrach, 20 Week. Dig., 4; S. C., 96 N. Y. 456; aff'g S. C., 18 Week. Dig., 444.)

That section is still in force, having been preserved by section 3 of chapter 245, Laws of 1880. (Washburn v. Catlin, 20 Week. Dig., 12; S. C., 97 N. Y., 623; modifying S. C., 18 Week. Dig., 442.)

See, also, Code Civ. Pro., § 1771.

See, also, cases cited in note 1 to form No. 815 (*post*), and see Chamberlain v. Chamberlain (83 Hun, 96), San-

ford v. Sanford (42 State Rep., 1), McBride v. McBride (119 N. Y., 519), Romaine v. Channey (129 N. Y., 566).

The court denying a separation to the wife cannot, under 2 R. S., 174, § 55 (see Code Civ. Pro., § 1766), give judgment awarding the custody of the children to her and provide for their maintenance by the husband. (Davis v. Davis, 75 N. Y., 221.)

Upon failure of the plaintiff to make out a case for a divorce the defendant is entitled to judgment dismissing the complaint. (Id.)

*It seems*, that where a husband and wife live separate, without being divorced, the remedy of the wife seeking custody of the minor children is by habeas corpus, under 2 R. S., 149, §§ 1, 2. (Id.) By section 40 of the domestic relations law, ch. 292 of Laws of 1896, provisions are made for application for habeas corpus for child detained by parent, and by the same act the last mentioned sections, 1 and 2, are repealed. That chapter takes effect October 1, 1896.

court, that heretofore, and on or about the ——— day of ———, a final judgment was rendered in the above entitled action, a copy of which is hereto annexed, by which, among other things, your petitioners, the plaintiff and defendant, were separated from bed and board forever.

That, since the rendition of the said judgment, your petitioners have become reconciled, and have been, for ——— months, living together as husband and wife [*or state other facts showing reconciliation*], and they pray that this court will revoke the said judgment, subject to such regulations and restrictions as the court may see fit to impose, according to the statute in such case made and provided.

A. B.

C. D.

[Verification by both parties as in form No. 52.]

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No. 818.

**Order Revoking Judgment of Separation Pursuant to Joint Application of the Parties.**

(Code Civ. Pro., § 1767.)

[At, etc., as in form No. 80.]

[Title of cause.]

On reading and filing the petition of the parties to the above entitled action, dated ———, 18—, by which it appears that since the rendition of the judgment, entered herein on the ——— day of ———, 18—, separating the parties from bed and board forever, the plaintiff and defendant have become reconciled, and said petition having been accompanied with due and satisfactory evidence of their said reconciliation:

It is hereby ordered, on motion of E. F., of counsel for said plaintiff and defendant, that the said judgment be and the same is hereby revoked, subject to the following regulations and restrictions [here insert same].

## ARTICLE FOURTH.

FORMS RELATING TO GENERAL PROVISIONS OF CODE OF CIVIL  
PROCEDURE IN REFERENCE TO MATRIMONIAL ACTIONS.

(Code Civ. Pro., Ch. 15, Tit. 1, Art. 4.)

- No. 819. Petition for alimony and expenses in action for divorce or separation.
- 820. Order of reference as to alimony and expenses.
- 821. Report of referee as to alimony, etc.
- 822. Order awarding alimony, etc., on report of referee.
- 823. Affidavit on application for leave to marry again.
- 824. Order modifying judgment so as to allow marriage of defendant.
- 825. Notice of application for sequestration of property and appointment of receiver.
- 826. Affidavit to obtain sequestration of property on failure to comply with order or judgment directing payment of alimony, etc.
- 827. Order sequestering property of defendant and appointing receiver.
- 828. Indorsement on summons in matrimonial actions where complaint is not served.
- 829. Affidavit of service of summons within the State, or of the summons and complaint without the State, in suit for divorce or separation, or to annul a marriage.
- 830. Affidavit to move for order to show cause why husband should not make payment of alimony.
- 831. Order to show cause why the defendant should not be punished for his failure to make the payment.

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 No. 819.

**Petition for Alimony and Expenses in Action for Divorce  
or Separation.**

(Code Civ. Pro., § 1769.)

[Title of cause.]

*To the ——— Court :*

The petition of the above named plaintiff respectfully shows, that the above entitled action has been commenced for the purpose of obtaining a divorce from the defendant, and a dissolution of the marriage between the plaintiff and defendant [*or state other purpose of the action*], because of the alleged adultery [*or state other cause*] of the defendant.

That the defendant has answered the complaint, denying the said adultery [*or other alleged cause*], with which he is charged in the said complaint, and setting up other matters of defense, as will more fully appear by reference to the said answer.

And your petitioner further shows, that she is wholly destitute of the means of supporting herself during the pendency of the action, or of carrying on the said action and defraying the expenses attending the same.

That your petitioner has been informed, and believes, that the said defendant has real estate and personal property to a large amount, and amply sufficient to enable him to advance thereout, to your petitioner, such sums as may be necessary for the purposes above mentioned.

That your petitioner is informed, and believes, that the said defendant is the owner of property to the amount of \_\_\_\_\_ dollars, and that his annual income is about \_\_\_\_\_ dollars.

That the children of the said marriage, to wit [state names and ages], are living with the plaintiff, and that plaintiff has no means to provide for their maintenance and education.

Your petitioner, therefore, prays that the said defendant may, by an order of this court, be required to pay to your petitioner a reasonable sum for her support and maintenance during the pendency of this action, and such sum or sums of money as may be necessary to enable your petitioner to carry on her defense in this action, and to defray the necessary costs and expenses thereof, and to provide suitably for the education and maintenance of the children of said marriage, and for such other or further relief in the premises as may be just.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

M. B.

[Verification as in form No. 52.]

<sup>1</sup>With slight changes, this may be made to answer for a petition where the wife is defendant.

See *Winton v. Winton* (31 Hun, 290), overruling *Anonymous* (15 Abb. [N.S.] 307), that the court has no power, after judgment in favor of the wife in an action for separation, to require the husband to pay a sum of money to her attorney for services rendered, or to be rendered, in the action; nor does the fact that an appeal is pending to the Court of Appeals from the judgment of the General Term, affirming such judgment, authorize such order. But see *McBride v. McBride* (119 N. Y., 519, 55 Hun, 401).

The court has power, in an action brought by the husband to have his marriage declared void on the ground that the wife's former husband was

living at the time of his marriage with her, to make an order allowing the wife a counsel fee and alimony *pendente lite*. (*O'Dea v. O'Dea*, 31 Hun, 441; S. C., 18 Week. Dig., 377; citing *Griffin v. Griffin*, 47 N. Y., 134, 136; *Brinkley v. Brinkley*, 50 N. Y., 184.)

An order cannot be made granting alimony to the wife after the decree has been made, in an action for separation, not providing therefor; but under 2 R. S., 147, § 59, an order may be made after decree, which did not provide for the support, etc., of the children, making provision for such support. (*Erkenbrach v. Erkenbrach*, 20 Week. Dig., 4 [Ct. of App.]; 96 N. Y., 456; aff'g S. C., 18 Week. Dig., 444.) See *McBride v. McBride* (119 N. Y., 519).

The same rule was held as to the

**Order of Reference as to Alimony and Expenses.**

(Code Civ. Pro., § 1769.)

[Title of cause.]

On reading and filing the petition of the plaintiff, duly verified, and dated the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and the affidavits accompanying the same, with proof of due service, etc., and on reading [name opposing papers], and on motion of W. M., counsel for the petitioner, after hearing H. F. for the defendant in opposition thereto:

It is hereby ordered, that it be referred to F. P., of \_\_\_\_\_, to inquire and report what would be a reasonable sum to be allowed to the said plaintiff for her support and maintenance, and for the maintenance and education of the children of said marriage, mentioned in the said petition.

And it is further ordered, that the said referee inquire and report what would be a reasonable sum to be allowed to said plaintiff to enable her to carry on the said action, and to defray the necessary costs and expenses thereof; and

support of children, in an action for absolute divorce, by the Court of Appeals in Washburn v. Catlin (20 Week. Dig., 12; 97 N. Y., 623; aff'g S. C., 18 Week. Dig., 442); and see Catlin v. Catlin (31 Hun, 632).

As to the granting of alimony in actions for separation and absolute divorce, see Collins v. Collins (71 N. Y., 269, rev'g S. C., 10 Hun, 272), Collins v. Collins (80 N. Y., 1), Kennedy v. Kennedy (73 id., 369), Kinzey v. Kinzey (7 Daly, 460); Starkweather v. Starkweather (29 Hun, 488), Jacobson v. Jacobson (12 Civ. Pro. R., 198), Beach v. Beach (29 Hun, 181), Galusha v. Galusha (116 N. Y., 635), Moriarty v. Moriarty (32 State Rep., 115), Simonds v. Simonds (57 Hun, 290), Rublinsky v. Rublinsky (24 N. Y. Supp., 920), Walsh v. Walsh (4 Misc., 448), Frickel v. Frickel (id., 382), Blinks v. Blinks (5 id., 193), Bucki v. Bucki (54 State Rep., 287), Lowenthal v. Lowenthal (68 Hun, 366), Galusha v. Galusha (138 N. Y., 272), Gray v. Gray (143 N. Y., 354), Aldrich v. Aldrich (74 Hun, 638), Dailey v. Dailey (9 Misc., 511), Gray v. Gray (78 Hun, 610), Shaw v. Shaw (26 N. Y. Supp., 715), Emerson v. Emerson (26 N. Y. Supp., 291), Mercer v. Mercer (73 Hun, 192), McCarthy v. McCarthy (143 N. Y., 235), Wetmore v. Wetmore (79 Hun, 268), Atherton v. Atherton (82 Hun, 179), Thrall v. Thrall (83 id., 188), Cohen v. Cohen (11 Misc., 704), Halsted

v. Halsted (id., 592), McBride v. McBride (53 Hun, 448). In actions to annul marriage for physical incapacity, etc., see Allen v. Allen (8 Abb. N. C., 175), Bloodgood v. Bloodgood (59 How. Pr., 27), Meo v. Meo (22 Abb. N. C., 58), Lee v. Lee (4 Civ. Pro. R., 321). As to allowance of counsel fee, etc., in action for limited divorce, see Bertschy v. Bertschy (14 Week. Dig., 111), citing Douglas v. Douglas (13 Abb. [N. S.], 291); and see also Browne v. Browne (9 Civ. Pro. R., 180), Desbrough v. Desbrough (29 Hun, 192), Brennan v. Brennan (19 Week. Dig., 342), Beadleston v. Beadleston (103 N. Y., 402), Chase v. Chase (29 Hun, 527), Maxwell v. Maxwell (28 id., 566), Uhlman v. Uhlman (51 Super. Ct., 361), Waring v. Waring (100 N. Y., 570, aff'g S. C., 31 Hun, 169), Williams v. Williams (6 N. Y. Supp., 645), Pountney v. Pountney (32 State Rep., 335), Ober v. Ober (28 id., 23), Strauss v. Strauss (38 id., 478), Stahl v. Stahl (36 id., 228), Percival v. Percival (124 N. Y., 637), Rudolph v. Rudolph (34 State Rep., 1), Van Wormer v. Van Wormer (33 id., 31), Pettee v. Pettee (45 id., 649), Vincent v. Vincent (16 Daly, 534), Kirsch v. Kirsch (45 State Rep., 287), Scragg v. Scragg (44 id., 345), Sigel v. Sigel (28 Abb. N. C., 308), Chamberlain v. Chamberlain (63 Hun, 96), Sanford v. Sanford (42 State Rep., 1), McCarthy



that the said referee report as to the times and manner in which the said sums should be paid by the defendant.<sup>1</sup>

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No. 821.

**Report of Referee as to Alimony, etc.**

(Code Civ. Pro., § 1769.)

[Title of cause.]

I, the undersigned, referee appointed in this action by order of this court, made and entered on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, do respectfully report:

That having been attended by the attorneys for the respective parties, I have proceeded to a hearing of their proofs and allegations regarding the matters so referred to me, and find as follows:

That it has appeared upon such hearing that the defendant has the following real and personal property, to wit: a house and lot situated on \_\_\_\_\_ street, in the city of \_\_\_\_\_, which is of the value of \_\_\_\_\_ dollars, and the annual rents and profits of which are \_\_\_\_\_ dollars [in like manner describe other real property, stating any incumbrances thereon].

That it has also appeared that the said defendant is the owner of the following personal property [describe same], and that the value thereof is about the sum of \_\_\_\_\_ dollars.

I also report that the children of said plaintiff and defendant, to wit: T. B., aged \_\_\_\_\_ years, and H. B., aged \_\_\_\_\_ years, both reside with the plaintiff.

And I further report, that, in my opinion, the sum of \_\_\_\_\_ dollars per month would be a reasonable and proper allowance to be paid by the defendant to the plaintiff for her support and maintenance and the maintenance and education of said children during the pendency of this action, and that said amount should be paid to her [monthly] from the date of said order, and that the sum of \_\_\_\_\_ dollars would be a proper sum to be allowed the plaintiff to enable her to carry on this action.

All of which is respectfully submitted.

Dated \_\_\_\_\_, 18—.

R. M., *Referee.*

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For non-payment of temporary alimony the defendant's answer may be stricken out, and a notice of motion for that purpose may be served upon his attorney. *Walker v. Walker*, 82 N. Y., 260; *aff'g S. C.*, 20 Hun, 400.) As to sequestration of property and

appointment of receiver, see § 1772, Code Civ. Pro.; for proceedings for contempt, see § 1773 *id.*, and forms under title 3 of chapter 17, *id.*; and see *Ryer v. Ryer* (19 Week. Dig., 358).

<sup>1</sup> See *Gerard v. Gerard* (2 Barb Ch., 73); and see notes to last form No. 819.

No. 822.

**Order Awarding Alimony, etc., on Report of Referee.**

(Code Civ. Pro., § 1769.)

At, etc., as in form No. 80.]

[Title of cause.]

On reading and filing the report of \_\_\_\_\_, referee, appointed by order of this court, dated \_\_\_\_\_, 18—, with proof of due service of a copy thereof, with notice of this motion, on the defendant's attorney, and on reading [name any opposing papers]:

It is hereby ordered, on motion of F. G. for the plaintiff, after hearing G. H. for the defendant [*or* no one appearing to oppose], that said report be and the same is hereby confirmed, and that the plaintiff pay to the defendant [directions for payment as in report, form No. 821.]

No. 823.

**Affidavit on Application for Leave to Marry Again.**

(Laws of 1879, chap. 321.)

[Title of cause.]

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that he is the defendant in the above entitled action.

That plaintiff and defendant were married on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

That said action was brought, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, for a divorce, on the ground of the adultery of the defendant.

That a judgment was rendered therein, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, dissolving the said marriage contract, and directing, among other things, that the said plaintiff might marry again during the life-time of the defendant; but that the defendant should not marry again until the death of the plaintiff, as will appear from the copy of said judgment, which is hereto annexed, marked A.

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said plaintiff intermarried with one G. J.

That the conduct of the defendant, since the dissolution of the said marriage, has been uniformly good, as will appear by the annexed affidavits of M. F. and R. P.

And deponent states that he is desirous of contracting a remarriage and asks that the said judgment of divorce may be modified so as to permit him to marry again during the plaintiff's life-time.<sup>1</sup>

[That no previous application has been made for such modification.<sup>2</sup>]

A. B.

[Jurat as in form No. 46.]

No. 824.

**Order Modifying Judgment so as to Allow Marriage of Defendant During Plaintiff's Life-Time.**

(Laws of 1879, chap. 321.)

[At, etc., as in form No. 80.]

[Title of cause.]

On reading and filing affidavits of A. B., C. D. and E. F., dated ———, 18— [with proof of due service thereof, with notice of this motion on the defendant's attorney],<sup>3</sup> and on reading [name opposing papers], and on motion of A. M., for the defendant [after hearing P. F., for the plaintiff, in opposition thereto (*or* no one appearing to oppose)], and five years having elapsed since the decree was entered herein dissolving the marriage between the plaintiff and the defendant, and the court being satisfied that the plaintiff has married again, and that the conduct of the defendant has been uniformly good since the dissolution of the said marriage: [\*]

It is hereby ordered, pursuant to statute, that the said decree herein, entered on the ——— day of ———, 18—,

<sup>1</sup> Leave shall not be granted to remarry, except upon full disclosure and satisfactory proof. (*Waas v. Waas*, 5 Month. L. Bul., 59.)

See, also, *Matter of Greene* (8 Abb. N. C., 450), *Moore v. Moore* (8 Abb. N. C., 171.)

<sup>2</sup> Insert these words in brackets if the application is made *ex parte*, under rule 25 of Gen. Rules of Practice. See note 2 to form No. 209.

<sup>3</sup> No notice is required by the act to be given of the application.

be modified, so as to permit the remarriage of the said defendant with any person during the life-time of the plaintiff.  
 [Or a reference may be ordered as to the facts.]

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No. 825.

**Notice of Application for Sequestration of Property, and Appointment of Receiver.**

(Code Civ. Pro., § 1772.)

[Title of cause.]

As in form No. 324 to [\*], and from thence as follows: For an order sequestering the personal property of the defendant, and the rents and profits of his real property, and appointing R. F., of ———, or some other suitable person, receiver thereof, and for such other and further relief as may be just, with costs of this motion.

Yours, etc.,

M. N., *Plaintiff's Attorney.*

[Office address.<sup>1</sup>]

To P. R., *Defendant's Attorney.*

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No. 826.

**Affidavit to Obtain Sequestration of Property on Failure to Comply with Order or Judgment Directing Payment of Alimony, etc.**

(Code Civ. Pro., § 1772.)

[Title of cause.]

COUNTY OF ———, ss.:

A. B., of ———, being duly sworn, says, that she is the plaintiff in the above entitled action.

That said action was brought to obtain a divorce from the defendant and a dissolution of the marriage between the plaintiff and defendant [or state other relief], and for other relief, as will appear by the complaint therein.

That upon the application of the plaintiff an order was made and entered herein [or that a final judgment was en-

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<sup>1</sup> See note 2 to form No. 122.

tered herein], on the ——— day of ———, 18—, a copy of which is hereto annexed.

And deponent further says, that the said defendant has not complied with the directions of said order [*or* judgment] in that he has failed to pay the amount of ——— dollars, directed thereby to be paid, on the ——— day of ———, 18—, for the support and maintenance of the plaintiff [*or* state other violation of the order or judgment], although a copy of said order [*or* judgment], certified by the clerk of ——— county, was duly served upon the said defendant, on the ——— day of ———, 18—, as will appear by the affidavit of ———, hereto annexed.

That the defendant is the owner of both real and personal property, the value of which is about ——— dollars.

A. B.

[Jurat as in form No. 46.]

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No. 827.

**Order Sequestrating Property of Defendant and Appointing Receiver.**

(Code Civ. Pro., § 1772.)

[At, etc., as in form No. 80.]

[Title of cause.]

On reading and filing the affidavit of A. B., dated ———, 18—, with proof of due service thereof, and of notice of this motion, upon the [defendant's attorney] herein, and it appearing that said defendant has failed to comply with the directions of the judgment [*or* order] entered herein on the ——— day of ———, 18—, and to [state in what manner he has failed to comply with such directions], and on reading [name any opposing papers]:

Now, on motion of F. G., for the plaintiff, after hearing G. H., for the defendant [*or* no one appearing to oppose]:

It is hereby ordered, that T. R., of ———, be and he is hereby appointed receiver of the personal property of the defendant, C. D., and of the rents and profits of the real estate of said defendant, which are hereby sequestered, pursuant to the provisions of section 1772 of the Code of

Civil Procedure, upon the said receiver's executing, acknowledging and filing, with the clerk of this court, a bond in the form required by law, to the people of this State, in the penalty of \_\_\_\_\_ dollars, with two sufficient sureties, to be approved as to its form and manner of execution by [a] judge of this court.

And it is further ordered, that said receiver take the said rents and profits, and other property so sequestered, and apply them, from time to time, to the payment of any of the sums of money hereinbefore specified, under the directions of this court, as justice may require.

[Add injunction against defendant, substantially as in form No. 292.]

And that the said defendant pay to the plaintiff \_\_\_\_\_ dollars costs of this motion.<sup>1</sup>

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No. 828.

**Indorsement on Summons in Matrimonial Actions, where Complaint is not Served.**

(Code Civ. Pro., § 1774.)

Legibly written or printed upon the face thereof as follows:

“Action to annul marriage,” “Action for divorce,” or “Action for a separation,” according to the article of title 1 of chapter 15, under which the action is brought.

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No. 829.

**Affidavit of Service of Summons within the State, or of the Summons and Complaint without the State, in Suit for Divorce or Separation, or to Annul a Marriage.**

(Code Civ. Pro., § 1774; Gen. Rules of Prac., No. 18.)

\_\_\_\_\_ COUNTY, ss.:

E. F., of \_\_\_\_\_, being duly sworn, says, that he is of the age of eighteen years and upwards [*or that he is and*

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<sup>1</sup>For bond of receiver, see form No. 302, and see other forms relating to receivers, contained in article 1 of title 4 of chapter 7, commencing on page 208.

That in an action upon a foreign judgment of divorce to enforce payment of alimony decreed thereby,

equity has, it seems, no jurisdiction to sequester defendant's property or compel him to give security for future alimony, see *Wood v. Wood*, (7 Misc., 579). No other relief can be had in such an action than a recovery for past due alimony. (Id.)

was at the time of the service hereinafter mentioned more than twenty-one years of age].

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, he personally served the annexed summons [*or* summons and complaint] upon F. C., the defendant therein named, at the store [*or* dwelling, etc.] No. — \_\_\_\_\_ street, \_\_\_\_\_, in the \_\_\_\_\_ of \_\_\_\_\_, in the State of \_\_\_\_\_, by delivering to and leaving with said defendant a copy [*or* copies] thereof.

That deponent knew the person so served to be the person mentioned and described in said summons as defendant therein.

That the knowledge which deponent had of the person so served being the defendant and the proper person to be served, and the manner in which he acquired such knowledge are as follows [here state same fully].<sup>1</sup>

That the copy of the summons delivered to the defendant, as aforesaid, contained the following words, legibly written [*or* printed], upon the face thereof, to wit: "action to annul a marriage [*or* "action for a divorce," *or* "action for a separation," as the case may be].

E. F.

[Jurat as in form No. 46.]

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No. 830.

**Affidavit to Move for Order to Show Cause why Husband Should not Make Payment of Alimony, etc.**

(Code Civ. Pro., § 1773.)

[Title of cause.]

COUNTY OF \_\_\_\_\_, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that she is the plaintiff in the above entitled action.

That said action was brought to obtain a divorce from defendant, and a dissolution of the marriage between plaintiff and defendant.

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<sup>1</sup>The facts must vary so widely in each case that it is not attempted to give any general form of these statements which are required by rule 18 as to the affiant's knowledge of the person served and the manner of ac-

quiring it. See further provisions of rule 18, as amended in 1895, such amendment to take effect Jan. 1, 1896, on the subject. See, also, Sears v. Sears (9 Civ. Pro. R., 432), Rudolph v. Rudolph (34 State Rep., 1).

That an order [*or* final judgment] was made [*or* rendered] herein on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a copy of which is hereto annexed.

That a copy of said order [*or* judgment] was, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, served upon the said defendant, but that said defendant has made default in paying the sum directed to be paid by said order, and falling due on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, for the support and maintenance of the plaintiff [*or* state other purpose].

That payment cannot be enforced by means of the sequestration of the personal property of said defendant, and of the rents and profits of his real estate, and appointing a receiver thereof, or by resorting to the security given by him for the payment of said amount, for the following reasons, to wit [state the reasons, so as to make it appear that payment cannot be enforced by such means].<sup>2</sup>

A. B.

[Jurat as in form No. 46.]

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No. 831.

**Order to Show Cause why the Defendant Should not be Punished for his Failure to Make the Payment.**

(Code Civ. Pro., § 1773.)

[At, etc., as in form No. 80.]

On reading and filing the affidavit of A. B., dated \_\_\_\_\_, 18—, and on motion of M. N., attorney for the plaintiff:

It is hereby ordered, that the defendant, C. B., show cause at a \_\_\_\_\_ Term of the \_\_\_\_\_ Court, to be held at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at the opening of the court, or as soon as counsel can be heard, why he should not be punished for his failure to make the payment mentioned in the said affidavit.

That a copy of this order, and of said affidavit, be served upon the said defendant, personally, on or before the \_\_\_\_\_ day of \_\_\_\_\_, 18—.<sup>1</sup>

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<sup>1</sup> For contempt proceedings, after return of the order, see forms Nos. 1185, etc.

C., 19 W. D., 358); Ryckman v. Ryckman (20 W. D., 129; S. C., 34 Hun, 235, aff'd 98 N. Y., 639); Gray v. Gray (84 Hun, 347).

<sup>2</sup> See Ryer v. Ryer (33 Hun, 116, S.



## TITLE II

## FORMS RELATING TO ACTIONS RELATING TO A CORPORATION.

## ARTICLE FIRST.

## FORMS RELATING TO ACTION BY A CORPORATION, AND ACTION AGAINST A CORPORATION TO RECOVER DAMAGES OR PROPERTY.

(Code Civ. Pro., Ch. 15, Tit. 2, Art. 1.)

No. 832. Allegations of incorporation in complaint in action by or against a corporation.

833. Order to be served with answer or demurrer in action against corporation upon promissory note, or other evidence of debt.

## No. 832.

**Allegations of Incorporation in Complaint in Action by or against a Corporation.**

(Code Civ. Pro., § 1775.)

[Title of cause.]

The complaint of the [insert name of corporation (*or* the complaint of A. B.)], respectfully shows.

That it [*or* that defendant] is a domestic [*or* foreign] corporation [in case of a foreign corporation add, "created under the laws of the State, etc., of ———."].<sup>1</sup>

## No. 833.

**Order to be Served with Answer or Demurrer in Action against Corporation upon Promissory Note or other Evidence of Debt.**

(Code Civ. Pro., § 1778.)

[Title of cause.]

Upon reading the pleadings in this action, and upon the application of M. N., attorney for the defendant herein, I do hereby order and direct, that the issues presented by the said pleadings be tried<sup>2</sup>

Dated ———, 18—.

A. M., *Judge of* ——— *Court.*

<sup>1</sup>See *Fraser v. Granite State Provident Ass'n* (8 Misc., 7); *Noye Co. v. Raymond* (8 id., 353); *Harmon v. Vanderbilt Hotel Co.* (79 Hun, 392); *Lamson Cons. Store Service Co. v. Coyningham* (11 Misc., 579); *Nicoll v. Clark* (13 id., 128); *Matter of Broadway and Seventh Ave. R. R. Co.* (73 Hun, 7) *Goldsmith v. Wells Co.* (86 id., 489).

<sup>2</sup>The instruments referred to in sec-

lute and not conditional contracts. An action upon a life insurance policy is not within its provisions. (*N. Y. Life Ins. Co. v. Universal Life Ins. Co.*, 88 N. Y., 424.)

As to origin and intention of that provision, see (*id.*) See, also, *Shorer v. Times Printing, etc., Co.* (119 N. Y. 483, aff'g S. C., 53 Hun, 88); *Ford v. Binghamton Hydraulic Power Co.* (54 Hun. 451).

## ARTICLE SECOND.

FORMS RELATING TO ACTIONS TO PROCURE THE DISSOLUTION OF A CORPORATION, AND ACTIONS TO ENFORCE THE INDIVIDUAL LIABILITY OF THE OFFICERS OR MEMBERS OF A CORPORATION, WITH OR WITHOUT A DISSOLUTION THEREOF.

(Code Civ. Pro., Ch. 15, Tit. 2, Art. 3.)

- No. 834. Complaint by creditor of corporation for sequestration of property, etc., after return of execution unsatisfied.  
 835. Complaint in suit by creditor or stockholder after demand upon attorney-general to commence the action.  
 836. Final judgment in action for dissolution of a corporation.

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No. 834.

**Complaint by Creditor of Corporation for Sequestration of Property, etc., after Return of Execution Unsatisfied.**

(Code Civ. Pro., § 1784.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a judgment was rendered in the \_\_\_\_\_ Court in favor of the above named plaintiff against the defendant, the [insert name of corporation], a domestic corporation, for the sum of \_\_\_\_\_ dollars.

That the judgment roll upon said judgment was filed in the county clerk's office of \_\_\_\_\_ county, on the \_\_\_\_\_ day of \_\_\_\_\_, 18— [and that a transcript thereof was filed and said judgment duly docketed in the county clerk's office of \_\_\_\_\_ county, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—].<sup>1</sup>

That on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, an execution upon said judgment, against the property of said defendant, was issued to the sheriff of the county of \_\_\_\_\_, in which county the said defendant [transacts and] at the time of the issuing of said execution transacted its general business [or in which county the principal office of said de-

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<sup>1</sup> Insert these words in brackets than that in which the judgment roll where the judgment is docketed in, is filed, and execution issued to, a county other

defendant (is and) was, at the time of the issuing of said execution, located], and that said execution has been returned by said sheriff wholly unsatisfied [*or* unsatisfied to the extent of ——— dollars].

Wherefore the plaintiff demands judgment that the property of the said defendant may be sequestered, and that a fair and just distribution thereof, [+] and of the proceeds thereof, among its fair and honest creditors, may be made according to law,<sup>1</sup> and that a receiver of the property of the said corporation may be appointed with the powers and authority conferred, and subject to the duties and liabilities imposed, by law upon such a receiver,<sup>2</sup> and that the plaintiff may have such other or such further relief as may be proper in the premises, together with the costs of this action.

M. N., *Plaintiff's Attorney.*

[Office address.<sup>3</sup>]

[Verification as in forms Nos. 151, etc.]

No. 835.

**Complaint in Suit by Creditor or Stockholder to Dissolve Corporation after Demand upon Attorney-General to Commence the Action.**

(Code Civ. Pro., § 1786.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that the defendant is a domestic corporation, and that the plaintiff has, since the ——— day of ———, 18—, been a creditor of said defendant by reason of the following facts [here set forth the liability] [*or* a stockholder of said defendant to the extent of ——— shares]; that said defendant has remained insolvent for more than one year [*or* state one of the other grounds for dissolution under section 1785].

<sup>1</sup> See section 1793, Code Civ. Pro. N. Y., 456); *People v. Eq. Mutual*

<sup>2</sup> See sections 1788 and 1789, Code Civ. Pro., as to receiver and his powers, duties, etc. As to notice to Attorney-Gen'l of application for his appointment, see *Whitney v. N. Y. & Atlantic R. Co.* (32 Hun, 164, 171).

*Fire Ins. Co.* (12 Misc., 556).

<sup>3</sup> See note 2 to form No. 122.

As to action by stockholder of corporation to dissolve same, see *Porter v. Industrial Information Co.* (5 Misc., 262).

See, also, *Whittlesey v. Frantz* (74

That [here state facts showing insolvency, and that such insolvency has continued for more than a year (*or* state other facts bringing the case within one of the subdivisions of section 1785)].

That the plaintiff, on or about the ——— day of ———, 18—, submitted to Hon. ———, the attorney general of the State of New York, a statement of facts, verified by his oath, showing that said defendant had been insolvent for more than one year [*or* state other ground of action under section 1785], and that the said attorney-general omitted, for more than sixty days after said submission, to commence an action for the dissolution of said defendant, and that thereupon an application was made by plaintiff to the ——— Court, at a ——— Term thereof, held, etc., for leave to commence such an action, and that pursuant to said application an order was made at said term granting leave to the plaintiff to maintain this action.

Wherefore the plaintiff prays judgment that said defendant may be dissolved, and that its corporate rights, privileges and franchises may be declared forfeited, and that a fair and just distribution of the property thereof, etc.<sup>1</sup>

[Conclude as in form No. 834 from (†).]

M. N., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> See section 1793, Code Civ. Pro.

It was held in *People v. Albany and Vermont R. R. Co.* (77 N. Y., 232; rev'g S. C., 15 Hun, 126), that a lessee of a portion of a railroad should be made a party defendant upon its own application to an action brought against its lessor to forfeit its franchise, especially where the suit seems to be a friendly one between the people and the corporation, and the intention appears to be to abandon the portion of the road which is leased to the applicant.

See, as to temporary injunction, Code Civ. Pro., § 1787.

By section 1790 (*id.*), where the action is brought by a creditor of a corporation, and the stockholders, etc., or any of them, are made liable by law, in any event or contingency, for the payment of his debt, the parties so liable may be made parties defendant, and their liability declared and enforced by the judgment.

See further as to such actions, and the proceedings, judgment, etc., *therein*, sections 1791–1796 (*id.*).

<sup>2</sup> See note 2 to form No. 132.

## No. 836.

**Final Judgment in Action for Dissolution of a Corporation.**

(Code Civ. Pro., § 1793.)

[At, etc., as in form No. 80.]

[Title of cause.]

The summons, with a copy of the complaint in this action, having been duly served upon the defendant, the [name of corporation], and the said corporation having appeared herein by M. F., as its attorney, and answered the said complaint, and the said action having been referred to C. P., as referee, to hear and determine the same, and take an account of the property and effects of the said [name of corporation], and the report of said referee having been duly made and filed; and due notice of application for the confirmation of the said report, and for final judgment thereupon, at this term, having been served upon the said defendant's attorney, and on reading [name opposing papers]:

Now, on motion of I. J., of counsel for the plaintiff, after hearing, etc. [*or* no one appearing to oppose]:

It is hereby ordered, that the said referee's report be and the same is hereby, in all respects, confirmed.

And it is hereby further ordered and adjudged, that the said [corporation] be and the same is hereby dissolved, and that M. R., of ———, be and he is hereby appointed receiver of the property thereof, and the said receiver is hereby vested with the power and authority, and subjected to the duties and liabilities, of a receiver, appointed pursuant to the provisions of section 2429 of the Code of Civil Procedure.

And it is hereby further ordered and adjudged, that the said M. R., before entering upon the duties of his appointment, shall give and file with the clerk of ——— county his bond to the people of the State of New York, with ——— sureties, in the penalty of ——— dollars, conditioned for the faithful performance of his duties as such receiver, and for the due accounting for all moneys received by him as such receiver, and that said receiver, from the time of his having filed as before directed the bond herein-

before required, shall be vested with all the estate, real and personal, of the said [name of corporation], and shall be trustee of such estate for the benefit of the creditors of such corporation, and of its stockholders.<sup>1</sup>

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ARTICLE THIRD.

FORMS RELATING TO ACTION BY THE PEOPLE TO ANNUL A CORPORATION.

(Code Civ. Pro., Ch. 15, Tit. 2, Art. 4.)

- No. 837. Complaint in action by attorney-general to vacate act of incorporation.
838. Complaint in action to annul charter of corporation, under section 1798 of Code of Civ. Procedure.
839. Injunction order restraining corporation and the officers, etc., from exercising corporate rights, etc.

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No. 837.

**Complaint in Action by Attorney-General to Vacate Act of Incorporation.**

(Code Civ. Pro., § 1797.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, an act was passed by the Legislature of the State of New York, entitled “An act, etc.,” directing the bringing of this action.

That the act of incorporation of the defendant, the [name of corporation], was procured upon a fraudulent suggestion [or upon the concealment of a material fact] made by [or with the knowledge of] A. B. and C. D. [two] of the persons incorporated by said act, said fraudulent suggestion [or concealment] being as follows to wit [set forth the facts relating to the same].

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<sup>1</sup> See art. 3 of title 4 of chap. 8 of part 3 of R. S. (3 R. S. [7th ed.], p. 2399), for the provisions of the Revised Statutes, on the subject of receivers of corporations, remaining unrepealed and made applicable to receivers appointed

under section 2429 of Code Civ. Pro., by chapter 245 of 1880.

See sections 1794 and 1795 of Code Civ. Pro., for judgment against stockholders and directors, trustees or other officers, where they are made parties.

Wherefore the plaintiff demands judgment that the said act of incorporation of the defendant be vacated and annulled, and that the said [name of corporation], and each officer thereof, be perpetually enjoined from exercising any of the corporate rights, privileges and franchises thereof, and that said corporation be dissolved; and that a receiver be appointed and the property of said corporation be distributed among its creditors and stockholders, as where a corporation is dissolved upon its voluntary application, as prescribed in chapter seventeenth of the Code of Civil Procedure, and for costs of this action, and for such other and further relief as may be proper.<sup>1</sup>

M. N., *Attorney-General.*

[Office address.]

[Verification as in form No. 153, adding after (†) in form No. 152, therein referred to, as follows: the people of the State.]

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No. 838.

**Complaint in Action to Annul Charter of Corporation,  
under section 1798, Code of Civil Procedure.**

(Code Civ. Pro., § 1798.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that said plaintiff, as attorney general of the State of New York, has been duly authorized, by the \_\_\_\_\_ Court, to bring this action.<sup>2</sup>

That the defendant, the [name of corporation], has

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<sup>1</sup> As to form of final judgment, see form No. 836, and section 1801, Code Civ. Pro., in connection therewith.

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> Before granting leave the court may, in its discretion, require such previous notice of the application as it thinks proper, to be given to the corporation, or any officer thereof, and may hear the corporation in opposition thereto. (Code Civ. Pro., § 1799.)

The order will not be reviewed upon appeal, unless, perhaps in an extreme case, where the complaint is on its face wholly without foundation. (*People v. Boston, H. T. and W. R. Co.*, 27 Hun, 528.)

It rests in the discretion of the court, whether notice shall be given of the application. (*Id.*)

As to the effect of a reversal or vacating of such order upon a pending action, *quære*. (*Id.*)

offended against the following provision of the act of the Legislature of this State, passed ———, entitled “An act, etc.,” under which it was created [*or altered, or renewed*] [*or of an act of the Legislature, passed ———, entitled “An act, etc.,” amending the act entitled “An act, etc.,” passed ———, 18—, under which it was created (or altered, or renewed)*] [*or set forth other causes for annulling charter, as prescribed in section 1798, subs. 2, 3, 4, 5*] by the following acts and omissions, viz. [here state same].

Wherefore the plaintiff demands judgment that the charter of said [name of corporation] be vacated [and that its existence be annulled (insert here same prayer for injunction and receiver as in form No. 837)], and for costs of this action, and for such other and further relief in the premises as may be proper.<sup>1</sup>

M. N., *Attorney-General.*

[Office address.<sup>2</sup>]

[Verification as in form No. 153. See, also, last form.]

### No. 839.

## **Injunction Order Restraining Corporation and its Officers, etc., from Exercising Corporate Rights, etc.**

(Code Civ. Pro. § 1802.)

[At, etc., as in form No. 80.]

[Title of cause.]

On reading and filing the complaint in this action [and the affidavits of E. F. and G. H., dated (respectively) on the ——— day of ———, 18—, and on the ——— day of ———, 18—], and on motion of M. N., counsel for the plaintiff, [\*] and it appearing that due notice of this application has been given to A. F., the president [*or name other official title*] of the [name of corporation],<sup>3</sup> and, on reading [name opposing papers], on motion of M. N., counsel for the plaintiff, and P. R. for the defendant [*or no one appearing to oppose*]:

<sup>1</sup> For form of final judgment, see form No. 836, and section 1801, Code Civ. Pro.

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> An injunction order suspending the general and ordinary business of a cor-



It is hereby ordered, that the defendant, the [name of corporation], and any and all of its directors, trustees and other officers be and they are hereby restrained, commanded and enjoined to refrain from exercising any of the corporate rights, privileges or franchises [or from exercising the following corporate rights, privileges and franchises, to wit (naming them)] of said corporation [and from transacting any of the following business (describe the same)] until the further order of the court.

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#### ARTICLE FOURTH.

#### FORMS RELATING TO TWO OR MORE OF THE ACTIONS SPECIFIED IN TITLE TWO OF CHAPTER FIFTEEN OF THE CODE OF CIVIL PROCEDURE.

(Code Civ. Pro., Ch. 15, Tit. 2, Art. 5.)

- No. 840. Injunction or order restraining creditors of corporation from bringing actions, or from taking further proceedings in actions.
841. Order requiring creditors of corporation to exhibit and prove their claims.
842. Notice by referee to creditors of corporation to present and prove their claims.
843. Notice of application for injunction against corporation or officer thereof.
844. Notice of motion for appointment of receiver of corporation.

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#### No. 840.

#### **Injunction Order Restraining Creditors of Corporation from Bringing Actions, or from Taking Further Proceedings in Actions.**

(Code Civ. Pro., § 1806.)

As in form No. 839 to [\*], and from thence as follows: Ordered, that the creditors of the [name of corporation] be restrained, and are hereby commanded and enjoined to refrain from bringing actions against the said defendant [or against the said defendants, or any of them], for the recovery of a sum of money [or that A. B. be restrained, etc., from

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poration, etc., can only be granted after (Code Civ. Pro., § 1809.) For form notice of the application therefor to of notice, see form No. 843 the proper officer of the corporation

taking any further proceedings in the action heretofore commenced by him against said corporation (*or* against C. D., a stockholder of said corporation) for the recovery of the sum of \_\_\_\_\_ dollars], until the further order of the court.<sup>1</sup>

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No. 841.

**Order Requiring Creditors of Corporation to Exhibit and Prove their Claims.**

(Code Civ. Pro., § 1807.)

[At, etc., as in form No. 80.]

[Title of cause.]

On reading and filing the complaint in this action, and [name other motion papers]:

It is hereby ordered, on motion of E. F., counsel for the plaintiff, that the creditors of the [name of corporation] are hereby required to exhibit and prove their claims against said corporation, to M. R., of \_\_\_\_\_, who is hereby appointed referee for that purpose, within six months from the first publication of notice of this order, at the office of said referee, No. — \_\_\_\_\_ street, in the \_\_\_\_\_ of \_\_\_\_\_, and thereby make themselves parties to this action.

And it is further ordered, that the creditors of the said corporation, who make default in so doing, shall be precluded from all benefit of the judgment entered on the \_\_\_\_\_ day of \_\_\_\_\_, 18— [or to be entered] herein, and from any distribution which may be made thereunder.

And it is further ordered, that notice of this order shall be given by publication in [name the newspapers and place of their publication], for [state the length of time of publication].

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No. 842.

**Notice by Referee to Creditors of Corporation to Present and Prove their Claims.**

(Code Civ. Pro., § 1807.)

[Title of cause.]

Pursuant to the provisions of section 1807 of the Code of

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<sup>1</sup> See *Atty.-Gen. v. Guardian M. L. Schuyler's Steam Tow Boat Co.* (64 Ins. Co. (77 N. Y., 272). *Matter of Hun*, 384, *aff'd S. C.*, 136 N. Y., 169).

Civil Procedure, I, M. R., the referee appointed herein by order of the \_\_\_\_\_ Court, duly made and entered as hereinafter mentioned, do hereby give notice to all the creditors of the [name of corporation], that an order has been entered in the above entitled action at a \_\_\_\_\_ Term of the \_\_\_\_\_ Court, held at the \_\_\_\_\_ of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, requiring all creditors of said corporation to exhibit and prove their claims to me as such referee, at my office hereinafter mentioned, within [six] months from the first publication of this notice, and thereby make themselves parties to the said action, and that the creditors who make default in so doing shall be precluded from the benefit of the judgment entered herein on the \_\_\_\_\_ day of \_\_\_\_\_, 18— [or to be entered herein], and from any distribution which is to be made thereunder, and that pursuant to said order, I do hereby notify said creditors that they present and prove their said claims against said corporation to me, as such referee, on or before the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at my office, No. — \_\_\_\_\_, street, in the \_\_\_\_\_ of \_\_\_\_\_.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

M. R., *Referee.*

No. 843.

**Notice of Application for Injunction against Corporation or Officer Thereof.**

(Code Civ. Pro., § 1809.)

SIR—You will please take notice, that upon the pleadings and other proceedings in the above entitled action, and upon the affidavits and other papers, with copies of which you are herewith served, a motion will be made at, etc., [\*] for an injunction order restraining the defendant, the [name of corporation], and any and all of its directors, trustees and other officers from exercising any of the corporate rights, privileges or franchises [or from exercising the following corporate rights, privileges and franchises, to wit (naming them)] of said corporation [and from trans-

<sup>1</sup>See *People v. Security Life Ins. Co.* (78 N. Y., 114; 79 id., 267); *Attorney-General v. Continental Life Ins. Co.* (88 N. Y., 77); and see, also, amendment to section 1807, Code Civ. Pro., by ch. 372 of Laws of 1886, pur-

suant to which amendment insert in above form after word "thereunder" as follows: except as provided by said section 1807 of the Code of Civil Procedure.

acting any of the following business (describe the same)], and for such other and further order or relief as may be proper.

Yours, etc.,

M. N., *Attorney-General*.

[Office address.<sup>1</sup>]

To A. R., *President of the* ——— [or other officer].

No. 844.

**Notice of Motion for Appointment of Receiver of Corporation.**

(Code Civ. Pro., § 1810.)

As in form No. 843 to [\*], and from thence as follows: For the appointment of a temporary receiver of the property of the said corporation, with all the powers and authority conferred by law upon such a receiver [or with the powers and authority, and subject to the duties and liabilities, of a permanent receiver, or so much thereof as the court may think proper],<sup>2</sup> and for such other or further relief as the court may deem proper to grant [with costs of this motion].

M. N., *Attorney General* [or *Plaintiff's Attorney*].

[Office address<sup>3</sup>]

To F. R., *President* [or other officer] of the [name of corporation].

<sup>1</sup> It was held in *Wilkie v. Rochester and S. L. R. R. Co.* (12 Hun, 242), under chap. 151, § 1, of Laws of 1870, corresponding substantially with § 1809 of Code of Civ. Pro., that an *ex parte* injunction to restrain the directors of a corporation from removing the treasurer and considering a resolution declaring the office vacant was void, and that the objection was not waived by a motion to dissolve it.

<sup>2</sup> See sections 1788 and 1789, Code Civ. Pro., and see chap. 378, Laws of 1883, "An act in relation to receivers of corporations." Also, *Porter v. Industrial Information Co.* (5 M'sc. 262); *Holland Trust Co. v. Consolidated Gas, etc., Co.* (85 Hun, 454).

See note 2 to form No. 122.

TITLE III.

FORMS RELATING TO ACTIONS RELATING TO THE ESTATE OF  
A DECEDENT.

ARTICLE FIRST.

FORMS RELATING TO ACTIONS BY OR AGAINST AN EXECUTOR  
OR ADMINISTRATOR.

(Code Civ. Pro., Ch. 15, Tit. 3, Art. 1.)

- No. 845. Complaint in action by or against executor or administrator
- 846. Complaint against executor or administrator for legacy or distributive share.
- 847. Bond by guardian *ad litem* to infant where suit is brought for legacy, etc.
- 848. Affidavit to obtain order from surrogate to issue execution against an executor or administrator.
- 849. Notice to executor or administrator of application for leave to issue execution on judgment against him.
- 850. Order permitting execution to issue against an executor or administrator on judgment against him.
- 851. Undertaking required from legatee before issuing of execution upon judgment against executor.

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No. 845.

**Complaint in Action by or against Executor or Administrator.**

(Code Civ. Pro., § 1814.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that [set forth cause of action].

That on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said A. B. died, being, at the time of his death, a resident of the county of \_\_\_\_\_ [or state other facts conferring jurisdiction on the surrogate's court],<sup>1</sup> intestate [or leaving a last will and testament, by which he nominated and constituted the plaintiff (or defendant) executor thereof]; and that afterwards, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said plaintiff [or defendant] was, by the surrogate's court of the said county of \_\_\_\_\_, duly appointed as administrator of all and singular the goods, chattels and

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<sup>1</sup> See section 2476, Code Civ. Pro., to take proof of wills and to grant letters testamentary or of administration.

credits of said A. B. [or as executor of said last will and testament of said A. B.], by letters of administration [or testamentary] duly issued to said plaintiff [or defendant], and that said plaintiff [or defendant] has duly qualified and entered upon the discharge of his duties as such administrator [or executor].

Wherefore the plaintiff demands judgment, as such executor [or administrator (or against said ——— as such executor, etc.)], for [state relief].<sup>1</sup>

M. N., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

No. 846.

### Complaint against Executor or Administrator for Legacy or Distributive Share.

(Code Civ. Pro., § 1819.)

[Title of cause.]

The complaint of the above named plaintiff respectfully

<sup>1</sup>Where the averments in and the frame of a complaint are such as to affix to the plaintiff a representative character and standing in the litigation, and to show that the cause of action, if any, devolved upon him solely in that character, the omission in the title to the action of the word "as" between the name of the plaintiff and words descriptive of his representative capacity, does not prevent him from claiming in that capacity. (Beers v. Shannon, 73 N. Y., 292; rev'g S. C., 12 Hun, 161.)

Where the action was in form against W. as executor, but the cause of action was against him as devisee, and the objection was not taken below as to form. *Held*, that as the objection was a technical one, affecting no substantial right, the action would be treated as one to enforce the personal liability of W. (Brown v. Knapp, 79 N. Y., 136; rev'g S. C., 17 Hun, 160.) See, also, Stilwell v. Carpenter (2 Abb. N. C., 238), Cordier v. Thompson (8 Daly, 172), Patterson v. Copeland (52 How. Pr., 460), Alger v. Conger (17 Hun, 45), Mander v. Low (12 Misc., 316), Gibson v. Blakley (85 Hun, 305), Duclos v. Benner (25 State Rep., 413),

Scott v. Parker (id. 865), Hayward v. Place (27 id., 115), Benner v. Benner (35 id., 602), Newcombe v. Lottimer (id., 614, aff'd, without opinion, 128 N. Y., 618), Griswold v. Met. Elevated R. Co. (122 id., 102), Laney v. Laney (83 State Rep., 673), Burtis v. Burtis (39 id., 637), Knox v. Met. Elevated R. Co. (58 Hun, 517), Douglass v. Leonard (44 State Rep., 293, rev'g S. C., 39 id., 179), Kraemer v. Adelsberger (122 N. Y., 467), Watson v. King (73 Hun, 340), Wetmore v. Porter (92 N. Y., 76), Schultz v. Cookingham (30 Hun, 443), Matter of Consalus (95 N. Y., 340), Kittleman v. Bradt (13 Daly, 529), Buckland v. Gallup (105 N. Y., 453, aff'g S. C., 40 Hun, 61), Ensign v. Ensign (14 State Rep., 481), Ferris v. Disbrow (22 Week. Dig., 330), Guibert v. Sanders (10 State Rep., 43), Pittman v. Johnson (35 Hun, 38, aff'd 102 N. Y., 742), Hentz v. Phillips (23 Abb. N. C., 15), Shepard v. Manhattan R. Co. (5 N. Y. Supp., 189), Sheffield v. Hamlin (26 Hun, 237).

In an action to foreclose a purchase money mortgage, given by an executor, as such, it is unnecessary to allege the time and manner of his appoint-

ment, as he and his grantees are estopped from denying it. (Skelton v. Scott, 18 Hun, 375.) See, also, Kingsland v. Stokes (25 id., 107); Secor v. Pendleton (47 id., 281).

The addition of the words "executor, etc.," in the summons and complaint, may be treated as surplusage, where the complaint contains nothing to indicate that the plaintiff was

charged, or the defendant was sued, in a representative capacity. (Bannon v. McGrane, 45 N. Y. Super. Ct., 517.)

As to suits by foreign executors, see Matter of Webb (11 Hun, 124), Brown v. Knapp (17 Hun, 160), Field v. Gibson (20 Hun, 274), Lawrence v. Townsend (88 N. Y., 24).

<sup>2</sup> See note 2 to form No. 122.





shows, that on or about the ——— day of ———, 18—, J. R. died intestate [*or* leaving a last will and testament, dated on the ——— day of ———, 18—], being at the time of his death a resident of the county of ——— [*or* state other facts conferring jurisdiction on the surrogate to issue letters].

That afterwards, and on or about the ——— day of ———, 18—, and more than one year since, the defendant, C. D., was duly appointed by the surrogate of ——— county, by letters of administration [*or* testamentary], duly issued, to be the administrator of, etc. [*or* to be the executor of the said last will and testament], of said deceased; and the said C. D. thereupon duly qualified, and entered upon the discharge of his duties as such administrator [*or* executor].

That said J. R. left him surviving the said plaintiff, his [state relationship], and only next of kin.

That said J. R. left no widow or children surviving him [*or* state other facts, showing plaintiff's right to distributive share].

That the said distributive share of said estate, to which the plaintiff is entitled, amounts to ——— dollars.

[*Or* that in and by said last will and testament, the said J. R. bequeathed to the plaintiff a legacy of ——— dollars.]

That on or about the ——— day of ———, 18—, plaintiff demanded of the said C. D., as such administrator [*or* executor], the payment of such distributive share of the estate of said J. R. [*or* of such legacy] to which he is entitled as aforesaid, but that said C. D. refused, and still refuses and neglects, to pay the same.

Wherefore the plaintiff demands judgment for the sum of ——— dollars, with interest thereupon from the ——— day of ———, 18—,<sup>1</sup> against the said defendant, as administrator [*or* executor] as aforesaid, together with the costs of this action.<sup>2</sup>

M. N., *Plaintiff's Attorney.*

[Office address.']

[Verification as in forms Nos. 151, etc.]

<sup>1</sup>As to interest on legacies, see *Brown v. Knapp* (*infra*), *Kerr v. Dougherty* (17 Hun, 341; *aff'd* S. C., 79 N. Y., 327); *Thorn v. Garner* (113 N. Y., 198); *Matter of McGowan* (124 id., 526); *Lyon v. Industrial School Association* (127 id., 402); *Matter of Stanfield* (135 id., 292); *Matter of Clark* (62 Hun, 275); *matter of Maine* (id., 334); *Matter of Lusak* (2 Connolly, 380); *Matter of McKay* (5 Misc., 123).

No. 847.

**Bond by Guardian ad litem to Infant, where Suit is  
Brought for Legacy, etc.**

(Code Civ. Pro., § 1820.)

As in form No. 340 to [\*], and from thence as follows: That whereas, the above bounden, A. B., is about to be appointed the guardian *ad litem* of said G. H., an infant, in an action about to be commenced by said infant against C. D. as executor of the last will and testament [*or* as administrator of, etc.] of E. F., deceased, for the recovery of a legacy of \_\_\_\_\_ dollars, bequeathed to said G. H. by said will [*or* of a distributive share of \_\_\_\_\_ dollars in the estate of said E. F. belonging to said G. H.]:

Now, therefore, the condition of this obligation is such that if the said A. B. shall duly account to said G. H. when said G. H. shall attain full age, or in case of his death to his legal representatives for all money or other property received by said A. B. as such guardian *ad litem* by reason of such legacy [*or* distributive share], then, etc., as in form No. 340 to end.

|       |         |
|-------|---------|
| A. B. | [L. s.] |
| C. D. | [L. s.] |
| E. F. | [L. s.] |

Sealed and delivered in presence of \_\_\_\_\_.

[Acknowledgment or proof, affidavits of justification and approval as in forms Nos. 340 and 538.]

<sup>2</sup> "At common law, a suit for a legacy did not lie. (5 Term R., 690; 18 Johns., 428; 4 Mass., 634.) In this State a remedy by action in courts of law was given by statute as early as 1801. (24 Sess. Laws, ch. 174, § 7; 1 Webs. & Skin., 540, § 18.) Substantially the same provision was incorporated in the Revised Statutes. (2 R. S., 114, §§ 9-16.) Under the statute, actions of debt for legacies have been frequently entertained. (2 Johns. Cas., 97; *id.*, 200; 2 Johns., 243; 10 *id.*, 155.)" Op. Smith J., in *Rundle v. Allison* (34 N. Y., 183).

See, further, as to actions on legacies *Eherhardt v. Schnster* (6 Abb. N. C., 141), *Brown v. Knapp* (17 Hun,

160; S. C., 79 N. Y., 136), *Hoyt v. Hoyt* (17 Hun, 192), *Lewis v. Maloney* (12 Hun, 207), *Kerr v. Dougherty* (*supra*), *Drake v. Wilkie* (30 Hun, 537), *Wall v. Bulger* (46 Hun, 346), *In re Van Dyck* (25 Week. Dig., 177), *Matter of Dunham* (22 Abb. N. C., 479), *Matter of Underhill* (32 State Rep., 1061, aff'g S. C., 1 Connoly, 541), *Camp v. Smith* (117 N. Y., 354), *Cocks v. Haviland* (28 State Rep., 389), *Carter v. Board of Education of Presbyterian Church of U. S.* (68 Hun, 435), *Matter of Hodgman* (140 N. Y., 421), and see, also, forms Nos. 1471, 1472, *post*, and notes thereto.

<sup>3</sup> See note 2 to form No. 122.

No. 848.

**Affidavit to Obtain Order from Surrogate to Issue Execution upon Judgment against Executor or Administrator.**

(Code Civ. Pro., § 1825.)

[Title of cause.]

\_\_\_\_\_ COUNTY, *ss.*:

A. B., of \_\_\_\_\_, being duly sworn, says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a judgment was recovered in the \_\_\_\_\_ Court in favor of [deponent], as plaintiff, against R. M., as executor [*or* as administrator] of, etc., of J. G., deceased, to whom letters testamentary [*or* of administration] were issued by the surrogate's court of \_\_\_\_\_ county, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, for the sum of \_\_\_\_\_ dollars, damages and costs; and that the judgment roll upon said judgment was filed in the \_\_\_\_\_ county clerk's office on the said \_\_\_\_\_ day of \_\_\_\_\_, 18— [and that said judgment was duly docketed in the county clerk's office of \_\_\_\_\_ county, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—].<sup>1</sup>

That the said judgment has never been paid, nor has any part thereof [*or* state the sum due, according to the fact].

That the indebtedness upon which said judgment was recovered was [set forth nature of debt].

That said R. M. resides at \_\_\_\_\_, in the county of \_\_\_\_\_ [*or* that the said R. M. cannot, with due diligence, be served with notice of an application for an order granting leave to issue execution, as will appear from the affidavits of I. J. and K. L., hereto annexed [*or* state search and inquiry made by deponent to find the executor, etc.].

A. B.

[Jurat as in form No. 46.]

No. 849.

**Notice to Executor or Administrator of Application for Leave to Issue Execution on Judgment against him.**

(Code Civ. Pro., § 1826.)

[Title of cause.]

SIR—Take notice, that upon the affidavit, with a copy of

<sup>1</sup> Insert these words in brackets, in another county than the one in where the judgment has been docketed which the judgment roll was filed,

which you are herewith served, a motion will be made to the surrogate of \_\_\_\_\_ county, at his office in the \_\_\_\_\_ of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock — M., for an order permitting an execution to be issued upon the judgment mentioned in the said affidavit for the amount due thereupon as stated in the said affidavit, and for such other or further order or relief as may be proper.

Yours, etc.,

J. C., *Plaintiff's Attorney.*

[Office address.<sup>1</sup>]

To R. M., *Executor [or Administrator] of, etc., of J. G., deceased.*

No. 850.

**Order Permitting Execution to Issue against an Executor or Administrator on Judgment against him.**

(Code Civ. Pro., § 1826.)

At a Surrogate's Court, held in and for the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—:

Present, Hon. P. R., *Surrogate.*

[Title of proceeding.]

An application having been made by A. B. for leave to issue execution upon a judgment rendered by the \_\_\_\_\_ Court on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, for \_\_\_\_\_ dollars and \_\_\_\_\_ cents, in favor of said A. B. against R. M., as executor [*or administrator*] of, etc., of J. G., deceased; and due notice of said application having been given, as required by law, to said executor [*or administrator*], and an accounting having been had on the part of said executor, etc., by which it appears that the assets in the hands of said R. M., as such executor [*or administrator*], after payment of all sums chargeable against them for expenses, and for claims entitled to priority as against the said plaintiff are [not] [*or will (not)*] be sufficient to pay all the debts, legacies and other claims of the class to which the claim of the plaintiff, under said judgment, belongs:

and it is desired to issue execution to \_\_\_\_\_  
the latter county.

<sup>1</sup> See note 2 to form No. 122.

It is hereby ordered and directed, that an execution may issue against the said defendant as executor [*or* administrator] as aforesaid, upon said judgment, for the collection of the sum of [insert amount], out of the personal property in his hands as such executor [*or* administrator].<sup>1</sup>

No. 851.

**Undertaking Required from Legatee before Issuing of Execution upon Judgment against Executor.**

(Code Civ. Pro., § 1827.)

[Title of proceeding.]

Whereas, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a judgment was rendered, by the \_\_\_\_\_ Court, in an action in which A. B. was plaintiff and R. M., as executor of the last will and testament [*or* as administrator of, etc.] of G. J., deceased, was defendant, in favor of said plaintiff and against said defendant, for the recovery of \_\_\_\_\_ dollars, damages and costs, being for the amount of a legacy bequeathed to said A. B. by the said will [*or* to which said A. B. was entitled for a distributive share of the estate of said G. J.]; and

Whereas, an application has been made to the surrogate of \_\_\_\_\_ county for leave to issue execution upon said judgment, and the said surrogate has required the said A. B. to file an undertaking, as required by law, to said executor [*or* administrator] before making an order permitting such execution to be issued, in the sum of \_\_\_\_\_ dollars:

Now, therefore, we, E. F., of \_\_\_\_\_, banker, and I. J., of \_\_\_\_\_, merchant,<sup>2</sup> do hereby, jointly and severally,

<sup>1</sup>For forms of execution and indorsement thereupon see forms Nos. 559, 260.

See, also, *Glacius v. Fogel* (88 N. Y., 434, aff'g S. C., 4 Redf., 516), *In re Nichols* (4 Redf., 288), *In re Clark* (2 Abb. N. C., 208), *Keyser v. Kelly* (4 Redf., 157), *Estate of Kelsey* (4 Month. L. Bul., 56), *Peters v. Carr* (2 Dem., 22), *Sippel v. Macklin* (id., 219), *Matter of Dougherty* (15 State Rep., 743), *Eisner v. Avery* (2 Dem., 466), *Jael v. Ritterman* (id., 242), *Peyser v. Wendt* (id., 22), *Estate of Taylor* (8 Civ. Pro. R., 453), *Matter of Jansen* (1 Connolly, 362), *Matter of Boyle* (29 State Rep., 946), *Matter of Waring* (7 Misc., 502), *Prentiss v. Bowden* (145 N. Y. 249), *Schmitt v. T.*

*haar* (88 N. Y., 503, aff'g S. C., 24 Hun, 168) *Columbus Watch Co. v. Hodenpyl* (61 Hun, 557, aff'd S. C., 135 N. Y., 430), *Estate of Morey* (6 Dem., 287).

If it appears by the affidavit that service cannot be made upon the executor or administrator with due diligence, notice must be given to such persons, and in such manner, as the surrogate directs, by an order to show cause why the application should not be granted. (Code Civ. Pro., § 1826).

<sup>2</sup>The sureties and amount are to be such as the surrogate directs. (Code Civ. Pro., § 1827.) See sections 810, etc., Code Civ. Pro., and notes to form No. 340, as to undertakings generally.

undertake, pursuant to the statute in such case provided, in the sum of \_\_\_\_\_ dollars, that if, after the collection of any sum of money by virtue of the said execution, the remaining assets are not sufficient to pay all sums for which the said defendant is chargeable, for expenses, claims entitled to priority as against the said applicant, and the other legacies [*or* distributive shares], of the class to which the said applicant's claim belongs, the plaintiff will refund to the defendant, the sum so collected, or such ratable part thereof, with the other legatees or representatives of the same class, as is necessary to make up the deficiency.

Dated \_\_\_\_\_, 18—.

E. F.

I. J.

In presence of \_\_\_\_\_.

[Acknowledgment or proof, affidavit and approval by surrogate as in forms Nos. 340, 538.]

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## ARTICLE SECOND.

### FORMS RELATING TO ACTION BY A CREDITOR AGAINST HIS DEBTOR'S NEXT OF KIN, LEGATEE, HEIR OR DEVISEE.

(Code Civ. Pro., Ch. 15, Tit. 3, Art. 2.)

- No. 852. Complaint in action against next of kin or legatee for debt of decedent.
853. Complaint in action against heirs or devisees for debt of intestate or testator.
854. Answer by heir or devisee of nothing received by descent or devise.
855. Final judgment in action for recovery from heir or devisee of debt of decedent.

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### No. 852.

#### Complaint in Action against Next of Kin or Legatee for Debt of Decedent.

(Code Civ. Pro., § 1837.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that [set forth original indebtedness of intestate or testator].

That after the making of said note [*or* describe other con-

tract], and on or about the ——— day of ———, 18—, the said A. B. departed this life [\*] intestate, and that the defendant, M. B., as the next of kin of said A. B., succeeded to the personal estate of said A. B., remaining after the payment of the debts of the said A. B., to wit: to at least the sum of ——— dollars, which amount was paid to said M. B., as such next of kin, by C. P., the administrator of the goods, etc., of said A. B., who was duly appointed such administrator on the ——— day of ———, 18—, by the surrogate's court of ——— county.

That no presentation of the claim against the estate of said A. B., above set forth, has been made to said administrator, and that the said claim is justly due and owing to the plaintiff. [†]

Wherefore the plaintiff demands judgment against said defendant for the sum of ——— dollars, with interest thereupon from the ——— day of ———, 18—.¹

M. N., *Plaintiff's Attorney.*

[Office address.²]

[Verification as in forms Nos. 151, etc.]

[Or in action against legatee, proceed as above to (\*), and from thence as follows: Having made and executed, in due form of law, his last will and testament, which he left unrevoked at his death, and by which he bequeathed to the defendant the sum of ——— dollars.

That on the ——— day of ———, 18—, the said will was duly admitted to probate by the surrogate's court of ——— county, and C. P. was duly appointed by said surrogate's court as the executor thereof.

That on the ——— day of ———, 18—, the said executor paid to the defendant the amount of said legacy.

That no presentation has been made of the said claim to said executor, and that the same is wholly unpaid, and is justly due and owing to the plaintiff.¹

That no assets of said estate were delivered by the said executor of, etc., of said A. B. to the surviving husband (or wife), or next of kin of said A. B.

¹ See *Selover v. Coe* (63 N. Y., 438), of claim is probably not necessary under section 1837 of Code Civ. Pro. The allegation as to non-presentation See also *Cunningham v. Parker* (146





N. Y., 29), Colgan v. Dunne (50 Hun, 443), Hentz v. Phillips (23 Abb. N. C., 15), Collier v. Miller (16 N. Y. Supp., 633), Sheil v. Muir (22 State Rep., 829), Armstrong v. McKelvey (104 N. Y., 179, aff'g S. C., 39 Hun, 213), Fink v. Berg (50 Hun, 211), Dodge v. Stevens (94 N. Y., 209), Reed v. Lozier (48 Hun, 50), Carpenter v. Carpenter (14 State Rep., 234), Clift v. Moses (116 N. Y., 144, aff'g S. C., 44 Hun, 312), Traud v. Magnes (49 N. Y. Super., 309), Hayward v. McDonald (7 Civ. Pro. Rep., 100), Mortimer v. Chambers (63 Hun, 335; 43 State Rep., 365), Read v. Patterson (45 State R., 793), O'Flynn v. Powers (136 N. Y., 412), Adams v. Fassett (73 Hun, 430), Rogers v. Patterson (79 id., 483), Brater v. Hooper (77 id., 244), as to actions by creditors against legatees, etc., under sections 1837-1860 of Code of Civil Procedure. See also note 5 to form No. 853, Hogan v. Cavanaugh (138 N. Y., 417; 139 id., 620).

<sup>2</sup> See note 2 to form No. 122.

(Or that assets of said estate were delivered by the said executor of, etc., of said A. B. to F. B., the surviving husband, or wife, of said A. B., or to J. C., next of kin of said A. B., to the value, or amount, of ——— dollars, but that the value of said assets has been recovered from the said F. B., or J. C., by C. M., another creditor of said A. B., or that such assets, after payment of the expenses of the administration of said estate and preferred demands, are not sufficient to satisfy the demand of the plaintiff above set forth.<sup>1</sup>)

[Concluding as in above form from (†).<sup>2</sup>]

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No. 853.

**Complaint in Action against Heirs or devisees for Debt of Intestate or Testator.**

(Code Civ. Pro., § 1843.)

As in form No. 852 to [\*], and from thence as follows: Intestate leaving the said defendant his sole heir-at-law, and that as such heir-at-law the said defendant became entitled to real property, situated in the county of ———, of the value of ——— dollars, which said real estate is described as follows [describe same].<sup>3</sup>

That one C. P. was, on the ——— day of ———, 18—, duly appointed administrator of, etc., of said A. B., by the surrogate of ——— county.

[Here insert from form below given against devisee from (††) to (††)].

[Conclude as in form No. 852 from (†), adding as follows:

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<sup>1</sup> See Code Civ. Pro., §§ 1841, 1842.

<sup>2</sup> Where the shares of the estate belonging to infants have been paid over to their general guardians, the action is properly brought against the infants, and the judgment should direct the money to be paid out of the funds in the hands of the guardians. (Merchants' Ins. Co. of N. Y. v. Hinman, 34 Barb., 410; S. C., 13 Abb. Pr., 110.)

As to parties to action, see Code

Civ. Pro., § 1838; as to apportionment of recovery and costs in joint action, see Code Civ. Pro., § 1839; in a several action, see Code Civ. Pro., § 1840.

<sup>3</sup> See section 1851, Code Civ. Pro., as to description and statement of value. Also, Parsons v. Bowne (7 Paige, 354), as to discovery where property was unknown under the former procedure, and see Code Civ. Pro., §§ 870, 872, for present relief in such case.

And that the said debt of the plaintiff be collected out of the real property above described.<sup>1</sup>

[Or in action against devisee proceed as in form No. 852 to (\*), and from thence as follows: Having made and executed in due form of law his last will and testament, which he left unrevoked at his death and by which he devised to the defendant certain real property, situated in the county of \_\_\_\_\_, described as follows (describe same), which said real estate is of the value of \_\_\_\_\_ dollars.<sup>2</sup>

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said will was duly admitted to probate and record as a will of real and personal estate by the surrogate's court of \_\_\_\_\_ county, and C. P. was on that day duly appointed as executor thereof (or allege the non-issue of letters within the State, and that three years have elapsed since the death of the testator).<sup>3</sup>

That the said claim is wholly unpaid and is justly due and owing to the plaintiff.

(++) If there were no assets say: That said A. B. left no personal assets within the State to be administered; or say, that the assets of said A. B. within the State were not sufficient to pay the plaintiff's debt, in addition to the expenses of administration, and debts of a prior class.

(Or that the plaintiff has been, or will be, unable, with due diligence, to collect the amount of said claim by proceeding in the proper surrogate's court, to wit: in the surrogate's court of \_\_\_\_\_ county, and by action against the said executor and against the surviving husband, or wife, of said A. B., or the legatees or next of kin of said A. B.)<sup>4</sup>

(++) That the real property of said A. B., which descended to his heirs, was not sufficient to pay the said debt of the plaintiff (or that the plaintiff has been unable, or will be unable, with due diligence, to collect his said debt by an action against the heirs of the said A. B.).<sup>5</sup>

[Conclude with prayer for judgment as in above form.]

<sup>1</sup> See section 1852, Code Civ. Pro., as to time within which action must be brought. See, also, Malloy v. Vanderbilt (4 Abb. N. C., 127), O'Flynn v. Powers (136 N. Y., 412), Adams v. Fassett (73 Hun, 403).

<sup>4</sup> See section 1848, Code Civ. Pro.

<sup>5</sup> See section 1849, Code Civ. Pro.,

<sup>2</sup> See note 3, page 730.

<sup>3</sup> See section 1844, Code Civ. Pro.,

## No. 854.

**Answer by Heir or Devisee of Nothing Received by Descent or Devise.**

(Code Civ. Pro., § 1843.)

And the defendant [further] answering the complaint in this action, says, that he, the said defendant, has not, at the time of the commencement of this action, nor at any time before or since, had any real property or interest therein by descent [*or* by (effectual) devise] from the said A. B., deceased.

## No. 855.

**Final Judgment in Action for Recovery from Heir or Devisee of Debt of Decedent.**

(Code Civ. Pro., §§ 1852, 1854.)

As in general form of judgment for plaintiff, No. 457, adding, where any of the real property descended or devised to defendant has not been aliened by him at the time of the commencement of the action, as follows: And it is further adjudged and directed, that the said amount be collected out of the real property, which has descended [*or*

as to these allegations in action against devisee.

As to deductions for prior recoveries, see section 1850, Code Civ. Pro.

The action must be brought jointly against all the heirs to whom any real property descended, or jointly against all the devisees. (Code Civ. Pro., § 1846; see, also, *Kellogg v. Olmsted*, 6 How. Pr., 487; *Cassidy v. Cassidy*, 1 Barb. Ch. R., 467.)

A defendant cannot be charged both as heir-at-law and next of kin in the same count of a complaint. (*Armstrong v. Wing*, 10 Hun, 520.)

The heirs or devisees and personal representatives cannot be joined in one suit. (*Stuart v. Kissam*, 11 Barb., 271; *Mersereau v. Ryerss*, 3 N. Y., 262; *Greene v. Martine*, 27 Hun, 246). But

see, also, Code Civ. Pro., § 1860, modifying these decisions.

As to recovery, under article 2, title 3, chapter 8, part 3 of R. S., by creditor of a decedent, against the personal representative of a devisee, or heir of such decedent who has aliened the real property devised or descended to him, see *Traud v. Magnes* (18 Week. Dig., 19). That article is repealed by chapter 245 of 1880.

See, also, cases referred to in note 1 to form No. 852, and *Blossom v. Hatfield* (24 Hun, 275), *Mead v. Jenkins* (27 Hun, 570), *Rogers v. Patterson* (87 Hun, 219).

See, as to stay of proceedings in suit when application has been made to surrogate's court for disposal of real property to pay debts of decedent, and as to further proceedings in the action in that case, Code Civ. Pro., § 1845.

been devised] to the defendant from [or by] said A. B., described as follows [describe same].<sup>1</sup>

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ARTICLE THIRD.

FORMS RELATING TO ACTION TO ESTABLISH OR IMPEACH A WILL.

(Code Civ. Pro., Ch. 15, Tit. 3, Art. 3.)

- No. 856. Complaint, under subd. 1 of section 1861, Code Civil Procedure, in action to establish will.  
 857. Complaint, under subd. 2 of section 1861, Code Civil Procedure, in action to establish will.  
 858. Final judgment that will be established.

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No. 856.

**Complaint, under Subd. 1 of Section 1861, Code Civil Procedure, in Action to Establish a Will.**

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that lately, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, M. F. died at the \_\_\_\_\_ of \_\_\_\_\_, in the \_\_\_\_\_ of \_\_\_\_\_, in which place he then resided.

That in his life-time, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said M. F. duly made and published his last will and testament which relates to [both real and] personal estate, and by which he gave and bequeathed to the plaintiff a legacy of \_\_\_\_\_ dollars, as by the said will, a copy of which is hereto annexed and marked schedule A, will more fully appear.

[Or in case a copy of the will cannot be obtained, say after word "dollars," as follows: That the said will was in sub-

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<sup>1</sup> As to apportionment among defendants of amount, see Code Civ. Pro., § 1847; *Fink v. Berg* (50 Hun, 211).

If it appears that, before the commencement of the action, or afterwards and before the filing of a notice of pendency of the action, the defendant aliened the real property descended or devised to him, or any part thereof, the plaintiff may, at his election, take

a final judgment against him for the value of the property aliened, or so much thereof as may be necessary, as in an action for the defendant's own debt. (Code Civ. Pro., § 1854.)

As to preference under judgment, see Code Civ. Pro., § 1852.

See, also, Code Civ. Pro., §§ 1855-1861.

stance and to the effect following, according to the best of deponent's knowledge, information and belief (state substance of will).] [\*]

That the said M. F. subscribed his said last will and testament at the end thereof, on the said ——— day of ———, 18—, in the presence of E. F. and G. H., two attesting witnesses, and at the same time of making said subscription declared the said instrument so subscribed by him to be his last will and testament, in the presence of said witnesses, and requested each of said witnesses to sign his name at the end thereof, which they accordingly did in his presence and in the presence of each other.

That the said testator, at the time of executing the said will, was, in all respects, competent to make a will and not under restraint.

That said original will is in the ——— of ——— and cannot be obtained for the purpose of being admitted to probate, under the laws of the State of New York in a surrogate's court, for the reason that [state reason].

[Or that said original will was in existence at the time of the testator's death, but has been lost (*or* destroyed) since that time by accident (*or* design) (*or* was fraudulently destroyed during the testator's life-time, stating facts constituting the fraud), and before it was duly proved and recorded within this State.'] [†]

That the defendants [naming them] are the heirs-at-law and next of kin of said M. F.

That said M. F. died, leaving personal property in the county of ———, in the State of New York, which said personal property still is, and remains in, said county unadministered, and that while said property remains unadministered upon, the plaintiff cannot obtain payment of

<sup>1</sup> By section 1865, Code Civ. Pro., the plaintiff is not entitled to a judgment establishing a lost or destroyed will, unless the will was in existence at the time of the testator's death, or was fraudulently destroyed in his life-time, and its provisions are clearly and distinctly proved by at least two credible witnesses, a correct copy or draft being equivalent to one witness. See, also, *Sheridan v. Houghton* (16 Hun, 628; S. C., 6 Abb. N. C., 234; *aff'd*,

84 N. Y., 643), *Early v. Early* (5 Redf., 376), *McNally v. Brown* (5 Redf., 372). In re *Demmert* (5 Redf., 299). Also as to probate of lost or destroyed will in surrogate's court, see Code Civ. Pro., § 2621, and forms under that section. And see *Anderson v. Anderson* (112 N. Y., 104), *Hewitt v. Hewitt* (28 State Rep., 251), *Perry v. Perry* (49 State Rep., 291), *Colby v. Colby* (81 Hun, 221).

the amount of his said legacy [*or state other circumstances which render it necessary that such will should be admitted to probate and record*].

Wherefore this plaintiff asks that said will be adjudged and decreed to be the last will and testament of the said M. F., and be, by the judgment of this court, established as such [*and that it be ordered and decreed by this court, that an exemplified copy of said will be transmitted to the surrogate of ——— county, and that the same be recorded in his office, and that letters testamentary or letters of administration, with the will annexed, be issued thereupon from his court, in the same manner, and with like effect, as upon a will duly proved in that court*],<sup>1</sup> and that the plaintiff may have such other and further relief as may be proper and necessary in the premises.<sup>2</sup>

F. P., *Plaintiff's Attorney*.  
[Office address.<sup>3</sup>]

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No. 857.

**Complaint under Subd. 2 of Section 1861, Code Civil Procedure, in Action to Establish a Will.**

(Code Civ. Pro., § 1861, subd. 2.)

As in last form to [\*], omitting the words [both real and] therefrom, and continue as follows:

That said M. F. [set forth manner of execution of will].

That said will was duly executed according to the laws of the ——— of ———, in which it was executed [*or in which the testator resided at the time of his death*], the statute of which State, etc., relating to the execution of wills, is as follows [set forth same],<sup>4</sup> and that the said will cannot be admitted to probate in a surrogate's court, under the laws of this State, by reason of the following facts [set forth same].

[Then continue as in form No. 856 from (+), to end thereof.<sup>5</sup>]

<sup>1</sup> See Code Civ. Pro., § 1863, as to cases in which this relief may be had.

<sup>2</sup> See *Younger v. Duffie* (94 N. Y., 535; S. C., 18 Week. Dig., 366; aff'g S. C., 28 Hun, 242; 16 Week. Dig., 35).

<sup>3</sup> See note 2 to form No. 122.

<sup>4</sup> See as to manner of pleading the statute law of foreign State, *Holmes v. Broughton* (10 Wend., 75), *Throop v. Hatch* (3 Abb. Pr., 23), *Phinney v.*

No. 858.

**Final Judgment that Will be Established.**

(Code Civ. Pro., § 1862.)

As in form No. 457 to [\*], and from thence as follows: That the last will and testament of M. F., as set forth in the complaint in this action, dated ———, 18—, of which the following is a copy, to wit [insert copy of will] [or the substance of which is as follows (state same)],<sup>1</sup> be and the same is hereby adjudged to be and established as the last will and testament of the said M. F., and relating to [both real and] personal property.

[And it is further adjudged and decreed, that an exemplified copy of said will be transmitted to the surrogate of ——— county, and that the same be recorded in his office, and that letters testamentary, or letters of administration, with the will annexed, be issued thereupon from his court in the same manner, and with like effect, as upon a will duly proved in that court.<sup>2</sup>]

[Add any provisions as to costs.]

**TITLE IV.****FORMS RELATING TO OTHER SPECIAL ACTIONS AND RIGHTS OF ACTION .****ARTICLE FIRST.****FORMS RELATING TO JUDGMENT CREDITOR'S ACTION.**

(Code Civ. Pro., Ch. 15, Tit. 4, Art. 1.)

- No. 859. Complaint in action by judgment creditor.  
 860. Complaint by judgment creditor in action to set aside a chattel mortgage given by corporation in contemplation of insolvency.  
 861. Complaint against judgment debtor and his trustee, to reach the trust fund or the income thereof.

Phinney (17 How. Pr., 197), Phillips v. James (3 Robt., 720; S. C., 1 Abb. [N. S.], 311), Kip v. McLean (2 Civ. Pro. Rep. [McCarty], 166; S. C., 15 Week. Dig., 169), Cambeis v. McDonald [No. 2], (2 State Rep. 130), Robarge v. Central Vermont R. R. Co. (18 Abb. N. C., 363), Angell v. Van Schaick (56 Hun, 247), Fagan v. Strong (17 Civ. Pro. R., 438), Rothschild v. Rio Grande Western R. Co. (59 Hun, 454); 26 Abb. N. C. 315.

<sup>1</sup> See notes to form No. 856.

<sup>2</sup> By section 1864, Code Civ. Pro., a copy of the will, or, if it is lost or destroyed, the substance thereof, must be incorporated into the final judgment.

<sup>3</sup> See section 1863, Code Civ. Pro., as to cases in which this last clause in brackets is to be inserted.

See, also, section 1865, Code Civ. Pro., cited in note 1 to form No. 856.



- No. 862. Complaint against judgment debtor and his assignee to set aside assignment.
863. Complaint against judgment debtor to set aside a fraudulent judgment and sale.
864. Final judgment in judgment creditor's action.
865. Final judgment in judgment creditor's action setting aside and declaring void a fraudulent incumbrance.
866. Final judgment in action by judgment creditor, setting aside fraudulent conveyance.
867. Final judgment in judgment creditor's action dismissing complaint, with costs to be set off.
868. Petition by judgment creditor for leave to come in as a party to creditor's action.
869. Order upon petition granting petition for leave to come in as a party to creditor's suit.
870. Notice of application for injunction order and order to show cause against injunction on creditor's complaint.
871. Same, as last form with clause for appointment of receiver.
872. Injunction order in action by judgment creditor.
873. Order of reference to appoint receiver in judgment creditor's action.
874. Bond of receiver in judgment creditor's action.
875. Order appointing referee to take examination of judgment debtor, and to direct assignment and delivery of his property, and conveyance of his real estate.
876. Assignment to receiver in creditor's suit.
877. Notice of motion for leave to make a supplemental complaint in judgment creditor's action.
878. Affidavit on motion for leave to make supplemental complaint in judgment creditor's action.
879. Order granting leave to make supplemental complaint in judgment creditor's action.
880. Supplemental complaint in judgment creditor's action.

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No. 859.

**Complaint in Action by Judgment Creditor.**

(Code Civ. Pro., § 1871.)

[Title of cause.]

The complaint of the above named plaintiff [on behalf of himself and all other judgment creditors of the defendant (whose executions have been issued and returned unsatisfied, and), who shall, in due time, come in and seek relief by, and contribute to, the expenses of this action]<sup>1</sup> respectfully shows, that on the ——— day of ———, 18—, the

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<sup>1</sup> See *Edmeston v. Lyde* (1 Paige, 637), *Mattison v. Demarest* (19 Abb., 356; 2 Barb..Ch. Pr., 154).

plaintiff, duly recovered a judgment against the defendant, C. D., in the Supreme Court of the State of New York [*or* name other court (*or* before a ——— justice of the peace in and for the town of ———)], for the sum of ——— dollars and ——— cents, damages and costs.

That the judgment roll upon said judgment was duly filed in the county clerk's office of ——— county, in which county said action was triable [*or* name other clerk's office], on the said ——— day of ———, 18—, and said judgment was duly docketed in said clerk's office on that day.

[That a transcript of said judgment was duly filed, and said judgment duly docketed, in the ——— county clerk's office, on the ——— day of ———, 18—.]

That an execution against the property of said C. D. was, on the ——— day of ———, 18—, duly issued out of the [said] ——— Court, upon said judgment, to the sheriff of the said county of ———, in which county said C. D. then resided and has resided ever since [and now resides].<sup>1</sup>

[*Or* in which county the said C. D. then had (and now has) an office for the regular transaction of business in person (*or* in which said judgment roll was filed as aforesaid; *or* in which a transcript of said judgment was filed as aforesaid), said C. D. not being at the time of the issuing of said execution, or at the time of the commencement of this action, a resident of the State of New York (and not having at either of the times last aforesaid an office for the regular transaction of business, in person, therein), but then (and now), being a resident of ———, in the State of ———.<sup>2</sup>]

That said execution has since, and on or about the ——— day of ———, 18—, been returned by said sheriff to the said ——— county clerk's office, wholly unsatisfied [*or* unsatisfied to the amount of ——— dollars], and that there still remains due and unpaid, upon said judgment, the sum of ——— dollars. [\*]

And the plaintiff further alleges, that at the time of the recovery of the judgment above mentioned against the said C. D., the said C. D. was, and for several years previous

<sup>1</sup> See subd. 1 of section 1872, Code Civ. Pro. The execution must issue out of a court of record. (§ 1871, *id.*) See *Weaver v. Haviland* (142 N. Y., 534; *aff'g S. C.*, 68 Hun, 376); *Le Fevre v. Phillips* (81 Hun, 232), *Prentiss v. Bowden* (145 N. Y., 342), *National Tradesmen's Bank v. Wetmore* (124

N. Y. 241), *Capital City Bank v. Parent* (34 State Rep., 856; 47 *id.*, 643), *Kerr v. Delaney* (60 Hun, 315), *Galle v. Tode* (38 State Rep., 362), *Iselin v. Henlein* (16 Abb. N. C., 73).

<sup>2</sup> See subd. 2 of section 1872, Code Civ. Pro.

thereto has been, engaged in mercantile business at the \_\_\_\_\_ of \_\_\_\_\_, and that in the course of the said mercantile business of the said defendant, divers persons became indebted to him to a large amount, and that the said defendant has, at the time of the commencement of this action, debts due to him, and for which he holds divers securities and evidences to a large amount, and has divers goods, wares and merchandise, or other articles of personal property, which belong to him, or in which he is in some way or manner beneficially interested, and that he has equitable interests and things in action of some nature or kind, which might and ought to be applied to the payment of the plaintiff's said judgment.

And plaintiff further alleges, upon information and belief, that the said C. D. has property, debts and other equitable interests, things in action or effects, and which the plaintiff has been unable to reach by execution on the said judgment.

And that this action is not brought by collusion with the defendant, or with any other person, or for the purpose of protecting the property or effects of the said defendant against the claims of other creditors, but for the sole and only purpose of compelling payment and satisfaction of said judgment.

Wherefore the plaintiff demands judgment and relief, that a discovery be compelled of any thing in action or other property belonging to the said C. D., and of any money, thing in action, or other property due to him or held in trust for him, except of such property as is by law excepted from such discovery;<sup>1</sup> and that the transfer thereof, and the payment or delivery thereof to him, or to any other person, may be prevented; and that the payment and satisfaction of plaintiff's said judgment may be procured out of any money, thing in action or other personal property belonging to or due to the said defendant, C. D., or held in trust for him, which is discovered in this action,<sup>2</sup> including the interest, if any, of the said defendant, in a

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<sup>1</sup> As to how such discovery may be compelled, see section 1878, Code Civ. Pro., and see section 1879 (id.) as to property excepted.

<sup>2</sup> See section 1873, Code Civ. Pro.

contract for the purchase of real property by him, in the manner required by law.'

That an injunction may be granted, restraining the transfer to any person, or the payment or delivery to the said C. D., of any money, thing in action or other property or interest, which may, by the provisions of article first of title fourth of chapter fifteenth of the Code of Civil Procedure, be applied to the satisfaction of the sum due to the plaintiff.<sup>1</sup>

That a receiver may be appointed of the property of the said judgment debtor, and that the said C. D., and any other defendant in this action, convey or deliver to the said receiver, as justice requires, any property real or personal, book, voucher or other paper, or to execute any instrument which this court may deem necessary for perfecting or assuring the said receiver's title and possession;<sup>2</sup> and that the plaintiff may have his costs of this action, and such other and further relief as may be proper and agreeable to equity.<sup>3</sup>

M. N., *Plaintiff's Attorney.*

[Office address.<sup>4</sup>]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> See sections 1874 and 1875, Code Civ. Pro.

<sup>2</sup> See sections 603, 1876, Code Civ. Pro., as to injunction, and forms under article first of title second of chapter seventh (*id.*), page 142 (*ante*).

<sup>3</sup> See section 1877, Code Civ. Pro., as to appointment of receiver, etc., and forms under chapter 7, title 4, article 1 (*id.*), page 208 (*ante*); also, *Young v. Heermans* (66 N. Y., 374; modifying S. C., 5 Hun, 121), *Shand v. Hanley* (71 N. Y., 319), *State Bank of Syracuse v. Gill* (23 Hun, 410), *Keiley v. Dusenbury* (77 N. Y., 597; aff'g S. C., 42 N. Y. Super. Ct., 238).

<sup>4</sup> As to reaching surplus in the hands of trustees for the benefit of the judgment debtor, above what is necessary for his support and maintenance, etc., see *McEvoy v. Appleby* (27 Hun, 44), *Williams v. Thorn* (70 N. Y., 270), *Kilroy v. Wood* (42 Hun, 636), *Gifford v. Rising* (51 *id.*, 1), *Masten v. Ammerman* (*id.*, 244), *Tolles v. Wood* (99 N. Y., 616), *Myer v. Thomson* (35 Hun, 561), *Stow v. Chapin* (21 State Rep., 38), *Scoville v. Halliday* (16 Abb. N. C., 43; 36 Hun, 165); 16 Abb.

N. C., 20, *note*, *Parks v. Murray* (2 State Rep., 628), *Popfinger v. Yutte* (102 N. Y., 38), *Green v. Griswold* (23 State Rep., 218), *Decker v. Decker* (108 N. Y., 128), *Andrews v. Whitney* (82 Hun, 117).

The right acquired by a patentee may be reached by a judgment creditor's action, but, *it seems*, that an unpatented invention cannot be reached. (*Gillett v. Bate*, 86 N. Y., 87; *Ager v. Murray*, 105 U. S. [15 Otto], 126, 131).

In an action against three copartners upon a partnership obligation the summons was served upon two, and judgment was perfected by default against the two served. An execution was issued against the joint property of all the defendants and returned unsatisfied. *Held*, that plaintiff had sufficiently exhausted its remedy under section 294, Code of Procedure, to entitle it to proceed in equity to reach joint property. (*Produce Bank v. Morton*, 67 N. Y., 199.) See Code Civ. Pro., §§ 1871, 2461, and see *Lewishon v. Drew* (15 Hun, 647).

See, also, *Burnett v. Gould* (27 Hun,

No. 860.

### Complaint by Judgment Creditor in Action to Set Aside a Chattel Mortgage Given by Corporation in Contemplation of Insolvency.

(Code Civ. Pro., § 1871.)

[Title of cause.]

The plaintiff complains of the defendants and alleges [that the plaintiff is a domestic corporation, under the laws of the United States, doing business as a banking corporation in the \_\_\_\_\_ of \_\_\_\_\_.]

That the defendant, R. & Co., is [also] a domestic corporation incorporated under the statute of this State authorizing corporations for manufacturing and other purposes, passed February 17, 1848.

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the plaintiff recovered a judgment in the Supreme Court of this State against said R. & Co. for the sum of \_\_\_\_\_ dollars.

That the said judgment was duly docketed in the county of \_\_\_\_\_ on the day on which it was recovered, and that an execution was issued in due form on the said judgment against the real and personal property of the said defendant, R. & Co., to the sheriff of \_\_\_\_\_ county, in which county the said defendant, R. & Co., carried on and had its principal place of business, and that the said execution is still outstanding in the hands of the sheriff of \_\_\_\_\_ county, by whom the plaintiff is informed and believes that there are no assets of the said R. & Co. other than those hereinafter mentioned to satisfy the said judgment of this plaintiff; that the said judgment of the plaintiff was recov-

366), Crouse v. Frothingham (27 Hun, 123), Southard v. Benner (72 N. Y., 424), Sturges v. Vanderbilt (73 N. Y., 384; aff'g S. C., 11 Hun, 136), Hastings v. Drew (76 N. Y., 9), Bergen v. Carman (79 N. Y., 146; rev'g S. C., *sub nom.* Snedeker v. Snedeker, 18 Hun, 355), Raynor v. Gordon (16 Hun, 126), Gillett v. Staples, (16 Hun, 587), Genesee R. Nat. Bank v. Mead (18 Hun, 303), Mead v. Stratton (20 Week. Dig., 44), Estes v. Wilcox (67 N. Y., 264; 21 W. D., 42), Kerr v. Dildine (6 State Rep., 163), Bank of Montreal v. Gleason (14 Civ. Pro. Rep., 377), Fox v. Hodge (17 Week. Dig., 412), Niver v. Crane (98 N. Y., 40), Gardener v. Furey (50 Hun, 82), Kingman v. Frank (33 Hun, 471), Barron v. Brummer (100 N. Y., 372), Platt v. Jones (96 N. Y., 24; aff'g S. C., 49

Super. Ct., 279), First Nat. Bank of Jersey City v. Miller (4 Month. Law Bul., 92), Peysen v. Halsted (5 N. Y. Supp., 827), Royer Wheel Co. v. Fielding (101 N. Y., 504; rev'g S. C., 31 Hun, 294), Mead v. Stratton (20 Week. Dig., 44), Lichtenberg v. Hertfelder (33 Hun, 57; aff'd 103 N. Y., 202), Stokes v. Ammerman (121 N. Y., 337), Putzel v. Schulhoff (36 State Rep., 430), McDonald v. McDonald (33 State Rep., 39), Fuller Electrical Co. v. Lewis (101 N. Y., 674), Kitchen v. Lowery (127 N. Y., 53), Hart v. Albright (28 Abb. N. C., 74), Romaine v. Channcey (129 N. Y., 566; aff'g S. C., 60 Hun, 477), Koehler v. Olsen (68 Hun, 63), Hyde v. Houston (61 State Rep., 330), Andrews v. Whitney (82 Hun, 117).

The action will not lie by a judgment creditor, where more than ten years

ered against said defendant, R. & Co., upon [a promissory note on which the said defendant, R. & Co., had become liable to the plaintiff as indorser (*or* maker) thereof], and that the plaintiff has advanced and paid to the said R. & Co. the sum recovered in said judgment for principal and interest as specified in said judgment.

That there is now due upon the judgment aforesaid to the plaintiff the said sum recovered thereby, together with interest from the date of the said judgment, upon the said amount thereby recovered.

That the said defendant, R. & Co., on the ——— day of ———, 18—, was and for a long time previously thereto had been carrying on, in the ——— of ———, the business of manufacturing and selling merchandise, viz. [state articles], and other articles of that character and had in its possession at the time last aforesaid and owned a large quantity of manufactured articles and merchandise which it was offering for sale and selling in its said business, and also tools and machinery employed by it in their manufacture.

That the said R. & Co. was, on the said ——— day of ———, 18—, and for a long time previously thereto had been unable to pay its debts and insolvent and owed large sums of money in various amounts more in the aggregate than the value of the assets which belonged to it, and, upon information and belief, that the said defendant, R. & Co., has no assets of any substantial value liable to levy and sale under execution other than those which are covered by the chattel mortgage hereinafter mentioned [according to the statements of said R. & Co., made by the managing officer thereof, from which statements such information has been derived].

That on the ——— day of ———, 18—, the said R. & Co., as plaintiff is informed and believes, in view of its inability to pay its indebtedness and its insolvency, and in contemplation of such insolvency and of a stopping of payment of its debts as they should mature, executed a mortgage upon the merchandise, tools, machinery and articles aforesaid to the defendant, H. B., dated ———, 18—, for the sum of ——— dollars, as collateral security for [cer-

have elapsed since the docketing of the judgment, if no new lien upon the land has been acquired by the levy of an execution thereon. (*Evans v. Hill*, 18 Hun, 464.)

The judgment must have been recovered in a court of this State. (*Davis v. Bruns*, 23 Hun, 648.)

\* See note 2 to form No. 122.

tain promissory notes specified in said mortgage, amounting in the aggregate to the sum of ——— dollars of principal, and also for a certain open account amounting to the sum of ——— dollars], upon which said [notes and account] said R. & Co. claimed to be indebted at the time of the execution of said mortgage [that beside the alleged debts of the said defendant, R. & Co., attempted by it to be provided for by said mortgage, said defendant, R. & Co., owed to the plaintiff in this action large sums of money for which no provision was made in said mortgage], and that as plaintiff is informed and believes [according to the statements of R. & Co., made on or about ——— —, 18—, from which statement such information is derived], the amount of its liabilities, exclusive of the debts provided for by said mortgage, was and is the sum of at least ——— dollars, and the amount of its assets less than ——— dollars [after deducting the amount included in said mortgage], and that said mortgage was executed and delivered by said R. & Co. for the purpose of giving a preference to the claims against it, mentioned in the said mortgage, over the claims of the other creditors of said R. & Co., and to the exclusion of the said last named creditors, in the distribution of the assets of the said R. & Co.

That the said mortgage was, immediately after the execution and delivery thereof, filed in the clerk's office of the county of ———, and became and is an apparent lien upon the goods and merchandise and articles, tools and machinery therein, and in the schedule thereunto attached described, and that the same hinders and obstructs and prevents the collection of the amount due upon the judgment aforesaid of this plaintiff, under the execution issued thereon and outstanding in the hands of the sheriff aforesaid.

That immediately after the execution and delivery of the aforesaid mortgage, the said defendant, R. & Co., suspended the payment of its debts, and refused to pay its indebtedness to the plaintiff upon the [notes hereinbefore mentioned, which became due at or about the time of the filing

of the said mortgage], and refused to pay their other debts and liabilities, declaring themselves unable to do so.

That after the commencement of the plaintiff's action against R. & Co. aforesaid, the said defendant, H. B., commenced an action in the ——— Court of the city of ——— against the defendant, R. & Co., to recover upon one or more of the notes purporting to be secured by the mortgage aforesaid of R. & Co. to said H. B., and by means of a shorter time prescribed for answering in said ——— Court, and by reason of defendant, R. & Co., by some one of its officers, amenable to service of process for said company, voluntarily placing himself within the reach of the process of that court, so that service could be made upon said R. & Co. of process from said court, and by reason of the default of said R. & Co. said H. B. recovered a judgment in said action against said R. & Co. for the sum of ——— dollars, and entered the same and transcribed the same to ——— county, at a day prior to that on which the judgment aforesaid of the plaintiff became due.

That an execution upon the said judgment so recovered in behalf of said H. B. has been placed in the hands of the sheriff of ——— county, and that said execution is claimed by the owners of said judgment and appears upon the record to be a lien upon the assets of said defendant, R. & Co., prior to the execution aforesaid of the plaintiff.

That the said judgment recovered, as aforesaid, in the ——— Court of the city of ——— was recovered through the collusion of the said R. & Co., with the plaintiffs in the said action in the said ——— Court, and by the said R. & Co. voluntarily and with the design to secure a preference for said judgment of the said ——— Court, placing itself within reach of the process of that court, and in fraud of the rights of the plaintiff.

That the said R. & Co., after the execution of the said mortgage, was permitted to remain, and did remain, in possession of the said mortgaged property and was permitted to sell, and did sell, part of the same in its ordinary business, and was allowed to receive the proceeds thereof for its own use, and that said sales were made and money so received by the consent and under an agreement to that



effect between the said defendant, R. & Co., and the said mortgagee.

That the said mortgagee has taken possession and has advertised the property and proposes to sell the same under the said mortgage, and the said sheriff proposes to sell the right and title of said R. & Co., under the prior execution to that of the plaintiff; that the sheriff has levied under the plaintiff's execution and still holds said levy; that the property is likely to be scattered and either the property or its proceeds removed out of the jurisdiction of this court, and that in case of an attempt to sell under the plaintiff's execution there is such a cloud upon the title that no one will bid on the property.

[That plaintiff is informed and believes that the mortgagee claims a lien on said property, by virtue of said mortgage, to the extent of some ——— dollars, and that the debts secured by said mortgage and the said judgment of H. B. are, in part, the same debts, and that he claims to enforce his liens for the full amount of each of said liens.]

That the said alleged mortgage provides, among other things, that the mortgagees therein named may, at any time, take possession of the said property, and may sell the same to satisfy the said mortgage, and that the said mortgagee has, by his agents, taken possession of the said property, and disputes the right of the sheriff to take the same under the execution in his hands, other than the execution aforesaid of the said mortgagee claiming to hold possession, and to dispose of the same under the said mortgage.

[That the said defendant, H. B., is a foreign corporation under the laws of the ——— of ———.]

The plaintiff, therefore, demands judgment.

That the said mortgage executed by R. & Co., defendant, to the defendant, H. B., may be adjudged fraudulent as against the plaintiff's judgment, and the execution issued thereon, and void, and that it may be removed as a cloud upon the title of the said R. & Co., and that the said property now apparently covered by the said mortgage may become subject to the execution of this plaintiff, now in the hands of the sheriff, freed from any lien of said mortgage.

That the defendants, and each of them, and their agents, attorneys and servants, and all persons acting and claiming under them, may be enjoined and restrained from selling or interfering with any of the said mortgaged property, and that a temporary injunction may be ordered restraining any of the defendants, their agents or servants, from interfering with or selling or disposing of the property during the pendency of this action.

That a receiver may be appointed to take possession of the said property, and that the invalidity of the said mortgage and of the said judgment of said H. B. may be determined and declared, and that the defendants deliver possession of said property to said receiver, that said property may be sold by said receiver and the proceeds thereof may be applied in payment of the judgment aforesaid of the plaintiff, and interest thereon, after satisfying the expenses of such receivership and the costs of this action, and for such other and further relief as to this court may seem just in the premises and equitable.<sup>1</sup>

A. W., *Plaintiff's Attorney.*

[Office address.]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> See notes to last form No. 859, and see, also, among other recent cases, *Young v. Heermans* (66 N. Y., 374), *Adsit v. Butler* (87 N. Y., 585), aff'g S. C., *sub nom.*, *Adsit v. Sandford* (23 Hun, 45), *Geery v. Geery* (63 N. Y., 252), *Van Wyck v. Baker* (10 Hun, 39), *Dewey v. Moyer* (72 N. Y., 70), *Union Nat'l Bank v. Warner* (12 Hun, 306), *Ballou v. Jones* (13 Hun, 629), *Sloane v. Waring* (9 Week. Dig., 170), *Howell v. Earp* (21 Hun, 393), *Nat. Bank of Rondout v. Dreyfus* (14 Week. Dig., 160), *Lichtenbergh v. Herdtfelder* (19 Week. Dig., 334), *Coleman v. Burr* (93 N. Y., 17), *Bates v. Plonsky* (28 Hun, 112; S. C., 64 How. Pr., 232; 2 Civ. Pro. Rep. [Browne], 389; id. [McCarty], 221), *Genesee River Nat. Bank v. Mead* (92 N. Y., 637), *Prentiss v. Nichols* (16 Week. Dig., 73), *McClosky v. Stewart* (63 How. Pr., 137), *Quinby v. Strauss* (90 N. Y., 664), *National Tradesmen's Bank v. Wetmore* (124 id., 241), *Kley v. Healey* (127 id., 555), *Spelman v. Friedman* (130 id., 421), *Central Nat. Bank v. Seligman* (138 id., 435), *Abegg v. Bishop* (142 N. Y., 286), *Weaver v. Haviland* (id., 534), *Lichtenbergh v. Hertfelder* (103 N. Y., 302, aff'g S. C., 33 Hun, 57), *Wil-*

*cox v. Payne* (22 Abb. N. C., 207), *Braem v. Merchants' Nat. Bank of Syracuse* (25 State Rep., 281, aff'd S. C., 127 N. Y., 555), generally as to action to set aside fraudulent conveyance and transfer.

A judgment creditor cannot maintain an action to have an instrument declared fraudulent and void, when a valid general assignment for the benefit of creditors has been made by the debtor previous to the procuring of the judgment. (*Childs v. Kendall*, 17 Week. Dig., 546; *Lowery v. Clinton*, 32 Hun, 267; S. C., 19 Week. Dig., 191; citing *Spring v. Short*, 90 N. Y., 538, by which *Leonard v. Clinton*, 26 Hun, 288, is regarded as overruled.) See, also, *Wheeler v. Lawson* (103 N. Y., 40), *Tremaine v. Mortimer* (128 id., 1), *Stephens v. Perrine* (143 id., 476), *Dorthy v. Servis* (46 Hun, 628).

The sheriff is the only party who can maintain an equitable action to prevent the removal of property from his possession after levy, or to recover, because the same was secretly or otherwise removed or converted. (*Steffin v. Lockwood*, 17 Week. Dig., 418.)

Such an action cannot be maintained

No. 861.

**Complaint against Judgment Debtor and His Trustee, to Reach the Trust Fund or the Income Thereof.**

As in form No. 859 to [\*], and from thence as follows: That the defendant, C. D. [the judgment debtor], is the beneficiary under a trust created by deed heretofore executed by him [or created by the will of ———, deceased], of which a copy is hereto annexed as a part of this complaint.

That the fund, consisting of about the sum of ——— dollars, is now in the hands of the defendant, E. F. [the trustee], as trustee [or executor], and the defendant, C. D., is entitled to receive, and does receive, annually, the sum of ——— dollars therefrom.

[If it be a trust under which the plaintiff can reach only surplus income, say:] That the defendant, C. D., is a man without family, and resides at ———, where he has been for the ——— years last past, and still is boarding, and the sum of ——— dollars, annually, is a reasonable sum

by a judgment creditor. (Steffin v. Lockwood, 17 Week. Dig., 418.)

But where a lease contains a chattel mortgage clause, which is valid between the parties but void as to a judgment creditor because not filed, which is being used as a fraudulent obstruction to the enforcement of the execution out of the property covered by the lease, an action may be maintained by the judgment creditor against the parties to the lease to remove the obstruction in aid of the execution. (Id.)

An action by a judgment creditor to set aside a fraudulent conveyance, and to have the property adjudged to be subject to the lien of his judgment and the execution issued thereon, and then in the hands of the sheriff, is not affected by the return during its pendency of the execution. (Royer Wheel Co. v. Fielding, 31 Hun, 274; rev'd on other points, 101 N. Y., 504.)

The judgment debtors may be joined

as defendants in the action, although their ownership of the property sought to be reached is several. (Bradner v. Holland, 19 Week. Dig., 368.)

The provisions of sections 1871-1879 of Code Civ. Pro., do not apply to an action where the judgment debtor is a corporation. (Code Civ. Pro., § 1879.) But the jurisdiction of the court to set aside the conveyance made by the corporation in violation of the statute, in aid of an execution or upon the return of an execution, wholly or in part unsatisfied, is not interfered with by this provision.

This form of complaint may easily be adapted to the case of a fraudulent mortgage or transfer by an individual.

For complaint in judgment creditor's action to procure a judgment directing sale of property exempted as a homestead, under section 1402, Code Civ. Pro., see form No. 578, p. 447.

\* See note 2 to form No. 122.

for his support; and that the sum of ——— dollars, annually, is surplus income.

[If the plaintiff is entitled only to the accrued surplus, add:] Of which surplus ——— dollars is in the hands of the defendant, E. F., already accrued, but not paid over.

Wherefore the plaintiff asks that the defendants be enjoined from paying over and from receiving said fund [*or* so much of said income already accrued as is not necessary for the support of the said C. D. and his family]; and that the sum be applied to the satisfaction of the plaintiff's judgment and interest, and the costs of this action, or for such other, etc.

[Conclude as in form No. 860.¹]

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No. 862.

**Complaint against Judgment Debtor and His Assignee to Set Aside Assignment.**

As in form No. 859 to [\*], and from thence as follows: That after the contracting of the debt on which the aforesaid judgment was recovered the said C. D. executed and delivered to the defendant, E. F., an assignment of all his property in trust for the payment of his debts [of which a copy is hereto annexed, marked schedule A, and made a part of this complaint], to which assignment the said E. F. assented in writing, which assent was embraced therein [*or* indorsed thereupon].

That said assignment [and assent] was [*or* were] duly acknowledged by said assignor and assignee, and was [*or* were] duly recorded in ——— county clerk's office, in which county said C. D. resided [*or* carried on his business] at the time of the execution thereof,² in book No. — of deeds, at page —.

¹ This form is from 3 Barb. Ch. Pr. (2d ed., vol. 3), 709.

See Williams v. Thorn (70 N. Y., 270; 81 id., 381), McEvoy v. Appleby (27 Hun, 44), McEwen v. Brewster (17 id., 223; S. C., 19 id., 337), Pray v. Hegeman (27 id., 603), Parker v. Harrison (42 N. Y. Super. Ct., 150), Jackson v. Prime (12 W. Dig., 113), Miller v. Miller (1 Abb. N. C., 30), and note 4 to form No. 859.

² See Laws of 1877, ch. 466, § 2. In case of copartnership the assignment is required to be recorded in the county where the principal place of business of the copartners is situated.

also ch. 318 of 1878, amending above mentioned act; also, McBlain v. Speelman (20 W. Dig., 455; 35 Hun, 263); Camp v. Burton (id., 479; S. C., 34 Hun, 511); Claffin v. Smith (21 id., 236); Warner v. Jaffray (96 N. Y., 248); McIlhargy v. Chambers (117 id., 532, rev'g S. C., 51 Hun, 332) Franey v. Smith (125 id., 44, rev'g S. C., 47 Hun, 119); Dutchess Co. Mut. Ins. Co. v. Van Wagoner (132 N. Y., 398); Barth v. Backus (140 N. Y., 230); Vanderpoel v. Gorman (id., 563), among other cases; and see amendments to said section 2 by chapter 294

That the said E. F. accepted said trust and has collected a large sum of money and other property from the assets so assigned, amounting in all to the sum of more than \_\_\_\_\_ dollars.

That the said assignment was made by the said C. D. with the intent to hinder, delay and defraud his creditors; that it was not accompanied by an immediate and continued change of possession of the property; that since the same was executed and delivered, and up to the present time, the said property has remained in the actual possession and under the control of said C. D., who has retained possession and control thereof under the false and fraudulent pretence that he is the agent of said C. D.

That the pretended indebtedness set forth in said assignment as due from said C. D. to the defendant, G. H. [preferred creditor], is fictitious; that in fact no such indebtedness exists; but that the same is therein inserted for the purpose of enabling said C. D. to distribute the proceeds of the goods passed under the assignment, among his friends, and thereby to keep possession and control thereof himself.

That the defendant, C. D., has not any other property than that embraced in the assignment aforesaid, out of which the said judgment could be satisfied in whole or in part; that unless the said property can be reached and applied to the payment of said judgment the same must remain wholly unpaid.

Wherefore the plaintiff demands judgment:

1. That said assignment be adjudged fraudulent and void as against the plaintiff [and such other judgment creditors of said C. D. as shall elect to come in and share the expenses of this action].

2. That a receiver of all the property and effects of said C. D. be appointed.

3. That the defendants be adjudged to account for all the property received by them, or either of them, under said assignment, and for all the proceeds arising from the sale thereof, and deliver the same to such receiver.

4. That such defendants be, in the meantime, enjoined and restrained from disposing of any of said property, or

paying away any of the proceeds thereof, or in anywise interfering therewith.

5. That said receiver pay, out of the proceeds of said property, the judgment aforesaid, and the costs and expenses of this action, and hold the balance subject to the further order of this court.

6. Or for such other or further relief as shall be just.<sup>1</sup>

J. C., *Plaintiff's Attorney*.

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

No. 863.

### Complaint against Judgment Debtor to Set Aside a Fraudulent Judgment and Sale.

As in form No. 859 to [\*], and from thence as follows: That previous to the time of the docketing of said judgment in said county of \_\_\_\_\_, the said defendant, C. D., was the owner, in fee simple, of certain real estate, situate in said county of \_\_\_\_\_, described generally as follows [insert brief description].

That said defendant was also the owner, and in possession of certain personal property not exempt by law from execution, to wit [description and value of property].

That prior to the entry of the said judgment, but after the indebtedness upon which the aforesaid judgment was rendered had accrued, the said defendant, C. D., authorized a judgment to be entered, on confession, in the Supreme Court, against him, in favor of the defendant, E. F., for the sum of \_\_\_\_\_ dollars damages and costs, for a pretended debt of that amount, for money alleged to have been previously lent and advanced by said E. F. to the said C. D.

That such proceedings were thereupon had, that said judgment was so entered for such sum in the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and execution being thereupon issued upon the said judgment, the personal property hereinbefore mentioned was thereunder sold at public auction by the sheriff of the said county of \_\_\_\_\_

<sup>1</sup> This form is substantially from 3 Barb. Ch. Pr. (2d ed.), 705.

See notes to forms Nos. 859, 860.

<sup>2</sup> See note 2 to form No. 122.

———, on, etc., and was struck off to said defendant, E. F., at a sum far less than its real value, who thereupon took possession, and is now in possession of the same, claiming to be the owner thereof. And the personal property of the said C. D. not being sufficient to satisfy the said judgment, the real estate of the said C. D. was, on the —— day of ——, 18—, exposed for sale by the sheriff of said county, under an execution issued upon said judgment, and was struck off to the said defendant, E. F. [also at a price much below its real value], his being the highest bid for the same; and the said sheriff thereupon executed, in duplicate, and delivered to the said E. F., his certificate of sale of the said real estate, on the —— day of ——, aforesaid, but no deed or conveyance has yet been executed by said sheriff, the time for such conveyance not yet having arrived.

The plaintiff alleges, on information and belief, that the said last mentioned judgment was fraudulently confessed by the said C. D. to the said E. F., and for the purpose of covering up his said property and defrauding the plaintiff in the collection of his said debt and demand.

That said C. D. was not indebted to the said E. F. in said sum of —— dollars, for which said judgment was so confessed, or in any other sum, but said judgment was confessed without any consideration, and the sale of the said property made with the full knowledge and concurrence of said defendant, E. F., with the intention and design of cheating and defrauding this plaintiff out of his said debt and demand, and of transferring the ostensible ownership and possession of the property of said C. D. liable to execution to the said defendant, E. F., so as to prevent this plaintiff, or any other creditor, from levying upon and selling the whole, or any part of said property, in satisfaction of his or their debt or debts and demands.

The plaintiff further alleges, on information and belief, that the said real estate cannot be sold for a sum more than about one-half of the plaintiff's said judgment, and that said defendant, E. F., is a man of no pecuniary responsibility, and is possessed of little or no property, other than

that so bid in by him as aforesaid, and is in embarrassed circumstances.

Wherefore the plaintiff demands judgment against the defendants, that the said judgment in favor of the said E. F., against the said C. D., and the proceedings and sale under it, including the sheriff's said certificate of sale, be set aside, vacated and declared null and void.

That an injunction be allowed restraining the said defendants, or either of them, from disposing of, transferring, incumbering, or in any manner interfering with the said property, or any part thereof; and that a receiver be appointed, with the usual powers and duties, to whom the said defendants, shall be directed to assign the said property real and personal, and all other estate, property and effects of said defendant, C. D., and who shall be authorized and directed to sell the same, or so much thereof as shall be necessary for that purpose, and apply the proceeds, or so much thereof as shall be necessary, to the payment of the plaintiff's said judgment and interest thereon, together with the costs of this action, or for such other or further relief as this court shall think proper to grant.<sup>1</sup>

J. C., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

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No. 864.

### Final Judgment in Judgment Creditor's Action.

(Code Civ. Pro., § 1873.)

[Title of cause.]

Judgment of the ——— day of ———, 18—.

The summons and copy complaint in this action having been served personally on the defendant, more than twenty days since, and no demurrer or answer having been received, and an order having been made, bearing date on the ——— day of ———, 18—, whereby E. F. was appointed a receiver of the estate and property, equitable interests and effects of the

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<sup>1</sup> This form is from 3 Barb. Ch. Pr. (2d ed.), 706; see notes to forms Nos. 859, 860.

<sup>2</sup> See note 2 to form No. 122.



defendant, C. D., with the usual powers and duties, and upon the usual directions; and the said receiver having become duly qualified by filing the requisite security, and taken upon himself the duties of said trust, and he having proceeded to reduce said property and effects to money as far as practicable [and collected a sum sufficient, as appears by his report thereof (*or* by the report of ———, referee, appointed to take and state said receiver's accounts)]:

Now, therefore, on motion of ———, etc., it is adjudged, pursuant to, etc., [\*] that out of the moneys in the hands of the said receiver, so collected and held by him, such receiver, after deducting his charges for disbursements and commissions, at the rate allowed by law, do pay the plaintiff, or his attorney, his costs and disbursements of this action, the sum of ——— dollars, and take his receipt therefor; and that out of the residue of said moneys he pay the said plaintiff, or his attorney, the amount of his debt and judgment, to wit: the sum of ——— dollars, with interest thereon from the time said judgment was entered, to wit: the ——— day of ———, 18—, and take from said plaintiff an acknowledgment of satisfaction of said judgment, and deliver the same to said defendant [*or* to the clerk of the county of ———], to the end that said judgment may be cancelled and discharged of record.

[If there are no other claimants of the fund, add:] And it is further adjudged, that said receiver pay over to the said defendant the residue of the money so remaining in his hands, or account with him for the same, and deliver to him all and singular the property and effects, books of account, evidences of debt or other papers or documents relating to said trust estate, on demand of said defendant; and also, if said defendant shall so require, that said receiver execute back to him a general release and assignment of all and singular the property, equitable interests and effects of the said trust estate, remaining in his hands undisposed of; on which assignment and delivery being made, it is adjudged, that the said receiver be discharged from his said trust, and his bond be delivered up to him and cancelled.<sup>1</sup>

<sup>1</sup> From 3 Barb. Ch. Pr. (2d ed.), 717. The right acquired by a patentee may be reached, by a judgment creditor's action; but it seems that an unpatented

## No. 865.

**Final Judgment in Judgment Creditor's Action Setting Aside and Declaring Void a Fraudulent Incumbrance.**

As in form No. 864 to [\*], and from thence as follows: That the judgment of this court, entered on confession, in the clerk's office of the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in favor of the defendant, E. F., against the defendant, C. D., for the sum of \_\_\_\_\_ dollars, damages and costs, together with the proceedings thereunder, including the execution issued on said judgment, the sale of the real and personal property thereon, and the sheriff's certificate of sale of the real estate to the defendant, E. F., bearing date the \_\_\_\_\_ day of \_\_\_\_\_, 18—, be and the same are set aside and vacated and declared null and void and of no effect whatever, and the said judgment is ordered and adjudged to be cancelled and discharged of record by the clerk of said county of \_\_\_\_\_.

And it is further adjudged, that the plaintiff in this action be authorized to proceed upon his execution issued on the judgment in the Supreme Court, wherein he is plaintiff and said C. D., defendant, for \_\_\_\_\_ dollars, damages and costs, entered in the office of the clerk of the county of \_\_\_\_\_, and a transcript thereof filed and docketed in the county of \_\_\_\_\_, or issue another execution thereon if it be necessary; and that said defendant, E. F., turn out and deliver to said sheriff, upon said execution so issued, or hereafter to be issued, said personal property, to wit [describing it], to be sold and applied upon the same, and if not sufficient to satisfy the same, with interest thereon and sheriff's fees and the costs of this action, herein adjudged at the sum of \_\_\_\_\_ dollars, which the said defendant, C. D., is hereby adjudged to pay to the said plaintiff, that said sheriff thereupon proceed to advertise and sell said real estate for the payment and satisfaction of the same.

And it is further adjudged, that if said property, real or personal, be not sufficient to pay said judgment, interest

invention cannot be so reached. (Gillett v. Bate, 86 N. Y., 87.)

See, also, notes to forms Nos. 859, 860.

As to form of judgment in action to reach trust fund or income thereof, see

cases cited in note 1 to form No. 861; as to provisions for satisfaction out of interest of judgment debtor in contract for purchase of real property by him, see sections 1874, 1875, Code Civ. Pro.

and sheriff's fees, and the costs of this action, the said plaintiff have further execution for the same against the defendant, C. D.<sup>1</sup>

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No. 866.

**Final Judgment in Action by Judgment Creditor, Setting Aside Fraudulent Conveyance.**

As in form No. 864 to [\*], and from thence as follows: That the deed of conveyance, executed by the defendant, C. D., to the defendant, E. F., of the premises mentioned and described in the complaint, bearing date on the —— day of ——, 18—, be, and the same is hereby declared fraudulent and null and void; and it is adjudged, that the same be set aside and discharged of record, and that the said defendants execute, acknowledge and deliver to the said receiver a conveyance and quit-claim of said premises, which are described in the complaint in this action as follows [insert description].

And it is further adjudged and ordered, that the said receiver do forthwith thereafter proceed to sell, at public auction [specify mode of sale, advertising, etc.], the said property so conveyed; and out of the proceeds thereof, after first deducting the expenses of said sale, and his lawful charges and commissions, that said receiver do pay to the plaintiff, or his attorney, the costs of this action, herein adjusted and settled at the sum of —— dollars; and out of the residue thereof, if there be sufficient for that purpose, that he pay the said plaintiff's debt and judgment, to wit: the sum of —— dollars, with interest thereon from the —— day of ——, 18— [directing the residue either to be paid over to the defendant, and the receiver discharged, or brought into court, etc.].<sup>2</sup>

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No. 867.

**Final Judgment in Judgment Creditor's Action Dismissing Complaint, with Costs to be Set Off.**

As in form No. 457, of judgment for defendant, adding

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<sup>1</sup> From 3 Barb. Ch. Pr. (2d ed.), 718.  
See notes to forms Nos. 859, 860.

<sup>2</sup> From 3 Barb. Ch. Pr. (2d ed.), 719.  
See notes to forms Nos. 859, 860.

as follows: And that the said costs be and the same are hereby set off against so much of the plaintiff's said judgment in the [Supreme Court] against the defendant, mentioned in the complaint and entered in the office of the clerk of the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, for \_\_\_\_\_ dollars damages and costs.

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No. 868.

**Petition by Judgment Creditor for Leave to Come in as a Party to Creditor's Action.**

[Title of cause.]

*To the Supreme Court of the State of New York [or name other Court]:*

The petition of J. M., of \_\_\_\_\_, respectfully shows, that he is a creditor, by judgment, of the defendant, C. D., in this action.

That his said judgment was obtained in the \_\_\_\_\_ Court, against the said defendant, for the sum of \_\_\_\_\_ dollars damages and costs, and was duly entered and docketed in the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

That an execution against the property of the said C. D., was issued out of the said \_\_\_\_\_ Court, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, to the sheriff of the county of \_\_\_\_\_, where the said defendant then resided [and now resides].

[Or where he then had (and still has) an office for the regular transaction of business in person (or where the judgment roll upon said judgment is filed; or where a transcript of said judgment is filed), the said defendant not being, at the time of the issuing of said execution, a resident of the State.<sup>1</sup>]

That said sheriff has duly returned the said execution to the office of the clerk of \_\_\_\_\_ county wholly unsatisfied [or unsatisfied to the extent of \_\_\_\_\_ dollars], and that there is still due and unpaid, upon said judgment, the said sum of \_\_\_\_\_ dollars, with interest thereupon from the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

That this action was commenced on or about the \_\_\_\_\_

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<sup>1</sup> See subd. 2 of section 1872, Code Civ. Pro.

day of ———, 18—, in favor of the plaintiff and all other persons, being judgment creditors, similarly situated, who should come in and contribute to the expenses thereof against the defendant, C. D., for [state relief], and such proceedings have been had in said action that, by an order in said action, dated ———, 18—, a receiver has been appointed of the property and effects of said C. D., and said receiver has become duly qualified to act by filing the requisite security, and is now in possession of the property and effects of said C. D.

Your petitioner further shows, that since the appointment of said receiver, now more than [one year] last past, no proceedings whatever have been taken in said action [the said plaintiff's attorney having died and no person having been appointed in his place], and no steps whatever have been taken by the plaintiff, or the said receiver, for bringing the said action and proceedings to a close.

Your petitioner further shows, that he is desirous of being made a party to this action, and is willing, and hereby offers, upon being allowed to come in as such party, to contribute his proportion to 'the expenses of such action.

Wherefore your petitioner prays that, by an order of the court, he may be allowed to come in and be made a party plaintiff to this action with the said plaintiff, A. B., upon payment to him of your petitioner's ratable share of the costs and expenses of this action, in proportion to the amount of his said judgment, to be settled by the clerk, or otherwise ascertained and allowed by the court, or for such other or further relief as to the court may seem proper.<sup>1</sup>

Dated ———, 18—.

J. M.

[Verification as in form No. 52.]

<sup>1</sup> See *Dias v. Bouchaud* (10 Paige, 445), *The Bank v. Dugan* (2 Bland, 254), *Mattison v. Demarest* (19 Abb., 356; S. C., 1 Robt., 717), *O'Brien v. Browning* (11 Hun, 179; appeal dismissed, S. C., 77 N. Y., 630).

The plaintiff in an action brought by a judgment creditor in behalf of himself and all other creditors similarly situated, who shall come in and

contribute to the expenses thereof, may settle and discontinue it, at any time before final judgment, without the consent of the other creditors. (*Tremain v. Guardian Mut. Life Ins. Co.*, 11 Hun, 286; *Derby v. Yale*, 13 id., 273.) See *Clafin v. Gordon* (39 Hun, 54).

The above petition and following order are substantially from 3 Barb. Ch. Pr. (2d ed.), 720.

No. 869.

**Order upon Petition Granting Petitioner Leave to Come in as a Party to Creditor's Suit.**

[At, etc., as in form No. 80.]

[Title of cause.]

On reading and filing the petition of J. M., dated ———, 18—, and duly verified for leave to come in as a party plaintiff on contributing to the expenses of this action, and on motion of ——— of counsel for the petitioner, and after hearing ——— of counsel for the plaintiff:

It is hereby ordered, that the said J. M. be allowed to come in, and that he be and hereby is made a party plaintiff in this action, on paying to the plaintiff, A. B., the sum of ——— dollars, being his ratable proportion of the costs and expenses of this action [*or* that it be referred to the clerk of this court to settle the costs and disbursements of this action, and ascertain and report to this court the amount thereof in proportion to the amount of his judgment, for the said J. M. to contribute and pay, to the end that on the coming in and confirmation of said report, a further order may be made allowing the said J. M. to come in and be made a party plaintiff, on payment of his just proportion of such costs and expenses].

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No. 870.**Notice of Application for Injunction Order and Order to Show Cause against Injunction on Creditor's Complaint.**

(Code Civ. Pro., § 1876.)

As in form No. 213, inserting therein, as acts enjoined, as follows: [\*] From selling, assigning, or transferring, receiving, collecting, discharging or incumbering, or in any manner interfering with any property, real or personal [not exempt by law from execution, or otherwise by law exempted], things in action or other equitable property and interests, of any kind whatever held or controlled by him, or by any other person held in trust for him, or for his use and benefit, or in which he has any interest whatever, except

where such trust has been created by, or the fund so held in trust has proceeded from, a person other than the said defendant;<sup>1</sup> and also from making any assignment of his property, and from confessing any judgment for the purpose of giving preference to any other creditor over the plaintiff, or from doing any other act or thing to enable other creditors or persons to obtain any portion of his said property.<sup>2</sup> [†]

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No. 871.

**Same as Last Form, with Clause for Appointment of Receiver.**

(Code Civ. Pro., § 1877.)

As in form No. 870 to end thereof, adding: Also, that [*or why*] a receiver of the estate, property, rights, interests and effects of the said defendant, C. D., with the usual powers and duties, and upon the usual directions [*should not*], be appointed, according to the statute and the practice of the court.<sup>3</sup>

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No. 872.

**Injunction Order in Action by Judgment Creditor.**

(Code Civ. Pro., § 1876.)

As in form No. 214, reciting as acts to be prohibited "the transfer by the defendant, C. D., to any person, and the payment or delivery to the defendant, C. D., of any money, thing in action or other property or interest which might, under the provisions of article first of title fourth of chapter fifteenth of the Code of Civil Procedure, be applied to the satisfaction of the sum due to the plaintiff," and inserting as acts enjoined as in form No. 870, from [\*] to end of that form.<sup>4</sup>

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<sup>1</sup> For property excepted from the provisions of this article (article 4 of title 4 of chapter 15), see section 1879, Code Civ. Pro.

<sup>2</sup> As to form of injunction applicable to surplus of trust fund, see *Rider v. Mason* (4 Sandf. Ch., 351), *Sillick v.*

*Mason* (2 Barb. Ch., 79), and see, also, cases cited in note 1 to form No. 861.

<sup>3</sup> See, also, forms Nos. 290 and 291. The two applications can only be united where both are made to the court.

<sup>4</sup> See notes to form No. 870.

## No. 873.

**Order of Reference to Appoint Receiver in Judgment Creditor's Action.<sup>1</sup>**

(Code Civ. Pro., § 1877.)

See form No. 303 (vol. 1, p. 218). The sixty days' earnings of the judgment debtor, which are by section 1879, Code Civil Procedure, to be allowed him, if necessary, to the support of his family, are not excepted from the order, as they depend upon subsequent proof. They are excepted from the assignment made by the debtor under the order, form No. 876.

## No. 874.

**Bond of Receiver in Judgment Creditor's Action.**

(Code Civ. Pro., § 1877.)

See form No. 302 (vol. 1, p. 217).

## No. 875.

**Order Appointing Referee to take Examination of Judgment Debtor, and to Direct Assignment and Delivery of his Property and Conveyance of his Real Estate.**

(Code Civ. Pro., §§ 1877, 1878.)

[At, etc., as in form No. 80.]

[Title of cause.]

The summons and complaint in this action having been served more than twenty days since, and no answer or demurrer having been received on behalf of the defendant, C. D. [*or* this action having been brought to trial before the court without a jury, and the decision of the judge thereon having been filed and entered, etc., etc.] :

Now, on motion of J. C., of counsel for the plaintiff, and after hearing N. P., counsel for the defendants :

Ordered, that it be referred, to \_\_\_\_\_, Esq., of \_\_\_\_\_, to take the examination of the defendant, C. D.,

<sup>1</sup> See note 1 to form No. 299, and see forms Nos. 293, and 295-297, for proceedings for such appointment.



and of such witnesses as shall be produced before him under oath, concerning the property, chattels, things in action, equitable interests and effects of the said defendant, C. D., and to report the same to this court, with all convenient speed. And the said referee is authorized and hereby empowered to direct the assignment, transfer and delivery to the receiver heretofore [*or* herein] appointed of any and all property, real and personal, book, voucher or other paper of said defendant, which shall or may be discovered in his possession or under his control, and belonging to or held in trust for him at the time of the commencement of this action, except such property as is by law exempt from execution and otherwise exempted by law, and except where the trust has been created by, or the fund so held in trust has proceeded from, some person other than said C. D.

[If there be real estate add: And also to direct a written assignment and conveyance to said receiver of the real estate of the said C. D., mentioned and described in the complaint.]

And it is further ordered, that said defendant, C. D., do appear and attend, from time to time, and whenever summoned or required so to do, before said referee, and produce such books, accounts and papers, and submit to such examination as the said referee shall direct, in relation to any matter which he may lawfully be required to disclose.<sup>1</sup>

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No. 876.

**Assignment to Receiver in Creditor's Suit.**

(Code Civ. Pro., § 1877.)

This indenture, made the \_\_\_\_\_ day of \_\_\_\_\_, 18—, between C. D., of \_\_\_\_\_, of the first part, and T. M., of \_\_\_\_\_, a receiver appointed by the [Supreme Court of the State of New York], of the second part.

Whereas, in and by an order of the [Supreme Court of the State of New York], made at a [Special] Term of said court, held at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in a certain cause pending in said court, wherein A. B. is plaintiff and C. D. is defendant,

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<sup>1</sup> From 3 Barb. Ch. Pr. (2d ed.), 715.

It was ordered, that it be referred to ——— as referee, to appoint a receiver of all the debts, property, equitable interests and things in action of the said party of the first part at the time of the commencement of this action, to wit: on the ——— day of ———, 18—, and to take from such receiver the requisite security for the faithful performance of his duties.

And it was further ordered, that the said party of the first part assign, transfer and deliver over to such receiver, on oath, under the direction of the said referee, all the property, real and personal, and all contracts for the purchase of land and all other equitable interests, things in action and other effects which belonged to or were held in trust for said party of the first part, or in which he had any beneficial interest at the time of the commencement of said action, as aforesaid, excepting as hereinafter is excepted; and

Whereas, the said party of the second part has been duly appointed said receiver and has given and filed the requisite security, pursuant to law and the provisions of said order.

Now, this indenture witnesseth, that the said party of the first part, in obedience to the said order, and in consideration of the premises aforesaid and of one dollar to him in hand paid by the said party of the second part, at or before the ensembling and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, conveyed, assigned and delivered over to the said party of the second part, under the direction of the referee appointed by said order, testified by his approval endorsed hereon, all and every the estate, real and personal, chattels real, money, outstanding debts, things in action, equitable interests, property and effects, whatsoever and wheresoever, of or belonging, or due to or held in trust for the said party of the first part, or in which he had any right, title or interest at the time of the commencement of this action, to wit: on the ——— day of ———, 18— (excepting from the property hereby conveyed, any property which is expressly exempted by law from levy and sale, by virtue of an execution; and excepting, also, any money, thing in action or other property held in trust for

said C. D., where such trust has been created by, or the fund so held in trust has proceeded from, a person other than the said party of the first part, and excepting the earnings of the said C. D. for his personal services rendered within sixty days next before the commencement of said action, it having been made to appear, by the oath of said C. D., that those earnings are necessary for the use of a family supported in whole [*or in part*] by his labor);<sup>1</sup> also hereby transferring and conveying to said party of the second part all deeds, writings, leases, muniments of title, books of account, papers, vouchers, and other evidences relating or appertaining to the property, equitable interests, things in action and effects hereby granted and conveyed or intended so to be, to have and to hold the same unto him, the said party of the second part, as such receiver as aforesaid, and to his successors and assigns, subject to the present and future order, direction and control of the said [Supreme] Court; and for the better and more effectually enabling the said party of the second part, his successors and assigns, to recover and receive all or any part of the estate, property, book debts, things in action and effects hereby granted, conveyed, assigned and transferred, he, the said party of the first part, hath made and appointed, and by these presents doth make and appoint the said party of the second part, his successors and assigns, the attorney of him, the said party of the first part, in his name or otherwise, to commence, continue, discontinue and again bring, perfect and carry out actions and suits against any corporate company, association, firm, person or persons for or on account of all or any part of the said estate, property, equitable interests, things in action or effects.

In witness whereof, the said party of the first part hath hereunto set his hand and seal the day and year first above written.

C. D. [L. S.]

Sealed and delivered in the presence of \_\_\_\_\_.

[Acknowledgment or proof as in forms Nos. 340, 538.]

INDORSED.

I approve of the within assignment and direct that the

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<sup>1</sup> See section 1879 of Code Civ. Pro., as to property excepted.

party of the first part therein named execute the same and deliver it to the party of the second part.

T. M., *Referee.*

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No. 877.

**Notice of Motion for Leave to Make a Supplemental Complaint in Judgment Creditor's Action.**

[Title of cause.]

SIR—Take notice, that upon the affidavit, a copy of which is hereto annexed and herewith served upon you, and upon the pleadings and proceedings in the above entitled action, a motion will be made at, etc., on, etc., for permission to make a supplemental complaint in this action, in addition to [*or in place of*] the former complaint herein,<sup>1</sup> alleging the facts which are contained in the said affidavit [*or a copy of which supplemental complaint is hereto annexed*], and for such other and further relief as may be proper.

Yours, etc.,

M. N., *Plaintiff's Attorney.*

[Office address.]

To C. P., *Defendant's Attorney.*

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No. 878.

**Affidavit on Motion for Leave to Make Supplemental Complaint in Judgment Creditor's Action.**

[Title of cause.]

——— COUNTY, *ss.:*

A. B., of ———, being duly sworn, says, that this action was commenced for the purpose of compelling the discovery by the defendant, a judgment creditor of the plaintiff,

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<sup>1</sup>By section 544, Code Civ. Pro., the party may apply for leave to make a supplemental pleading either in addition to or in place of the former pleading. In the former event, if the application is granted, a provisional remedy, or other proceeding already taken, in the action, is not affected by the supplemental pleading; but the right of the adverse party to have it vacated or set aside, depends upon

the case presented by the original and supplemental pleadings. See also *Gerstein v. Fisher* (12 Misc., 211), *Patterson v. Hare* (74 Hun, 269), *Brown v. May* [No. 2], (17 Abb. N. C., 208), *Deyo v. Morss* (74 Hun, 224), *Oelberman v. New York & Northern R. R. Co.* (31 Abb. N. C., 256), among other recent cases as to supplemental complaint.

<sup>2</sup>See note 2 to form No. 122.

of property of said defendant, and for other relief, as appears by the complaint therein.

That the summons and complaint therein were served on the defendant on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and that the defendant has answered the said complaint, and said action is at issue upon said complaint and answer [or state other proceedings in suit].

That said action is triable in the county of \_\_\_\_\_.

That before any further proceedings were had in said action [state the supplemental matter].

And deponent further shows, that said facts occurred after his former complaint [or that deponent was ignorant of said facts when said former complaint was made].<sup>1</sup>

A. B.

[Jurat as in form No. 46.]

No. 879.

### Order Granting Leave to Make Supplemental Complaint in Judgment Creditor's Action.

[At, etc., as in form No. 80.]

[Title of cause.]

On reading and filing the affidavit of A. B., dated \_\_\_\_\_, 18—, and [name motion papers], and on motion of \_\_\_\_\_, counsel for the plaintiff, after hearing, etc.:

Ordered, that the plaintiff have leave to make a supplemental complaint in this action, in addition to [or in place of], the former complaint herein,<sup>2</sup> alleging the facts which are contained in the said affidavit [or a copy of which complaint is annexed to said affidavit], within \_\_\_\_\_ days from the date of this order, on payment to the defendant of \_\_\_\_\_ dollars costs of this motion.<sup>3</sup>

<sup>1</sup> See section 544, Code Civ. Pro.

<sup>2</sup> See note 1 to form No. 877.

<sup>3</sup> The power of the court to which a motion is made for leave to put in a supplemental pleading, is the same now as it was before the present Code. It has still a discretion to permit or refuse such a pleading, subject only to the limitation that the discretion must

be exercised reasonably, and not capriciously or willfully. (*Spears v. Mayor, etc.*, of New York, 72 N. Y., 442.)

When sufficient reasons appear for the refusal of the leave by the court below, an appeal from the order refusing will be dismissed. (*Id.*)

See, also, *Fleischman v. Bennett* (79 N. Y., 579), *Prouty v. Lake Shore* and

No. 880.

**Supplemental Complaint in Judgment Creditor's Action.**

[Title of cause.]

The supplemental complaint of the plaintiff respectfully shows [on behalf of himself and all other creditors of C. D. entitled under the original complaint to come in and contribute to the expenses of this action], that the above entitled action was commenced in this court on the ——— day of ———, 18—, against the defendant, C. D., by the service of a summons and copy of complaint, to which original complaint the plaintiff refers as a part of this supplemental complaint.

That an injunction order was granted in said action on the ——— day of ———, 18— [set forth the proceedings in the action, and the matters which have rendered a supplemental complaint necessary].

That said facts, stated in this supplemental complaint, have occurred since the former complaint was made [or that the plaintiff was ignorant of said facts stated, etc., at the time the former complaint was made.]

Wherefore the plaintiff demands judgment, as is demanded by the said original complaint [and that the said assignment may be set aside; that the property assigned be delivered to a receiver, etc., and that the defendants may be restrained by injunction from disposing of any of the said assigned property].<sup>1</sup>

M. N., *Plaintiff's Attorney.*[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

M. S. R. Co. (85 N. Y., 272), McDonald v. Davis (12 Hun, 95), Angell v. Lawton (14 Hun, 70), Latham v. Richards (15 Hun, 129), Fincke v. Rourke (20 Hun, 264), Ratzler v. Ratzler (2 Abb. N. C., 461), Townsend v. Simpson (13 Week. Dig., 450), Holly v. Graf (29 Hun, 443), Cornwall v. Cornwall (30 Hun, 573), Tiff v. Bloomberg (18 Week. Dig., 277), Pierson v. Cronk (28 Week. Dig., 280), Patterson v. Hare (74 Hun, 269), Gerstein v. Fisher (12 Misc., 211), Haas v. Colton (id., 308), Frisbie v. Averell (87 Hun, 217), and see note 1 to form No. 877

as to cases in which a supplemental pleading will or will not be allowed.

As to terms on which leave will be granted, see Wilcox v. Daggett (15 Week. Dig., 208).

Ordinarily the party should be allowed to put in a supplemental answer, without regard to the question whether the court thinks the defense to be a good one, unless it is clearly bad or frivolous. (Mitchell v. Allen, 25 Hun, 543; 21 W. D., 257.) Gerstein v. Fisher (12 Misc., 211).

<sup>1</sup>See Johnson v. Snyder (7 How. Pr., 395; 2 Barb. Ch. Pr., 70 [2d ed.]), and

## ARTICLE SECOND.

## FORMS RELATING TO ACTION BY A PRIVATE PERSON UPON AN OFFICIAL BOND.

(Code Civ. Pro., Ch. 15, Tit. 4, Art. 2.)

- No. 881. Affidavit on application for leave to prosecute sheriff's official bond.  
 882. Order granting leave to prosecute sheriff's bond.  
 883. Indorsement upon execution issued upon a judgment recovered upon sheriff's bond.  
 884. Complaint in action upon sheriff's bond.  
 885. Answer under section 1884 of Code of Civil Procedure by surety upon sheriff's bond.  
 886. Affidavit to move for ratable distribution of moneys collected out of sureties in sheriff's bond.  
 887. Notice of motion for ratable distribution of moneys collected from sureties in sheriff's bond.  
 888. Order directing ratable distribution, or of reference upon such motion.

## No. 881.

**Affidavit on Application for Leave to Prosecute Sheriff's Official Bond.**

(Code Civ. Pro., § 1880.)

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that [set forth cause of action against sheriff for escape or other actionable default or misconduct in his office (*or* set forth recovery of judgment against the sheriff for the escape, etc., and return of execution unsatisfied)].<sup>3</sup>

That satisfaction of the said claim [*or* of said judgment or of the claim upon which it was rendered] has not been received.

[That said amount has been duly demanded of said M. N.<sup>4</sup>]

That said M. N. is, as deponent believes, individually

see note 3 to form No. 879, and note 1 to form No. 877.

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> It is not necessary to show the recovery of a previous judgment against the sheriff. (*Ex parte* Chester, 5 Hill, 555.)

<sup>4</sup> If the default consists of the non-payment of money, and special provision is not otherwise made by law, it must appear that it has been demanded of the sheriff, or that such demand cannot be made with due diligence. (Code Civ. Pro., § 1891.) But such

unable to respond in damages for the said escape [*or default, or misconduct*].<sup>1</sup>

That no previous application, etc. [as in form No. 209 from (†) substituting for "injunction order," as follows: order granting leave to prosecute such bond for the said escape, etc.].

A. B.

[Jurat as in form No. 46.]

[Annex certified copy of bond.]

No. 882.

### Order Granting Leave to Prosecute Sheriff's Bond.

(Code Civ. Pro., § 1881.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

On reading and filing the affidavit of J. D., dated ———, 18—, together with a certified copy of the official bond of M. N., sheriff of ——— county :

It is hereby ordered, on motion of E. F., counsel for said J. D., that the said J. D. have leave to maintain an action upon the said bond in this court for the escape [*or default, or misconduct*] set forth in said affidavit in his own name as plaintiff, as if he was the obligee named in said bond.<sup>2</sup>

proof is not necessary, where the applicant has recovered a judgment against the officer. (*Id.*)

See, also, *Rhineland v. Mather* (5 Wend., 102).

<sup>1</sup>See *Anderson v. Hitchcock* (2 Wend., 299).

See, also, *Matter of Chamberlain* (42 Barb., 281; 28 How. Pr., 1; 18 Abb., 103), as to application.

As to liability of sheriff for which his bond may be prosecuted, see *People ex rel. Kellogg v. Schnyler* (4 N. Y. 173), *Dennison v. Plumb* (18 Barb., 89), *Pond v. Leman* (45 Barb., 152), *Cumming v. Brown* (43 N. Y., 514), *People ex rel. Comstock v. Lucas* (93 N. Y., 585; rev'g S. C., 25 Hun, 610), *Bishop v. Mosher* (65 Hun, 519), *Whitman v. Haines* (21 State Rep., 41), *Crouse v. Bailey* (32 State Rep., 394), *Grant v. Tefft* (29 id., 496), *Reilly v. Dodge* (131 N. Y., 153), *Koehler v. Gorman* (3 Misc., 621), *McConihe v. Palmer* (76 Hun, 116), *Norcross v.*

*Hollingsworth* (83 Hun, 127), *Adams v. Tater* (42 Hun, 384), *Lewis v. Douglas* (53 Hun, 587), *Taylor v. Fitch* (14 Week. Dig., 335).

The application may be made to the Supreme Court. (Code Civ. Pro., § 1880, as amended by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896.)

As to successive applications by same person to maintain actions upon the same bond for other defaults or misconduct, see section 1882, Code Civ. Pro., as amended by same chapter.

The application may be made without notice; but in that case, the officer, or either of his sureties, may apply, upon notice, to vacate an order permitting the applicant to maintain an action, upon any ground showing that it ought not to have been granted. (Code Civ. Pro., § 1892; *Matter of Chamberlain*, 42 Barb., 281; S. C., 18 Abb., 103; 28 How. Pr., 1.)

<sup>2</sup>See notes to form No. 881.



No. 883.

**Complaint in Action upon Sheriff's Bond.**

(Code Civ. Pro., § 1881.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that heretofore and on or about the ——— day of ———, 18—, the defendants, by their certain writing obligatory, sealed with their seals and dated on the day last aforesaid, acknowledged themselves to be held and firmly bound unto the people of the State of New York, in the sum of ——— dollars, for which payment, well and truly to be made, the said defendants bound themselves, their heirs, executors and administrators firmly by the said writing obligatory.

And the said plaintiff further shows, that the said writing obligatory was and is subject to a condition thereunder written, whereby after reciting that “whereas, the above bounden, A. B., hath been elected to the office of sheriff of the county of ———, at a [general] election held therein on the ——— day of [November], 18—,” it is provided, that if the said A. B. should well and faithfully in all things perform and execute the office of sheriff of the said county of ——— during his continuance in said office, by virtue of the said election, without fraud, deceit or oppression, then the said obligation to be void, or else to remain in full force.

And the said plaintiff, for assigning a breach in the said writing obligatory, says, that heretofore, on the ——— day of ———, 18—, the said plaintiff recovered a judgment in the ——— court in his favor against C. D. for the sum of ——— dollars, the judgment roll upon which judgment was filed, and said judgment was duly docketed in the said county of ———, on the day last aforesaid.

That an execution against the property of the said C. D. was duly issued upon said judgment, on the ——— day of ———, 18—, and delivered to the said A. B. as such sheriff, by which he was directed to satisfy the said judgment and to collect the said sum of ——— dollars, with interest thereupon from the ——— day of ———, 18—, then actually due thereupon, out of the personal property

of the said C. D., and if sufficient personal property could not be found, out of the real property belonging to him at the time when said judgment was docketed in the clerk's office of the county of \_\_\_\_\_, or at any time thereafter; and to return said execution to the clerk of the county of \_\_\_\_\_ within sixty days after the receipt thereof.

That by virtue of said execution the said A. B., who was, at the time of such delivery thereof to him and from thence, until and at and after the day of the return thereof, sheriff of the said county of \_\_\_\_\_ afterwards and before the said return day of said writ, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and within the said county of \_\_\_\_\_ seized and took divers goods and chattels of said C. D. of great value, to wit: of the value of the moneys so directed to be levied and collected as aforesaid, and then and there levied the same thereout; but did not, nor has he paid the said amount of \_\_\_\_\_ dollars so collected by him, nor any part thereof, to the said plaintiff [nor has he returned said writ as he was thereby commanded and required to do].

[That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the plaintiff duly demanded of the said A. B. the amount so collected by him as such sheriff, but that the said A. B. did not pay the said amount (*or* allege that a demand cannot be made, with due diligence), and that satisfaction of the same or of any part thereof has not been received.¹]

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the plaintiff recovered a judgment in the \_\_\_\_\_ Court against the said A. B., as such sheriff, for the sum of \_\_\_\_\_ dollars, for the damages which the said plaintiff had sustained by reason of the neglect of the said defendant, A. B., as such sheriff of the county of \_\_\_\_\_ as aforesaid [as well], in not paying over and rendering unto the said plaintiff the money so as aforesaid directed to be levied and collected as aforesaid by the said writ, and which had been levied and collected by him, the said A. B., as such sheriff as aforesaid [as for not returning the said writ according to the exigency thereof, as he was by the said writ commanded

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¹ It is not necessary to allege a default does not consist in the non-payment of money. (Code Civ. Pro., § 1891.)

as aforesaid], and also for the sum of ——— dollars for the costs and charges of the said plaintiff in the said last mentioned suit, whereby the said plaintiff sustained further damages to the amount of the said last mentioned costs and charges [or any other cause of action may be substituted for that above set forth, as provided by section 1880, Code Civil Procedure].

That leave has been granted to the plaintiff by an order of the ——— Court, duly made at a [Special] Term thereof, held at, etc., on, etc., and entered in ——— county clerk's office, on the ——— day of ———, 18—, to maintain an action upon the said official bond of said A. B., as such sheriff, for the default of the said A. B. as aforesaid.

Wherefore the plaintiff demands judgment against the said defendants for ——— dollars and ——— cents, with costs of this action.<sup>1</sup>

E. F., *Plaintiff's Attorney.*  
[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

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No. 884.

**Indorsement upon Execution Issued upon a Judgment Recovered upon Sheriff's Bond.**

(Code Civ. Pro., § 1883.)

As in form No. 560, adding as follows: You are directed to collect said amount, in the first place, out of the property of the defendant, M. N. [naming the sheriff], and if sufficient property of the said M. N. cannot be found, then to collect the deficiency out of the property of the defendants, I. J. and K. L. [naming the sureties].<sup>3</sup>

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<sup>1</sup> See note 1 to form No. 881, as to liability of sheriff for which his bond may be prosecuted, and 4 Keyes, 93.

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> The execution is issued to the coroners, or a particular coroner, of the county where the sheriff is a party. (Code Civ. Pro., §§ 173, 1862.)

No. 885.

**Answer under Section 1884 of Code Civil Procedure by Surety upon Sheriff's Bond.**

(Code Civ. Pro., § 1884.)

[Title of cause.]

And the defendant, I. J. [further] answering, says, that he [and the defendant, K. L. (*or* that the defendant, K. L.)], has [*or* have] been or will be compelled for want of sufficient property of the defendant, M. N. [naming the sheriff], to pay upon a judgment [*or* judgments] recovered against him [*or* them], upon the same bond mentioned in the said complaint, [\*] an aggregate amount exclusive of costs, officers' fees and expenses, equal to the sum for which the said defendant, I. J., is liable by reason of the said bond [*or* if less than the amount of plaintiff's demand, say from (\*) as follows: the sum of ——— dollars, for which said defendant claims to be allowed in this action as a partial defense thereto].

A. F., *Defendant's Attorney.*[Office address.<sup>1</sup>]

[Verification as in forms Nos. 151, etc.]

No. 886.

**Affidavit to Move for Ratable Distribution of Moneys Collected out of Sureties in Sheriff's Bond.**

(Code Civ. Pro., § 1885.)

———— COUNTY, ss. :

A. B., of ———, being duly sworn, says, that on the ——— day of ———, 18—, an order was made by the ——— Court granting leave to deponent to prosecute the official bond of M. N., sheriff of ——— county, for the collection of a claim against said M. N., in favor of said deponent, for the escape of a prisoner committed to his custody [*or* state other actionable default or misconduct in his office].

That actions are now pending upon said bond as follows [so far as deponent has any knowledge, information or

<sup>1</sup> See note 2 to form No. 122.

belief thereof], to wit [describe such actions, stating name of plaintiffs' attorneys and amounts for which they are brought, respectively], and that judgments have been heretofore recovered upon said bond and remain uncollected as follows [state such judgments, giving names of parties, amounts thereof and names of plaintiffs' attorneys].

That the aggregate amount of the liabilities, which might be [and have been] recovered by actions upon the said bond, is at least \_\_\_\_\_ dollars, according to the best of deponent's knowledge, information and belief, and exceeds the sum for which I. J. and K. L., the sureties therein, are liable, the penalty of said bond being the amount of \_\_\_\_\_ dollars.

A. B.

[Jurat as in form No. 46.]

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No. 887.

**Notice of Motion for Ratable Distribution of Moneys Collected from Sureties in Sheriff's Bond.**

(Code Civ. Pro., § 1885.)

[Title of cause or proceeding.]

SIR—Take notice, that upon the affidavit, with a copy of which you are herewith served, a motion will be made at, etc., on, etc., for an order directing and providing for the distribution of the moneys collected out of the property of I. J. and K. L., the sureties in the official bond of M. N., sheriff of \_\_\_\_\_ county, among the persons in favor of whom the said liabilities have accrued in the proportion to the amount which each one is entitled to recover, to be ascertained by a reference, or in such other manner as the court directs, and for such other or further relief as may be proper.

Yours, etc.,

E. F., *Attorney for* \_\_\_\_\_.

[Office address.<sup>1</sup>]

To T. R., *Attorney for* \_\_\_\_\_, and S. T., *Attorney for* \_\_\_\_\_.

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Until the hearing and decision of the motion mentioned

<sup>1</sup> See note 2 to form No. 122.

in the within [*or* foregoing] notice, the payment to the plaintiffs in the actions mentioned in the annexed affidavits, or any of them, of any sum collected, or to be collected, by any judgment rendered therein, is hereby forbidden.

Dated \_\_\_\_\_, 18—.

A. O., *Judge* [*or Justice*] of the \_\_\_\_\_ Court.

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No. 888.

**Order Directing Ratable Distribution or of Reference upon such Motion.**

(Code Civ. Pro., § 1885.)

[Title of cause or proceeding.]

On reading and filing the affidavit of A. B., dated \_\_\_\_\_, 18—, and [name other motion papers], with proof of due service of said affidavit, and notice of this motion on T. R., attorney for \_\_\_\_\_, and S. T., attorney for \_\_\_\_\_, and on motion of E. F., of counsel for \_\_\_\_\_, after hearing, etc.:

It is hereby ordered, that it be and hereby is referred to M. B., to ascertain the amount which each of the persons is entitled to recover, in whose favor liabilities have accrued upon the official bond of M. N., sheriff of \_\_\_\_\_ county; and the payment to the plaintiff, in any action, of any sum collected or to be collected by virtue of the judgment therein is hereby forbidden, until the further order of the court hereupon.

[*Or* the order may provide for the distribution, if practicable, without a reference.]

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ARTICLE THIRD.

FORMS RELATING TO ACTION BY A PRIVATE PERSON FOR A PENALTY OR FORFEITURE,

(Code Civ. Pro., Ch. 15, Tit. 4, Art. 3.)

No. 889. Complaint in action for penalty and damages, given by section 1436 of Code Civil Procedure, against a sheriff, for selling real estate contrary to chapter 13 of Code Civil Procedure.

- No. 890. Complaint in action for penalty given by statute, to any person who sues therefor.
891. Indorsement upon summons in action to recover penalty or forfeiture, where complaint is not served.

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No. 889.

**Complaint in Action for Penalty and Damages Given by Section 1436 of Code of Civil Procedure, Against a Sheriff, for selling Real Estate Contrary to Chapter 13 of Code of Civil Procedure.**

(Code Civ. Pro., § 1893.)

[Title of cause.]

The plaintiff complains of the defendant, and alleges, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the plaintiff recovered a judgment against one E. F., in the \_\_\_\_\_ Court, for \_\_\_\_\_ dollars, the judgment roll whereupon was duly filed and said judgment duly docketed in the county of \_\_\_\_\_, on the day aforesaid [and a transcript thereof was filed and said judgment duly docketed in the clerk's office of \_\_\_\_\_ county, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—].

That after the rendition of the said judgment and docketing thereof as aforesaid, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, an execution was duly issued to the defendant as sheriff of the county of \_\_\_\_\_ against the property of the said E. F. which was directed to said sheriff, and required the said sheriff to satisfy the said judgment upon which was therein stated to be actually due, at the time of its issue, the sum of \_\_\_\_\_ dollars, with interest thereupon from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, out of the personal property of the said E. F., and, if sufficient personal property could not be found, out of the real property belonging to him at the time when the said judgment was docketed in the clerk's office of the county of \_\_\_\_\_, or at any time thereafter, and was delivered on the said \_\_\_\_\_ day of \_\_\_\_\_, 18—, to the said defendant, as such sheriff, to be executed according to law.

That said defendant was, at the time of such delivery [and ever since has been, and still is], sheriff of the said county of \_\_\_\_\_.

And the said plaintiff further says, that afterwards, to wit: on the ——— day of ———, 18—, the said defendant, as sheriff aforesaid, did, by virtue of the said writ, and of the statute in such case made and provided, duly levy upon and take in execution the following real property of the said E. F., to wit [describe same], and although the said defendant was, by virtue of the said writ, and of the statute in such case provided [to wit: of section 1384 of the Code of Civil Procedure], bound to sell the said premises at public auction, between the hour of nine in the morning and sunset [*or if the case require it, state any other duty prescribed in the said statute, and which the sheriff violated*]; yet the said defendant, as sheriff aforesaid, contrary to his duty as such sheriff and the aforesaid statute, did [state the particular violation, with time, place and other particulars, and show how the plaintiff became injured], whereby the said defendant became liable [by virtue of section 1436 of the Code of Civil Procedure]<sup>1</sup> to pay the said plaintiff [who, the said plaintiff alleges, is the party injured thereby] the sum of one thousand dollars, and, in addition thereto, the damages the said plaintiff has sustained thereby, to wit: the sum of ——— dollars.

Wherefore the plaintiff demands judgment against the defendant for the sum of ——— dollars, and for the costs of this action.

C. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> As to reference to the statute under which the action may be maintained, see *People v. McCann* (67 N. Y., 506, and *Nellis v. N. Y. Cent. R. R. Co.*, 30 id., 505, therein cited). See, also, *People v. Justices, etc.* (12 Hun, 65), and see for special rules relating to this class of actions, *Health Dep't of N. Y. v. Knoll* (70 N. Y., 530), *Conley v. Palmer* (2 N. Y., 182; aff'g S. C., 4 Denio, 374), *Fisher v. N. Y. C. and H. R. R. Co.*, 46 N. Y., 644), *Suydam v. Smith* (52 N. Y., 383), *Verona Central Cheese Co. v. Murtaugh* (50

N. Y., 314), *Perry v. Edwards* (44 N. Y., 223), *People v. Kolb* (3 Abb. Ct. of App. Dec., 529), *Meier v. Met. Gaslight Co.* (14 Week. Dig., 552), *Paine v. East* (15 Week. Dig., 281).

As to limitation for commencement of action, see section 983, Code Civ. Pro.

As to action to recover penalty or forfeiture, not exceeding a specified sum, see section 1898, Code Civ. Pro., and *Lammond v. Volans* (14 Hun, 263).

<sup>2</sup> See note 2 to form No. 122.



No. 890.

**Complaint in Action for Penalty Given by Statute to any Person who Sues Therefor.**

(Code Civ. Pro., § 1894.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that by an act of the legislature of the State of New York, entitled "An act, etc.," passed, etc., it is enacted that [set forth the provisions of the act prescribing the penalty or forfeiture].<sup>1</sup>

That before the commencement of this action, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the defendant [set forth violation of the statute by which penalty, etc., has been incurred].

Wherefore the plaintiff demands from the said defendant the sum of \_\_\_\_\_ dollars [insert amount of penalty prescribed by the statute], together with the costs of this action.<sup>2</sup>

M. N., *Plaintiff's Attorney.*

[Office address.]

[Verification as in forms Nos. 151, etc.]

No. 891.

**Indorsement upon Summons in Action to Recover Penalty or Forfeiture, where Complaint is not Served.**

(Code Civ. Pro., § 1897.)

According to the provisions of [section \_\_\_\_\_ of]<sup>4</sup>

<sup>1</sup> As to setting forth statute, see the cases of *People v. McCann and Nellis v. N. Y. C. R. R. Co.*, referred to in note 1 to last form No. 889. These decisions were made under 2 R. S., 480, part 3, ch. 8, tit. 6, § 1. That title was repealed by chapter 245 of 1880, and sections 1893 to 1898 of Code Civ. Pro., are substituted therefor. The provisions of section 1, giving a form of complaint, are abrogated, and the general provisions of the Code Civ. Pro., as to pleading, now apply to these actions. See, also, section 530 id.

<sup>2</sup> By section 1894, Code Civ. Pro., this action may be maintained by any person in his own name; but the ac-

tion cannot be compromised or settled without the leave of the court in which it is brought.

See, also, generally as to actions for penalties, etc., the cases cited in note to last form No. 889, and see *Higgins v. Dakin* (86 Hun, 461), *People v. Briggs* (114 N. Y., 56; aff'g S. C., 47 Hun, 266), *Bellinger v. Birge* (54 Hun, 511), *Langdon v. N. Y., L. E., etc., R. Co.* (58 id., 122), *Palen v. N. Y., New Haven, etc., R. Co.* (42 State Rep., 219), *Board of Health of Yonkers v. Coppitt* (71 Hun, 149).

<sup>3</sup> See note 2 to form No. 122.

<sup>4</sup> The section is to be specified if penalties or forfeitures are given in

chapter ——— of the Laws of 18— of the State of New York, entitled “An act, etc.,” [giving title] passed ———, 18— [or section ——— of title ——— of chapter ———, of part ——— of the Revised Statutes].<sup>1</sup>

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ARTICLE FOURTH.

FORMS RELATING TO CERTAIN ACTIONS TO RECOVER DAMAGES FOR WRONGS.

(Code Civ. Pro., Ch. 15, Tit. 4, Art. 4.)

- No. 892. Complaint for suing vexatiously in the name of another or of unknown person.
893. Complaint in action for causing death by negligence.
894. Complaint for negligence causing death—another form.
895. Answer to complaint, form No. 894.
896. Complaint in action for injury caused by negligence.
897. Complaint against carrier for negligence causing loss of box.
898. Complaint for negligence in setting fire on defendant's land, so that it spread into plaintiff's farm and destroyed his trees, etc.
899. Complaint for one vessel running foul of another.
900. Complaint against an attorney for negligently conducting a cause to trial without proper evidence.
901. Complaint against attorney for negligently defending an action.
902. Complaint against attorney for negligence in investigating title for a purchase of property.
903. Same, for negligence in investigating title for the purpose of a loan thereupon.
904. Complaint against physician and surgeon for malpractice.
905. Complaint against an inn-keeper for negligence.
906. Complaint against a bailee for negligence.
907. Complaint against the owner of a coach for negligence of himself or of his servant in driving the same against the plaintiff's coach.
908. Complaint in action for slander imputing unchastity to a woman.
909. Complaint in action for slander, general form, for words actionable in themselves.
910. Statement of special damages in complaint for slander.
911. Complaint for slanderous words indirectly accusing plaintiff of a specific offense.

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different sections thereof for different acts or omissions. (Code Civ. Pro., § 1897.)

<sup>1</sup> See *People v. Justices, etc.* (12 Hun, 65), *Schoonmaker v. Brooks* (24 Hun, 553), *People v. Bull* (42 N. Y. Super. Ct., 19), *Mayor of N. Y. v. Eisler* (14 Week. Dig., 362); 2 Civ. Pro. Rep. [Browne], 125), *Overseers of the Poor v. McCann* (20 Week. Dig., 114), *Hitchman v. Baxter* (20 Week. Dig.,

304), *Young v. Gregg* (9 Civ. Pro. R., 262), *Prussia v. Guenther* (16 Abb. N. C., 230), *Townsend v. Hopkins* (9 Civ. Pro. R., 257), *Vernon v. Palmer* (48 Super. Ct., 231), *Sears v. Sears* (9 Civ. Pro. R., 432), *Spoor v. Cornell* (12 Civ. Pro. R., 319), *People v. O'Neill* (54 Hun, 610), *Rudolph v. Rudolph* (34 State Rep., 1), *Dellisser v. N. Y., New Haven, etc., R. Co.*, (39 id., 242), *Lassen v. Aronson* (29 Abb. N.C., 114).

- No. 912. Complaint for slander where the words are spoken ironically.  
913. Same, where it is to be collected from question and answer.  
914. Answer justifying a charge of perjury.  
915. Complaint for slandering a person in his trade by calling him a rogue, etc.  
916. Complaint in action for slander of title.  
917. Complaint in action for libel.  
918. Complaint for a libel containing distinct passages of scandalous matter.  
919. Same, for a libel in a letter.  
920. Complaint for criminal connection with plaintiff's wife.  
921. Complaint for debauching daughter or servant of plaintiff.  
922. Complaint for seduction of plaintiff's daughter.  
923. Complaint for harboring and concealing the plaintiff's wife.  
924. Complaint for keeping dog used to bite mankind.  
925. Complaint for keeping a dog used to bite sheep or other animals.  
926. Complaint for breach of promise to marry.  
927. Complaint for false imprisonment.  
928. Complaint for assault and battery.  
929. Same complaint, another form.  
930. Answer that plaintiff committed first assault.  
931. Answer that defendant was preserving the peace.  
932. Complaint for maliciously suing plaintiff six times before a justice.  
933. Complaint for maliciously causing the indictment of the plaintiff.  
934. Complaint for maliciously causing the arrest of the plaintiff on a charge of stealing.  
935. Complaint for a fraudulent concealment in the sale of a horse.  
936. Complaint for a false warranty of a horse.  
937. Complaint on a sale with all faults, where fraudulent means are used to prevent the purchaser from discovering defects, etc.  
938. Complaint for falsely and fraudulently affirming that he, the defendant, owned the horse.  
939. Complaint for falsely representing a third person as fit to be trusted, etc.  
940. Complaint in action for false representations made to induce a purchase of real estate.  
941. Complaint in action where false representations have been made to induce credit.  
942. Complaint against sheriff for false return.  
943. Complaint against sheriff for not making return.  
944. Complaint against sheriff for an escape.  
945. Same, where arrest has been made under order of arrest, and action is brought after judgment.  
946. Same, on an escape from custody under order of arrest, when the action is brought before judgment.  
947. Complaint for conversion of personal property.  
948. Same, in action brought by executor.  
949. Complaint for arresting a witness while attending as such upon subpœna.  
950. Complaint for manufacturing candles near a dwelling-house.

No. 892.

**Complaint for Suing Vexatiously in the Name of Another  
or of Unknown Person.**

(Code Civ. Pro., § 1900.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that heretofore the defendant, contriving wrongfully and maliciously to oppress and injure the plaintiff, on or about the ——— day of ———, 18—, did, for vexation and trouble, and out of mere malice towards the said plaintiff, cause and procure the said plaintiff to be sued by a certain summons [and complaint], in the name of L. M.; and the said plaintiff avers that the said suit was commenced without the consent of the said L. M., therein named as plaintiff [*or that there is no such person known as L. M., named as plaintiff in the said summons*]; and the said plaintiff further avers that, by reason of such wrongful and malicious arrest as aforesaid, he has been obliged to expend [here state the amount and to what purpose expended, as “to defend said action,” or otherwise, as the case may be, and also state any other damages sustained, thus: “And has also, by reason thereof, suffered great pains of body and mind, and for the space of ——— days was prevented from attending to his lawful avocation, etc.”], by means of which the plaintiff is entitled to recover treble damages, to wit: to the amount of ———, under the provisions of section 1900 of the Code of Civil Procedure,<sup>2</sup> for which amount the plaintiff demands judgment against the defendant, with costs of this action.

R. H., *Plaintiff's Attorney.*

[Office address.']

No. 893.

**Complaint in Action against Railroad Company for Causing  
Death by Negligence.**

(Code Civ. Pro., § 1902.)

[Title of cause.]

The complaint of the above named plaintiff respectfully

<sup>1</sup> See note 2 to form No. 122.506), and *Nellis v. N. Y. C. R. R. Co.*<sup>2</sup> See *People v. McCann* (67 N. Y., (30 N. Y., 505), therein cited.

shows, that the defendant is a domestic corporation [*or* is a foreign corporation incorporated under the laws of the (State) of ———], and was such corporation on the ——— day of ———, 18—, and for a long time previous thereto, and was, during the time aforesaid, the owner of a railroad, and engaged as a common carrier of passengers upon said railroad for hire, between the [city] of ——— and the ——— of ———, in the [State] of ———, upon its cars, drawn by locomotive engines. [\*]

That, upon the day last aforesaid, C. D., the plaintiff's testator [*or* intestate], entered one of the cars of said defendant at ———, with the assent of the defendant, for the purpose [†] of being conveyed thereby from the said ——— of ——— to the said ——— of ——— [he having paid to said defendant the fare between the said points, to wit, ——— dollars].<sup>1</sup>

That by the negligence of the said defendant, its agents or servants, the train of cars, in one of which cars the said C. D. was riding as aforesaid, was thrown from the track [by reason of the displacement of a rail of the track of said railroad, at [*or* near] ———, and in the State of [New York],<sup>2</sup> and the car in which said C. D. was seated was overturned, and C. D. was thrown from his seat with great violence [††] and was killed [*or* sustained injuries by which his death was caused], his said death occurring on the [said] ——— day of ———, 18— [*or* state other facts in regard to the accident].

<sup>1</sup> The action for a negligent injury to a passenger lies against the carrier, although there be no contract, and the service he is rendering is gratuitous. (*Carroll v. Staten Island R. R. Co.*, 58 N. Y., 126; *Webber v. Herkimer & Mohawk Street R. Co.*, (21 W. D., 47.)

<sup>2</sup> An action will lie in this State, under the statute of another State, similar to but not identical with our statute, where the injury was committed in that State. The existence of such a statute must be alleged and proved, and the construction put upon it by the courts of that State is conclusive here. The action must be brought by an administrator appointed here; and letters need not be taken out in the State where the injury occurred. (*Leonard v. Columbia S. Nav.*

*Co.*, 84 N. Y., 48.) See, also, *Wooden v. Western N. Y. R. R. Co.* (126 N. Y., 10).

As to manner of pleading a foreign statute, see form No. 857 (vol. 2, p. 735), and cases cited in note 4 to that form. See, also, *Debevoise v. N. Y., Lake Erie & W. R. Co.* (21 W. D., 138; 98 N. Y., 377).

The action may be maintained against a foreign corporation. (*Stallnecht v. Pennsylvania R. R. Co.*, 13 Hun, 451.)

An action will lie under our statute where the injury and death occurred on the high seas, on board a vessel hailing from and registered in a port of this State, and employed by the owners in their own business. (*McDonald v. Mallory*, 77 N. Y., 546; *rev'g S. C.*, 44 N. Y. Super. Ct., 80.)

Plaintiff further says, that the said accident occurred and said injuries were inflicted [without any negligence or fault on the part of the said C. D., and] solely by the negligence and fault of the defendant and its agents, servants and employees.<sup>1</sup>

[Allege intestacy of C. D., or making of will, etc., by him, and appointment of plaintiff as executor or administrator, etc., substantially as in form No. 845.]

That said C. D. left him surviving his wife, J. D. [and M. D. and F. D., his only surviving children and next of kin].<sup>2</sup>

Wherefore the plaintiff, as such administrator [or executor], demands judgment against the defendant for the sum of \_\_\_\_\_ dollars, besides the costs of this action.<sup>3</sup>

R. F., *Plaintiff's Attorney.*

[Office address.<sup>4</sup>]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> The rule that the plaintiff cannot recover, unless the death was caused solely by the negligence of the defendant or its servants to which the negligence of the deceased in no degree contributed, is the same as in an action brought to recover damages by reason of a negligent injury to the person of the plaintiff. (*Cordell v. N. Y. C. & H. R. R. Co.*, 75 N. Y., 330; *Hart v. Hudson River Bridge Co.*, 84 id., 56; *Cosgrove v. N. Y. C. & H. R. R. Co.*, 87 id., 88.)

That the averment that the injury occurred without the fault of the decedent is unnecessary and that the allegation that it occurred by the negligence of the plaintiff covers the absence of negligence on the part of the decedent. See *Urquhart v. The City of Ogdensburg* (23 Hun, 75; 20 W. D., 413).

The rules as to the right of recovery, where the deceased was, at the time of the injury, in the employment of the defendant, and received the injury in the course of his employment, are the same as where a servant sues his master for a negligent injury to the plaintiff's person. (*Gibson v. Erie Railway Co.*, 63 N. Y., 449; rev'g S. C., 5 Hun, 31; *Malone v. Hathaway*, 64 N. Y., 5; rev'g S. C., 3 Hun, 553; *Slater v. Jewett*, 85 N. Y., 61.)

<sup>2</sup> The term next of kin, as used in art. 4 of title 4 of ch. 15 of Code Civ. Pro., includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed assets of a decedent,

after payment of debts and expenses, other than a surviving husband or wife. (Code Civ. Pro., §§ 1870, 1905.)

To entitle to a recovery under section 1902, Code Civ. Pro., the decedent must leave him or her surviving a husband, wife or next of kin.

<sup>3</sup> See further as to action under section 1902, Code Civ. Pro., *Cardot v. Barney* (63 N. Y., 281), *Cordell v. N. Y. C. & H. R. R. Co.* (64 N. Y., 535; rev'g S. C., 6 Hun, 461), *Sauter v. N. Y. C. & H. R. R. Co.* (66 N. Y., 50; aff'g S. C., 6 Hun, 446), *Kennedy v. Ryall* (67 N. Y., 379; aff'g S. C., 40 N. Y. Super. Ct., 347), *Quinn v. Power* (87 N. Y., 535; overruling S. C., 17 Hun, 102), *Ellis v. N. Y. L. E. and W. R. R. Co.* (95 N. Y., 546), *Seybolt v. Same* (95 N. Y., 562), *Brewer v. N. Y. L. E. & W. R. Co.* (124 N. Y., 65).

It was held in *Hegerich v. Keddie* (32 Hun, 141 [Daniels, J., dissenting]), that the action may be maintained against the personal representatives of the wrong-doer, following *Yertore v. Wiswall* (16 How. Pr., 8). See *Russell v. Smbury* (37 Ohio St. Rep.; 25 Alb. L. J., 308), to the contrary; and see *Hegerich v. Keddie* (99 N. Y., 258), reversing same case (32 Hun, 141), and overruling *Yertore v. Wiswall* (16 How. Pr., 8); and see *Wooden v. Western N. Y. and P. R. Co.* (126 N. Y., 10).

It constitutes a defense to such an action that the deceased in his lifetime brought an action against the de-

No. 894.

## Complaint Against Railroad Company for Negligence Causing Death—Another Form.

(Code Civ. Pro., § 1902.)

[Title of cause.]

Plaintiff shows to the court, that defendant is a railroad corporation organized and existing under and by virtue of the laws of the State of New York, and a common carrier of [\*] passengers, and has been so since January 1, 1874, and since that time it has, as such carrier and corporation, daily run its train from the city of S. to the city of P., in said State.

That on or about March 17, 1874, one J. S., of S., was carried from S. to P. in one of defendant's passenger trains, as a passenger, having duly paid his fare as such, according to defendant's regulations and requirements.

That upon the arrival of said train at defendant's station

defendant, for the damages sustained by him through the same injury, and recovered and collected a judgment therefor. (Littlewood v. The Mayor, 89 N. Y., 24; aff'g S. C., 47 N. Y. Super. Ct., 547, and overruling Schlichting v. Wintgen, 25 Hun, 626.) See, also, Murray v. Usher (117 N. Y., 542, aff'g S. C., 46 Hun, 404)

See, also, Stuebing v. Marshall (14 Week. Dig., 289 [N. Y. Com. Pl.]; S. C., 2 Civ. Pro. Rep. [Browne], 77), that a release from the person entitled to receive the proceeds, is a bar to the action by the executor or administrator.

As to damages recoverable and for whose benefit, see Code Civ. Pro., §§ 1903, 1904, Houghkirk v. Pres., etc., Del. and Hud. C. Co. (92 N. Y., 219; rev'g S. C., 28 Hun, 407, and cases there cited), Durkee v. Central Pacific R. R. Co. 56 Cal., 388; S. C., 33 Am. R., 59), Davis v. Standish (26 Hun, 608), Etherington v. The Prospect Park and Coney Island R. R. Co. (88 N. Y., 641), Sauter v. N. Y. Cent. and H. R. R. R. Co. (*supra*), Kennedy v. Ryall (*supra*), McGovern v. N. Y. Cent. and H. R. R. R. Co. (67 N. Y., 417), Salter v. Utica and Black River R. R. Co. (86 N. Y., 401), Bierbauer v. N. Y. Cent. and H. R. R. R. Co. 15 Hun, 559; aff'd, 77 N. Y., 538, Terry v. Jewett (17 Hun, 395), Gorham v. N. Y. Cent. and H. R. R. R. Co. (23 Hun, 449), Manning v. P. H.

Iron Co. (27 Hun, 219), Cornwall v. Mills (44 N. Y. Super. Ct., 45), Murphy v. N. Y. Cent. and H. R. R. R. Co. (88 N. Y., 445), Lee v. Van Voorhis (78 Hun, 576). Section 1904 of Code Civ. Pro., provides that the damages in case of accident resulting in death, shall be limited to \$5,000, but the constitution of N. Y. State of 1894 repeals this limitation (art. 1, § 18). See, also, amendment to § 1904 of Code Civ. Pro. by ch. 946 of Laws of 1895, and see Isola v. Weber (13 Misc., 97), holding that said section 18 of article 1 of the Constitution is retrospective and comprehends recoveries under rights of action which had accrued at the time when the Constitution went into effect, viz.: January 1, 1896; but see O'Reilly v. Utah, Nev. & Col. Stage Co. (87 Hun, 406), *contra* approved by Court of Appeals, 147 N. Y., 329, rev'g Isola v. Weber, before cited; and see Gurney v. Grand Trunk R. Co. (37 State Rep., 557), Geoghegan v. Atlas Steamship Co. (3 Misc., 224), Klemm v. N. Y. C. & H. R. R. Co. (78 Hun, 287), Johnson v. Long Island R. Co. (80 Hun, 306), Keenan v. Brooklyn City R. R. Co. (145 N. Y., 348), Fitzgerald v. N. Y. C. & H. R. R. Co. (88 Hun, 359), Cavanagh v. Ocean Steam Nav. Co. (19 Civ. Pro. R., 391), Wooden v. W. N. Y. and P. R. R. Co. (147 N. Y., 508), among other recent cases as to damages, etc.

at P. aforesaid, as plaintiff is informed and believes, and while said J. S., after having been invited by defendant to alight from said train, as plaintiff is informed and believes, was attempting so to do, defendant negligently and violently, as plaintiff is informed and believes, started its train, whereby said J. S. was, as plaintiff is informed and believes, thrown from his footing, and so bruised and injured that he shortly after died of such injuries on the 24th of March, 1874.

That it was defendant's duty, upon the arrival of such train at such station, to bring such train to a stand, and keep it standing still so that all its passengers might alight therefrom with safety, but that defendant neglected its duty in that regard as aforesaid, and the death of said J. S. was caused by defendant's negligence.

That on the 1st day of April, 1874, plaintiff was duly appointed, by the county judge of Schenectady county, sole administrator of the goods, chattels and credits of said J. S., deceased, and duly entered upon the discharge of his duties as such.

And plaintiff has sustained damage, by reason of the aforesaid facts, in the sum of \$ ———.

Wherefore plaintiff demands judgment for \$ ———, and interest from March 24, 1874, besides costs.<sup>1</sup>

E. W. P., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

No. 895.

**Answer to Complaint, form No. 894.**

(Code Civ. Pro., § 1902.)

[Title of cause.]

The defendant, in the above entitled action, answers the complaint therein, as follows :

The defendant admits that it is now, and since January 1,

<sup>1</sup> The above complaint is from the R. R. Co. (66 N. Y., 50). See notes case of *Sauter v. N. Y. C. and H. R.* to last form, No. 893.

<sup>2</sup> See note 2 to form No. 122



1874, has been, a railroad corporation and a common carrier of passengers, and, as such, ran its trains daily from the city of S. to the city of P. in the State of New York, and that J. S., deceased, died on or about the 24th day of March, 1874.

The defendant denies any knowledge or information sufficient to form a belief of any or either of the allegations in said complaint contained, excepting those hereinbefore specifically admitted.

The defendant alleges, upon information and belief, that the negligence of said J. S., deceased, contributed to cause his death.<sup>1</sup>

S. W. J., *Defendant's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

No. 896.

### Complaint in Action Against Railroad Company for Injury Caused by Negligence.

As in form No. 893 to [\*], and from thence as follows: That upon the day last aforesaid, the plaintiff entered one of the cars of said defendant, at ———, with the assent of the defendant, for the purpose, etc. [continue as in form No. 893 from (+) to (++)], substituting “plaintiff” for “C. D.” therein, and continue as follows], and [his right arm was fractured and broken], and the said plaintiff was, in other respects, greatly hurt, bruised and wounded, and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit, hitherto, during all which time he, the said plaintiff, suffered and underwent great pain, and was hindered and prevented from performing and transacting his necessary affairs and business by him during that time to be performed and transacted; and also thereby he, the said plaintiff, was forced and obliged, and did necessarily pay, lay out and expend a large sum of money, to wit: the sum of ——— dollars, in and about endeavoring to be

<sup>1</sup> From *Sauter v. N. Y. C. and H. R. R. Co.* (66 N. Y., 50).      <sup>2</sup> See note 2 to form No. 122.

cured of the bruises, wounds, sickness, soreness and lameness and disorder aforesaid.

Plaintiff further says, that the said accident occurred, and said injuries were inflicted [without any negligence or fault on the part of the plaintiff, and]<sup>1</sup> solely by the negligence and fault of the defendant and its agents, servants and employees.

Wherefore, etc. [insert prayer for judgment].<sup>2</sup>

F. R., *Plaintiff's Attorney.*

[Office address.]<sup>3</sup>

No. 897.

### Complaint against Carrier for Negligence Causing Loss of Box.

As in form No. 894 to [\*], and from thence as follows: Goods and chattels for hire from \_\_\_\_\_ to \_\_\_\_\_, and has been such corporation and common carrier since the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

That on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and while the said defendant was such common carrier the plaintiff, at \_\_\_\_\_, caused to be delivered to the said defendant, and the said defendant then and there accepted from the plaintiff a certain box, containing divers goods and chattels, to wit [specify the articles], of the said plaintiff of great value, to wit: of the value of \_\_\_\_\_ dollars, to be safely and securely carried and conveyed by the said defendant from \_\_\_\_\_ aforesaid to \_\_\_\_\_ aforesaid, and there, to wit: at, etc., aforesaid, safely and securely to be delivered for the said plaintiff, for certain reasonable reward, to the said defendant, in that behalf.

That the said defendant, not regarding its duty as such common carrier as aforesaid, did not safely and securely carry or convey the said box and its contents aforesaid from \_\_\_\_\_ aforesaid to \_\_\_\_\_ aforesaid, nor there, to wit: at \_\_\_\_\_ aforesaid, safely and securely deliver the same

<sup>1</sup> See note 3 to form No. 893.

(21 W. D., 88); *Edwards v. N. Y.*, etc., R. Co. (id., 231).

<sup>2</sup> See the cases cited in note 3 to form No. 893, generally as to actions for negligence; also, *Nolan v. King*

<sup>3</sup> See note 2 to form No. 122.

for him, the said plaintiff, but, on the contrary thereof, the said defendant, its agents and servants, so carelessly and negligently behaved and conducted themselves, in the premises, that by and through the carelessness, negligence and default of the said defendant, its agents and servants, in the premises, the said box and its contents aforesaid became and were wholly lost to the said plaintiff.

Wherefore the plaintiff, etc. [prayer for judgment].<sup>1</sup>

M. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

No. 898.

**Complaint for Negligence in Setting Fire on Defendant's Land, so that it Spread into Plaintiff's Farm and Destroyed his Trees, etc.**

[Title of cause.]

The plaintiff complains of the defendant and alleges, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said plaintiff was seized in fee, and in possession of [*or set forth what other estate he held or possessed*], a certain farm, etc., situated in the town of \_\_\_\_\_, in the county of \_\_\_\_\_, containing \_\_\_\_\_ acres of land, and bounded and described as follows, to wit [describe same].

That the defendant was at the same time and place last mentioned also possessed [and seized in fee]<sup>3</sup> of a certain other farm, piece or parcel of land next to and adjoining [*or near to*] the said farm or piece or parcel of land of the said plaintiff, yet the said defendant well knowing the premises, and not regarding the safety and preservation of the property of the said plaintiff, did, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, set fire to the wood, trees or timber then and there standing and growing on the said land so

<sup>1</sup>A common carrier is bound to exercise reasonable care and prudence in the transportation of property, and is liable for loss resulting from a failure in this respect, although by his contract the transportation is "at the owner's risk." (*Canfield v. Baltimore and Ohio R. R. Co.*, 93 N. Y., 532.) See also *Wheeler v. Oceanic Steam*

*Nav. Co.* (125 N. Y., 155; rev'g S. C., 52 Hun, 75), *Kenney v. N. Y. Central*, etc., R. Co. (id., 422; aff'g S. C., 54 Hun, 143), *Zimmer v. N. Y. Central*, etc., R. Co. (137 id., 460); *Weinberg v. Nat. Steamship Co.* (29 State R., 219).

<sup>2</sup>See note 2 to form No. 122.

<sup>3</sup>It is not necessary to set forth the title of defendant.

possessed [and owned] by him, the said defendant as aforesaid, and did then and there so carelessly, negligently and improvidently manage, direct and conduct the said fire, that by and through the mere carelessness, negligence and mismanagement of the said defendant, his servants and agents in and about the said fire, and the spreading thereof to the farm, etc., of the said plaintiff, one thousand pine trees, one thousand oak trees, one thousand chestnut trees, twelve hundred yards of fence, one barn, one stable, and one dwelling-house of him the said plaintiff, then and there standing and being on the said farm, piece or parcel of land of him the said plaintiff, and being of great value, to wit: of the value of ——— dollars, then and there caught fire from the spreading of the fire aforesaid, so set as aforesaid, by the said defendant, and which spreading as aforesaid might and would have been then and there prevented, had the said defendant then and there used due skill, care and attention to prevent the same, by means of which said want of care, circumspection and skill as aforesaid of the said defendant, the said one thousand pine trees, etc. [stating the rest], of the said plaintiff, were then and there entirely burnt, consumed, destroyed and lost to the said plaintiff, by the spreading of the fire as aforesaid, to his damage ——— dollars, for which, etc. [prayer for judgment].<sup>2</sup>

M. F., *Attorney for Plaintiff.*

[Office address.<sup>3</sup>]

[Verification as in forms Nos. 151, etc.]

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No. 899.

**Complaint for One Vessel Running Foul of Another.**

[Title of cause.]

The plaintiff complains of the defendant, and alleges,

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<sup>2</sup> See *Clark v. Foot* (8 Johns. Rep., 421, 422), *Stuart v. Hawley* (22 Barb., 619), *Calkins v. Barger* (44 id., 424), *Hays' Administrator v. Miller* (6 Hun, 320), *Webb v. The Rome, Watertown and Ogdensburg R. R. Co.* (49 N. Y., 420), *Losee v. Buchanan* (51 id., 476), *Hogle v. N. Y. C. and H. R. R. Co.* (28 Hun, 363), *Reiper v. Nichols* (31 id., 491), *Ryan v. N. Y. C. R. R. Co.* (35 N. Y., 210; aff'd S. C., 4 Wall. [U. S.], 244), *Hinchey v. Manhattan R. Co.* (18 Week. Dig., 273), *Heeg v. Licht* (80 N. Y., 579; rev'g S. C., 16 Hun, 257); *Ferguson v. Hubbell* (97 N. Y., 507), *O'Neill v. N. Y.,*

Ontario, etc., R. Co. (115 id., 579), v. Fitchburg R. Co. (46 State Rep., 796; Van Fleet v. N. Y. Central, etc., R. Co. (27 State Rep., 76), Eighme v. Rome, Watertown, etc., R. Co. (32 id., 757), Cosulich v. Standard Oil Co. (122 N. Y., 118), Townley v. Fall Brook Coal Co. (35 State Rep., 975), Collins v. N. Y. Central, etc., R. Co. (33 id., 569), Brummit v. Furness (27 N. E. Rep., 656), Van Nostrand v. Walkill R. Co. (46 State Rep., 456), Loeber v. Roberts (42 id., 687), Sugarman v. Manhattan Elevated R. Co. (42 id., 30), Martin v. N. Y.; Ontario and Western R. Co. (62 Hun, 181), Babcock

v. Fitchburg R. Co. (46 State Rep., 796; 67 Hun, 469; 140 N.Y., 308); L. 1892, ch. 692, Haskell v. Northern Adirondack Co. (49 State Rep., 483), Genung v. N. Y. and N. E. R. Co. (50 id., 511), Wheeler v. N.Y. Central, etc., R. Co. (67 Hun, 639), Frace v. N. Y., Lake Erie, etc., R. Co. (68 id., 325; 143 N. Y., 182); Flinn v. N. Y. Central, etc., R. Co. (142 N. Y., 11), Phoenix Ins. Co. v. N. Y. Central, etc., R. Co. (75 Hun, 216), Piper v. N. Y. Central, etc., R. Co. (76 id., 44), Frier v. D. and H. Canal Co. (86 Hun, 464).

<sup>3</sup> See note 2 to form No. 122.



that heretofore, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said plaintiff was possessed, as of his own goods and chattels, of a certain sloop [*or schooner, or ship, etc.*], called the Eagle, together with her tackle, apparel, furniture, boats, etc., of a great value, to wit: of the value of \_\_\_\_\_ dollars, and she then having also on board divers goods and chattels [of a large value, to wit: of the value of \_\_\_\_\_ dollars] for freight, to be conveyed and navigated from, etc., to, etc., on the [Hudson river], and which said last mentioned goods and chattels belonged to divers other persons, to wit [name them], and were so put on board and intrusted by the said owners thereof to be so conveyed by the said plaintiff as a common carrier.

That the said defendants were then possessed of another vessel [*or steamboat, or sloop, etc.*], called the Novelty, and which said vessel also navigated the said river, and was then proceeding on the said river in a southerly direction, while the said vessel of the said plaintiff was then proceeding thereon in a northerly direction.

That the said defendant, well-knowing the premises, to wit: on, etc., at, etc., so negligently, carelessly and unskillfully did, by himself and his servants, manage, conduct and navigate the said vessel of the said defendant, that by and through the mere negligence, mismanagement and carelessness of the said defendant and his servants, the said vessel of the said defendant did forcibly, and with great violence, then and there run foul and against the said vessel of the said plaintiff, and then and there [state the injury done, with the particular loss and damage to the vessel and cargo, etc.], to the damage of the plaintiff of \_\_\_\_\_ dollars, for which amount, etc., prayer for judgment.<sup>1</sup>

M. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

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<sup>1</sup> See *Hawkins v. Dutchess and Orange Steamboat Co.* (2 Wend., 452), *Ferry Co. of Brooklyn* (47 N. Y., 176; S. C., 68 N. Y., 385), *Parrott v. Knickerbocker and N. Y. Ice Co.* (46 N. Y., 361; rev'g S. C., 2 Sweeny, 93), *Austin v. New Jersey Steamboat Co.* (43 Co. (59 N. Y., 292), *Hoffman v. Union N. Y., 75), Mailler v. Express Propel-*

### Complaint against an Attorney for Negligently Conducting a Cause to Trial, without Proper Evidence.

[Title of cause.]

The plaintiff complains of defendant and alleges, that before and at the time of the committing of the grievances by the said defendant as hereinafter mentioned, the said plaintiff, at the special instance and request of the said defendant, had retained and employed the said defendant, as an attorney of the Supreme Court of the State of New York, to prosecute and conduct a certain action [for the conversion of personal property] in the same court, by and at the suit of the said plaintiff, against one E. F., for [taking away and converting to his use certain goods and chattels, claimed by him, the said plaintiff, to be his own proper goods and chattels], for certain reasonable fees and reward, to be therefor paid by the said plaintiff to the said defendant; and the said defendant then and there accepted and entered upon such retainer and employment, to wit: at \_\_\_\_\_ [and thereupon it then and there became and was the duty of the said defendant to prosecute and conduct the said action in a proper, skillful and diligent manner].

That the said defendant not regarding such his duty or his retainer and employment, but contriving and intending to injure and aggrieve the said plaintiff, in this behalf, did not nor would prosecute or conduct the said action in a proper, skillful or diligent manner, and, on the contrary thereof, prosecuted and conducted the same action to trial in so improper, unskillful and negligent a manner [in not having a certain instrument before then prepared by the said defendant, and purporting to be a sale and assignment of the said goods and chattels by the said E. F. to the said plaintiff, so that the same might have been given in evidence on the said trial of said action], that the said plaintiff by the neglect and default of the said defendant in that behalf

ler line (61 N. Y., 312), Cooper v. Eastern Transportation Co. (75 N. Y., 116), Silliman v. Lewis (49 N. Y., 379), Perry v. Lansing (17 Hun, 34), Lambert v. Staten Island R. R. Co. (70 N. Y., 104), Erwin v. Neversink Steamboat Co. (88 N. Y., 184); Chase v. Belden (21 W. D., 99), Jung v. Starin (12 Misc., 362), Flannery v. Cornell Steamboat Co. (89 Hun,

135), Fitzsimmons v. McConnell (27 State Rep. 590), Case v. Perew (46 Hun, 57), Bedell v. Kirk (44 State Rep., 483), Feeney v. Minnisceongo Towing Co. (50 State Rep., 252), New York Harbor Towboat Co. v. N. Y., Lake Erie & W. R. Co. (76 Hun, 258), Young v. Staten Island R. T. R. Co. (8 Misc., 460).

<sup>2</sup>See note 2 to form No. 122.



was [hindered and prevented from giving the same instrument in evidence upon the trial of the said action], and by reason thereof was afterwards, to wit: on, etc. [day of nonsuit, or about it], at, etc., compelled to suffer himself, the said plaintiff, to be nonsuited in the said action, whereby he, the said plaintiff, was not only hindered and prevented from recovering his said damages from the said E. F. by reason of [his taking away and converting the said goods and chattels], as aforesaid, but hath also been forced and obliged to pay and hath paid to the said E. F. a large sum of money, to wit: the sum of ——— dollars for his costs and charges in and about the defense of the said action, and hath also paid to the said defendant another large sum of money, to wit: the sum of ——— dollars for his costs and charges for the prosecution and conduct of the said action.

Wherefore, etc. [prayer for judgment].<sup>1</sup>

M. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

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No. 901.

**Complaint against Attorney for Negligently Defending an Action.**

[Title of cause.]

The plaintiff complains of the defendant and alleges, that at the time of the making of the promise and undertaking of said defendant, hereinafter mentioned, a certain action had been commenced and prosecuted and was then depending, by and at the suit of one J. K. against the said plaintiff, in the [Supreme Court] for [the recovery of ——— dollars, claimed to be due and owing to said J. K. from said

<sup>1</sup>As to the rules governing this class of actions, see *Von Wallhofen v. Newcombe* (10 Hun, 236, and cases there cited), *Purves v. Landell* (12 C. & F., 91), *Hart v. Frame* (6 C. & F., 193; 3 Jur., 547), *Hill v. Finney* (4 F. & F., 616), *Kemp v. Burt* (1 N. & M., 262; 4 Barn. & Ad., 424), *Mercer v. King* (1 F. & F., 490), *Reece v. Rigby* (4 B. & A., 202), *Swannell v. Ellis* (8 Moore, 340; 1 Bing., 347), *Godefroy v. Jay* (7 Bing., 413; 5 M. & P., 284), *Hatch v.*

*Lewis* 2 F. & F., 407), *Looff v. Lawton* (20 Week. Dig., 309; 97 N. Y., 478), *Stout v. Smith* (31 A. L. J., 411; 93 N. Y., 25), *Case v. Hotchkiss* (3 Keyes, 334), *Bowman v. Tallman* (40 How. Pr., 1; aff'g S. C., 2 Rob., 385), *Cole v. Roby* (33 State Rep., 734), *Grinnell v. Sherman* (38 State Rep., 587), *Barney v. Fuller* (39 id., 926), *Maher v. Hymon* (43 id., 540), *Carter v. Tallcot* (36 Hun, 393).

plaintiff], and thereupon he employed and retained the said defendant, he being then an attorney of the said court, as such attorney to defend the said action for the said plaintiff, and in consideration of such employment the said defendant undertook and then and there faithfully promised the said plaintiff to defend the said action for him, the said plaintiff, in a proper and careful manner; and, although such proceedings were thereupon had in the said action, that afterwards, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, it became and was the duty of the said defendant, under and by virtue of his said retainer and his said promise and undertaking, to file or deliver a proper and sufficient answer to the complaint therein, nevertheless the said defendant, not regarding his said promise and undertaking, but contriving, etc., to injure the said plaintiff in this behalf, did not nor would, when it was his duty so to do as aforesaid, file or deliver a proper or sufficient answer to the said complaint, but, on the contrary thereof, wholly omitted and neglected so to do, and by reason thereof, and by and through the default and neglect of the said defendant in that behalf, afterwards, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, judgment by default was obtained in the said action against him, the said plaintiff, by which it was adjudged, in and by the said court, in the said action, that the said J. K. should recover against the said plaintiff a large sum of money, to wit: the sum of \_\_\_\_\_ dollars; and the said plaintiff was afterwards, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, forced and obliged to pay, and did pay to the said J. K., the said sum of money so recovered by him as aforesaid, and also by means of the premises, he, the said plaintiff, was put to divers costs and charges in and about his endeavoring to defend the said action, amounting in the whole to a large sum of money, to wit: \_\_\_\_\_ dollars, and hath lost and been deprived of the means of recovering the same from the said J. K.

Wherefore, etc. [prayer for judgment].<sup>1</sup>

M. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> See note 1 to form No. 900.

<sup>2</sup> See note 2 to form No. 122.

No. 902.

**Complaint Against an Attorney for Negligence in Investigating Title for a Purchase of Property.**

[Title of cause.]

The plaintiff complains of the defendant, and alleges, that on the ——— day of ———, 18—, the said plaintiff had contracted and agreed with certain persons, to wit: E. F. and G. H., for the purchase from them of certain lands and tenements, with the appurtenances, situate in the county of ———, in fee simple, at and for a large sum of money, to wit: ——— dollars, to be paid for the same, which said lands and tenements, with the appurtenances, the said E. F. and G. H. then assumed to have sufficient power to sell and convey to the said plaintiff in fee simple; and thereupon, heretofore, to wit: on the day and year aforesaid, the said plaintiff [at the special instance and request of the said defendant], retained and employed the said defendant as an attorney, to ascertain the title of the said E. F. and G. H. to the said lands and tenements, with the appurtenances, and to cause and procure an estate and interest therein, in fee simple, to be duly conveyed by the said E. F. and G. H. to the said plaintiff, for reasonable fees, and reward to the said defendant in that behalf, in a reasonable time then next following, and the said defendant then accepted and entered upon such retainer and employment.

That although a reasonable time for the said defendant's causing and procuring a good and sufficient title as aforesaid hath long since elapsed, yet the said defendant, not regarding his duty or his said retainer and employment, but contriving and intending to injure, aggrieve, harrass and oppress the said plaintiff in this behalf, did not, nor would use due endeavors to cause or procure a good and sufficient title to the fee simple of and in the said lands, tenements and premises, with the appurtenances, to be conveyed to the said plaintiff within such reasonable time as aforesaid, or at any time since, but hath hitherto wholly neglected and refused so to do; and afterwards, to wit, on the ——— day of ———, 18—, wrongfully and injuri-

ously caused and procured the said plaintiff to pay to the said E. F. and G. H. a large sum of money, to wit, the sum of ———, as and for the purchase money of the said lands, tenements and premises, with the appurtenances, without having a good and sufficient title to the fee simple of and in the same, conveyed to the said plaintiff, and by reason of the neglect and improper conduct of the said defendant in that behalf, the said plaintiff hath not obtained a good or sufficient title to the said tenements and premises with the appurtenances in fee simple, and thereby hath been hindered and prevented from selling and disposing thereof; and the said lands tenements and premises, with the appurtenances, have become and are of little use or value to the said plaintiff, to the damage of the said plaintiff of ——— dollars, for which amount, etc. [prayer for judgment].<sup>1</sup>

M. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

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No. 903.

**Complaint Against Attorney for Negligence in Investigating Title for the Purpose of a Loan Thereupon.**

[Title of cause.]

The plaintiff complains of the defendant, and alleges, that heretofore, and on or about the ——— day of ———, 18—, one H. C. was desirous of obtaining from the said plaintiff a loan of ——— dollars, upon interest, at and after the rate of six per cent per annum, and as a security for the repayment thereof, and interest thereupon as aforesaid, to the said plaintiff, proposed to encumber certain lands, tenements and premises situated in the county of

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That the plaintiff thereupon, to wit, on the day and year aforesaid, employed and retained the said defendant as an attorney for fees and reward to him in that behalf, to ascertain

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<sup>1</sup> See note 1 to form No. 900, and see *Elder v. Bogardus*, Hill & D. Supp., 116.

<sup>2</sup> See note 2 to form No. 122.

the title of the said H. C. to the said lands and premises, and to take due and proper care that the same should be a sufficient security for the repayment of the said sum of money and interest, and the said defendant accepted and entered upon such retainer and employment.

That the said defendant, not regarding his duty or his said retainer and employment, but contriving and intending to injure and aggrieve the plaintiff in this behalf, did not, nor would, take due and proper care to ascertain the title of the said H. C. to the said lands, tenements and premises, nor take due and proper care that the same should be a sufficient security for the repayment of the said sum and interest.

And the said plaintiff further saith, that he, confiding in the said performance of the said duty of the said defendant, afterwards, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, did lend and advance to the said H. C. the said sum of \_\_\_\_\_ dollars, upon the security of certain lands, tenements and premises in the county of \_\_\_\_\_ aforesaid, as and for a sufficient security in that behalf; and the said defendant, in pursuance of his said retainer, caused to be prepared and executed a certain indenture and certain securities relating to the said supposed estate and interest of the said H. C. in the said last mentioned lands, tenements and premises, as and for such sufficient security for the repayment of the said sum of \_\_\_\_\_ dollars, and interest as aforesaid, the same being then and there, by reason of the said defendant's negligence, carelessness, unskillfulness and improper conduct in the premises, a bad and insufficient security for the repayment of the said sum of \_\_\_\_\_ dollars and interest as aforesaid, to the damage of the plaintiff of \_\_\_\_\_ dollars, for which, etc. [prayer for judgment].<sup>1</sup>

M. F., *Plaintiff's Attorney*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> See note 1 to form No. 900, and note 1 to form No. 902.

<sup>2</sup> See note 2 to form No. 122.

**Complaint against Physician and Surgeon for Malpractice.**

[Title of cause.]

The plaintiff in this action complains of the defendant herein, and alleges, that at D———, in the county of ——, and State of New York, on or about the —— day of ——, she, the said plaintiff, accidentally fell from a horse and broke or dislocated her left arm at the elbow joint by means of such fall, and that on that day, and immediately after receiving said injury, she employed the defendant for a reasonable compensation, to be paid by her to him, to set and reduce the said fracture or dislocation of said arm, and to attend to the same, and to use his care, skill and diligence in regard thereto, until the said arm should be restored and cured of its injury.

That at the time of such employment of the defendant by her, the plaintiff, the defendant was a practicing physician and surgeon, and held himself out as, and represented himself to be, to her and to the public, a scientific, skillful and competent physician and surgeon, and as fully qualified for the practice of both medicine and surgery, and that he, the defendant, thus employed by the plaintiff, undertook to treat and care for the plaintiff and her said arm, carefully and skillfully; but, nevertheless, the defendant, disregarding and neglecting his duty in that regard, did negligently, carelessly, unskillfully and ignorantly set and treat said arm of said plaintiff, and negligently and unskillfully failed to properly reduce, set or treat said fracture or dislocation of said arm, and carelessly and unskillfully neglected to properly support the said arm with bandages and splints, and carelessly and unskillfully left the said arm without having applied bandages or splints thereto, and so negligently, carelessly and unskillfully treated said arm that, by reason of said carelessness and unskillfulness, the said arm became greatly swollen and inflamed, and she was put to great pain and suffering in consequence thereof, and her general health was, and still remains, thereby impaired greatly, and said arm was, by said careless, negligent and unskillful treatment thereof, and by the defend-

ant's neglect thereof, rendered, and still remains, stiff and deformed and almost totally useless, and she, the said plaintiff, was thereby compelled to undergo and submit to and was subjected to the expense and pain of a severe surgical operation to partially remedy the said results of said careless, negligent and unskillful treatment, which she, the plaintiff, did submit to and undergo at the hands of the defendant, and endured and suffered great pain and distress thereunder, and she was subjected to great suffering and anguish, and is still thereby subject to great pain, distress, suffering and inconvenience, and plaintiff alleges that she has been thereby, to wit: by the ignorant, unskillful, careless and negligent treatment by the defendant, greatly damaged and injured and crippled and deformed.

Wherefore the plaintiff demands judgment for \$10,000, besides the costs of this action.<sup>1</sup>

S. D. F., *Plaintiff's Attorney.*

[Office address.²]

[Verification as in forms Nos. 151, etc.]

No. 905.

### Complaint against an Inn-keeper for Negligence.

[Title of cause.]

The plaintiff complains against the defendant and alleges, that the said defendant before and at the time of the loss hereinafter mentioned was and from thence hitherto hath been and still is an inn-keeper, and as such inn-keeper he, the said defendant, hath, for and during all that time kept, and still doth keep, a certain common inn for the reception, lodging and entertainment of travelers, commonly called or

<sup>1</sup> It is not necessary in order to sustain an action for malpractice against a surgeon, that there should be proof of gross culpability on his part; having engaged in the performance of services requiring skill and care, he is liable for a want of the required skill, or for an omission to exercise proper care. (*Carpenter v. Blake*, 75 N. Y., 12; aff'g S. C., 10 Hun, 358.)

See, also, *Carpenter v. Blake* (50 N. Y., 696; rev'g S. C., 60 Barb., 488), *Baird v. Gillett* (47 N. Y., 186), *Keily v. Colton* (1 City Ct., 439), *Blair v. Bartlett* (75 N. Y., 150), *Carpenter v.*

*Blake* (2 Lans. 206). The above form is substantially the complaint in *Carpenter v. Blake* (75 N. Y., 12). See, also, *Deeves v. Lockhart* (21 W. D., 185), *Wells v. World's Dispensary Medical Ass'n* (9 State Rep., 452); 27 Abb. N. C., 54, note; *Gedney v. Kingsley* (41 State Rep., 794), *Du Bois v. Decker* (130 N. Y., 325), *Rowe v. Lent* (42 State Rep., 483), *Winner v. Lathrop* (67 Hun, 511), *Schopen v. Ransom* (83 Hun, 234), *Degnan v. Ransom* (id., 267), *Barton v. Govan* (40 A. L. J., 498; 116 N. Y., 659; aff'g S. C., 42 Hun, 655).

<sup>2</sup> See note 2 to form No. 122.

known by the name or sign of \_\_\_\_\_, situate and being at \_\_\_\_\_.

That the said defendant so being such inn-keeper and so keeping the said inn as aforesaid, the said plaintiff [*or* his servant, "one J. K., the servant of the said plaintiff"], on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, put up and was then and there received into said inn as a traveler by the said defendant, and then and there brought into the said inn a certain box, containing certain wearing apparel, goods and chattels, to wit, etc. [enumerate chattels], of him, the said plaintiff, of great value, to wit: of the value of \_\_\_\_\_ dollars, and which said box and its contents aforesaid were then and from thence, until and at the time of the loss hereinafter mentioned, within the said inn, and that the said plaintiff [*or* the said J. K., the servant of the said plaintiff], during all that time abided as a traveler therein.<sup>1</sup>

That the said defendant did not keep the said box and its contents aforesaid, so brought into and so being in the said inn as aforesaid, safely and without diminution or loss, but on the contrary thereof, the said defendant and his servants, so negligently and carelessly behaved and conducted themselves in that behalf, that afterwards, and whilst the said plaintiff [*or* the said J. K., the servant of said plaintiff] so abided in the said inn as aforesaid, to wit: on the same day and year aforesaid, the said box and its contents aforesaid were, by and through the mere carelessness, negligence and default of the said C. D. and his servants in that behalf, wrongfully and unjustly taken and carried away by some person or persons to the said plaintiff [*or* to the said plaintiff and J. K., his servant] as yet unknown, and were and still are thereby wholly lost to the said plaintiff.<sup>1</sup>

Wherefore, etc. [prayer for judgment].

M. F., *Plaintiff's Attorney*.

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> To enforce the liability the relation of inn-keeper and guest must be established. (Ingallsbee v. Wood, 33 N. Y., 577; Mowers v. Fethers, 61 id., 34; rev'g S. C., 6 Lans., 112.)

When the relation of inn-keeper and guest is established, the inn-keeper is liable as an insurer of property entrusted to him by the guest, unless the loss

is due to the negligence or fraud of the guest, or to the act of God, or the public enemy. (Hulett v. Swift, 33 N. Y., 571; Ramaley v. Leland, 43 id., 539.)

As to what constitutes the relation, see above cases and Hancock v. Rand (94 N. Y., 1; S. C., 18 Week. Dig., 76), Converse v. Walker (30 Hun, 596), Kopper v. Willis (9 Daly, 460), Lewis v.



## No. 906.

## Complaint against a Bailee for Negligence.

[Title of cause.]

The plaintiff complains against the defendant and alleges, that the said plaintiff heretofore, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_, at the special instance

Hitchcock (10 Fed. R., 4), Korn v. Schedler (15 Week. Dig., 468), Gostenhofer v. Clair (13 Week. Dig., 502), Plum v. Jarnier (3 Law Bul., 36), Hancock v. Rand (94 N. Y., 1; aff'g S. C., 17 Hun, 279), Classen v. Leopold (2 Sweeny, 705), Coykendall v. Eaton (55 Barb., 188), Willard v. Reinhardt (2 E. D. Smith, 148), Gastenhoefer v. Clair (10 Daly, 265), Toub v. Schmidt (60 Hun, 409).

As to liability under statutes of 1855, ch. 421, and 1866, ch. 658, see Purvis v. Coleman (21 N. Y., 111), Hyatt v. Taylor (42 N. Y., 258), Ramaley v. Leland (*supra*), Wilkins v. Earle (44 N. Y., 172), Bendetson v. French (46 N. Y., 266), Rosenplaenter v. Roessle (54 N. Y., 262), Faucett v. Nichols (64 N. Y., 377).

The mere fact that a guest at a hotel takes the key to his room, but omits to lock the door, does not constitute such negligence on his part as will relieve the landlord from liability for goods stolen from the room while the door remains unlocked. (Classen v. Leopold, 2 Sweeny, 705.)

Where a guest at an inn is notified that he must put his baggage in a particular place, that it may be safely kept, and he neglects to do so, the inn-keeper is not liable in case of its loss. (Wilson v. Halpin, 30 How. Pr., 124; S. C., 1 Daly, 496.) An inn-keeper's liability for the baggage of a guest continues for such a reasonable time after the latter pays his bill and leaves the hotel as may be necessary to secure its removal. (Maxwell v. Gerard, 84 Hun, 537.)

In an action against an inn-keeper to recover the value of property lost by a guest, proof of the loss or larceny of the goods from the room in which he lodged is sufficient proof of carelessness on the part of the defendants. (Gile v. Libby, 36 Barb., 70.)

The inn-keeper is answerable to his guest for the dishonesty of a fellow guest. (Id.) See, also, Jacobi v. Haynes (14 Misc. 15).

An action lies against the inn-keeper for goods lost or stolen from the inn, without proof of negligence. (Clute v. Wiggins, 14 Johns., 175; McDonald v. Edgerton, 5 Barb., 560.)

Further, as to negligence on the part of guest, see Purvis v. Coleman (*supra*), Fowler v. Dorlon (24 Barb., 384.)

As to what constitutes an inn, see Wintermute v. Clarke (5 Sandf., 242), Taylor v. Monnot (4 Duer, 116; S. C., 1 Abb., 325), Carpenter v. Taylor (1 Hilt., 193).

A demand before suit is not necessary, where the goods are lost. (McDonald v. Edgerton (*supra*), Willard v. Reinhardt (*supra*).

As to what property the inn-keeper is liable for independently of the statutes, see Taylor v. Monnot (*supra*), Needles v. Howard (1 E. D. Smith, 54).

See further, ch. 227 of Laws of 1883, amending ch. 421 of 1855, by which the liability for loss of baggage, etc., exceeding the sum of \$500, is made to depend upon the question of the negligence of the inn-keeper, who must, however, establish as to such property the absence of negligence on his part. See, also, ch. 284 of Laws of 1892.

<sup>2</sup> See note 2 to form No. 122.

and request of the said defendant, caused to be delivered to him, the said defendant [a certain sideboard], of him, the said plaintiff, of great value, to wit: of the value of \_\_\_\_\_ dollars, to be taken care of and safely and securely kept by the said defendant, for the said plaintiff, and he, the said defendant, undertook and then and there agreed with the said plaintiff, to take due and proper care of the said [sideboard] for the said plaintiff, and to redeliver the same to him, the said plaintiff, to wit: at \_\_\_\_\_; yet the said defendant, not regarding his duty in that behalf, did not, nor would, take due and proper care of the said [sideboard], for the said plaintiff; nor did, nor would, when he was so requested as aforesaid, or at any time before or afterwards, redeliver the same to the said plaintiff, but, on the contrary thereof, he, the said defendant, so carelessly behaved and conducted himself with respect to the said sideboard, and took so little and such bad care thereof, that by and through the carelessness, negligence and improper conduct of the said defendant, the said [sideboard] became and was wholly lost to the said plaintiff, to the damage of the plaintiff of \_\_\_\_\_, for which, etc. [prayer for judgment].

M. F., *Plaintiff's Attorney.*

[Office address.<sup>1</sup>]

[Verification as in forms Nos. 151, etc.]

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No. 907.

**Complaint against the Owner of a Coach for Negligence of Himself or of His Servant, in Driving the Same against the Plaintiff's Chaise.**

[Title of cause.]

The complaint of the plaintiff respectfully shows, that heretofore, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said plaintiff, at \_\_\_\_\_, was lawfully possessed of a certain carriage, to wit [a chaise] of great value, to wit: of the value of \_\_\_\_\_ dollars, and of a certain horse [or divers, to wit, \_\_\_\_\_ horses], then and there drawing the same, and in which said carriage the said plaintiff was

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<sup>1</sup> See note 2 to form No. 122.

then riding in and along a certain public and common highway, and the said defendant was also then and there possessed of a certain other carriage, and of a certain other horse [or divers, to wit, ———— horses] drawing the same, and which said carriage, and horses of the said defendant were then and there under the care, government and direction of [a certain, then servant of] the said defendant, who was then and there driving the same in and along the said highway, to wit, at ————. Nevertheless the said defendant then and there [by his said servant] so carelessly and improperly drove, governed and directed his said carriage and horses, that by and through the carelessness, negligence and improper conduct of the said defendant [by his said servant], in that behalf [one of the hind wheels of], the said carriage of the said defendant then and there ran and struck with great force and violence upon and against the said carriage of the said plaintiff, and thereby then and there crushed, broke to pieces, damaged and destroyed the same [and one of the wheels, and the splinter-bar and one of the shafts thereof], and the said carriage of the said plaintiff thereby then and there became and was rendered of no use or value to the said plaintiff, and thereby the said plaintiff was then and there cast out and thrown with great force and violence from and off his said carriage to and upon the ground, and thereby and by means of the several premises aforesaid, the said plaintiff was then and there greatly bruised, hurt and wounded, and became and was sick, sore, lame and disordered, and so remained and continued for a long space of time, to wit: hitherto, during all which time the said plaintiff suffered great pain and was hindered and prevented from performing and transacting his lawful affairs and business by him during that time to be done and transacted; and also by means of the premises, was forced and obliged to pay, lay out and expend, and hath necessarily paid, laid out and expended, divers large sums of money, to wit: the sum of ———— dollars, in and about endeavoring to be healed and cured of his said wounds, hurts and bruises, occasioned as aforesaid; and also by means of the premises, the said plaintiff hath paid, laid out and expended a large sum of money, to wit: the

sum of ——— dollars, in and about the repairing of the said chaise so damaged as aforesaid.

Wherefore, etc. [prayer for judgment].

M. F., *Plaintiff's Attorney.*

[Office address.¹]

[Verification as in forms Nos. 151, etc.]

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No. 908.

**Complaint in Action for Slander, Imputing Unchastity to a Woman.**

(Code Civ Pro., § 1906.)

[Title of cause.]

The plaintiff by her complaint says, that this defendant, during the months of March and February, 1873, on divers days contriving, and wickedly and maliciously intending, to injure the plaintiff in her good name, fame and credit, and to bring her into public scandal, infamy and disgrace, with and amongst all her neighbors, and other good and worthy citizens, and to cause it to be suspected and believed by those neighbors and citizens that the plaintiff had been and was guilty of the offenses and misconduct hereinafter mentioned, to have been made and charged upon her by said defendant, and to vex, harass and oppress her, the said defendant, did, at the time aforesaid, at Poughkeepsie, in a certain discourse which the defendant then and there had in the presence and hearing of divers good and worthy citizens, falsely and maliciously speak and declare of and concerning the said plaintiff, and of and concerning the said plaintiff in the way of her profession and business, then false and scandalous, malicious and defamatory words following, that is to say: Miss D. is a common street runner; that men and boys follow her through the streets; that Miss D. is a common prostitute, and that you put a common whore in a school-house full of boys and what can any one expect to do with them; she is a common prostitute; she is a common whore, and runs with men and boys, and you put her, a common whore, in the school-house full of boys;

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¹ See note 2 to form No. 122.

she is a common street runner, and boys follow her through the streets as she passes along.

By means of the committing of which said several grievances, by the said defendant as aforesaid, the said plaintiff has been and still is greatly injured in her good name and credit, and also greatly injured in her profession and business, and brought into public scandal, infamy and disgrace, with and amongst all her neighbors and other good and worthy citizens, to the damage of the plaintiff of \$1,000.

Wherefore, etc. [prayer for judgment].<sup>1</sup>

G. W., *Plaintiff's Attorney.*

[Office address.]

[Verification as in forms Nos. 151, etc.]

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No. 909.

**Complaint in Action for Slander, General Form, for Words Actionable in Themselves.**

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that the plaintiff always was and is a good, true and honest citizen, and never was guilty of any of the crimes hereinafter laid to his charge.

That the said defendant knowing the premises, but contriving and maliciously intending to injure, defame and slander the said plaintiff in his good name, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_, [†] in a certain discourse which the said defendant then and there had [with the said plaintiff], in presence and hearing of good and worthy persons, and citizens of this State, [\*] to, of and concerning the said plaintiff, these false, scandalous and malicious words did speak, publish and declare, to wit: [“you (the said plaintiff meaning) are a robber; you (the said plaintiff meaning) are a damned robber; I (the said defendant meaning) believe you are a robber and a thief;

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<sup>1</sup> The above form of complaint is from *Distin v. Rose* (69 N. Y., 122; aff'g S. C., 7 Hun, 83).

See notes to next form, No. 909, and see *Doe v. Roe* (32 Hun, 628), *Blanch-*

ard v. Tulip (32 Hun, 638), *Sturges v. Wiltsie* (19 Week. Dig., 266 [Sup. Ct., Gen. Tm.]), *Cowell v. Day* (18 Week. Dig., 97 [Sup. Ct., Gen. Tm.]).

<sup>2</sup> See note 2 to form No. 122.

you (the said plaintiff meaning) are a counterfeiter (meaning that the said plaintiff had been guilty of counterfeiting money, or some evidence of debt, or some paper executed for a valuable consideration); I (the said defendant meaning) believe you are a counterfeiter'''] [*or set forth in like manner the other slanderous words, e. g., you (meaning the said plaintiff) are perjured*].

That by reason of the speaking, publishing and uttering of which said false, scandalous and malicious words the said plaintiff is greatly prejudiced in his good name, fame and reputation, and also greatly injured in his profession and business [set forth special damage, if any],<sup>1</sup> wherefore the said plaintiff says that he is injured, and has sustained damages to the amount of [one thousand] dollars.<sup>2</sup>

Wherefore the plaintiff demands [insert prayer for judgment.]

F. W., *Plaintiff's Attorney.*

[Office address.]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> Special damage is only necessary to be averred (in order to sustain the action) where it constitutes in part the cause of action. In other words, where the right to maintain the action depends upon the fact that the damage has been sustained. (*Fagen v. Davison*, 2 Duer, 153, citing *Linden v. Graham*, 1 id., 670; *Kendall v. Stone*, 1 Selden, 14.) But no evidence can be received in an action of slander, of any loss or injury which the plaintiff has sustained by the speaking of the words, unless it be specially stated in the complaint, and this rule applies equally to the case where the special damage is the gist of the action and where the words are actionable, *per se*. (*Hallock v. Miller*, 2 Barb., 630.)

In the latter case, where no special damage is averred, the law implies damages, the extent of which is to be judged of by the jury from the facts proved, the circumstances and aggravation attending the uttering of the

slanderous words. (*Herrick v. Lapham*, 10 Johns., 231.)

<sup>2</sup> It is not necessary, in an action for libel or slander, to state, in the complaint, any extrinsic fact, for the purpose of showing the application to the plaintiff, of the defamatory matter; but the plaintiff may state, generally, that it was published or spoken concerning him; and if that allegation is controverted, the plaintiff must establish it on the trial. In such an action, the defendant may prove mitigating circumstances, notwithstanding that he has pleaded or attempted to prove a justification. (Code Civ. Pro., § 535.)

Where the answer alleges in justification the truth of the words spoken, it is not error to refuse to charge, as matter of law, that the answer cannot be considered by the jury to enhance the damages. Notwithstanding the change effected by the Code, in allowing matters to be adduced in justification, although insufficient for that

## No. 910.

**Statement of Special Damages in Complaint for Slander.**

By means of which said premises the said plaintiff hath been and is greatly injured in his credit and reputation, and brought into public scandal, infamy and disgrace with and amongst all his neighbors, friends and acquaintances, insomuch that divers of those friends and neighbors, and especially A. B., C. D., E. F., etc. [the persons hereinbefore in that behalf named], have wholly refused to permit any intercourse or society with him, or to receive or admit him into their respective houses or company, or to find or provide for him meat, drink or any other benefits and advantages in any manner whatsoever, as they before that time had done, and otherwise would have continued to have

purpose, to be used in mitigation of damages, still, where there is an entire failure to sustain the slander, and the circumstances show that the reiteration in the answer was malicious and without probable cause, for believing it true, it may be considered by the jury on the question of damages; but, it seems, this rule should be confined to cases of bad faith. (*Distin v. Rose*, 69 N. Y., 122; aff'g S. C., 7 Hun, 83.) And see further, as to pleading in action of slander and libel, under above section, *Kelly v. Waterbury* (87 N. Y., 179), *Hamilton v. Eno* (81 N. Y., 116), *Hatfield v. Lasher* (81 N. Y., 246; aff'g S. C., 17 Hun, 23), *Willover v. Hill* (72 N. Y., 36), *Fleischman v. Bennett* (87 N. Y., 231; aff'g S. C., 23 Hun, 200), *Havemeyer v. Fuller* (10 Abb. N. C., 9; 60 How. Pr., 316), *Gunning v. Appleton* (58 How. Pr., 471), *Hallock v. Miller* (2 Barb., 630; 19 W. D., 145); and see *Thomas v. Smith* (75 Hun, 573), *Germ Proof Filter Co. v. Pasteur Filter Co.* (81 id., 49), *Holmes v. Jones* (121 N. Y., 461, rev'g S. C., 50 Hun, 345), *Marx v. Press Publishing Co.* (134 N. Y., 561), *Warner v. Same* (132 id., 181), *Cruikshank v. Gordon* (118 id., 173, aff'g S. C., 48 Hun, 308), *Lanpher v. Clark* (77 Hun, 506), *Carpenter v. Knapp* (74 id., 99), *Rennie v. Ryder* (23 State Rep., 141), *Ward v. Deane* (32 State Rep., 270), *Fitzgerald v. Geils* (84 Hun, 295), *Nealon v. Frishie* (11 Misc., 12).

In an action for slander, where the words are actionable, *per se*, an alle-

gation of malice in the complaint is not necessary. In such an action, if the truth of the words spoken is relied upon as a defense, the particulars must be set forth in the answer. (*Robinson v. Hatch*, 55 How. Pr., 55.)

The defendant may show in mitigation that the words were spoken in the heat of passion, caused by recent provoking conduct on the part of the plaintiff. (*Palmer v. Lang*, 7 Daly, 33.)

As to what words are actionable, *per se*, see *Robertson v. Bennett* (44 N. Y. Super. Ct., 66), *Trimmer v. Hiscock* (27 Hun, 364), *White v. Cheesbro* (16 Week. Dig., 186). And as to cases in which special damages may be recovered, see *Terwilliger v. Wands* (17 N. Y., 54, 59; aff'g S. C., 25 Barb., 313), *Fowles v. Bowen* (30 N. Y., 26), *Bassell v. Elmore* (48 N. Y., 561), *Anonymous* (60 N. Y., 262), *Gideon v. Dwyer* (87 Hun, 246), *Maeske v. Smith* (35 State Rep., 541), *Courtney v. Manheim* (35 id., 125), *Erwin v. Dezell* (64 Hun, 391).

As to bill of particulars in action for slander, see *Gardinier v. Knox* (27 Hun, 500).

The plaintiff should not be allowed to amend his complaint, by increasing his claim for damages, a plea of justification having failed. (*McGuckin v. Sister*, 2 Edm. Sel. Cas., 466.)

As to husband's liability for slander by his wife, under married woman's acts, see *Tait v. Culbertson* (57 Barb., 9), *Norris v. Corkhill* (32 Kans., 409; 31 Alb. Law J., 62).

<sup>3</sup> See note 2 to form No. 122.

done, whereby the said plaintiff hath lost all these valuable benefits and advantages, being to him of great value, to wit: of the value of ——— dollars, and hath been and is greatly reduced and prejudiced in his fortunes and pecuniary circumstances, and obliged to incur a much greater expense in his necessary living and supporting himself, to a large amount, to wit: to the annual amount of ——— dollars than he theretofore had done, and otherwise would have continued to do, and hath been and is greatly impoverished, and all his friends have wholly withdrawn their friendship and acquaintance, to the damage, etc.

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No. 911.

**Complaint for Slanderous Words Indirectly Accusing  
Plaintiff of a Specific Offense.**

As in form No. 909 to [\*], and from thence as follows: Falsely and maliciously spoke and published, of and concerning the said plaintiff, and of and concerning the [theft of certain goods and chattels, to wit: of two spoons and six linen cloths of one E. F. of the value of ———, which had been theretofore feloniously stolen, taken and carried away, to wit: at ———, on or about the ——— day of ———, 18—], the false, etc., words following, that is to say, he [meaning the said plaintiff] had a hand in the affair [meaning the said theft of the said goods and chattels], and thereby then and there meaning that the said plaintiff had been and was guilty of [feloniously stealing, taking and carrying away of the said goods and chattels]; insomuch that divers of these persons, neighbors and citizens, to whom the innocence and integrity of the said plaintiff in the premises were unknown, have, on account of the speaking and publishing of which said several false, malicious and defamatory words [*or* committing of said grievances], by said defendant as aforesaid, from thence hitherto suspected and believed, and still do suspect and believe, the said plaintiff to have been, and to be, a person guilty of [theft] so as aforesaid, charged upon and imputed to him by the said defendant, and have, by reason of the committing of the said grievances by the said defendant as afore-



said, from thence hitherto wholly refused, and still do refuse, to have any transaction, acquaintance or discourse with him, the said plaintiff, as they were before used and accustomed to have, and otherwise would have had, and also by reason of the premises, etc. [here state any special damages that may have arisen to plaintiff in consequence of the slander], and also by means of the premises, the said plaintiff hath been, and is, otherwise much injured and damnified, to the damage of the said plaintiff of \_\_\_\_\_ dollars, for which amount, etc. [prayer for judgment].

[Signature, etc.]

[Verification as in forms Nos. 151, etc.]

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No. 912.

**Complaint for Slander where the words are Spoken Ironically.**

As in form No. 909 to [\*], and from thence as follows: In an ironical manner, falsely and maliciously spoke and published of and concerning the said plaintiff, the ironical, false, scandalous, malicious and defamatory words following, that is to say, he [meaning the said plaintiff], is no thief [thereby then and there meaning that the said plaintiff had been and was a thief, and the said persons and citizens of this State then and there understood that that was the meaning of the said words].

[Conclude as in form No. 909.]

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No. 913.

**Complaint for Slander where it is to be Collected from Question and Answer.**

As in form No. 909 to [\*], and from thence as follows: Of and concerning the said plaintiff and in answer to the following question then and there, in the presence and hearing of the said last mentioned citizens, put by the said plaintiff to the said defendant, that is to say: "What, do you [meaning the said defendant] mean to say I [meaning himself, the said plaintiff] am a sheep stealer?" then and there, in the presence and hearing of the said last mentioned citi-

zens, falsely and maliciously answered, spoke and published, to, and of and concerning the said plaintiff, these false, scandalous, malicious and defamatory words following, that is to say: "Yes, you [meaning the said plaintiff] are," thereby then and there meaning that the said plaintiff had been and was guilty of sheep stealing.

[Conclude as in form No. 909.]

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No. 914.

**Answer Justifying a Charge of Perjury.**

[Title of cause.]

The defendant [further] answering the complaint alleges, that before the speaking and publishing of the said words, of and concerning the plaintiff, as in the said complaint charged, to wit: at a term of a circuit court held at the [city] of ———, in the month of ———, 18—, then and there holden before one of the judges of this court, according to the form of the statute in such case made and provided, a certain issue before then joined in an action brought and prosecuted in this court by and at the suit of one A. B., as plaintiff, against C. D., as defendant, for the supposed breach of certain promises and undertakings, came on to be tried in due form of law, and was then and there tried by a jury of the country in that behalf, duly taken and sworn between the parties aforesaid; and upon such trial of the said issue, this plaintiff appeared as a witness for and on behalf of the said A. B., the plaintiff in the said action, and this plaintiff was then and there in open court, holden as aforesaid, before the said judge thereof, duly sworn and took his corporal oath upon the holy gospel of God, to speak the truth the whole truth and nothing but the truth, touching and concerning the matters in question in the said issue; the said court then and there having sufficient power and authority to administer the said oath to this plaintiff in that behalf; and upon the trial of the said issue it then and there became and was material to ascertain the truth of the matters hereafter stated to have been sworn by this plaintiff.

And this defendant further says, that this plaintiff being so sworn as aforesaid, upon his oath as aforesaid, falsely, willfully, maliciously and corruptly, and by his own act and consent, did depose, swear and give evidence, amongst other things, at and upon the said trial, that [here set forth that part of plaintiff's evidence in which he committed perjury]; whereas, in truth and in fact [here negative the plaintiff's evidence as in an indictment for perjury]; and this plaintiff did thereby in the said court, so holden as aforesaid, upon his said oath upon the trial of the said issue, falsely, wickedly, willfully and corruptly commit willful and corrupt perjury; wherefore this defendant at the several times spoke and published of and concerning the said plaintiff, the said several words in the said complaint mentioned to have been spoken and published by the said defendant, of and concerning this plaintiff, as it was lawful for him to do for the cause aforesaid.<sup>1</sup>

[Signature, etc., as in form No. 909.]

[Verification as in forms Nos. 151, etc.]

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No. 915.

**Complaint for Slandering a Person in His Trade by Calling Him a Rogue, etc.**

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that the said plaintiff, at the time of the committing of the grievances by the said defendant, as hereinafter mentioned, was of good reputation and credit, and was engaged in business as a [merchant] at ———, and has been from thence hitherto, and still is, engaged in said business.

That the said defendant on the ——— day of ———, 18—, contriving, and wickedly and maliciously intending to injure the plaintiff in his good name, fame and credit, and to bring him into public scandal, infamy and disgrace with and amongst all his neighbors and other good and worthy citizens, and to cause it to be suspected and believed by these neighbors and citizens, that the said plaintiff had been and was guilty of the offenses and misconduct hereinafter mentioned to have been made and charged upon him by the

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<sup>1</sup>Spoooner v. Keeler (51 N. Y., 527), Burns v. Monell (26 State Rep., 942).

said defendant, and to vex, harass and oppress the plaintiff, on or about the ——— day of ———, 18—, at ———, in the presence and hearing of divers good and worthy persons, falsely and maliciously spoke and published of and concerning the plaintiff, and of and concerning him in his said trade and business, the false and defamatory words following, that is to say, “he” [meaning the said plaintiff] “is a great rogne, and keeps false books,” etc. [here set out the slanderous words with proper innuendos].

That, by means of the premises, the plaintiff has sustained great loss and damage, and by means thereof divers persons, to wit, A. B. & Co. and C. D. and E. F.,<sup>1</sup> who, respectively, before the time of the committing of the said grievances had been and were customers of, and used and accustomed to deal with the plaintiff in the way of his aforesaid business, to the great profit and advantage of the said plaintiff, have from thence hitherto wholly neglected and refused, and still do neglect and refuse, to continue as such customers, or to deal with the said plaintiff, and [allege any further special damage], and has, by means of the premises, been greatly damaged in reputation and credit, and in his said business otherwise greatly injured and damnified.

Wherefore the plaintiff demands judgment, etc. [insert prayer for judgment].

A. B., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> A plaintiff who brings an action for slander, by which he lost his customers in trade, cannot prove that any persons not named in his declaration left off dealing with him in consequence of the words spoken. (*Hallock v. Miller*, 2 Barb., 630.)

And, it seems, that the customers themselves are the only proper witnesses of the fact, and that their declarations cannot be proved. (*Id.*)

The special damage to support an action for defamatory words, not ac-

tionable in themselves, must result from injury to the plaintiff's reputation, which affects the conduct of others towards him. His mental distress, physical illness and inability to labor, occasioned by the aspersion, are not such natural and legal consequences of the words spoken, as to give an action. (*Terwilliger v. Wands*, 17 N. Y., 54). And see 35 Hun, 622.

See, also, notes to forms Nos. 908, 909; *Gideon v. Dwyer*, 87 Hun, 246.

<sup>2</sup> See note 2 to form No. 122.

No. 916.

**Complaint in Action for Slander of Title.**

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that the said plaintiff was before and at the time of the committing of the grievances by the said defendant hereinafter mentioned, seized in fee [*or* name other estate] of certain premises situated in the town of ———, in the county of ———, described as follows [insert brief description].

That the said plaintiff being so seized of said premises was desirous of selling the same by public auction, and for that purpose caused the said premises to be, and the same were, on the ——— day of ———, 18—, put up and exposed for sale by public auction [by one G. H. as the agent and auctioneer of the said plaintiff].

That the said defendant well knowing the premises, but contriving and falsely and fraudulently intending to injure the said plaintiff, and to cause it to be suspected and believed that he, the said plaintiff, had no title, estate or interest of, in and to the said land, with the appurtenances, and to hinder and prevent the said plaintiff from selling or disposing of the same, and otherwise to injure the plaintiff and put him to expense and trouble, falsely and maliciously caused and procured a certain person, to wit: one W. M. to attend and be present, at and upon said sale, and before the said estate and interest has been sold and disposed of, falsely and maliciously caused and procured the said W. M. to assert and represent, and the said M. N. did then and there accordingly, in the presence and hearing of divers citizens of this State then and there present, of and concerning the plaintiff [and of and concerning the said G. H., so being such auctioneer as aforesaid], and of and concerning the said land and appurtenances and the plaintiff's said estate and interest therein, as follows [stating the words with proper innuendos].

That by means of the committing of said several grievances by the defendant as aforesaid divers of the said citizens, who were present at said sale and who were then and

there about to be and become purchasers of the said land, and especially J. K., who was then and there about to bid for and would otherwise have purchased the same, were then and there prevented from bidding for and becoming the purchasers thereof, and from thence hitherto have wholly declined to purchase the same, and thereby the said plaintiff has not only lost and been deprived of all the emoluments and advantages which he might and would have derived and acquired from the sale thereof, but has been forced to pay and expend large sums of money, to wit: the sum of \_\_\_\_\_ dollars, in and about the said exposure to sale, and the expenses incidental thereto.

Wherefore, etc. [prayer for judgment].<sup>1</sup>

A. M., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

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No. 917.

**Complaint in Action for Libel.**

[Title of cause.]

The plaintiff, in his complaint, says, that this defendant,

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<sup>1</sup> As to action for slander of title to personal property and what must appear to maintain it, see *Like v. McKinstry* (41 Barb., 186; aff'd 4 Keyes, 397; 3 Abb. App. Dec., 62).

It is necessary to name in the complaint in an action for slander of title, whereby the plaintiff was prevented from obtaining a loan upon the mortgage of the property, or from selling it, the person or persons who refused for that cause to loan or purchase. If not named the complaint is demurrable. (*Linden v. Graham*, 1 Duer, 670.)

To maintain an action for slander of title to lands, the words spoken must not only be false, but they must be uttered maliciously, and be followed as a natural and legal consequence by a pecuniary damage to the plaintiff, which must be specially alleged and proved. (*Kendall v. Stone*, 5 N. Y., 14; rev'g S. C., 2 Sandf. S. C. R., 269.)

Where an existing contract of sale was voluntarily annulled by the plaintiff, at the request of the other contracting party based upon the words

spoken by the defendant—*held*, the action could not be maintained; that the damages, if any, were the consequence of the voluntary act of the plaintiff, and not of the words spoken by the defendant. (*Id.*)

To sustain the action, not only specific falsity, but the loss of a purchaser in consequence must be alleged. Delay in consummating the sale is not enough, nor a general depreciation in value. (*Bonanza Development Co. v. Hayes*, 5 Month. L. Bul., 28.)

See further, as to damages recoverable in the action, etc., *Like v. McKinstry (supra)*, *Kendall v. Stone (supra)*, *Childs v. Tuttle* (48 Hun, 228), *Germ Proof Filter Co. v. Pasteur Filter Co.* (81 id., 49), *John W. Lovell Co. v. Houghton* (54 Super. Ct., 60), *Dodge v. Colby* (37 Hun, 515; 108 N. Y., 445), *Brentman v. Note* (3 N. Y. Supp., 420), *Cornwell v. Parke* (52 Hun, 596), *Bonanza Development Co. v. Hayes* (5 Month. Law Bull., 28), *Hastings v. Giles Lithographic Co.* (51 Hun, 364).

on the ——— day of ———, 18—, contriving and wickedly and maliciously intending to injure the plaintiff in his good name, fame and credit, and to bring him into public scandal, infamy and disgrace with and amongst all his neighbors, and other good and worthy citizens, and to cause it to be suspected and believed by those neighbors and citizens, that the said plaintiff had been and was guilty of the offenses and misconduct hereinafter mentioned to have been made and charged upon him by the said defendant, and to vex, harass and oppress him, the said defendant, did, on the ——— day of ——— aforesaid, at ———, [\*] falsely, wickedly and maliciously compose and publish, and cause and procure to be published, in a newspaper called the ———, of and concerning him, the said plaintiff, a false, scandalous and defamatory libel, containing, amongst other things, the false, scandalous, malicious, defamatory and libelous matter following, of and concerning the said plaintiff, that is to say [here set forth the libelous matter with the innuendos, etc.], by means of committing of which said several grievances by the said defendant, the plaintiff hath been, and still is, greatly injured in his good name, fame and credit, and brought into public scandal, infamy and disgrace with and amongst all his neighbors, and other good and worthy citizens [set forth special damages], to the damage of this plaintiff of ——— dollars.

Wherefore plaintiff demands judgment, etc. [prayer for judgment].<sup>1</sup>

M. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> See, generally, as to action of libel and pleadings therein, Woods v. Pangburn (75 N. Y., 495; rev'g S. C., 14 Hun, 540), Daly v. Byrne (77 N. Y., 182), Kelly v. Waterbury (87 id., 179), Hamilton v. Eno (81 id., 116), Hatfield v. Lasher (81 id., 246; aff'g S. C., 17 Hun, 23), Willover v. Hill (72 N. Y., 36), Fleischman v. Bennett (87 id., 231; aff'g S. C., 23 Hun, 200), Wallace v. Bennet (1 Abb. N. C., 478), Bell v. Sun Printing, etc., Co. (42 N. Y. Super. Ct., 567; S. C., 3 Abb. N. C., 157), Havemeyer v. Fuller (10 Abb. N. C., 9; S. C., 60 How. Pr., 316), Gunning v. Appleton (58 How. Pr., 471), Robinson v. Hatch (55 How. Pr., 55), Palmer v. Lang (7 Daly, 33), Robertson v. Bennett (44 N. Y. Super. Ct., 66), Younger v. Duffie (26 Hun, 442),

Purdy v. Rochester Printing Co. (96 N. Y., 372; rev'g S. C., 26 Hun, 206), Brooks v. Harison (91 N. Y., 83), People v. Isaacs (1 N. Y. Crim. R., 148), Lyons v. Townsend (2 Edm. Sel. Cas., 452), Kinney v. Roberts & Co. (26 Hun, 166), Van Aernam v. McCune (32 Hun, 316), Bergmann v. Jones (94 N. Y., 51), Hinman v. Hare (19 Week. Dig., 441 [Sup. Ct., Gen. T.]), Prescott v. Tousey (18 Week. Dig., 468 [N. Y. Super. Ct., Gen. T.]), section 535, Code Civ. Pro., cited in note 1 to form No. 909, and see among other recent cases, Moore v. Francis (121 N. Y., 199), Holmes v. Jones (id., 461), John W. Lovell Co. v. Houghton (116 id., 520), Kingsbury v. Bradstreet Co. (116 N. Y., 211), Woodruff v. Bradstreet Co. (id., 217), Ward v. Deane (32 State

### Complaint for a Libel Containing Distinct Passages of Scandalous Matter.

As in form No. 917 to [\*], and from thence as follows: Falsely, wickedly and maliciously [compose and] publish, and cause and procure to be [composed and] published, of and concerning the said plaintiff [and of and concerning, etc., if any special inducement is to be referred to], a certain false, scandalous, malicious and defamatory libel, in a certain part of which said libel there was and is contained, amongst other things, the false, scandalous and malicious defamatory and libelous matter following, of and concerning the said plaintiff [and of and concerning, etc., if any special inducement to be referred to], that is to say [here set out the libelous paragraph with innuendos as usual, then proceed thus], and in another part of which said libel there was and is contained, amongst other things, the false, scandalous, malicious, defamatory and libelous matter following, of and concerning the said plaintiff [and of and concerning, etc., if any special inducement is to be referred to], that is to say [here set out the libelous paragraph with innuendos as usual], and in part, etc. [so proceeding on to state any other libelous paragraph, and conclude as in form No. 917].

Rep., 270), *Morey v. Morning Journal Asso.* (123 N. Y., 207), *Mattice v. Wilcox* (36 State Rep., 914, aff'd 41 id., 946), *Griebel v. Rochester Printing Co.* (60 Hun, 319), *Marx v. Press Pub. Co.* (134 N. Y., 561, aff'g S. C., 34 State Rep., 316), *Hartman v. Morning Journal Asso.* (46 State Rep., 181), *Witcher v. Jones* (43 id., 151), *Sawyer v. Bennett* (49 id., 774), *Winchell v. Argus Co.* (69 Hun, 154), *Stafford v. Morning Jour. Asso.* (68 id., 467, aff'd 142 N. Y., 598), *O'Shaughnessy v. Morning Jour. Asso.* (71 id., 47), *Mattice v. Wilcox* (id., 485), *Wellman v. Sun Printing, etc., Asso.* (66 id., 331), *Rider v. Rulison* (74 id., 239), *Smith v. Matthews* (6 Misc., 162), *Jesper v. Press Pub. Co.* (76 Hun, 64), *Stokes v. Stokes* (id., 314), *Keene v. Tribune Asso.* (id., 488), *Arrow Steamship Co. v. Bennett* (73 id., 81), *Hatch v. Matthews* (9 Misc., 307, aff'd 85 Hun, 322), *Feely v. Jones* (79 Hun, 18), *Kingsley v. Kingsley* (id., 569), *Holmes v. Jones* (147 N. Y., 59), *Palmer v. Bennett* (83 Hun, 220), *Johnson v. Synett* (89 id., 192), *Hatch v. Matthews* (83 id., 349),

*Turton v. N. Y. Recorder Co.* (144 N. Y., 144), *Youmans v. Paine* (86 Hun, 479), *Link v. Moore* (84 id., 118), *Hussey v. N. Y. Recorder Co.* (39 id., 609), *Hawk v. Am. News Co.* (24 Civ. Pro. R., 255).

An action, civil or criminal, cannot be maintained against a reporter, editor, publisher or proprietor of a newspaper for the publication therein of a fair and true report of any judicial, legislative or other public and official proceedings, without proving actual malice in making the report. (Code Civ. Pro., § 1907.)

The last section does not apply to a libel contained in the heading of the report, or in any other matter added by any person concerned in the publication, or in the report of anything said or done at the time and place of the public and official proceedings, which was not a part thereof. (Id., § 1908.)

See, also, cases cited in notes to form No. 909, as to damages, etc.

<sup>2</sup> See note 2 to form No. 122.



No. 919.

**Same, for a Libel in a Letter.**

[Proceed as in form No. 917 to the statement of the mode of publication, and then as follows:] In the form of a letter, addressed to one A. B., falsely and maliciously, etc. [proceed as in form No. 917].

No. 920.

**Complaint for Criminal Conversation with Plaintiff's Wife.**

[Title of cause.]

The plaintiff complains of the defendant and alleges, that the said defendant contriving and wrongfully and wickedly and unjustly intending to injure the said plaintiff, and to deprive him of the comfort, fellowship and assistance of B., the wife of him, the said plaintiff, and to alienate and destroy her affection for him, the said plaintiff, heretofore and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and on divers other days and times since that day, wrongfully, wickedly and unjustly debauched and carnally knew the said B. being the wife of the said plaintiff, and thereby the affection of the said B. for him, the said plaintiff, was then and there alienated and destroyed, and also by reason of the premises, the said plaintiff hath, hence, hitherto, wholly lost and been deprived of the comfort, fellowship, society, aid and assistance of the said B., his said wife, in his domestic affairs, which the said plaintiff ought to have had and otherwise would have had, and has suffered great distress of mind, to the great damage of the plaintiff of \_\_\_\_\_ dollars.

Wherefore the plaintiff demands, etc. [prayer for judgment].

A. F., *Plaintiff's Attorney.*[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> The plaintiff may recover damages beyond the actual loss of service in an action for seduction of a daughter, for the dishonor to himself and his family and for injured feelings. (Per Gardner, J., *Dain v. Wycoff*, 7 N. Y., 191.)

As to damages in this action, and what evidence may be given in mitigation thereof, see *Smith v. Masten* (15 Wend., 270). *Schorn v. Berry* (63 Hun, 110).

An execution may be issued against the person of the judgment debtor in

No. 921.

**Complaint for Debauching Daughter or Servant of Plaintiff.**

[Title of cause.]

The plaintiff complains of the defendant and says, that the said defendant contriving and unjustly intending to injure the said plaintiff, and to deprive him of the assistance and service of B., the daughter and servant of the said plaintiff, on the ——— day of ———, 18—, and at divers other times since the said ——— day of ———, 18—, at ———, debauched and carnally knew the said B., whereby the said B. became pregnant and sick with child, and so remained and continued for a long space of time, to wit: for the space of nine months then next following, at the expiration whereof the said B. was delivered of the child of which she was pregnant as aforesaid, by means of which said several premises she, the said B., for a long space of time, to wit: for the space of two years, became and was unable to do or perform the necessary affairs and business of the said plaintiff, so being her father and master as aforesaid, and thereby the said plaintiff lost and was deprived of the service of his daughter and servant, and also by means of the said several premises, the said plaintiff was forced and obliged to and necessarily did pay, lay out and expend divers sums of money, amounting to ——— dollars, in and about the care and nursing of the said B., his said daughter and servant, and in and about the delivery of the said child, and suffered great anxiety and distress of body and mind, to the damage of this plaintiff of ——— dollars.

Wherefore the plaintiff demands, etc. [prayer for judgment].<sup>3</sup>

M. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

an action for criminal conversation with the plaintiff's wife. (*Delamater v. Russell*, 4 How. Pr., 234.)

As to form of complaint in this action and bill of particulars therein, see *Tilton v. Beecher* (59 N. Y., 176).

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> An action for the seduction of his daughter, cannot be maintained by the father of an indentured servant against the master by whom she is seduced. In such an action the plaintiff must

No. 922.

**Complaint for Seduction of Plaintiff's Daughter.**

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that before, and at the time of the committing of the grievance hereinafter mentioned, Rebecca, the daughter and servant of the said plaintiff, resided with the said plaintiff, and greatly assisted her in the business of herself and family, yet the said plaintiff, well-knowing the said premises, but contriving, etc., to wit, on the —— day of ——, 18—, at ——, falsely and wrongfully represented to the said Rebecca, that his, the said defendant's former wife, was dead, and that he was then and there unmarried, and then and there falsely and wrongfully induced and persuaded the said Rebecca to marry him, provided she, the said plaintiff, would consent thereto; and in further execution of his said false, wicked and injurious acts hereinafter mentioned, the said defendant did then and there

have the right to the services of the person seduced. (*Dain v. Wyckoff*, 7 N. Y., 191.) But proof that the defendant procured her to be indentured as a servant as a means of affecting the seduction, is an answer to the objection that the plaintiff was not entitled to her services. (*Id.*, 18 N. Y., 45.)

That a step-father cannot maintain the action for the seduction of a step-daughter who has left his house, and is seduced while in the service of a third person, although, before the birth of the child she returns to his house, engages in his service, and is there nursed and attended during her confinement, see *Bartley v. Richtmyer* (4 N. Y., 38); see, also, that case, and cases there cited, and *Mulvehall v. Millward* (11 N. Y., 343), *White v. Nellis* (31 N. Y., 405), *Lipe v. Eisenlerd* (32 N. Y., 229, 729), *Gray v. Durland* (51 N. Y., 424; aff'g S. C., 50 Barb., 100), *Furman v. Van Sise* (56

N. Y., 435), *Certwell v. Hoyt* (6 Hun, 575), *Knight v. Wilcox* (14 N. Y., 413; rev'g S. C., 18 Barb., 212), *Leloup v. Eschause* (2 City Ct. Rep., 55), *Lawrence v. Spence* (99 N. Y., 669, aff'g S. C., 29 Hun, 169), *Lawyer v. Fritcher* (130 N. Y., 239; 14 Law. R. Ann., 700), *Ayer v. Colgrove* (81 Hun, 322), as to the general principles upon which the action may be maintained.

It is no defense to the action, that the illicit connection was had with force and not by consent. (*Lawrence v. Spence* (29 Hun, 169; *Damon v. Moore*, 5 Lans., 454.)

As to damages recoverable in this action, see *Dain v. Wyckoff* (7 N. Y., 191), *Damon v. Moore* (*supra*), *Lipe v. Eisenlerd* (*supra*), *Davidson v. Abbott* (52 Vt., 510; S. C., 36 Am. R., 767), *Savery v. Croke* (52 Wis., 612; S. C., 38 Am. R., 768); *Travis v. Barger* (24 Barb., 614), *Ingerson v. Miller* (47 Barb., 47), *Wandell v. Edwards* (25 Hun, 49S), Code Civ. Pro., §§ 536, 508.

induce and persuade the said plaintiff to give such consent by the like false and wrongful representations as aforesaid, and thereupon, to wit, at ———, on, etc., the said marriage was thereupon had and solemnized by and between the said Rebecca and the said defendant, whereas, in fact and in truth, the lawful wife of the said defendant was then living, to wit, at, etc.; and whereas, also in fact and in truth, the said defendant was not then unmarried, and which the said defendant then and there well knew.

[That the defendant afterwards abandoned the said Rebecca, and left her wholly destitute of support, and still does neglect and refuse to maintain and support her.]

By means whereof the plaintiff has been, and still is, deprived of the service of the said Rebecca, who has been rendered unable to maintain herself or assist the plaintiff.

That the plaintiff has expended divers sums of money, to wit, the sum of ——— dollars, about the nursing and maintaining of the said Rebecca, to the damage, etc.<sup>1</sup>

M. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

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No. 923.

### Complaint for Harboring and Concealing the Plaintiff's Wife.

[Title of cause.]

The plaintiff complains of the defendant and alleges, that heretofore, and on the ——— day of ———, 18—, the said plaintiff's wife, Mary, without his consent, went away from him, and went to the said defendant, who, well knowing the premises, received her and kept and concealed her from the said plaintiff from the day aforesaid until the commencement of this suit, and wholly refused to deliver her to the said plaintiff, or to discover her place of residence; but unlawfully entertained and harbored her during all that time, whereby the said plaintiff was, during all that time and still is deprived of her society, assistance

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The action is on the case in tort, and cannot be maintained against the representatives of the wrong-doer. (*Holiday v. Parker*, 23 Hun, 71.)

<sup>1</sup> See *Borden v. Fitch* (15 Johns., 121), and see note 3 to form No. 921.

<sup>2</sup> See note 2 to form No. 122.

and service in and about her domestic affairs, to the damage, etc.<sup>1</sup>

M. N., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

No. 924.

**Complaint for Keeping Dog Used to Bite Mankind.**

[Title of cause.]

The plaintiff complaining of the defendant says, that the said defendant, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_, wrongfully kept a dog which he, the said defendant, well knew was accustomed [\*] to attack and bite mankind, and which dog, at the time and place aforesaid, attacked and bit the plaintiff, and did then and there greatly lacerate, hurt and wound one of the legs of the said plaintiff, whereby the said plaintiff became sick, sore and lame, and so remained and continued for a long space of time, to wit: for [six weeks] then next following; during which time he, the said plaintiff, thereby suffered and underwent great pain, and was thereby prevented from performing and transacting his regular business; and also by means of the premises the said plaintiff was put to great expense, cost and charges, in the whole amounting to the sum of \_\_\_\_\_ dollars, in and about endeavoring to be cured of the said wounds, sickness and lameness and disorder so occasioned, and hath been and still is by means of the premises otherwise greatly injured and damnified, and that the amount of such loss and injury is the sum of \_\_\_\_\_ dollars.

Wherefore the plaintiff demands judgment, etc. [prayer for judgment].<sup>3</sup>

M. F., *Plaintiff's Attorney.*

[Office address.<sup>4</sup>]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> The same form, with a slight variation, will do for harboring and detaining the plaintiff's child or servant, whereby he loses their assistance and service.

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> As to the general principles upon which the action can be maintained, see *Rider v. White* (65 N. Y., 54), *Lynch v. McNally* (73 N. Y., 347), *Muller v.*

No. 925.

**Complaint for Keeping a Dog Accustomed to Bite Sheep or other Animals.**

As in form No. 924 to [\*], and from thence as follows: To hunt, chase, bite, worry and kill sheep and lambs, which said dog, on the day and year aforesaid, and on divers other days and times between that day and the commencement of this action, did hurt, chase, bite and worry [one hundred] sheep and lambs of the plaintiff, being of the value of \_\_\_\_\_ dollars, by means whereof divers, to wit: [fifty] of the said sheep and lambs of the said plaintiff, being of the value of \_\_\_\_\_ dollars, then and there died and became of no value to the said plaintiff, and the residue of the said sheep and lambs of the said plaintiff being also of great value, were then and there greatly terrified, damaged and injured, and rendered of no use or value to the said plaintiff, to the damage of the plaintiff of \_\_\_\_\_ dollars.

Wherefore the plaintiff demands judgment, etc. [prayer for judgment].<sup>1</sup>

F. M., *Plaintiff's Attorney.*

[Office address.]<sup>2</sup>

[Verification as in forms Nos. 151, etc.]

No. 926.

**Complaint for Breach of Promise to Marry.**

[Title of cause.]

The plaintiff complains of the defendant and alleges, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in consideration that the plaintiff, who was then sole and unmarried, at the request of the defendant, would marry him on request, the defendant promised the plaintiff to marry the plaintiff on request; and the said plaintiff, confiding in the said promise and undertaking of the said defendant, has always, from thence hitherto, remained, and continued, and still is, sole

McKesson (73 N. Y., 195), Van Leuven State Rep., 304), Moynahan v. Wheeler v. Like (4 Denio, 127; aff'd S. C., 1 (117 N. Y., 285), Webber v. Hoag (28 N. Y., 515), Rogers v. Rogers (26 State Rep., 630), Argersinger v. Levor Week. Dig., 236), Putnam v. Wigg (37 (54 Hun, 613), Marsh v. Hand (120 N.

Y., 315), *Simpson v. Griggs* (58 Hun, 393), *Jacoby v. Ockerhausen* (37 State Rep., 710), *Milsheimer v. Sullivan* (27 Pac. R., 1), *Malone v. Knowlton* (39 State Rep., 901), *Kinmouth v. McDougall* (46 id., 211), *Kessler v. Lockwood* (42 id., 563), *Hussey v. King* (22 Atl. Rep., 476), *Lettis v. Horning* (67 Hun, 627), *Quilty v. Battie* (135 N. Y., 201), *Helmke v. Statler* (69 Hun, 107), *Hubert v. Bedell* (50 State Rep., 251),

*Bandschuh v. Mayer* (81 Hun, 111), *Hanke v. Friederich* (140 N. Y., 224), *Jennings v. Burton Co.* (73 Hun, 545), *Farley v. Picard* (78 id., 560), *Turner v. Craighead* (83 id., 112).

<sup>4</sup>See note 2 to form No. 122.

<sup>1</sup>See cases cited in note 3 to last form, No. 924, particularly *Van Leuven v. Like* (1 N. Y., 515).

<sup>2</sup>See note 2 to form No. 122.





and unmarried, and has been, [\*] and still is, ready and willing to marry the said defendant; and although the said plaintiff, after the making of the said promise, and undertaking of the said defendant, to wit: on the ——— day of ———, 18—, and at divers other times, requested the said defendant to marry her, the said plaintiff, yet the said defendant, not regarding his said promise and undertaking, did not, nor would, at the said time or times when he was so requested as aforesaid, or at any time before or afterwards, marry her, the said plaintiff, but has hitherto wholly neglected and refused so to do, and still neglects and refuses so to do, to the damage of the plaintiff of ——— dollars.

[Or as above to (\*), and from thence as follows: Ready and willing to marry the said defendant; yet the said defendant, not regarding his said promise and undertaking, and after the making of the same, to wit: on the ——— day of ———, 18—, wrongfully and injuriously married a certain other person, to wit: one C. P., contrary to his said last promise and undertaking, so by him made as aforesaid, to the damage of the plaintiff of ——— dollars.<sup>1</sup>]

Wherefore, etc. [prayer for judgment].

A. M., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> The form of the complaint will vary according to the promise, whether it be to marry on request, in a reasonable time, at a particular time, after a particular event, or generally. The material facts are, that in consideration that plaintiff promised to marry defendant, defendant promised to marry plaintiff, either on request or as the case may be; a statement of the request, the expiration of the time, or the happening of the event; that plaintiff offered to marry defendant, and defendant's neglect to fulfill his promise. (Voorhies' Code [10th ed.], note *a*, p. 187; citing Buzzard v. Knapp, 12 How., 504.)

See also, Homan v. Earl (13 Abb. [N. S.], 402; aff'd S. C., 53 N. Y., 267), Wade v. Kalbfleisch (15 Abb. [N. S.], 16; aff'd S. C., 58 N. Y., 282),

Haviland v. Halsstead (34 id., 643), Fiebel v. Obersky (note *n*, p. 403; 13 Abb. [N. S.]), Hamilton v. Lomax (26 Barb., 615; S. C., 6 Abb., 142), Johnson v. Jenkins (24 N. Y., 252), Button v. McCauley (5 Abb. [N. S.], 29; rev'g S. C., 38 Barb., 413), Palmer v. Andrews (7 Wend., 142), Thorn v. Knapp (42 N. Y., 474), Kniffen v. McConnell (30 id., 285), Cushman v. Burritt (14 Week. Dig., 59), Campbell v. Ar buckle (21 State Rep., 412), Cammerer v. Muller (38 id., 583), Roe v. Doe (33 id., 41), Kerns v. Hagenbuckle (42 id., 210), Yale v. Curtiss (71 Hun, 436), Nearing v. Van Fleet (id., 137), Keegan v. Sage (31 Abb. N. C., 54), Button v. Hibbard (82 Hun, 289).

The action cannot be maintained against an infant (Leichtweiss v. Traskow, 21 Hun, 487, and cases cited),

No. 927.

**Complaint for False Imprisonment.**

[Title of cause.]

The plaintiff complains of the defendant and alleges, that the defendant, in the [city] of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, with force and arms assaulted the plaintiff, and then and there seized and laid hold of the said plaintiff, and, with great force and violence, pulled and dragged about the said plaintiff; and also then and there forced and compelled the said plaintiff to go from and out of a certain dwelling-house, situate and being in the [city] of \_\_\_\_\_, into the public street, and then and there forced and compelled him to go in and along divers public streets, to a certain police office, situate and being in the said [city] and then and there imprisoned the plaintiff, and kept and detained him in prison there, without any reasonable or probable cause whatsoever, for the space of [six weeks] then next following, contrary to the laws and customs of this State and against the will of the said plaintiff, whereby the said plaintiff was not only greatly hurt, bruised and wounded, but was also, thereby then and there greatly exposed and injured in his credit and circumstances, and was then and there hindered and prevented from performing and transacting his necessary affairs and business,

but may be maintained by an infant. (Willard v. Stone, 7 Cow., 23; Holt v. Ward, 2 Strange, 93; Hunt v. Peake, 5 Cow., 475.)

Where the defendant has married another woman, a request need not be averred (Caines v. Smith, 15 M. & W., 189), and this is so where the promise is to marry upon request. (Short v. Stone, 8 Q. B., 358.)

Where the defendant promised to marry the plaintiff so soon as his (defendant's) father should die, and the defendant, during the father's lifetime, refused absolutely to marry the plaintiff—*Held*, reversing the judgment of the court below, that a breach of contract had been committed on which

the plaintiff could sue. (Frost v. Knight, L. R., 7 Ex., 111; rev'g S. C., L. R., 5 Ex., 322.)

The parties having entered into an agreement to marry "in the fall," the defendant announced to the plaintiff, in October, that he would not perform the contract—*Held*, that an action commenced immediately was not prematurely brought. (Burtis v. Thompson, 42 N. Y., 246.)

The action cannot be revived against the representatives of the promissor, as it does not relate to property interests but to personal injuries. (Wade v. Kalbfleisch, *supra*.)

<sup>2</sup> See note 2 to form No. 122.

by him during that time to be performed and transacted, by means whereof the said plaintiff says that he is injured, and has sustained damage to the amount of ——— dollars, for which amount, together with the costs of this action, plaintiff demands judgment against the defendant.<sup>1</sup>

M. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

No. 928.

### Complaint for Assault and Battery.

[Title of action.]

The plaintiff complains of the defendant and alleges, that the said defendant, at ———, on the ——— day of ———, 18—, with force and arms assaulted this plaintiff, and then and there, with force and violence, seized and laid hold of the said plaintiff by his nose, and greatly squeezed and pulled the same, and then and there with a certain stick,

<sup>1</sup> The material allegations are that the defendant imprisoned the plaintiff against his will and without authority of law.

See Eddy v. Beach (7 Abb. Pr., 17), Shaw v. Jayne (4 How. Pr. 119), Exner v. Exner (2 Abb. N. C., 109), Maloney v. Dows (15 How. Pr. 261), Bradner v. Faulkner (93 N. Y., 515), Voltz v. Blackmar (64 id., 440), Coats v. Darby (3 id., 517), Burns v. Erben (40 id., 463), Thorne v. Turck (94 id., 90), Fay v. O'Neill (36 id., 11), Mott v. Union Bank of City of New York (38 id., 18), Lynch v. Metropolitan R. R. Co. (90 id., 77), Miller v. Adams (52 id., 409), Guilleaume v. Rowe (94 id., 268), Hallock v. Dorniny (69 id., 238; rev'g S. C., 7 Hun, 52), Lange v. Benedict (73 N. Y., 12; aff'g S. C., 8 Hun, 362), Dusenbury v. Kieley (85 N. Y., 383), Schewe v. Mulvey (14 W. Dig., 334), Hayes v. Bowe (65 How. Pr., 347), Fitzpatrick v. N. Y. and M. B. R. R. Co. (15 Week. Dig., 506), Artega v. Conner (88 N. Y., 403; aff'g S. C., 47 N. Y. Super. Ct. 494), Nebenzahl v. Townsend (61 How. Pr., 353; S. C., 12 Week. Dig. 511), Rutherford v. Holmes (66 N. Y., 368; aff'g S. C., 5 Hun, 317), Meyer v. Clark (41 N. Y. Super. Ct., 107), Warner v. Perry (14 Hun, 337), Blodgett v. Race (18 Hun, 132), Kenner v. Morrison (12 id., 204), Birdsall v. Fuller (11 id., 204; Marks v. Townsend (97 N. Y. 590) Fisher v.

Langbein (103 id., 84), Hopner v. McGowan (116 id., 405), Rosen v. Stein (54 Hun, 345), Austin v. Vrooman (128 N. Y., 229), Carson v. Dessau (36 State Rep., 425), Oppenheimer v. Manhattan R. Co. (45 id., 134), Sullivan v. Newman (43 id., 893), Brunner v. Downs (id., 824), Perry v. Sutley (45 id., 61), Kolzem v. Broadway, etc., R. Co. (1 Misc., 148), Toomey v. Delaware, L. & W. R. Co. (4 Misc., 392), Wilson v. Manhattan R. Co. (2 id., 127), Hewitt v. Newburger (141 N. Y., 538; rev'g S. C., 66 Hun, 235), Atwood v. Beirne (73 Hun, 547), Callahan v. Searles (78 id., 238), Pastor v. Regan (9 Misc., 547), Carson v. Desseau (142 N. Y., 445), De Matties v. Le Maida (74 Hun, 432), Swart v. Rickard (id., 339), Kreiser v. Scofield (10 Misc., 350; rev'g S. C., 9 id., 200), Warren v. Dennett (13 id., 329), Cuniff v. Beecher (84 Hun, 131), Parks v. Gilligan (14 Misc., 121), for cases in which the action may be maintained and as to pleadings, evidence, damages, etc., therein.

An agreement not to sue for false imprisonment, given as a condition of release from arrest, is void for duress. (Guilleaume v. Rowe, 94 N. Y., 268.)

The right of action for a false imprisonment begins when the actual imprisonment ceases. (Van Ingen v. Snyder, 24 Hun, 81; S. C., 11 Week. Dig., 370.)

<sup>2</sup> See note 2 to form No. 122.

and with his fists, gave and struck the plaintiff a great many violent blows and strokes on and about divers parts of his body; and also then and there, with great force and violence, shook and pulled about the said plaintiff, and cast and threw the said plaintiff down to and upon the ground, and then and there violently kicked the said plaintiff, and gave and struck him a great many other blows and strokes; and also then and there, with great force and violence, rent, tore and damaged the clothes and wearing apparel of the said plaintiff, to wit: one coat, waistcoat and pantaloons of great value, to wit: of the value of twenty dollars, which clothes the said plaintiff then and there wore and was clothed with; by means of which said several premises the said plaintiff was then and there greatly hurt, bruised and wounded, and became and was sick, sore and lame, and so remained and continued for the space of [six weeks] then next following, during all of which time the plaintiff thereby suffered and underwent great pain, and was hindered and prevented from performing and transacting his necessary affairs and business, by him during that time to be performed and transacted, and also thereby the said plaintiff was forced and obliged to, and necessarily did pay, lay out and expend, a large sum in money, in and about endeavoring to be cured of the bruises, wounds, sickness, soreness, lameness and disorder aforesaid, occasioned as aforesaid, to the damage of the plaintiff of ——— dollars, for which amount plaintiff demands judgment against the defendant.<sup>1</sup>

W. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> The material allegation is, that the defendant assaulted and beat plaintiff.

The complaint may state the business and employment of the parties, and the object and intent of the assault, together with the statement that it caused the plaintiff to be ridiculed, etc., and this held not to be immaterial or irrelevant. Although not essential to enable the plaintiff to maintain his action, the allegations are material upon the question of damages, and may be proved. (*Root v. Foster*, 9 How., 37.)

See, also, *Gilbert v. Rounds* (14 How., 46), *Brewer v. Temple* (15 How., 236).

A complaint in an action by a female, alleged "that the defendant, with force and arms, ill-treated and made an assault upon her, and then and there debauched and carnally knew her." *Held*, upon demurrer, a sufficient averment of an assault and battery. (*Koenig v. Nott*, 2 Hilt., 323; S. C., 8 Abb., 384). See, also, *Stevens v. Rodger* (25 Hun, 54).

See, also, *Johnson v. McConnel* (15 Hun, 293), *Geraty v. Stern* (30 Hun, 426), *Labar v. Koplin* (4 N. Y., 547), *Corning v. Corning* (6 N. Y., 97), *Jewett v. Banning* (21 N. Y., 27), *Werely v. Persons* (28 N. Y., 344), *Wall v. Lee*

No. 929.

**Another form of Complaint for Assault and Battery.**

[Title of cause.]

The plaintiff complains of the defendant and alleges, that the said defendant, heretofore and on the ——— day of ———, 18—, at ———, with force and arms, made an assault on the plaintiff, and then and there beat, bruised, wounded and ill-treated him, to the damage of the plaintiff of ——— dollars, for which, etc. [prayer for judgment].

[Signature, etc., as in last form.]

No. 930.

**Answer that Plaintiff Committed first Assault.**

[Title of cause.]

The defendant [further] answering the complaint says, that said plaintiff ought not to have or maintain his action against him, because the said plaintiff, just before the time in the said complaint mentioned, with force and arms, made an assault upon [\*] him, the said defendant, and would then and there have beaten, bruised and ill-treated the said defendant if he had not immediately defended himself against the said plaintiff; wherefore he, the said defendant, did defend himself against the said plaintiff, as he lawfully might, for the cause aforesaid, and, in so doing, did necessarily and unavoidably, a little bruise, wound and ill-treat the said plaintiff, and rend, tear, damage and spoil the said wearing apparel in the said complaint mentioned, doing no unnecessary damage to the said plaintiff upon the occasion aforesaid, and if any hurt or damage then and there hap-

(34 N. Y., 141), *Waffle v. Dillenback* (38 N. Y., 53), *Wood v. Phillips* (43 N. Y., 152), *Bliss v. Johnson* (73 N. Y., 529), *Kiff v. Youmans* (86 N. Y., 324), *Langdon v. Guy* (91 N. Y., 660), *Comstock v. Dodge* (43 How., 97), *Priest v. H. R. R. Co.* (10 Abb. [N. S.], 60; S. C., 2 *Sweeney*, 595; aff'd 65 N. Y., 589); *McMillan v. Cronin* (75 N. Y., 474), *O'Donnell v. McIntyre* (No. 2) (37 Hun, 623), *Newman v. Marshall* (52 Super. Ct., 102), *Bristor v. Burr* (120 N. Y., 427), *Kain v. Larkin* (56 Hun, 79), *Morgan v. N. Y. Central, etc.*, R. Co. (23 N. Y. Supp., 197),

*Howe v. Oldham* (52 State Rep., 734), *Townsend v. Stewart* (53 id., 147), *Liebstadter v. Federgreen* (80 Hun, 245), *O'Connell v. Samuel* (81 id., 357), *Conway v. Carpenter* (73 id., 540; 80 id., 428), *Watson v. Oswego Street R. Co.* (7 Misc., 562), *Kosters v. Brooklyn B., etc.*, R. Co. (10 id., 18), *Caldwell v. C. P. N. & E. R. Co.* (7 id., 67), *Dean v. Rapplee* (75 Hun, 389; aff'd S. C., 145 N. Y., 319), *Morgan v. Powers* (83 Hun, 298), *Isaacs v. Flahive* (14 Misc., 249), for recent authorities as to this action.

<sup>2</sup> See note 2 to form No. 122.

pened to the said plaintiff, or to his said wearing apparel, the same was occasioned by said assault so made by the said plaintiff on him, the said defendant, and the necessary and lawful defense of him, the said defendant, against the said plaintiff, which are the same supposed trespasses complained of by the said plaintiff against this defendant.<sup>1</sup>

P. R., *Defendant's Attorney.*

[Office address.<sup>2</sup>]

No. 931.

**Answer that Defendant was Preserving the Peace.**

As in last form No. 930 to [\*], and from thence as follows: One M. B., and was then and there at the same time beating and ill-treating the said M. B., in breach of the peace of the people of the State of New York; wherefore the said defendant, at the said time to preserve the peace of the said people of the State of New York, and to part the said plaintiff from, and to prevent him from further beating and ill-treating the said M. B., gently laid his hands upon the said plaintiff, as he lawfully might, for the cause aforesaid, which are the same assaulting, beating and ill-treating the said plaintiff has set forth in his complaint in this action.<sup>3</sup>

[Signature, etc., as in last form.]

[Verification as in forms Nos. 151, etc.]

No. 932.

**Complaint for Maliciously Suing Plaintiff Six Times  
Before a Justice.**

[Title of cause.]

The plaintiff complains of the defendant and alleges, that on the ——— day of ———, 18—, [†] the said defendant, not having any just or probable cause of action against the said plaintiff, did then and there wrongfully, willfully

<sup>1</sup> That the plea may be interposed with a general denial, see *Lansing v. Parker* (9 How. Pr., 288).

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> That this defense may be interposed with a general denial, see *Lansing v. Parker* (9 How. Pr., 288). See, also, 16 Abb. Pr., 235.

and maliciously cause the said plaintiff to be summoned to appear at, etc., on, etc., before F. G., Esq., one of the justices of, etc., to answer, etc., [as in summons], and at which day and place the said plaintiff did duly appear to answer the said defendant before the said justice [he, the said plaintiff, being obliged to pay and did pay the sum of ——— dollars for his necessary expenses in traveling from his home, to wit: at, etc., to the place appointed by the said justice for his appearance as aforesaid, being the distance of (fourteen) miles, and being obliged also to pay a large sum of money, to wit: the sum of (five) dollars, for retaining counsel to defend him therein], and the said defendant did not appear, but suffered the same suit to be discontinued [or show in what other manner the case was disposed of], he, the said defendant, well knowing that he had no just or probable cause of action against the said plaintiff, [†] and afterwards, on the ——— day of ———, 18— [insert from (†) to (†), and so repeat the different summonses according to the facts], all which premises are to the said plaintiff's damage of ——— dollars, for which amount the plaintiff demands judgment against the defendant, with costs of this action.<sup>1</sup>

M. F., *Plaintiff's Attorney.*  
[Office address.<sup>2</sup>]

<sup>1</sup>See *Pangburn v. Bull* (1 Wend., 345), *Masten v. Deyo* (2 id., 424), *Gorton v. De Angelis* (6 id., 418), *Hall v. Suydam* (6 Barb., 83), *Sheldon v. Carpenter* (4 N. Y., 579), *Bulkeley v. Keteltas* (6 id., 384), *Besson v. Southard* (10 id., 236), *McKown v. Hunter* (30 id., 625), *Rockwell v. Brown* (36 id., 207), *Burns v. Erben* (40 id., 463), *Carl v. Ayers* (53 id., 14), *Farnam v. Feeley* (56 id., 451), *Heyne v. Blair* (62 id., 19), *Dennis v. Ryan* (65 id., 385; aff'g S. C., 5 Lans., 350; 63 Barb., 145), *Fagnan v. Knox* (66 N. Y., 525; S. C., 1 Abb. N. C., 246), *Thaule v. Krekeler* (81 N. Y.; 428), *Neil v. Thorn* (88 id., 270; rev'g S. C., 17 Hun, 144), *Bradner v. Faulkner* (93 N. Y., 515), *Smith v. Smith* (26 Hun, 573), *Bingham v. Beckwith* (19 Week. Dig., 422), *Thompson v. Lumley* (1 Abb. N. C., 254), *Blodgett v. Race* (18 Hun, 132), *Barber v. Gould*

(20 id., 446), as to the action for malicious prosecution generally. See also *Avery v. Blair* (21 W. D., 178; 20 Abb. N. C., 259 note; *Dorendinger v. Tschechtelin* (12 Daly, 34), *Young v. Lyall* (23 State Rep., 215), *Gierhon v. Ludlow* (6 N. Y. Supp., 111), *Mohar v. Simmons* (3 State Rep., 293), *Jones v. McCaddin* (105 N. Y., 641; aff'g S. C., 21 Week. Dig., 53), *Ingram v. Root* (51 Hun, 238), *Marks v. Townsend* (97 N. Y., 590), *Gallagher v. Stoddard* (47 id., 101), *Collins v. Manning* (1 State Rep., 193), *Silkman v. Crosby* (14 id., 563), *Wass v. Stevens* (6 N. Y. Supp., 131; aff'd S. C., 128 id., 123), *Eldred v. Fowdneyn* (16 id., 83), *Hazzard v. Flury* (120 id., 223), *Collins v. Manning* (32 State Rep., 998) *Anderson v. How* (116 N. Y., 336), *Hall v. Kehoe* (28 State R., 357), *English v. Major* (59 Hun, 317), *Molloy v. Long Island R. Co.* (59 id.,

No. 933.

**Complaint for Maliciously Causing the Indictment of the Plaintiff.**

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that the defendant heretofore, and on the ——— day of ———, 18—, contriving and maliciously intending to injure the plaintiff, and to cause him to be imprisoned and kept and detained in prison, and to put him to great expense, and to vex, harass and oppress and wholly ruin the plaintiff, falsely and maliciously, and, without any reasonable or probable cause whatsoever, indicted, and caused and procured to be indicted, the said plaintiff, by a grand jury at a [court of oyer and terminer], held at the ——— of ———, in and for the county of ———, on the day last aforesaid, for the [state offense alleged in indictment], and falsely and maliciously, and without any reasonable or probable cause whatever, prosecuted, and caused and procured to be prosecuted, the said indictment against the said plaintiff, at [a court of oyer and terminer], held at the ——— of ———, in and for the county of ———, on the ——— day of ———, 18—, until the said plaintiff afterwards, to wit, at the [said court of oyer and terminer], was, in due manner, and according to due course of law, by a jury of the said county, acquitted of the premises in the said indictment charged upon him, the said plaintiff, in manner aforesaid; whereupon it was then and there considered, by the said court, that the said plaintiff of the premises in the said indictment specified, should be discharged, and should go without day [as by the record and proceedings thereof, remaining in the said court, will more fully appear].

That by means of the said premises he, the said plaintiff, hath been forced and obliged to undergo, and hath undergone, many great troubles and labors both of body and mind, and been obliged to lay out and expend divers large

424), *Bandell v. May* (39 State Rep., 432), *English v. Major* (36 id., 69), *Robbins v. Robbins* (39 id., 453; aff'd 133 N. Y., 597), *Humphreys v. Prudential Ins. Co.* (41 State Rep., 453), *Sprague*

*v. Gibson* (43 id., 332), *Brounstein v. Wile* (47 id., 788), *Farrell v. Friedlander* (63 Hun, 254), *Wrench v. Samenfeld* (47 State Rep., 378), *Oppenheim v. Manhattan R. Co.* (45 id.,



134), *Brounstein v. Sahlm* (65 Hun, 365), *Streahan v. Nat. Steamship Co.* (66 id., 48), *Sales v. Hoetzel* (48 State Rep., 205), *Toomey v. Delaware, L. and W. R. Co.* (2 Misc., 82), *Grout v. Cottrell* (50 State Rep., 829), *Ferguson v. Arnaw* (142 N. Y., 530; rev'g S. C., 50 State Rep., 852), *Witham v. Thomas* (50 State Rep., 884), *Willard v. Holmes and o'rs* (142 N. Y., 492; rev'g S. C., 2 Misc., 303), *Stevens v. Met. Life Ins. Co.* (id., 534), *Howe v. Oldham* (69 Hun, 57), *Kline v. Hibbard* (80 Hun, 50), *Johnson v. Girdwood* (7 Misc., 651), *De Matteis v. La Maida* (74 id., 432), *Grant v. Cottrell* (143 N. Y., 677), *Purcell v. Long Island City* (84 Hun, 439).

The material allegations are a prosecution by the defendant; its termi-

nation favorably to the plaintiff; malice and want of probable cause.

Under section 484, Code Civ. Pro., subd. 2, a cause of action for false imprisonment and for malicious prosecution can be united in the same complaint. (*Haight v. Webster*, 18 Week Dig., 108; 97 N. Y., 590.)

That an action lies in damages for the malicious prosecution of a civil suit, see also *Easton v. Bank of Stockton* (Sup. Ct. of Cal., Nov., 1884 [19 Rep., 5]; cited 31 Alb. Law Jour., 63), and *McCardle v. McGinley* (86 Ind., 538; S. C., 44 Am. Rep., 343, 346); *contra*, *Muldoon v. Rickey* (103 Penn. St., 110), there referred to. See also *Willard v. Holmes, Booth & Haydens* (142 N. Y., 492, 495; S. C., 2 Misc., 303, 304).

<sup>2</sup> See note 2 to form No. 122,



sums of money, in the whole amounting to the sum of \_\_\_\_\_ dollars, in and about the defending himself in the premises, and the manifestation of his innocence therein; and hath been imprisoned, and kept and detained in prison, for a great length of time, to wit, for the space of \_\_\_\_\_ days; and the said plaintiff was also, by means of the premises, greatly hindered and prevented from transacting his necessary and lawful affairs and business for divers long spaces of time, and hath been and is otherwise greatly injured and damnified, and very much impoverished, to wit: in the sum of \_\_\_\_\_ dollars, for which amount, with the costs of this action, plaintiff demands judgment against the defendant.<sup>1</sup>

M. F., *Plaintiff's Attorney.*  
[Office address.<sup>2</sup>]

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No. 934.

**Complaint for Maliciously Causing the Arrest of Plaintiff  
on a Charge of Stealing.**

[Title of cause.]

The plaintiff alleges that he is a resident of the \_\_\_\_\_ of \_\_\_\_\_, and a \_\_\_\_\_ by occupation.

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, he went on a pleasure trip to Coney Island, and when on his return on the steamer Chicopee, shortly after leaving Coney Island, the defendant charged him [plaintiff], in the presence and hearing of a large concourse of passengers, with stealing, or attempting to steal, his breast pin, and caused the plaintiff to be arrested and taken into custody by a police officer on board the boat, and caused him to be so kept in custody and subject to the mortification of being pointed out and stared at by a large number of passengers from New York city and Brooklyn as a thief, for nearly an hour before the boat reached the dock at Fulton ferry, when plaintiff, by direction of the defendant, was taken by the policeman to a station-house in Washington street, Brooklyn, accompanied by defendant as complainant, and where defendant made a complaint against plaintiff charging him, plaintiff,

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<sup>1</sup> See note 1 to last form No. 932.

<sup>2</sup> See note 2 to form No. 122.

with having committed a larceny from his, the defendant's, person, and with having stolen a diamond pin from his person, on which charge this plaintiff was committed for examination until the Monday following [this having occurred on Saturday afternoon], and this plaintiff was kept in the station-house until Monday, the \_\_\_\_\_ day of \_\_\_\_\_, 18—, when he was taken before Justice Cornwall, a criminal magistrate in a police court, and an examination was had and he was honorably discharged.

That on the hearing before the magistrate the defendant had the pin in his bosom, and then pressed only a charge of an attempt to steal the pin, though this plaintiff charges that when he was arrested, and when committed, defendant's charge was that of stealing the pin.

The plaintiff further says, that he was not guilty of stealing, or attempting to steal, the defendant's pin, and was never guilty of any crime whatever, and up to that time had always been esteemed a good and worthy citizen and respected by all his neighbors.

The plaintiff further says, that the charge made by the defendant, and the arrest and imprisonment was made and caused without any probable cause to suspect the plaintiff of either stealing or attempting to steal this pin, and the arrest, committal and detention were malicious.

That plaintiff suffered great mental agony and physical discomfort, and asks judgment against defendant for \$5,000 damages and costs of suit.<sup>1</sup>

E. M., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

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No. 935.

**Complaint for a Fraudulent Concealment on the Sale of a Horse.**

[Title of cause.]

The complaint of the above named plaintiff respectfully

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<sup>1</sup> See note 1 to form No. 932. This complaint is from the case of *Carl v. Ayers* (53 N. Y., 14).

<sup>2</sup> See note 2 to form No. 122.

shows, that on the —— day of ——, 18—, at ——, the said plaintiff bought of the said defendant his certain horse for the sum of —— dollars, then paid therefor; and the said defendant, well knowing the said horse to have the heaves, which fact was then unknown to the said plaintiff, he, the said defendant, then intentionally, falsely and fraudulently concealed the said fact from the knowledge of the said plaintiff, and thereby sold the said horse to him for the price aforesaid; and the said horse of the said defendant, in fact, at the time of the said sale thereof, had the heaves, to the knowledge of the said defendant, and was thereby rendered, and hath since so continued, utterly unfit for use.

Wherefore the plaintiff alleges that he has been damaged to the amount of —— dollars, for which amount, with the costs of this action, he demands judgment against the defendant.<sup>1</sup>

M. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

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No. 936.

### Complaint for a False Warranty of a Horse.

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that the said plaintiff heretofore, to wit: on the —— day of ——, 18—, at ——, at the special instance and request of the said defendant, bargained with the said defendant to buy of him, the said defendant, a certain horse, at and for a certain price or sum of money, to wit, the sum of —— dollars; and the said defendant by then and there falsely and fraudulently warranting the said horse to be sound and quiet in harness, then and there sold the said

<sup>1</sup> The principle is well settled that, where a vendor of a chattel is guilty of a fraudulent concealment of material facts in relation to the sale, to the injury of the vendee, an action at law is maintainable to recover damages. It

is not enough that a vendor tells the truth in respect to the article sold, as far as he goes. He should tell the whole truth fully and fairly. (*Nickley v. Thomas*, 22 Barb., 652.)

<sup>2</sup> See note 2 to form No. 122.

horse to the said plaintiff for the said sum of ——— dollars, then and there paid by the said plaintiff to the said defendant for the same, whereas, in truth and in fact, the said horse was, at the time of the said warranty and the sale thereof, unsteady, restive and ungovernable in harness, and hath, from thence hitherto, so remained and continued; and the said plaintiff, in fact, saith that the said defendant, by means of the premises, falsely and fraudulently deceived him, the said plaintiff, on the sale of the said horse as aforesaid, and thereby the said horse afterwards, to wit: on, etc., not only became of no use or value to the said plaintiff, but also then and there greatly kicked, hurt, injured and spoiled a certain other horse of him, the said plaintiff, of great value, to wit: of the value of ——— dollars; and thereby also the said plaintiff was then and there put to great expense of his moneys, in the whole amounting to a large sum of money, to wit: the sum of ——— dollars, in and about the feeding and taking care of, and selling and disposing of, the said horse.

Wherefore, etc. [prayer for judgment].<sup>1</sup>

M. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

### No. 937.

#### **Complaint on a Sale with all Faults, where Fraudulent Means are Used to Prevent the Purchaser from Discovering Defects, etc.**

[Title of cause.]

The plaintiff complains against the defendant and alleges, that on the ——— day of ———, 18—, the said defend-

<sup>1</sup> The material allegations are, the warranty, that it was false, and that the purchaser was deceived by it. (*Holman v. Dord*, 12 Barb., 336, 339.)

There need be no allegation that the defendant knew the warranty was false. (*Id.*)

Under a complaint for a false war-

ranty, the plaintiff proved a warranty and breach thereof, but gave no evidence tending to show fraud. *Held* (*Lott, Ch., Com., dissenting*), that the gravamen of the action was fraud, not a breach of warranty, and plaintiff could not recover upon proof of the latter only. (*Ross v. Mather*, 51 N.

ant was possessed of a certain horse, and which said horse before and at the time of the sale thereof to the said plaintiff, as hereinafter mentioned, had contracted a certain malady and unsoundness, rendering the said horse of no use or value, to wit: the glanders, and which the said defendant then well knew; yet the said defendant intending to defraud the said plaintiff in this behalf, by then falsely, fraudulently and deceitfully using certain false and fraudulent acts, contrivances and applications to make the said horse appear to be a sound horse, and not glandered, and by suppressing the appearance of the said glanders, then sold the said horse, so being unsound and glandered, as aforesaid, to the said plaintiff, the said plaintiff to risk the soundness of the said horse; and the said plaintiff, not knowing that the said horse was so unsound and glandered, was thereby induced to buy, and then bought, the said horse of the said defendant, and then paid to him a large sum, to wit: ——— dollars, as and for the price and value of the said horse, and was also thereby induced to agree with the said defendant to risk the soundness of the said horse as aforesaid; whereas, in truth and in fact, the said horse, at the time of the said sale as aforesaid, was unsound and glandered and of no use or value whatever.

Wherefore, etc. [prayer for judgment]

M. F., *Plaintiff's Attorney.*

[Office address.']

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No. 938.

**Complaint for Falsely and Fraudulently Affirming that He, the Defendant, Owned the Horse.**

[Title of cause.]

The plaintiff complains of the defendant and alleges, that

Y., 108; disapproving, *Williamson v. Allison*, 2 East, 446.) See, also, *Bogardus v. N. Y. Life Ins. Co.* (101 N. Y., 328, 343), *Bosworth v. Higgins* (26 State R., 474); 23 Abb. N. C., 93 *note*.

The existence and terms of the warranty, as material and traversable facts, must be alleged in the complaint. (*Prentice v. Dike*, 6 Duer, 220.)

To sustain an action upon a warranty, it is not necessary that all the representations made by the defendant should be false or all actionable. If any part of the representations are actionable it will be sufficient. (*Sweet v. Bradley*, 24 Barb., 549.)

<sup>1</sup> See note 2 to form No. 122.

heretofore, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_, the said defendant, intending to deceive and defraud the plaintiff, did encourage him to buy a certain bay horse, then in the possession of the said defendant,<sup>1</sup> of the value of \_\_\_\_\_ dollars, and falsely and fraudulently affirmed that the said horse belonged to him, the said defendant, and thereby caused the said plaintiff to buy the said horse, which the said defendant delivered as his horse; and the said plaintiff, confiding in the said defendant's affirmation, purchased said horse of him, and satisfied him therefor; whereas, in truth, at the time of said affirmation and delivery, the said defendant was not the owner of the said horse, and had no right to sell him, but the horse belonged to one F. D., and the said defendant well knew the same, to the plaintiff's damage of \_\_\_\_\_ dollars, for which amount, with the costs of this action, plaintiff claims judgment against the defendant.

M. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

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No. 939.

**Complaint for Falsely Representing a Third Person as fit to be Trusted, etc.**

[Title of cause.]

The plaintiff complains of the defendant and alleges, that plaintiff was, at the time of the committing of the grievance by the defendant, as hereinafter next mentioned, and from thence hitherto hath been, and still is, engaged in the trade and business of a \_\_\_\_\_, at \_\_\_\_\_.

That on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, one J. K. applied to the said plaintiff, and then and there requested the said plaintiff to sell goods on credit to him, the

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<sup>1</sup> Though the general rule is that the vendor of a chattel impliedly warrants the title, yet, when the chattel is not in the vendor's possession, but in that of another, this rule does not prevail. In such case the party buys at his

own peril, unless there be an express warranty. (*Edick v. Crim*, 10 Barb., 445; *Scranton v. Clark*, 39 id., 273; S. C. aff'd, 39 N. Y., 220.)

<sup>2</sup> See note 2 to form No. 122.



said J. K., in the way of his, the said plaintiff's, said trade and business; and the said plaintiff being then unacquainted with the character and circumstances of the said J. K., was then and there referred by him to the said defendant for information respecting the same, whereof the said defendant afterwards, and before the sale of any goods to the said J. K., by said plaintiff, to wit: on or about the ——— day of ———, 18—, had notice from [one L. M., the servant of] the said A. B., and the said defendant was then and there interrogated by the said [L. M. on the part of the said] A. B.; respecting the character and circumstances of the said J. K.

That the said defendant, well knowing the premises, and that the said J. K. was then in bad circumstances and unfit to be trusted with goods on credit, but contriving and fraudulently intending to deceive and injure the plaintiff in this behalf, on the day and year aforesaid, falsely, fraudulently and deceitfully informed the said [L. M.], in answer to certain questions then and there put to the said defendant by the said [L. M. on the part of the said] plaintiff, respecting the character and circumstances of the said J. K., that he, the said defendant, knew the said J. K., and had done a deal of business with him, and taken a deal of his [the said J. K.'s] money; and that he, the said defendant, then did business with the said J. K., and that, upon the whole, he, the said defendant, believed the said J. K. to be a good man [thereby meaning that he, the said defendant, believed the said J. K. to be a man in good circumstances, and fit to be trusted with goods on credit].

That by means, and in consequence of which information so given by the said defendant to the said [L. M.] as aforesaid, the said plaintiff, not knowing to the contrary, but believing therefrom that the said J. K. was a man in good circumstances, and fit to be trusted as aforesaid, afterwards, to wit: on the day and year aforesaid, and on divers other days and times between that day and the ——— day of ———, then next following, was induced to give credit to the said J. K., and did then sell and deliver to him divers goods on credit to a large amount, to wit: ——— dollars worth; whereas, in truth and in fact, the said J. K.,

at the time of the said defendant so giving the said information to the said [L. M.] as aforesaid, was in bad and insolvent circumstances, and not fit to be trusted with goods on credit; and whereas, in truth and in fact, the said defendant did not, at that time, do business with the said J. K.; and whereas, in truth and in fact, the said defendant did not believe the said J. K. to be a good man, but, on the contrary thereof, at that time well knew the said J. K. then was in bad and insolvent circumstances, and not fit to be trusted with goods on credit.

And the said plaintiff further says, that the said several sums of money are still wholly due and unpaid to the said plaintiff, and he is likely wholly to lose the same.

Wherefore the plaintiff [prayer for judgment].<sup>1</sup>

M. F., *Plaintiff's Attorney.*

[Office address.]

[Verification as in forms Nos. 151, etc.]

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No. 940.

**Complaint in Action for False Representations Made to Induce a Purchase of Real Estate.**

[Title of cause.]

The plaintiff complains of defendant for this, to wit: that the said defendant, on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in consideration that the said plaintiff would buy of him a farm of land situate in the town of \_\_\_\_\_, in the county of \_\_\_\_\_, and pay unto him the sum of \$9,000, by transfer of other real estate and other securities for the

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<sup>1</sup> False representations as to the solvency or pecuniary condition of another, to be actionable as fraudulent, must, at the time, have been known to be false by the person making them, or he must have assumed or intended to convey the impression that he had actual knowledge of their truth, though conscious that he had no such knowledge. (*Marsh v. Falker*, 40 N. Y., 562, and *Chester v. Comstock* in note 40 id., p. 575.)

See, also, *Zabriskie v. Smith* (13 N. Y., 320), *Myer v. Amidon*, 45 id., 169), *Hubbell v. Meigs* (50 id., 483), *Wakeman v. Dalley* (51 id., 27), *Duffany v. Ferguson* (65 id., 482), *Frisbee v. Fitzsimons* (3 Hun, 674), *Meyer v. Amidon*

(23 id., 553), *Salisbury v. Howe* (87 N. Y., 128), *Babcock v. Libbey* (82 id., 144), *Doty v. Campbell* (1 How. Pr. N. S., 101), *Hickey v. Morrell* (102 N. Y., 454, 463), *Gossler v. Lissburger* (19 Week. Dig., 291), *Thompson v. Gray* (11 Daly, 183), *Schwenk v. Naylor* (102 N. Y., 683), *Phillips v. Wortendyke* (31 Hun, 192), *Jex v. Strauss* (122 N. Y., 293), *Kelly v. Gould* (47 State Rep., 5; aff'd S. C., 141 N. Y., 596), *Kujek v. Goldmann* (5 Misc., 360); aff'd S. C., 9 id., 34), *Rothmiller v. Stein* (9 id., 167; aff'd S. C., 143 N. Y., 581), *Markey v. Diamond* (46 State Rep., 283).

<sup>2</sup> See note 2 to form No. 122.

same, falsely and fraudulently represented and alleged that the said farm contained ninety acres of land.

And the said plaintiff alleges, that he relied upon such representations and allegations of the said defendant, and did purchase and pay for the said farm at the price above specified, and that such representations and allegations were untrue, and that said farm contained only about seventy-eight and a half acres of land, and that the said plaintiff hath sustained damages to the amount of \$1,500.

Wherefore he brings suit and demands judgment against the said defendant for the sum of \$1,500, besides costs of this suit.<sup>1</sup>

P. W. B., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

No. 941.

### Complaint in Action where False Representations have been made to Induce Credit.

[Title of cause.]

The plaintiff complains of the defendant and alleges, that

<sup>1</sup>This form of complaint is from the case of *Thomas v. Beebe* (25 N. Y., 224), which case sustains the form and holds that the allegation that the defendant "falsely and fraudulently represented" is a sufficient statement of the scienter. See, also, to same effect, *Miller v. Barber* (*infra*), p. 564.

To maintain an action to recover damages for deceit in inducing a purchase, it is not necessary to show a return or offer to return the property. (*Miller v. Barber*, 66 N. Y., 558.)

See, also, *Barber v. Morgan* (51 Barb., 116), *Star Steamship Co. v. Mitchell* (1 Abb. [N. S.], 396), as to form of complaint for deceit in inducing the sale of property.

A mere assertion by a vendor as to the value of property offered by him for sale, although untrue and known by him to be so, will not render him responsible to the vendee for damages. There must have been a want of knowledge on the part of the latter, and a purchase by him in entire reli-

ance upon the representations made, or there must have been some artifice employed to prevent inquiry or the obtaining knowledge by him. (*Chrysler v. Canaday*, 90 N. Y., 272; distinguishing *Simar v. Canaday*, 53 id., 298; and reversing S. C., 12 Week. Dig., 214). See, also, *Drake v. Grant* (36 Hun, 464), *Weidner v. Phillips* (39 Hun, 1), *Tyler v. Guy* (21 Week. Dig., 56), *Dake v. Grant* (22 State Rep., 502), *Schwenck v. Naylor* (102 N. Y., 683), *Tyler v. Guy* (24 Week. Dig., 39), *Cross v. Devine* (46 Hun, 421), *Hopkins v. Riggs* (30 State Rep., 391), *Schumaker v. Mather* (133 N. Y., 590).

As to whether in such an action the jury can give punitive damages, *quære*. (*Chrysler v. Canaday supra*).

See, also, *Long v. Warren* (68 N. Y., 426), and cases there cited, as to what is necessary to sustain this action.

For a form of complaint in action for deceit in sale of chattels, see *Moore v. Noble* (53 Barb., 425).

<sup>2</sup>See note 2 to form No. 122.

heretofore, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_, the defendant, to induce the plaintiff to sell to him on credit certain goods and chattels [*or* wares and merchandise], to wit [state nature of goods], of the value of \_\_\_\_\_ dollars, falsely and fraudulently represented to plaintiff that [state the representations made].<sup>1</sup>

That the plaintiff relying upon these representations of defendant, sold and delivered the said goods and chattels to the defendant, for which the defendant agreed to pay \_\_\_\_\_ dollars.

That the said representations so made by defendant were untrue, and that in truth and in fact [state in what respect the representations were false, as in form No. 939].

That no part of the price of said goods and chattels has been paid. [\*]

Wherefore the plaintiff demands judgment against the defendant for \_\_\_\_\_ dollars and \_\_\_\_\_ cents, with interest from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, together with the costs of this action.

[*Or* if special damages have been sustained, as above to (\*), and from thence as follows: That by reason of said false and fraudulent representations, the plaintiff has been put to great trouble and expense, to wit (state special damages), and conclude with prayer for judgment as above.]

M. F., *Plaintiff's Attorney.*

[Office address.²]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> The complaint must state in what manner the plaintiff was induced to give the credit; in other words, the representation made should be stated, that the court may judge if it was sufficient to mislead, or the plaintiff does not show a cause of action. (*Wells v. Jewett*, 11 How., 242.) See, also, *Thurman v. Mosher* (1 Hun, 344; S. C., 3 N. Y. Supr. Ct. [T. & C.], 583).

Since the addition in 1879 of subdivision four to section 549 of the Code of Civ. Pro., in order to subject the defendant to an arrest in an action upon a contract, express or implied,

for fraud, in incurring the liability sought to be enforced, the facts showing the fraud must be distinctly set forth in the complaint. (*Hecht v. Levy*, 20 Hun, 53.) See, also, *Flatow v. Von Bremsen* (33 State Rep., 24), *Markey v. Diamond* (46 id., 283).

The allegation that the defendant "falsely and fraudulently represented," is a sufficient allegation of the *scienter* in the complaint. (*Miller v. Barber*, 66 N. Y., 558, 564; *Thomas v. Beebe*, 25 id., 244; *Moore v. Noble*, 53 Barb., 425.)

A debt fraudulently contracted be-

No. 942.

**Complaint against Sheriff for False Return.**

[Title of cause.]

The above named plaintiff complains of the defendant and says, that on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, he obtained a judgment in the \_\_\_\_\_ Court against one W. M., of the \_\_\_\_\_ of \_\_\_\_\_, in the county of \_\_\_\_\_, amounting to \_\_\_\_\_ dollars, the judgment roll upon which was filed in the \_\_\_\_\_ county clerk's office, and a transcript thereof duly filed and said judgment docketed in the office of the clerk of the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and that an execution thereon was duly issued to and received by this defendant, as sheriff of the said county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, against the property of the said W. M., commanding the said sheriff to levy the said sum of \_\_\_\_\_ dollars, and interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and [\*] the said defendant, by virtue of the said execution, took in execution goods and chattels of the said W. M., in value more than sufficient to satisfy the said execution and his fees and charges thereon; and yet the said defendant, afterwards, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, returned the said writ, and made return thereto that the said defendant, W. M., had no goods and chattels in his, the defendant's, bailwick, out of which he could cause to be levied the amount of the said judgment, and that by reason of the premises the plaintiff has sustained damage to the amount of \_\_\_\_\_ dollars [insert amount of judgment], and interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, for which amount, with costs of this action, he demands judgment against the defendant.

M. F., *Plaintiff's Attorney.*

[Office address.\*]

[Verification as in forms Nos. 151, etc.]

comes due immediately upon the discovery of the fraud, without regard to the stipulated time of credit. (Muser v. Lissner, 20 Week. Dig., 319.)

\*See note 2 to form No. 122.

## No. 943.

**Complaint against Sheriff for not making Return.**

As in last form No. 942 to [\*], and from thence as follows: And to return the said execution, within sixty days after the receipt thereof by him, to the county clerk of ——— county; and now, at this time, the defendant, although sufficient time has elapsed therefor, has not returned the said execution as commanded and directed, and that, by reason of such neglect, this plaintiff has sustained damage to the amount of ——— dollars [amount of judgment], and interest thereupon from the ——— day of ———, 18— [day of entry of judgment], for which amount, together with the costs of this action, this plaintiff demands judgment against the defendant.

B. P., *Plaintiff's Attorney.*

[Office address.<sup>1</sup>]

[Verification as in forms Nos. 151, etc.]

## No. 944.

**Complaint against Sheriff for an Escape.**

As in form No. 942 to [\*], and from thence as follows: Which said execution was returned wholly unsatisfied, and afterwards, on or about the ——— day of ———, 18—, another execution was issued and received by this defendant on the said ——— day of ———, 18—, commanding him, the said sheriff, forthwith to arrest the said W. M. and commit him to the jail of the said county of ——— until he should pay the said judgment, or should be discharged according to law by virtue of which said writ, the said defendant, so being sheriff as aforesaid, took and arrested the said W. M. by his body, and then and there, by virtue of the said writ, had and kept and detained him in his custody in execution for the said sum of ——— dollars, besides sheriff's fees and poundage, and kept and detained him in custody from thence till the said defendant, before the commencement of this action, without the leave or license, and against the will of this plaintiff, suffered and

<sup>1</sup> See note 2 to form No. 122.

permitted the said W. M. to escape and go at large, and the said W. M. did escape and go at large wheresoever he would, out of the custody of this defendant, being sheriff as aforesaid, and the said sum of ——— dollars and interest thereon being then and still wholly unpaid and unsatisfied. whereby an action has accrued to this plaintiff to demand and have of and from this defendant the said sum of ——— dollars, and interest thereon from the ——— day of ———, 18—, and plaintiff prays judgment therefor, with the costs of this action.<sup>1</sup>

B. P., *Plaintiff's Attorney.*  
[Office address.<sup>2</sup>]

No. 945.

**Complaint in Action for Escape, where Order of Arrest has been Issued and Arrest made under it.**

[Title of cause.]

The plaintiff complains of the defendant as follows: That at all the times hereinafter mentioned, the defendant was the sheriff of the [city and] county of [New York].

That heretofore, to wit: on or about the ——— day of

<sup>1</sup> The sheriff is not liable for the escape if process of arrest is void. (Carpenter v. Willett, 31 N. Y., 90; 1 Keyes, 510; Goodwin v. Griffin, 88 N. Y., 629); but he cannot take advantage of mere irregularity in process. (Douglas v. Haberstro, 88 N. Y., 611), or set up error in process rendering it voidable only (Dunford v. Weaver, 84 N. Y., 445).

As to insolvency of the debtor as a defense, see case last cited and Smith v. Knapp (30 N. Y., 581), also Code Civ. Pro., § 158.

"All that the plaintiff must allege and prove, to maintain his action, is the recovery of the judgment, the issuing and delivery of the execution to the sheriff, the capture of the debtor by the sheriff upon the execution and the escape from custody before suit brought against the sheriff therefor." (Per Grover, J., Richtmeyer v. Remsen, 38 N. Y., 208.)

Further, as to action generally, pleadings, defenses, etc., see cases above cited and Wesson v. Chamberlain (3 N. Y., 331), Bush v. Pettibone (4 id., 300), Hutchinson v. Brand, 9 id., 208), Bense v. Lynch (44 id., 162), Bullymore v. Cooper (46 id., 236; aff'g S. C., 2 Lans., 71), Lawrence v. Campbell (32 N. Y., 455), Cosgrove v. Bowe (2 Civ. Pro. Rep. [Browne], 61), McCreery v. Willett (4 Bosw., 643; aff'd S. C., 9 id., 600; 23 How. Pr., 129), Renick v. Orser (4 Bosw., 334), Maas v. O'Brien (14 Hun, 95), Toll v. Alvord (64 Barb., 568), Wilckens v. Willett (1 Keyes, 521; 4 Abb. App. Dec., 596); Code Civ. Pro., § 158, Davis v. Fiske (17 Week. Dig., 350), People ex rel Tully v. Davidson (67 How. Pr., 416), Zenner v. Blessing (4 N. Y. Supp., 866), Meyers v. Becker (29 Hun, 567), McConihe v. Palmer (76 Hun, 116).

<sup>2</sup> See note 2 to form No. 122.

———, 18—, this plaintiff commenced an action in this court against one P. W for the recovery of the sum of ——— dollars, with interest thereon from the ——— day of ———, 18—, in which, on or about the ——— day of ———, 18—, the Hon J. W. W, one of the [judges] of this court, on an affidavit, then and there presented to him, made his certain order, bearing date on that day, as follows [here set forth copy order of arrest], which said order, with the affidavit upon which the same was obtained, and the summons and complaint in the said action, and copies to serve on the said P. W., were thereafter, to wit: on or about the ——— day of ———, 18—, delivered to the defendant, on behalf of the plaintiff, with instructions to arrest the said P. W.

That thereafter, to wit: on or about the ——— day of ———, 18—, the defendant, under and by virtue of said order, at ———, did arrest the said P. W., and at the same time delivered to him, a copy of the said order, and of the said affidavit upon which the same was granted, and of the said summons and complaint.

That bail was not given for the said P. W. in the said action, nor was any deposit made by him on his behalf with the defendant instead of bail.

That such proceedings were thereafter had, in the said action, that on or about the ——— day of ———, 18—, the plaintiff recovered judgment therein against the said P. W. for the sum of ——— dollars, and the judgment roll thereupon was filed in the [name clerk's office] [a transcript of which judgment was filed and said judgment duly docketed in the office of the clerk of the county of ———, on the ——— day of ———, 18—].

That thereupon, to wit: on or about the ——— day of ———, 18—, the plaintiff issued his execution on said judgment in due form of law against the property of the said P. W., directed to the defendant, and requiring him to satisfy the said judgment out of the personal property of the said P. W., and, if sufficient personal property could not be found, out of the real property belonging to the said P. W. on the day when the said judgment was docketed in said county, or at any time thereafter.



That thereafter, to wit: on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the defendant did return the said execution wholly unsatisfied to the office of the clerk of the county of \_\_\_\_\_.

[Then allege issue of execution against person of P. W., arrest of defendant thereunder and his escape, and the non-payment of the judgment, as in form No. 944, and continue as follows]: and that said P. W. has not rendered himself amenable to the said execution against his person to enforce the said judgment, to the damage, etc. (conclude as in form No. 944)].<sup>1</sup>

M. W., *Plaintiff's Attorney*.  
[Office address.]<sup>2</sup>

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No. 946.

**Complaint against Sheriff in Action for an Escape from Custody, under Order of Arrest, when the Action is Brought before Judgment.**

[Title of cause.]

The plaintiff complains of the defendant and alleges, that heretofore and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, an order directing the arrest of C. D., in an action in the [Supreme] Court between the above named plaintiff as plaintiff and said C. D. as defendant for [state cause of action or case justifying arrest under sections 549, 550, Code Civ. Pro. (*or* insert copy of order of arrest)], was duly made by Hon. A. O., one of the justices of said court, directed to the sheriff of \_\_\_\_\_ county [*or* to the sheriff of any county], by which the said sheriff was directed forthwith to arrest the said C. D., if he was found within his county, to hold him to bail in the sum of \_\_\_\_\_ dollars, and to return the order, with his proceedings thereunder, as required by law.

That said order was delivered, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, to the defendant who was then and at the time of the arrest hereinafter mentioned the sheriff of the county of \_\_\_\_\_ to be executed by him as such sheriff.

That said defendant as such sheriff afterwards and on or

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<sup>1</sup> See notes to form No. 944.

<sup>2</sup> See note 2 to form No. 122.

about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, arrested the said C. D. pursuant to the requirement of the said order, and had and detained said C. D. in custody, and kept and detained him in his custody from thence till the said defendant, without the leave or license and against the will of this plaintiff, suffered and permitted the said C. D. to escape and go at large, and the said C. D. did escape and go at large wheresoever he would, beyond the liberties of the jail of the said county of \_\_\_\_\_, and out of the custody of this defendant, being sheriff as aforesaid, to the damage of the plaintiff of \_\_\_\_\_ dollars, for which amount, with the costs of this action, plaintiff prays judgment against the defendant.<sup>1</sup>

M. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

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No. 947.

### Complaint for Conversion of Personal Property.

[Title of cause.]

The plaintiff complains of the defendant and alleges, that the said plaintiff was heretofore, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, lawfully possessed [*or* was entitled to the immediate possession], as of his own property, of certain goods and chattels, to wit [describing them; *e. g.*, ten horses, etc. [describing animals], a certain indenture of release, bearing date the \_\_\_\_\_ day of \_\_\_\_\_, 18—, purporting to be made between J. K., of the one part, and L. M., of the other part, and purporting to be a conveyance from the said J. K. to the said L. M. of certain tenements therein mentioned; and a certain other deed, purporting to be a mortgage of certain tenements by the said J. K. to the said L. M.; and of a certain indenture of lease, bearing date, etc., and made between one N. O. of the first part and one P. Q. of the other part, by which said last mentioned indenture the said N. O. demised to the said P. Q. certain

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<sup>1</sup> See notes to form No. 942, and see *Cosgrove v. Bowe* (2 Civ. Pro. Rep. 61), that such action may be maintained and for form of complaint.

<sup>2</sup> See note 2 to form No. 122.

tenements therein mentioned, for a certain term therein mentioned and yet unexpired; and a certain writing obligatory commonly called a bond, sealed with the seal of one R. S., whereby the said R. S. became bound to the said A. B. in the penal sum of ——— dollars, and then and still being in full force; and a certain bill of exchange in writing, made and drawn by one T. U. upon, and accepted by, the said C. D., bearing date the ——— day of ———, 18—, whereby the said T. U. requested the said C. D., six months after the date thereof, to pay to the said A. B., or his order, the sum of ———; and a certain other bill of exchange, accepted by the said C. D., for the payment by him, the said C. D., of a certain sum of money, to wit: the sum of ———, at a certain day therein mentioned, and now past; and a certain promissory note, in writing, made and drawn by one W. X., whereby he, the said W. X., promised to pay to the said A. B., or his order, a certain sum of money, to wit: the sum of ——— dollars, at a certain time therein mentioned and now past; and divers, to wit: twelve notes of the National Commercial Bank of Albany, commonly called bank notes, for the payment of the sum of ——— dollars each; and divers, to wit: twenty pieces of the current coin of this State called eagles [*or* half eagles, dollars, half-dollars, dimes, etc.]; and divers, to wit: twenty tables, twenty chairs, etc. [specifying the goods, and avoiding any repetition of the same articles, and describing each as generally as possible, omitting the quality as “mahogany,” “silver,” etc.],<sup>1</sup> of the value of ——— dollars.

That on the said ——— day of ———, 18—, the said defendant converted and disposed of the said goods and chattels to his own use, to the damage of the plaintiff of ——— dollars, for which amount the plaintiff demands judgment against said defendant, with costs of this action.<sup>2</sup>

M. F., *Plaintiff's Attorney.*

[Office address.<sup>3</sup>]

[Verification as in forms Nos. 151, etc.]

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<sup>1</sup> As to description of property, see 407), Gordon v. Hostetter (37 N. Y., Pierson v. Townsend (2 Hill, 550), 99; 4 Abb. N. S., 263), Carpentier v. Dows v. Bignall (Hill & Den. Supp., Willett (1 Keyes, 519), Bissel v. Drake

No. 948.

**Complaint in an Action for Conversion of Chattels Brought by an Executor.**

[Title of cause.]

The plaintiff complains of the defendant and alleges, that J. K. in his life-time, and on or about the ——— day of ———, 18—, was lawfully possessed of divers goods and chattels, to wit, etc. [describe the property], of great value, to wit: of the value of ——— dollars, as of his own property.

That the defendant afterwards and on the ——— day of ———, 18—, and in the life-time of the said J. K., at ———, converted and disposed of the said goods and chattels to his own use.

[Allege death (intestacy) and appointment of plaintiff as administrator (*or* executor) as in form No. 845.]

That by means of the premises the plaintiff, as such administrator [*or* executor], has been damaged to the amount

(19 Johns., 66). See, also, Code Civ. Pro., § 1697.

<sup>2</sup> As to what should be averred and proved in an action brought by the maker of a negotiable promissory note for its conversion against a person who, before it has any legal inception, wrongfully negotiates it to a *bona fide* holder for value, and that such an action can be maintained, see Decker v. Matthews (12 N. Y., 313).

In such a case, the plaintiff is entitled to recover the amount of the note as damages for its conversion, without averring or proving that he has paid it to the holder. It is sufficient that he is legally liable to pay it. (*Id.*)

A wrongful intent is not a necessary element of the conversion. It is enough that the owner has been deprived of his property by some unauthorized act of another, assuming dominion or control over it. (*Boyce v. Brockway*, 31 N. Y., 490.)

The allegation of a conversion is sufficient, without alleging demand and refusal. (*King v. Fitch*, 2 Abb.

Ct. App. Dec., 508.) Demand and refusal in general constitutes a conversion, or, as is sometimes expressed, is evidence of a conversion. There are exceptions to the application of this rule. (*Hill v. Covell*, 1 N. Y., 522; *McCormick v. Penn. Cent. R. R. Co.*, 80 N. Y., 353, 356.) Demand before action is unnecessary, if the goods were tortiously obtained. (*Pease v. Smith*, 61 N. Y., 477.) A *bona fide* purchaser of chattels, wrongfully taken, is not liable for conversion until after a demand and refusal. (*Gillet v. Roberts*, 57 N. Y., 28.) An assignee for the benefit of creditors, innocently taking possession of chattels tortiously acquired by assignor, is not liable for conversion before demand. (*Jessop v. Miller*, 2 Abb. Ct. App. Dec., 449.) The action will lie for a note wrongfully obtained and destroyed by defendant without a demand. (*Powell v. Powell*, 71 N. Y., 71.) See, also, *Hynes v. Patterson* (28 Hun, 528). See, also, note 1 to form No. 948, and see generally as to action, among other cases, *Marine Bank*

of Buffalo v. Fiske (71 N. Y., 353), Tuttle v. Hazard (13 Week. Dig., 222), Collins v. Ralli (20 Hun, 246, aff'd 85 N. Y., 637), Hallett v. Carter (19 Hun, 629), Ryerson v. Kanfield (13 Hun, 387), Hynes v. Patterson (95 N. Y., 1, aff'g S. C., 28 Hun, 528), Richards v. Pitts Ag. Works (37 Hun, 1), Brush v. Batten (15 State Rep., 548), Mather v. Freeloove (3 State Rep., 424; 25 Week. Dig., 343), Holeman v. Randall (26 Week. Dig., 20), Dexter v. Dexter (23 State Rep., 208), Burns v. Winchell (44 Hun, 261), Kelsey v. Lyon (97 N. Y., 629), Manchester v. Tibbetts (121 id., 219), Zimmer v. Bantel (28 State Rep., 899), Phillips v. McNab (30 id., 853), McAllaster v. Bailey (127 N. Y., 583), Lewis v. Ocean Nav. Co. (125 id., 341), Baker v. Hart (123 id., 470), Heald v. Van Sicen (38 State Rep., 187; aff'd S. C., 128 N. Y., 612), Gregory v. Fitchner (27 Abb. N. C., 86), Deeley v. Dwight (132 N. Y., 59), Genin v. Schwenk (62 Hun, 574), Dyett v. Hyman (129 N. Y., 351), Moore v. Prentiss Tool & Supply Co. (133 N. Y., 144), Korneman v. Fred. Hower Brewing Co. (4 Misc., 299), Banmann v. Jefferson (id., 147), Thompson v. Vroman (66 Hun, 345), Castle v. Corn Exchange Bank (75 Hun, 89), Russell v. McCall (141 N. Y., 437), Gullman v. Sharp (81 Hun, 462), Brady v. Smith (9 Misc., 716), Biel v. Horner (id., 492), Knight v. Sackett, etc., Lith. Co. (141 N. Y., 404), Clark v. Costello (79 Hun, 588), McQueen v. Lockwood (id., 612), Button v. Kinnetz (88 id., 35), Van Houten v. Pye (87 id., 19), Lawatsch v. Cooney (86 id., 546), Lamb v. O'Reilly (13 Misc., 212), Bishop v. Hendrick (82 Hun, 323), Cushman v. Oothout (88 id., 54), Gregg v. Wittemann (12 Misc., 90), Hovey v. Bromley (85 Hun, 540), Farrelly v. Hubbard (84 id., 391), Reddin v. Lawlor (13 Misc., 211), Perkins v. Slocum (82 Hun, 366), Goddard v. Cassell (84 id., 43), Freck v. Hughes (90 id., 16), Hoff v. Conmeight (14 Misc., 314), McLaughlin v. Harriott (id., 343).

\* See note 2 to form No. 122.



of \_\_\_\_\_ dollars, for which amount, with the costs of this action, he demands judgment, etc.<sup>1</sup>

M. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

[When the conversion was not in the life-time of the testator, say as above to the statement of the conversion, and then as follows: And the said defendant afterwards, and after the death of the said J. K., to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, converted and disposed of the said goods and chattels to his own use.]

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No. 949.

**Complaint for Arresting a Witness while Attending as Such upon Subpœna.**

[Title of cause.]

The plaintiff complains against the defendant and alleges, that heretofore and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, while the said plaintiff was attending and remaining as a witness before [naming the style of the court, etc., *or* while the said plaintiff was going to (*or* returning from), state the place, as a witness before, etc.], and to attend which court he had been duly and in good faith subpœnaed as a witness, by virtue of a writ of subpœna issuing out of and under the seal of the said court, thereby commanding the said plaintiff [here state the terms of the subpœna], he, the said plaintiff, then and there was unlawfully and wrongfully arrested by the said defendant, by pretext of a certain [state the process as nearly as may be], and was detained under such arrest for the space of \_\_\_\_\_ days [*or* hours], then next after such arrest, although the said plaintiff, at the time of such arrest, to wit: on the day aforesaid, at, etc., offered to make affidavit before him, he, the said defendant, then and there being [state the office he held], that he, the said plaintiff, had been legally subpœnaed to attend as a witness as aforesaid, before the court, and at the day

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<sup>1</sup> See notes to last form, No. 947. As to pleading time in actions generally, see *People ex rel. Crane v. Ryder* (12 N. Y., p. 439).

<sup>2</sup> See note 2 to form No. 122.

and place in the said writ of subpoena for that purpose specified, and that he, the said plaintiff, had not been so subpoenaed by his own procurement, with intent of avoiding the service of any process, yet the said defendant then and there refused to accept such offer, of the said plaintiff, or to discharge him from such arrest, by means whereof [and by force of the statute in that case made], he, the said defendant, became liable to pay the said plaintiff three times the amount of the damages which a jury might find in his favor; all which premises are to the said plaintiff's damage of \_\_\_\_\_ dollars, for which amount, etc. [prayer for judgment].<sup>1</sup>

M. F., *Attorney for Plaintiff.*  
[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

No. 950.

### Complaint for Manufacturing Candles near a Dwelling-house.

[Title of cause.]

The plaintiff complains of the defendant and alleges, that the said plaintiff, before and at the time of the committing of the grievances by the said defendant as hereinafter mentioned, was and from thence hitherto has been and still is possessed of a certain message or dwelling-house and premises, situated in the county of \_\_\_\_\_ [or at, etc.]; and the said message or dwelling-house, and premises, the said plaintiff, with his family, at the times hereinafter mentioned, occupied and inhabited, and still doth occupy and inhabit.

That the said defendant, before and at the time of the committing of the grievances hereinafter next mentioned, was, and from thence hitherto hath been, and still is possessed of a certain piece or parcel of ground contiguous and near to the said message or dwelling-house, and premises,

<sup>1</sup> See Code Civ. Pro., §§ 860 to 866. As to action, damages, etc., section 863 (id.), and see forms Nos. 363, 364, 365 and notes thereto, pages 270, etc., and see Schofield v. Kreiser (61 Hun, 368), Laws of 1892, ch. 682, § 2; People ex rel. Hess v. Inman (74 Hun, 130), Michaels v. Hains (78 id., 500), Sebring v. Stryker (10 Misc., 289), Hollender v. Hall (18 Civ. Pro. R., 394), Thorp v. Adams (25 Abb. N. C., 408), Finch v.

Galigher (id., 404), Fretcher v. Franks (15 N. Y. Supp., 674), Thorp v. Adams (33 State Rep., 797), Lederer v. Adams (id., 799; aff'd without op., 125 N. Y., 748), Hollender v. Hall (33 State Rep., 848), Day v. Harris (37 id., 322), Sander v. Harris (id., 594), Higgins v. Dewey (27 Abb. N. C., 81), Mark v. La Société, etc. (46 State Rep., 660); 30 Abb. N. C., 65, note; North River Construction Co. v. Taussig (Daily Reg.,



of the said plaintiff, to wit: in the county of ——— [or at, etc.] aforesaid.

That the said defendant contriving and intending to injure, prejudice and aggrieve the said plaintiff, and to incommode and annoy him and his family in the possession, occupation and enjoyment of his said messuage and dwelling-house, and premises, heretofore, to wit: on, etc., and on divers other days and times, between that day and the time of the commencement of this suit, wrongfully and injuriously erected and built a certain building and erection on the said piece or parcel of ground of the said defendant, so being contiguous and near to the said messuage or dwelling-house, and premises, of the said plaintiff as aforesaid, and wrongfully and injuriously kept, and continued and caused to be kept and continued, the same building and erection, so erected and made, for a long space of time, to wit, hitherto, and on the several days and times aforesaid, to wit, in the county of ——— [or at, etc.] aforesaid, wrongfully and injuriously exercised and carried on, in the said house and building, the trade or business of a candle maker or manufacturer of candles, and made, or caused and procured to be made and manufactured, divers large quantities of candles therein; by means of which several premises divers noisome, noxious and offensive vapors, fumes, smokes, smells and stenches, on the several days and times aforesaid, rose, issued and proceeded from the said building and erection, and entered into and spread and diffused themselves over and upon, into, through and about the said messuage or dwelling-house and premises of the said plaintiff, and the air over, through and about the same, was thereby greatly filled and impregnated with the said noisome, noxious and offensive vapors, fumes, smokes, smells and stenches, and was rendered, on the said several days and times aforesaid, and became and was and still is, corrupted, offensive, unwholesome, unhealthy and uncomfortable, and the said plaintiff hath thereby been, and still is, greatly annoyed and incommoded in the use, possession, occupation and enjoyment of the said messuage or dwelling-house and premises, and hath been, and is, by means of the committing of the grievances aforesaid by the said defendant as

Mar. 6, 1884), Pope v. Negus (14 Civ. Pro. R., 406), Pritsch v. Schlicht (5 State Rep., 871), Sheehan v. Bradford, etc., R. R. Co. (15 Civ. Pro. R., 429).

Cohn v. Kauffman (Daily Reg., April 30, 1884).

<sup>2</sup> See note 2 to form No. 122.

aforsaid, otherwise greatly damnified and injured, to wit: to the amount of \_\_\_\_\_ dollars, for which amount, etc. [prayer for judgment].<sup>1</sup>

M. F., *Plaintiff's Attorney.*

[Office address.]

[Verification as in forms Nos. 151, etc.]

## ARTICLE FIFTH.

### FORMS RELATING TO MISCELLANEOUS ACTIONS AND RIGHTS OF ACTION.

(Code Civ. Pro., Ch. 15, Tit. 4, Art. 5.)

- No. 951. Complaint in action to set aside security as usurious.
- 952. Affidavit to apply for leave to sue upon a judgment.
- 953. Notice of motion for leave to sue upon a judgment.
- 954. Order granting leave to sue upon a judgment.
- 955. Complaint in action upon judgment of court of record.
- 956. Complaint on a judgment rendered by a justice of the peace.
- 957. Complaint on bond for payment of money.
- 958. Same, setting forth breaches of condition.
- 959. Complaint on bond other than for payment of money.
- 960. Complaint on bond to perform covenants in another instrument.
- 961. Complaint on bond for annuity.
- 962. Complaint by accommodation maker of note, who has paid the same.
- 963. Complaint by guarantor against original debtor after payment of debt.
- 964. Complaint on a promise to save surety harmless.
- 965. Complaint on a guaranty.
- 966. Undertaking in action upon lost negotiable paper.
- 967. Complaint against maker of note.
- 968. Complaint against maker and indorser of note.
- 969. Complaint on check by payee against maker.
- 970. Same, by bearer against drawer.
- 971. Same, against maker and indorser.
- 972. Complaint on bill of exchange by drawee against acceptor.
- 973. Same, by endorsee against acceptor.
- 974. Same, by acceptor against drawer.
- 975. Same, against acceptor, drawer and indorser.
- 976. Same, against maker for non-acceptance.
- 977. Complaint on foreign bill by drawer or indorser against acceptor.
- 978. Same, by indorsee against drawer.
- 979. Same, by indorsee against acceptor, supra protest.

<sup>1</sup> As to action for nuisance, see Code 2, p. 621, to that form, and Spring v. Civ. Pro., §§ 1660-1664, and see form D., L. & W. R. Co. (88 Hun, 385).

No. 741, and notes 3, p. 620, and 1 and <sup>2</sup> See note 2 to form No. 122.

- No. 980. Complaint for work, labor and services.  
 981. Complaint for fees of attorney, etc.  
 982. Complaint for bill of a surgeon or physician.  
 983. Complaint for work, labor and materials in building house.  
 984. Complaint for goods sold and delivered.  
 985. Complaint on account stated.  
 986. Complaint for use and occupation.  
 987. Complaint for money had and received.  
 988. Complaint for money lent.  
 989. Complaint on undertaking given on appeal.  
 990. Complaint by executor on policy of life insurance.  
 991. Complaint on policy of insurance of goods, etc.  
 992. Answer alleging non-compliance with conditions of the policy.  
 993. Complaint against lessee for rent.  
 994. Complaint for non-delivery of goods sold.  
 995. Complaint for trespass in taking goods.  
 996. Complaint on a covenant of quiet enjoyment in a deed.  
 997. Complaint on covenant of seisin.  
 998. Complaint under civil damage act.  
 999. Complaint against mechanic for doing his work badly.  
 1000. Complaint for breach of warranty of a horse.  
 1001. Answer, coverture of defendant.  
 1002. Answer of infancy of plaintiff or deft.  
 1003. Answer of duress.  
 1004. Answer of release.  
 1005. Answer of payment.  
 1006. Answer of accord and satisfaction.  
 1007. Answer of discharge under the insolvent act.  
 1008. Answer of usury.  
 1009. Answer of usury to action by an indorser against drawer of a bill, etc.  
 1010. Answer that note was given to compound a felony.  
 1011. Answer that plaintiff is not a corporation.  
 1012. Answer that note was given for gambling.  
 1013. Answer of statute of frauds on a guaranty.  
 1014. Answer of arbitrament and award.  
 1015. Answer of judgment recovered.  
 1016. Answer claiming set-off.

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No. 951.

**Complaint in Action to Set Aside Security as Usurious.**

(Code Civ. Pro., § 1911; Laws 1837, ch. 430.)

[Title of cause.]

The plaintiff complains of the defendant and alleges, that heretofore and on, etc., the plaintiff, A. B., applied to this defendant for a loan of money.

That thereupon and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the defendant loaned to the plaintiff, A. B., the sum of \$1,000, under and in pursuance of and subject to the terms of the following agreement, which, at or about the time of the plaintiff's procuring said loan, was executed [*or made*] by the parties to this action, to wit: that the said plaintiff should pay and the defendant should reserve and secure to himself for the loan of the said sum of \$1,000, a greater sum than at the rate of [six] per centum per annum, to wit, the sum of \_\_\_\_\_ dollars in addition to said interest.

That at the time the defendant made the said loan to the said plaintiff, he required and obtained of the plaintiff the following security for the repayment of the said loan, to wit [a bond to be executed by the said plaintiff, and a mortgage to be executed by the said plaintiff and his wife, the plaintiff, M. B., upon the property described as follows, to wit (describing same)], which said [bond and mortgage] were [respectively] executed as aforesaid [and duly acknowledged, and delivered to said defendant as security for the repayment of the said amount, and said interest and charges as agreed, and said mortgage is recorded in \_\_\_\_\_ county clerk's office in book of mortgages number \_\_\_\_\_, at page \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—].

And plaintiff further alleges, that said agreement is in all respects corrupt, illegal and usurious and was made contrary to [*or with the illegal and corrupt intent to evade*] the statute in such case made and provided.

That the mortgage aforesaid is a cloud upon the title of the plaintiffs to the premises therein mentioned and an insurmountable obstacle to the sale of the said house and lot, or the obtaining a loan thereon, and is a great injury and damage to the plaintiffs.

[That these plaintiffs have, before the commencement of this action, offered to pay to the defendant \$1,000 and interest at the rate of six per centum per annum upon that sum for the time of the loan, which the defendant refused to receive. and these plaintiffs now offer to repay to the said defendant the said sum of \$1,000, loaned by him to the said plaintiff, A. B., and six per cent interest on the same

from the time he borrowed the money, and will for that purpose bring the same into court.<sup>1</sup>]

That these plaintiffs are unable to obtain complete and adequate redress except in this action.

Wherefore the plaintiffs pray that the [bond and] mortgage set forth in the complaint be declared null and void, and that the defendant be required by the judgment in this action to deliver up to the plaintiffs the [bond and] mortgage aforesaid, and that the same be cancelled, and that the defendant be decreed to satisfy the said mortgage of record, and that the defendant be perpetually enjoined and restrained from enforcing the said mortgage at law or in equity, and from selling, parting with or incumbering in any manner the said mortgage, and that the plaintiffs may have such further, etc.<sup>2</sup>

[Signature, etc., as in form No. 936.<sup>1</sup>

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> The allegations in brackets are not necessary in the case of a borrower. (See Laws of 1837, ch. 430 [3 R. S., 7th ed., 2255], and *Browne v. Vredenburg*, 43 N. Y., 197).

It is, however, provided by section 1911, Code Civ. Pro., that a cause of action to cancel, or otherwise affect, an instrument executed or an act done, as security for a usurious loan or forbearance, can be transferred, where the instrument or act creates a specific charge upon property, which is also transferred in disaffirmance thereof, and not otherwise; but, in that case, the transferee does not succeed to the right, conferred by statute upon the borrower, to procure relief, without paying, or offering to pay, any part of the sum or thing loaned.

By inserting allegations of a transfer of the security as required by the statute and inserting the words in brackets this form will answer for such a complaint. (See, also, *Wheeler v. Lee*, 64 N. Y., 242; *Tiedeman v. Ackerman*, 16 Hun, 307.)

See further, as to action to set aside instrument for usury, *Tyng v. Commercial Warehouse Co.* (58 N. Y., 308), *Allerton v. Belden* (49 id., 373), *Wheeler v. Lee* (*supra*, p. 247), *Buckingham v. Corning* (91 N. Y., 525), *Wright v. Clapp* (28 Hun, 7), *O'Brien v. Ferguson* (37 id., 368), *Marx v. Tailer* (27 Week. Dig., 71), *Richards v. Ludington* (60 Hun, 135), *Dickerson v. Valentine* (8 N. Y. Supp. 540), *Palmer v. Jones* (69 Hun, 240).

<sup>2</sup> It is held in *Allerton v. Belden*, *supra*, that the fact that a party has made an agreement or given a security which is void for usury, is not sufficient to entitle him to apply to a court of equity to have the contract annulled. The right to this relief exists only when, from the form of the security, the defense cannot be made available at law, or where the instrument sought to be avoided is a cloud upon the title to land, or some other necessity for the interposition of a court of equity is shown.

No. 952.

**Affidavit to Apply for Leave to Sue upon a Judgment.**

(Code Civ. Pro., § 1913.)

[Title of cause.]

COUNTY OF \_\_\_\_\_, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a judgment was rendered in the Supreme Court of the State of New York [*or* name other court; *or* by H. F., a justice of the peace for the town of \_\_\_\_\_, in the county of \_\_\_\_\_] for the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents damages, and \_\_\_\_\_ dollars and \_\_\_\_\_ cents costs, in favor of this deponent and against said C. D., the judgment roll whereupon was filed in the \_\_\_\_\_ county clerk's office on the \_\_\_\_\_ day of \_\_\_\_\_, 18— [and a transcript whereof was filed and said judgment duly docketed in the \_\_\_\_\_ county clerk's office, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—].<sup>1</sup>

That said judgment was rendered upon filing the report of E. F., duly appointed in said action as referee, to hear and determine the same [*or* upon filing the decision of Hon. A. O., a justice (*or* judge) of said \_\_\_\_\_ court; *or* upon the verdict of a jury rendered in said action; *or* upon the default of the said defendant to appear (*or* answer) therein, upon personal service of the summons in said action upon him; *or* state other authority for entry of judgment, so as to show that the case is not excepted by subdivision 1 of section 1913],<sup>2</sup> and is wholly unpaid [*or*, is unpaid to the amount of \_\_\_\_\_ dollars], with interest, etc.

That at or after the time of the rendition of said judgment, the said defendant was the owner of certain real estate situated in the county of \_\_\_\_\_, and that the lien

<sup>1</sup> No application need be made to bring a suit upon the judgment of a justice's court, or other court not of record, unless it has been made the judgment of the county court (or court of common pleas) by filing a transcript in the county clerk's office. After such transcript has been filed, an application becomes necessary, as in the case of other judgments of courts of record. (Baldwin v. Roberts, 30 Hun, 163; S. C., 17 Week. Dig., 239.) It may be material, also, in other cases, to state the filing of transcript; *e. g.*, where it is desired to show the judgment to be a lien upon real property in a county other than that in which

the judgment roll is filed. See Harris v. Clark (65 Hun, 361), following Diefenbach v. Roch (112 N. Y., 621), decided subsequent to Baldwin v. Roberts (*supra*), that section 1913 of Code Civ. Pro. does not apply to a judgment rendered by a justice's court and docketed in the county clerk's office. See, also, Herman v. Stalp (15 Daly, 292). See, also, amendments to sections 376 and 3017 Code Civ. Pro., referred to in note 1 to form No. 956.

<sup>2</sup> The statements as to manner of entry of judgment, and as to filing judgment roll, only apply to judgments originally entered in courts of record.

of said judgment upon said real estate is about to expire [or state other reasons why leave is desired to sue upon the judgment].

[That personal service of notice of motion for leave to sue upon said judgment cannot, in the opinion of this deponent, be made upon (said defendant) with due diligence, for the following reasons (state same).<sup>1</sup>]

A. B.

[Jurat as in form No. 46.]

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No. 953.

**Notice of Motion for Leave to Sue upon a Judgment.**

As in form No. 170, on motion to the court, to [\*], and from thence as follows: Upon the affidavit hereto annexed for an order granting leave to the plaintiff to bring an action against the defendant upon the judgment mentioned and described in said affidavit [with costs of this motion], and for such other and further relief as may be proper.<sup>2</sup>

Dated ———, 18—.

Yours, etc.,

M. N., *Plaintiff's Attorney.*

[Office address.]

To T. R., etc.

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No. 954.

**Order Granting Leave to Sue upon a Judgment.**

(Code Civ. Pro., § 1913.)

[At, etc., as in form No. 80.]

[Title of cause.]

On reading and filing the affidavit of A. B., dated ———, 18—, and [name any other motion papers], with proof of

<sup>1</sup>The court may direct in what manner notice of the motion may be given, if it appears that personal service cannot be made with due diligence upon the adverse party, or the person proposed to be made the adverse party. (Code Civ. Pro., § 1913, subd. 2.)

Generally as to this application and

its necessity, see notes to forms Nos. 955, 956, and see *Tufts v. Braisted* (4 Duer, 607; S. C., 1 Abb., 83), *Finch v. Carpenter* (5 Abb., 225), *Clark v. Story* (29 Barb., 295), *Harris v. Clark* (65 Hun, 361), cited on p. 854, *ante*, in note to form No. 952; *Freeman v. Dutcher* (15 Abb. N. C., 431), *McButt*





v. Herrick (4 Abb. Pr., 441), McGuire v. Gallagher (2 Sandf., 402), Wells v. Henshaw (3 Bosw., 625), Wheeler v. Dakin (12 How. Pr., 537), Graham v. Scripture (26 id., 501), Nat. Mechanics' Banking Ass'n v. Usher (1 Sweeny, 403), Smith v. Britton (2 T. & C., 498), Hanover Fire Ins. Co. v. Tomlinson (3 Hun, 630), Farish v. Austin (25 id., 430), Church v. Van Buren (55 How. Pr., 489), Goodyear Dental, etc., Co. v. Friselle (22 Hun, 174), Baldwin v.

Roberts (30 id., 163), Carpenter v. Butler (29 id., 251), Agar v. Tibbetts (46 id., 52), Spencer v. Wait (9 Civ. Pro. R., 93), Morton v. Palmer (39 State Rep., 236), Merritt v. Fowler (76 Hun, 424), Knapp v. Valentine (67 State Rep., 582), Van Arsdale v. King (87 Hun, 617); see, also, note 1, p. 857, *post*, to form No. 955.

<sup>2</sup> See notes to form No. 952.

<sup>3</sup> See note 2 to form No. 122.

due service of notice of motion upon, etc. [as required by the order of this court, made on the \_\_\_\_\_ day of \_\_\_\_\_, 18—], and on reading and filing [name any opposing papers], and on motion of E. F., of counsel for the plaintiff, and after hearing, etc. [*or* no one opposing]:

It is hereby ordered, that leave be and hereby is granted to the plaintiff to bring an action against the defendant upon the judgment rendered in the above entitled action in the \_\_\_\_\_ Court in favor of said A. B. against said defendant on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, for \_\_\_\_\_ dollars, damages and [\_\_\_\_\_ dollars and \_\_\_\_\_ cents] costs.<sup>1</sup>

No. 955.

### Complaint in Action upon a Judgment of Court of Record.

(Code Civ. Pro., § 1913.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a judgment [\*] was duly rendered in the [Supreme Court of the State of New York], in an action pending therein between the above named A. B., as plaintiff, and C. D., as defendant, in favor of the said A. B. and against the said C. D., for the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, damages and costs, which said judgment still remains in full force and effect, and not reversed, satisfied or otherwise vacated.

[That said judgment was rendered against the said defendant by default for want of an appearance (*or* answer, etc.), the summons therein having been served upon the said C. D. by publication thereof, pursuant to the order of the \_\_\_\_\_ Court therefor, made on the \_\_\_\_\_ day of \_\_\_\_\_, 18— (*or* state other method of service, other than personal).']

That the said [Supreme] Court, by an order duly made at a Special Term thereof, held at the \_\_\_\_\_ of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, granted leave to the

<sup>1</sup> See notes to form No. 952.

ant to subd. 1 of section 1913, Code

<sup>2</sup> Insert or omit the clause in brackets where the facts require it, pursu-

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plaintiff, upon his application therefor, to bring an action upon said judgment against the said C. D.<sup>1</sup>

Wherefore the plaintiff prays judgment against the defendant for the sum of \_\_\_\_\_ dollars, with interest thereupon from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, besides the costs of this action.<sup>2</sup>

M. F., *Plaintiff's Attorney.*  
[Office address.<sup>3</sup>]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> It is necessary to set forth the leave, stating how, when and from whom obtained. (Graham v. Scripture, 26 How., 501; Smith v. Britton, 45 id., 423; Hall v. Taylor, 8 id., 428; but see Prince v. Cujas, 7 Robt., 76; Finch v. Carpenter, 5 Abb., 225.)

It is held in Farish v. Austin (25 Hun, 430), that the failure to obtain leave is fatal to a judgment rendered in the action; but in German Savings Bank v. Carrington (14 Week. Dig., 475 [Supr. Ct., Gen. Tm.],) it is said that obtaining leave is not a jurisdictional requirement, citing Smith v. Britton (2 N. Y. Supr. Ct. [T. & C.], 498), McKernan v. Robinson (34 N. Y., 105), in which latter case an order granting leave to bring the action was granted, *nunc pro tunc*, in the action was sustained. See, also, Earle v. David (36 N. Y., 634), which was an action to recover for a deficiency arising on foreclosure sale, to bring which, permission of the court is required by 2 R. S., 191, § 153, *et seq.*, and which was commenced without such permission, and the defendant demurred to the complaint, the demurrer was sustained, but thereafter the court, upon plaintiff's application, gave plaintiff permission to amend, and to bring and continue the action "without prejudice to the proceedings already had." The complaint was thereupon amended, and upon a second demurrer was held sufficient, the court citing, McKernan v. Robinson (*supra*). See, also, McParland v. Bain (26 Hun, 38, 45), Church v. Van Buren (55 How. Pr., 489); and see note 1, p. 855, to form No. 952.

<sup>2</sup> As to what may be set up in defense of an action on a judgment, see, among

other cases, Dobson v. Pearce (12 N. Y., 156), Mandeville v. Reynolds (68 id., 528), Revere Copper Co. of Boston v. Dimmock (90 N. Y., 33), Green v. Hallenbeck (32 Hun, 469), Patrick v. Shaffer (94 N. Y., 423), Trebilcox v. McAlpine (62 Hun, 317), Blank v. Blank (107 N. Y., 91), Mather v. Parsons (32 Hun, 338), Ward v. Town of Southfield (102 N. Y., 287), Helburn v. Rosenson (2 State Rep., 618), Stevens v. Union Trust Co. (57 Hun, 498), Stillwell v. Carpenter (59 N. Y., 414), Mayor, etc., of N. Y. v. Brady (115 id., 599), White v. Reid (70 Hun, 197).

It was held, in Goodyear Dental Vulcanite Co. v. Friselle (22 Hun, 174), under § 71 Code Pro., that an action could be maintained without leave of the court, upon a judgment of a United States Circuit Court within this State, although such judgment had been docketed in a county clerk's office, as provided by the provision of the Code of Procedure corresponding to section 1271 of the Code of Civ. Pro., which section was repealed in 1879. See, also, Morton v. Palmer (39 State Rep., 236).

The mere averment that a judgment has been recovered in another State, followed by the averment of its assignment to the plaintiff, is not sufficient, in the absence of any further allegations, to make out a cause of action. (Horton v. Shipherd, 14 Week. Dig., 453 [Gen. Tm. Supr. Ct.] )

As to the cases in which the prohibition of section 1628, Code Civ. Pro., against suit without leave of the court is applicable, see Wyckoff v. Devlin (17 Week. Dig., 467).

<sup>3</sup> See note 2 to form No. 122.

No. 956.

**Complaint on a Judgment Rendered by a Justice of the Peace.**

(Code Civ. Pro., § 1913.)

As in form No. 955 to [\*], and from thence as follows: Was duly rendered by M. N., a justice of the peace of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, for the sum of \_\_\_\_\_ dollars, in favor of the plaintiff and against the defendant,<sup>1</sup> which said judgment still remains in full force and effect and not reversed, satisfied or otherwise vacated.

Wherefore the plaintiff prays judgment against the defendant for [amount of judgment], with interest thereupon from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, together with the costs of this action.

[Signature, etc., as in form No. 955.]

No. 957.

**Complaint on Bond for Payment of Money.**

(Code Civ. Pro., § 1915.)

[Title of cause.]

The plaintiff complains of the defendant and alleges, that

<sup>1</sup> In pleading a judgment, or other determination, of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction; but the judgment or determination may be stated to have been duly given or made. If that allegation is controverted, the party pleading must, on the trial, establish the facts conferring jurisdiction. (Code Civ. Pro., § 532.)

By the filing of a transcript of a justice's judgment in the county clerk's office, it becomes the judgment of the county court. After such filing an action cannot be brought upon it in the justice's court, but must be brought in a court of record upon leave first obtained from the court in which it is brought. (Baldwin v. Roberts, 30 Hun, 163.) But see note 1, p. 854, to form No. 952, in regard to effect of filing transcript of justice's judgment.

In an action upon a judgment of a justice of the peace, brought in the county wherein it was rendered, within five years after the rendition thereof, against a defendant upon whom the summons was personally served, no costs can be recovered, except where the justice who rendered the judgment is dead, or out of office, or otherwise incapable of acting; or has removed from the county; or where one of the parties has died; or where the docket of the judgment has been lost or destroyed. (Code Civ. Pro., § 3154.)

As to what defenses may be set up, see cases referred to in the last paragraph of note 2 to form No. 955.

A judgment rendered by a justice of the peace outlaws from the time of its rendition, and not from the time of its docketing in the county clerk's office.

heretofore, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said defendant by his certain bond or writing obligatory, dated on that day and sealed with his seal, acknowledged himself to be held and firmly bound unto the said plaintiff in the sum of [one thousand] dollars, to be paid to the said plaintiff [\*] [on the \_\_\_\_\_ day of \_\_\_\_\_, 18—]; yet the said defendant [although often, and particularly on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, requested so to do] hath not as yet paid the said sum of one thousand dollars, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused, and still neglects and refuses, so to do, to the damage of plaintiff of [one thousand] dollars.

Wherefore plaintiff demands judgment for the sum of [one thousand] dollars [with interest thereupon from the \_\_\_\_\_ day of \_\_\_\_\_, 18— (or from the time of the commencement of this action)],<sup>1</sup> besides the costs of this action.

M. F., *Plaintiff's Attorney.*

[Office address.]

[Verification as in forms Nos. 151, etc.]

No. 958.

### Complaint on Bond for Payment of Money, Setting forth Breaches of Condition.

(Code Civ. Pro., § 1915.)

As in form No. 697, including the condition of the bond,

An action should therefore be brought upon it, under subd. 4 of section 382 of Code Civ. Pro., within six years after its date and not after its docketing. (*Slocum v. Stoddard*, 20 Week. Dig., 556.) See amendments by ch. 307 of Laws of 1894, to sections 376 and 3017 of Code of Civ. Pro., by which these judgments when docketed in county clerk's office become outlawed in like manner as judgments of courts of record, that is, after the expiration of twenty years from the time when the party recovering the judgment was first entitled to a mandate to enforce it.

<sup>1</sup>The damages to be recovered for a breach, or successive breaches, of the condition of a bond for the payment of money cannot in the aggregate exceed the penal sum, with interest thereupon, from the time when the

defendant made default in the performance of the condition. (Code Civ. Pro., § 1915.)

As to what constitutes a bond for the payment of money, see *Lyon v. Clark* (8 N. Y., 148), *Beers v. Shannon* (73 id., 292; rev'g S. C., 12 Hun, 161), *Emerson v. Booth* (51 Barb., 40).

If no time of payment is fixed the time of a demand should be alleged, if made, as the interest would run from that time. (*Barry v. Ransom*, 12 N. Y., 463, 465; *Warren v. Wheeler*, 8 Metc., 97.)

If no demand has been made in such case previous to the action, interest should be claimed from the time of its commencement, as that is equivalent to a demand. (*White v. Miller*, 78 N. Y., 393, and cases there cited.)

<sup>2</sup>See note 2 to form No. 122.

and from thence as follows: And the plaintiff further shows, that the said defendant has failed to comply with the condition of the said bond, by omitting to pay the sum of \_\_\_\_\_ dollars, which, by the terms and conditions of said bond, became due on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

Wherefore the plaintiff demands judgment against the defendant for the sum of \_\_\_\_\_ dollars, with interest thereupon from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, besides the costs of this action.<sup>1</sup>

M. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

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No. 959.

**Complaint on Bond other than for the Payment of Money.**

(Code Civ. Pro., § 1915.)

As in form No. 957 to [\*], and from thence as follows: That the said bond was, and is, subject to a certain condition thereunder written, whereby [if there be any recital, add, “after reciting to the effect that,” etc., and state the recital], it is provided that, etc. [state the condition], then the said obligation to be void, otherwise to be and remain in full force and effect. Nevertheless, the said plaintiff alleges that, after the making of the said bond, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said defendant [state the breach, and if more than one, proceed as follows: And the said plaintiff for assigning a further breach of the said condition of the said bond, further says, that, etc. (state further breach)].

By means of which said several premises, the said plaintiff has sustained damages to the amount of [five hundred] dollars. Yet the said defendant [although on the \_\_\_\_\_ day of \_\_\_\_\_, requested so to do], has not as yet paid the said sum of [five hundred] dollars, or any part thereof, to the said plaintiff, but has hitherto neglected and refused, and still neglects and refuses, so to do.<sup>3</sup>

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<sup>1</sup> See notes to form No. 957.

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> See notes to form No. 957, and for forms relating to actions on official bonds, see forms Nos. 881, etc.

Wherefore, etc. [prayer for judgment as in form No. 957].  
 [Signature, etc., as in last form.]  
 [Verification as in forms Nos. 151, etc.]

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No. 960.

**Complaint on Bond to Perform Covenants in Another Instrument.**

(Code Civ. Pro., § 1915.)

As in form No. 957 to [\*], and from thence as follows: And the said plaintiff says, that the said bond was made with a condition thereunder written, that if [set out the condition *verbatim*] the above bounden defendant did well and truly observe, etc., all and singular the covenants, etc., whatsoever, which, on the part of the said defendant, were or ought to be observed, etc., in a certain indenture bearing even date with the said bond, and made between the said plaintiff of the one part and the said defendant of the other part, according to the true intent and meaning of the said indenture, then the said obligation was to be void, etc.

And the said plaintiff further says, that by the said indenture, in the condition of the said bond mentioned, he did demise into the said defendant, all that, etc. [here set out the demise, and such of the covenants as have been broken and assign breaches of them and conclude as in form No. 957, from "by means of," etc.].

[Signature, etc., as in form No. 958.]

[Verification as in forms Nos. 151, etc.]

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No. 961.

**Complaint on Bond for Annuity.**

(Code Civ. Pro., § 1915.)

[Set out bond and condition and then proceed as follows:] Nevertheless the said plaintiff in fact says, that after the making of the said bond, to wit, on the ——— day of ———, 18—, a large sum of money, to wit, the sum of [two hundred] dollars of the said annuity or yearly sum of [eight hundred] dollars, for one quarter of a year then elapsed, became and was due and owing from the said de-

fendant to the said plaintiff, and still is in arrear and unpaid, contrary to the form and effect of the said bond, and of the said condition thereof, by reason of which said breach the said bond became forfeited, yet the said defendant [although often and particularly on the ——— day of ———, 18—, requested so to do] has not as yet paid the said sum of ——— dollars.

Wherefore, etc. [prayer for judgment].

M. F., *Plaintiff's Attorney.*

[Office address.¹]

[Verification as in forms Nos. 151, etc.]

No. 962.

**Complaint by Accommodation Maker of Promissory Note  
who has Paid the Same.**

[Title of cause.]

The plaintiff complains against the defendant and alleges, that heretofore, and on or about the ——— day of ———, 18—, the plaintiff made his promissory note, of which the following is a copy, to wit [insert copy].

That said note was made at the special instance and request, and for the accommodation, of the said defendant, and that the plaintiff never received any consideration therefor, and the defendant promised to pay the same at its maturity.

That thereupon the said defendant endorsed the said note, and the same was by him, before maturity, transferred to C. F. for a valuable consideration.

That defendant did not pay the said note, or any part thereof, when the same became due, or at any time thereafter, and that the plaintiff was compelled to pay the same; and on the ——— day of ———, 18—, did pay the same to the said C. F., and that defendant has not paid the same to the plaintiff, or any part thereof.²

Wherefore, etc. [prayer for judgment].

[Signature, etc., as in form No. 961.]

[Verification as in forms Nos. 151, etc.]

¹ See note 2 to form No. 122.

indorser, may recover, in an action

² A surety, including a drawer or against his principal, his reasonable



No. 963.

**Complaint by Guarantor against the Original Debtor after Payment of Debt.**

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that heretofore, and on or about the ——— day of ———, 18—, the defendant made and executed [set forth agreement].

That upon the execution of said [name of agreement], the plaintiff, by an agreement in writing, guaranteed the payment [*or* performance, etc., according to fact].

That [here state the breach of his agreement by defendant], and that the plaintiff was obliged to pay, and did pay, on the ——— day of ———, 18—, to ———, the amount of ——— dollars, by reason of the failure of the defendant to pay the same [*or* state other failure to perform], which sum remains due and unpaid from defendant to plaintiff.

Wherefore, etc. [prayer for judgment].<sup>1</sup>

[Signature, etc., as in form No. 961.]

[Verification as in forms Nos. 151, etc.]

No. 964.

**Complaint on a Promise to Save Surety Harmless.**

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that the said defendant, on the ——— day of ———, 18—, in consideration that he, the said plaintiff, would, by his bond or writing obligatory, bearing date on the day and year aforesaid, become held and firmly bound

costs and other expenses, incurred necessarily and in good faith, in the prosecution or defense, by the express or implied consent of the principal of an action or special proceeding relating to the demand secured. This provision does not affect any special agreement relating to those costs and expenses. (Code Civ. Pro., § 1916.)

See, also, *Thompson v. Taylor* (72 N. Y., 32; aff'g S. C., 11 Hun, 274), as to rules relating to this action. Section 1916, *supra*, is a revision of section 3 of chapter 314 of Laws of 1858, referred to in that decision.

<sup>1</sup> See note 2 to form No. 962.

as surety for one J. B. unto A. A. [then sheriff of the county of ———], in the penal sum of ——— dollars, to be paid, etc. [describing the penal part of the said bond], and which said bond or writing obligatory was to contain a certain condition that if, etc. [here set forth condition substantially], he, the said defendant, would indemnify and save harmless him, the said plaintiff, of, from and against all damages, costs and charges which he might sustain or be put to, for or by reason of his becoming security as aforesaid, in manner aforesaid, for the said J. B.; and the said plaintiff confiding in such promise and undertaking of the said defendant in manner aforesaid made to the said plaintiff, did, in consideration thereof, duly execute and deliver the aforesaid bond or writing obligatory unto the said A. A.

And the plaintiff further alleges, that [here state when and in what manner the plaintiff was damaged in consequence of his becoming surety], of all which the said defendant afterwards, to wit, on, etc., had due notice, but that the defendant has not paid the said amount or any part thereof.<sup>1</sup>

Wherefore, etc. [prayer for judgment].

[Signature, etc., as in form No. 961.]

[Verification as in forms Nos. 151, etc.]

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No. 965.

### Complaint on a Guaranty.

[Title of cause.]

The plaintiff complains against the defendant and alleges, that heretofore, and on the ——— day of ———, 18—, in consideration that the said plaintiff, at the special instance and request of the said defendant, would sell and deliver goods, etc., to the value, etc., to one F. M., he, the defendant, then and there undertook, etc., to guaranty to the said plaintiff the payment of the said money; and the plaintiff avers that he, confiding in the said promise, etc., did sell, etc.

That said F. M. has not paid the said amount, or any

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<sup>1</sup> See *Hale v. Andrus* (6 Cow., 225).

part thereof, although the time of payment therefor has long since expired, of which the defendant had due notice, but the defendant has not paid the same, or any part thereof.

Wherefore, etc. [prayer for judgment].

[Signature, etc., as in form No. 961.]

[Verification as in forms Nos. 151, etc.]

No. 966.

**Undertaking in Action upon Lost Negotiable Paper.**

(Code Civ. Pro., § 1917.)

[Title of cause.]

Whereas, it has appeared [*or will appear*] upon the trial of the above entitled action, that a negotiable promissory note [*or bill of exchange*] upon which said action [*or the counterclaim interposed in said action*] is founded, described as follows [describe note, etc., as near as may be], was lost, while it belonged to E. F., the plaintiff [*or defendant*] therein.

Now, therefore, we, A. B., of \_\_\_\_\_, by occupation a \_\_\_\_\_, and C. D., of \_\_\_\_\_, by occupation a \_\_\_\_\_, do hereby jointly and severally undertake, pursuant to section 1917 of the Code of Civil Procedure, in the sum of \_\_\_\_\_ dollars,<sup>1</sup> that the said E. F. will indemnify the said defendant [*or plaintiff*], his heirs and personal representatives, against any claim by any other person on account of the said note [*or bill*], and against all costs and expenses by reason of such a claim.<sup>2</sup>

Dated \_\_\_\_\_, 18—.

A. B.

C. D.

In presence of \_\_\_\_\_.

[Acknowledgment or proof, justification and approval as in forms Nos. 340 and 538.]

<sup>1</sup> The sum is to be fixed by the judge or referee, not less than twice the amount of the note or bill.

<sup>2</sup> The statute (2 R. S., 406, §§ 75, 76) which required the giving of a bond

of indemnity, in case of the non-production of a bill or note, and to which section 1917 of Code Civil Procedure corresponds, was held to be limited to cases of *lost* instruments and to have

No. 967.

**Complaint against Maker of a Note.**

[Title of cause.]

The above plaintiff complains that the above named defendant, on the ——— day of ———, 18—, by his certain promissory note, in writing, dated on that day, for value received, promised to pay to this plaintiff, or his order, the sum of ——— dollars [thirty days] from the date thereof [with interest], and that he has not paid the same, nor any part thereof, but is justly indebted to the plaintiff therefor; whereupon the plaintiff demands judgment against the said defendant for ——— dollars, with interest thereon from the ——— day of ———, 18—, besides costs of this action.<sup>1</sup>

E. F., *Plaintiff's Attorney.*[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

No. 968.

**Complaint against Maker and Indorser of a Note.**

[Title of cause.]

The above named plaintiff complains that the defendant, I. J., on the ——— day of ———, 18—, at ———, by his certain promissory note, in writing, dated on that day, for value received, promised to pay to the defendant, K. L.

no application to the case of a *destroyed* check or note. (Scott v. Meeker, 20 Hun, 161, and cases cited.)

That the party need not join in the undertaking, see section 811, Code Civ. Pro., and note 1 to form No. 340, and generally as to undertakings, see notes to that form and to form No. 341.

See, also, Frank v. Wessels (64 N. Y., 155), Wright v. Wright (54 N. Y., 437), Smith v. Young (2 Barb., 545), Desmond v. Rice (1 Hilt., 530).

By section 1918, Code Civ. Pro., where an action is prosecuted or de-

fended by the people of the State, or by a public officer in their behalf, the people or the public officer may prove the contents of a lost note or bill of exchange by parol or other secondary evidence, and may recover or set off the amount due thereupon, without giving any security to the adverse party.

<sup>1</sup> For complaint upon a written instrument for payment of money only, by setting forth copy, see form No. 164, *ante*, and see notes to that form.

<sup>2</sup> See note 2 to form No. 122.

or his order, the sum of \_\_\_\_\_ dollars [thirty days] from the date thereof [with interest], and the defendant, K. L. afterwards, for value received, indorsed the said note, and the same was thereupon, for value received, transferred to the said plaintiff.

That payment of said note was duly demanded at maturity, and refused, and the same was thereupon duly protested for non-payment, and notice of such demand and refusal was duly given to said indorser, the expense of which protest was the sum of \_\_\_\_\_.

That said defendants have never paid the said note, or any part thereof, but are justly indebted to the plaintiffs therefor.

Wherefore the plaintiff demands judgment, against the defendants for \_\_\_\_\_ dollars, with interest thereupon from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, besides costs of this action, and said notary's fees.<sup>1</sup>

E. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

No. 969.

### Complaint on Check by Payee against Maker.

[Title of action.]

The above named plaintiff complains that the defendant, for value received, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, made his check, in writing, dated that day, directed to the \_\_\_\_\_ bank, and thereby directed and required the said bank to pay to the [\*] plaintiff [or bearer], on demand, the sum of \_\_\_\_\_ dollars, and the defendant then delivered the said check to the plaintiff.

And the plaintiff says, that, after the making of the said check, and on the \_\_\_\_\_ day of \_\_\_\_\_, aforesaid, the

<sup>1</sup> See note 1 to form No. 969, and see *Spellman v Weider* (5 How. Pr., 5), *Spencer v. Rogers Locomotive Works* (17 Abb., 110), *Price v. McClave* (3 Abb., 254; 6 Duer, 544), *Conkling v. Gandall*

(1 Abb. Ct. App. Dec., 423), *Farmers' and Mechanics' Bank of Genesee v. Wadsworth* (24 N. Y., 547), *Van Duzer v. Howe* (21 N. Y., 531).

<sup>2</sup> See note 2 to form No. 122.

said check was presented to the said bank and payment demanded therefor, but was refused; and the said bank have not paid the said check, or any part thereof, of which demand and non-payment defendant had due notice, the expense whereof was the sum of ——— dollars; nor has the defendant paid the said check, or any part thereof.

Wherefore the plaintiff demands, etc. [prayer for judgment as in last form].<sup>1</sup>

E. F., *Plaintiff's Attorney.*

[Office address.]

[Verification as in forms Nos. 151, etc.]

No. 970.

### Complaint on Check by Bearer against Drawer.

As in form No. 969 to [\*], and from thence as follows: G. H., or bearer, ——— dollars, and delivered said check to the said G. H., who thereupon transferred and delivered the same to the plaintiff [if there was an intermediate transfer, the averment should be as follows: and the said check was afterwards duly transferred to the plaintiff], and the said plaintiff then became and was, and is, the lawful bearer of the said check.<sup>1</sup> And the said bank did not pay the said check, although the same was afterwards, and on the ——— day of ———, 18—, duly presented to them for payment thereof, of all which the defendant had due notice, the expense whereof was the sum of ——— dollars; nor has the defendant paid the same, or any part thereof.

Wherefore, etc. [prayer for judgment].

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> See *Woodbury v. Sackrider* (2 Abb. Pr., 402), *Price v. McClave* (6 Duer, 544), *Judd v. Smith* (3 Hun, 190); and see, also, *Cook v. Warren* (88 N. Y., 37), in which *Woodbury v. Sackrider, supra*, is partially overruled, and it is held that an averment that the note was duly protested was not a sufficient allegation of notice to the indorsers, and that an averment of notice to the maker tends to exclude the idea of an

intention to aver notice also to the indorsers, and see note 1 to form No. 968.

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> The fact that plaintiff is the bearer is a material one to be alleged; its statement will be a sufficient allegation of plaintiff's title. (*Mechanics' Bank v. Straiton*, 5 Abb. N. S., 11; 36 How. Pr., 190.)

No. 971.

**Complaint on Check against Maker and Indorser.**

As in form No. 969 to [\*], inserting the name of the maker after word defendant, and from thence as follows: Defendant, L. M., or order, the sum of ——— dollars, and the said defendant, L. M., for value received, afterwards indorsed the said check, and the same was, for value received, delivered to the said plaintiff.

That payment of the said check was duly demanded and refused, and the same was thereupon duly protested for non-payment, and notice of such demand and refusal was duly given to the said defendants, the expense of which protest was the sum of ——— dollars.

That said bank, or said defendant, have never paid the said check, or any part thereof, but that said defendants are justly indebted to the plaintiff therefor.

Whereupon, etc. [prayer for judgment as in form No. 968].<sup>1</sup>

[Signature, etc., as in form No. 968.]

[Verification as in forms Nos. 151, etc.]

No. 972.

**Complaint on Bill of Exchange by Drawee against Acceptor.**

[Title of cause.]

The above named plaintiff complains, that on the ——— day of ———, 18—, one C. B., at the [city] of ———, made his draft or bill of exchange, in writing, dated on that day, and directed to the defendant, and thereby required the said defendant [two months], after the date thereof, to pay to [\*] the plaintiff, or order, the sum of ——— dollars, and interest thereon from the date thereof; and the said defendant afterwards, and for value received, accepted the said draft or bill, and promised the plaintiff to pay the same according to the terms and effect thereof, and of the said acceptance thereof. But the said defendant has not paid the same, nor any part thereof, but is justly indebted to the plaintiff therefor in the sum of ——— dollars, and interest thereon from the ——— day of ———, 18—, and for

<sup>1</sup> See note 1 to form No. 969.

which sum, besides the costs of this action, the plaintiff demands judgment against the defendant.<sup>1</sup>

[Signature, etc., as in form No. 968.]

[Verification as in forms Nos. 151, etc.]

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No. 973.

**Complaint on Bill of Exchange by Indorsee against Acceptor.**

As in form No. 972 to [\*], and from thence as follows: One E. F., or order, ——— dollars [two months] after date [or after sight thereof], which period has now elapsed.

That the said E. F. afterwards indorsed the said bill and delivered the same so indorsed to the plaintiff for value received, and the defendant [afterwards] accepted the said bill, and promised the plaintiff to pay the said bill according to the tenor and effect thereof and of the said acceptance thereof, yet the defendant did not pay the amount thereof [although the said bill was presented to him when it became due].

Wherefore, etc. [prayer for judgment as in form No. 968].<sup>2</sup>

[Signature, etc., as in form No. 968.]

[Verification as in forms Nos. 151, etc.]

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No. 974.

**Complaint on Bill of Exchange, Acceptor against Drawers.**

[Title of cause.]

The plaintiff, in this his complaint, says, that these defendants are indebted to him for certain moneys advanced by this plaintiff and by him paid in taking up a certain draft drawn by these defendants by the style of J. B. & Co., for ——— dollars and interest, dated ———, 18—, payable ——— days after date, and accepted by this plaintiff and by him paid at maturity, without funds to meet the same.

Wherefore, etc. [prayer for judgment].

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

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<sup>1</sup> See note 1 to form No. 969, and see Purdy v. Vermilya (8 N. Y., 346.)

<sup>2</sup> See note 1 to form No. 972.



## No. 975.

**Complaint on Bill of Exchange against Acceptor, Drawer and Indorser.**

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that the defendant, A. B., at ———, made his draft, or bill of exchange, bearing date ———, 18—, directing and requiring the defendant, C. D., for value received, to pay to the order of the defendant, E. F., the sum of ——— dollars, and interest ——— days from the date thereof, and the said defendant, C. D., for value, accepted the said draft, and the same was, for value received, indorsed by the said E. F., and by him for value transferred and delivered to the said plaintiff.

That payment of the said draft was duly demanded at maturity and refused, and the same was thereupon duly protested for non-payment, and notice of said demand and non-payment was duly given to the said drawer and indorser, the expense of which protest was ———.

That said defendants have never paid the said draft, or any part thereof, but are justly indebted to the plaintiffs therefor, whereupon the plaintiff demands judgment against the said defendants for ——— dollars and interest thereupon from the ——— day of ———, 18—, with costs of this action and ——— notary's fees.<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

## No. 976.

**Complaint on Bill of Exchange against Maker for Non-acceptance.**

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that the defendant, on the ——— day of ——— 18—, at ———, for value received, made his draft or bill of exchange in writing, dated on that day, and directed the same to one A. B., requiring the said A. B. to pay to the

<sup>1</sup> See note 1 to form No. 972.

defendant [sixty days] from the date thereof the sum of ——— dollars and interest from the date thereof, and for value the said defendant indorsed the same to the plaintiff [or to one L. M., who then and there indorsed the same to the plaintiff].

That the same was duly and in due time presented to the said A. B. for acceptance, and the said A. B. refused to accept the same, and the same was duly protested for the non-acceptance thereof, and notice of such presentation and non-acceptance was duly given to the said defendant, and the expense of such protest was the sum of ———.

That said defendant has not paid the said draft or any part thereof.

Wherefore, etc. [prayer for judgment as in form No. 968].<sup>1</sup>

[Signature, etc., as in form No. 968.]

[Verification as in forms Nos. 151, etc.]

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No. 977.

**Complaint on Foreign Bill by Drawer or Indorser against Acceptor.**

[Title of cause.]

The plaintiff complains against the defendant and alleges, that the said plaintiff [or one E. F.], on the ——— day of ———, 18— [in parts beyond the seas], to wit: at [Paris, in France], made his bill of exchange, in writing, and directed the same to the defendant, and thereby required the defendant to pay [that his second of exchange (according to the bill) first and third of the same tenor and date not paid] to the plaintiff [or one G. H.], or order, one hundred dollars [or three thousand francs], two months after the date thereof [or at two usances, that is to say, at (two) calendar months after the date thereof (according to the bill)], which period has now elapsed [if the action be by an indorsee, state the drawer's, E. F's., endorsement to the plaintiff in the common form], and the defendant [then and there] accepted the said bill and promised the plaintiff to pay the same according to the tenor and effect thereof, and of the said acceptance thereof [when the bill is to be paid in foreign

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<sup>1</sup> See note 1 to form No. 972.

money, add the following averment: and the said plaintiff alleges that the said sum of (three thousand francs), in the said bill mentioned, at the time of making the said bill, and when the same became due, was and is of the value of six hundred dollars of lawful money of the State of New York].

That the defendant has not paid the said bill, nor any part thereof, but the same remains wholly unpaid.

Wherefore, etc. [prayer for judgment].

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

No. 978.

**Same, by Indorsee against Drawer.**

[Title of cause.]

The plaintiff complains of the defendant and alleges, that the said defendant, on the ——— day of ———, 18— [in parts beyond the seas], to wit, at [Paris, in France], made his bill of exchange in writing, dated that day, and directed the same to one E. F., and thereby required the said E. F. to pay to the said defendant [*or* one G. H.], or order, one hundred dollars, two months after the date thereof, which period is now elapsed. And the said defendant [then and there] indorsed the said bill [to one G. H., who then and there indorsed and delivered the same] to the plaintiff, [\*] and the said bill was afterwards [*or* thereupon] presented to the said E. F. for acceptance, and the said E. F. then and there refused to accept the same. [If the bill is drawn in sets, add averment, as follows: nor did, nor would he, accept the said (first) or (third) of exchange in the said bill mentioned.] Whereupon the said bill was duly protested for non-acceptance thereof, of all which the said defendant had due notice.

That the defendant has not paid the said bill nor any part thereof, but the same remains wholly due and unpaid.

Wherefore, etc. [prayer for judgment].

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

[*Or* as above to (\*), and from thence as follows: And the

said E. F. did not pay the said bill, although the same was duly presented to him on the day when it became due, whereupon the said bill was then and there duly protested for non-payment thereof, of all which the defendant then and there had due notice.]

[Conclude as above.]

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No. 979.

**Same, Indorsee against Acceptor, supra Protest.**

[Title of cause.]

The plaintiff complains against the defendant and alleges, that one E. F., on the —— day of ——, 18— [in parts beyond the seas], to wit, at [Paris, in France], made his bill of exchange in writing, and directed the same to one G. H., and thereby required the said G. H. to pay to the said E. F., or order, one hundred dollars, two months after the date thereof, which period has now elapsed. And the said E. F. then and there indorsed the same to [L. M., who then and there indorsed the same to] the plaintiff, and the said bill was duly presented to the said G. H. for acceptance, and he then and there refused to accept the same, whereupon the said bill was then and there protested for non-acceptance thereof, of all of which the defendant had due notice. And thereupon the said defendant, in order to prevent the said bill from being sent back and returned to the said E. F., did, under the said protest, accept the said bill, and the said G. H. did not pay the said bill, although the same was presented to him for payment on the day when it became due, whereupon the said bill was then and there duly protested for non-payment thereof, of all which the defendant then and there had due notice.

That the said bill has not been paid, nor has any part thereof.

Wherefore, etc. [prayer for judgment].

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

No. 980.

**Complaint for Work, Labor and Services.**

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that the above named defendant is indebted to him [\*] for the work, labor and services of the plaintiff, to wit [state general nature of the services], which said work, labor and services were performed at the request of the defendant [and for materials furnished (and for money paid, laid out and expended) by the plaintiff to (and for) defendant at his request] from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, to the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in the sum of \_\_\_\_\_ dollars, and interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, for which sum, with the costs of this action, the plaintiff demands judgment against the defendant.<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

No. 981.

**Complaint for Fees of Attorney, etc.**

As in form No. 980 to [\*], and from thence as follows: In the sum hereinafter mentioned for the work and labor, care and diligence of the said plaintiff, by him bestowed and performed for the said defendant, and at his request, as attorney and counsel of the said defendant, and upon his retainer in divers causes, suits and business for the said defendant, and for certain fees due and of right payable to him in respect thereof, and for drawing, copying and engrossing of divers conveyances, deeds and other paper writings, for and at the request of the said defendant, and for

<sup>1</sup> As to form of complaint in this action, see *Beekman v. Platner* (15 Barb., 550), *Chesborough v. N. Y. and Erie R. R. Co.* (26 Barb., 9; S. C., 13 How. 557), *Hosley v. Black* (28 N. Y., 433; S. C., 26 How. Pr., 97, and cases there cited), *Hurst v. Litchfield* (39 N. Y., 377); and see *Lent v. N. Y. and M. R. Co.* (130 N. Y., 504), *Moffett v. Sackett* (18 id., 520), as to allegation of non-payment.

In an action for a wrongful dismissal, an allegation of readiness and willingness to serve is sufficient, without any allegation of an offer to serve. (*Wallace v. Warren*, 7 Dowl. & L., 60; 4 Ex., 364.)

See *Atkinson v. Collins* (9 Abb., 353; 30 Barb., 430), *Merwin v. Hamilton* (6 Duer, 253), *Brown v. Colie* (1 E. D. Smith, 267).

divers journeys and other attendances done and performed by the said plaintiff in and about the business and suits of the said defendant, and at his like request.

Wherefore, etc. [prayer for judgment].

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

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No. 982.

**Complaint for the Bill of a Surgeon or Physician.**

As in form No. 980 to [\*], and from thence as follows: In the sum hereinafter mentioned for divers drugs and medicines, between the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and the \_\_\_\_\_ day of \_\_\_\_\_, 18—, found, administered and provided by the said plaintiff to and for the said defendant, and at his request, and for divers visits, attendances and journeys and other medical aid, during that time, found, provided and done and performed by the said plaintiff to and for the said defendant, and at his like request, and for divers surgical operations, consultations and other services, during that time, found, done and performed by said plaintiff to and for the said defendant and at his like request, and for divers other [medical and surgical work, labor and services, and] drugs and medicines during that time found and provided [therefor and done and performed by the said plaintiff], to and for the said defendant, and at his like request.

Wherefore the plaintiff [prayer for judgment].

[Signature, etc., as in form No. 969.]

[Verification, etc., as in forms Nos. 151, etc.]

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No. 983.

**Complaint for Work, Labor and Materials in Building House.**

[Title of cause.]

The plaintiff, in his complaint, says, that this defendant is indebted to this plaintiff for the work, labor and services, care and diligence of this plaintiff and his servants for the defendant at sundry times, and also for materials and other

necessary things supplied by this plaintiff to the defendant, at his request,<sup>1</sup> in [building a certain dwelling house for the said defendant at the village of West Troy in the county of Albany].

That the amount of such work, labor and services, care and diligence of this plaintiff and his servants, and also for the materials and other necessary things, furnished at the request of the defendant, is the sum of five hundred dollars. And the plaintiff admits that he has received from the said defendant the sum of two hundred dollars, in part payment of the same, but the balance, to wit, of three hundred dollars, and interest thereon from the ——— day of ———, 18—, is still due and unpaid to the plaintiff.

Wherefore, etc. [prayer for judgment].<sup>2</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

No. 984.

### Complaint for Goods Sold and Delivered.

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that the said defendant is indebted to this plaintiff for goods, wares and merchandise, to wit [law books, blank books and stationery], heretofore, between the ——— day of ———, 18—, and the ——— day of ———, 18—, sold and delivered by this plaintiff to the said defendant at divers times, amounting to ——— dollars, and interest thereon from the ——— day of ———, 18—.

Wherefore the plaintiff demands judgment, etc.\*

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> As to necessity of alleging request, see *Spear v. Downing* (22 How. Pr., 30, 32), and cases there cited.

<sup>2</sup> As to form of complaint, see *Farcy v. Lee* (10 Abb., 143), *Prince v. Down* (2 E. D. Smith, 525), *Smith v. Brown* (17 Barb., 431), *Adams v. Mayor of*

*New York* (4 Duer, 295), and cases cited in note 1 to form No. 980.

<sup>3</sup> See the cases cited in note 2 to form No. 983, and *Lent v. N. Y. and M. R. Co.* (130 N. Y., 504), *Moffett v. Sackett* (18 id., 522), as to allegation of non-payment.

No. 985.

**Complaint on Account Stated.**

[Title of cause.]

The plaintiff complains of the defendant, that heretofore and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said plaintiff and defendant came to an accounting together [*or* an account was stated between the plaintiff and defendant].

That on such accounting [*or* by such statement] defendant was found to be indebted to the plaintiff in the sum of \_\_\_\_\_ dollars [which amount defendant promised to pay].<sup>1</sup>

That defendant has not paid the said amount or any part thereof.

Wherefore plaintiff demands judgment, etc.<sup>2</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

No. 986.

**Complaint for Use and Occupation.**

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that the defendant is indebted to this plaintiff for the use and occupation of [certain rooms in the Athenæum building], from the first day of May, 18—, to the first day of May, 18—, at the yearly rent of \_\_\_\_\_ dollars.

Wherefore he demands judgment, etc.<sup>3</sup>

[Signature, etc., as in form No. 969.]

[Verification, etc., as in forms Nos. 151, etc.]

<sup>1</sup>These words need not be inserted if no promise has been made.

<sup>2</sup>See as to what constitutes an account stated, etc., *Lockwood v. Thorne* (11 N. Y., 170; 18 id., 235), *Bruen v. Hone* (2 Barb., 586), *Dows v. Durfee* (10 Barb., 213), *Carpenter v. Kent* (50 N. Y. Super. Ct., 371), *Surdam v. Fuller* (31 Hun, 500), *Samson v. Freedman* (102 N. Y., 699), *Botlum v. Moore* (13 Daly, 464), *Knickerbocker v. Gould* (4 State Rep., 465), *Manchester Paper Co. v. Moore* (104 N. Y. 680), *Knickerbocker v. Gould* (115 id., 533, aff'g S. C., *supra*), *August v. Fourth Nat. Bank* (15 State Rep., 956), *Weber v. Bridgman*, (12 id.,

622; 113 N. Y., 600), *Aylsworth v. Gallagher* (52 State R., 505), *Pickard v. Simpson* (6 N. Y. Supp., 93), *Stephen v. Ayers* (57 Hun, 51), *Vernon v. Simmons* (28 State Rep., 173), *Beach v. Kidder* (28 id., 590), *Kingsley v. Melcher* (56 Hun, 547), *Jugla v. Trouttet* (120 N. Y., 21), *Burlingame v. Shelmire* (35 State R., 161), *Kemp v. Peck* (59 Hun, 118), *Austin v. Wilson* (33 State Rep., 503), *Brockman v. Meyers* (36 id., 650), *Frankel v. Wathen* (58 Hun, 543), *Lawson v. Douglass* (43 State Rep., 356), *Holler v. Apa* (id., 529), *Bradley Fertilizer Co. v. South Pub. Co.* (44 id., 119) (*Campbell v. Campbell* (40 id., 817), *Rob-*



bins v. Downey (45 id., 279), Mackay v. Kahn (44 id., 286), Liscomb v. Agate (67 Hun, 388), Davis v. Kling (77 id., 593), McClain v. Schofield (74 id., 437), Loeb v. Keyes (86 id., 353), Blant v. Borchardt (12 Misc., 197), Dakin v. Walton (85 Hun, 561), Vestner v. Findlay (10 Misc., 410), Conville v. Shook (144 N. Y., 686).

As to form of complaint, see Graham v. Cammon (13 How. Pr., 360), Emery v. Pease (20 N. Y., 62), Finley v. Fay (96 N. Y., 663), Schutz v. Morrette (146 id., 137).

The giving of a promissory note is *prima facie* evidence of an accounting and settlement of all demands between the parties, and that the maker was indebted to the payee upon such settlement to the amount of the note. (Lake v. Tysen, 6 N. Y., 461.)

<sup>3</sup>This action cannot be maintained where there is a lease under seal, either against the lessee or his assignee. (Kierstedt v. Orange, etc., R. R. Co., 69 N. Y., 343.)

It can only be sustained on the ground of a subsisting tenancy between the parties. (Id., 347.) See, also, Preston v. Hawley (139 N. Y., 296), Lamb v. Lamb (146 id., 317), Collyer v. Collyer (113 id., 442), Preston v. Hawley (101 id., 586; 39 State Rep., 721; 46 id., 776).

See, further, as to rules governing the action, Gilhooley v. Washington (4 N. Y., 217), Fletcher v. Button (4 id., 396), Vernam v. Smith (15 id., 327), Bedford v. Terhune (30 id., 453), Hall v. Western Trans. Co. (34 id., 284), Coit v. Planer (51 id., 647), Austin v. Ahearne (61 id., 6) Thomas v. Nelson (69 id., 118), Davis v. Delaware & Hudson Canal Co. (109 id., 47), Sadler v. Riggs (29 State Rep., 15), Reynolds v. Lawton (23 id., 670), Whitman v. Bowe (56 Hun, 141), Seton v. Clark (42 State Rep., 561), Lamb v. Lamb (76 Hun, 186, aff'g S. C., 146 N. Y., 317), Gustaveson v. Otis (75 id., 611), Ives v. Quinn (7 Misc., 155), Richards v. Littell (11 id., 637).



No. 987.

**Complaint for Money had and Received.**

[Title of cause.]

The plaintiff complains of defendant, that the said defendant is indebted to him in the sum of \_\_\_\_\_ dollars, for money had and received by defendant to the use of the plaintiff, and that no part thereof has been paid to the plaintiff.<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

No. 988.

**Complaint for Money Lent.**

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that heretofore and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, he loaned to the defendant \_\_\_\_\_ dollars, to be repaid on the \_\_\_\_\_ day of \_\_\_\_\_, 18— [that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, he duly demanded from said defendant the payment of said amount];<sup>2</sup> but that defendant has not paid the same or any part thereof.

Wherefore the plaintiff demands judgment against the defendant for the said sum of \_\_\_\_\_ dollars, with interest thereupon from the \_\_\_\_\_ day of \_\_\_\_\_, 18—.<sup>3</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms No. 151, etc.]

<sup>1</sup> See, among numerous cases, *Adams v. Holley* (12 How. Pr., 326), *Harpending v. Shoemaker* (37 Barb., 270), *Chapman v. Forbes* (123 N. Y., 532), *Rosenberg v. Block* (54 Super. Ct., 537, rev'd S. C., 118 N. Y., 329), *Risdon v. De La Rúa* (51 id., 63, aff'd 98 N. Y., 653), *Roberts v. Ely* (113 id., 128), *Brown v. Brown* (40 Hun, 418), *Fisher v. Martin* (6 State Rep., 102), *Peyser v. Wilcox* (64 How. Pr., 525), *Mayor, etc., of New York v. Second Ave R. Co.* (31 Hun, 241, aff'd S. C., 102 N. Y., 572, 577), *Pierson v. McCurdy* (33 Hun, 520, aff'd S. C., 22 Week. Dig., 253; 100 N. Y., 608), *Remsen v. Wheeler* (105 N. Y., 573), *Brehm v. Mayor, etc.* (104 id., 186), *Moore v. Williams* (115 id., 586), *Cutler v. Am. Exchange Nat. Bank* (113 id., 593), *Bridges v. Supervisors of Sullivan* (92 id., 570), *First Nat. Bank of Ballston Spa v. Supervisors of Saratoga* (106 id., 488), *Coffin v. City of Brooklyn* (116 id., 159), *Place v. Hayward* (117 id., 487), *Strough v. Supervisors of Jefferson* (119 id., 212), *Mason v. Prendergast* (120 id., 536), *Roberts v. Ellwood* (116 id., 651), *Ackerman v. Cobb Line Co.* (125 id., 361), *Webb v. Meyers* (64 Hun, 11), *Freeman v. Grant* (132 N. Y., 22), *Newhall v. Wyatt* (139



id., 452), *Vaughn v. Village of Port Chester* (135 id., 460), *Tripler v. Mayor etc.*, of N. Y. (139 id., 1), *Wood v. Young* (141 id., 211), *Crosby v. Clark* (80 Hun, 426), *Kane v. Aldridge* (78 id., 606), *Dieckerdorf v. Alder* (12 Misc., 445), *Otis v. Crouch* (89 Hun, 548), *Kruger v. Galewski* (13 Misc., 56), *Walsh v. Nat. Broadway Bank* (id., 3), *Ætna Ins. Co. v. Mayor* (14 id., 145), *Brown v. Brown* (83 Hun, 160), *Dumois v. Hill* (11 Misc., 242), *Am. Preserving Co. v. Wiltsie* (10 id., 462), *Vestner v. Findlay* (10 id., 410), *Prout v. Chisholm* (89 Hun, 108), *Todd v. Vaughan* (90 id., 70), *Roldan v. Power* (14 Misc., 480), *Flandrow v. Hammond* (148 N. Y., 129, rev'g S. C., 72 Hun, 105).

<sup>2</sup>If no time was specified for payment the loan will bear interest from the time of a demand, or if not demanded before action from the time of the commencement of the action.

See the cases cited on that subject in note 1 to form No. 957.

<sup>3</sup>The material allegations are that money was lent, and that it has not been repaid. (*Whitehead v. Allen*, 3 Trans. App., 261.)

It is not necessary to allege a request by defendant. (*Victors v. Davis*, 1 Dowl. & L., 984; 12 M. & W., 766.)

No. 989.

**Complaint on Undertaking Given on Appeal.**

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that heretofore, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, he recovered a judgment in the \_\_\_\_\_ Court against one O. M. for \_\_\_\_\_ dollars and \_\_\_\_\_ cents, damages and costs, the judgment roll whereupon was filed in the \_\_\_\_\_ county clerk's office on that day.

That the said O. M. appealed from said judgment to the \_\_\_\_\_ Court, and that on such appeal the said defendants, E. F. and G. H., executed an undertaking,<sup>1</sup> as required by law, by which they jointly and severally undertook that the said appellant would pay all costs and damages which might be awarded against the said O. M. on said appeal, not exceeding five hundred dollars, and also jointly and severally undertook that, if the said judgment appealed from, or any part thereof, should be affirmed [or said appeal should be dismissed], the said appellant would pay the sum recovered or directed to be paid by the said judgment, or the part thereof as to which said judgment should be affirmed.

And this plaintiff further says, that afterwards, the judgment mentioned and referred to in the said undertaking, and in this complaint mentioned, as recovered against the said O. M., was wholly affirmed [or the said appeal was dismissed] by the \_\_\_\_\_ Court, with costs of the said appeal, and that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a judgment was duly entered in \_\_\_\_\_ county clerk's office against said O. M., and in favor of the plaintiffs, affirming the said first mentioned judgment [or dismissing the said appeal] and for \_\_\_\_\_ dollars costs of said appeal [that executions were issued upon said judgments respectively to the sheriff of \_\_\_\_\_ county against the property of the said O. M. since said affirmance, and on or about the \_\_\_\_\_ day of \_\_\_\_\_,

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<sup>1</sup> The allegation that the undertaking of the complete execution including was executed by the defendants is a sufficient allegation, and there being no the delivery of the instrument. (Robert v. Good, 36 N. Y., 408; aff'g, Robert v. Snelling, 2 Daly, 64.)

18—, which executions have been since returned by the said sheriff wholly unsatisfied,<sup>1</sup> and]; that nothing has been collected or paid upon said judgments.

That more than ten days before the commencement of this action, and on or about the ——— day of ———, 18—, the plaintiff caused to be served upon F. G., Esq., the attorney for the said appellant, a written notice of the entry of the said judgment, affirming the said judgment appealed from [*or* dismissing the said appeal].<sup>2</sup>

Nevertheless, the said defendants have not paid the said plaintiff the said judgments, nor any part thereof, but are justly indebted to the plaintiff therefor in the sum of ——— dollars, with interest upon the sum of ——— dollars from the ——— day of ———, 18—, and on ——— dollars from the ——— day of ———, 18—, for which amount, together with the costs of this action, the plaintiff demands judgment against the defendant.

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

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No. 990.

### Complaint by Executor on Policy of Life Insurance.

[Title of cause.]

This plaintiff in his complaint says, that the defendant, at the request and for the benefit of C. D., on the ——— day of ———, 18—, made its writing obligatory, or policy of insurance, under its seal, in the words and figures following, to wit [here insert policy], which said policy of insurance the said defendant, on the said ——— day of

<sup>1</sup> There is apparently no provision requiring execution to be returned upon the judgments before suit upon the undertaking, but these allegations may be inserted in case they have been issued and returned.

<sup>2</sup> A complaint on an undertaking, given upon appeal, which fails to allege service of the requisite notice ten days before the commencement of ac-

tion, is fatally defective on demurrer. So held under section 348 of the Code of Procedure, which was substantially the same as section 1309 of Code Civ. Pro., *g. v.* (Porter v. Kingsbury, 71 N. Y., 588; *aff'g* S. C., 5 Hun, 597.)

For form of notice, see form No. 524, and see cases cited in note 2 to that form.

———, 18—, did, for the consideration or premium therein expressed, deliver to the said C. D.

And the plaintiff further says, that the said C. D. duly and in due time paid the annual premiums mentioned in the said policy, from the time of making the said policy until the time of his decease.

And this plaintiff further says, that the said C. D. departed this life [but not by his own hands, or the hands of justice, etc.], ' on the ——— day of ———, 18—, having previously, and on the ——— day of ———, 18—, made has last will and testament, in due form, thereby appointing the plaintiff the executor thereof; which said last will and testament has been duly proved by the surrogate's court, of the county of ———, and letters testamentary thereupon, duly issued to this plaintiff on the ——— day of ———, 18—.

And this plaintiff further says, that the defendant has not paid the said sum of \$5,000, nor any part thereof.

Wherefore he demands judgment, etc. [insert prayer for judgment].<sup>2</sup>

[Signature, etc., as in form No. 949.]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup>In an action upon a life insurance policy, which contained a condition that if the insured died by his own hand or act, whether sane or insane, the company should not be liable for an amount greater than the reserve of such policy, the answer set up a breach of this condition as a defense. *Held*, that it was no part of the plaintiff's case to prove the manner of the death of the insured, that it was for the defendant to plead and prove the breach of the condition. (*Germain v. Brooklyn Life Ins. Co.*, 30 Hun, 536.)

The complaint was sufficient without any allegation of the cause of the death of the insured. (*Id.*; citing *Murray v. N. Y. Life Ins. Co.*, 85 N. Y., 236, *q. v.*)

In the latter case it is said by Miller, J., at page 239: "It (the complaint) alleged, among other things, that the death of the insured was not caused by the breaking of any of the conditions and agreements in either of the policies. This allegation was not required,

and all that was essential to make out a cause of action was a statement of the contract, the death of the assured, and the failure to pay as provided."

The presumption of law that a sane man found dead has not committed suicide does not extend to the case of an insane man so found (*Germain v. Brooklyn Life Ins. Co.*, 26 Hun, 604.)

See further as to form of complaint in action on life insurance policy, *Simons v. N. Y. Life Ins. Co.* (16 Week. Dig. 272), *Taylor v. Charter Oak Life Ins. Co.* (9 Daly, 489; aff'g S. C., 8 Abb. N. C., 331; 59 How. Pr., 468), *Cahen v. Continental Life Ins. Co.* (69 N. Y., 300), *Grattan v. Metropolitan Life Ins. Co.* (80 N. Y., 281), *Baxter v. Brooklyn Life Ins. Co.* (44 Hun, 184), *Stewart v. Union Mut. Life Ins. Co.* (63 Hun, 328), *Bogardus v. N. Y. Life Ins. Co.* (101 N. Y., 328), *Knorr v. New York State Mutual Benefit Association* (79 Hun, 83), *Baumiller v. Workingman's Co-operative Association* (9 Misc., 157).



No. 991.

**Complaint on Policy of Insurance of Goods, etc.**

[Title of cause.]

The plaintiff by his complaint shows, that the said defendant,<sup>1</sup> heretofore, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, made a certain deed-poll or policy of insurance, and sealed with the seal of the defendant, in the words and figures following [insert policy], which said deed-poll or policy of insurance the said defendant, on the said \_\_\_\_\_ day of \_\_\_\_\_, 18—, delivered to this plaintiff, upon his paying to the said defendant the amount of premium as in the said policy expressed and set forth, and that thereupon the said defendant became the insurer to the said plaintiff for the sum of \_\_\_\_\_ dollars, in the said policy of insurance set forth, of the [goods, wares and merchandise in], the said building, in the said policy mentioned, for the time therein specified.

[And the said plaintiff further says, that the said policy of insurance, on his application, was duly renewed and continued by the said defendant in full force and effect, from time to time, until the \_\_\_\_\_ day of \_\_\_\_\_, 18—, on which last mentioned day the said plaintiff, at \_\_\_\_\_, made another application to the said defendant for the renewal and continuation of the said policy; and the said defendant then and there, in consideration of the sum of \_\_\_\_\_ dollars, to him paid by the said plaintiff, the receipt whereof was, by the said defendant, in writing, acknowledged, the said defendant continued the said policy in force for the sum of \_\_\_\_\_ dollars for one year, to wit, from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, to the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at noon.]

And this plaintiff further says, that at the time of insuring the said [goods wares and merchandise], he was the sole owner thereof, and so continued the sole and exclusive owner till the same [were] destroyed by fire<sup>2</sup> on the \_\_\_\_\_

<sup>1</sup> For allegations in suit by or against corporation, see form No. 832.

<sup>2</sup> As to necessity for averment of interest in the property, and what constitutes a proper allegation of such

interest, see *Fowler v. N. Y. Indemnity Ins. Co.* (26 N. Y., 422; rev'g S. C., 23 Barb., 143), *Wyman v. Wyman* (26 N. Y., 253), *Frink v. The Hampden Insurance Co.* (1 Abb. N. S., 343;

day of ———, 18— [next aver the cause of the fire, loss and destruction of the goods, and the facts as to compliance with the terms as to proof of loss, to entitle the plaintiff to recover], by reason whereof an action has accrued to the said plaintiff to have, and demand of and from the said defendant, the sum of ——— dollars, so insured as aforesaid, and interest thereon.<sup>1</sup>

Wherefore, etc. [prayer for judgment].

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

### No. 992.

#### Answer Alleging Non-compliance with Conditions of the Policy.

As in form No. 1001 to [\*], and from thence as follows : That the plaintiff did not, before the commencement of this action, give due notice, or any notice, of the loss of the said goods by fire, for which he seeks recovery in this action ; nor did the said plaintiff, previous to the commencement of this action, furnish to the said company any statement of the loss of the said goods, as by the said policy is required to be done, and in several other particulars the said plaintiff

45 Barb., 387), *Ferguson v. Mass. Mut. Life Ins. Co.* (22 Hun, 320), *Shearman v. Niagara Fire Ins. Co.* (46 N. Y., 526, 529), *Williams v. Ins. Co. of North America* (9 How. Pr., 365) ; *Delahunt v. Ætna Ins. Co. of Hartford* (21 W. D., 82 ; S. C., 97 N. Y., 537), *Velie v. Newark City Ins. Co.* (23 Week. Dig., 456).

The complaint should state that the property insured was injured by fire. (*Rodi v. Rutger's Fire Ins. Co.*, 6 Bosw., 23).

<sup>1</sup> Where, by the policy, a loss was made payable sixty days after due notice and proof thereof, *held*, that plaintiffs were entitled to interest after the expiration of sixty days from the time of furnishing proofs of loss, not from the time the loss was adjusted and settled. (*Hastings v. Westchester Fire Ins. Co.*, 73 N. Y., 141.)

As to necessity of negating breach of condition, see *Hunt v. Hndson River Fire Ins. Co.* (2 Duer, 481), *Ellsworth v. Ætna Fire Ins. Co.* (89 N. Y., 186).

In an action by a mortgagor upon a policy of insurance issued to him, but in terms payable to the mortgagee, the complaint must aver that the mortgage has been paid, or must join the mortgagee as a party. (*Ennis v. Harmony Fire Ins. Co.*, 3 Bosw., 516.)

As to time for accruing of action with reference to proofs of loss, see *Barnum v. Merchants' Fire Ins. Co.* (31 Alb. Law Jour., 176 ; S. C., 97 N. Y., 188, and cases there cited), *Jennings v. Grand Trunk Railway Co.* (52 Hun, 227).

As to proper form of action to recover upon an executory agreement to issue an insurance policy, see *Post v. Ætna Ins. Co.* (43 Barb., 351).

utterly neglected and refused to comply with the terms and conditions in the said policy set forth and expressed, and the said plaintiff at divers times received into his said store a large quantity of goods known and described as extra hazardous, well knowing that such reception was a violation of the conditions in the said policy contained; and at the time of the said fire the said plaintiff had in his store a large quantity of such extra hazardous goods, by means whereof the conditions of the said policy were violated, disregarded and broken, and these defendants entirely discharged from their liability on the said policy written.<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

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No. 993.

**Complaint against Lessee for Rent.**

[Title of cause.]

The plaintiff complains of the defendant and alleges, that heretofore and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, he rented to the defendant herein a [store and dwelling, known and distinguished as No. — \_\_\_\_\_ street in the city of \_\_\_\_\_], for the term of \_\_\_\_\_ years from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at the yearly rent of \_\_\_\_\_ dollars, payable [quarterly], which said sum this defendant by an agreement in writing by him signed agreed to pay; and that having so hired the said premises the said defendant entered and occupied, but has not paid the rent for the same for [the first two quarters of the said year], amounting to \_\_\_\_\_ dollars and interest on \_\_\_\_\_ dollars from the \_\_\_\_\_ day of \_\_\_\_\_, and on \_\_\_\_\_ dollars from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, for which amount, with costs of this action, plaintiff demands judgment against the defendant.<sup>2</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

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<sup>1</sup> See note 1 to form No. 991.

<sup>2</sup> For complaint for use and occupation, see form No. 986, and see note 1 to that form.

As to complaint in action against assignee of a lease, see Norton v. Vulture (1 Hall, 384), Holsman v. De Gray (6 Abb., 79), Tate v. McCormick (23

No. 994.

**Complaint for the Non-delivery of Goods Sold.**

[Title of cause.]

The plaintiff in his complaint says, that on the third day of May, 18—, at ———, he bought of the defendant one thousand barrels of flour at the price or sum of ——— dollars per barrel, which said flour the said defendant then and there sold to this plaintiff, and agreed to deliver to this plaintiff, at his store in the city of Schenectady, on or before the tenth day of July aforesaid, on the following terms, to wit: the payment of three hundred dollars at the time of such sale, and the balance in ten days from the delivery of the said flour.

And this defendant further says, that he paid to the said defendant the said sum of three hundred dollars, and is still ready and willing to perform his part of the said contract; but the said defendant, although sufficient time has elapsed therefor, has failed to fulfill his part of the said agreement, and does still neglect and refuse to perform the same, to the great damage of this plaintiff, to wit: to the damage of five hundred dollars, for which amount he demands judgment against the defendant, with costs of this action.<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

No. 995.

**Complaint for Trespass in Taking Goods.**

[Title of cause.]

The plaintiff complains of the defendant, that he, the said defendant, on the tenth day of September, 1851, at S——, in the county of R——, wrongfully broke into the plaintiff's barn and took from his possession one large wagon, two sets of harness, two bay horses, one buffalo robe and one whip, being the property of this plaintiff, and then and there took and carried away the same and converted them

Hun, 218), Van Rensselaer v. Jones (2 Barb., 643), Van Rensselaer's Executors v. Gallup (5 Denio, 454).

<sup>1</sup> See Camp v. Norton (53 Barb., 96).

to his own use, to the damage of this plaintiff of \_\_\_\_\_ dollars.

Wherefore he demands, etc.<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

No. 996.

**Complaint on a Covenant of Quiet Enjoyment in a Deed.**

[Title of cause.]

The plaintiff in his complaint shows to the court that heretofore, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said defendant, and \_\_\_\_\_, his wife, made their warranty deed, or indenture, in the words and figures following [here set out deed], which said deed or indenture, for a valuable consideration, to wit: the sum of \_\_\_\_\_ dollars, defendant then and there delivered to this plaintiff.

And this plaintiff further says, that he, the said plaintiff, has not been permitted, nor has he been able, from time to time, and at all times, peaceably and quietly to have, hold, use, occupy, possess and enjoy the said premises in the said indenture mentioned, and thereby intended to be conveyed; nor has he been able to have, receive and take the rents, issues and profits thereof, but, on the contrary, one E. M., who, at the time of making the said indenture hereinbefore set forth, and continually from thence until and at the time of the eviction, ejection and expulsion hereinafter mentioned, had, and still has, lawful right and title to the said premises with the appurtenances, did enter into the same, and in and upon the possession of the said tenements, and ejected, expelled and removed the said plaintiff, by due process of law, from the possession and occupation of all and every part of the said premises [*or* if only a part, set out what part], with the appurtenances, and kept and held out, and still keeps and holds out, him, the said plaintiff, so thereof expelled, from his possession and occupation thereof, contrary to the form and effect of the said indenture, and of the said covenant of the said defendant, so by

<sup>1</sup> For complaint in action for trespass upon real property, see form No. 744.

him made in that behalf as aforesaid,<sup>1</sup> by reason of all which premises the said plaintiff has not only entirely lost, and been deprived of the said lands and tenements in the said indenture particularly mentioned, and of divers large sums of money by him, the said plaintiff, laid out and expended in and upon the said premises, in repairing, amending and improving the same, but has also been obliged to pay the costs and charges sustained by the said E. M. in prosecuting a certain action in the nature of ejectment for the recovery thereof, all of which amount to a large sum, to wit, \_\_\_\_\_ dollars.<sup>2</sup>

Wherefore he demands, etc. [prayer for judgment].

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

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No. 997.

**Complaint on Covenant of Seisin.**

[Title of cause.]

The plaintiff complains of the defendant and alleges, that on the 31st day of March, 1876, the defendant, R. S. N., and Ida, his wife, for a valuable consideration, by deed conveyed to the plaintiff in fee simple absolute all, etc. [describing property].

That said deed contained a covenant, on the part of the defendant, of which the following is a copy, to wit [insert copy covenant of seisin].

That at the time of the execution and delivery of the said deed the defendant was not the true, lawful and rightful owner,<sup>3</sup> nor was he lawfully seized in his own right of a

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<sup>1</sup> In assigning a breach of a covenant "it must distinctly appear by express words, or by a necessary implication, that admitting the truth of the facts stated in the complaint, the defendant has broken the covenant. The words of the covenant need not literally, but must, in all cases, be substantially followed." (Schenck v. Naylor, 2 Duer, 675.)

See, also, Lynch v Murray (21 How.,

154), *Greenvault v. Davis* (4 Hill, 643), *Beddoe's Executor v. Wadsworth* (21 Wend., 120), *Wooley v. Newcomb* (87 N. Y., 605), cited in note 1 to form No. 997.

<sup>2</sup> In an action for a breach of covenant, the alleged damages must be averred in the complaint. (*Neary v. Bostwick*, 2 Hilt., 514, and cases cited.)

<sup>3</sup> Allegations in a complaint upon a covenant of seisin that defendant was

good, absolute and indefeasible estate of inheritance in fee simple, nor had he good right, full power and lawful authority to grant, bargain, sell and convey the same in said manner and form as in said deed pretended and adopted.

By reason of the matters aforesaid this plaintiff has sustained damage in the sum of six hundred dollars, for which he demands judgment, with costs of this action.

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

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No. 998.

**Complaint under Civil Damage Act.**

(Ch. 646, Laws of 1873.)

[Title of cause.]

The plaintiff respectfully shows to this court, that he is the father of G. B. V., a minor, who was twenty years of age, March 6, 1874; that said G. B. V. resided with the plaintiff on his farm in O———, St. Lawrence county, New York, and assisted plaintiff in carrying on the work and business of the said farm, and was a means of support to plaintiff up to September 19, 1874.

That the defendant, W. O., is, and during the year 1874 has been, the owner of a certain lot and building on the northeast corner of Ford and Catharine streets in the city of O———, New York, which building is kept as a hotel by said O., and is known as the "National Hotel."

That prior to the month of September, 1874, said defendant, O., leased to the defendant, J. B. J., a room in the basement of said building for a bar-room, with knowledge that intoxicating liquors were to be sold therein, and during the month of September, 1874, said defendant, J., kept a

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not the lawful owner, and was not seized of the premises in fee, are sufficient; it is not essential that the title should be set out in detail (*Woolley v. Newcomb*, 87 N. Y., 605), from which case the above form of complaint is taken, and see that case that burden of proof under a general denial of the allegations of the above complaint is upon the plaintiff, who must prove the breach of the covenant, and that it is not upon the defendant to show his title, overruling *Potter v. Kitchen* (5 Bosw., 566).

bar in said room at which he sold intoxicating liquors, all of which was done with the knowledge and consent of said defendant, O.

That on or about the 19th day of September, 1874, the said G. B. V. became and was intoxicated at O——— aforesaid; that such intoxication was caused in whole or in part by intoxicating liquor sold or given away at said bar by the defendant, J., his agents or servants.

That in consequence of said intoxication the said G. B. V. was so injured that he has ever since been sick, and for the greater part of the time confined to his bed and delirious, and plaintiff has been put to large expense for medical attendance, nurses and medicines for his said minor son, and has been wholly deprived of his labor and services, and has been thereby injured in his property and means of support, and has sustained damages in the sum of two thousand dollars.

Wherefore plaintiff demands judgment against the defendants for two thousand dollars damages, besides the costs of this action.<sup>1</sup>

E. C. J., *Plaintiff's Attorney.*

[Office address.]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup>As to action under civil damage act, see *Volans v. Owen* (74 N. Y., 526), from which case this complaint is taken. It was held, in that case, that the plaintiff could not recover for loss of service or the expenses of his son's illness under the words "means of support," without proof that the services were necessary to his support, or that the charge brought upon him by his son's illness diminished his means, so as to render them inadequate therefor.

The act of 1873 is a constitutional enactment. It is doubtless an extreme exercise of legislative power, but it violates no express or implied prohibition of the Constitution. (*Bertolf v. O'Reilly*, 74 N. Y., 526.) That act was not repealed by chapters 401 and 403 of the Laws of 1892. The latter acts are simply amendatory of the former, and do not affect a cause of action which accrued prior to their passage. (*Quinlan v. Welch*, 141 N. Y., 158; aff'g S. C., 69 Hun, 584.)

A married woman who owns a building in which intoxicating liquors are sold by her husband, and who has knowledge that such business is carried on by him, is liable under that act. (*Mead v. Stratton*, 87 N. Y., 493.)

See, also, *Neu v. McKechnie* (95 N. Y., 632), *Loveland v. Briggs* (32 Hun, 477), *Becker v. Barnum* (19 Week. Dig., 94), *Davis v. Standish* (26 Hun, 608), *Quain v. Russell* (12 id., 376), *Brookmire v. Monaghan* (15 id., 16), *Aldrich v. Sager* (9 id., 537), *Hill v. Berry* (75 N. Y., 229); also see 26 Alb. Law Jour., 226, for review of cases, and see *O'Conner v. Conzen* (23 Week. Dig., 533), *McCarty v. Wells* (51 Hun, 171), *Ackerman v. Betz* (11 State Rep., 355), *Campbell v. Schlesinger* (48 Hun, 428), *Beers v. Wallhizer* (43 id., 254), *Stevens v. Cheney* (36 id., 1), *Mullen v. Christian* (22 Week. Dig., 59); 21 Abb. N. C., 7, note; *Elliott v. Barry* (34 Hun, 129), *Conklin v. Tice* (15 State Rep., 835), *Reid v. Terwilliger* (116 N. Y., 530, rev'g 42 Hun, 310), *Ketcham v. Fox* (52 Hun, 284), *Blatz v. Rohrback* (116 N. Y., 450, rev'g S. C., 42 Hun, 402), *Dudley v. Parker* (55 Hun, 29), *Rouse v. Catskill and N. Y. Steamboat Co.* (59 id., 80), *Dudley v. Parker* (132 N. Y., 386), *Bacon v. Jacob* (63 Hun, 51), *Hall v. Germain* (131 N. Y., 536, aff'g S. C., 37 State Rep., 320), *Streever v. Birch* (62 Hun, 298), *Astheimer v. O'Pray* (41 State Rep., 220), *Goram*



No. 999.

**Complaint against Mechanic for Doing His work Badly.**

[Title of cause.]

The plaintiff complains of the defendant and says, that on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, by a certain agreement then made by and between the said plaintiff and the said defendant, it was agreed that the said defendant should take down a certain dwelling-house in the [city] of \_\_\_\_\_, and should build another dwelling-house for the said plaintiff agreeably to certain plans thereof, then in the possession of the said defendant, and that the said contract or agreement was in the words and figures following [set out copy contract].

And although the said defendant did afterwards, and before the commencement of this action, erect and build the said dwelling-house, with the appurtenances, for the said plaintiff, yet the said defendant, not regarding his agreement, although the said plaintiff has performed his part of the contract, but contriving and intending to defraud and deceive the said plaintiff in this behalf, did not, nor would, erect or build the said house agreeably to the said plans, agreement and particulars, with good and proper materials, and in a sound, substantial and workman-like manner, but wholly neglected and refused so to do ; and, on the contrary thereof, he, the said defendant, erected and built the said last-mentioned house with the appurtenances different from and contrary to the said plans and agreement and particulars, and with bad and improper materials, and in a slight, weak, inartificial and unworkmanlike manner, contrary to the form and effect of the said plans, agreement and undertaking, to the damage of the plaintiff of \_\_\_\_\_ dollars.

Wherefore he demands judgment, etc.

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

v. Cable (44 id., 292), Bennett v. Levi (46 id., 754), Comstock v. Hopkins (61 Hun, 189), Laws of 1892, chaps. 401 and 403; O'Rourke v. Piatt (67 Hun, 71), Reinhardt v. Fritzsche (69 id., 565), De Puy v. Cook (90 id., 43).

That cause of action survives against estate of party causing death, see *Moriarity v. Bartlett* (20 Week. Dig., 277).

As to assignment of cause of action,

see *Ludwig v. Glaessel* (20 Week. Dig., 302).

The statute has no extra territorial effect. The cause of action is given by statute, and must refer only to an injury done in this state. (*Goodwin v. Young*, 20 Week. Dig., 299; S. C., 34 Hun, 252; 31 Alb. Law Jour., 183.)

As to joinder of defendants, see *Morenus v. Crawford* (15 Hun, 45).

<sup>2</sup>See note 2 to form No. 122.

No. 1000.

**Complaint for Breach of Warranty of a Horse.**

[Title of cause.]

The plaintiff complains of the defendant and says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at the special instance and request of the said defendant, he bargained with the said defendant and bought of the said defendant a certain horse, at and for the sum of \_\_\_\_\_ dollars; and the said defendant, by then and there representing and warranting the said horse to be in every way sound and gentle and quiet in harness,<sup>1</sup> then and there sold the said horse to the said plaintiff for the said sum of \_\_\_\_\_ dollars, which this plaintiff then and there paid to the said defendant, whereas, in truth and in fact, the said horse was, at the time of the said warranty and sale thereof, unsound and had the heaves, and was unsteady, restive and ungovernable in harness, and has so remained and continued from thence hitherto.

And this plaintiff further says, that relying upon the said warranty of the said defendant, he afterwards attempted to use the said horse in harness, and the said horse being unsteady, restive and ungovernable in harness, without the fault of this plaintiff, ran away, greatly injuring and breaking the said plaintiff's wagon, and also greatly injuring and bruising the said plaintiff, whereby the said plaintiff became sick, sore and lame, and was hindered and prevented from doing his work, which it was necessary for him to do, and has been put to great expense in divers ways on account of his relying upon the said warranty of the said horse, and has sustained damage thereby to a large amount, to wit, \_\_\_\_\_ dollars.

Wherefore he demands judgment, etc.<sup>2</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> An affirmation in regard to an existing fact, distinctly and positively made in the negotiations for trade, should be regarded as a contract and enforced as a warranty. (*Sweet v. Bradley*, 24 Barb., 554; *Wilbur v.*

*Cartright*, 44 id., 536; *Richardson v. Mason*, 53 id., 601.)

As to pleading implied warranty, see *Hoe v. Sanborn* (21 N. Y., 555), *Littauer v. Goldman* (72 N. Y., 506).

<sup>2</sup> See form No. 936, and note 1 to that form.

No. 1001.

**Answer, Coverture of Defendant.**

[Title of cause.]

This defendant [further] answering the complaint of the plaintiff says, [\*] that at the time of the service of the summons [and complaint] in this action on this defendant, she was [and still is], the wife of one C. B., who is still living in the city of Buffalo, and that the cause of action set forth in the said plaintiff's complaint does not concern the separate property or liability of this defendant.

[Or as above to (\*) and from thence as follows: That at the time of the making of the supposed (note) alleged in the complaint, this defendant was (and still is) the wife of one C. B., and that the said note was not made in or about the carrying on of any trade or business by her, and did not relate to, and was not, for the benefit of her separate estate, and was not charged upon her separate estate.]<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

No. 1002.

**Answer, Infancy of Plaintiff or Defendant.**

As in form No. 1001 to [\*], and from thence as follows: That the said plaintiff is an infant, under the age of twenty-one years, to wit: of the age of eighteen years, and has commenced this action in his own person, and not by his next friend or guardian *ad litem*.<sup>2</sup>

<sup>1</sup> See Code Civ. Pro., § 450, and see Ferris v. Holmes (8 Daly, 217), Brand v. Hammond (65 How. Pr., 264), Alexander v. Shilaber (64 id., 530), Knowles v. Toone (96 N. Y., 534), Scudder v. Gori (18 Abb. Pr., 222), Bogert v. Gullick (65 Barb., 326; 45 How., 335), Fairlie v. Bloomingdale (38 Hun, 220), Suau v. Caffé (122 N. Y., 308), Linderman v. Farquharson (101 id., 434), Blaechinska v. Howard Mission and Home (130 id., 497; rev'g S. C., 56 Hun, 322), Noel v. Kinney (106 N. Y., 74; rev'g S. C., 15 Abb. N. C., 403), Willis v. Albertson, 20 Abb. N. C.,

263), Bowery Nat. Bank v. Sniffen (54 Hun, 394), Hoyt v. Malone (31 State Rep., 739), Bannon v. McCahill (30 id., 305), Queens Co. Bank v. Leavitt (56 Hun, 426); 3 Abb. N. C., 150; Porter v. Dunn (131 N. Y., 314; rev'g S. C., 61 Hun, 310), Edwards v. Woods (131 N. Y., 350); Gates v. Williams (3 Misc., 376), Lashaw v. Croissant (88 Hun, 206), Sands v. Sparling (82 id., 401), Miller v. Richardson (88 id., 49), Farrell v. Harrison (14 Misc., 462).

By chapter 381, Laws of 1884, as amended by chapter 594 of Laws of



1892, a married woman may contract with her husband or any other person, to the same extent, with like effect and in the same form as if unmarried, and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary. *But nothing herein contained shall be construed to authorize the husband and wife to enter into any contract by which the marriage relation shall be altered or dissolved, or to re-*

*lieve the husband from his liability to support his wife.* Section 2 of the said act of 1884 was repealed by said chapter 594 of 1892, the changes made by which act in section one are above indicated by italics.

<sup>2</sup> See Code Civ. Pro., §§ 469, 1686, and *Smart v. Haring* (14 Hun, 276).

Before the enactment of chapter 14 of Code Civ. Pro., the rights of infants to real property were enforceable by their guardians in ecogage. (*Cagger v. Lansing*, 64 N. Y., 417; *More v. Deyoe*, 22 Hun, 208.

[Or that at the time of the making of the supposed (contract) alleged in the complaint, the defendant was under the age of twenty-one years, to wit: of the age of \_\_\_\_\_ years.]

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

### No. 1003.

#### Answer of Duress.

As in form No. 1001 to [\*], and from thence as follows: This defendant ought not to be charged with the demand referred to in the complaint in this action by virtue of the said [writing obligatory], because he, the said defendant, at the time of making the said [writing] aforesaid, was unlawfully imprisoned by the said plaintiff [and others in collusion with him], and then and there detained in prison, until, by the force and duress of imprisonment of him, the said defendant, he made the said writing, and delivered the same to the said plaintiff as his [writing obligatory].<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

### No. 1004.

#### Answer of Release.

As in form No. 1001 to [\*], and from thence as follows: That after the making of the said several promises and undertakings in the said complaint mentioned, and before the commencement of this action, to wit: on the \_\_\_\_\_ day

<sup>1</sup> For recent decisions as to what constitutes duress, see *Solinger v. Earle* (82 N. Y., 393), *Guilleaume v. Rowe* (48 Super. Ct., 169; 63 How. Pr., 175; 14 Week. Dig., 196; aff'd 94 N. Y., 268), *McPherson v. Cox* (86 id., 472; rev'g S. C., 21 Hun, 493), *Met. Life Ins. Co. v. Meeker* (85 N. Y., 614), *Dunham v. Griswold* (16 Week. Dig., 501; aff'd 100 N. Y., 224); *Haynes v. Rudd* (102 id., 272; rev'g S. C., 30 Hun, 237), *Fowler v. Butterly* (78 N. Y., 68), *Barry v. Brune* (71 id., 261), *Smith v. Rowley* (66 Barb., 502), *White v. Baxter* (41 N. Y. Super. Ct., 358; aff'd 71 N. Y., 254), *Stilwell v. Mut.*

*Life Ins. Co. of N. Y.* (72 id., 385), *Scholey v. Halsey* (72 id., 578), *Secor v. Clark* (115 id., 666; aff'g without op. S. C., 54 Super. Ct., 494), *Wallace v. Hoexter* (17 Abb. N. C., 267), *Schoener v. Lissauer* (107 N. Y., 111), *Bliss v. Wallis* (3 How. Pr. [N. S.], 325), *Vaughn v. Village of Port Chester* (43 Hun, 427), *Potter v. Greene* (39 id., 72), *Ziporkes v. Chmelniker* (15 State Rep., 215), *Scudder v. Burrows* (7 id., 605), *Secor v. Clark*, 117 N. Y. 350; rev'g S. C., 56 Super. Ct., 162), *Strang v. Peterson* (56 Hun, 418), *Adams v. Irving Nat. Bank* (116 N. Y., 606), *Oregon Pac. R. R. Co. v. De Forest*

(32 State Rep., 178), Barnett v. Weber (125 N. Y., 118), Oregon Pac. R. Co. v. Forrest (128 id., 83), Stone v. Weiler (128 id., 655; aff'g S. C., 32 State Rep., 926), Doyle v. Rector, etc., of Trinity Church (133 N. Y., 372), Sawyer v. Greener (44 State Rep., 203), Foerster v. Squier (46 id., 289), Lazzarone v. Oishei (2 Misc., 200), Baldwin v. Sullivan Timber Co. (48 State Rep., 296), White v. Rasines (50 id., 458), Jewelers' League v. De Forest (80 Hun, 376), Day v. Studebacker Bros. Mfg. Co. (13 Misc., 326), Lynch v. Laner (14 id., 252).





of ———, 18—, the said plaintiff made his certain writing of release in the words and figures following [set forth copy of release].

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

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No. 1005.

**Answer of Payment.**

As in form No. 1001 to [\*], and from thence as follows : That the said plaintiff ought not to have or maintain this action against him, because the said defendant did, on the day mentioned in the said [writing obligatory] [or on the ——— day of ———, 18—],<sup>1</sup> pay to the said plaintiff the sum of [five hundred] dollars in the said [condition] mentioned, together with all interest then due thereon, according to the form and effect of the said condition.

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

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No. 1006.

**Answer of Accord and Satisfaction.**

As in form No. 1001 to [\*], and from thence as follows : That he, the said defendant, before the commencement of this action, to wit: on the ——— day of ———, 18—, at ———, paid to the said plaintiff the sum of ——— dollars, in full satisfaction and discharge of the sum in the said [breach of covenant] mentioned, and of all the damages by the said plaintiff mentioned, by reason of the non-payment thereof; which said sum of ——— dollars the said

<sup>1</sup> It should be stated that the payment was after the cause of action accrued, but the day of payment is not necessary to be stated. (Beesley v. Dolley, 6 Bing. N. C., 37.)

As to plea of payment by check, see Strong v. Stevens (4 Duer, 668), Bradford v. Fox (38 N. Y., 289), Syracuse,

etc., R. R. Co. v. Collins (1 Abb., N. C., 47).

If the payment was made intermediate the commencement of the action and the time of putting in the answer, the defendant may set up this fact in his answer as a defense to the action. (Willis v. Chipp, 9 How., 568; Carpenter v. Bell, 19 Abb., 258.)

plaintiff then and there accepted and received of and from this defendant, in full satisfaction and discharge of the said sum in the said [breach of covenant] mentioned, and of the damages of the said plaintiff by him sustained by reason of the said [breach of covenant].<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

### No. 1007.

#### Answer of Discharge under the Insolvent Law.

As in form No. 1001 to [\*], and from thence as follows: That heretofore and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, an order was duly made by the county court of \_\_\_\_\_ county<sup>2</sup> in a certain proceeding then pending therein, taken pursuant to chapter 17 of the Code of Civil Procedure, by which the said court did grant to the said defendant a discharge from his debts, of which order the following is a copy, to wit [insert copy of order].

And this defendant further says, that said debts and liabilities set forth in the complaint were due or contracted at the time of the execution of an assignment of his property in said proceeding, as required by section 2175 of said Code of Civil Procedure, and that at the time [of making the said several promises and undertaking, and every of them, and] when the petition was presented in said proceeding the said plaintiff was a resident of the State [or state other facts so as to show that the exception in section 2183 of Code Civil Procedure does not apply].<sup>3</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup>The accord must be completely executed to sustain the plea. (Day v. Roth, 18 N. Y., 448; Kromer v. Heim, 75 N. Y., 574.) See, also, Hills v. Sommer (53 Hun, 392), Lawrence v. Barker (9 Daly, 140), Brennan v. Ostrander (50 Super. Ct., 426), Fondavila v. Jourgensen (52 id., 403), Morehouse v. Second Nat. Bank (98 N. Y., 503), McDonough v. Buffalo State Asylum (96 id., 640), Jaffray v. Davis (124 N. Y., 164, rev'g 48 Hun, 500),

Allison v. Abendroth (108 N. Y., 470), Weeks v. Zimmerman (22 State Rep., 56), Carstero v. Smalholz (29 State Rep., 493), Grant v. Tefft (26 id., 102), Farmer v. Medico Legal Journal Assn. (id., 940), Rosenfeld v. New (32 id., 301), McKenzie v. Harrison (120 N. Y., 260), Hood v. Hayward (124 N. Y., 1), Stuber v. McEntee (47 State Rep., 94), Fuller v. Kemp (138 N. Y., 231, rev'g S. C., 40 State Rep., 672), Lesson v. Mass. Mut. Benefit Associa-

tion (3 Misc., 415), *Nassoioy v. Tomlinson* (65 Hun, 491), *Jacobs v. Day* (5 Misc., 410), *Hathaway v. Orient Insurance Co.* (134 N. Y., 409), *Wright v. Wright* (74 Hun, 138), *Strauss v. Trotter* (6 Misc., 77), *Bicknell v. Speir* (7 id., 108), *Campbell v. Hurd* (id., 235), *Stuber v. McEntee* (142 N. Y., 200), *Davis v. Kling* (77 Hun, 598).

<sup>2</sup>See sections 2149-2188 of Code Civ. Pro., for proceedings to obtain discharge of insolvent, and that it is sufficient under section 161 of Code of

Procedure (§ 532, Code Civ. Pro.), to say that the judgment or determination of the officer granting the discharge was duly given or made, see *Livingston v. Oaksmith* (13 Abb., 183), *Wheeler v. Dakin* (12 How. Pr., 542).  
<sup>3</sup>See *Smith v. Bennett* (17 Wend., 479).

For form of answer of discharge under bankrupt act, see *McCormick v. Pickering* (4 N. Y., 276), *Hennequin v. Clews* (46 N. Y. Super. Ct., 330).



No. 1008.

**Answer of Usury.**

As in form No. 1001 to [\*], and from thence as follows: That before the making of the promises and undertakings in the said complaint mentioned, it was corruptly, and against the form of the statute in that case made and provided, agreed by and between the said plaintiff and the said defendant, that the said plaintiff should lend and advance to the said defendant the said sum of four hundred dollars in said complaint mentioned, and that the said defendant should forbear and give day of payment thereof to the said defendant for twenty days, and that the said defendant, for the loan of the said four hundred dollars, and for giving day of payment as aforesaid, should give and pay the said plaintiff the sum of fifty dollars, being more than the lawful interest upon the same, and that in pursuance of the said usurious and corrupt agreements, the said plaintiff did then and there lend and advance to the said defendant the said sum of four hundred dollars, which said sum of fifty dollars was paid by the said defendant to the said plaintiff for the forbearance in giving day of payment.<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

No. 1009.

**Answer of Usury to Action by Indorsee against Drawer of a Bill, etc.**

As in form No. 1001 to [\*], and from thence as follows: That before the making of the said bill of exchange, to wit, on the ——— day of ———, 18—, it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the said E. F. [the acceptor]

<sup>1</sup> See *Miller v. Schuyler* (20 N. Y., 522), *Manning v. Tyler* (21 id., 567), *Dagal v. Simmons* (23 id., 491), *Merchants' Exchange Nat. Bank of N. Y. v. Commercial Warehouse Co.* (49 id., 635), *Nat. Bank of Auburn v. Lewis* (75 id., 516; rev'g S. C., 10 Hun, 468; S. C., 81 N. Y., 15), *Maule v. Crawford* (14 Hun, 193), *Morford v. Davis* (28 N. Y., 481), *Griggs v. Howe* (31 Barb., 100; aff'd S. C., 2 Keyes, 574), *F. and M. Nat. Bank v. Lang* (22 Hun, 372), *Cone v. Warner* (18 Week. Dig., 90), *Long Island Bank v. Boynton* (105 N. Y., 656), *Union Bank v. Newman* (35 State Rep., 422), as to plea of usury.

and one G. H., that he, the said G. H. [here state the usurious agreement; *e. g.*, as follows], should lend and advance to the said E. F. a certain sum of money, to wit: the sum of seven hundred and fifty dollars, and that he, the said G. H., should forbear and give day of payment of the said sum, from the time of lending and advancing the same until the 10th day of April, 18—, and that for the forbearing and giving day of payment of the said sum, the said E. F. should give and pay to the said G. H. the sum of two hundred and fifty dollars; and that for securing the repayment of the said sum of seven hundred and fifty dollars, so to be lent and advanced as aforesaid, together with the said further sum of two hundred and fifty dollars, on the said 10th day of April, in the year last aforesaid, the said defendant should make and draw and endorse, and the said E. F. should accept the said bill of exchange in the complaint mentioned, and that the said E. F. should deliver the same to the said G. H.

And this defendant further saith, that in pursuance, and in part performance of the said corrupt and unlawful agreement, the said defendant afterwards, to wit: on the said ——— day of ———, 18—, made and drew and indorsed, and the said E. F. then and there accepted, the said bill of exchange, and the said E. F. then and there delivered the said bill of exchange so made and indorsed and accepted as aforesaid to the said G. H., on the terms aforesaid; and that in further pursuance of the said corrupt and unlawful agreement, the said G. H., afterwards, to wit: on the day and year last aforesaid, did lend and advance to the said E. F. the said sum of seven hundred and fifty dollars.

And the said defendant further says, that the said sum of two hundred and fifty dollars, so agreed to be given and paid by the said E. F. to the said G. H. for such loan and forbearance as aforesaid, and so secured as aforesaid, exceeds the rate of [six] dollars for the forbearing of one hundred dollars for a year, contrary to the statute in such case made and provided.<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

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<sup>1</sup> See note 1 to form No. 1003.

## No. 1010.

**Answer that the Note was Given to Compound a Felony.**

As in form No. 1001 to [\*], and from thence as follows: That heretofore and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, one L. M., the son of the said defendant, had feloniously stolen, taken and carried away [state the property, or if it be another crime state it], and the said defendant, in order to compound and settle the same felony, did give and execute the [note or bill, etc., mentioned in the complaint], and that the said note [or bill] was given for and upon no other or different consideration whatever.'

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

## No. 1011.

**Answer that Plaintiff is Not a Corporation.**

(Code Civ. Pro. § 1776.)

As in form No. 1001 to [\*], and from thence as follows: That the said plaintiffs were not at the time of the commencement of this action, and are not, a corporation, and have no right as such to commence or prosecute this action.<sup>2</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> It is not necessary to prove that the payee in terms agreed to compound a crime, in order to render the note invalid; but it is sufficient if that was the intention of the parties and the agreement was such as to carry out that intent. (Conderman v. Trenchard, 58 Barb., 165; S. C., 40 How., 71; S. C., 3 Lans., 108; *sub nom.* Conderman v. Hicks.)

See, also, Grimes v. Hillenbrand (4 Hun, 354), Palmer v. Minar (8 id., 342), Haynes v. Rudd (83 N. Y., 251; rev'g S. C., 17 Hun, 477; S. C., 30 id., 237), Nickelson v. Wilson (60 N. Y., 362), English v. Rumsey (32 Hun, 486; S. C., 19 Week. Dig., 204), Smith v. Crego (54 Hun, 22), Barrett v. Weber (25 N. Y., 18), Buffalo Press Club v. Greene (86 Hun, 20; aff'g 26 N. Y. Supp., 525), as to the general principles applying to this defense, and by whom it may be interposed.

<sup>2</sup> See Bengston v. The Thingvalla Steamship Co. (31 Hun, 96; S. C., 18 Week. Dig., 411), Concordia Savings and Aid Ass'n v. Read (93 N. Y., 474),

Derrenbacher v. Lehigh Valley R. R. Co. (21 Hun, 612; rev'd, S. C., 87 N. Y., 636), Ansonia Brass Co. v. Conner (13 Week. Dig., 87), Trustees Can. Academy v. McKechnie (90 N. Y., 629, 630), Bank of Richfield Springs v. Clarke (22 Week. Dig. 569), Brooks v. Farmers' Creamery Ass'n (21 id., 58), Lamson Consolidated Store Service Co. v. Conyngham (11 Misc., 428), Goldsmith v. Wells Co. (86 Hun, 489).

Section 1776, Code Civ. Pro., is simply a re-enactment of the old law. (93 N. Y., *supra*, p. 477.) See Matter of Broadway and Seventh Ave. R. Co. v. Acker (73 Hun, 7), that that section has no application to proceeding for condemnation of real property, the answer in which is regulated by the provisions of § 3365, Code Civ. Pro.

It was held under 2 R. S., 458, § 3, as am'd by ch. 422, Laws of 1864, of which this section is a revision, that its provisions were not applicable to a national bank. (N. Y. Nat. Ex. Bank v. Jones, 9 Daly, 248 [Gen. Tm].)

## No. 1012.

**Answer that Note was Given for Gambling.**

As in form No. 1001 to [\*], and from thence as follows: That before the making of the said promissory note in the said complaint mentioned, the said plaintiff and the said defendant played together at a game called, etc., for divers sums upon tick and credit, and not ready money; and the said plaintiff, at said game, won of the said defendant, and the said defendant then and there lost the sum of \_\_\_\_\_ dollars, whereof no part was then and there paid by the said defendant to the said plaintiff; and afterwards, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said defendant gave and made to the said plaintiff the aforesaid promissory note, for the said sum of money so lost by the said defendant and won by the said plaintiff at the said game, by reason whereof the said note is void in law.<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

## No. 1013.

**Answer of Statute of Frauds in Action on a Guaranty.**

As in form No. 1001 to [\*], and from thence as follows: That the said several supposed promises and undertakings, in the said complaint mentioned, were special promises, and each of them was a special promise for the debt of another person, to wit, J. C., and that no agreement in respect of, or relating to, the supposed causes of action in the said complaint mentioned, or either of them, nor any memorandum or note thereof, was or is in writing, or was or is signed by the said defendant, or by any other person by him thereunto lawfully authorized, according to the form of the statute in such case made and provided.<sup>2</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup> See 3 R. S. (7th ed.), 1963, § 16; Stannard v. Eytinge (5 Robt., 90; S. C., 33 How., 262; 3 Abb. [N. S.], 42), aff'd 106 N. Y., 674), May v. Burras (13 Abb. N. C., 384.)

<sup>2</sup> As to the necessity of pleading this defense in action on contract for damages, see Blanck v. Littell (9 Daly 268).

Where a contract is clearly, upon



No. 1014.

**Answer of Arbitrament and Award.**

As in form No. 1001 to [\*], and from thence as follows: That after the making of the said several promises in the said complaint mentioned, and before the commencement of this action, and on the ——— day of ———, 18—, said plaintiff and the said defendant submitted themselves, as required by law, by an instrument in writing duly acknowledged [or proved] and certified, in like manner as a deed to be recorded<sup>1</sup> [or state other mode of submission], and engaged [thereby] in all things well and truly to keep, obey and perform the award, arbitrament and final determination of A. B. [and C. D.] arbitrators, indifferently elected and named as well on the part and behalf of the plaintiff as of the defendant, to arbitrate, award and determine, of and concerning all and all manner of action and actions, and cause and causes of action and of all controversies and demands whatsoever, at any time theretofore had, made, committed or depending by and between the said parties or either of them, so as the said award should be made by the said arbitrators under their hands, and ready to be delivered to the parties in difference or such of them, as should desire the same, on or before the ——— day of ——— then next [or insert a copy of the instrument; or describe the particular matters submitted] (which time for making the said award was afterwards and before the time for making the same expired, by consent of the said plaintiff and of the said defendant, enlarged until the ——— day of ———, 18—), and it was then and there agreed by and between the said plaintiff and the said defendant that the award made before that time should be binding and conclusive between them.

And the defendant further says, that the said arbitrators,

its face, within the statute of frauds, it is upon the plaintiff to show the facts by which he desires to take it out of the statute. (*Millar v. Fitzgibbons*, 9 Daly, 505; S. C., 12 Week. Dig., 237.)

See, further, as to this plea, *Alger v. Johnson* (4 Hun, 412), *Crane v. Powell* (139 N. Y., 379), *Myers v. Dorman* (34 Hun, 115), *Marie v. Garrison* (13 Abb. N. C., 210, 278, 306).

<sup>1</sup>For provisions relating to arbitrations, see sections 2365-2386 of Code Civ. Pro.

As to how far these provisions affect a submission made otherwise than as prescribed therein, see section 2386 (*supra*), and *McNulty v. Solley* (95 N. Y., 242).

The submission is in legal effect a

before the expiration of the said last mentioned time limited for making their award, took upon themselves the burden of the said arbitration, and having duly examined and considered the subject matters in dispute between the said plaintiff and the said defendant, the said arbitrators did make an award in writing, under their hands, of and concerning the premises, and of and concerning the said premises and undertakings in the said complaint mentioned [and delivered the same to (said) A. B., the (attorney for the) plaintiff (*or* defendant), *or* filed the same in the office of the (county clerk of ——— county)], and did thereby then and there award that [here set forth the award]<sup>1</sup> [and that said award was afterwards duly confirmed by this ——— court, in the manner provided by law and by said instrument, and that a judgment was duly entered upon said award against the said (defendant) in favor of said (plaintiff) as provided by law and by said instrument of submission on the ——— day of ———, 18—, for (state relief)].<sup>2</sup>

That said amount awarded has been paid [*or* tendered] to the plaintiff by defendant [*or* that the said award has been duly performed by said defendant on his part] before the commencement of this action.<sup>3</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

No. 1015.

### Answer of Judgment Recovered.

As in form No. 1001 to [\*], and from thence as follows: That the said plaintiff heretofore, and on or about the ——— day of ———, 18—, in this court, recovered a

discontinuance of an action pending upon the cause of action submitted. (Id.)

<sup>1</sup>See *Armstrong v. Masten* (11 Johns., 189), *Brazil v. Isham* (1 E. D. Smith, 437), *Cole v. Blunt* (2 Bosw., 116), *Giles Lithographic, etc., Co. v. Recamier Manuf. Co.* (15 State Rep., 354), as to necessity of averring performance, and in what cases.

<sup>2</sup>This may be alleged when the facts justify it.

<sup>3</sup>That the substance, at least, of the award must be alleged, see *Gihon v. Levy* (2 Duer, 176).

A valid award made by an arbitrator upon a cause of action, is a bar to a suit thereon, although the award has not been performed. (*Brazill v. Isham*, 12 N. Y., 9.) See, also, *New York Lumber, etc., Co. v. Schneider* (119 id., 475).

To entitle a defendant, in a suit, to insist upon an award upon the cause

judgment against this defendant for the sum of \_\_\_\_\_ dollars for the same causes of action as in this complaint mentioned and contained, as will appear by the judgment roll of the said action filed in the office of the clerk of the county of \_\_\_\_\_, on the day aforesaid, which said judgment still remains in force and effect.<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

No. 1016.

### Answer Claiming Set-off.

As in form No. 1001 to [\*], and from thence as follows: That at the time of the commencement of this action, the plaintiff was, and still is, indebted to this defendant in the sum of \_\_\_\_\_ for the work, labor, care and diligence of this defendant and his servants and workmen for the said plaintiff, and at his request, which said sum of \_\_\_\_\_ dollars the defendant hereby claims should be set off and allowed to the defendant against the said plaintiff, and demands judgment in his favor for the balance thereof, to wit: the sum of \_\_\_\_\_ dollars, together with the costs of this action.

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

## TITLE V.

FORMS RELATING TO OTHER ACTIONS BY AND AGAINST PARTICULAR PARTIES.

### ARTICLE FIRST.

ACTION BY OR AGAINST AN UNINCORPORATED ASSOCIATION.

(Code Civ. Pro., Ch. 15, Tit. 5, Art. 1.)

No. 1017. Complaint in action by or against association consisting of seven or more persons.

of action as a bar, he must allege it as such in his answer. (Id.)

And where in an action on an account the answer merely denied the allegations in the complaint. *Held*, that the defendant could not insist upon an award made upon the account as a bar to the suit, although the fact

of the award appeared from the plaintiff's evidence. (Id.)

<sup>1</sup>See *Krekeler v. Ritter* (62 N. Y., 372), *Southern Life Ins. and Trust Co. v. Davis* (4 Edw. Ch. 588), *King v. Townshend* (65 Hun, 567, *aff'd* 141 N. Y., 358), *Massa v. Cutting* (28 Week. Dig., 380).

- No. 1018. Affidavit to move for substitution on death, etc., of the officer of such association against whom action is brought.
1019. Notice of motion for substitution of president, etc., of such association.
1020. Order substituting president, etc., of such association.
1021. Execution upon money judgment in action against such association.
1022. Complaint in action against members of such association.

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No. 1017.

**Complaint in Action by or against Association Consisting of Seven or More Persons.**

(Code Civ. Pro., § 1919.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that at the time of the making of the [promissory note] hereinafter mentioned and set forth, and at the time of the commencement of this action, the [name of association] was, and now is, an unincorporated association, consisting of seven or more persons, and that the defendant [*or* plaintiff] is, and was at the time of the commencement of this action, the president [*or* treasurer] of said association.

That [here set forth the facts constituting the cause of action, and conclude with prayer for judgment as follows]:

Wherefore the plaintiff demands judgment [against the said defendant] as such president [*or* treasurer], for, etc.<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

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<sup>1</sup> The word president, or treasurer, as used in section 1919 of Code Civ. Pro., means a president or treasurer *eo nomine*, or persons discharging the ordinary functions and duties of such officer under another name. (Hathaway v. American M. S. Exchange, 18 Week. Dig., 328; S. C., 31 Hun, 575.)

As to action for libel against joint-stock association, see Duncan v. Jones (32 Hun, 12), Van Arnam v. McCune (19 Week. Dig., 412; S. C., 32 Hun, 316).

See, also, National Bank v. Van Derwerker (74 N. Y., 234), Saltsman v. Shults (14 Hun, 256), Poultney v. Bachman (10 Abb. N. C., 252), Flagg v. Swift (25 Hun, 623), Ebbinghausen v. Worth Club (4 Abb. N. C., 300), Park v. Spaulding (10 Hun, 128), Shaw v. Cock (12 Hun, 173; S. C. aff'd, 78 N. Y., 194), McGuffin v. Dinsmore (4 Abb. N. C., 241), among other cases, generally as to this action, also Brooks v. F. C. Ass'n (21 W. D., 58), Soule v. Mogg (21 id., 186), Sanders v. Euling

(8 Civ. Pro. R., 166), Van Aernam v. Bleistein (102 N. Y., 355), Laws of 1894, ch. 235; People ex rel. Winchester v. Coleman (133 N. Y., 279), McCabe v. Goodfellow (39 State Rep., 941), McKane v. Adams (123 N. Y., 609), Wells v. Monihan (35 State Rep., 494), Wicks v. Monihan (54 Hun, 614), Ebbinghausen v. Worth Club (4 Abb. N. C., 300, *note*), Loubat v. Le Roy (15 id., 44, *note*), Matter of Carpenters and Joiners' Union (17 id., 112, *note*), McCabe v. Goodfellow (133 N. Y., 89; 44 State Rep., 253), Wells v. Monihan (129 N. Y., 161, aff'g S. C., *supra*), Wicks v. Monihan (130 id., 232, aff'g S. C., *supra*), Burt v. The Oneida Community (137 id., 346), Matthews v. Associated Press of N. Y. (136 id., 333), Schwartz v. Wheeler (29 Abb. N. C., 332), Manzinger v. Courier Co. (82 Hun, 575).



## No. 1018.

**Affidavit to Move for Substitution on Death, etc., of the Officer of such Association, Consisting of Seven or More Members, against whom Action is Brought.**

(Code Civ. Pro., § 1920.)

[Title of cause.]

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that he is [description of affiant].

That this action was brought against [or by] C. D., as president [or treasurer], of the [name of association].

That since the commencement of this action the said C. D. has died [or state other incapacity], and that E. F. has succeeded to the presidency [or treasurership] of the said association [or that E. F. is now the treasurer (or president) of said association].

A. B.

[Jurat as in form No. 46.]

## No. 1019.

**Notice of Motion for Substitution of President, etc.**

(Code Civ. Pro., § 1920.)

As in form No. 324 to [\*], and from thence as follows: For an order substituting E. F., as president [or treasurer], of the [name of association], as defendant [or plaintiff], in the above entitled action, in place of C. D., against whom such action is brought; and that said action be continued by [or against] said E. F. as such president [or treasurer] [with costs of such motion].

Dated \_\_\_\_\_, 18—.

M. H., *Plaintiff's* [or *Defendant's*] *Attorney*.[Office address.<sup>1</sup>]To F. R., Esq., *Attorney for* \_\_\_\_\_.<sup>1</sup> See note 2 to form No. 122.

No. 1020.

**Order Substituting President, etc., of Association.**

(Code Civ. Pro., § 1920.)

[At, etc., as in form No. 80.]

[Title of cause.]

On reading and filing the affidavit of A. B., dated ———, 18—, and [name other motion papers], with proof of due service of a copy of said affidavit, with notice of this motion, on F. R., attorney for ———, and on reading and filing [name opposing papers], and on motion of M. H., counsel for the plaintiff [*or* defendant], after hearing, etc.:

It is hereby ordered, that E. F., as president [*or* treasurer] of the [name of association], be and he is hereby substituted as defendant [*or* plaintiff] in the above entitled action in place of C. D., against whom such action is brought, and that said action be continued by [*or* against] said E. F. as such president [*or* treasurer] [with ten dollars costs of this motion to the ———].

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 No. 1021.
**Execution upon Money Judgment in Action against Association.**

(Code Civ. Pro., § 1921.)

As in form No. 556 to [++], and from thence as follows: Out of any personal property belonging to the [name of association], or owned, jointly or in common, by all the members thereof, and to return, etc. [as in form No. 556 to end thereof].

[Signature, etc., as in form No. 556.]

[Indorsement as in form No. 560.]

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 No. 1022.
**Complaint in Action against Members of Such Association.**

(Code Civ. Pro., § 1922.)

[Title of cause.]

The complaint of the above named plaintiff respectfully



shows, that the [name of association] is, and has been since the \_\_\_\_\_ day of \_\_\_\_\_, 18—, an unincorporated association consisting of seven or more persons, located in the \_\_\_\_\_ of \_\_\_\_\_, and that the defendants are [a part of] the members thereof.

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, an action was brought in the \_\_\_\_\_ Court by the plaintiff against C. D., as president [*or* treasurer] of said [name of association], upon the cause of action hereinafter mentioned and set forth ; and that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a judgment was duly recovered in said action in favor of the said plaintiff therein, for the sum of \_\_\_\_\_ dollars damages, and \_\_\_\_\_ dollars costs. against said C. D., as president, etc.

That the judgment roll in said action was filed, and said judgment duly docketed, in the \_\_\_\_\_ county clerk's office in which county said action was triable, on the \_\_\_\_\_ day of \_\_\_\_\_, 18— [and a transcript of said judgment was duly filed and said judgment was duly docketed in the \_\_\_\_\_ county clerk's office, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—].

That an execution was afterwards, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, duly issued upon said judgment to the sheriff of \_\_\_\_\_ county, and that said execution has been, since and before the commencement of this action, duly returned wholly unsatisfied [*or* unsatisfied to the extent of \_\_\_\_\_ dollars, etc.].

[Here set forth cause of action, and conclude with prayer for judgment as follows:]

Wherefore the plaintiff demands judgment against the defendants for [amount remaining unpaid of claim], with interest, etc., and for \_\_\_\_\_ dollars costs of said first mentioned action, which remain uncollected by virtue of said execution, and for the costs of this action.<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

<sup>1</sup>As to the right to bring an action against the members without having first exhausted the remedy against the association, see *Flagg v. Swift* (25 Hun, 623), *Park v. Spanling* (10 Hun, 128), Code Civ. Pro., § 1923, and see Mr. Throop's note to that section in his code, and the cases cited in note 1, p. 904, to form No. 1017. By section 9 of chapter 235 of Laws of 1894, entitled

"An act in relation to joint stock associations constituting chapter 45 of the general laws," chapters 245 of Laws of 1854, 289 of Laws of 1867, and 505 of Laws of 1885 are repealed.

That where an action has been brought against the members of the association, as prescribed in subdivision 1 of section 1922, Code Civ. Pro.,

## ARTICLE SECOND.

FORMS RELATING TO ACTIONS BY OR AGAINST CERTAIN  
COUNTY, TOWN AND MUNICIPAL OFFICERS.

(Code Civ. Pro., Ch. 15, Tit. 5, Art. 2.)

- No. 1023. Complaint in action by a tax-payer against a public officer, agent, commissioner, etc.
1024. Complaint in action, by town officer, under section 1926, Code of Civil Procedure.
1025. Proceeding to substitute successor in office, on death, etc., of party sued in official capacity.

## No. 1023.

**Complaint in Action by a Tax-payer against a Public  
Officer, Agent, Commissioner, etc.**

(Code Civ. Pro., § 1925.)

[Title of cause.]

The plaintiffs in this action for complaint therein allege, that they are each freeholders, residents and tax-payers of the town of S., in the county of W. and State of N. Y., and that they have and own real estate and property in said town and subject to taxation therein; that they and each of them are assessed for and liable to pay taxes therein, and also have paid taxes therein within one year previous to the commencement of this action.

The plaintiffs further allege, that there are upwards of three hundred persons owners of real estate and residents of said town of S., who are assessed for and liable to pay taxes therein, and who have a common interest with the above named plaintiffs in this action and the subject matter thereof.

That the persons and parties interested are so very numerous as to make it impracticable to bring them before the

the time for the commencement of the action by or against the officer, and the return of the first execution issued upon the final judgment rendered therein, is not a part of the time limited by law for the commencement of the second action, see Code Civ. Pro., § 1923.

For statement to be filed by persons composing such an association or firm under section 1945 of Code Civ. Pro., to entitle them to be made parties to an action against the members, see form No. 1032, *post*.

court, and, therefore, the above named plaintiffs sue for themselves as well as in behalf and for the benefit of all of the parties having a common or general interest in this action or the subject matter thereof.

[Then follows the statement of the cause of action, and the complaint concludes with a prayer for judgment, as follows:]

The plaintiffs from and upon the facts hereinabove set forth ask the order or decree of this court, that the said so-called bonds signed by said so-called commissioners and in the possession of the defendant, the "Attica and Arcade R. R. Co.," its officers or agents, or claimed to be owned by them, shall not be sold or delivered to any person or persons whatsoever, but shall be cancelled and destroyed and be adjudged void and of no effect, and that the said so-called commissioners shall do no act or thing as such commissioners tending to create any indebtedness against said town or against the plaintiffs or their property, or against the other tax-payers or their property whom the plaintiffs represent, and that the said defendant, A. J. K., the collector of said town, shall not collect the said sum of seven hundred dollars, or any part thereof, out of the property of the said plaintiffs or the said town of S., or out of the property of the other tax-payers whom the plaintiffs represent, and that he shall not pay the said seven hundred dollars, or any part thereof, to the said so-called commissioners, and that the said so-called commissioners shall not receive the said seven hundred dollars, or any part thereof, or pay the same, or any part thereof, as interest on the so-called town bonds, and that during the pendency of this action each and all of the said defendants, their employees, officers, agents, attorneys or representatives, and all other persons, be enjoined and restrained by injunction from doing any act or thing above mentioned, or any other act or thing in the collection of the said seven hundred dollars or paying over the same or any part thereof, and that they be restrained from collecting any interest or principal to pay said so-called bonds, or any part thereof, or the interest warrants or coupons annexed to the said so-called bonds or any of them, and that by a final decree of this court the

said injunction be made perpetual, and for such further or other relief in the premises as may be deemed just and equitable by the court.

T. C., *Attorney for Plaintiff.*

[Office address.²]

[Verification as in forms Nos. 151, etc.]

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No. 1024.

**Complaint in Action by town Officer under Section 1926,  
Code of Civil Procedure.**

(Code Civ. Pro., § 1926.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows to this court, that the town of L. is one of the towns in the county of S., and State of N. Y., and the plaintiff is its supervisor.

That the N. Y. and O. M. R. R. Co. was a corporation duly organized under the laws of the State of N. Y., and that such company constructed and put in operation a railroad in said State, known as the N. Y. and O. M. railroad,

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<sup>1</sup> This form is taken from the complaint in *Metzger v. Attica and Arcade R. R. Co.* (79 N. Y., 171), brought under chapter 161 of Laws of 1872, of which section 1925, Code Civil Procedure is a revision. The complaint in the case of *Ayers v. Lawrence* (59 N. Y., 192), which is said in the opinion of Allen, J., therein to have been "the first instance in which the act of 1872 (ch. 161), for the protection of tax-payers against the frauds, embezzlements and wrongful acts of public officers and agents came under review" in the Court of Appeals, "or was relied upon to sustain an action," contains a similar statement, and is upon a like cause of action. And see further as to actions under that act and under this section and as to when such actions can be maintained, *Lutes v. Briggs* (64 N. Y., 404; rev'g S. C., 5 Hun, 67), *Latham v. Richards* (12

Hun, 360, the appeal in which was dismissed in 72 N. Y., 607), *Sherman v. Trustees of Clifton Springs* (27 Hun, 390, 392), *Alvord v. Syracuse Savings Bank* (20 Week. Dig., 153; 34 Hun, 143), *Bird v. The Mayor, etc.* (19 Week. Dig., 571).

As to supplemental complaint in this action, see *Latham v. Richards* (15 Hun, 129).

That an injunction may issue therein *pendente lite*, see *Hurlburt v. Banks* (1 Abb. N. C., 157; 52 How. Pr., 176). An injunction was denied in *Hull v. Ely* (2 Abb. N. C., 440), on the ground that the action did not appear to be brought in good faith by the plaintiff as a tax-payer, to protect his interests as such, but to protect the interests of a rival claimant of the franchises sought to be enjoined. See, also, amendment to section 1925, Code Civ. Pro., by ch. 524 of Laws of 1892, by which

which said road was constructed and operated, and is still being operated, through the said town of L.

That on the ——— day of ———, 18—, an act was passed by the legislature of the State of N. Y., entitled “An act to subject the real and personal property of the N. Y. and O. M. railroad to taxation, and to appropriate the amount of the county taxes to certain towns, to be applied toward the payment of the interest or principal on certain town bonds,” being chapter 296 of the Laws of 1874, of which act the following is a copy [here is inserted copy of said act].

The plaintiff further alleges, that, before the passage of the said act, the said town of L. issued its bonds in aid of the construction of the said N. Y. and O. M. railroad, under and by virtue of the provisions of acts of the legislature [describing same], and which said acts are referred to in the act hereinbefore set forth, and which said bonds to a large amount were outstanding at the time of the passage of the act hereinbefore set forth, and are still outstanding and unpaid, and upon which said bonds the interest is payable semi-annually.

The plaintiff further alleges, that in each and every year since the issue of said bonds, the said town has had commissioners, who were appointed for said town under the provisions of the said acts of the legislature, which are referred to in the act hereinbefore set forth, which said commissioners have, at all times, been duly qualified, and have been acting as such under the provisions of said statute.

The plaintiff further alleges, that under and in pursuance of the provisions of said chapter 296 of the Laws of 1874, the real property of the said N. Y. and O. M. R. R. Co. consisting of the said road and lands and buildings connected therewith, and of the appurtenances thereto belonging, and located in said town of L., has been in each year, since the passage of said act, duly assessed by the board of assessors of said town; and that in each and every of said years [naming them], under and by virtue of the warrant for the collection of taxes in said county, issued by the board of supervisors of said county, there has been levied **and collected upon the said property of the said railroad**

a resident corporation may maintain the action under the same circumstances and conditions as a resident citizen (Laws of 1892, p. 1052), and see *Talcott v. City of Buffalo* (125 N. Y., 280, rev'g S. C., 57 Hun, 43), *Ziegler v. Chanin* (198 id., 249), *Peck v. Balkman*

(130 id., 394, rev'g S. C., 55 Hun, 91), *Boyle v. Grant* (36 State Rep., 207), *Olp v. Loddick* (38 id., 122); 22 Abb. N. C., 26; *Armstrong v. Grant* (56 Hun, 226), *Calhoun v. Millard* (121 N. Y., 69), *Beebe v. Supervisors of Sullivan* (64 Hun, 377), *Boon v. City of*

company in said town a just and ratable proportion of the county taxes of said county, which said tax has been, in each year, collected by the collector of said town, in the same manner and under the same warrant by which other taxes were collected.

Plaintiff further alleges, that in each and every of the years last above named, the amount of county taxes so collected from the said railroad company, and from the property thereof in the said town of L., has been erroneously and illegally paid over by the collectors of said town to the county treasurer of said county of S., and that the same has been paid out and used by said treasurer for the use and benefit of said county, and that such payment by said collectors to the county treasurer as aforesaid was made, and the payment and use of the said money for the benefit of said county by the said treasurer as aforesaid occurred, without consent of said town, or of any of its officers, by which it could be legally represented, and that no part of the said money so collected from the property of the said railroad company for county taxes has been paid in any year to the commissioners of said town, as required by said act of 1874, hereinbefore set forth; but that all of the said money was paid to the county treasurer as aforesaid, under the directions of the board of supervisors of said county, and the said money was paid out and used by the said treasurer for the benefit of said county, under the directions of said board of supervisors.

Plaintiff further alleges, that at the annual meeting of the board of supervisors of said county, which convened on the ——— day of ———, 18—, the said town of L., by its supervisor, duly demanded of the said board that it should levy and collect upon the taxable property of said county, and refund the same to the said town of L., by directing the same to be paid to the said railroad commissioners of said town, the said sums of money which have been collected from the property of said railroad company in said town during the years above stated, and which was so erroneously and illegally paid over to the said county treasurer and used for the benefit of said county as aforesaid, and that the said board of supervisors refused, and still refuses,

Utica (5 Misc., 391), West v. City of Utica (71 Hun, 540), N. Y. Central & H. R. R. Co. v. Maine (71 id., 417), Wilkins v. Mayor (9 Misc., 610), Adamson v. Union R. Co. (74 Hun, 3), Stearns v. Tew (6 Misc., 404), Bell v. City of Rochester (61 State Rep., 721),

Squire v. Preston (82 Hun, 88), Adamson v. Nassau Electric R. Co. (89 id., 261, rev'g S. C., 12 Misc., 600), Parfitt v. Kings Co. Gas, etc., Co. (12 id., 278), Robinson v. Gilroy (10 id., 205), Terrell v. Strong (14 id., 258).

<sup>2</sup> See note 2 to form No. 122.

to levy the said money, or to pay the same to the said town, or to the said commissioners thereof, as requested by the supervisor of the said town as aforesaid.

That the said town has also, by its supervisor aforesaid, demanded the said money of the county treasurer of said county, but that the said county treasurer refused, and still refuses, to pay the same, or any part thereof, alleging that he has no money in the treasury with which to make such payment.

The plaintiff alleges, upon information and belief, that the amount of county taxes so collected upon the property of said railroad company in said town, and paid over to the county treasurer as aforesaid, during the years above stated, including taxes levied for school purposes and for canals under legislative enactment, was, in each year, as follows: In 18—, ——— dollars [stating each year separately]. Total, ——— dollars.

That the amounts of said county taxes so collected from said property, and paid over in each of said years, exclusive of taxes levied for schools and canals under legislative enactments, were as follows: In 18—, etc., ——— dollars, etc. [stating each year separately]. Total, ——— dollars.

The plaintiff further alleges, that on account of the said money so had and received by the said county of S., and which belongs to the said town of L. as aforesaid, the said county is indebted to and liable to pay said town the sum of ——— dollars, county taxes so levied and collected upon the property of the said N. Y. and O. M. Railroad Company, in the years aforesaid.

Wherefore the plaintiff demands that the defendant account for the said money so had and received as aforesaid, and that the plaintiff have judgment for the amount thereof, which is claimed at the said amount of ——— dollars [inserting amount first mentioned], together with the interest thereon, and for such other judgment decree or relief as may be just and equitable, and for costs of this action.<sup>1</sup>

F. B., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

No. 1025.

## Proceeding to Substitute Successor in Office on Death of Party Sued in Official Capacity.

(Code Civ. Pro., § 1930.)

See note 1 to form No. 1024.

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### ARTICLE THIRD.

#### FORMS RELATING TO ACTIONS AND RIGHTS OF ACTIONS AGAINST AND BETWEEN JOINT-DEBTORS.

(Code Civ. Pro., Ch. 15, Tit. 5, Art. 3.)

- No. 1026. Judgment for money against defendants jointly indebted, where all are not served.
1027. Indorsement upon execution issued on judgment for money against joint-debtors, where all have not been served.
1028. Complaint in action to charge defendant not personally summoned.
1029. Judgment in action to charge defendant not personally summoned.
1030. Release to joint-debtor compounding separately with creditor.
1031. Release to partner compounding separately with creditor.
1032. Statement by persons composing joint-stock association of members thereof.
1033. Complaint against partner not sued.
1034. Order in partnership action under section 1947, Code of Civil Procedure
1035. Undertaking in partnership action on application of members of firm to continue the business pending the action.

<sup>1</sup> This form of complaint is from the case of *Bridges v. Supervisors, etc.* (92 N. Y., 570).

It was held in *Manchester v. Her- rington* (10 N. Y., 164), that under 2 R. S., 474, section 100, upon the expiration of the term of office of a public officer, pending a suit in his name, it is optional with the parties authorized to apply for a substitution whether they will make such application or not; and that until the successor in office or the adverse party applies for a substitution the suit shall proceed in the names of the original parties.

The same rule is held to apply under section 1930 of Code Civ. Pro., in *Farnham v. Benedict* (29 Hun, 44).

See, also, *Hitchman v. Baxter* (5 Civ. Pro. Rep., 226). *People ex rel. Lardner v. Carson* (78 Hun, 544), *Bel- linger v. Birge* (54 Hun, 511).

See further, as to action by town officer, *Hagadorn v. Raux* (72 N. Y., 583); *Victory v. Blood* (25 Hun, 515), *Chrigstrom v. McGregor* (74 Hun, 343).

In an action brought pursuant to sections 1926, 1927 of Code Civ. Pro., the officer by or against whom it is brought must be described in the summons, or other process by which it is commenced, and in the subsequent proceedings therein by his individual name, with the addition of his official title. (Code Civ. Pro., § 1929.)

An objection, growing out of an omission to join any officer who ought to be joined with the others, must be taken by the answer, or in a special proceeding, before the close of the case on the part of the defendant, otherwise it is waived. (Id.)

<sup>2</sup> See note 2 to form No. 122.



## No. 1026.

**Judgment for Money against Defendants Jointly Indebted, where all are not Served.**

(Code Civ. Pro., § 1932.)

As in general forms Nos. 457, 462, against all the defendants,<sup>1</sup> adding as follows :

[This judgment, however, may be enforced only against the joint personal property of said defendants, G. W. F. and F. W. F., and the separate real and personal property of the defendant, G. W. F.<sup>2</sup>]

## No. 1027.

**Indorsement upon Execution Issued on Judgment for Money against Joint-Debtors, where all have not been Served.**

(Code Civ. Pro., §§ 1934, 1935.)

As in form No. 560, adding at end thereof as follows :  
The defendants, A. B. [and C. D.] was [or were] not summoned, and the within execution is not to be levied upon the sole property of said A. B. [and C. D.], but it may be collected out of personal property owned by said A. B. [or C. D.] jointly with the other defendants, E. F. and G. H., or with [either] of them, and out of the real and personal property of said E. F. and G. H., or of [either] of them.

[Signature, etc., as in form No. 560.]

<sup>1</sup> See Produce Bank v. Morton (67 N. Y., 199), Orleans Cc. Nat. Bank v. Spencer (19 Hun, 569), Judd Linseed, etc., Co. v. Hubbell (76 N. Y., 543), Decker v. Kitchen (26 Hun, 173), Orr v. McEwen (16 Hun, 625; 6 Civ. Pro., 38), Staples v. Gokcy (20 Week. Dig., 564).

The clerk with whom the judgment roll is filed must write upon the docket, opposite or under the name of each defendant, upon whom the summons was not served, the words "not summoned," and a like entry must be made by each county clerk with whom the

judgment is afterwards docketed. The judgment does not, by virtue of its being docketed, bind any real property, or chattel real, owned by such a defendant. But this section does not affect the plaintiff's right of action to charge the judgment upon any real property. (Code Civ. Pro., § 1936.)

<sup>2</sup> The clause in brackets may probably be omitted under section 1932 of Code Civ. Pro.

See as to its necessity under section 136 of Code of Pro., the head-note to Northern Bank of Kentucky v. Wright (5 Robt., 604.)

See, also, Yerkes v. McFadden (141 N. Y., 136.

No. 1028.

**Complaint in Action to Charge Defendant not Personally Summioned.**

(Code Civ. Pro., § 1937.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows :

*First.* That heretofore, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in an action then pending in [this court], wherein M. E. D. was plaintiff and E. A. R., J. P. R. and E. R. were defendants, it was adjudged and decreed by the consideration and determination of said court, that the said defendants in said action should pay to the plaintiff in said action, and the plaintiff in said action should receive of and from said defendants in said action the sum of \_\_\_\_\_ dollars, as by the judgment in said action, and the roll thereof on file in the office of the clerk of said court, when produced as this court shall direct, will more fully and at large appear.

That thereafter, heretofore, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, said defendant, F. W. T., and one G. W. T., entered into a certain undertaking in said action bearing date on that day, in the words and figures following, that is to say [here is inserted copy undertaking].

That the said undertaking was duly acknowledged by the said G. W. T. and the defendant in this action, and filed in the office of the clerk of the \_\_\_\_\_ Court, and a copy thereof served on the attorney for the plaintiff in said action.

That thereafter, heretofore, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, upon an appeal had and taken by the said defendants in said action from the aforesaid judgment to the General Term of this court, in which the undertaking last set forth was given and filed, it was by the consideration and determination of said General Term adjudged and decreed that the judgment so as aforesaid appealed from should stand in all things affirmed, and that the said plaintiff should recover of and from said defendants in said action the sum of \_\_\_\_\_ dollars, as by the judgment of said General Term of said court, and the roll thereof, when

produced as this court shall direct, will more fully and at large appear.

That thereafter and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, notice of the entry of such judgment of the General Term was duly served on the adverse party.<sup>1</sup>

That the said defendants have not paid the costs and damages awarded against them on said appeal, or the amount directed to be paid by the said judgment.

*Second.* [Here is set forth the undertaking given on appeal to the Court of Appeals by the same sureties, its acknowledgment and filing, and the justification of the sureties, and the service of a copy thereof on the attorney for the plaintiff, and the complaint continues as follows.]

That thereafter, heretofore, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, upon an appeal had and taken by the said defendants in said action from the aforesaid judgment of the General Term of the \_\_\_\_\_ Court to the Court of Appeals of the State of New York, in which appeal the above undertaking was given and filed, it was by the consideration and determination of said Court of Appeals adjudged and decreed that the judgment so as aforesaid appealed from should stand in all things affirmed, so far as the same related to the defendant, E. A. R., and that the plaintiff in said action should recover of and from said defendant, E. A. R., in said action, her costs and disbursements on such appeal to be taxed as by the remittitur from said court to this court, when produced as this court shall direct, will more fully and at large appear.

That thereafter said remittitur was filed in the office of the clerk of the \_\_\_\_\_ Court, and judgment thereon and for the costs of said appeal, amounting to the sum of \_\_\_\_\_ dollars, was duly entered in favor of said M. E. D., as of the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in the office of the clerk of said \_\_\_\_\_ Court.

[Then is alleged assignments of the judgments to the plaintiff, and the complaint continues as follows.]

That no part of said moneys has ever been paid, and there is now due and owing to this plaintiff, by reason of the premises, the sum of \_\_\_\_\_ dollars and the interest

<sup>1</sup> See note 2 to form No. 989, p. 881.

thereon from, etc., and the further sum of \_\_\_\_\_ dollars and the interest thereon from, etc.

And the plaintiff further shows :

That an action was commenced in the \_\_\_\_\_ Court in favor of this plaintiff about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the complaint in which action set forth the facts hereinbefore contained, and asked judgment for the amount of said several judgments.

That said G. W. T. and F. W. T. were named as defendants therein ; that the summons therein was served upon said G. W. T., but was not served upon said F. W. T. ; that the judgment demanded in that action was for a sum of money upon an indebtedness upon contract in which said defendant, F. W. T., and said G. W. T., were jointly indebted, and that only the defendant, G. W. T. was summoned, and that in said action judgment was duly entered in this plaintiff's favor in the office of the clerk of this court, on the 10th day of May, 1880, for the sum of \_\_\_\_\_ dollars damages and \_\_\_\_\_ dollars costs, making in all the sum of \_\_\_\_\_ dollars, and that the said judgment has not, nor has any part thereof, been paid, and at the date of this verification,<sup>1</sup> to wit, the \_\_\_\_\_ day of \_\_\_\_\_, 18—, there is due upon the said judgment the sum of \_\_\_\_\_ dollars and the interest thereon from, etc., to wit, the sum of \_\_\_\_\_ dollars.

Wherefore the plaintiff demands judgment establishing the liability of the defendant, F. W. T., to pay the sum of \_\_\_\_\_ dollars, being the amount of the last aforesaid judgment entered in said action in the \_\_\_\_\_ Court in favor of this plaintiff, on the 10th day of May, 1880, for the sum of \_\_\_\_\_ dollars, with interest thereon from the said \_\_\_\_\_ day of \_\_\_\_\_, 18—, and charging the property

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<sup>1</sup> The complaint in such an action must be verified; must contain an allegation that the judgment has not been paid; and must state the sum remaining unpaid thereupon, at the time of the verification. (Code Civ. Pro., § 1938.)

The defendant's answer is restricted to defenses or counterclaims which he

might have made in the original action, if the summons therein had been served upon him, when it was first served upon a defendant jointly indebted with him, objections to the judgment, and defenses or counterclaims which have arisen since it was rendered. (Code Civ. Pro., § 1939.)

of said defendant with the payment of said sum of \_\_\_\_\_ dollars and interest, together with the costs of this action.<sup>1</sup>

F. M., *Plaintiff's Attorney.*

[Office address.]

[Verification as in forms Nos. 151, etc.]

No. 1029.

### Judgment in Action to Charge Defendants not Personally Summoned.

(Code Civ. Pro., § 1941.)

As in form No. 457 to [\*], or as in form No. 462 to and including the word "adjudged," and from thence as follows: That the plaintiff, A. B., recover from and against the defendant, C. D., the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, which is hereby determined to be the amount remaining unpaid upon the judgment originally rendered on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, against G. W. T. and said defendant, in the \_\_\_\_\_ Court, and that said plaintiff also recover from and against said defendant \_\_\_\_\_ dollars and \_\_\_\_\_ cents for his costs of this action, amounting in all to the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents.

J. L., *Clerk.*

No. 1030.

### Release to Joint-Debtor Compounding Separately with Creditor.

(Code Civ. Pro., § 1942)

Whereas, A. B. and C. D. are jointly indebted to the undersigned, E. F., upon, [\*] [describe claim]; and, whereas, the said A. B. has made a separate composition and settlement with the said E. F. of his liability upon said [claim]: [†]

Now, therefore, in consideration of the sum of \_\_\_\_\_ dollars, to me in hand paid by said A. B., in full, of the amount agreed to be paid by said A. B. upon said settle-

<sup>1</sup>This complaint is substantially from the case of *Morey v. Tracey* (92 N. Y., 581). See, also, *Oneida County Bank v. Bonney* (101 N. Y., 173), *Utica Clothes Dryer Manuf. Co. v. Otis* (37 Hun, 301), *Kantrowitz v. Kulla* (20 Abb. N. C., 321), *Richardson v. Case* (3 Civ. Pro. R., 295), *Decker v. Kitchen* (26 Hun, 173), *Long*

*v. Stafford* (103 N. Y., 274), *Harbeck v. Pupin* (55 Hun, 335, aff'd 123 N. Y., 115), *Heckeman v. Young* (id., 406), *Same v. Same* (134 N. Y., 170), *National Broadway Bank v. Hitch* (29 Abb. N. C., 400), *O'Hanlon v. Scott* (89 Hun, 44), as to this action.

<sup>2</sup>See note 2 to form No. 122.

ment, I do hereby, pursuant to section 1942 of the Code of Civil Procedure,<sup>1</sup> release and discharge the said A. B. from all and every liability to me upon said [claim]; and the said A. B. is hereby exonerated therefrom.

This instrument is not, in any way, to affect the liability of said C. D., to me, upon said [claim].

In witness whereof, I have hereunto set my hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

E. F. [L. s.]

Sealed and delivered in presence of G. H.

[Acknowledgment as in form No. 340, or proof as in form No. 538.]

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No. 1031.

**Release to Partner Compounding Separately with Creditor.**

(Code Civ. Pro., § 1942.)

As in form No. 1030 to [\*], and from thence as follows: A partnership indebtedness of the late firm of A. B. and C. D., which firm has now been dissolved by consent [*or* state how otherwise] for [describe claim]; and, whereas, the said A. B. has made a separate composition and settlement with the said E. F. of his said liability upon said [claim]:

Now, therefore, etc. [as in form No 1030 from (†) to end thereof, inserting therein after word “therefrom,” as follows], and from all liability thereupon incurred by reason of his connection with the said partnership.<sup>2</sup>

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No. 1032.

**Statement by Persons Composing Joint-Stock Association of Members thereof.**

(Code Civ. Pro., § 1945.)

We, the undersigned, do hereby state and certify, pur-

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<sup>1</sup>See *Bank of Poughkeepsie v. Ibotson* (5 Hill, 461), *Hoffman v. Dunlop* (1 Barb., 185), *Cornell v. Masten* (35 id., 157), *Morgan v. Smith* (70 N. Y., 537), *Benedict v. Rea* (21 Week. Dig., 73), *Abbott v. Royce* (20 State Rep., 694), *Hood v. Hayward* (48 Hun, 330), *Marx v. Jones* (36 id., 290); 23 Abb. N. C., 194, *note*, *Newman v.*

*Stuckey* (32 State Rep., 876), *Harbeck v. Pupin* (123 N. Y., 115, *aff'g* S. C., 55 Hun, 335), *Commercial Nat. Bank v. Taylor* (64 Hun, 499).

As to effect of release to discharge the docket of a judgment, etc., see Code Civ. Pro., § 1943.

<sup>2</sup>See notes to last form No. 1030, and see *Stitt v. Cass* (4 Barb., 92).

suant to section 1945 of the Code of Civil Procedure, that the names of all the persons now composing the [name of association or firm], an association [*or* a firm] engaged in the periodical transportation of passengers [*or* property] in the counties of [naming them], in the State of New York, are as follows: A. B., C. D., etc.

In witness whereof, we have hereunto set our hands at the \_\_\_\_\_ of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 18—.¹  
[Signatures of members.]

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No. 1033.

**Complaint against Partner not Sued.**

(Code Civ. Pro., § 1946.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that heretofore and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, an action was commenced in the \_\_\_\_\_ Court, by the above named plaintiff, against A. B. and C. D., defendants, upon the cause of action hereinafter set forth.

That G. H., the above named defendant, who was a member of the firm of A. B. & Co., and as such should have been made a party defendant in said action was not joined as a defendant therein.

That final judgment was, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, taken against the said A. B. and C. D., the defendants in said action, for the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, damages and costs, the judgment roll whereupon was filed in \_\_\_\_\_ county clerk's office on the day last aforesaid.

That said judgment still remains wholly unsatisfied [*or* that the sum of \_\_\_\_\_ dollars, with interest, etc., still remains due and unpaid upon said judgment].

And the said plaintiff further shows, that, etc. [here set forth the cause of action].

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¹The statement is conclusive for the purposes specified in section 1945, as against the parties filing it, until thirty days after filing, in like manner a new statement showing a change of interest. (Code Civ. Pro., § 1945.) See also note 1, page 907, to form No. 1022.

Wherefore the plaintiff prays judgment against the said defendant, G. H., for, etc.]<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

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No. 1034.

**Order in Partnership Action under Section 1947, Code of Civil Procedure.**

(Code Civ. Pro., § 1947.)

[At, etc., as in form No. 80.]

{Title of cause.}

On reading and filing the affidavit of A. B., dated ———, 18—, by which it appears that this action is brought [state purpose of action], and on reading and filing notice of this motion, with proof of due service thereof and of a copy of said affidavit upon [name parties served], and on reading and filing [name any opposing affidavits], and on motion of I. J., counsel for ———, after hearing K. L., for ——— :

It is hereby ordered, that the partnership business of the firm of H. & Co. may be continued during the pendency of this action by [name the partners authorized], upon their executing and filing with the clerk of ——— county an undertaking in the form required by law, in the sum of ——— dollars, with [two] sufficient sureties, to be approved as required by law, to the effect that they will obey all orders of the court in the above entitled action, and will perform all things which the judgment therein requires them to perform [add any further conditions imposed by the court].

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No. 1035.

**Undertaking in Partnership Action on Application of Members of Firm to Continue the Business Pending the Action.**

(Code Civ. Pro., § 1947.)

{Title of cause.}

Whereas, the above entitled action has been brought to

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<sup>1</sup> See Decker v. Kitchen (26 Hun, 173).



dissolve the partnership heretofore existing between the plaintiffs and defendants under the firm name of H. & Co. [or state other purpose of the action under § 1947, Code Civ. Pro.].

And whereas [names of partners applying], have applied for and obtained an order authorizing the partnership business of said partnership to be continued during the pendency of said action by them upon filing an undertaking as prescribed by section 1947 of the Code of Civil Procedure, with sureties, and in the amount and upon the conditions hereinafter contained.

Now, therefore, we, E. F., of \_\_\_\_\_, by occupation a \_\_\_\_\_, and G. H., of \_\_\_\_\_, by occupation a \_\_\_\_\_, do hereby jointly and severally undertake, pursuant to said section and to said order, in the sum of \_\_\_\_\_ dollars,<sup>1</sup> that the said [partners applying] will obey all orders of the \_\_\_\_\_ Court in the above entitled action, and will perform all things which the judgment therein requires them to perform [add any further conditions imposed by the court].

Dated \_\_\_\_\_, 18—.

E. F.

G. H.

Sealed and delivered in presence of \_\_\_\_\_ \_\_\_\_\_.

[Acknowledgment or proof, justification and approval as in forms Nos. 340, 538.]

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<sup>1</sup> The amount and the sureties to be such as the order prescribes.

## CHAPTER XVI.

FORMS RELATING TO ACTIONS IN BEHALF OF THE PEOPLE,  
AND SPECIAL PROCEEDINGS INSTITUTED IN THEIR BE-  
HALF BY STATE WRIT.

TITLE I. Forms relating to actions in behalf of the people.

TITLE II. Forms relating to special proceedings instituted by state writ.

## TITLE I.

## ARTICLE FIRST.

FORMS RELATING TO ACTION AGAINST THE USURPER OF AN  
OFFICE OR FRANCHISE.

(Code Civ. Pro., Ch. 16, Tit. 1, Art. 1.)

- No. 1036. Complaint in action against person usurping, etc., public office.
- 1037. Complaint against persons acting as a corporation without being  
duly incorporated, etc.
- 1038. Affidavit to obtain order for delivery of books and papers.
- 1039. Order to show cause upon affidavit, No. 1038.
- 1040. Affidavit of defendant to prevent issuing of warrant.
- 1041. Order discharging defendant upon return of order to show cause.
- 1042. Warrant on failure to make affidavit, etc.
- 1042a. Search warrant for such books and papers withheld.
- 1043. Complaint in action for damages, after final judgment in action  
against person usurping, etc., public office.
- 1044. Final judgment in action against persons acting as a corporation  
without being duly incorporated.
- 1045. Final judgment in action for usurping, etc., office.

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No. 1036.

**Complaint in Action against Person Usurping, etc., Public  
Office.**

(Code Civ. Pro., § 1948, subd. 1.)

SUPREME COURT—COUNTY OF ALBANY.

|   |
|---|
| <p>The People of the State of New<br/>York upon the relation of J. S.<br/><i>agst.</i><br/>M. N. N.</p> |
|---|

The above named plaintiffs, by L. W. R., attorney-general

of the State of New York, complain of the above named defendant, and allege as follows :

*First.* That during the times hereinafter mentioned, the city of Albany was, and has ever since continued to be, and still is, a corporation and body corporate, by the name of the city of Albany, and duly incorporated by law.

*Second.* That in and by the act of the legislature, incorporating said city, and the acts amendatory thereof, several offices are created and methods and means of filling the same are provided ; and among such offices is that of mayor of said city, and his election by the legal voters of said city is therein provided for ; that under and by virtue of the provisions of said acts, an election for the office of mayor, among other offices of said corporation, was held in the city of Albany on the second Tuesday of April, 1882, and such election was then held for the purpose of electing some person to fill the office of mayor of said city for two years from the first Tuesday of May, 1882, that being the time when the term of office of the then Mayor would expire and the time when the term of office of the person elected at said election would commence, and which office such person so elected would have a right to hold during the term for which he was elected, viz.: for two years from the first Tuesday in May, 1882.

*Third.* And that at said election, as aforesaid, held in said city, the above named J. S. was, as the plaintiffs allege upon information and belief, by the greatest number of legal votes cast at such election, duly and legally elected mayor of said city of Albany for the term of two years, to commence on the first Tuesday of May, 1882, and this action is brought upon the relation of the said J. S.

*Fourth.* That notwithstanding the election of the said J. S. to said office by the greatest number of legal votes cast at said election. the defendant, M. N. N., as plaintiffs allege on their information and belief, usurped and intruded into and now unlawfully holds and exercises within said city the office of mayor of said city of Albany, and unlawfully claims and assumes to be the mayor of said city, and to have the right to exercise the duties of the office for the term of two years from the first Tuesday of May, 1882.

*Fifth.* Wherefore the plaintiffs demand that judgment be rendered herein upon the rights of the said J. S. to hold the said office, and also upon the pretended rights of the defendant thereto, and that it be adjudged that the defendant has no just or legal right to hold, occupy or exercise the said office of mayor of said city, and has had no such right since the first Tuesday of May, 1882, and that the said J. S. has the legal and just right to hold the said office for the term of two years from the first Tuesday of May, 1882, and that the plaintiffs may recover of the defendant the costs of this action, and that the defendant be ousted and excluded from said office, and be adjudged to pay to the plaintiffs a fine of two thousand dollars.<sup>1</sup>

L. W. R., *Attorney-General,*  
*Attorney for Plaintiffs.*  
 [Office address.']

CITY AND COUNTY OF ALBANY, ss. :

J. S., being duly sworn, says, that he is the relator above named; that he is acquainted with the facts stated in the

<sup>1</sup>A person claiming to hold a municipal office cannot maintain an action in his own name to determine his right thereto, where it does not appear that any person claims the office in hostility to him, or that there has been any interference by the defendant with his legal rights as officer. (*Demarest v. Wickham*, 63 N. Y., 320; *aff'g S. C.*, 4 Hun, 627.)

The provision of section 423 of the Code of Procedure (§ 1983, Code Civ. Pro.), abolishing the writ of *quo warranto*, and proceedings by information in the nature thereof, have only done away with the form of the proceeding. The remedies theretofore had in these forms may now be obtained by civil action. (*People ex rel. Hatzel v. Hall*, 80 N. Y., 117.)

The right to bring an action to try the title to a public office is vested in the attorney-general, and his decision as to whether or not the action shall be brought is final, and a *mandamus* cannot be brought to compel him to bring such an action. (*People v. Fairchild*, 67 N. Y., 334; *aff'g S. C.*, 8 Hun, 334.)

See further, as to cases in which this action may be brought, and as to proceedings therein, *People v. Flanagan* (66 N. Y., 237; *aff'g S. C.*, 5 Hun, 187), *People v. Common Council* (77 N. Y., 503), *People v. Ferris* (76 id., 326), *People v. Thornton* (25 Hun, 456), *People v. McCausland* (54 How. Pr., 151), *People ex rel. Swinburne v. Nolan* (30 Hun, 484, S. C., 32 id., 612; 65 How. Pr., 468), *People v. Kenney* (92 N. Y., 647; 96 N. Y., 294), *People v. Whitlock* (92 id., 191), *People v. Perley* (80 id., 624), *People v. Wilson* (62 id., 186), *People ex rel. Cornell v. Knox* (38 Hun, 236), *People ex rel. Swinburne v. Nolan* (101 N. Y., 539, *aff'g S. C.*, 32 Hun, 612), *St. Stephen's Church cases* (25 Abb. N. C., 253), *People v. Platt* (117 N. Y., 159), *People v. Broadway R. Co. of Brooklyn* (56 Hun, 45).

In an action under subdivision 1 of section 1948, Code Civ. Pro., the claimant is a proper, if not a necessary, party plaintiff. (*People v. De Bevoise*, 27 Hun, 596.)

See, also, note 1 to form No. 496, as to submission of a controversy with

foregoing complaint; that the grounds of his belief, as to the matters therein stated on information and belief, are the sworn evidence of electors residing in said city who voted at the election named in said complaint, and the returns of said election and information that deponent has received from persons having knowledge of the facts of said election; that he has heard read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

J. S.

[Jurat as in form No. 46.]

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No. 1037.

**Complaint against Persons Acting as a Corporation without being duly Incorporated, etc.**

(Code Civ. Pro., § 1948, subd. 3.)

[Title of cause.]

The people of the State of New York by L. W. R., their attorney-general, complain of the defendant above named and allege, upon information and belief:

That heretofore, to-wit: on or about the \_\_\_\_\_ day of

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out action, involving the right to a public office.

By chapter 399, Laws of 1884, section 1953 of Code of Civ. Pro., was amended in relation to recovery of damages in action of *quo warranto*, by substituting a new action for the purpose of such recovery, instead of requiring them to be claimed in the same action.

It is provided by Code Civ. Pro., section 1949, that the attorney-general, besides stating the cause of action in the complaint, may, in his discretion, set forth therein the name of the person rightfully entitled to the office; and thereupon, and upon proof by affidavit, that the defendant, by means

of his usurpation or intrusion, has received any fees or emoluments belonging to the office, an order to arrest the defendant may be granted by the court or a judge. The provisions of title first of chapter seventh of Code Civ. Pro., apply to such an order, and the proceedings thereupon and subsequent thereto, except where special provision is otherwise made in title 1 of chapter 16 of that act. For that purpose the order is deemed to have been made, as prescribed in section 549 of Code Civ. Pro. (See forms Nos. 178, etc.)

The rule that a temporary injunction will not be granted pending an action to try the title to an office has been preserved, *it seems*, under the Code of

———, 18—, the defendants associated themselves together under the name of the U. S. M. C., and pretended to be incorporated as a medical college and thereafter assumed to and did act as a corporation and perform pretended corporate acts; and they established a pretended medical college in the city of N. Y. and pretended to give instruction in the art of medicine and surgery, for which they demanded and received compensation, and issued and granted diplomas to graduates and pretended to do all other acts pertaining to and ordinarily done by incorporated medical colleges.

That the said defendants were not and are not incorporated nor chartered by any act of the legislature of this State, nor by the Regents of the University of the State of New York, nor by any lawful authority, nor by any authority, except as hereinafter stated; but they assume and pretend that they have been incorporated under and pursuant to the provisions of the act of the legislature known as chapter 319 of the Laws of 1848, and entitled "an act for the incorporation of benevolent, charitable, scientific and missionary societies," passed April 12, 1848, and the several laws amending the same and supplementary thereto; and by virtue of a certificate in writing acknowledged before notaries public, with the consent and approval of one of our justices of the Supreme Court of the State, indorsed thereon,

Civil Procedure. *Morris v. Whelan*, 11 Abb. N. C., 64; disapproving *Palmer v. Foley*, 36 N. Y. Super. Ct., 14; 45 How. Pr., 110.) See, also, *Johnston v. Garside* (65 Hun, 208).

Where two or more persons claim to be entitled to the same office or franchise, the attorney-general may bring the action against all to determine their respective rights thereto. (Code Civ. Pro., § 1954.)

That the action is to be brought in the name of the people of the State, see Code Civ. Pro., § 1984.

See, also, as to form of judgment for costs where judgment is rendered or a final order made against the people and that execution is not to be issued against the people, Code Civ. Pro., § 1985; and see, also, *People v. Denison* (84 N. Y., 272).

And that where an action is brought by the attorney-general, as prescribed in title 1 of chapter 16 of Code of Civil Procedure, on the relation or information of a person, having an interest in the question, the complaint must allege, and the title to the action must show, that the action is brought upon relation of that person, see Code Civ. Pro., § 1986.

That attorney-general cannot receive a retainer, it being contrary to Constitution (art. 5, § 1) that he should do so, see *People ex rel. Gould v. Mut. Union Tel. Co.* (2 Civ. Pro. [McCarty], 295). See, also, *People ex rel. Lardner v. Carson* (78 Hun, 544), that a new attorney-general need not be substituted in the action as attorney for the plaintiff.

<sup>2</sup> See note 2 to form No. 122.

filed in the office of the clerk of the county of N. Y., May 28, 1878, and also in the office of the secretary of state, of which certificate, acknowledgments, consent and approval copies are hereto annexed, marked "A," and made a part of this complaint.

That the said defendants do not pretend to be incorporated by or pursuant to any law, or by reasons other than those last above stated ; but do pretend as one of the articles of association that "the business and purposes of this corporation shall be to establish and maintain in the manner required by the act entitled 'an act relative to the incorporation of colleges and academies,' passed by the legislature of the State of New York, April 12, 1853," a medical and surgical college, etc.

That said defendants, under said name, are still assuming to act as a corporation, and to do corporate acts as aforesaid as an incorporated medical college, and pretending to graduate matriculates with the degree of doctor of medicine and issue diplomas accordingly.

That the said pretended incorporation is not authorized by law for the reasons :

*First.* That the said act of 1848, and the acts amendatory thereof and supplementary thereto, furnish no sufficient or lawful authority for the incorporation of a medical college.

*Second.* That the defendants have not complied with the provisions of chapter 184 of the Laws of 1853, and particularly with sections 6 and 7 thereof, in that they have not filed any certificate, nor furnished evidence to the regents of the university of the subscription of fifty thousand dollars as therein provided, nor obtained from said regents either a temporary or perpetual charter as therein provided.

Wherefore the said plaintiffs demand that it be adjudged that the defendants are not legally incorporated, and that said pretended U. S. M. C. is not an incorporated institution ; that the defendants are acting as a corporation and doing pretended corporate acts without authority of law ; and that they, the defendants, and all others acting with or under them, or their pretended authority, be enjoined and restrained from acting as a body corporate, and from doing

acts as a corporation, and for such other and such further relief as may be equitable.<sup>1</sup>

L. W. R., *Attorney-General*.

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

No. 1038.

**Affidavit to Obtain Order for Delivery of Books and Papers.**

(Code Civ. Pro., §§ 1952, 2471a.)

[Title of cause.]

To Hon. A. C., a justice of the Supreme Court in the ——  
judicial district [or, county judge of —— county]:

A. B., of ——, being duly sworn, says, and makes his complaint pursuant to statute, as follows: that the above entitled action was brought to [state purpose of (action)].

That final judgment was rendered therein on the —— day of ——, 18——, a copy of which is hereto annexed, marked A.

That this deponent has duly taken the oath of office and has given his official bond as prescribed by law and has taken upon himself the execution of the said office of [name office].

That immediately thereafter and on the —— day of ——, 18——, this deponent demanded of C. D., the defendant in this [action] who resides at ——, in the county of ——, the delivery of all the books and papers in the custody or possession of, or under the control of, the said defendant belonging or appertaining to the said office of [name office], but the said defendant refused [or has neglected] to deliver any of said books and papers [or describe those undelivered], and that none of said books or papers [above mentioned], which, as deponent is informed and believes, are in the possession or under the control of said defendant, have been delivered by said defendant to this deponent.<sup>3</sup>

A. B.

[Jurat as in form No. 46.]

<sup>1</sup>The foregoing complaint is substantially from the case of *People v. Gunn* (96 N. Y., 317).

It is not necessary in an action brought by the attorney-general under section 1948, Code Civ. Pro., that leave



of the court to bring the same should be obtained. (People v. Boston, H. T. and W. R. Co., 27 Hun, 528.) See, however, People ex rel. Gould v. Mut. Union Tel. Co. (2 Civ. Pro. R. [McCarty], 295).

An action in the nature of *quo warranto* is, it seems, the appropriate if not the only action to test the legality of a corporation formed under the general village act. (People v. Clark, 70 N. Y., 518.)

<sup>3</sup>See note 2 to form No. 122.

<sup>3</sup>The proceedings are now regulated by section 2471a of Code of Civil Procedure, inserted in that statute by chapter 179 of Laws of 1893, being title 13 of chapter 17 of said Code. The application may be made to any justice of the Supreme Court of the district, or to the county judge of the county in which the person refusing resides. The proceedings were formerly regulated by article 5 of title 6 of chapter 5 of the first part of the R. S. (7th ed., p. 375).



No. 1039.

**Order to Show Cause upon Affidavit.**

(Code Civ. Pro., §§ 1952, 2471a.)

As in form No. 325 to word "why," and from thence as follows: ' Why he should not be compelled to deliver to the plaintiff, A. B., the books and papers mentioned and described in the affidavit of said A. B., hereto annexed, dated \_\_\_\_\_, 18— [or otherwise describe papers, etc.].

And it is further ordered, that copies of this order, and of said affidavits and papers annexed hereto, be served upon the said defendant, personally, on or before the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and upon I. J., the attorney for the said defendant, personally, or [conclude as in form No. 325].

No. 1040.

**Affidavit of Defendant to Prevent Issuing of Warrant.**

(Code Civ. Pro., §§ 1952, 2471a.)

[Title of cause.]

\_\_\_\_\_ COUNTY, ss.:

C. D., of \_\_\_\_\_, being duly sworn, says that he is the defendant in the above entitled action; that he has truly delivered over to the plaintiff, A. B., in this action, his successor in the office of [name office], all the books and papers

See, also, *Conover v. Devlin* (26 Barb., 429), *In re Bartlett* (9 How. Pr., 414), *In re Baker* (11 id., 419), *The People v. Peabody* (26 Barb., 437), *Matter of Bradley* (141 N. Y., 527), *People ex rel. Salisbury v. Holcomb* (5 Misc., 459), *Matter of Foley* (8 id., 196), *People ex rel. Smith v. Barrett* (29 State Rep., 159), *Case v. Campbell* (16 Abb. N. C., 269), *Bridgman v. Hall* (id., 272), *Matter of McGrory v. Henderson* (43 Hun, 438), *People ex rel. Le Roy v. Foley* (148 N. Y., 677).

Where, pending the proceedings, a person, not a party, gets possession of the office, under claim of title the judgment does not affect him. (*People v. Murray* (73 N. Y., 535; rev'g S. C., 8 Daly, 347).)

Where a judgment for the plaintiff, under which he has been put into possession of the books, etc., pertaining to the office, was reversed by the Court of Appeals, and a new trial granted; *held*, that the latter court, under section 1323 of Code Civ. Pro., could compel restitution. (*People v. Livingston*, 80 N. Y., 86.)

<sup>1</sup> As to the judge, etc., to whom this application is to be made, see section 2471a of Code of Civil Procedure, substituted for article 5 of title 6 of chapter 5, part 1, of R. S. (7th ed., p. 376), by chapter 179 of Laws of 1893; and generally as to this proceeding, see note 3 to last form, No. 1038.

As to orders to show cause, see rule 37 of Gen. Rules of Prac., cited in note 1 to form No. 162.

in his custody, or appertaining to his office, within his knowledge or to his belief.<sup>1</sup>

C. D.

[Jurat as in form No. 46.\*]

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No. 1041.

**Order Discharging Defendant upon Return of Order to Show Cause.**

(Code Civ. Pro., §§ 1952, 2471a.)

[Title of cause or proceeding.]

Upon the return of the order to show cause, made by me in the above entitled [action], and dated ———, 18—, why [the defendant] should not be compelled to deliver over to the plaintiff all the books and papers [mentioned in said order] in his custody as [naming office], or in any way appertaining to said office, with proof of due service of said order upon said [defendant], and the said [defendant] having made affidavit before me, pursuant to the statute in such case made and provided, that he has truly delivered over to the said [plaintiff], his successor in said office, all the books and papers in his custody, or appertaining to his said office, within his knowledge:

Now, after hearing, etc., I do hereby order, that all further proceedings before me, upon the complaint of [the plaintiff], for the delivery of said books and papers shall cease, and that the said [defendant] be discharged.<sup>3</sup>

Dated ———, 1—.

A. O., *Judge [or Justice], etc.*

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No. 1042.

**Warrant on Failure to Make Affidavit, etc.**

(Code Civ. Pro., §§ 1952, 2471a.)

[Title of cause.]

Final judgment having, on the ——— day of ———, 18—, been rendered in the above entitled action upon the

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<sup>1</sup> See section 2471a of Code Civ. Pro., and note 3 to form No. 1038. That section was substituted by chapter 179 of Laws of 1893 for section 52 of chapter 5, title 6, article 5, part 1, of R. S. (7th ed., p. 376).

<sup>2</sup> The affidavit is to be made before

the justice or judge, on the return of the order. (Id.) *Matter of McGrory v. Henderson* (43 Hun, 438).

<sup>3</sup> See section 2471a of Code Civ. Pro., substituted for section 52 of R. S., referred to in note 1 to form No. 1040.

right and in favor of the plaintiff therein, and adjudging him to be entitled to the office of [name office], and adjudging the defendant to be guilty of usurping [*or* intruding into, *or* unlawfully holding] the said office, and ousting and excluding the said defendant therefrom, and the said plaintiff having duly taken the oath of office and given his official bond, as prescribed by law, and taken upon himself the execution of said office, and the said plaintiff having thereafter, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, demanded of the said defendant the books and papers in his custody, or under his control, belonging to the said office, and the said defendant having refused [*or* neglected] to deliver such books and papers [*or* a part of said books and papers (describing them)], and the said plaintiff having thereupon made complaint to me thereof, pursuant to statute, and an order to show cause having been made by me, returnable on this day and at this time and place, and due proof of the service of said order having been made, the said plaintiff [and said defendant] having [personally and], by their counsel, appeared before me at said time and place, and I having proceeded to inquire into the circumstances, and the said defendant not having made affidavit before me that he has truly delivered over to his successor all the books and papers in his custody as [name office], or appertaining to said office, within his knowledge, or to his belief, and it having appeared that [some of] such books and papers are withheld by said defendant :

Now, therefore, by virtue of the statute in that case made, I, A. O., judge [*or* justice], etc., do, in the name of the people of the State of New York, command the sheriff of the county of \_\_\_\_\_ to commit the said defendant, C. D., to the jail of the said county, there to remain until he shall deliver such books and papers, or be otherwise discharged according to law.

Given under my hand and seal at \_\_\_\_\_, in the [said] county of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 18—.<sup>1</sup>

[L. s.]

A. O., *Judge* [*or Justice*], etc.

<sup>1</sup> See In the Matter of Daniel S. Baker (11 How. Pr., 418), as to form of warrant. See, also, note 3 to form No. 1038.

requirement of the complainant, see section 2471a of Code Civ. Pro., substituted for section 54 of above cited statute (R. S., 7th ed., 376).

As to search warrant to be issued on

No. 1043.

**Complaint in Action for Damages after Final Judgment in  
Action against Person Usurping, etc., Public Office.**

(Code Civ. Pro., § 1953.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that heretofore and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, an action was brought by the people of the State of New York upon the relation of the above named plaintiff, as plaintiffs, against C. D., the defendant above named, as defendant, by the complaint in which action it was alleged that the said C. D. had [state briefly the nature of the action].

That such proceedings were had in said action that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, final judgment was rendered therein, a copy of which is hereto annexed, marked A [or state substance of judgment].

That the said defendant has received from [stating officer] as salary belonging and appertaining to said office of \_\_\_\_\_ for and during the period of his usurpation of said office, namely, from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, up to the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the sum of \_\_\_\_\_ dollars, which sum belonged by right to the said plaintiff and not to the said defendant.

That by reason of the said usurpation, etc., of the said office of [name office] by said C. D., the plaintiff has been damaged in the sum of \_\_\_\_\_ dollars, for which amount, with costs of this action, plaintiff demands judgment against defendant.<sup>1</sup>

F. R., *Plaintiff's Attorney.*

[Office address.]

[Verification as in forms Nos. 153, etc.]

<sup>1</sup>See *People ex rel. Swinburne v. Nolan* (30 Hun, 484), as to practice before amendment of 1884 to section 1953 of Code Civ. Pro.; and see note 1 to form No. 1036 as to nature of such amendment.

As to action to recover salary, see *Dolan v. The Mayor* (68 N. Y., 274; aff'g S. C., 8 Hun, 440), *Nichol v. McLean* (63 How., 448), *Steehr v. Curran* (26 Alb. L. J., 268; S. C., 15 Vroom.'s

*R.* [45 N. J. L.]), *Hagan v. City of Brooklyn* (126 N. Y., 643), *Nichols v. McLean* (101 N. Y., 526; 33 A. L. J., 291), *People ex rel. Wren v. Goetting* (133 N. Y., 569), *People ex rel. Swinburne v. Nolan* (101 id., 539, aff'g S. C., 32 Hun, 612), *Morley v. Mayor of N. Y.* (35 State Rep., 262), *Demarest v. Mayor, etc., of N. Y.* (74 Hun, 517, aff'd S. C., 147 N. Y., 203).

<sup>2</sup>See note 2 to form No. 122.

## No. 1042a.

**Search Warrant for such Books and Papers Withheld.**

(Code Civ. Pro., §§ 1952, 2471a.)

*The People of the State of New York, to the sheriff of the county of ———, or to any constable of any town in said county:*

As in form No. 1042 to paragraph beginning with word "Now," and from thence as follows:

Now, therefore, you are commanded in the day-time to search the house of said defendant [naming him], situated [insert a particular designation or description of the said house, and of any other place to be searched], for the said books and papers [or either of them as the case may be], so withheld, and all other such books and papers as belonged to the said [naming defendant], as [stating official title], as aforesaid, in his official capacity, and which appertained to the said office of [naming same], and seize and bring them before the undersigned.

Witness, Hon. A. C., Justice of the Supreme Court (or County Judge of ——— county), at the (city) of ———, this ——— day of ———, 1——.<sup>1</sup>

[Signature and Seal.]

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<sup>1</sup>If any such books and papers are brought before the judge or justice by virtue of such warrant, he shall determine whether they appertain to such office, and, if so, shall cause them to be delivered to the complainant. (Code Civ. Pro., § 2471a.)





## No. 1044.

**Final Judgment in Action against Persons Acting as Corporation Without being duly Incorporated.**

(Code Civ. Pro., § 1955.)

After recitals, etc. (see form No. 457), as follows :

Now, on motion of L. W. R., attorney-general, attorney for the plaintiffs, it is adjudged :

That the said defendants are not, and have not been, incorporated as the United States Medical College, with the franchises or powers of a medical college, and that the said United States Medical College, mentioned in the complaint, is not, and never has been, incorporated as a medical or surgical college, and does not possess the powers or franchises of a medical college :

And it is further adjudged, that the defendants, and each of them, and all persons acting with or under them, or any of them, be and they are hereby enjoined and restrained from acting, or assuming to act, as an incorporated medical or surgical college, and from usurping or exercising the powers, functions or franchises of an incorporated medical or surgical college, and from maintaining or assuming to maintain, for gain or otherwise, a medical or surgical college, and from granting diplomas or certificates of graduation to medical students or practitioners, purporting to be granted by a medical or surgical college, and that the plaintiffs recover, etc.<sup>1</sup>

## No. 1045.

**Final Judgment in Action for Usurping, etc., Office.**

(Code Civ. Pro., § 1956.)

[Title of cause.]

Judgment of the ——— day of ———, 18—.

The issue joined in this cause having been brought to trial at a circuit of this court, held at the city of Albany on the 25th day of June, 1883, before Mr. Justice W. and a jury, and on such trial the jury having, by their verdict, found and determined :

<sup>1</sup> This form is from the case of *People v. Gunn* (96 N. Y., 317), in which the complaint is given at form No. 1037.

*First.* That on the 11th day of April, 1882, at a charter election then held in the city of Albany, J. S., the above named relator, was duly elected mayor thereof.

*Second.* That M. N. N. was not elected at that time, and was, at the time of the commencement of this action, and has since been, wrongfully holding said office:

Now, on motion of L. W. R., attorney-general, it is

*Ordered*, adjudged and determined, that the said relator, J. S., was rightfully elected to the office aforesaid, and entitled to hold said office under said election; and that the said M. N. N. was not elected to said office [and that the said plaintiff is entitled to recover against the defendant such damages, penalty and costs as may be adjudged, and which adjudication may be added to the foot hereof].<sup>1</sup>

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#### ARTICLE SECOND.

##### FORM RELATING TO ACTION TO VACATE LETTERS PATENT.

(Code Civ. Pro., Ch. 16, Tit. 1, Art. 2.)

No. 1046. Complaint in action to vacate letters patent.

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No. 1046.

##### Complaint in Action to Vacate Letters Patent.

(Code Civ. Pro., § 1957.)

For form of this complaint, see *People v. Clarke* (9 N. Y., 349).

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#### ARTICLE THIRD.

##### FORMS RELATING TO ACTIONS BY THE PEOPLE FOR A FINE, PENALTY OR FORFEITURE, OR UPON A FORFEITED RECOGNIZANCE.

(Code Civ. Pro., Ch. 16, Tit. 1, Art. 3.)

No. 1047. Indorsement upon summons in action by attorney-general or district attorney for forfeiture or penalty to the people of the State.

1048. Complaint on recognizance after indictment found.

1049. Complaint on recognizance after complaint made and before indictment found.

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<sup>1</sup> This judgment is from the case of *People ex rel. Swinburne v. Nolan* (30 Hun, 484). Since the amendment of 1884, by ch. 399, this clause in brackets should not be included. As to the nature of that amendment, see note 1 to form No. 1036.

No. 1047.

**Indorsement under Summons in Action by Attorney-General or District Attorney for Forfeiture or Penalty to the People of the State.**

(Code Civ. Pro., § 1964.)

Same as form No. 891 (page 777).

No. 1048.

**Complaint on Recognizance after Indictment Found.**

(Code Civ. Pro., § 1966.)

[Title of cause.]

The plaintiff complains of the defendant and alleges, that said defendant heretofore, to wit: on the —— day of ——, 18—, and at the —— of ——, in the county of ——, and within the jurisdiction of this court, personally came before [the court], in the county of ——, and then and there acknowledged to owe the people of the State of New York the sum of —— dollars, which said recognizance was and is subject to a certain condition thereunder written, which condition was that if one E. F. should personally appear at the then next Court of —— to be holden in and for the county of ——, then and there to answer to a certain indictment pending against him for ——, and should not depart the court without leave, and should abide the order of such court in the premises, then the said recognizance in and by the said condition thereof was to be void, or else to remain in full force; which said recognizance, taken and acknowledged as aforesaid, afterwards, to wit: on the —— day of ——, 18—, was by an order of the said last mentioned court, as by the said recognizance and the said condition thereof now remaining of record in the office of the clerk of the county of ——, in the county of ——, reference being thereto had will more fully and at large appear.

And the said plaintiffs aver, that the next Court of —— to be holden and held next after the signing and acknowledgment of the said recognizance in and for the county of ——, was held at the ——, in the county of ——, in

and for the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, before [one of] the judges of the same court, and that the said last mentioned court commenced its session on the said last mentioned day; and at the said last mentioned court, held on the day and at the place last mentioned, the said indictment then was pending undetermined therein, and the said recognizance last mentioned has been regularly respited thereto, and then was a record of the said last mentioned court.

And the said plaintiffs further say, that afterwards, at the said term of the said last mentioned court holden in and for the said county of \_\_\_\_\_, at the \_\_\_\_\_, in the county of \_\_\_\_\_, the said \_\_\_\_\_ failed in the performance of the condition of the said recognizance in this.

That the said E. F. being then and there called in open court, during the sitting of the said court, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, did not personally appear in said court, and abide the order of the said court in the premises, but therein wholly failed and made default; whereupon an order was entered by the said court forfeiting the said recognizance, and directing the same to be prosecuted according to law.<sup>1</sup>

And the said plaintiffs further say, that the said defendant has not paid the said sum of \_\_\_\_\_ dollars, so as aforesaid acknowledged by him to be owing to the said plaintiffs, nor any part thereof, and that the said recognizance is in full force, strength and effect, in no manner reversed, vacated or satisfied, and that they, the said plaintiffs, have not yet obtained satisfaction of the same, nor of any part thereof; whereby an action has accrued to the said plaintiffs to demand and have of and from the said defendant the said sum of \_\_\_\_\_ dollars hereinabove demanded.

Nevertheless, the said defendant [although often requested to do so], has not paid the said sum of money above demanded to the said plaintiffs, or any part thereof, but to do so has hitherto wholly neglected and refused and still does neglect and refuse [to the damage of the plaintiffs

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<sup>1</sup> See Code Civ. Pro., § 1965.

of ——— dollars],<sup>1</sup> for which amount, with interest thereupon from the ——— day of ———, 18—, plaintiffs demand judgment against the defendant.<sup>2</sup>

[Signature, etc., as in form No. 969.]

[Verification as in form No. 153, adding after (+) in No. 152, as follows: Are the people of the State.<sup>3</sup>]

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No. 1049.

**Complaint on a Recognizance after Complaint made and Before Indictment Found.**

(Code Civ. Pro., § 1966.)

[Title of cause.]

The plaintiff complains of the defendant and alleges, that the said defendant heretofore, to wit: on the ——— day of ———, 18—, at the town of ———, in the county of ———, and within the jurisdiction of this court, personally came before O. M., one of the justices of the peace for preserving the peace in the county of ——— as aforesaid, in his own proper person, and then and there entered into a recognizance, in writing, signed with his own hand, by which recognizance the said defendant acknowledged E. F. to owe to said plaintiffs the sum of ——— dollars, and the said defendant did then and there consent, grant and agree, that the said sum should be made of his goods and chattels, lands and tenements, and levied to the use of the said plaintiffs if said E. F. should fail in performing the condition of the said recognizance, which condition was, that E. F., the said ———, should personally appear at the then next court having criminal jurisdiction of said offense, to be holden in and for the county of ———, then and there to answer an indictment to be preferred against him for the offense aforesaid, and to do and receive what should, by said court, be then and there enjoined upon him, and should not depart the court without leave, and should in the meantime keep the peace.

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<sup>1</sup> It is not necessary, in such an action, to allege and prove any damages by reason of the breach of the condition; but where the people are entitled to judgment therein, they must have judgment absolute, for the penalty of the recognizance. (Code Civ. Pro., § 1966.)

<sup>2</sup> See *People v. Scott* (67 N. Y., 585).

<sup>3</sup> See, also, form of verification in form No. 1050.

And upon the performance of the said condition, the said recognizance was to be void, otherwise of force ; which said recognizance, taken and acknowledged as above, before the said O. M., one of the justices of the peace for preserving the peace as aforesaid, he having full power and competent authority to take the same afterwards, that is to say : on the ——— day of ———, in the year 18—, was duly filed of record by the clerk of said county of ———, at his office in the ——— ; and the said plaintiffs aver that the next court of ———, to be holden and held next after the signing and acknowledgment of said recognizance in and for the county of ———, commenced its session and was held at the ———, in the ———, in and for the county of ———, on the ——— day of ———, 18—.

And such proceedings were thereupon had in the said court, that, at the said court commencing its session and held on the day and at the place aforesaid, an indictment was found and presented against the said E. F. for ———, and such proceedings were thereupon afterwards had, that the said recognizance was, in due form of law, respited and continued until and to the term of ———, holden at the ———, in the county of ———, on the ——— day of ———, 18—, as by the record of the said recognizance and proceedings thereof, still remaining in the said court at the ———, in the county of ——— aforesaid, more fully appears.

And the before mentioned plaintiffs do further say, that afterwards, at the said term of the said last mentioned court, holden in and for the said county of ———, to wit : the said court commencing on the ——— day of ———, 18—, the said E. F. failed in the performance of the condition of the said recognizance in this : that the said E. F., being then and there called in open court, during the sitting of said court, to wit, on the ——— day of ———, 18—, did not personally appear in and abide the order of the said court, but therein wholly failed and made default ; whereupon an order was entered by the said court forfeiting the said recognizance, and directing the same to be prosecuted according to law, as by the record and proceedings of the said court will more fully and at large appear.

And the said plaintiffs further say, that the said defendant has not paid the sum of —— dollars so as aforesaid, acknowledged separately by said defendant to be owing to the said plaintiffs.

And the said plaintiffs aver, that the record of the said recognizance remains in full force, strength and effect, in no manner reversed, vacated or satisfied, and that they, the said plaintiffs, have not yet obtained satisfaction of the same, whereby an action hath accrued to the said plaintiffs to demand and have of the said defendant the said sum of —— dollars. Nevertheless the said defendant, although often requested, has not paid the said sum of money, or any part thereof, to the said plaintiffs, but hitherto has refused, and still doth refuse, to pay the same to the said plaintiffs [to the damage of the said plaintiffs of —— dollars].

Wherefore the said plaintiffs [prayer for judgment as in form No. 1048].<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in last form No. 1048.]

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#### ARTICLE FOURTH.

#### FORM RELATING TO CERTAIN ACTIONS FOUNDED UPON THE SPOILIATION OR OTHER MISAPPROPRIATION OF PUBLIC PROPERTY.

(Code Civ. Pro., Ch. 16, Tit. 1, Art. 4.)

No. 1050. Complaint in action for public funds illegally obtained, converted, etc.

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No. 1050.

#### **Complaint in Action for Public Funds Illegally Obtained, Converted, etc.**

(Code Civ. Pro., § 1969.)

[Title of cause.]

The complaint of the people of the State of N. Y., by D. P., their attorney-general, plaintiffs in the above entitled action, against W. T. and the mayor, aldermen and commonalty of the city of N. Y., defendants in the same action, respectfully shows and alleges :

*First.* That by virtue of an act of the legislature of this

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<sup>1</sup> See notes to form No. 1048.

State, passed on the 26th day of April, 1870, entitled "an act to make further provision for the government of the county of N. Y.," it was enacted that all liabilities against said county, previous to the passage of that act, should be audited by the mayor of the city of N. Y., the comptroller of said city and the then present president of the board of supervisors of the said county, and that the amounts which should be found to be due should be provided for by the issue of revenue bonds of the said county, payable during the year 1871; that the said board of supervisors should include in the ordinance levying the taxes for the year 1871 an amount sufficient to pay said bonds, and the interest thereon, and that the claims on such liabilities should be paid by the said comptroller to the party or parties entitled to receive the same upon the certificate of the said three officers or persons so required to audit in that behalf by the said act.

That at the passage of said act A. O. H. was mayor of the said city, R. B. C. was the comptroller thereof, and the said W. M. T. was president of the board of supervisors of the said county; that the said W. M. T. continued to be such president until the fourth day of July next thereafter, and the said H. and C. respectively continued to hold their said respective offices during the time of all the acts and transactions hereinafter mentioned.

That after the passage of such act, and on or about the 4th day of May, 1870, with intent to cheat and defraud the county of N. Y. and the tax-payers thereof and the people of the State of N. Y., the said W. M. T., and one J. W., since deceased, did unlawfully and fraudulently contrive, conspire and agree together to procure false and pretended claims to be set up and to be allowed and paid in formal compliance with said act and in the manner hereinafter stated.

That after the passage of such act, and after the said board of three auditors in the same act mentioned had held the meeting hereinafter mentioned, and before the 13th day of August, 1870, several pretended claims, falsely alleged and purporting to be such liabilities of said county, within the true intent and meaning of the said act, amounting in



the aggregate to six million, one hundred and ninety-eight thousand, nine hundred and fifty-seven dollars and eighty-five cents, as specified in the annexed schedule thereof, marked A, which is made part of this complaint, were by the said three auditors, in apparent and formal compliance with the terms of said act, respectively certified to have been so audited and allowed by them, as hereinafter more particularly stated.

That from time to time, as such certifications were respectively made known to him or his subordinates, the said comptroller, in order to provide, as prescribed by said act, funds to pay the amount so certified, caused to be issued bonds, as prescribed by said act, and obtained thereon from *bona fide* purchasers of such bonds, prior to the said thirteenth day of August in the year last aforesaid, the said sum of six million, one hundred and ninety-eight thousand, nine hundred and fifty-seven dollars and eighty-five cents, which last mentioned sum was, in the usual modes of keeping moneys officially received on account of said county, deposited in the National Broadway Bank of the city of New York to the credit of an account kept by the chamberlain of the city of N. Y., as county treasurer of the said county, by virtue of his said official character as such chamberlain.

That the moneys so deposited as aforesaid were not, nor was any of them, ever examined or audited by the said board of three auditors, or by any of them, and that but one meeting of such board of auditors was ever held.

That at such meeting no accounts, claims or liabilities against the said county, or under said act, were presented or considered, nor was any other proceeding had thereat, except that a paper was then and there subscribed by the said three auditors so in said act mentioned.

That such meeting was held on the 5th day of May, in the year last aforesaid, and that such paper now remains in the said comptroller's office, and is in the following words :

COMPTROLLER'S OFFICE, *May 5, 1870.*

The undersigned meet as a commission, under and by virtue of section four of chapter 382 of the laws of 1870.

On motion of the mayor it is resolved, that the county auditor collect from the appropriate committees of the board of supervisors all bills and liabilities against the county, incurred prior to April 26, 1870, and amounts now due thereon, and that the evidence of the same be the authorization of the same by the said board, or its appropriate committee, on certificate of clerk or president; and that thereupon the said county auditor annex the vouchers to the appropriate blanks for our signature and action, as directed by the section aforesaid, and payment.

A. O. H., *Mayor*.

W. M. T., *Pres't Board of Superv's*.

R. B. C., *Comptroller*.

That at the date of such paper, and during all the pecuniary transactions hereinafter mentioned, the said J. W., since deceased, was called and styled the county auditor, and was the person intended by that style of office in such last mentioned paper.

That said W., or his assistants, to the plaintiffs and their attorney-general unknown, from time to time, after the making of such paper, and prior to the said 13th day of August, acted upon the said pretended accounts of claims mentioned in schedule A as aforesaid, which were, in point of form, authenticated conformably to the requisites of such last mentioned paper, to each of which he, the said W., attached a certificate of allowance or audit, filled up as to the amount and date in his own hand-writing, the residue being in print; that a blank form of such certificate is contained in the schedule marked "C," to this complaint annexed as a part thereof; whereupon each of the said board of three auditors, separately, without any investigation or conference with, or the presence of either of the other members thereof, signed the same; and thereupon, by direction of the said comptroller, a warrant for the payment of such claim was prepared, signed by the said comptroller and countersigned by the said mayor and one J. B. Y., then clerk of the said board of supervisors, on which, on the day of the date of the same, the said bank, in good faith, and without any knowledge or notice of the fraudu-

lent acts, practices or intents in this complaint mentioned, or of any of them, did, in the due and ordinary course of business, for and in behalf of said county treasurer, and to the debit of his said account, pay to some person or persons, to the plaintiffs and their attorney-general unknown, on presentation of such warrant, the amount thereof, in the usual method of paying checks upon banks.

That every warrant was in the form usually and lawfully employed in drawing money from the bank account of such county treasurer in payment of claims and liabilities of the said county, after such claims had been duly audited, allowed and ordered to be paid by the proper officers in that behalf; and that the schedule marked D, to this complaint annexed, and hereby made a part thereof, contains in blank the form of all such warrants.

That the said accounts and claims so pretended to have been audited, and for which warrants were so made and paid as aforesaid, and which are mentioned in the said schedule marked A, were all false, fictitious and fraudulent, and did not, nor did any of them, represent any liabilities or liability against the said county, or any real or actual liabilities or liability, which, according to the true intent and meaning of said act of the legislature, were directed to be audited, provided for or paid, or any just or lawful demand whatever.

That the said W. M. T. and J. W., under and in pursuance of the unlawful and fraudulent combination, conspiracy and agreement aforesaid, between them, and with the intent to cheat and defraud as aforesaid, procured the said false and fraudulent claims and accounts to be prepared and made up, audited and certified as aforesaid, in the form required by the act aforesaid, they, the said W. M. T. and J. W., well knowing at the times when he the said W. M. T. so certified such claims respectively, that the said claims were false, fictitious and fraudulent as aforesaid, and in like fraudulent manner, and with like fraudulent intent as last aforesaid, obtained such warrants mentioned in said schedule A, and procured payment thereof from the said bank as aforesaid, and fraudulently obtained to their own use the said sum of six million. one hundred and ninety-eight thou-

sand, nine hundred and fifty-seven dollars and eighty-five cents, so paid them as aforesaid.

That the said schedule marked A, contains a statement of the said warrants respectively, showing as to each warrant the following particulars namely, [here follow the particulars].

That the said money so paid upon the said warrants by the said bank and so obtained thereon and converted to their own use by the said W. M. T. and J. W., have not, nor have any of them, or any part thereof, been recovered back or restored unto the proper or lawful official receiver, depository or custodian thereof, either in specie or in compensation for the same, or otherwise.

*Second.* That the said defendants, the mayor, aldermen and commonalty of the city of N. Y., set up and pretend to some right or interest in the premises.

And the said plaintiffs therefore demand judgment against the said defendant, W. M. T., for the said sum of six million, one hundred and ninety-eight thousand, nine hundred and fifty-seven dollars and eighty-five cents, with interest thereon from the 1st day of September, 1870, and their costs of the action.\*

D. P., *Attorney-General.*  
[Office address.†]

STATE, CITY AND COUNTY OF N. Y., ss.:

W. H. P., of said city, being duly sworn, says, he is an attorney and counsellor of the Supreme Court, and is employed as assistant and associate with the attorney-general in prosecuting the demands mentioned in the foregoing complaint, and hath read the said complaint; that for several years last past deponent has been engaged in investigating

\* This complaint is from the case of *People v. Tweed* (63 N. Y., 202). The action was brought under chapter 49 of Laws of 1875, of which section 1969 of Code Civ. Pro. is a revision.

The constitutionality of the act was affirmed in the above cited case, although the point was not expressly adjudicated.

See, further, as to this action, *Wood v. The Mayor* (73 N. Y., 556), *People v. N. Y. and Manhattan Beach R. Co.* (84 N. Y., 565; aff'g S. C., 22 Hun, 95), *People v. Starkweather* (42 N. Y., Super. Ct., 325), *People v. Wood* (121 N. Y., 522), *People v. Coggeshall* (138 id., 635).

† See note 2 to form No. 122.

the matters alleged and stated and referred to in said complaint, and has made himself familiar with the relevant books, records and documents in the comptroller's office and in the National Broadway Bank, in said complaint referred to, and that the schedules therein referred to have been examined by himself repeatedly, and also by deponent's directions and under deponent's superintendence; that deponent has diligently investigated and made himself acquainted with the facts alleged in said complaint and is so acquainted with the same; that the said complaint is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

W. H. P.

[Jurat as in form No. 46.]

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## TITLE II.

FORMS RELATING TO SPECIAL PROCEEDINGS INSTITUTED BY STATE WRIT.

### ARTICLE FIRST.

FORMS RELATING TO PROVISIONS APPLICABLE TO TWO OR MORE STATE WRITS.

(Code Civ. Pro., Ch. 16, Tit. 2, Art. 1)

No. 1051. Undertaking on issuing habeas corpus.

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No. 1051.

### Undertaking to be Given on Issuing Habeas Corpus.

(Code Civ. Pro., § 2000.)

Whereas, a writ of habeas corpus to bring up E. F., a prisoner [to testify], before, etc. [as in writ], has been issued by the Hon. A. O., a [justice] of the [Supreme] Court [or by the (Supreme) Court (or county court of ———) now in session at, etc.], to the sheriff of the county of ———, by which the said sheriff is commanded that he bring E. F., now in custody of him, the said sheriff, under and by virtue of ———, before the said justice of the Supreme Court [or before the said court; or before A. B., a referee; or C. D., a justice of the peace, etc.], on the application of A. B.:

Now, therefore, I (*or we*), G. H., of \_\_\_\_\_, by occupation a \_\_\_\_\_ [and I. J., of \_\_\_\_\_, by occupation a \_\_\_\_\_],<sup>1</sup> do hereby jointly and severally undertake, pursuant to statute, to and with M. N., as such sheriff, in the sum of \_\_\_\_\_ dollars,<sup>2</sup> that I [*or we*] will pay the charges of carrying back the said prisoner if he be remanded: and that the prisoner will not escape by the way, either in going to, remaining at, or returning from, the place to which he is to be taken.

Dated \_\_\_\_\_, 18—.

G. H.  
[I. J.]

In presence of \_\_\_\_\_.

[Acknowledgment or proof, justification and approval, as in forms Nos. 340, 538.]

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#### ARTICLE SECOND.

#### FORMS RELATING TO THE WRIT OF HABEAS CORPUS, TO BRING UP A PERSON TO TESTIFY

(Code Civ. Pro., Ch. 16, Tit. 1, Art. 2.)

No. 1052. Habeas corpus to testify

1053. Affidavit to procure habeas corpus to testify.

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#### No. 1052.

#### Habeas Corpus to Testify.

(Code Civ. Pro., § 2008.)

*The People of the State of New York [upon the relation of A. B.] to the Sheriff of the County of \_\_\_\_\_ [or name other officer], greeting:*

We command you that you have the body of K. L. detained in our prison [*or jail*] at \_\_\_\_\_, under your custody, as it is said, under safe and secure conduct at or before, etc. [as in subpoena, form No. 357, to (\*), substituting "he" for "you," and then proceed as follows:] And immediately

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<sup>1</sup> At least one surety (Code Civ. Pro., § 2000.) tained for a specific sum of money; if not, it must be one thousand dollars.

<sup>2</sup> At least twice the sum for which the prisoner is detained, if he is de- (Id.)

<sup>3</sup> See section 1994, Code Civ. Pro.

after the said K. L. shall then and there have given his testimony before, etc., in the said action [*or* proceeding], that you return him to our said prison [*or* jail] under safe and secure conduct and have you then and there this writ.<sup>1</sup>

Witness, etc. [teste].

[L. s.]

C. J., *Clerk.*

J. B., *Attorney.*

[Indorsed.]

Allowed this \_\_\_\_\_ day of \_\_\_\_\_, 18— [upon the application of L. M., attorney-general of the State of New York (*or* of P. F., district attorney of the county of\_\_\_\_\_)].<sup>2</sup>

A. O., *Judge [or Justice], etc.*

No. 1053.

### Affidavit to Procure a Habeas Corpus to Testify.

(Code Civ. Pro., § 2012.)

[Title of cause.]

\_\_\_\_\_ COUNTY, *ss.:*

A. B., of \_\_\_\_\_, being duly sworn, says, that he is the plaintiff [*or* defendant] in this action, and that the same is brought in the [Supreme] Court and is triable in the county of \_\_\_\_\_, for [state particulars].

That the defense to the same is [state it].

That this deponent has fully and fairly stated the case to A. H., his counsel in this cause, who resides at \_\_\_\_\_, and has also stated to his said counsel the facts which he expects to prove by C. D., as a witness for deponent in this cause, and who is now a prisoner in the custody of the sheriff of the county of \_\_\_\_\_.

That the said C. D. is a material and necessary witness

<sup>1</sup> As to remanding, etc., prisoner, see Code Civ. Pro., § 2013; as to the seal, see (id.) § 1992; as to allowance of writ, see (id.) § 1996; as to time of return, see (id.) §§ 1998, 2006; for form of return, see form No. 31 and §§ 2013, 2014 (id.).

<sup>2</sup> When the writ is issued upon the application of the attorney-general, or

of the district attorney having charge of the action or special proceeding, the indorsement of the allowance must state that it was issued upon such an application. (Code Civ. Pro., § 1993.) See, further, as to allowance, § 1996 (id.).

As to service of writ, see §§ 1999, 2000, 2003, Code Civ. Pro.

for this deponent on the trial of this cause, and that without the benefit of his testimony he cannot safely proceed to the trial of the said cause, as he is advised by his said counsel, after such statements were made to him, and verily believes, and that such trial is noticed for [state the time and court, etc].

That said prisoner is now confined in the \_\_\_\_\_ at \_\_\_\_\_, in the county of \_\_\_\_\_, under a sentence for a felony, to wit: for \_\_\_\_\_ [or under a sentence for \_\_\_\_\_, and not for a felony].<sup>1</sup>

A. B.

[Jurat as in form No. 46.]

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### ARTICLE THIRD.

#### FORMS RELATING TO THE WRIT OF HABEAS CORPUS, AND THE WRIT OF CERTIORARI, TO INQUIRE INTO THE CAUSE OF DETENTION.

(Code Civ. Pro., Ch. 16, Tit. 2, Art. 3.)

- No. 1054. Petition on application for writ of habeas corpus or certiorari to inquire into cause of detention.
1055. Writ of habeas corpus to inquire into the cause of detention.
1056. Writ of certiorari to inquire into cause of detention.
1057. Return to writ of habeas corpus and certiorari—official.
1058. Return to writ of habeas corpus or certiorari other than official.
1059. Attachment for not obeying writ.
1060. Commitment upon return of warrant.
1061. Precept by judge to bring before him the prisoner.
1062. Order for discharge of prisoner.
1063. Order remanding prisoner under section 2032 of Code Civ. Pro.
1064. Order discharging or bailing prisoner in certain cases upon writ of habeas corpus.
1065. Notice to person interested in detention, etc.
1066. Denials by the prisoner of return, etc.

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<sup>1</sup>The writ is not to issue to bring up a prisoner sentenced to death, nor is it to issue to bring up one confined under any other sentence for a felony, except where the application is made in behalf of the people to bring him up as a witness on the trial of an indictment, and then only *by and* in the discretion of *a justice of the Supreme Court*, on such notice to the district attorney of the county wherein the prisoner was convicted, and upon such terms and conditions, and under such regulations, as the judge prescribes. (Code Civ. Pro., § 2011.) See, also, ch. 416 of Laws of 1880, as amended by ch. 267

of Laws of 1885, § 1. By ch. 946 of Laws of 1895, amendments were made to § 2011 of the Code of Civ. Pro., as indicated above by italics, such amendments taking effect Jan. 1, 1896.

For proceedings generally upon the writ, and upon application therefor, see Code Civ. Pro., §§ 2008-2014. Of these sections 2009 and 2010 were amended by ch. 946 of Laws of 1895, the amendments taking effect Jan. 1, 1896.

Where the attorney-general or district attorney makes the application, he need not swear to the advice of counsel. (Id., § 2012.)



- No. 1067. Order for discharge of prisoner or dismissing proceedings where certiorari has been issued on application for habeas corpus.
1068. Order for bail on return to writ of certiorari.
1069. Recognizance of prisoner for his appearance.
1070. Judge's certificate of compliance to be made upon the order, No. 1.
1071. Attachment for not obeying final order for discharge.
1072. Warrant to bring up prisoner about to be removed, No. 1.
1073. Warrant to bring up prisoner about to be removed, etc., No. 2.
1074. Notice of appeal from an order refusing to grant writ of habeas corpus or certiorari.
1075. Order admitting prisoner to bail pending appeal.
1076. Recognizance of prisoner on appeal from final order dismissing proceedings, etc., on habeas corpus, etc.

No. 1054.

**Petition on Application for Writ of Habeas Corpus or Certiorari to Inquire into Cause of Detention.**

(Code Civ. Pro., § 2019.)

*To the Supreme Court of the State of New York [or name other court or judge]:*

The petition of A. B. respectfully shows, that he is now imprisoned [*or restrained in his liberty*], in the custody of [*or by (state the officer or person who imprisons or restrains him of his liberty)*],<sup>1</sup> at ———— [*state place of confinement, if known, or, if unknown, state that fact*],<sup>2</sup> and according to the best knowledge and belief of the petitioner for a supposed criminal offense, to wit [*state it (or state other cause or pretence of the imprisonment or restraint)*].

That a copy of the mandate, by virtue of which such imprisonment [*or restraint*] is made, is hereto annexed, marked A [*or state: that by reason of the said petitioner being removed (or concealed) before this application a demand of a copy of the mandate could not be made, or that such copy was demanded and the legal fees thereof duly tendered to the said (state officer or person having the prisoner in his custody), and that the said copy was refused*].

<sup>1</sup> The party is to be described, if his name is not known. (Code Civ. Pro., § 2019, subd. 1.)

<sup>2</sup> If the petition fails to state the place where the prisoner is confined, or to negative the matters specified in subdivision 2 of section 2019, Code Civ. Pro., it is fatally defective, and the writ will be quashed. (*People v. Cowles*, 59 How. Pr., 287 [Sup. Ct., Sp. Tm.]). See, also, *People ex rel. Hoyle v. Osborne* (6 Civ. Pro. R., 299).

But if he is not confined for any supposed offense, then state, to the best of the petitioner's knowledge and belief, for what cause or under what pretence he is confined, or aver, "that he is utterly ignorant of the pretence under which he is confined," and add, if the fact be so, but he hath heard or understood, and that according to the best knowledge and belief of the petitioner, such pretence is as follows [state it], and the said petitioner avers, that, to the best of his knowledge and belief, he is not committed or detained by virtue of any mandate issued by any court of the United States or any judge thereof [in a case where such courts or judges have exclusive jurisdiction, under the laws of the United States, or have acquired exclusive jurisdiction by the commencement of legal proceedings in such a court], or by virtue of the final judgment or decree of any competent tribunal of civil or criminal jurisdiction or the final order of such a tribunal, made in a special proceeding, instituted for any cause [other than for the alleged contempt above mentioned],<sup>1</sup> or by virtue of any execution issued upon such judgment, decree or final order.

[When the application is made to an officer residing in an adjoining county to the one in which the prisoner is detained, state the facts authorizing such application under subdivision three of section 2017.]

Wherefore your petitioner prays a habeas corpus [*or certiorari*] to discharge him from custody, as he is advised by counsel, and believes his imprisonment to be illegal, in this [state the causes] [*or to bring him up in order to be bailed*].<sup>2</sup>

Dated \_\_\_\_\_, 18—.

A. B. [by L. M.]

\_\_\_\_\_ COUNTY, ss.:

A. B., the above named petitioner [*or L. M., on behalf of A. B., the above named petitioner*], being duly sworn, says, that he believes the foregoing petition to be true.

A. B.

[Jurat as in form No. 46.]

<sup>1</sup> See section 2016, Code Civ. Pro., subdivision 2, and section 2032, *id.*, subdivisions 2 and 3, and see *People ex rel. Hoyle v. Osborne* (6 Civ. Pro. R. [Browne], 299).

<sup>2</sup> It is held in *People ex rel. Hoyle v. Osborne* (*supra*), that the application of a wife living separate from her husband for a writ of habeas corpus to remove her minor child from the custody

No. 1055.

**Writ of Habeas Corpus to Inquire Into the Cause of Detention.**

(Code Civ. Pro., § 2021.)

*The People of the State of New York [on the relation of E. F.],<sup>1</sup> to the Sheriff of, etc. [or to A. B.] :*

We command you that you have the body of C. D., by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said C. D. is called or charged, before — [the Supreme Court, at a special term (*or*, term of the Appellate Division) thereof to be held, *or* E. F., justice of the Supreme Court, *or* otherwise, as the case may be], at —, on — [*or* immediately after the receipt of this writ], to do and receive what shall then and there be considered concerning the said C. D., and have you then there this writ.

Witness, —, one of the justices [*or* judges] of the said court [*or* county judge, *or* otherwise, as the case may

to which it has been legally committed by its father, and to have it committed to her, should be made to the court, and that the writ must be issued by the court, and that a judge at chambers has no power to issue the writ in such a case, since the repeal of subdivision 21 of section 16 of the judiciary act of 1847, by chapter 417 of the Laws of 1877. See, also, *People ex rel. Williams v. Corey* (46 Hun, 409).

See, also, *Matter of Larson* (96 N. Y., 381; rev'g S. C., 31 Hun, 539), *Matter of Moses* (13 Abb. N. C., 189), *Matter of Serafino* (66 How. Pr., 178), *People ex rel. Devoe v. Kelly* (97 N. Y., 212; aff'g in part, S. C., 32 Hun, 536), *People ex rel. Knowlton v. Sadler* (2 N. Y. Crim. R., 438), *In re Crow* (30 Alb. Law Jour., 210; S. C., 19 N. W. R., 713), *Matter of Forsyth* (66 How. Pr., 180), *People ex rel. McIntyre v. Hurlbut* (67 id., 362), *People v. Gray* (67 id., 456), *People ex rel. Evans v. McEwen* (67 id., 105), *Matter of Lewinski* (66 id., 175), *People ex rel. McDonald v. Keeler* (32 Hun, 563), *People ex rel. Tully v. Davidson* (67 How., 416), *Matter of Dixon* (11 Abb. N. C., 118), *Matter of Wright* (29 Hun, 357), *Matter of Laurent* (11 Abb. N. C., 120),

*People ex rel. Trainor v. Baker* (89 N. Y., 460), *People ex rel. Sherwin v. Mead* (28 Hun, 237; aff'd 92 N. Y., 415; see, also, 22 Week. Dig., 404), *People v. Donohue* (14 Hun, 133), *People ex rel. Frey v. Warden of N. Y. County Jail* (100 N. Y., 20, rev'g S. C., 34 Hun, 393), *Matter of Francesca* (66 How. Pr., 178), *People ex rel. Clarke v. Clarke* (64 id., 7), *People ex rel. Van Heck v. Catholic Protectory* (38 Hun, 127, aff'd 101 N. Y., 195), *People ex rel. Pickard v. Sheriff of Chautauqua* (11 Civ. Pro. R., 172), *People ex rel. McCoy v. Warden of City Prison* (3 Crim. R., 370), *People ex rel. Perkerson v. Sisters of St. Dominic* (34 Hun, 463), *In re Diss Debar* (3 N. Y. Supp., 667), *People ex rel. Society for Prevention of Cruelty to Children v. Gilmore* (26 Hun, 1, rev'd in part; S. C., 88 N. Y., 626), *Anonymous* (18 Abb. N. C., 216), *People ex rel. Martin v. Walters* (15 id., 461), *People ex rel. Parr v. Parr* (121 N. Y., 679, aff'g S. C., 49 Hun, 473), *People ex rel. Brown v. Carpenter* (32 State Rep., 322), *Ex parte Stanley* (25 Tex. Ap., 372), *Cooper v. People* (6 L. R. A., 430), *Matter of Simon* (128 N. Y., 626, rev'g S. C., 37 State Rep., 48), *Matter of McFarland* (59 Hun,



304), *People ex rel. Danziger v. P. E. House of Mercy* (128 N. Y., 180), *People ex rel. Pruyne v. Walts* (122 id., 238), *Ex parte Burrus* (136 U. S., 586), *Ex parte Cox* (32 Pac. R., 1893), *Matter of Taylor* (8 Misc., 159), *People ex rel. Young v. Stout* (81 Hun, 336), *People ex rel. Gunn v. Webster* (75 id., 278), *People ex rel. O'Brien v. Woodworth* (78 id., 586), *Winne v. Houghtaling* (84 id., 166), *Matter of Henry* (13 Misc., 34), *People ex rel. Peck v. Schartz* (13 id., 563), *People ex rel. McLoughlin v. Wilson* (88 Hun, 258), and sections 2015 to 2066, Code Civ. Pro., for recent cases and the statutes relating to this writ and proceedings thereupon.

A justice of the Supreme Court has power, under section 2017 of Code Civ. Pro., to grant a writ of habeas corpus directed to any person in any part of the State. (*People ex rel. Clarke v. Clarke*, 64 How. Pr., 7.)

<sup>1</sup>The forms of writs of habeas corpus and certiorari are *verbatim*, the ones prescribed by sections 2021, 2022 of Code Civ. Pro., as amended by chap. 946 of Laws of 1895, taking effect January 1, 1896, except that the words "on the relation of E. F." are inserted and the seal is affixed, both of which changes are, it seems, necessary, under sections 1992, 1994 (*id.*).

be], the \_\_\_\_\_ day of \_\_\_\_\_, in the year eighteen hundred and \_\_\_\_\_.

[L. S.] A. O., *Justice* [or *Judge*], *etc.*  
M. N., *Attorney for* \_\_\_\_\_.

[Office address.<sup>1</sup>]

[Allowance to be indorsed as in form No. 1052.<sup>2</sup>]

No. 1056.

### Writ of Certiorari to Inquire into Cause of Detention.

(Code Civ. Pro., § 2022.)

*The People of the State of New York* [on the relation of E. F.],<sup>3</sup> to the Sheriff of, *etc.* [or to A. B.] :

We command you that you certify fully and at large to \_\_\_\_\_ [the Supreme Court, at a special term (or term of the Appellate Division) thereof, to be held, or E. F., justice of the Supreme Court, or otherwise, as the case may be], at \_\_\_\_\_, on \_\_\_\_\_ [or immediately after the receipt of this writ], the day and cause of the imprisonment of C. D., by you detained, as it is said, by whatsoever name the said C. D. is called or charged, and have you then there this writ.

Witness, *etc.*, as in form No. 1055.

[L. S.] [Signatures, *etc.*, as in form No. 1055.]  
[Allowance to be indorsed as in form No. 1055.<sup>4</sup>]

<sup>1</sup> The signature of the attorney is required by section 24 (*id.*). As to office address, see note 2 to form No. 122.

For returns by sheriff to the writs of habeas corpus and certiorari, see form No. 31, and note 2 to that form; and as to where the writ may be made returnable in case the application therefor is made to the Supreme Court or a justice thereof, in a county other than that where the person is imprisoned or confined, see section 2023 (*id.*).

The return must be signed by the person making it, and unless he is a sworn public officer, and makes his return in his official capacity, it must be verified by his oath. (See form No. 1058.)

If the body of the prisoner is not produced, when in the custody of the officer or other person, the return must state that the prisoner is so sick or infirm that the production of him would endanger his life or health.

(Code Civ. Pro., § 2027.) And see form No. 1057. As to proceedings on such a return, see Code Civ. Pro., § 2040. See also as to return, *People ex rel. Mooney v. Walsh* (21 Abb. N. C., 299), *People ex rel. Evans v. McEwan* (67 How. Pr., 105), *People ex rel. Slatzkata v. Baker* (19 State Rep., 485), *People ex rel. Clark v. Grant* (111 N. Y., 584), *People ex rel. Trainor v. Baker* (89 *id.*, 460), *People ex rel. Sherwin v. Mead* (28 Hun, 227).

The writ of habeas corpus or of certiorari is not to be disobeyed for any defect in form, and particularly in the cases specified in section 2024, Code Civ. Pro. (*id.*, § 2024).

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> See note 2 to form No. 1052, as to allowance.

<sup>4</sup> See note 1 to form No. 1055.

<sup>5</sup> See note 2 to form No. 1052, as to allowance.

No. 1057.

**Return to Writ of Habeas Corpus and Certiorari—Official.**

(Code Civ. Pro., § 20.6.)

See form No. 31 and notes thereto, the words “the original of which I also herewith produce,” have been sometimes inserted in the return after the words “I transmit to you,” in cases where the prisoner is detained by virtue of a mandate or other written authority. But these words are not considered to be properly any part of the return, although the original writ is required to be produced and exhibited by section 2026, Code Civil Procedure, subdivision 2.

By section 2027, Code Civil Procedure, if the body of the prisoner is not produced, it is required to be stated in the return to a writ of habeas corpus, “that the prisoner is so sick or infirm that the production of him would endanger his life or his health.”

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No. 1058.

**Return to Writ of Habeas Corpus or Certiorari Other than Official.**

(Code Civ. Pro., § 2026.)

The return of R. A. P. to the writ of habeas corpus hereto annexed, I do hereby certify and return to Hon. C. E. P., a justice of the Supreme Court, that I hold the said T. D. under and by virtue of a warrant issued by the governor of the State of New York for the arrest of the said T. D., under the name of J. D., and for his surrender to the authorities of the State of Massachusetts by virtue of a requisition from the governor of that State, a copy of which warrant is hereto annexed, the original of which I hold in my possession [*or state other authority for the detention*].

All of which I certify, and have here the body of the said T. D., as by the said writ I am commanded.

R. A. P.

Dated ———, 18—.

STATE OF NEW YORK, }  
 ——— County, } *ss.:*

R. A. P., being duly sworn, says, that the foregoing re-

turn is true to the best of his knowledge, information and belief.

R. A. P.

[Jurat as in form No. 46.]

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No. 1059.

**Attachment for not Obeying Writ.**

(Code Civ. Pro., § 2028.)

[Title of proceeding.]

It appearing to me, on oath, that \_\_\_\_\_, to whom a writ of habeas corpus [*or certiorari*] was directed, and upon whom the same has been duly served, commanding him to bring before me A. B., in the said writ named, has neglected [*or refused*] to obey the same according to the command thereof, by not producing the said A. B. before me, nor by making a return to such writ within the time limited by law [\*], and no sufficient cause having been shown for such neglect [*or refusal*]:

Therefore [†] the sheriff of any county where the said \_\_\_\_\_ may be found [*or the coroner of the county of \_\_\_\_\_; or G. H., who is hereby specially appointed and designated to execute this warrant*],<sup>1</sup> is hereby commanded, in the name of the people of the State of New York, forthwith to apprehend the said \_\_\_\_\_ and bring him before me, at, etc.

Given under my hand and seal at, etc., on, etc.

[L. s.]

[Signature of judge.]

J. B., *Attorney for* \_\_\_\_\_.

[Office address.<sup>2</sup>]

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No. 1060.

**Commitment upon Return of Warrant.**

(Code Civ. Pro., § 2028.)

[Title of proceeding.]

A. B. [sheriff, etc.] having been brought before me, on a

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<sup>1</sup> If the delinquent is a sheriff, the oner of his county, or to a particular warrant must be directed to any cor- person specially appointed to execute



warrant issued by me, stating [recite the warrant], I do, therefore, in the name of the people of the State of New York, command the sheriff of \_\_\_\_\_ county [*or* coroner, or other person, to be named therein], forthwith to convey the said \_\_\_\_\_ to the jail of the said county of \_\_\_\_\_, and there commit him to close custody in such jail, without being allowed the liberties thereof, there to remain until he shall make return to the writ in such warrant mentioned [and until he shall comply with my order (state what the order is, in relation to the person for whose relief the writ of habeas corpus or certiorari was issued)], and shall comply with any other order which may be made by me in relation to the said [name the person for whose relief the writ was issued], and the jailor is commanded to receive and keep him accordingly.

Given under my hand and seal at, etc., on, etc.

[L. s.]

[Signature of judge.]

M. N., *Attorney for* \_\_\_\_\_.

[Office address.']

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No. 1061.

**Precept by Judge to Bring before Him the Prisoner.**

(Code Civ. Pro., § 2029.)

As in form No. 1059 to [\*], and from thence as follows: And whereas, I have issued [*or* am about to issue at the same time with this precept], a warrant of attachment, pursuant to law, to \_\_\_\_\_, commanding him forthwith to apprehend the said A. B. and bring him before me.

I do therefore command the sheriff of \_\_\_\_\_ county [*or* name other officer or person to whom the warrant of attachment is directed] forthwith to bring before me the said A. B., at, etc. [who shall thereafter remain in the custody of the said (name officer or person executing the precept), until discharged, bailed or remanded, as I may direct].<sup>3</sup>

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the warrant and designated therein. (Code Civ. Pro., § 2028.)

be proper, to insert this clause in brackets, which is the effect given to the precept by section 2029, Code Civ. Pro.

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> It may not be necessary, but will

Given under my hand and seal at, etc., on, etc.

[Signature of judge.]

L. F., *Attorney for* \_\_\_\_\_.

[Office address.']

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No. 1062.

**Order for Discharge of Prisoner.**

(Code Civ. Pro., § 2031.)

[Title of proceeding.]

It appearing upon the return of the writ of habeas corpus [*or certiorari*] allowed by me that A. B. is imprisoned [con-  
fined or restrained] by [name of officer or person by whom  
he is held], and no lawful cause for the said imprisonment  
[*or restraint*] of said A. B., or for the continuance thereof  
having been shown, I do therefore order and direct the said  
\_\_\_\_\_ forthwith to discharge the said A. B. from his  
custody.

Given under my hand at, etc., on, etc.'

[Signature of judge, etc.]

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No. 1063.

**Order Remanding Prisoner under Section 2032 of Code  
Civil Procedure.**

(Code Civ. Pro., § 2032.)

[Title of proceeding.]

It having appeared upon the return of the writ of habeas  
corpus [*or certiorari*] allowed by me that A. B., upon whose  
application the said writ was issued, is detained in custody  
by \_\_\_\_\_, by virtue of a mandate issued by a court [*or*  
judge] of the United States, in a case where such courts [*or*  
judges] have exclusive jurisdiction [*or in like manner recite*  
other cause of detention under section 2032 of Code Civ.

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<sup>1</sup> See note 2 to form No. 122.

<sup>2</sup> By section 2048, Code Civ. Pro.,  
the writ of discharge is abolished.  
See, further, the provisions as to ser-

vice of final order to discharge pris-  
oner contained in that section.

For cases in which a prisoner dis-  
charged may and may not be re-im-  
prisoned, see Code Civ. Pro., § 2050.

Pro.], and that the time for which he may legally be so detained has not expired :

I do hereby order, that the said A. B. be and he is hereby remanded to the custody of the said \_\_\_\_\_ under said mandate.

Dated at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

[Signature of judge.]

\_\_\_\_\_  
No. 1064.

**Order Discharging or Bailing Prisoner in Certain Cases upon Writ of Habeas Corpus.**

(Code Civ. Pro., § 2035.)

[Title of cause.]

It appearing on the return of the writ of habeas corpus, heretofore allowed by me, that A. B., upon whose application said writ was allowed, has been legally committed for a criminal offense, to wit: for \_\_\_\_\_ [or it appearing on the return, etc., by the testimony offered with the return (or upon the hearing of the above entitled matter), that A. B. is guilty of a criminal offense, to wit: of \_\_\_\_\_, but that the commitment therefor is irregular] [and due notice of application for the order having been given to A. B. (district attorney of \_\_\_\_\_ county)]; now, after hearing, etc.:

I do hereby order, that said A. B. [\*] be discharged from custody by the sheriff of \_\_\_\_\_ county, upon his giving bail, as required by law, in the sum of \_\_\_\_\_ dollars for his appearance, at, etc. [specifying the court and the term thereof].<sup>1</sup>

[Or as above to (\*) and from thence as follows: His case not being bailable, be remanded to the custody (or placed under the restraint) of the sheriff of \_\_\_\_\_ county (or name other officer or person in whose custody he is, or who is entitled to such custody).<sup>2</sup>]

Dated \_\_\_\_\_, 18—.

[Signature of judge.]

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<sup>1</sup> Where bail is given pursuant to an order made as prescribed in section 2035, Code Civ. Pro., the proceedings are the same as upon the return to a writ of certiorari, where it appears for which see sections 2045, 2046, 2047 (id.) Said section 2046 was amended by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896, q. v.

<sup>2</sup> As to these directions for custody of a prisoner who is not entitled to his

No. 1065.

**Notice to Person Interested in Detention, etc.**

(Code Civ. Pro., § 2038.)

[Title of proceeding.]

SIR—You will please take notice, that a writ of habeas corpus [*or of certiorari*] has been allowed by me [*or by Hon. A. O., judge (or justice), etc., returnable at, etc., on, etc., to bring before me (or before said judge, etc.), the body of A. B., confined in (state the place) by (state whom)*] [and that the hearing thereupon has been adjourned to the ——— day of ———, 18—, at, etc., before me (*or before said judge, etc.*)] [said writ was allowed upon the affidavit, with a copy of which you are herewith served].<sup>1</sup>

Dated ———, 18—.

[Signature of judge<sup>2</sup> (*or of attorney for applicant*).]

[Office address of attorney.]

To G. H.<sup>3</sup> [*District Attorney of the county of ———*].

No. 1066.

**Order for Discharge of Prisoner or Dismissing Proceedings where Certiorari has been Issued on Application for Habeas Corpus.**

(Code Civ. Pro., § 2043.)

[Title of proceeding.]

It appearing upon the return to the writ of certiorari heretofore allowed by me, upon the application of A. B. for a writ of habeas corpus to inquire into the cause of his detention by ———, that the said A. B. is [\*] unlawfully imprisoned [*or restrained in his liberty*] by said ——— :

discharge, and is not bailed, see Code Civ. Pro., § 2036.

<sup>1</sup>It appears not to have been usual, but seems proper that a copy of the affidavit should be served with the notice.

<sup>2</sup>If the notice given is a full eight days' notice required by the statute, it may, it would seem, be given either by the judge or the attorney; but, if the time is shortened, the notice should

be given by the judge, who may also direct the manner of the service.

<sup>3</sup>For the purpose of an appeal, the person to whom the notice is given becomes a party to the special proceeding. (Code Civ. Pro., § 2038.) See, also, *People ex rel. Navagh v. Frink* (41 Hun, 188), *People v. Carter* (48 id., 165), *People ex rel. Brush v. Brown* (103 N. Y., 684).

And the said relator avers :

*First.* That, etc.

*Second.* That, etc.

*Third.* The said relator further avers, for the reasons aforesaid, that he is held in custody and restrained of his liberty without due, proper and sufficient process of law therefor.

Wherefore the said relator respectfully prays your honor that he may be discharged from the custody of the said defendant and be permitted to depart without delay.

T. D.

COUNTY OF W———, }  
 Town of ———, } ss.:

T. D., being duly sworn, saith, that the foregoing traverse is true to the best of his knowledge, information and belief.

T. D.

[Jurat as in form No. 46.]

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No. 1067.

**Order for Discharge of Prisoner or Dismissing Proceedings where Certiorari has been Issued or Application for Habeas Corpus.**

(Code Civ. Pro., § 2043.)

[Title of proceeding.]

It appearing upon the return to the writ of certiorari heretofore allowed by me, upon the application of A. B. for a writ of habeas corpus to inquire into the cause of his detention by ———, that the said A. B. is [\*] unlawfully imprisoned [or restrained in his liberty] by said ——— :

I do hereby order, that the said A. B. be discharged forthwith by the said ——— from his custody.

[Or as above to (\*), and from thence as follows : Lawfully imprisoned (or detained) by ———, and is not entitled to be bailed, I do hereby dismiss the proceedings upon such application.]

Dated at ———, on the ——— day of ———, 18—.

[Signature of judge.]

No. 1068.

**Order for Bail on Return to Writ of Certiorari.**

(Code Civ. Pro., § 2045.)

[Title of proceeding.]

It appearing upon the return of the writ of certiorari, heretofore allowed by me, that A. B., upon whose application said writ was allowed, is entitled to be bailed:

I do hereby order that said A. B. be discharged from custody by \_\_\_\_\_, upon his giving bail as required by law in the sum of \_\_\_\_\_ dollars for his appearance at, etc. [specifying the court and the term thereof].

Dated \_\_\_\_\_, 18—.

A. O., *Judge, etc.*

No. 1069.

**Recognizance of Prisoner for His Appearance.**

(Code Civ. Pro., § 2046.)

STATE OF NEW YORK, }  
*County of* \_\_\_\_\_, } ss.:

Be it remembered, that on this \_\_\_\_\_ day of \_\_\_\_\_, 18—, A. B., of the \_\_\_\_\_ of \_\_\_\_\_, in said county, and C. D. of the same place, banker, and E. F. of the same place, merchant, personally came before A. O., a justice of the Supreme Court of the State of New York, and jointly and severally acknowledged themselves to be indebted to the people of the State of New York in the sum of \_\_\_\_\_ dollars, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the conditions following: [\*]

Whereas, the above named A. B. is in the custody of the sheriff of the said county of \_\_\_\_\_, under a commitment from M. N., a justice of the peace for the town of \_\_\_\_\_, in said county, from which commitment it appears that the said A. B. is charged with the crime of [naming it], committed within said county [*or otherwise, according to the fact*]; and,

Whereas, an order was made by Hon. R. W. P., a justice of the Supreme Court, dated \_\_\_\_\_, 18—, directing the

discharge of said A. B., upon bail being given by him in the sum hereinafter mentioned, for his appearance at the term of the court hereinafter mentioned, as required by law :

Now, therefore, the condition of this recognizance is such, that if the said A. B. shall personally appear at the next court of \_\_\_\_\_, to be held in and for said county of \_\_\_\_\_, then and there to answer to an indictment to be preferred against him for the said offense, and further to do and receive what shall, by the said court, be then and there enjoined upon him, and shall not depart the said court without leave, then this recognizance to be void ; otherwise to remain in full force and virtue.<sup>1</sup>

A. B. [L. s.]

C. D. [L. s.]

E. F. [L. s.]

Subscribed and acknowledged before me, the day and year first above written, by [A. B.]<sup>2</sup> C. D. and E. F.

A. O., *Judge, etc.*

STATE OF NEW YORK, }  
 \_\_\_\_\_ County, } *ss.:*

C. D. and E. F. being severally duly sworn, each for himself deposes and says, that he is one of the sureties named in the foregoing recognizance ; that he is a resident and householder of the county of \_\_\_\_\_, and is worth the sum of \_\_\_\_\_ dollars<sup>3</sup> over and above all demands against him.

C. D.

E. F.

[Jurat as in form No. 340.]

[Approval as in form No. 340.]

<sup>1</sup> It was held in *People ex rel. Sherwin v. Mead* (64 How. Pr., 252), that an appeal bond given under section 2062 of Code Civ. Pro., the form of which as regards the party's executing it, is to be like the recognizance required by section 2046, Code Civ. Pro., must be executed by the relator personally within the jurisdiction of the court.

<sup>2</sup> It is not necessary that the prisoner should appear in person before the judge to acknowledge the recognizance; but it may be acknowledged by the prisoner, and certified in like manner as a deed to be recorded in the county. (Code Civ. Pro., § 2046.)

<sup>3</sup> Twice the sum in which he is required to be bound.

No. 1070.

**Judge's Certificate of Compliance to be Made upon the Order (No. 1069).**

(Code Civ. Pro., § 2047.)

I, A. O., judge [*or justice*], etc., do hereby certify, pursuant to section 2047 of the Code of Civil Procedure, that the within [*or foregoing*] order has been complied with by A. B., therein mentioned, by the giving of the recognizance of said A. B., with two sureties, in the sum of \_\_\_\_\_ dollars, for his appearance as prescribed in said order; which recognizance has been [this day] filed by me with the \_\_\_\_\_ clerk.

Dated \_\_\_\_\_, 18—.

A. O., *Justice [or Judge], etc.*

No. 1071.

**Attachment for not Obeying Final Order for Discharge.**

(Code Civ. Pro., § 2049.)

[Title of proceeding.]

It appearing to me that the final order, made by me on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, directing \_\_\_\_\_ to discharge A. B. from his custody has been duly served upon the said \_\_\_\_\_, and that said \_\_\_\_\_ has hitherto failed to obey the said order and has not discharged the said A. B. as thereby required.

Therefore, etc. [conclude as in form No. 1059 from (†)].

No. 1072.

**Warrant to Bring up Prisoner About to be Removed (No. 1).**

(Code Civ. Pro., § 2054.)

[Title of proceeding.]

*To the Sheriff of the County of \_\_\_\_\_ [or to any Sheriff (or Constable), or to A. B.]:*

It having appeared to me satisfactorily, by proof, that A. B. is held in unlawful confinement [*or custody*] by \_\_\_\_\_, and that there is good reason to believe that he



will be carried out of the State [*or will suffer irreparable injury*] before he can be relieved by a writ of habeas corpus or a writ of certiorari, to wit: that, etc. [*reciting the facts*]:

Now, therefore, you are hereby commanded to take the said A. B., and forthwith to bring him before me, to be dealt with according to law [*and the said proof being also sufficient to justify the arrest of the said C. D. as for a criminal offense, to wit (stating offense), committed by said C. D., in the taking and detaining said A. B., I do further direct you to arrest the said C. D. for the said offense.*]<sup>1</sup>

Witness my hand this \_\_\_\_\_ day of \_\_\_\_\_, 18—, at, etc.

[Signature of judge.]

M. N., *Attorney for* \_\_\_\_\_.  
[Office address.]

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No. 1073.

**Warrant to Bring up Prisoner about to be Removed, etc.**  
(No. 2).

(Code Civ. Pro., § 2054.)

STATE OF NEW YORK, }  
*City and County of New York,* } ss.:

*To the Sheriff of the city and county of [New York and his Deputies; to the Superintendent of the Municipal Police of the city of New York, and to all the Captains and Officers of said Municipal Police, and to any Constable of the said city]:*

Whereas, E. F. J., superintendent of "The New York Society for the Prevention of Cruelty to Children," a corporation duly incorporated under and in pursuance of the

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<sup>1</sup>See section 2055, Code Civ. Pro.

<sup>2</sup>If the warrant is issued by a court, it must be under the seal thereof; if by a judge, it must be under his hand. (Code Civ. Pro., § 2054.)

*Quære*, whether a parent, guardian or other person, having lawful custody of an infant child, although using such child, or permitting it to be used for a purpose forbidden by the act to prevent and punish wrongs to children (Laws of 1876, ch. 122), can properly

be regarded as holding the child in illegal confinement within the meaning of this section. (*People v. Gilmore*, 26 Hun, 1; *aff'd*, except as to costs, S. C., 88 N. Y., 625.)

For proceedings under the warrant, see sections 2056, 2057, Code Civ. Pro., and see, also, *People ex rel. Navagh v. Frink* (41 Hun, 188), *People ex rel. Brush v. Brown* (103 N. Y., 684).

<sup>3</sup>See note 2 to form No. 122.

laws of this State, has applied to me for a warrant to take a certain child called "Little Bob," or "Le Petit Bob," alleged to be illegally confined by and in the custody of W. M. D. at and within the premises No. 72 East Fourth street, in the city and county of New York; and,

Whereas, it appears from the proofs before me that, etc. [setting forth particulars]; from which facts it satisfactorily appears to me that the said child, "Little Bob," or "Le Petit Bob," is held in illegal confinement and custody by the said W. M. D., and that there is good reason to believe that said child will be carried out of the State by or will suffer some irreparable injury at the hands of the said W. M. D. before such child can be relieved by the issuing of a habeas corpus or certiorari.

And the facts further appearing to me sufficient to justify the arrest of the said W. M. D., having such child in his custody, as for a criminal offense committed in the taking and detaining of such child.

These are, therefore, in the name of the people of the State of New York, to authorize and command you immediately to take the said child, "Little Bob," or "Le Petit Bob," and, also, to arrest the said W. M. D., and bring them, and each of them, before me without delay, to be dealt with according to law.

Given under my hand [and seal] at the city of New York, this 9th day of October, 1879.<sup>1</sup>

[L. s.]

\_\_\_\_\_ C. D., *Justice, etc.*

No. 1074.

### Notice of Appeal from an Order Refusing to Grant Writ of Habeas Corpus or Certiorari.

(Code Civ. Pro., § 2058.)

See general notice of appeal from order in special proceeding, form No. 552, and see note 1 to that form, as to provisions applicable to such appeals and forms therefor.\*

<sup>1</sup> This form of warrant is substantially the one used in *People v. Gilmore* (88 N. Y., 626). by a judge it must be under his hand. (Code Civ. Pro., § 2054.)

If the warrant is issued by the court **it must be under the seal thereof; if** See, also, notes to last form, No. 1072. \* An order directing a further return to a writ of habeas corpus or certiorari

No. 1075.

**Order Admitting Prisoner to Bail Pending Appeal.**

(Code Civ. Pro., § 2060.)

[Title of proceeding.]

A final order having been heretofore made by me,<sup>1</sup> dated on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in the above entitled matter, by which A. B. was remanded to the custody of \_\_\_\_\_ [or by which the proceedings herein were dismissed, or state other effect of order]; and,

Whereas, it has appeared by the affidavit of said A. B., dated \_\_\_\_\_, 18—, that said A. B. has appealed [or intends to appeal] from the said order to the [Appellate Division of the Supreme Court], and the offense with which the said A. B. is charged being aailable offense, and due notice of this application having been given to the district attorney of \_\_\_\_\_ county:

Now, on the application of said A. B., and after hearing, etc., and on filing [name any opposing papers]:<sup>2</sup>

It is hereby ordered, that the sum in which the said A. B. shall be admitted to bail pending the said appeal, be and the same is hereby fixed at the sum of \_\_\_\_\_ dollars.<sup>3</sup>

issued under the Code of Civ. Pro., (§ 2015, *et seq.*), to inquire into the cause of detention of a person, is not appealable under section 2058, *id.*, and the General Term (now Appellate Division) of the Supreme Court has no authority to review it. (Matter of Larson, 96 N. Y., 381; *rev'g* S. C., 31 Hun, 539.)

Where, upon appeal from an order of the General Term reversing such an order, the appeal papers did not show that the objection to its jurisdiction was raised before that court, *held*, that it could be raised in the Court of Appeals. (*Id.*)

See, further, as to proceedings upon such appeals, sections 2059-2064, Code Civ. Pro.; and as to execution of recognition given pending the appeal, see *People ex rel. Sherwin v. Mead* (64 How. Pr., 252). See, also, amendments to sections 2061, 2062 and 2064

of Code Civ. Pro., by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896.

<sup>1</sup>The order may be made either before or after the final order. (Code Civ. Pro., § 2060.)

<sup>2</sup>See note 4, page 126, as to specifying papers read.

<sup>3</sup>The act (ch. 663 of Laws, 1873) of which section 2060 (*supra*) is a revision, did not enlarge the number of cases in which bail might be taken, or which might be reviewed upon habeas corpus, but simply rendered more effective the review of those cases in which the writ could be lawfully prosecuted under the provisions of the Revised Statutes in force when it was enacted. (*People ex rel. Phelps v. Oyer and Terminer*, 14 Hun, 21.)

See, also, *People ex rel. Cowley v. Bowe* (58 How. Pr., 393).

## No. 1076.

**Recognizance of Prisoner on Appeal from Final Order Dismissing Proceedings, etc., on Habeas Corpus, etc.**

(Code Civ. Pro., §§ 2061, 2062.)

As in form No. 1069 to [\*], and from thence as follows: Whereas, the said A. B. is in the custody of the sheriff of the county of ———, under a commitment from, etc., by which commitment it appears that the said A. B. is charged with the crime of [naming it];<sup>1</sup> and, whereas, a final order has been made by Hon. A. O., a justice of the Supreme Court, upon an application to him by said A. B. for a writ of habeas corpus [*or* of certiorari] to inquire into the cause of his detention dismissing the said proceedings [*or* remanding the said A. B. to the custody of said sheriff, etc. (stating general nature of the order)], which order bears date on the ——— day of ———, 18—; and, whereas, the said A. B. has perfected [*or* intends to take] an appeal from said final order to the [Appellate Division of] the [Supreme] Court.

[*Or* whereas, the said A. B. has appealed to the (Appellate Division) of the (Supreme) Court from said final order; and, whereas, said Appellate Division has affirmed (*or* reversed) the said order, and the said A. B. has perfected an appeal to the Court of Appeals from the said order of affirmance (*or* reversal), dated ———, 18—.]

Now, therefore, the condition of this recognizance is such that if the said A. B. shall personally appear at a Term of the Appellate Division of the [Supreme] Court, to be held at the ——— of ———, on the ——— day of ———, 18—, and abide by and perform the order of the said appellate court, then this recognizance to be void, or otherwise to remain in full force and virtue.<sup>2</sup>

<sup>1</sup>The offense must be bailable. (Code Civ. Pro., § 2060.)

This recognizance may also be given on appeal to the Court of Appeals from an order reversing the order granting the discharge of the prisoner. (Code Civ. Pro., § 2062). In that case it will be necessary to make a slight change in the recital.

<sup>2</sup>Where no order or other direction

of the court, relating to the disposition of the prisoner, is made at the term specified in a recognizance, given as prescribed in section 2061 or section 2062 of this act, the matter is deemed adjourned, without an order to that effect, to the next term of the appellate division of the Supreme Court, to be held in the same department; and thereafter to each successive

[Or in case of an appeal to the Court of Appeals, say: shall personally appear at a term of the Appellate Division of the (Supreme) Court to abide by and perform its judgment or order, made after the determination of the said last mentioned appeal, then, etc.]

A. B. [L. s.]

C. D. [L. s.]

E. F. [L. s.]

Subscribed and acknowledged before me, this day and year first above written by [A. B.],<sup>1</sup> C. D. and E. F.

A. O., *Judge, etc.*

[Justification as in form No. 1069, and approval as in form No. 340.]

#### ARTICLE FOURTH.

##### FORMS RELATING TO THE WRIT OF MANDAMUS.

(Code Civ. Pro., Ch. 16, Tit. 2, Art. 4.)

- No. 1077. Affidavit on application for writ of mandamus.
- 1078. Order for issue of writ of mandamus.
- 1079. Alternative writ of mandamus.
- 1080. Writ of peremptory mandamus.
- 1081. Notice of motion and order to show cause on application for peremptory mandamus.
- 1082. Affidavit of service of alternative writ of mandamus.
- 1083. Return to alternative writ of mandamus.
- 1084. Demurrer to alternative writ of mandamus
- 1085. Demurrer to return to alternative writ of mandamus.
- 1086. Notice of filing return to alternative writ of mandamus.
- 1087. Notice of appeal from order granting peremptory mandamus, or from final order upon alternative mandamus.

#### No. 1077.

##### **Affidavit on Application for Writ of Mandamus.**

(Code Civ. Pro., § 2067.)

———— COUNTY, ss.:

A. B., of ———, being duly sworn, says, that [here set

term until such an order or direction is made. The prisoner is bound to attend at each successive term of the appellate division, and the recognizance is valid for his attendance accordingly, without any notice or other formal proceedings. (Code Civ. Pro., § 2064, as amended by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896.) See also amend-

ments to said sections 2061 and 2062 by the same chapter. A stay of proceedings under a final order on habeas corpus discharging a prisoner, pending an appeal from such order, cannot be granted. (People ex rel. Young v. Stout (10 Misc., 247.) See, also, People ex rel. McIntyre v. Hurlbut (67 How. Pr., 362).  
<sup>1</sup>See note 2 to form No. 1069.

forth the facts to show that the relator is entitled to the writ, and to the relief demanded].<sup>1</sup>

That, etc. [as in form No. 209 from (†), when application is made *ex parte*.

A. B.

[Jurat as in form No. 46.]

No. 1078.

### Order for Issue of Writ of Mandamus.

(Code Civ. Pro., §§ 2067, 2070.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

On reading and filing the affidavits of, etc. [naming motion papers], and on motion of E. C. for the relator, and after hearing H. F., in opposition thereto:

It is ordered [\*], that an alternative [*or a peremptory*] mandamus issue out of and under the seal of this court, directed to the said [naming defendant], commanding him forthwith to [state acts required (*or to show cause to the contrary at the* ——— county clerk's office, in the ——— of ———; *or at the office of the clerk of said* ——— court in, etc.)], twenty days after the service of said writ upon him.<sup>2</sup>

<sup>1</sup> To entitle a party to a writ of mandamus, he must show himself legally and equitably entitled to some right properly the subject of the writ, and that it is legally demandable from the person to whom the writ is directed; also that such person still has it in his power to perform the duty required. (People ex rel. Stevens v. Hayt (66 N. Y., 606; rev'g S. C., 7 Hun, 34).

So, also, whatever is required to be done by the relator as a condition precedent to the right demanded, must be shown affirmatively to have been performed by him before he is entitled to the writ. (Id.)

See, also, People ex rel. Clason v. Nassau Ferry Co. (86 Hun, 128), People ex rel. Wooster v. Maher (64 id., 408), People ex rel. Dowdney v. Thompson (99 N. Y., 641), People ex rel. Stevens v. Lott (42 Hun, 408), People ex rel. Boltzer v. Daley (37 id., 461), People ex rel. Everett v. Supervisors of Ulster (93 N. Y., 397), People ex rel. Hall v. Supervisors of Greene) 13 Abb. N. C., 421), People ex rel. City of Lockport

v. Supervisors of Niagara (49 Hun, 22), Clementi v. Jackson (92 N. Y., 591), People ex rel. Cooper v. Registrar of Arrears (114 id., 19), People ex rel. Ostrander v. Chapin (105 id., 309), People ex rel. Eq. Life Ins. Soc. of U. S. v. Chapin (103 id., 635; aff'g S. C., 39 Hun, 230), People ex rel. Millard v. Chapin (104 N. Y., 96; rev'g S. C., 40 Hun, 386), People ex rel. Woods v. Crissey (91 N. Y., 616), People ex rel. Smith v. Schiellein (95 id., 124), People ex rel. Russell v. Canvassers of Albany (46 Hun, 390), People ex rel. McMackin v. Board of Police of N. Y. (107 N. Y., 235; aff'g 46 Hun, 296), People ex rel. Third Avenue R. Co. v. Newton (112 N. Y., 396), People v. Myers (50 Hun, 479, aff'd 112 N. Y., 676), People ex rel. Stanley v. Van Sicken (43 id., 537), People ex rel. Stranahan v. Thompson (98 N. Y., 6), People ex rel. Title Guaranty, etc., Co. v. Reilly (38 Hun, 429), People ex rel. Bennett v. Miller (43 id., 363), People ex rel. Robinson v. O'Keefe (100 N. Y., 572),

People v. N. Y., L. E., etc., R. Co. (104 id., 58; rev'g S. C., 40 Hun, 570), People ex rel. Union Ins. Co. v. Nash (111 N. Y., 310), People ex rel. Humphrey v. Supervisors of Ulster (30 Hun, 146), People ex rel. Welling v. Meakim (56 id., 626), People ex rel. Mount Magdalen School v. Dickson (57 id., 312), People ex rel. Nostrand v. Wilson (119 N. Y., 515), Matter of Sullivan (55 Hun, 285), People ex rel. Ballou v. Wendell (57 id., 362), People ex rel. Lockwood v. Village of Saratoga Springs (54 id., 10), St. Stephen's Church Cases (25 Abb. N. C., 242), Matter of McGrath (56 Hun, 76), People v. Myers (35 State Rep., 755; aff'd without opinion (126 N. Y., 639), Matter of Attorney-General (58 Hun, 218), People ex rel. Wilson v. Trustees of Mt. Vernon (59 Hun, 204), Brown v. Duane (60 id., 98), People ex rel. Stimson v. Board of Education of N. Y. (id., 486), People ex rel. Nicholl v. N. Y. Infant Asylum (122 N. Y., 190), People ex rel. Cecil v. Bellevue Hospital Med. College (60 Hun, 107, aff'd 123 N. Y., 621), People ex rel. Sherwood v. State Board of Canvassers (129 N. Y., 360), People ex rel. O'Mara v. Supervisors of Cayuga (40 State Rep., 238), People ex rel. Pond v. Supervisors of Monroe (47 id., 456), People ex rel. Daley v. Rice (129 N. Y., 449), Wren v. Goetting (133 id., 569), People ex rel. Lane v. Case (46 State Rep., 269), People ex rel. Jones v. N. Y. Homoeopathic Medical College and Hospital (47 id., 395), People ex rel. Wood v. Assessors, etc., of Taxes of Brooklyn (137 N. Y., 201), People ex rel. Hasbrouck v. Supervisors of Dutchess (135 id., 522), People ex rel. Howes v. Tracy (66 Hun, 465), People ex rel. Woodward v. Rosendale (5 Misc., 378), People ex rel. Crouse v. Supervisors of Fulton, (70 Hun 560), Weston v. City of Newburgh (67 id., 127), People ex rel. Kellner v. Mayor, etc., of N. Y. (3 Misc., 131), People ex rel. Reynolds v. Common Council of City of Buffalo (2 id., 7), People ex rel. George E. Matthews Co. v. City of Buffalo (5 id., 36), People ex rel. Fargo v. Rosendale (76 Hun, 112), People ex rel. Woodward v. Rosendale (id., 103), People ex rel. Fairchild v. Preston (140 N. Y., 549), People ex rel. Wooster v. Maher (141 id., 335), Hayes v. Consolidated Gas Co. (143 id., 641), People ex rel. Am. Bible Society v. Commissioners of Taxes (142 id., 348), People ex rel. Keteltas v. Fitch (78 Hun, 321), People ex rel. Keene v. Supervisors of Queens Co. (142 N. Y., 271), Matter

of Baird (75 Hun, 545), Matter of Ryan (6 Misc., 478), People ex rel. Miller v. Justices of Sessions (78 Hun, 334), Matter of Torney (7 Misc., 260), People ex rel. Huntington v. Crennan (141 N. Y., 239), Matter of Popoff (10 Misc., 272), Matter of Loeder (14 id., 208), People ex rel. Hoffman v. Tedcastle (12 id., 468), People ex rel. Lewis v. Brush (146 N. Y., 60), Matter of Freel (89 Hun, 79), People ex rel. Weed-Parsons Co. v. Palmer (14 Misc., 41), Matter of Harris (12 id., 223), People ex rel. Ranton v. City of Syracuse (88 Hun, 203), Matter of Nottingham (id., 443), People ex rel. Kings Co. Gas and Illuminating Co. v. Schieren (89 id., 220), People ex rel. Goetchius v. McGoldrick (24 Civ. Pro. R., 292), People ex rel. Ryan v. Aldridge (83 Hun, 279), Nassau Electric R. Co. v. White (12 Misc., 631), People ex rel. Dinsmore v. Gilroy (82 Hun, 500), Sheehan v. Treasurer of Long Island City (11 Misc., 487), People ex rel. Ready v. Mayor of Syracuse (144 N. Y., 63), People ex rel. Dady v. Supervisors of Brooklyn (89 Hun, 241), People ex rel. Cochrane v. Wells (11 Misc., 239), People ex rel. Slater v. Smith (83 Hun, 432), People ex rel. Read v. Town Auditors (80 id., 114), People ex rel. Rumph v. Supervisors of Kings Co. (89 id., 38), People ex rel. Goring v. President, etc., of Village of Wappingers Falls (83 id., 130, aff'd S. C., 144 N. Y., 616), Matter of Torney (11 Misc., 291), People ex rel. Drake v. Sutton (88 Hun, 193), People ex rel. Grunwald v. Ind. Order Ahavas Israel (13 Misc., 426), Jordan v. Board of Education (14 id., 119), People ex rel. Purdy v. Fitch (147 N. Y., 355), People ex rel. Hoffman v. Rupp (90 Hun, 145), Gleason v. Blanc (14 Misc., 620), among recent cases as to issue of mandamus.

See, also, notes to forms Nos. 1078, 1079, 1080.

<sup>2</sup> See as to place where the writ is to be made returnable, Code Civ. Pro., § 2072, as amended by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896.

Where the first writ of mandamus has been duly served, a return must be made to the same as therein required, unless it is an alternative writ, and a demurrer thereto is taken. In default of a return, the person or persons upon whom the writ was served may be punished, upon the application of the people or of the relator, for a contempt of court. (Code Civ. Pro., § 2073.)





No. 1079.

**Alternative Writ of Mandamus.**

(Code Civ. Pro., § 2067.)

As in form No. 1080 to [\*], and from thence as follows: Now, therefore, we being willing that full and speedy justice be done in this behalf to him, the said A. B., as it is just, command you, firmly enjoining, that immediately after the receipt of this writ, you [insert the thing or matter required to be done or omitted, substantially according to the order of the court allowing the mandamus], or that you show cause to the contrary thereof, lest complaint shall again come to us by your default; and in what manner you shall have executed this, our writ, make known to our [Supreme] Court at the office of the county clerk of \_\_\_\_\_ county [or of the clerk of said court], at the \_\_\_\_\_ of \_\_\_\_\_, twenty days after the service hereof upon you.<sup>1</sup>

Witness, etc. [teste].

[L. s.]

J. L., Clerk.

E. C., Attorney for \_\_\_\_\_.

[Allowance as in form No. 1052.]

No. 1080.

**Writ of Peremptory Mandamus.**

(Code Civ. Pro., § 2070.)

*The People of the State of New York [upon the relation of A. B.²] to [the Court, Board of Supervisors, Commissioners of Highways, or other officers or persons to whom it is directed], greeting:*

Whereas [here recite the facts or statements briefly which preceded the gravamen or injury]. Nevertheless you, the aforesaid [court, officer or person] have unjustly [state

<sup>1</sup>As to the contents of alternative mandamus and demurrer thereto, see Code Civ. Pro., § 2076. That the proceeding by mandamus was an action under the former practice, where there had been a return and the suit had gone to pleadings, and a trial thereon had been had, see *People ex rel. Lumley v. Lewis* (28 How. Pr., 159, 470); and see sections 2082-2090, Code Civ. Pro., generally as to the proceedings after issue. The proceeding is now a special proceeding under title 2 of chap. 16, Code Civ. Pro.

See also amendments to §§ 2084, 2085, 2087, 2089 of Code Civ. Pro. by chap. 946 of 1895, taking effect January 1, 1896.

That the writ of alternative mandamus cannot be quashed or set aside upon motion for any matter involving the merits, see Code Civ. Pro., § 2075.

A motion to set such writ aside for any other cause, or to set aside the service thereof, must be made at a term whereat the writ might have been granted. (Id.)

See further provisions as to writ

briefly the order or proceeding of which you complain], as we are informed by his complaint [\*], and which complaint we have adjudged to be true, as appears to us of record :

Now, therefore, we being willing that full and speedy justice be done in this behalf to him, the said A. B., as it is just, command you, firmly enjoining, that immediately after the receipt of this writ you [insert the thing or matter required to be done, or omitted, substantially according to the order of the court allowing the mandamus], lest complaint shall again come to us by your default ; and in what manner this, our command, shall be executed, make appear to our said justices of our said Supreme Court of judicature, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at a Special Term of said Supreme Court, to be held at, etc., and then sending back to us this our writ.<sup>3</sup>

Witness, etc. [teste].

[L. S.]

J. L., *Clerk.*

E. C., *Attorney for* \_\_\_\_\_.

[Allowance as in form No. 1052.]

and to pleadings thereunder, section 2080, Code Civ. Pro. ; and as to where writ may be granted, see sections 2068, 2069 id., as amended by chap. 946 of Laws of 1895, taking effect January 1, 1896, People ex rel. Lower v. Donovan (29 Abb. N. C., 172; 135 N. Y., 82, rev'g S. C., 63 Hun, 512.)

<sup>2</sup> See Code Civ. Pro., § 1994.

<sup>3</sup> It is error for the court to grant a mandamus under seal upon a motion in an action. Mandamus is now a State writ, and should be applied for in a separate proceeding. (Youmans v. Terry, 19 Week. Dig., 259 [Gen. Tm., Supr. Ct.] )

See as to practice upon application for peremptory mandamus, and rules relating thereto, People v. Board of Supervisors (64 N. Y., 600), People v. Wendell (71 id., 171), People v. Board of Apportionment (64 id., 627), People v. Assessors (52 How. Pr., 140), People ex rel. Schwager v. McLean (25 Abb. N. C., 470), People v. N. Y. Central, etc., R. Co. (30 Hun, 78), People ex rel. Hasbrouck v. Canvassers of Dutchess Co. (45 State Rep., 613), People ex rel. Best v. Preston (62 Hun, 185), People ex rel. Hasbrouck v. Supervisors of Dutchess (135 N. Y., 522), Matter of Manning (71 Hun, 236), People ex rel. O'Sullivan v. New York Law School (68 id., 118), People

ex rel. Bush v. Canvassers of Ulster Co. (66 id., 265), People ex rel. Daniels v. Crawford (68 id., 547), Matter of Loader (14 Misc., 208), People ex rel. Hoffman v. Tedcastle (12 id., 468), People ex rel. Lewis v. Brush (146 N. Y., 60, aff'g S. C., 83 Hun, 613), Matter of Freel (89 Hun, 79), People ex rel. Purdy v. Fitch (147 N. Y., 355, rev'g S. C., 87 Hun, 304), among other cases.

It can only now be granted, in the first instance, where the applicant's right to the mandamus depends only upon questions of law, and notice of the application has been given to a judge of the court, or to the corporation, board or other body, officer or other person to which, or to whom, it is directed. (Code Civ. Pro., § 2070.)

For proofs required upon the application, manner of service of writ, etc., see same section as amended by chap. 496 of Laws 1895, taking effect January 1, 1896.

As to consequence of failure to make return, see section 2073, Code Civ. Pro.

A motion to set aside or quash a writ of temporary mandamus, or to set aside the service thereof, must be made at a term whereat the writ might have been granted. (Code Civ. Pro., § 2075.)

No. 1081.

**Notice of Motion and Order to Show Cause on Application for Peremptory Mandamus.**

(Code Civ. Pro., § 2070.)

As in forms Nos. 324 and 325, inserting as relief, that a writ of peremptory mandamus issue to [name board, officer, etc.], directing said \_\_\_\_\_ to [state object of writ].<sup>1</sup>

No. 1082.

**Affidavit of Service of Writ of Alternative Mandamus.**

(Code Civ. Pro., § 2071.)

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_, in the county of \_\_\_\_\_, he served the annexed writ upon [name the judge or judges of the court; or the members of the board or body served; or the chairman or other presiding officer of the board or body, or the officer of the corporation, describing them by their official titles], by delivering to him [or to each of them] a copy of the annexed original writ, and, at the same time, showing him [or each of them], the said annexed original writ, as follows.<sup>2</sup>

A. B.

[Jurat as in form No. 46.]

No. 1083.

**Return to Writ of Alternative Mandamus.**

(Code Civ. Pro., §§ 2074, 2077.)

[Title of cause.]

The return of C. D. to the alternative writ of mandamus, a copy of which is hereto annexed marked A, shows cause against obeying the command of said writ, as follows:

<sup>1</sup> See notes to form No. 1080.<sup>2</sup> Where one or more of the persons, upon whom to make service, as prescribed in section 2071 of Code of Civ. Pro., cannot, after due diligence be found, the exhibition of the original

writ may be dispensed with, and service may be made upon him or them as prescribed by law for the service of a summons issued out of the Supreme Court. (Code Civ. Pro., § 2071.)

[*First.*] The said C. D. denies, etc. [insert any necessary denials of the facts alleged in the writ, and allegations of new matter, as in general forms of answer Nos. 140, 141].<sup>1</sup>

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No. 1084.

**Demurrer to Writ of Alternative Mandamus.**

(Code Civ. Pro., § 2076.)

See forms of demurrer to complaint in article two, title one of chapter six, *ante*, forms Nos. 122, etc.<sup>2</sup>

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No. 1085.

**Demurrer to Return to Writ of Alternative Mandamus.**

(Code Civ. Pro., § 2078.)

[Title of proceeding.]

The above named relator demurs [*or* the people of the State of New York demur] to the defendant's return to the

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<sup>1</sup> The provisions of chapter 6 of Code Civ. Pro., relating to the form and contents of an answer, containing denials and allegations of new matter, except those provisions which relate to the verification of an answer, and to a counterclaim contained therein, apply to a return to an alternative writ of mandamus, showing cause against obeying the command of the writ. For the purpose of the application, each complete statement of facts, assigning a cause why the command of the writ ought not to be obeyed, is regarded as a separate defense, and must be separately stated and numbered. (Code Civ. Pro., § 2077.)

That the person having made a return to the writ cannot be compelled to make a further return, see Code Civ. Pro., § 2078.

See, further, as to allegations, etc., *People ex rel. Lefever v. Supervisors of Ulster* (34 N. Y., 268), *People ex rel. Kelly v. Common Council* (77 N. Y., 503), *People ex rel. Neptaniel v. Order of The American Star* (53 Super. Ct., 66), *People ex rel. Andrews v. McGuire* (29 State Rep., 674), *People ex*

*rel. Egan v. Columbia Club* (20 Civ. Pro. R., 319), *People ex rel. Uhrig v. Gilroy* (60 Hun, 507), *People ex rel. Gaylord v. Supervisors of Schoharie* (15 N. Y. Supp., 795), *People ex rel. Mullin v. Brotherhood of Engineers* (19 Civ. Pro. R., 175), *Pierce, Butler & Pierce Mfg. Co. v. Bleckwenn* (62 Hun, 265, *aff'd* 131 N. Y., 570), *People ex rel. Ketcham v. Excise Comm'rs of N. Y.* (46 State Rep., 41), *People ex rel. Dreicer v. Ouderkerk* (76 Hun, 119).

<sup>2</sup> A demurrer may be taken to this writ, in a case where a defendant may demur to a complaint, or to a cause of action separately stated in a complaint as prescribed in chapter six of Code Civ. Pro., and it must be in like form. (Code Civ. Pro., § 2076.)

See, further, as to these demurrers, same section.

Where the defendant demurs to the writ, or to a part thereof, a copy of the demurrer must be served upon the attorney for the people or the relator within the time prescribed by law for filing it. (Code Civ. Pro., § 2081.)

writ of alternative mandamus herein, upon the ground that the same is insufficient in law upon the face thereof.<sup>1</sup>

A. B., *Attorney for Relator*

[*or M. N., Attorney-General*].

[Office address.<sup>2</sup>]

No. 1086.

**Notice of Filing Return to Alternative Writ of Mandamus.**

(Code Civ. Pro., § 2081.)

[Title of cause.]

SIR—Please take notice, that the defendant's return to the alternative writ of mandamus in this cause, has been duly filed in the office of the \_\_\_\_\_ county clerk [*or of the clerk of the \_\_\_\_\_ court*].<sup>3</sup>

Dated \_\_\_\_\_, 18—.

Yours, etc.,

M. F., *Attorney for Defendant*.

[Office address.<sup>2</sup>]

To J. M., *Attorney for Relator* [*or L. W. R., Attorney-General*].

No. 1087.

**Notice of Appeal from Order Granting Peremptory Mandamus, or from Final Order upon Alternative Mandamus.**

(Code Civ. Pro., § 2087.)

See form No. 552, page 424, *ante*, and see notes to that form.<sup>4</sup>

<sup>1</sup> Where the people or the relator demur to the return, or a part thereof, a copy of the demurrer must be served upon the attorney for the defendant within twenty days after notice that the return has been filed. (Code Civ. Pro., § 2081.)

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> Where the people or the relator demur to the return, or to a part thereof, a copy of the demurrer must be served upon the attorney for the defendant within twenty days after the service of this notice. (Code Civ. Pro., § 2081.)

As to when issue of fact arises upon the return, see Code Civ. Pro., § 2079;

and as to pleadings upon writ of mandamus, see *id.*, § 2080. As to costs on mandamus, see § 2086, *id.*; *People v. N. Y., Lake Erie, etc., R. Co.* (47 Hun, 43), *People v. N. Y. Central, etc. R. Co.* (30 Hun, 78), *People ex rel. Keene v. Board of Supervisors of Queens Co.* (83 Hun, 237), *Matter of Schwager* (36 State Rep., 534), *People ex rel. Bates v. Speed* (73 Hun, 302).

<sup>4</sup> See as to matters relating to such an appeal, in the *Matter of Dederick* (77 N. Y., 595), *People v. Clyde* (69 N. Y., 603), *People v. Schuyler* (69 N. Y., 242), *People v. Supervisors* (70 N. Y., 228), *People v. Rochester and State Line R. R. Co.* (15 Hun, 188), *People*

## ARTICLE FIFTH.

## FORMS RELATING TO THE WRIT OF PROHIBITION.

(Code Civ. Pro., Ch. 16, Tit. 2, Art. 5.)

- No. 1088. Notice of motion for writ of prohibition.  
 1089. Order that alternative writ of prohibition issue.  
 1090. Alternative writ of prohibition.  
 1091. Affidavit of service of alternative writ of prohibition.  
 1092. Return to alternative writ of prohibition.  
 1093. Final order awarding absolute writ of prohibition, or against the relator.  
 1094. Absolute writ of prohibition.  
 1095. Notice of appeal from final order in proceedings by writ of prohibition.

## No. 1088.

**Notice of Motion for Writ of Prohibition.**

(Code Civ. Pro., § 2091.)

As in form No. 170, substantially, to [\*], and from thence as follows: For an order that a writ [*or* an alternative writ] of prohibition issue out of said court, and under the seal thereof, commanding, etc. [state requirements of writ], and for such other and further, etc.; that said application will be made upon the affidavits and papers with copies of which you are herewith served.

Dated \_\_\_\_\_, 18—.

[Signature, etc., as in form No. 170.]

To A. B., etc.

## No. 1089.

**Order that Alternative Writ of Prohibition Issue.**

(Code Civ. Pro., § 2091.)

As in form No. 1078 to [\*], and from thence as follows: That an alternative writ of prohibition issue out of and under the seal of this court, directed to [name court or judge] and to C. D., commanding them to desist and refrain from any further proceedings in, etc.

[State the requirements of the writ.]

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v. N. Y. C., etc., R. R. Co. (30 Hun, 7<sup>c</sup>), People v. Fairman (91 N. Y., 385), People v. Spicer (34 Hun, 584; S. C., 20 Week. Dig., 444), People v. Ranton v. Doyle (88 Hun, 203), People ex rel. Fiske v. Devermann (83 Hun, 181), People ex rel. Platt v. Board of State Canvassers (74 Hun, 179).

No. 1090.

**Alternative Writ of Prohibition.**

(Code Civ. Pro., § 2094.)

*The People of the State of New York* [on the relation of A. B.<sup>1</sup>], to [name the Court or Judge to be restrained], and to E. F.,<sup>2</sup> greeting:

We hereby command you, and each of you, to desist and refrain from any further proceeding in an action pending in the [——— Court], in which M. N. is plaintiff and O. F. is defendant [or in the matter of, etc.; or with respect to (describing particular matter or thing to be refrained from)], [\*] until the further direction of the [describing court], and also to show cause at the time when, and the place where, this writ is made returnable, why you, and each of you, should not be absolutely restrained from any further proceedings in the said action [or special proceeding, or matter].

And you are, and each of you is, hereby commanded to make your return to this writ, at the [naming term of court],<sup>3</sup> forthwith [or on the —— day of ——, 18—, at —— o'clock in the —— noon].

Witness, etc. [teste].

[L. s.]

J. L. Clerk.

A. M., Attorney for ——.

[Office address.]

[Allowed, etc., as in form No. 1052, adding thereto as follows: Upon the affidavit of (said) ——, dated ——, 18— (and name other papers).<sup>4</sup>]

<sup>1</sup> See Code Civ. Pro., § 1994.

<sup>2</sup> The writ must be directed to the court in which, or to the judge before whom, and also to the party in whose favor, the proceedings to be restrained were taken, or are about to be taken. (Code Civ. Pro., 2094.)

<sup>3</sup> The writ is to be made returnable either forthwith or at a day certain, before the term which granted it, or upon the first day of a future term, therein specified, at which application for the writ might have been made. Where it is granted at a term of the appellate division in a judicial department, adjoining that wherein the matter originated, it may, in the discretion of the court, be made returnable at a term of the appellate division of either department. (Code Civ. Pro., § 2095, as amended by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896.)

See, as to terms at which the writ

may be granted, id., §§ 2092, 2093, and amendments to latter section by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896, and as to effect of writ granted at a General Term (now Appellate Division) of the Supreme Court, addressed to the Special Term, see *People ex rel. The Mayor v. Nichols* (79 N. Y., 582; rev'g S. C., 18 Hun, 530).

And generally as to cases in which the writ will lie, see, among other cases, *People v. Talcott* (21 Hun, 591; S. C., 59 How., 269), *People v. Waldron* (52 How. Pr., 221), *People v. Cooper* (57 id., 416), *People v. Special Term* (57 id., 467), *People v. Third District Court* (57 id., 443), *People v. Court of Special Sessions* (N. Y. Daily Reg., Jan. 3, 1884), *People v. McAdam* (2 Civ. Pro. Rep. [Browne], 52; S. C., 2 id. [McCarty], 86; 58 How., 442; rev'd 84 N. Y., 287), *People v. Parker* (63 How. Pr., 3), *Thomson v. Tracy* (60 N. Y., 81),

No. 1091.

**Affidavit of Service of Alternative Writ of Prohibition.**

(Code Civ. Pro., § 2095.)

As in form No. 1082, adding thereto as follows: And deponent further says, that he delivered with each copy of said writ, served as aforesaid, to the person upon the same was served, a copy of the annexed papers upon which said writ was granted.<sup>1</sup>

No. 1092.

**Return to Alternative Writ of Prohibition.**

(Code Civ. Pro., § 2098.)

[Title of proceeding.]

The court of \_\_\_\_\_ [describing court], held in and for, etc. [*or* A. O., justice, etc.], to whom the writ of prohibition, a copy of which is hereto annexed, is directed, does hereby make return to said writ as follows [here insert statement of the facts necessary to be returned].

In witness whereof, I have caused the seal of said court to be hereunto affixed, this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

[L. s.]                      J. L., Clerk [*or* A. O., Justice, etc.].

*Or* as follows:

[Title of proceeding.]

I, C. D., the party to whom the writ of prohibition, a copy of which is hereto annexed, is directed, do hereby adopt the return of the \_\_\_\_\_ court [*or* of Hon. A. O., justice, etc.], hereto annexed, and rely upon the matters

Norton v. Dowling (46 How. Pr., 7), People ex rel. Salke v. Talcott (21 Hun, 591), Lunn v. Langbein (12 W. Dig., 20), Matter of Cameron (5 Hun, 270), People ex rel. Moissen v. County Court of Kings (23 Week. Dig., 137), People ex rel. James v. Surrogate of Putnam (16 Abb. N. C., 241; 36 Hun, 218), People ex rel. Smith v. Grogan (3 Crim. Rep., 335), People ex rel. Evans v. Letson (3 How. Pr. [N. S.], 381), People ex rel. Oakley v. Petty (32 Hun, 443), People ex rel. Howard v. Boswick (2 City Ct., 163), People ex rel. Henry Prouse Cooper Co. v. Kelly (12 Civ. Pro. R., 414), People ex rel. Wemple v. Canvassers of Albany

(20 Abb. N. C., 25 n), People ex rel. Toy v. Mayer (71 Hun, 182), People ex rel. Baldwin v. Goldfogle (28 Civ. Pro., 417), People ex rel. Hess v. Hinman (74 Hun, 130).

<sup>4</sup> This addition seems to be proper, as by section 2094 of Code Civ. Pro., the writ need not contain any statement of the facts or legal objections upon which the relator founds his claim to relief; and by section 2095 a copy of the papers upon which it is granted is to be served with each copy of the writ.

<sup>1</sup> See Code Civ. Pro., § 2095, as amended by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896.



therein contained, as sufficient cause why the said court [*or* justice, etc.] should not be restrained, as mentioned in the said writ.

In witness whereof, I have hereunto subscribed my name, on this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

C. D.

[Verification by C. D., substantially as in forms Nos. 151, etc.]<sup>1</sup>

No. 1093.

**Final Order Awarding Absolute Writ of Prohibition, or against the Relator.**

(Code Civ. Pro., § 2100.)

[At, etc., as in form No. 80 or form No. 211.]

[Title of proceeding.]

An alternative writ of prohibition having been heretofore issued in the above entitled matter, pursuant to the order of this court herein, dated on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, returnable at, etc., and directed to [name court, etc.], commanding, etc. [reciting directions of alternative writ], and said writ having been duly served upon said [name court, etc., served], together with a copy of the papers upon which it was granted, and [recite proceedings upon return of the writ]:

Now, after hearing, etc.,

It is hereby ordered, that [\*] an absolute writ of prohibition issue herein, out of and under the seal of this court, absolutely restraining the said [name court or judge] from any further proceedings in the said action [*or* special proceeding, *or* matter], and that all proceedings [*or* specify proceeding<sup>2</sup>] heretofore taken in the said action [etc.], be

<sup>1</sup>See Code Civ. Pro., § 2098. The verification need not be made where the return consists only of objections to the legal sufficiency of the papers upon which the writ was granted. (Id.)

See further as to return and proceedings thereupon and thereafter, sections 2096-2102, Code Civ. Pro., and amendments to sections 2096,

2099, 2101 and 2102, id., by ch. 946 of 1895, taking effect Jan. 1, 1896.

<sup>2</sup>The proceedings which the court or officer, named in the writ, may be directed to vacate or annul, are only the interlocutory or mesne proceedings, prior to the final decision; for, if there has been a final decision, prohibition will not lie. (People v. Comm'rs of Excise, 61 How. Pr., 514.)

vacated and annulled, and that the said defendant, A. B., pay to the said relator, C. D., the sum of \_\_\_\_\_ dollars, costs and disbursements of this proceeding.<sup>1</sup>

[Or as above to (\*), and from thence as follows: That the said (name court or judge), and the said C. D., be and they are hereby authorized to proceed in the said action (etc.), as if the said alternative writ had not been issued, and that the said relator, C. D., pay to the said defendant, A. B., the sum of, etc., as above.]

No. 1094.

### Absolute Writ of Prohibition.

(Code Civ. Pro., § 2100.)

As in form No 1090 to [\*], inserting therein after the words "and each of you," as follows: Pursuant to the final order of the court herein, made and entered on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

Witness, etc. [teste].

[L. s.]

J. L., *Clerk.*

O. M., *Attorney for* \_\_\_\_\_.

[Allowed, etc., as in form No. 1052.]

No. 1095.

### Notice of Appeal from Final Order in Proceedings by Writ of Prohibition.

(Code Civ. Pro., § 2101.)

See form No. 552, page 424, *ante.*<sup>2</sup>

<sup>1</sup> See as to punishment for non-payment of costs, Code Civ. Pro., § 2007.

<sup>2</sup> As to stay upon appeal, see Code Civ. Pro., § 2101, as amended by ch. 946 of Laws of 1895, taking effect

Jan. 1, 1896; and see further, as to appeal from order in special proceeding, *People ex rel. Collins v. Spicer* (20 Week. Dig., 444).

## ARTICLE SIXTH.

## FORMS RELATING TO THE WRIT OF ASSESSMENT OF DAMAGES.

(Code Civ. Pro., Ch. 16, Tit. 2, Art. 6.)

- No. 1096. Petition on application for writ of assessment of damages.  
 1097. Writ of assessment of damages.  
 1098. Notice of execution of writ of assessment of damages.  
 1099. Oath to jurors on execution of writ of assessment of damages.  
 1100. Inquisition upon writ of assessment of damages.  
 1101. Return of execution of writ of assessment of damages.  
 1102. Notice to owners and persons interested in the property of filing inquisition, etc.  
 1103. Order confirming inquisition.  
 1104. Petition for moneys paid into court, under writ of assessment of damages.

## No. 1096.

**Petition on Application for Writ of Assessment of Damages.**

(Code Civ. Pro., § 2104.)

The petition of G. C., governor of the State of New York, by L. W. R., attorney-general [*or* district attorney of the county of \_\_\_\_\_], respectfully shows:

That your petitioner is authorized by [state the law authorizing the taking] to take possession of the real property hereinafter described, for the use of the people of this State, for the purposes mentioned in said act, to wit [state same].

That your petitioner has been unable to agree, and cannot agree, with the owner [*or* owners] thereof for the purchase of said real property, which is described as follows, to wit [insert description as in writ, form No. 1097].

Your petitioner therefore prays that this court will grant a writ of assessment of damages for the purpose of assessing the damages which the owner or owners of such real property will sustain by being deprived thereof, and your petitioner will ever pray, etc.

L. W. R., *Attorney-General*  
 [*or District Attorney of \_\_\_\_\_ County*].

[Office address.<sup>1</sup>]

[Verification as in form No. 52.]

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<sup>1</sup> See note 2 to form No. 122.

No. 1097.

**Writ of Assessment of Damages.**

(Code Civ. Pro., §§ 2106, 2107)

*The People of the State of New York, to the Sheriff of  
 \_\_\_\_\_ County],<sup>1</sup> greeting :*

Whereas, L. R., attorney-general of the State of New York [*or* district attorney of the county of \_\_\_\_\_], has made application, in the name of the governor of the State, to our Supreme Court, at a Special Term thereof, held at the \_\_\_\_\_ of \_\_\_\_\_, in the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, for a writ of assessment of damages, concerning the property hereinafter described, of which he is authorized by law to take possession for the use of the people of this State [*or* of the United States],<sup>2</sup> and cannot agree with the owner [*or* owners] thereof for its purchase ; and,

Whereas, an order has been made by said Special Term, pursuant to said application, granting the said writ, which order has been duly entered and bears date on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

Now, therefore, we command you to inquire, by the oaths of twelve men of your county, qualified to act as trial jurors in a court of record, whether the owner or owners of the said real property, or any of them, will sustain any damages by the taking thereof, for the use of the people of the State ; and if so, the amount thereof ; and that you return this writ to the Supreme Court, without delay, with the finding of the jury thereupon.<sup>3</sup>

The following is the description of the real property to be taken, above referred to, to wit [describe same, as required in complaint in ejectment].<sup>4</sup>

Witness, etc. [teste].

[L. s.]

J. L., *Clerk.*

L. R., *Attorney-General, etc.*

[Office address.<sup>4</sup>]

[Allowed, etc., as in form No. 1052.]

<sup>1</sup> See as to taking by the United States, section 2119, Code Civ. Pro.

<sup>2</sup> See *The United States v. Dumplin Island* (1 Barb., 24), which seems to be the only reported case under part 3,

ch. 9, tit. 2, art. 4 of the R. S., from which art. 6 of tit. 2 of ch. 16 of Code Civ. Pro., is taken.

<sup>3</sup> See section 1511, Code Civ. Pro.

<sup>4</sup> See note 2 to form No. 122.

No. 1098.

**Notice of the Execution of Writ of Assessment of Damages.**

(Code Civ. Pro., § 2108.)

STATE OF NEW YORK, }  
 County of ———, } ss.:

By virtue of a writ of assessment of damages, issuing out of the Supreme Court of this State, and tested on the ——— day of ———, 18—, and to me directed and delivered, by which I am commanded to inquire by the oaths of twelve men of my county, qualified to act as trial jurors in a court of record, whether the owner or owners of the real property hereinafter described will sustain any damages by the taking thereof, for the use of the people of the State, and, if so, the amount thereof.

The said premises are described as follows to wit [insert description].

Notice is therefore hereby given, that I will proceed to execute the said writ on the ——— day of ———, 18—, at ——— o'clock in the ——— noon, at the ———, in the ——— of ———, in said county.<sup>1</sup>

Dated ———, 18—.

M. N., *Sheriff of* ——— *County.*

No. 1099.

**Oath to Jurors on Execution of Writ of Assessment of Damages.**

(Code Civ. Pro., § 2110.)

You do, each of you, swear, that you will diligently inquire whether the owner or owners of the real property, to be viewed by you, and which is mentioned and described in the writ of assessment of damages issued by the Supreme Court of this State to the sheriff of ——— county, will sustain any damages by the taking thereof for the use of the people of the State [*or of the United States*],<sup>2</sup> and, if

<sup>1</sup>To be published once in each week for at least three successive weeks, in a newspaper printed in the county. (Code Civ. Pro., § 2108.) The sheriff must notify twelve men of his county, qualified to act as trial jurors in a court of



record, to attend at the time and place, and for the purpose specified in the notice. Each juror must be notified as a juror is notified to attend a trial term of the Supreme Court. Upon his failure to attend, when duly notified, his attendance may be procured by attachment, and proceedings may be taken against him, and he may be punished thereupon, by the Supreme Court, as where a juror, duly notified,

fails to attend at a trial term thereof. The sheriff may require the attendance of a talesman, in place of a juror notified and not appearing; or he may adjourn the proceedings, for the purpose of punishing the defaulting juror, or compelling his attendance. (Id., § 2109, as amended by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896.)

<sup>2</sup> See note 1 to form No. 1097.

so, the amount thereof; and will give a true verdict, according to the best of your judgment, without favor or partiality, so help you God.<sup>1</sup>

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No. 1100.

**Inquisition upon Writ of Assessment of Damages.**

(Code Civ. Pro., § 2111.)

STATE OF NEW YORK, }  
 County of ———, } ss.:

Inquisition taken this ——— day of ———, 18—, at, etc., before M. N., sheriff of the county of ———, under and by virtue of the writ of assessment of damages, to said sheriff directed and delivered and to this inquisition annexed, by the oaths of twelve jurors of said county, qualified to act as trial jurors in a court of record, who, being duly summoned and sworn by the said sheriff, say, upon their oaths, that A. B. is the owner in fee of the real property firstly described in said writ, as follows, to wit [describe same].

C. D. is the owner in fee of the real property secondly described in said writ, as follows, to wit [describe same].

And E. F. holds the said last mentioned real property by lease granted by K. L., on, etc., for the term of ——— years, at an annual rent of ——— dollars.

That said A. B. will sustain damages, to the amount of ——— dollars, by being deprived of the said premises so owned by him.

That said C. D. will sustain damages, to the amount of ——— dollars, by being deprived of the said premises so owned by him.

And that E. F. will sustain injury and damages, to the amount of ——— dollars, by being deprived of the said premises so held by him as aforesaid.

And the said jurors, upon their oaths aforesaid, do further say, that the people of the State of New York [*or* of the United States],<sup>2</sup> should pay for the taking of the said several parcels of real property the said several sums so assessed as

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<sup>1</sup> See note 1 to form No. 1097.

<sup>2</sup> See note 1 to form No. 1097.



aforesaid to the said persons to whom the same are assessed as aforesaid, respectively.

In witness whereof we, the said sheriff, as well as the said jurors, have hereto set our hands and seals the day and year first above written.

—————, *Jurors.* [L. s.] A. B., *Sheriff.* [L. s.]

No. 1101.

**Return of Execution of Writ of Assessment of Damages.**

(Code Civ. Pro., § 2111.)

COUNTY OF ———, *ss.:*

I certify and return, that on the coming to me of the within writ of assessment of damages, I caused due notice of the time and place of executing the same to be given, by publishing a notice thereof once in each week for three weeks successively, immediately preceding such time, in a public newspaper printed in said county; that I summoned twelve men of said county, qualified to act as trial jurors in a court of record, as I am within commanded, to attend at the time and place designated in such notice for executing said writ, and then and there administered to each of said jurors the oath prescribed by statute; that thereupon the said jurors viewed together all the real property specified in said writ, and after so viewing the same made inquisition of the matters required in and by the within writ by them to be made; which inquisition, under the hands and seals of the said jurors, as well as under my hand and seal, is hereto annexed.<sup>1</sup>

Dated ———, 18—.

A. B., *Sheriff of* ——— *County.*

<sup>1</sup> The inquisition and return are to be filed by the sheriff immediately after the signing of the inquisition in the office of the clerk of the county in which the real estate is situated. (Code Civ. Pro., § 2111.) That section does not require the inquisition to be

sealed by the sheriff or jurors, but only to be signed by them, but it seems to have been customary to affix seals to the signatures under the former statute, although none were expressly required by it.

No. 1102.

**Notice to Owners and Persons Interested in the Property  
of Filing Inquisition, etc.**

(Code Civ. Pro., § 2112.)

*To the owners of, and persons interested in, the real prop-  
erty hereinafter described :*

You are hereby notified that the writ of assessment of damages, heretofore issued and delivered to the sheriff of \_\_\_\_\_ county, to assess the damages which the owners of the real property hereinafter mentioned and described will sustain by being deprived thereof, has been filed with the inquisition made thereupon and the return of said sheriff thereto, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in the \_\_\_\_\_ county clerk's office, and that you are hereby required to show cause at a Special Term of the Supreme Court, to be held at, etc., on, etc., why the said inquisition should not be confirmed [*or why the said inquisition should not be set aside*].<sup>1</sup>

[The following is the description of the said real prop-  
erty, to wit (insert description).]

Dated \_\_\_\_\_, 18—.

L. W. R., *Attorney-General*  
[*or District Attorney of \_\_\_\_\_ County*].

No. 1103.

**Order Confirming Inquisition.**

(Code Civ. Pro., § 2114.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

The writ of assessment of damages heretofore issued in

<sup>1</sup> The clause in brackets may be inserted instead of the clause in regard to confirmation, if the governor so directs. (Code Civ. Pro., § 2112.)

The notice must be published at least once in each week, for three successive weeks, in a newspaper printed in the county, and also in the news-

paper printed at Albany, in which legal notices are required to be published. (Id.)

See, also, as to publication of notices required to be published in State paper, after the expiration of the existing contract, note 1, p. 520, to form No. 650.

the above entitled proceeding, having been duly executed by the sheriff of \_\_\_\_\_ county, as required by law, and the said sheriff having duly filed in the \_\_\_\_\_ county clerk's office, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the inquisition taken pursuant to the requirements of said writ, together with his return thereto, and due notice having been given of this application by publishing a notice thereof in the form, and for the time, required by law :

Now, upon the application of L. W. R. [attorney-general, for the people of the State of New York],<sup>1</sup> and after hearing, etc.:

It is hereby ordered, upon reading, etc. [name the papers upon which the application is made and opposed], that the people of [the State], upon paying into court the damages assessed by the said inquisition, shall be entitled to an absolute estate in the real property described in the said writ, and in the appurtenances belonging thereto [of which said real estate the following is the description, to wit (describe same)]<sup>2</sup>.

No. 1104.

**Petition for Moneys Paid into Court under Writ of Assessment of Damages.**

(Code Civ. Pro., § 2118.)

*To the Appellate Division of the Supreme Court, in the \_\_\_\_\_ Department:*

The petition of A. B., of \_\_\_\_\_, respectfully shows, that heretofore an application was made by the attorney-general of this State [*or* by the district attorney of the county of \_\_\_\_\_, in this State] for a writ of assessment of damages to assess the damages which the owner [*or* owners] of the real property hereinafter described would sustain by being deprived of said real property.

That such proceedings were had on such application, that

<sup>1</sup> See sections 2104, 2119, Code Civ. Pro.

<sup>2</sup> The description of the property is perhaps unnecessary, but seems proper to be inserted.

<sup>3</sup> The court may, if it determines that

the inquisition is in any respect excessive, unjust or otherwise materially defective, set aside the writ and order a new writ to issue, or another inquisition taken to supply the defects.

(Code Civ. Pro., § 2113.)

on the ——— day of ———, 18—, the inquisition made pursuant to law in such proceedings was filed, with the return of the sheriff of ——— county, to whom the writ of assessment of such damages had been issued, in the ——— county clerk's office, a copy of which inquisition is hereto annexed.

That by said inquisition the amount of ——— dollars was awarded to your petitioner as damages for the taking of [a portion of] the real property, described in said writ and inquisition, as appears by said inquisition.

That an order confirming said inquisition was duly made at, etc., on the ——— day of ———, 18—, and declaring that the people of the State, upon paying into court the amount of the damages assessed by the inquisition, should be entitled to an absolute estate in the real property described in said writ and in the appurtenances belonging thereto; that said amount was accordingly paid into court, and to the county treasurer of ——— county, on the ——— day of ———, 18— [and was afterwards invested as follows, under the order of this court (state how invested and the income derived therefrom)].

And your petitioner therefore prays, that payment may be made to him of the said sum of ——— dollars, awarded to him by the said inquisition and so paid into court, as aforesaid, and the income thereof remaining uninvested' [or that the securities aforesaid in which said amount has been invested as aforesaid may be transferred to him], and your petitioner will ever pray, etc.

Dated ———, 18—.

A. B.

[Verification as in form No. 52.]

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#### ARTICLE SEVENTH.

#### FORMS RELATING TO THE WRIT OF CERTIORARI, TO REVIEW THE DETERMINATION OF AN INFERIOR TRIBUNAL.

(Code Civ. Pro., Ch. 16, Tit. 2, Art. 7.)

No. 1105. Writ of certiorari to supply defect in record.

1106. Affidavit on application for writ of certiorari to review.

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<sup>1</sup> Either principal or income or both may be applied for in whole or in part. (Code Civ. Pro., § 2118.) See, also, amendments to that section by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896. If an application for the money paid into court is not made as prescribed in said section 2118, the appellate division of the supreme court in that judicial department may provide, by order, for the investment, under the direction of the court, of the

- No. 1107. Notice of such application.  
 1108. Writ of certiorari to review.  
 1109. Affidavit of service of writ of certiorari to review.  
 1110. Return to writ of certiorari to review.

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No. 1105.

**Writ of Certiorari to Supply Defect in Record.**

(Code Civ. Pro., § 2124.)

As in form No. 1108 to [\*], and from thence as follows: In a certain appeal now pending in this court, in [describe action or proceeding], it is necessary in order to supply a defect [etc.] in the record [*or* name other papers] before this court, that the record [*or* papers] hereinafter mentioned and described should be produced in this court, and justice requires that the said defect [etc.] should be supplied, and adequate relief cannot be obtained by means of an order:

Now, therefore, we do command, and strictly enjoin you, that you do certify and return to this court, at a term of the Appellate Division thereof, to be held at, etc., on, etc., under your hand, the [describing record or papers], as fully, etc.

[Conclude as in form No. 1108.<sup>1</sup>]

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No. 1106.

**Affidavit on Application for Writ of Certiorari to Review.**

(Code Civ. Pro., § 2127.)

———— COUNTY, ss.:

A. B. of ———, being duly sworn, says, that [here set forth the proceedings, showing a proper case for the issuing of the writ].<sup>2</sup>

A. B.

[Jurat as in form No. 46.]

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money, and of the interest to arise therefrom, in permanent securities, for the benefit of the owners. (Code Civ. Pro., § 2117, as amended by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896.)

<sup>1</sup> See *Graham v. The People* (6 Lans., 149), *Kanouse v. Martin* (3 Sandf. [S. C.] R., 593), *People v. Cancemi* (7 Abb. Pr., 271; S. C., 16 N. Y., 501), *Sweet v. Overseers of Clinton* (3 Johns., 23).

<sup>2</sup> The application must be founded

upon an affidavit or a verified petition, which may be accompanied by other written proof; and must show a proper case for the issuing of the writ. It can be granted only at a term of the appellate division of the Supreme Court or at special term, and the granting or refusal thereof is discretionary with the court. (Code Civ. Pro., § 2127, as amended by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896.)

Article 7 of title 2 of chapter 16 of

No. 1107.

**Notice of Application for Writ of Certiorari to Review.**

(Code Civ. Pro., § 2128.)

As in form No. 170 substantially to [\*], and from thence as follows: For an order that a writ of certiorari issue, directed to [state body or officer, etc.], commanding said [board, etc.], to [state substance of requirements of the writ], and for such other or further relief as may be proper; that such application will be made upon [name the papers], with copies of which you are herewith served.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

Yours, etc.,

A. M., *Attorney for* \_\_\_\_\_.[Office address.<sup>2</sup>]

To G. C., etc.

No. 1108.

**Writ of Certiorari to Review.**

(Code Civ. Pro., § 2129.)

*The People of the State of New York [on the relation of C. D.],<sup>2</sup> to [naming the body or officer or person having custody of the record, or other papers, to be certified, or both, if necessary]:<sup>3</sup>*

Whereas, [\*] we have been informed, by the affidavit [or verified petition] of C. D., dated on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, that certain proceedings were had [before

Code Civ. Pro., is not applicable to a writ of certiorari brought to review a determination made in any criminal matter, except a criminal contempt of court. (Id., § 2148.)

See, also, *People v. Tax Commissioners* (77 N. Y., 605), *People v. Fire Commissioners* (85 N. Y., 655), *People v. Police Commissioners* (86 N. Y., 639), *Jones v. People* (79 N. Y., 45), as to discretion.

<sup>1</sup> See as to service of this notice, and upon whom, when required by court, Code Civ. Pro., § 2128; see, also, *People v. Perry* (16 Hun, 461).

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> See Code Civ. Pro., § 1994.

<sup>4</sup> See, further, as to direction of writ, section 2129, Code Civ. Pro., and *The People v. Board of Comm'rs, etc.* (97 N. Y., 37), *People v. Walter* (68 N. Y., 403; rev'g S. C., 2 Hun, 385), *Matter of Leary* (30 Hun, 394), *People v. Assessors of Herkimer* (6 Civ. Pro. [Browne], 297); and as to what the terms "body or officers" and the word "determination" include, see section 2146 (id.).

As to seal, see the case last cited, and section 1992, Code Civ. Pro.

you], (state the proceedings of which complaint is made)' and we being willing, for certain reasons, to be certified of such proceedings, if any such were had [before you], do command and strictly enjoin you that you do certify and return those proceedings, with all things appertaining thereto, within twenty days after the service upon you of this writ, at the office of the clerk of ——— county [or name other clerk's office],<sup>2</sup> under your hand, as fully and amply as the same remain before you, so that our [Supreme]<sup>3</sup> Court may further cause to be done thereupon what of right, and according to law, ought to be done, and have you then there this writ.<sup>4</sup>

Witness, etc. [teste].

[L. s.]

J. L., *Clerk.*

G. H., *Attorney for* ———.

[Allowance as in form No. 1052.]

No. 1109.

### Affidavit of Service of Writ of Certiorari to Review.

(Code Civ. Pro., § 2130.)

Under subdivision 1:

Same, substantially, as affidavit of service of summons. (See forms 73, etc.)

Under subdivision 2:

As in form No. 73 to and including word New York, and from thence as follows: He served the writ of certiorari, a copy of which is hereto annexed, upon the [judges of the]

<sup>1</sup> A certiorari should name the parties aggrieved and set forth the cause of complaint. (*Ex parte* the Mayor, etc., of Albany, 23 Wend., 277.)

<sup>2</sup> See Code Civ. Pro., § 2132.

<sup>3</sup> A writ of certiorari can be issued only out of the Supreme Court, except in a case where another court is expressly authorized by statute to issue it. (Code Civ. Pro., § 2123, as amended by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896). See, also, section 2124 (*id.*).

<sup>4</sup> As to limitation of time for granting writ, see sections 2125, 2126, Code Civ. Pro., and see amendments to the latter section by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896.

As to stay of proceedings upon issu-

ing of writ, see Code Civ. Pro., § 2131, *People v. Aldermen* (10 Abb. N. C., 33), *People v. Supervisors of Ulster* (19 Week. Dig., 208).

As to place and notice of hearing and papers upon which it is to be heard, see sections 2138, as amended by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896, and 2139, Code Civ. Pro.

As to questions to be determined by the court upon the hearing, see Code Civ. Pro., § 2140. *People v. French* (32 N. Y., 306), *People v. Hair* (29 Hun, 125), *People v. Jourdan* (13 Week. Dig., 207), *People v. Board of Fire Comm'rs* (30 Hun, 376), *People v. Weaver* (20 Week Dig., 565), *People v. Zoll* (97 N. Y., 203).

As to cases in which the writ may,

——— Court to whom it is directed, by filing the said writ with the clerk of ——— county [*or* name other clerk], at the office of said clerk in said ———.

Under subdivision 3:

Same, substantially, as form No. 1082.

[Signature, etc., as in form No. 73.]

No. 1110.

### Return to Writ of Certiorari to Review.

(Code Civ. Pro., § 2134.)

[Title of proceeding.]

The return of ——— to the writ of certiorari [a copy of which is] hereto annexed.

By virtue of, and in obedience to, the writ of certiorari [a copy of] which is hereto annexed, and to me directed, I do hereby certify and return to the [Supreme] Court, that I have annexed hereto, and file herewith, a transcript, certified by me, of the record [*or* proceedings (and a statement of the other matters)] specified in, and required by, said writ.

In witness whereof, I have hereunto set my hand and seal, this ——— day of ———, 18—.¹

[L. s.]

O. M. [official title].

and may not, issue, see Code Civ. Pro., sections 2120, 2121, 2122, 2147, 2148; and among other recent cases relating to the writ and proceedings thereupon, see *Dows v. Village of Irvington* (66 How. Pr., 93), *People v. Fairman* (17 Week. Dig., 168), *People v. Cobb* (14 Abb. N. C., 493), *People v. Sweet* (18 Week. Dig., 258), *People v. Heddon* (32 Hun, 299), *People v. Campbell* (50 Super. Ct. R., 82), *People v. Fire Comm'rs* (96 N. Y., 544), *People v. Pond* (13 Abb. N. C., 1), *People v. Tax Comm'rs* (10 id., 35), *Matter of Lauterjung* (48 Super. Ct., 308), *People v. Dennison* (28 Hun, 328), *People ex rel. Trustees of Jamaica v. Supervisors of Queens* (131 N. Y., 468), *People ex rel. Edison Electrical Illuminating Co. v. Barker* (139 id., 55), *People ex rel. Burby v. Common Council of Auburn* (85 Hun, 601), *People ex rel. Supervisors of Chenango v. Board of State Assessors* (22 Week. Dig., 453), *People ex rel. Kent v. Board of Fire Comm'rs* (100 N. Y., 82), *People ex rel. Albany & Greenbush Bridge Co. v. Weaver* (34 Hun, 321; appeal dismissed, 99 N. Y., 657), *People ex rel. Mayor, etc., of N. Y. v. McCarthy* (102 N. Y., 630), *People ex rel. Panama R. Co. v. Com'rs of Taxes of N. Y.* (104 id., 240), *People ex rel. Flanagan v. Police Comm'rs of N. Y.* (93 id., 97), *People ex rel. Wyatt v. Williams* (17 Abb. N. C., 366), *People ex rel. Walkill Valley R. Co. v. Keator* (36 Hun, 572), *People ex rel. Gibson v. French* (16 State Rep., 1012), *People ex rel. Cushman v. Heddon* (32 Hun, 299), *People ex rel. Drevot v. Fire Comm'rs of N. Y.* (30 id., 396), *People ex rel. Kent v. Fire Comm'rs* (1 Central Rep., 167), *People ex rel. Eckerson v. Christie* (115 N. Y., 153), *People ex rel. Paddock v. Lewis* (55 Hun, 521), *People ex rel. Leo v. Hill* (126 N. Y., 497), *People ex rel. Am. Contracting, etc., Co. v. Wemple* (60 Hun, 225), *People ex rel. Cook v. Hildreth* (126 N. Y., 360), *People ex rel.*



Higgins v. Grant (58 Hun, 158), People ex rel. Davidson v. Gilon (126 N. Y., 147), People ex rel. Brush Electric Mfg. Co. v. Wemple (129 id., 543), People ex rel. Trustees of Jamaica v. Supervisors of Queens (131 id., 468), People ex rel. Edison Electric Illuminating Co. v. Barker (139 id., 55), Matter of Corwin (135 id., 245), People ex rel. Blakeslee v. Comm'rs of Land Office (id., 447), People ex rel. Equitable Gas Light Co. v. Barker (66 Hun, 21; aff'd without op., 137 N. Y., 544), People ex rel. Press Pub. Co. v. Martin (142 id., 228), People ex rel. Russell v. Fire Comm'rs of Saratoga Springs (76 Hun, 146), People ex rel. Taylor v. Forbes (143 N. Y., 219), People ex rel. Copcutt v. Board of Health of Yonkers (140 id., 1), Matter of Tiffany & Co. (80 Hun, 486), Matter of Winegard (78 id., 58), People ex rel. Dreicer v. Onderkirk (76 id., 119), Beardslee v. Dolge (143 N. Y., 160), People ex rel. Heiser v. Gilon (76 Hun, 346), People ex rel. Oppenheimer Pub., etc., Co. v. Pople (81 id., 333), People ex rel. Taylor v. Seaman (8 Misc., 152), People ex rel. Forest Commission v. Campbell (82 Hun, 338), People ex rel. Barnes v. Court of Sessions (id., 242), People ex rel. Western N. Y. & P. R. Co. v. Adams (88 id., 122), People ex rel. Schaeffler v. Barker (87 id., 194), People ex rel. Wilson v. Medical Society of Dutchess Co. (84 id., 445), People ex rel. Hecker, etc., Mining Co. v. Barker (147 N. Y., 31), People ex rel. Hanford v. Thayer (88 Hun, 136), Jordan v. Board of Education (14 Misc., 119), People ex rel. Spencer v. Village of New Rochelle (83 Hun, 195), People ex rel. Wechsler v. Harkness (84 id., 445), People ex rel. Com. Mut. Ins. Co. v. Tax Comm'rs (144 N. Y. 483), People ex rel. Goodwin v. Martin (82 Hun, 1), People ex rel. Keller v. Many (69 id., 138), People ex rel. Kelly v. Scott (86 id., 174), People ex rel. Burby v. Com. Council of Auburn (35 id., 601), People ex rel. Dexter v. Palmer (86 id., 513), Matter of Fitch (147 N. Y., 334), People ex rel. Gould v. Barker (14 Misc., 586), People ex rel. Canaday v. Williams (90 Hun, 501).



## CHAPTER XVII.

### FORMS RELATING TO CERTAIN PROCEEDINGS INSTITUTED WITHOUT WRIT.

- TITLE I.** Forms relating to proceedings relating to insolvent debtors and to prisoners.
- TITLE II.** Forms relating to summary proceedings to recover the possession of real property.
- TITLE III.** Forms relating to proceedings to punish a contempt of court, other than a criminal contempt.
- TITLE IV.** Forms relating to proceedings to collect a fine.
- TITLE V.** Forms relating to proceedings to discover the death of a tenant for life.
- TITLE VI.** Forms relating to proceedings for the appointment of a committee of the person and the property of a lunatic, idiot or habitual drunkard, and to general powers and duties of the committee.
- TITLE VII.** Forms relating to proceedings for the disposition of the real property of an infant, lunatic, idiot or habitual drunkard.
- TITLE VIII.** Forms relating to arbitrations.
- TITLE IX.** Forms relating to proceedings to foreclose a mortgage by advertisement.
- TITLE X.** Forms relating to proceedings to change the name of an individual.
- TITLE XI.** Forms relating to proceedings for the voluntary dissolution of a corporation.
- TITLE XII.** Forms relating to proceedings supplementary to an execution against property.

#### TITLE I.

#### FORMS RELATING TO INSOLVENT DEBTORS AND TO PRISONERS.

#### ARTICLE FIRST.

#### FORMS RELATING TO PROCEEDINGS FOR DISCHARGE OF AN INSOLVENT FROM HIS DEBTS.

(Code Civ. Pro., Ch. 17, Tit. 1, Art. 1.)

- No. 1111.** Petition for discharge of insolvent debtor.
- 1112.** Consent of creditor to discharge, to be annexed to petition with affidavit thereto.
- 1113.** Schedule to be annexed to petition of insolvent debtor.
- 1114.** Affidavit of debtor to be annexed to his schedule.
- 1115.** Order to show cause why petitioner should not be discharged from his debts.

- No. 1116. Affidavit of service of order to show cause.  
 1117. Affidavit of publication pursuant to order.  
 1118. Specification by creditor of objections, and demand of jury.  
 1119. Order directing trial by jury of questions of fact.  
 1120. Affidavit to procure order for petitioner to produce his non-resident wife.  
 1121. Order requiring the petitioner to bring his wife before the court as a witness.  
 1122. Order directing the execution of an assignment by an insolvent debtor.  
 1123. Assignment by debtor to trustees pursuant to order.  
 1124. Certificate of trustee that assignment has been made.  
 1125. Certificate of county clerk of recording of assignment.  
 1126. Order granting discharge of insolvent debtor.  
 1127. Discharge of insolvent debtor.  
 1128. Affidavit upon refusal of trustee to give certificate, etc.  
 1129. Order to show cause upon affidavit, No. 1128.  
 1130. Order upon return of order to show cause, No. 1129.  
 1131. Affidavit to move for order directing judgment to be cancelled, etc.  
 1132. Notice of application for cancellation and discharge of judgment.  
 1133. Order for cancellation and discharge of judgment.

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No. 1111.

**Petition for Discharge of Insolvent Debtor.**

(Code Civ. Pro., § 2151.)

*To the County Court of the county of ——— [or to the Supreme Court]:*

The petition of A. B. respectfully shows, that he resides in the ——— of ———, in the county of ———, and State of New York.

That he is unable to pay all his debts in full.

That he is willing to assign his property for the benefit of all his creditors, and, in all other respects, to comply with the provisions of article first of title first of chapter seventeenth of the Code of Civil Procedure,<sup>1</sup> for the purpose of being discharged from his debts.

And your petitioner prays that he may be discharged accordingly.

Dated ———, 18—.

**A. B.**

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<sup>1</sup> See Code Civ. Pro., § 3344. As to residence, see *Matter of Dimock* (11 Misc., 610). As to the courts to which the application may be made, see section 2150, Code Civ. Pro., as amended by ch. 946 of the Laws of 1895, taking effect Jan. 1, 1896.

———— COUNTY, ss.:

A. B., of ———, being duly sworn, says, that he is the petitioner mentioned in the foregoing petition subscribed by him; that said petition is, in all respects true, in matter of fact.<sup>1</sup>

A. B.

[Jurat as in form No. 46.]

[Annex schedule form No. 1113, and consents of creditors as in form No. 1112, and affidavit as in form No. 1114.]

No. 1112.

**Consent of Creditor to Discharge to be Annexed to Petition with Affidavit Thereto.**

(Code Civ. Pro., §§ 2152, 2160.)

I, C. D., residing in the ——— of ———, in the county of ———, and [State of New York] in the United States, do [*or* The (name of corporation, etc.), located and having its principal place of business at ———, in the county of ———, and (State of New York) in the United States does], hereby consent to the discharge of A. B., the petitioner named in the annexed petition, from his debts, upon his complying with the provisions of article first of title first of chapter seventeenth of the Code of Civil Procedure.

And I hereby relinquish [*or* The (name of corporation, etc., hereby relinquishes)] the mortgage [etc.] given, etc., on, etc., for the payment of the sum of ——— dollars, mentioned in my affidavit annexed hereto, so far as the same affects real or personal property belonging to the said A. B., or transferred by him since the lien of said mortgage, etc., was created to the trustees to be appointed pursuant to said petition, for the benefit of all the creditors of said A. B.<sup>2</sup>

[Annexed hereto are (sworn copies of the) original accounts, etc.<sup>3</sup>]

In witness whereof, I have hereunto set my hand [and affixed the common seal of said (name of corporation, etc.)], being duly authorized for that purpose, by the order of the

<sup>1</sup>The affidavit must be verified on the day of the presentation of the petition. (Code Civ. Pro., § 2151) See, also, *People ex rel. Kenyon v. Sutherland* (81 N. Y., 1, rev'g S. C., 16 Hun, 192), *Morrow v. Freeman* (61 id., 515), *Schaeffer v. Soule* (23 Hun, 583, aff'd without op., 85 N. Y., 645), *Barnes v. Gill* (13 Abb. Pr., N. S., 169), *Mills v.*

*Hildreth* (5 Hun, 364), *Wheeler v. Emmeleuth* (58 id., 369, aff'd without op., 125 N. Y., 750), *Starr v. Patterson* (27 Abb. N. C., 19).

<sup>2</sup>See Code Civ. Pro., § 2158. *Augsbury v. Crossman* (10 Hun, 389).

<sup>3</sup>A consenting creditor residing without the State, and within the United States, must annex to his consent the

board of directors of said \_\_\_\_\_, on this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

[Seal of corporation.]

C. D. [*Director, etc.*]

\_\_\_\_\_ COUNTY, ss.:

C. D., being duly sworn, says, that he resides [*or that the \_\_\_\_\_ is a corporation duly organized for \_\_\_\_\_ purposes under the laws of the State of [New York] and is located and has its principal place of business] at the \_\_\_\_\_ of \_\_\_\_\_, in the county of \_\_\_\_\_, and State of [New York.]*

That A. B., the petitioner named in the annexed petition, is justly indebted to him [*or to the said \_\_\_\_\_*] [*or will become justly indebted to him (or to the said \_\_\_\_\_), on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in the sum of \_\_\_\_\_ dollars, upon a certain promissory note [etc.], in writing, made, etc., the general ground or consideration of which is as follows, to wit [state same].*

[*That he derived (or that said \_\_\_\_\_ derived) title to said note (etc.) from E. F., and that he (or that said E. F., or that said, name of corporation) actually, and in good faith, paid the said E. F. for the said note (etc.) the sum of \_\_\_\_\_ dollars.*] [\*]

That neither this deponent [*nor said (name of corporation)*], nor any person, to his [*or to its*] use, has received from the said A. B., or from any other person, payment of a demand, or any part thereof, in money, or in any other way, or any gift or reward of any kind, upon an express or implied trust, confidence or understanding that he should consent to the discharge of the said A. B.<sup>9</sup>

[*That he has been duly authorized to make the foregoing consent and relinquishment by order of the board of directors of said \_\_\_\_\_.*]

C. D.

[Jurat as in form No. 46.]

original accounts, or sworn copies thereof, and the original specialties or other written securities, if any, upon which his demand arose or depends. Provided, however, that when such original specialties, or other written

securities, are lost, such fact must be stated as a reason for not annexing thereto the consent, and the fact of the loss, and the manner of the loss thereof, must be stated by the creditor to the best of his knowledge, or

must be otherwise proved by affidavit to the satisfaction of the court; and the court may thereupon, in such case or proceeding, by its order, dispense with the annexing to such consent of the original specialties or other written securities. (Code Civ. Pro., § 2161, as amended by Laws of 1889, ch. 502, by adding words "Provided, etc.")

<sup>4</sup>It must be stated whether the indebtedness arose upon written security.

<sup>5</sup>As to affidavit by executor, etc., see last clause of section 2160, Code Civ. Pro.; and as to order of surrogates or justice of the Supreme Court in such case, see section 2153, id.

As to affidavit in case of corporation or joint-stock association, see section 2154, id.; in case of partnership, see

section 2155, id. If the affidavit is made by an individual or by an officer of a corporation without the State, it may be taken before an officer authorized by the laws of the state to take and certify the acknowledgment or proof of deeds, to be recorded in the State; and when certified by him to have been taken before him, and accompanied with the like certificates, as to his official character and the genuineness of his signature, as are required to authorize a deed acknowledged before him to be recorded within the state, may be used as if taken and certified in this State by an officer authorized by law to take and certify the same. (§ 814, id.) See, also, *Ross v. Wigg* (34 Hun, 192), *Matter of Wilcox's Estate* (1 Misc., 55).





No. 1113.

Schedule to be Annexed to Petition of Insolvent Debtor.

(Code Civ. Pro., § 2162.)

A full and true account of all the creditors of A. B., an insolvent debtor, with a statement of the place of residence of each creditor, if it is known; or, if it is not known, a statement of that fact, the sum owing to each of them by the said insolvent, and the nature of each debt or demand with the true cause and consideration thereof, the place where the same accrued, and a statement of any existing judgment, mortgage or collateral or other security for the payment of the debt, made pursuant to section 2162 of the Code of Civil Procedure.<sup>1</sup>

| CREDITORS. | RESIDENCE. | SUM OWING TO EACH CREDITOR. |        | NATURE OF DEBT WITH THE TRUE CAUSE AND CONSIDERATION THEREOF, AND WHETHER ARISING UPON WRITTEN SECURITIES, OR ACCOUNT OR OTHERWISE. | ACCRUED AT. | STATEMENT OF ANY EXISTING JUDGMENT, MORTGAGE OR COLLATERAL OR OTHER SECURITY, FOR THE PAYMENT OF ANY SUCH DEBT. |
|------------|------------|-----------------------------|--------|---|-------------|---|
|            |            | DOLLARS.                    | CENTS. |   |             |   |
|            |            |                             |        |   |             |   |

A full and true inventory of all the property of A. B., an insolvent debtor, in law or in equity, of the incumbrances existing thereon, and of all the books, vouchers and securities relating thereto.

[Insert statement of same.]

[For affidavit to be annexed to this schedule, see form No. 1114.]

<sup>1</sup> See *Devlin v. Cooper* (20 Hun, 188; aff'd S. C., 84 N. Y., 410), *Schaeffer v. Soule* (23 Hun, 583), *Dieckerhoff v. Ahlborn* (3 Abb. N. C., 372), *Matter of Cohen* (18 Civ. Pro. R., 156), *Wheeler v. Emmeleuth* (58 Hun, 369), *Starr v. Patterson* (27 Abb. N. C., 19).

No. 1114.

**Affidavit of Debtor to be Annexed to his Schedule (No. 1112).**

(Code Civ. Pro., § 2163.)

I, A. B., do swear [*or affirm*], that the matters of fact, stated in the schedule hereto annexed, are, in all respects, just and true; that I have not, in contemplation of my becoming insolvent, or within two years before presenting the petition herein, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property, in order to defraud any of my creditors; that I have not, in any instance, created or acknowledged a debt for a greater sum than I honestly and truly owed; and that I have not paid, secured to be paid, or in any way compounded with, any of my creditors, with a view fraudulently to obtain the prayer of my petition; that I have not done, suffered or been privy to any act, matter or thing which, if accomplished, would be ground for withholding my discharge under the provisions of this act, or invalidate such discharge if granted.<sup>1</sup>

A. B.

Subscribed and sworn to before me, }  
 this ——— day of ———, 18—. }

A. O., ——— *County Judge*

[*or in the city of New York the judge holding the term at which the order to show cause is made*].

No. 1115.

**Order to Show Cause why Petitioner should not be Discharged from his Debts.**

(Code Civ. Pro., § 2164.)

At a term of the ——— county court held [*or at a Special Term of the Supreme Court held in and for the city and county of New York*], at the ——— of ———, in the county of ———, on the ——— day of ———, 18—.

Present, Hon. J. C. N., ——— *County Judge* [*or J. F. D., Justice, etc.*]

[Title of proceeding.]

On reading and filing the petition of A. B., of the ———

<sup>1</sup> See section 2163 of Code of Civil Procedure, as amended by chapter 278 of Laws of 1896, taking effect May 1, 1896.

of ———, in the county of ———, dated ———, 18—, and the consents, schedules and affidavits annexed thereto, it is,

*Ordered*, that all the creditors of the said petitioner show cause before this court, at a ——— term thereof to be held at, etc., on, etc., why an assignment of the said A. B.'s property should not be made, and he be thereupon discharged from his debts, as prescribed in article first of title first of chapter seventeenth of the Code of Civil Procedure.

And it is further ordered and directed, that this order be published once in each of the ten weeks [*or six weeks*]<sup>1</sup> immediately preceding the said ——— day of ———, 18—, in the [insert name of a newspaper published in the county] a newspaper published at ———, in said county of ——— [and in the ———, a newspaper published in the city of New York].<sup>2</sup>

And it is further ordered and directed, that a copy of this order be served, by said petitioner, upon each of his creditors residing within the United States, and whose place of residence is known to him, either personally, at least twenty days before the said ——— day of ———, 18—, or by depositing it, at least forty days before that day, in the post-office, inclosed in a post-paid wrapper, addressed to the creditor at his usual place of residence.<sup>3</sup>

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No. 1116.

**Affidavit of Service of Order to Show Cause.**

(Code Civ. Pro., § 2166.)

[Title of proceeding.]

———— COUNTY, ss. :

A. B., of ———, being duly sworn, says, that on the

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<sup>1</sup> See section 2165, Code Civ. Pro., as amended by Laws of 1890, chap. 231, p. 438.

<sup>2</sup> As to publication of notices which have been required to be published in the State paper, after the expiration of the existing contract, see note 1, page 520, to form No. 650. By the amendment of section 2165 of Code Civ. Pro., above mentioned, the publication in the newspaper printed at

Albany in which legal notices are required by law to be published is no longer necessary.

<sup>3</sup> The officer has no jurisdiction, if in any one of the ten weeks there was no publication, although there were in all ten publications in ten weeks; and an order for an assignment made in such a case is a nullity. (*Dieckerhoff v. Ahlborn*, 2 Abb. N. C. 372.) See, also, *Billinge v. Pickert* (39 Hun, 504).

\_\_\_\_\_ day of \_\_\_\_\_, 18—, he deposited in the post-office at \_\_\_\_\_, copies of the annexed order to show cause, each inclosed in a post-paid wrapper, and addressed as follows: One of said copies to I. J., at \_\_\_\_\_, his usual place of residence; one of said copies to J. K., at \_\_\_\_\_, his usual place of residence, etc.<sup>1</sup>

A. B.

[Jurat as in form No. 46.]

[Proof of personal service is the same as of personal service of summons in an action in the Supreme Court. (See forms Nos. 73, etc.)]

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No. 1117.

**Affidavit of Publication Pursuant to Order.**

(Code Civ. Pro., § 2166.)

\_\_\_\_\_ COUNTY, ss. :

A. B., of \_\_\_\_\_, being duly sworn, says, that he is, and has been, during all the time hereinafter mentioned, the printer [*or* foreman (*or* principal clerk) of the printer] of the [name of newspaper], [\*] a newspaper published at the \_\_\_\_\_ of \_\_\_\_\_, in the said county of \_\_\_\_\_, [*or* a newspaper published in the city of New York], and that a copy of the annexed order has been published in the said [name of newspaper] once in each of the ten [*or* six] weeks<sup>2</sup> immediately preceding the \_\_\_\_\_ day of \_\_\_\_\_, 18—; that said publication commenced on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and terminated on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

A. B.

[Jurat as in form No. 46.]

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<sup>1</sup>See *People v. Sutherland* (81 N. Y., 1; rev'g S. C., 16 Hun, 192), as to sufficiency of service under former statutes.

<sup>2</sup>See note 2 to form No. 1115.

No. 1118.

**Specification by Creditor of Objections and Demand of Jury.**

(Code Civ. Pro., § 2168.)

[Title of proceeding.]

*To the County Court of* ——— *county* [or to the Supreme Court :<sup>1</sup>]

I, C. D., one of the creditors of the said A. B., do hereby make and specify the following objections to the discharge of said A. B., as an insolvent debtor, to wit:

*First.* That the consents of creditors of said A. B. having debts owing to them in good faith, then due or thereafter to become due, and amounting to not less than two thirds of all the debts, owing by the said A. B. to creditors residing within the United States are not annexed to the petition filed by said A. B., in this proceeding.

*Second.* That the said A. B., in order to obtain his discharge, has procured E. F., one of the persons whose consent is annexed to said petition, to sign said consent as a creditor for the sum of ——— dollars and upwards, not owing to him by the said A. B.

*Third.* That [state any further objections in detail which the creditor may have].

[And I demand a trial by a jury of the questions of fact arising upon the foregoing objections.]

Dated ———, 18—.

C. D.

——— COUNTY, ss.:

C. D., being duly sworn, says, that he resides in the ——— of ———, in the county of ——— and State of [New York], in the United States, and that he is a creditor of A. B., the petitioner herein, in the sum of ——— dollars.<sup>2</sup>

C. D.

[Jurat as in form No. 46.]

<sup>1</sup>By amendment of section 2151, of the Code of Civil Procedure, by chapter 946 of Laws of 1895, taking effect Jan. 1, 1896, the Supreme Court is substituted for the Court of Common Pleas in the city of New York, as the court to which the application in this proceeding is to be made in that city.

<sup>2</sup>This form of affidavit is to be made in a case where the creditor's name

does not appear in the schedule; if the debt is not set forth in the schedule he must also file his affidavit, to the effect specified in subdivisions first and second of section 2160 of Code Civ. Pro. (§ 2169, id.). See form of the latter affidavit in form No. 1112 to (\*).

For form of order settling and stating questions to be tried by a jury (§ 2169, id.), see form No. 353.

No. 1119.

**Order Directing Trial by Jury of Questions of Fact.**

(Code Civ. Pro., § 2168.)

[At, etc., as in form No. 1115.]

[Title of proceeding.]

C. D., one of the creditors of A. B., an insolvent debtor, having filed with the clerk of this court a specification, in writing, of his objections to the discharge of the said A. B. as an insolvent debtor, and having demanded a trial by a jury of the questions of fact arising thereupon :

It is hereby ordered, that the said questions of fact be tried by a jury, and that the said jury be drawn in the same manner as for the trial of civil causes, from the jurors summoned and attending this court.

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 No. 1120.
**Affidavit to Procure Order for Petitioner to Produce His Non-Resident Wife.**

(Code Civ. Pro., § 2171.)

[Title of proceeding.]

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 COUNTY, ss.:

C. D., of ———, being duly sworn, says, that he is one of the creditors of A. B., who is petitioning for a discharge as an insolvent debtor in this proceeding.

That M. B., the wife of said A. B., resides without the State, to wit: at ———, in the State of ———.

C. D.

[Jurat as in form No. 46.]

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 No. 1121.
**Order Requiring the Petitioner to Bring his Wife Before the Court as a Witness.**

(Code Civ. Pro., § 2171.)

[At, etc., as in form No. 1115.]

[Title of proceeding.]

On reading and filing the affidavit of C. D., a creditor of

A. B., who is petitioning for a discharge as an insolvent debtor in this proceeding, dated ———, 18—, by which it appears that M. B., the wife of said A. B., resides without the State, and at ———, in the State of ———, and upon the application of said C. D. :

It is hereby ordered, that said A. B. be and he is hereby required to bring his said wife before this court, at the hearing [*or* trial] of this proceeding, to the end that she may be examined as a witness.

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No. 1122.

**Order Directing the Execution of an Assignment by Insolvent Debtor.**

(Code Civ. Pro., § 2174.)

[At, etc., as in form No. 1115.]

[Title of proceeding.]

A. B., the petitioner herein, having, upon the return of the order to show cause heretofore granted, presented to the court, and filed with the clerk, proof to the satisfaction of the court, that the said order has been duly published and served as thereby required, and the court having thereupon on that day [*or* on the ——— day of ———, 18—, to which the said proceeding was adjourned] heard the allegations and proofs of the parties, and it having appeared by the verdict of the jury herein [*or* it having appeared satisfactorily to the court] that A. B., who is applying herein for his discharge as an insolvent debtor, pursuant to the provisions of article first of title first of chapter seventeenth of the Code of Civil Procedure, is justly and truly indebted to the creditors consenting to such discharge in sums which amount, in the aggregate, to two-thirds of all the debts which the said A. B. owed, at the time of presenting his petition, to creditors residing within the United States; that said A. B. has honestly and fairly given a true account of his property, and that he has, in all things, conformed to the matters required of him by the said article :

Now, on motion of C. F., counsel for the said petitioner, It is hereby ordered and directed, that the said A. B. exe-

cute to M. N., residing at the ——— of ———, in the county of ———, in this State [and O. P., residing, etc.],<sup>1</sup> an assignment, duly executed and acknowledged [*or proved*] and certified in like manner as a deed to be recorded in the county of ———, of all his property, at law or in equity, in possession, reversion or remainder, and all books, vouchers and papers relating thereto,<sup>2</sup> excepting only so much thereof as is exempt by law from levy and sale by virtue of an execution, for the use and benefit of all his creditors.

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No. 1123.

**Assignment by Debtor to Trustees Pursuant to Order.**

(Code Civ. Pro., § 2177.)

*Know all men by these presents*: That I, A. B., an insolvent debtor, did heretofore, and on the ——— day of ———, 18—, present a petition, in writing, and duly verified to the county court of ——— county [*or to the Supreme Court,*<sup>3</sup>] praying for relief pursuant to the provisions of article first of title first of chapter seventeenth of the Code of Civil Procedure, to which petition were annexed the schedule required by said article, duly verified, and also written instruments executed and verified pursuant to said article by my creditors residing in the United States, having debts owing to them, in good faith, then due. or thereafter to become due, which amounted to not less than two-thirds of all the debts owing by me to creditors residing within the United States, consenting to my discharge from my debts, upon my complying with the provisions of said article; whereupon the said court made an order requiring all my creditors to show cause before it, at, etc., on, etc., why an assignment of my property should not be made and I be thereupon discharged from my debts as prescribed in said article, and directing the publication and service of said order as required by said article, which said order was duly published and served as therein required, and no good cause

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<sup>1</sup> See as to trustees, Code Civ. Pro., §§ 2175, 2176.

<sup>2</sup> See note 1, page 1001, to form No. 1118.

<sup>3</sup> See Code Civ. Pro., §§ 2175, 2178.



appearing to the contrary, and it satisfactorily appearing to the said court that I was justly and truly indebted to the consenting creditors, in sums which amount in the aggregate to two-thirds of all the debts, which I owed, at the time of presenting my said petition, to creditors residing within the United States, and that I had honestly and fairly given a true account of my property, and had in all things conformed to the matters required of me by said article, the said court has, by its order duly made and entered on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, directed an assignment to be made by me of all my property to the trustee [*or* trustees] hereinafter mentioned for the benefit of all my creditors pursuant to the provisions of said article.

Now, therefore, know ye, that, in conformity to the said direction, I have granted, released, assigned and set over, and by these presents do grant, release, assign and set over unto M. N., of \_\_\_\_\_ [and to O. P., of \_\_\_\_\_], the said trustee [*or* trustees], all my property, at law or in equity, in possession, reversion or remainder, and all the books, vouchers and papers relating thereto, excepting only so much thereof as is exempt by law from levy and sale by virtue of an execution, to hold the same unto the said M. N. [and O. P.], for the benefit of all my creditors.

In witness whereof, I have hereunto set my hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_, in the year 18—.<sup>1</sup>

A. B. [L. s.]

Sealed and delivered in presence of \_\_\_\_\_

[Add acknowledgment as in form No. 340, or proof as in form No. 538.]

<sup>1</sup> As to recording, see section 2175, Code Civ. Pro.; as to effect of assignment, see section 2177 (*id.*).

The assignment is invalid as a conveyance of the insolvent's estate, at least as against one who is not a *bona fide* purchaser from the assignee for value without notice, where the preliminary proceedings upon which it is based are void because not in confor-

mity with the statute. (*Rockwell v. McGovern*, 69 N. Y., 294; distinguishing *Rockwell v. Brown*, 54 *id.*, 210.)

The mention of a nominal pecuniary consideration does not validate the assignment, where it appears by the assignment itself that the intention was to create a statutory trust, and to convey no other estate or interest than was necessary for that purpose. (*Id.*)

See, also, *Murphy v. Philbrook* (6 N. Y. Supp., 543).

## No. 1124.

**Certificate of Trustee that Assignment has been Made.**

(Code Civ. Pro., § 2178.)

I, M. N., of, etc., do hereby certify, that A. B., an insolvent debtor, has this day granted, conveyed and assigned to me, for the benefit of all his creditors, by an assignment, in writing, duly executed and acknowledged [*or proved*] in like manner as a deed to be recorded in the county of \_\_\_\_\_, all his property at law or in equity in possession, reversion or remainder, and all the books, vouchers and papers relating thereto, excepting only so much thereof as is exempt by law from levy and sale by virtue of an execution, and that he has delivered to me so much thereof as is capable of delivery.

In witness whereof, I have hereunto set my hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

M. N. [L. s.]

Sealed and delivered in presence of \_\_\_\_\_.

[Acknowledgment as in form No. 340, or proof, as in form No. 538.]

## No. 1125.

**Certificate of County Clerk of Recording of Assignment.**

(Code Civ. Pro., § 2178.)

STATE OF NEW YORK, }  
 County of \_\_\_\_\_, } ss.:

I, J. L., county clerk of the county of \_\_\_\_\_, do hereby certify, that an assignment, in writing, by A. B., an insolvent debtor, to M. N. [and O. P.], as trustee [*or trustees*], for the benefit of all his creditors, duly executed and acknowledged [*or proved*] in like manner as a deed to be recorded in the said county of \_\_\_\_\_, of all his property [describing it, as in form No. 1124], dated \_\_\_\_\_, 18—, has been duly recorded in my office on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

In witness whereof, I have hereunto set my hand and seal, on this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

[L. s.]

J. L., *Clerk.*

No. 1126.

**Order Granting Discharge of Insolvent Debtor.**

(Code Civ. Pro., § 2178.)

[At, etc., as in form No. 1115.]

[Title of proceeding.]

Upon the production by A. B., of the \_\_\_\_\_ of \_\_\_\_\_, in the county of \_\_\_\_\_, and State of New York, in the United States, the petitioner, for a discharge from his debts in the above entitled proceeding, pursuant to the provisions of article first of title first of chapter seventeenth of the Code of Civil Procedure, of a certificate of M. N., the trustee appointed by an order of this court, made and entered herein on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, pursuant to the provisions of said article, duly acknowledged [*or proved*], and certified in like manner as a deed to be recorded in the county of \_\_\_\_\_, by which certificate it appears that the said A. B. has executed to him an assignment, dated \_\_\_\_\_, 18—, for the benefit of all his creditors, duly acknowledged [*or proved*], and certified in like manner as a deed to be recorded in the county of \_\_\_\_\_, of all his property, at law or in equity, in possession, reversion or remainder, excepting only so much thereof as is exempt by law from levy and sale, by virtue of an execution, and of all the books, vouchers and papers relating thereto, and that he has delivered so much thereof as is capable of delivery; and upon the production, also, by said A. B., of the certificate of J. L., county clerk of \_\_\_\_\_ county, that the said assignment has been duly recorded in his office on the \_\_\_\_\_ day of \_\_\_\_\_, 18—:

Now, on motion of G. C., attorney for said A. B., and due notice of this motion having been given to [name parties served], and after hearing, etc. [*or no one appearing to oppose*]:

It is hereby ordered, that the said A. B. be and he is hereby [\*] granted a discharge from his debts, pursuant to the provisions of said article first of title first of chapter seventeenth of the Code of Civil Procedure.<sup>1</sup>

<sup>1</sup> It seems necessary that an order court. For discharge, see next form should be entered that the discharge No. 1127. be granted, as the proceeding is in the

**Discharge of Insolvent Debtor.**

(Code Civ. Pro., § 2178.)

[Title of proceeding.]

*To all to whom these presents shall come or may concern :*

Whereas, A. B., an insolvent debtor, residing at the — of —, in the county of — and State of New York, did, on the — day of —, 18—, present a petition in writing and duly verified to the county court of — county [or to the supreme court],<sup>1</sup> praying for his discharge from his debts, pursuant to the provisions of article first of title first of chapter seventeenth of the Code of Civil Procedure, upon his assigning his property for the benefit of all his creditors, and in all other respects complying with the provisions of said article, to which petition was annexed the schedule required by said article, duly verified, and, also, written instruments executed by creditors of said A. B., residing in the United States, having debts owing to them in good faith, then due or thereafter to become due, which amounted to not less than two-thirds of all the debts owing by said A. B. to creditors residing within the United States, and accompanied by the affidavits of such creditors [and in case of creditors residing without the State by (sworn copies of) the original accounts, and the original specialties and other written securities upon which these demands arose or depended],<sup>2</sup> as required by said article, consenting to his discharge from his debts, upon his complying with the provisions of said article ; whereupon the said court made an order requiring all the creditors of the said A. B. to show cause before it, at a time and place therein specified, why an assignment of the property of the said A. B. should not be made and he be thereupon discharged from his debts as prescribed in said article, and directing the publication and service of said order as required by said article, which said order was duly published and served as thereby required ; and,

Whereas, it appeared, upon the hearing of said petition,

<sup>1</sup>See note 1, p. 1001, to form No. 1118. amended by chapter 502 of Laws of 1889, cited in note 3, p. 995, to form

<sup>2</sup>See section 2161, Code Civ. Pro., as No. 1112.

by the verdict of a jury [*or* satisfactorily to the court], that the said A. B. was justly and truly indebted to the consenting creditors in sums which amounted in the aggregate to two-thirds of all the debts, which the said A. B. owed at the time of presenting his said petition to creditors residing within the United States, and that the said A. B. had honestly and fairly given a true account of his property, and had in all things conformed to the matters required of him by said article, the said court, by its order duly made and entered, on the ——— day of ———, 18—, directed an assignment to be made by said A. B., for the benefit of all his creditors, of all his property at law or in equity, in possession, reversion and remainder, excepting only so much thereof as was exempt by law from levy and sale by virtue of an execution to M. N.; and

Whereas, [\*] upon the production, by said A. B., of the certificate of said M. N., duly acknowledged [*or* proved] and certified in like manner as a deed to be recorded in the county of ——— to the effect that the said A. B. had assigned to him on the ——— day of ———, 18—, by an instrument in writing duly acknowledged [*or* proved] and certified in like manner as a deed to be recorded in the county of ———, all his property so directed to be assigned, and all the books, vouchers and papers relating thereto, and that he had delivered so much thereof as was capable of delivery; and also of a certificate of the county clerk of the county of ———, that the said assignment had been duly recorded in his office on the ——— day of ———, 18—, [†] the said court made an order on the ——— day of ———, 18—, granting to the said A. B. a discharge from his debts, pursuant to the provisions of said article.

Now, therefore, pursuant to said last mentioned order, the said A. B. is hereby discharged from his debts, pursuant to the provisions of said article.<sup>1</sup>

Witness, etc. [*teste*].

[L. s.]

J. L., *Clerk*.

F. C., *Attorney for A. B.*

[Office address.<sup>2</sup>]

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<sup>1</sup> See note 1 to last form No. 1126, and as to recording discharge and other papers, and as to their effect as evidence, see Code Civ. Pro. § 2181; as to effect

## No. 1128.

**Affidavit Upon Refusal of Trustee to Give Certificate, etc.**

(Code Civ. Pro., § 2179.)

[Title of proceeding.]

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, an assignment was executed in the above entitled proceeding, pursuant to the order of this court herein, for the benefit of all his creditors, of all the property directed by said order to be assigned by him, and of all the books, papers and vouchers relating thereto, to M. N., the trustee appointed by said order, which assignment was duly acknowledged [*or* proved], and certified in like manner as a deed to be recorded in the county of \_\_\_\_\_, and that he has delivered to said M. N. so much of said property as is capable of delivery, and that deponent has paid [*or* tendered] to said M. N. the expense of making [*or* of acknowledging] the certificate [*or* of recording said assignment in the \_\_\_\_\_ county clerk's office], as is required by section 2178 of the Code of Civil Procedure to be done by said trustee, in order to entitle deponent to his discharge in this proceeding, and has requested the said trustee to execute [*or* to acknowledge] said certificate [*or* to cause said assignment to be so recorded], but that said M. N. has hitherto refused and neglected to execute [*or* acknowledge] said certificate [*or* to cause said assignment to be so recorded].

A. B.

[Jurat as in form No. 46.]

## No. 1129.

**Order to Show Cause upon Affidavit (No. 1128).**

(Code Civ. Pro., § 2179.)

As in form No. 325, making necessary changes, to word

of discharge, see sections 2182, 2183, 2184 (id.); as to release from imprisonment under execution or order of arrest, see section 2185 (id.).

<sup>2</sup> See note 2 to form No. 122.

“why,” and from thence as follows: Why the said petitioner should not be discharged, notwithstanding the neglect [*or* refusal] of the said M. N. to execute the certificate [*or* specify other neglect or refusal] as mentioned and set forth in said affidavit, and why the appointment of said M. N., as such trustee, should not be revoked.<sup>1</sup>

And it is further ordered, that copies of this order and of the said affidavit, hereto annexed, be served upon said M. N. personally on or before the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

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No. 1130.

**Order upon Return of Order to Show Cause (No. 1129).**

(Code Civ. Pro., § 2180.)

[At, etc., as in form No. 1115.]

{Title of proceeding.}

Upon the return of the order to show cause, made herein on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, with proof of due service thereof, and of a copy of the affidavit of A. B., dated \_\_\_\_\_, 18—, therein referred to upon \_\_\_\_\_, and it appearing by the said affidavit that the assignment to M. N., as trustee herein, required to be executed by said A. B., has been duly executed, and that the said A. B. has duly delivered all his property directed to be assigned, and all the books, vouchers and papers relating thereto, which are capable of delivery; and on motion of E. F., attorney for said A. B., after hearing, etc. [*or* no one appearing to oppose]:

It is hereby ordered [\*], that a discharge be and hereby is granted to said A. B. from his debts, pursuant to the provisions of article first of title first of chapter seventeenth of the Code of Civil Procedure.

[*Or* as above to (\*), and from thence as follows: That the appointment of said M. N., as trustee, in these proceedings, by the order of this court, dated \_\_\_\_\_, 18—, be and the same is hereby revoked, and that upon the entry of this order the powers of said M. N., as such trustee, and his interest in the property so assigned to him, shall cease.

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<sup>1</sup>See as to order to show cause generally, note 1 to form No. 162.

(And it is hereby further ordered, that F. P., residing at \_\_\_\_\_, in this State, be and he is hereby appointed the trustee in these proceedings in place and stead of said M. N., such appointment is to have the same effect as if the said M. N. was named as trustee in the said original assignment.<sup>1</sup>)]

No. 1131.

**Affidavit to Move for Order Directing Judgment to be Cancelled, etc.**

(Code Civ. Pro., § 2182.)

[Title of cause.]

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that heretofore, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, an application was made by him to the county court of the county of \_\_\_\_\_ [or to the supreme court]<sup>2</sup> for his discharge from his debts, pursuant to the provisions of article first of title first of chapter seventeenth of the Code of Civil Procedure, and that such proceedings were had upon said application that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a discharge was granted to deponent by said court from his debts, pursuant to said article, of which discharge a copy is hereto annexed marked "A."

And deponent further says, that heretofore, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a judgment was rendered by the \_\_\_\_\_ court in favor of M. G., and against this deponent, for the sum of \_\_\_\_\_ dollars, damages and costs.

That the judgment roll thereon was filed in the \_\_\_\_\_ county clerk's office on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and said judgment was duly docketed in said county clerk's office on that day.

And deponent further says, that [here show, if necessary, that the debt comes within the provisions of section 2182,

<sup>1</sup>This clause in parenthesis is to be inserted in case there are no other trustees. (Code Civ. Pro., § 2180.)

<sup>2</sup>See note 1, p. 1001, to form No. 1118.



and not within the exceptions in sections 2183 and 2184; or the judgment roll may be annexed to show these facts].

And deponent further says, that he has been discharged from the payment of the said judgment by the said discharge.<sup>1</sup>

A. B.

[Jurat as in form No. 46.]

No. 1132.

**Notice of Application for Cancellation and Discharge of Judgment.**

(Code Civ. Pro., § 2182.)

Substantially as in form No. 170 to [\*], and from thence as follows: For an order discharging the said judgment, mentioned in the affidavit of A. B. herewith served, from record, and that the clerk of the county of \_\_\_\_\_ cancel and discharge the docket thereof, as if the proper satisfaction piece of the said judgment was filed and for such other, etc., substantially as in form No. 170 to end thereof.

Dated \_\_\_\_\_, 18—.

[Signature, etc., as in form No. 170.]

To C. D., etc.<sup>2</sup>

No. 1133.

**Order for Cancellation and Discharge of Judgment.**

(Code Civ. Pro., § 2182.)

As in form No. 174 to [\*], and from thence as follows: It is hereby ordered, that the judgment mentioned in said affidavit, rendered in the \_\_\_\_\_ Court in favor of C. D. against said A. B., on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, for \_\_\_\_\_ dollars, the judgment roll whereupon was filed and said judgment docketed in \_\_\_\_\_ county clerk's office on the day aforesaid, be cancelled and discharged of record, and that the clerk of said county of \_\_\_\_\_ cancel

<sup>1</sup> See forms Nos. 490, 491, 492, for proceedings to obtain cancellation, etc., of judgment after discharge in bankruptcy, and see notes to those forms.

<sup>2</sup> This notice, accompanied with copies of the papers upon which the application is made, must be given to the judgment creditor, unless, etc. See section 2182, Code Civ. Pro.; and see,

also, *Wheeler v. Emmeleuth* (121 N. Y., 241; S. C., 41 A. L. J., 500), *Leo v. Joseph* (31 State Rep., 152), *Eberspacher v. Boehm* (33 id., 792; aff'd without op., 126 N. Y., 678), *Thomas v. Snyder* (77 Hun, 365), *Stern v. Meyer* (9 Misc., 102).

See note 1 to form No. 1131.

and discharge the docket thereof, as if the proper satisfaction piece of the said judgment was filed, it having appeared that said A. B. has been discharged from the payment of said judgment, pursuant to the provisions of article first of title first of chapter seventeenth of the Code of Civil Procedure.<sup>1</sup>

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ARTICLE SECOND.

FORMS RELATING TO EXEMPTION FROM ARREST OR DISCHARGE FROM IMPRISONMENT OF AN INSOLVENT DEBTOR.

(Code Civ. Pro., Ch. 17, Tit. 1, Art. 2.)

- No. 1134. Petition for exemption from arrest and discharge from imprisonment of insolvent debtor.
1135. Affidavit to be annexed to schedule.
1136. Order to show cause upon petition, No. 1134.
1137. Order directing assignment by debtor.
1138. Assignment by debtor pursuant to order.
1139. Order for discharge of debtor.
1140. Exemption and discharge of debtor.

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No. 1134.

**Petition for Exemption from Arrest and Discharge from Imprisonment of Insolvent Debtor.**

(Code Civ. Pro., § 2189.)

*To the County Court of the county of* ———— *[or to the Supreme Court]:*<sup>2</sup>

The petition of A. B. respectfully shows, that he resides in the \_\_\_\_\_ of \_\_\_\_\_, in the county of \_\_\_\_\_, and State of New York.

[That he is imprisoned in the \_\_\_\_\_, at \_\_\_\_\_, in the county of \_\_\_\_\_.]

That the cause of his imprisonment is as follows, to wit [state same].

That he is unable to pay his debts in full.

That he is willing to assign his property for the benefit of all his creditors, and, in all other respects, to comply with the provisions of article second of title first of chapter sev-

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<sup>1</sup> See note 1 to form No. 1131, p. 1013. 1895, taking effect Jan. 1, 1896, as to

<sup>2</sup> See section 2188 of Code Civ. Pro., courts to which application is to be as amended by ch. 946 of Laws of made.

enteenth of the Code of Civil Procedure, for the purpose of being exempted from arrest and imprisonment, as prescribed therein.

Wherefore your petitioner prays that, upon his so doing, he may thereafter be exempted from arrest by reason of a debt arising upon a contract made previously hereto [and that he may be discharged from his said imprisonment].

Dated ———, 18—.

A. B.

———— COUNTY, ss.:

A. B., of ———, being duly sworn, says, that he is the petitioner named in and who subscribed the foregoing petition; that the said petition is, in all respects, true in matter of fact.

A. B.

[Jurat as in form No. 46.<sup>1</sup>]

[Annex schedule as in form No. 1113; see section 2190, Code Civil Procedure; for affidavit to schedule, see section 2191, id., and next form No. 1135.]

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No. 1135.

**Affidavit to be Annexed to Schedule.**

(Code Civ. Pro., § 2191.)

I, A. B., do swear [*or affirm*], that the matters of fact, stated in the schedule hereto annexed, are, in all respects, just and true.

That I have not, at any time, or in any manner whatsoever, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property, in order to defraud any of my creditors; and that I have not paid, secured to be paid, or in any way compounded with, any of my creditors, with a view that they,

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<sup>1</sup> The affidavit must be taken on the day of the presentation of the petition. (Code Civ. Pro., § 2189.)

See *Develin v. Cooper* (84 N. Y., 411; aff'g S. C., 20 Hun, 188), *In re Smal* (53 How. Pr., 432), *Matter of Roberts* (10 Hun, 253; rev'd S. C., 70

N. Y., 5), but not on point discussed below. *Goodwin v. Griffis* (88 N. Y., 629), *Schaffer v. Riseley* (114 N. Y., 23, rev'g S. C., 44 Hun 6), *People ex rel. Eldridge v. Fancher* (1 Hun, 27), *Dieckerhoff v. Ahlborn* (2 Abb. N. C., 372), *Mills v. Hildreth* (5 Hun, 364).

or any of them, should abstain from opposing my discharge.<sup>1</sup>

A. B.

[Jurat as in form No. 46, or form No. 151.]

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No. 1136.

**Order to Show Cause upon Petition (No. 1134).**

(Code Civ. Pro., § 2192.)

[At, etc., as in form No. 1115.]

[Title of proceeding.]

The petition of A. B., of \_\_\_\_\_, dated on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and the papers annexed thereto having been presented to this court and filed with the clerk, praying that upon his assigning his property for the benefit of all his creditors, and in all other respects complying with the provisions of article second of title first of chapter seventeenth of the Code of Civil Procedure, he may thereafter be exempted from arrest by reason of a debt arising upon a contract previously made [and that he may be discharged from his imprisonment]:

It is hereby ordered, on motion of C. F., counsel for the said petitioner, that all the creditors of said A. B. show cause at, etc., on, etc., why the prayer of the petitioner should not be granted.

[Add directions for publication and service of the order same as in form No. 1115.]

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No. 1137.

**Order Directing Assignment by Debtor.**

(Code Civ. Pro., § 2194.)

[At, etc., as in form No. 1115.]

[Title of proceeding.]

A. B., the petitioner herein, having, upon the return of

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<sup>1</sup> As to the officer before whom this affidavit is to be made, see Code Civ. Pro., § 2191, as amended by chapter 946 of Laws of 1895, taking effect Jan. 1, 1896.

<sup>2</sup> For proof of service and publication of the order, see forms Nos. 1116, 1117; for specification of objections by

the order to show cause heretofore granted, presented to this court, and filed with the clerk, proof to the satisfaction of the court that the said order has been duly published and served as thereby required, and the court having thereupon, on that day [*or* on the ——— day of ———, 18—, to which the said proceeding was adjourned], heard the allegations and proofs of the parties appearing, and it having appeared satisfactorily to the court by said proof [*or* by the verdict of the jury rendered herein], that the said petitioner is unable to pay his debts; that the schedule annexed to his petition is true; that he has not been guilty of any fraud or concealment in violation of the provisions of article second of title first of chapter seventeenth of the Code of Civil Procedure, and that he has conformed in all things to the matters required of him by said article:

It is hereby ordered, on motion of C. F., counsel for the said petitioner, after hearing, etc. [*or* no one appearing to oppose], that [insert same directions for execution of assignment as in form No. 1122].<sup>1</sup>

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No. 1138.

**Assignment by Debtor Pursuant to Order.**

(Code Civ. Pro., § 2194.)

*Know all men by these presents:* That, etc. [proceed as in form No. 1123, making the necessary changes in the recitals].

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No. 1139.

**Order for Discharge of Debtor.**

(Code Civ. Pro., § 2195.)

Proceed as in form No. 1126 to [\*], making necessary changes in the recitals, and from thence continue as follows: [†] Forever hereafter exempted from arrest or im-

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opposing creditor and demand of jury trial, see form No. 1118; proof by creditor under section 2169, see form No. 1112; for proceedings under sec-

tions 2171, 2172, see forms Nos. 1120, 1121.

<sup>1</sup> For certificate of trustee and of county clerk, see forms Nos. 1124, 1125.

prisonment by reason of any debt due at the time of the making the said assignment, or contracted before that time though payable afterwards; or by reason of any liability incurred by him by making or indorsing a promissory note, or by accepting, drawing or indorsing a bill of exchange before the execution of the said assignment; or in consequence of the payment, by any party to such a note or bill, of the whole or any part of the money secured thereby, whether the payment is made before or after the execution of the assignment with the exceptions specified in section 2218 of the Code of Civil Procedure.<sup>1</sup>

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No. 1140.

**Exemption and Discharge of Debtor.**

(Code Civ. Pro., § 2195.)

[Title of proceeding.]

*To all to whom these presents shall come or may concern, greeting:*

Whereas, A. B., of —, in the county of —, heretofore, and on the — day of —, 18—, presented to the county court of — county [or to the supreme court,]<sup>2</sup> and filed with the clerk of said court his petition, in writing, in due form, and duly verified on that day, praying that upon his assigning his property for the benefit of all his creditors, and in all other respects complying with the provisions of article second of title first of chapter seventeenth of the Code of Civil Procedure, he might thereafter be exempted from arrest by reason of a debt arising upon a contract previously made [and discharged from his imprisonment], as prescribed in said article, to which petition was annexed the schedule required by law, duly verified on that day; and,

Whereas, the said court thereupon made an order, requiring all the creditors of said petitioner to show cause before it, at a time and place therein specified, why the prayer of

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<sup>1</sup>See note 1 to form No. 1126.

<sup>2</sup>See note 2 to form No. 1134.

the said petitioner should not be granted, and directing that the said order be published and served in the manner prescribed in section 2165 of the Code of Civil Procedure, for the publication and service of an order made as therein prescribed ; and,

Whereas, on the day specified in said order, and before any other proceedings were taken in said matter, the said petitioner presented to said court, and filed with the clerk, proof to the satisfaction of the court that the said order had been duly published and served as required thereby, and the court having thereupon heard the allegations and proofs of the parties appearing ; and it having appeared by the verdict of the jury rendered therein [*or it having appeared satisfactorily to the court*], that the said petitioner was unable to pay his debts, that the schedule annexed to his said petition was true, that he had not been guilty of any fraud or concealment in violation of the provisions of said article, and that he had, in all things, conformed to the matters required of him by said article ; an order was made by said court directing the execution of an assignment of all his property, at law or in equity, in possession, reversion or remainder, excepting only so much thereof as was exempt by law from levy and sale by virtue of an execution to M. N., the trustee therein designated ; and,

Whereas [*insert as in form No. 1127 from (\*) to (+), and continue as follows*], the said court, made an order on the ——— day of ———, 18—, granting to the petitioner a discharge, as is hereinafter provided :

Now, therefore, in pursuance of the said last mentioned order, the said A. B. is [*conclude as in form No. 1139 from (+) to end thereof*].

Witness, etc. [*teste as in form No. 242*].

[*L. s.*]

E. F., *Attorney for A. B.*

[*Office address.*<sup>1</sup>]

J. L., *Clerk.*

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<sup>1</sup> See note 2 to form No. 122.

## ARTICLE THIRD.

## FORMS RELATING TO DISCHARGE OF AN IMPRISONED JUDGMENT DEBTOR FROM IMPRISONMENT.

(Code Civ. Pro., Ch. 17, Tit. 1, Art. 1)

- No. 1141. Petition for discharge of person imprisoned by virtue of an execution.
1142. Notice to creditors of presentation of petition, etc.
1143. Order upon presentation of petition.
1144. Order directing assignment by debtor imprisoned under execution.
1145. Assignment by debtor imprisoned under execution.
1146. Order discharging debtor imprisoned under execution.
1147. Notice by creditor to debtor to apply for discharge.

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 No. 1141.
**Petition for Discharge of Person Imprisoned by Virtue of an Execution.**

(Code Civ. Pro., § 2203.)

*To the [name of court].<sup>1</sup>*

The petition of A. B. respectfully shows, that he is imprisoned in the [name place of confinement] at \_\_\_\_\_, in the county of \_\_\_\_\_.

That he is imprisoned by virtue of an execution [*or of executions*], of which a copy is [*or copies are*] hereto annexed marked A, etc. [*or state the substance of the execution or executions*] [and that your petitioner has been imprisoned by virtue of said execution (*or executions*) for more than three months].<sup>2</sup>

That the sum of \_\_\_\_\_ dollars is now due and unpaid upon said execution [*or executions*].

Your petitioner further shows, that he has annexed hereto, and presents herewith, a schedule marked B, containing a just and true account of all his property, and of all charges affecting the same, as the said property and charges existed at the time when he was first imprisoned and at the time when this petition is prepared, together with a just and true account of all deeds, securities, books, vouchers and papers, relating to the said property and to the charges thereupon.

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<sup>1</sup> See section 2201, Code Civ. Pro., courts to which application should be as amended by ch. 946 of Laws of made.

1895, taking effect Jan. 1, 1896, as to <sup>2</sup> See Code Civ. Pro., § 2202.



And your petitioner prays that an order may be made by this court, directing your petitioner to be brought before it on a day designated therein, and that your petitioner may be discharged from his said imprisonment upon his complying with the provisions of article third of title first of chapter seventeenth of the Code of Civil Procedure, and may have such other and further relief as he may be entitled to under the provisions of said article.

A. B.

Dated \_\_\_\_\_, 18—.

I, A. B., do swear [*or affirm*], that the matters of fact stated in the petition and schedule hereto annexed, are, in all respects, just and true; and that I have not, at any time, or in any manner whatsoever, disposed of or made over any part of my property, not exempt by express provision of law from levy and sale by virtue of an execution, for the future benefit of myself or my family, or disposed of or made over any part of my property with intent to injure or defraud any of my creditors.<sup>1</sup>

A. B.

[Jurat as in forms Nos. 46 or 151.]

[Schedule A, referred to in the foregoing petition.]

[Schedule B, referred to in the foregoing petition.]

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 No. 1142.

### Notice to Creditors of Presentation of Petition, etc.

(Code Civ. Pro., § 2205.)

[Title of proceeding.]

SIR—Take notice, that the petition and schedules, copies of which are herewith served upon you, will be presented to the \_\_\_\_\_ Court, at a [Special] Term thereof, to be held at the \_\_\_\_\_, in the \_\_\_\_\_ of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at the opening of the court [*or at* \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon], or as soon

<sup>1</sup>This oath must be subscribed and taken on the day of the presentation of the petition. (Code of Civ. Pro., § 2204.)

See Goodwin v. Griffis (88 N. Y., 629), In re Chappell (23 Hun, 179), In re Smal (53 How. Pr., 432), In re Rob-

erts (10 Hun, 253; S. C., 70 N. Y., 5), Borthwick v. Howe (27 Hun, 505), Shaffer v. Riseley (114 N. Y., 23, reversing same case, 44 Hun, 6), In re Boyce (19 Civ. Pro. R., 23), Matter of Paton (7 Misc., 467).

thereafter as counsel can be heard, and that application will be then and there made to said court that the prayer of said petition be granted.

Dated \_\_\_\_\_, 18—.

F. C. [*Attorney for*], *Petitioner.*

[*Office address.*']

To W. G.\*

\_\_\_\_\_  
No. 1143.

### Order upon Presentation of Petition.

(Code Civ. Pro., § 2208.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

A. B. having presented his petition to this court, dated \_\_\_\_\_, 18—, with the schedule and affidavit, as required by law, praying for an order directing the said A. B. to be brought before this court on a day designated therein, and that the said A. B. be discharged from his imprisonment by virtue of an execution issued out of the \_\_\_\_\_ Court in an action wherein C. F. is plaintiff and the said A. B. is defendant, [\*] and due proof having been made to the court of the service upon the said C. F. of a copy of said petition and of said schedule and affidavit, together with a written notice of the time when, and place where, they would be presented.

Now, on motion of M. J., counsel for the said petitioner, after hearing, etc., and on reading [name opposing papers (*or* no one appearing to oppose)]:

It is hereby ordered, that the sheriff of the county of \_\_\_\_\_ bring the said A. B. before this court at, etc., on, etc.

\_\_\_\_\_  
No. 1144.

### Order Directing Assignment by Debtor Imprisoned under Execution.

(Code Civ. Pro., § 2208.)

As in form No. 1143 to [\*], and from thence as follows:

<sup>1</sup> See note 2 to form No. 122.

service, see sections 2205, 2206, 2207,

<sup>2</sup> As to the persons upon whom the notice is to be served, and manner of Code Civ. Pro.

And an order directing the sheriff of the county of \_\_\_\_\_ to bring said A. B. before this court on a day designated therein having been duly made, and the said A. B. brought before the court in pursuance thereof; and the court having heard and determined the allegations and proofs of the parties, and being satisfied that the said petition and schedule are correct, and that the petitioner's proceedings are just and fair. [†]

Now, on motion of M. J., of counsel for the said petitioner, after hearing, etc., and on reading [name opposing papers (*or* no one appearing to oppose)]:

It is hereby ordered and directed, that the said A. B. execute to I. K., of \_\_\_\_\_ [and K. L., of \_\_\_\_\_], who is [*or* are] hereby appointed trustee [*or* trustees] to receive the same, an assignment of all his property, not expressly exempt by law from levy and sale by virtue of an execution; or of so much thereof as is sufficient to satisfy the execution [*or* executions] by virtue of which he is imprisoned.<sup>1</sup>

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No. 1145.

### Assignment by Debtor Imprisoned under Execution.

(Code Civ. Pro., §§ 2208, 2211.)

Whereas, I, A. B., did present to the \_\_\_\_\_ Court a petition, duly verified on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, with the schedule and affidavit required by law, and praying for an order directing me to be brought before the said court on a day designated therein, and that I, said A. B., be discharged from imprisonment by virtue of an execution issued out of

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<sup>1</sup> See *Borthwick v. Howe* (27 Hun, 505), *In re Fowler* (8 Daly, 548), *Matter of Fitzgerald* (5 Abb. N. C., 357), *In re Benson* (60 How. Pr., 314), *Sparks v. Andrews* (1 City Ct., 76), *Matter of Pearce* (29 Hun, 270), *Barck v. Scun* (N. Y. Daily Reg., May 31, 1883), *Haviland v. Kane* (1 Abb. [N. S.], 409), *Moran v. Secord* ([U. S. Circt. Ct., S. D.] 15 Reporter, 355), *Matter of Rosenberg* (10 Abb. [N. S.], 450), *Kappel v. Yotz* (N. Y. Daily Reg., Dec. 26, 1883), *Matter of Benson* (10 Daly, 166), *Price v. Orcutt* (N. Y. Daily Reg., May 26, 1884), *Zung v. Van Minden* (N. Y. Daily Reg., Dec. 6, 1883), *Coffin v. Gourlay* (20 Hun, 308), *Suydam v. Belknap* (20 Hun, 87), *Develin v. Cooper* (20 Hun, 188; aff'd, 84 N. Y., 410), *Moore v. McMahon* (20 Hun, 44), *In re Fitzgerald* (8 Daly, 188), and cases cited in note 1, page 1021, to form No. 1141, among other cases as to these proceedings.

the \_\_\_\_\_ Court, in an action wherein C. F. is plaintiff and I, the said A. B., am defendant, and an order so directing me to be brought before the said court having been duly made, and I having been brought before the said court in pursuance thereof, and the court having heard the allegations and proofs of the parties and being satisfied that the said petition and schedule was correct, and that my proceedings, as said petitioner, were just and fair, and having ordered me to execute to J. K., of \_\_\_\_\_ [and K. L., of \_\_\_\_\_], thereby appointed trustee [*or* trustees], an assignment of all my property not expressly exempt by law from levy and sale by virtue of an execution; or of so much thereof as is sufficient to satisfy the said execution [*or* executions], by virtue of which I am imprisoned.

Now, therefore, in consideration thereof, and in conformity to the order of said court, I have assigned and transferred, and hereby do assign and transfer, unto the said J. K. [and K. L.], as such trustee [*or* trustees], all my property, not expressly exempt by law from levy and sale by virtue of an execution [*or* describe particular property assigned].

In witness whereof, I have hereunto set my hand and seal this \_\_\_\_\_ day of \_\_\_\_\_, 18—.<sup>1</sup>

A. B. [L. s.]

Sealed and delivered in presence of \_\_\_\_\_.

[Acknowledgment as in form No. 340, or proof as in form No. 538.]

No. 1146.

### Order Discharging Debtor Imprisoned under Execution.

(Code Civ. Pro., § 2212.)

As in form No. 1144 to [†], and from thence as follows: And an order having been thereupon made by said court, directing the said A. B. to execute to J. K., of \_\_\_\_\_ [and K. L., of \_\_\_\_\_], thereby appointed trustee [*or* trustees], an assignment of all his property not expressly exempt by law from levy and sale by virtue of an execution,

<sup>1</sup> As to powers and duties of the \_\_\_\_\_ as to effect of assignment, see section trustees, see Code Civ. Pro., § 2215; 2211 (*id.*).

or of so much thereof as was sufficient to satisfy the execution [*or* executions] by virtue of which he was imprisoned, and said assignment having been duly executed, and acknowledged [*or* proved] and certified in like manner as a deed to be recorded in the county of ———, and having been recorded in the clerk's office of said county [and also in the clerk's office of the county of ———], and the said petitioner having produced to the court satisfactory evidence that the petitioner has actually delivered to the said trustee [*or* trustees] all the property so directed to be assigned which was capable of delivery [*or* the said petitioner having given security, approved by the court, for the future delivery of the property so directed, etc. (as above)]:

Now, therefore, on motion of C. F., of counsel for said petitioner:

It is hereby ordered, that the said A. B. be and he hereby is discharged from imprisonment by virtue of the said executions.<sup>2</sup>

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No. 1147.

**Notice by Creditor to Debtor to Apply for Discharge.**

(Code Civ. Pro., § 2216.)

SIR—You are hereby notified, pursuant to the provisions of section 2216 of the Code of Civil Procedure, that you are required to apply for your discharge, according to the provisions of article third of title first of chapter seventeenth of said Code.<sup>1</sup>

Dated ———, 18—.

Yours, etc.,

M. N.

[Office address or place of business.']

To A. B.

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<sup>1</sup> As to effect of discharge, see sections 2213, 2214, 2218, Code Civ. Pro.      <sup>2</sup> See section 2217, Code Civ. Pro., as to effect of this notice.

<sup>3</sup> See note 2 to form No. 122.

## ARTICLE FOURTH.

FORMS RELATING TO CARE OF THE PROPERTY OF A PERSON  
CONFINED FOR CRIME

(Code Civ. Pro., Ch. 17, Tit. 1, Art. 4.)

- No. 1148. Petition for appointment of trustees to take charge of property of person imprisoned for crime.  
 1149. Order upon presentation of petition.  
 1150. Order upon the return of order to show cause, No. 1149.

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 No. 1148.

**Petition for Appointment of Trustee to take Charge of  
 Property of Person Imprisoned for Crime.**

(Code Civ. Pro., § 2222.)

*To the County Court of the county of \_\_\_\_\_, [or the Supreme Court in the \_\_\_\_\_ judicial district]:<sup>1</sup>*

The petition of J. K. respectfully shows, that A. B. is imprisoned in the State prison at \_\_\_\_\_, for a term less than life, to wit: for \_\_\_\_\_ years from the \_\_\_\_\_ day of \_\_\_\_\_, 18— [or in the penitentiary (or county jail) of the county of \_\_\_\_\_, at \_\_\_\_\_ for a longer term than one year, to wit: for the term of \_\_\_\_\_, from, etc.], under the sentence of the \_\_\_\_\_ Court, for the offense of \_\_\_\_\_, as will more fully appear from the copy of the sentence of conviction of said A. B., annexed to and accompanying this petition, duly certified by the clerk of \_\_\_\_\_ county [or name other clerk of the court], under the seal of said \_\_\_\_\_ court.<sup>2</sup>

That said A. B. resided at \_\_\_\_\_, in the county of \_\_\_\_\_, in the State of [New York], at the time of his said imprisonment.

That your petitioner resides at \_\_\_\_\_, in the State of [New York], and is a creditor of said A. B. to the amount of \_\_\_\_\_ dollars [or is the husband, or wife, or child of said A. B., or is one of the next of kin (or one of the heirs presumptive) of said A. B. (showing in what way), or a

<sup>1</sup>As to courts to which such application must be made, see section 2219 of Code Civ. Pro., as amended by chapter 946 of Laws of 1895, taking effect January 1, 1896.

<sup>2</sup>An affidavit of the applicant is to be annexed to this copy of the sentence, stating that the person so convicted is actually imprisoned thereunder. (Code Civ. Pro., § 2224.)

relative of said A. B. whom he is bound to support, to wit, a \_\_\_\_\_].

That the name and residence of each person who is entitled to make this application, as prescribed in section 2220 of the Code of Civil Procedure, is as follows, to wit [state same].

That the following is a brief description of the property, real and personal, of the said prisoner, and of the value thereof, to wit [describe same].

[That annexed hereto is (*or are*) (sworn copies of) the original account (*or accounts*), and the original (name written specialties or securities, if any), upon which the demand of your petitioner arose (*or depends*).<sup>1</sup>]

[That a certain mortgage (*or judgment, or other security*) for the payment of a certain sum of money, to wit, \_\_\_\_\_ dollars (describing it), which affects (*or is a lien upon*) certain real (*or personal*) property belonging to said A. B. (*or transferred by said A. B. since said lien was created*), is owned by (*or held in trust for*) your petitioner, which said mortgage (*etc.*) your petitioner hereby relinquishes, so far as it affects said property, to the trustee to be appointed pursuant to this petition, for the benefit of all the creditors of said A. B., pursuant to section 2221 of the Code of Civil Procedure.<sup>2</sup>]

And your petitioner prays that this court will appoint one or more trustees to take charge of the property of said A. B., as prescribed in article fourth of title first of chapter seventeenth of the Code of Civil Procedure.<sup>3</sup>

J. K.

Dated \_\_\_\_\_, 18—.

\_\_\_\_\_ COUNTY, ss.:

J. K., being duly sworn, says, that he is the petitioner named in the foregoing petition by him subscribed, and

<sup>1</sup> This clause in brackets is to be inserted and the papers annexed if the applicant is a creditor residing within the United States, and not a resident of the State. (Code Civ. Pro., §§ 2161, 2222.) And see note 3 to form No. 1112.

<sup>2</sup> See section 2221, Code Civ. Pro., as to this relinquishment.

<sup>3</sup> If any of the facts required to be set forth in the petition cannot be ascertained by the petitioner, after the exercise of due diligence, that fact must be stated. (Code Civ. Pro., § 2222.) For proceedings in that case, see *id.* section.

that the matters of fact therein stated are true, to the best of said petitioner's knowledge and belief.

J. K.

[Jurat as in form No. 46.]

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No. 1149.

**Order upon Presentation of Petition.**

(Code Civ. Pro., § 2224.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

On reading and filing the petition of J. K., dated ———, 18—, praying for the appointment of one or more trustees to take charge of the property of A. B., who is imprisoned in the [name prison, etc.], at ———, for the term of ——— years for the offense of ———, pursuant to the provisions of article fourth of title first of chapter seventeenth of the Code of Civil Procedure, to which petition are annexed a copy of the sentence of conviction of said A. B., duly certified and verified as required by law, and the other papers required by said article, and on motion of M. G., of counsel for said petitioner:

It is hereby ordered, [\*] that all the creditors of said prisoner, and all persons interested in his estate, show cause at, etc., on, etc., why such an appointment should not be made [add directions for manner of service of the order].

[Or as above to (\*), and from thence as follows: That M. H. (and G. L.) be and he is (or they are) hereby appointed trustee (or trustees) of the property of the said A. B., pursuant to the provisions of said article.¹]

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No. 1150.

**Order upon the Return of Order to Show Cause (No. 1149).**

(Code Civ. Pro., § 2225.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

Upon the return of the order to show cause, granted

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¹ As to effect of order appointing trustee, see Code Civ. Pro., § 2226.



herein by this court, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, pursuant to the provisions of article fourth of title first of chapter seventeenth of the Code of Civil Procedure, with proof of due service thereof as required thereby, and the court having heard the allegations and proofs of the creditors and other persons interested in the estate of A. B., who have appeared, and it appearing that the said A. B. is indebted to [the petitioner and to other persons]: [\*]

It is hereby ordered, that M. H. [and G. L.] be and he is [or they are] hereby appointed trustee [or trustees] of the property of said A. B., pursuant to the provisions of article fourth of title first of chapter seventeenth of the Code of Civil Procedure.

[Or as above to (\*), and from thence as follows: And the persons interested in the property of said A. B. having paid such indebtedness (or given security for the payment of such indebtedness as the court has prescribed): It is hereby ordered, on motion of, etc., that the prayer of the petitioner be denied.¹]

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## TITLE II.

### FORMS RELATING TO SUMMARY PROCEEDINGS TO RECOVER THE POSSESSION OF REAL PROPERTY.

(Code Civ. Pro., Ch. 17, Tit. 2.)

- No. 1151. Petition by landlord, etc., under subdivision 1 of section 2231 of Code Civil Procedure.
- 1152. Same petition, under subdivision 2 of section 2231 of Code Civil Procedure.
- 1153. Same petition, under subdivision 3 of section 2231 of Code Civil Procedure.
- 1154. Same petition, under subdivision 4 of section 2231 of Code Civil Procedure.
- 1155. Same petition, under subdivision 5 of section 2231 of Code Civil Procedure.
- 1156. Notice to pay rent or to surrender possession of premises.
- 1157. Notice to pay taxes or assessments, or to surrender possession of premises.
- 1158. Petition by person entitled to possession of real property, under subdivision 1 of section 2232 of Code Civil Procedure.

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¹ Or the prayer of the petition may be granted as justice requires. (Code Civ. Pro., § 2225. tee, see (id.) § 2226; duties of trustee, (id.) §§ 2228, 2229; application of article 4, tit. 1, ch. 17, Code Civ. Pro., section 2230 (id.).

As to effect of order appointing trus-

- No. 1159. Same petition, under subdivision 2 of section 2232 of Code Civil Procedure.
1160. Same petition, under subdivision 3 of section 2232 of Code Civil Procedure.
1161. Same petition, under subdivision 4 of section 2232 of Code Civil Procedure.
1162. Petition for removal of a person for forcible entry or detainer.
1163. Notice to tenant at will or at sufferance to remove.
1164. Notice in cases specified in section 2232 of Code Civil Procedure.
1165. Notice to landlord or owner of premises occupied as a bawdy-house, etc.
1166. Petition by one in the neighborhood of bawdy-house, etc., for removal of occupant.
1167. Precept upon presentation of petition.
1168. Affidavit of service of precept.
1169. Answer to petition upon return of the precept.
1170. Final order upon return of the precept or upon trial.
1171. Warrant to dispossess tenant, etc.
1172. Return of officer to warrant.
1173. Undertaking to effect stay, under subdivision 1 of section 2254 of Code Civil Procedure.
1174. Same, under subdivision 2 of section 2254 of Code Civil Procedure.
1175. Same, under subdivision 3 of section 2254 of Code Civil Procedure.
1176. Affidavit to be made, under subdivision 3 of section 2254 of Code Civil Procedure, to obtain stay.
1177. Notice by creditor of lessee of his intention to redeem.
1178. Petition of person redeeming premises.
1179. Order to show cause upon petition, No. 1178.
1180. Final order upon the return of order to show cause, No. 1179.
1181. Notice of appeal from final order, under title 2 of chapter 17 of Code Civil Procedure.
1182. Undertaking on appeal from final order, under section 2262 of Code Civil Procedure.
1183. Order of reversal of final order.
1184. Complaint in action for recovery of damages sustained by dispossession, where final order is reversed on appeal.

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No. 1151.

**Petition by Landlord, etc., under Subdivision 1 of Section 2231 of Code of Civil Procedure.**

(Code Civ. Pro., § 2235.)

*To the [naming officer or court]:'*

The petition of T. W. [or of C. F.]<sup>1</sup> respectfully shows, [\*\*] that F. G. is a tenant [or lessee] at will [or at sufferance, or

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<sup>1</sup> See section 2234 of Code Civ. Pro., as to where and to whom the application is to be made.  
as amended by chap. 946 of Laws of 1895, taking effect January 1, 1896,

<sup>2</sup> Insert here name of agent, when application is made by agent.

for part of a year, *or* for one year, *or* for \_\_\_\_\_ years] of all and singular [here describe property], under a lease thereof to him, from your petitioner [*or* from T. W.], made [and executed], on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, to continue for the term of \_\_\_\_\_ from the \_\_\_\_\_ day of \_\_\_\_\_, 18— [*or* during the will and pleasure of your petitioner (*or* of said T. W.)], at the \_\_\_\_\_ rent of \_\_\_\_\_ dollars, payable \_\_\_\_\_ [†]¹ [and that G. H. is the assignee of the interest of said F. G. in said lease (*or* that I. J. is the under tenant of said F. G. of said demised premises, *or* of a portion of said demised premises, describing it)] [†],² and that said F. G. [*or* that said G. H.]³ holds over and continues in the possession of said demised premises [*or* of a portion of said demised premises, to wit, describing it] [†] after the expiration of his term, without the permission of your petitioner [*or* of said T. W.], who is his landlord, and who owns the said property in fee [*or* state other interest]. [\*]

[That your petitioner is the agent of said T. W., and is authorized as such to institute proceedings for the removal of said F. G. from the said premises.]⁴

[That your petitioner (*or* the said T. W.) has given one month's notice, in writing, to said F. G. (*or* to said G. H.),⁵ as required by law, in order to terminate the said tenancy, requiring him to remove from said premises, which said notice was served on said F. G. on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.⁶]

¹ If the lease came to the petitioner or his principal by assignment, state who the original parties were, and that it was so assigned.

² If there are two or more persons against whom the special proceeding is instituted, and some are under-tenants or assigns, the petition must specify who are principals or tenants and who are under-tenants or assigns. (Code Civ. Pro., § 2235.)

See, also, Croft v. King (8 Daly, 265; 1 City Ct. R., 157), Ash v. Purnell (32 State Rep., 306; 26 Abb. N. C., 92).

³ This clause in brackets is intended for the case of an assignee.

⁴ See Cunningham v. Goelet (4 Denio,

71), People *ex rel.* Wyman v. Johnson, (1 T. & C., 578), People *ex rel.* Tuttle v. Walton (2 T. & C., 534).

⁵ This is required to be stated by section 2236 of Code Civ. Pro., in the case of a tenancy at will or at sufferance where the tenant is proceeded against for holding over after the expiration of his term. See for notice required, 1 R. S., 745, §§ 7, 8 (7th ed., 2201).

That the notice is to be given to the immediate tenant or his assignee, see Taylor on Land. and Tenant, § 481; citing Doe v. Williams (6 B. & P., 41); see, also, Birdsall v. Phillips (17 Wend., 464, 473).

Wherefore your petitioner prays for a final order to remove said F. G. [and G. H., etc.], from said real property, according to the provisions of title second of chapter seventeenth of the Code of Civil Procedure.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

T. W. [or C. F.]

[Verification as in form No. 52]

No. 1152.

**Same Petition, under Subdivision 2 of Section 2231 of Code of Civil Procedure.**

(Code Civ. Pro., § 2235.)

As in form No. 1151 to [‡], and from thence as follows: Without the permission of your petitioner [or of said T. W.], who is his landlord, after a default in the payment of rent, pursuant to the agreement under which the said demised premises are held, to wit: of the rent falling due, by the terms of said agreement, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and that a demand of said rent has been made [or that three days previous notice in writing requiring, in the alternative, the payment of such rent or the possession of the said premises has been served] on behalf of the said petitioner [or of said T. W.] on the said F. G.

<sup>1</sup>By slight changes, this form may be made to meet the case of a legal representative either of the lessor or lessee. See, also, amendment to subd. 1 of section 2231 of Code Civ. Pro., by chap. 335 of Laws of 1894, taking effect September 1, 1894. And see *Barry v. Smith* (69 Hun, 88, aff'g S. C., 1 Misc., 240).

The statute applies to proceedings against corporate bodies. (*Brown v. The Mayor*, 66 N. Y., 385; aff'g S. C., 5 Daly, 481.)

In order to authorize the proceeding against a person as a tenant of the petitioner, the conventional relation of landlord and tenant must exist. (*People v. Howlett*, 76 N. Y., 574; aff'g S. C., 13 Hun, 138.)

See, also, *People v. Shorb* (14 Hun, 112), *People v. Angel* (61 How. Pr., 157), *Bostwick v. Frankfield* (11 Hun, 475; aff'd 74 N. Y., 207), *Donelly v.*

*O'Day* (1 Misc., 165), *Nemetty v. Taylor* (100 N. Y., 562), *Zink v. Bohn* (3 N. Y. Supp., 4), *Matter of Hosley* (56 Hun, 240), *Hasbrouck v. Stokes* (13 N. Y. Supp., 333), *McDonald v. McLaury* (*infra*), *Manhattan Life Ins. Co. v. Gosford* (3 Misc., 509), *Stover v. Chasse* (6 id., 394), *Peer v. O'Leary* (3 id., 350), *Lowman v. Sprague* (73 Hun, 408), *People ex rel. Baldwin v. Goldfogle* (23 Civ. Pro. R., 417), *Gallagher v. David Stevenson Brewing Co.* (13 Misc., 40), *Wyckoff v. Frommer* (*infra*), *Goelet v. Roe* (14 id., 28), *Pearson v. Germond* (83 Hun, 88), *Bailey v. Crowell* (13 Misc., 63), *Cowdrey v. Turner* (*infra*), *Bixby v. Casino Co.* (14 Misc., 346), *Earle v. McGoldrick* (*infra*), *Swigley v. Jones* (1 City Ct., 127), *Bultman v. Kinde'lon* (2 Civ. Pro. R., 47), *Campbell v. Babcock* (26 Abb. N. C., 35), *Kelly v. Smith* (41 State Rep., 620), *Penoyer v.*

Brown (13 Abb. N. C., 82), Weisenbach v. Pokalski (Daily Reg., Dec. 14, 1883), Michenfelder v. Gunther (66 How. Pr., 464), Brainard v. Hudson (1 City Ct., 448), Ottinger v. Prince (2 id., 353), Mahan v. Sewell (6 N. Y. Supp., 662), Kramer v. Amberg (4 id., 613), Shaw v. McCarthy (11 Daly, 150), Matter of Matthews (49 Hun, 346), Barnum v. Fitzpatrick (27 id., 334), Barry v. Smith (69 Hun, 88), Donnelly v. O'Day (1 Misc., 165), Durant Land, etc., Co. v. Thompson-Houston Electric Co. (2 id., 182), Lang v. Everling (3 id., 530), Stover v. Chasse (6 Misc., 394), Peer v. O'Leary (8 id., 350), Cottle v. Sullivan (id., 184), Estelle v. Dinsbeer (9 id., 487), Lowman v. Sprague (73 Hun, 408).

A ward may take this proceeding upon a lease made by his guardian. (People v. Ingersoll, 20 Hun, 316.) As to guardian ad litem for infant, see Jessurun v. Mackie (24 Hun, 624).

A demand of rent, with interest, does not invalidate the proceedings. (People v. Dudley, 58 N. Y., 323.) See, further, as to demand, People v. Gross (50 Barb., 231), People v. Platt (43 Barb., 116), Wyckoff v. Frommer (*infra*).

Further, as to contents, etc., of petition, see People v. Matthews (38 N. Y., 451), People v. Boardman (4 Keyes, 59), People v. Teed (48 Barb., 424; S. C., 33 How. Pr. R., 238), Campbell v. Mallory (23 How. Pr., 183), Kent v. Sturges (Daily Reg., June 4, 1884), Posson v. Dean (8 Civ. Pro. R., 177), Coatesworth v. Thompson (5 State Rep., 309), Holzderber v. Forrestal (13 Daly, 34), Ash v. Purnell (32 State Rep., 306; 26 Abb. N. C., 92), McDonald v. McLaury (43 State Rep., 512), Drummond v. Fisher (45 id., 283), Fuchs v. Cohen (29 Abb. N. C., 56), Hoffman v. Van Allen (3 Misc., 99), Cowdrey v. Turner (85 Hun, 451), Wyckoff v. Frommer (12 Misc., 149), Earle v. McGoldrick (15 id., 135), Ward v. Burgher, 90 Hun, 540).

See People ex rel. Crawford v. De Camp (12 Hun, 378), as to defective affidavit.



[*or upon the said G. H.*] in the manner prescribed in title second of chapter seventeenth of the Code of Civil Procedure, for the service of a precept, as appears by the affidavit hereto annexed, and that said rent still remains unpaid.

That your petitioner [*or said T. W.*] owns said premises in fee [*or state other interest*].

[Conclude as in form No. 1151, from (\*).<sup>2</sup>]

[Date, signature and verification as in form No. 1151.]

### No. 1153.

#### Same Petition, under Subdivision 3 of Section 2231 of Code of Civil Procedure.

(Code Civ. Pro., § 2235.)

As in form No. 1151 to [‡], and from thence as follows: After default in the payment for sixty days after the same have become payable of taxes [*or assessments*] levied on such demised premises which he [*or which the said F. G.*]<sup>1</sup> has agreed in writing to pay pursuant to the said agreement under which the said demised premises are held, and that a demand for the payment of said taxes [*or assessments*] has been made upon said F. G. [*or that three days' notice in writing requiring, in the alternative, the payment thereof and of any interest or penalty thereon, or the possession of said premises has been served upon said F. G., as prescribed in title two of chapter seventeenth of the Code of Civil Procedure for the service of a precept, as appears from the affidavit hereto annexed*] in behalf of said T. W., who is his

<sup>1</sup> Insert these words in brackets where the proceedings relate to an assignee, of the lessee.

Where the only proof of a demand for the rent was contained in an affidavit, stating that the affiant "has demanded the said rent by a three days' notice, in writing, a copy of which is annexed;" *held*, that the affidavit failed to show such a service of a written demand of the rent as the statute requires. (People v. Keteltas, 12

Hun, 67.) And see McDonald v. McLaury (43 State Rep., 512).

See, also, Brainard v. Hudson (1 City Ct. Rep, 448), People v. Paulding (22 Hun, 91), Armstrong v. Cummings (20 Hun, 313), People v. Loomis (27 Hun, 328).

<sup>2</sup> See notes to form No. 1151.

<sup>3</sup> Insert these words in brackets where the proceedings relate to an assignee, of the lessee.

landlord, and owns said property in fee [*or state other interest*].

[Conclude as in form No. 1151 from (\*).<sup>1</sup>]

[Date, signature and verification as in form No. 1151.]

No. 1154.

**Same Petition, under Subdivision 4 of Section 2231 of Code of Civil Procedure.**

(Code Civ. Pro., § 2235.)

As in form No. 1151 to [++], so far as that form is applicable to a tenancy for a term of three years or less, and from thence as follows: And that said F. G. [naming tenant or lessee<sup>1</sup>, being in possession under the said lease, has, during the term thereof, taken the benefit of an insolvent act to wit: the act entitled "An act, etc." [*or has been adjudicated a bankrupt under the laws of the United States*].

That your petitioner [*or said T. W.*] is the owner of said premises in fee [*or state other interest*].

[Conclude as in form No. 1151 from (\*).<sup>2</sup>]

[Date, signature and verification as in form No. 1151.]

No. 1155.

**Same Petition, under Subdivision 5 of Section 2231 of Code of Civil Procedure.**

(Code Civ. Pro., § 2235.)

As in form No. 1151 to [++], and from thence as follows: And that [a part of] the said demised premises are used [*or occupied*] as a bawdy-house [*or house of assignation for lewd persons, or for an illegal trade (or manufacture, or business), to wit (naming same)*]. [\*]

That your petitioner [*or that said T. W.*] is the owner of said property in fee [*or name other interest*].

[Conclude as in form No. 1151 from (\*).<sup>3</sup>]

[Date, signature and verification as in form No. 1151.]

<sup>1</sup> See notes to form No. 1151, and see *Witty v. Acton* (29 State Rep., 653), *Sperling v. Isaacs* (13 Daly, 275), *Bixby v. Casino Co.* (14 Misc., 346). relates to any city in the State. (Id., subd.)

<sup>2</sup> See notes to form No. 1151.

<sup>3</sup> See notes to form No. 1151.

This proceeding, under subd. 3 of section 2231 of Code Civ. Pro., as amended by ch. 13 of Laws 1885, only This proceeding cannot be maintained, under subd. 4 of section 2231 (subd. 5 of that section as amended by



No. 1156.

**Notice to Pay Rent or to Surrender Possession.**

(Code Civ. Pro., § 2231, subd. 2.)

To C. D.:

You will take notice, that you are indebted to me in the sum of \_\_\_\_\_ dollars for rent of the [house and premises No. —, in \_\_\_\_\_ street, in the village (*or* city) of \_\_\_\_\_], now occupied by you, and that I require, in the alternative, the payment of said rent on or before the \_\_\_\_\_ day of \_\_\_\_\_, 18—, or the possession of the said premises.'

Dated \_\_\_\_\_, 18—.

Yours, etc.,

\_\_\_\_\_  
A. B., *Landlord.*

No. 1157.

**Notice to Pay Taxes or Assessments or to Surrender the Possession of Premises.**

(Code Civ. Pro., § 2231, subd. 3.)

To C. D.:

You will take notice, that default has been made by you in the payment of taxes [*or* assessments] levied upon the premises [describing them], which you have agreed, in writing, to pay, pursuant to the agreement under which the said premises are held by you, to wit: the taxes, etc. [stating them], and that I hereby require, in the alternative, the payment of said taxes [*or* assessments], and of any interest and penalty thereon, on or before the \_\_\_\_\_ day of \_\_\_\_\_, 18—, or the possession of said premises.'

Dated \_\_\_\_\_, 18—.

Yours, etc.,

\_\_\_\_\_  
A. B., *Landlord.*

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ch. 13 of 1885), where the illegal use [McCarty], 47), Prouty v. Prouty (5 or occupation of the premises has been How. Pr., 81), Moench v. Xung (29 discontinued before the proceedings are State Rep., 731). commenced. (Shaw v. McCarty, 63 For proceeding by owner or tenant How. Pr., 286; 14 Week. Dig., 569 [N. of real property in the immediate Y. C. P., Gen. Tm.]; Jones v. Demady, neighborhood of real property occu- 2 Civ. Pro. R. [McCarty], 246.) pied as a bawdy-house, etc., for removal of tenant, etc., see section 2237, Code Civ. Pro., and for forms of notice and petition under that section, see forms Nos. 1165, 1166.

See, also, People v. McCarty (62 How. Pr., 152; 13 Week. Dig., 237), People v. Bennett (14 Hun, 58, 63), Bultman v. Kindelon (2 Civ. Pro. R.

## No. 1158.

**Petition by Person Entitled to Possession of Real Property, under Subdivision 1 of Section 2232 of Code of Civil Procedure.**

As in form No. 1151 to [\*\*], and from thence as follows: That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the real property hereinafter described was sold by the sheriff of \_\_\_\_\_ county at public auction, after due notice, at \_\_\_\_\_, in the county of \_\_\_\_\_, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, by virtue of an execution against the property of C. D., issued upon a judgment of the \_\_\_\_\_ court, rendered on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in favor of A. B. against the said C. D. for the sum of \_\_\_\_\_ dollars, the judgment roll whereupon was filed and said judgment duly docketed in the [said] county of \_\_\_\_\_ on that day [and which said judgment was duly docketed in the county of \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 18—].<sup>1</sup>

That [your petitioner] became the purchaser upon such sale.

That the said C. D. is now in possession of said real property [or that said real property was owned by said C. D. at the time of the recovery of said judgment and the docketing thereof as aforesaid, but that the same has since been conveyed and is now owned by E. F., who is in possession thereof, claiming title thereto under the said C. D].

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the title of [your petitioner] in said real property was perfected by the execution and delivery to [your petitioner] of a deed, pursuant to said sale, of all the right and interest which said C. D. had therein at the time said judgment was docketed in the said county of \_\_\_\_\_ as aforesaid, or at any time thereafter; and that [your petitioner] is now the owner in fee of said premises under said deed [or state other interest].

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a notice in behalf of [your petitioner] requiring all persons occupying the said property to quit the same by the \_\_\_\_\_ day of \_\_\_\_\_

<sup>1</sup> For affidavit of service of this notice which is the same as of a precept, see form No. 1168.

<sup>2</sup> For affidavit of service of this no-

tice, which is the same as of a precept, see form No. 1168.

<sup>1</sup> Insert this clause in brackets when the property has been sold in a county

———, 18—, was served personally upon said C. D. [*or was affixed conspicuously upon said property*], but that said C. D. holds over and continues in possession of said real property.

[That your petitioner is the agent of said ———, and as such is duly authorized to take this proceeding for the removal of said C. D. (*or E. F.*) from said premises.']

The following is the description of the said real property, to wit [describing same].

Wherefore your petitioner prays, etc., as in form No. 1151.<sup>2</sup>

Dated ———, 18—.

[Signature and verification as in form No. 1151.]

No. 1159.

**Same Petition, under Subdivision 2 of Section 2232 of Code of Civil Procedure.**

(Code Civ. Pro., § 2235.)

As in form No. 1151 to [\*\*], and from thence as follows: That on the ——— day of ———, 18— [your petitioner], became the purchaser of the real property hereinafter described, at a sale thereof, duly made upon the foreclosure of a mortgage, by proceedings taken as prescribed in title ninth of chapter seventeenth of the Code of Civil Procedure, which said mortgage was dated ———, 18—, and was executed by C. D. [and his wife, M. D.] [*or by E. F.* (and

other than that in which the judgment roll is filed.

<sup>1</sup> See note 4 to form No. 1151.

<sup>2</sup> As to what facts are necessary to confer jurisdiction in this proceeding, see *Getting v. Mohr* (20 Week. Dig., 367). Same case (34 Hun, 340).

To maintain this proceeding in case of a sale of leasehold interest under execution, the sale must be advertised and conducted as required by law for a sale of real property. (*Mitnacht v. Cocks*, 65 How. Pr., 84.)

But no irregularity in the judgment on which the execution was issued can

be inquired into. (*Jack v. Cashin*, 1 City Ct., 72; *Getting v. Mohr*, *supra*.)

If there are tenants or assigns, etc., of the person holding over they must be made parties and their interest stated. See note 2, p. 1031, to form No. 1151.

See, also, *People v. McAdam* (84 N. Y., 287; rev'g S. C., 22 Hun, 559) *Territt v. Cowenhoven* (79 N. Y., 400; aff'g S. C., 11 Hun, 320); and under a similar statute, *People v. Walsh* (87 N. Y., 481), *People v. Palmer* (16 Hun, 136).

J. F., his wife), under whom C. D. claimed said real property] to M. N., and described said property.

That the title of [your petitioner] under the said foreclosure, has been duly perfected.

That said C. D. holds over, and continues in possession of said real property, after a notice to quit has been given, as prescribed in section 2236 of the Code of Civil Procedure, in behalf of [your petitioner] requiring all persons occupying the said property to quit the same by the \_\_\_\_\_ day of \_\_\_\_\_, 18—, which said notice was served personally upon the said C. D. [or affixed conspicuously upon the said property] on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and after the perfecting of [your petitioner's] title as aforesaid.

[If the petition is made by the agent of the purchaser, insert statements as to such agency as in form No. 1151.]

That your petitioner owns the said property in fee [or state other interest].

The following is the description of said real property, to wit [describe same].

Wherefore, etc. [prayer as in form No. 1151].<sup>1</sup>

Dated \_\_\_\_\_, 18—.

T. W. [or C. F.]

[Verification as in form No. 52.]

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No. 1160.

**Same Petition, under Subdivision 3 of Section 2232 of Code of Civil Procedure.**

(Code Civ. Pro., § 2235.)

As in form No. 1151 to [\*\*], and from thence as follows: That C. D. occupies and holds the real property hereinafter described, under an agreement with [your petitioner], who is the owner thereof in fee simple [or state other interest], to occupy and cultivate it upon shares [or for a share of the crops thereof].

That the time fixed by said agreement for the occupancy by said C. D. of said real property has expired.

That said C. D. holds over and continues in possession of the said real property after, etc. [insert same statements in

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<sup>1</sup>See notes to forms Nos. 1151, 1158, *State ex rel. Dewey v. Burdick* (5 N. and see *Cowdrey v. Turner* (85 Hun, Y. Supp., 363), *Goff v. Vedder* (12 Civ. 452), *Lang v. Everling* (3 Misc., 530), *Pro. R.*, 358).

regard to notice to quit as in form No. 1159, omitting the statement as to perfecting of title].

[If the petition is made by the agent of the purchaser, insert statements as to agency as in form No. 1151.]

The following is the description of said real property, to wit [describe same].

Wherefore, etc. [prayer as in form No. 1151].

Dated ———, 18—.

T. W. [*or* C. F.]

[Verification as in form No. 52.]

No. 1161.

**Same Petition, under Subdivision 4 of Section 2232 of Code of Civil Procedure.**

(Code Civ. Pro., § 2235.)

As in form No. 1151 to [\*\*], and from thence as follows : That your petitioner is the owner, in fee simple [*or* state other interest], and is entitled to the possession of the following described parcel of land, to wit: All that certain, etc., situated, in the city of ——— (*or* in the incorporated village of ———), in the county of ———, and State of New York, bounded and described as follows, to wit [describe same].

That C. D. [*or* that E. F., to whom C. D. has succeeded] has intruded into [*or* has squatted upon] the said parcel of land, without the permission of [your petitioner], and that the occupancy of said parcel of land, then commenced, has continued without the permission of [your petitioner].

[*Or* that permission was given by (your petitioner) to said C. D. (*or* E. F.) to occupy said parcel of land, but that such permission has been revoked, and that notice of such revocation has been duly given by (your petitioner) to the said C. D.]

That said C. D. holds over, etc. [insert same statement in regard to notice to quit as in form No. 1159, omitting the statement as to perfecting of title].

<sup>1</sup> See notes to forms Nos 1151, 1158.

[If the petition is made by the agent of the owner, insert statements as to such agency as in form No. 1151.]

Wherefore, etc. [prayer as in form No. 1151].<sup>1</sup>

Dated \_\_\_\_\_, 18—.

T. W. [or C. F.]

[Verification as in form No. 52.]

### No. 1162.

## Petition for Removal of a Person for Forcible Entry or Detainer.

(Code Civ. Pro. §§ 2233, 2235.)

As in form No. 1151 to [\*\*], and from thence as follows: That C. D. has heretofore and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, made forcible entry [or made entry in a peaceable manner] into the real property described as follows, to wit [describe same], and has forcibly put [your petitioner] out of the possession [or if the entry was peaceable say: and forcibly holds (your petitioner) out of the possession] of the said real property.

That your petitioner is the owner of said real property in fee simple [or state other interest], and was such owner at the time of such entry [or at the time of such forcible holding out], and was peaceably in actual possession of the said property at the time of said forcible entry [or was peaceably in constructive possession of said property at the time of said forcible holding out].<sup>2</sup>

[If application is made by an agent insert statements as to such agency as in form No. 1151.]

Wherefore your petitioner prays, etc. [prayer as in form No. 1151].<sup>3</sup>

Dated \_\_\_\_\_, 18—.

T. W. [or C. F.]

[Verification as in form No. 52.]

<sup>1</sup> See notes to forms Nos. 1151, 1158. See, also, amendment to subd. 4 of section 2232 of Code Civ. Pro., by ch. 232 of Laws of 1894, taking effect Sept. 1, 1894; *Suydam v. Wood* (2 City Court Rep., 23), *O'Donnell v. McIntyre* (41 Hun, 100). By the said amendment the words "any real property" were substituted in place of "a parcel of land in a city or incorporated village." The provisions of

sections 2951, 2952 of Code Civ. Pro., relating to removal of causes from a justice's court, where an answer is interposed which raises a question of title to real property, do not apply to summary proceedings for the removal of squatters under subdivision 4 of section 2232 (id.). (*Matter of White*, 12 Abb. N. C., 348.)

<sup>2</sup> See section 2245, Code Civ. Pro., and see *People v. Van Nostrand* (9

No. 1163.

**Notice to Tenant at Will or at Sufferance to Remove.**

(Code Civ. Pro., § 2236.)

To A. B.:

You are hereby notified that you are required to remove from the property [describing it] which you now hold of me, at the expiration of one month from the service of this notice upon you, pursuant to the statute relating to the rights and duties of landlord and tenant.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

Yours, etc.,

\_\_\_\_\_  
C. D., *Landlord.*

No. 1164.

**Notice in Cases Specified in Section 2232 of Code of Civil Procedure.**

(Code Civ. Pro., § 2236.)

To C. D., and all other persons occupying the premises hereinafter described:

You and each of you are hereby required to quit the property described as follows, to wit [describe same], by the \_\_\_\_\_ day of \_\_\_\_\_, 18—.<sup>2</sup>

Dated \_\_\_\_\_, 18—.

Yours, etc.,

\_\_\_\_\_  
T. W. [*or C. F. agent for T. W.*].

Wend., 50), and *Bliss v. Johnson* (73 N. Y., 529), cited in note 1 to form No. 745.

<sup>2</sup> See note 1 to form No. 745, and notes to forms Nos. 1151, 1158.

A petition alleging a peaceable entry by the petitioner and a forcible ejection from the premises by the defendant is insufficient, under section 2245, Code Civ. Pro. (*Kent v. Sturges*, N. Y. Daily Reg., June 4, 1884). See, also, *Compton v. "The Chelsea"* (139 N. Y., 538; rev'g S. C., 70 Hun, 361), *Schneider v. Leizman* (57 Hun, 561).

<sup>1</sup> The notice need not specify the time within which the premises must be surrendered, and if a day is specified in it which elapses less than a month from the time of the service of the notice, it will not vitiate the notice. It is sufficient if the tenant have one month's notice, in writing, of the intention of the landlord to terminate

the tenancy. (*Burns v. Bryant*, 31 N. Y., 453; *People v. Schackno*, 48 Barb., 551.) See, also, *Peer v. O'Leary* (8 Misc., 350).

Where a lease required a ten days' notice to quit, a notice requiring the tenant to surrender possession as soon as practicable was held to be insufficient. (*People ex rel. Sanford v. Gedney*, 15 Hun, 475.)

As to requisites of notice, see 1 R. S., 745, §§ 7 and 8 (7th ed., 2201).

As to service of the notice, see *Banks v. Carter* (7 Daly, 417).

<sup>2</sup> The notice must be served at least ten days before the day specified therein. (Code Civ. Pro., § 2236). See as to notice in New York or Brooklyn to monthly tenants holding over, ch. 357 of Laws of 1889, amd'g ch. 303 of Laws of 1882, and see *Simpson v. Masson* (11 Misc., 351).

No. 1165.

**Notice to Landlord or Owner of Premises Occupied as a Bawdy-house, etc.**

(Code Civ. Pro., § 2237.)

*To T. W. :*

You are hereby notified, pursuant to section 2237 of the Code of Civil Procedure, that you are required to make an application for the removal of the person or persons using [*or occupying*] the premises [*describing them*], which are used [*or occupied*] as a bawdy-house [*or as a house of assignation for lewd persons*], and of which premises you are the landlord [*or owner*].

Dated \_\_\_\_\_, 18—.

Yours, etc.,

A. B.

No. 1166.

**Petition by one in the Neighborhood of Bawdy-House, etc., for Removal of Occupant.**

(Code Civ. Pro., § 2237.)

Proceed substantially as in form No. 1155 to [\*], and from thence as follows: That your petitioner on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, served [*or caused to be served*], personally, upon said T. W., a written notice, pursuant to section 2237 of the Code of Civil Procedure, requiring said T. W. who is, and was, at the time of the service of such notice, the owner [*or landlord*] of said demised premises, owning the same in fee [*or state other interest*], to make an application for the removal of the person or persons using [*or occupying*] the said demised premises.

That more than five days have elapsed since the service of such notice upon said T. W., and that said T. W. has not made such an application.

[*Or that said T. W. has made such application, but has not, in good faith, diligently prosecuted it (state the facts showing such want of diligence).*]

Wherefore your petitioner prays, etc. [*prayer as in form No. 1151*].

Dated \_\_\_\_\_, 18—.

A. B.

[*Verification as in form No. 52.*]



No. 1167.

**Precept upon Presentation of Petition.**

(Code Civ. Pro., § 2238.)

*The People of the State of New York, to C. D., etc. [naming the person or persons designated in the petition as being in possession of the premises]:<sup>1</sup>*

Whereas, T. W. [or C. F.] has presented to me [or has filed with me] his petition, as prescribed in title second of chapter seventeenth of the Code of Civil Procedure, in writing, and duly verified, alleging that [set forth the facts contained in petition].

You are, therefore, hereby required forthwith to remove from the property [describing it], or to show cause, at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, why possession of said property should not be delivered to said [T. W. or C. F.].<sup>2</sup>

Witness my hand this \_\_\_\_\_ day of \_\_\_\_\_, 18—, at, etc.

M. N. [official title<sup>3</sup>].

[A copy of section 2241 of Code Civil Procedure is by that section required to be indorsed upon each copy of the precept served otherwise than personally upon the person to whom it is directed.] \_\_\_\_\_

No. 1168.

**Affidavit of Service of Precept.**

(Code Civ. Pro., § 2240.)

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that on the \_\_\_\_\_

<sup>1</sup> See *Croft v. King* (8 Daly, 265), and as to direction in cases under section 2237, Code Civ. Pro., see section 2242 (id.)

<sup>2</sup> Except in cases specified in section 2237, Code Civ. Pro., insert here name of petitioner; in cases under that section insert name of owner or landlord. (Code Civ. Pro., § 2238.)

<sup>3</sup> In New York city, where the application is made to a district court, the petition must be filed with and the precept must be issued by the clerk of the court, and must be made return-

able before the court at the place designated, pursuant to law, for holding the court. (Code Civ. Pro., § 2239.)

A precept to dispossess a tenant holding over after the expiration of his term, which is made returnable the day after its issue, is not authorized by the statute and confers no jurisdiction. (*Luhrs v. Commors*, 13 Abb. N. C., 88; S. C., 30 Hun, 468.)

See, also, *Nemetty v. Naylor* (100 N. Y., 562), *Sperling v. Isaacs* (13 Daly, 275), *Luhrs v. Commoss* (13 Abb. N. C., 88), as to precept.

\_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_, in the city [*or* town] of \_\_\_\_\_, in the county of \_\_\_\_\_, he served the annexed precept upon C. D. [*or* upon the \_\_\_\_\_ Company], to whom it is directed [\*], by delivering a copy thereof to said C. D. [*or* to M. F., the president, etc., of the said \_\_\_\_\_ Company], and at the same time showing him the said original precept.

[*Or* as above to (\*), so far as the same applies to service upon a natural person, and from thence as follows: And who resides at \_\_\_\_\_, in the city (*or* town) of \_\_\_\_\_, in which the property described in said precept is situated, but was absent from his dwelling-house at the time of such service, by delivering a copy thereof with a copy of section 2241 of the Code of Civil Procedure indorsed thereupon<sup>1</sup> (†), at his said dwelling-house, to M. F.,<sup>2</sup> a person of suitable age or discretion who then resided there, to wit: a person of the age of at least \_\_\_\_\_ years.]

[*Or* as above to (†), and from thence as follows: At the property therein described and sought to be recovered, to M. F.,<sup>2</sup> a person of suitable age and discretion residing (*or* employed) there, to wit: of the age of at least \_\_\_\_\_ years, there being no person of suitable age and discretion who could, with reasonable diligence, be found at his said dwelling-house (*or* add in case of service upon person employed at the property, as follows: *or* residing at said property); that deponent made the following efforts to find a person at said C. D.'s dwelling-house of suitable age and discretion upon whom such service could be made, to wit (state efforts and inquiries made).]

[*Or* under subdivision 3 as above to (\*), and from thence as follows: By affixing a copy of the said precept upon a conspicuous part of the property therein described, to wit: on (state where affixed), deponent being unable with reasonable diligence, to wit (state efforts made), to make personal service upon said C. D., and said C. D. being absent from

<sup>1</sup> This clause is necessary in all cases where service is not personal. (Code Civ Pro., § 2241.)

<sup>2</sup> The name of the person to whom the copy was delivered must be stated,

if it can be ascertained with reasonable diligence (Code Civ Pro., § 2243.)

If the name cannot be ascertained state that fact, and state inquiries made to ascertain the name.

his dwelling-house at the time of said service (or his dwelling-house not being situated in the town of \_\_\_\_\_ in which the said property is situated), and deponent being unable with reasonable diligence, to wit (state efforts made), to find any person of suitable age and discretion who resided at said dwelling-house upon whom to make such service, and deponent being unable with reasonable diligence, to wit (state efforts made), to find any person of suitable age and discretion upon whom to make such service residing or employed at said property.]

[That such service was made at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon of said \_\_\_\_\_ day of \_\_\_\_\_, 18—, and at least two hours before the hour at which said precept is returnable.<sup>1</sup>]

A. B.

[Jurat as in form No. 46.]

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No. 1169.

**Answer to Petition upon Return of the Precept.**

(Code Civ. Pro., § 2244.)

[Title of proceeding.]

The answer of C. D., to the petition of A. B. in the above

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<sup>1</sup> Add this last clause to each of the above, if the precept is returnable on the day it is issued. (Code Civ. Pro., § 2240, last clause.)

Where there are two or more defendants, who are absent from the premises, leaving one copy of the process with the person in charge is not sufficient; and where, in such a case, the affidavit of service stated that they were served by "leaving a copy, etc.;" held, that neither defendant was sufficiently served, and that there was a jurisdictional defect in the proceedings. (People *ex rel.* Crawford v. De Camp, 12 Hun, 378.)

As to service upon a corporation under the former statute, see Brown v. The Mayor (66 N. Y., 385).

A return of service of the precept, regular on its face, is conclusive against collateral attack, and the judgment subsequently rendered in the matter will protect the party upon whose application the proceedings were instituted. (Feickert v. Freisem, 1 City Ct., 369.)

As to service of precept where the case is within section 2237 of Code Civ. Pro., see section 2242 (*id.*).

See further as to proof of service of precept, Code Civ. Pro., § 2243.

In case of service by a sheriff, constable or marshal, it may be proved by his certificate stating the facts. (*Id.*) The above forms of affidavit may be easily adapted to the case of a certificate.

See, also, Grafton v. Brigham (70 Hun, 141), People *ex rel.* Allen v. Murray (2 Misc., 152), Jacobs v. Zeltner (9 *id.*, 455), Feickert v. Freisem (1 City

entitled matter, respectfully shows, that he is [state facts authorizing him to answer].

And the said C. D., further answering the said petition, denies each and every allegation contained in said petition [or make specific denials of material allegations].<sup>1</sup>

Dated ———, 18—.

C. D.,

[Office address or place of business.\*]

[Verification as in forms Nos. 151, etc.]

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No. 1170.

### Final Order upon Return of the Precept or upon Trial.

(Code Civ. Pro., § 2249.)

[At, etc., as in form No. 80 (when made by the court).]

[Title of proceeding.]

Upon the return of the precept herein, issued upon the petition of T. W. [or of C. F.], filed ———, 18—, by which it appears that [recite contents of petition], and due proof having been made by the petitioner of the service thereof, and [\*] no sufficient cause having been shown why the prayer of such petitioner should not be granted [or C. D. having filed an answer to said petition (and demanded a jury trial) and the verdict of the jury (or my decision, or the decision of the judge or justice) upon the trial hereof, being in favor of the petitioner]:

It is hereby ordered and directed, that the delivery of the possession of the property described in the said petition be and the same is hereby awarded to the said petitioner [or that the occupant (or occupants) be removed from the prop-

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Ct., 369), Rathburn v. Weber (13 Civ. Pro. R., 50).

<sup>1</sup> See, also, form No. 140 and notes thereto.

As to what defenses may be interposed, see Crawford v. Kastner (26 Hun, 440), People ex rel. Ainslee v. Howlett (76 N. Y., 574; aff'g S. C., 13 Hun, 138), People ex rel. Jacks v. Callahan (8 Week. Dig., 297). In case of forcible entry or detainer, see Code Civ. Pro., § 2245; People v. Covill (14 Week. Dig., 31). See, also, amendment to section 2244 of Code Civ. Pro., by ch. 705 of Laws of 1893, and Rogers v. Earle (5 Misc., 164), Bloom v. Huyck (71 Hun, 252), Dickinson v. Price (64

id., 149), Matter of Wright (42 State Rep., 455), Jennings v. McCarthy (40 id., 179), Barnum v. Fitzpatrick (46 id., 891), People ex rel. Baldwin v. Goldfogle (23 Civ. Pro. R., 417), Stover v. Chasse (9 Misc., 45), Burrell v. Do Sim (10 id., 745), Pearson v. Germond (83 Hun, 88).

As to appointment of guardian *ad litem* for an infant, see Jessurun v. Mackie (24 Hun, 624; appeal dismissed, S. C., 86 N. Y., 622). As to adjournments, see section 2248 Code Civ. Pro., and People ex rel. Allen v. Murray (21 N. Y. Supp., 397; aff'g S. C., 23 Civ. Pro. R., 53).

<sup>2</sup> See note 2 to form No. 122.

erty described in said petition],<sup>1</sup> with ——— dollars<sup>2</sup> costs of this proceeding, which are hereby awarded to the said petitioner.<sup>3</sup>

[*Or as above to (\*) and from thence as follows: A written answer having been filed by C. D., the person to whom said precept was directed (or otherwise state his right to appear), and the issues raised thereby having been tried by a jury (or by naming court or judge, etc.), and the verdict of the jury, or the decision of said judge (or justice), having been rendered in favor of the said C. D.: It is hereby ordered, etc. (state relief), with ——— dollars costs<sup>2</sup> of this proceeding, which are hereby awarded to the said C. D.*]<sup>3</sup>

Date [of judge's order].

A. O., *Judge, etc.*  
(when made by judge).

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No. 1171.

**Warrant to Dispossess Tenant, etc.**

(Code Civ. Pro., § 2251.)

*The People of the State of New York, to the Sheriff of the county of ———, or to any Constable [or Marshal] of the city of ———, or to any Constable of the town of ———, greeting:*

Whereas, A. B., on the ——— day of ———, 18—, presented to [or filed with]<sup>4</sup> [me] a petition as prescribed in title second of chapter seventeenth of the Code of Civil Procedure, stating that [recite the facts stated by the petitioner, including the description of the property], whereupon [I] issued a precept directed to [naming persons], the

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<sup>1</sup> Insert this clause in case of a proceeding under section 2237, Code Civ. Pro. (§ 2249, id.).

<sup>2</sup> See as to amount of costs and their collection, Code Civ. Pro., § 2250.

<sup>3</sup> The final order, though taken by default, is conclusive in an action by the landlord to recover the rent, as to all the matters of fact stated in the affidavit (petition) which are required to be so stated by the statute. (Brown v. The Mayor, 66 N. Y., 385.) See also, Peer v. O'Leary (8 Misc., 350), People ex rel. White v. Loomis (27 Hun, 328), Grafton v. Brigham (70

id., 131), Reich v. Cochrane (74 id., 551), Wyckoff v. Frommer (12 Misc., 149), Harris v. Treu (14 id., 172), Earle v. McGoldrick (15 id., 135).

But although it is conclusive that some rent is due, it is not conclusive that the amount due is correctly stated in the affidavit (petition). (Jarvis v. Driggs, 69 N. Y., 143.)

See also, Terrett v. Cowenhoven (11 Hun, 320), as to effect of the order in a proceeding taken by a purchaser under an execution sale.

<sup>4</sup> See Code Civ. Pro., §§ 2238, 2239.

person [*or* persons] designated in the said petition as being in the possession of the property described in said petition, and requiring him [*or* them] forthwith to remove from the said property, or to show cause before [me], at a time and place specified in the said precept, to wit: at, etc., on, etc., why possession of the said property should not be delivered to the said petitioner [*or* to the owner (*or* landlord) of said property]; and,

Whereas, sufficient cause was not shown upon the return of the said precept, with proof of due service thereof upon the said C. D. [*or*, whereas, the said C. D., at the time when said precept was returnable, by his written answer, filed with (me) and duly verified, denied the allegations, or some of the material allegations, of the said petition (and demanded a jury, and at the time of such demand paid to me the necessary costs and expenses of obtaining such jury);<sup>1</sup> and, whereas, the verdict of the said jury (*or* my decision) upon the trial of said issues was in favor of the said petitioner], and [I] thereupon made a final order, as required by said title, awarding to the said petitioner the delivery of the possession of the said property [*or* directing the removal of the said occupant]:

Now, therefore, you are hereby commanded to remove all persons from the said property [and to put the said petitioner in possession thereof].<sup>2</sup>

Witness my hand at \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

M. N. [official title].

No. 1172.

### Return of Officer to Warrant.

(Code Civ. Pro., § 2252.)

In pursuance of the within command, I have this day re-

<sup>1</sup> See Code Civ. Pro., §§ 2244, 2247.

<sup>2</sup> This clause in brackets is to be omitted, in cases under section 2237 of Code Civ. Pro., (§ 2251, *id.*).

The warrant protects the constable in ejecting persons not parties to the special proceeding, but, in such a case, the complainant is liable to an action by a person not a party, who is ejected by virtue thereof. (*Croft v. King*, 8 Day, 265.)

As to execution of warrant, see Code Civ. Pro., § 2252; as to effect upon lease, see (*id.*) § 2253.

See also, *Ash v. Purnell* (26 Abb. N. C., 92; 32 State Rep., 306), as to issuing of warrant; *Duffus v. Bangs* (43 Hun, 52, *aff'd* S. C., 122 N. Y., 423), *Gregg v. Boyd* (69 Hun, 588), as to effect of warrant.

moved all persons from [and put the within named T. W. in the full possession of]' the premises within described.

Dated \_\_\_\_\_, 18—.

M. N. [official title].

No. 1173.

**Undertaking to Effect Stay, under Subdivision 1 of Section 2254, Code Civil Procedure.**

(Code Civ. Pro., § 2254.)

[Title of proceeding.]

Whereas, it has been established by the final order entered herein, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, that C. D., [†] a lessee [*or* tenant] of the premises described as follows, to wit [describe same], [\*] holds over after a default in the payment of rent, pursuant to the agreement under which the said demised premises are held *or* after a default in the payment of taxes (*or* assessments) levied on the said demised premises which he has agreed in writing to pay]:

Now, therefore, we, E. G., of \_\_\_\_\_, by occupation a \_\_\_\_\_ [and G. H., of \_\_\_\_\_, by occupation a \_\_\_\_\_], do hereby [jointly and severally] undertake, pursuant to statute, to and with A. B., in the sum of \_\_\_\_\_ dollars,<sup>2</sup> that said C. D. will pay to said A. B., the petitioner in said proceeding, the said rent [*or* will pay the said taxes (*or* assessments)] within ten days [and the interest and penalty thereupon], and the costs of this proceeding.

Dated \_\_\_\_\_, 18—.

E. F.

[G. H.]

[Acknowledgment as in form No. 340, or proof as in form No. 538; affidavit and approval as in form No. 340.]

No. 1174.

**Undertaking to Effect Stay, under Subdivision 2 of Section 2254, Code Civil Procedure.**

(Code Civ. Pro., § 2254.)

As in form No. 1173 to [\*], and from thence as follows:

<sup>1</sup> See note 2 to form No. 1171. as the judge or justice may approve.

<sup>2</sup> In such sum and with such sureties (Code Civ. Pro., § 2254.) There need

Has taken the benefit of an insolvent act [*or* has been adjudicated a bankrupt], during the term of his lease :

Now, therefore, [we] E. F., of \_\_\_\_\_, by occupation a \_\_\_\_\_, and G. H., of \_\_\_\_\_, by occupation a \_\_\_\_\_, do hereby [jointly and severally] undertake, pursuant to statute, to and with A. B., the petitioner in said proceeding, in the sum of \_\_\_\_\_ dollars,<sup>1</sup> that the said C. D. will pay to said A. B. the rent of the said premises, as it has become or hereafter becomes due.

Dated \_\_\_\_\_, 18—.

E. F.  
[G. H.]

[Acknowledgment, etc., as in form No. 1173.]

No. 1175.

**Undertaking to Effect Stay, under Subdivision 3 of Section 2254, Code Civil Procedure.**

(Code Civ. Pro., § 2254.)

As in form No. 1173 to [†], and from thence as follows : Continues in possession of the following described real property, to wit [describe same], which has been sold by virtue of an execution against his property :

Now, therefore, [we], etc. [as in form No. 1173], do hereby undertake, pursuant to statute, to and with A. B., the petitioner in said proceeding, that said C. D. will pay all costs, and damages which may be recovered against him, in an action of ejectment to recover the said property, brought against him by said A. B., within six months hereafter ; and that he will not commit any waste upon or injury to the said property during his occupation thereof.<sup>2</sup>

Dated \_\_\_\_\_, 18—.

E. F.  
[G. H.]

[Acknowledgment, etc., as in form No. 1173.]

be only one surety, unless two are expressly required. (Code Civ. Pro., § 811.)<sup>1</sup> See note 2 to form No. 1173, and see, as to disposal of undertaking, Code Civ. Pro., § 2255.

<sup>1</sup> See note 2 to form No. 1173.



No. 1176.

**Affidavit to be Made, under Subdivision 3 of Section 2254,  
Code Civil Procedure, to Obtain Stay.**

(Code Civ. Pro., § 2254.)

[Title of proceeding.]

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that he is the defendant above named and claims the possession of the property described in the petition in the above matter, by virtue of a right [*or* title] acquired after the sale of said property set forth in the said petition, to wit [set forth same] [*or* as guardian or trustee for I. J.].<sup>1</sup>

A. B.

[Jurat as in form No. 46.]

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No. 1177.

**Notice by Creditor of Lessee of His Intention to Redeem.**

(Code Civ. Pro., § 2257.)

[Title of proceeding.]

Notice is hereby given that I, M. C., a [\*] judgment creditor of C. D., the lessee of the property described as follows, to wit [describe same], whose judgment was docketed in the county of \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and before the precept herein was issued, which judgment was rendered in the [Supreme] Court in [my] favor against said C. D. for \_\_\_\_\_ dollars, and upon which judgment is now due to me the sum of \_\_\_\_\_ dollars, with interest thereupon from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, [†] intend to redeem the said premises, as prescribed in section 2257 of the Code of Civil Procedure.

M. C.

Dated \_\_\_\_\_, 18—.

[*Or* as above to (\*), and from thence as follows: Mortgage of the lease made by \_\_\_\_\_ to \_\_\_\_\_, dated, etc.,

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<sup>1</sup> See *People v Palmer* (16 Hun, 136), *Schermerhorn v. Carter* (8 Week. Dig., 383).

of the premises described as follows, to wit (describing same), by a mortgage executed by (said) C. D. to me, dated \_\_\_\_\_, 18—, and duly recorded in the \_\_\_\_\_ county clerk's office on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, and before the precept herein was issued, upon which mortgage is due to me the sum of \_\_\_\_\_ dollars, with interest thereupon from the \_\_\_\_\_ day of \_\_\_\_\_, 18—.]

[Conclude as in above form from (†)].

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No. 1178.

**Petition of Person Redeeming Premises.**

(Code Civ. Pro., § 2259.)

[Title of proceeding.]

To [*naming judge or justice, etc.*]:

The petition of C. D., of \_\_\_\_\_, respectfully shows: That he is the defendant in the above entitled proceeding [*or a judgment creditor of C. D., whose judgment was docketed in \_\_\_\_\_ county on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and before the precept in the above entitled proceeding was issued; or a mortgagee of the lease (describing it) of the property (describing same) by a mortgage (describing it, stating parties, date and time and place of record)*].

That the above entitled proceeding was founded upon an allegation that the said C. D. held over, after default, in the payment of the rent, under said lease [*or describe lease*], and that the unexpired term of the said lease was more than five years at the time when the warrant in said proceeding was issued.

[That a notice of your petitioner's intention to redeem the said premises, as provided by section 2257 of the Code of Civil Procedure, was duly filed with (naming judge or justice), who issued the said warrant (*or who succeeded in office the judge, or justice, who issued the said warrant*) on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and before the expiration of one year after the execution of said warrant as hereinafter mentioned].

That a warrant was duly issued in said proceeding by

Hon. A. M., judge, etc., on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, directed to \_\_\_\_\_, and describing said property, and commanding [state command of warrant], and said warrant was executed by said \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, pursuant to the command thereof, as will appear from his return thereto on file in the \_\_\_\_\_ clerk's office.

And your petitioner further says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and within one year after the execution of said warrant as aforesaid, he paid [*or* tendered] all rent in arrears under said lease at the time of the said payment [*or* tender], with interest thereupon, and the costs and charges incurred by the said petitioner, to wit: the sum of \_\_\_\_\_ dollars to the said A. B., the petitioner in said proceeding [*or* to the said A. M., the judge (*or* justice) who issued the said warrant (*or* to B. F., the successor in office of the said A. M., the judge, etc.), your petitioner not being able to find A. B., the petitioner in said proceeding, within five days before the expiration of a year after the execution of said warrant, within the city (*or* town) of \_\_\_\_\_, wherein (a portion of) the said property is situated, with reasonable diligence, to wit (state efforts made to find the petitioner)].

[That no redemption was made by the said lessee within a year after the execution of said warrant.]

Wherefore your petitioner prays that an order may be made by your honor, establishing the rights and liabilities of the parties upon the said redemption, and for such other and further relief as may be proper.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

C. D.

[Verification as in form No. 52.]

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No. 1179.

**Order to Show Cause upon Petition (No. 1178).**

(Code Civ. Pro., § 2259.)

[Title of proceeding.]

Upon the annexed petition of C. D., dated \_\_\_\_\_, 18—,

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<sup>1</sup> This petition may be easily adapted notices under section 2257 of Code to a case where two or more mortgages, or judgment creditors, have filed Civ. Pro.

let A. B., above named, show cause before me, at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, why the prayer of said petitioner should not be granted.

And it is further ordered, that copies of this order, and of said petition, be served upon said A. B., on or before the \_\_\_\_\_ day of \_\_\_\_\_, 18—.¹

Dated \_\_\_\_\_, 18—.

\_\_\_\_\_  
A. O., *Judge, etc.*

No. 1180.

**Final Order upon the Return of Order to Show Cause (No. 1179).**

(Code Civ. Pro., § 2259.)

[Title of proceeding.]

Upon the return of the order to show cause, granted herein by me, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, with proof of due service thereof, as required thereby, and the court having heard the allegations and proof of the parties, and after hearing, etc. :

It is hereby ordered, that, etc. [state the relief granted].²

\_\_\_\_\_  
A. O., *Judge, etc.*

No. 1181.

**Notice of Appeal from Final Order, under Title 2 of Chapter 17 of Code Civil Procedure.**

(Code Civ. Pro., § 2260.)

For this notice on appeal from final order of justice of the peace, see § 3046, C. C. P., and for general form of notice of appeal, see forms Nos. 511, 512, 513, which may be adapted to this notice. But see provisions of sections 2261, 2262 of Code Civil Procedure as to effect of such an appeal.³ Those sections were each of them amended by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896, having been previously amended by ch. 705 of Laws of 1893.

¹ As to orders to show cause, see note 1 to form No. 162, and rule 37 of Gen. Rules of Practice.

² The court is required to grant such relief as justice requires. The order, or a certified copy thereof, may be recorded in like manner as

a deed. (Code Civ. Pro., § 2259 ; and see the further provisions of that section )

³ Where a notice of appeal in summary proceedings to remove a tenant from possession demanded a new trial in the county court,—*held*, that such

No. 1182.

**Undertaking on Appeal from Final Order under Section 2262, Code Civil Procedure.**

(Code Civ. Pro., § 2262.)

As in form No. 547, making necessary changes to words "now, therefore, etc.," and from thence as follows:

Now, therefore [we], E. F., of \_\_\_\_\_, by occupation a \_\_\_\_\_ [and G. H., of \_\_\_\_\_, by occupation a \_\_\_\_\_],<sup>1</sup> do hereby [jointly and severally] undertake, pursuant to statute, to and with the said A. B., that if [the said appeal is dismissed, or if judgment is rendered against the appellant in the said appellate court, and an execution issued thereupon is returned wholly or partly unsatisfied, they will pay the amount of the said judgment, or the portion thereof remaining unsatisfied, not exceeding the sum of \_\_\_\_\_ dollars]<sup>2</sup> [and, further, that if], upon the appeal, a final determination is rendered against the said appellant, he will pay all rent accruing, or to accrue, upon the said premises [or the value of the use and occupation of the said premises],<sup>3</sup> subsequent to the institution of the said special proceeding.

Dated \_\_\_\_\_, 18—.

E. F.  
[G. H.]

[Acknowledgment or proof, justification and approval as in forms Nos. 340, 538.]

new trial was not authorized by the Code of Civil Procedure. (Brown v. Cassady, 20 Week. Dig., 56; 34 Hun, 55.)

Where such proceedings are regularly prosecuted, the remedy of the defeated party is by appeal from the final determination, and not by an action to restrain its enforcement. (Sheehy v. Kelly, 20 Week. Dig., 78.)

See, also, People v. Perry (16 Hun, 461), decided under former statute, and Jessurun v. Mackie (24 Hun, 624; appeal dismissed, S. C., 86 N. Y., 622), Warner v. Henderson (25 Hun, 303), Shaw v. McCarty (2 Civ. Pro. R., 235), Van Schaick v. Koster (2 Civ. Pro., 239), Shaw v. McCarty (11 Daly, 150), People ex rel. Durant Land Imp. Co. v. Jeroloman (69 Hun, 301), Jacobs v. Zeltner (9 Misc., 455), Harris v. Treu (14 id., 172).

<sup>1</sup> One or more sureties, see section 811, Code Civ. Pro.

<sup>2</sup> This clause is from section 3050 of Code Civ. Pro., and is to stay proceedings upon an appeal from the final order of a justice of the peace to the county court. If the appeal is from the final order of another court or judge, the first clause of the undertaking must be that required on appeal to such court to perfect the appeal, and to stay the execution of the order appealed from. (Code Civ. Pro., §§ 2260, 2262; for forms, see Nos. 538, 547.) See, also, amendments by ch. 705 of Laws of 1893, to sections 2261 and 2262 of Code of Civil Procedure.

<sup>3</sup> Insert this clause where there is no lease. (Code Civ. Pro., § 2262.)

The proceedings, to obtain order for

No. 1183.

**Order of Reversal of Final Order.**

(Code Civ. Pro., § 2263.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

The appeal taken by C. D. from the final order of \_\_\_\_\_ in the above entitled proceeding, dated \_\_\_\_\_, 18—, having been heard at a \_\_\_\_\_ Term of the \_\_\_\_\_ Court, held at, etc. :

Now, on motion of E. F., attorney for the respondent, after hearing M. C. for the appellant :

It is hereby ordered, that the said final order appealed from, be and the same is hereby reversed, with \_\_\_\_\_ dollars costs and disbursements of the said appeal, to be paid by the said A. B. to the said C. D.

[Insert provisions for restitution.<sup>1</sup>]

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 No. 1184.

**Complaint in Action for Recovery of Damages Sustained by Dispossession, where Final Order is Reversed on Appeal.**

(Code Civ. Pro., § 2263.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that heretofore, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a special proceeding was brought by A. B., before, etc., under title second of chapter seventeenth of the Code of Civil Procedure, to remove the plaintiff, C. D., as his tenant [etc.], from the possession of the premises situated in the \_\_\_\_\_ of \_\_\_\_\_, in the county of \_\_\_\_\_, described as follows, to wit [describe same], and that such proceedings were had therein that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a final order was made by said \_\_\_\_\_, directing the removal of said plaintiff from said premises

stay and the order, will be like those contained in forms Nos. 548, 549, 550.

<sup>1</sup> See notes to forms Nos. 532 and 533. *Marsh v. Masterson* (22 State

Rep.), *Woods v. Kernan* (19 Civ. Pro. R., 180).

For orders dismissing appeal from orders, and affirming or modifying same, see forms Nos. 529, 530.

with \_\_\_\_\_ dollars costs of said proceedings, which were thereby awarded to said A. B.

That a warrant was issued accordingly, under the hand of said \_\_\_\_\_, directed to [the sheriff of \_\_\_\_\_ county], describing said property, and commanding said [sheriff] to remove all persons therefrom, and to put the said A. B. in possession thereof.

That, under said warrant, the said plaintiff was removed by said sheriff from said premises, he being then in possession thereof [under a lease thereof, etc.].

That an appeal was taken by the plaintiff to the [county court of \_\_\_\_\_ county], and said final order was reversed by said \_\_\_\_\_ court, and a judgment of reversal of said final order and for \_\_\_\_\_ dollars, costs of said appeal, was duly entered in the \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

And plaintiff further says, that by the said dispossession he was [state special damages], and has suffered other great injury and inconvenience [and that said costs were collected from him by virtue of an execution issued upon said final order],<sup>1</sup> and he claims damage for such dispossession in the sum of \_\_\_\_\_ dollars, for which amount [and for said costs so collected, as aforesaid], and for costs of this action, he prays judgment against the defendant.

A. W., *Plaintiff's Attorney.*  
[Office address.<sup>2</sup>]

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### TITLE III.

#### FORMS RELATING TO PROCEEDINGS TO PUNISH A CONTEMPT OF COURT OTHER THAN A CRIMINAL CONTEMPT.

(Code Civ. Pro., Ch. 17, Tit. 3.)

- No. 1185. Affidavit on which to procure warrant, or order to show cause in contempt proceedings.
1186. Order for warrant for contempt of court issued without notice.
1187. Warrant to commit for contempt of court issued without notice.
1188. Order to show cause why the accused should not be punished for the alleged offense.

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<sup>1</sup>It may be doubtful whether these costs can be recovered in this action, which is brought to recover the damages sustained by the dispossession. (See Code Civ. Pro., § 2263.) See, also, as to recovery, Glaser v. Cumisky (40 State Rep., 872).

<sup>2</sup>See note 2 to form No. 122.

- No. 1189. Order directing warrant of attachment to issue for contempt of court.
1190. Warrant of attachment in proceedings for contempt of court.
1191. Notice to sheriff, etc., to return execution or show cause, etc.
1192. Proof of service of notice to return execution.
1193. Affidavit of delivery of execution to sheriff.
1194. Clerk's certificate of search for execution and not finding same.
1195. Affidavit of search for mandate.
1196. Order upon decision of motion to compel return of mandate by sheriff.
1197. Undertaking to procure discharge.
1198. Affidavit in proceedings for contempt where the accused is in the custody of sheriff, etc.
1199. Writ of habeas corpus in contempt proceedings.
1200. Return to writ of habeas corpus in contempt proceedings.
1201. Return to warrant of attachment in contempt proceedings.
1202. Order directing interrogatories to be filed.
1203. Interrogatories to accused in contempt proceedings.
1204. Answer of accused to interrogatories.
1205. Order convicting defendant of the contempt charged and directing his punishment.
1206. Warrant of commitment, pursuant to order.
1207. Affidavit to obtain release of offender.
1208. Notice of application for discharge of offender.
1209. Order discharging offender from imprisonment.
1210. Order when accused does not appear.
1211. Complaint on undertaking given for appearance of offender.

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No. 1185.

**Affidavit on which to Procure Warrant, or Order to Show Cause in Contempt Proceedings.**

(Code Civ. Pro., §§ 2268, 2269.)

[Title of cause.]

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that [set forth the facts showing the commission of the offense, and where the offense consists of a neglect or refusal to obey an order [etc.] of the court requiring the payment of costs, or of a specified sum of money, show that a personal demand thereof has been made by the person entitled thereto, or by his duly authorized attorney, whose power of attorney was exhibited and the nature of his authority stated at the time the demand was made, and that at the time of such demand a copy of the order [etc.], duly certified by the clerk of the



court, in whose office the order [etc.] has been entered, has been served upon the accused].<sup>1</sup>

That, etc. [as in form No. 209, substantially, from (+)].

A. B.

[Jurat as in form No. 46.]

No. 1186.

**Order for Warrant to Commit for Contempt of Court Issued without Notice.**

(Code Civ. Pro., § 2268.)

[At, etc., as in form No. 80.]

[Title of cause.]

Whereas, an order [*or* judgment] was heretofore made [*or* rendered] by this court, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in the above entitled action, by which C. D. was [among other things] required to pay the sum of \_\_\_\_\_ dollars, etc. [stating substance of the order, etc.], and the court being satisfied by proof by the affidavit of A. B., dated \_\_\_\_\_, 18—, that a certified copy of said order [*or* judgment] has been served upon said C. D., and that a per-

<sup>1</sup>As to the cases to which proceedings under this title apply, see section 2266 of Code Civ. Pro., and section 14 (*id.*), therein referred to; and see *Clark v. Binger* (75 N. Y., 344; aff'g S. C., 43 N. Y. Super. Ct., 126, 344), *In re H.* (87 N. Y., 521), *O'Gara v. Kearney* (77 N. Y., 423), *People v. R. and S. L. R. R. Co.* (76 N. Y., 294; aff'g 14 Hun, 371), *Fischer v. Raab* (81 N. Y., 235; rev'g S. C., 58 How. Pr., 221), *McComb v. Weaver* (11 Hun, 271), *Park v. Park* (80 N. Y., 156), *People v. Riley* (25 Hun, 587), *People v. Reilly* (56 How. Pr., 223), *Ryckman v. Ryckman* (19 Week. Dig., 41; S. C., 32 Hun, 193), *Gardner v. Gardner* (87 N. Y., 14; rev'g S. C., 24 Hun, 627), *Whitman v. Haines* (21 State Rep., 41), *Second Nat. Bank of Oswego v. Dunn* (2 Civ. Pro. R., 259), *Steele v. Gunn* (19 State Rep., 654), *Egan v. Lynch* (49 Super. Ct., 454), *Nathans v. Hope* (5 Civ. Pro. R., 401, rev'd 100 N. Y., 615), *Norwood v. Ray Man'g Co.* (11 Civ. Pro. R., 273), *Moffatt v. Herman* (17 Abb. N. C., 107), *People ex rel. Slight v. Potter*

(6 State Rep., 753), *People ex rel. Duffus v. Brown* (46 Hun, 320), *Reynolds v. Parkes* (2 Dem., 399), *Matter of Odell* (6 Dem., 344), *McCauley v. Palmer* (40 Hun, 38), *Hart v. Johnson* (43 Hun, 505), *Beard v. Snook* (47 Hun, 158), *Matter of Hess* (48 *id.*, 586), *Forstman v. Schulting* (42 *id.*, 643), *People ex rel. Roosevelt v. Edson* (51 Super. Ct., 238), *Prince Mfg. Co. v. Prince Metallic Paint Co.* (51 Hun, 443), *Rochester, etc. R. Co. v. N. Y., Lake Erie, etc. R. Co.* (48 *id.*, 190), *Myers v. Becker* (95 N. Y., 486, aff'g S. C., 29 Hun, 567), *Sandford v. Sandford* (44 Hun, 563), *Isaacs v. Isaacs* (10 Daly, 306), *Ryckman v. Ryckman* (34 Hun, 235, aff'd without op., 98 N. Y., 639), *Winton v. Winton* (53 Hun, 4), *Jacquín v. Jacquín* (36 Hun, 378), *Cockefair v. Cockefair* (23 Abb. N. C., 219), *King v. Barnes* (113 N. Y., 476), *Moffat v. Herman* (116 N. Y., 131), *Ross v. Butler* (57 Hun, 110), *Aldinger v. Pugh* (*id.*, 181), *People ex rel. Steitz v. Rice* (*id.*, 62), *Branth v. Branth* (36 State Rep., 628), *Whitney v. Whitney* (33 *id.*, 704), *Rhodes v.*



- Linderman (43 id., 520), Lawrence v. Harrington (63 Hun, 195), Cancimino's Towing, etc., Co. v. Cancimino (43 State Rep., 49), Boon v. McGucken (67 Hun, 251), Cunningham v. Hatch (3 Misc., 101), Pittsfield Nat. Bank v. Tailer (50 State Rep., 415), Matter of Board of Health of Yonkers (69 Hun, 110), Greite v. Henricks (71 Hun, 11), Betz v. Buckel (30 Abb. N. C., 278), Canda v. Gollner (73 Hun, 493), Dawson v. Parsons (74 id., 221), De Lancey v. Piepgras (73 Hun, 610), Holly Mfg. Co. v. Venner (74 id., 458), Martin Cantine Co. v. Warshaeur (7 Misc., 412), Matter of Hopper (9 id., 171), Matter of Wilkes (62 State Rep., 224), People ex rel. Gaynor v. McKane (78 Hun, 154), People v. Bouchard (6 Misc., 459), Vermont Marble Works v. Wilkes (62 State Rep., 121), Barnard v. Grantz (79 Hun, 413), Mercer v. Mercer (73 id., 192), People ex rel. Platt v. State Board of Canvassers (74 id., 179), People ex rel. Taylor v. Lehman (8 Misc., 152), Matter of Taylor (id., 159), People ex rel. Taylor v. Forbes (143 N. Y., 219), Gerton Carriage Co. v. Richardson (6 Misc., 466), Walford v. Harris (78 Hun, 346), First Nat. Bank of Plattsburgh v. Fitzpatrick (80 Hun, 75), Matter of Hall (85 id., 620), McAveney v. Brush (13 Misc., 79), Kendrick v. Wandall (88 Hun, 513), Taber v. N. Y. Elevated R. Co. (12 Misc., 460), Davis v. Davis (83 Hun, 500), People ex rel. Platt v. Rice (144 N. Y., 249, aff'g S. C., 80 Hun, 437), Spiehler v. Asiel (83 Hun, 223), Merritt v. Sparling (88 id., 491), Matter of Gaines (83 id., 225), Kittel v. Stueve (11 Misc., 279), People v. Lewis (14 id., 264), Fromme v. Gray (14 Misc., 592), Matter of Gains (15 id., 75), Hills v. Peekskill Savings Bank (30 Hun, 546), People ex rel. Pond v. Tamsen (15 Misc., 364), Matter of Arkenburgh (id., 416), Wolfe v. Knight (15 Misc., 438).
- As to power of a referee to punish for contempt, see Code Civ. Pro., § 2272, Naylor v. Naylor (32 Hun, 228), People ex rel. Baldwin v. Miller (9 Misc., 1).
- As to the distinction between a criminal and civil contempt, see People ex rel. Kelly v. Aitken (19 Hun, 327).
- For mandate of commitment for criminal contempt under section 11, Code Civ. Pro., see form No. 1, and see notes to that form, and see People ex rel. Jones v. Davidson (35 Hun, 471).
- A defendant who has been imprisoned under an order adjudging him guilty of contempt, and who has been discharged upon *habeas corpus* on the ground that the punishment inflicted is unauthorized, cannot be again brought up, retried and resented for the same contempt. (Snyder v. Van Ingen, 9 Hun, 569.)
- An affidavit on information and belief was held sufficient to sustain an order to show cause for the purpose of these proceedings, and put defendant to a denial. (Rahl v. Rahl, 14 Week. Dig., 560.)
- See, also, notes to form No. 1186.

sonal demand of said sum has been made upon said C. D.,<sup>1</sup> by, etc., and that payment thereof has been refused [*or neglected*] by said C. D. : [\*]

Now, therefore, it is hereby ordered, on motion of \_\_\_\_\_, that the said C. D., by reason of the premises aforesaid, is guilty of a contempt of court.

And it is further ordered, that the said C. D., for the contempt aforesaid, of which he is guilty, be imprisoned by the sheriff of the county of \_\_\_\_\_, in the jail of said county, until the said sum of money and the costs and expenses of this proceeding to compel such payment, to wit: the sum of \_\_\_\_\_ dollars, together with the sheriff's fees on the warrant hereinafter mentioned, are paid, or until he is discharged according to law, and that a warrant issue committing the said C. D. accordingly.

No. 1187.

### Warrant to Commit for Contempt of Court Issued without Notice.

(Code Civ. Pro., § 2268.)

[Title of cause.]

*To the Sheriff of the County of \_\_\_\_\_ :*

Whereas, etc., as in form No. 1186 to [\*], and from thence as follows: And an order having been thereupon duly made

<sup>1</sup> Under the authority of *Park v. Park* (80 N. Y., 156), held, that the defendant in a suit for divorce would be liable to punishment for contempt for refusal to comply with the directions contained in the judgment for payment of alimony, but that to subject him to such punishment, under sections 1246 and 2268 of Code Civ. Pro., a certified copy of the judgment must have been served upon him and a demand for the money made upon him. (*Ryckman v. Ryckman*, 19 Week. Dig., 41; S. C., 32 Hun, 193; 84 id., 238; aff'd without opinion, 98 N. Y., 639.) See, also, *Hubbard v. Hubbard* (N. Y. Daily Reg., Feb. 15, 1884), *Sandford v. Sandford* (40 Hun, 540; 44 Hun, 563), *Whitney v. Whitney* (33 State Rep., 704).

In such an action, execution can properly issue only for costs (Code

Civ. Pro., § 1769), and such being the case, an attachment may be issued for non-payment of alimony under section 1241, Code Civ. Pro. (id.).

See, however, *Rahl v. Rahl* (14 Week. Dig., 560), *Isaacs v. Isaacs* (10 Daly, 306; S. C., 61 How. Pr., 369), *Mahon v. Mahon* (50 Super. Ct., 92; S. C., 5 Civ. Pro. R. [Browne], 58), *Gane v. Gane* (45 Super. Ct., 355; S. C., 46 id., 218), *Baker v. Baker* (23 Hun, 360), which last two cases are distinguished in 34 Hun, 238, above cited.

The defendant cannot relieve himself from his obligation to comply with the direction contained in the judgment by showing, on an application for an attachment, his inability to pay. He must apply, under section 2286 of Code Civ. Pro., for relief on that

by this court on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, adjudging the said C. D. guilty of a contempt of court by reason of the premises aforesaid, and directing that the said C. D. for the contempt aforesaid, of which he is guilty, be imprisoned by the sheriff of the county of \_\_\_\_\_, in the jail of said county, until the said sum of money, to wit: the sum of \_\_\_\_\_ dollars, and the costs and expenses of the said proceeding to compel such payment, to wit: the sum of \_\_\_\_\_ dollars and your fees upon this warrant, are paid, or until he is discharged according to law, and that a warrant issue committing the said C. D. accordingly :

Now, therefore, you are hereby required, pursuant to said order, to arrest the said C. D., and to imprison him in the said jail until the said sum of money, and said costs and expenses, are paid, or until he is discharged according to law.<sup>1</sup>

Witness, etc. [teste].

[L. s.]

J. L., *Clerk.*

M. F., *Attorney for* \_\_\_\_\_.

[Office address.<sup>2</sup>]

[Indorsed.]

The said C. D. may give an undertaking as prescribed by law, in the sum of \_\_\_\_\_ dollars, for his appearance to answer.

A. O., *Judge, etc.*<sup>3</sup>

ground. (Ryckman v. Ryckman, 34 Hun, 238; aff'd 98 N. Y., 239, without op.; distinguishing Cochrane v. Ingersoll, 13 id., 368; *contra*, Goodenough v. Davids, 4 Month. L. Bul., 35.)

See, also, Strobridge v. Strobridge (21 Hun, 238), In re estate of Anthony Battle (26 Week. Dig., 392).

In a proceeding under section 2286 of Code Civ. Pro., for the release of the defendant, it was held that inability to pay was no excuse, if caused by the voluntary act of the party. (Ryer v. Ryer, 33 Hun, 116.)

See, also, note 1 to form No. 1185.

<sup>1</sup> See section 2285, Code Civ. Pro., and see notes to forms Nos. 1185, 1186.

As to nature of confinement under process for contempt, see section 157, Code Civ. Pro., and In re Clark (20 Hun, 551).

A copy of the warrant, and of the affidavit upon which it is issued, must be served upon the accused, when he is arrested by virtue thereof. (Code Civ. Pro., § 2274.)

As to manner of execution of warrant, see section 2276 Code Civ. Pro.

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> See section 2275, Code Civ. Pro.

No. 1188.

**Order to Show Cause why the Accused should not be Punished for the Alleged Offense.**

(Code Civ. Pro., § 2269.)

[At, etc., as in form No. 80 (when made by court).]

[Title of cause.]

I having been [*or* the court having been] satisfied by the affidavit of A. B., dated ———, 18—, that C. D. has [state the offense alleged to have been committed, and in case the offense consists of the refusal to obey an order of the court requiring the payment of costs, or of a specified sum of money, state that a personal demand thereof has been made, and that payment thereof has been refused or neglected]:<sup>1</sup>

I do hereby order and require [*or* it is hereby ordered and required], that said C. D. show cause before me [*or* before this court], at, etc., on, etc., why he should not be punished for the alleged offense.

I do hereby further order [*or* it is hereby further ordered], that a copy of said affidavit and of this order be served upon said C. D., personally, on or before the ——— day of ———, 18—.

Date [when made by judge].

A. O., *Judge, etc.*  
(when made by judge).

<sup>1</sup> See section 2268, Code Civ. Pro., as to demand, etc. In cases under that section the court may issue without notice a warrant for the commitment of the offender. See form No. 1187, and notes thereto.

An order to show cause, granted on the eighth of July, returnable at Kingston at 10 A. M. on the tenth of the same month and served at noon on the ninth, was held not to give the defendants, the village of Athens and its trustees, reasonable time to show cause why they should not be punished for contempt in violating an injunction. (Power v. Village of Athens, 19 Hun, 165.)

The discretion of the justice fixing

such time is reviewable at General Term. (Id.)

See, also, among other cases, *The Mayor v. N. Y. & S. I. Ferry Co.* (64 N. Y., 622), *Atlantic & Pac. Tel. Co. v. B. & O. R. R. Co.* (87 N. Y., 355; aff'g S. C., 46 N. Y. Super. Ct., 377), *Isaacs v. Isaacs* (10 Daly, 306), *Mahon v. Mahon* (5 Civ. Pro. R. [Browne], 58; S. C., 50 Super. Ct., 92), *Naylor v. Naylor* (32 Hun, 228), *Ryer v. Ryer* (67 How. Pr., 369; S. C., 33 Hun, 116), *Matter of Jones* (6 Civ. Pro. R., 250), *Noland v. Noland* (29 Hun, 630), *Gillies v. Kreuder* (1 Dem., 349), *Matter of Bradner* (87 N. Y., 171), *People ex rel. Negus v. Dwyer* (90 N. Y., 402), *Brisbane v. Brisbane* (5 Civ. Pro. R.

No. 1189.

**Order Directing Warrant of Attachment to Issue for Contempt of Court.**

(Code Civ. Pro., § 2269, subd. 2.)

[At, etc., as in form No. 80.]

[Title of cause.]

On reading and filing the affidavit of A. B., dated ———, 18—, whereby the court is satisfied that C. D., has been guilty of a contempt of this court, to wit [state the offense], and on motion of M. F., counsel for ——— :

It is hereby ordered, that a warrant of attachment issue to the sheriff of the county of ——— [or of any county where said C. D. may be found], commanding him to arrest the said C. D. and to bring him before this court forthwith [or at, etc., on, etc.], to answer for the alleged offense.<sup>1</sup>

No. 1190.

**Warrant of Attachment in Proceedings for Contempt of Court.**

(Code Civ. Pro., § 2269, subd. 2.)

[Title of proceeding.<sup>2</sup>]

*The People of the State of New York, to the Sheriff of the county of ——— [or to the Sheriff of any county where C. D. may be found]:*

The court [or I] being satisfied by the affidavit of A. B.,

[Browne], 352; S. C., 67 How. Pr., 184), Brett v. Brett (33 Hun, 547), Sandford v. Sandford (40 id., 540), People ex rel. Clark v. Grant (13 Civ. Pro. R., 183), McCauley v. Palmer (40 Hun, 38), Hart v. Johnson (43 id., 505), Gamman v. Berry (34 id., 138), Union Trust Co. v. Gage (6 Dem., 358), Matter of Ammerman (3 State Rep., 356), as to practice in these proceedings.

The order of commitment upon return of order to show cause will be substantially like form No. 1205, changing the recitals to meet the facts. No warrant of commitment is necessary in such a case. (Code Civ. Pro., § 2283, and see form No. 1196, and note 2 to that form.)

As to power of legislature to punish for contempt and form of warrant in their proceedings, see People ex rel.

McDonald v. Keeler (99 N. Y., 463, rev'g S. C., 32 Hun, 563), People v. Sharp (107 N. Y., 427).

An order to show cause why a person should not be punished for contempt made by a county judge whose term expires before the return day may be heard before his successor. (Gamman v. Berry, 34 Hun, 138.)

As to judge by whom order may be made, see Code Civ. Pro., § 2271.

In what cases it may be made by referees and before whom it shall be returnable in such case, see Code Civ. Pro., section 2272, and see Naylor v. Naylor (32 Hun, 228).

The order may be made, either before or after the final judgment in the action, or the final order in the special proceeding. It is equivalent to a no-





heretofore and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, delivered to you in this action, within ten days after the service of this notice, or to show cause at a [Special] Term of the \_\_\_\_\_ Court, to be held at, etc., on, etc., at the opening of the court on that day, or as soon thereafter as counsel can be heard, why an attachment should not issue against you, with costs of this motion.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

Yours, etc.,

F. M. [*Attorney for Plaintiff*].

[Office address.<sup>2</sup>]

No. 1192.

**Proof of Service of Notice to Return Mandate.**

(Code Civ. Pro., § 2270.)

[Title of cause.]

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, he served a notice, of which the annexed is a copy, on E. F., sheriff of \_\_\_\_\_ county, to whom it is directed, by delivering the same to him, personally, at \_\_\_\_\_ [or by leaving the same in his office, in the \_\_\_\_\_ of \_\_\_\_\_, during the hours when the same is required by law to be kept open, no person being present therein (or by delivering said copy to M. N., the person in charge of his office at \_\_\_\_\_ during the hours, etc., said person being in his said office at the time of said service)].<sup>3</sup>

A. B.

[Jurat as in form No. 46.]

rant may be issued and where returnable, see Code Civ. Pro., § 2270; and as to cases in which it may be issued by a referee, and where returnable in such cases, see section 2272 (id.), and *Naylor v. Naylor* (32 Hun, 228).

<sup>1</sup>See note 2 to form No. 122.

<sup>2</sup>See section 2275, Code Civ. Pro. The indorsement is discretionary.

<sup>3</sup>See rule 6 of Gen. Rules of Prac.

<sup>4</sup>See note 2 to form No. 122.

<sup>5</sup>See section 184 of county law, chap. 686 of 1892, as amended by chap. 718 of Laws of 1895, as to service of paper upon sheriff.

See, also, *Dunford v. Weaver* (84 N. Y., 445), cited in note 1 to form No. 79.

No. 1193.

**Affidavit of Delivery of Execution to Sheriff.**

(Code Civ. Pro., § 2270.)

[Title of cause.]

COUNTY OF \_\_\_\_\_, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that he is the attorney for the plaintiff in the above entitled action.

That judgment was rendered therein and the roll thereof filed in the clerk's office of \_\_\_\_\_ county, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, for \_\_\_\_\_ dollars and \_\_\_\_\_ cents damages and costs in favor of deponent against C. D., and a transcript thereof was duly filed and said judgment duly docketed in the clerk's office of the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18— [as this deponent is informed and believes].

That execution against the property of the said C. D., in due form of law, was duly issued thereon to E. F., the sheriff of the said county of \_\_\_\_\_, by which said sheriff was commanded to make the said sum of \_\_\_\_\_ dollars, with interest and his fees, and to return the said execution to the clerk of the county of \_\_\_\_\_ within sixty days after the receipt thereof by him, the said sheriff; and that the same was delivered to and received by said sheriff for execution, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, as this deponent is informed and believes

That this deponent has made inquiries at the office of the clerk of \_\_\_\_\_ county for said execution, and he has learned that although the time for returning said execution has expired said execution has not been returned, and that the said judgment has not been paid to the plaintiff, nor has any part thereof, but that the whole remains due and unpaid, and that the said sheriff is in default in not returning the said execution, and in not paying over the said moneys.<sup>1</sup>

A. B.

[Jurat as in form No. 46.]

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<sup>1</sup> The proof of receipt of execution may be by affidavit or other written evidence. (Code Civ. Pro., § 2270.)      Sec for receipt by sheriff of mandate form No. 6.

No. 1194.

**Clerk's Certificate of the Search for Execution and not Finding Same.**

(Code Civ. Pro., § 2270.)

See form No. 402, and note 1 to that form. Describe the paper as follows: The execution issued in the action between A. B., plaintiff, and C. D., defendant, to E. F., sheriff of \_\_\_\_\_ county.

No. 1195.

**Affidavit of Search for Mandate.**

(Code Civ. Pro., § 2270.)

[Title of cause.]

COUNTY OF \_\_\_\_\_, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, he, this deponent, made inquiry at the office of the clerk of the county of \_\_\_\_\_, for the execution issued in the above entitled action to E. F., the sheriff of \_\_\_\_\_ county, and that deponent was informed by said clerk [*or* by a clerk therein], after search, that such execution had not been returned to said office; and this deponent verily believes that such execution has not been returned to said office.

A. B.

[Jurat as in form No. 46.]

No. 1196.

**Order upon Decision of Motion to Compel Return of Mandate by Sheriff.**

(Code Civ. Pro., §§ 2270, 2281, 2283.)

[At, etc., as in form No. 80.]

[Title of cause.]

On reading and filing the affidavit of A. B., dated \_\_\_\_\_, 18—, showing the delivery of an [execution] in this action to E. F., the sheriff of \_\_\_\_\_ county, together with notice

to said sheriff to return the same, and of this motion, and due proof of service of said notice and a copy of said affidavit upon said sheriff, together with [an affidavit] showing that such [execution] has not been returned according to the command thereof, and on motion of C. M., of counsel for the plaintiff, after hearing, etc. [and on filing, name opposing papers]; and the court having determined [\*] that the said sheriff has not returned the said [execution] as thereby commanded, and that his neglect to do so was calculated to [and actually did] defeat, impair, injure and prejudice the rights or remedies of the [plaintiff] in the above entitled action [or special proceeding] brought in this court:

It is hereby ordered and adjudged accordingly, that the said sheriff has not returned, etc. [repeat as above from (\*) to: It is hereby ordered, etc.].<sup>1</sup>

And it is hereby further ordered and directed, that a fine of ——— dollars, being the amount of the costs and expenses, which appear to have been incurred by said A. B. by reason of the said neglect of said E. F., be and the same is hereby imposed upon the said E. F., sheriff as aforesaid, and that said E. F. pay the same to said A. B., or his attorney, in satisfaction of the costs and expenses which appear to have been incurred by him by the said neglect of said E. F.

And it is further ordered and adjudged, that the said E. F. be imprisoned by the coroners of the county of ———, or any of them, in the common jail of the county of ——— until he has returned the said execution, and has paid the fine hereby imposed upon him, to wit: the said sum of ——— dollars, with the fees hereupon [and that a warrant of commitment be issued accordingly].<sup>2</sup>

<sup>1</sup> The order must adjudicate in terms, that the accused has committed the offense charged, and that it was calculated to, or did, actually defeat, impair, etc., the rights or remedies of the plaintiff. If it does not, it must be reversed. (*Mahon v. Mahon*, 19 Week. Dig., 346; S. C., 50 Super. Ct., 92; 5 Civ. Pro. [Browne], 58.) See also, *Wolfe v. Knight* (15 Misc., 438), *Matter of Sims* (57 Hun, 433), *Fischer v. Langbien* (103 N. Y., 84), *Whitney v. Whitney* (33 State Rep., 704), *Law-*

*rence v. Harrington* (63 Hun, 195), *Wolf v. Buttner* (6 Misc., 119).

<sup>2</sup> The offender may be committed upon a certified copy of the order without further process. (Code Civ. Pro., § 2283.) But that a warrant may also be issued, see (*id.*) § 2285. See the latter section as to length of imprisonment.

Where a final order has been made, convicting a person of contempt, and pronouncing judgment of fine and imprisonment, the proceedings are so far

No. 1197.

**Undertaking to Procure Discharge.**

(Code Civ. Pro., § 2277.)

[Title of proceeding.]

Whereas, a warrant of attachment was heretofore issued by, etc., to the [sheriff of ——— county] in the above entitled proceeding, directing the said sheriff [state directions of warrant]; and,

Whereas, by the indorsement thereupon of the judge, [etc.] issuing the same, the said C. D. was authorized to give an undertaking for his appearance to answer in the sum hereinafter mentioned.

Now, therefore, we, the said C. D., of ———, and E. F., of ———, by occupation a ———, and G. H., of ———, by occupation a ———, do hereby, jointly and severally, undertake, pursuant to section 2277 of the Code of Civil Procedure, with the people of the State of New York, in the sum of ——— dollars, that the said C. D. will appear, at, etc., on, etc., the time and place where the said warrant is returnable, and then and there abide the direction of the court [or judge (or referee)].

Dated ———, 18—.

C. D.  
E. F.  
G. H.

[Acknowledgment or proof, justification and approval as in forms Nos. 340 and 538.]

No. 1198.

**Affidavit in Proceedings for Contempt where the Accused is in the Custody of Sheriff, etc.**

(Code Civ. Pro., § 2278.)

As in form No. 1185, adding thereto as follows: That the

terminated that a certiorari may be issued to review them. (People v. Donohue, 59 How. Pr., 417 [Gen. Tm., Supr. Ct.] )

The fact that a sheriff was served

with a warrant of attachment against the plaintiff's property before the return day, is no excuse for not returning the execution. He should make a special return according to the fact.

said C. D. is in the custody of the sheriff of ——— county [or name other officer], by virtue of an execution against his person [or by virtue of a mandate for a contempt or misconduct (or by virtue of a commitment upon a criminal charge, stating briefly the particulars of the execution, etc., under which he is held)].<sup>2</sup>

A. B.

[Jurat as in forms No. 46.]

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 No. 1199.
**Writ of Habeas Corpus in Contempt Proceedings.**

(Code Civ. Pro., § 2278.)

As in form No. 1055 to word “by,” in line three, and from thence as follows: By whatsoever name the said C. D. is called or charged, before [naming court], at, etc., on, etc. [or immediately after the receipt of this writ], to answer for the offense of a contempt of said court, to wit [naming offense], to do and receive what shall then and there be considered concerning the said C. D., and have you then there this writ.

Witness, etc. [conclude as in form No. 1055].

[Indorsement as upon form No. 1190.<sup>3</sup>]

[Signatures, seal, allowance, etc., as in form No. 1055.]

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 No. 1200.
**Return to Writ of Habeas Corpus in Contempt Proceedings.**

(Code Civ. Pro., § 2279.)

Substantially as in forms Nos. 31 and 1057.

(Parker v. Bradley, 46 N. Y. Super. Ct., 244 [Sp. Tm.] )

<sup>1</sup> The officer taking the acknowledgment of the undertaking must, if the sheriff so requires, examine under oath, to a reasonable extent, the persons offered as sureties concerning their property and circumstances. (Code Civ. Pro., § 2277.)

<sup>2</sup> For writ of habeas corpus, which is required to be issued in this case by section 2278, see next form, No. 1199.

<sup>3</sup> It seems to be implied in section 2279, Code Civ. Pro., that the indorsement provided for by section 2275 (id.) may be made upon this writ of habeas corpus, although the latter section in terms only provides for it in the case of a warrant of attachment.

As to duty of officer to whom the writ is directed, see section 2278, Code Civ. Pro.

[*Or* where an undertaking has been given, proceed as in form No. 31 to (\*), and from thence as follows: Before the return day of said writ the said C. D. executed and delivered to me the undertaking, which is filed by me herewith.']

Wherefore I do not have the body, etc. [as in form No. 31.]

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No. 1201.

**Return to Warrant of Attachment in Contempt Proceedings.**

(Code Civ. Pro., § 2279.)

I, M. N., sheriff of \_\_\_\_\_ county, do hereby certify and return to the [within] warrant of attachment, that I have arrested the said C. D. [and have him before this court at the day and place therein mentioned], as I am thereby commanded, and that at the time of said arrest I delivered to the said C. D. a copy of the said warrant and of the affidavit therein mentioned upon which it was issued.

And I further certify and return, that the said C. D., pursuant the indorsement of \_\_\_\_\_ upon said warrant, executed and delivered to me, before the return day thereof, an undertaking, which I file herewith, and that I thereupon discharged the said C. D. from said arrest.

Dated \_\_\_\_\_, 18—.

M. N., *Sheriff, etc.*

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No. 1202.

**Order Directing Interrogatories to be Filed.**

(Code Civ. Pro., § 2280.)

[At, etc., as in form No. 80 (when made by court).]

[Title of proceeding.]

The defendant, C. D., having been charged with a contempt of court, in [violating an order of injunction granted in an action in this court, between A. B., plaintiff, and said C. D., defendant], and a warrant of attachment [*or* writ of habeas corpus] having been heretofore issued against him for such contempt, directed to the sheriff of \_\_\_\_\_ county,

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<sup>1</sup> See note 3 to form No. 1199.

and returnable here on this \_\_\_\_\_ day of \_\_\_\_\_, 18—, and the said sheriff having made return thereto that he had arrested the said C. D., and brought him before [this court] at this time and place as thereby commanded [*or* that he had arrested the said C. D., and that said C. D. had given an undertaking as allowed by the indorsement upon said warrant (*or* writ) and had been thereupon discharged by him, which undertaking was filed by said sheriff with his said return], and the said C. D. now being personally before this court by virtue of said warrant [*or* of said writ], and denying that he is guilty of the offense charged against him:

It is hereby ordered, on motion of M. C., attorney for the plaintiff, that the said A. B. do forthwith [*or* within \_\_\_\_\_ days] file in the office of the clerk of this court interrogatories, specifying the facts and circumstances of the offense charged against him, and that he serve a copy thereof upon the said C. D. [*or* upon the attorney for the said C. D.], and that the said defendant make written answers thereto, under oath, and file the same with the clerk of this court within \_\_\_\_\_ after the time when the said interrogatories are served upon him, and that either party may produce affidavits, or other proof, contradicting or corroborating any answer [\*], and that said C. D. attend before [this court, in the custody of said sheriff], on, etc., at, etc., that [the court] may determine upon the original affidavits, and the answers and proofs, whether the said C. D. has committed the offense charged.

A. O., *Judge, etc.*

(*when made by judge.*)

Date [when made by judge, etc.]

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No. 1203.

### **Interrogatories to Accused in Contempt Proceedings.**

(Code Civ. Pro., § 2280.)

[Title of proceeding.]

Interrogatories to be administered to C. D., above named, touching a contempt alleged against him for [the violation



of the order of injunction issued in an action between, etc.], which interrogatories are filed, pursuant to an order of the court [*or judge, etc.*], dated ———, 18—.

*First interrogatory:* Were you, or were you not, on or about the ——— day of ———, 18—, or at any other time, and at what time, served with an order of injunction, issued in an action in said court between A. B., plaintiff, and C. D., defendant, on the ——— day of ——— last? Was, or was not, such order served upon you by showing you the original order of injunction, signed by the judge granting the same, and leaving with you a copy thereof? [*or by delivering to and leaving with you a copy of said order, certified by the county clerk of the county of ———?*] When and by whom was this service made? Answer this interrogatory fully and particularly.

*Second interrogatory:* [Proceed in the above manner, by such questions as will show, or tend to show, the accused guilty of the offense charged.']

G. H., *Attorney for* ———.

[Office address.<sup>2</sup>]

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No. 1204.

### Answer of Accused to Interrogatories.

(Code Civ. Pro., § 2280.)

[Title of proceeding.]

The answer of C. D., on oath, to the interrogatories filed by A. B. herein, pursuant to an order of the court, etc., made on the ——— day of ———, 18—.

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<sup>1</sup> Interrogatories are not necessary where the proceedings are commenced by order to show cause. (*The Mayor v. N. Y. and S. I. Ferry Co.*, 64 N. Y., 622; *aff'g S. C.*, 40 N. Y. Super. Ct., 300; Code Civ. Pro., § 2280.)

See, also, *People v. Cartwright* (11 Hun, 362), *People v. Cooper* (20 Hun, 486), *Slater v. Merritt* (75 N. Y., 268), *In the matter of Steinert* (24 Hun, 246), *Sargent v. Warren* (2 State Rep., 179), as to proceedings upon return of warrant.

A temporary injunction which by its terms is to continue in force until further order of the court, is abrogated by a final judgment in the action in favor of plaintiff, which makes no provision for the continuance of the injunction, and does not grant any other or further injunction, and there can be no punishment for contempt for thereafter disregarding its directions. (*Gardner v. Gardner*, 87 N. Y., 14.)

<sup>2</sup> See note 2 to form No. 122.

*First.* To the first interrogatory he answers and says [insert the answer to the first interrogatory].

*Second.* To the second interrogatory he answers and says [insert answer].

[And in like manner to the other interrogatories.<sup>1</sup>]

C. D.

[Jurat as in form No. 46.]

No. 1205.

### Order Convicting Defendant of the Contempt Charged, and Directing His Punishment.

(Code Civ. Pro., § 2281.)

[At, etc., as in form No. 80 (when made by court).]

[Title of proceeding.]

A warrant of attachment [*or* writ of habeas corpus] having been heretofore issued out of this court [*or* by me], directed to the sheriff of ——— county, commanding him to arrest C. D. and to bring him before this court [*or* before me] forthwith [*or* on the ——— day of ———, 18—], to answer for a contempt of court in [violating the injunction order made in an action in this court, between A. B., plaintiff, and said C. D., defendant, on the ——— day of ———, ———, 18—, in that (stating manner of violation)], and the said sheriff having made return thereto that he had arrested, etc. [state substance of return, as in forms Nos. 1200, 1201], and the said C. D. [\*] having appeared personally in this court, and interrogatories having been filed, pursuant to the order of this court, specifying the facts and circumstances of the offense charged against him, and the said C. D. having made written answers thereto, on oath, and the court having determined upon the original affidavits, the answers and subsequent proofs, to wit [naming other papers read], [\*] that the said C. D. has committed the offense charged, and that it was calculated to [and actually did], defeat, impair, impede or prejudice the rights or remedies of the said A. B.:

It is hereby ordered accordingly, on motion of, etc., that

<sup>1</sup> See note 1 to form No. 1203.

the said C. D. has committed, etc. [repeating as above from (\*)].<sup>1</sup>

And it is further ordered, that a fine of \_\_\_\_\_ dollars be and the same is hereby imposed upon the said C. D. for his misconduct.

And it is further ordered, that the said C. D. pay to the said plaintiff the costs and expenses of these proceedings, amounting to the sum of \_\_\_\_\_ dollars, and sheriff's fees as hereinafter mentioned.

It is also further ordered, that the said C. D. be and he is hereby directed to stand committed to the common jail of the county of \_\_\_\_\_, there to remain, charged upon said contempt, until the fine imposed as aforesaid, together with the said costs and expenses, and sheriff's fees hereupon, or upon the warrant issued pursuant hereto, be fully paid, unless he shall be sooner discharged by the court, and that a warrant of commitment be issued accordingly.<sup>2</sup>

Date [when made by judge].

A. O., *Judge, etc.*  
(when made by judge).

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No. 1206.

### Warrant of Commitment Pursuant to Order.

(Code Civ. Pro., § 2281.)

[Title of proceeding.]

*The People of the State of New York, to the Sheriff of the County of \_\_\_\_\_, greeting:*

Whereas, an order was made by the [Supreme] Court at a [Special] Term thereof, held at, etc., on, etc., in the above entitled proceeding, that C. D. be committed to the common jail of the county of \_\_\_\_\_, there to remain charged with

<sup>1</sup> See as to necessity of these statements, *Mahon v. Mahon* (19 Week. Dig., 346, cited in note 1 to form No. 1196). *Hasse v. Mattheson* (1 Misc. 2), *Bergin v. Deering* (70 Hun, 381), *Boon v. McGucken* (67 Hun, 251), *People ex rel. Cauffman v. Van Buren* (136 N. Y., 252), *Matter of Muller* (67 Hun, 34), *First Nat. Bank of Plattsburgh v. Fitzpatrick* (80 Hun, 75), *Wolf v. Buttner* (6 Misc., 119), *Wolfe v. Knight* (15 id., 438).

<sup>2</sup> Where such a final order has been made, the proceedings are so far terminated, that a certiorari may be issued to review them. (*People v. Donohue*, 59 How. Pr., 417 [Sup. Ct., Gen. Tm.].) See, also, *Wolf v. Buttner* (6 Misc. R., 119), as to contents of order and its nature.

As to disposition of the prisoner upon return of habeas corpus, see Code Civ. Pro., § 2282.

As to amount of fine, see (id.) § 2284 ;



the contempt mentioned in said order, until he should have [paid the fine mentioned in said order, imposed upon him for his said misconduct, amounting to the sum of \_\_\_\_\_ dollars, together with the costs and expenses of the proceedings for such misconduct, amounting to the sum of \_\_\_\_\_ dollars, and the sheriff's fees hereupon], and that a warrant of commitment issue accordingly.

Now, therefore, we command you, that you take the body of said C. D., and him safely and closely keep in your custody, in the common jail of the county of \_\_\_\_\_, until he shall have fully [paid the fine imposed as aforesaid, to wit: the sum of \_\_\_\_\_ dollars, and also the costs and expenses aforesaid, amounting to \_\_\_\_\_ dollars, and your fees hereupon], or until the said C. D. shall be discharged by the further order of this court, and that you make re-

Martin Cantine Co. v. Warshaeur (7 Misc., 412), H. M. Co. v. Venner (74 Hun, 458).

As to length of imprisonment, see (id.) § 2285; Matter of Morris (45 Hun, 167), Anonymous (18 Abb. N. C., 216).

That the expenses of the proceedings to punish the guilty party may be included in the fine, see Brett v. Brett (83 Hun, 547; aff'd, without opinion, 98 N. Y., 619), and cases there cited. See, also, Matter of Morris (*supra*), Doyle v. Doyle (4 Civ. Pro. R., 265), Fenlon v. Dempsey (22 Abb. N. C., 114), Matter of Bernhard (16 State Rep., 240), Fall Brook Coal Co. v. Hecksher (42 Hun, 534), King v. Flynn (37 id., 329), Stubbs v. Ripley (39 id., 626), Matter of Jones (6 Civ. Pro. R., 250), Wheelock v. Noonan (55 Super. Ct., 382), King v. Barnes (113 N. Y., 476), People ex rel. Jones v. Davidson (35 Hun, 471), Matter of Ammerman (3 State Rep., 356), Quigley v. Quigley (45 Hun, 23), Clark v. Clark (11 Civ. Pro. R., 7), People ex rel. Borst v. Grant (41 Hun, 351), Moffat v. Herman (116 N. Y., 131), Fenlon v. Dempsey (17 Civ. Pro. R., 388), People ex rel. O'Conner v. Sickles

(59 Hun, 342), Lawrence v. Harrington (63 id., 195), People ex rel. Meyer v. Masonic Guild, etc. (22 Civ. Pro. R., 74), Cunningham v. Hatch (30 Abb. N. C., 31), Matter of Board of Health of Yonkers (69 Hun, 110), Luedeke v. Coursen (3 Misc., 559), Meyer v. Drey-spring (id., 560), People ex rel. Baldwin v. Miller (9 Misc., 1), Langerman v. McAdam (6 Misc., 374), Holly Mfg. Co. v. Venner (74 Hun, 458), Martin Cantine Co. v. Warshaeur (7 Misc., 412), Hovey v. Elliott (145 N. Y., 126), Taber v. Manhattan R. Co. (14 Misc., 189), De Witt v. Gunn (24 Civ. Pro., 406).

Where the party acted in good faith, and in accordance with what he believed to be his duty, only motion fees and disbursements can be taxed as costs. (People v. Cooper, 20 Hun, 486.) See, also, King v. Flynn (37 id., 329.)

For form of commitment for contempt for not answering question, see People ex rel. Mitchell v. Sheriff (7 Abb. Pr., 98; 29 Barb., 622), and note 1 to form No. 1206, and see same in criminal contempt proceeding, form No. 1.

turn of this writ with your proceedings thereon, to our said court.<sup>1</sup>

Witness, etc. [teste].

[L. s.]

J. L., *Clerk.*

F. C., *Attorney for* \_\_\_\_\_

[Office address.<sup>2</sup>]

### MEMORANDUM.

In a case referred to in the concluding sentence of section 2285 Code Civ. Pro., say after word "discharged" in form No. 1206, as follows: according to law or by the further order of this court, said imprisonment not to continue longer than for the term of \_\_\_\_\_ months, and that you make return, etc. (concluding as in form No. 1206) and, in such case, say after word "unless" in form No. 1205, as follows: he shall be sooner discharged according to law or by the court, said imprisonment not to continue longer than \_\_\_\_\_ months, and that a warrant of, etc. (concluding as in form No. 1205.)

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No. 1207.

### **Affidavit to Obtain Release of Offender.**

(Code Civ. Pro., § 2286.)

[Title of proceeding.<sup>1</sup>]

\_\_\_\_\_ COUNTY, ss.:

C. D., of \_\_\_\_\_, being duly sworn, says, that on the

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<sup>1</sup> See *People ex rel. Jones v. Davidson* (21 Week. Dig., 324; S. C., 35 Hun, 471), as to warrant in case of contumacious and unlawful refusal to answer legal and proper interrogatories.

Although it is not necessary that the questions which the witness has refused to answer should be set out *in haec verba* in the commitment, yet it

is the better practice to so set them out. (Id.)

See, also, last paragraph of note 2 to form No. 1205; and see *People ex rel. Duffus v. Brown* (46 Hun, 320), *Matter of Jones* (6 Civ. Pro., 250), *People ex rel. Pond v. Tamsen* (15 Misc., 364).

<sup>2</sup> See note 2 to form No. 122.

——— day of ———, 18—, a warrant was issued pursuant to the final order of the court made in the above entitled proceeding, which was taken to punish him for a contempt of court, pursuant to title third of chapter seventeen of the Code of Civil Procedure, to the sheriff of the county of ———, commanding the said sheriff, etc. [reciting the directions of the warrant (*or* order)].<sup>1</sup>

That deponent is now, and has been since the ——— day of ———, 18—, imprisoned in the said jail of ——— county, in the custody of said sheriff, under the [warrant] aforesaid.

And this deponent further says, that he is unable to endure said imprisonment [*or* that he is unable to pay the sum required by said order to be paid, or any part thereof (*or* to perform the act or duty required by said order to be performed)], in order to entitle him to be released from said imprisonment.

That [here state reasons for such inability to endure the imprisonment, pay, etc.].

And this deponent asks that the court will make an order directing the said sheriff to discharge him from his imprisonment.<sup>2</sup>

C. D.

[Jurat as in form No. 46.]

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No. 1208.

### Notice of Application for Discharge of Offender.

(Code Civ. Pro., § 2286.)

[Title of proceeding, etc.]<sup>1</sup>

SIR—Take notice, that upon the affidavit, with a copy of which you are herewith served, a motion will be made, at, etc., on, etc., for an order directing the discharge of C. D.

<sup>1</sup> If the imprisonment is under the order of the court, the title will be that of the action, etc., in which the proceeding was taken, and the affidavit must be changed accordingly.

<sup>2</sup> See *Moore v. McMahon* (20 Hun, 44), *Strobridge v. Strobridge* (21 Hun, 283), *Park v. Park* (18 Hun, 466), *Mahon v. Mahon* (80 N. Y., 156; aff'g S. C., 19 Week. Dig., 346), *Matter of Steinert* (29 Hun, 301), *Ryckman v.*

*Ryckman* (34 Hun, 235; S. C., 20 Week. Dig., 129), *Ryer v. Ryer* (33 Hun, 116; S. C., 67 How. Pr., 369; 19 Week. Dig., 358), *People ex rel. Borst v. Grant* (41 Hun, 351), *Matter of Ryckman* (39 Hun, 646; aff'd S. C., 98 N. Y., 639), *Wheelock v. Noonan* (55 Super. Ct., 302), *People ex rel. Clark v. Grant* (13 Civ. Pro. R., 183), *Stubbs v. Ripley* (39 Hun, 626; 102 N. Y., 734).

from imprisonment under the [warrant] of commitment heretofore [issued] herein, and for such other, etc.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

E. F., *Attorney for C. D.*  
[Office address.<sup>2</sup>]

To A. B.

\_\_\_\_\_  
No. 1209.

**Order Discharging Offender from Imprisonment.**

(Code Civ. Pro., § 2286.)

[At, etc., as in form No. 80 (when made by court).]

[Title of proceeding, etc.]

On reading and filing the affidavit of C. D., dated \_\_\_\_\_, 18—, by which it appears that said C. D. is imprisoned in the common jail of \_\_\_\_\_ county, in the custody of the sheriff of said county, under a [warrant issued to him] in the above entitled [proceeding, which was a proceeding] for a contempt, under title third of chapter seventeenth of the Code of Civil Procedure, and that said C. D. is unable to endure said imprisonment, [*or is unable to pay the sum required by the final order in said proceeding to be paid (or to perform the act or duty, to wit: stating same, required by the final order in said proceeding to be performed)*] by reason of [state reason], and on filing proof of due service of notice of this motion upon A. B., and on motion of M. F. for said C. D., and after hearing, etc., and on reading [name opposing papers (*or no one appearing to oppose*)]:

It is hereby ordered, that the sheriff of \_\_\_\_\_ county, in whose custody the said C. D. is under said warrant of commitment, discharge the said C. D. from the said imprisonment<sup>1</sup> [here state terms upon which discharge is granted].

A. O., *Judge [or Justice, etc.]*  
(*when made by judge*).

Date [of judge's order].

<sup>1</sup> See notes to form No. 1207.

<sup>2</sup> See note 2 to form No. 122.



No. 1210.

**Order when Accused does not Appear.**

(Code Civ. Pro., § 2288.)

As in form No. 1205 to [\*], and from thence as follows: Having failed to appear on the return day of said warrant:<sup>1</sup>

It is hereby ordered, on motion of, etc. [†], that another warrant of attachment issue herein to the sheriff of the county of ———, commanding him to arrest the said C. D. and bring him before this court [etc.], forthwith [*or on, etc., at, etc.*], to answer for the said offense.

[*Or as above to (†), and from thence as follows: That the said undertaking given by said C. D. (upon his arrest as aforesaid), be prosecuted by and in the name of A. B.']*

Date [when made by judge].

[Signature]

*(when made by judge, etc.).*

No. 1211.

**Complaint on Undertaking Given for Appearance of Offender.**

(Code Civ. Pro., § 2289.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that heretofore and on or about the ——— day of ———, 18—, a warrant of attachment was issued out of the ——— Court [*or by A. O., judge, etc.*] in a proceeding taken pursuant to title third of chapter seventeenth of the Code of Civil Procedure against C. D. for a contempt of court, directed to the sheriff of ——— county, commanding him, etc. [state command of writ].

That by an indorsement upon said warrant the said court [etc.] authorized the giving of an undertaking by said C. D. for his appearance to answer in the sum of ——— dollars.

That said C. D. was arrested by the said sheriff pursuant to said warrant, and that thereupon the defendants exe-

<sup>1</sup> Or the order may direct both the cution of the undertaking. (Code Civ. Pro., § 2288.)

cuted an undertaking, pursuant to statute, a copy of which is hereto annexed, marked "A," and that said C. D. delivered the said undertaking to said sheriff before the return day of said warrant, and thereupon the said sheriff discharged said C. D. from said arrest.

And this plaintiff further says, that the said C. D. did not appear at the time when, and the place where, the said warrant was returnable, as aforesaid, to wit, at, etc., on, etc., and then and there abide the direction of the said court [etc.], and that thereupon an order was duly made by said court [etc.], directing the said undertaking to be prosecuted by and in the name of the plaintiff.

And plaintiff further shows, that he has been damaged by the misconduct of the defendant to the extent of \_\_\_\_\_ dollars, and that he has been put to costs and expenses in the proceeding in which said warrant was issued amounting to the sum of \_\_\_\_\_ dollars.

Wherefore plaintiff prays judgment against the defendants for the sum of \_\_\_\_\_ dollars, with the costs of this action.<sup>1</sup>

C. F., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

#### TITLE IV.

##### FORMS RELATING TO PROCEEDINGS TO COLLECT A FINE.

(Code Civ. Pro., Ch. 17, Tit. 4.)

No. 1212. Warrant for collection of fines imposed by court of record.

No. 1212.

##### Warrant for Collection of Fines Imposed by Court of Record.

(Code Civ. Pro., § 2293.)

*To the Sheriff of the County of \_\_\_\_\_ :*

You are hereby commanded, pursuant to the provisions

<sup>1</sup> See, as to action by attorney-general or district attorney upon the undertaking, section 2290 of Code Civ. Pro.

<sup>2</sup> See note 2 to form No. 122.

See, also, as to punishment of misconduct at trial term, § 2292 of Code Civ. Pro., as amended by ch. 946 of Laws of 1895, taking effect Jan. 1,

1896, reading as follows: Where misconduct, which is punishable by fine or imprisonment, as prescribed in this title, occurs at a trial term, or with respect to a mandate returnable at such term, and was not punished at the term at which it occurred; the Supreme Court may inquire into and punish the

of title fourth of chapter seventeenth of the Code of Civil Procedure, to collect from each of the persons named in the schedule hereto annexed, the sum set opposite that person's name; and to pay over the sum collected to the treasurer of the county of \_\_\_\_\_, and to return this warrant with your proceedings thereupon at a \_\_\_\_\_ term of the \_\_\_\_\_ Court, to be held next after the expiration of sixty days from the receipt hereof by you.<sup>1</sup>

[L. s.] J. L., *County Clerk of \_\_\_\_\_ County*  
[or other description].

*SCHEDULE of the fines imposed by the \_\_\_\_\_ Court, at a [Trial Term of the Supreme Court], held at the \_\_\_\_\_ of \_\_\_\_\_, in [and for] the County of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18— [upon residents of the County of \_\_\_\_\_],<sup>2</sup> without being accompanied with an order for the immediate commitment of the person so fined, until the fine is paid :*

| NAMES OF PERSONS<br>FINED. | PLACE OF<br>RESIDENCE. | AMOUNT OF FINE<br>IMPOSED. | CAUSE FOR WHICH FINE<br>WAS IMPOSED. |
|----------------------------|------------------------|----------------------------|--------------------------------------|
|                            |                        |                            |                                      |

STATE OF NEW YORK, }  
\_\_\_\_\_ County, } ss.:

I, J. L., clerk of said county, do hereby certify, pursuant to the provisions of title fourth of chapter seventeenth

misconduct, as if it had occurred at a Special Term of the Supreme Court, held in the same county, or with respect to a mandate returnable at such a Special Term.

<sup>1</sup> As to place where returnable and proceedings upon failure to return, see Code Civ. Pro., section 2297, as amended by chap. 946 of Laws of 1896, taking effect January 1, 1896.

As to manner of execution of warrant, see section 2296 (id.).

As to liability of sheriff, see section 2300 (id.), and form No. 943.

As to application of this title, see section 2301, Code Civ. Pro.

<sup>2</sup> If a delinquent resides in another county, a separate warrant for the collection of the fine imposed upon him, with an appropriate schedule annexed thereto, must be issued in like man-

of the Code of Civil Procedure, that the foregoing schedule contains a true abstract of the orders imposing fines [upon residents of the county of ——]<sup>1</sup> made at a [Trial Term of the Supreme Court], held at the —— of ——, in the county of ——, on the —— day of ——, 18—, without being accompanied with an order for the immediate commitment of the person so fined until said fine is paid.

In witness whereof, etc.

J. L., *County Clerk of —— County*  
[or other description].

## TITLE V.

### FORMS RELATING TO PROCEEDINGS TO DISCOVER THE DEATH OF A TENANT FOR LIFE OF REAL PROPERTY.

(Code Civ. Pro., Ch. 17, Tit. 5).

- No. 1213. Petition for production of tenant for life of real property.  
 1214. Notice of presentation of petition.  
 1215. Order upon presentation of petition.  
 1216. Affidavit to procure writ of habeas corpus for prisoner, etc.  
 1217. Referee's report in these proceedings.  
 1218. Order dismissing the petition when the original order has been complied with.  
 1219. Petition of person evicted for restoration to possession of real property.  
 1220. Complaint in action by person evicted under order for rents and profits.

### No. 1213.

#### **Petition for Production of Tenant for Life of Real Property.**

(Code Civ. Pro., § 2303.)

*To the Supreme Court of the State of New York :<sup>1</sup>*

The petition of A. B. respectfully shows, [\*] that he is the owner [in fee] of the remainder of certain real property situated in the —— of ——, in the county of ——, and is entitled to claim the same after the death of C. D., who

ner to the sheriff of the county where he resides. (Code Civ. Pro., § 2295.)

<sup>1</sup> Insert this clause in brackets when there are delinquents residing in other counties.

is entitled to a life estate therein, which said real property is described as follows, to wit [describe same].

That M. F. is in possession of said real property under title derived from the said C. D., being the tenant for —— years of the said C. D. [*or* state other interest].

[*Or* that M. F. is the guardian of said C. D., who is, if living, an infant under the age of twenty-one years (*or* is the husband of said C. D., if living, *or* is the trustee, etc., of said C. D., if living), and as such is the person who has or is entitled to the custody of the person of said C. D. [*or* to the care of the estate of said C. D.).]

That your petitioner believes that the said C. D. is dead, and that such belief is founded upon the following grounds, to wit [state same].

That no application has been [heretofore] made for the relief hereby prayed for [within one calendar year from the date of this petition].

Wherefore your petitioner prays for an order, directing the production of the said C. D., as prescribed in title fifth of chapter seventeenth of the Code of Civil Procedure, by the said M. F.<sup>2</sup>

Dated ——, 18—.

A. B.

—— COUNTY, ss.:

A. B., of ——, being duly sworn, says, that he is the petitioner named in the foregoing petition, by him subscribed, and that the matters of fact therein set forth are true.

A. B.

[Jurat as in form No. 46.]

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No. 1214.

### Notice of Presentation of Petition.

(Code Civ. Pro., § 2304.)

SIR—Take notice, that the annexed [*or* foregoing] peti-

<sup>1</sup> See note 1 to form No. 1214, as to place at which application is to be made.

<sup>2</sup> See *Avery v. Everett* (21 Week. Dig., 268; 36 Hun, 6, aff'd S. C., 110 N. Y., 317), as to the case of a felon imprisoned for life, and that in his case an estate in remainder, depending upon his death, would not vest in in-

terest or possession, and see, also, *Matter of Zeph* (50 Hun, 523); note 1 to form No. 316. A proceeding cannot be instituted under Code Civ. Pro., § 2302 to require the production of a devisee who holds a base or determinable fee, liable to be defeated by her death without issue (*Matter of Hyde*, 41 Hun, 72).

tion will be presented to the Supreme Court, at a Special Term thereof to be held at, etc., on, etc.,<sup>1</sup> and that application will be made to said court, upon such presentation, at the opening of said court, or as soon thereafter as counsel can be heard, for the relief therein specified.<sup>2</sup>

Dated \_\_\_\_\_, 18—.

A. B. [*or* M. N., *Attorney for* A. B.].

[Office address.]

To M. F. [*Guardian, etc.*].

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No. 1215.

**Order upon Presentation of Petition for Discovery of Death of Life-Tenant.**

(Code Civ. Pro., § 2305.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

Upon the presentation of the petition and affidavit of A. B., which petition bears date \_\_\_\_\_, 18—, with due proof, by the affidavit of \_\_\_\_\_, dated \_\_\_\_\_, 18—, of service of a copy thereof, and of notice to M. F. [*guardian, etc.*], of the presentation of the same at this court, on this day, [\*] and no sufficient cause to the contrary having been shown by said M. F., and on motion of I. J., counsel for said petitioner, and after hearing R. T., for said M. F., and on reading [*name opposing papers (or no one appearing to oppose)*]:

It is hereby ordered, that the said M. F. [*guardian, etc.*], produce the said C. D. before this court [*or before I. L., who is hereby appointed as referee for that purpose*], at, etc., on, etc., or, in default thereof, to prove that he is living.<sup>4</sup>

[*Or as above to (\*) and from thence as follows: And the*

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<sup>1</sup> The application is to be made at a Special Term of the Supreme Court, held within the judicial district, wherein the property, or a part thereof, is situated. (Code Civ. Pro., § 2302.)

<sup>2</sup> A copy of the petition, including the affidavit, together with this notice,

must be personally served at least fourteen days before its presentation upon the person required by the prayer of the petition to produce the tenant for life. (Code Civ. Pro., § 2304.)

<sup>3</sup> See note 2 to form No. 122.

<sup>4</sup> See section 2306, Code Civ. Pro., as

said M. F. (as guardian, etc.) having presented to the court presumptive proof, by the affidavit of ———, dated ———, 18—, that the said C. D. is, or lately was, at ———, in the State of ——— :

It is hereby ordered, on motion of ———, of counsel for said A. B., and after hearing, etc., that the said A. B. is hereby required to take out a commission (to F. C. and G. M., residing at ———, in the said State of ———), for the purpose of obtaining a view of the said C. D., and of taking such testimony respecting his identity as the parties produce :

And it is further ordered and directed, that the proceedings upon the said petition be stayed until the return of the said commission ; and that the said petition be dismissed, with costs, unless the said petitioner takes out such commission within ——— days from the date of this order, and diligently procures it to be executed and returned at his own expense.<sup>1</sup>]

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No. 1216.

**Affidavit to Procure Writ of Habeas Corpus for Prisoner,  
etc.**

(Code Civ. Pro., § 2307.)

[Title of proceeding.]

———— COUNTY, ss. :

M. F., of ———, being duly sworn, says, that this proceeding is brought to obtain the discovery, pursuant to title fifth of chapter seventeenth of the Code of Civil Procedure, of C. D., a life-tenant of certain property described in the petition herein.

That [state what proceedings have been taken].

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to service of order, powers of referee, etc.

<sup>1</sup> See Code Civ. Pro., § 2311, as to the issuing of commission; for general provisions respecting it, see (id.) section 2312, and for form of commission, etc., see forms Nos. 382, etc., which forms are to be modified according to the requirements of the order; and, fur-

ther, as to execution of commission, see (id.) sections 2313, 2314, 2315.

Upon the return of the commission, the proceedings are the same as upon the report of a referee, as prescribed in sections 2309, 2310, Code Civ. Pro.

But the court may, in its discretion, receive additional proof from either party. (Code Civ. Pro., § 2315.)

And deponent further says, that the said C. D. is imprisoned in the \_\_\_\_\_, at \_\_\_\_\_, and is in the custody of [stating officer], for the [crime] of \_\_\_\_\_, and not upon a sentence for a felony, or is kept [*or* detained] within this State, to wit: at \_\_\_\_\_, by G. M., as this deponent is informed and believes by R. S. and T. W., whose affidavits are also hereto annexed [*or* state reasons why their affidavits cannot be procured].<sup>1</sup>

M. F.

[Jurat as in form No. 46.]

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No. 1217.

**Referee's Report in Proceeding to Compel Production of Life-tenant.**

(Code Civ. Pro., § 2308.)

[Title of proceeding.]

I, I. J., duly appointed by the court in the above entitled proceeding, do hereby respectfully report:

That I have been attended by the parties and their counsel, and have heard the allegations and proofs of the parties, having first taken the oath prescribed by law, which is hereto annexed.

That a person was produced before me [*or* that no person was produced before me] as being C. D., the person whose death is in question, and that I have taken in the form of depositions, which are hereto annexed, the proofs which have been taken before me respecting the identity of the said person so produced with the said C. D. [*or* in case of no one being produced, say as follows, after word annexed: the proofs which have been taken before me upon the question whether the said C. D. is living]

And I further report, that my conclusions upon the questions controverted before me are as follows [state same].

All of which is respectfully submitted.<sup>2</sup>

Dated \_\_\_\_\_, 18—.

I. J., *Referee.*

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<sup>1</sup> For form of this writ of habeas corpus, see form No. 1055.

<sup>2</sup> The referee must deliver his report to the petitioner, or file it with the



No. 1218.

**Order Dismissing the Petition when the Original Order  
has been Complied with.**

(Code Civ. Pro., §§ 2309, 2310.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

Upon filing the report of I. J., the referee appointed in the above proceeding, dated ———, 18—, and the proofs thereto appended, by which it appears to the satisfaction of the court [*or* the court having heard the proofs and allegations of the respective parties upon their appearing, pursuant to the order of the court made herein on the ——— day of ———, 18—, from which proofs and allegations it appears to its satisfaction] [\*] that M. F. [guardian, etc.], the party required to produce the tenant for life, or to prove his existence, has fully complied with the said order, and on motion of M. R., counsel for said M. F., after hearing, etc. :

It is hereby ordered, that the petition of A. B., in this proceeding, be and is hereby dismissed.

And it is further ordered, that said A. B. pay the costs of these proceedings, to wit: the sum of ——— dollars to said M. F., guardian, etc.

[*Or* as above to (\*), and from thence as follows: That C. D., the person upon whose life the final estate depends, was not produced; and M. F., the party required to produce him, or to prove his existence, has not proved to the satisfaction of the court that he is living:

Now, on motion of ———, for the petitioner, after hearing, etc.:

It is hereby ordered and declared, that the said C. D. is presumed to be dead, for the purpose of these proceedings:

And it is further ordered and directed, that the petitioner, said A. B., be forthwith let into possession of the real property described in the petition herein, as follows (describe same), as if the said C. D. were actually dead (and

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clerk, within ten days after the case is closed. (Code Civ. Pro., § 2308.)

The referee has the same powers,

and is entitled to the same compensation as a referee appointed for the trial

of an issue in an action. (Id., § 2306.)

that the said A. B. pay to the said M. F. the sum of \_\_\_\_\_ dollars, ' for the costs and disbursements of this proceeding.))]

\_\_\_\_\_  
No. 1219.

**Petition of Person Evicted for Restoration to Possession of Real Property.**

(Code Civ. Pro., § 2317.)

[Title of proceeding.]

As in form No. 1213 to [\*], and from thence as follows: That heretofore and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, A. B. presented a petition to this court in the above entitled proceeding, pursuant to the provisions of title fifth of chapter seventeenth of the Code of Civil Procedure, praying for an order directing the production of C. D., the tenant for life of the real property hereinafter mentioned by your petitioner [guardian, etc.], and that such proceedings were thereupon had, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, an order was made by this court, a copy of which is hereto-annexed, awarding to said A. B. the possession of said real property as prescribed in said title, upon the presumption of the death of said C. D.

That under said order, and pursuant thereto, your petitioner was evicted from the said real property.

And your petitioner further says, that the said C. D. is now living at \_\_\_\_\_ [as your petitioner is informed and believes by M. N. and J. H., whose affidavits are hereto annexed],<sup>2</sup> and he prays that this court will grant an order restoring him to the possession of said real property, which is described in the said order of which a copy is hereto annexed.<sup>3</sup>

Dated \_\_\_\_\_, 18—.

M. F.

[Verification as in form No. 1213.<sup>4</sup>]

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<sup>1</sup> A gross sum not exceeding fifty dollars, in addition to disbursements. These may be denied or awarded to or against either party as justice requires, in case the order is in favor of the petitioner. In the case of the dismissal of the petition, such costs must be

awarded, to be paid by the petitioner. (Code Civ. Pro., §§ 2309, 2310, 2316.)

<sup>2</sup> If the affidavits are not annexed account for their absence. See note 2 to form No. 178, and note 2 to form No. 236.

<sup>3</sup> The proceedings on the petition are

No. 1220.

**Complaint in Action by Persons Evicted under Order for Rents and Profits.**

(Code Civ. Pro., § 2318.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that heretofore, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a proceeding was brought in the \_\_\_\_\_ Court, pursuant to title fifth of chapter seventeenth of the Code of Civil Procedure, by the defendant, the party entitled to the remainder therein [in fee], for the discovery of the death of C. D., the tenant for life of certain real property, described as follows, to wit [describe same].

That such proceedings were had in the said proceeding, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, an order of said court was entered therein, a copy of which is hereto annexed marked "A," and referred to as, and made part of, this complaint.

That the plaintiff was evicted, pursuant to said order, and said defendant let into possession thereof, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, by the sheriff of \_\_\_\_\_ county, and remained out of said possession until on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, when he was restored to the possession thereof [by the order of the said \_\_\_\_\_ Court, made pursuant to his petition, a copy of which order is hereto annexed marked "B," and is referred to as, and made a part of, this complaint].

That during the above mentioned time for which he was deprived of the possession of said premises, the said A. B. occupied the same, and that, during all of said time, the said C. D. was living, and that, at the time of such eviction, the plaintiff was entitled to an estate therein for [state term thereof] under title derived from said C. D. as his tenant, etc.

And plaintiff further shows, that the rents and profits of said property, during such period of his being evicted from

the same as upon the original application. (Code Civ. Pro., § 2317.) The petition may also be made by the heirs or legal representatives of the person evicted. (Id.)

<sup>4</sup> There may be some doubt as to whether the petition is to be verified in the general form as in form No. 52, or as prescribed in section 2303 for the original petition.

said property, and while he was entitled to possession thereof as aforesaid, amounts to the sum of ——— dollars, for which amount, with the costs of this action, plaintiff demands judgment against the defendant.

M. N., *Plaintiff's Attorney.*

[Office address.<sup>1</sup>]

[Verification as in forms Nos. 151, etc.]

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## TITLE VI.

### FORMS RELATING TO PROCEEDINGS FOR THE APPOINTMENT OF A COMMITTEE OF THE PERSON AND OF THE PROPERTY OF A LUNATIC, IDIOT OR HABITUAL DRUNKARD, AND TO THE GENERAL POWERS AND DUTIES OF THE COMMITTEE.

(Code Civ. Pro., Ch. 17, Tit. 6.)

- No. 1221. Petition for appointment of committee of person incompetent to manage himself or his affairs, in consequence of lunacy, etc.
1222. Affidavit to be annexed to petition.
1223. Petition by overseers of the poor for appointment of committee.
1224. Notice of presentation of petition.
1225. Order for commission or for jury trial.
1226. Commission to inquire as to lunacy, etc.
1227. Oath of commissioners.
1228. Precept to sheriff to summon jury.
1229. Sheriff's return to precept.
1230. Oath to jurors.
1231. Oath to witnesses.
1232. Subpœna for witnesses.
1233. Notice to lunatic, etc., of execution of commission.
1234. Notice to produce lunatic, etc.
1235. Inquisition.
1236. Notice of application to confirm finding of jury.
1237. Final order on return of commission.
1238. Bond of committee.
1239. Commission to committee.
1240. Complaint in action by committee of lunatic, etc.
1241. Complaint in action against committee.
1242. Petition by lunatic, etc, for discharge of committee, etc., on his recovery.
1243. Affidavits annexed to petition for discharge of committee.
1244. Order discharging committee.
1245. Inventory and account of committee to be rendered annually.
1246. Order for inventory or account, or for further inventory, etc., by committee.

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<sup>1</sup> See note 2 to form No. 122.

action, see section 2319, Code Civ. Pro.  
 As to effect of final order as evidence This complaint may be modified to  
 in action of ejectment, or in the above meet the particular facts of the case.

No. 1221.

**Petition for Appointment of Committee of Person Incompetent to Manage Himself or His Affairs in Consequence of Lunacy, etc.**

(Code Civ. Pro., §§ 2323, 2324, 2325.)

*To the Supreme Court [or name other court]:*<sup>1</sup>

The petition of A. B., of ———, respectfully shows, that C. D., who resides in the ——— of ———, in the county of ———, and State of ——— [*or the place of whose residence cannot be ascertained by your petitioner*], is a lunatic, etc., and is incompetent by reason and in consequence of such lunacy, etc., to manage himself [*or his affairs*].

[That said C. D. is seized of personal property situated at ———, in (this State) consisting of ———, of the probable value of not to exceed ——— dollars, and of real estate, situated at ———, in (this State), the probable value of which does not exceed the sum of ——— dollars.<sup>2</sup>]

That the names and residences of the husband [*or wife*] of said C. D., and of his next of kin and heirs, are as follows, so far as the same are known to your petitioner, or can be ascertained by him with reasonable diligence, to wit [*state efforts made to ascertain them*], namely [*state the names and residences*].

[That service of notice of the application to be made upon this petition upon said ——— [*or upon the overseer (or superintendent) of the poor; or name officer exercising corresponding functions under another official title, of the town, etc., of ———, should be dispensed with for the following reasons (state same).*<sup>3</sup>]

<sup>1</sup> Except as provided in the next section, where the application is made to the Supreme Court, the petition must be presented at a Special Term held within the judicial district, or to a justice of said court within such judicial district at chambers, where the person alleged to be incompetent resides; or if he is not a resident of the State, or the place of his residence cannot be ascertained, where some of his property is situated, or the State

institution is situated of which he is an inmate. (Code Civ. Pro., § 2323.) See further as to courts having jurisdiction of proceeding, and the nature of such jurisdiction, *id.*, §§ 263 (subd. 8), 340 (subd. 4), 2320; and see amendment to section 2320 by chap. 504 of Laws of 1894, taking effect Sept. 1, 1894, and also as to designation of lunatic, etc., in proceedings. See also, *Matter of Wing* (83 Hun, 284); also amendment to section 2320 of Code



Civ. Pro., by chap. 946 of Laws of 1895, taking effect Jan. 1, 1896; and see section 2323(a), id., added by chap. 824 of Laws of 1895, as to application when incompetent person is in a State institution; petition by whom made; contents and proceedings upon presentation thereof. The above form may be easily adapted to such case, *mutatis mutandis*. See also, section 2323(b), also added by said chap. 824, as to award of costs and disbursements to petitioner in cases provided for by said section 2323(a); and see, further, section 2336(a), added by same chapter as to sections of Code Civ. Pro. not applicable in such cases.

<sup>2</sup>The petition in a case of a non-resident of the State must show that

the alleged lunatic, etc., has property situated in the State. It is not sufficient to state that fact in the affidavits annexed to the petition. (*Matter of Fowler*, 2 Barb. Ch., 305.) By an amendment to section 2325 of Code Civ. Pro., by ch. 263 of Laws of 1891, taking effect Sept. 1, 1891, the petition must state in addition to above allegations what property has been conveyed by the alleged incompetent person during the alleged incompetency, and to whom, and its value, and what consideration was paid for it or was agreed to be paid for it, if any. See note 2, p. 1092, to this form for such amendment in full.

<sup>3</sup>See *In re Demelt* (27 Hun, 480), as to the necessity for this statement.

That annexed hereto are the affidavits of P. F. [and G. C.], showing that the said C. D. is a lunatic, etc.,<sup>1</sup> and that the case is one of those specified in title sixth of chapter seventeenth of the Code of Civil Procedure.

Wherefore your petitioner prays that this court will appoint a committee of the person [and property, *or* of the property, *or* of a portion of the property (specifying it)] of said C. D., pursuant to the provisions of said title.<sup>2</sup>

Dated \_\_\_\_\_, 18—.

A. B.

[*Or* A. B. *by* M. F., *his* Attorney].

[Office address.<sup>3</sup>]

\_\_\_\_\_ COUNTY, ss.:

A. B. [*or* M. F.], of \_\_\_\_\_, being duly sworn, says, that he is the above named petitioner [*or* that he is the attorney for the above named petitioner]; that the matters of fact stated in said petition are true.

A. B. [*or* M. F.].

[Jurat as in form No. 46.]

\_\_\_\_\_  
No. 1222.

### Affidavit to be Annexed to Petition.

(Code Civ. Pro., § 2325.)

\_\_\_\_\_ COUNTY, ss.:

P. F., being duly sworn, says, that he is and has been for \_\_\_\_\_ a practicing physician, and resides in the \_\_\_\_\_ of \_\_\_\_\_, in the county of \_\_\_\_\_.

That he has made an investigation as to the sanity, etc.,

<sup>1</sup>It is usual to require the affidavit of a physician as to lunacy, etc., but the court may, in its discretion, grant the writ upon the affidavit of a non-professional person. After the return of an inquisition finding sufficient facts, the sufficiency of the allegations of the petition cannot be questioned. (In re Zimmer, 15 Hun, 214.) For form of affidavit see form No. 1222.

<sup>2</sup>See further as to this proceeding, Hunter v. Hatfield (12 Hun 381; S. C., 73 N. Y., 600), In re Rogers (9 Abb. N. C., 141), Matter of Church (64 How. Pr., 393); Section 2325 of Code Civ. Pro. and amendment thereto by

chap. 263 of Laws of 1891, taking effect Sept. 1, 1891; Matter of Jackson (37 Hun, 306), In re Cook (6 N. Y. Supp., 720), Southern Tier Masonic Relief Ass'n v. Landenbach, 5 id., 901), Matter of Baird (8 State Rep., 493), In re Klock (49 Hun, 450), Dominick v. Dominick (20 Abb. N. C., 286), Viets v. Union Nat. Bk. of Troy (101 N. Y., 563; rev'g S. C., 31 Hun, 484), Matter of Mason, 51 id., 138), Hughes v. Jones (116 N. Y., 67), Matter of Sanford (39 State Rep., 8 8), Matter of Dunn (37 id., 802), Gridley v. College of St. Francis Xavier (137 N. Y., 327). The amendment of 1891



above referred to, of section 2325, Code Civ. Pro., was by inserting the following words: and also the probable value of the property possessed and owned by the alleged incompetent person, and what property has been conveyed during said alleged incompetency, and to whom, and its value, and what consideration was paid for it, if any, or was agreed to be paid.

As to appointment of foreign com-

mittee in case of a non-resident of the State residing within the United States, see section 2326, Code Civ. Pro., and as to rights of foreign committee, see In Matter of Bomanjee Byramee Colah (3 Daly, 308), In re Traznier (2 Redf., 171). In such a case it should appear by the petition that such a committee has been appointed. See also, Butler v. Jarvis (51 Hun, 248).

<sup>3</sup> See note 2 to form No. 122.



of C. D., mentioned in the annexed petition of A. B., for the appointment of a committee of the person [and property] of said C. D.

That as the result of said investigation he is of the opinion that said C. D. is, by reason of lunacy [*or idiocy, or habitual drunkenness*], incompetent to manage himself or his affairs, and that he has been in that condition for ———— past.

That the grounds of deponent's opinion and belief are as follows [state same, setting forth facts and circumstances showing insanity, or idiocy, etc.].<sup>1</sup>

P. F.

[Jurat as in form No. 46.]

No. 1223.

**Petition by Overseers of the Poor for Appointment of Committee.**

(Code Civ. Pro., § 2324, 2325.)

*To the Supreme Court [or name other court]:*

The petition of M. B. and F. D. respectfully shows, that they are the overseers of the poor for the town, etc., of ————, in the county of ———— [*or otherwise describe the officers by their official titles*].

That C. D., who resides in said town, etc., of ————, is, as your petitioners are informed and believe, a lunatic, etc., and that by reason of his said lunacy, etc., is incompetent to manage himself or his affairs.

That no relative, or other person, has applied for the appointment of a committee of the person or property of the said C. D. [make the further allegations contained in the petition, form No. 1221].

Dated ————, 18—.

M. B.  
F. D.

[Annex affidavit as in form No. 1222.]

[Verification as in form No. 1222.]

<sup>1</sup> See *In re Zimmer* (15 Hun, 214), cited in note 1, page 1092, to form No. 1221, as to by whom the affidavit may be made. See, also, generally, as to petition and contents thereof, notes to form No. 1221.

No. 1224.

**Notice of Presentation of Petition.**

(Code Civ. Pro., § 2325.)

To \_\_\_\_\_ :

Take notice, that the petition of A. B., a copy of which is hereto annexed, will be presented to the [Supreme] Court at a [Special] Term thereof, to be held at, etc., on, etc., at the opening of the court, or as soon as counsel can be heard, and an application will then and there be made to said court that the prayer of the said petitioner be granted.<sup>1</sup>

Yours, etc.,

M. N., *Attorney for Petitioner.*[Office address.<sup>2</sup>]

To [name parties specified in the order].

No. 1225.

**Order for Commission or for Jury Trial.**

(Code Civ. Pro., § 2327.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

Upon reading and filing the petition of A. B., dated \_\_\_\_\_, 18—, in the above entitled matter, and praying, etc. [recite prayer of petition], together with the affidavit of P. F. thereto annexed, dated \_\_\_\_\_, 18—, by which it presumptively appears, to the satisfaction of the court, that the case is one of those specified in title sixth of chapter seventeenth of the Code of Civil Procedure, and that a committee ought, in the exercise of a sound discretion, to be appointed for the person [and estate] of said C. D., alleged to be a \_\_\_\_\_ and to be incompetent, by reason of \_\_\_\_\_, to manage himself or his affairs, and

<sup>1</sup> As to consequences of omission to require notice to be given by the order or to state in the petition reasons why it should not be given, see *In re Demelt* (27 Hun, 480).

The notice, when required, may be given in any manner which the court

deems proper, and for that purpose the hearing may be adjourned to a subsequent day, or to another term at which the petition might have been presented. (Code Civ. Pro., § 2325.)

<sup>2</sup> See note 2 to form No. 122.

after hearing M. N. for the said petitioner, and F. R. for ———, and on reading [name any opposing papers]:

It is hereby ordered, [\*] that a commission issue to [name commissioner or commissioners, stating residences and occupations], directing said commissioners to cause the sheriff of the county of ——— to procure a jury, and that they inquire by the said jury into the matters set forth in the said petition, and, also, into the value of the real and personal property of the said C. D., and the amount of his income [add directions, with reference to conveyance by him, as contained in commission, form No. 1226].

And it is further ordered, that upon the execution of the said commission the person or persons having charge of the said C. D., or in whose custody he shall be, do produce him before the said commissioners and jury, to be inspected and examined by them, whenever required to do so by such commissioners; and that notice of the hearing before such commissioners and jury be given to [name parties], personally [*or* name other manner of service].<sup>1</sup>

[And it is further ordered, that testimony respecting anything said or done by said C. D., or his demeanor or state of mind, more than two years before the hearing before said commissioners and jury shall be received as proof of the lunacy of said C. D.]<sup>2</sup>

[Insert any further directions as prescribed by the court.]<sup>3</sup>

[*Or* as above to (\*), and from thence as follows: That the questions of fact, arising upon the competency of the said C. D., be tried by a jury at a trial term of this court, to be held at, etc., on, etc.,<sup>4</sup> and that the following questions of fact be then and there tried, to wit (state same) (*or* provide for settlement of the questions to be tried).<sup>5</sup>

That ——— days previous notice of the trial of such questions be given to (name persons).

(Insert any further directions required by the court.)<sup>3</sup>]

<sup>1</sup> See Code Civ. Pro., § 2328, and *In re Demelt* (27 Hun, 480), cited in note 1 to form No. 1124.

<sup>2</sup> See Code Civ. Pro., § 2335.

<sup>3</sup> See Code Civ. Pro., § 2323.

<sup>4</sup> See Code Civ. Pro., § 2327, subd. 2, as amended by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896.

<sup>5</sup> See section 2334. Code Civ. Pro. The questions may be settled as where

an order for a similar trial is made in an action. (*Id.*) See forms Nos. 352, etc. See, also, amendment to section 2327 of Code of Civil Procedure, by adding subdivision 3 thereto, taking effect Sept. 1, 1891 (Laws of 1891, ch. 263), and see amendments to said section 2327, by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896, and to said section 2334, by same chapter.

No. 1226.

**Commission to Inquire as to Lunacy, etc.**

(Code Civ. Pro., § 2328.)

*The People of the State of New York, to H. R., J. A. C.  
and L. E. of the county of ———, greeting:*

Know ye, that we have assigned to you, to cause the sheriff of ——— county to procure a jury, and to inquire by the said jury into the matters set forth in the petition of A. B., dated ———, 18— [of which a copy is hereto annexed], and also into the value of the real and personal property of C. D., of ———, and the amount of his income, and whether the said C. D. is a lunatic [*or an idiot, or an habitual drunkard, etc.*], and is incompetent, by reason of such lunacy, etc., to manage himself or his affairs, and if so, from what time,<sup>1</sup> after what manner and how, and whether the said C. D., being so incompetent, has alienated any lands or tenements or not, and, if so, what lands or tenements, to what person or persons, when, where, in what manner and how; and what lands and tenements still remain to him, and of what value the lands and tenements by him alienated, as well as by him retained, and how much the rents, issues and profits thereof are worth by the year; and what is the value of his goods, chattels and personal estate; and who will be the nearest heirs of the said C. D. and entitled to his estate, in case of his death, and of what age [add any further instructions as prescribed by the order].

And, therefore, we command you, that at a certain day and place, or at certain days and places, which you for that purpose shall appoint, you diligently make inquisition in the premises, and that you cause reasonable notice of the time and place by you appointed for that purpose, to be given to the said C. D., and that you send the inquisition which you shall thereupon make, signed by you or by the majority of you, and by those persons by whom it shall be made, distinctly and plainly and without delay, to our [Supreme] Court, together with this writ.

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<sup>1</sup> As to the time to which the inquiry § 2335, amended by ch. 946 of Laws of will be restricted unless specially directed by the order, see Code Civ.Pro., 1895, taking effect Jan. 1, 1896.

Witness, J. P., one of the justices of our [Supreme] Court, at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—. <sup>1</sup>  
 [L. S.] J. L., Clerk.  
 J. C., Attorney for the Petitioner.  
 [Office address.<sup>2</sup>]

RETURN TO COMMISSION.

The execution of this commission appears in the schedule hereunto annexed.

H. R.,  
 J. A. C., } *Commissioners.*  
 L. E., }

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No. 1227.

**Oath of Commissioners.**

(Code Civ. Pro., § 2329.)

[Title of proceeding.]

\_\_\_\_\_ COUNTY, ss.:

We, H. R., J. A. C. and L. E., the commissioners appointed by a commission issued in the above entitled proceeding, dated on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, do severally swear, that we will faithfully, honestly and impartially discharge the trust committed to us as such commissioners. <sup>3</sup>

H. R.  
 J. A. C.  
 L. E.

[Jurat as in form No. 46.]

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<sup>1</sup> As to oath to be taken by commissioners, see next form No. 1227, and section 2329 of Code Civ. Pro., and see same section as to removal of commissioners for incompetency, etc., and filling of vacancies created by their death, removal or resignation.

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> As to officers before whom the oath may be taken and filing same, see Code Civ. Pro., § 2329.

No. 1228.

**Precept to Sheriff to Summon Jury.**

(Code Civ. Pro., § 2330.)

[Title of proceeding.]

*To the Sheriff of the County of* \_\_\_\_\_ :

We [naming commissioners], the commissioners duly appointed by a commission issued out of the \_\_\_\_\_ Court, in the above entitled proceeding, dated \_\_\_\_\_, 18—, pursuant to the provisions of title sixth of chapter seventeenth of the Code of Civil Procedure, to inquire, among other things, as to the lunacy, etc., of C. D., of \_\_\_\_\_, and whether said C. D. is incompetent by reason of such lunacy, etc., to manage himself [and his affairs], do hereby require you, pursuant to said commission, to notify, not less than twelve, nor more than twenty-four, indifferent persons, qualified to serve and not exempt from serving, as trial jurors in the \_\_\_\_\_ Court, to appear before us as such commissioners at, etc., on, etc., to make inquiry as commanded by the said commission.

Given under our hands [and seals]<sup>1</sup> at \_\_\_\_\_ this day of \_\_\_\_\_, 18—.<sup>2</sup>

[Signatures (and seals) of commissioners.]

No. 1229.

**Sheriff's Return to Precept.**

(Code Civ. Pro., § 2330.)

I do hereby certify and return, that I have notified the jurors named in the annexed list to appear at the time and place mentioned in the annexed precept, as I am thereby commanded.<sup>3</sup>

Dated \_\_\_\_\_, 18—.

F. R., *Sheriff of* \_\_\_\_\_ *County.*

List of jurors notified as above mentioned.

[Names of jurors, with residences and occupations.]

<sup>1</sup> No seals seem to be required.

ceedings of the jury for failure of the sheriff to make his return.

<sup>2</sup> See Matter of Gill (N. Y. Daily Reg., Aug. 1, 1883 [N. Y. Super. Ct., Sp. Tm.]) as to setting aside the pro-

<sup>3</sup> See note 2 to last form, No. 1228.



No. 1230.

**Oath to Jurors.**

(Code Civ. Pro., § 2331.)

You do severally, solemnly swear, well and truly to make inquiry touching the lunacy [*or idiocy, or habitual drunkenness, etc.,*] of C. D., and of all such matters as shall be given you in charge by virtue of a commission issued out of, and under the seal of, the [Supreme] Court, and now here to be executed, and a true inquisition make according to the evidence.

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No. 1231.

**Oath to Witnesses.**

(Code Civ. Pro., § 2331.)

You do swear that the evidence you shall give, touching the lunacy, etc., of C. D., and as to who are his next of kin, and the nature, extent and value of his real and personal estate, and all such other matters and things as shall be required of you, by virtue of a commission issued out of the [Supreme] Court, to inquire into the said lunacy, etc., and now here to be executed, shall be the truth, the whole truth and nothing but the truth.

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No. 1232.

**Subpœna for Witnesses.**

(Code Civ. Pro., § 2331.)

*In the name of The People of the State of New York :*

To M. F., S. P., etc.:

By virtue of a commission issued out of, and under the seal of, the [Supreme Court of the State of New York], dated the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and directed to the undersigned, to inquire whether C. D., of the \_\_\_\_\_ of \_\_\_\_\_, in the county of \_\_\_\_\_, be a lunatic, etc., or not, we, the undersigned, do hereby require you, and each of you, personally to be and appear before us at the execution of the said commission, at, etc., on, etc., then and there to testify those things which you, or either of you,

know, touching the lunacy, etc., of the said C. D., and all such other matters as shall be demanded of you by virtue of the said commission. Hereof fail not at your peril.

Given under our hands and seals, this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

[Signatures and seals of commissioners.]

No. 1233.

**Notice to Lunatic, etc., of Execution of Commission.**

(Code Civ. Pro., § 2331.)

[Title of proceeding.]

To C. D. :

Take notice, that a commission to inquire as to your lunacy, etc., issued out of and under the seal of the [Supreme] Court, and directed to the undersigned, as commissioners, will be executed at, etc., on, etc., at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

Yours, etc.,

[Signatures of commissioners.]

No. 1234.

**Notice to Produce Lunatic, etc.**

(Code Civ. Pro., § 2331.)

[Title of proceeding.]

To B. C. and to all others having in their custody or power the above named C. D. :

The undersigned, by virtue of a commission issued out of the [Supreme] Court, to inquire as to the lunacy, etc., of C. D., of \_\_\_\_\_, dated the \_\_\_\_\_ day of \_\_\_\_\_, 18—, do hereby require you to produce before us the said C. D., at the execution of said commission, at, etc., on, etc., at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, there to be examined and inspected by us, and you are to give him notice accordingly.

Given, etc. [as in form No. 1232].

[Signatures and seals of commissioners.]

<sup>1</sup> See Southern Tier Masonic Relief Assn. v. Laudenbach (5 N. Y. Supp., 901), Matter of Blewitt (131 N. Y., 541; aff'g S. C., 61 Hun, 568), Matter of Lowe (49 State Rep., 914), Gridley

v. College of St. Francis Xavier (137 N. Y., 327), Matter of Blewitt (138 N. Y., 148; aff'g S. C., 68 Hun, 127), as to necessity for notice to lunatic.

No. 1235.

**Inquisition.**

(Code Civ. Pro., § 2332.)

[Title of proceeding.]

An inquisition taken at the house of ———, in the town of W———, in the county of S———, on the ——— day of ———, 18—, before H. R., J. A. C. and L. E., commissioners, appointed by virtue of a commission issued out of and under the seal of the Supreme Court of the State of New York, bearing date the ——— day of ———, 18—, to them, the said commissioners directed, to inquire, among other things, of the lunacy [*or idiocy, or habitual drunkenness*] of C. D., of ———, upon the oaths of [insert names of the jurors], good and lawful men of the said county, who, being summoned, sworn and charged, upon their oath, say, that the said C. D., at the time of taking this inquisition, is a lunatic, and of unsound mind, and does not enjoy lucid intervals [*or is an idiot, or is an habitual drunkard, etc.*], so that he is incompetent in consequence of such lunacy, etc., to manage himself or his affairs [and that he has been in the same state of ——— for the space of two years last past (and upwards)<sup>1</sup>] [*or in case of idiocy from his nativity*] (that the said C. D. hath, from his infancy, been subject to fits, which may have been the occasion of his lunacy, but how otherwise he became a lunatic the jurors aforesaid know not, except only by the visitation of God).<sup>2</sup>

And the jurors aforesaid, upon their oath aforesaid, further say, that whether the said C. D., being in that state, hath alienated any lands and tenements or not the jurors aforesaid know not [*or that the said C. D., being in that state, did, on or about the ——— day of ———, 18—, at ———, by a warranty deed, sell, alien and convey unto R. S., of, etc., a certain house and lot, situate in the city of*

<sup>1</sup> See Section 2335, Code Civ. Pro., as to limits of the inquiry in cases of lunacy, and, also, see *In re Demelt* (27 Hun, 480), which holds that since the adoption of that section it is erroneous, in the case of lunacy, to include in the inquisition a statement that the incompetency existed for any definite time prior thereto.

In cases of lunacy, therefore, omit this clause. See, also, *Dominick v. Dominick* (20 Abb. N. C., 286), *In re*

*Cook* (6 N. Y. Supp., 720), *Matter of Church* (64 How. Pr. R., 393), *In re Klock* (49 Hun, 450), *Jones v. Hughes* (15 Abb. N. C., 141), *Viets v. Union Nat. Bank of Troy* (101 N. Y., 563), *Matter of Jackson* (37 Hun, 306), *Matter of Mason* (51 Hun, 138), *Matter of Sanford* (39 State Rep., 808), *Matter of Dunn* (37 id., 802).

<sup>2</sup> Omit this clause in parenthesis in cases of idiocy or habitual drunkenness.

Albany, being, etc., which came to him by descent from his father, for the nominal consideration of ——— dollars, but that the actual amount received by the said C. D., for said house and lot, was only about ——— dollars, which was less than one-third of the value thereof, the same being worth at least ——— dollars].

And the jurors aforesaid, on their oaths aforesaid, do further say, that the following lands and tenements, goods and chattels, yet remain to him, the said C. D., to wit [describe his property], and that the said lands and tenements now belonging to said C. D. are worth about ——— dollars, and that the issues and profits thereof, by the year, are worth about the sum of ——— dollars; and further, that the value of the goods, chattels and personal estate of the said C. D. is about the sum of ——— dollars.

And the jurors aforesaid do further say, that C. H., the wife of G. H., of, etc., is the sister of the said C. D., and that she is, at the time of taking this inquisition, of the age of thirty years, or thereabouts; and that R. D., of, etc., is the brother of the said C. D., and is, at the time of taking this inquisition, of the age of twenty-seven years, or thereabouts; that the said C. H. and R. D. are the nearest heirs of the said C. D., and will be entitled to his estate, in equal proportions, in case of his death.

In witness whereof, as well the said commissioners as the jurors aforesaid, have to this inquisition set their hands [and seals]<sup>1</sup> the day and year first above written.

[Names of commissioners.]

[Names of jurors.] \_\_\_\_\_

No. 1236.

### Notice of Application to Confirm Finding of Jury.

(Code Civ. Pro., § 2336.)

[Title of proceeding.]

SIR—Take notice, that an application will be made to the

<sup>1</sup> Seals seem to be no longer required by the provisions of section 2332, Code Civ. Pro., which only requires that the commissioners, or a majority of them, and jurors should sign the inquisition. That section further requires that the

inquisition should be annexed to the commission and filed with the clerk.

See as to these proceedings, 2 Barb. Ch. Pr. (2d ed.), 226, and the cases there cited.

[Supreme] Court, at a [Special] Term thereof, to be held at, etc., on, etc., at the opening of the court, or as soon thereafter as counsel can be heard, that the finding of the jury upon the commission heretofore issued in the above matter be confirmed, with costs of this proceeding, and for such further or other relief as the court may think proper to grant; which motion will be founded on the said commission, the return thereto, and the inquisition taken under such commission, and upon all the other papers and proceedings herein.

M. F., *Attorney for Petitioner.*

[Office address.¹]

To [name the parties opposing the application].

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No. 1237.

**Final Order on Return of Commission.**

(Code Civ. Pro., § 2336.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

On reading and filing the inquisition in this matter, taken under and by virtue of the commission heretofore issued out of this court, from which it appears that the jury have found that the said C. D. is a lunatic [*or* idiot, *or* habitual drunkard], and that he is incompetent, by reason of such lunacy, etc., of managing himself or his affairs, and that he is seized and possessed of certain real [and personal] property in the said inquisition specified, and on reading and filing [name other motion papers]:

Now, on motion of W. C. N., of counsel for said petitioner, and after hearing F. M., of counsel for said C. D., in opposition thereto:

It is hereby ordered [\*], that the finding of the jury upon the execution of the said commission, as set forth in the said inquisition, be and the same is hereby confirmed.

And it is further ordered, that F. C., Esq., of, etc., be and he is hereby appointed the committee of the [person and estate] of the said C. D., upon his giving a bond in the

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¹ See note 2 to form No. 122.

penalty of ——— dollars, to be approved by a judge [*or justice*] of this court, and conditioned that he will, in all things, faithfully discharge the trust reposed in him, and obey all lawful directions of this court, or of a judge thereof, or of any other court or judge, touching the trust; and that he will, in all respects, render a just and true account of all money and other property received by him, and of the application thereof, and of his committeeship, whenever he is required so to do by a court of competent jurisdiction.

And it is further ordered, that upon the filing of such bond, a commission may be issued to such committee, under the seal of this court.

And it is further ordered, that said committee pay, out of the funds in his hands [the sum of ———, for], the necessary disbursements of the said petitioner, and the sum of ——— dollars for his costs and counsel fees [and that said committee also pay to P. F., attorney for ———, who has appeared herein, the sum of fifty dollars, and (the sum of ——— dollars, for)], his disbursements herein.<sup>1</sup>

[*Or as above to [\*], and from thence as follows: That the petition of A. B. herein, be and the same is hereby dismissed, with [fifty dollars costs and disbursements, to be paid by the said petitioner to the adverse party.]*<sup>2</sup>]

No 1238.

### Bond of Committee.

(Code Civ. Pro., § 2337.)

**As in form No. 340 to [\*], and from thence as follows:**

<sup>1</sup>As to the security to be given by the committee, see Code Civ. Pro., §§ 2337, 2595, 2830, 2831.

As to compensation of committee, see section 2338 (*id.*), as amended by chap. 516 of Laws of 1890, in effect September 1, 1890, and by chap. 946 of Laws of 1895, in effect January 1, 1896, and *In re Colah* (6 Daly, 51), decided under former statute; *Matter of Board of Street Opening* (89 Hun, 525), *Matter of Learned* (12 Misc., 562).

As to his general powers and filling of vacancies, see section 2339 (*id.*), *Walrath v. Abbott* (75 Hun, 445), *Hill*

*v. Horton* (4 Dem., 88), *Bechtle v. Manhattan R. Co.* (31 Abb. N. C., 483), *Ford v. Livingston* (140 N. Y., 162).

<sup>2</sup>Or the court may direct a new trial or hearing, or make such final order as justice requires. (Code Civ. Pro., § 2336.)

See, also, *In re McAdams* (19 Hun, 292), *In re Gilbert* (3 Abb. N. C., 222), *In re Rogers* (9 Abb. N. C., 141).

As to compensation of commissioners and jurors, see Code Civ. Pro., § 2333, and rule 71 of Gen. Rules of Prac.

A committee of the property cannot

enter upon the execution of his duties until security is given as prescribed by the court. A committee of the person cannot enter upon the execution of his duties until security is given, if required by the court. (Code Civ. Pro., § 2337.)

By chapter 824 of Laws of 1895, section 2336(a) was added to Code Civ.

Pro., by which sections 2325 to 2336 of title 6 of chapter 17 of Code Civ. Pro., both inclusive, are made inapplicable to applications for the appointment of a committee made by it on behalf of the State to secure reimbursement, in whole or in part, for maintenance and support in a State institution.





That if the above bounden, A. B., shall, and do in all things, faithfully discharge the trust reposed in him as committee of the person and estate of C. D., a lunatic, etc., to which he has been duly appointed by order of the \_\_\_\_\_ Court, dated \_\_\_\_\_, 18—, and shall obey all lawful directions of the said court, or a judge thereof, and of any other court or judge, touching the said trust; and shall, in all respects, render a just and true account of all money and other property received by him, and of the application thereof, and of his said committeeship whenever he is required so to do, by a court of competent jurisdiction, then the preceding obligation to be void, otherwise to remain in full force and virtue.<sup>1</sup>

A. B. [L. s.]  
 C. D. [L. s.]  
 E. F. [L. s.]

Sealed and delivered in presence of \_\_\_\_\_.

[Acknowledgment or proof, affidavit and approval as in forms Nos. 340 and 538.]

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No. 1239.

**Commission to Committee.**

*The People of the State of New York, to all to whom these*  
 [L. s.] *presents shall come, greeting:*

Whereas, by a certain inquisition, taken at the town of \_\_\_\_\_, in the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, by virtue of our commission, in that behalf duly made and issued, to inquire, among other things, of the lunacy [or idiocy, or habitual drunkenness, etc.] of C. D., of, etc., it is found, among other things, that the said C. D., at the time of taking said inquisition, was a lunatic [not having lucid intervals] [or an idiot, or an habitual drunkard, etc.], and was, by reason of such lunacy, etc., incompetent to manage himself or his affairs, as by the said inquisition remaining of record in our [Supreme] Court may more fully appear, for the care and custody of whom, and for the management of his estate, it belongs to us, in our [Supreme] Court, to provide; and,

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<sup>1</sup> See note 1 to last form, No. 1237, 1887, making the provisions of section and amendment to section 2337 of Code 2595, id., applicable to the security to Civ. Pro., by chapter 681 of Laws of be given by the committee.

Whereas, sufficient security is given to us on behalf of the said C. D. by F. C., as is customary, and as required by law in such cases :

Now, therefore, know ye, that we have given, granted and committed, and by these presents do give, grant and commit unto the said F. C., the care and custody of the person [and the possession, care and management of the estate, as well real as personal] of the said C. D., during our pleasure, to be signified in our [Supreme] Court; and the said F. C. is hereby required to return and file in the office of the clerk of our [Supreme] Court, in the month of January in each year, in the county of ———, a just and true inventory account and affidavit, as required by law,<sup>1</sup> and that out of the said estate, or the rents, issues and profits thereof, he provide for the maintenance, sustenance and support of the said C. D. and his family.

And the said F. C. is further required, to abide by and obey all and every such lawful order or orders in the premises as may hereafter be made in our said [Supreme] Court, or by another court or judge,<sup>2</sup> and to render a full and just account of the execution of the said trust, and of the estate, property and effects which shall have come to his hands, when and as often as required by our said court or a judge thereof [*or by the county judge of* ——— county].<sup>3</sup>

Witness, etc. [teste].

J. L., *Clerk.*

A. M., *Attorney for Petitioner.*  
[Office address.']

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No. 1240.

### Complaint in Action by Committee of Lunatic, etc.

(Code Civ. Pro., § 2340.)

[Title of cause.]

The plaintiff complaining as the committee of C. D., a lunatic, etc., alleges that on the ——— day of ———,

<sup>1</sup> See sections 2341, 2342 of Code Civ. Pro., and see amendment to sec. 2341 by ch. 51 of Laws of 1894, as to accounting by the committees for money earned by the services of the incompetent person as for other money received of such person. By chapter 425 of Laws of 1885, trust companies may be appointed committees of lunatics or idiots by court having jurisdiction. Security in such cases is not necessary, unless specially re-

by the court. (L. 1885, p. 735.) That a committee appointed by a foreign court cannot be recognized here, see *Bayard v. Scanlon* (1 City Court, 487).

<sup>2</sup> See section 2339, Code Civ. Pro., and *Walrath v. Abbott* (75 Hun, 445, 450). For application by committee to agree to partition of real property of lunatic, etc., and proceedings thereupon, see forms Nos. 668, etc.

<sup>3</sup> See section 2342 of Code Civ. Pro.

18—, upon proceedings duly instituted in the [Supreme Court of this State], in and for the county of ———, by an inquisition taken and returned, said C. D. was found to be a lunatic, etc., and thereupon this plaintiff was by an order duly made by said court, on the ——— day of ———, 18—, at ———, appointed committee of the estate and person of the said C. D.

That at the time of the appointment of this plaintiff as such committee the defendant was, as this plaintiff is informed and believes, indebted to the said C. D. in the sum of ——— dollars, for [allege nature and form of indebtedness].

The plaintiff further says, that the said indebtedness upon the said ——— aforesaid has not been paid, nor any part thereof, to the said C. D., before the appointment of the said plaintiff as such committee, as he is informed and believes, and that the same has not been paid to this plaintiff since said appointment, and he alleges and claims that by virtue of the said order of the [Supreme] Court said money became due and payable to this plaintiff, as such committee, and is still due to him, he being the owner thereof as aforesaid.

Wherefore the plaintiff, as such committee, demands judgment for, etc. [state relief claimed], with the costs of this action.<sup>1</sup>

M. N., *Attorney for Plaintiff.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

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No. 1241.

### Complaint in Action against Committee.

[Title of cause.]

[Usual commencement, and statement of cause of action, against lunatic, etc., after which, add:] That afterwards [or on the ——— day of ———, 18—], at ———, the

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<sup>1</sup> The committee of the person and estate of a lunatic cannot, in his own name, sue to recover land belonging to the lunatic previously to his appointment. The action must be brought in the lunatic's name. (*Burnet v. Bookstaver*, 10 Hun, 481.)

<sup>2</sup> See note 2 to form No. 122.

said C. D. was, by the [Supreme] Court, duly declared and adjudged to be a lunatic, etc.

That the defendant was then and there, by the said court, duly appointed committee of the [person and] estate of the said C. D.

Wherefore the plaintiff demands judgment against said defendant as such committee for ——— dollars, and interest thereupon from the ——— day of ———, 18—, to be paid out of the estate of the said C. D., in the hands of the defendant as such committee, besides the costs of this action.<sup>1</sup>

A. M., *Plaintiff's Attorney.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

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No. 1242.

**Petition by Lunatic, etc., to Discharge Committee, etc.,  
on his Recovery.**

(Code Civ. Pro., § 2343.)

[Title of original proceeding.]

*To the Supreme Court [or name other court]:*

The petition of the above named C. D. respectfully sheweth, that on the ——— day of ———, 18—, a commission was issued out of this court against your petitioner, and on the ——— day of ——— following an inquisition was taken [or a trial was had and an order rendered] under the same, whereby your petitioner was duly found to be a lunatic, etc., and F. C., of ———, was subsequently appointed by this court committee of his [person and] estate.

That your petitioner having fully recovered his sound state of mind and understanding [or having been habitually temperate in the use of ardent spirits] for twelve months

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<sup>1</sup> A complaint against a committee of an habitual drunkard which omits to allege or show by what court or authority the debtor was declared to be an habitual drunkard, and the custody of his person and estate awarded to the defendant, is bad, on demurrer, for

not stating a cause of action. (Hall v. Taylor, 8 How. Pr., 428.)

In that case it is doubted whether an action at law can be maintained against the committee, to recover a judgment upon a debt or demand against the drunkard.

<sup>2</sup> See note 2 to form No. 122.

past, as appears by the affidavits hereto annexed, is desirous that the said committee should be discharged, and that the property of your petitioner, remaining in the hands of the said F. C. as such committee, should be restored to your petitioner, after deducting the legal charges and expenses of the said committee.

Your petitioner, therefore, prays that he may be at liberty to attend in open court, or before a referee, for the purpose of being examined as to his sanity of mind and competency of understanding [*or* as to his temperate habits and competency] for the management of his estate; and that the court will make an order discharging the said committee and restoring his property, and for such other and further relief as may be proper.

Dated \_\_\_\_\_, 18—.

C. D.

[Verification as in form No. 52.]

[Annex affidavits as in next form No. 1243.]

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No. 1243.

**Affidavits Annexed to Petition for Discharge of Committee.**

(Code Civ. Pro., § 2343.)

[Title of original proceeding.]

\_\_\_\_\_ COUNTY, ss. :

F. C., of \_\_\_\_\_, being duly sworn, says, that he is the committee of C. D., above named.

That, about a year since, the said C. D. was happily restored to a state of convalescence, and that soon afterwards the said deponent resigned the management of his affairs into the hands of the said C. D. and from that time to the present, he has uniformly and constantly shown himself to be in his perfect senses, and has now the management of his own affairs, which he conducts with the utmost regularity and with great precision.

And this deponent further says, that from the time last mentioned to the present time, the said C. D. has, at all times, appeared to be perfectly rational and free from any symptom of derangement, and that at this time deponent believes

him to be of good and perfectly sound mind, memory and understanding.

F. C.

[Jurat as in form No. 46.]

———— COUNTY, ss. :

C. C., of ———, being duly sworn, says, that he is a doctor of physic and resides at ———.

That he knows the said C. D. above named and described, and has known him for upwards of ——— years.

That he heard he was afflicted with insanity about two years ago, but that he was happily restored to a convalescent state about a year since.

And deponent further says, that he has seen the said C. D. many times during the past year, and that he never betrayed any symptom of insanity; and that he, this deponent, saw the said C. D. on the ——— day of ———, instant, when this deponent did not discover in him the slightest symptom of insanity or unsoundness of intellect, and that this deponent verily believes the said C. D. to be of perfectly sound mind, memory and understanding.<sup>1</sup>

C. D.

[Jurat as in form No. 46.]

No. 1244.

### Order Discharging Committee.

(Code Civ. Pro., § 2343.)

[At, etc., as in form No. 80.]

[Title of original proceeding.]

On reading and filing the petition of C. D., above named, dated the ——— day of ———, 18—, setting forth that he has perfectly recovered his sound state of mind and understanding [*or* has been habitually temperate in the use of ardent spirits] for twelve months past, and praying for the discharge of his committee, F. C., heretofore appointed in the above matter, and for the restoration of his property,

<sup>1</sup> The above affidavits are from 3 facts of each case, and may be adapted Barb. Ch. Pr. (2d ed.), 667. They to the case of habitual drunkenness. must be conformed, of course, to the

and on reading and filing the affidavits of R. D. and C. C., dated [respectively] ———, 18—, etc., in support of said petition; and upon examining the said C. D., in open court, as to his sanity of mind and competency of understanding [*or* as to his habits, etc.]:

It is hereby ordered, on motion of H. C., counsel for said C. D., that the said committee, F. C., heretofore appointed herein of the person [and estate] of said C. D., be and he is hereby discharged, and that he restore to said C. D. the property remaining in his hands of the said C. D., after deducting the legal charges and expenses of the said committee.<sup>1</sup>

No. 1245.

**Inventory and Account of Committee to be Rendered Annually.**

(Code Civ. Pro., § 2341.)

SUPREME COURT [*or* NAME OTHER COURT].

|   |
|---|
| IN THE MATTER OF THE ACCOUNTING<br>OF F. C., COMMITTEE OF C. D., A<br>LUNATIC, ETC. |
|---|

INVENTORY.

A just and true inventory of the [personal],<sup>2</sup> property of C. D., a lunatic [etc.], on the ——— day of ———, 18—,

<sup>1</sup>Or the order may provide for a reference and accounting, if necessary.

In case of the death of the lunatic, etc., during his incompetency, the power of the committee ceases, and the property of the decedent must be administered and disposed of, as if a committee had not been appointed. (Code Civ. Pro., § 2344.) And see Matter of Grant (83 Hun, 25).

<sup>2</sup>By section 2842 of Code Civ. Pro., to which reference is made in section 2341 (*id.*), the inventory is only to contain "a full and true statement of each article or item of *personal* property of, etc." But by the form of affidavit to be filed with the inventory, etc., under

section 2843 (*id.*), it is to be stated that it contains a "full and true statement of all the property remaining in his hands, etc." In the form from which the above inventory and account are substantially taken, viz.: the appendix to the rules of the court of chancery, No. 17, the account contains a statement of the real property, as well as the personal, and it would seem to be proper that this should be included in the inventory.

See, also, Carter v. Bockwith (128 N. Y., 312), Matter of Blewitt (131 N. Y., 141), Same matter (45 State Rep., 829), Matter of Owens (44 *id.*, 306), Matter of Brugh (61 Hun, 193).

made pursuant to law by F. C., committee of said lunatic [etc.] :

|          |  |                   |
|----------|--|-------------------|
| 18—.     |  |                   |
| Dec. 31. | Balance of cash on hand this day .....   | \$16 74           |
|          | Robert Gray's bond and mortgage on real estate, which is well secured, with interest at [six] per cent from ———, 18—.....  | 850 00            |
|          | Two hundred and forty-two shares of stock in the ——— bank, worth at par value .....  | 1,200 00          |
|          | Five shares of ——— stock, par value \$1,000, but actually worth only about .....   | 300 00            |
|          | A bond of G. Lord, and mortgage for \$800 on unincumbered real estate which is well secured, with interest at [six] per cent, interest due from ———, 18—.....  | 800 00            |
|          | S. Drake's bond and mortgage for \$910 on unincumbered real estate, with interest at ——— per cent, interest due from ———, 18—.....   | 910 00            |
|          | J. Field's bond and mortgage for \$700, well secured on unincumbered real estate, with interest from ———, 18—, interest due from ———, 18—.....   | 700 00            |
|          | Balance of a legacy left to lunatic [etc.] by John Miller, deceased .....  | 250 00            |
|          | [A cultivated farm in the town of Charlton, in the county of Saratoga, containing 110 acres in good repair, under a lease for one year from ———, 18—, at an annual rent of \$70, worth about <sup>1</sup> ].....   | 1,200 00          |
|          | [A dwelling-house and lot of ground on Genesee street, in the city of Utica; dimensions of lot 200 feet in depth and 28 feet in width, under a lease for one year from May 1, 18—, at an annual rent of \$180, payable quarter-yearly, worth about <sup>1</sup> ]..... | 3,000 00          |
|          | Estimated value of [real and] personal estate .....  | <u>\$8,726 74</u> |

#### ACCOUNT CURRENT.

*The estate of C. D., a lunatic [etc.], to F. C., Committee, 18—.*

|           |  |          |
|-----------|--|----------|
| 18—.      |  |          |
| May 2.    | To cash paid M. Louis, bill for board and lodging, etc.,     | \$27 33  |
| June 4.   | Dr. Jones' bill for medical attendance .....                 | 9 17     |
| July 9.   | J. Fox's bill for tuition.....                               | 13 21    |
|           | 15. P. Storm, in full, for mortgage on farm .....            | 5,000 00 |
| Aug. 19.  | Cash loaned on mortgage to A. B.....                         | 839 08   |
|           | 11. S. Mark's bill for books and stationery.....             | 17 36    |
| Sept. 17. | Collector, for taxes on dwelling-house and lot in Utica,     | 19 23    |
|           | 29. G. Bull's bill for repairing dwelling-house in Utica.... | 43 19    |
| Oct. 12.  | S. Rider, repairing barn in town of Charlton.....            | 62 40    |
|           | 20. Postage on letter from A. B.....                         | 25       |
| Nov. 6.   | D. Gray's bill for merchandise.....                          | 33 29    |



**APPOINTMENT OF COMMITTEE OF LUNATIC, ETC. 1113**

|      |     |   |                   |
|------|-----|---|-------------------|
| Nov. | 18. | Wm. Lott's bill for board and lodging.....  | \$46 67           |
|      | 21. | S. Newland's bill for lumber used in repairing house<br>and barn .....  | 15 44             |
| Dec. | 31. | Loaned Robert Gay on his bond and mortgage on farm,<br>Commissions <sup>1</sup> for receiving moneys since last annual<br>account, exclusive of capital received from previous<br>investments : | 350 00            |
|      |     | 2½ per cent on \$1,000 00.....  | 25 00             |
|      |     | 1¼ per cent on 5,000 00.....  | 62 50             |
|      |     | ½ per cent on 553 98.....   | 2 77              |
|      |     | Do for moneys paid out, exclusive of investments and<br>reinvestments :   |                   |
|      |     | 2½ per cent on \$1,000 00.....  | 25 00             |
|      |     | 1¼ per cent on 4,000 00.....  | 50 00             |
|      |     | ½ per cent on 637 54.....   | 3 18              |
|      |     | Balance due the estate.....   | 9 24              |
|      |     |   | <u>\$6,654 30</u> |

**CONTRA.**

|       |      |   |                   |
|-------|------|---|-------------------|
|       | 18—. |   | <b>CR.</b>        |
| Jan.  | 1.   | Balance due as by last annual account.....  | \$27 32           |
| Feb.  | 2.   | Cash received, one quarter's rent on dwelling-house in<br>Utica.....  | 45 00             |
| March | 7.   | One year's interest on G. Lord's bond and mortgage....  | 56 00             |
| April | 15.  | Dividend on —— bank stock. ....   | 73 50             |
| May   | 3.   | One year's rent on farm in town of Charlton .....   | 59 00             |
|       | 8.   | One quarter's rent on house in Utica.....   | 45 00             |
| June  | 12.  | L. Kern's note, principal..... \$73 00  |                   |
|       |      | Interest 1 year, 3 months, 15 days .....  | 6 59              |
|       |      |   | 79 59             |
| July  | 27.  | One year's interest on S. Drake's bond and mortgage...  | 63 70             |
| Aug.  | 4.   | One quarter's rent on dwelling-house in Utica....   | 45 00             |
|       | 19.  | One year's interest on J. Field's bond and mortgage....   | 42 00             |
|       | 19.  | Cash for timber sold J. Peters .....  | 6,000 00          |
| Sept. | 27.  | Part of the amount of legacy to infant by John Miller's<br>will.....  | 70 00             |
| Oct.  | 13.  | Amount of G. Lord's note given for balance of last<br>year's interest on his mortgage, including interest on<br>note..... | 23 19             |
| Nov   | 13.  | One quarter's rent on house in Utica.....   | 45 00             |
|       |      |   | <u>\$6,654 30</u> |

——, *January* ——, 18—.

———— COUNTY, ss. :

F. C., of ——, the committee of the person and property of the above named C. D., a lunatic [etc.], being duly

<sup>1</sup>As to compensation of committee, former statute. See, also, amend-see Code Civ. Pro., § 2338, and In re ———— by ch. 516 of Laws of 1894, to Colah (6 Daly, 51), decided under the section 2338 Code Civ. Pro.

sworn, doth depose and say, that the foregoing inventory and account contain, to the best of deponent's knowledge and belief, a full and true statement of all his receipts and disbursements on account of said C. D.; and of all money and other personal property of the said C. D., which have come to this deponent's hands, or have been received by any other person by his order or authority, or for his use, since his appointment [*or* since the filing of his last inventory and account], and of the value of all such property, together with a full and true statement and account of the manner in which he has disposed of the same; and of all the property remaining in his hands at the time of the filing of said inventory and account; and a full and true description of the amount and nature of each investment made by him since his appointment [*or* since the filing of his last annual inventory and account], and that he does not know of any error or omission in the said inventory or account to the prejudice of the said C. D.

F. C.

[Jurat as in form No. 46.]

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 No. 1246.

**Order for Inventory or Account, or for Further Inventory,  
etc., by Committee.**

(Code Civ. Pro., § 2342.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

It having appeared by the examination made by me [*or* which I have caused to be made by, etc.] of the accounts and inventories filed by the committees of property of lunatics, idiots and habitual drunkards in the county of \_\_\_\_\_ since the first day of February, 18—.

That [\*] F. C., of \_\_\_\_\_, the committee of the property of C. D., a lunatic, etc., appointed as prescribed by title sixth of chapter seventeenth of the Code of Civil Procedure, has omitted to file his annual inventory [*or* account, *or* inventory and account, *or* the affidavit relating to the inventory and account filed by him] for the year 18— :

It is hereby ordered, that the said F. C., as such committee, file his said annual account, etc., for the year 18— [or state other requirement], on or before the ——— day of ———, 18—, in the ——— clerk's office [and, also, that said F. C. pay the expense of serving this order upon him].'

[Or as above to (\*), and from thence as follows: In my opinion the interest of C. D., a lunatic (etc.), requires that F. C., the committee of said C. D., appointed as prescribed in title sixth of chapter seventeenth of the Code of Civil Procedure, should render a more full and satisfactory inventory (or account, or inventory and account) as such committee: It is hereby ordered, etc., that said F. C. file, on or before the ——— day of ———, 18—, in the (name clerk's office), a more full and satisfactory account (or inventory, or inventory and account, etc.) (and, also, that said F. C. pay, etc.).<sup>1</sup>]

Dated ———, 18—.

A. O., [*Presiding*] Judge, etc.<sup>2</sup>

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## TITLE VII.

### FORMS RELATING TO PROCEEDINGS FOR THE DISPOSITION OF THE REAL PROPERTY OF AN INFANT, LUNATIC, IDIOT OR HABITUAL DRUNKARD.

(Code Civ. Pro., Ch. 17, Tit. 7.)

- No. 1247. Complaint in action to compel infant or lunatic, etc., trustee to convey.
- 1248. Complaint in action to compel specific performance of contract by infant, etc.
- 1249. Order for judgment that infant, etc., trustee convey.
- 1250. Order for judgment for specific performance of contract by infant, etc.
- 1251. Petition for sale of real property of infant.
- 1252. Petition by committee of lunatic, idiot or habitual drunkard for sale of his real estate to pay debts.
- 1253. Order upon petition appointing special guardian of infant.
- 1254. Bond of committee or special guardian.
- 1255. Order to show cause why committee should not file bond.

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<sup>1</sup> This direction may be inserted by the judge in his discretion. (See Code Civ. Pro., § 2342.)

to be made, see Code Civ. Pro., § 2342. See, also, amendments to section 2342, Code Civ. Pro., by ch. 746 of Laws of 1895, taking effect Jan. 1, 1896.

<sup>2</sup> As to judge by whom the order is

- No. 1256. Order upon return of order to show cause, No. 1255.  
 1257. Order appointing referee to inquire into merits of application.  
 1258. Referee's report.  
 1259. Final order upon referee's report.  
 1260. Report of special guardian or committee of agreement to sell.  
 1261. Order confirming guardian's (etc.) report, and directing a conveyance.  
 1262. Another form of order of confirmation, where proceeds are retained by guardian, etc.  
 1263. Another form of order of confirmation, where the amount of the proceeds exceeds five hundred dollars and no real security has been given by the guardian.  
 1264. Deed by special guardian etc.  
 1265. Release of widow's right of dower.  
 1266. Final report of special guardian.  
 1267. Order confirming final report of special guardian.  
 1268. Consent of owner of dower estate, etc., to receive a gross sum in satisfaction thereof.

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No. 1247.

**Complaint in Action to Compel Infant or Lunatic, etc.,  
 Trustee to Convey.**

(Code Civ. Pro., § 2345, subd. 1.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that he is entitled to a conveyance of the real property hereinafter described from F. P., who holds said property as trustee [stating the nature of the trust, and the facts showing that the infant should convey the premises, etc.].

That said F. P. is an infant of the age of \_\_\_\_\_ years [or is a lunatic, etc.], and that he resides at \_\_\_\_\_ [in this State], and that M. F., of \_\_\_\_\_, is the general guardian [or the committee of the property (and person)] of said F. P.

Wherefore plaintiff prays judgment that the said infant [or lunatic, etc.], execute a conveyance of the said real property, which is described as follows, to wit [describe same], to the plaintiff and his heirs and assigns forever, or that the said guardian of said infant [or the said committee of said lunatic, etc.], or a special guardian to be appointed in this action for said infant, etc., execute such conveyance in

the name of such infant, etc.; and for such other and further relief as may be just, with costs of this action.<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

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No. 1248.

**Complaint in Action to Compel Specific Performance of Contract by Infant, etc.**

(Code Civ. Pro., § 2345, subd. 2.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, G. H., of \_\_\_\_\_ [now deceased], entered into a written contract with J. K., of the same place, by which the said G. H., for a good and valuable consideration covenanted and agreed to convey to said J. K., on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the following described premises, to wit [describe same].

That said J. K., in consideration of the promises and agreements on the part of the said G. H., covenanted and agreed to pay to the said G. H., on the said \_\_\_\_\_ day of \_\_\_\_\_, 18—, the sum of \_\_\_\_\_ dollars, and also on that day to execute and deliver to said G. H. the bond of the said L. M., in the penalty of \_\_\_\_\_ dollars, conditioned to pay to the said G. H., on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the sum of \_\_\_\_\_ dollars, with interest thereon semi-annually, and also his mortgage covering the premises aforesaid, and conditioned as aforesaid, a copy of which contract is hereto annexed, marked "A"; and to which, for greater particularity, the plaintiff refers as a part of this complaint.

And the plaintiff further shows, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, said G. H. departed this life, intestate without performing the said contract, and leaving three

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<sup>1</sup> See section 2347, Code Civ. Pro., for judgment to be rendered in the action. See, also, form No. 1248.

For appointment of guardian *ad litem* for infant defendant, see forms Nos. 111, 112, etc.

By section 2346, Code Civ. Pro., as amended in 1882, the action may be

maintained by the committee of the lunatic or other incompetent person; but, in that case, the court must appoint a special guardian for the incompetent person, as required by law, where an infant is defendant, and the proceedings are the same as in a like action against an infant.

adult and three infant children him surviving, and that the said children, as the heirs-at-law of said G. H., are now seized of the said premises in fee.

That the names of the said adult children of said G. H. are M. H., F. H. and R. H., and they reside at \_\_\_\_\_ aforesaid.

That the names of the three infant children of said G. H. are I. H., who is now of the age of \_\_\_\_\_ years; P. H., who is now of the age of \_\_\_\_\_ years, and L. H., who is now of the age of \_\_\_\_\_ years; that said infant children reside at \_\_\_\_\_ and have no general guardian.

And the plaintiff further shows, that he was duly appointed the administrator of the goods, etc., of said G. H., on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, by the surrogate of \_\_\_\_\_ county, in which county said G. H. resided at the time of his death.

And the plaintiff further shows, that he is desirous that a specific performance of the said contract, on the part of said infants, should be decreed by this court.

That the said J. K. is also desirous that such performance should be decreed, as are also the said adult children, as will more fully appear by the consent of said J. K. and said adult children, which is hereto annexed, marked "B," and referred to as a part of this complaint.

Wherefore the plaintiff prays judgment directing that the said infant children convey to the said J. K. all their right, title and interest in the said premises, which they derived from the said G. H., as aforesaid, according to the terms of the said contract, upon the performance by the said J. K. of the covenants and agreements to be performed by him in and by said contract, or that the guardian *ad litem* of said infants execute such conveyance in the name of said infants upon the performance by the said J. K. as aforesaid, and that the court will grant such further or other relief as may be proper.<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in form No. 151, etc.]

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<sup>1</sup> See note 1 to last form, No. 1247.

No. 1249.

**Order for Judgment that Infant, etc., Trustee Convey.**

(Code Civ. Pro., § 2347.)

As in form No. 1250 to [\*], and from thence as follows: It is hereby ordered, that C. P., the guardian *ad litem* of the said infant defendant, execute, acknowledge and deliver to J. K. [within ten days after service upon him of a copy of the judgment entered hereupon], a good and sufficient conveyance of all the estate, right, title and interest of the said infant as trustee as aforesaid, in and to the premises described as follows in said complaint, to wit [describe same].

And it is further ordered, that the said plaintiff pay to the said guardian *ad litem* ——— dollars costs of this action [or insert other directions as to costs], and that plaintiff have judgment accordingly.<sup>1</sup>

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 No. 1250.
**Order for Judgment for Specific Performance of Contract by Infant, etc.**

(Code Civ. Pro., § 2347.)

[At, etc., as in form No. 80.]

[Title of cause.]

On filing due proof of personal service of the summons and a copy of the complaint in this action upon each of the defendants, and proof that no answer or demurrer has been served, except the usual general answer which has been put in on behalf of the said defendants by C. P., the guardian *ad litem* of said defendants, duly appointed herein, and on filing proof of due service of notice of this application for judgment upon said guardian *ad litem* [or upon F. R., the attorney for said guardian *ad litem*], and on motion of ———, for the plaintiff, and after hearing, etc.; and the court being satisfied, after hearing the parties, that a con-

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<sup>1</sup> For form of judgment upon the order, see form No. 469, and see Hunter v. Dashwood (9 Paige, 280), Hunter v. Dashwood (2 Edw. Ch., 415), Swarthout v. Burr (1 Barb., 499).

See, as to costs, Sutphen v. Fowler

veyance of said premises described in the complaint herein ought to be made, as hereinafter directed: [\*]

It is hereby ordered and adjudged, that said C. P., the guardian *ad litem* of the said infants, defendants herein, execute, acknowledge and deliver, in the name of said infants, to J. K. [within ten days after service upon him of a copy of the judgment entered hereupon], a good and sufficient conveyance of all the estate, right, title and interest of the said infants in and to the premises described in the complaint herein as follows, to wit [describe same], upon his complying with the terms and conditions to be performed on his part under the contract set forth in the said complaint.

And it is further ordered, that, etc. [insert directions as to costs], and that plaintiff have judgment accordingly.<sup>1</sup>

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No. 1251.

### Petition for Sale of Real Property of Infant.

(Code Civ. Pro., §§ 2348, 2350.)

*To the Supreme Court of the State of New York*\* [or name other court]:

The petition of A. B. and C. B. respectfully shows, that said A. B. is an infant of the age of fourteen years and upwards, and became of the age of ——— years on the ——— day of ———, 18—, and resides at, etc.; that E. B. is an infant under the age of fourteen years, and resides at, etc., and became of the age of ——— years on the ——— day of ———, 18—, and that C. B. is the mother, etc., of said infants [or is the general guardian of said infants.]

That the said infants are two of the children and heirs-at-law of W. B., late of, etc., deceased, and that as such heirs-at-law they are each entitled to an undivided fifth part, subject to the right of dower of [the said] C. B., their mother, of a lot of land, situated in the Second ward of the

<sup>1</sup> See note 1 to last form, No. 1248.

<sup>2</sup> Where the application is made to the Supreme Court, the petition must be presented at a term held within the judicial district in which the property,

or a part thereof, is situated. (Code Civ. Pro., § 2349.) See, also, rule 55 of Gen. Rules of Practice, as am'd 1887, taking effect Jan. 1, 1888. (Hun's Court Rules, 1896, p. 241.)



city of Troy, with a dwelling-house and out-houses thereon, and known as lot No. 160, Fourth street ; also to an undivided fifth part of a certain lot, piece or parcel of land, situate, lying and being in the town of ———, in the county of ———, consisting of about three hundred acres of land, and bounded and described as follows [insert description].

That the said house and lot in the city of Troy are worth the sum of ——— dollars, and produce an annual income of ——— dollars ; that the said lot or parcel of land lying in the town of ——— is worth about ——— dollars, but is entirely unproductive, being wild and unimproved.

That the brothers of said infants, R. B., J. B. and S. B., own the other three-fifths of the said real estate above mentioned and threaten to commence proceedings against said infants for the partition thereof.

And your petitioners further show, that the said infants do not own any other real estate than that above described, and that they have no personal property of any kind or to any amount whatever, except their necessary wearing apparel [and except, etc.], and no income, except as above stated [if they have had any personal property which has been disposed of, show what disposition has been made of it, and if there are any demands against the infants' estate, state them ; see section 2350, Code Civil Procedure].<sup>1</sup>

And your petitioners further show, that [the said] C. B., the mother of said infants, as the widow of the said W. B., deceased, the father of the said infants, is entitled to dower in the said real estate, and that she has no means of support for herself or her said infant children, except what she and they may acquire by their own exertions, and that it is necessary that the said premises, or some part thereof, should be sold [*or mortgaged, or leased*] and the proceeds, or some part thereof, be applied towards the necessary education and maintenance of said infants ; and the said C. B. [hereby] offers to unite in the sale of said premises, and to release her right of dower therein, upon condition that one-third part of the purchase money be securely invested and the annual interest thereof be paid to her during her natural life ; or that a gross sum be paid to her in lieu

<sup>1</sup> By an amendment to section 2350 of Code Civ. Pro. by Laws of 1893, ch. 311, this clause need not be inserted where the application is made for the sale of an undivided interest of the infant or incompetent person in one or more parcels of land in order to avoid an action of partition on the part of his co-tenants. In the case above specified, by the same amendment

thereof, equal in value to her life estate therein, to be ascertained on the principle of life annuities.<sup>1</sup>

That no previous application for the sale of said real estate, or any part thereof, has been made [excepting (state any previous application, the time thereof and what disposition has been made of the same)].<sup>2</sup>

Your petitioners therefore pray, that the said real estate may be sold [*or* leased, *or* mortgaged] by and under the direction of this court, and that W. R., of the city of Troy, counselor-at-law, who is the uncle of [*or* who is in no way related to] the said infants, may be appointed their special guardian, for the purpose of selling, etc., the interests of said infants in the said real estate, and E. F., of ———, and G. H., of ———, are proposed as sureties for the said W. R. as such special guardian, to join with him in a bond in such penalty and upon such conditions as may be required, and that your petitioners may have such other and further relief as may be proper.<sup>3</sup>

Dated ———, 18—.

A. B.

C. D.

[Verification as in form No. 52.]

#### CONSENT OF GUARDIAN.

I hereby consent to be appointed the special guardian of the infants named in the foregoing petition.

Dated ———, 18—.

W. R.

the petition must state the particulars and value of the real property in respect to which a sale is desired.

<sup>1</sup> See as to consent of owner of dower estate, etc., to receive gross sum, etc., in satisfaction thereof, section 2362, Code Civ. Pro.; and for form of such consent, see form No. 1268; and see amendments to section 2361, Code Civ. Pro., by ch. 237 of Laws of 1890, and ch. 639 of 1893.

<sup>2</sup> See rule 55 of Gen. Rules of Prac., and see generally, as to these proceedings, rules 55 to 60, *id.*

<sup>3</sup> See *Battel v. Torrey* (65 N. Y., 294), *In re Valentine* (72 N. Y., 184); *rev'g S. C.*, 10 Hun, 53), *Muller v. Strupman* (6 Abb. N. C., 343), as to jurisdiction; as to interest which may be sold, etc., see Code Civ. Pro., § 2348, *Jenkins v. Fahey* (73 N. Y., 355; *rev'g S. C.*, 11 Hun, 351), *In re Haight* (14 Hun, 176), *Matter of Dodge* (105 N. Y., 585; *rev'g S. C.*, 40 Hun, 443), *Aldrich v. Funk* (48 Hun, 367), *Ellwood v. Northrup* (106 N. Y., 172), *Hardie v.*

*Andrews* (13 Civ. Pro. R., 413), *Matter of Hynes* (51 Hun, 340; *aff'd*, without opinion, 113 N. Y., 656), *Matter of Matthews* (27 Hun, 254; *aff'd S. C.*, without opinion, 90 N. Y., 688), *Kelly v. Pitcher* (18 State Rep., 364), *Buderus v. Immen* (20 Week. Dig., 88), *Armstrong v. Wernstein* (6 N. Y. Supp., 148), *Behrens v. Rodenburgh* (1 City Court, 93), *Dodge v. St. John* (96 N. Y., 260), *Ryder v. Wood* (29 State Rep., 62), *Weinstock v. Levison* (26 Abb. N. C., 244), *Field v. Dessar* (131 N. Y., 184), *Matter of Stafford* (3 Misc., 106), *Flynn v. Lynch* (23 Civ. Pro. R., 369).

This petition may be adapted to the case of the sale of the real property of a lunatic, etc. In that case the application should be made by the committee of the property, or by a relative or other person. (Code Civ. Pro., § 2349.) It can only be granted when a committee of his property has been appointed. (*Id.*, § 2351.)

See, also, for petition by committee

No. 1252.

**Petition by Committee of Lunatic, Idiot or Habitual Drunkard for Sale of His Real Estate to pay Debts.**

(Code Civ. Pro., §§ 2348, 2350.)

*To the Supreme Court of the State of New York [or name other court]:*

The petition of F. C., the committee of the person and estate of C. D., a lunatic [etc.], respectfully shows, that by an order of the \_\_\_\_\_ Court, made on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, your petitioner was appointed such committee.

That, as such committee, he has duly made out [and verified] an inventory of the estate of the said C. D., real and personal, and has therein stated the value thereof, and the amount of the rents and profits of the said real estate, and of the debts owing by the said lunatic [etc.], a copy of which is hereto annexed.

That it appears, from said inventory, that the said real estate consists of a house and lot, situate in the city of Albany, being No. —, etc., of the value of about \_\_\_\_\_ dollars, and which rents for the sum of \_\_\_\_\_ dollars annually.

That the value of the said personal estate, at the time of your petitioner's appointment, was about \_\_\_\_\_ dollars, but that your petitioner has been obliged to sell the following articles, namely [specify them], and apply the proceeds to the payment of debts owing by the said lunatic, to wit: a debt of \_\_\_\_\_ dollars, due to W. S. for medical attendance, and a debt of \_\_\_\_\_ dollars, due to T. R. for boarding said lunatic, and the sum of \_\_\_\_\_ dollars for the costs of the proceeding for your petitioner's appointment to his attorney.

Your petitioner further shows, that the following is an account of the debts and demands now existing against the estate of the said lunatic [etc.], viz. [set forth a list of the debts with their amounts].

for sale, etc., to pay debts of the lunatic, etc., form No. 1252.

The petition under subdivision 3 of section 2348, Code Civ. Pro., will be substantially like the complaints forms Nos. 1247, 1248. See, also, amendment to section 2348 by chap. 237 of Laws of 1890, so as to permit sale, etc., of infant's real estate, to preserve or improve the same, and by chap. 639

of Laws of 1893, so as to permit sale or release of inchoate right of dower in real property and other releases. Also amendment to section 2359, Code Civ. Pro., by chap. 523 of Laws of 1892, and to section 2350, id., by chap. 311 of 1893.

For complaint in action for foreclosure of a mortgage given by infants, see form No. 698.

That the aggregate amount of such debts and demands is ——— dollars, as near as can be ascertained, for the payment of which, in addition to the expenses of supporting such lunatic, the income of his real and personal estate, which amounts to ——— dollars, is wholly inadequate, and that even his whole personal estate would not be sufficient to discharge the same, were it sold for that purpose.

Your petitioner, therefore, prays that, by an order of this court, he may be authorized and empowered to mortgage or sell so much of the real estate of the said lunatic as may be necessary for the payment of his debts, and for such other relief as may be necessary.<sup>1</sup>

Dated ———, 18—.

F. C.

[Verification as in form No. 52.]

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No. 1253.

**Order upon Petition Appointing Special Guardian of Infant.**

(Code Civ. Pro., § 2352.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

On reading and filing the petition, dated ———, 18—, of A. B., of ———, an infant over the age of fourteen years, to wit: of the age of ——— years and upwards, and of E. B., of ———, an infant under the age of fourteen years, to wit: of the age of ——— years and upwards, and of C. B., the mother, etc. [*or* general guardian], of said infants, in their behalf, praying for the sale of certain real estate of the said infants therein described, under

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<sup>1</sup> The filing of a petition, showing the existence of a valid outstanding debt against the insane person, which requires the disposition of his real estate to enable his committee to pay, vests the court with jurisdiction of the subject matter, and such jurisdiction is not divested by subsequent irregularities unless steps were taken in

violation of some express provisions of that statute.

So held, under chapter 446 of 1874, the provisions of which are contained in this title. (*Agricultural Ins. Co. v. Barnard*, 96 N. Y., 526.)

Upon such application the committee represents the lunatic, and is not required to give him notice of the proceedings. (*Id.*)

the direction of this court, and for the appointment of W. R., of \_\_\_\_\_, as special guardian, for the purpose of conducting the said sale; and on reading and filing the consent of said W. R., annexed to said petition, to become such special guardian:

It is hereby ordered, that said W. R. be and he is hereby appointed the special guardian of said infants, with respect to the proceedings herein, upon his filing with the county clerk of \_\_\_\_\_ county [*or name other clerk*] a bond in form as required by law, to [each of said infants], with two sufficient sureties, in the penalty of \_\_\_\_\_ dollars, each of which sureties shall be worth the penalty of the bond over and above all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution, which bond shall be duly acknowledged, or proved, and certified, and accompanied with affidavits of justification made by the sureties, and approved as required by law, conditioned for the faithful discharge of his trust, for the paying over and investing of, and accounting for, all money received by him in this proceeding, according to the direction of any court having authority to give directions in the premises, and for the observance of the directions of the court in relation to the said trust.<sup>4</sup>

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No. 1254.

### Bond of Committee or Special Guardian.

(Code Civ. Pro., §§ 2351, 2352.)

As in form No. 340 to [\*], and from thence as follows: That, whereas, the above named A. B. has been duly appointed the special guardian of D. B. [and E. B.], infants [*or an infant*] [*or of C. D., a lunatic, etc.*], in a proceeding for the sale [etc.], of certain real property of said infants [*or infant, etc.*] [*or, whereas, the above named A. B., as committee of C. D., a lunatic, has made application for the sale (or mortgaging, or leasing) of certain real property of said C. D.; or, whereas, application has been made by \_\_\_\_\_ for the sale of certain real estate of C. D., a lunatic, etc.,*

<sup>4</sup>See Code Civ. Pro., §§ 2351, 2352, and Gen. Rules of Prac., No. 57, and see amendment to said section 2352 by chap. 268 of Laws of 1893, adding thereto as follows: Any trust company authorized by the laws of this state to act as general guardian of the estate

of an infant without giving security may be appointed such special guardian, and in such case the court, in the order of appointment, may dispense with the giving and filing of any such bond. See, also, amendment to section 2351, *id.*, by chap. 639 of 1893.

of whose person and estate the above named A. B. is the committee.]:

Now, if the said A. B. shall, and do, faithfully discharge his trust upon such application as such special guardian [*or* committee], and shall pay over and invest and account for all moneys received by him in the said special proceeding, according to the direction of any court having authority to give directions in the premises, and shall observe the directions of the court in relation to the said trust, then the preceding obligation to be void, otherwise to remain in full force and virtue.<sup>1</sup>

[Signatures and seals as in form No. 340.]

Sealed and delivered in presence of ————

[Acknowledgment or proof, justification and approval as in forms Nos. 340, 538.]

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No. 1255.

**Order to Show Cause why Committee Should not File Bond.**

(Code Civ. Pro., § 2351.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

Upon reading and filing the petition of A. M., in the above entitled proceeding, dated ———, 18—, praying for the sale, etc., of certain real estate of C. D., a lunatic [etc.], and on motion of F. P., counsel for said petitioner:

It is hereby ordered, that F. C., the committee of the person and estate of said C. D., show cause at, etc., on, etc.,

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<sup>1</sup> The omission of a penalty in such a bond does not affect its validity; its only effect is to make the liability commensurate with the condition. (Dodge v. St. John, 96 N. Y., 260.)

See, also, Agricultural Ins. Co. v. Barnard (96 N. Y., 525; rev'g S. C., 26 Hun, 302), as to bond in proceedings under chapter 446 of Laws of 1874, to mortgage the real estate of a lunatic, etc., for payment of his debts.

A bond of the proposed special guardian and his surety, although exe-

cuted before the order appointing him was made, is valid and sufficient, if delivered, approved and filed afterwards. So held in reference to proceedings under former rules and statutes before the Code of Civ. Pro. (Center v. Finch, 22 Hun, 146.)

Upon a breach of the condition of the bond, the court must direct it to be prosecuted for the benefit of the person injured. (Code Civ. Pro., § 2353.) As to effect of failure to file bond until after the making of an

why he should not file a bond to ———, in such proceeding, in the amount of ——— dollars, with two sufficient sureties, conditioned for the faithful discharge of his trust; for the paying over and investing of, and accounting for, all money received by him in said proceeding, according to the direction of any court having authority to give directions in the premises, and for the observance of the directions of the court in relation to the said trust.

And it is further ordered, that a copy of this order, and of said petition, be served personally on said F. C., on or before the ——— day of ———, 18—.<sup>1</sup>

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No. 1256.

**Order upon Return of Order to Show Cause (No. 1255).**

(Code Civ. Pro., § 2351.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

On the return of the order to show cause, made herein on the ——— day of ———, 18—, why F. C., the committee of C. D., a lunatic, etc., should not file a bond herein as such committee, in form and amount, and with sureties, as provided by said order, with proof of due personal service of a copy of said order to show cause and of said petition on said F. C., as thereby required, and on motion of ———, counsel for the petitioner herein, and after hearing, etc., and on reading [name any opposing papers] [or no one appearing to oppose]; and it appearing that there is probable cause for such application:

It is hereby ordered, that said F. C., as such committee, be and he is hereby required to file a bond [describing it as in last form] within ——— days from the date of this order [or from the time of the service upon him of a copy of this order], or, that in case of his failure so to do, that R. P., of ———, be and he is hereby appointed the special

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order of reference, see *Kelly v. Pitcher* (18 State Rep., 364.)

See, also, *Behrings v. Rodenburgh* (1 City Court, 93), *Ryder v. Wood* (29 State Rep., 62).

<sup>1</sup>See note 1 to form No. 162, as to orders to show cause; also *Marcele v. Saltzman* (66 How. Pr., 205), and form No. 325.

guardian of said C. D., with respect to the proceedings herein, upon his filing his bond [describing bond as in form No. 1255].<sup>1</sup>

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No. 1257.

**Order Appointing Referee to Inquire into Merits of the Application.**

(Code Civ. Pro., § 2354.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

The petition of A. B. and E. B., infants, and of C. B., the mother [*or* general guardian] of said infants, on their behalf, dated ———, 18—, having been duly presented and filed in the above entitled proceeding on the ——— day of ———, 18—, and the court having made an order thereupon on the said ——— day of ———, 18—, appointing W. R. special guardian of said infants, with respect to the proceedings herein, upon his filing with the [name clerk] his bond as therein mentioned, and it having appeared by, etc., that said bond has been duly filed with the said clerk on the ——— day of ———, 18— :

Now, upon the application of ———, attorney for said petitioners, it is hereby ordered, that I. L., of ———, counselor-at-law, be and he is hereby appointed as referee to inquire into the merits of the said application, and that said referee examine into the truth of the allegations of the said petition, hear the allegations and proofs of all persons interested in the application, and report his opinion thereupon, together with the testimony, with all convenient speed.<sup>2</sup>

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<sup>1</sup>The same order may be made, appointing a special guardian, if the committee elects that such appointment shall be made. (Code Civ. Pro., § 2351) See, also, amendment to section 2351 by chap. 268 of Laws of 1893.

<sup>2</sup>The requirement of the statute that the petition shall be referred is sub-

stantial, and cannot be dispensed with; an omission to refer constitutes a fatal defect in proceedings under the statute. (In the matter of Valentine, 72 N. Y., 184; rev'g S. C., 10 Hun, 83.) See, also, Ellwood v. Northrup (106 N. Y., 172), Aldrich v. Funk (48 Hun, 367).



No. 1258.

**Referee's Report.**

(Code Civ. Pro., § 2354.)

[Title of proceeding.]

I, I. J., appointed referee in the above entitled proceeding, by an order of the court therein dated ——— 18—, do hereby report:

That having taken the oath as required by law, which oath is hereto annexed marked "A," and having been attended by the counsel for the petitioners and by the special guardian of the said infants [etc.], I have examined into the truth of the allegations of the petition herein, and have heard the proofs and allegations of all persons interested in the property, or otherwise interested in the application.

That, in my opinion, a sale [*or* lease, *or* mortgage] of the premises described in the said petition [*or* state portion thereof] would be beneficial to the said infants [*or* lunatic, etc.], and the reasons therefor are as follows [here state same].

And I further report that the said infants [etc.] are [*or* is] in absolute need of having the whole [*or* state portion] of the proceeds of such sale [lease *or* mortgage] for the payment of [his] debts [*or* for the maintenance and necessary education of himself (and his family)], in addition to what he might earn by his own exertions [*or* state that said infants (etc.) are not in absolute need of any portion of the proceeds, etc., as above].

And I further report, that the said premises are worth, in the aggregate, the sum of ——— dollars; that the house and lot, situated in the city of Troy, are worth ——— dollars, and that the lot of land, situated in the town of ———, in the county of ———, is worth ——— dollars.

And I further report, that, in my opinion, it will be for the interests of the said infants [etc.] to have the said real estate sold [*or* mortgaged, *or* leased], upon the following terms and conditions:

That so much of the proceeds of their shares or interests

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<sup>1</sup> For form of oath of referee, see form No. 439, and see note 1 to that form.

in the same as may be necessary to pay their respective proportions of the gross value of the dower right of [their mother] C. B. therein, and the costs of these proceedings, be paid by the purchaser on the delivery of the deed, and that the payment of the residue of the purchase money of the interests of said [infants] be secured by the bond of the purchaser, and a mortgage upon the said premises, to be given to the [county treasurer of \_\_\_\_\_ county in trust for the said (infants)],<sup>1</sup> conditioned to pay the interest thereon semi-annually, at the rate of \_\_\_\_\_ per cent per annum, and the principal in two equal installments, one of which shall be paid on the day when the said A. B. shall arrive at the age of twenty-one years, and the other on the day when the said E. B. shall arrive at full age [or insert other provisions as may be required].

And I further report, that C. B. [the mother of said infants and who], is entitled to her dower in the premises, is willing to join in the said sale [or mortgage, or lease], and that I have ascertained the value of her life estate in the premises on the principle of life annuities, and that the present value of the same is \_\_\_\_\_ dollars.

That I have annexed hereto the testimony taken by me upon said reference, marked "B" [state any further facts that may be necessary and proper].

All of which is respectfully submitted.<sup>2</sup>

Dated \_\_\_\_\_, 18—.

I. J., *Referee.*

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No. 1259.

### Final Order upon Referee's Report.

(Code Civ. Pro., § 2355.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

Upon filing the report of I. J., referee, appointed herein by order of this court, which report is dated \_\_\_\_\_, 18—,

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<sup>1</sup> See rule 58 of Gen. Rules of Prac. effect Jan. 1, 1888. (Hun's Court Rules, 1896, pp. 241, etc.) See, also, <sup>2</sup> As to contents of this report, see section 2354, Code Civ. Pro., and rule 56 of Gen. Rules of Prac.; and see, generally, as to these proceedings, rules 55 to 60, id., as am'd 1887, taking amendments to § 2354 by ch. 268 of 1893 and note 2, p. 1128, to form No. 1257. As to dower interest, see note 1, p. 1122, to form 1251.

from which it appears satisfactorily to this court that the interests of the said infants [etc.] will be promoted by a sale [*or* lease, *or* mortgage] of [their shares in] the real estate mentioned in the petition in this matter, for the reasons stated in said report, on motion of W. N., of counsel for the said petitioners :

It is ordered, that the said report be and the same is hereby confirmed.

And it is further ordered, that W. R., the [special guardian] of said [infants] be and he is hereby authorized and empowered and directed to sell [*or* let for a term of ——— years, *or* mortgage] all the right, title and interest of the said infants, in and to said real estate [*or* describe part thereof], at a price [*or* for an amount] not less than the sum specified by said referee in his report as the [value] thereof, and upon the terms and conditions therein specified.

[Insert further directions of the court as to time, manner and conditions of sale and conveyance.]

But it is hereby further ordered, that before such sale [*or* lease, *or* mortgage] be made pursuant hereto the said special guardian [*or* committee] enter into an agreement therefor, subject to the approval of this court, and report the said agreement to this court under oath.

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No. 1260.

**Report of Special Guardian or Committee of Agreement to Sell.**

(Code Civ. Pro., § 2356.)

[Title of proceeding.]

*To the [name court]:*

In pursuance of an order of this court, made in the above entitled matter, on the ——— day of ———, 18—, authorizing and empowering and directing me, as the [special guardian of the infants] therein named, to contract for the sale and conveyance [etc.] of all the right, title and interest of the said [infants], in and to the real estate mentioned and described in the petition in this matter, dated the ———

day of ———, 18—, and to report, upon oath, the terms and conditions of the agreement made by me with the [purchaser or purchasers] before the execution of any deed or instrument of conveyance [etc.] of the said premises :

I, W. R., the said special guardian [*or* committee], do certify and report, that I have entered into an agreement, subject to the approbation of this court, with B. P. J., of, etc., for the sale [etc.] of all the right, title and interest of the said [infants], in and to the said real estate, upon the following terms and conditions, viz.: the said B. P. J. to pay therefor the sum of ——— dollars, as follows: so much of the said purchase money as may be necessary to pay the respective portions of said infants of the gross value of the right of dower of their mother, C. B., therein, and the costs of these proceedings, on the delivery of the deed, and the payment of the residue of said purchase money to be secured by a bond of the purchaser and a mortgage upon the said premises, to be given by him to the county treasurer of the county of ———, in trust for the said infants, conditioned to pay the interest thereon semi-annually, at the rate of ——— per cent per annum, and the principal in two equal installments, one of which shall be paid on the day when the said A. B. shall arrive at the age of twenty-one years, and the other on the day when the said E. B. shall arrive at that age [*or* state other terms of sale, etc., as may be necessary].<sup>1</sup>

That the gross value of the right of dower of the said C. B. in the said premises is ——— dollars, and the costs of these proceedings amount to ——— dollars,<sup>2</sup> after deducting which sums from the amount of the purchase money, as aforesaid, there will remain the sum of ——— dollars due to the said [infants] collectively, to be secured as aforesaid, or ——— dollars to each.

And I further report that the above are the best terms upon which I could sell the said property, and that, in my opinion, the premises are an ample security for the pay-

<sup>1</sup>The agreement may be annexed to report and referred to. See, also, *Hardie v. Andrews* (13 Civ. Pro. R., 413), *Buderus v. Timmen* (20 Week. Dig., 88), *Armstrong v. Wernstein* (6 N. Y. Supp., 148), *Aldrich v. Funk* (48 Hun, 367), *Weinstock v. Levison*

(26 Abb. N. C., 244); § 2356 Code Civ. Pro., as amended by ch. 639 of 1893.

<sup>2</sup>See as to amount of costs, rule 58 of Gen. Rules of Prac., and *Matter of Morrell* (4 Paige, 44), *Matter of Matthews* (29 Hun, 254, aff'd without op., 90 N. Y., 688).

ment of the balance of the purchase money not paid down and the interest.

All of which is respectfully submitted.

Dated \_\_\_\_\_, 18—.

W. R., *Special Guardian* [etc.].

\_\_\_\_\_ COUNTY, ss.:

W. R., the [special guardian] named in the foregoing report, being duly sworn, says, that he has read the above report, to which he has subscribed his name, and knows the contents thereof, and that the matters therein stated are true.

W. R.

[Jurat as in form No. 46.]

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No. 1261.

**Order Confirming Guardian's (etc.) Report and Directing a Conveyance.**

(Code Civ. Pro., §§ 2356, 2361.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

On reading and filing the report of W. R., the special guardian [etc.] of the above named [infants], made in pursuance of the order of this court, dated the \_\_\_\_\_ day of \_\_\_\_\_, 18—, stating that in pursuance of said order he had entered into an agreement, subject to the approbation of this court, with B. P. J., for the [sale] of all the right, title and interest of the said [infants], in and to the real estate mentioned in said order, upon the terms and conditions specified in the said report, on motion of W. N., of counsel for the said petitioners:

It is ordered, that the said report, and the agreement therein mentioned, be and the same are hereby ratified and confirmed.

And it is further ordered, that the said special guardian [etc.] do execute, acknowledge and deliver to the said B. P. J., a good and sufficient [conveyance] of all the estate, right, title and interest of the said [infants] in and to the premises aforesaid, upon his complying with the terms and condi-

tions upon which, by the said agreement, the [deed] was to be delivered.

And it is further ordered, [\*] that out of the purchase money paid by the said B. P. J., upon the delivery of the deed, the said special guardian [etc.] do pay the sum of ——— dollars to C. B. for her dower right in the shares of said infants in the premises, and take her receipt and release in full discharge thereof, executed and acknowledged as required by law, she having filed her consent, as provided by section 2362 of the Code of Civil Procedure, to accept such gross sum in satisfaction thereof [*or* give directions for the investment, as provided in that section, according to the consent]; and that he pay to the attorney for the petitioner the costs of these proceedings, to wit: the sum of ——— dollars' [*or* to be taxed].

And it is further ordered, that the moneys which shall be received by the county treasurer of ——— county, from time to time, for interest upon the bond and mortgage given by the purchaser, be paid over by him to the said [special guardian] to be applied by him to the maintenance and education of the said infants, and that said [guardian] make a report, under oath, of the disposition and investment of the proceeds of such sale, etc. [*or* make other provisions as may be necessary].

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No. 1262.

**Another form of Order of Confirmation, where Proceeds are Retained by Special Guardian (etc.).**

(Code Civ. Pro., §§ 2356, 2361.)

As in form No. 1261 to [\*], and from thence as follows: That so much of the proceeds of said [sale] as shall be necessary be applied to the payment of the expenses of said sale, together with the costs of these proceedings, to wit: the

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<sup>1</sup>See note 2 to form No. 1260. See, also, as to directions of final order as to dower, etc., where a consent has been filed to accept a gross sum, section 2362, Code Civ. Pro. For form of consent, see form No. 1268. See, also, amendment to section 2361 Code Civ. Pro., as to provisions of order in case of release of inchoate right of dower,

by ch. 639 of Laws of 1893, and *Walrath v. Abbott* (75 Hun, 452)

See, also, as to provisions of final order where the interest of the infant, etc., consists of a right of dower, or an estate for life or years, section 2363, Code Civ. Pro.

As to payment of debts of infants, etc., see section 2364 (id.).

sum of ——— dollars [*or* to be taxed];<sup>1</sup> and of the remainder of such proceeds so much as may be immediately necessary be applied to the maintenance and education of the said infants [etc.], and that the residue thereof be kept or put out at interest, or invested [on bond and mortgage] for the benefit of the said [infants]; and that said [special guardian] do make a return to the court, in writing and upon oath, of the investment and disposition of the proceeds as soon as may be.<sup>2</sup>

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No. 1263.

**Another form of Order of Confirmation, where the Amount of the Proceeds exceed Five Hundred Dollars and no Real Security has been Given by the Guardian.**

(Code Civ. Pro., §§ 2356, 2361.)

As in form No. 1261 to [\*], and from thence as follows. That the said [special guardian] bring the share or portion of the consideration money received by him upon said sale which belongs to said infants, after paying thereout to the attorney of the said infants the costs of these proceedings, to wit: the sum of ——— dollars [*or* to be taxed], into court, and deposit the same with the county treasurer of ——— county, to be invested by him for the use of said infants [*or* the court may direct the investment of the proceeds by the special guardian for the use of the infant].<sup>3</sup>

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No. 1264.

**Deed by Special Guardian, etc.**

(Code Civ. Pro., § 2356.)

This indenture, made the ——— day of ———, in the year 18—, between A. B. and E. B., infants under the age of twenty-one years, by W. R., their special guardian, of the first part, and B. P. J., of ———, of the second part:

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<sup>1</sup> See note 2 to form No. 1260.

<sup>2</sup> In the case contemplated in form No. 1261, the proceeds are not retained by the guardian, etc., the whole amount of the cash payment being applied to extinguish the claim of dower, and to pay the costs, form No. 1262, is adapt-

ed to the case where the proceeds are retained by the guardian, he having given real security, or the proceeds not exceeding \$500.

<sup>3</sup> See rules 58 and 59 of Gen. Rules of Practice; and see *Stiles v. Stiles* (1 Lans., 90).

Whereas, a petition was heretofore presented to the Supreme Court of the State of New York [*or* name other court] by the said A. B., who is an infant over the age of fourteen years, and by C. B., the mother, etc. [*or* general guardian], of the said E. B., who is an infant under the age of fourteen years, and of said A. B., on their behalf, praying for a sale of the right, title and interest of the said infants in the real estate therein mentioned ; and,

Whereas, such proceedings were afterwards had in the said court, upon the said petition, that, by an order of said court, made on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said W. R. was appointed the special guardian of the said infants with respect to said proceedings, upon his giving the security therein required ; and,

Whereas, such security, duly approved and acknowledged, was subsequently filed by the said guardian in the proper office ; and,

Whereas, by another order of the said court, made on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said W. R. was authorized and empowered to contract for the sale and conveyance of the right, title and interests of the said infants in said real estate, at a price not less than that specified in the report of I. J., the referee referred to in said order, to wit: the referee appointed by the court pursuant to statute, to inquire into the merits of said application, and upon the terms and conditions mentioned therein and in said referee's report ; and,

Whereas, in pursuance of the last mentioned order the said special guardian afterwards made his report, dated the \_\_\_\_\_ day of \_\_\_\_\_, 18—, to the said court, stating that he had entered into an agreement, subject to the approval of the said court, with B. P. J., of, etc., for the sale of all the right, title and interests of the said infants in and to the said real estate upon the terms and conditions therein mentioned ; and,

Whereas, by another order of the said court, made on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, it was ordered, that the said report of such special guardian, and the agreement therein mentioned, be and the same were thereby ratified and confirmed ; and,



Whereas, it was further ordered by the said court, in and by the said last mentioned order, that the said special guardian should execute, acknowledge and deliver to the said B. P. J., a good and sufficient conveyance of all the estate, right, title and interest of the said infants in and to the said premises, upon his complying with the terms and conditions upon which, by the said agreement, such deed was to be delivered; and,

Whereas, the said B. P. J., the purchaser aforesaid, has complied with the terms and conditions of the said agreement:

Now, therefore, this indenture witnesseth, that the said party of the first part, special guardian as aforesaid, by virtue of the power and authority conferred upon him by the several orders above mentioned, and in pursuance of the statute in such case made and provided, for and in consideration of the sum of ——— dollars to him in hand paid, at or before the ensealing and delivery of these presents, by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, hath granted, bargained, sold, remised, released and conveyed, and by these presents doth grant, bargain, sell, remise, release and convey, unto the said party of the second part, his heirs and assigns forever, all the right, title and interest of the said infants, A. B. and E. B., of, in and to [\*] all that certain [insert description], to have and to hold the said premises, and every part and parcel thereof, with the appurtenances, to the said B. P. J., his heirs and assigns, to his and their only proper use, benefit and behoof forever.

In witness whereof, the said parties of the first part, by their special guardian aforesaid, have hereunto set their hands and seals, the day and year first above written.<sup>1</sup>

A. B. [L. s.]

E. B. [L. s.]

[By W. R., *their Special Guardian.*]

Sealed and delivered in presence of L. M.

[Acknowledgment by guardian as in form No. 340, or proof as in form No. 538.]

<sup>1</sup> The guardian should strictly pursue the order of the court in respect to the manner of the execution of the conveyance. He cannot convey the premises, except pursuant to such order. (*Hyatt v. Seeley*, 11 N. Y., 52;

No. 1265.

**Release of Widow's Right of Dower.**

(Code Civ. Pro., § 2362.)

*Know all men by these presents* : That I, C. B., of ———, widow of F. B., late of ———, deceased, for and in consideration of the sum of ——— dollars, to me in hand paid by B. J. P., of ———, the receipt of which is hereby confessed and acknowledged, have granted, bargained, sold, remised, released and quitclaimed, and by these presents do grant, bargain, sell, remise, release and quitclaim to the said B. J. P., his heirs and assigns, all that certain piece or parcel of land [insert description], to have and to hold the said premises, with the appurtenances, to the said B. J. P., his heirs and assigns, to and for the use and behoof of him, his heirs and assigns forever.

And the said C. B. for herself, her heirs, executors and administrators, doth covenant and agree, to and with the said B. J. P., his heirs and assigns, that she hath not done any act whereby the said above described premises now are, or at any time have been, incumbered or affected in any manner whatever.

In witness whereof, the said C. B. has hereunto set her hand and seal, this ——— day of ———, 18—.

C. B. [L. s.]

Sealed and delivered in presence of ——— ———.

[Acknowledgment as in form No. 340, or proof as in form No. 538.]

No. 1266.

**Final Report of Guardian.**

(Code Civ. Pro., § 2361.)

[Title of proceeding.]

*To the [name court] :*

I, W. R., the special guardian of the above named infants, having been directed by an order of this court, dated

Battell v. Burrill, 10 Abb. [N. S.], 103; 535; aff'g S. C., 9 Hun, 493), Matter O'Reilly v. King, 2 Robt., 593; S. C., of Hurlbut (43 Hun, 311, 313).  
28 How., 409).

It is no objection to the conveyance

See, also, Cole v. Gourlay (79 N. Y.,

the \_\_\_\_\_ day of \_\_\_\_\_, 18—, to execute, acknowledge and deliver, in the name of said infants, to B. J. P., of \_\_\_\_\_, a conveyance of the interest of said infants in the real estate mentioned and described in the petition in these proceedings, for a sum not less than \_\_\_\_\_ dollars, do hereby certify and report, that I have executed such conveyance as in and by said order I was directed, such purchaser having complied with the terms and conditions of said sale.

That I have received from such purchaser, on account of the purchase money, the sum of \_\_\_\_\_ dollars.

That out of said sum last mentioned, I have paid to the attorney for the petitioners the sum of \_\_\_\_\_ dollars for the costs and expenses of these proceedings, including referee's fees, and \_\_\_\_\_ dollars to C. B. to satisfy her dower interest in said premises; and that I have taken from the said C. B. a release and discharge in full of her said dower interest, and that I have disposed of the residue of said sum in the manner directed by this court, as follows, to wit [state manner].

That I have taken from the attorney of the petitioners his receipt for such costs and expenses, which [together with the discharge of C. B.] is hereto annexed.

I further report that I have taken from the said B. J. P. a bond and mortgage to the said infants [*or state how funds have been disposed of*].

That I have invested the residue of the said proceeds, amounting to the sum of \_\_\_\_\_ dollars, at an interest of [six] per centum per annum, payable semi-annually, on good security by bond and mortgage, to wit: the bond of M. J., of \_\_\_\_\_, and a mortgage executed and acknowledged by him and his wife upon unincumbered real estate in the city of \_\_\_\_\_, worth double the amount of such proceeds, which mortgage I have caused to be recorded in

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that it is executed by the guardian conjointly with adult owners. (*O'Reilly v. King, supra.*)

See as to effect of conveyance, section 2358, Code Civ. Pro., as amended by ch. 639 of Laws of 1893.

As to cases in which real property,

or an interest therein, shall not be sold, leased or mortgaged, see section 2357, Code Civ. Pro.

See, also, amendment to section 2361 Code Civ. Pro., by ch. 639 of Laws of 1893.

the office of the clerk of the county of \_\_\_\_\_ [*or state*  
other method of investment pursuant to the order].

All of which is respectfully submitted.

Dated \_\_\_\_\_, 18—.

W. R.

[Verification as in form No. 1260.]

No. 1267.

**Order Confirming Final Report of Special Guardian.**

[At, etc., as in form No. 80.]

[Title of proceeding.]

On reading and filing the final report of W. R., the special guardian of A. B. and M. B., infants, of the execution and delivery of a deed of the real estate of said infants, heretofore sold by him, bearing date \_\_\_\_\_, 18—, and on motion of G. C., attorney for the said special guardian:

*Ordered*, That the said report be and the same is hereby, in all things, ratified and confirmed.

No. 1268.

**Consent of Owner of Dower Estate, etc., to Receive a Gross Sum in Satisfaction Thereof.**

(Code Civ. Pro., § 2362.)

[Title of proceeding.]

I, M. B., of \_\_\_\_\_, having a contingent [*or absolute*] right of dower [*or as tenant for life, or as tenant for a term of years*] in the property described in the petition in the above proceeding [*or in the following described portion of the property described in the petition in the above proceeding, to wit (describe same)*], do hereby consent to receive from the proceeds of the sale thereof a gross sum, to be fixed according to the principles of law applicable to annuities, in satisfaction of my said right [*or estate*] in said premises [*or to have a proportionate share of the proceeds of the sale of the said premises invested and the interest thereof paid to me from the time of the said investment (or*

of the commencement of my right, *or* estate, in said premises), until the determination of my said right, *or* estate, in satisfaction, etc.].

In witness whereof, I have hereunto set my hand, this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

M. B.

In presence of \_\_\_\_\_.

[Acknowledgment or proof as in forms Nos. 340, 538.<sup>1</sup>]

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## TITLE VIII.

### FORMS RELATING TO ARBITRATIONS.

(Code Civ. Pro., Ch. 17, Tit. 8.)

- No. 1269. Submission of controversies to arbitration, short general form.
- 1270. General submission, full form.
- 1271. Special submission of a controversy.
- 1272. Appointment by arbitrators of time and place of hearing, and notice to parties.
- 1273. Oaths of arbitrators.
- 1274. Subpcena to appear before arbitrators as a witness.
- 1275. Oath to witness before arbitrators.
- 1276. Award by arbitrators.
- 1277. Award by arbitrators, another form.
- 1278. Notice of motion to confirm award.
- 1279. Order upon motion confirming award.
- 1280. Notice of motion to vacate or modify the award.
- 1281. Order vacating, etc., the award.
- 1282. Judgment upon award.
- 1283. Affidavit in case of the death of, or the appointment of a committee for, a party, after filing or delivering of the award.
- 1284. Order extending time within which motion to vacate, etc., award must be made.
- 1285. Revocation of submission.
- 1286. Notice to opposite party of revocation.
- 1287. Complaint against a party revoking a submission to arbitration.
- 1288. Arbitration bond.

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### No. 1269.

#### Submission of Controversies to Arbitration, Short General Form.

(Code Civ. Pro., § 2366.)

We, G. H., of \_\_\_\_\_, and J. K., of \_\_\_\_\_, do hereby

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<sup>1</sup> This acknowledgment is not required by the statute. (Code Civ. Pro., § 2362.) The money is not to be paid, or the investment made, until an effect-

mutually agree to submit all our matters in difference, of every name and kind, now existing between us, and which might respectively be the subjects of an action, to the arbitration, determination and award of A. B., C. D. and E. F., as arbitrators, the said arbitrators [or any two of them]<sup>1</sup> to hear and determine the same, and make their award, in writing, on or before the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

[The said arbitrators may select (*or* appoint) an additional arbitrator (*or* umpire) by appointment in writing.] [\*]

And we further agree, that a judgment of a court of record, to wit: the \_\_\_\_\_ Court [in the county of \_\_\_\_\_],<sup>2</sup> shall be rendered upon the award made pursuant to this submission, as provided by section 2366 of the Code of Civil Procedure.

Witness our hands, this \_\_\_\_\_ day of \_\_\_\_\_, 18—.<sup>3</sup>

G. H.

J. K.

In presence of \_\_\_\_\_.

[Acknowledgment or proof, as in forms Nos. 340, 538.]

ual release of the right or estate of the person so consenting, executed to the satisfaction of the court, and duly acknowledged, etc, has been filed with the clerk. (Id.) For form of release of dower, see form No. 1265.

<sup>1</sup>An award by a majority is valid, unless the concurrence of all is expressly required in the submission. (Code Civ. Pro., § 2371.)

<sup>2</sup>If the Supreme Court is specified, the submission may also specify the county in which the judgment shall be entered. If it does not, the judgment may be entered in any county. (Code Civ. Pro., § 2366.)

<sup>3</sup>As to what controversies may or may not be submitted to arbitration and generally on the subject, see Code Civ. Pro., § 2365; *Keep v. Keep* (16 Hun, 141; S. C., 17 id., 152), *Wood v. Tunnichiff* (74 N. Y., 38), *Stout v. Woodward* (71 N. Y., 590), *Ryder v. Dodge* (14 Week. Dig., 84), *Dodds v. Hakes* (114 N. Y., 260), *Cobb v. Dolphin Mfg. Co.* (108 id., 463), *Giles*

*Lithographic, etc., Co. v. Recamier Mfg. Co.* (15 State Rep., 354), *Gustaveson v. McGay* (12 Daly, 423), *White v. Matthews* (14 Week. Dig., 27), *Matter of Martin* (1 How. Pr. [N. S.], 28), *Linde v. Republic Fire Ins. Co.* (50 Super. Ct., 362), *Wilberly v. Matthews* (91 N. Y., 648), *Bedell v. Kennedy* (109 id., 153), *Davenport v. Long Island Ins. Co.* (15 Week. Dig., 62), *Livingston v. Sage* (95 N. Y., 289), *Harris v. Hiscock* (91 id., 340), *People ex rel. Union Ins. Co. v. Nash* (111 id., 310), *N. Y. Lumber, etc., Co. v. Schneider* (15 Civ. Pro. R., 30), *Nat. Bank of Republic v. Darrah* (30 Hun, 29), *McNulty v. Solley* (95 N. Y., 242, aff'g S. C., 31 Hun, 17), *Chatfield v. Hewlett* (2 Dem., 191), *Hurst v. N. Y. Produce Exchange* (100 N. Y., 605), *N. Y. Lumber and Wood Working Co. v. Schneider* (119 id., 475), *Matter of Bennett* (30 State Rep., 166, aff'd without op., 121 N. Y., 718), *Union Ins. Co. v. Central Trust Co.* (36 State Rep., 435), *McGregor v. Sprott* (35

id., 907), *Matter of Di Carlo* (59 Hun, 360), *Flannery v. Shahagian* (34 State Rep., 887), *Same v. Same* (45 id., 698; 134 N. Y., 85), *Herbst v. Hageners* (137 id., 290), aff'g S. C., 62 Hun, 568), *Beach v. Sterne* (67 Hun, 341), *Box v. Costello* (6 Misc., 415), *Matter of Grening* (74 Hun, 62), *Heyman v. Smadbeck* (6 Misc., 527), *Union Insurance Co. v. Central Trust Co.* (87 Hun, 140, aff'g S. C., 24 Civ. Pro., 219), *Shrump v. Parfitt* (84 id., 341).

The submission is, in legal effect, a discontinuance of an action pending upon the cause of action submitted, although the arbitrators have not consented to act; and their subsequent failure or refusal to take upon themselves the duties of the arbitration, does not revive the action. (*McNulty*

*v. Solley*, 95 N. Y., 242; aff'g S. C., 31 Hun, 17; 17 Week. Dig. 568.)

This result follows, although the submission is not acknowledged as prescribed by section 2366 of the Code of Civ. Pro. (Id.)

See, also, as to effect of there being no acknowledgment, *Cutter v. Cutter* (48 Super. Ct., 470), *Lorenzo v. Deery* (26 Hun, 447).

See, also, *Harris v. Hiscock* (91 N. Y., 340), as to effect of submission.

Section 2366 of Code Civ. Pro., is applicable only to submissions made as prescribed in title 8 of chapter 17 of that statute. (*Lorenzo v. Deery* (26 Hun, 447).)

See, also, *Cutter v. Cutter* (48 Super. Ct., 470), and section 2386, id.

As to who may bind by submission, see *McPherson v. Cox* (86 N. Y., 472;





No. 1270.

**General Submission, Full Form.**

(Code Civ. Pro., § 2366.)

Whereas, differences do now and for a long time have existed between A. B. and C. D., both of the city of Albany, in relation to divers subjects of controversy and dispute, and which might respectively be the subjects of an action.

Now, therefore, the undersigned, said A. B. and C. D., do hereby mutually covenant and agree to and with each other to submit all and all manner of actions, cause and causes of actions, suits, controversies, claims and demands whatsoever now pending, existing or held by and between the said parties to J. K., M. C. and E. F., as arbitrators, who [or any two of whom] shall arbitrate, award, order, judge and determine of and concerning the same.

[The said arbitrators may select (*or* appoint) an additional arbitrator (*or* umpire) by appointment in writing.]

And we do mutually covenant and agree [†] to and with each other, that the said award to be made by the said arbitrators, or any two of them, shall in all things by us, and each of us, be well and faithfully kept and observed [provided, however, that the said award shall be made in writing, under the hands of the said arbitrators, or any two of them, and duly acknowledged or proved and certified as required by law, and filed in the ——— county clerk's office (*or* in the office of the clerk of the ——— Court),

rev'g S. C., 21 Hun, 493), People v. Supervisors (24 Hun, 413); Tilton v. U. S. L. Ins. Co. (8 Daly, 84).

In cases of doubt as to intention regarding matters to be arbitrated upon, the presumption is in favor of an intent that all matters in controversy should be decided. (Jones v. Welwood, 71 N. Y., 208; aff'g S. C., 9 Hun, 166.)

Where a submission is full and general of all matters in question between the parties, and the intent appears to have everything decided if anything is, a decision of all matters submitted will be imperatively required to valid-

ate the award, and an award determining a part only is void. (Id.)

It is only, *it seems*, when the matters omitted are not necessarily dependent upon, and connected with, the other points, that a partial award will be sustained. (Id., p. 217.)

As to appointment of an additional arbitrator, or umpire, and his duties, see Code Civ. Pro., § 2367.

For answer of arbitrament and award, see form No. 1014.

See, also, as to provision for fees of arbitrators, Code Civ. Pro., § 2371.

or delivered to the said parties in difference, or either of them, or his attorney, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—].<sup>1</sup>  
 [Conclude as in form No. 1269, from (\*).<sup>2</sup>]

A. B.  
 C. D.

In presence of \_\_\_\_\_.  
 [Acknowledgment or proof as in forms Nos. 340, 538.]

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No. 1271.

### Special Submission of a Controversy.

(Code Civ. Pro., § 2366.)

Whereas, a controversy is now existing and pending between A. B. and C. D., in relation to [state subject of the controversy], which might be the subject of an action.

Now, therefore, the said A. B. and C. D. do hereby mutually consent and agree to submit the said controversy, and all questions of difference in regard thereto, to the arbitration and decision of G. H., I. J. and K. L. [or any two of them].

[The said arbitrators may select (*or* appoint) an additional arbitrator (*or* umpire) by appointment in writing.]

And we do mutually covenant and agree [conclude as in last form from (†)].<sup>3</sup>

A. B.  
 C. D.

In presence of \_\_\_\_\_.  
 [Acknowledgment or proof as in forms Nos. 340, 538.]

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No. 1272.

### Appointment by Arbitrators of Time and Place of Hearing, and Notice to Parties.

(Code Civ. Pro., § 2368.)

A. B. }  
 and } *In arbitration.*  
 C. D. }

To A. B. and C. D. :

You are hereby notified that the undersigned, arbitrators

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<sup>1</sup> See section 2372, Code Civ. Pro., as to the filing or delivery.

<sup>2</sup> See notes to form No. 1269.

<sup>3</sup> See notes to forms Nos. 1269, 1270.

appointed pursuant to an agreement between you, dated \_\_\_\_\_, 18—, hereby appoint the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, as the time and [name place of hearing], as the place for the hearing of the matters so submitted to them, and that they will attend at such time and place for the purpose of such hearing.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

Yours, etc.,

[Signatures of arbitrators.]

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No. 1273.

**Oaths of Arbitrators.**

(Code Civ. Pro., § 2369.)

[Title of arbitration as in form No. 1272.]

We, the undersigned arbitrators, appointed by and between A. B. and C. D., do swear, that we respectively will faithfully and fairly hear and examine the matters in controversy between the before named parties, and will make a just award therein according to the best of our understanding.

[Signatures of arbitrators.]

[Jurat as in form No. 46.]

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No. 1274.

**Subpœna to Appear Before Arbitrators as a Witness.**

(Code Civ. Pro., § 2370.)

*The People of the State of New York, to J. K., and L. M. greeting :*

You are hereby commanded and required to be and appear

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<sup>1</sup>The time for making an award, under a sealed submission, may be extended by parol agreement; and if the parties proceed without objection, after the time has expired, they will be deemed to have waived the stipulation as to time. (Wood v. Tunncliffe, 74 N. Y., 38.)

As to adjournments, see Code Civ. Pro., § 2368.

<sup>2</sup>This oath is to be taken before an officer designated in section 842 of

Code Civ. Pro. It may be waived by the written consent of the parties to the submission or their attorneys. (Code Civ. Pro., § 2369.)

See also Kelsey v. Darrow (22 Hun, 125), Wilberly v. Matthews (11 Week. Dig., 471), Cutter v. Cutter (48 Super. Ct., 470), Flannery v. Shahagian (34 State Rep., 887), Same v. Same (134 N. Y., 85; 45 State Rep., 498), Matter of Grening (74 Hun, 62), Box v. Costello (6 Misc., 415).

before [names of arbitrators], or any two of them, arbitrators chosen to determine a controversy between A. B. and C. D., at [name place of attendance], on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, then and there to testify and give evidence in relation to said controversy before said arbitrators, on the part of said A. B. Hereof fail not at your peril.

Given under our hands this \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_.

[Signatures of arbitrators.]

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No. 1275.

**Oath to Witness Before Arbitrators.**

(Code Civ. Pro., § 2370.)

You do swear that the evidence which you shall give to the arbitrators here present, in a certain issue joined [*or* on certain matters of difference], between A. B. and C. D., shall be the truth, the whole truth, and nothing but the truth, so help you God.<sup>1</sup>

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No. 1276.

**Award by Arbitrators.**

(Code Civ. Pro., § 2371, 2372.)

A. B. )  
 and ) *In arbitration.*  
 C. D. )

The undersigned [name arbitrators] having been duly appointed arbitrators, as to certain matters in difference between the above named A. B. and C. D., by a bond [*or* submission, in writing] executed by the said parties, bearing date on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, as by reference thereto will fully appear, and having heard the proofs and allegations of the said parties, and duly deliberated thereupon, do hereby award, determine and order, that [insert the finding of the arbitrators].

[And we do further require the payment by (name party) of our fees and expenses as such arbitrators, to wit: the

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<sup>1</sup> See *Matter of Grening* (74 Hun, 62).

sum of ——— dollars for ——— days attendance of each of us as said arbitrators, and [name expenses.¹]

In witness whereof, we have hereunto set our hands [and seals],² this ——— day of ———, 18—.

[Signatures of arbitrators.]

In presence of ——— ———.

[Acknowledgment or proof as in forms Nos. 340, 538.]

No. 1277.

### Award of Arbitrators, Another Form.

(Code Civ. Pro., §§ 2371, 2372.)

[Title of arbitration as in form No. 1276.]

*To all to whom these presents shall come or may concern :*

We [name arbitrators], to whom was submitted as arbitrators, the matters in controversy existing between A. B. and C. D., as by the condition of their respective bonds or obligations [*or* the submission] executed by the said parties respectively [and sealed with their respective seals], dated the ——— day of ———, 18—, more fully appears :

Now, therefore, know ye, that we, the arbitrators mentioned in the said bond [*or* submission], having heard the proofs and allegations of the respective parties, and examined the matters in controversy by them submitted therein, do therefore make this award, in writing, that is to say, the said, etc.

In witness whereof, we have hereunto subscribed these presents, this ——— day of ———, in the year 18—.³

[Signatures of arbitrators.]

In the presence of ——— ———.

[Acknowledgment or proof as in forms Nos. 340, 538.]

¹ See section 2371, Code Civ. Pro.

² As to requirements of award, filing, etc., see Code Civ. Pro., § 2372; and see generally, as to powers, etc., that section, and section 2371, *id.*, and notes to form No. 1269.

³ See also, *Brown v. Lyddy* (11 Hun, 451), *Lorenzo v. Deery* (26 *id.*, 447), *Matter of Martin* (1 How. Pr. [N. S.],

28), *Shrump v. Parfitt* (84 Hun, 341), and note 1, to form No. 1272.

Any form of words which amounts to a decision of the question submitted is good as an award. Technical expressions are not necessary, nor technical precision and certainty, nor any introductory recitals. (*Crary's N. Y. Prac.*, vol. 1, p. 34, citing *Russ., Arb.*,

No. 1278.

**Notice of Motion to Confirm Award.**

(Code Civ. Pro., § 2373.)

[Title of arbitration as in form No. 1276.]

*To C. D. [or I. J., Attorney for C. D.]:*

Take notice, that an application will be made to the [name court], at a ——— term thereof, to be held at, etc., on, etc., for an order [\*] confirming the award of [name arbitrators] in the above entitled matter, which award is dated ———, 18— [and for judgment thereupon and in accordance therewith], with costs, and for such other or further relief as may be proper.

That said application will be made upon said award, and upon [name other papers].<sup>1</sup>

Yours, etc.,

A. B. [*or M. N., Attorney for A. B.*][Office address.<sup>2</sup>]

No. 1279.

**Order upon Motion Confirming Award.**

(Code Civ. Pro., §§ 2373, 2374.)

[At, etc., as in form No. 80.]

[Title of arbitration as in form No. 1276.]

On reading [and filing] the award made by the arbitrators [naming them] in the above matter, dated the ——— day of ———, 18—, by which it appears that, etc. [state substance of award], with proof of due service upon C. D., etc., of notice of this application, together with a copy of

244; *Butler v. Mayor of N. Y.*, 1 Hill, 489; *Ott v. Schroepel*, 1 Seld., 482; *Ott v. Schroepel*, 4 Barb., 250.) See also, *Beach v. Sterne* (67 Hun, 341), *Herbst v. Hagenaeers* (137 N. Y., 290), *Flannery v. Shahagian* (134 id., 85).

<sup>1</sup> See notes to form No. 1276.

<sup>2</sup> The application must be made at any time within one year after the award is made, to the court specified in the submission. Service of the notice is to be made upon the adverse

party to the submission, or his attorney, as prescribed by law for service of a notice of a motion upon an attorney in an action in the same court. In the Supreme Court, the motion must be made within the judicial district embracing the county where the judgment is to be entered. (Code Civ. Pro., § 2373.)

As to costs, see Code Civ. Pro., § 2378.

<sup>2</sup> See note 2 to form No. 122.

said award, and upon motion of M. J., counsel for said A. B., after hearing, etc., and on reading [name any opposing papers]: [\*]

It is hereby ordered, that the said award be and the same is hereby confirmed, and that the said A. B. have judgment against the said C. D. for the relief therein specified, and for the fees and expenses of the said arbitrators as therein mentioned, and [twenty-five dollars] costs of this application, and of the proceedings subsequent hereto, and his disbursements therefor, to wit: the sum of ———— [or to be taxed].<sup>1</sup>

No. 1280.

**Notice of Motion to Vacate or Modify, etc., the Award.**

(Code Civ. Pro., § 2376.)

As in form No. 1278 to [\*], and from thence as follows: Vacating [or modifying (or correcting) in the following particulars (stating same)], the award of [name the arbitrators], made herein, dated ————, 18—, with costs,<sup>2</sup> and for such other or further relief as may be proper.

That such application will be made upon the said award, and upon the affidavits and papers, with copies of which you are herewith served.<sup>3</sup>

Yours, etc.,

C. D. [or F. J. *Attorney for C. D.*].

[Office address.<sup>4</sup>]

To A. B.

Let all proceedings on the part of A. B., to enforce the said award, be stayed until the hearing and determination of the within noticed motion.

Dated ————, 18—.

A. O., *Judge, etc.*

<sup>1</sup> See notes to form No 1278.

<sup>2</sup> See as to costs upon vacating award, Code Civ. Pro., § 2377.

<sup>3</sup> This notice must be served upon the adverse party, or his attorney, within three months after the award

is filed or delivered. (Code Civ. Pro., § 2376.) As to stay of proceedings and by whom granted, see same section.

<sup>4</sup> See note 2 to form No. 122.

No. 1281.

**Order Vacating, etc., Award.**

(Code Civ. Pro., § 2376.)

[At, etc., as in form No. 80.]

[Title of arbitration as in form No. 1276.]

On reading and filing [name motion papers], with notice of motion, that the award made herein by [name arbitrators], as arbitrators, dated the ——— day of ———, 18—, be vacated [*or* modified, *or* corrected, etc.], and on motion of ———, of counsel for C. D., after hearing, etc., and on reading [name opposing papers]:

It is hereby ordered, that the said award be and the same is hereby vacated, with ——— dollars costs and disbursements, to wit: ——— dollars<sup>1</sup> [*or* to be taxed], to be paid by the said A. B. to the said C. D.<sup>2</sup>

[*Or* be modified (*or* corrected) in the following particulars, to wit (state same), with (ten) dollars costs of this motion, to be paid, etc., as above.]

<sup>1</sup>See as to costs, etc., section 2377, Code Civ. Pro.

<sup>2</sup>As to grounds upon which the award may be vacated or modified, see sections 2374, 2375, Code Civ. Pro., and *Curtis v. Gokey* (68 N. Y., 300; rev'g S. C., 5 Hun, 555), *Jones v. Welwood* (71 N. Y., 208; aff'g S. C., 9 Hun, 166), *Halstead v. Seaman* (82 N. Y., 27), *Boughton v. Seaman* (9 Hun, 392), *Locke v. Filley* (14 Hun, 139), *Fallon v. Kelehar* (16 Hun, 266), *De Castro v. Brett* (56 How. Pr., 484), *Shrump v. Parfitt* (84 Hun, 341), *Nat. Bank of Republic v. Darrah* (30 Hun, 294), *Flannery v. Shahagian* (45 State Rep., 598; 134 N. Y., 85), *Chism v. Schipper* (39 Alb. Law Jour., 149), among other cases.

Arbitration proceedings should be regarded with favor, and reviewed with great liberality, so as to sustain

rather than reverse; and if an award is within the submission, and there is no evidence of fraud, courts will not ordinarily interfere with the determination. (*Roosevelt v. Nichols* 6 Week. Dig., 437 [Supr. Ct., Gen. Tm.]).

*It seems*, that an award made against the estate of a deceased person, under a submission made by his personal representatives, ascertains and liquidates the claim, but confers no priority of payment over other creditors upon the person in whose favor it is made. Nor does an award of payment absolutely affect the rights of other creditors, although it may bind the representatives personally. (*Wood v. Tunnicliff*, 74 N. Y., 38.)

As to effect upon proceedings of death, or the appointment of a committee of a party, and proceedings thereupon, see Code Civ. Pro., § 2332.



No. 1282.

**Judgment upon Award.**

(Code Civ. Pro., § 2378.)

[ Title of arbitration. ]

Judgment of the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

It is adjudged, pursuant to the order of the \_\_\_\_\_ Court, made at a \_\_\_\_\_ Term thereof, held at, etc., on, etc., on motion of \_\_\_\_\_, attorney for A. B. [*or* C. D.], that the said A. B. recover from and against the said C. D. the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, together with \_\_\_\_\_ dollars costs and disbursements<sup>1</sup> [*or* state other relief].<sup>2</sup>

J. L., *Clerk.*

No. 1283.

**Affidavit in Case of the Death of, or the Appointment of a Committee for, a Party, after Delivery of the Award, on Application to Confirm, etc.**

(Code Civ. Pro., § 2382.)

\_\_\_\_\_ COUNTY, ss. :

A. B., of \_\_\_\_\_, being duly sworn, says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, an agreement was made between this deponent and C. D., by which the said parties thereto submitted to the award of [name arbitrators] all the matters in controversy between them [*or* specify matter submitted].

That such proceedings were had, pursuant to said submission, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, an award was made by said arbitrators, and filed [in the \_\_\_\_\_ county clerk's office], as provided thereby [*or* was delivered to the said A. B., *or* his attorney, as provided thereby], a copy of which award is hereto annexed, marked "A."

That on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and after the award of said arbitrators had been filed [*or* deliv-

<sup>1</sup> See Code Civ. Pro., §§ 2377, 2378, as to costs, etc.

<sup>2</sup> As to effect of judgment rendered upon an award and enforcement thereof, see Code Civ. Pro., § 2380. As to

appeal, see *id.*, § 2381, and *Matter of Pooie v. Johnston* (32 Hun, 215), *Matter of Poole* (5 Civ. Pro. R. [Browne], 579).

ered] as aforesaid, the said C. D. died, being, at the time of his death, a resident of the county of \_\_\_\_\_, intestate, and that M. P., of \_\_\_\_\_, has since been duly appointed by the surrogate of said \_\_\_\_\_ county administrator of the goods, etc., of said C. D., deceased [or leaving a will, of which M. P. has since been appointed the executor by the surrogate of said \_\_\_\_\_ county]<sup>1</sup> [or set forth lunacy, etc., proceedings, and appointment of committee for adverse party after the award has been filed or delivered].

A. B.

[Jurat as in form No. 46.]

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 No. 1284.

**Order Extending Time within which Motion to Vacate,  
etc., Award Must be Made in Case of Death, etc.**

(Code Civ. Pro., § 2382.)

[At, etc., as in form No. 80.]

[Title of arbitration as in form No. 1276.]

Upon the accompanying affidavit of \_\_\_\_\_, dated \_\_\_\_\_, 18—:

It is hereby ordered, that the time within which notice of a motion to vacate, modify or correct the award in the above entitled matter must be served, be and the same is hereby extended for [name term] from the date of this order.

Dated \_\_\_\_\_, 18—.

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 A. O., *Judge, etc.*

No. 1285.

**Revocation of Submission.**

(Code Civ. Pro., § 2383.)

[Title of arbitration.]

*To* [names of arbitrators]:

GENTLEMEN—Take notice, that I hereby revoke your

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<sup>1</sup> The application may also be made property. Notice of the application by the executor, etc., of the deceased must be given. (See provisions of section 2382, Code Civ. Pro.) party, or by his heir or devisee, who has succeeded to his interest in the real

powers as arbitrators under the submission made to you by C. D. and myself, in writing, and dated the \_\_\_\_\_ day of \_\_\_\_\_, 18—.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

Yours, etc.,

A. B. [*by I. J., his Agent, duly authorized.*]

No. 1286.

### Notice to Opposite Party of Revocation.

[Title of arbitration.]

To C. D. :

SIR—Take notice, that I have this day revoked the powers of [name arbitrators], arbitrators chosen to settle the matter [*or matters*] in controversy between us, by a notice of revocation, of which the [following] is a copy.

Dated \_\_\_\_\_, 18—.

Yours, etc.,

A. B.

[Annex copy of notice of revocation.]

No. 1287.

### Complaint Against a Party Revoking a Submission to Arbitration.

(Code Civ. Pro., § 2384.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that heretofore, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, by a certain agreement [in writing, duly executed and acknowledged, *or* proved, and certified in like manner as a deed to be recorded] then made by and between the defendant and the plaintiff, it was, amongst other things,

<sup>1</sup> A seal is unnecessary in any case. The submission cannot be revoked after the allegations and proofs of the parties have been closed, and the matter finally submitted to the arbitrators for their decision. Any party may revoke. (Code Civ. Pro., § 2383.) See, also, *People ex rel. Union Ins. Co. v. Nash* (111 N. Y., 310), *N. Y. Lumber, etc., Co. v. Schneider* (15 Civ.

Pro. R., 30; 119 N. Y., 140), *Union Ins. Co. v. Central Trust Co.* (87 Hun, 140).

As to liability of party revoking, see sections 2384, 2385, Code Civ. Pro.

As to effect of the death of a party to a submission, or the appointment of the committee of the person or property of such a party, as a revocation, see section 2382 of Code Civ. Pro.

agreed, by and between the said plaintiff and the defendant, that they would submit the matters in controversy then existing between the said plaintiff and the said defendant, respecting certain money claimed by the said [plaintiff] to be due from him, the said [defendant] [*or* respecting certain unsettled accounts and matters between them, etc., according to the terms of the agreement], to the final award and determination of A. B., C. D. and E. F., arbitrators, chosen by the said parties [*or* any two of them], so as the said arbitrators should make their award [in writing], ready to be delivered to the said parties, or such of them as should require the same, on or before the \_\_\_\_\_ day of \_\_\_\_\_, then next [*or* to be filed in the \_\_\_\_\_ county clerk's office (*or* name other clerk's office), or delivered to one of the said parties or his attorney, on or before the \_\_\_\_\_ day of \_\_\_\_\_, then next]<sup>1</sup> [and thereupon, afterwards, to wit: on the day and year first above mentioned, in consideration of the premises, and that the said plaintiff, at the said defendant's request, had then promised the said defendant to perform the said agreement, in all things to be performed by the said plaintiff by virtue thereof, the said defendant then promised the said plaintiff to perform the same in all things, to be by him, the said defendant, performed by virtue thereof];<sup>2</sup> and thereupon, afterwards, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said arbitrators proceeded upon the said submission so as aforesaid made, and the said parties then appeared before the said arbitrators, and proceeded to the trial and investigation of the matters so submitted to the said arbitrators as aforesaid; and afterwards, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, after the said investigation was commenced, and before the cause was finally submitted to the said arbitrators, the said defendant revoked the said submission by an instrument of revocation, in writing, signed by [him], and delivered to the said arbitrators, whereby the powers of the said arbitrators in the premises ceased and were annulled, and whereby, also, the said plaintiff sustained great damage, to wit: \_\_\_\_\_ dol-

<sup>1</sup> See provisions of section 2372, Code were contained in the old pleadings, Civ. Pro. may be omitted under the present sys-

<sup>2</sup> These words in brackets, which tem of pleading.

lars for his costs, expenses and damages in employing and paying counsel, subpoenaing and paying witnesses, and in otherwise preparing for the trial of the said cause before the said arbitrators.

Wherefore the plaintiff demands judgment against the defendant for \_\_\_\_\_ dollars, with the costs of this action.<sup>1</sup>

[Signature, etc., as in form No. 969.]

[Verification as in forms Nos. 151, etc.]

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No. 1288.

### Arbitration Bond.

As in form No. 340 to [\*], and from thence as follows: That if the above bounden, A. B., shall well and truly submit to the decision of [name arbitrators], named, selected and chosen arbitrators as well by and on the part and behalf of the said A. B., as of the said C. D., between whom a controversy exists, to hear all the proofs and allegations of the parties, of and concerning [state matter in controversy], and all matters relative thereto. But before proceeding to take any testimony therein the said arbitrators shall be sworn faithfully and fairly to hear and examine the matters in controversy between the parties to these presents, and to make a just award according to the best of their understanding, so as the award of the said arbitrators be made in writing, subscribed by them, and duly acknowledged or proved and certified in like manner as a deed to be recorded, and ready to be delivered to the said parties [*or* filed in the \_\_\_\_\_ county clerk's office (*or* name other clerk's office), or delivered to one of said parties or his attorney]<sup>2</sup> on or before the \_\_\_\_\_ day of \_\_\_\_\_, 18—, then the above obligation to be void, otherwise to remain in full force and virtue.

And it is hereby mutually agreed, by and between the parties to these presents, that judgment shall be rendered upon the award which may be made pursuant to this sub-

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<sup>1</sup> See, further, as to recovery, Code Civ. Pro., § 2385, Union Ins. Co. v. Central Trust Co. (87 Hun, 140).

arbitrators for their fees, under section 2384, *id.*, will be in most respects similar to the above.

The complaint in an action by the

<sup>2</sup> See section 2372, Code Civ. Pro.

mission, in the ——— Court [in the county of ———],<sup>1</sup> to the end that all matters [*or the said matter*] in controversy in that behalf, between the said parties, shall be finally concluded, pursuant to the provisions of the statute for determining controversies by arbitration, to wit: of title eighth of chapter seventeenth of the Code of Civil Procedure.<sup>2</sup>

[Signatures and seals as in form No. 340.]

Sealed and delivered in the presence of ——— ———.

[Acknowledgment as in form No. 340, or proof as in form No. 538.]

## TITLE IX.

### FORMS RELATING TO PROCEEDINGS TO FORECLOSE A MORTGAGE BY ADVERTISEMENT.

(Code Civ. Pro., Ch. 17, Tit. 9.)

- No. 1289. Notice of sale in foreclosure by advertisement.
- 1290. Notice of postponement of sale.
- 1291. Affidavit of sale.
- 1292. Affidavit of publication of notice of sale and postponement.
- 1293. Affidavit of affixing notice at or near entrance to court house.
- 1294. Affidavit of affixing copy of notice by county clerk in book kept by him.
- 1295. Affidavit of service of notice of sale.
- 1296. Note by clerk upon margin of record of mortgage.
- 1297. Bill of costs on foreclosure by advertisement.
- 1298. Petition for surplus moneys arising upon sale.
- 1299. Notice of application for surplus.
- 1300. Order of reference upon the application.
- 1301. Report of referee as to priority of liens, etc.
- 1302. Order upon report of referee.

### No. 1289.

#### Notice of Sale in Foreclosure by Advertisement.

(Code Civ. Pro., § 2391.)

Whereas, A. B., of ——— [and J. B., his wife], duly

<sup>1</sup> Insert this clause in brackets, where the judgment is to be in the Supreme Court.

<sup>2</sup> *It seems*, that this form may be still used under the statute, certainly it can be outside of it. As to what agreements

the statute applies to, see Code Civ. Pro., § 2386, and see *Lorenzo v. Deery* (26 Hun, 447).

The parties should execute bonds to each other. The obligor in one bond will be the obligee in the other

mortgaged to C. D., of ———, all that certain, etc. [describing property substantially as in mortgage] [and, whereas, the said mortgage was duly assigned by the said C. D. to E. F., of ———, and was, by said E. F., duly assigned to G. H., of ———];<sup>1</sup> and,

Whereas, said mortgage is dated on the ——— day of ———, 18—, and is recorded, with a power of sale therein contained, in the ——— county clerk's office, at ———, on the ——— day of ———, 18—, at ——— o'clock in the ——— noon, in book No. — of mortgages, at page —; and,

Whereas, the amount claimed to be due upon said mortgage, at the time of the first publication of this notice, is ——— dollars [and, whereas, the sum of ——— dollars, secured by said mortgage, is not due at the time of the first publication of this notice, but is to become due thereupon:

Now, therefore, notice is hereby given, that, by virtue of the said power of sale, and in pursuance of the statute in such case provided, the said mortgage will be foreclosed by a sale of the said mortgaged premises [*or* by a sale of the part of said mortgaged premises, described as follows, to wit (describe same)],<sup>2</sup> at, etc., on, etc., at ——— o'clock in the ——— noon at public auction.<sup>3</sup>

Dated ———, 18—.

C. D., *Mortgagee*

[*or* E. F., *Assignee of the Mortgage*].<sup>4</sup>

<sup>1</sup> State in like manner the different assignments.

<sup>2</sup> See Code Civ. Pro., § 2388.

<sup>3</sup> A notice of sale, as filed in the clerk's office, and as published for the first four weeks, was, by mistake, dated April 23, 1858, instead of 1868. *Held*, that the mistake was obvious by inspection, and could not have misled, and did not invalidate the proceedings. (*Mowry v. Sanborn*, 68 N. Y., 153; *rev'd* S. C., 7 Hun, 380.)

<sup>4</sup> The notice must be subscribed by the person entitled to execute the power of sale, unless his name distinctly appears in the body of the notice, in

which case it may be subscribed by his attorney or agent. (Code Civ. Pro., § 2388.)

As to manner in which sale is to be conducted, see Code Civ. Pro., § 2393, *Story v. Hamilton* (86 N. Y., 428; *aff'd* S. C., 20 Hun, 133), *Ellsworth v. Lockwood* (9 Hun, 548).

As to form of notice, etc., see *Judd v. O'Brien & Waddle* (21 N. Y., 186), *Hornby v. Cramer* (12 How. Pr., 490), *Burnet v. Denniston* (5 Johns. Ch., 35), *Jencks v. Alexander* (11 Paige, 626), *Rathbone v. Clarke* (9 Abb., 68, note), *Klock v. Cronkhite* (1 Hill, 108), *Bunce v. Reed* (16 Barb., 347), *Cox v. Wheeler*

No. 1290.

**Notice of Postponement of Sale.**

(Code Civ. Pro., § 2392.)

The sale above noticed is hereby postponed to the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at the same time and place mentioned in the foregoing notice.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

C. D., *Mortgagee*[or E. F., *Assignee of the Mortgagee*].<sup>2</sup>

No. 1291.

**Affidavit of Sale.**

(Code Civ. Pro., § 2396.)

\_\_\_\_\_ COUNTY, ss.:

J. S., of \_\_\_\_\_, being duly sworn, says, that he sold as auctioneer, and at public auction, the premises described in the annexed printed notice of sale, at the time and place therein mentioned [or at the time and place to which the same was duly postponed], to wit: at, etc., on, etc., at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon,<sup>3</sup> and that G. H., of \_\_\_\_\_, then and there purchased the [†] same for the price of \_\_\_\_\_ dollars, he being the highest bidder, and that being the highest sum bidden for the same; [†] that such sale was in the day time, and in all respects honestly, fairly and legally conducted to his best knowledge and belief.<sup>3</sup>

J. S.

[Jurat as in form No. 46.]

[Annex printed copy of notice.<sup>4</sup>]

(7 Paige, 251), *Candee v. Burke* (1 Hun, 549), *Davis v. N. Y. Concert Co., Limited* (41 Hun, 492), *Batterman v. Albright* (122 N. Y., 484, aff'g S. C., 6 State Rep., 334), *People v. Burdick* (52 Hun, 348), *Goodhart v. Latting* (53 id., 26), *Hemmer v. Hustace* (51 id., 457), *Yonker v. Treadwell* (4 N. Y. Supp., 674), § 2395, Code Civ. Pro., as amended by ch. 209 of Laws of 1889; *Morehouse v. Morehouse* (15 Week. Dig., 575), *Barley v. Roosa* (35 State Rep., 898), *Ostrander v. Hart* (43 id., 910), *Stanley v. Freckleton* (47 id., 383), *Jenks v. Quinn* (137 N. Y., 223), *Lewis v. Duane* (69 Hun,

28; aff'd S. C., 141 N. Y., 302), *Ritter v. Devine* (80 Hun, 303).

The mortgagee or his assignee, or the legal representative of either, may, fairly and in good faith, purchase the mortgaged property, or any part thereof, at the sale. (Code Civ. Pro., § 2394.)

As to effect of sale, see id., § 2395.

<sup>1</sup>This notice of postponement is to be annexed to and published with the notice of sale. The publication is to be once in each week until the time to which the sale is finally postponed. (See section 2392, Code Civ. Pro.)

<sup>2</sup>See note 4 to last form, No. 1289.



[*Or* if the sale was in parcels substitute in above between (†) and (†) as follows: parcel described as follows of said mortgaged premises, to wit (describe parcel), for the sum of \_\_\_\_\_ dollars; that I. J., of \_\_\_\_\_, purchased the parcel of said mortgaged premises described as follows, to wit (describe same), for \_\_\_\_\_ dollars, etc., the total amount realized for said property being the sum of \_\_\_\_\_ dollars ]

No. 292.

**Affidavit of Publication of Notice of Sale and Postponement .**

(Code Civ. Pro., §§ 2385, 2396.)

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that the annexed printed advertisement was published in the [name newspaper], a newspaper published in the county of \_\_\_\_\_ wherein [a part of] the property therein described to be sold is situated, for at least twelve weeks immediately preceding the day of sale therein mentioned, and once at least in each of those weeks, the first publication thereof being on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

[And deponent further says, that the annexed notice (*or* notices) of postponement of said sale was (*or* were) published with the said annexed notice of sale in the said newspaper as soon as practicable thereafter, and said publication was continued at least once in each week, from the day of sale mentioned in said notice, until the time to which the said sale is thereby (finally) postponed and upon which said sale was made.]

That deponent is, and has been since the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the publisher [*or* printer] of said newspaper [*or* the foreman or principal clerk of the publisher, etc.].<sup>1</sup>

A. B.

[Jurat as in form No. 46.]

[Annex printed copy of notice of sale and postponements.<sup>2</sup>]

<sup>2</sup> See as to recording affidavits and their effect as evidence, section 2398, Code Civ. Pro.; as to note to be made upon margin of record of mortgage by clerk, see section 2399 (*id.*), and form No. 1296; and further, as to affidavits, (*id.*), § 2400; see also, *Mowry v. Sanborn* (65 N.Y., 581; 68 *id.*, 153; 72 *id.*,

534), *Osborn v. Merwin* (12 Hun, 332), *Story v. Hamilton* (86 N. Y., 428), *Hemmer v. Hustace* (51 Hun, 457).

<sup>4</sup> See note 5 to form No. 1293.

<sup>1</sup> See *Mowry v. Sanborn* (72 N. Y., 534), *Howard v. Hatch* (29 Barb. 297), and see also, as to publication of notice of postponement, Code Civ. Pro.,

No. 1293.

**Affidavit of Affixing Notice at or near Entrance to Court House.**

(Code Civ. Pro., §§ 2388, 2396.)

COUNTY OF \_\_\_\_\_, ss.:

C. D., of \_\_\_\_\_, being duly sworn, says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, he affixed [*or* saw affixed] a true copy of the annexed printed notice of mortgage sale in a conspicuous place, and in a proper and substantial manner, at [*or* near] the entrance to the building where the county court of the county of \_\_\_\_\_ is, and then was directed to be held,<sup>3</sup> to wit: at the [court house] in the town [*or* city] of \_\_\_\_\_, in said county [that being the building where said court is, and then was, directed to be held, nearest to the premises described in said notice].<sup>4</sup>

C. D.

[Jurat as in form No. 46.]

[Annex printed copy notice of sale.<sup>5</sup>]

No. 1294.

**Affidavit of Affixing Copy of Notice by County Clerk in Book kept by Him.**

(Code Civ. Pro., §§ 2388, 2390, 2396.)

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and at least eighty-four days before the day of sale mentioned in the annexed printed notice, he delivered a copy of the annexed printed notice to the county clerk of the county of \_\_\_\_\_, wherein [some part of] the mortgaged property is situated, and that

§ 2388, subd. 1, as amended by ch. 730 of Laws of 1894; § 2392 id.; and see note 1 to form No. 1290.

<sup>2</sup>See, however, note 5 to form No. 1293.

<sup>3</sup>In the city of New York, from "where," as follows: where the Court of Common Pleas for the city and county of New York is directed by

law to be held. (Code Civ. Pro., § 2388, subd. 2.)

<sup>4</sup>This last clause in brackets is to be inserted when there are two or more such buildings in the same county. (Code Civ. Pro., § 2388.)

<sup>5</sup>See, however, amendment to section 2397, Code Civ. Pro., by ch. 399 of 1882.

on the same day he saw said county clerk affix said copy in a book kept in his office for that purpose, and forthwith make and subscribe a minute, at the bottom of the said copy, of the time when he received and affixed it, and index the said notice to the name of the mortgagor.<sup>1</sup>

A. B.

[Jurat as in form No. 46.]

[Annexed printed copy notice of sale.\*]

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No. 1295.

**Affidavit of Service of Notice of Sale.**

(Code Civ. Pro., §§ 2388, 2389, 2396.)

———— COUNTY, ss.:

A. B., of ———, being duly sworn, says, that on the ——— day of ———, 18—, and more than [*or at least*] fourteen days before the day of sale mentioned in the annexed printed notice of mortgage sale, he served the said notice upon [naming parties served],<sup>2</sup> [\*] by delivering to, and leaving with, each of them personally, a true copy of said notice.

That deponent is of full age, viz.: of the age of twenty-one years and upwards [*or was of the age of (eighteen) years on the ——— day of ———, 18—*].

[*Or as above to (\*)*, and from thence as follows: by leaving a true copy of said notice, addressed to said (name parties served), at their respective dwelling-houses, with persons of suitable age and discretion, to wit: of the ages of at least ——— years; that deponent is, etc. (as above).]

[*Or under subdivision two of section 2389, as above to (\*)*, substituting, however, for word fourteen, words twenty-eight, and from thence as follows: by depositing a copy

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<sup>1</sup>The affidavit, substantially as above, may also be made by the county clerk, stating the fact that he is such county clerk, and that said notice was delivered to him, etc. (Code Civ. Pro., § 2396.) See also, *Van Vleck v. Enos* (88 Hun, 348), *Pitt v. Amend* (84 id., 492).

The notice must be delivered to the clerk of each county whersin the mort-

gaged property, or some part thereof, is situated. (Code Civ. Pro., § 2388.)

<sup>2</sup> See note 5 to form No. 1293.

<sup>3</sup> As to persons upon whom the notice must be served, see subd. 4 of section 2388, Code Civ. Pro., and *Van Schaick v. Saunders* (32 Hun, 515), and cases there cited; *Bond v. Bond* (51 Hun, 507); § 2389, Code Civ. Pro.; as amended by ch. 685 of Laws of 1887.

(*or* copies) of said notice in the post-office at \_\_\_\_\_, properly inclosed in a postpaid wrapper (*or* postpaid wrappers) directed (respectively) to M. N. at his place of residence, to wit: at \_\_\_\_\_; to J. K. at his place of residence, to wit: at \_\_\_\_\_, etc.; that deponent is, etc. (as above).<sup>1</sup>

A. B.

[Jurat as in form No. 46.]

[Annex printed copy notice of sale.\*]

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No. 1296.

**Note by Clerk upon Margin of Record of Mortgage.**

(Code Civ. Pro., § 2399.)

The affidavits of sale of the property described in this mortgage are recorded in book No. — of mortgages, at page —.

Dated \_\_\_\_\_, 18—.

I. J., *Clerk.*

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No. 1297.

**Bill of Costs on Foreclosure by Advertisement.**

(Code Civ. Pro., § 2401, 2402, 2403.)

|  |        |
|--|--------|
| Dr., notice of sale, 5 fols., at 25c.....                                  | \$1 25 |
| Copy same to keep at 13c.....  | 65     |
| Copy notice for printer at 13c.....  | 65     |
| Copy notice for posting at court house .....                               | 65     |
| Expense of posting . . . . .   | 1 00   |
| Dr., affidavit of posting 2 fols. and copy at 25c.....                     | 50     |
| Copy notice annexed at 13c.....  | 13     |
| Clerk's fees on same.....  | —      |
| Dr., affidavit of posting in clerk's office, 2 fols. and copy, at 13c..... | 52     |
| Printer publishing notice, 13 insertions, 5 fols.....                      | 21 75  |
| Printer publishing two postponements of sale, 1 fol. each.....             | 1 50   |
| Printer publishing two additional insertions notice of sale .....          | 5 00   |
| Dr., affidavit of publication 2 fols. and a copy at 13c.....               | 39     |
| Copy notice annexed at 13c.....  | 65     |
| Copy notice to serve on mortgagor at 13c.....                              | 65     |
| Serving [ten] notices .....  | 10 00  |
| Dr., affidavit of service, 2 fols. and copy, at 38c .....                  | 76     |

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<sup>1</sup> See section 2397, Code Civ. Pro., as to affidavits, and note 5 to form No. 1293.

<sup>2</sup> See note 5 to form No. 1293.

|  |        |
|--|--------|
| Copy notice annexed, 5 fols., at 13c.....                              | \$0 65 |
| Postages (state items).....  | —      |
| Clerk's fees for searches (amount actually paid).....                  | —      |
| Dr., affidavit of circumstances of sale, 4 fols. and copy, at 38c..... | 1 52   |
| Copy printed notice annexed.....                                       | 65     |
| Superintending sale.....   | 10 00  |
| Recording affidavits (amount actually paid).....                       | —      |
| Oaths to 5 affidavits at 12c.....                                      | 60     |

———— COUNTY, ss.:

J. M., of ———, being duly sworn, says, that he is the attorney for ———, the mortgagee [*or assignee of the mortgagee*], executed by ——— to ———, and which has been duly foreclosed under the statute.

That, according to the best of deponent's knowledge and belief, the several disbursements charged in the bill of costs hereto annexed have been actually and necessarily paid or incurred.

That the copies of papers charged therein were actually and necessarily used, or obtained for use.

That such bill of costs contains no charge for any draft or copy of any affidavit, or other paper, which has not been made, or for any other service which has not been performed, except such services as are allowed by law to be taxed prospectively, and that the number of folios contained in the draft, or in the copies of said papers, are not overcharged in such bill.<sup>1</sup>

J. M.

[Jurat as in form No. 46.]

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No. 1298.

**Petition for Surplus Money Arising upon Sale.**

(Code Civ. Pro., § 2405.)

*To the Supreme Court :*

The petition of A. B., of ———, respectfully shows, that heretofore proceedings were taken by C. D., pursuant to title ninth of chapter seventeenth of the Code of Civil Procedure, for the sale of the real property described as

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<sup>1</sup> See section 3267, Code Civ. Pro.; under those sections. See, also, Ferguson v. Wooley (9 Civ. Pro. R., 236). 2403, 3262-3268, *id.*, and see forms

follows, to wit [describe same], in foreclosure of a mortgage executed by \_\_\_\_\_ to \_\_\_\_\_, dated \_\_\_\_\_, 18—, and recorded in \_\_\_\_\_ county clerk's office on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, in book No. — of mortgages, at page —, and a sale of said property was made in said proceedings on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

That a surplus remained of the proceeds of said sale, amounting to \_\_\_\_\_ dollars, over and above the sum due, and to grow due, upon said mortgage, and the costs and expenses of the said foreclosure, and that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the attorney for the said mortgagee [*or* for E. F., the assignee of said mortgage], by whom said mortgage was foreclosed, paid into this court, and to the county treasurer of \_\_\_\_\_ county, the said surplus.

And your petitioner further shows, that at the time of said sale he had an interest in [*or* lien upon] the said property [*or* in (*or* upon) a portion of said property, to wit (describing same)], said interest [*or* lien] being, by reason of [state nature of interest or lien]; and your petitioner claims that he is entitled to said surplus moneys [*or* to a part of said surplus moneys] by reason of his said interest in [*or* lien upon] said property; and your petitioner prays for an order of this court directing the payment to him of said surplus moneys [*or* of so much of said surplus moneys as may be necessary to satisfy his said interest, *or* lien].

Dated \_\_\_\_\_, 18—.

A. B.

[Verification as in form No. 52.]

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No. 1299.

### Notice of Application for Surplus.

(Code Civ. Pro., § 2406.)

[Title of proceeding.]

SIRS—Take notice, that the undersigned will apply at, etc., on, etc., for an order, pursuant to the prayer of his petition, filed in the \_\_\_\_\_ county clerk's office on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, directing the payment to him of [a part of] the surplus moneys arising upon the sale of the

property described in the said petition, a copy of which is herewith served upon you, and for such other and further relief as may be proper.

Dated \_\_\_\_\_, 18—.

Yours, etc.,

M. C., *Attorney for Petitioner.*

[Office address.<sup>1</sup>]

To [name parties served].

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No. 1300.

**Order of Reference upon the Application.**

(Code Civ. Pro., § 2407.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

Upon the presentation of the petition of A. B., dated \_\_\_\_\_, 18—, which was filed in the \_\_\_\_\_ county clerk's office on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, with proof of due service of notice of this application upon each person who has filed a like petition, and also upon each person upon whom a notice of sale was served, as shown in the affidavit of sale [or upon his executor or administrator], and on motion of M. F., for the said petitioner, and after hearing, etc., and on reading [name opposing papers]:

It is hereby ordered, that I. J., of \_\_\_\_\_, counselor at law, be and he is hereby appointed referee, to ascertain and report the amount due to the petitioner, and to each other person, which is a lien upon the surplus money mentioned in said petition of A. B., and the priorities of the several liens thereupon.

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No. 1301.

**Report of Referee as to Priority of Liens, etc.**

(Code Civ. Pro., § 2407.)

[Title of proceeding.]

I, the undersigned referee, appointed by order of this court, dated \_\_\_\_\_, 18—, to ascertain and report the

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<sup>1</sup> See note 2 to form No. 122.

amount due to A. B., the petitioner in this proceeding, and to each other person, which is a lien upon the surplus moneys arising upon the sale of the premises described in the said petition, and the priority of the several liens thereupon, do respectfully report [proceed substantially as in form No. 716, making necessary changes to suit the case].<sup>1</sup>

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No. 1302.

**Order upon Report of Referee.**

(Code Civ. Pro., § 2407.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

On reading and filing the report, dated \_\_\_\_\_, 18—, of I. J., referee, appointed herein by order of this court, dated \_\_\_\_\_, 18—, from which it appears that A. B. is entitled to the [whole] of the surplus moneys arising upon the sale of the real property described in his petition, filed in the \_\_\_\_\_ county clerk's office on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, which surplus has been paid into court and to the county treasurer of \_\_\_\_\_ county [*or* make other recitals according to the report], and it appearing that due notice of this motion has been given to [name parties served]:

Now, on motion of M. P., counsel for said petitioner, and after hearing, etc. [*or* no one appearing to oppose], and on reading [name any other motion papers]:

It is hereby ordered, that the said report be and the same is hereby confirmed, and that said county treasurer pay, etc. [here insert provisions for distribution substantially as in form No. 718, or other similar provisions, as may be required].<sup>2</sup>

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<sup>1</sup>See, also, forms and notes referred to in note 2 to next form No. 1302.

<sup>2</sup>See, also, proceedings for surplus moneys, in action to foreclose mortgage, forms Nos. 709, 710, etc., and notes to those forms; and see Floyd v. Clark (16 Daly, 528), Quackenbush

v. O'Hare (129 N. Y., 480), Matter of Stilwell (139 N. Y., 337, aff'd S. C., 68 Hun, 407).

As to the cases in which these proceedings for surplus do not apply, see section 2408, Code Civ. Pro.



## TITLE X.

FORMS RELATING TO PROCEEDINGS TO CHANGE THE NAME OF  
AN INDIVIDUAL OR CORPORATION.

(Code Civ. Pro., Ch. 17, Tit. 10.)

- No. 1302a. Petition by corporation to assume another corporats name.  
 1303. Petition by person of full age for leave to assume another names.  
 1304. Order upon petition, form No. 1303, granting such leave, provided, etc.  
 1304a. Order upon petition of a corporation, form No. 1302a.  
 1304b. Notice of presentation of petition of corporation, form No. 1304a, for leave to assume another name.  
 1305. Petition by infant for change of name.  
 1306. Affidavit of publication of order.

## No. 1302a.

**Petition by Corporation to Assume Another Corporate Name.**

(Code Civ. Pro., § 2411.)

*To (substantially as in form No. 1303):*<sup>1</sup>

The petition of the [name of corporation] respectfully shows, That it is a domestic banking, etc. [stock] corporation duly incorporated under the laws of the state of New York, to wit: under [state law under which it was incorporated], located and doing business at the town [or, city] of ———, in the county of ———, in this state, in which town [or, city] its principal business office is situated [or, in which its principal operations are (or, heretofore have been) conducted.]

That your petitioner desires to assume another name, than that now held by it, and that the name which it proposes to assume is The (state same);

That the grounds of its application for such change of name are as follows, to wit: (state same).

[That this petition has been authorized by a resolution of the board of directors of your said petitioner, (and

<sup>1</sup> As to courts to which petition of corporation for leave to assume another corporate name is to be presented, see sections 2411 and 2412 of Code of Civil Procedure, as amended by chapter 366 of Laws of 1893.

approved by the superintendent of banks; or, by the superintendent of insurance; or, by the board of railroad commissioners, as will appear from the certificate of such approval hereto annexed)].<sup>2</sup>

[That the certificate of the secretary of state of the state of New York is annexed to this petition, as required by section 2411 of the Code of Civil Procedure, marked "Schedule A."]<sup>3</sup>

And your petitioner prays, etc. (substantially as in form No. 1303).

Dated ———, 1—.

The (name of corporation),

[By A. M., *President, etc.*]

[Annex "Schedule A" certificate of secretary of state, and other certificates, when required.]

STATE OF NEW YORK, }  
 ——— COUNTY. } ss.:

A. M., of ———, being duly sworn, says, that he is the president of the (name of corporation); that he has read the foregoing petition subscribed by him, and that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged upon information and belief, and that as to such matters he believes it to be true.

A. M.

(Jurat as in form No. 46.)

<sup>2</sup> This clause is to be inserted in case of a corporation having, respectively, banking powers or the power to make loans upon pledges or deposits, or to make insurances, or if it be a railroad corporation. (Code Civ. Pro., §§ 2411,

2412, as amended by ch. 366 of Laws of 1893.)

<sup>3</sup> As to cases in which this certificate is required to be annexed, see section 2411 of Code of Civil Procedure. See, also, Matter of United States Mortgage Company (83 Hun, 572).

## No. 1303.

**Petition by Person of Full Age for Leave to Assume Another Name.**

(Code Civ. Pro., § 2412)

To the County Court of the county of \_\_\_\_\_ [or to the Supreme Court or to the City Court of New York]:<sup>1</sup>

The petition of A. B. [\*] respectfully shows, that he is of full age, to wit: of the age of twenty-one years and upwards, and resides in the town [or city] of \_\_\_\_\_, in the county of \_\_\_\_\_, in this State.

That he desires to assume another name than that now held by him, and that the name which he proposes to assume is C. D.

That the grounds for his application for such change of name are as follows, to wit [state same].

That he is married [or is unmarried].

That there are no judgments rendered, or actions pending against him [or that the following actions, and no others, are pending against him, to wit (state same), and that the following judgments, and no others, have been rendered against him, to wit (state same)].<sup>2</sup>

That the following commercial paper is outstanding in the said name sought to be abandoned by him, to wit [describe same] [or that no commercial paper is outstanding in, etc.].<sup>2</sup>

That your petitioner was born in the \_\_\_\_\_ of \_\_\_\_\_, in the county of \_\_\_\_\_, and State of \_\_\_\_\_, and the name of his father is [or was] M. B., and that of his mother is [or was] F. B.<sup>2</sup>

And your petitioner prays the order of this court, for which no previous application has been made,<sup>2</sup> granting him leave to assume the name of C. D. in place of that of A. B., his present name, pursuant to the provisions of title tenth of chapter seventeenth of the Code of Civil Procedure, and for such other relief as may be proper.

Dated \_\_\_\_\_, 18—.

A. B.

[Verification as in form No. 52.]

<sup>1</sup> As to the courts to which the application must be made, see Code Civ. Pro., §§ 2410, 2411, as amended. See ch. 366 of Laws of 1893, and chapter 264 of Laws of 1894, amending title 10 of chap. 13 of Code of Civ. Pro. These amendments relate principally to the change of name of a corporation. See, also, amendments to section 2410 by

ch. 946 of Laws of 1895, taking effect Jan. 1, 1896, by which the application is to be made by a resident of the State to the county court of the county in which he resides, or, if he resides in the city of New York, either to the Supreme Court or to the city court of New York.

<sup>2</sup> See note 2 to form No. 209.

## No. 1304.

**Order upon Petition, forms Nos. 1303, 1305, Granting such Leave Provided, etc.**

(Code Civ. Pro., § 2414.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

Upon reading and filing the petition of A. B., of, etc. [an infant, by E. F., (his) general guardian (or guardian of his person, or his next friend)], dated ———, 18—, praying for leave to assume the name of C. D. in place of his present name [and the affidavits of G. H. and J. K., presented therewith (and on filing proof of due service of notice of the presentation of said petition at this time and place, upon the proper parties)],<sup>3</sup> and on motion of C. M., counsel for said petitioner [and after hearing, etc.], and the court being satisfied, by said petition [and affidavits], that there is no reasonable objection to the petitioner's assuming the name proposed [and that the interests of said (naming infant) will be substantially promoted by said change]<sup>5</sup>:

It is hereby ordered, that the said A. B. be and he is hereby authorized to assume the said name of C. D. in place of his present name of A. B., on the ——— day of ———, 18—,<sup>4</sup> upon his complying with the provisions of section 2414 of the Code of Civil Procedure, viz.: that he cause a copy of this order to be published within ten days after this order is made in the ———, a newspaper published in the

<sup>3</sup> See *In re Hamilton* (10 Abb. N. C., 79 [N. Y. C. P., Sp. Tm.]), that these statements are necessary in the case of an adult.

<sup>4</sup> This notice is to be given in case the application is made by an infant by his next friend. As to the parties upon whom it is to be served in such

case, see Code Civ. Pro., § 2414, as amended by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896.

<sup>5</sup> Not less than thirty days after the entry of the order.

<sup>6</sup> Insert this clause in case the application is made on behalf of an infant. (Code Civ. Pro., § 2414.)

county of——, and that within ten days after the making of this order he cause it to be entered and the papers upon which it was granted, and an affidavit of the publication thereof, as above directed, to be filed and recorded in the county clerk's office of the said county of —— [or in the office of the clerk of the city court of New York],<sup>1</sup> and that after the said requirements are complied with the said petitioner must, on and after the said —— day of ——, 18—, be known by the name which he is here hereby authorized to assume and by no other name.<sup>2</sup>

No. 1304a.

**Order upon Petition of a Corporation, form No. 1302a.**

(Code Civ. Pro., § 2414.)

At, etc. [as in form No. 80].

[Title of proceeding.]

Upon reading and filing the petition of the [name of corporation], a domestic [stock] banking, etc., corporation incorporated under the laws of the State, to wit: [stating act of incorporation], located and doing business at, etc. [as in petition form No. 1302a], praying for leave to assume the name of the [state same], in place of its present corporate name, and the court being satisfied by said petition [and by the certificate presented therewith] that said petition is true, and that there is no reasonable objection to the change of name proposed, and that said petition has been duly authorized], [and that due notice of the presentation of said petition has been made and given as required by law], and on motion of ——, counsel for said petitioner [and after hearing, etc.].

It is hereby ordered and directed that the said [name of petitioner] be and it is hereby authorized to assume the

<sup>1</sup> Insert clause in brackets where the order is made by the city court of New York. (Code Civ. Pro., § 2414.) See amendments to that section by ch. 366 of 1893.

<sup>2</sup> See section 2414, Code Civ. Pro.

As to the effect of the change of name upon an action or special pro-

ceeding theretofore or thereafter commenced against the person whose name is changed, see section 2416 (id.).

As to return to be made by county clerks, etc., of changes made of names, see section 2417 (id.).

name of the [insert same] in place of its present name, on the \_\_\_\_\_ day of \_\_\_\_\_, 1—, upon its complying with the provisions of section 2414 of the Code of Civil Procedure, viz.: that this order be entered and the papers on which it was granted be filed within ten days hereafter in the county clerk's office of the county of \_\_\_\_\_, and that a certified copy of this order shall, within ten days after the entry thereof, be filed in the office of the Secretary of State; and also in the office of the superintendent of banks [or, of the superintendent of insurance; or of the board of railroad commissioners], and that a copy of this order be published within ten days after the entry thereof in the \_\_\_\_\_, a newspaper published in the county of \_\_\_\_\_, once in each week for four successive weeks, and that after the said requirements are complied with, the said petitioner must, on and after the said \_\_\_\_\_ day of \_\_\_\_\_, 1—, be known by the name which it is hereby authorized to assume and by no other name.<sup>1</sup>

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No. 1304b.

**Notice of Presentation of Petition of Corporation, form No. 1304a, for Leave to Assume Another Name.**

(Code Civ. Pro., § 2413.)

Notice is hereby given, pursuant to the provisions of section 2413 of the Code of Civil Procedure, that a petition will be presented to [naming court], at a \_\_\_\_\_ term thereof to be held at, etc., on, etc., by the [name of corporation], for leave to assume the name of the [insert

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<sup>1</sup>The provisions in regard to this order were contained in sections 2413 and 2414 of the Code of Civil Procedure, as amended respectively by chapter 264 of Laws of 1894, and by chapter 946 of Laws of 1895, the latter chapter taking effect Jan. 1, 1896.

See as to publication of notice of presentation of petition, said section 2413, as amended. For form of notice of presentation of petition, see form No. 1304b. See, also, provisions of section 2415 id., as to taking effect of order.

same], and that application will be made to said court, upon such presentation for such leave, and for such other and further relief as may be proper and necessary.<sup>1</sup>

Dated \_\_\_\_\_, 1—.

M. N., Attorney for the [name of corporation].  
[Office address.]

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No. 1305.

**Petition of Infant for Change of Name.**

(Code Civ. Pro., §§ 2412, 2413.)

As in form No. 1303 to [\*], and from thence as follows:  
An infant, by E. F., his general guardian [or the guardian of his person, or his next friend], respectfully shows:

That said A. B. is an infant under the age of twenty-one years, and became of the age of \_\_\_\_\_ years on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and that said infant resides in the town [or city] of \_\_\_\_\_, in the county of \_\_\_\_\_, in this State.

That the said A. B. desires to assume another name than that now held by him, and that the name which he proposes to assume is C. D.

That the grounds for his application for such change of name are as follows [state same], and that your petitioner verily believes that the interests of said infant will be substantially promoted by the change of his name as aforesaid.

[That the name of the father of said infant is M. B., who resides at, etc. (or that the father of said infant is dead, (or, cannot be found), and that F. B. is the mother of said

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<sup>1</sup> See section 2413 of Code Civ. Pro., 1894, as to this notice and publication as amended by chapter 264 of Laws of thereof.

infant and resides at, etc.; *or* that the father and mother of said infant are both dead (*or* cannot be found), and that I. J. is the general guardian of said infant; *or* the guardian of said infant's person, and resides at, etc., *or* that said infant has no general guardian or guardian of his person, or father or mother residing in this State.)<sup>1</sup>

And your petitioner prays the order of this court, granting leave to said infant to assume the name of C. D., in place of that, etc.

[Conclude as in form No. 1303.]

Dated ———, 18—.

A. B. [*by* E. F., *his General Guardian, etc.*].

[Verification by guardian, etc., as in form No. 52.]

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No. 1306.

**Affidavit of Publication of Order.**

(Code Civ. Pro., § 2414.)

———— COUNTY, *ss.* :

M. N., of ———, being duly sworn, says, that he is, and has been, since the ——— day of ———, 18—, the publisher [*or* printer (*or* one of the publishers, etc.)] of the ———, a newspaper published at ———, in the county of ———, and that the annexed order has been published in the said newspaper on the ——— day of ———, 18—. (or, once in each week for four successive weeks, the first publication thereof being made on the ——— day of ———, 1——.)<sup>2</sup> M. N.

[Jurat as in form No. 46.]

[Annex copy of order.]

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**TITLE XI.**

**FORMS RELATING TO THE VOLUNTARY DISSOLUTION OF A CORPORATION.**

(Code Civ. Pro., Ch. 17, Tit. 11.)

- No. 1307. Petition by majority of trustees, etc., for dissolution of a corporation.  
 1308. Petition for dissolution of corporation in case the directors, etc., are equally divided respecting its management.  
 1809. Order to show cause on presentation of petition.

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<sup>1</sup> Insert these statements in brackets where the application is made by a next friend. (Code Civ. Pro., § 2413, as amended by ch. 264 of Laws of 1894.

<sup>2</sup> Insert the words *once, etc.*, in parenthesis in the case of a corporation after word *newspaper*, and omit in that case the other words following that word. (Code Civ. Pro., § 2414.)



- No. 1310. Schedule to be annexed to the petition.  
 1311. Referee's report.  
 1312. Notice of appearance to make persons appearing, parties to the proceeding.  
 1313. Notice of motion for final order.  
 1314. Final order dissolving corporation, etc.

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No. 1307.

**Petition by Majority of Trustees, etc., for Dissolution of a Corporation.**

(Code Civ. Pro., §§ 2419, 2421.)

To [*name of court*]:<sup>1</sup>

The petition of [names of directors, trustees or other officers petitioning]:

That they are [\*] a majority of the directors, etc., of the [name of corporation], a corporation created by [*or under*] the laws of this State, to wit: by [*or under*] An act, etc., passed ———, 18— [state the act by or under which the corporation was created], for the purpose of [state same].

[†] That they have discovered that the stock, effects and other property of said corporation are not sufficient to pay all just demands for which it is liable, or to afford a reasonable security to those who may deal with it [*or that they deem it beneficial to the interests of the stockholders that the said corporation should be dissolved for the following reasons, to wit (state same)*].

That the principal office of the said corporation is located at the town [*or city*] of ———, in the county of ———, in this State.

That a schedule is annexed to this petition, marked "A," containing the following matters, as far as your petitioners know, or have the means of knowing, the same [here insert the paragraphs numbered respectively from 1 to 7, both inclusive, of section 2421 of the Code of Civil Procedure].

Wherefore your petitioners pray for a final order of this

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<sup>1</sup> The petition is to be presented to the Supreme Court. (Code Civ. Pro., § 2419, as amended by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896. The papers must be presented at a

term of that court held within the judicial district, embracing the county wherein the principal office of the corporation is located. (Id., § 2423, as amended by same chapter.)

court dissolving the said corporation, as prescribed in title eleventh of chapter seventeenth of the Code of Civil Procedure, and for such other and further relief as may be proper.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

[Signatures of petitioning directors, etc.]

\_\_\_\_\_ COUNTY, ss. :

[Names and residences of directors, etc.], being severally duly sworn, each for himself says, that the matters of fact stated in the foregoing petition, subscribed by them, and the schedule thereto annexed and therein referred to, marked "A," are just and true, so far as he knows, or has the means of knowing, the same.

[Signatures of petitioners.]

[Jurat as in form No. 46.]

[Annex schedule, form No. 1310.]

No. 1308.

**Petition for Dissolution of Corporation in Case the Directors, etc., are Equally Divided Respecting its Management.**

(Code Civ. Pro., §§ 2420, 2421.)

As in form No. 1307 to [\*], and from thence as follows: Trustees [*or* directors] of the [name of corporation], a corporation created for the purpose of [state same] under a general statute of this State for the formation of corporations and having an even number of trustees or directors, to wit : \_\_\_\_\_ directors, etc.

That the trustees, etc., of said corporation are equally divided respecting the management of its affairs, and the entire stock of the said corporation, to wit : \_\_\_\_\_ shares

<sup>1</sup> As to statements of petition, and generally as to these proceedings, see Matter of Pyrolusite Manganese Co. (29 Hun, 429; S. C., 3 Civ. Pro. Rep., 270), Chamberlain v. Rochester, etc., Co. (7 Hun, 557), Matter of Dubois (15 How. Pr., 7), Matter of Christian Jansen Co., Limited (128 N. Y. 550), Drew v. Longwell (81 Hun, 144), Matter of Hitchcock Mfg. Co. (1 App. Div. R.,

164), Matter of Hamilton Park Co. (id. 375), Matter of Schuyler's Steam Tow Boat Co. (136 N. Y., 169), Hegewisch v. Silver (140 id., 414), People v. Seneca Lake Grape & Wine Co. (52 Hun, 174), Matter of Dramatic Fund Association (22 Abb. N. C., 231), In re Livingston's Sportsmen's Ass'n (17 State Rep., 879), In re Importers', etc., Exchange of New York (18 State

Rep., 195; 132 N. Y., 212), Matter of the Mart (22 Abb. N. C., 227), Re Santa Eulalia Silver Min. Co. (21 State Rep., 89, Matter of E. M. Boynton Saw & File Co. (34 Hun, 369), Matter of Binghamton Gen. Electric Co. (143 N. Y., 261), Skinner v. Smith (56 Hun, 437), People v. Remington & Sons (54 id., 480), Matter of Home Provident Safety Fund Ass'n (129 N. Y., 288); ch. 304 of Laws of 1894 amd'g § 2420 Code Civ. Pro.; ch. 258 of Laws of 1894, amd'g § 2427 id.; Matter of N. Y. Oxygen Co. (24 Civ. Pro. R., 398), Matter of Lewis & Fowler Mfg. Co. (89 Hun, 208); ch. 175 of Laws of 1895, amd'g § 2429 Code Civ. Pro.; Farmers' Loan & Trust Co. v. Bankers', etc., Tel. Co. (148 N. Y., 315, aff'g s. c. 83 Hun, 560), Nevitt v. First Nat. B'k of Albany (91 Hun, 48), Rodgers v. Adriatic Fire Ins. Co. (148 N. Y., 34, aff'g S. C. 87 Hun, 384), Olney v. Baird (15 Misc., 386).

As to temporary injunction in action by stockholders to restrain the proceedings, on the ground of bad faith and fraudulent purposes of the directors in taking them, see Jewett v. Swann (19 Week. Dig., 144).



thereof, is, at this time, owned by the trustees [*or* directors] thereof [*or* is so divided that one-half thereof, to wit: ——— shares, is owned (or controlled) by persons favoring the course of one-half of the trustees (*or* directors) and one-half by persons favoring the course of the other half of the trustees (*or* directors) of said corporation].

That your petitioners have discovered that, etc. [conclude as in form No. 1307, from (+)].<sup>1</sup>

Dated ———, 18—.

[Signatures of directors, etc.]

[Verification as in form No. 1307.]

[Annex schedule as in form No. 1310.]

No. 1309.

### Order to Show Cause on Presentation of Petition.

(Code Civ. Pro., § 2423.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

On reading and filing the petition of E. R. V., H. B. and E. G. G., as trustees of the [name of corporation], a ——— corporation created under the laws of this State, having its principal office located at ———, etc., which petition is dated ———, 18—, and the schedule thereto annexed, duly verified by the petitioners on the ——— day of ———, 18—, and on motion of M. C., of counsel for the petitioners:

*Ordered*, That all persons interested in said corporation show cause before this court, at, etc., on, etc.<sup>2</sup> [*or* before J. L., Esq., who is hereby appointed referee for that purpose, at his office, No. ——— street, in the (city) of ———, N. Y., on the ——— day of ———, 18—, at ——— o'clock in the ——— noon of that day],<sup>2</sup> why the said corporation should not be dissolved.

And it is further ordered, that a copy of this order be

<sup>1</sup> See last sentence of section 2420 of Code Civ. Pro., by which certain corporations are excluded from the provisions of that section; and see notes to form No. 1307.

<sup>2</sup> Not less than three months after

the granting of the order. (Code Civ. Pro., § 2423.) See amendments to said section 2423 by chapter 314 of 1889; and by chapter 946 of 1895, taking effect January 1, 1896; and see section 8 of chapter 378 of 1883.

published at least once in each week of the three weeks immediately preceding the said — day of —, 18—, in the —, a newspaper printed at<sup>1</sup> —, in the county of —, and also in the — [and—] newspapers published in the [city] of —, in the county of —, wherein this order is entered.<sup>2</sup>

No. 1310.

### Schedule to be Annexed to the Petition.

(Code Civ. Pro., § 2421.)

Schedule "A" annexed and referred to in the foregoing petition.

Here insert the matters required by subdivisions Nos. 1 to 7, both inclusive, of section 2421 of Code Civil Procedure.<sup>3</sup>

[Signatures of petitioners.]

<sup>1</sup>See note 1, p. 520, to form No. 650, as to State paper, and publication of notices therein; and see chapter 262 of Laws of 1885.

By section 2 of chapter 133 of Laws of 1884, referred to in that note, it is provided as follows:

"§ 2. Any and all notices and advertisements in any and all suits, actions and special proceedings in any court, or before any judge of any court of this State, now required or allowed to be published in the State paper, shall hereafter be published in such newspaper published in the county wherein the place of trial is designated, or wherein the papers in such special proceedings are required to be, or are, filed, as shall be designated by such court or judge."

The above form is drawn according to the provisions of said section 2.

<sup>2</sup>See Code Civ. Pro., § 2424.

By the provisions of section 2423 (id.), as amended by chapter 946 of Laws of 1895, taking effect Jan. 1, 1896, the order must be entered and the papers filed, within ten days after the order is made with the clerk of the

county where the principal office of the corporation is located; and see, also, *Freemen's Nat. Bank v. Smith* (13 Blatchf., 220).

As to service of order, see Code Civ. Pro., § 2425.

If a referee is not designated in the order to show cause, the court may, in its discretion, appoint a referee when or after the order is returnable. (Code Civ. Pro., § 2426.)

That it constitutes a jurisdictional defect in the proceeding, if the order requires cause to be shown "why the prayer of the petitioner should not be granted," instead of "why the corporation should not be dissolved," see *Matter of Pyrolusite Manganese Co.* (29 Hun, 429; S. C., 3 Civ. Pro., Rep., 270). See, also, *People v. Seneca Lake Grape and Wine Co.* (52 Hun, 174), *In re Christian Jensen Co., Limited* (15 N. Y. Supp., 144, aff'd S. C., 128 N. Y., 550).

<sup>3</sup>The schedule may be in form similar to form No. 1113. The affidavit, however, to be used is as annexed to form No. 1307.

No. 1311.

**Referee's Report.**

(Code Civ. Pro., § 2426.)

[Title of proceeding.]

*To the [name of court]:*

I, the undersigned, the referee to whom a reference was made by an order of this court, made at a [Special] Term thereof, held at, etc., on the ——— day of ———, 18—, requiring all persons to show cause before me at, etc., on, etc., why the [name of corporation] should not be dissolved, do hereby respectfully report:

That due proof having been made by affidavit [which is hereto annexed] of the publication of said order as thereby required, I proceeded at the time and place last aforesaid to a hearing of the matters so referred, being attended by F. C., Esq., the counsel for the petitioners, and also by [naming parties who appeared].

That I thereupon heard the proofs and allegations of the said parties, and took testimony in relation to the matters set forth in said petition, and also in regard to such other matters and things pertaining to the affairs of said corporation as were brought before me, which testimony duly subscribed by the respective witnesses, and certified by me, is hereto annexed.

I further report, that the schedule "A," annexed to said petition, is, in all respects, just and true [*or is just and true with the exception of several items of personal property contained in the additional schedule hereto annexed, marked "F," which I find belongs to said corporation, and is to be added to said schedule, and with the exception of several debts of the said corporation, proved before me, and not entered on said schedule, and which are contained in the additional schedule hereto annexed, marked "G," which shows the name of each of said creditors, the sum due him, his place of residence, the nature of the debt, and the true cause and consideration of the indebtedness (*or state otherwise, as the facts may be*)], and I find and determine the facts relating to said corporation accordingly.*

And I further report, that the following is a statement of

the effects, credits and other property, and of the debts and engagements of the said corporation, and of all other matters pertaining to its affairs, viz. [state same].<sup>1</sup>

[I return herewith the said original petition, and the schedules annexed thereto, which have been transmitted to me for use upon such hearing by the clerk of \_\_\_\_\_ county, upon my written order, and are annexed to this, my report.]<sup>2</sup>

All of which is respectfully submitted.<sup>3</sup>

Dated \_\_\_\_\_, 18—.

\_\_\_\_\_  
J. K., *Referee.*

No. 1312.

**Notice of Appearance to Make Persons Appearing Parties to the Proceeding.**

(Code Civ. Pro., § 2428.)

[Title of proceeding.]

Notice is hereby given, that A. M. hereby appears [by the undersigned as his attorney] in the above entitled proceeding, and that notice of motion for the final order therein may be served upon the undersigned, at No. — \_\_\_\_\_ street, in the [city] of \_\_\_\_\_, in this State.

Dated \_\_\_\_\_, 18—.

M. F., *Attorney for A. M.*

[or A. M.].

[Office address or place of residence.]  
\_\_\_\_\_

No. 1313.

**Notice of Motion for Final Order.**

(Code Civ. Pro., § 2428.)

[Title of proceeding.]

SIRS—Take notice, that a motion will be made upon the

<sup>1</sup> That the report must contain this statement, see *Matter of Pyrolusite Manganese Co.* (29 Hun, 429), and Code Civ. Pro., § 2426. See, also, *Matter of E. M. Boynton Saw & File Co.* (34 Hun, 369).

<sup>2</sup> See Code Civ. Pro., § 2427.

<sup>3</sup> The decision of the court, when no reference is made, must be in writing, and the same directions are given in regard to its contents as to those of the referee's report. (Code Civ. Pro., § 2426.)

<sup>4</sup> See note 2 to form No. 122.



report of ———, referee duly appointed herein, and upon all other papers and proceedings herein, for a final order in this proceeding, dissolving the [name of corporation] and appointing one or more receivers of its property, and for such other or further order or relief as may be proper.<sup>1</sup>

Dated ———, 18—.

F. C., *Attorney for the Petitioners.*

[Office address.<sup>2</sup>]

To [name parties served].

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No. 1314.

**Final Order Dissolving Corporation, etc.**

(Code Civ. Pro., § 2429.)

[At, etc., as in form No. 80.]

[Title of proceeding.]

Upon reading and filing the report of I. J., referee duly appointed herein by an order of this court, made at a [Special] Term thereof held at, etc., on, etc. [*or* the decision of Hon. A. O., one of the justices (*or* judges) of this court, dated, etc.], with notice of motion for a final order thereupon, and upon all the papers and proceedings herein, with proof of due service, as required by law and as therein required, of the order to show cause, made herein, on the ——— day of ———, 18—, and of due service of said notice upon [each person who has made himself a party to these proceedings, by filing with the clerk before the close of the hearing before said referee, a notice of his appearance as required by law (and upon the attorney-general)],<sup>3</sup> and it appearing to the court that the said [name of corporation] is insolvent [*or* that a dissolution of the said ——— will be beneficial to the interests of the stockholders and not injurious to the public interests, for the following reasons, viz.: that (state same)]:

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<sup>1</sup> As to notice to attorney-general of application for the appointment of receiver of corporation under section 8 of ch. 378 of Laws of 1883, see *Whitney v. N. Y. and Atlantic R. R. Co.* (32 Hun, 164, 171, 172).

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> See note 1 to last form No. 1313: and see further as to notice, Code Civ. Pro., § 2428.

It is hereby ordered, that the said [name of corporation] be and the same is hereby dissolved, and that T. F., of \_\_\_\_\_ [and C. P., of \_\_\_\_\_], be and he is [or they are] hereby appointed receivers of the property thereof, upon [his] executing, acknowledging and filing with the clerk of this court a bond, in the form required by law, to the people of this State, in the penalty of \_\_\_\_\_ dollars, with two sufficient sureties, to be approved by a judge [or justice] of this court, conditioned for the faithful discharge of his duties as such receiver.<sup>1</sup>

[Add further provisions substantially as in form No. 292.]

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## TITLE XII.

### FORMS RELATING TO PROCEEDINGS SUPPLEMENTARY TO AN EXECUTION AGAINST PROPERTY.

(Code Civ. Pro., Ch. 17, Tit. 12.)

#### ARTICLE FIRST.

### FORMS RELATING TO PROCEEDINGS TO COMPEL AN EXAMINATION OF THE JUDGMENT DEBTOR, AND OF HIS DEBTOR OR BAILEE.

(Code Civ. Pro., Ch. 17, Tit. 1, Art. 1.)

- No. 1315. Affidavit to obtain order to examine judgment debtor after return of execution against property issued out of a court of record.
1316. Affidavit to procure order for examination after the issuing and before the return of an execution.
1317. Order for examination of judgment debtor after return of execution.
1318. Affidavit to procure warrant for arrest of judgment debtor.
1319. Warrant for arrest of judgment debtor.
1320. Undertaking of judgment debtor to obtain his discharge from arrest.
1321. Warrant upon failure to comply with the order directing undertaking to be given.
1322. Affidavit to obtain order for examination of person or officer of corporation having property, etc., of judgment debtor.
1323. Order to examine person having property, etc., of judgment debtor.
1324. Referee's return pursuant to order.
1325. Oath of referee.
1326. Affidavit to obtain order permitting payment of debt to sheriff.
1327. Notice of application for order permitting payment to sheriff by person indebted to judgment debtor.

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<sup>1</sup> For form of receiver's bond, see form No. 302.

See as to sales, etc., which are void as against the receiver and creditors of the corporation, Code Civ. Pro., § 2430; as to which corporations are

excepted from this title (title 11 of ch. 17 of Code Civ. Pro.), see (id.), § 2431. See, also, ch. 175 Laws of 1895, amending § 2429 Code Civ. Pro., and see notes to form No. 1307.

- No. 1328. Order permitting person to pay debt to sheriff.  
 1329. Notice of application for order that debtor pay over money, etc.  
 1330. Order requiring delivery of money or property to sheriff or receiver by judgment debtor.  
 1331. Order directing the payment or application of money or property by sheriff.  
 1332. Order directing balance, etc., to be paid to judgment debtor in certain cases.  
 1333. Affidavit of service of injunction order and order requiring debtor attendance for examination.  
 1334. Sheriff's return of arrest pursuant to warrant.  
 1335. Order dismissing or discontinuing proceeding.  
 1336. Order directing payment of costs to judgment creditor.  
 1337. Order directing payment of costs to judgment debtor.  
 1338. Affidavit to obtain examination of judgment debtor, etc., when execution has been issued pursuant to section 1941 of the Code of Civil Procedure.

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No. 1315.

**Affidavit to Obtain Order to Examine Judgment Debtor,  
 After Return of Execution against Property Issued out  
 of a Court of Record.**

(Code Civ. Pro., § 2435.)

[Title of proceeding.]

———— COUNTY, ss.:

A. B., of ———, being duly sworn, says, that on the ——— day of ———, 18—, a judgment was rendered by the [name court or officer] in favor of [deponent] and against C. D., for ——— dollars, and ——— cents damages, and ——— dollars and ——— cents costs [which judgment was afterwards duly assigned to (deponent), and is now owned by him].<sup>1</sup>

[That the judgment roll thereupon was duly filed in the office of the county clerk of the county of ———, and said judgment was duly docketed in said clerk's office on the day last aforesaid.]

[That a transcript thereof was duly filed, and said judgment was duly docketed, in the ——— county clerk's office, on the ——— day of ———, 18—.]

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<sup>1</sup> See *Lindsay v. Sherman* (5 How. Pr., 308), *Frederick v. Decker* (18 How. Pr., 96).

That said judgment was rendered upon the said judgment debtor's appearance [*or* upon the personal service of the summons upon said C. D.].<sup>1</sup> [\*\*]

That an execution was duly issued upon said judgment [†] out of said court [*or* name other court of record out of which the execution was issued], (by leave of said court, duly obtained,) on the ——— day of ———, 18—, against the property of the said C. D. to the sheriff of the county of ——— where the said C. D. resides [*or* has a place for the regular transaction of business, in person], at the time of the commencement of this proceeding.

[*Or* where the judgment roll upon said judgment (*or* where a transcript of said judgment) is filed as aforesaid, said C. D. not being, at the time of the commencement of this proceeding, a resident of this State.<sup>2</sup>] [\*]

That said execution has, less than ten years since, and on the ——— day of ———, 18—, been duly returned<sup>3</sup> by said sheriff to the county clerk of the county of ———, wholly unsatisfied [*or* unsatisfied to the extent of ——— dollars], and [††] that the whole amount of said judgment is still unpaid, together with interest thereupon from the ——— day of ———, 18— [*or* that there still remains due and unpaid, upon said judgment, the sum of ——— dollars, together with interest thereupon from the ——— day of ———, 18—].

[Deponent further says, that he is the attorney (*or* agent) of said (naming party on whose behalf the application is made), and, as such, is duly authorized to take proceedings against said C. D., as provided in title twelfth of chapter seventeenth of the Code of Civil Procedure.<sup>4</sup>]

That, etc. [substantially as in form No. 209, from (†)].<sup>5</sup>

A. B.

[Jurat as in form No. 46.]

<sup>1</sup> See Code Civ. Pro., § 2458.

<sup>2</sup> As to the cases in which these forms are to be respectively used see Code Civ. Pro., § 2458, subds. 1, 2 and 3.

<sup>3</sup> See Marx v. Spaulding (21 Week. Dig. 275; S. C., 35 Hun, 478, aff'd, 99 N. Y., 675), that in case of an improper return by a sheriff, the remedy is to require the sheriff to make a proper return, and, if he refuses, to move to compel him to do so before proceedings supplementary to the execution are taken. See, also, Baker v. Herki-

mer (43 Hun, 86), Wright v. Nostrand (94 N. Y., 31), Methodist Book Concern & Co. v. Hudson (1 How. Pr. [N. S.], 517).

<sup>4</sup> See Hawes v. Burr (7 Robt., 452). As to statement by personal representative, see Collier v. De Revere (7 Hun, 61), Pardee v. Tilton (20 Hun, 76), Walker v. Donovan (6 Daly, 552; 53 How. Pr., 3).

Where the attorney who made the affidavit did not state therein directly

No. 1316.

**Affidavit to Procure Order for Examination after the Issuing and before the Return of an Execution.**

(Code Civ. Pro., § 2436.)

As in form No. 1315 to [\*], and from thence as follows: That said sheriff has not yet returned the said execution.

And deponent further says, that the said C. D. has property which he unjustly refuses to apply toward the satisfaction of said judgment, to wit [state property] [as deponent is informed by F. G., whose affidavit is hereto annexed, and verily believes].

[That deponent cannot obtain the affidavit of said F. G., in this proceeding, for the following reasons, to wit (state same).<sup>1</sup>]

that he was such attorney, but merely described himself as such, it was *held*, that this did not prevent the court from having jurisdiction of the proceeding. (Miller v. Adams, 52 N. Y., 409, 414.) See, also, Moore v. Taylor (40 Hun, 56), Kress v. Moorhead (26 Week. Dig., 410), Brown v. Walker (28 State Rep., 36, aff'd without op., 121 N. Y., 717.)

<sup>1</sup>This clause is inserted in pursuance of rule 25 of Gen. Rules of Prac.; as to what it is necessary to show in case a previous examination has been had, see Canavan v. McAndrew (20 Hun, 46), Grocers' Bank v. Bayaud (21 Hun, 203), Jurgenson v. Hamilton (5 Abb. N. C., 149), Carter v. Clarke (7 Robt., 43), Irwin v. Chambers (40 N. Y. Super. Ct., 432), Goodall v. Demarest (2 Hilt., 534), Sellig v. McIntyre (N. Y. Daily Reg., July 28, 1883), Cromwell v. Spofford (4 Civ. Pro. Rep., 273), Rallings v. Pitmann (49 Super. Ct., 307), Methodist Book Concern & Co. v. Hudson (1 How. Pr. [N. S.], 517), Marshall v. Link (36 State Rep., 60), Weiss v. Ashman (11 Misc., 377).

As to statements upon information and belief, see Miller v. Adams (52

N. Y., 409), Klinke v. Levey (N. Y. Daily Reg., Aug. 22, 1883), Mahnken v. Pape (id., Aug. 28, 1883; 65 How. Pr., 453), Day v. Lee (32 How. Pr., 95), S. C. as People v. Jones (1 Abb. N. C., 172), and note 1 to form No. 1316. See, also, Teffts v. Eppstein (17 Civ. Pro. R., 168), Cooman v. Board of Education of Rochester (37 Hun, 96).

As to before what judge the proceedings may be instituted, see section 2434, Code Civ. Pro., as amended by chapter 946 of 1895, taking effect January 1, 1896, and see, further, that section as to statements of affidavit in certain cases, and see Jacobson v. Doty Plaster Manuf. Co. (32 Hun, 436), Felt v. Dorr (29 id., 14), Davis v. Herrig (65 How. Pr., 290), Baldwin v. Perry (25 Hun, 72), Folwell v. Cambeis (14 Week. Dig., 115), Merrill v. Allin (46 Hun, 623), Peck v. Baldwin (58 id., 308), Douglass v. Mainzer (40 id., 75), Browning v. Hayes (41 id., 382), Potts v. Davidson (1 How. Pr. [N. S.], 216), Ackerley, etc., Co. v. Partz (39 State Rep., 17), Gildersleeve v. Lester (69 Hun, 344), Blanchard v. Reilly (11 Civ. Pro. R., 278), Graves v. Scoville (12 id., 165), McIntyre v. Allen (43



Hun, 124), Carroll v. Langan (63 id., 380), Schenck v. Erwin (id., 104), Merritt v. Judd (18 Civ. Pro. R., 159).

By section 2462, Code Civ. Pro., the provisions of sections 26, 52 and 279, id., apply to a special proceeding instituted as prescribed in article first of title first of chapter seventeenth, id.; and see, further, provisions of said section 2462.

As to cases in which said article first is not applicable, and what property cannot be reached in proceedings under it, see Code Civ. Pro., § 2463.

As to affidavit in supplementary proceedings to collect a tax, see chapter 640, Laws of 1881; and see Matter of Jacob Conklin (21 Week. Dig., 329).

See, also, Felt v. Dorr (29 Hun, 14), and form No. 559, as to the requisites of an execution issued upon a judgment recovered against an assignee for the benefit of creditors, and of the affidavit in supplementary proceedings founded thereupon.

By an amendment to section 2435, Code Civ. Pro., by chapter 176 of Laws of 1896, the provisions of that section are extended to an execution in the case of an order issued in the same manner as upon a judgment, so far as the provisions of said section

can be applied in substance. That amendment takes effect September 1, 1896. By the same chapter section 2432, Code Civ. Pro., was amended by adding thereto as follows: The party to whom costs are awarded in a special proceeding shall be entitled to the same remedies under this title, under the same circumstances, as near as may be, as a judgment creditor. And for the purpose of this title, the party to whom such costs are awarded shall be deemed a judgment creditor, and the party against whom they are awarded shall be deemed a judgment debtor. As to execution upon order for costs, etc., see section 779, Code Civ. Pro., and note 5, page 428, to form No. 556. The above form, No. 1315, may easily be adapted to this case.

Where the judgment is more than five years old at the time of issuing execution the affidavit must show that an application has been made to the court for leave to issue execution or that an execution has been issued and returned unsatisfied, in whole or in part, within five years after the entry of the judgment. (Code Civ. Pro., §§ 1377, 1378.)

<sup>1</sup>As to statements made in an affi-

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and after the issuing of said execution, a demand was made by this deponent [*or* by C. J., whose affidavit is hereto annexed], upon said C. D., to apply his said property to the satisfaction of the said judgment, and that said C. D. refused [*or* has neglected] to apply the said property to that purpose, pursuant to said demand.<sup>1</sup>

[Conclude as in form No. 1315, from (++)<sup>2</sup>]

A. B.

[Jurat as in form No. 46.]

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No. 1317.

**Order for Examination of Judgment Debtor after Return of Execution.**

(Code Civ. Pro., § 2435.)

[Title of proceeding.]

Proof having been made to me, by the affidavit of A. B. [*or* of C. F., *or* of M. F., attorney, etc., for A. B. *or* C. F.], dated \_\_\_\_\_, 18—, that a judgment was heretofore, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, rendered by the \_\_\_\_\_ Court, upon personal service of the summons [*or* upon the personal appearance of the judgment debtor] in favor of [said A. B.] against C. D., for the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, damages and costs, and the judgment roll thereupon filed in the \_\_\_\_\_ county clerk's office on the \_\_\_\_\_ day of \_\_\_\_\_, 18— [which judgment has been duly assigned to said C. F., and is now owned by him], and that a transcript of said judgment was duly filed, and said judgment duly docketed, in the \_\_\_\_\_ county clerk's office on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and that execution was duly issued thereupon on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, out of the \_\_\_\_\_ Court, against the property of said C. D., to the sheriff of the proper county, and

davit upon information and belief, see note 2 to form No. 178, and note 3 to form No. 236, and note 5, page 1181.

<sup>1</sup>See *First Nat. Bank v. Wilson* (13 Hun, 232), *Levy v. Beacham* (64 id., 62), *Bowery Bank of N. Y. v. Widmayer* (9 N. Y. Supp., 629) as to necessity of demand.

<sup>2</sup>See cases above cited in note 1, and *Sackett v. Newton* (10 How. Pr., 560), *Owen v. Dupignac* (17 id., 512), *Mahnken v. Pape* (N. Y. Daily Reg., August 28, 1883; 65 How. Pr., 453), *Mason v. Hackett* (21 Week. Dig., 79), generally as to this proceeding, and notes to last form, No. 1315.



that said execution has been since duly returned by said sheriff, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, to the \_\_\_\_\_ county clerk's office wholly [*or partly*] unsatisfied, and that said judgment still remains wholly [*or partly*] unpaid and unsatisfied :

[And it appearing, by (said) affidavit, that each of the judges before whom this proceeding might be instituted, as prescribed by section 2434 of the Code of Civil Procedure, is (either) absent from the county (*or is unable, or disqualified to act.*)]

Now, upon the application of [M. F., attorney for] the said A. B. [*or C. F.*]:

I do hereby order, that the said C. D. is hereby required, pursuant to law, to attend before [\*] me [*or before E. F., a justice of the Supreme Court residing in the \_\_\_\_\_ judicial district (or county judge of the county of \_\_\_\_\_, etc.)*],<sup>1</sup> at, etc., on, etc., at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, to be examined concerning his property.

[†] And I do hereby enjoin the said A. B., and all other persons, from making or suffering any transfer or other disposition of, or interference with, the property of the said A. B., until further direction in the premises.<sup>2</sup>

[*Or as above to (\*)*, and from thence as follows: I. J., who is hereby designated and appointed as referee for that purpose, at, etc., on, etc., at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, to be examined concerning his property, and that said referee certify to me, (*or to E. F., a justice of the Supreme Court residing in the \_\_\_\_\_ judicial district, or the county judge of the county of \_\_\_\_\_, etc.*)<sup>3</sup> all the evidence and the other proceedings taken before him (conclude as in above from †).<sup>4</sup>]

Dated \_\_\_\_\_, 18—.

A. O., *Judge, etc.*

<sup>1</sup> See Code Civ. Pro., § 2434. Or the order may require the party's attendance at such time and place as may be appointed by the judge or referee. *Baldwin v. Goldsmith* (2 Law Bul., 19).

<sup>2</sup> See Code Civ. Pro., § 2451, and see *People v. Randall* (73 N. Y., 416).

See, also, *Morris v. First Nat. Bank* (68 N. Y., 362), that injunction order is superseded by an order appointing a receiver.

<sup>3</sup> See Code Civ. Pro., § 2434.

<sup>4</sup> See Code Civ. Pro., § 2442.

The order must state all the facts necessary to confer jurisdiction, otherwise it is irregular, although the affidavit states them. Thus, where the order is based on a judgment of a district court of New York city, or of a justice's court, it must recite the filing of a transcript and docketing the judgment with the county clerk and state



the time of so doing. (*Day v. Brosnan*, 6 Abb. N. C., 312; N. Y. Com. P. [Sp. Tm.] )

See, also, *Pardee v. Tilton* (20 Hun, 76, aff'd S. C., 83 N. Y. 623), *Diossy v. West* (8 Daly, 298), *Bank for Savings v. Hope* (8 Daly, 316), *Muldoon v. Pierz* (1 Abb. N. C., 309), *First Nat. Bank v. Dering* (8 Week. Dig., 261), *Jennings v. Lancaster* (15 Misc., 444), *Conyngham v. Duffy* (125 N. Y., 200), *Baumler v. Ackerman* (63 Hun, 41), *Logan v. McCall Publishing Co.* (140 N. Y., 447), *Importers' & Traders' Nat. Bank of N. Y. v. Quackenbush* (143 id., 567, rev'g S. C., 80 Hun, 111), *Cleveland v. Johnson* (5 Misc., 484), *Marx v. Spaulding* (16 Abb. N. C. 309), *Weiss v. Ashman* (11 Misc., 377),

*McGuire v. Hudson* (41 State Rep., 295), *Bolt v. Hauser* (33 State Rep., 343), *Ackerly, etc., Co. v. Partz* (39 id., 17), *Peck v. Baldwin* (58 Hun, 308), *Stephens v. Page* (4 Misc., 517), *Datcheldor v. Nugent* (24 N. Y. Sup., 828), *People ex rel. Gottchius v. McGoldrick* (24 Civ. Pro. R., 292), *People v. Cowan* (146 N. Y., 348, rev'g S. C., 11 Misc., 302), *Aultman & Taylor Co. v. Syme* (87 Hun, 295), *Importers, etc., Bank of N. Y. v. Quackenbush* (144 N. Y., 651), generally as to order. That such proceedings may be instituted against a foreign corporation having no agent and doing no business in the state, and a receiver of its property in this state be appointed, see *Logan v. McCall Pub. Co.* (140 N. Y., 447).

## No. 1318.

**Affidavit to Procure Warrant for Arrest of Judgment Debtor.**

(Code Civ. Pro., § 2437.)

As in form No. 1315 to end thereof, and from thence as follows: And deponent further says, that there is, in his opinion, danger that the said C. D. will leave the State of New York [*or* will conceal himself], and that there is reason to believe that he has property which he unjustly refuses to apply to the payment of the said judgment.

That such opinion and belief are founded upon the following facts [state the facts, and, as to matters stated upon information and belief, add affidavit of informant, or account for its absence].<sup>1</sup>

## No. 1319.

**Warrant for Arrest of Judgment Debtor.**

(Code Civ. Pro., § 2437.)

*The People of the State of New York, to the Sheriff of the County of \_\_\_\_\_ :*

Whereas, proof has been made to me, by affidavit, that a judgment was heretofore, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, rendered by the \_\_\_\_\_ Court, upon personal service of the summons [*or* upon the personal appearance of the judgment debtor], in favor of A. B. and against C. D., for \_\_\_\_\_ dollars and \_\_\_\_\_ cents, damages and costs [which judgment has been duly assigned to E. F., and is now owned by him] [the judgment roll whereupon was duly filed in the \_\_\_\_\_ county clerk's office on the \_\_\_\_\_ day of \_\_\_\_\_, 18—], and a transcript of which judgment

<sup>1</sup> See notes referred to in note 1 to form No. 1316.

See *Netzel v. Mulford* 59 How. Pr., 452), *Robshand v. Waring* (1 Abb. N. C., 311).

These statements may, in like manner, be inserted in form No. 1316.

was duly filed, and said judgment duly docketed, in the \_\_\_\_\_ county clerk's office on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and that an execution has been duly issued thereupon out of the \_\_\_\_\_ Court to the sheriff of the proper county on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and that said execution has since, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, been duly returned by said sheriff to the \_\_\_\_\_ county clerk's office wholly [*or partly*] unsatisfied, and that said judgment still remains wholly [*or partly*] unpaid and unsatisfied.

And also upon proof, by affidavit, to my satisfaction, that there is danger that the said C. D. will leave the State of New York [*or conceal himself*], and that there is reason to believe that he has property which he unjustly refuses to apply to the payment of said judgment, to wit: that [here recite facts as they appear by the affidavit, form No. 1318].

You are hereby required to arrest the said C. D., and to bring him before me [*or before, etc.*], at etc., on, etc., then and there to be dealt with according to law. And this shall be your warrant therefor.<sup>1</sup>

Witness, etc. [as in form No. 242].

[Signature of judge as in form No. 242.]

[Signature, etc., of attorney as in form No. 242.]

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No. 1320.

### **Undertaking of Judgment Debtor to Obtain his Discharge from Arrest.**

(Code Civ. Pro., § 2440.)

[Title of proceeding.]

Whereas, a warrant was issued by Hon. A. O., judge, etc., in the above entitled proceeding, to the sheriff of \_\_\_\_\_ county, pursuant to section 2437 of the Code of Civil Procedure, requiring the said sheriff to [state requirement of warrant]; and,

Whereas, the said C. D. has been arrested and brought before said judge [*or name other judge*]; and,

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<sup>1</sup> See notes to form No. 1319, and *Denning v. Schieffelin* (26 State Rep., §§ 2438, 2439, Code Civ. Pro.; 96).

Whereas, it has appeared to the satisfaction of said judge, from the examination of said C. D. [*or* name other proof], that there is danger that he will leave the State [*or* conceal himself], and that he has property which he has unjustly refused to apply to the satisfaction of the judgment mentioned in said warrant, and an order has thereupon been made by said judge, dated ———, 18—, requiring said C. D. to give an undertaking, with the sureties and in the sum and within the time specified in said order. [\*]

Now, therefore, we, E. F., of ——— [merchant], and G. H., of ——— [farmer], do hereby jointly and severally undertake, pursuant to the said order and to the provisions of section 2440 of the Code of Civil Procedure, that said C. D. will, from time to time, as the said judge [*or* justice] directs, attend before the said judge [*or* before the referee appointed (*or* to be appointed)] in these proceedings, and that he will not, until discharged from arrest by virtue of the said warrant, dispose of any of his property which is not exempted from seizure by section 2463 of the Code of Civil Procedure.

Dated ———, 18—.

E. F.

G. H.

In presence of ———.

[Acknowledgment as in form No. 340, or proof as in form No. 538, affidavits and approval as in form No. 340.]

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No. 1321.

**Warrant upon Failure to Comply with the Order Directing Undertaking to be Given.**

(Code Civ. Pro., § 2440.)

As in form No. 1320 substantially, to [\*], and from thence as follows: And, whereas, the said C. D. has failed to comply with the said order within the time therein specified:

Now, therefore, I do hereby commit the said ——— to the [naming prison], there to remain in the custody of the sheriff of ——— county, until the close of the examination in these proceedings, or until the giving of the said undertaking, except as I may direct the said sheriff to pro-

produce him, from time to time, as required, in the course of these proceedings.

Witness, etc. [as in form No. 242].

A. O., *Judge, etc.*

M. N., *Attorney for* \_\_\_\_\_,  
[Office address.<sup>1</sup>]

No. 1322.

**Affidavit to Obtain Order for Examination of Person or Officer of Corporation Having Property, etc., of Judgment Debtor.**

(Code Civ. Pro., § 2441.)

Add to forms Nos. 1315 and 1316, as follows: And this deponent further shows, upon information and belief, that [\*] F. M., who resides at \_\_\_\_\_, in this State [or who does not reside in this State, but resides at \_\_\_\_\_, in the State of \_\_\_\_\_, but has a place for the transaction of his business, in person, at \_\_\_\_\_, in the county of \_\_\_\_\_, in this State, or who does not reside in this State. and has no place, etc.],<sup>2</sup> has [†] personal property of the said C. D. exceeding ten dollars in value, to wit [describe property] [or is indebted to the said C. D., in the sum of \_\_\_\_\_ dollars, upon, etc.].

[That the information of deponent, upon which such belief is based, is derived from G. H., whose affidavit is hereto annexed, or whose affidavit could not be obtained for the reason that (state reason).<sup>3</sup>]

A. B.

[Jurat as in form No. 46.]

[Or in case of a corporation say, from (\*): The (name of corporation), of which J. K., who resides at \_\_\_\_\_, in the county of \_\_\_\_\_, in this State (or who does not reside in this State, but resides at \_\_\_\_\_, in the State of \_\_\_\_\_, and has a place for the regular transaction of business, in

<sup>1</sup> See note 2 to form No. 122.

<sup>2</sup> See section 2459, Code Civ. Pro., and see *Anway v. David* (9 Hun, 296), *Jurgenson v. Hamilton* (5 Abb. N. C., 149), *Foster v. Wilkinson* (37 Hun, 242), *Merrill v. Allen* (46 Hun, 623), *Peck v. Baldwin* (58 Hun, 308), *Gildersleeve v. Lester* (69 Hun, 344) *Fleming v. Tourgee* (40 State Rep., 705), *Collins v. Beebe* (54 Hun, 318), *Grinnell v. Sherman* (19 Civ. Pro. Rep., 139),

*Lingsweiler v. Lingsweiler* (18 Civ. Pro. R., 81), *O'Connor v. Mechanics' Bank* (124 N. Y., 324), *Schenck v. Irwin* (63 Hun, 104), *Leonard v. Bowman* (40 State Rep., 135), *Waldron v. Walker* (43 State Rep., 605), *Franey v. Smith* (88 Hun, 215), *Grand Lodge of K. of P. v. Manhattan Savings Institution* (12 Misc., 626).

<sup>3</sup> See note 1 to form No. 1316.

person, at ———, in the county of ———, in this State, *or* who does not reside in this State, and has no place for the regular transaction of business, in person, within this State), is the president, etc. has, etc., as above from (+).]

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No. 1323.

**Order to Examine Person Having Property, etc., of Judgment Debtor.**

(Code Civ. Pro., § 2441.)

[Title of proceeding.]

Upon proof, by the affidavit of A. B. [*or* C. F., *or* of M. F., attorney for A. B., *or* C. F.], dated ———, 18— [*or* name other evidence], to my satisfaction, that a judgment was rendered in the ——— Court on the ——— day of ———, 18—, in favor of A. B. against C. D., upon the personal appearance of said C. D. [*or* upon the personal service of the summons upon said C. D.], for ——— dollars and ——— cents [and the judgment roll thereupon filed in the ——— county clerk's office on the ——— day of ———, 18—] [a transcript of which judgment was duly filed, and said judgment duly docketed, in the ——— county clerk's office on the ——— day of ———, 18—]<sup>1</sup> [which judgment has been duly assigned to said C. F., and is now owned by him] and that an execution has been duly issued thereupon on the ——— day of ———, 18—, to the sheriff of the proper county against the property of said C. D., as prescribed in section 2458 of the Code of Civil Procedure, and that said execution has been returned on the ——— day of ———, 18—, wholly [*or* partly] unsatisfied [*or* has not been returned]; and also that F. M. [*or* name corporation] has personal property of said C. D. exceeding ten dollars in value [*or* is indebted to said C. D. in a sum exceeding ten dollars]:

[Insert here clause in brackets, immediately preceding word "now," in form No. 1317, when required by section 2434.]

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These proceedings may be pursued either alone or simultaneously with the proceedings against the debtor under subdivisions 1 and 2 of section

2432, Code Civ. Pro. (See last clause of that section.)

<sup>1</sup> See *Day v. Brosnan* (6 Abb. N. C., 312).



Now, upon the application of [M. F., attorney for] the said A. B. [*or* C. F.]:

I do hereby order and require the said F. M. [*or* K. L., president, etc., of the (name corporation)] to attend and be examined before [me<sup>1</sup> (*or* before I. J., who is hereby appointed referee for that purpose)], at, etc., on, etc., at ——— o'clock in the ——— noon, concerning the said property [*or* debt] [and that said referee certify to me (*or* to I. F., a justice of the Supreme Court, residing in the ——— district, or the county judge of the county of ———)]<sup>2</sup> all the evidence, and the other proceedings taken by him].

And I do hereby further order, that the said C. D. and F. M. [*or* name of corporation], be and they are hereby enjoined and restrained from making or suffering any transfer or other disposition of, and from interfering with, the said property [*or* debt] of the said C. D., until further direction in the premises.

[And I do hereby further order, that a copy of this order and of the said affidavit be served upon, and notice of the proceedings subsequent thereto be given to, said C. D. (state time and manner of notice).<sup>3</sup>]

Dated ———, 18—.

A. O., *Judge, etc.*

No. 1324.

### Referee's Return Pursuant to Order.

(Code Civ. Pro., §§ 2442, 2444.)

[Title of proceeding.]

Examinations and testimony of C. D., etc., taken pursuant to the annexed order of Hon. A. O., judge, etc., dated ———, 18—, by E. F., referee, at ———, on the ——— day of ———, 18—, at ——— o'clock in the ——— noon [and on other days to which the said examination was, from time to time, adjourned, as hereinafter stated].

<sup>1</sup> The judge may, in his discretion, specify the officer. (Code Civ. Pro., § 2444.)

<sup>2</sup> See Code Civ. Pro., § 2434.

<sup>3</sup> This requirement is in the discretion of the judge; but a receiver can-

not be appointed without such notice, except as otherwise prescribed in article second of title twelfth of chapter seventeenth of Code Civ. Pro. (Id., § 2441.)

—————, 18—, — A. M.

Present, F. G., for —————; G. H., for —————.

Said C. D. having been first duly sworn by said referee, did depose as follows, being examined by F. G., for —————.  
[Insert direct testimony.]

And on his cross examination by G. H., for —————, said C. D. did further depose as follows.

[Insert testimony upon cross-examination.]

And so on.

I, E. F., referee, do hereby certify and report, that the foregoing examination [*or* examinations] of ————— was [*or* were] taken before me in the above entitled proceeding, pursuant to the annexed order, at the time[s] and place[s] above mentioned.

That every answer or declaration of said C. D., etc., upon said examination[s] is therein inserted.

That said deposition [*or* depositions] was [*or* were], when completed, carefully read by me to the said C. D., etc., and was [*or* were] thereupon subscribed by him [*or* by them] in my presence.

And I further certify and report, that before entering upon said examination[s] or taking testimony, I subscribed and took the oath required by section 2445 of the Code of Civil Procedure, which oath is annexed to, and returned by, me with this my report.

All of which is respectfully submitted.<sup>1</sup>

Dated —————, 18—.

—————  
E. F., *Referee.*

No. 1325.

### Oath of Referee.

(Code Civ. Pro., § 2445.)

[Title of proceeding.]

I, E. F., the referee appointed in the above entitled proceeding, do solemnly swear that I will faithfully and fairly

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<sup>1</sup> See section 2460, as to what questions witnesses are required to answer, and as to use of evidence; and also *People v. Spier* (12 Hun, 70), *Barber v. People* (17 Hun, 366), *Loomis v. People* (19 Hun, 601), *Dusenbury v. Dusenbury* (63 How. Pr., 349; 48 Super. Ct., 205), *Mechanics' and Traders'*

discharge my duty upon such reference, and will make a just and true report according to the best of my understanding.<sup>1</sup>

E. F.

[Jurat as in form No. 46.]

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No. 1326.

**Affidavit to Obtain Order Permitting Person to Pay Debt to Sheriff.**

(Code Civ. Pro., § 2446.)

[Title of proceeding.]

———— COUNTY, ss.:

A. B., of ———, being duly sworn, says, that he is the [attorney for the] judgment creditor in the above entitled proceeding.

That said proceeding was commenced before Hon. A. O., judge, etc., on the ——— day of ———, 18—, and is now pending before said judge, who, on the day aforesaid, granted an order [*or* warrant] therein requiring, etc. [state requirements of order or warrant].

That no receiver has been appointed therein and no receivership has been extended thereto.

That B. C., of ———, or the [name of corporation] is indebted to C. D., the judgment debtor herein, in the sum of ——— dollars, upon [state nature of indebtedness] [as deponent is informed by said B. C., whose affidavit is hereto annexed, and believes to be true].<sup>2</sup>

That, etc. [as in form No. 209 substantially, from (†)].<sup>3</sup>

A. B.

[Jurat as in form No. 46.]

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Bank v. Healy (14 Week. Dig., 120), Bacon v. Goldsmith (1 City Ct., 462), Seligman v. Wallach (6 Civ. Pro. Rep., 232), among other cases, as to the examination. Also Matter of Robertson v. Hay (12 Misc., 7), Weaver v. Brydges (85 Hun, 503), Meyers v. Herbert (64 Hun, 200), Barnes v. Levy (23 Civ. Pro. R., 253), Blake v. Bolte (10 Misc., 333).

<sup>1</sup> The parties may expressly waive the oath. The oath may be adminis-

tered by an officer designated in section 842 of Code Civ. Pro. (§ 2445, id.) For form of waiver, see form No. 440, substituting therein section 2445 for section 1016, Code Civ. Pro.

<sup>2</sup> As to statements upon information and belief, see notes referred to in note 1 to form No. 1316.

See, also, note 5 to form No. 1315.

<sup>3</sup> Insert this clause where application is made without notice.

No. 1327.

**Notice of Application for Order Permitting Payment to Sheriff by Person Indebted to Judgment Debtor.**

(Code Civ. Pro., § 2446.)

[Title of proceeding.]

SIRS—Take notice, that an application will be made to Hon. A. O., judge [*or* justice] of the ——— Court], at, etc., on, etc., for an order permitting B. C. [*or* name corporation] to pay to the sheriff of ——— county the sum of ——— dollars on account of the indebtedness of said B. C., etc., to said C. D., mentioned in the affidavit of A. B., a copy of which is hereto annexed, and herewith served upon you, and for such other, etc.

That said application will be made upon the said affidavit, and upon [name other papers].<sup>1</sup>

Dated ———, 18—.

[Signature, etc., as in form No. 324.]

To [name persons notified].

No. 1328.

**Order Permitting Person to Pay Debt to Sheriff.**

(Code Civ. Pro., § 2446.)

[Title of proceeding.]

It having appeared to my satisfaction, by the affidavit of A. B., in the above entitled proceeding heretofore commenced before me, dated ———, 18—, that B. C., of ——— [*or* that the (name of corporation)], is indebted to said C. D., the judgment debtor herein, in the sum of ——— dollars, upon, etc. [state nature of indebtedness], and due notice having been given of this application to [name persons notified] as directed by me, and no receiver having been appointed herein, and no extension having been made of any receivership hereto :

Now, upon the application of F. G., counsel for said A. B.,

<sup>1</sup> The application may be made upon such notice, given to such persons as the judge deems just, or without notice. (Code Civ. Pro., § 2446.) See, also note 1 to next form, No. 1328.

the judgment creditor herein, I, A. O., the judge, etc., by whom the order [*or* warrant] herein, by which this proceeding was instituted, was granted, do hereby order, pursuant to section 2446 of the Code of Civil Procedure, that said B. C. [*or* name corporation] be and he [*or* it] is hereby permitted to pay to the sheriff of \_\_\_\_\_ county the sum of \_\_\_\_\_ dollars on account of his [*or* its] said indebtedness to said C. D. [said payment to have the effect provided by said section 2446 of the Code of Civil Procedure; that is to say, the same will be, to the extent thereof, a discharge of the said indebtedness, except as against a transferee from the said judgment debtor, in good faith and for a valuable consideration, of whose rights the said B. C., etc., had actual notice when the payment was made].<sup>1</sup>

Dated \_\_\_\_\_, 18—.

A. O., *Judge, etc.*

No. 1329.

**Notice of Application for Order that Debtor Pay Over Money, etc.**

(Code Civ. Pro., § 2447.)

[Title of proceeding.]

SIRS—Take notice, that upon the examination [and testimony] herein, an application will be made to Hon. A. O., judge, etc., at, etc., on, etc., for an order directing C. D., the judgment debtor herein [*or* name other person as in form No. 1330], immediately to pay over the sum of \_\_\_\_\_ dollars [*or* deliver the following property, to wit (describing it)], to the sheriff of the county of \_\_\_\_\_, or to A. M., the receiver appointed herein [*or* whose receivership has been extended to this proceeding], and for such other, etc.<sup>2</sup>

Yours, etc.

[Signatures, etc., as in form No. 324.]

To C. D. etc. [name other persons notified].

<sup>1</sup> See *Schrauth v. Dry Dock Savings Bank* (86 N. Y., 390; aff'g S. C., 8 Daly, 106), *Wright v. Cabot* (47 N. Y. Super. Ct., 229), *Chandler v. City of Fon du Lac* (56 How. Pr., 449), *Waldman v. O'Donnell* (57 How. Pr., 215), *Remney v. Gedney* (57 How. Pr., 217), *Grassmuck v. Richards* (2 Abb. N. C.,

No. 1330.

**Order Requiring Delivery of Money or Property to Sheriff  
or Receiver by Judgment Debtor.**

(Code Civ. Pro., § 2447.)

[Title of proceeding.]

It having appeared by the examination [and testimony] taken in the above entitled proceeding, that C. D., the judgment debtor herein, has in his possession, or under his control, certain money [or personal property] belonging to him, to wit [describe same] [or that one or more articles of personal property capable of delivery, to wit (describe same), the right of said C. D. to the possession whereof is not substantially disputed, are in the possession (or under the control) of G. H., of ———], and due notice of this application having been given to ———, as required by me:

Now, upon motion of A. F., counsel for A. B., the judgment creditor herein, after hearing, etc., and on reading [name opposing papers (or no one appearing to oppose)], I do hereby order and direct the said C. D. [or G. H.] immediately to pay the said sum of ——— dollars [or to deliver the said articles of personal property] to the sheriff of the county of ——— [or to A. M., the receiver appointed in this proceeding (or whose receivership has been extended to this proceeding)].<sup>3</sup>

Dated ———, 18—.

A. O., *Judge, etc.*

No. 1331.

**Order Directing the Payment or Application of Money or  
Property by Sheriff.**

(Code Civ. Pro., § 2449.)

[Title of proceeding.]

A. M., having been appointed receiver of the property of

359), among other cases as to such a payment. Also, Grand Lodge, etc., v. Man. Savings Institution (12 Misc., 626), Franey v. Smith (88 Hun, 215).

It may not be necessary, although it seems proper, to insert the last clause in brackets in the order.

<sup>3</sup> See note 3 to form No. 1330.

The order is to be made upon such a notice, given to such persons as the judge deems just, or without notice. (Code Civ. Pro., § 2447.)

<sup>3</sup> See, as to this application, First National Bank v. Whitehall Trans. Co.,

C. D., the judgment debtor herein, by my order, dated 18— [or the receivership of A. M., of the property of C. D., the judgment debtor herein, having been extended to the proceeding by my order, dated ———, 18—]:

It is hereby ordered, on the application of F. G., attorney for said A. B., after hearing, etc., that ———, the sheriff of ——— county, pay [or deliver] to said receiver the money [or the proceeds of the property, or the property] paid [or delivered] to him, pursuant to my order, made herein on the ——— day of ———, 18—, after deducting his fees.

Dated ———, 18—.

A. O., *Judge, etc.*

[Or it having appeared to my satisfaction by the examination of C. D., the judgment debtor herein (and other testimony), taken before me (or before I. J., referee herein, and returned to me), that an order appointing a receiver of the property of said C. D., the judgment debtor herein, or extending a receivership of said property hereto is not necessary; now, upon the application of M. F., attorney for said A. B., it is hereby ordered, that the sheriff of ——— county apply the money heretofore paid to him (or the proceeds of the property heretofore delivered to him, pursuant to my order herein, dated ———, 18—), upon the execution now in his hands (or which may be hereafter issued to him), in favor of said A. B. against said C. D.]

Dated ———, 18—.

[Signature as above.]

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No. 1332.

**Order Directing Balance, etc., to be Paid to Judgment Debtor in Certain Cases.**

(Code Civ. Pro., § 2450.)

[Title of proceeding.]

It having appeared by the affidavit of A. B., dated, etc.,

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(18 Hun, 161), Dickinson v. Onderdonk (18 id., 479), Griswold v. Tompkins (7 Daly, 214), Tinkey v. Langdon (13 Week. Dig., 384), Moller v. Wells (29 Hun, 587), Hayes v. McClelland (20 Week. Dig., 393), Miller v. Lyons (17 id., 86), Grand Lodge K. of P. v. Manhattan Savings Institution (12 Misc., 626), Serven v. Lowerre (3 Misc., 113).

that the sum of ——— dollars has been paid [*or* certain property, to wit: describing same, has been delivered] to the sheriff of the county of ——— [*or* to M. N., appointed receiver of the property of C. D., in the above entitled proceeding; *or* to whom a receivership was extended in the above entitled proceeding], pursuant to my order, made herein on the ——— day of ———, 18—, and that the said sum [*or* the sum of ——— dollars thereof, *or* the said property, *or* a portion of said property to wit (state same)], still remains in the hands of said sheriff [*or* of said receiver], and that said proceeding has been dismissed [*or* discontinued, *or* name other cases provided for in section 2450 of the Code of Civil Procedure]:

Now, upon motion of M. N., attorney for said A. B., after hearing, etc.:

It is hereby ordered, that the said sheriff [*or* receiver] pay the said sum of ——— dollars [*or* the said portion of said sum of ——— dollars], remaining in his hands [*or* deliver the said property, *or* the said portion of said property remaining in his hands], to the said C. D. [*or* to F. H., who appears by said affidavit to be entitled thereto], upon payment of his fees, and all other sums legally chargeable against the same.

Dated ———, 18—.

A. O., *Judge, etc.*

No. 1333.

**Affidavit of Service of Injunction Order and Order Requiring Debtor's Attendance for Examination.**

(Code Civ. Pro., § 2452).

[Title of proceeding.]

———— COUNTY, ss.:

E. F., of ———, being duly sworn, says, that on the ——— day of ———, 18—, he served the annexed original order, in the above entitled proceeding, upon C. D. [the judgment debtor in the above entitled proceeding], by delivering to said C. D. a copy thereof, and of the affidavit of A. B., therein mentioned, upon which the same was made, and by exhibiting, at the same time, the said annexed origi-



nal order, under the hand of the judge making it, to the said C. D.

That said service was made at the [city] of \_\_\_\_\_, in the county of \_\_\_\_\_, in this State' [where said C. D. resided at the time of such service; *or* that said C. D., at the time of such service, resided (*or* had an office for the regular transaction of business in person), at \_\_\_\_\_, in the county of \_\_\_\_\_, in this State, *or* resided out of this State].<sup>1</sup>

E. F.

[Jurat as in form No. 46.]

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No. 1334.

**Sheriff's Return of Arrest Pursuant to Warrant.**

(Code Civ. Pro., § 2453.)

I certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_, in the county of \_\_\_\_\_, I arrested the within named C. D., pursuant to the within warrant, and, at the same time and place, delivered to him a copy of the said warrant, and of the affidavit therein mentioned, upon which the same was granted, and that I have produced the said C. D. before Hon. A. O., judge, etc., at the time and place mentioned in said warrant, as I am thereby required.

Dated \_\_\_\_\_, 18—.

[Signature as in form No. 35.]

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No. 1335.

**Order Dismissing or Discontinuing Proceeding.**

(Code Civ. Pro., § 2454.)

[Title of proceeding.]

Upon the application of M. N., attorney for A. B., the

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<sup>1</sup> As to service upon a corporation to which this affidavit may be adapted, see Code Civ. Pro., § 2452; Logan v. McCall Pub. Co. (140 N. Y., 447, 449).

ting to examination without objection. (Newell v. Cutler, 19 Hun, 74.)

An irregularity in service, such as failure to show the original order, is waived by appearance, and submit-

<sup>2</sup> These statements in brackets relate to the requirements of section 2459, Code Civ. Pro., in the case of the service of an order for the attendance of the judgment debtor, etc.

judgment creditor in the above entitled proceeding, and on filing the affidavit of said A. B., dated ———, 18—, showing that, etc. [state substance of affidavit], and after hearing, etc.:

I do hereby order, that the above entitled proceeding be and the same is hereby discontinued upon the following terms, namely [state same].<sup>1</sup>

Dated ———, 18—.

A. O., *Judge, etc.*

[*Or it* having appeared to me by the affidavit of C. D., dated ———, 18—, that A. B., the judgment creditor in the above entitled proceeding, has unreasonably neglected (*or* delayed) to proceed therein (*or* that the judgment upon the return of an execution upon which this proceeding was brought has been satisfied), and due notice of this application having been given to said A. B., and to (name other persons served),<sup>2</sup> and on motion of M. F. counsel for (said C. D.), and after hearing, etc., and on reading (name opposing papers) (or no one appearing to oppose): I do hereby order, that the above entitled proceeding be and the same is hereby dismissed, upon the following terms (state same)].

Dated ———, 18—.

A. O., *Judge, etc.*

No. 1336.

### Order Directing Payment of Costs to Judgment Creditor.

(Code Civ. Pro., § 2455.)

[Title of proceeding.]

I do hereby order and allow to A. B., the judgment creditor herein, upon the application of J. C., attorney for said A. B., the sum of ——— dollars, as costs,<sup>3</sup> in this proceeding, and direct the same to be paid by the sheriff of ———

<sup>1</sup> See *Ballou v. Boland* (14 Hun, 355), *Stanley v. Lovett* (14 id., 412), *Kennedy v. Norcott* (54 How. Pr., 87), *Schanck v. Conover* (56 id., 437).

<sup>2</sup> This notice is only to be given, *it seems*, when a receiver has been appointed. (Code Civ. Pro., § 2454.)

<sup>3</sup> As to amount of costs, etc., which may be allowed, see Code Civ. Pro., § 2455.

See, also, *Fredericks v. Niver* (28 Hun, 417), *Valiente v. Bryan* (3 Civ. Pro. Rep. [Browne], 358; S. C., 65 How. Pr., 203), *Serven v. Lowerre* (3 Misc., 113), *Hutson v. Weld* (38 Hun, 142), *Grinnel v. Sherman* (19 Civ. Pro., 139), *Colne v. Girard* (19 Abb. N. C., 288), *Boelger v. Swivel* (1 How. Pr. [N. S.], 372), *Putnam v. Anthony* (7 State Rep., 580).

county [*or by M. N., receiver herein*], out of any money which has come, or which may come, to his hands [*or within* \_\_\_\_\_ days by the said C. D., the judgment debtor herein, etc.].

Dated \_\_\_\_\_, 18—.

A. O., *Judge, etc.*

No. 1337.

**Order Directing Payment of Costs to Judgment Debtor.**

(Code Civ. Pro., § 2456.)

[Title of proceeding.]

C. D., the judgment debtor in this proceeding [*or describe other party examined*], having been examined herein, and property applicable to the payment of the judgment not having been discovered in the course of this proceeding :

Now, upon the application of G. H., attorney for said C. D., I do hereby allow to said C. D. the sum of \_\_\_\_\_ dollars, as costs herein, and I hereby direct the payment of said amount by A. B., the judgment creditor, within \_\_\_\_\_ days after the personal service upon him of a certified copy of this order, and a demand thereof by said judgment debtor or his lawful agent or attorney [*or by A. M., the receiver of the property of said C. D., herein ; or by the sheriff of the county of* \_\_\_\_\_, out of any money which has come, or may come, to the hands of said receiver (*or sheriff*)].<sup>1</sup>

Dated \_\_\_\_\_, 18—.

A. O., *Judge, etc.*

<sup>1</sup> This clause in brackets can only be inserted when the allowance is made to another person than the judgment debtor. (Code Civ. Pro., § 2456.)

Under a similar provision of the Code of Procedure, it has been customary to direct the amount allowed as costs to be deducted from the amount of the judgment, when the allowance is made to the judgment debtor.

For proceedings for a contempt in disobeying order, see section 2457, Code Civ. Pro., and forms Nos. 1185, etc. ; and see *Tremain v. Richardson* (68 N. Y., 617), *Reynolds v. Gilchrest* (9 Hun, 203), *Tinker v. Crooks* (22 Hun, 579), *People v. Jones* (1 Abb. N. C., 172), *Lehmaier v. Griswold* (46 N.

Y. Super. Ct., 11), *Gamman v. Berry* (34 Hun, 138), *Kendrick v. Wandall* (88 Hun, 519), *Rineland v. Dunham* (2 Civ. Pro. [Browne] 32), *Keller v. Zeigler* (5 Month. Law Bul., 15), *McGill v. Weil* (19 Civ. Pro. R., 43), *Bareither v. Brosche* (id., 446), *Duffus v. Cole* (39 State Rep., 838), *Meyers v. Herbert* (64 Hun, 200), *Aldrich v. Davis* (46 State Rep., 587), *Vermont Marble Works v. Wilkes* (62 State Rep., 121), *Canda v. Gollner* (73 Hun, 493), *Gerton Carriage Co. v. Richardson* (6 Misc., 466), *Wolf v. Buttner* (6 id., 119), *De Witt v. Gunn* (24 Civ. Pro. R., 406), *Blakes v. Bolte* (10 Misc., 333), *Wolfe v. Knight* (15 Misc., 438).

See, also, cases cited in note to form No. 1336.

No. 1338.

**Affidavit to Obtain Examination of Judgment Debtor, etc.,  
when Execution has been Issued Pursuant to Section  
1941 of Code of Civil Procedure.**

(Code Civ. Pro., § 2461.)

As in form No. 1315 to [\*\*], and from thence as follows :  
And was rendered pursuant to the provisions of article  
third of title fifth of chapter fifteenth of the Code of Civil  
Procedure, for the amount determined to be unpaid upon a  
judgment originally rendered on the \_\_\_\_\_ day of \_\_\_\_\_,  
18—, against G. W. T. and said defendant, in the \_\_\_\_\_  
Court, upon their joint liability, and for the costs of the  
action in which the first above mentioned judgment was  
rendered.

That an execution was duly issued upon the judgment  
aforesaid, rendered against said C. D. on the \_\_\_\_\_ day  
of \_\_\_\_\_, 18— [describing judgment upon which pro-  
ceeding is brought].<sup>1</sup>

(Conclude as in form No. 1315 from [†]).

A. B.

[Jurat as in form No. 46.]

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ARTICLE SECOND.

## FORMS RELATING TO THE RECEIVER.

(Code Civ. Pro., Ch. 17, Tit. 12, Art. 2.)

No. 1339. Notice of application for appointment of receiver.

1340. Order appointing receiver.

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No. 1339.

**Notice of Application for Appointment of Receiver.**

(Code Civ. Pro., § 2464.)

[Title of proceeding.]

To C. D., etc.:

Take notice, that an application for an order appointing

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<sup>1</sup> For form of complaint upon judgment against joint debtor not originally served, see form No. 1028; and for form of judgment in such an action, see form No. 1029. This form may also be incorporated in forms Nos. 1316, 1318.

a receiver of your property [*or* of the property of C. D., the judgment debtor] in the above entitled proceeding; will be made to Hon. A. O., judge [*or* justice] of the ——— Court, at, etc., on, etc., and for such other or further relief as may be just.

That said application will be made upon [name papers].<sup>1</sup>

Dated ———, 18—.

Yours, etc.,

F. C., *Attorney for A. B.*

[Office address.]

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No. 1340.

**Order Appointing Receiver.**

(Code Civ. Pro., § 2464.)

[Title of proceeding.]

An order having been heretofore made by me herein on the ——— day of ———, 18—, requiring C. D., the judgment debtor [*or* otherwise describe person], to attend and be examined concerning his property [*or* state other requirement of the order] before me [*or* before I. J., a referee appointed for that purpose (*or* a warrant having been heretofore issued by me to the sheriff of ——— county)], as prescribed in article first of title twelfth of chapter seventeenth of the Code of Civil Procedure, which order [*or* warrant] was returnable to me, and the said C. D. having been accordingly examined before me [*or* before said referee], and at least two days' notice<sup>2</sup> of this application for an order appointing a receiver herein having been given to the said C. D. personally [*or* I being satisfied that said C. D. cannot, with reasonable diligence, be found within the State, having dispensed with notice of this application for the ap-

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<sup>1</sup> See Code Civ. Pro., § 2464, and *Ashley v. Turner* (22 Hun, 226), *Whitney v. Welch* (2 Abb. N. C., 442), *Morgan v. Van Kohnstamm* (9 Daly, 355), *Goddard v. Stiles* (90 N. Y., 199), *Strong v. Epstein* (14 Abb. N. C., 322), *S. C.*, 6 Civ. Pro. R. [Browne], 36), *Grace v. Curtiss* (3 Misc., 558), *Sayles v. Best* (49 State Rep., 460), *Baker v. Brundage* (79 Hun, 382), *Sheffield*

*Farm Co. v. Burr* (11 Misc., 638).

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> When the order to attend and be examined, or the warrant, has been served upon the judgment debtor, a receiver may be appointed upon the return day thereof, or at the close of the examination, without further notice to him. (Code Civ. Pro., § 2464.)

pointment of a receiver herein (*or* having directed notice of this application to be given by, state manner of service), and said notice having been given as required by me], and I having ascertained by the oath of said C. D., the said judgment debtor [*or* state how, otherwise], that no action specified in article first of title fourth of chapter fifteenth of the Code of Civil Procedure, or special proceeding instituted as prescribed in article first of title twelfth of chapter seventeenth of the Code of Civil Procedure, is pending against said judgment debtor [*or* state that an action or proceeding, describing it, has been commenced, and whether or not a receiver has been appointed therein, and that due notice has been given of the application to the judgment creditor prosecuting said action or proceeding, in such manner as directed by (me)]:<sup>1</sup>

Now, therefore, I do hereby, upon the application of F. C., attorney for said A. B., and after hearing, etc., and on reading [name opposing papers (*or* no one appearing to oppose)], appoint C. H., of ———, receiver of the property of the said C. D., the judgment debtor herein [*or* do hereby extend the receivership of said ——— to this proceeding],<sup>2</sup> upon the said receiver executing, acknowledging and filing with the clerk of this court, a bond in the form required by law to the people of this State, in the penalty of ——— dollars, with two sufficient sureties, to be approved as to its form and manner of execution by [a] judge of this court [*or* by me], conditioned for the faithful discharge of his duties as such receiver.

[And I do hereby order and direct the said C. D., the judgment debtor herein, to execute, acknowledge and deliver to the said receiver, a good and sufficient deed and conveyance of all his real estate, wheresoever situated.<sup>3</sup>]

And I do hereby further order, that there be allowed to A. B., the judgment creditor herein, the sum of ———

<sup>1</sup> See section 2465, Code Civ. Pro.

<sup>2</sup> See section 2466, Code Civ. Pro., and *State Bank of Syracuse v. Gill* (23 Hun, 410). That a non-resident of the State cannot be appointed receiver, and that a receiver cannot act as such after ceasing to be a resident, see subd. 5 of § 2469, Code Civ. Pro., added to that section by ch. 85 of Laws of 1892, taking effect September 1, 1896. But that section by its terms, does not affect the title of a purchaser in good faith, without notice, and for a valuable consideration; or the payment of a debt in good faith, and with-

out notice. See, also, *Merry v. Wilcox* (92 Hun, 210, 213).

<sup>3</sup> This clause is no longer necessary unless in case of real estate, etc., situated in a foreign State. (Code Civ. Pro., § 2468, subd. 1; *Manning v. Evans*, 19 Hun, 500; *Buchanan v. Hunt*, 21 Week. Dig., 288; S. C., 98 N. Y., 560; rev'g S. C., 33 Hun, 329). See, also, *Moore v. Duffy* (74 Hun, 78); *Maders v. Whallon* (id., 372). And see cases cited in note 2 to this form, page 1203.

It cannot be granted *ex parte*. (*Reed v. Champagne*, 5 Week. Dig., 227.)

dollars<sup>1</sup> as costs, and I hereby direct the payment thereof by said receiver out of any money which has come or may come into his hands as such receiver [or by the said C. D., within ——— days after the service upon him of a certified copy of this order, and a demand by the said A. B., or his duly authorized attorney, for the payment thereof].

And it appearing by the affidavit of ———, dated, etc., that sufficient grounds exist therefor, I do hereby enjoin, etc. [add injunction as in form No. 1323].<sup>2</sup>

### TITLE XIII.

#### FORMS RELATING TO PROCEEDINGS TO COMPEL DELIVERY OF BOOKS AND PAPERS TO PUBLIC OFFICERS.

(Code Civ. Pro., ch. 17, tit. 13.)<sup>3</sup>

- No. 1338a. Complaint to compel delivery of books, etc.  
 1338b. Order to show cause granted upon complaint, form No. 1338a.  
 1338c. Affidavit of delivery of books, etc.  
 1338d. Order discharging defendant on return of order to show cause.  
 1338e. Warrant to commit the person withholding.  
 1338f. Search warrant for such books and papers withheld.

<sup>1</sup> See section 2455 as to amount of costs which may be allowed, and how made payable. See, also, *Serven v. Lowerre* (3 Misc., 113).

<sup>2</sup> See section 2451, Code Civ. Pro., as to injunction. It may be made simultaneously with the order or warrant by which the proceeding is instituted, and upon the same papers, or afterwards upon an affidavit showing sufficient grounds therefor.

An order restraining the transfer of property "until further order in the premises," is superseded by an order appointing a receiver, and a subsequent transfer is not a contempt. (*People v. Randall*, 73 N. Y., 416; *Morris v. First Nat. Bank*, 68 id., 362.)

As to vesting of the property of judgment debtor in the receiver, see Code Civ. Pro., §§ 2468, 2469; and see, among other cases, *Peters v. Carr* (2 Dem., 22), *Faneuil Hall Nat. Bank v. Bussing* (147 N. Y., 665), *Smith v. McQuade* (59 Hun, 374), *Gifford v. Rising* (59 id., 42), *Palmer v. Colville*

(63 id., 536), *Metcalf v. Del Valle* (64 id., 245), *Stearns & Co. v. Eaton* (43 State Rep., 605), *Matter of Crane* (81 Hun, 96), *Moore v. Duffy* (74 id., 78), *Bennett v. Wolfolk* (80 id., 390), *Ward v. Petrie* (92 id., 605), *Pettibone v. Drakeford* (37 id., 628), *Moore v. Taylor* (40 id., 56), *Smith v. Tozer* (42 id., 22), *McCorkle v. Hermann* (117 N. Y., 297), *O'Connor v. Mechanics' Bank* (124 id., 324), *Nicoll v. Spowers* (105 id., 1), *Stephens v. Perrine* (143 id., 476), *Matter of Rainey* (26 N. Y. Supp., 872), *Sheffield Farm Co. v. Burr* (11 Misc., 638).

The order is to be filed and recorded. (Code Civ. Pro., § 2467.)

As to duty of county clerk upon filing of order, or certified copy thereof, see section 2470, Code Civ. Pro.; as to what court has control of the receiver, see section 2471, id.; *Wing v. Disse* (15 Hun, 190), *Pool v. Spofford* (14 Hun, 369).

<sup>3</sup> This title (13), consisting of section 2471a of the Code of Civil Procedure,

No. 1338a.

**Complaint to Compel Delivery of Books, etc.**

(Code Civ. Pro., § 2471a.)

STATE OF NEW YORK, }  
 COUNTY OF —, } ss.:

*To the Hon. D. C. H., Justice of the Supreme Court (or, Hon. J. H. C., county judge of the county of —):*

A. B., of said county, being duly sworn, makes complaint against C. D., late [town clerk of the town of —, in said county], and says that the deponent was duly elected [town clerk of said town of —, at an annual town meeting of such town, held on the — day of —, 1—]; that he has taken and filed the oath prescribed by law.

That by virtue of such election he is successor to the said C. D., late [town clerk] as aforesaid; that he has required and demanded that the said C. D. deliver over to him, as such successor, all the records, books and papers in his possession or custody, or under his control, belonging or appertaining to said office of [town clerk].

And this deponent further alleges that the said C. D. has refused and neglected so to deliver such records, books and papers, or any part thereof; and that, as this deponent is informed and believes, said C. D. has in his possession, or under his control, the following records, books and papers appertaining to the said office of town clerk, to wit: [describing them], and that he unjustly and unlawfully withholds the same from this deponent.<sup>1</sup>

A. B.

[Jurat as in form No. 46.]

was added to that statute by Laws of 1893, chapter 179. See, also, Matter of Bradley (141 N. Y., 527), in which the application was made under the

provisions of 1 R. S., 125, § 51, as to rules governing such application.

<sup>1</sup>See, also, form No. 1033, at page 930, *ante*, and note 3 thereto.



No. 1338b.

**Order to Show Cause Granted upon Complaint, form No. 1338a.**

(Code Civ. Pro., § 2471a.)

STATE OF NEW YORK, }  
 COUNTY OF ———, } ss. :

[Title of proceeding.]

Complaint having been made to me, the undersigned, as follows, to wit: [insert a copy of the complaint form No. 1338a], and being satisfied by the oath of the said complainant [add "and other testimony offered," if any such was offered] that the said books and papers [or either, according to the fact] are withheld as aforesaid, I, therefore, pursuant to the provisions of the statute in such case made and provided, do hereby order and direct the said C. D., the person so refusing, to show cause before me at [my office in the (city) of ———, in said county, on the tenth day of May, instant, at 10 o'clock in the forenoon], why he should not be compelled to deliver the same books and papers [or either, as the case may be].<sup>1</sup>

[Signature.]

Dated, etc.

No. 1338c.

**Affidavit of Delivery of Books, etc.**

(Code Civ. Pro., § 2471a.)

[Title of proceeding.]

STATE OF NEW YORK, }  
 COUNTY OF ———, } ss. :

C. D., of the ——— of ———, in said county, being duly sworn, says that he is the person mentioned as late [insert name of office] in a certain affidavit and complaint made by one A. B., before the Hon. ——— ———, justice of the Supreme Court [or, county judge of ——— county], on the ——— day of ———, 1—, and that he has truly delivered

<sup>1</sup> See, also, form No. 1039, *ante*, page 930, and note 1 thereto.

over to said A. B., his successor in said office of [naming same], all the books, records and papers in his custody or appertaining to his office within his knowledge, or to his belief.<sup>1</sup>

C. D.

[Jurat as in form No. 46.]

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No. 1338d.

**Order Discharging Defendant on Return of Order to Show Cause.**

(Code Civ. Pro., § 2471a.)

Same, substantially, as form No. 1041, p. 932, *ante*.<sup>2</sup>

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No. 1338e.

**Warrant to Commit the Person Withholding.**

(Code Civ. Pro., § 2471a.)

*The People of the State of New York, to the Sheriff of the County of ——— :*

Complaint having been made to the undersigned, as follows, to wit: [insert a copy of the complaint.] Whereupon, pursuant to the provisions of the statute, being satisfied by the oath of the said complainant [add "and other testimony offered," if any such was offered] that the said books and papers [or either, according to the fact] were withheld as aforesaid, the undersigned granted an order, directing the said C. D., the person so refusing, to show cause before the undersigned at, etc. [as in the order] why he should not be compelled to deliver the same books and papers [or either, as the case may be], at which place and time so appointed [or if at any other time to which the matter was adjourned, so state] upon

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<sup>1</sup> See section 2471a of the Code of Civil Procedure, as to this affidavit, and see note 3 to form No. 1038, at page 930, *ante*, and notes 1 and 2 to form No. 1040, at page 932, *ante*. This affidavit must be made before

the justice or judge on the return of the order.

<sup>2</sup> See section 2471a of Code of Civil Procedure, and note 3, page 932, *ante*, to form No. 1041.

due proof being made of the service of the said order, the undersigned proceeded to inquire into the circumstances, and the said C. D. having omitted to make the oath prescribed by the statute in such case made and provided, and it appearing to the undersigned that the said books and papers [or either of them, to be described] are withheld as aforesaid (\*);

Now, therefore, you are commanded that you take the said C. D., if he may be found in your bailiwick, and commit him to jail of the said county of —; there to remain until he shall deliver the said books and papers [or either, or such of them as are withheld], or be otherwise discharged according to law.

Witness —, Justice of the Supreme Court (or County Judge of — county), at the (city) of —, this — day of —, 1——.<sup>1</sup>

[Seal.]

[Signature.]

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No. 1338f.

**Search Warrant for such Books and Papers Withheld.**

(Code Civ. Pro., § 2471a.)

Same as form No. 1042a, *ante*.<sup>2</sup>

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<sup>1</sup> See, also, form No. 1042, page 932, *ante*, and note 1 thereto, and see section 2471a of Code of Civ. Pro.      <sup>2</sup> See form No. 1042a, and note 1 thereto.

## CHAPTER XVIII.

## FORMS RELATING TO SURROGATES' COURTS AND PROCEEDINGS THEREIN.

(Code Civ. Pro., Ch. 18.)

- TITLE I. Forms relating to the organization, jurisdiction and powers of the court; duties, powers and disabilities of the surrogate and to miscellaneous provisions.
- TITLE II. Forms relating to provisions relating generally to the proceedings in surrogates courts, and to appeals from those courts.
- TITLE III. Forms relating to granting and revoking probate, letters testamentary and letters of administration, to foreign wills and ancillary letters.
- TITLE IV. Forms relating to proceedings by or against an executor or administrator, touching the administration and settlement of the estate.
- TITLE V. Forms relating to disposition of the decedent's real property, for the payment of debts and funeral expenses, and to distribution of the proceeds.
- TITLE VI. Forms relating to provisions relating to a testamentary trustee.
- TITLE VII. Forms relating to provisions relating to a guardian.

## TITLE I.

## ARTICLE FIRST.

## FORMS RELATING TO THE JURISDICTION OF THE COURT AND AUTHORITY OF THE SURROGATE.

(Code Civ. Pro., Ch. 18, Tit. 1, Art. 1.)

No. 1341. Subpœna in surrogate's court.

## No. 1341.

**Subpœna in Surrogate's Court.**

(Code Civ. Pro., § 2481, subd. 3.)

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

To ———, greeting:

We command you, that, all and singular business and excuses being laid aside, you and each of you appear and attend before the surrogate of the county of ———, at

a surrogate's court, to be held in and for the county of \_\_\_\_\_, at the surrogate's office in the \_\_\_\_\_ of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, to testify and give evidence in a certain special proceeding now pending in said court, entitled "In the matter of \_\_\_\_\_, late of the \_\_\_\_\_ of \_\_\_\_\_, deceased;" and, for a failure to attend, you will be deemed guilty of a contempt of court, and liable to pay all damages sustained thereby by the party aggrieved, and forfeit fifty dollars in addition thereto.<sup>1</sup>

In witness whereof, we have caused the seal of office of our said surrogate to be hereunto affixed.

Witness, F. W., surrogate of our said county, at the \_\_\_\_\_ of \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

[L. s.]

F. W., *Surrogate*

[or A. F., *Clerk of the Surrogate's Court*].

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## ARTICLE SECOND.

### FORMS RELATING TO THE GENERAL DUTIES AND DISABILITIES OF THE SURROGATE OR TEMPORARY SURROGATE.

(Code Civ. Pro., Ch. 18, Tit. 1, Art. 2.)

- No. 1342. Certificate of surrogate of his disqualification to act in a particular matter.
1343. Petition for order of general term upon disqualification, etc., of surrogate.
1344. Order of general term upon petition (form No. 1343).

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#### No. 1342.

### Certificate of Surrogate of His Disqualification to act in a Particular Matter.

(Code Civ. Pro., § 2485.)

I, F. W., surrogate of the county of \_\_\_\_\_, do hereby certify, pursuant to article second of title first of chapter eighteenth of the Code of Civil Procedure, that I am precluded [*or* disqualified], by reason of [*state reason*], from acting in the matter of, etc., and that there is no officer designated in section 2484 of said Code in whom my juris-

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<sup>1</sup> For *duces tecum* clause, see form No. 356, and see notes No. 359; for affidavit of service of subpoena, see form No. 356, and see notes to that form.

diction or powers, with respect to the said matter, can vest, or who is qualified to act therein, and I do hereby accordingly, pursuant to the provisions of the said article, designate the surrogate of the county of \_\_\_\_\_' to act in my place in the said matter.

In witness whereof, I have hereunto set my hand [and the seal of said surrogate's court],<sup>2</sup> at \_\_\_\_\_, in the county of \_\_\_\_\_, on this \_\_\_\_\_ day of \_\_\_\_\_, 18—.<sup>3</sup>

[L. s.]

F. W., *Surrogate*.

No. 1343.

**Petition for Order of Justice of the Supreme Court upon Disqualification, etc., of Surrogate.**

(Code Civ. Pro., § 2488.)

*To Hon. \_\_\_\_\_, a Justice of the Supreme Court in the \_\_\_\_\_ District:*

The petition of A. M. respectfully shows, that he is the attorney-general of the State of New York, and has been directed by the governor of said State to make this application [*or* that he is the district attorney of the county of \_\_\_\_\_; *or* that he is (*or* is about to become) a party to a special proceeding (now pending) in the surrogate's court of the county of \_\_\_\_\_, to wit (stating proceeding, and showing how he has become, or is about to become, such party).]

And your petitioner further shows, that the office of the surrogate of the county of \_\_\_\_\_ is vacant by reason of [state how vacancy has occurred] [*or* that F. P., the surrogate of the county of \_\_\_\_\_, is disqualified (*or* precluded from acting) in the above mentioned special proceeding by reason of (state reason), *or* state otherwise, according to the fact, so as to bring the case within subdivision two of section 2487 of the Code of Civil Procedure], and that no special

<sup>1</sup> The surrogate designated must be the surrogate of an adjoining county, other than New York. (Code Civ. Pro., § 2485, am'd by Laws of 1893, ch. 686, by twice striking out the words "or Kings" following "New York.")

<sup>2</sup> No seal appears to be required.

<sup>3</sup> See *The People ex rel. Oakley v.*

*Petty* (32 Hun, 443), *People ex rel. Kirk v. Weiant* (30 Hun, 475), *Matter of Hancock* (91 N. Y., 284; rev'g S. C., 27 Hun, 78), *Matter of Chauncey* (32 Hun, 429), *Matter of Tyler* (60 Hun, 566), *People ex rel. Lent v. Carr* (100 N. Y., 236).

provision is made by law for the discharge of the duties of the office of said surrogate in that contingency.

That C. P., of ———, the [special surrogate, etc.], is authorized in such case to discharge the duties of the surrogate of said county, until the said vacancy is filled [*or* until the said disability ceases].

Your petitioner, therefore, prays, that this court will grant an order, pursuant to the provisions of section 2488 of the Code of Civil Procedure, establishing the fact that the said surrogate is so disqualified [*or* precluded from acting, etc.; *or* otherwise, according to the fact], and the authority of the said [special surrogate] to act [in the place of said F. P.], as surrogate of ——— county, and to discharge the duties of said surrogate until the said vacancy is filled [*or* until such disability ceases] [*or* in said special proceeding], and for such other or further relief as may be proper.<sup>1</sup>

Dated ———, 18—.

A. M.

[Verification as in form No. 52.]

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No. 1344.

**Order of Justice of Supreme Court upon Petition (Form No. 1343).**

(Code Civ. Pro., §§ 2487, 2488.)

[Title of proceeding.]

On reading and filing the petition of A. M. [attorney-general, etc.], dated ———, 18—, by which it appears that [reciting substance of the petition] [and due notice of this motion having been given to (naming parties notified)]:<sup>2</sup>

I do hereby order, on motion of ———, after hearing, etc. [*or* no one appearing to oppose], that G. H., the special surrogate of ——— county [*or* name other officer

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<sup>1</sup> See the cases cited in note 3 to form No. 1342, and see note 2 to next form.

The proof of authority from the General Term, now justice of the supreme court, etc., required under section 2484, is only needed, when the office of surrogate is vacant, or the surrogate is disabled by reason of "sickness, absence or lunacy." (People ex rel. Oakley v. Petty, 32 Hun, 443, 445. Per Barnard, P. J.)

<sup>2</sup> The order may be made upon or without notice, as the justice granting

it thinks proper. (Code Civ. Pro., § 2488, as amended by Laws of 1889, ch. 495.) By amendment to section 2487 of Code of Civil Procedure by ch. 684 of Laws of 1887, a justice of the Supreme Court of the judicial district embracing the county was substituted for the General Term in granting authority to make the order. See, also, amendments to that section by Laws of 1893, ch. 686, and by ch. 946 of Laws of 1895, taking effect Jan. 1, 1896.

or court], be and he [*or it*] is hereby designated and empowered to discharge the duties of the office of the surrogate of ——— county in the said special proceeding [*or until the said vacancy therein is filled (or until the said disability ceases)*].

[And it is further ordered, that the said I. J. give security for the due discharge of his duties as such officer by (name security to be given).<sup>1</sup>]

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## TITLE II.

### ARTICLE FIRST.

#### FORMS RELATING TO PROCESS, AND SERVICE THEREOF; APPEARANCE AND JOINDER OF ISSUE, AND MISCELLANEOUS REGULATIONS OF PRACTICE.

(Code Civ. Pro., Ch. 18, Tit. 2, Art. 1.)

- No. 1345. General form of citation issued by surrogate.  
 1346. Affidavit of personal service of citation.  
 1347. Affidavit to procure order for service of citation upon a resident of the State by publication.  
 1348. Order directing service of citation on resident of the State by publication.  
 1349. Order for service by publication in cases provided for by sections 2522, 2523 of the Code of Civil Procedure.  
 1350. Affidavits of service of citation without the State, and of publication and deposit in the post-office.  
 1351. Affidavit of service of citation upon infant under fourteen, lunatic, etc., or upon a corporation.  
 1352. Order for additional service in case of infant, etc.  
 1353. Notice of appearance in surrogate's court.  
 1354. Order appointing special guardian of infant or lunatic, etc.  
 1355. Consent of special guardian to his appointment.  
 1356. Notice of application for appointment of special guardian for infant, etc.  
 1357. Proof of service of citation, subpoena, etc.  
 1358. Verification of written pleading, etc., in surrogate's court.

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<sup>1</sup>The justice may, in his discretion, require the officer to give security for the due discharge of the duties therein. (Code Civ. Pro., § 2488, as amended by ch. 495 of Laws of 1889.) See note 2 to this form; p. 1207 *ante*.

See, also, notes to form No. 1343, and see section 2489 of Code Civ. Pro., as to how the order may be revoked, and how the appointment is superseded, etc.



No. 1345.

**General Form of Citation Issued by Surrogate.**

(Code Civ. Pro., § 2519.)

*The People of the State of New York, to A. B. and C. D.:*<sup>1</sup>

You, and each of you, are hereby cited and required, personally, to be and appear before our surrogate [or before the surrogate's court] of the county of \_\_\_\_\_, at, etc., on, etc., at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon of that day, then and there to [state purpose of citation].

[And if any of the persons interested be under the age of twenty-one years, they are required to appear by their guardian, if they have one; or, if they have none, to appear and apply for one to be appointed, or, in the event of their neglect or failure to do so, a guardian will be appointed by the surrogate to represent and act for them in the proceeding.<sup>2</sup>]

In testimony whereof, we have caused the seal of our said surrogate's court to be hereunto affixed.

Witness, F. W., Esq., surrogate of our said county, at the \_\_\_\_\_ of \_\_\_\_\_, in the county of \_\_\_\_\_, the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord 18—.<sup>3</sup>

[L. s.]

F. W., *Surrogate*<sup>3</sup>[or A. F., *Clerk to the Surrogate's Court*].

No. 1346.

**Affidavit of Personal Service of Citation.**

(Code Civ. Pro., § 2520.)

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, he served the annexed cita-

<sup>1</sup> See Code Civ. Pro., § 2519.<sup>2</sup> It is customary to insert this clause when there appear to be infants interested. See Code Civ. Pro., § 2531; also, Price v. Fenn (3 Dem., 341; 8 Civ. Pro., 206).<sup>3</sup> See, also, as to citations generally, sections 2515-2520, Code Civ. Pro., and that the insertion in a citation of the name of a party to be served by a

person other than the clerk of the court who made out the citation, and without his authority, gives the court no jurisdiction over the party whose name is inserted, see Boerum v. Betts (1 Dem., 471). See, also, Matter of Bradley (70 Hun, 104), Lambert v. Craft (98 N. Y., 342), Matter of Alexander (83 Hun, 147), Matter of Phalen (51 id., 203), Matter of Brooks (Daily



Reg., Aug. 13, 1886), *Mead v. Miller* (3 Dem., 577), *Matter of Soule* (46 Hun, 661), *Hoyt v. Hoyt* (112 N. Y., 493), *In re Stephen's Estate* (2 N. Y. Supp., 36), *Matter of Duston* (Daily Reg., Jan. 3, 1884), *Matter of Leinkauf* (4 Dem., 17), *Farmers' Loan and Trust Co. v. McKenna* (3 id., 219), *Matter of Seabra* (38 Hun, 218), *Matter of Washburn* (12 Misc., 242), *Price v. Fenn* (3 Dem., 341), *Matter of Cortwright* (3 id., 13), *Matter of Moore* (18 Week. Dig., 42).

<sup>4</sup> As to official designation in cases in which the county judge is also surro-

gate, and in case of special and acting surrogate, see section 2483, Code Civ. Pro.; as to authority of clerk, see section 2509, id.; *Mauran v. Hawley* (2 Dem., 396). By an amendment, by Laws of 1893, ch. 686, to § 2509 of Code Civ. Pro., the clerk or other person employed in any capacity in a surrogate's office, shall not act as attorney or counsel, or as referee, or special guardian, in any matter before the surrogate.

See, also, *Matter of Hurlburt* (43 Hun, 311), *Matter of Atwood* (10 Misc., 481, 485).

tion upon F. G., at the [city] of \_\_\_\_\_, in the county of \_\_\_\_\_, and State of New York, by [\*] delivering to said F. G. a copy thereof.<sup>1</sup>

A. B.

[Jurat as in form No. 46.]

[*Or* as above to (\*), and from thence as follows: By leaving a copy thereof at the residence of said F. G. (*or* the place where said F. G. was sojourning) at the time of said service, to wit (No. ——— street), in the (city) of \_\_\_\_\_, in the county of \_\_\_\_\_, and State of New York, with a person of suitable age and discretion, to wit: of the age of at least \_\_\_\_\_ years, who stated that said F. G. was not at home (*or* was ill, and could not see this deponent), but that he would hand the said copy to him immediately (*or* on his return) (*or* state other circumstances of service, to give the surrogate good reason to believe that the copy came to the knowledge of the person served in time for him to attend at the return day).]

A. B.

[Jurat as in form No. 46.]

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 No. 1347.

### Affidavit to Procure Order for Service of Citation upon a Resident of the State by Publication.

(Code Civ. Pro., § 2521.)

[Title of proceeding.]

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that he is [description of affiant may be here inserted].

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, he made the following efforts to serve the annexed citation, which had been delivered to him by \_\_\_\_\_ for the purpose of such service, upon I. J., one of the persons to whom it is directed, who then resided [and now resides] at \_\_\_\_\_, in the county

<sup>1</sup> See *Boerum v. Betts* (1 Dem., 471), *Matter of Carhart* (2 Dem., 627; 67 How. Pr., 216), *Matter of Gregory* (13 Misc., 363), *Matter of Merritt* (5 Dem., 544), *Matter of Washburn* (12 Misc., 242), *Matter of Lawrence* (26 State Rep., 238), *Matter of Bonnett* (1 Connolly, 294), *Matter of Porter* (1 Misc.,

489), *Potter v. Ogden* (136 N. Y., 384), *Matter of Washburn* (12 Misc., 242), *O'Connor v. Huggins* (113 N. Y., 511), *Matter of Carhart* (2 Dem., 627). Any person may serve the citation although a party to the special proceeding (Code Civ. Pro., § 2520).

of \_\_\_\_\_, in this State, in the manner prescribed by section 2520 of the Code of Civil Procedure, to wit [here state the efforts made].

And deponent further says, that the said I. J. cannot be found [or that the said I. J. evades such service, so that it cannot be made upon him].

A. B.

[Jurat as in form No. 46.]

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No. 1348.

**Order Directing Service of Citation on Resident of this State by Publication.**

(Code Civ. Pro., § 2521.)

[Title of proceeding.]

It having appeared to my satisfaction by the affidavit of A. B., dated \_\_\_\_\_, 18—, that proper and diligent effort has been made to serve the citation, a copy of which is hereto annexed, upon I. J. [one of the persons], to whom it is directed, who resides at the [city] of \_\_\_\_\_, in the county of \_\_\_\_\_, in this State, and that the said F. G. cannot be found [or evades the service of the said citation, so that it cannot be made upon him]:

Now, upon the application of \_\_\_\_\_, I do hereby order and direct, that service of the said citation upon said F. G. be made by leaving a copy thereof, etc. [concluding as in form No. 91, making necessary changes].<sup>1</sup>

Dated \_\_\_\_\_, 18—.

F. W., *Surrogate of* \_\_\_\_\_ *County.*

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No. 1349.

**Order for Service by Publication in Cases Provided for by Sections 2522, 2523 of the Code of Civil Procedure.**

(Code Civ. Pro., § 2524.)

[Title of proceeding.]

It having appeared to my satisfaction by the duly verified petition of A. B., dated \_\_\_\_\_, 18— [or state other method

<sup>1</sup> See, also, sections 436 and 437, Code Civ. Pro., the provisions of which sections are made applicable to this order by section 2521, id.

of proof], that the F. G. Company, a corporation named in the citation, a copy of which is hereto annexed, is a foreign corporation [*or* that G. H., one of the persons named in the citation, a copy of which is hereto annexed, is not a resident of the State; *or*, being a resident of the State, has departed therefrom with intent to defraud his creditors (*or* to avoid the service of process); *or* is a resident of the State, but is temporarily absent therefrom, *or* state in like manner other circumstances bringing the case within the provisions of sections 2522 or 2523 of the Code of Civil Procedure], and that the case is one of those specified in sections 2522 [*or* 2523] of the Code of Civil Procedure :

I do hereby, upon the application of said A. B., order and direct, the service of the said citation upon the said F. G. Company [*or* upon said G. H.] by publication of said citation in two newspapers published in the county of —, to wit: the [name of newspaper], a newspaper published at the [city] of —, and the, etc. (as above), [and also in the (name of newspaper), a newspaper published at —, in the county of —,<sup>1</sup> once in each of six successive weeks, or at the option of said A. B. [naming petitioner], by delivering a copy of the said citation, without the State, to the said G. H. [*or* to an officer of said F. G. Company, specified in section 431 or 432 of the Code of Civil Procedure],<sup>2</sup> in person [and to the person with whom said G. H. is sojourning].<sup>3</sup>

[\*] And I do hereby further order and direct, that on or before the day of the first publication of said citation, the said A. B. [naming petitioner] deposit in the post-office, at —, a copy of the said citation and of this order, contained in a securely closed postpaid wrapper, directed to the said G. H. [*or* to the said F. G. Company] at — [and a further copy of the said citation, likewise contained in a securely closed postpaid wrapper, directed to the person with whom the said G. H. is sojourning].<sup>4</sup>

<sup>1</sup> See section 2535, Code Civ. Pro., as to publication of citation; and see note 1 to form No. 650, and ch. 262 of Laws of 1885, as to publication in State paper.

<sup>2</sup> Insert this clause when the service is made upon a corporation.

<sup>3</sup> Insert this clause in brackets, if the person to be served is an infant under the age of fourteen years.

<sup>4</sup> See the cases cited in note 1, p. 68, to form No. 94; also *McCully v. Heller* (66 How. Pr., 468), *Piper v. Williams* (5 Month. L. Bul., 31), *Phelps v. Phelps*

[Or as above to (\*), and from thence as follows: And I being satisfied by the said petition (etc.) that the said petitioner cannot, with reasonable diligence, ascertain a place where the said G. H. would probably receive matter transmitted through the post-office, do hereby dispense with the deposit of any papers therein.]

Dated at the \_\_\_\_\_ of \_\_\_\_\_, in the county of \_\_\_\_\_, and State of New York, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

F. W., *Surrogate of* \_\_\_\_\_ *County.*

No. 1350.

**Affidavits of Service of Citation without the State, and of Publication and Deposit in the Post-office.**

(Code Civ. Pro., § 2525.)

Substantially as in forms Nos. 97, 98, 99.<sup>1</sup>

No. 1351.

**Affidavit of Service of Citation upon Infant under Fourteen, Lunatic, etc., or upon a Corporation**

(Code Civ. Pro., § 2526.)

Same, substantially, as forms Nos. 74 to 79.

No. 1352.

**Order for Additional Service in Case of Infant, etc.**

(Code Civ. Pro., § 2527.)

Substantially the same as forms Nos. 80 and 81, making the necessary changes.<sup>2</sup>

(6 Civ. Pro. R. [Browne], 117), *Matter of Macaulay* (94 N. Y., 574), *Saw Mill Co. v. Dock* (3 Dem., 55; 7 Civ. Pro., 237), *Matter of Merritt* (5 Dem., 544), *In re Koch* (19 Civ. Pro. R., 165), *Matter of Washburn* (12 Misc., 242), generally as to order.

The affidavits or petition, upon this application, will be similar to forms Nos. 92 and 93. See as to such affidavits, note 2 to form No. 92, and see *Argall v. Bachrach* (18 Week. Dig., 267), *Kennedy v. N. Y. Life Ins. and*

*Trust Co.* (101 N. Y., 487, rev'g S. C., 32 Hun, 35), *Lockwood v. Brantly* (31 Hun, 155), *Greenbaum v. Dwyer* (4 Civ. Pro. [Browne], 276; S. C., 66 How. Pr., 266), *Ratel v. Ratel* (17 Week. Dig., 136), *Donnelly v. West* (66 How. Pr., 428), *Piser v. Lockwood* (30 Hun, 6).

<sup>1</sup>In the case of a citation to a non-resident executor, six weeks did not intervene between the day of its issue and the time at which it was returnable, an order was made for its service

No. 1353.

**Notice of Appearance in Surrogate's Court.**

(Code Civ. Pro., § 2528.)

[Title of proceeding.]

SIR—Take notice, that I [have been retained by and] appear [for A. B.] in the above entitled proceeding, and demand that all notices and papers therein be served upon me at [my office] No. ——— street, in the city of ———, N. Y. [or at my office in the village (or town) of ———, in the county of ———, N. Y.].<sup>1</sup>

Dated ———, 18—.

Yours, etc.,

A. B. [or C. D., *Attorney for A. B.*]

No. ——— street, ———, N. Y.

To M. F., *Attorney for* ———, and to P. P., *Surrogate of* ——— *County.*

No. 1354.

**Order Appointing Special Guardian of Infant or Lunatic, etc.**

(Code Civ. Pro., § 2530.)

[Title of proceeding.]

C. D., an infant [or lunatic, etc], [\*] not having appeared in the above entitled proceeding by his general guardian [or by his committee]: [†]

It is hereby ordered, upon the application of ———, due notice of said application having been personally served upon said C. D. [and also upon G. H., the committee of said C. D.],<sup>2</sup> that F. M., of ———, whose written consent to be

by publication, or personally, without the State, and service was made personally upon the executor out of the State, more than thirty days before the return day—*Held*, that the service was sufficient. (Matter of Macaulay, 94 N. Y., 574.)

<sup>2</sup> See Matter of Cortright (3 Dem., 13), In re Stephen's Estate (2 N. Y. Supp., 36).

<sup>1</sup> See Weller v. Suggett (3 Redf., 249), Matter of Macaulay (27 Hun, 577; aff'd S. C., 94 N. Y., 574), Krause v. Averill (4 Civ. Pro. R. [Browne], 410; S. C., 66 How. Pr., 97), Phelps v. Phelps (6 Civ. Pro. R.

[Browne], 117), Ratel v. Ratel (17 Week. Dig., 136), Matter of Halsey (13 Abb. N. C., 353; 2 Dem., 577), Code Civ. Pro., § 2529, Peters v. Carr (2 Dem., 22), Crossman v. Crossman (id., 69), Merritt v. Jackson (id., 214), Matter of Hamilton (69 Hun, 200), Laws of 1896, chap. 570; amending section 2523, Code Civ. Pro., taking effect September 1, 1896; Laws of 1893, chap. 686, amending section 2509, Code Civ. Pro.; Chatfield v. Hewlett (2 Dem., 191), and see cases cited in notes to form No. 59.

<sup>3</sup> See, as to notice, section 2531 of Code Civ. Pro.



the special guardian of said C. D., in said proceeding, has been duly filed, be and he is hereby appointed special guardian of said C. D., to appear for him in this proceeding.

Dated at \_\_\_\_\_, in the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

F. W., *Surrogate*.

[*Or* as above to (\*), and from thence as follows: Having appeared herein by M. N., his general guardian (*or* committee), and I having inquired into the facts, and there being ground to suppose that the interest of said M. N. is adverse to that of said infant (*or* lunatic, etc.) (*or* that the interests of said C. D. require the appointment of a special guardian for him herein).]

[Conclude as in above form from (†).<sup>1</sup>]

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No. 1355.

**Consent of Special Guardian to His Appointment.**

(Code Civ. Pro., § 2530.)

[Title of proceeding.]

I, F. M., of \_\_\_\_\_, do hereby consent to be appointed the special guardian of C. D., an infant [*or* lunatic, etc.], in the above entitled proceeding [I having no interest therein adverse to said C. D.].<sup>2</sup>

Dated \_\_\_\_\_, 18—.

F. M.

[Acknowledgment as in form No. 340.]

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No. 1356.

**Notice of Application for Appointment of Special Guardian for Infant, etc.**

(Code Civ. Pro., § 2531.)

[Title of proceeding.]

SIR—Take notice, that an application will be made to the

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<sup>1</sup> See *Story v. Dayton* (22 Hun, 450), *Pinckney v. Smith* (26 Hun, 524), *In Matter of Ludlow* (5 Redf., 391), *Gunning v. Lockman* (3 Redf., 273), *Matter of Watson* (2 Dem., 642), *Matter of Leinkauf* (4 Dem., 1), *Farmers' Loan and Trust Co. v. McKenna* (3 id., 219), *Matter of Seabra* (38 Hun, 218), *Tilden v. Dows* (2 Dem., 489), *Matter of Don-*

*lon* (66 Hun, 199), *Potter v. Ogden* (136 N. Y., 384), *Laws of 1893*, ch. 686, amd'g § 2509 Code Civ. Pro.

<sup>2</sup> Rule 10 of the surrogate's court of New York county, requires this statement to be made, and it seems to be proper in every case, although not required by the statute. See also rules 11 and 12 of N. Y. Surrogate's Court.

surrogate of \_\_\_\_\_ county, at, etc., on, etc., for the appointment of a special guardian, to appear for [you] in the above entitled proceeding.

Dated \_\_\_\_\_, 18—.

Yours, etc.,

A. B., *Petitioner* [*or Attorney for Petitioner*].

[Office address.<sup>1</sup>]

To C. D., etc.

\_\_\_\_\_  
No. 1357.

### Proof of Service of Citation or Subpœna, etc.

(Code Civ. Pro., § 2532.)

See forms contained in chapter fifth, page 38, *ante*, for proof of service of summons issued out of the Supreme Court.<sup>2</sup>

\_\_\_\_\_  
No. 1358.

### Verification of Written Pleading, etc., in Surrogate's Court.

(Code Civ. Pro., § 2534.)

See forms Nos. 151, etc., and form No. 52, for verification of petition.<sup>3</sup>

## ARTICLE SECOND.

### FORMS RELATING TO HEARING, INCLUDING TRIAL BY JURY AND REFERENCE.

(Code Civ. Pro., Ch. 18, Tit. 2, Art. 2.)

No. 1359. Petition to surrogate to take examination of an aged, sick or infirm witness.

<sup>1</sup> See note 2 to form No. 122, *Matter of Monell* (46 State Rep., 693).

<sup>2</sup> In every other case than of service of a citation or subpœna, proof of service must be made by affidavit; or, where the person served is of full age, and not incompetent, by a written admission signed by him, accompanied with proof, by affidavit or otherwise, of the genuineness of the signature. (Code Civ. Pro., § 2532.) For form of admission of service and proof thereof, see form No. 89.

<sup>3</sup> A verification to a petition, stating that the petitioner "knows the con-

tents thereof; and that the same are true"—*Held*, to be a substantial compliance with the requirements of sections 526 and 2534 of the Code of Civ. Pro. Such a statement is equivalent to saying that the allegations are true to the knowledge of deponent. (*Matter of Macaulay*, 94 N. Y., 574.)

See, also, *Moorhouse v. Hutchinson* (2 Dem., 429), *Crosier v. Cornell Steamboat Co.* (27 Hun, 215; *aff'd.* without opinion, 92 N. Y., 626), *Thompson v. Mott* (2 Dem., 154), *Matter of Wisner* (3 id., 11).

- No. 1360. Order for examination of a witness in another county.  
 1361. Order appointing referee to take testimony of sick, etc., witness.  
 1362. Return of surrogate of another county of examination of witness before him.  
 1363. Decision of surrogate upon a trial by him of an issue of fact.  
 1364. Notice of exceptions to surrogate's decision.  
 1365. Order appointing referee on accounting.  
 1366. Referee's report on accounting.  
 1367. Order of surrogate for trial by jury.

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No. 1359.

**Petition to Surrogate to take Examination of an Aged,  
 Sick or Infirm Witness.**

(Code Civ. Pro., §§ 2539, 2540.)

[Title of proceeding.]

*To the Surrogate of ——— County :*

The petition of A. B. respectfully shows, that he is a party to the above entitled special proceeding which has been instituted in the surrogate's court of said county [*or* of the county of ———], to procure the probate [*or* the revocation of the probate] of the will of C. D., late of ———, in the [said] county of ——— [*or* state other purpose of proceeding].

That the testimony of I. J. who [resides and] is at ———, in said county [*or* in the county of ———], is material and necessary to your petitioner in said proceeding [said I. J. being a subscribing witness to said will],<sup>1</sup> as he is advised by M. N., his counsel herein, who resides at, etc., to whom he has fully stated what he expects to prove by said witness, and verily believes.

That the said I. J. is so aged, being of the age of ——— years [*or* is so sick, *or* is so infirm], as to be unable to attend before you to be examined [within a reasonable time, to which the hearing of the said proceeding may be adjourned, to wit: within ——— days].<sup>2</sup>

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<sup>1</sup> Insert this clause where the facts authorize it. It is necessary to be inserted where the attendance of the witness is required in another county than that of the surrogate to whom the application is made. (Code Civ. Pro., § 2540.)

<sup>2</sup> Insert this clause in brackets, where the witness is in another county than that of the surrogate to whom the ap-

That [here state more particularly the circumstances which render it impossible for the witness to attend].

Wherefore your petitioner prays that you will proceed to the place where the said witness is, and there, as in open court, take his examination [*or* that you will make an order directing that the said witness be examined before F. P., the surrogate of ——— county],<sup>1</sup> and for such other or further order or relief as may be proper, and according to law.<sup>2</sup>

Dated ———, 18—.

A. B.

[Verification as in form No. 52.]

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No. 1360.

**Order for Examination of a Witness in Another County.**

(Code Civ. Pro., § 2540.)

[Title of proceeding.]

Upon the application of A. B., a party to the above entitled proceeding, which has been instituted [\*] to procure the probate [*or* the revocation of the probate] of the will of C. D., late of ———, in the county of ———, deceased, and upon proof by affidavit [to wit: by the verified petition] of said A. B., dated ———, 18—, to my satisfaction, that the testimony of I. J., who [resides and] is at ———, in the county of ———, is material and necessary to said A. B., he being a subscribing witness to said will, and that said I. J. is so aged [*or* sick, *or* infirm] as to be unable to attend before me to be examined, and I having good reason to believe that said C. D. cannot attend before me within a reasonable time, to which the hearing of said proceeding can be adjourned :

I do hereby order and direct, that the said witness, I. J., be examined before Hon. T. P., the surrogate of the said county of ———, on the ——— day of ———, 18—, at [state place], at ——— o'clock in the ——— noon.

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plication is made. (Code Civ. Pro., § 2540.)      fied petition is an affidavit. (Code Civ. Pro., § 3343, subd. 11.)

<sup>1</sup> See note 2 to form No. 1359.

See, also, *Matter of Gee* (24 Civ.

<sup>2</sup> The proof may also be made by the affidavit of the applicant. A veri-  
Pro. R., 241).

And I do hereby further order and direct, that a certified copy of this order be delivered to said surrogate of \_\_\_\_\_ county, on or before the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and that \_\_\_\_\_ days' notice, in writing, of such examination, be given to [naming the persons] personally [or state other manner of service].

Dated at \_\_\_\_\_, in the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

F. W., *Surrogate of* \_\_\_\_\_ *County.*

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No. 1361.

**Order Appointing Referee to take Testimony of Sick, etc.,  
Witness.**

(Code Civ. Pro., §§ 2539, 2540.)

As in last form, No. 1360, to [\*], and from thence as follows: To [state object of proceeding], and upon proof by affidavit [to wit: by the verified petition] of said A. B., dated \_\_\_\_\_, 18—, to my satisfaction, that the testimony of I. J. who [resides and] is at \_\_\_\_\_, in the county of \_\_\_\_\_, is material and necessary to said A. B., and that said I. J. is so aged [or sick, or infirm], as to be unable to attend before me to be examined:

I do hereby order and direct, that the said witness, I. J., be examined before M. P., of \_\_\_\_\_, who is hereby appointed a referee to take the testimony of said I. J., and to report the same to me.

Dated, etc. [as in last form].

[Signature as in last form.]

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No. 1362.

**Return of Surrogate of Another County of Examination of  
Witness Before Him.**

(Code Civ. Pro., § 2540.)

[Title of proceeding.]

Examination of I. J., a witness, taken before T. P., surrogate of \_\_\_\_\_ county, in the above entitled proceeding, at \_\_\_\_\_, in the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon [to which time and place the said examination was adjourned by said surrogate], pursuant to article second of title second of chapter eighteenth of the Code of Civil Procedure.

Present, F. G., for \_\_\_\_\_; G. H., for \_\_\_\_\_.

I. J., being first duly sworn by said surrogate, testified as follows, being examined by F. G., for \_\_\_\_\_ [here insert direct testimony of witness].

And on his cross-examination by G. H., for \_\_\_\_\_, said I. J. further testified as follows [here insert cross-examination of witness].

[Signature of witness.]

I, T. P., surrogate of \_\_\_\_\_ county, do hereby certify that the foregoing examination was taken before me in the above entitled proceeding, at the time and place aforesaid, pursuant to the order, of which a certified copy is hereto annexed, and was then and there reduced to writing, and subscribed by said I. J. [or state other manner of authentication] in my presence.

In witness whereof, I have hereunto set my hand and the seal of the surrogate's court of \_\_\_\_\_ county, on this \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_, in the said county of \_\_\_\_\_.

[L. s.]

T. P., *Surrogate.*

No. 1363.

### Decision of Surrogate upon a Trial by Him of an issue of Fact.

(Code Civ. Pro., § 2545.)

Substantially as in form No. 431, making necessary changes.<sup>1</sup>

<sup>1</sup>An appeal from a surrogate's decree cannot be heard, when the case contains no decision of the surrogate pursuant to section 2545 of the Code of Civil Procedure. (Waldo v. Waldo, 19 W. Dig., 100; S. C., 32 Hun, 251.)

See, also, Matter of Chauncey (19 Week. Dig., 457; S. C., 32 Hun, 429), Matter of Winslow (12 Misc., 254), Mills v. Hoffman (92 N. Y., 181), Dickel v. Yates (2 Dem., 229), Matter of Dodge (40 Hun, 443; 105 N. Y., 585), Matter of Hoyt (5 Dem., 284), Tilby v. Tilby (3 id., 258), Matter of Keef (43 Hun, 98), Hood v. Hood (5

Dem., 50), Matter of Kanfan (39 State Rep., 236), Matter of O'Brien (5 Misc., 136), Matter of Hesdra (4 Misc., 37), Matter of Hamilton (76 Hun, 200), People ex rel. Morgan v. Rollins (33 Hun, 47). And see cases cited in note 1 to form No. 1365.

As to reversal of surrogate's decree under section 2545 of Code Civ. Pro., see In the Matter, etc., of Ross (87 N. Y., 514), Snyder v. Sherman (88 N. Y., 656), Matter of will of Smith (95 N. Y., 516; S. C., 19 Week. Dig., 220), Loder v. Whelpley (111 N. Y., 239), Burger v. Burger (id., 523), Matter of

No. 1364.

**Notice of Exceptions to Surrogate's Decision.**

(Code Civ. Pro., § 2545.)

As in form No. 418, substantially, making necessary changes. (See, also, note 1 to that form.)

No. 1365.

**Order Appointing Referee on Accounting.**

(Code Civ. Pro., § 2546.)

[Title of proceeding.]

J. H. and C. F., the executors of the last will and testament of J. H., late of the [city] of ———, deceased, having presented an account of their proceedings as such executors [and as testamentary trustees under said will] for final settlement, and sundry persons interested in the said estate having filed objections to the said account:

It is ordered, that the said account, objections and claims be referred to J. F., Esq., of ———, counselor at law, to examine the same, and to take and report the evidence upon the facts in the said proceeding, and to examine the said accounts, and to hear and determine all questions arising upon the settlement of the said account which the surrogate has power to determine, and to make a report thereon, subject, however, to confirmation by the surrogate.

And it is further ordered, that the first hearing of this matter before the said referee take place at the office of said referee, No. ——— street, in the [city] of ———, N. Y., on the ——— day of ———, 18—, at ——— o'clock in the ——— noon of that day, and that the said referee bring in his report herein before the surrogate, on the ——— day of ———, 18—, at ——— o'clock in the ——— noon, which last mentioned day is appointed for the hearing of the parties hereto, at the surrogate's office in the city of ———, on the confirmation of the report of the said referee.<sup>1</sup>

F. W., *Surrogate.*

Sprague (125 id., 732), Matter of Folts (71 Hun, 492), Matter of Palmateer (78 id., 43), Matter of Torkinton (79 id., 128), Matter of Morgan (104 N. Y., 75), Hewlett v. Elmer (103 id., 156), Matter of Miner (146 id., 121),

Matter of Gaines (84 Hun, 520), Matter of Seagrist (1 App. Div., 615).

<sup>1</sup> See Matter of Lefingwell (30 Hun, 528), Benedict v. Cooper (3 Dem., 362), In re Pearsall (4 N. Y. Supp., 365), Matter of Plumb (27 State Rep., 299),

No. 1366.

**Referee's Report on Accounting.**

(Code Civ. Pro., § 2546.)

[Title of proceeding.]

*To the Surrogate's Court in and for the County of ——— :*

It having, by order, made and entered herein on the ——— day of ———, 18—, been duly referred to me as referee to examine the account of J. H. and C. F., as executors of the last will and testament of P. H., deceased [and as testamentary trustees under said will], and the objections and claims thereto, and to take and report the evidence upon the facts in the said proceedings and to examine the said account, and to hear and determine all questions arising upon the settlement of the said account which the surrogate has power to determine; and having been duly sworn as such referee, the oath taken by me as such being hereto annexed; and having thereupon been attended by counsel for the several parties appearing herein, and having heard the proofs, allegations and evidence of the respective parties, I do find, determine and report as follows:

*First.* That the account presented and filed by said J. H. and C. F., as executors of the last will and testament of R. H. deceased, is correct.

That the said executors are charged therein with all moneys and property received by them from or on account of the said estate, and have made for and on account of said estate, and should be allowed herein the payments set forth and credited in their said account as such executors.

[*Second.* That the amount received by said executors from the proceeds of sales of securities owned by said testator, was all that was collectable and receivable therefrom by them; that said securities were pledged by the testator as collateral to certain notes and indebtedness, and all the moneys realized from the sale of said securities over and above the amount of such notes or indebtedness, for which the same were pledged, was paid over to, and is accounted for by, said executors in their account filed herein.]

*Third.* That the moneys received by said executors from

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Matter of Bayer (54 Hun, 189), Matter of Moulton (32 State Rep., 631), Matter of May (31 id., 50), Matter of Wheeler (28 id., 638), In re Prout (18 Civ. Pro. R., 270), Matter of Falls (29 State Rep., 759), Matter of Havemeyer (25 id., 59), Matter of Bedford (30 Hun, 551), Matter of Gray (91 N. Y., 502), Mills v. Hoffman (92 N. Y., 181, rev'g S. C., 26 Hun, 594), Dickel v. Yates (2 Dem., 229), Matter of Dodge (40 Hun, 443; 105 N. Y., 585), Matter of O'Brien (45 Hun, 284).



the sales of [other] securities and personal property owned by said testator, was all that the said [last mentiond] securities and property were fairly worth.

That said sales were made at public auction in the usual manner, and that the ordinary means, by advertising, etc., and due diligence and prudence, were used in obtaining a just price for the same.

*Fourth.* That the said executors are not chargeable with or accountable herein for the articles enumerated in the inventory filed by them, and therein marked "exempt," or for so much of the articles enumerated and approved in their said inventory, and therein marked "reserved for widow," as amount in value to [three hundred] dollars by said inventory and appraisal.

*Fifth.* That the total amount of moneys received and realized by said executors from the body or principal of the testator's estate, which came into their hands as executors on his decease, is ——— dollars, and the total amount expended by them therefrom for debts of the testator and funeral expenses is ——— dollars, and there is now in their hands thereof, in money, the sum of ——— dollars.

*Sixth.* That the said executors have also in hand, and unadministered and undisposed of, the following property and assets belonging to said estate, to wit [enumerate same].

That the claims mentioned in said account against the said J. H. and C. F., personally, were, at the time of the testator's death, and have ever since been, uncollectible, and are probably of little or no value [beyond the share or interest of said J. H. and C. F. in the testator's estate]<sup>1</sup> [or insert other findings as may be necessary].

All of which is respectfully submitted. The evidence and testimony and proofs, taken by me herein, are also herewith certified and returned.<sup>2</sup>

Dated ———, 18—.

J. F., *Referee.*

<sup>1</sup> As to claims against the executors personally, see *Baucus v. Stover* (89 N. Y., 1; rev'g S. C., 24 Hun, 109), *Matter of Consalus* (95 N. Y., 340), *Matter of Potter* (32 Hun, 599), *Matter of Jones* (2 Misc., 221), *Matter of Cooper* (6 id., 501).

<sup>2</sup> See note 1 to last form No. 1365. By an amendment to § 2546 of Code Civ. Pro., by ch. 796 of 1895, the report must be passed upon and confirmed, approved, modified or rejected by a surrogate within sixty days after it has been submitted to him.

No. 1367.

**Order of Surrogate for Trial by Jury.**

(Code Civ. Pro., § 2547.)

See form No. 353, *ante*.<sup>1</sup>**ARTICLE THIRD.****FORMS RELATING TO DECREES AND ORDERS OF THE SURROGATE'S COURT AND THE ENFORCEMENT THEREOF.**

(Code Civ. Pro., Ch. 18, Tit. 2, Art. 3.)

- No. 1368. Transcript of surrogate's decree directing payment of sum of money.
1369. Execution upon surrogate's decree directing payment of sum of money.
1370. Affidavit in proceedings for contempt, in not obeying surrogate's decree directing payment of sum of money.
1371. Affidavit of appraisers as to days occupied, and expenses in making appraisal and inventory.

No. 1368.

**Transcript of Surrogate's Decree, Directing Payment of Sum of Money.**

(Code Civ. Pro., § 2553.)

|  |   |   |
|--|---|---|
| <b>Name (and Residence, Title, Trade or Profession)<sup>2</sup> of Party against whom Decree was Rendered.</b> |   | <b>Name of Party in whose favor Decree was Rendered.</b>              |
|  |   |   |
| <b>Amount Directed to be Paid.</b>   | <b>Time of Filing Decree.</b>                     | <b>Name of Attorney for Party in whose favor Decree was Rendered.</b> |
|  | _____, 18—, _____ o'clock and _____ minutes, — M. |   |

<sup>1</sup> As to review of trial by jury, pursuant to the order, see sections 2548, 2549, Code Civ. Pro.

<sup>2</sup> These are required to appear by section 1246 of Code Civ. Pro., in case any of them are stated in the judgment.

SURROGATE'S COURT, }  
 \_\_\_\_\_ County, } ss.:

I do hereby certify that the foregoing is a transcript of a decree for the payment of a sum of money, made and entered in the surrogate's court of \_\_\_\_\_ county.

In witness whereof, I have hereunto set my hand and the seal of the said court, on this \_\_\_\_\_ day of \_\_\_\_\_, 18—<sup>1</sup>

[L. s.] F. W., *Surrogate of \_\_\_\_\_ County*  
 [or M. G., *Clerk of Surrogate's Court of \_\_\_\_\_ County*].

No. 1369.

**Execution upon Surrogate's Decree Directing Payment of Sum of Money.**

(Code Civ. Pro., § 2554.)

*The People of the State of New York, to the Sheriff [or the Coroners, or A. N., a Coroner, of the County of \_\_\_\_\_]:*<sup>2</sup>

Whereas, a decree was made by the surrogate's court of the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in a proceeding in said court, in the matter of, etc. [giving title of proceeding], directing the payment by A. B. [the executor, etc.], of the sum of \_\_\_\_\_ dollars into said surrogate's court [or to C. D., etc. (a), party to said proceeding], and a transcript of said decree was filed and said judgment was duly docketed in the office of the clerk of your county on the \_\_\_\_\_ day of \_\_\_\_\_, 18—; and,

Whereas, there is now actually due upon the said decree the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, with interest thereupon from the \_\_\_\_\_ day of \_\_\_\_\_, 18—:

Now, therefore, you are hereby required to satisfy the said decree out of the personal property of the said A. B., and if sufficient personal property cannot be found, out of the real property belonging to him at the time when said judgment was docketed in the clerk's office of the county of \_\_\_\_\_, or at any time thereafter, and to return this

<sup>1</sup> As to assignment and satisfaction of decree, see section 2553, Code Civ. Pro., and form No. 489; Matter of Wilcox (1 Misc., 55).      <sup>2</sup> See as to direction of execution, section 1362, Code Civ. Pro., and note 1 to form No. 556.

execution to the surrogate's court of \_\_\_\_\_ county within sixty days after the receipt thereof.

Witness, Hon. F. W., surrogate of \_\_\_\_\_ county, at \_\_\_\_\_, on this \_\_\_\_\_ day of \_\_\_\_\_, 18—. <sup>1</sup>

[L. s.] F. W., *Surrogate of \_\_\_\_\_ County*  
[or P. M., *Clerk of Surrogate's Court of \_\_\_\_\_ County*].

INDORSED.

[Title of proceeding.]

*Execution to [the Sheriff] of \_\_\_\_\_ County:*

Levy \_\_\_\_\_ dollars, with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, besides your fees and poundage, as within directed, and return this execution within sixty days after its receipt by you to the surrogate's court of \_\_\_\_\_ county.

F. W., *Surrogate, etc.*

[or P. M., *Clerk, etc.*].

Received \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock — M.

M. N., *Sheriff*

[By M. N., *his Deputy*].

No. 1370.

**Affidavit in Proceedings for Contempt in not Obeying Surrogate's Decree Directing Payment of a Sum of Money.**

(Code Civ. Pro., § 2555.)

[Title of proceeding.]

\_\_\_\_\_ COUNTY, *ss.:*

A. B., of \_\_\_\_\_, being duly sworn, says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a decree was rendered by the surrogate's court of the county of \_\_\_\_\_, a copy of which is hereto annexed [or state substance of decree].

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a copy of the said decree, duly certified by the surrogate of \_\_\_\_\_ county [or by the clerk of the surrogate's court of \_\_\_\_\_ county],

<sup>1</sup> See, generally, as to executions, Ritterman (2 Dem., 242). See, also, notes to forms 556, etc., and see Bingham v. Burlingame (19 Week. Dig., 447; S. C., 33 Hun, 211), Matter of Dissosway (91 N. Y., 235), Disosway (7 Misc., 502).  
v. Hayward (1 Dem., 175), Joel v.

was served upon the said C. D. [naming the party directed to make the payment] [and payment of the sum of \_\_\_\_\_ dollars, required by said decree to be paid by him, was duly demanded by said deponent (*or* by M. F., the duly authorized attorney of said deponent, whose power of attorney was exhibited and the nature of his authority stated at the time when said demand was made and copy served) (as appears by the affidavit of said M. F. hereto annexed)].<sup>1</sup>

[That a transcript of said decree was duly filed, and said judgment duly docketed, in the clerk's office of the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and an execution was issued against the property of the said C. D., on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, as prescribed by section 2554 of the Code of Civil Procedure. to the sheriff of said county of \_\_\_\_\_, a copy of which execution is hereto annexed, and that said execution has been returned by the said sheriff wholly unsatisfied (*or* unsatisfied to the extent of \_\_\_\_\_ dollars), and that said amount, with interest, etc., still remains due and unpaid upon said decree from said C. D. to the said deponent].<sup>2</sup>

That, etc. [as in form No. 209, substantially, from (+)].

A. B.

[Jurat as in form No. 46.]

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No. 1371.

**Affidavit of Appraisers as to Days Occupied, and Expenses in Making Appraisal and Inventory.**

(Code Civ. Pro., § 2565.)

\_\_\_\_\_ COUNTY, ss. :

A. B. and C. D., being severally duly sworn, say, and each for himself says, that they were appointed by the surrogate of \_\_\_\_\_ county, by an order made and entered

<sup>1</sup> See section 2555, Code Civ. Pro., 19; S. C., 34 Hun, 302). In the cases also note 1 to form No. 1186. mentioned in subs. 1 and 4 of section

<sup>2</sup> See In the matter of Dissosway (91 N. Y., 235), Woodhouse v. Woodhouse (5 Redf., 131), Matter of Kellinger (1 Dem., 433), Joel v. Ritterman (5 Redf., 136), In re Snyder, Ex. (21 Week. Dig.,

2555, Code Civ. Pro., this clause in brackets is to be omitted. For forms of further proceedings for contempt, see forms 1185, etc.

by him on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, appraisers of the goods, etc., of E. F., deceased.

That they, as such appraisers, appraised and made an inventory of the said goods, etc.

That the time actually and necessarily occupied by each of them in making said appraisal and inventory was \_\_\_\_\_ days, and that their actual expenses as such appraisers amounted to the sum of \_\_\_\_\_ dollars, to wit [state items of expenses].

A. B.

C. D.

[Jurat as in form No. 46.]

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#### ARTICLE FOURTH.

#### FORMS RELATING TO APPEALS FROM DECREE OR ORDER OF SURROGATE'S COURT.

(Code Civ. Pro., Ch. 18, Tit. 2, Art. 4.)

- No. 1372. Affidavit by person appealing, not a party to the special proceeding.
- 1373. Notice of entry of surrogate's, etc., decree, or order to limit time of appeal therefrom.
- 1374. Notice of appeal from decree or order of surrogate or surrogate's court.
- 1375. Undertaking on appeal from surrogate's, etc., decree or order, in cases under sections 2577, 2578, Code of Civil Procedure.
- 1376. Judgment or order upon appeal from surrogate's, etc., decree.
- 1377. Order awarding jury trial upon reversal of surrogate's decree in probate cases.

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#### No. 1372.

#### Affidavit by Person Appealing, not a Party to the Special Proceeding.

(Code Civ. Pro., § 2569.)

[Title of proceeding.]

\_\_\_\_\_ COUNTY, ss. :

E. F., of \_\_\_\_\_, being duly sworn, says, that he [\*] is a creditor of [or a person interested in] the estate of M. N., deceased [or in the fund affected by the decree (or order) entered in the above entitled proceeding on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, by the surrogate's court (or surrogate)

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<sup>1</sup> Appraisers have no right to receive for their fees more than the statute allows, however large the estate may be, unless the parties interested consent. (Matter of Harriott, 145 N. Y., 540.) Under the amendment of § 2711, Code Civ. Pro., by ch. 686 of Laws of 1893, the number of days' services

of ——— county (state nature of decree or order)], by reason of [state indebtedness or interest].

That he was not a party to the above entitled proceeding, but was entitled by law to be heard therein upon his application.

[Or as above to (\*) and from thence as follows: Has acquired, since the decree (or order) made and entered in the above entitled proceeding by the surrogate's court (or surrogate) of ——— county, on the ——— day of ———, 18— (state nature of decree or order), a right (or interest) in the estate of M. N., deceased (or in the fund affected by said decree, etc.), which right (or interest) is as follows (state same); that said right (or interest) would have entitled him to be heard, if it had been acquired previously to the time when the said decree (or order) was made.<sup>1</sup>]

E. F.

[Jurat as in form No. 46.]

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No. 1373.

**Notice of Entry of Surrogate's, etc., Decree or Order to Limit Time for Appeal Therefrom.**

(Code Civ. Pro., § 2572.)

Substantially the same as form No. 551, making necessary changes.<sup>2</sup>

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No. 1374.

**Notice of Appeal from Decree or Order of Surrogate or Surrogate's Court.**

(Code Civ. Pro., § 2574.)

[Title of proceeding.]

Take notice, that A. B. appeals [upon questions of law and upon the facts]<sup>3</sup> to the Supreme Court<sup>4</sup> from the decree

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rendered by and the amount of the expenses of the appraiser must be verified by the affidavit of the appraiser, delivered to the executor, etc., and adjusted by the surrogate before payment of his fees. (Id.) See, also, provisions of § 2565, Code Civ. Pro., and see amendment to section 2509, Code of Civil Procedure by ch. 686 of Laws of 1893, forbidding clerk or other employee of surrogate's office to act as appraiser.

<sup>1</sup> This affidavit must be filed, and a

copy thereof served, with the notice of appeal, form No. 1374. (Code Civ. Pro., § 2569.)

<sup>2</sup> See, also, notes to form No. 551, and see *Matter of Williams* (6 Misc., 512).

<sup>3</sup> See section 2576, Code Civ. Pro., and *In re Jackson* (19 Week. Dig., 270), *Matter of Potter* (32 Hun, 599), *Matter of Will of Stewart* (135 N. Y., 413).

<sup>4</sup> See sections 2568, 2570, Code Civ. Pro., as to court to which appeal is to be taken, and in what cases.

[*or* final order, *or* order]<sup>1</sup> of the surrogate's court [*or* of the surrogate] of the county of \_\_\_\_\_, entered in the above entitled matter on the \_\_\_\_\_ day of \_\_\_\_\_, 18— [state nature of order] [*or* from so much of the decree (*or* order) of, etc., entered in the above entitled matter on the \_\_\_\_\_ day of \_\_\_\_\_, 18— (state nature of order), as directs that, etc.] [and that the said appellant intends to bring up, for review, upon said appeal, the order entered in said proceeding on the \_\_\_\_\_ day of \_\_\_\_\_, 18— (specifying briefly nature of the order)].<sup>2</sup>

Dated \_\_\_\_\_, 18—.

F. C., *Attorney for Appellant.*

[Office address.<sup>3</sup>]

To *the Surrogate of the County of* \_\_\_\_\_ [*and (specify parties to proceeding, etc.)*].<sup>4</sup>

No. 1375.

### Undertaking on Appeal from Surrogate's, etc., Decree or Order, in Cases under Sections 2577, 2578, Code Civil Procedure.

(Code Civ. Pro., §§ 2577, 2578, 2581.)

[Title of proceeding.]

Whereas, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a decree [*or* order] was made and entered in the above entitled proceeding [in the surrogate's court in (*or* by the surrogate of) the county of \_\_\_\_\_], admitting to probate a paper pur-

<sup>1</sup> The final determination of the rights of the parties to a special proceeding in a surrogate's court is styled, indifferently, a final order or a decree. (Code Civ. Pro., § 2550; *Matter of Dissosway*, 91 N. Y., 235). A direction of a surrogate's court, made or entered in writing, and not included in a decree, is styled an order. (Code Civ. Pro., § 2556.)

<sup>2</sup> See Code Civ. Pro., §§ 2571, 2578.

<sup>3</sup> See note 2 to form No. 122.

Where a notice of appeal is signed by an attorney, other than the attorney of record, the objection should be raised by a motion to dismiss the appeal. (*Thierry v. Crawford* (33 Hun, 366.)

<sup>4</sup> See Code Civ. Pro., §§ 2573, 2574.

As to appeal by person not a party to the proceeding, and affidavit required in such case, see Code Civ. Pro., §§ 2569, 2572, and form No. 1372; as to time for taking appeal, see *id.*, § 2572.

For sections of Code Civ. Pro. made applicable to these appeals, see section 2575, *id.*, and see forms under those sections; and see, further, *Matter of Williams* (6 Misc., 514), *Matter of Will of Stewart* (135 N. Y., 413), *Matter of Allen* (81 Hun, 91), *Matter of Miner* (146 N. Y., 121; *aff'g S. C.*, 72 Hun, 568).



porting to be the will<sup>1</sup> of G. M., deceased [*or otherwise describe nature of decree, or specify part of decree appealed from*]; and,

Whereas, A. B. [a party to said proceeding], feeling aggrieved thereby, intends to appeal therefrom to the Supreme Court:

Now, therefore, we, E. F., of ———, and G. H., of ———, do hereby jointly and severally undertake, to and with the people of the State of New York, pursuant to the statute in such case made and provided, [†] that the said appellant will pay all costs and damages which may be awarded against him upon said appeal, not exceeding two hundred and fifty dollars.

Dated ———, 18—.

E. F.

G. H.

[Acknowledgment or proof as in forms Nos. 340 and 538, and affidavits and approval by surrogate or a judge of the appellate court as in form No. 340.]

[*Or as above to (+), and from thence as follows: In the sum of ——— dollars, that the said appellant will pay all costs and damages which may be awarded against him upon said appeal, and will pay the said sum directed by said decree, etc., to be paid or collected (or will deposit, or distribute the money directed by said decree to be deposited or distributed, or will deliver the said property directed by said decree to be delivered), or the part thereof as to which the said decree (or order) is affirmed.*<sup>2</sup>]

[*Or as above to (\*), and from thence as follows: And do further, jointly and severally, undertake to and with said people, in the sum of ——— dollars, that if the said decree (or order) appealed from, or any part thereof, is affirmed, or if the said appeal is dismissed, the appellant will, within twenty days after the affirmance or dismissal, surrender himself in obedience to the said decree (or order), to the custody of the sheriff of the county of ———.*<sup>3</sup>]

<sup>1</sup> See section 2514, subd. 4, Code Civ. Pro.      appeal from an order or decree specified in section 2578 of Code Civ. Pro.

<sup>2</sup> Insert this clause in brackets, in case a stay of execution is desired on      <sup>3</sup> Insert this clause in brackets, in case a stay of execution is desired on

No. 1376.

**Judgment or Order upon Appeal from Surrogate's, etc., Decree.**

(Code Civ. Pro., § 2572.)

See forms Nos. 530 to 536, which may be adapted to the judgment required in these cases, excepting order of reversal in probate cases, as to which, see next form No. 1377; see, also notes to those forms.<sup>1</sup>

No. 1377.

**Order Awarding Jury Trial upon Reversal of Surrogate's Decree in Probate Cases.**

(Code Civ. Pro., § 2588.)

As in form No. 529 to [\*], and from thence as follows: The appeal from the decree of the surrogate's court in the county of \_\_\_\_\_, entered in the above entitled proceeding on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, admitting to probate [*or* revoking the probate of] the will of M. F., deceased, having been heard at this term, it is hereby, on motion of A. M., for the appellant, and after hearing M. N., for the respondent:

*Ordered*, that the said decree be and the same is hereby wholly reversed, and that a trial by a jury of the material

appeal from an order or decree specified in section 2579 of Code Civ. Pro.

See, also, as to undertaking and stay generally, *Sudlow v. Pinckney* (1 Dem., 158), *Du Bois v. Brown* (1 Dem., 317, 334), *Matter of Bullard* (4 Civ. Pro. Rep. [Browne], 284); and as to amount of undertaking, and how fixed, see Code Civ. Pro., § 2580, as to undertaking guaranteed by company, see last paragraph of note 1 to form No. 341, and ch. 401 of Laws of 1885, amending ch. 486 of Laws of 1881; *Nichols v. McLean* (20 Week. Dig., 492; S. C., 98 N. Y., 458), *Hurd v. Hannibal, etc.*, R. R. Co. (83 Hun, 109); also see notes to forms Nos. 340, 341, 538, as to undertaking generally.

As to how far proceedings are stayed by appeal, see §§ 2582, 2583, 2584, Code Civ. Pro., *Matter of Gaines* (83 Hun, 225).

<sup>1</sup> See, as to costs of appeal, Code Civ. Pro., § 2589; *Cole v. Terpenning* (27 Hun, 111), *Matter of will of Martin* (98 N. Y., 193; S. C., 32 Alb. Law Jour., 31).

That a decree or order of the surrogate's court may not be reversed for an error in admitting or rejecting evidence, unless it appears to the appellate court that the exceptant was necessarily prejudiced thereby, see Code Civ. Pro., § 2545; *Matter of will of Smith* (95 N. Y., 516; S. C., 19 Week. Dig., 220), *Snyder v. Sherman* (88 N. Y. 656), *In re Ross* (87 N. Y., 514).

questions of fact, arising upon the issues between the parties, be and the same is hereby directed [with costs to abide the event of said trial].

And it is further ordered, that the following issues of fact are to be tried by said jury, to wit [stating same].

And it is further ordered, that said trial be had at a circuit court in and for the county of \_\_\_\_\_, to be held at \_\_\_\_\_, etc., on, etc. [*or* at a term of the \_\_\_\_\_ county court (*or* of the court of common pleas for the city and county of New York), to be held at, etc., on, etc.].<sup>1</sup>

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#### ARTICLE FIFTH.

#### FORMS RELATING TO PROVISIONS RELATING GENERALLY TO LETTERS, AND GENERALLY TO EXECUTORS, ADMINISTRATORS, GUARDIANS AND TESTAMENTARY TRUSTEES.

(Code Civ. Pro., Ch. 18, Tit. 2, Art. 5.)

- No. 1378.** Official oath of executor, administrator or guardian.  
**1379.** Order directing deposit of security with surrogate or with trust company.  
**1380.** Order authorizing withdrawal, etc., of security from county treasurer or trust company by executor, etc.  
**1381.** Petition for new bond or new sureties to be given by executor, etc.  
**1382.** Order that citation issue to executor, etc., to show cause why prayer of petition (No. 1381) should not be granted.  
**1383.** Citation to executor, etc., to show cause why the prayer of petition (No. 1381) should not be granted.  
**1384.** Order upon return of citation (No. 1383).  
**1385.** Decree after expiration of time fixed for filing new bond, etc., allowed by order.  
**1386.** Petition of sureties in a bond for their relief from responsibility.  
**1387.** Order that citation issue to executor, etc., pursuant to petition (form No. 1386).  
**1388.** Citation requiring executor, etc., to show cause, pursuant to petition (form No. 1386).  
**1389.** Decree on return of citation (form No. 1388).  
**1390.** Order directing as to custody of property, when co-executors, etc., disagree.  
**1391.** Complaint in action upon official bond of administrator, etc.  
**1392.** Complaint by successor of administrator, etc., upon his official bond, after revocation of letters.

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<sup>1</sup> See, also, order for trial of issues by jury, form No. 353, and see In re will of Smith (19 Week, Dig., 252), Matter of will of Martin (98 N. Y., 193; S. C., 32 Alb. Law Jour., 31). See, also, note 1 to last form No. 1376.

## No. 1378.

**Official Oath of Executor, Administrator or Guardian.**

(Code Civ. Pro., § 2594.)

\_\_\_\_\_ COUNTY, ss.:

I, A. B., of \_\_\_\_\_ [the executor named in the will], of C. D., late of the [city] of \_\_\_\_\_, in the county of \_\_\_\_\_, deceased, about to be appointed by the surrogate of \_\_\_\_\_ county [executor of the said will], do solemnly swear and declare that I will well, faithfully and honestly discharge the duties of such [executor] according to law.

A. B.

[Jurat as in form No. 46.]

## No. 1379.

**Order Directing Deposit of Security with Surrogate or with Trust Company.**

(Code Civ. Pro., § 2595.)

[Title of proceeding.]

The value of the estate of B. C. being so great that I deem it inexpedient to require security from C. M., executor of the will of said B. C. [*or* administrator of, etc., of said B. C.], in the full amount prescribed by law, I do hereby order and direct, pursuant to section 2594 of the Code of Civil Procedure, that the following securities, to wit [describe same], belonging to said estate [*or* fund], be deposited with me, to be delivered to the county treasurer of \_\_\_\_\_ county [*or* to be deposited with the (name of trust company), subject to the order of said C. M., as executor, etc., countersigned by the surrogate of \_\_\_\_\_ county].

Dated at \_\_\_\_\_ in the county of \_\_\_\_\_, this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

C. D., *Surrogate of* \_\_\_\_\_ *County.*

## No. 1380.

**Order Authorizing Withdrawal, etc., of Security from County Treasurer or Trust Company by Executor, etc.**

(Code Civ. Pro., § 2595.)

[Title of proceeding.]

An order having been heretofore made by me, in the

above entitled proceeding, directing the deposit of the following securities belonging to the estate of B. C., with me,

be delivered to the county treasurer of \_\_\_\_\_ county [to be deposited with the (name of trust company)], subject to the order of C. M., as executor, etc., countersigned by the surrogate of \_\_\_\_\_ county [and said securities having been so delivered and deposited], pursuant to said order, and an additional bond having been given by said C. M., as such executor, in the amount of \_\_\_\_\_ dollars [or due proof having been made to me by the affidavit of said C. M., dated \_\_\_\_\_, 18— (or state other proof), that the estate of said B. C. has been so reduced by payments, etc.], that the penalty of the bond originally given by said C. M., as such executor, etc., will be sufficient in amount to satisfy the provisions of law relating to the penalty thereof, if the following security [or securities], to wit [state same], is [or are] reckoned in the said estate :

Now, upon the application of F. G., for said executor, etc., I do hereby order and direct, that the county treasurer of \_\_\_\_\_ [or the (name trust company)] [\*] deliver to said C. M., as such executor, etc. [upon his order, countersigned by me],<sup>1</sup> the said [naming security or securities to be withdrawn].

[Or as above to (\*), and from thence as follows: Pay to said C. M., as such executor, etc. (upon his order, countersigned by me),<sup>1</sup> the sum of \_\_\_\_\_ dollars, being the principal (or interest) received by said treasurer (or by said company) upon (naming security, etc., as may be required).<sup>2</sup>]

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No. 1381.

**Petition for New Bond or New Sureties to be Given by Executor, etc.**

(Code Civ. Pro., § 2597.)

*To the Surrogate's Court of \_\_\_\_\_ county:*

The petition of E. F., respectfully shows, that he is [state interest in estate or fund, or other right to petition].<sup>3</sup>

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<sup>1</sup> Insert this clause in brackets where the security is deposited with a trust company. (Code Civ. Pro., § 2595.)

<sup>2</sup> By chapter 516 of Laws of 1885,

section 2595 of Code Civ. Pro., was amended so as to apply to a guardian.

<sup>3</sup> As to who may petition, see Code Civ. Pro., § 2597.

That C. M., who was appointed executor [etc.] of the will [etc.] of C. B., by the said surrogate's court, on the ——— day of ———, 18—, executed his bond, in due form of law, with C. D., of ———, and E. F., of ———, as sureties, in the sum of ——— dollars, to the people of the State of New York, dated ———, 18—, conditioned for the faithful discharge of the trust reposed in him as such executor, etc., and for his obedience to all lawful decrees and orders of the said surrogate's court, touching the administration of the estate committed to him, as will more fully appear by reference to said bond on file in the office of the surrogate of said county.<sup>1</sup>

And your petitioner further shows, that said C. D. is insufficient as a surety in said bond [state reason of insufficiency] [*or* has removed (*or* is about to remove) from the State of New York, *or* show that the bond is inadequate in amount].

And your petitioner prays, that the said C. M. may be required to give a new bond as such executor, etc., in the penalty of at least ——— dollars [*or* to give new (*or* additional) sureties as such executor, as the case requires], or, in default thereof, that he may be removed from his said office, and that the letters issued to him as such executor, etc., may be revoked.<sup>2</sup>

Dated ———, 18—.

**E. F.**

[Verification as in form No. 52.]

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No. 1382.

**Order that Citation Issue to Executor, etc., to Show Cause why Prayer of Petition (No. 1381) Should not be Granted.**

(Code Civ. Pro., § 2597.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

Upon reading and filing the petition of **E. F.**, a person

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<sup>1</sup> For form of bond of administrator, etc., see form No. 1413. *Bick v. Murphy* (2 Dem., 251, cited in note 3 to form No. 1386), *Stevens v.*

<sup>2</sup> See *Sutton v. Weeks* (5 Redf., 353), *Stevens* (2 Dem., 469).

interested in the estate of C. B., as [stating interest, etc., or other right to petition], in writing and duly certified, dated \_\_\_\_\_, 18—, praying that, etc. [state prayer of petition], and on motion of G. H., counsel for said petitioner :

It is hereby ordered, that a citation issue, pursuant to statute, to C. M., executor of the will [etc.] of C. B., requiring said C. M. to show cause why the prayer of said petition should not be granted.

F. W., *Surrogate of* \_\_\_\_\_ *County.*

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No. 1383.

**Citation to Executor, etc., to Show Cause why the Prayer of Petition (No. 1381) Should not be Granted.**

(Code Civ. Pro., § 2597.)

As in form No 1345, inserting therein, as the purpose of the citation, as follows: To show cause why you should not be required to give a new bond, as [executor of the will of B. C., deceased], in a larger penalty than your present bond given as such [executor], to wit: in the penalty of at least \_\_\_\_\_ dollars [or to give new or additional sureties as such executor], or in default thereof that you be removed from your said office, and that the letters issued to you as such executor [etc.] be revoked.

In testimony, etc. [conclude as in form No. 1345].

[Signature as in form No. 1345.]

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No. 1384.

**Order upon Return of Citation.**

(Code Civ. Pro., § 2598.)

[Title of proceeding.]

Upon the return of the citation, dated \_\_\_\_\_, 18—, issued in the above entitled proceeding, upon filing the petition of A. B., dated the \_\_\_\_\_ day of \_\_\_\_\_, 18—, with proof of due service thereof upon C. M. [executor of the will of B. C., deceased], and said C. M. having appeared [by J. H., his attorney], and the surrogate having heard the allegations and proofs of the parties, and having

found certain of the objections of said petitioner to the [sureties in the present bond of said executor], to be valid, to wit [state same], and, after hearing M. N., for the said petitioner, and said J. H. for the said C. M.:

I do hereby order and direct, that said C. M., as [executor of the will of B. C., deceased], give new and additional sureties [or a new bond, in the penalty of ——— dollars], within five days from the date of this order, and that, in default thereof, his letters be revoked.

Dated ———, 18—.

F. W., *Surrogate of* ——— *County.*

No. 1385.

**Decree After Expiration of Time for Filing new Bond, etc., Allowed by Order.**

(Code Civ. Pro., § 2599.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

An order having been made in the above entitled proceeding, dated ———, 18—, upon the return of the citation therein, directing C. M., the [executor of the will of B. C., deceased], to give new [or additional] sureties [or a new bond, in the penalty of ——— dollars], as such [executor], within five days from the date of said order [and that, in default thereof, his letters be revoked];<sup>1</sup> and the said O. M. having [\*] executed a bond with new [or additional] sureties, and said bond having been approved by me, and filed in the office of the surrogate of ——— county, as required by said order:

I do hereby order and decree, that the above entitled proceeding be dismissed with ——— dollars costs, to be paid by, etc., to etc.<sup>2</sup>

F. W., *Surrogate of County* ———.

[Or as above to (\*), and from thence as follows: Failed to comply with the said order, and to file a new bond as

<sup>1</sup> Omit this clause in brackets where the proceedings is dismissed.

<sup>2</sup> As to amount of costs to be allowed, see Code Civ. Pro., 2561.



thereby required, I do hereby order and decree, on motion, etc., and after hearing, etc., that the said C. M. be and he is hereby removed from the office of (executor of the will of B. C., deceased), and that the letters (testamentary upon said will) heretofore issued to him, as such executor, be and they are hereby revoked (†)' [and that said C. M. be and he is hereby required to account for all money and other property received by him as such (executor), and to pay and deliver over all money and other property in his hands as such (executor), into this court (*or* to his successor in office) (*or* to, naming other person entitled to receive same, etc.).<sup>2</sup>]

No. 1386.

**Petition of Sureties in a Bond for their Release from Responsibility.**

(Code Civ. Pro., § 2600.)

*To the Surrogate's Court of ——— County:*

The petition of A. B. and C. D. respectfully shows, that they are the sureties in the bond of C. M., given for the faithful discharge of his duties as [name office], dated ———, 18—, and on file in the surrogate's office in said county.

That they desire to be released from responsibility as such sureties, on account of any future breach of the condition of the said bond, pursuant to the provisions of title second of chapter eighteenth of the Code of Civil Procedure.

Wherefore your petitioners pray, that they may be released from responsibility on account of any future breach of the condition of said bond, and that the said C. M., the principal in said bond, may be cited to show cause why he should not give new sureties, and that a citation may issue accordingly.<sup>3</sup>

Dated ———, 18—.

A. B.  
C. D.

[Verification as in form No. 52.]

<sup>1</sup> As to effect of decree revoking as to this portion of the decree, and see letters, see Code Civ. Pro., §§ 2603, 2604. Peck v. Sherwood (5 Redf., 416), referred to in note 1 to form No. 1389.

<sup>2</sup> See section 2603, Code Civ. Pro., <sup>3</sup> It was *held*, in a proceeding under

No. 1387.

**Order that Citation Issue to Executor, Pursuant to Petition (form No. 1386).**

(Code Civ. Pro., § 2601.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

Upon reading and filing the petition of A. B. and C. D., dated ———, 18—, praying that they may be released from responsibility on account of any future breach of the condition of the bond of C. M. [executor, etc.], upon which they are sureties :

It is hereby ordered, that a citation issue to said C. M. pursuant to the prayer of said petition.

Dated ———, 18—.

F. W., *Surrogate, etc.*

No. 1388.

**Citation Requiring Executor, etc., to Show Cause, Pursuant to Petition (form No. 1386).**

(Code Civ. Pro., § 2601.)

As in form No. 1345 to [\*], and from thence as follows :  
To show cause why A. B. and C. D., the sureties in the

ch. 229 of the Laws of 1862, amending ch. 460 of Laws 1837, of which sections 2600 and 2601 of Code Civ. Pro. are a revision, that the statute excluded the idea that either the administratrix, or any parties interested in the estate, might require the surety to continue as such against his will, and accordingly that the fact that the surety and his relations are indebted to the estate, and that his object in making the application is in order to procure the administration to be transferred to a person who will refrain from enforcing payment of such debts from him and them is not ground for refusing the application. (Lewis v. Watson, 3 Redf., 43.)

An application, under section 2600 of Code Civ. Pro., cannot be blended with one under section 2598 (*id.*), and an attempt so to unite them is sufficient ground for their dismissal. (Bick v. Murphy, 2 Dem., 251.)

*It seems*, that sections 2600 and 2601 of Code Civ. Pro., do not effect any substantial alteration in the pre-existing law, contained in Laws 1837, ch. 460, and its amendments. (Shook v. Goddard, 2 Dem., 201.)

Those sections do not apply to a bond executed in 1878. (*Id.*)

As to service of citation in this proceeding on non-resident executor out of the State, see *Stevens v. Stevens* (3 Redf., 507).

bond of C. M., executor, etc., dated ———, 18—, and filed in the surrogate's office of ——— county, should not be released from responsibility on account of any future condition of the said bond :

In testimony whereof, etc. [as in form No. 1345].<sup>1</sup>

F. W., *Surrogate, etc.*

No. 1389.

**Decree on Return of Citation (form No. 1388).**

(Code Civ. Pro., § 2601.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

The citation heretofore issued in the above entitled proceeding, upon filing the petition, duly verified, of A. B. and C. D., the sureties in the bond of C. M. [executor, etc.], having been returned with due proof of service upon [\*] C. M., the said [executor], and the said C. M. having filed in the office of the surrogate of this county a bond in the usual form, as such [executor], with new sureties, to the satisfaction of the surrogate [within the time fixed by said surrogate therefor] :

It is hereby ordered and decreed by said surrogate, and by this court, on motion of ———, of counsel for said petitioners, after hearing, etc., that A. B. and C. D., the petitioners herein, be and they hereby are released from their liability upon the bond of C. M., given for the faithful discharge of his duties as [executor, etc.], dated ———, 18—, and on file in said surrogate's office, for any act or default of said C. M., as such [executor], subsequent to the date of this decree.<sup>2</sup>

F. W., *Surrogate, etc.*

[Or as above to (\*), and from thence as follows : And the said C. M. not having, within the time fixed by the surrogate therefor, filed in the surrogate's office of this county a bond in the usual form, with new sureties, to the satisfaction of the surrogate ; it is hereby ordered and decreed by

<sup>1</sup> See notes to form No 1386.

<sup>2</sup> See note 3 to form No. 1386.

said surrogate, and by this court, that the letters testamentary heretofore issued to said C. M., upon the will of B. C., be and the same are hereby revoked (add further provisions, as may be required).<sup>1</sup>

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No. 1390.

**Order Directing as to Custody of Property when Co-executors, etc., Disagree.**

(Code Civ. Pro., § 2602.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

It having appeared, by the affidavit [*or* verified petition]<sup>2</sup> of J. K., dated ———, 18—, that said J. K. and his co-executor F. P., of the will of B. C., deceased, disagree respecting the custody of the money [*or* property] belonging to the estate of the said B. C., and an order having been thereupon made, upon the application of said J. K., requiring said F. P. to show cause why the surrogate should not give directions as to the disposition of said money [*or* property], and said order to show cause having been duly served upon said F. P. as thereby required :

Now, upon the return of said last mentioned order, and after hearing M. G. for said applicant, and E. F. for said F. P. :

It is hereby ordered, that the said property of said estate [*or* designate particular property] be deposited in [name place] in the joint custody of the said [executors], and subject to their joint order [*or* that the said money of said estate (*or* designate particular money) be deposited in the ——— bank (*or* name trust company), to be drawn out upon the joint order of said executors)].<sup>3</sup>

F. W., *Surrogate, etc.*

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<sup>1</sup> See section 2603, Code Civ. Pro., and form No. 1385. Whether payment to a legatee can be decreed under Code Civ. Pro., § 2603, *quære*. (Peck v. Sherwood, 5 Redf., 416.)

<sup>2</sup> A verified petition is an affidavit. (Code Civ. Pro., § 3343, subd. 11.)

<sup>3</sup> See *Thompson v. Mott* (1 Dem., 32), *Guion v. Underhill* (id., 302), *Hassey v. Keller* (id., 577).

Disobedience of the directions of the order may be punished as a contempt of the court. (Code Civ. Pro., § 2602.)

No. 1391.

**Complaint in Action upon Official Bond of Administrator, etc.**

(Code Civ. Pro., § 2607.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that on or about the ——— day of ———, 18—, the defendant, A. B., was appointed the administrator of, etc., of B C., deceased, and duly qualified and entered upon the discharge of his duties as such administrator.

That before entering upon the discharge of his said duties, and on the ——— day of ———, 18—, he, together with the defendants, E. F. and G. H., as his sureties, executed and filed in the office of the surrogate of ——— county their joint and several bond, as required by law, in the penal sum of ——— dollars, conditioned for the faithful discharge by said A. B. of the trust reposed in him as such administrator, and for his obedience to all lawful decrees and orders of the surrogate's court of ——— county, touching the administration of the estate committed to him as such administrator. [†]

And the plaintiff further shows, that on the ——— day of ———, 18—, a decree was duly rendered<sup>1</sup> by the surrogate of ——— county, adjudging that said A. B. was chargeable as such administrator with the sum of ——— dollars, directing the payment by said A. B. of the said sum to the plaintiff, a copy of which decree is hereto annexed.

That a transcript of said decree was duly filed and said judgment was duly docketed in the ——— county clerk's office, on the ——— day of ———, 18—.

That on the ——— day of ———, 18—, an execution was issued upon said decree against the property of said A. B. to the sheriff of the county of ——— [where said A. B. then resided and still resides],<sup>2</sup> which execution has been since duly returned by said sheriff wholly unsatisfied [or unsatisfied to the extent of ——— dollars].

<sup>1</sup> See section 532, Code Civ. Pro., as to pleading judgment or other determination of court of special jurisdiction.

<sup>2</sup> Insert this clause in brackets if the principal debtor is a resident of the State. (Code Civ. Pro., § 2607.)

Wherefore the plaintiff demands judgment against the defendants for the sum of \_\_\_\_\_ dollars [stating sum remaining uncollected], with interest thereupon from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and for costs of this action.<sup>1</sup>

M. F., *Attorney for Plaintiff.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.]

No. 1392.

**Complaint by Successor of Administrator, etc., upon his Official Bond, after Revocation of Letters.**

(Code Civ. Pro., § 2608.)

As in last form, No. 1391, to [†], and from thence as follows: That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a decree was duly made by the surrogate of \_\_\_\_\_ county revoking the said letters of administration issued to said A. B.

That [in and by said decree and] on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the plaintiff was duly appointed the administrator of the goods, etc., of said B. C. in the place and stead of said A. B.

That [here set forth cause of action].

Wherefore, etc. [prayer for judgment].<sup>3</sup>

M. C., *Attorney for Plaintiff.*

[Office address.<sup>4</sup>]

[Verification as in forms Nos. 151, etc.]

**TITLE III.**

**ARTICLE FIRST.**

**FORMS RELATING TO THE PROBATE OF A WILL AND GRANT OF LETTERS THEREON.**

(Code Civ. Pro., Ch. 18, Tit. 3, Art. 1.)

No. 1393. Petition for the probate of a will.

1394. Order that citation issue for probate of will.

<sup>1</sup> A demand upon the administrator to perform a decree for payment is not necessary, before suing the surety. (Mundorff v. Wangler, 44 N. Y. Super. Ct., 495.)

The fact that the administrator's bond has not been approved by the surrogate, is no defence to the surety. (Id.)

See, generally, as to proof in such

- No. 1395. Citation to attend probate of will.
- 1396. Notice requiring the examination of all the subscribing witnesses, etc., to a written will.
- 1397. Answer to petition for probate of will.
- 1398. Deposition of subscribing witnesses to will.
- 1399. Proof of handwriting, in case of death or absence from the State, of either of the subscribing witnesses.
- 1400. Interrogatories to be annexed to commission for examination of subscribing witness to will.
- 1401. Proof of custody of the will.
- 1402. Decree admitting will to probate and record.
- 1403. Petition for proof of lost or destroyed will.
- 1404. Decree admitting lost or destroyed will to probate.
- 1405. Decree setting aside a will.
- 1406. Surrogate's certificate of probate of a will
- 1407. Affidavit stating objections to granting letters.
- 1408. Order that executor appear to attend inquiry.
- 1409. Order that objector proceed with the inquiry.
- 1410. Objections to issuing of letters to an executor named in the will.
- 1411. Decree upon objections.
- 1412. Letters testamentary upon will.
- 1413. Bond of executor or administrator.
- 1414. Renunciation by executor.
- 1415. Retraction of renunciation by executor.
- 1416. Instrument selecting person as executor under a power contained in a will.
- 1417. Petition for order requiring an executor named in will to qualify or renounce.
- 1418. Order requiring executor named in will to qualify or renounce.
- 1419. Order in case of failure of executor to qualify, pursuant to order (form No. 1391).
- 1420. Petition for appointment of administrator, with the will annexed.
- 1421. Renunciation by person having prior right to administer.
- 1422. Letters of administration, with the will annexed.

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No. 1393.

**Petition for the Probate of a Will.**

(Code Civ. Pro., § 2614.)

*To the Surrogate's Court of the County of \_\_\_\_\_ :*

The petition of A. B. respectfully shows, that heretofore,

an action, id.; and, as to rules relating thereto, see *Kelly v. West* (80 N. Y., 139), *Harrison v. Clark* (87 N. Y., 572), *Scofield v. Churchill* (72 N. Y., 565), *Browning v. Vanderhoven* (4 Abb. N. C., 166), *Brewster v. Balch* (41 N. Y. Super. Ct., 63), *Hood v. Hood* (85 N. Y., 561; rev'g S. C., 19 Hun, 300),

*Bearns v. Gould* (77 N. Y., 455; aff'g S. C., 8 Daly, 384), *Boyle v. St. John* (28 Hun, 454), *Estate of Scofield* (3 Civ. Pro., 323; S. C., 1 Dem., 196).

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> See notes to last form No. 1391.

<sup>4</sup> See note 2 to form No. 122.

and on or about the ——— day of ———, 18—, C. D. died at the town [*or city*] of ———, in the county of ———, being at the time of his death a resident of the said county of ——— [*or state other facts showing the surrogate's jurisdiction*].<sup>1</sup>

That said C. D., in his life-time, made and executed his will, dated on the ——— day of ———, 18—, which he left unrevoked at his death, and by which he appointed your petitioner the executor [*or one of the executors*] thereof [*or by which he devised (or bequeathed) to your petitioner certain real estate (or the sum of ——— dollars; or state other interest in or claim against the estate)*].

That said C. D. left him surviving P. D., his widow, and G. D., J. D. and K. L., wife of R. L., his [*children*] and only [*heirs at law and*] next of kin,<sup>2</sup> all of whom reside at ———, and all of whom are of full age, except the said J. D., who is an infant of the age of ——— years and upwards.

That said will relates to both real and personal property [*or relates exclusively to real (or personal) property*].<sup>3</sup>

Wherefore your petitioner prays, that the said will may be proved, and that the said P. D., G. D., J. D. and K. L. [*or that the said widow, heirs at law and next of kin of said B. C.*], may be cited to attend the probate thereof.<sup>4</sup>

Dated ———, 18—.

A. B.

[Verification as in form No. 52.]

<sup>1</sup> As to surrogate's jurisdiction, see Code Civ. Pro., § 2476, and see as to cases where a new county is erected, or territory is transferred from one county to another, § 2479 *id.*, and see, also, Matter of McGinness (13 Misc., 714), Matter of Campbell (88 Hun, 374), Washburn v. Cope (144 N. Y., 287), Matter of Owens (24 Civ. Pro. R., 256), Hopkins v. Lane (17 State Rep., 277). In re Plumb (135 N. Y., 661).

<sup>2</sup> Where persons to be cited constitute a class, the petitioner must set forth in an affidavit the name of each of them, unless the name, or part of the name, of one or more of them cannot, after diligent inquiry, be ascertained by him, in which case that fact must be set forth. (Code Civ. Pro., § 2518).

See, also, same section, that a petition, duly verified, is deemed an affidavit within its provisions.

<sup>3</sup> See Code Civ. Pro., § 2615.

<sup>4</sup> Where a petition for probate of a will gave the date of the will, stated that it related to both real and personal estate, and was signed by the witnesses named, and also named one of the executors—*held*, that the description of the will was sufficient, under section 2614 of Code Civ. Pro., to give the surrogate jurisdiction, although the will was executed in duplicate and the petition did not state that fact. (Crossman v. Crossman, 95 N. Y., 145; aff'g S. C., 30 Hun, 385; see also, S. C., 2 Dem., 69.)

See same case as to the rules regulating the admission to probate of wills executed in duplicate, and see, further, as to contents of petition and jurisdiction of surrogate, People v. Surrogate of Putnam Co. (21 Week. Dig., 498), and cases, etc., cited in note 1, above.

An instrument may be admitted to probate which simply names executors



No. 1394.

**Order that Citation Issue for Probate of Will.**

(Code Civ. Pro., § 2614.)

At a surrogate's court, held in and for the county of \_\_\_\_\_, at the surrogate's office in the [city] of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

Present, F. W., *Surrogate*.

On reading and filing the petition of A. B., dated \_\_\_\_\_, 18—, praying that the will of C. D., late of the [city] of \_\_\_\_\_, in the county of \_\_\_\_\_, deceased, may be proved, and that a citation may issue to the proper persons to attend the probate thereof:

It is hereby ordered, on motion of \_\_\_\_\_, for said petitioner, that a citation issue to the proper persons, pursuant to the prayer of the petition, requiring them to appear in this court on the \_\_\_\_\_ day of \_\_\_\_\_ next, at o'clock in the \_\_\_\_\_ noon of that day, to attend the probate of the said will.

F. W., *Surrogate*.

No. 1395.

**Citation to Attend Probate of Will.**

(Code Civ. Pro., § 2616.)

*The People of the State of New York, to P. D., G. D., J. D. and K. L.:*<sup>1</sup>

Whereas, A. B. has applied to the surrogate's court of the county \_\_\_\_\_, for the proof of the will of C. D., late of the [city] of \_\_\_\_\_, in the county of \_\_\_\_\_, deceased, which said will relates to both real and personal property

and authorizes them to sell real property. (Barber v. Barber, 17 Hun, 72.)

As to necessity for written application, see Wright v. Fleming (19 Hun, 370).

<sup>1</sup> It is no longer necessary to state the residence of the person cited. (Code Civ. Pro., § 2519.)

See, also, section 2616, Code Civ.

Pro., as to direction of citation, in case the surrogate cannot ascertain, to his satisfaction, whether the decedent left, surviving him, any person who would be entitled to the property affected by the will if the decedent had died intestate.

As to appearance by parties not cited see section 2617, id.

[*or exclusively to real (or personal) property*] [and is a nuncupative will]:<sup>1</sup>

Therefore you, and each of you, are cited and required to appear at the office of the surrogate of the county of \_\_\_\_\_, in the [city] of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_ next, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon of that day, to attend the probate of the said will.<sup>1</sup>

In testimony, etc. [as in form No. 1345].

[L. s.] F. W., *Surrogate of* \_\_\_\_\_ *County*  
[*or Clerk of the Surrogate's Court of* \_\_\_\_\_ *County*].<sup>2</sup>

No. 1396.

### Notice Requiring the Examination of all the Subscribing Witnesses, etc., to a Written Will.

(Code Civ. Pro., § 2618.)

[Title of proceeding.]

Take notice, that [the undersigned] M. D., one of the heirs at law, etc., of C. D., deceased, contesting the probate of the written instrument [*or instruments*] propounded for probate as the will of the said C. D., dated [respectively] on the \_\_\_\_\_ day of \_\_\_\_\_, 18— [and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—], hereby requires the examination of all the subscribing witnesses to said will, and of any other witness whose testimony the surrogate is satisfied may be material.<sup>3</sup>

Dated \_\_\_\_\_, 18—.

M. D.

[*or C. H., Attorney for M. D.*]

[Office address, etc.<sup>4</sup>]

<sup>1</sup> This fact must be stated when the case requires it. (Id., § 2616.)

As to proof of service of citation, see section 2520 id., and form No. 1346 and notes.

<sup>2</sup> See section 2509, Code Civ. Pro., subd. 2, and *Mauran v. Hawley* (2 Dem., 396), as to power of clerk to sign mandate.

As to persons to be cited, see section 2615, Code Civ. Pro., and *Dyer v. Erving* (2 Dem., 160). See, also, amendment to §§ 2615, 2617 of Code

Civ. Pro., by ch. 118 of 1894; *Matter of Gregory* (13 Misc., 363).

<sup>3</sup> The notice may be filed with the surrogate at any time before the proofs are closed. (Code Civ. Pro., § 2618.) As to effect of filing, see same section.

See, also, *Swenarton v. Hancock* (22 Hun, 38; aff'd, 84 N. Y., 653, upon the facts), the decision on affirmance is more fully reported in 9 Abb. N. C., 326.

<sup>4</sup> See note 2 to form No. 122.

No. 1397.

**Answer to Petition for Probate of Will.**

(Code Civ. Pro., § 2618.)

[Title of proceeding.]

The answer of M. D., the sole heir at law, etc., of C. D., deceased, to the petition of ——— herein, dated ———, 18—, respectfully shows [upon information and belief].

[Here insert any necessary denials of the allegations of the petition. See general form of answer, No. 140.]

And the said M. D., further answering the said petition, alleges :

*First.* That the said paper mentioned in said petition, dated ———, 18—, purporting to be his last will and testament, is not the last will and testament of C. D., deceased, and that the alleged execution thereof was not the free, unconstrained or voluntary act of said C. D.

*Second.* That the said paper, purporting to be a codicil to said alleged last will and testament, is not a codicil to said alleged last will, and that the alleged execution thereof was not the free, unconstrained or voluntary act of said C. D.

*Third.* That neither at the time the said papers purport to have been executed, nor at any time when they were executed [if ever executed], was the said C. D. of sound mind, memory and understanding.

*Fourth.* That neither of said papers was subscribed, published and attested as and for a last will, or a codicil, in conformity with the statute in such case made and provided.

*Fifth.* That the said papers are, and each of them is, void as a testamentary disposition of said decedent's property.

*Sixth.* That the papers propounded for probate, as the will of said C. D., are not valid as such, and are, and each of them is, illegal and void.

*Seventh.* That the contestant is the [brother and sole heir at law and only next of kin] of said decedent, and is vested by law with the title to his estate, both real and personal, and is entitled to the sole and exclusive use and possession thereof.

Wherefore the above named M. D., contestant, prays that this proceeding may be dismissed, with costs.<sup>1</sup>

M. F., *Attorney for Contestant.*

[Office address.<sup>2</sup>]

[Verification as in forms Nos. 151, etc.<sup>3</sup>]

No. 1398.

### Deposition of Subscribing Witnesses to Will.

(Code Civ. Pro., § 2618.)

STATE OF NEW YORK, SURROGATE'S COURT.

COUNTY OF \_\_\_\_\_.

Present, F. H. W., *Surrogate.*

|   |
|---|
| <p>IN THE MATTER OF PROVING THE<br/>LAST WILL AND TESTAMENT OF<br/>_____, DECEASED.</p> |
|---|

COUNTY OF \_\_\_\_\_, ss.:

A. B., of the [city] of \_\_\_\_\_, in the county of \_\_\_\_\_, and J. T., of the [city] of \_\_\_\_\_, in the county of \_\_\_\_\_, being first duly sworn in open court, do depose and say, and each for himself deposeth and saith, that he is a subscribing witness to the instrument now shown to him, purporting to be the last will and testament of C. D., late of the [city] of \_\_\_\_\_, in the county of \_\_\_\_\_.

That the said C. D. did, in the presence of this deponent subscribe his name [*or* acknowledge to this deponent his subscription to have been made], at the end of the instrument which is now shown and exhibited to this deponent as aforesaid, and which purports to be the last will and tes-

<sup>1</sup> See as to pleadings in surrogate's courts, section 2533 of Code Civ. Pro.

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> The provisions of sections 523, 524, 525 and 526 of the Code Civ. Pro., apply to a verification made pursuant to chapter eighteenth (*id.*), and to the petition or other paper so verified, where they can be so applied in substance, without regard to the form of

the proceeding. (Code Civ. Pro., § 2534.) See, also, as to form of verification, Matter of application, etc., of Macaulay (94 N. Y., 574); as to verification by attorney, see Moorhouse v. Hutchinson (2 Dem., 429), Estate of Lamar (20 Daily Reg., No. 113).

See, further, as to verification of pleading, § 2533, Code Civ. Pro.

tament of the said J. F., and which bears date on the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord one thousand eight hundred and \_\_\_\_\_.

And this deponent further saith, that the said C. D., the said testator, did, at the same time of subscribing his name as aforesaid at the end of the said will [*or* at the time of making said acknowledgment], declare the said instrument so subscribed, and now exhibited, to be his last will and testament; and this deponent did thereupon subscribe his name at the end of the said will, as an attesting witness thereto, in the presence of, and at the request of, the said testator.

And this deponent further saith, that, at the said time when the said testator subscribed his name to the said last will as aforesaid [*or* made said acknowledgment], and at the time of the deponent subscribing his name as an attesting witness thereto as aforesaid, the said C. D. was of sound mind and memory, of full age to execute a will, of [real or] personal property, to wit: of the age of upwards of \_\_\_\_\_ years, and was not under any restraint to the knowledge, information or belief of this deponent. And further these deponents say not.<sup>1</sup>

T. B.  
J. F.

Subscribed and sworn this \_\_\_\_\_ day }  
of \_\_\_\_\_, 18—, before me. }  
\_\_\_\_\_ \_\_\_\_\_, *Surrogate.*

No. 1399.

**Proof of Handwriting in Case of Death or Absence from the State, etc., of either of the Subscribing Witnesses.**

(Code Civ. Pro., §§ 2619, 2620.)

[Title of proceeding.]

A. B., of \_\_\_\_\_, being duly sworn, says, that G. H., one

<sup>1</sup> The statute does not confine the proponent of a will to the testimony of the subscribing witnesses, nor compel him to examine them as to testator's testamentary capacity. (*Whitfield v. Whitfield*, 19 Week. Dig., 386).

As to want of recollection, etc., of subscribing witness under section 2620

Code Civ. Pro., see above cited case, and *Matter of will of Cottrell* (95 N. Y., 329), *Rolla v. Wright* (2 Dem., 482). See, also, amendments to section 2620, by ch. 508 of Laws of 1888; and see *Matter of Clark* (75 Hun, 471), cited in note 2 to form No. 1399.

of the subscribing witnesses to the instrument in writing, purporting to be the will of C. D., late of ———, deceased, dated ———, 18—, now shown to defendant, is dead [*or* is absent from the State, *or* is a lunatic, *or* cannot, after due diligence, be found within the State or elsewhere, as appears from the annexed affidavit of G. M.].

[And deponent further says, that the testimony of said G. H. cannot, with due diligence be obtained by a commission for the following reasons (state same).<sup>1</sup>]

And deponent further says, that he is well acquainted with said G. H. [who formerly resided at ——— in the State of New York, but now resides at, etc., in the State of ———], and with the manner and style of his handwriting, having often seen him write, and that he verily believes that the signature, "G. H.," signed as a witness to said instrument, in writing, is the true and genuine handwriting and signature of the said G. H.<sup>2</sup>

A. B.

[Jurat as in last form No. 1398.]

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No. 1400.

### Interrogatories to be Annexed to Commission for Examination of Subscribing Witness to Will.

(Code Civ. Pro., § 2620.)

[Title of proceeding.]

Interrogatories to be administered to I. J. and N. M., witnesses to be produced, sworn and examined before R. W., commissioner, in the [city] of ———, in the [State] of ———, in the matter of proving the will of C. D., late of the [city] of ———, now pending before the surrogate of the county of ———, under and in pursuance of the commission hereto annexed.

<sup>1</sup> See section 2620, Code Civ. Pro.

<sup>2</sup> These facts, stated in the affidavit, may be proved by one or more affidavits, in manner similar to above.

An application for the probate of a will, one of two subscribing witnesses to which has not been produced, will be refused where proponents neither take steps to examine such witness, orally or by commission, nor establish satisfactorily their inability to do so. (Graber v. Haaz, 2 Dem., 216.)

"Now, where there are only two sub-

scribing witnesses, the examination of both is essential if both are accessible (Code Civ. Pro., 2618, 2619, 2620)." (Id.; per Rollins, surrogate.)

Section 2620 of Code Civ. Pro. does not, as amended by ch. 508 of Laws of 1888, require the evidence of a subscribing witness to the will absent from the State, to be taken before the probate thereof unless demanded by a party to the proceeding. Matter of Clark (75 Hun, 471). See, also, Upton v. Bernstein (76 Hun, 516).

*First interrogatory.* What is your name, age, residence and occupation?

*Second interrogatory.* Were you acquainted with C. D., late of the [city] of ———, deceased? State how long, and how intimately, you were acquainted with him, and when and where he died?

*Third interrogatory.* Look at the instrument, in writing [hereunto annexed], bearing date the ——— day of ———, in the year 18—, purporting to be the will of the said C. D., and say whether or not you were present at the time of the execution of the same? If so, where? State particularly what took place at the execution of the said instrument? Who was present? What was said and done, and by whom?

*Fourth interrogatory.* Was anything said in regard to the witnessing of the said instrument, and by whom, and who were present?

*Fifth interrogatory.* What was done with regard to the witnessing the execution of the said instrument, and in whose presence?

*Sixth interrogatory.* What was the condition of the said C. D., as regards the soundness or unsoundness of his mind, at the time the said instrument was executed?

*Seventh interrogatory.* Was the said C. D. under any restraint at the time of the execution of the said instrument?

*Eighth interrogatory.* What was the age of the said C. D. at the time of the execution of said instrument?

*Ninth interrogatory.* Do you know of any other matter or thing relating to the execution of the said instrument, and the condition of the mind of said C. D. at the time of its execution? Answer fully and particularly.<sup>1</sup>

M. N., *Attorney for*

A. B., *Proponent of Will.*

[Office address.<sup>2</sup>]

I hereby allow the foregoing interrogatories.

Dated ———, 18—.

F. W., *Surrogate.*

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<sup>1</sup> For general form of cross-interrogatories to be administered, etc., see form No. 384. For form of commission, see form No. 382. The order for issuing commission (No. 381) may be adapted to this case: and see, further,

No. 1401.

**Proof of Custody of the Will.**

(Code Civ. Pro., § 2622.)

[Title of proceeding.]

COUNTY OF ———, ss.:

P. T., of ———, being duly sworn and examined before A. W. B., surrogate of the county of ———, doth depose and say, that he received the instrument, in writing, bearing date the ——— day of ———, 18—, purporting to be the will of J. T., deceased, from the said J. T., immediately after he executed the same.

That the said instrument remained in the custody of this deponent until he brought the same to the office of the surrogate of the county of ———, where he deposited the same for probate, and that, whilst the said instrument remained in the custody of this deponent, the same was, in no respect, altered or changed.

P. T.

[Jurat as in form No. 1398.]

## ANOTHER FORM.

[Title of proceeding.]

COUNTY OF ———, ss.:

E. S. and P. F., both of ———, being severally duly sworn and examined before A. W. B., surrogate of the county of ———, do depose and say as follows: And the said E. S., for himself, doth depose and say, that at the request of J. T., now deceased, he drew and wrote the instrument in writing now produced and shown to this deponent, bearing date the ——— day of ———, 18—, purporting to be the will of the said J. T., deceased, and attended to the execution of the same.

as to proceedings relating to commissions, p. 284 *et seq.*, and notes to forms. By section 2538 of Code Civ. Pro., the provisions of article second of title third of chapter ninth (*id.*) are made applicable to surrogates' courts and to the proceedings therein, so far as they can be applied to the substance and subject matter of a proceeding without regard to its form. See as to filing

testimony and commission in surrogate's office, amendment to section 2620 Code Civ. Pro., by ch. 508 of Laws of 1888.

For form of direct interrogatories, where the probate is not contested, see Dayton on Surrogates (ed. of 1855, p. xi, appendix).

<sup>2</sup>See note 2 to form No. 122.



That he received the said instrument from the said J. T. immediately after the execution thereof, and that the same remained in the custody of this deponent until the ——— day of ——— last past, when he handed the same to P. F., one of the executors therein named, to take charge thereof.

And the said P. F., for himself, doth depose and say, that he received the said instrument from the said E. S. on the ——— day of ——— last past, as above stated.

That the same remained in his custody until the ——— day of ——— last past, when he brought the same to the office of the surrogate of the county of ———, where he deposited the same for probate.

And these deponents further say, that whilst the said instrument remained in their respective custody, the same was, in no respect, altered or changed.<sup>1</sup>

E. S.

P. T.

[Jurat as in form No. 1398.]

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No. 1402.

**Decree Admitting Will to Probate and Record.**

(Code Civ. Pro., § 2623.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

Satisfactory proof having been made of the due service of the citation heretofore issued in this matter, requiring the proper persons to appear in this court on the ——— day of ———, 18—, and attend the probate of the will of C. D., late of the [city] of ———, deceased, bearing date on the ——— day of ———, 18—, and F. G., the executor named in the said will, having appeared by M. C., his attorney and counsel in support of the probate of the same [and P. D., the widow of said deceased, having appeared in person and by ———, her attorney and counsel, in opposition thereto, and contested the probate of the same; and ———. the special guardian of A. D. and G. D., minors,

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<sup>1</sup> These affidavits may be required be made by the person presenting the by the surrogate in his discretion, and will for probate. (Code Civ. Pro., § he may also require a like affidavit to 2622.)

two of the heirs and next of kin of the said deceased, having also appeared]; and no other parties or persons having appeared in the said matter, and the said matter having been duly heard [and adjourned from day to day until this day], [\*] and after hearing the proofs and allegations of the said F. G. [and of the said P. D.] [and the said ———, special guardian as aforesaid, having submitted the rights and interests of the said minors to the care and discretion of this court], and due deliberation having been thereupon had, and it appearing, upon the proof taken, that the said will was duly executed; that the testator, at the time of executing the same, was, in all respects, competent to make a will, and not under restraint [and the surrogate being satisfied of its genuineness and the validity of its execution];<sup>1</sup> and, on motion of ———, in behalf of the said executor:

It is hereby adjudged and decreed, and the surrogate of the county of ———, by virtue of the power and authority in him vested, doth adjudge and decree, that the said will was duly executed; that the same is genuine and valid; that the said will, and the proofs and examinations taken in respect to the same, be recorded; and that the said will be admitted to probate as a will valid to pass real [and personal] property.

[And ——— having expressly put in issue before the surrogate the validity construction and effect of the following clause of said will, to wit (insert same), it is further adjudged and decreed, that the true construction and legal effect of the above mentioned clause of said will is (state construction).<sup>2</sup>]

And it is further ordered, adjudged and decreed, that the objections to the probate of said will, not hereinbefore disposed of, be, and the same are hereby, dismissed as unproven and unsustainable.

And it is further ordered, that letters testamentary of said will be, and they are hereby, granted to said F. G. upon his taking the required oath.<sup>3</sup>

<sup>1</sup> This clause was formerly inserted, pursuant to section 17 of ch. 460 of Laws of 1837, which was repealed by ch. 245 of Laws of 1880; but the same provision is contained in section 2622, Code Civ. Pro.

<sup>2</sup> See section 2624, Code Civ. Pro.

<sup>3</sup> As to effect of decree in case of will

And it is further ordered, that [insert allowances of costs, etc., to parties, as to which see sections 2559-2562, Code Civil Procedure].

F. W., *Surrogate of* ——— *County.*

No. 1403.

**Petition for Proof of Lost or Destroyed Will.**

(Code Civ. Pro., § 2621.)

*To the Surrogate's Court of* ——— *County:*

The petition of M. B., of ———, respectfully shows [follow substantially the allegations of complaints Nos. 856, and 857, and conclude with prayer as follows]:

Your petitioner, therefore, prays, that said will may be adjudged and decreed by said court to be the will of the said M. F., and may be admitted to probate and recorded accordingly, as a will relating to both real and personal property [*or exclusively to real (or to personal) property*], and that letters testamentary or of administration, with the will annexed, may be issued thereupon by said court, in the same manner and with like effect as upon a will duly proved in said court.<sup>1</sup>

M. B.

[Verification as in form No. 52.]

No. 1404.

**Decree Admitting Lost or Destroyed Will to Probate.**

(Code Civ. Pro., § 2621.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

Upon reading and filing proof of due service of the cita-

of personal property, see section 2626, Code Civ. Pro.; in case of will of real property, see section 2627 (id.).

Where the will names one or more persons to be executor or executors thereof, upon a contingency, the surrogate must inquire into the facts, and if the contingency has happened that fact must be recited in the decree. (Code Civ. Pro., § 2636.)

<sup>1</sup> See notes to forms Nos. 856, 857 and 858; and see, also, *In re Russell* (33 Hun, 271), *In re Simpson* (56 How. Pr., 125), *Colligan v. McKernan* (2 Dem., 421), *Matter of Colligan* (5 Civ. Pro., 198), *Hatch v. Sigman* (1 Dem., 519), *Matter of Ruser* (6 id., 31; 19 State Rep., 791), *Matter of Soule* (40 State Rep., 600.)

tion issued herein upon the persons to whom the same was directed, to wit: upon the heirs at law and next of kin of M. F., requiring said person to appear in this court on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and attend the probate of the will of M. F., late of the [city] of \_\_\_\_\_, deceased, bearing date on, etc., and [recite appearances, etc., as in form No. 1402, stating whether or not the probate was contested], and on motion of T. F., counsel for the petitioner herein [and after hearing W. B., counsel for, etc.]:

It is hereby ordered, that the will of M. F., as set forth in the petition in this proceeding, bearing date \_\_\_\_\_, 18—, and of which the following is a copy, to wit [insert copy of will] [or the substance of which is as follows (state same), it having appeared that said will was in existence at the time of the death of said testator [or was fraudulently destroyed in the life-time of said testator], and its provisions having been clearly and distinctly proved by [name them] two credible witnesses [or by \_\_\_\_\_, one credible witness and by a correct copy (or draft) thereof],<sup>1</sup> and that the said will was duly executed, and that the said testator, at the time of executing it, was, in all respects, competent to make a will of [real and] personal property, and not under restraint, be and the same is hereby admitted to probate as a will valid, to pass real property [or personal property] [or both real and personal property].

Add further provisions of decree, form No. 1402, as may be necessary.<sup>2</sup>

F. W., *Surrogate of* \_\_\_\_\_ *County.*

No. 1405.

### Decree Setting Aside a Will.

(Code Civ. Pro., § 2625.)

As in form No. 1402 to [\*], and from thence as follows: And the instrument in writing bearing date the \_\_\_\_\_ day of \_\_\_\_\_, 18—, purporting to be the will of the said C. D., deceased, having been produced, and M. N. and P. R., two of the subscribing witnesses to the said instrument,

<sup>1</sup> See Code Civ. Pro., § 1865.

<sup>2</sup> See notes and cases referred to in note to form No. 1403.

having been duly examined touching the facts and circumstances attesting the execution thereof, and the competency of the said C. D. to execute the same as and for his will, and after hearing the proofs and allegations of the said F. G. and of the said P. D.; and the said ———, special guardian as aforesaid, having submitted the rights and interests of the said minors to the care and discretion of this court, and due deliberation having been thereupon had, and on motion of Mr. ———, of counsel for the said P. D.:

It is adjudged and decreed, and the surrogate of the county of ———, by virtue of the power and authority in him vested, doth adjudge and decree, that the said instrument, in writing, was not executed and attested in the manner prescribed by law for the execution and attestation of wills.

And further, it is declared, and the surrogate aforesaid, by virtue of the power and authority aforesaid, doth declare, that the said instrument is utterly null and void and invalid, as or for the will of the said C. D., deceased.

And further, the said surrogate doth order, that the costs of all the parties to this proceeding, and the fees and expenses thereof, be paid out of the estate of the said deceased, to wit [state amounts allowed respectively].<sup>1</sup>

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No. 1406.

**Surrogate's Certificate of Probate of a Will.**

(Code Civ. Pro., § 2629.)

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STATE OF NEW YORK, }  
*Surrogate's Court—Albany County.* }

I, F. W., surrogate [*or* clerk of the surrogate's court] of ——— county, do hereby certify, that the within [*or* annexed] instrument [*or* instruments], bearing date [respectively] ———, 18— [and ———, 18—] [*or* exemplified copy of a will, *or* statement of the tenor of a will]<sup>2</sup> was [*or* were], upon due proof, admitted to probate by said surro-

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<sup>1</sup> See as to costs, etc., Code Civ. Pro., §§ 2556–2562; *Matter of Bender* (86 Hun, 590). was admitted without production of an original written will. (Code Civ. Pro., § 2629.)

<sup>2</sup> Insert this clause in case the will

gate's court, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, as the will of A. B., late of \_\_\_\_\_, in the county of \_\_\_\_\_, deceased, and as valid to pass both real and personal [*or real, or personal*] property.

And I further certify, that the said will [and the proof taken in relation to the execution thereof] are recorded in the surrogate's office of the county of \_\_\_\_\_, in book of wills, vol. —, at page —, kept in my office for that purpose.

In witness whereof, I have hereunto set my hand and the seal of said court, on this \_\_\_\_\_ day of \_\_\_\_\_, 18—.<sup>1</sup>

[L. S.] F. W., *Surrogate*  
[*or Clerk of Surrogate's Court of \_\_\_\_\_ County*].

No. 1407.

### Affidavit Stating Objections to Granting Letters.

(Code Civ. Pro., § 2636.)

[Title of proceeding.]

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that he is a creditor of A. B., whose will is offered for probate in the above entitled proceeding, said A. B. having been indebted to him at the time of his death upon [state nature of indebtedness] [*or show other interest in estate*].

That deponent objects to the granting of letters testamentary upon said will to \_\_\_\_\_ the executor [*or one of the executors*] named in said will.

That the following are the legal objections made by deponent to such appointment, to wit [state same], and that he believes the foregoing statement of said objections to be true.

[*Or that deponent is advised by T. P., his counsel, who resides at \_\_\_\_\_, and believes that there are legal objections to such appointment, and that he intends to file a specific statement of the same, verified as required by law.*]

E. F.

[Jurat as in form No. 46.]

<sup>1</sup> As to effect of this certificate as to evidence, see Code Civ. Pro., § 2629.      <sup>2</sup> As to proceedings upon filing affidavit, see sections 2637, 2638, Code Civ. Pro.      See, also, as to objections, Estate of

No. 1408.

**Order that Executor Appear to Attend Inquiry.**

(Code Civ. Pro., § 2637.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

On reading and filing the objections of P. D. [a legatee under the will] of C. D., late of \_\_\_\_\_, deceased, against the granting of letters testamentary of the said will to \_\_\_\_\_, one of the executors therein named :

It is ordered, that the said \_\_\_\_\_ appear before the surrogate of the county of \_\_\_\_\_, at his office in the [city] of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon of that day, and attend the inquiry into the said objections.

F. W., *Surrogate.*

No. 1409.

**Order that Objector Proceed with the Inquiry.**

(Code Civ. Pro., § 2637.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

P. D. [a legatee under the will] of C. D., late of \_\_\_\_\_, deceased, having filed objections against the granting of letters testamentary of the said will to \_\_\_\_\_, one of the executors therein named :

It is ordered, on motion, etc., that the said P. D. appear before the surrogate of the county of \_\_\_\_\_, at his office in the [city] of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon of that day, and proceed with the inquiry into the said objections.

F. W., *Surrogate.*

Demarest (1 Civ. Pro. R., 302). Estate of Vernon (1 Civ. Pro. R., 304).

It is not necessary that the appointment of an executor should be made in so many words. Any provision in the will showing that the testator in-

tended that the duties of an executor should be discharged by the person named, is sufficient to constitute him an executor. (In re Blancan, 4 Redf., 151.)

No. 1410.

**Objections to Issuing of Letters to an Executor Named in the Will.**

(Code Civ. Pro., § 2636.)

[Title of proceeding.]

*To* ———, *Surrogate of the County of* ——— :

The objections of P. D., of ———, a legatee under the will of C. D., late of ———, deceased, against the granting of letters testamentary of the said will to ———, one of the executors named therein.

*First objection.* That the circumstances of said ——— are such, that they do not afford adequate security to the creditors, or persons interested in the estate of said C. D., for the due administration of the said estate<sup>1</sup> [that he has recently failed in his business in the (city) of ——— and become insolvent, and that the debts owing by the said ——— greatly exceed the amount of property belonging to him].

*Second objection.* That said ——— is not a resident of the State of New York, but resides at ———, in the [State] of ———, and has no office within the State for the transaction of business in person, and that said will contains no express provision, to the effect that he may act, as such executor, without giving security.<sup>2</sup>

*Third objection.* That the said ——— is incompetent to execute the duties of the trust, as executor of said will, by reason of improvidence.

Dated ———, 18—.

P. D. [*or* M. G., *Attorney for* P. D.].[Office address.<sup>3</sup>]

——— COUNTY, ss.:

———, of ———, being duly sworn, says, that he is [the attorney for] the person named as objector in the fore-

<sup>1</sup> See section 2638, Code Civ. Pro., (22 Hun, 9), Estate of Demarest (1 Civ. subd. 1; Martin v. Duke (5 Redf., 597), Pro. R., 302), Estate of Vernon (1 Civ. Ballard v. Charlesworth (1 Dem., 501), Pro. 304), Estate of Sohn (1 Civ. Pro. Hovey v. McLean (1 Dem., 396), Morgan v. Morgan (3 Dem., 612), Pro. R., 373).

<sup>3</sup> See note 2 to form No. 122.

<sup>2</sup> See subd. 2 of section 2638, Code Civ. Pro., and Van Wyck v. Van Wyck 3 R. S. (7th ed.), 2289, §§ 3, 4; as to



going statement of objections, subscribed by him ; that he believes said statement to be true.

P. D. [*or* M. G.].

[Jurat as in form No. 46.]

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No. 1411.

**Decree upon Objections.**

(Code Civ. Pro., § 2637.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

P. D. [a legatee under the will] of C. D., late of the [city] of ———, deceased, having duly filed his objections against the granting of letters testamentary of the said will to ———, one of the executors named therein, and the surrogate having inquired into the said objections, and due proof having been taken, and after hearing counsel for the respective parties, it is adjudged and decreed, and the surrogate, by virtue of the authority in him vested, doth adjudge and decree [\*], that the said ——— is incompetent, by reason of improvidence, to execute the duties of his trust, as such executor, and that letters testamentary of the said will be refused to the said ———.

[*Or* as above to (\*), and from thence as follows: That the circumstances of said ——— are such as not to afford adequate security to the creditors, or persons interested in the said estate, for the due administration of the said estate; and, further, the said surrogate doth order, that such letters testamentary be refused to the said ———, until he shall give the like bond as is required by law of administrators in the case of intestacy.]

[*Or* as above to (\*), and from thence as follows: That the said objections be dismissed; and, further, it is ordered, that such letters testamentary issue to the said ———, and that the said P. D. pay the costs of the said ——— on this proceeding, to wit: ——— dollars, and the fees

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rights of executor in case of removal of disability, see (*id.*) § 5.

objections, Estate of Shand (20 Daily Reg., No. 35).

See, also, generally, as to form of

and expenses herein, to wit: the sum of \_\_\_\_\_ dollars (*or to be taxed.*)]

F. W., *Surrogate.*

\_\_\_\_\_  
No. 1412.

### Letters Testamentary upon Will.

(Code Civ. Pro., § 2636.)

*The People of the State of New York, by the grace of God free and independent, to all to whom these presents shall come or may concern, send greeting:*

Know ye, that at the [city] of \_\_\_\_\_, in the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord one thousand eight hundred and \_\_\_\_\_, before F. H. W., surrogate of our said county, the last will and testament of \_\_\_\_\_, late of \_\_\_\_\_, deceased [a copy whereof is hereunto annexed], was proved, and is now approved and allowed of by us; and the said deceased, having, whilst [he] lived, and at the time of his death, goods, chattels or credits within the county of \_\_\_\_\_, in this State, [*or, being, at the time of his death, a resident of the county of \_\_\_\_\_, in this State, etc.*], by means whereof the proving and registering the said will and granting administration of all and singular the said goods, chattels and credits, and also the auditing, allowing and final discharging the account thereof, doth belong unto us, the administration of all and singular the goods, chattels and credits of the said deceased, and any way concerning [his] will, is granted unto G. H., of \_\_\_\_\_ [and J. J., of \_\_\_\_\_], executor [*or executors*] in the said will named, he [*or they*], having [respectively] first taken and subscribed an oath, before the said surrogate, faithfully and honestly to discharge the duties of such executor [*or executors*], hereby requiring, you the said G. H. [and J. J.], to make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have or shall come to your hands, possession or knowledge; as also to make, or cause to be made, duplicates of such inventory, and cause the same to be signed by the appraisers; and the same so made and signed, that you make return thereof to

the surrogate of the said county, within three months from the date hereof.

In testimony whereof, we have caused the seal of office of our said surrogate to be hereunto affixed. Witness F. H. W., Esq., surrogate of the said county, at the [city] of \_\_\_\_\_, in the said county, on the \_\_\_\_\_ day of \_\_\_\_\_, in the year of our Lord one thousand eight hundred and \_\_\_\_\_.

[L. s.] F. H. W., *Surrogate*  
[or J. F., *Clerk of Surrogate's Court*] of \_\_\_\_\_ *County*.<sup>1</sup>

No. 1413.

**Bond of Executor or Administrator.**

(Code Civ. Pro., § 2638.)

As in form No. 340 to [\*], and from thence as follows: That if the above bounden, A. B., shall faithfully discharge the trust reposed in him as executor of the will of C. D. [or as administrator of all and singular the goods, chattels and credits of C. D.], late of the [city] of \_\_\_\_\_, deceased, and shall obey all lawful decrees and orders of the surrogate's court of the county of \_\_\_\_\_, touching the administration of the estate committed to him as such executor [or administrator], then the preceding obligation to be void, otherwise to remain in full force and virtue.<sup>2</sup>

[Signatures, etc., as in form No. 340.]

Sealed and delivered in presence of \_\_\_\_\_

[Acknowledgment as in form No. 340, or proof as in form No. 538; affidavits and approval, by surrogate, as in form No. 340.]

No. 1414.

**Renunciation by Executor.**

(Code Civ. Pro., § 2639.)

[Title of proceeding.]

I, C. M., of \_\_\_\_\_, the executor [or one of the execu-

<sup>1</sup> By subdivision 2 of section 2509, Code Civ. Pro., the clerk of the court is given power to sign letters. See, also, generally as to letters testamentary, notes to form No. 1410.

<sup>2</sup> As to form of bond, see Code Civ.

tors] named and appointed in and by the will of C. D., late of \_\_\_\_\_, deceased, do hereby [\*] renounce the said appointment, and all right and claim to letters testamentary of the said will, or to act as executor thereof, and pray the surrogate of the county of \_\_\_\_\_ to accept this my renunciation.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

.C. M.

In presence of I. J.

[Acknowledgment as in form No. 340, or proof as in form No. 538.]

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No. 1415.

**Retraction of Renunciation by Executor.**

(Code Civ. Pro., § 2639.)

As in form No. 1414 to [\*], and from thence as follows: Retract the renunciation heretofore made by me, dated \_\_\_\_\_, 18—, and filed and recorded in the surrogate's office of \_\_\_\_\_ county on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.<sup>2</sup>

Dated \_\_\_\_\_, 18—.

C. M.

In presence of I. J.

[Acknowledgment, etc., as in last form, No. 1414.]

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No. 1416.

**Instrument Selecting Person as Executor, Under a Power Contained in a Will.**

(Code Civ. Pro., § 2640.)

[Title of proceeding.]

I, F. P., of \_\_\_\_\_, pursuant to a power contained in the will of C. D., late of the [city] of \_\_\_\_\_, deceased,

Pro., §§ 2638, 2667. See, also, notes to last form.

<sup>1</sup> See, as to retraction of renunciation, Code Civ. Pro., § 2639, and next form, No. 1415.

The instrument of renunciation, etc.,

must be filed and recorded in the surrogate's office. (Id.)

<sup>2</sup> See, as to cases in which retraction may be made, and as to its effect, Code Civ. Pro., § 2639.

The retraction must be filed and recorded in the surrogate's office. (Id.)

dated \_\_\_\_\_, 18—, authorizing the selection by me of an executor of said will [to act with the executor (*or* executors) named in said will], do hereby select and designate M. F., of \_\_\_\_\_, as the [*or* an] executor of said will [to act as aforesaid].<sup>1</sup>

Dated \_\_\_\_\_, 18—.

F. P.

In presence of \_\_\_\_\_.

[Acknowledgment as in form No. 340, or proof as in form No. 538.]

\_\_\_\_\_

No. 1417.

**Petition for Order Requiring Executor Named in Will to Qualify or Renounce.**

(Code Civ. Pro., § 2642.)

*To the Surrogate of \_\_\_\_\_ County:*

The petition of A. F. respectfully shows, that he is one of the executors named in the will of C. D., late of \_\_\_\_\_, deceased [*or* otherwise describe party applying].

That more than thirty days have elapsed since the said will was admitted to probate by the surrogate's court of the county of \_\_\_\_\_ [*or* since (state other facts bringing the case within section 2642 of the Code of Civil Procedure)], and that C. M., one of the executors named in said will, has not qualified or renounced as such executor.

[And your petitioner further shows, that the said C. D. cannot be served personally within the State, with an order requiring him to qualify as such executor as provided by law, for the reason that (state reason).<sup>2</sup>]

And your petitioner prays, that an order be made requiring the said C. M. to qualify as such executor within a time therein specified, and directing that, in default of so doing, he may be deemed to have renounced his appointment.

Dated \_\_\_\_\_, 18—.

A. F.

[Verification as in form No. 52.]

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<sup>1</sup> See, as to objections to such executor, section 2641, Code Civ. Pro., and forms Nos. 1407-1411.

<sup>2</sup> See as to service by publication, Code Civ. Pro., § 2642.

## No. 1418.

**Order Requiring Executor Named in Will to Qualify or Renounce.**

(Code Civ. Pro., § 2642.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

It appearing by the petition dated \_\_\_\_\_, 18—, of A. F., one of the executors named in the will of C. D. [*or otherwise describe party applying*], that C. M., named as an executor by said will, has not qualified or renounced as executor thereof, within thirty days after probate thereof [*or within thirty days after the filing in this office of an instrument designating him as such executor, pursuant to a power of appointment contained in said will; or within five days after an objection to his appointment has been established in a case specified in section 2638 of the Code of Civil Procedure*]. [\*]

Now, upon the application of [M. N., attorney for] said A. F.:

I do hereby order and require the said C. M. to qualify as such executor, within \_\_\_\_\_ days from the service of a copy of this order upon him personally [*or in the manner hereafter mentioned*].

And I further direct, that, in default of so doing, he be deemed to have renounced his appointment.

[And it having appeared by the said petition (*or name other proof*), to my satisfaction, that this order cannot, with due diligence, be served personally upon said C. M. within the State; I do hereby direct, that the said order be served upon him by (state manner of service by publication or otherwise.)]

F. W., *Surrogate.*

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## No. 1419.

**Order in Case of Failure of Executor to Qualify, Pursuant to Order (form No. 1418).**

(Code Civ. Pro., § 2642.)

**As in form No. 1418 to [\*], and from thence as follows:**

And I having made an order upon the filing of said petition requiring the said C. M. to qualify, as such executor, within \_\_\_\_\_ days from the service upon him of a copy of said order, personally [*or* in the manner therein prescribed], and directing that in default of so doing he be deemed to have renounced his appointment; and the said order having been duly served upon the said C. M., as therein prescribed, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and the said C. M. not having qualified within the time fixed by said order:

Now, therefore, on motion of, etc.:

I do hereby order and declare, that the said C. M. has renounced his appointment as executor of the said will.<sup>1</sup>

F. W., *Surrogate.*

No. 1420.

**Petition for Appointment of Administrator with the Will Annexed.**

(Code Civ. Pro., § 2644.)

*To the Surrogate of \_\_\_\_\_ County:*

The petition of A. B., of \_\_\_\_\_, respectfully shows, that he is a creditor of C. D., late of \_\_\_\_\_, deceased, by reason [state nature of claim] [*or* state other interest of petitioner in estate].

That the will of said C. D. was duly admitted to probate by a decree made and entered in the surrogate's court of \_\_\_\_\_ county, as a will of real [and personal] property, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

That no person is named in said will as the executor thereof, and that said will contains no power of selection of an executor thereof to any person [*or* that no person has been selected as executor of said will by virtue of the power of selection to \_\_\_\_\_, therein contained, or state other necessity for application].

That the following are the names and places of residence, of the persons who have a prior right of letters of adminis-

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<sup>1</sup> See further provisions of section 2642, Code Civ. Pro., as to revocation of the order, etc.

tration, with the will annexed, upon the estate of the said C. D., to wit [state same].<sup>1</sup>

That all of said persons are of full age, except the said M. B., who is an infant of ——— years of age and upwards.

And your petitioner further shows, that [as he is informed and believes] the said C. D. left real property not exceeding ——— dollars in value,<sup>2</sup> and personal property not exceeding in value ——— dollars.

And your petitioner prays, that all persons having a prior right to that of your petitioner to administration, with the will annexed, upon the estate of said C. D., and who have not renounced such appointment, may be cited to show cause why administration should not be granted to your petitioner.

A. B.

[Verification as in form No. 52.]

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No. 1421.

### Renunciation by Person having Prior Right to Administer.

(Code Civ. Pro., § 2644.)

[Title of proceeding.]

I, F. D., of the [city] of ———, in the county of ———, a residuary legatee under the will of C. D., late of ———, deceased [*or* other proper description], do hereby renounce

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<sup>1</sup> See as to the persons entitled, and order of their rights, to administer, and generally as to form of petition, Code Civ. Pro., §§ 2643, 2644, Estate of Batchelor (64 How., 350; 2 McCarty's Civ. Pro. R., 291; 1 Dem., 209), Fowler v. Walter (1 Dem., 240), Matter of Allen (2 Dem., 203).

<sup>2</sup> The real property need not be stated unless the same, or the proceeds thereof, may come into the hands of the executor or administrator by virtue of any provision contained in the will, in which case it is to be taken into consideration in fixing the penalty of the

bond of the administrator. (Code Civ. Pro., § 2645.)

See, further, as to bond, Estate of Weeks (3 Law. Bul., 79; S. C., 1 Civ. Pro. R., 164).

The proceedings upon the petition are the same, as upon an application for administration upon the estate of intestate. (Code Civ. Pro., § 2644.) See forms under art. 4 of tit. 3 of ch. 18.

For form of oath of administrator with the will annexed, see form No. 1378; for form of bond, see form No. 1413.



all right and claim to administration, with the will annexed, of the goods, chattels and credits of the said C. D.

Witness my hand at \_\_\_\_\_ aforesaid, this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

F. D.

Sealed and delivered in presence of \_\_\_\_\_  
[Acknowledgment or proof as in forms No. 340, 538.']

No. 1422.

**Letters of Administration, with the Will Annexed.**

(Code Civ. Pro., § 2643.)

*The People of the State of New York, by the grace of God free and independent, to C. F. [residuary legatee under the last will and testament of], C. D., late of \_\_\_\_\_, deceased, send greeting :*

Whereas, E. F. died, having previously made, and duly executed, his last will and testament, which said will was admitted to probate by the surrogate of \_\_\_\_\_ county, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—; and,

Whereas, [A. G. and F. R., the executors in said will named, have both renounced]; and,

Whereas, the said C. D., at or immediately previous to his death, was an inhabitant of the county of \_\_\_\_\_, by means whereof the proving and registering of said will, and [†] the ordering and granting administration of all and singular the goods, chattels and credits, whereof the said testator died possessed in the State of New York; and, also, the auditing, allowing and discharging the final account thereof, doth appertain unto us; and we, being desirous that said will should be observed and performed, and that the goods, chattels and credits of the said deceased may be well and faithfully administered, applied and disposed of, do grant unto you, the said C. F., full power, by these presents, to administer and faithfully to dispose of all and singular the said goods, chattels and credits; to ask, demand, recover and receive the debts which unto the said deceased, while living and at the time of his death, did be-

<sup>1</sup> The renunciation is to be filed with \_\_\_\_\_ of is to be proved to his satisfaction. the surrogate, and the execution there- (Code Civ. Pro., § 2644.)

long; and to pay the debts which the said deceased did owe, so far as the said goods, chattels and credits will thereto extend and the law require; hereby requiring you to observe and perform the said last will and testament, and observe and perform all the duties to which you would have been subject if you had been named the executor thereof; hereby to make, or cause to be made, a true and perfect inventory of all and singular the personal property and effects of the said deceased, which have or shall come to your hands, possession or knowledge, and the same so made to exhibit or cause to be exhibited in the office of the surrogate of the said county of \_\_\_\_\_ at or before the expiration of three calendar months from the date hereof; and, also, to obey all orders that may, from time to time, be made by the surrogate of the county of \_\_\_\_\_ touching the administration of the estate hereby committed to you. [\*]

And we do, by these presents, depute, constitute and appoint you, the said C. F., administrator, with the will annexed, of all and singular the goods, chattels and credits which were of the said C. D., deceased.

In testimony, etc. [as in form No. 1412, to end thereof].

[L. s.]

[Signature as in form No. 1412.]

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## ARTICLE SECOND.

### FORMS RELATING TO REVOCATION OF PROBATE.

(Code Civ. Pro., Ch. 18, Tit. 3, Art. 2.)

- No. 1423. Petition for revocation of probate of will.  
 1424. Citation upon petition for revocation of probate of will.  
 1425. Decree revoking probate, or confirming probate and dismissing petition.  
 1426. Notice of revocation of probate.

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### No. 1423.

#### Petition for Revocation of Probate of Will.

(Code Civ. Pro., § 2647.)

*To the Surrogate's Court of \_\_\_\_\_ County:*

The petition of A. B., of \_\_\_\_\_, respectfully shows, that

he is a son and heir at law of C. D., late of ———, deceased [*or state other interest in the estate*].

That less than one year since, and on the ——— day of ———, 18—, a decree was made and recorded by said court, admitting to probate a written instrument [*or written instruments*], dated, etc., as the will of the said C. D. [*or if the time stated of recording the decree is not within a year from the presentation of the petition, show the disability of the petitioner which extended the time*],<sup>1</sup> as a will valid to pass [*both real and*] personal property.

And your petitioner shows that the said will was invalid for the following reasons [*state same, e. g.*]:

*First.* That the said C. D., at the time of the execution of said instrument [*or instruments*] purporting to be his will, was not competent to make a will.

*Second.* That the said instrument [*or instruments*] was [*or were*] not [*nor was either of them*] executed and attested in the manner prescribed by law for the execution and attestation of wills.

*Third.* That the execution of the said instrument [*or instruments*] by the said C. D., was obtained by fraud, imposition and coercion practiced upon the said C. D. by certain legatees and devisees named in the said instrument [*or instruments*], or by some person or persons at their instance, and under and by their direction and connivance; and that the said C. D., at the time of the execution of the instrument, was under the duress and restraint of the said legatees and devisees.

*Fourth.* That the testimony of the attesting witnesses to the said instrument [*or instruments*] was vague, indefinite and uncertain, and did not prove the due execution and attestation of the said instrument [*or instruments*] in the mode prescribed by law.

That C. M., of ———, is the executor of said will [*or administrator, with the will annexed, of said estate*], and that [*naming legatees and devisees named in will, and stating their residences*], are the devisees and legatees named in said will, and that [*naming and stating residences of par-*

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<sup>1</sup> See Code Civ. Pro., § 2648.

ties to the proceeding for probate], are the persons who were parties to the proceeding, in which the probate of said instrument was granted.<sup>1</sup>

Wherefore your petitioner prays, that the probate of said instrument [*or* instruments] may be revoked, and that the above named persons may be cited to show cause, pursuant to article second of title third of chapter eighteenth of the Code of Civil Procedure, why such probate should not be revoked, and for such other or further relief as may be necessary and proper.<sup>2</sup>

A. B.

[Verification as in form No. 52.]

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No. 1424.

**Citation upon Petition for Revocation of Probate of Will.**

(Code Civ. Pro., § 2649.)

As in general form No. 1345, inserting after word "there," as follows: To show cause why the probate of the instrument [*or* instruments] admitted to probate as the will of C. D., late of \_\_\_\_\_, deceased, should not be revoked.<sup>3</sup>

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<sup>1</sup>If a legatee is dead, his executor or administrator must be cited, if one has been appointed; if not, such person must be cited as representing him, as the surrogate designates for that purpose. (Code Civ. Pro., § 2649.)

<sup>2</sup>As to this proceeding generally, see *Matter of Will of Gouraud* (95 N. Y., 256; S. C., 18 Week. Dig., 516; rev'g S. C., 28 Hun, 560; 16 Week. Dig., 265), *In re Will of Phillips* (21 Week. Dig., 140; S. C., 98 N. Y., 267), *Pryer v. Clapp* (1 Dem., 387), *Hoyt v. Jackson* (2 Dem., 443), *Heilman v. Jones* (5 Redf., 398), *Matter of Dustan* (N. Y. Daily Reg., January 3, 1884), *Becker v. Bochus* (5 Redf., 488), *Matter of Janes* (87 Hun, 57), *Matter of*

*Tilden* (98 N. Y., 434), *Matter of Patterson* (79 Hun, 371), *Matter of Laytin* (15 Misc., 660), *Henry v. Henry* (4 Dem., 253), *Matter of Bonnett* (1 Conolly, 294).

As to suspension of proceedings by executor, after service of the citation upon him, see Code Civ. Pro., § 2650. *Bray v. Smith* (1 Dem., 168), *Matter of McGowan* (28 Hun, 246), *Matter of Hoyt* (31 Hun, 176), *La Bau v. Vanderbilt* (3 Redf., 384).

<sup>3</sup>As to parties to whom citation is to be directed, see Code Civ. Pro., § 2649; and see notes to form No. 1423.

As to hearing upon the return of citation and evidence thereupon, see (id.) § 2651.

No. 1425.

**Decree Revoking Probate, or Confirming Probate, and Dismissing Petition.**

(Code Civ. Pro., § 2652.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

This matter having come on to be heard upon the written petition, duly verified, of A. D. [the son and heir at law], of C. D., late of ———, deceased. dated ———, 18—, containing allegations against the validity of the will of C. D., late of ———, deceased [and the competency of the proof thereof], and praying that the probate of the said will, the decree admitting which to probate was recorded in this court, on the ——— day of ———, 18—, might be revoked, and that the proper persons might be cited to show cause why the same should not be revoked, and on the return of the citation heretofore issued therein requiring C. M., the executor who has taken upon himself the execution of the said will, and C. F., W. F. and F. T., the legatees and devisees named in the said will, and [name other persons cited] who were parties to the special proceeding upon which the probate of said will was granted, to appear in the court on the ——— day of ———, 18—, and due proof of the personal service of said citation on all the persons and parties named therein having been produced and filed, and the said petitioner having appeared by M. N., his attorney and counsel, in support of the said allegations, and the said C. M., executor as aforesaid, and the said C. F. having appeared by C. C., their attorney and counsel, in opposition thereto, and the said F. T. having appeared by A. M., her attorney and counsel, also in opposition thereto, and L. F., the special guardian of W. F., one of the said legatees, a minor, having duly appeared in behalf of the said minor, and no other party or person having appeared in the said matter, and the said matter having been heard on several days, and duly adjourned to this day, and upon hearing the proofs of the parties aforesaid, and counsel for them respectively, and due deliberation having been thereupon had :

It is adjudged, decided and decreed, and the surrogate of the county of \_\_\_\_\_, by virtue of the power and authority in him vested, [\*] doth adjudge, decide and decree, that the said C. D., at the time he executed the instrument in writing, bearing date the \_\_\_\_\_ day of \_\_\_\_\_, 18—, purporting to be his will, was not of sound mind, nor competent to execute a will, and that the said instrument was not duly executed as and for the will of the said C. D., deceased.

And it is further adjudged, decreed and declared, and the surrogate aforesaid doth adjudge, decree and declare that the said instrument in writing is utterly null and void as or for the will of the said C. D., deceased.

And the said surrogate doth further order and decree, that the probate of the said will heretofore granted by the surrogate's court of the county of \_\_\_\_\_, and bearing date on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, be and the same is hereby revoked, and that the costs of all the parties to this proceeding, and the fees and expenses thereof, to wit [insert provisions as to costs],<sup>1</sup> be paid out of the estate of the said deceased.

[And it is further ordered, adjudged and decreed that the letters testamentary heretofore issued upon such instrument be and the same are hereby revoked.<sup>2</sup>]

[L. s.]

[Signature as in form No. 1426.]

[Or, as above to (\*), and from thence as follows: doth order, adjudge and decree that the said will of C. D., deceased, and the probate thereof, be and the same hereby are confirmed, and that the said petition of the said C. D. be dismissed; and it is further ordered, and the said surrogate pursuant to the statute in such case made and provided, doth hereby order and decree that the said \_\_\_\_\_ pay the (insert provisions as to costs).<sup>1</sup>]

<sup>1</sup> See section 2556, etc., Code Civ. Pro., as to amount and allowance of costs by surrogate, and see *Matter of O'Brien* (145 N. Y., 379).

<sup>2</sup> See section 2684 of Code Civ. Pro., that this clause is necessary where letters have been issued. See, also, section 2692, id.

No. 1426.

**Notice of Revocation of Probate of Will.**

(Code Civ. Pro., § 2653.)

[Title of proceeding.]

Notice is hereby given, pursuant to section 2653 of the Code of Civil Procedure, that the probate of the will of C. D., late of ———, deceased [and the letters testamentary issued thereupon to C. M.], have been revoked by a decree of the undersigned surrogate of ——— county, duly made and entered by him on the ——— day of ———, 18—.¹

Dated ———, 18—.

F. W., *Surrogate.*

## ARTICLE THIRD.

## FORMS RELATING TO PROBATE OF HEIRSHIP.

(Code Civ. Pro., Ch. 18, Tit. 3, Art. 3.)

- No. 1427. Petition for probate of heirship.  
 1428. Citation to attend probate of heirship.  
 1429. Decree establishing the right of inheritance.  
 1430. Petition to vacate or modify the decree establishing the right of inheritance.  
 1431. Citation upon petition (form No. 1430).

No. 1427.

**Petition for Probate of Heirship.**

(Code Civ. Pro., § 2654.)

*To the Surrogate's Court of ——— County:*

The petition of A. D., of ———, respectfully shows, that heretofore, and on or about the ——— day of ———, 18—, C. D., of ———, died intestate [or without having devised his real estate to specific persons], and seized in fee of certain real property situated in the [city] of ———, in the county of ———, in this State, described as follows [describe same].

¹ See Code Civ. Pro., § 2684.

This notice is to be caused by the surrogate, to be immediately published for three successive weeks, in a newspaper published in his county. (Code Civ. Pro., § 2653.)

By section 2653a of Code Civ. Pro., inserted in 1892, an action may be maintained to determine the validity of the probate of a will admitted to probate. All the devisees, legatees and heirs of the testator, and other in-

That said C. D. left him surviving your petitioner, and J. D., of ———, and F. D., of ———, his only children, and heirs at law.

That, as such heir at law, your petitioner is seized in fee simple absolute of the one undivided one ——— part of said real estate in fee simple [subject to the dower rights therein of his mother, P. D., the widow of said C. D.], and that said J. D. and F. D. are each of them seized of the one undivided one-third part thereof [subject to the said dower right therein of their mother, the said P. D.].

That your petitioner, and said J. D., are of full age, but that said F. D. is a minor of the age of ——— years and upwards.

Your petitioner prays, that a decree may be made by the surrogate of ——— county, pursuant to article third of title third of chapter eighteenth of the Code of Civil Procedure, establishing the rights of inheritance to said real estate, and that all the heirs of the said C. D. may be cited to attend the probate of that right, and that your petitioner may have such further or other relief as may be necessary and proper.

Dated ———, 18—,

A. B.

[Verification as in form No. 52.]

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No. 1428.

### Citation to Attend Probate of Heirship.

(Code Civ. Pro., § 2655.)

*The People of the State of New York, by the grace of God free and independent, to [naming heirs other than the petitioner], heirs at law of C. D., deceased:*

Whereas, A. D., of ———, has, on the ——— day of ———, 18—, presented to and filed with the surrogate's court of ——— county, his written petition, duly verified and dated ———, 18—, by which he claims to be the owner in fee simple absolute of the [undivided] one ——— part of the real property hereinafter described of C. D., late of ———, deceased, as one of the heirs at law of said C. D., and praying for a decree establishing the right of

interested persons, including the executor or administrator must be parties to the action (Laws of 1892, chap. 591, not retroactive). See, also, Hawke v.

Hawke (82 Hun, 439), Katz v. Schnaier (87 id., 343), and see amendments to said section 2653a, by chap. 943 of Laws of 1896.



inheritance thereto, and that the heirs of the said C. D. may be cited to attend the probate of that right:

Now, therefore, you are hereby cited and required to be and attend before our said surrogate of \_\_\_\_\_ county, on, etc., at, etc., to attend the probate of the said right of inheritance [add clause as to minors, as in form No. 1345].

[The following is the description of the above mentioned real property.]

In testimony, etc. [as in form No. 1345].

[L. s.]

[Signature as in form No. 1345.]

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No. 1429.

### Decree Establishing the Right of Inheritance.

(Code Civ. Pro., § 2656.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

The written petition of A. B., of \_\_\_\_\_, duly verified, and dated \_\_\_\_\_, 18—, having been presented to, and filed with, this court on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, setting forth that [here state briefly the facts stated in the petition], and praying for a decree establishing the right of inheritance to the real property described in said petition as follows, to wit [describe same], and that all the heirs of the said C. D. might be cited to attend the probate of that right; and the surrogate of \_\_\_\_\_ county having thereupon issued a citation accordingly, setting forth the name of the said decedent, and of the petitioner, the interest or share which the said petitioner claimed in said real property, and a brief description of the said real property, and requiring all the said heirs to attend the probate of said right, at, etc., on, etc., and the said citation having been returned with due proof of service thereof upon the parties to whom it was directed, and the said petitioner having appeared at the time at which the said citation was returnable by, etc. [reciting appearances as in form No. 1245], and the said matter having been heard on several days, and duly adjourned to this day, and the surrogate having heard the proofs and allegations of the parties, [\*] and there hav-

ing been no contest respecting the heirship of any party, or respecting the share to which any party is entitled in said real estate; and the said petitioner having established, by satisfactory evidence, that said C. D. died intestate [as to the said real property in question], on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

That, at the time of his death, he resided at \_\_\_\_\_.

That the said A. D., the petitioner, who resides at \_\_\_\_\_, and was of the age of \_\_\_\_\_ years on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and said J. D., who resides at \_\_\_\_\_, and was of the age of \_\_\_\_\_ years on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and F. D., who resides at \_\_\_\_\_, and was of the age of \_\_\_\_\_ years on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, were entitled to inherit from the said C. D. the said real property in equal shares, each of them being entitled to the undivided one-third part thereof, in fee simple absolute [subject to the right of dower therein of their mother, P. D., the widow of said C. D.].

It is hereby ordered, adjudged, decreed and declared, and the said surrogate, by virtue of the power and authority in him vested, doth hereby order, adjudge, decree and declare, that the right of inheritance to the said real property has been established to the satisfaction of said surrogate, in accordance with the above recited facts; and that the said A. D., F. D. and G. D. are each of them entitled to the equal undivided one-third part of said real property, as the heirs at law of said C. D., deceased.

[Insert any provisions as to costs.<sup>1</sup>]

F. W., *Surrogate of* \_\_\_\_\_ *County.*

[Or as above to (\*), and from thence as follows: And it having appeared that there is a contest respecting the heirship of said \_\_\_\_\_ (or respecting the shares to which said \_\_\_\_\_ is entitled as an heir of the said C. D.); it is hereby ordered, adjudged and decreed, and the said surrogate, by virtue of the power and authority in him vested, doth order, adjudge and decree, that the said proceeding be and it is hereby dismissed (add any provisions as to costs<sup>1</sup>).<sup>2</sup>]

<sup>1</sup> See provisions as to costs to be allowed by surrogate, sections 2556, etc., Code Civ. Pro.

<sup>2</sup> As to recording the decree, see section 2657, Code Civ. Pro.

No. 1430.

**Petition to Vacate or Modify the Decree Establishing the Rights of Inheritance.**

(Code Civ. Pro., § 2658.)

*To the Surrogate's Court of the County of \_\_\_\_\_:*

The petition of A. M. respectfully shows, that heretofore and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a petition was presented to, and filed with, this court by A. D., praying for a decree establishing the right of inheritance to certain real property, described as follows, to wit [describe same].

That such proceedings were thereupon had upon said petition, that on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and less than ten years since, a decree was made by the surrogate of \_\_\_\_\_ county, establishing the right of inheritance to said real estate, of which decree a copy is hereto annexed.

And your petitioner further shows, that he [state nature of right, title or interest of petitioner in the property, or part thereof (describing it), and show how his right, etc., is injuriously affected by the decree].

That the said decree is erroneous, in the following material particular [*or* particulars] [state how erroneous].

And your petitioner prays, that the said decree may be set aside [*or* modified in the particular (*or* particulars) above specified], and that all the persons whose heirship was established by the said decree may be cited to show cause why the prayer of this petition should not be granted.

Dated \_\_\_\_\_, 18—.

A. M.

[Verification as in form No. 52.]

No. 1431.

**Citation upon Petition (form No. 1430).**

(Code Civ. Pro., § 2658.)

*The People of the State of New York, by the grace of God free and independent, to [naming parties cited]:*

Whereas, A. M., of \_\_\_\_\_, has, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, presented to, and filed with, the surrogate's

court of \_\_\_\_\_ county his written petition, duly verified, dated \_\_\_\_\_, 18—, stating that the decree, heretofore entered in this court on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, establishing the right of inheritance to real property of C. D., late of \_\_\_\_\_, deceased, is erroneous in a certain material particular, specified in said petition, and praying that the said decree may be set aside [*or modified in that particular*], and that all the persons whose kinship was established by the said decree may be cited to show cause why the prayer of said petition should not be granted :

Now, therefore, you are hereby cited and required to be and attend before our surrogate of the county of \_\_\_\_\_, at, etc., on, etc., then and there to show cause why the prayer of said petition should not be granted.<sup>1</sup>

In testimony, etc. [as in form No. 1345].

[Signature as in form No. 1345.]

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#### ARTICLE FOURTH.

#### FORMS RELATING TO GRANT OF LETTERS OF ADMINISTRATION.

(Code Civ. Pro., Ch. 18, Tit. 3, Art. 4.)

- No. 1432. Petition for letters of administration.
- 1433. Citation on petition for letters of administration.
- 1434. Renunciation of right to administer.
- 1435. Appearance by creditor, etc.
- 1436. Decree awarding administration.
- 1437. Bond of administrator.
- 1438. Oath of administrator.
- ~~1439.~~ Letters of administration.

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No. 1432.

#### Petition for Letters of Administration.

(Code Civ. Pro., § 2662.)

[Title of proceeding.]

\_\_\_\_\_ COUNTY, ss. :

The petition of F. G., of the [city] of \_\_\_\_\_, respect-

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<sup>1</sup> As to proceedings upon return of citation, see section 2659 of Code Civ. Pro.

fully shows, that she is the [widow] of J. G., late of the [city] of ———, deceased.

That the said J. G. died a natural death on or about the — day of —, 1—, and died intestate, as your petitioner verily believes.

That your petitioner has made diligent search and inquiry for a will of the said deceased, and has not found any, or obtained any information that he left or ever made one.

That your petitioner has, to the best of her ability, estimated and ascertained the value of the personal property of which the said deceased died possessed, and of the probable amount to be recovered by reason of any right of action granted to an executor or administrator by special provision of law, and that the same does not exceed in value the sum of about five thousand dollars.

That the said intestate left kindred entitled to his estate, whose names and places of residence are as follows: H. G. and W. G., residing in the [city] of ———, in the county of ———, and S. B., wife of W. B., residing in the [city] of ———, in the county of ———, his only surviving children, all of full age, and R. G., residing in the [city] of ———, in the county of ———, a minor, having no general guardian, the only child of S. G., deceased, who was a son of the said intestate.

Your petitioner further shows, that the said intestate, at or immediately previous to his death, was a resident of the county of ———; that your petitioner is of full age, and she prays that a decree may be made awarding letters of administration of the goods, chattels and credits of the said intestate to her.<sup>1</sup>

[And that the persons required to be cited, as prescribed by section 2663 of the Code of Civil Procedure, may be cited to show cause why such a decree should not be made.<sup>2</sup>]<sup>3</sup>

Dated ———, 18—.

F. G.

[Verification as in form No. 52.]

<sup>1</sup> The prayer may be for the award of letters either to the petitioner or to such other person or persons having a prior right, as may be entitled thereto, or in the alternative, as the petitioner elects. (Code Civ. Pro., § 2662.)

<sup>2</sup> This clause in brackets must be inserted when there are any persons, residents of the state, who have a prior or equal right to administer to the petitioner, and who have not renounced. (Code Civ. Pro., §§ 2662, 2663.)

<sup>3</sup> See, further, as to contents of petition, section 2662 of Code Civ. Pro., as amended by chap. 686 of Laws of 1893, and *Roderigas v. East River Savings Inst.* (76 N. Y., 316; aff'g S. C., 43 N. Y. Super. Ct., 217). An allegation that the petitioner has made diligent search among the papers of the decedent, and found no will, is sufficient; or that a paper purporting to be a will was revoked by the testator in his lifetime; or that the paper was not a valid will, by reason of the inca-

No. 1433.

**Citation on Petition for Letters of Administration.**

(Code Civ. Pro., § 2663.)

As in general form No. 1345, inserting therein after word "there," as follows: To show cause why a decree should not be made awarding letters of administration of the goods, chattels and credits of C. D., late of the [city] of \_\_\_\_\_, deceased, intestate, to F. D., of \_\_\_\_\_, the brother [etc.] of the said decedent, who has made application for the same.<sup>1</sup>

No. 1434.

**Renunciation of Right to Administer.**

(Code Civ. Pro., § 2663.)

[Title of proceeding.]

I, P. F., of the [city] of \_\_\_\_\_, in the county of \_\_\_\_\_, a brother of C. F., late of the [city] of \_\_\_\_\_, deceased, intestate, do hereby renounce all my right and claim to administration of the goods, chattels and credits of the said intestate.

Witness my hand at \_\_\_\_\_ aforesaid, this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

P. F.

Signed in presence of \_\_\_\_\_.

[Acknowledgment or proof as in forms Nos. 340 and 538.<sup>2</sup>]

No. 1435.

**Appearance by Creditor, etc.**

(Code Civ. Pro., § 2663.)

See form No. 1353.

capacity of the testator. Where an invalid or inoperative testamentary paper is alleged, the executors and legatees named therein, if known, should be mentioned, and the court ought to require notice to them before granting administration. (Redfield's Law and Practice of Surrogates' Courts, 314). See, also, O'Connor v. Huggins (113 N. Y., 511), Matter of Hazard (51 Hun, 201), Martin v. Dry Dock, etc., R. Co. (92 N. Y., 70), Matter of Gould (30 State Rep., 949), Matter of Moulton (32 id., 631).

See, also, former section 2661, id., now part of § 2662, construed in Moorhouse v. Hutchinson (2 Dem., 429).

As to who are entitled to

administration and in what order, see Code Civ. Pro., 2660; Matter of Adm'n of Curser (89 N. Y., 401; rev'g S. C., 25 Hun, 579), Matter of Zeph (50 Hun, 523), Knox v. Nobel (77 id., 230), Matter of Wilson (92 id., 318), Matter of Lewis (id., 606).

<sup>1</sup>See notes to last form No. 1432.

As to citation in cases in which the surrogate is unable to ascertain, to his satisfaction, whether the decedent left, surviving him, any person entitled to succeed to his estate, see section 2663, Code Civ. Pro.

<sup>2</sup>Or the instrument may be otherwise proved to the satisfaction of the surrogate. (Code Civ. Pro., § 2663.)

No. 1436.

**Decree Awarding Administration.**

(Code Civ. Pro., § 2663.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

The written petition of ———, duly verified, dated ———, 18—, having been duly presented and filed herein, on the ——— day of ———, 18—, praying for a decree awarding letters of administration of the goods, chattels and credits of C. D., late of ———, deceased, to the [said petitioner], and a citation having been thereupon duly issued to the proper parties requiring them, etc. [state purpose of citation], and the said citation having been returned with due proof of service thereof as required by law, upon all the parties to whom the same was directed, and [recite appearances, adjournments, etc., as in form No. 1402]:

Now, it is hereby ordered, adjudged and decreed, on motion of ———, after hearing, etc., that letters of administration of the goods, chattels and credits of the said C. D., be and they are hereby awarded to said ——— upon [his] taking and subscribing the statutory form of oath, and executing a bond<sup>1</sup> in the form required by law, with [two] sureties, in the penalty of ——— dollars.

F. W., *Surrogate.*

No. 1437.

**Bond of Administrator.**

(Code Civ. Pro., § 2664.)

See form No. 1413.

No. 1438.

**Oath of Administrator.**

(Code Civ. Pro., §§ 2594, 2667.)

See form No. 1378.

<sup>1</sup> As to bond, see section 2664, Code § 2667, as amended by ch. 686 of Laws Civ. Pro., present section, formerly of 1893, and form No. 1413.

No. 1439.

**Letters of Administration.**

(Code Civ. Pro., § 2663.)

*The People of the State of New York, by the grace of God free and independent, to F. G. [widow] of J. G., late of the [city] of ———, in the county of ———, deceased, send greeting :*

Whereas, the said J. G., as is alleged, lately died intestate [being at the time of his death a resident of the county of ———, and] having, whilst living, and at the time of his death, goods, chattels or credits within [the said county of ———, in] this State, by means whereof the ordering and granting administration of all and singular the said goods, chattels and credits, and, also, the auditing, allowing and final discharging the account thereof, doth appertain unto us; and we, being desirous that the goods, chattels and credits of the said deceased may be well and faithfully administered, applied and disposed of, do grant unto you, the said F. G., full power, by these presents, to administer and faithfully to dispose of all and singular the said goods, chattels and credits; to ask, demand, recover and receive the debts which unto the said deceased, while living, and at the time of his death, did belong; and to pay the debts which the said deceased did owe, so far as the said goods, chattels and credits will thereto extend, and the law require, hereby requiring you to make, or cause to be made, a true and perfect inventory of all and singular the personal property and effects of the said deceased, which have or shall come to your hands, possession or knowledge, and the same so made to exhibit, or cause to be exhibited, into the office of the surrogate of the said county of ———, at or before the expiration of three calendar months from the date hereof; and, also, to obey all orders that may, from time to time, be made by the surrogate of the county of ——— touching the administration of the estate hereby committed to you; and we do by these presents depute, constitute and appoint you, the said F. G., administratrix of all and singular the



goods, chattels and credits which were of the said J. G., deceased.

In testimony whereof, etc. [as in form No. 1412].

[L. S.] \_\_\_\_\_ F. W., *Surrogate*.

## ARTICLE FIFTH.

### FORMS RELATING TO TEMPORARY ADMINISTRATION.

(Code Civ. Pro., Ch. 18, Tit. 3, Art. 5.)

- No. 1440. Petition for temporary administration.
- 1441. Notice of application for order appointing temporary administrator.
- 1442. Order appointing temporary administrator.
- 1443. Letters of temporary administration.
- 1444. Petition for payment of debt by temporary administrator.
- 1445. Oath of temporary administrator.
- 1446. Bond of temporary administrator.
- 1447. Petition that temporary administrator deposit money or show cause, etc.
- 1448. Order that temporary administrator make deposit or show cause why a warrant of attachment should not issue against him.

### No. 1440.

#### Petition for Temporary Administration.

(Code Civ. Pro., § 2670.)

[Title of proceeding, if proceeding is pending.]

*To the Surrogate of the County of* \_\_\_\_\_ :

The petition of A. B., of \_\_\_\_\_, respectfully shows, that he is a creditor of F. G., deceased, late, and at the time of his death, a resident of the [city] of \_\_\_\_\_, in the county of \_\_\_\_\_, having a claim against said F. G., upon, etc. [stating general nature of the claim] [*or* state other interest in estate].<sup>1</sup>

That delay has necessarily occurred in the granting of letters testamentary of the will of said F. G. [*or* of administration of, etc., of said F. G.], in consequence of a contest having arisen upon an application therefor [*or* for the probate of said will] [*or* state other cause].

That [naming persons and stating residences], have appeared as parties to the above entitled proceeding.

<sup>1</sup> See section 2670 as to who may apply, also *Matter of Chase* (32 211).

That said persons are of full age [except, etc.].

[That the safety of said estate requires the notice of this application, for the appointment of such temporary administrator, to be less than ten days, required by the statute, for the following reasons, viz. (state same).]

That your petitioner has, to the best of his ability, estimated and ascertained the value of the personal property, of which the said deceased died possessed, together with the probable amount to be recovered by reason of any right of action, granted to an executor or administrator by special provision of law, and that the same does not exceed in value the sum of about ——— dollars.

That [state any special reasons why the temporary administrator should be appointed].

Wherefore your petitioner prays, that letters of temporary administration of, etc., of said F. G. may be issued to ——— of ———,<sup>1</sup> pursuant to statute, and for such other or further relief as may be proper and necessary.<sup>2</sup>

Dated ———, 18—.

A. B.

[Verification as in form No. 52.]

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No. 1441.

### Notice of Application for Order Appointing Temporary Administrator.

(Code Civ. Pro., § 2670.)

[Title of proceeding.]

SIR—Take notice, that an application will be made upon

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<sup>1</sup> The letters may be issued to one or more persons competent and qualified to serve as executors. (Code Civ. Pro., § 2670.)

Where a temporary administrator is appointed by reason of a contest respecting a will, the executor named in the will is not a proper person to be appointed against the objection of the contestants, where he has an interest in any degree hostile to the estate. (Cornwell v. Cornwell, 1 Dem., 1.)

<sup>2</sup> See as to cases in which the ap-

pointment should be made, and proceedings thereupon, *West v. Mapes* (14 Week. Dig., 92), *Matter of Chase* (32 Hun, 318; S. C., 19 Week. Dig., 409), *Tooker v. Bell* (1 Dem., 52), *Matter of Plumb* (21 State Rep., 107), *Matter of Eddy* (10 Misc., 211).

The appointment is in the discretion of the surrogate. (*Matter of Chase, supra.*)

In a case specified in subdivision 2 of section 2670, Code Civ. Pro., the application is by petition, in like manner as for administration in a case of intestacy, and the proceedings are the

the proceedings herein, and upon the petition, a copy of which is hereto annexed, to the surrogate of \_\_\_\_\_ county, on, etc., at, etc.,<sup>1</sup> for the appointment of a temporary administrator of the estate of F. G., late of \_\_\_\_\_, deceased, and for such further or other relief as may be proper.

Dated \_\_\_\_\_, 18—.

M. C., *Attorney for* \_\_\_\_\_.  
[Office address.]<sup>2</sup>

To [name parties to the special proceeding].<sup>3</sup>

I being satisfied, by proof, that the safety of the estate of F. G., deceased, requires the notice of said application to be shortened, do hereby shorten the time of service of the foregoing notice to \_\_\_\_\_ days.

Dated \_\_\_\_\_, 18—.

\_\_\_\_\_ F. W., *Surrogate*.<sup>1</sup>

No. 1442.

**Order Appointing Temporary Administrator.**

(Code Civ. Pro., § 2670.)

[Title of proceeding.]

The written petition of A. B., of \_\_\_\_\_, dated \_\_\_\_\_, 18—, duly verified, having been filed herein, praying for the appointment of a temporary administrator of the estate of said F. G., and [the proof of the will of said C. D., being contested], and a delay being necessarily produced in granting letters testamentary [*or* of administration] in this matter, and it appearing that the situation of the property of the said deceased requires that such letters should be issued, and on reading and filing the bond executed by [the said petitioner], with two sufficient sureties, pursuant to the statute in such case made and provided, and it appearing that due notice of the application for the order has been given to each party to the above entitled proceeding who has appeared :

Now, on motion of, etc., after hearing, etc.:

It is ordered, that the prayer of the said petitioner be

same as in article fourth of title 3 of Code Civ. Pro. See forms Nos. 1432-1439 (§ 2670, id.).

<sup>1</sup> See Code Civ. Pro., § 2670.

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> See, also, Code Civ. Pro., § 2681.

granted, and that such letters issue to [the said petitioner] in pursuance thereof.<sup>1</sup>

F. W., *Surrogate*.

No. 1443.

### Letters of Temporary Administration.

(Code Civ. Pro., §§ 2670.)

*The People of the State of New York, to C. D., of ———, [sole executor named in the instrument in writing, purporting to be the will of F. G., late of the (city) of ———, deceased, propounded for proof and now pending before the surrogate of the county of ———].<sup>2</sup>*

Whereas, the proof of the said will is contested, and a delay is necessarily produced in granting letters testamentary of a will, or letters of administration of the goods, chattels and credits of the said F. G., deceased, and it appearing that the situation of the property of the said deceased requires that temporary letters of administration authorizing the preservation and collection of the goods of the deceased should be issued: and we being desirous that the goods, chattels, personal estate and debts of said deceased may be collected and preserved, do grant unto you, the said C. D., full power, by these presents, to collect, recover and receive the said goods, chattels, personal estate and debts of the said deceased; and to secure the same at such reasonable expense as the surrogate of the county of ——— shall allow; and to sell such of the goods as are perishable, under the direction of the said surrogate, after the same shall have been appraised; hereby requiring you to make, or cause to be made, a true and perfect inventory of such of the assets of the said deceased as shall come to your possession or knowledge, and return the same to our said surrogate within three months from the date of these presents;

<sup>1</sup> As to appointment of a temporary administrator in consequence of a contest respecting a will of real property, and authority which may be conferred upon him, see section 2675, Code Civ. Pro., and *Tooker v. Bell* (1 Dem., 52).

As to general powers of temporary

administrator, see Code Civ. Pro., §§ 2672, etc.

<sup>2</sup> See, however, as to the appointment of an executor named in the will where the proof thereof is contested, *Howard v. Dougherty* (3 Redf., 535), *Cornwell v. Cornwell* (1 Dem., 1), cited in note 1, page 1288, to form No. 1440.

and, also, faithfully and truly account for all property, money and things in action, received by you as such temporary administrator, whenever required by our said surrogate, or any other court of competent authority; and faithfully to deliver up the same to the person or persons who shall be appointed executors or administrators of the said \_\_\_\_\_, deceased, or to such other person as shall be authorized to receive the same by said surrogate; and we do, by these presents, depute, constitute and appoint you, the said C. D., temporary administrator of all and singular the goods, chattels and credits which were of the said \_\_\_\_\_, deceased.

In testimony, etc. [as in form No. 1412].

[L. S.] \_\_\_\_\_

F. W., *Surrogate*.

No. 1444.

**Petition for Payment of Debt by Temporary Administrator.**

(Code Civ. Pro., § 2674.)

*To the Surrogate of the County of \_\_\_\_\_ :*

The petition of A. B., of \_\_\_\_\_, respectfully shows, that your petitioner is a creditor of F. G., late of the [city] of \_\_\_\_\_, deceased.

That he has a valid claim against the said deceased, on a promissory note made to the said F. G. in his life-time to the order of your petitioner, dated the \_\_\_\_\_ day of \_\_\_\_\_, 18—, for \_\_\_\_\_ dollars, payable six months after date [*or state in like manner other indebtedness*].

That no payments have been made thereon, and that there are no offsets against the same to the knowledge of your petitioner.

That an order was duly made and entered by the surrogate of \_\_\_\_\_ county on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, appointing C. D. temporary administrator of the estate of the said F. G., and that temporary letters of administration of said estate were issued to said F. G. on the day aforesaid [*or on the \_\_\_\_\_ day of \_\_\_\_\_, 18—*].

That your petitioner duly exhibited his said claim to the said temporary administrator, under the notice published by him for the exhibition of claims, and that he assented to the justness and correctness of the same.

That your petitioner has demanded payment of the said claim from the said administrator since the expiration of one year from time of the granting of the letters aforesaid to him, and that he has neglected to pay the same.

Your petitioner further shows, that he is informed and believes that ample assets for the payment of all claims against the said F. G., and exceeding the debts of the said F. G., have come into the hands of said C. D., as such administrator aforesaid.

And your petitioner prays, that a citation may be issued to the temporary administrator aforesaid, requiring him to show cause why he should not pay the said debt of your petitioner.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

A. B.

[Verification as in form No. 52.]

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No. 1445.

**Oath of Temporary Administrator.**

(Code Civ. Pro., §§ 2594, 2671.)

See form No. 1378. \_\_\_\_\_

No. 1446.

**Bond of Temporary Administrator.**

(Code Civ. Pro., §§ 2664, 2670.<sup>2</sup>)

See form No. 1413. \_\_\_\_\_

No. 1447.

**Petition that Temporary Administrator Deposit Money or Show Cause, etc.**

(Code Civ. Pro., § 2679.)

*To the Surrogate of \_\_\_\_\_ County:*

The petition of A. B., of \_\_\_\_\_, respectfully shows, that he is a creditor of the estate of F. G., late of \_\_\_\_\_,

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<sup>1</sup> *Held*, that the surrogate's power to direct payment of debts by a collector, was wholly derived from section 10 of ch. 359 of 1870, and that the provisions of that statute must be strictly construed. (In re Haskett, 3 Redf., 165.) The proceedings upon the petition are the same as where a creditor pre-

deceased, by reason of [state nature of indebtedness] [\*] [or set forth other interest of petitioner in estate].

That C. D. was appointed temporary administrator of said estate, by order duly entered by the surrogate of \_\_\_\_\_ county, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and that temporary letters of administration of said estate were duly issued to him on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and that he has duly qualified and entered upon the discharge of his duties as such administrator. [\*]

That on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and more than ten days since, the said C. D. received, as such temporary administrator, the sum of \_\_\_\_\_ dollars in money belonging to said estate, and your petitioner alleges, upon information and belief, that said administrator has neglected to deposit said amount as is required by section 2678 of the Code of Civil Procedure [state any circumstances showing his failure to make such deposit].

Wherefore your petitioner prays that an order may be made, pursuant to statute, directing the said C. D. to deposit said money, forthwith, as is required by law, or to show cause why an attachment should not issue against him.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

A. B.

[Verification as in form No. 52.]

No. 1448.

**Order that Temporary Administrator make Deposit or show Cause why a Warrant of Attachment should not Issue against Him.**

(Code Civ. Pro., § 2679.)

[Title of proceeding.]

On reading and filing the petition of A. B., duly verified,

sents a petition, praying for a decree directing an executor or administrator to pay his debt, as prescribed in title fourth of chapter eighteenth of Code Civ. Pro. (§ 2674, id.) See forms Nos. 1465-1473.

be contained in a bond, given under the original provisions and the evidence in an action thereon, *Dayton v. Johnson* (69 N. Y., 419).

<sup>1</sup> See *Livermore v. Wortman* (25 Hun. 341), *Harrington v. Libby* (6 Daly, 259),

<sup>2</sup> See, as to the recitals which should

and dated ———, 18—, by which it appears that C. D., the temporary administrator of, etc., of F. G., deceased, received as such administrator the sum of ——— dollars, in money, belonging to the estate of said F. G., more than ten days since, and on or about the ——— day of ———, 18—, and that said C. D. has neglected to deposit said amount as is required by section 2678 of the Code of Civil Procedure, and upon the application of M. C., attorney for said A. B.:

I do hereby order, that said C. D. deposit said moneys forthwith, or show cause before me at, etc., on, etc., why a warrant of attachment should not issue against him.<sup>1</sup>

Dated ———, 18—.

\_\_\_\_\_ F. W., *Surrogate*.

#### ARTICLE SIXTH.

#### FORMS RELATING TO REVOCATION OF LETTERS TESTAMENTARY AND LETTERS OF ADMINISTRATION.

(Code Civ. Pro., Ch. 18, Tit. 3, Art. 6.)

- No. 1449. Petition by person interested for revocation of letters.
- 1450. Citation upon petition (form No. 1449).
- 1451. Order upon return of citation (form No. 1450).
- 1452. Decree revoking letters on failure to give bond.
- 1453. Petition by executor for revocation of letters.

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#### No. 1449.

#### Petition by Person Interested for Revocation of Letters.

(Code Civ. Pro., §§ 2685, 2686.)

[Title of original proceeding in which letters were issued.]

*To the Surrogate's Court of the County of ———:*

The petition of H. T., of ———, respectfully shows, that he is one of the legatees under the will of J. T., late of the [city] of ———, deceased [or that he is a creditor of the estate of J. T., late, etc., or state other interest in estate].

That the said will was proved before the surrogate of the

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<sup>1</sup> See as to time at which order is to be made returnable, and as to time and mode of service upon administrator, Code Civ. Pro. § 2679. As to withdrawal of money deposited by temporary administrator, id., § 2680.



county of ———, and admitted to probate, and recorded by said surrogate on the ——— day of ———, 18—, and that letters testamentary thereof were on the same day issued and granted to P. T., sole executor in the said will named [*or allege issue of letters of administration*].

And your petitioner further shows, that the circumstances of the said P. T. are so precarious as not to afford adequate security for his due administration of the estate of the said testator to the creditors or persons interested in the said estate; that the assets of the said testator which came into the hands of the said P. T., as such executor, as appears by the inventory filed by him, exceed ten thousand dollars; that the said P. T. has failed in his business and become insolvent, owing large sums of money; and your petitioner is apprehensive, and has reason to believe, that the said assets, or a portion thereof, will be lost or misapplied by the said P. T. [*or set forth in like manner other grounds for the application under section 2685 of Code Civil Procedure*].

And your petitioner prays for a decree revoking the said letters, and that the said executor [*or administrator*] may be cited to show cause why a decree should not be made accordingly, and for such further or other relief as may be proper.<sup>1</sup>

Dated ———, 18—.

H. T.

[Verification as in form No. 52.]

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No. 1450.

**Citation upon Petition (form No. 1449).**

(Code Civ. Pro., § 2686.)

*The People of the State of New York, to P. T., executor of the will of J. T. [*or administrator of, etc., of J. T.*], late of ———, deceased:*

You are hereby cited and required personally, to be and

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<sup>1</sup> Section 2686, Code Civ. Pro., provides that the petition must set forth the facts and circumstances, showing that the case is one of those specified in section 2685, and that "upon proof by affidavit or oral testimony satisfactory to the surrogate of the truth of the allegations contained in the petition a citation must be issued according to the prayer thereof." It is *held*, in

appear before our surrogate of the county of \_\_\_\_\_, at, etc., on, etc., then and there to show cause why a decree should not be made revoking the letters [testamentary] heretofore issued to you as such [executor].

In testimony whereof, we have caused, etc. [as in form No. 1345].

[L. s.]

[Signature as in form No. 1345.]

No. 1451.

**Order upon Return of Citation (form No. 1450).**

(Code Civ. Pro., § 2687, subd. 3.)

[At, etc., as in form No. 1394.]

[Title of original proceeding.]

On reading and filing due proof, by affidavit, of the due and personal service upon P. T., the executor of the will of J. T., late of the [city] of \_\_\_\_\_, deceased, of the citation heretofore issued in due form of law, requiring him to appear in this court on this day, to show cause why a decree should not be made revoking the letters testamentary heretofore issued to him as such executor; and the said P. T. having appeared, and H. T., the petitioner herein, having also appeared, and after hearing the proofs and allegations of the parties, and it satisfactorily appearing, by affidavit [or by oral testimony], that the allegations contained in said petition are true, and<sup>1</sup> that the circumstances of the said P. T., as aforesaid, are so precarious as not to afford adequate security to the creditors or other persons interested for his due administration of the estate:

It is ordered, and the surrogate of the county of \_\_\_\_\_, pursuant to the statute in such case made and provided, doth order and require, that the said P. T. give a bond as

Moorhouse v. Hutchinson (2 Dem., 429), that this latter provision requires additional proof to the petition to justify the issuing of a citation.

See Matter of Berney (3 Civ. Pro. R. [Browne], 122), Drexel v. Berney (1 Dem., 163), that a debtor to the estate is not a "person interested" and there-

fore not authorized to petition to revoke letters.

See, also, Hassey v. Keller (1 Dem., 577), Atkinson v. Striker (2 Dem., 261), Grubb v. Hamilton (2 Dem., 414), Hood v. Hood (2 Dem., 533), as to this proceeding.

<sup>1</sup> See note 1 to form No. 1449.

prescribed in article first of title third of chapter eighteenth of the Code of Civil Procedure, with sureties, like those required by law of administrators upon the estate of an intestate, in the penalty of ——— dollars, within five days from this day, or, in default thereof, that the letters testamentary heretofore issued to said P. T., as such executor, be revoked.

F. W., *Surrogate*.

No. 1451.

### Decree Revoking Letters on Failure to Give Bond.

(Code Civ. Pro., § 2687.)

[At, etc., as in form No. 1394.]

[Title of original proceeding.]

Letters testamentary of the will of J. T., late of the [city] of ———, deceased, having heretofore been granted and issued by the surrogate of the county of ——— to P. T., sole executor in the said will named, and H. T., of ———, a legatee under the said will, and interested in the estate of said deceased, having presented his written petition, duly verified, dated ———, 18—, to the said surrogate, alleging that the circumstances of the said P. T. are so precarious as not to afford adequate security to the creditors or persons interested for the due administration of the said estate; and the surrogate having thereupon [being satisfied, upon proof, by affidavit (*or* by oral testimony), of the truth of the allegations contained in the said petition],<sup>1</sup> issued a citation in due form of law to the said P. T., executor as aforesaid, requiring him to show cause on the ——— day of ———, 18—, now past, why a decree should not be made revoking the said letters; and due proof of the service of said citation having been filed with the said surrogate, and the said P. T. and the said H. T. having appeared on the said day, and after hearing the proofs and allegations of the parties, and it having appeared that the circumstances of the said P. T., executor as aforesaid, are precarious as aforesaid, and the surrogate having thereupon, pursuant to the statute in such case made and provided, ordered and required the said H. T. to give a bond as prescribed in article first of title

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<sup>1</sup> See note 1 to form No. 1449.

third of chapter eighteenth of the Code of Civil Procedure, with sureties as required by law of administrators upon the estate of an intestate, in the penalty of ——— dollars, within five days from the said day, and the said P. T. having [\*] neglected to give such bond so required :

It is ordered and decreed, and the surrogate of the county of ———, pursuant to the statute in such case made and provided, doth order and decree, that the letters testamentary of the will of J. T., late of the [city] of ———, deceased, heretofore granted and issued by the said surrogate to P. T., sole executor in the said will named, and bearing date on the ——— day of ———, 18—, be and the same are hereby revoked ; and all authority and rights of the said P. T., as such executor aforesaid, are hereupon to cease.<sup>1</sup>

[Insert any directions as to costs. See sections 2556, etc., of Code of Civil Procedure.]

F. W., *Surrogate*.

[Or as above to (\*), and from thence as follows: Within the time allowed by said order given the bond, as required by said order ; it is hereby ordered and decreed, and the surrogate of the county of ———, pursuant, etc., doth order and decree, that the proceedings upon the said petition of said H. T., be and they are hereby dismissed. And it is further ordered and decreed, that (insert provision as to costs ; see sections above referred to).]<sup>1</sup>

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### No. 1452.

#### Petition by Executor for Revocation of Letters.

(Code Civ. Pro., § 2689.)

*To the Surrogate's Court of the County of ——— :*

The petition of C. D., of the [city] of ———, respectfully shows, that he was duly qualified and appointed by

<sup>1</sup> *Held*, that the sureties in a bond given under the former statute, in a similar proceeding, were liable for previous defaults, and that the surrogate's decree upon the executor's accounting was conclusive upon the sureties. (Scotfield v. Churchill, 72 N. Y., 565; aff'g S. C., 9 Hun, 157.)

That decree does not affect testamentary trusts, except in the cases specially prescribed for that purpose in title sixth of chapter eighteenth of Code Civ. Pro., see section 2688, id.

See, also, Estate of Sohn (1 Civ. Pro. R., 373).

the surrogate of the county of \_\_\_\_\_ as the [executor of the will of F. G., late of the (city) of \_\_\_\_\_, deceased], on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

Your petitioner further shows, that immediately after his appointment as such [executor] he entered upon the duties of the trusts thereof.

And your petitioner further shows, upon information and belief, that the creditors, or persons claiming to be creditors, of the said deceased and their places of residence are as follows [state same].

That \_\_\_\_\_, the husband [or wife] of said decedent, resides at \_\_\_\_\_, and that the names and places of residence of the next of kin [or legatees] of said decedent are as follows [state same].<sup>1</sup>

And your petitioner further shows, that [state the facts upon which the application is founded].

Wherefore your petitioner prays, that his account as such [executor] may be judicially settled; that a decree may thereupon be made revoking his letters and discharging him accordingly, and that the same persons who must be cited upon a petition for a judicial settlement of his account as such [executor], as prescribed in article second of title fourth of chapter eighteenth of the Code of Civil Procedure, to wit: the creditors or persons claiming to be creditors; the husband [or wife], and the legatees [or next of kin] of said decedent, may be cited to show cause why such a decree should not be made.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

C. D.

[Verification as in form No. 52.]

#### ARTICLE SEVENTH.

#### FORMS RELATING TO FOREIGN WILLS; ANCILLARY LETTERS.

(Code Civ. Pro., Ch. 18, Tit. 3, Art. 7.)

No. 1453. Petition for ancillary letters testamentary, or with the will annexed, upon foreign probate.

1454. Petition for ancillary letters of administration.

1455. Citation on petition for ancillary letters.

<sup>1</sup> See Matter of Bernstein (3 Redf., see section 2690, Code Civ. Pro.; and see forms Nos. 1476-1488 20).

As to proceedings upon the hearing,

No. 1453.

**Petition for Ancillary Letters Testamentary, or with the Will Annexed, upon Foreign Probate.**

(Code Civ. Pro., §§ 2695, 2698.)

*To the Surrogate's Court of the County of ——— :*

The petition of C. D., of ———, respectfully shows, [\*] that F. M., now deceased, resided at the time of the execution by him of the will [*or at the time of his death*] herein-after mentioned out of the State of New York, and at ———, in the [State] of ———.

That in his life-time, and on or about the ——— day of ———, 18—, the said F. M. made and executed at ——— his will of [real and] personal property, and died on the ——— day of ———, 18—.

That on the ——— day of ———, 18—, said will was duly admitted to probate by [name court], a competent court, for that purpose, within the said State of ——— [and that letters testamentary (etc.) upon said will were duly issued by said ——— Court to your petitioner (*or to J. K.*)].<sup>1</sup>

And your petitioner further shows, that the said C. D. left personal property within the county of ———, in this State [and in no other county of this State] [*or state other facts giving jurisdiction to the surrogate*].<sup>2</sup>

[That your petitioner has, to the best of her ability, estimated and ascertained the value of the personal property left by the said C. D., and that the same, together with the probable amount to be recovered by reason of any right of action granted to an executor or administrator by special provision of law, does not exceed in value the sum of about ——— dollars.]<sup>3</sup>

[That the amount due from the said decedent to residents of this State, so far as your petitioner can ascertain the same,

<sup>1</sup> As to who may be appointed ancillary executor, etc., see Code Civ. Pro., § 2697; *Hendrickson v. Ladd* (2 Dem., 402).

<sup>2</sup> See Code Civ. Pro., §§ 2476, 2477; *In re Taintor* (5 Redf., 79), *Beers v. Shannon* (73 N. Y., 292; rev'g S. C., 12 Hun, 161), *Russell v. Hartt* (87 N.

Y., 19), *Moyer v. Weil* (1 Dem., 71), *Weed v. Waterbury* (5 Redf., 114), as to jurisdiction of surrogate.

<sup>3</sup> These clauses relate to the amount of the bond to be given by the executor, as to which see sections 2664, 2699; Code Civ. Pro.

does not exceed the sum of ——— dollars, and that the sums which the creditors of said decedent who reside in the State will be entitled to receive from the executor (etc.) of said decedent upon an accounting and distribution, either within this State or within the said State of ———, will not exceed, as your petitioner is informed and believes, the sum of ——— dollars.<sup>1</sup>]

That the names and residences of the creditors or persons claiming to be creditors of the said decedent residing within this State, so far as the same can be ascertained by your petitioner, are as follows, to wit [state same] [or that so far as can be ascertained by your petitioner there are no creditors, or persons claiming to be creditors, of the said decedent residing in this State].

And your petitioner further shows, that annexed to this petition are exemplified copies of the said will and of the said judgment [or decree, or order] admitting the same to probate, and, also, of the letters testamentary [or with said will annexed] issued by said ——— Court to ——— as aforesaid, and which are respectively marked exhibits "A," "B," and "C."<sup>2</sup>

And your petitioner prays that ancillary letters testamentary [or with the said will annexed] may be issued to your petitioner [or to J. K.<sup>1</sup>], pursuant to the statute in such case made and provided.<sup>3</sup>

Dated ———, 18—.

C. D.

[Verification as in form No. 52.]

<sup>1</sup> See note 3 to this form.

<sup>2</sup> Where an application is made pursuant to section 2695 of Code Civ. Pro., for ancillary letters under a will proved in a court of another State, by whose laws wills are admitted by the oral direction of the court without any written "judgment, decree or order," that fact should appear by the certificate of exemplification, or, if such a certificate is refused, then by the affidavit of a person having knowledge of those laws. (In re Hudson, 5 Redf., 333.)

<sup>3</sup> See Estate of Thompson (3 L. Bul., 95; S. C., 1 Civ. Pro., 264), Estate of 50), Matter of Gilleran (50 Hun, 399), Hopper v. Hopper (125 N. Y., 400),

Langbein (2 Civ. Pro. R. [Browne], 226; S. C., 1 Dem., 448), Estate of Batchelor (2 Civ. Pro. R. [McCarty], 291; S. C., 64 How. Pr., 350), Brown v. Landon (30 Hun, 57; S. C., 4 Civ. Pro. R., 11), Estate of Thompson (1 Civ. Pro. R. [McCarty], 264), Estate of Winnington (1 Civ. Pro. R. [McCarty], 267), Estate of Ladd (5 Civ. Pro. R. [McCarty], Estate of Gavin (15 Civ. Pro. R., 390), among other cases generally as to these proceedings. See, also, amendment to § 2595 of Code Civ. Pro., by ch. 495, of Laws of 1888.

As to general powers and duties of ancillary executors, etc., see Code Civ. R., § 2702.

No. 1454.

**Petition for Ancillary Letters of Administration.**

(Code Civ. Pro., §§ 2696, 2698.)

*To the Surrogate's Court of the County of ——— :*

The petition of C. D., of ———, respectfully shows, that F. M., now deceased, resided, at the time of his death, as hereinafter mentioned, out of the State of New York, and at ———, in the [State] of ——— [in the United States].

That said F. M. died intestate on the ——— day of ———, 18—, and that on the ——— day of ———, 18—, letters of administration of all and singular his goods, chattels and credits were issued by the ——— Court, a competent court of the said [State] of ——— to your petitioner [*or to G. H.*], and the said letters of administration are herewith presented to this court.

[*Or that your petitioner (or said G. H.) is entitled to the possession in the said ——— of ———, of the personal estate of said decedent.*<sup>1</sup>]

That no ancillary letters of administration have been issued upon the estate of the said F. M., and that no application for letters of administration upon the said estate has been made by a relative of said decedent [who is legally competent to act] to a surrogate's court of this State having jurisdiction to grant the same [in which either such letters have been granted, or the application has not been finally disposed of].<sup>2</sup>

[Here insert the allegations of petition, form No. 1453, as to the property left by decedent, and as to the names and residences of the creditors.]

[And your petitioner further shows, that he is the attorney, in fact, of the said G. H., and duly authorized as such to make this application on his behalf.<sup>3</sup>]

And your petitioner prays, that ancillary letters of administration may be issued to your petitioner [*or to said*

<sup>1</sup> See section 2696, Code Civ. Pro., as amended by ch. 535 of Laws of 1881, and by ch. 495 of Laws of 1888.

<sup>2</sup> See subs. 1 and 2 of section 2696, Code Civ. Pro.

<sup>3</sup> See Code Civ. Pro., § 2696.



G. H.] upon said estate, pursuant to the statute in such case made and provided.<sup>1</sup>

Dated ———, 18—.

C. D. [*Attorney in fact for G. H.*].

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No. 1455.

**Citation on Petition for Ancillary Letters.**

(Code Civ. Pro., § 2698.)

See general form of citation, No. 1345.<sup>2</sup>

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**TITLE IV.**

**ARTICLE FIRST.**

**FORMS RELATING TO AID, SUPERVISION AND CONTROL OF AN EXECUTOR OR ADMINISTRATOR.**

(Code Civ. Pro., Ch. 18, Tit. 4, Art. 1.)

- No. 1456. Petition by executor, etc., in proceeding to discover property withheld.
1457. Citation in proceeding to discover property withheld, etc.
1458. Order to be annexed to, or indorsed upon, citation (form No. 1457).
1459. Answer of person cited, as to ownership of property, etc.
1460. Decree awarding, possession of the property to petitioner.
1461. Bond to prevent decree.
1462. Warrant to seize property.
1463. Petition to compel the return of an inventory.
1464. Order that executor, etc., return inventory, or show cause why he should not be attached.
1465. Petition by creditor for payment of his claim.
1466. Order for citation on the above petition.
1467. Citation to executor to show cause why payment of claim should not be decreed.
1468. Answer of executor to petition for payment of a claim.
1469. Decree dismissing petition on filing of answer, etc.
1470. Decree for payment of a claim.
1471. Petition for payment of a legacy.
1472. Decree for payment of a legacy.
1473. Bond by legatee on application within a year.
1474. Petition on failure of executor, etc., to set aside exempt property.

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<sup>1</sup> See notes to form No. 1453, and *Weed v. Waterbury* (5 Redf., 114). each creditor or person claiming to be a creditor, where name and residence

As to general powers and duties of ancillary administrator, see Code Civ. Pro., § 2702. have been ascertained, and also generally to all creditors or persons claiming to be creditors of the decedent. (Code

<sup>2</sup> The citation is to be directed to Civ. Pro., § 2698.)

No. 1456.

**Petition by Executor, etc., in Proceeding to Discover Property Withheld, etc.**

(Code Civ. Pro., § 2707.)

*To the Surrogate's Court of the County of \_\_\_\_\_ :*

The petition of A. B., of \_\_\_\_\_, respectfully shows, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, your petitioner was appointed executor of the will [*or administrator of, etc.*] of F. G., late of \_\_\_\_\_, deceased, by the said surrogate's court.

And your petitioner further shows [upon information and belief], as follows: That C. D., of \_\_\_\_\_ [here state facts tending to show that money or other personal property which ought to be delivered to the petitioner, or which ought to be included in an inventory or appraisal, is in the possession or control of a person who withholds the same from him; or conceals or refuses to exhibit it, so that it cannot be inventoried or appraised].

And your petitioner prays, that an inquiry may be made respecting such money, etc., and that the said [naming person complained of] may be cited to attend the said inquiry, and to be examined accordingly.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

A. B.

[Verification as in form No. 52.]

<sup>1</sup>See *Tilton v. Ormsby* (10 Hun, 7; aff'd, 70 N. Y., 609), *Summerfield v. Howie* (2 Redf., 149).

The act (Laws 1870, ch. 394) under which the above decisions were made was held to be unconstitutional in *Matter of Beebe* (20 Hun, 462); but it was held, in *Matter of Curry* (25 Hun, 321; S. C., 1 Civ. Pro. R., 319), *Matter of Seaman* (16 Week. Dig., 118), that the provisions of Code Civ. Pro. (§ 2706, etc.), were so drawn as to avoid the objections taken in the last cited case, and that they are not in conflict with any of the provisions of the constitution.

All the executors, etc., should join in the application. (In re examination of *Slingerland*, 21 Week. Dig., 413; S. C., 36 Hun, 575 [Sup. Ct., Gen. Tm.])

An order made under former section 2706, now section 2707, is an order affecting a substantial right. (*Id.*)

See, also, as to this proceeding, *Met. Trust Co. v. Rogers* (1 Dem., 365), *Mead v. Sommers* (2 Dem., 296), *Mauran v. Hawley* (*id.*, 396), *Matter of Lynch* (83 Hun, 39), *Matter of Stewart* (77 *id.*, 564), *Matter of Wing* (41 *id.*, 452).

The petition may be accompanied with an affidavit or other evidence, written or oral, tending to support the allegations thereof. (Code Civ. Pro., former § 2706, now § 2707.)

As to officers to whom the petition may be presented in the absence of the surrogate and their powers, see Code Civ. Pro., former § 2709, now § 2708, as amended by ch. 946 of 1895, taking effect Jan. 1, 1896.

No. 1457.

**Citation in Proceeding to Discover Property Withheld, etc.**

(Code Civ. Pro., § 2707.)

See general form of citation No. 1345, inserting therein as the purpose of the citation, as follows: to attend the inquiry respecting the property, etc., alleged to be in your possession or control, and to belong to the estate of F. G., late of ———, deceased [*or otherwise, according to the proof*], and to be examined accordingly.<sup>1</sup>

[Annex to, or indorse upon, the citation next order, form No. 1458.]

No. 1458.

**Order to be Annexed to, or Indorsed upon, Citation (form No. 1457).**

(Code Civ. Pro., § 2708.)

[Title of proceeding.]

To [*naming party cited*]:

You are hereby required to attend personally, at the time and place specified in the within [*or annexed*] citation.

Dated at ———, in the county of ———, on the ——— day of ———, 18—.<sup>2</sup>

F. W., *Surrogate of* ——— *County.*

No. 1459.

**Answer of Person Cited, as to Ownership of Property, etc.**

(Code Civ. Pro., § 2709.)

[Title of proceeding.]

The answer of C. D. to the petition of A. B. herein, respectfully shows, that he is the owner of the property mentioned and described in the petition of A. B., in the above entitled proceeding [*or that he is entitled to the possession*

<sup>1</sup> See, as to citation to person residing or being without the county of the surrogate, section 2707, Code Civ. Pro. as amended by ch. 686 of Laws of 1893.

See, also, notes to form No. 1456.

The citation cannot be issued by the

clerk of the court. (*Mauran v. Hawley* 2 Dem., 396.)

<sup>2</sup> As to service of citation and order, see Code Civ. Pro., § 2708, as amended by ch. 686 of Laws of 1893, and *Mauran v. Hawley* (2 Dem., 396).

of the property mentioned, etc., by virtue of a lien thereon [*or special interest therein*], to wit [state nature of lien or interest].<sup>1</sup>

C. D. [*or M. N., Attorney for C. D.*]

[Office address, etc.]

[Verification as in forms Nos. 151, etc.]

No. 1460.

### Decree Awarding Possession of the Property to Petitioner.

(Code Civ. Pro., § 2709.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

The petition of A. B., of ———, executor of the will [*or administrator of, etc.*] of F. G., late of ———, deceased, dated ———, 18—, and duly verified [and accompanied by proofs by affidavit, etc., tending to support the allegations thereof],<sup>2</sup> having been duly filed in the above entitled proceeding on the ——— day of ———, 18—, from which petition [and other papers] it appears that C. D., of ———, has in his possession, or control, the sum of ——— dollars [*or name other property*] belonging to the estate of said F. G., deceased, which ought to be delivered to the said petitioner [*or which ought to be included in the inventory (or appraisal) of said petitioner*], and that said C. D. withholds the same from the said petitioner [*or conceals (or refuses to exhibit) the same so that it cannot be inventoried (or appraised)*]; and the surrogate being satisfied, upon the said petition [*or upon the papers so presented*], that there are reasonable grounds for an inquiry respecting said property, and having accordingly issued a citation, returnable before [him]<sup>3</sup> forthwith [*or on the*

<sup>1</sup> An answer that the person cited is the "owner of the property" in question is sufficient without showing how he became such; but where he claims to be "entitled to the possession thereof, by virtue of a lien thereon or special interest therein," he must allege the facts necessary to sustain the claim. (*Met. Trust Co. v. Rogers*, 1 Dem., 365.)

<sup>2</sup> See note 2 to form No. 122. By

chapter 686 of Laws of 1893, former sections 2710, 2711 and 2712 of Code Civ. Pro. were consolidated and renumbered as section 2709.

<sup>3</sup> The statute provides that the petition may be accompanied by such proofs. (Code Civ. Pro., § 2707.)

<sup>4</sup> See, as to before whom the citation may be made returnable in case of the

——— day of ———, 18—], requiring the said C. D. to attend the said inquiry and to be examined accordingly, and having indorsed thereupon [*or* annexed thereto] his order, requiring the said C. D. to attend, personally, at the time and place therein specified, and said citation and order having been duly, personally, served upon said C. D. as required by law, and said C. D. having attended, pursuant to the requirements of the said citation and order, and having been duly sworn and examined before [said surrogate], and said petitioner having also appeared by his attorney, M. G., and [the surrogate] having heard the other proofs and allegations of the parties, [\*] and no answer having been interposed by said C. D. to the said petition as prescribed by section 2710 of the Code of Civil Procedure, and the said proceeding having been duly adjourned, from time to time, until this day; and it having appeared to the said [surrogate] from the said examination [and other testimony] that there is reason to suspect that the sum of ——— dollars [*or* the property described as follows, to wit (describe same)] of the said decedent is withheld [*or* concealed] by the said C. D., and [†] no security for the payment of said money [*or* for the delivery of the possession of said property] having been given by said C. D. as prescribed by law:

It is hereby ordered and decreed, and the said [surrogate] doth hereby order and decree, that the said C. D. be and he is hereby required to deliver possession of the said sum of money [*or* of the said property] to the said petitioner.<sup>1</sup>

And it is further ordered and decreed, that [insert provisions as to costs; see sections 2556, etc., Code of Civil Procedure].

F. W., *Surrogate*.

[*Or* as above to (\*), and from thence as follows: And the said C. D. having (by his attorney, G. H.), interposed a written answer, duly verified, stating that he is the owner of the said property (*or* is entitled to the possession of the said property), by virtue of a lien thereon (*or* special property

person to be cited residing in another county from that of the surrogate, Code Civ. Pro., § 2707.

<sup>1</sup> See notes to form No. 1459.

See, as to proceedings for disobedi-

ence of the decree, Code Civ. Pro., § 2710, former § 2714, which was consolidated with § 2713, Code Civ. Pro., and re-numbered § 2710, by ch. 686 of Laws of 1893, and see form No. 1462.

therein), to wit (state lien, etc.), it is hereby ordered and decreed, that the above entitled proceeding be and the same is hereby dismissed; and it is further ordered, that, etc. (insert any provisions for costs, as to which see above).]

[*Or* as above to (†), and from thence as follows: The said C. D. having given security, as prescribed by law, for the payment of the said money (*or* for the delivery of the said property), and having paid the costs awarded by the said (surrogate) to the said petitioner, it is hereby ordered and decreed, that the above entitled proceeding be and the same is hereby dismissed.<sup>1</sup>]

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No. 1461.

**Bond to Prevent Decree.**

(Code Civ. Pro., § 2710.)

As in form No. 340 to [\*], and from thence as follows: That, whereas, a proceeding has been taken in the surrogate's court of ——— county by A. B. [executor of the will of], F. G., late of ———, deceased, for the payment of the sum of ——— dollars [*or* for the delivery of the following described property, to wit (describe same)], to said A. B. [executor] as aforesaid, by the above bounden C. D., as being the money [*or* property] of the said decedent; and,

Whereas, a decree is about to be made by said surrogate for the payment of said money [*or* the delivery of said property] to said [executor] by the said C. D.; and,

Whereas, the said C. D. desires to prevent the making of said decree, pursuant to the statute in such case made and provided:

Now, therefore, if the above bounden C. D. shall pay to the said A. B. [executor], as aforesaid, or his successor, the said sum of money [*or* shall deliver to said A. B. (executor), as aforesaid, or his successor, the said property, or, in default thereof, shall pay to said A. B. (executor), as aforesaid, the full value of the said property], and shall pay to the said A. B. [executor], as aforesaid, all damages awarded

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<sup>1</sup> As to security to be given, see Code Civ. Pro., §§ 2710, 2719, and form No. 1461.

Former sections 2713 and 2714 of

Code of Civ. Pro., were consolidated by ch. 686 of Laws of 1893, and renumbered as section 2710.

against him, the said C. D., for withholding the said money [or property], whenever it is determined, in an action or special proceeding to be brought by the said A. B. [executor], as aforesaid, or his successor, that it belongs to the estate of the said F. G., deceased, then the preceding obligation to be void, otherwise to remain in full force and virtue.

[Signatures, etc., as in form No. 340]

Sealed and delivered in presence of \_\_\_\_\_.

[Acknowledgment as in form No. 340, or proof as in form No. 538; affidavits and approval as in form No. 340.]

No. 1462.

### Warrant to Seize Property.

(Code Civ. Pro., § 2710.)

[Title of proceeding.]

*The People of the State of New York, to the Sheriff of the County of \_\_\_\_\_ [or to any Constable of the County of \_\_\_\_\_, or to a Marshal of the County of \_\_\_\_\_]:<sup>1</sup>*

Whereas [recite the proceedings, substantially as in form No. 1460, and proceed as follows]; and,

Whereas, a decree was thereupon duly made by said surrogate, requiring the said C. D. to deliver the possession of the said property to the said petitioner:

Now, therefore, you are hereby commanded to search for the said property, to seize it if it is found in the possession of the said C. D., or his agent, or a person deriving title from him since the presentation of the said petition, and for that purpose, if necessary, to break open any house in the day-time; and to deliver the property so seized to the said A. B., the said petitioner, and to return this warrant within sixty days hereafter [before me].<sup>1</sup>

Witness my hand [and the seal of said surrogate's court],<sup>2</sup>

<sup>1</sup> See provisions of section 2710, as to how to be made returnable. The words "before me" are intended to be inserted in a case where the issue is by another officer than the surro-

gate or temporary surrogate; and see note 1 to form No. 1460.

<sup>2</sup> If the decree is issued by the surrogate or temporary surrogate it must be under the seal of the surrogate's

at the \_\_\_\_\_ of \_\_\_\_\_, in the county of \_\_\_\_\_, on  
this \_\_\_\_\_ day of \_\_\_\_\_, 18—.<sup>1</sup>

[L. S.] \_\_\_\_\_

F. W., *Surrogate*.

No. 1463.

**Petition to Compel the Return of an Inventory.**

(Code Civ. Pro., § 2716.)

*To the Surrogate's Court of the County of New York:*

The petition of M. T., of the [city] of \_\_\_\_\_, respectfully shows, that your petitioner is a creditor of J. F., late of \_\_\_\_\_, deceased, intestate, and that there is justly due to him from the estate of the said deceased, on a promissory note made by the said J. F. in his life-time to your petitioner, the sum of \_\_\_\_\_ dollars, and interest from the \_\_\_\_\_ day of \_\_\_\_\_ in the year 18—.

Your petitioner further shows, that letters of administration of all and singular the goods, chattels and credits of the said J. F., deceased, were, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, granted by the surrogate of the county of \_\_\_\_\_ to P. F., of the [city] of \_\_\_\_\_, grocer, the brother of the said intestate; that more than three months have elapsed since the granting of the said letters, and that the said P. F. has failed to return an inventory of the personal property of the said intestate, and has not obtained an allowance of further time to do so [*or* that the said P. F. has filed an inventory of the personal property of the said intestate, but that the said inventory is insufficient (stating in what respects)].

And your petitioner prays, that an order may be made requiring the said P. F. to return an inventory of said property [*or* to return a further inventory of said property], or in default thereof to show cause why he should not be attached.<sup>2</sup>

Dated \_\_\_\_\_, 18—.

M. T.

[Verification as in form No. 52.]

court; if by any other officer it must be under his hand. (Code Civ. Pro., § 2710.) See note 1 to form No. 1460.

<sup>1</sup> See note 2 to form No. 1462.

<sup>2</sup> See *In re Robbins* (4 Redf., 144), *In re McIntyre* (4 Redf., 489), *Greenbough v. Greenbough* (5 Redf., 191), *Creamer v. Waller* (2 Dem., 851),



No. 1464.

**Order that Executor, etc., Return Inventory, or Show Cause why He Should Not be Attached.**

(Code Civ. Pro., § 2716.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

On reading and filing the petition, duly verified, of M. T., a creditor of J. F., late of the [city] of \_\_\_\_\_, deceased, intestate:

It is ordered, pursuant to the prayer of the said petition, that P. F., the administrator of all and singular the goods, chattels and credits of the said intestate, return an inventory of the personal property of the said intestate, according to law, or in default thereof that he show cause before me, at, etc., on, etc., why he should not be attached.<sup>1</sup>

F. W., *Surrogate*.

No. 1465.

**Petition by Creditor for Payment of His Claim.**

(Code Civ. Pro., § 2722, subd. 1.)

*To the Surrogate's Court of the County of \_\_\_\_\_:*

The petition of J. R., of the [city] of \_\_\_\_\_, merchant, respectfully shows, [\*] that your petitioner is a creditor of J. T., late of the city of \_\_\_\_\_, deceased.

That he has a valid claim against the said deceased, upon a promissory note made by the said J. T. in his life-time, to the order of your petitioner, dated the \_\_\_\_\_ day of \_\_\_\_\_, 18—, for \_\_\_\_\_ dollars, payable six months after date.

Estate of Barnes (1 Civ. Pro. R., 59), Brainard v. Birdsall (2 Dem., 331). Sections 2715 and 2716 of Code Civ. Pro., were consolidated by ch. 686 of Laws of 1893, and renumbered as section 2716.

<sup>1</sup> Upon the return of the order, if the delinquent has not filed a sufficient inventory, the surrogate must issue a warrant of attachment against him, upon which the proceedings are the same, as upon a warrant issued for

disobedience to an order as prescribed in title twelfth of chapter seventeenth of the Code of Civil Procedure. (§ 2716, id.) See note 2 to form No. 1463.

As to these proceedings, see section 2457, id.), and forms Nos. 1190, 1202 to 1210, which are to be adapted to this proceeding. See, also, note 1 to form No. 1337.

As to discharge of party, see, also, Code Civ. Pro., § 2716.

That the said claim is justly due and owing to your petitioner.

That no payments have been made thereon, and that there are no offsets against the same to the knowledge of your petitioner.

That letters testamentary of the will of the said P. J., deceased, were duly granted by the surrogate of the county of New York to P. T., sole executor in the said will named, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

That your petitioner duly exhibited the said claim to the said executor under the notice published by him for the exhibition of claims, and that he assented to the justness and correctness of the same.

That your petitioner has demanded payment of the said claim from the said executor, since the expiration of one year from the time of the granting of the said letters testamentary to him, and that he has neglected to pay the same.

Your petitioner further shows, that he is informed and believes that ample assets for the payment of all claims against the said J. T., deceased, have come into the hands of the said P. T. as such executor aforesaid, and that there is money, or other personal property of the said estate, applicable to the payment or satisfaction of the petitioner's claim, and which may be so applied, without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction.<sup>1</sup>

Wherefore your petitioner prays, that a decree be made directing the said executor to pay your petitioner's said claim, and that said executor may be cited to show cause why such a decree should not be made.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

J. R.

[Verification as in form No. 52.]

<sup>1</sup> See as to this proceeding, Baylis v. fying S. C., 11 Hun, 339), Matter of Swartwout (4 Redf., 395), Bulkley v. Stevenson (77 Hun, 203), Oakley v. Staats (4 id., 524), Lambert v. Craft Lamb (50 id., 568), Kennah v. McColgan (21 State Rep., 326).  
By chapter 686 of Laws of 1893, sections 2717 and 2718, Code Civ. Pro., were consolidated and renumbered as § 2722.

(98 N. Y., 342; S. C., 21 Weekly Dig., 181), McKeown v. Fagan (4 Redf., 320), Archer v. Furniss (4 id., 88), Stilwell v. Carpenter (2 Abb. N. C., 238), Thompson v. Taylor (71 N. Y., 217), McNulty v. Hurd (72 id., 518; modi-

No. 1466.

**Order for Citation on the Above Petition.**

(Code Civ. Pro., § 2722.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

On reading and filing the petition of J. R., of \_\_\_\_\_, merchant, a creditor of J. T., late of the [city] of \_\_\_\_\_, deceased, setting forth that he has a just claim against the said deceased:

It is ordered, that a citation issue to P. T., executor of the will of the said J. T., deceased, requiring him to appear in this court, on the \_\_\_\_\_ day of \_\_\_\_\_ instant, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon of that day, and show cause why a decree should not be made directing the payment of the said debt or claim against him.<sup>1</sup>

\_\_\_\_\_  
F. W., *Surrogate.*

No. 1467.

**Citation to Executor to Show Cause why Payment of Claim Should Not be Decreed.**

(Code Civ. Pro., § 2722.)

As in general form of citation, No. 1345, directing the same to P. T., the executor of the will of P. T., late of \_\_\_\_\_, deceased, and inserting therein as the purpose of the citation as follows: To show cause why a decree should not be made by the said surrogate directing the payment by you of the debt or claim of J. R., of the [city] of \_\_\_\_\_, merchant, against the said J. T., deceased, upon an alleged promissory note made by the said J. T. in his life-time to the order of the said J. R. for \_\_\_\_\_ dollars.

\_\_\_\_\_  
No. 1468.

**Answer of Executor to Petition for Payment of Claim.**

(Code Civ. Pro., § 2722, subd. 1.)

[Title of proceeding.]

The answer of P. T., executor of the will of J. T., late of

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<sup>1</sup> See note 1 to last form No. 1465.

the [city] of ———, deceased, to the petition of J. R., in the above entitled proceeding, respectfully shows [upon information and belief]:

*First.* Said executor denies that he has, or has had, as executor of the will of P. T., deceased, sufficient assets in his hands to pay the claims against said estate, or to pay the amount claimed in said petition, as due from the said estate of P. T., deceased, without injuriously affecting the rights of others entitled to priority or equality payment with the said petitioner, and denies, upon information and belief, that the said P. T. was indebted, at the time of his death, upon said promissory note in the amount of ——— dollars, or in any other sum whatever, and he alleges that said claim has been wholly paid [*or insert other denials as may be necessary*].

*Second.* And the said executor alleges, that it is doubtful whether the said alleged claim mentioned and set forth in the said petition is valid and legal.

That [here set forth the facts which show that it is doubtful].

And the said executor denies the validity and legality of the said claim [upon information and belief].

Whereupon the said executor prays, that a decree be made dismissing the said petition [with costs],<sup>1</sup> without prejudice to an action or an accounting in behalf of the petitioner.<sup>2</sup>

M. N. [*Attorney for P. J., Executor, etc.*].

[Office address.<sup>3</sup>]

[Verification as in forms Nos. 151.]

<sup>1</sup> Generally as to costs in surrogates' courts, see Code Civ. Pro., §§ 2556, etc.

<sup>2</sup> An oral plea of a general denial in answer to the petition, is ineffectual for any purpose. (*Lambert v. Craft*, 98 N. Y., 342; S. C., 21 Week. Dig., 181.) See, further, as to rules of pleading upon the application, *Lambert v. Craft* (*supra*), *Stilwell v. Carpenter* (2 Abb. N. C., 238), *Steinele v. Oechsler* (5 Redf., 312), *Hurlburt v. Durant* (88 N. Y., 121; S. C., 2 Civ. Pro. R. [Browne], 115), *Mumford v. Coddington*

(1 Dem., 27), *Matter of Charlick* (1 Dem., 34; S. C., 11 Abb. N. C., 56), *Estate of McKiernan* (4 Civ. Pro. R., 218), *Fiester v. Shepard* (92 N. Y., 251), *Tilden v. Dows* (3 Dem., 240), *Rank v. Camp* (3 Dem., 278), *Budlong v. Clemens* (3 Dem., 145), *Lynch v. Patchen* (3 id., 58), *Matter of Corbett* (90 Hun, 182), *Matter of Odell* (52 Hun, 88).

The surrogate has no power to direct the payment of a claim created by the executor. His jurisdiction extends only to claims against the deceased. (*Bulkley v. Staats*, 4 Redf., 524.)

<sup>3</sup> See note 2 to form No. 122.

No. 1469.

**Decree Dismissing Petition, etc., on Filing of Answer.**

(Code Civ. Pro., § 2722.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

The citation heretofore issued in the above entitled matter, upon the duly verified petition of J. R., dated ———, 18—, for payment of his alleged claim against the said estate of P. T., deceased, having been returned with proof of due service upon J. T., the executor of the will of said P. T., and said executor having appeared upon the return of said citation by M. N. as his attorney, and the said petitioner having also appeared upon the return of said citation by J. B. as his attorney, and the said application having been thereupon adjourned to this day, and the said executor having now appeared by his said attorney and filed his written answer to said petition, duly verified, setting forth facts showing that it is doubtful whether the said petitioner's claim is valid and legal, and denying its validity and legality [upon information and belief] [*or* it not having been proved to the satisfaction of this surrogate that there is money or other personal property of the estate of said P. T., applicable to the payment of the petitioner's claim, and which may be so applied, without injuriously affecting the rights of others, entitled to priority or equality of payment or satisfaction], and after hearing counsel for the respective parties:

It is hereby ordered, that the said petition be and the same is hereby dismissed without prejudice to an action or an accounting in behalf of the petitioner.

[And it is further ordered, that said executor render an account of his proceedings as such, and attend before the surrogate on the ——— day of ———, 18—, at ——— o'clock in the ——— noon, for the purpose of said accounting.<sup>1</sup>]

F. W., *Surrogate.*


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<sup>1</sup> See Code Civ. Pro., § 2725, subs. 3 and 4, as to accounting.

No. 1470.

**Decree for Payment of a Claim.**

(Code Civ. Pro., § 2722.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

J. R., of the [city] of ———, merchant, having heretofore presented his petition, duly verified, to the surrogate's court of the county of ———, dated ———, 18—, and setting forth that he had a valid claim against J. T., late of the [city] of ———, deceased, upon a promissory note made by the said J. T., in his life-time, to the order of the said petitioner, dated the ——— day of ———, 18—, for ——— dollars, payable six months after date, and praying a decree against P. T., the executor of the will of the said J. T., deceased, for payment of the said claim; and the said executor having been duly cited to appear on the ——— day of ——— last past, and show cause why such payment should not be decreed, and the said P. T. having appeared and having assented to the said claim of the said J. R., and having produced and filed an account as such executor; and the said matter having been heard on several days and duly adjourned to this day; and it appearing from the said account, and from the said proofs herein taken, that there are in the hands of the said P. T., as such executor as aforesaid, of the said estate of the said J. T., deceased, assets to the amount of two thousand seven hundred and twenty-five dollars, and that the debts and outstanding liabilities of the said deceased do not exceed the sum of one thousand seven hundred dollars:

It is ordered and decreed, and the surrogate of the county of ———, by virtue of the power in him vested, doth order and decree, pursuant to the statute in such case made and provided, that the said P. T., executor as aforesaid, pay to the said J. R. the full amount of his said claim and interest, amounting in the whole to the sum of ——— dollars and ——— cents.

And it is further ordered, that the said P. T. [personally]

pay the said J. R. the sum of \_\_\_\_\_, for his costs and disbursements in this proceeding.<sup>1</sup>

F. W., *Surrogate.*

No. 1471.

**Petition for Payment of a Legacy.**

(Code Civ. Pro., § 2722.)

As in form No. 1465 to [\*], and from thence as follows: That your petitioner is a legatee under the will of J. T., late of the city of \_\_\_\_\_, deceased; that the said will was duly proved before the surrogate of the county of \_\_\_\_\_ and admitted to probate by said surrogate and recorded in his office on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and that letters testamentary thereof were, on the same day, duly granted and issued to P. T., of \_\_\_\_\_.

That in and by said will the said J. T. did give and bequeath to your petitioner the sum of \_\_\_\_\_ dollars.

Your petitioner further shows, that ample assets of the estate of said testator, for the payment of all his debts and for the discharge of all the specific and general legacies given by his said will, have come into the hands of the said P. T. as such executor aforesaid; and that there is money or other personal property of the said estate applicable to the payment [*or* satisfaction] of your petitioner's legacy, and which may be so applied without injuriously affecting the rights of others entitled to priority or equality of payment or satisfaction.<sup>2</sup>

[Your petitioner further shows, that he is in indigent circumstances, and that an advance of (a portion of) said legacy is necessary for his support.<sup>3</sup>]

Wherefore your petitioner prays for a decree directing the said executor to pay said legacy, or its just proportionate part [*or* a portion of said legacy, to the amount of \_\_\_\_\_ dollars, as necessary for his support, upon the filing of a bond approved by the surrogate, as required by law, for the return of such portion, with interest, whenever re-

<sup>1</sup> See, as to costs, sections 2556, etc., Code Civ. Pro.

<sup>2</sup> See section 2722, Code Civ. Pro., subd. 2.

<sup>3</sup> By section 2723, Code Civ. Pro., as

amended by ch. 686 of Laws of 1893, being former section 2719 (*id.*), this fact must appear, where the application is made before the expiration of a year from the issuing of letters.

quired],<sup>1</sup> and that said executor may be cited to show cause why such a decree should not be made.<sup>2</sup>

Dated \_\_\_\_\_, 18—.

J. R.

[Verification as in form No. 52.]

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No. 1472.

### Decree for Payment of Legacy.

(Code Civ. Pro., §§ 2722, 2723.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

J. R., of the [city] of \_\_\_\_\_, a legatee under the will of J. T., late of the [city] of \_\_\_\_\_, deceased, having heretofore, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, presented to the surrogate's court of the county of \_\_\_\_\_, his duly verified petition, dated \_\_\_\_\_, 18—, praying for a decree directing P. F., the executor of said will to pay the legacy of \_\_\_\_\_ dollars given and bequeathed to said petitioner in and by said will, or its just proportional part [*or* to pay a portion of the legacy of \_\_\_\_\_ dollars given, etc., to the amount of \_\_\_\_\_ dollars, as necessary for his support],<sup>3</sup> and that said executor might be cited to show cause why such a decree should not be made; and a citation having been thereupon duly issued by the surrogate of said county, requiring said executor to show cause before him at, etc., on, etc., why such a decree should not be made, and said citation having been returned with proof of due service thereof upon the said P. T., and [recite appearances, etc.], and [it appearing that the amount of money and the value of the other property, in the hands of the said executor, applicable to the payment of debts, legacies and expenses, exceed, by at least one-third, the amount of all known debts and claims against the said estate, of all legacies which are

<sup>1</sup> See section 2723, Code Civ. Pro., as to bond, etc.

<sup>2</sup> See generally as to this proceeding *Matter of Hoyt* (31 Hun, 176; S. C., 13 Week. Dig., 360), *Matter of Hedding Meth. Ep. Church* (35 Hun, 315), *Matter of Macaulay* (94 N. Y., 574), *Estate of Reigelmann* (2 Civ. Pro. [Browne], 98; S. C., 2 Dem., 86), *Tuttle v. Heidermann* (5 Redf., 199), *Peysen v. Wendt* (2 Dem., 221), *Beek-*

*man v. Vanderveer* (3 id., 221), *Matter of Paton* (7 Misc., 377), *Matter of McClouth*, (9 id., 385), *Matter of Travis* (10 id., 298; aff'd S. C., 85 Hun, 420), *Matter of Peaslee* (81 Hun, 595), *Matter of Mansfield* (7 Misc., 383), *Matter of Alexander* (83 Hun, 147). Former sections 2717 and 2718 of Code Civ. Pro., were consolidated by ch. 686 of Laws of 1893 and renumbered as section 2722.



entitled to priority over the said petitioner's claim, and of all legacies or distributive shares of the same class; and that the payment of (——— dollars of) said legacy is necessary for the support of the said petitioner]:<sup>3</sup>

It is ordered and decreed by this court, and the said surrogate doth order, decree and allow, that the said P. T., executor as aforesaid [advance and], pay to the said J. R. [a portion of] his said legacy [to the amount of —— dollars] [upon the filing of a bond by said J. R., approved by the said surrogate, in the penalty of —— dollars, with two sufficient sureties, conditioned as prescribed by law, with respect to a bond which an executor, or an administrator with the will annexed, may require from a legatee upon payment or satisfaction of a legacy, before the expiration of one year from the time when letters were issued, pursuant to a direction to that effect contained in the will].<sup>3</sup>

And it is further ordered and decreed, that the said J. R. pay the costs and disbursements of this proceeding, to wit: the sum of —— dollars.

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No. 1473.

**Bond by Legatee on Application within a Year.**

(Code Civ. Pro., § 2721.)

*Know all men by these presents*, that we, H. T., of the [city] of ——, grocer, and G. S., of the same place, saddler, and J. B., of the same place, cooper, are held and firmly bound unto P. F., the executor of the will of J. T., late of the [city] of ——, deceased, in the sum of six hundred dollars, to be paid to the said P. T. as such execu-

<sup>3</sup> This clause in brackets relates to the provisions of section 2723, Code Civ. Pro., when the application is made within one year from the issuing of letters. As to the bond required in such case, see that section, and see section 44, p. 2300 (7th ed.), R. S.; Birdseye's Rev. Stats., etc., 1133, and next form, No. 1473, and Code Civ. Pro., § 2721. Section 44, 2 R. S., 90, was repealed by ch. 686 of Laws of 1893.

The required surplus of one-third, under that section, is to be estimated,

by excluding the amount of the petitioner's claim, and payments already made. (Tuttle v. Heidermann, 5 Redf., 199.)

See, also, In re Hoyt (18 Week. Dig., 360; S. C., 31 Hun, 176), Estate of Reigelmann (2 Civ. Pro. [Browne], 98), Hoyt v. Jackson (1 Dem., 553), Keteltas v. Green (9 Hun, 599), Barnes v. Barnes (13 Hun, 233), Lockwood v. Lockwood (3 Redf., 330), La Bau v. Vanderbilt (3 Redf., 334, 414), as to application under former section 2719, Code Civ. Pro., present section 2723.

tor aforesaid, or to his certain attorney, successor or assigns; to which payment well and truly to be made we bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

Whereas, the said J. T., in and by his will, did give and bequeath to the said H. T. the sum of one thousand dollars; and,

Whereas, the said legatee has lately applied to the surrogate's court of the county of \_\_\_\_\_, previous to the expiration of one year from the granting of letters testamentary to said executor, for a decree directing the payment by said executor of a portion of the said legacy to the amount of \_\_\_\_\_ dollars, as necessary for his support; and such proceedings having been thereupon had that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, a decree was made by the surrogate of said county directing the payment to the said J. T. of a portion of his said legacy upon his filing a bond as required by said order.

Now, the condition of this obligation is such that if any debts against the said deceased shall duly appear, and which there shall be no other assets to pay, and there shall be no other assets to pay other legacies, or not sufficient, and the said H. T. shall refund the legacy so paid, or such ratable proportion thereof, with the other legatees, as may be necessary for the payment of the said debts, and the proportional parts of such other legacies, and the costs and charges incurred by reason of the said payment to him, and if the probate of the said will shall be revoked, or the will be declared void, and the said H. T. shall refund the whole of the said legacy, with interest, to the executor or administrator entitled thereto, then this obligation to be void, otherwise to remain in full force and virtue.

H. T. [L. s.]

G. S. [L. s.]

J. B. [L. s.]

Sealed and delivered in presence of \_\_\_\_\_.

[Acknowledgment as in form No. 340, or proof as in form No. 538, affidavits and approval as in form No. 340.]

No. 1474.

**Petition on Failure of Executor, etc., to set Aside Exempt Property.**

(Code Civ. Pro., § 2724.)

*To the Surrogate's Court of the County of ——— :*

The petition of A. B., of ———, respectfully shows, that on the ——— day of ———, 18—, the will of C. D., late of ———, deceased, was duly admitted to probate by the surrogate of ——— county, and on the same day letters testamentary thereupon were issued to J. F., of ———, who duly qualified and entered upon the discharge of his duties as such executor [*or set forth issue of letters of administration upon the estate*].

That your petitioner is the widow [etc.] of the said C. D.

That [here set forth facts showing the failure of executor to set apart property for the petitioner].

Wherefore your petitioner prays for a decree, requiring such executor [*or administrator*] to set apart the property from said estate for the benefit of your petitioner, as is prescribed by law ; or, if it has been lost or injured or disposed of, to pay the value thereof or the amount of injury thereto, and that the said executor may be cited to show cause why such a decree should not be made.<sup>1</sup>

Dated ———, 18—.

A. B.

[Verification as in form No. 52.]

**ARTICLE SECOND.****FORMS RELATING TO ACCOUNTING, AND SETTLEMENT OF THE ESTATE.**

(Code Civ. Pro., Ch. 18, Tit. 4, Art. 2.)

- No. 1475. Petition for judicial settlement of account of executor or administrator.
1476. Order to account upon return of citation.
1477. Petition by executor, etc., for judicial settlement of his account on return of citation.
1478. Order that citation issue to creditors, etc., on petition of executor, etc., for judicial settlement of his account.

<sup>1</sup> See section 2724, Code Civ. Pro., upon the judicial settlement of the account of an executor or administrator.

- No. 1479. Petition of executor, etc., after expiration of a year for an accounting, he not having been cited.  
 1480. Administrator's, etc., account.  
 1481. Affidavit of executor, etc., to account.  
 1482. Account of executor or administrator on final settlement.  
 1483. Decree for payment and distribution.

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No. 1475.

**Petition for Judicial Settlement of Account of Executor or Administrator.**

(Code Civ. Pro., § 2727.)

*To the Surrogate's Court of the County of ——— :*

The petition of A. B., of the [city] of ———, respectfully shows, that your petitioner is a creditor of C. D., late of the [city] of ———, deceased, said A. B. having been indebted to him at the time of his death upon [state nature of indebtedness] [*or show how otherwise interested in the estate*].

That letters testamentary upon the will of said C. D. were duly issued to E. F., of ——— [more than one year since, and], on the ——— day of ———, 18—, by the surrogate of ——— county, said will having been admitted to probate by said surrogate on that day [*or that letters of administration of, etc., of said C. D., were duly issued to E. F., of ———, by the surrogate of ——— county, on the ——— day of ———, 18—*].<sup>1</sup>

[That said letters have been revoked by a decree of said surrogate, made and entered on the ——— day of ———, 18— [*or show how otherwise his powers have ceased*].<sup>2</sup>

[That a decree for the disposition by said executor, etc., of (an interest in) real property was made by said surrogate on the ——— day 18—, as prescribed in title fifth of chapter eighteenth of the Code of Civil Procedure, and that the said real property (*or interest in real property*), or a part thereof, has been disposed of by said executor (*or administrator*), pursuant to the said decree].<sup>3</sup>

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<sup>1</sup> See subd. 1 of section 2726, Code Civ. Pro.

<sup>2</sup> See subd. 3 of section 2726, Code Civ. Pro.

<sup>3</sup> See subd. 2 of section 2726, Code Civ. Pro.

[That the said E. F. has sold (*or* state how otherwise disposed of), as such executor (*or* administrator), a portion of said decedent's real property (*or* a devisable interest in the said decedent's real property; *or* the rents and profits, *or* proceeds, of certain real property of decedent), to wit (describe same), pursuant to a power contained in the said decedent's will.<sup>1</sup>]

Wherefore your petitioner prays for a judicial settlement of the account of the said E. F., as such executor [*or* administrator], and that the said executor [etc.] may be cited to show cause why he should not render and settle his account.<sup>2</sup>

Dated \_\_\_\_\_, 18—.

A. B.

[Verification as in form No. 52.]

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No. 1476.

### Order to Account upon Return of Citation.

(Code Civ. Pro., § 2728.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

The petition of A. B., of the [city] of \_\_\_\_\_, a creditor of the estate of C. D., late of \_\_\_\_\_, deceased, duly verified, and dated \_\_\_\_\_, 18—, having been heretofore duly filed in the above entitled proceeding, praying for a judicial settlement of the account of E. F., as executor of the will [*or* as administrator of, etc.] of said C. D., and a citation having been thereupon issued directed to said executor, and requiring him to show cause on, etc., at, etc., why he should

<sup>1</sup> See subd. 4 of section 2726, Code Civ. Pro. The application under this subdivision cannot be made until one year has elapsed since the letters were issued. (Id.)

<sup>2</sup> As to powers of surrogate upon final accounting of executors to pass upon the validity and interpretation of the various provisions of the will, see *In re Verplanck* (27 Hun, 409), *Ferrer v. Pyne* (81 N. Y., 281), and see note 1, p. 1246.

One entitled to a remainder, after a life estate given by a will, is a "person interested in the estate," within the meaning of section 2726 (formerly, now section 2727), Code Civ. Pro. (*Campbell v. Purdy*, 5 Redf., 434.)

See, also, *Edwards v. Edwards* (1 Dem., 132), *Schlegel v. Winckel* (2 id., 232), *Matter of Macaulay* (94 N. Y., 574), *Matter of Heuser* (87 Hun, 262), *Matter of De Pierris* (79 Hun, 277), *Matter of Ayrault* (81 id., 107),



Estate of Metcalfe (6 Misc., 524), Matter of Havens (8 id., 574), Matter of Perkins (75 Hun, 129), Matter of Monroe (142 N. Y., 484), Matter of Hurd (6 Misc., 171), Matter of Lang (144 N. Y., 275, rev'g S. C., 67 Hun, 107), Matter of Hodgman (82 Hun, 419), Matter of Smith (89 id., 606), Matter of Shipman (82 Hun, 108), Matter of Heuser (87 id., 262), Matter of Patterson (146 N. Y., 327, aff'g S. C., 79 Hun, 371), Washbou v. Cope (144 id., 287, rev'g S. C., 67 Hun, 272), Matter of Winslow (12 Misc., 254), Barker v. Laney (90 Hun, 108), Baldwin v. Smith (91 Hun, 230), Matter of French (52 id., 303), Van Valkenburgh v. Lasher (53 id., 594), In re Laramie (6 N. Y. Supp., 173), Matter of Niles (113 N. Y., 547), Matter of Whitehead (3 Dem., 227), Matter of Halsey (13 Abb. N. C., 353), Merritt v. Jackson (2 Dem., 214), Farmers' Loan and Trust Co. v. McKenna (3 Dem., 219), Matter of Seabra (38 Hun, 218), Smith v. Baylis (3 Dem., 567), Chatfield v. Hewlett (2 Dem., 191), Matter of Hurlburt (43 Hun, 311), Spencer v. Popham (5 Redf., 425), Matter of Underhill (117 N. Y., 471), Foulks v. Foulks (42 State Rep., 1038), Matter of Lawrence (26 State Rep., 238), Matter of Hodgman (31 id., 479).

not render and settle his said account, and said citation having been returned with due proof of service thereof upon said E. F., and said executor having [\*] failed to appear at said time and place at which said citation was returnable [*or* having appeared at said time and place (by ———, as his attorney), but having failed to show cause to the contrary (*or* to present and file a written petition, duly verified, praying that his account may be judicially settled, and that the proper persons may be cited to attend such settlement)]:

Now, upon the application of M. G., attorney for said petitioner, after hearing, etc.:

It is hereby ordered, that said E. F., render an account of his proceedings as such [executor] on the ——— day of ———, 18—, at, etc., and attend before the surrogate on that day, and from time to time, for the purpose of his accounting as such [executor].<sup>2</sup>

\_\_\_\_\_ F. W., *Surrogate*.

No. 1477.

**Petition by Executor, etc., for Judicial Settlement of His Account on Return of Citation.**

(Code Civ. Pro., §§ 2728, 2729.)

*To the Surrogate's Court of ——— County:*

The petition of E. F., of ———, respectfully shows, That he was duly qualified and appointed by the surrogate of the county of ——— as the executor of the will of C. D., late of the [city] of ———, deceased, on the ——— day of ——— in the year 18—, and that one year and upwards has expired since said appointment.

And your petitioner further shows, that immediately after his appointment as such executor he entered upon the discharge of his duties as such executor.

And your petitioner further shows, that so far as the same can be ascertained by him the names of the creditors, or

<sup>1</sup> Insert this clause in parenthesis, where a year has expired since the letters were issued. (Code Civ. Pro., §§ 2727, 2728.)

<sup>2</sup> A formal order need not be entered granting a creditor's petition for the judicial settlement of the account of an

executor, etc., where, in response to the citation, the latter files his account. (Schlegel v. Winkel, 2 Dem., 232.)

See, as to filing supplementary objections to accounting, *Matter of Turfier* (78 Hun, 258).



persons claiming to be creditors, of the said decedent [and places of residence] are as follows, to wit [state same]; that the name of the husband [*or* wife] of said decedent is J. D. [who resides at ———], and that the names [and places of residence] of the next of kin [and legatees] of said decedent are as follows, to wit [state same].<sup>1</sup> [\*]

That he has been required by the surrogate of ——— county to render an account of his proceedings as such executor, and that he desires to have his said account finally settled.

Your petitioner, therefore, prays, that his account as such executor may be judicially settled; and that the creditors, or persons claiming to be creditors, of the said decedent, and the husband [*or* wife] of said decedent, next of kin [and legatees] [*or* if either of those persons has died, pray that his executor or administrator, if any, may be cited to attend such settlement.<sup>2</sup>

Dated ———, 18—.

E. F.

[Verification as in form No. 52.]

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No. 1478.

**Order that Citation Issue to Creditors, etc., on Petition of Executor, etc., for Final Accounting.**

(Code Civ. Pro., § 2728.)

As in form No. 1476, to [\*], and from thence as follows: Appeared [by G. M. as his attorney] and filed his written petition, duly verified, praying that his account as such [executor] may be judicially settled and that the creditors of said decedent, and other proper persons, may be cited to attend such settlement:

It is hereby ordered, that a citation issue accordingly, returnable before me, at, etc., on the ——— day of ———, 18—, at ——— o'clock in the ——— noon of that day.<sup>3</sup>

F. W., *Surrogate*.

<sup>1</sup> See section 2728, Code Civ. Pro., and section 2519, id. The residences are not required to be stated.

<sup>2</sup> If one of two or more co-executors or co-administrators presents a petition for a judicial settlement of his

separate account, it must pray that his co-executors or co-administrators may also be cited. (Code Civ. Pro., § 2728). Section 2728 aforesaid was amended by ch. 426 of Laws of 1895, so as to authorize an accounting also upon the

No. 1479.

**Petition of Executor, etc., after the Expiration of a Year for an Accounting, he not Having been Cited.**

(Code Civ. Pro., § 2728.)

As in form No. 1477 to [\*], and from thence as follows: And your petitioner further shows, that he is prepared to render a final account of his proceedings as such [executor].

Your petitioner, therefore, prays, etc. [conclude as in form No. 1477].<sup>1</sup>

Dated \_\_\_\_\_, 18—.

[Signature as in form No. 1477.]

[Verification as in form No. 52.]

No. 1480.

**Account of Administrator, etc.**

(Code Civ. Pro., § 2729.)

**THE ESTATE OF A. B., DECEASED, IN ACCOUNT WITH C. D.,  
ADMINISTRATOR, ETC.**

| 18—.     | DR.  |        |
|----------|--|--------|
| Aug. 14. | To cash paid for advertising notice of sale of stock, fixtures, etc., at the factory in the <i>Sun</i> , <i>Tribune</i> and <i>Times</i> ,                         | \$4 25 |
|          | To cash paid for printing and circulating fifty hand bills of same sale .....  | 1 50   |
| 16.      | To cash paid E. G., the owner of the factory kept by the intestate, balance of two quarters' rent, due at the time administration was granted, with interest. .... | 275 08 |

petition of the executor or administrator, where notice requiring all persons having claims against the deceased to exhibit the same, with the vouchers thereof, to such executor or administrator has been duly published according to law.

<sup>3</sup> A surrogate may issue the supplemental citation specified in Code Civ. Pro., § 2727, only upon the return of a citation issued as prescribed in id., former § 2726, present § 2727; *i. e.*, one calling for a judicial settlement of the account. (Schlegel v. Winckel, 2 Dem., 232.)

A judicial settlement of the account, of an executor, etc., can be had in either of only two ways: (1) Upon petition of a creditor or person interested under Code Civ. Pro., § 2727; or

(2) upon a petition by the accounting party under id., § 2728. (Schlegel v. Winckel, *supra*.) See, further, as to filing account, *In re Harris* (1 Civ. Pro. R., 162).

The citation need not be directed to the petitioner in the special proceeding pending against the executor or administrator; but the hearing of that proceeding must be adjourned until the return of the citation so issued; when the two proceedings must be consolidated. The consolidation does not affect any power of the surrogate, which might be exercised in either proceeding. (Code Civ. Pro., § 2727.)

If any infants are parties, the surrogate has no jurisdiction to proceed beyond service of the citation, until

|       |     |  |            |
|-------|-----|--|------------|
| Feb.  | 15. | To cash paid <i>Evening Post</i> and <i>Times</i> , newspapers for advertising notices to creditors to exhibit their claims....                      | \$11 00    |
| Sept. | 2.  | To cash paid surrogate's fees for certificate.....   | 50         |
|       | 20. | To cash paid S. H. on account of his claim .....   | 22 50      |
| Jan.  | 10. | To cash paid Mrs. A. C., executrix, etc., of F. C., deceased, on account of debt due by the intestate to the estate of the said F. C., deceased..... | 375 00     |
| Feo.  | 3.  | To cash paid J. H., attorney, etc., for services, advice, costs, etc.....  | 95 13      |
|       |     | To balance cash on hand .....  | 448 08     |
|       |     |  | \$1,232 99 |

18—

CR.

|       |     |   |            |
|-------|-----|---|------------|
| Oct.  | 2.  | By cash, net proceeds of sale of fixtures, stock, etc., at the factory .....                          | \$543 47   |
|       | 16. | By cash received from sales at factory .....  | 31 96      |
|       |     | By cash received from J. M. in full of his account.....   | 7 00       |
|       |     | By cash proceeds on sale of horse.....  | 55 00      |
| Dec.  | 30. | By cash received from H. B. in full of his account .....  | 18 88      |
| March | 20. | By cash received from P. F. in full of judgment against him, with interest, by the hands of J. C..... | 126 40     |
| Feb.  | 12. | By cash left on deposit by intestate in ——— savings bank.....   | \$428 78   |
|       |     | By interest on ditto to January 1, 18—.....   | 6 50       |
|       |     | By ditto to July 1.....   | 7 50       |
|       |     | By ditto to January 1.....  | 7 50       |
|       |     |   | 450 28     |
|       |     |   | \$1,232 99 |

|      |     |  |          |
|------|-----|--|----------|
| Feb. | 15. | By balance brought down, amount now on hand, subject to the payment of expenses, and administrator's commissions, and to distribution <sup>2</sup> ..... | \$448 08 |
|------|-----|--|----------|

THE FOLLOWING CLAIMS EXIST AGAINST THE ESTATE OF THE SAID INTESTATE.

(Give a list, with particulars of the claims.)  
(Annex affidavit, next form, No. 1481.)

special guardians for the infants have been appointed. (In re Lockrow, 4 Abb. N. C., 173.)  
For general form of citation, see form No. 1345.

A creditor or a person interested in the estate, although not cited, is entitled to appear on the hearing, and thus make himself a party to the proceeding. (Code Civ. Pro., § 2728.) See, also, Matter of De Forest (86 Hun, 300.)

<sup>1</sup> See notes to form No. 1477; and as to petition by executor, etc., when letters have been revoked, see Code Civ. Pro., § 2728.

<sup>2</sup> See sections 2729-2731, Code Civ. Pro.; also, *Savage v. Sherman* (24 Hun, 307; S. C., 87 N. Y., 277), *Cox v. Schermerhorn* (18 Hun, 16), *Estate of Moffat* (24 id., 325), *Betts v. Betts* (4 Abb. N. C., 317, 323), *In re Leggatt* (4 Redf., 148), *Whitney v. Phoenix* (4 id., 180), *Wheelright v. Wheelright* (2 id., 501), *Carroll v. Hughes* (5 id., 337),

No. 1481.

**Affidavit of Executor, etc., to Account.**

(Code Civ. Pro., § 2733.)

———— COUNTY, ss.:

J. H., of ———, being duly sworn, says, that he is the executor of the will [*or* administrator of all and singular the goods, chattels and credits], of C. D., late of the [city] of ———, deceased.

That the foregoing account contains, according to the best of his knowledge and belief, a full and true statement of all his receipts and disbursements on account of the estate of the said decedent; and of all money and other property belonging to the said estate which have come to his hands, or which have been received by any other person by his order or authority, for his use; and that he does not know of any error or omission in the said account to the prejudice of any creditor of, or person interested in, the estate of the said decedent.

This deponent further says, that the sums under twenty dollars, charged in the said account, for which no vouchers or other evidences of payment are hereto annexed, or for which he may not be able to produce vouchers, or other evidences of payment, have actually been paid and disbursed by him as charged.

[And this deponent further says, that the items of said account for which no vouchers are produced, exceeding twenty dollars, were paid by deponent at the times and to the persons as stated in said account; that deponent did not take vouchers when he made such payments (*or* that the vouchers taken by him, when he made such payments, have been lost, or destroyed).<sup>1</sup>]

J. H.

[Jurat as in form No. 46.]

Estate of Slosson (4 Civ. Pro., R., 280), Meeker v. Crawford (5 Redf., 450), Matter of Roosevelt (5 Redf., 601), Slosson v. Naylor (2 Dem., 257), Waters v. Faber (2 Dem., 290), Secor v. Sentis (5 Redf., 570), Arthur v. Nelson (1 Dem., 337), Hall v. Campbell (1 Dem., 415), Marshall v. Wysong (3 Dem., 173),

Welling v. Welling (3 Dem., 511), as to compensation of executors, etc.; as to claims against and in favor of executors, etc., see section 2731, Code Civ. Pro.; Matter of Cooper (6 Misc., 501).

<sup>1</sup> See subd. 2 of section 2729, as to these items, and as to additional proof required in such cases. The above

No. 1482.

**Account of Executor or Administrator on Final Settlement.**

(Code Civ. Pro., § 2730.)

SURROGATE'S COURT—COUNTY OF \_\_\_\_\_.

IN THE MATTER OF THE JUDICIAL  
SETTLEMENT OF THE ACCOUNT OF  
E. F. AS THE [EXECUTOR OF THE  
WILL] OF C. D., DECEASED.

*To the Surrogate of the County of \_\_\_\_\_ :*

I, E. F., of the [city] of \_\_\_\_\_, do hereby render the following account of my proceedings as executor of the will of C. D., deceased, for judicial settlement :

On the \_\_\_\_\_ day of \_\_\_\_\_, 18—, letters testamentary of the will of C. D., late of the [city] of \_\_\_\_\_, deceased, were issued to me.

On the \_\_\_\_\_ day of \_\_\_\_\_, 18—, I caused an inventory of the personal estate of the deceased to be filed in this office, which personal estate therein set forth amounts, by appraisalment, by the appraisers, duly appointed, to \_\_\_\_\_ dollars.

Schedule A, hereto annexed, contains a statement of all the property contained in said inventory, sold by me at private sale, with the prices and manner of sale ; which sales were fairly made by me, at the best prices that could then be had, with due diligence, as I then believed. It also contains a statement of all the debts due the said estate and mentioned in said inventory which have been collected, and also of all interest for moneys received by me for which I am legally accountable.

Schedule B, hereto annexed, contains a statement of all debts in said inventory mentioned, not collected or collectable by me, together with the reasons why the same have not been collected and are not collectable ; and also a statement of the articles of personal property mentioned in said inven-

cause must be varied to meet the particular case.

trator upon final settlement, see next form, No. 1482; and, further, as to

For account of executor or adminis-

vouchers, see note 2 to that form.

tory unsold, and the reasons of the same being unsold, and their appraised value ; and also a statement of all property mentioned in said inventory lost by accident, without any willful default or negligence, the cause of its loss and appraised value. No other assets than those in said inventory, or herein set forth, have come to my possession or knowledge, and all the increase or decrease in the value of any assets of said deceased is allowed or charged in said schedules A and B.

Schedule C, hereto annexed, contains a statement of all moneys paid by me for funeral and other necessary expenses for said estate, together with the reason and objects of such expenditure.

On or about the ——— day of ———, 18—, I caused a notice for claimants to present their claims against the estate to me, within the period fixed by law, and at a certain place therein specified, to be published in two newspapers, according to law, for six months, pursuant to an order of the surrogate of the county of ———, to which order, notice and due proof of publication, herewith filed, I refer as part of this account.

Schedule D, hereto annexed, contains a statement of all the claims of creditors presented to and allowed by me, or disputed by me, and for which a judgment or decree has been rendered against me, together with the names of the claimants, the general nature of the claim, its amount and the time of the rendition of the judgment ; it also contains a statement of all moneys paid by me to the creditors of the deceased, and their names and the time of such payment.

Schedule E, hereto annexed, contains a statement of all moneys paid to the legatees, widow or next of kin of the deceased.

Schedule F, hereto annexed, contains the names of all persons entitled, as widow, legatee or next of kin of the deceased, to a share of his estate, with their places of residence, degree of relationship, and a statement of which of them are minors, and whether they have any general guardian, and, if so, their names and places of residence, to the best of my knowledge, information and belief.

Schedule G, hereto annexed, contains a statement of all

other facts affecting my administration of said estate, my rights and those of others interested therein.

|  |      |
|--|------|
| <b>I CHARGE MYSELF.</b>                                |      |
| Amount of inventory.....                               | \$ — |
| Amount of increase, as per exhibit A .....             | —    |
|  | \$ — |
|  | —    |
| <b>I CREDIT MYSELF.</b>                                |      |
| Amount of loss on sales, as per schedule B.....        | \$ — |
| Amount of debts not collected, as per schedule B ..... | —    |
| Amount of schedule C.....                              | —    |
| Amount of schedule D . . . . .                         | —    |
| Amount of schedule E.....                              | —    |
|  | \$ — |
| Leaving a balance of .....                             | —    |

To be distributed to those entitled thereto, subject to the deduction of the amount of my commissions,<sup>1</sup> and the expenses of this accounting. The said schedules, which are severally signed by me, are part of this account.<sup>2</sup>

[Annex affidavit as in form No. 1481.]

No. 1483.

**Decree for Payment and Distribution.**

(Code Civ. Pro., § 2743.)

[At, etc., as in form No. 1394.]

Present, F. W., *Surrogate*.

IN THE MATTER OF THE FINAL ACCOUNTING OF A. B., AS [EXECUTOR OF THE WILL] OF C. D., DECEASED.

A. B., sole executor of the will of C. D., late of the [city] of ———, deceased, having heretofore, and on the ——— day of ———, 18—, duly presented his petition, in writing, praying for a final judicial settlement of his accounts as such

<sup>1</sup> See note 2 to form No. 1480, as to commissions of executor, etc. N. Y., 476; rev'g S. C., 13 Hun, 206), Tickel v. Quinn (1 Dem., 425).  
<sup>2</sup> See as to vouchers, section 2729, Code Civ. Pro.; Boughton v. Flint (74 For order of reference of account to a referee, see form No. 1365; for form of referee's report, see form No. 1366.

executor, and a citation having been thereupon duly issued to all persons interested in the estate of said deceased, requiring them to appear in this court on the ——— day of ———, 18—, and attend the final judicial settlement of the accounts of said ———; and said citation having been returned with proof of the due service thereof according to law, and said executor having appeared and filed his accounts, and [state appearances, etc., as in form No. 1425], and the said account, and the vouchers therewith filed, having been duly examined and found correct:

It is ordered, adjudged and decreed, and the surrogate, by virtue of the power and authority in him vested, doth order, adjudge and decree, that the said accounts of said A. B., as such executor, as rendered and filed, be and the same are hereby finally settled and allowed.

The following is a summary statement of the said accounts settled and allowed, made and recorded, pursuant to the statute in such case made and provided; that is to say:

|  |             |
|--|-------------|
| The said executor is charged with the amount of the inventory..... | \$ —        |
| Increase .....   | —           |
| [Etc. (as may be necessary).]                                      | —           |
|  | <u>\$ —</u> |

|   |             |
|---|-------------|
| The said executor is credited by amount of funeral expenses, and expenses of administration ..... | \$ —        |
| Debts of the said deceased .....  | —           |
| [Etc. (as may be necessary).]   | —           |
|   | <u>\$ —</u> |

Leaving a balance in the hands of said executor belonging to the estate of the said C. D., deceased, of ——— dollars.

And it is further ordered and decreed, that said executor divide, pay and distribute the said amount of cash in his hands, after deducting therefrom the amount of his legal commissions for his services [which are hereby allowed at the sum of ——— dollars], and the amounts hereinafter specified allowed to him for costs [counsel fees] and ex-



penses of this accounting, as follows, to wit: that he pay and distribute, etc. [state distribution to be made].

And it is hereby further ordered and decreed, that the said executor be and he is hereby allowed his costs and disbursements in this proceeding, to wit: the sum of \_\_\_\_\_ dollars, and, in addition thereto, the sum of \_\_\_\_\_ dollars for a counsel fee upon this accounting, to be deducted from and paid out of the said moneys in his hands before distribution.<sup>1</sup>

And it is further ordered, that upon the payments and distribution being made by said executor as aforesaid, and upon filing the receipts of the above named legatees, and distributees for the amounts respectively paid them, that said executor be and he is hereby discharged from all liability as such executor.

And it is further ordered, that these proceedings, be and the same are hereby adjourned to the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon.

F. W., *Surrogate*.

### TITLE V.

#### FORMS RELATING TO THE DISPOSITION OF THE DECEDENT'S REAL PROPERTY, FOR THE PAYMENT OF DEBTS AND FUNERAL EXPENSES.

(Code Civ. Pro., Ch. 18, Tit. 5.)

- No. 1484. Petition for disposition of real property of a decedent, for the payment of his debts and funeral expenses.
- 1485. Decree directing mortgage or lease of real property of decedent, for payment of debts, etc.
- 1486. Decree for sale of real property, for payment of debts, etc., of decedent.
- 1487. Order directing execution of decree on filing of bond by executor, etc.
- 1488. Bond to be given by executor or administrator before executing decree for disposition of real property.

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<sup>1</sup> As to allowance and amount of costs, see Code Civ. Pro., §§ 2556-2563, *Hannahs v. Hannahs* (68 N. Y., 610), *Seaman v. Whitehead* (78 N. Y., 306); *Marsh v. Avery* (81 N. Y., 29), *Gilman v. Gilman* (63 id., 41), *Fowler v. Lockwood* (3 Redf., 465), *Estate of Valentine* (9 Abb. N. C., 313), *In re Miles* (5 Redf., 110), *Carroll v. Hughes* (5 Redf., 337), *Estate of Withers* (2 Civ. Pro. R., 162), *Harward v. Hewlett* (5 Redf., 330), *Walton v. Howard* (1 Dem., 103), *Hall v. Campbell* (1 Dem., 415), *Forster v. Kane* (1 Dem., 67), *Du Bois v. Brown* (id., 317), *Riggs v. Cragg* (89 N. Y., 479, rev'g S. C., 26 Hun, 89), *Osborne v. McAlpine* (4 Redf., 1), *Matter of Bender* (86 Hun, 570), *In re Laramie* (6 N. Y.



Supp., 175), Stokes v. Dale (1 Dem., 260), Matter of Fernbacher (17 Abb.N. C., 339), Du Bois v. Brown (1 Dem., 317), Matter of Clark (36 Hun, 301), Matter of Gray (91 N. Y., 502), Matter of Kee-ler (23 Abb. N. C., 276), In re Lamb's Will (5 N. Y. Supp., 565), Matter of Johnson (6 Dem., 55), Freeman v. Coit (27 Hun, 447; 96 N. Y., 63), Chalker v. Chalker (5 Redf., 480), Bunnell v. Ranney (2 Dem., 327), Matter of Sex-ton (1 id., 3), Estate of Stokes (3 Civ. Pro. R., 384), Scofield v. Adriance (2 Dem., 486), Estate of Willett (15 Civ. Pro. R., 284), In re Tacke's Will (17 State Rep., 805, among other cases.

See as to allowance for expenses of executor, etc., incurred on application to revoke letters. (Matter of O'Brien, 145 N. Y., 379).

- No. 1489. Report of sale by executor, etc.  
 1490. Order confirming sale.  
 1491. Deed of executor or administrator.  
 1492. Order for publication of notice of distribution.  
 1493. Notice of distribution of proceeds, of disposition of real property.  
 1494. Supplementary decree for distribution of proceeds of sale.  
 1495. Notice to widow of satisfaction of her dower.  
 1496. Widow's release of dower and consent to accept a gross sum.

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No. 1484.

**Petition for Disposition of Real Property of a Decedent,  
 for the Payment of His Debts and Funeral Expenses.**

(Code Civ. Pro., §§ 2750, 2751, 2752.)

*To the Surrogate's Court of the County of \_\_\_\_\_ :*

The petition of A. B., of \_\_\_\_\_, respectfully shows, that your petitioner is [stating character in which he applies].<sup>1</sup>

That letters of administration of, etc. [*or* letters testamentary upon the will], of C. D., late of \_\_\_\_\_ deceased, were first duly granted and issued to your petitioner [and G. H., of \_\_\_\_\_] [*or* to E. F., of \_\_\_\_\_, and I. J., of \_\_\_\_\_], by the surrogate of \_\_\_\_\_ county, within three years, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

And your petitioner further shows, that the following are the unpaid debts of and claims made against said decedent, and the names of the persons to whom the said debts are owing and by whom said claims are made, as nearly as your petitioner can, upon diligent inquiry, ascertain the same [state the debts and claims].<sup>2</sup>

That so far as your petitioner can, upon diligent inquiry, ascertain the same, the amount of the unpaid funeral expenses of said decedent is \_\_\_\_\_ dollars, and that the same are owing to F. P. [and J. R., and that the sum of \_\_\_\_\_ dollars thereof is owing to said F. P., and the balance thereof to said J. R.].<sup>3</sup>

That the following is a general description of all the de-

---

<sup>1</sup> See section 2750, Code Civ. Pro., as to who may make the application. That ancillary administrator cannot, see *In re Ladd* (5 Civ. Pro. R., 50).

As to action by executor, etc., to set aside fraudulent conveyance or incumbrance upon real estate of deceased person, and action or proceeding for

cedent's real property, and interest in real property, within the State, which may be disposed of as prescribed by title fifth of chapter eighteenth of the Code of Civil Procedure, so far as your petitioner can, upon diligent inquiry, ascertain the same, to wit [describe same, stating the value of each distinct parcel, and whether it is improved or not; whether it is occupied or not, and, if occupied, the name of each occupant].<sup>1</sup>

That the name of the husband [*or* wife] of said decedent is M. D.

That the names of the heirs and devisees of the said decedent are as follows, so far as your petitioner can, upon diligent inquiry, ascertain the same [state them].

That said C. B. and J. H. [naming infants and stating ages] are infants,<sup>2</sup> and [state the names of their general guardians, if any, or the fact that they have no general guardians].

[And your petitioner further shows, that the amount of the personal property which has come to the hands of your petitioner as such (executor) (and into the hands of his said co-executor), is (state same); that your said petitioner (and his said co-executor, *or* co-administrator) have (state the application of the personal property, and the amount which may yet be realized therefrom).<sup>3</sup>]

That your petitioner [*or* that said executor, etc.], has caused to be published, as prescribed by law, a notice, requiring creditors to present their claims, and the time for the presentation thereof, pursuant to said notice, has elapsed<sup>4</sup> [*or* state that such a notice has not been published].

And your petitioner prays for a decree, directing the disposition of the decedent's said real property, or interest in real property, or so much thereof as may be necessary, for the payment of his debts or funeral expenses, or, etc.,<sup>5</sup> by

296), Matter of Corwin (10 Misc., 197). And see amendment to subd. 2 *id.* by ch. 735 of Laws of 1894, as to statements in case of incumbrance by mortgage liens.

<sup>1</sup> See subd. 2 of section 2752, Code Civ. Pro., and section 2749 (*id.*).

<sup>2</sup> See subd. 3 of section 2752, Code Civ. Pro., amended by chapter 735 of Laws of 1894.

<sup>3</sup> These statements are required to be made, if the petition is presented by an executor or administrator.

(Code Civ. Pro., § 2752, subd. 4.)

<sup>4</sup> See last sentence of section 2754, Code Civ. Pro.

<sup>5</sup> By chapter 735 of Laws of 1894, the words "or if so decreed, as hereinafter provided, for the payment of any judgment liens existing upon such land, or some portion thereof, at decedent's death," were inserted in section 2750, Code Civ. Pro., after the words "funeral expenses." See also, amendment by same chapter to section 2749, *id.*

the mortgage, lease or sale at public or private sale thereof; and that the parties named in this petition, and all other necessary parties, as prescribed in title ninth of chapter eighteenth of the Code of Civil Procedure may be cited to show cause why such a decree should not be made.<sup>1</sup>

Dated ———, 18—.

A. B.

[Verification as in form No. 52.]

No. 1485.

**Decree Directing Mortgage or Lease of Real Property of Decedent for Payment of Debts, etc.**

(Code Civ. Pro., § 2760.)

[At, etc., as in form No. 1394.]

IN THE MATTER OF THE APPLICATION TO MORTGAGE, LEASE OR SELL THE REAL ESTATE OF C. D., DECEASED.

A. B., the [executor of the will] of C. D., deceased, having heretofore presented to the surrogate's court of the county of ——— his petition, duly verified, dated ———, 18—, praying for a decree directing a disposition of the said decedent's real property or interest in real property specified in section 2749 of the Code of Civil Procedure, or so much thereof as is necessary for the payment of his debts [and funeral expenses] [*or* funeral expenses] by the mortgage lease or sale at public or private sale thereof; and for the necessary citation to issue to the proper parties, and the

<sup>1</sup>See section 2753, Code Civ. Pro., amended by ch. 735 of Laws of 1894, as to statements of petition when some of the facts required to be stated by section 2752 (*id.*), cannot be ascertained by the petitioner upon diligent inquiry and proceedings thereupon. See also *Dennis v. Jones* (1 Dem., 80).

See also, *In re Estate of Akin* (20 Week. Dig., 24), *Mead v. Jenkins* (27 Hun, 570; S. C., 4 Redf., 369), *U. S. Life Ins. Co. v. Jordan* (5 *id.*, 207), *Jenkins v. Young* (21 Week. Dig., 307),

*In re Slingerland* (*id.*, 413), *Estate of Le Baron* (6 Civ. Pro. R., 62; S. C., 3 Dem., 37), *Raynor v. Gordon* (23 Hun, 264), *Dennis v. Jones* (1 Dem., 80), *Stilwell v. Swarthout* (81 N. Y., 109), *Matter of Fuller* (86 Hun, 47), *Raven v. Norton* (2 Dem., 110), as to this proceeding.

See, as to extension of time for application, by pendency of suit in court of record between a creditor and administrator, etc., Code Civ. Pro., § 2751.

surrogate being satisfied that all the facts specified in section 2752 of the Code of Civil Procedure, have been ascertained, as far as they can be upon diligent inquiry, and it appearing to him that the debts [*or* funeral expenses] of said estate cannot be paid without resorting to the real property, or interest in the real property described in said petition, having issued a citation pursuant to the prayer of said petition, requiring the parties named in the said petition and all other necessary parties as prescribed in title fifth of chapter eighteenth of the Code of Civil Procedure to appear before him at, etc., on, etc., to show cause why such a decree should not be made; and said citation having been returned with due proof of service thereof upon the parties to whom it was directed, and [state appearances], and the said surrogate having heard the proofs and allegations of the parties, and the facts required by section 2759 of the Code of Civil Procedure having been established to the satisfaction of the surrogate, and the surrogate having inquired whether sufficient money can be raised advantageously to the persons interested in the real property, by a mortgage or lease of the real property of which the decedent died seized, or of a part thereof, and to that end having appointed three competent and disinterested persons to examine and appraise each parcel of such real property, and its rental value, at its just and fair market value; and the said persons having so appraised the same and made a report signed by [two of] them, describing each parcel, and stating its value and rental value and having filed the same in said surrogate's office, and the surrogate having ascertained [\*] that the money can be raised, by the execution of a mortgage upon [*or* lease of] the [portion of the] said real property described in said petition and hereinafter described for [state particulars as to lease or mortgage]:

It is hereby ordered, directed and decreed, and the said surrogate doth order, direct and decree, that the said mortgage or lease be made and executed accordingly of the real property [*or* of the interest in real property] described as follows, to wit [describe same], for the purpose of paying the debts [and funeral expenses] [*or* funeral expenses] established by this decree, by the said executor [*or* administra-

tor] upon his giving the bond prescribed by law, in the penalty of ——— dollars, or, in case of his failure so to do within ——— from the date of this decree, by a freeholder, to be appointed by the surrogate of ——— county, as prescribed by law. [†]

And the said surrogate doth hereby determine and specify the amount of each debt established before him, as a valid and subsisting debt [*or* as a just and reasonable charge for funeral expenses] against the estate of the said decedent, to wit [state same].

And the said surrogate doth hereby further determine and specify, that the following demands presented as being against said estate have been rejected, to wit [state rejected demands].<sup>1</sup>

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No. 1486.

### Decree for Sale of Real Property for Payment of Debts, etc., of Decedent.

(Code Civ. Pro., §§ 2761, 2665.)

As in last form No. 1485 to [\*], and from thence as follows: That sufficient money cannot be raised advantageously to the persons interested in the said real property [*or* interest in real property], described in the said petition, and hereinafter described, by mortgage or lease thereof:

It is hereby ordered, directed and decreed, and the said surrogate doth order, direct and decree, that a sale of the real property [*or* interest in real property] hereinafter described, for the purpose of paying the debts [and funeral expenses] [*or* funeral expenses] established by this decree, or of so much thereof as is necessary in order to pay the said debts [and funeral expenses] [*or* funeral expenses], at public sale<sup>2</sup> [*or* at a private sale, at a price not less than

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<sup>1</sup> See, generally, as to decree for mortgage or lease, sections 2760, 2765, 2767, Code Civ. Pro.

As to recital of debts and judgment liens, see section 2758, Code Civ. Pro.; *People v. Westbrook* (61 How. Pr., 138), *In re Estate of Akin* (20 Week. Dig., 24).

As to proof of debt upon which judgment has been rendered, see sections

2756, 2757, Code Civ. Pro.; *Matter of Estate of Fox* (92 N. Y., 93), *Estate of Meakim* (5 Civ. Pro. R., 421), *Burnham v. Harrison* (3 Redf., 345), *East River Nat. Bank v. McCaffrey* (3 id., 97), *In re Fox* (14 Week. Dig., 339), *Matter of Stowell* (15 Misc., 533).

<sup>2</sup> See Code Civ. Pro., §§ 2761, 2765, as amended by ch. 735 of Laws of 1894.



the value thereof as appraised, pursuant to the provisions of section 2,760 of the Code of Civil Procedure], be made by the said executor [*or* administrator], upon his giving the bond prescribed by law, in the penalty of \_\_\_\_\_ dollars,<sup>1</sup> or, in case of his failure so to do within \_\_\_\_\_ days from the date of this decree, by a freeholder, to be appointed by the surrogate of \_\_\_\_\_ county, as prescribed by law [in the following order (state order in which the parcels are to be sold, if the decree directs the sale of two or more distinct parcels).<sup>2</sup>]

[Conclude as in last form No. 1485 from (†).]

No. 1487.

**Order Directing Execution of Decree upon Filing of Bond by Executor, etc.**

(Code Civ. Pro., § 2768.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

A. B., the executor of C. D., late of \_\_\_\_\_, deceased, having given and filed the bond required by the decree entered herein on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, the said [executor] is hereby directed to proceed to execute the said decree [with respect to (stating the property, if the executor is limited to a sale of part of the property)].<sup>3</sup>

And it is further ordered and directed, that the said [executor] may give the purchaser at such sale of any of the said real property a credit not exceeding three years, for not more than three-fourths of the purchase money of such real property purchased by him, to be secured by the bond of the said purchaser and his mortgage on the property, to him sold at such sale.<sup>4</sup>

<sup>1</sup> Not less than twice the value of the real property, or interest in real property, directed to be sold. (Code Civ. Pro., § 2766.)

<sup>2</sup> See section 2763, 2764, 2769, Code Civ. Pro., as to order of sale. Said section 2769 was amended by ch. 735 of Laws of 1894.

As to provisions of decree in case of sale of an interest under a contract for

the purchase of real property, see Code Civ. Pro., § 2779; and as to provisions in case the title to any of the real property is in controversy, see *id.*, § 2762.

See, also, notes to last form No. 1485.

<sup>3</sup> See section 2768, Code Civ. Pro.

<sup>4</sup> See as to credit, section 2771, Code

And it is further ordered, that the said executor do make a report, according to law, of all sales made by virtue of this order.

No. 1488.

**Bond to be Given by Executor or Administrator before  
Executing Decree for Disposition of Real Peoperty.**

(Code Civ. Pro., § 2766.)

As in form No. 340 to [\*], and from thence as follows: That, whereas, the above bounden, A. B. [executor of the will] of C. D., deceased, has lately made application to the surrogate's court of the county of \_\_\_\_\_ for a decree directing the disposition of the said decedent's real property [*or* interest in real property]; and,

Whereas, such proceedings, in due form of law, have been thereupon had that the surrogate of said county on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, made and entered a decree [\*] directing the said [executor] to sell [*or* execute a mortgage (*or* lease)] of the real property described in said decree upon the terms thereby prescribed for the purpose of paying the debts [and funeral expenses] [*or* the funeral expenses] established by the said decree upon his filing his bond as prescribed by law in the penalty<sup>1</sup> above mentioned:

Now, if the said A. B. shall faithfully perform the duties imposed upon him by the said decree and pay into the said surrogates' court within twenty days after the receipt thereof by him all money arising from the said mortgage [*or* lease, *or* sale], shall deliver to the surrogate of \_\_\_\_\_ county, within the same time, all the securities taken thereupon; and shall account for all money received by him, whenever he is required to do so by a court of competent jurisdiction, then this obligation to be void, otherwise to remain in full force and virtue.

[Signature and seals as in form No. 340.]

Sealed and delivered in presence of \_\_\_\_\_

[Acknowledgment as in form No. 340, or proof as in form

Civ. Pro., where the sale is that of an interest under a contract, the order may prescribe the security to be given. (Id.)

This provision as to credit may also be made by a separate order. (Id.)

<sup>1</sup> See section 2766, Code Civ. Pro., as to penalty.

No. 538, affidavits and approval by surrogate as in form No. 340.]

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No. 1489.

**Report of Sale by Executor, etc.**

(Code Civ. Pro., § 2775.)

[Title of proceeding.]

*To the Surrogate of the County of \_\_\_\_\_ :*

The report of A. B. [executor of the will] of C. D., deceased, of his proceedings under the decree, and for the sale of the real estate of said deceased, and order for the execution thereof, made respectively by said surrogate on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, shows :

That he caused a notice that the said real estate would be sold at public auction, at \_\_\_\_\_ in the [city] of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon of that day, to be posted for six weeks previous to the day appointed for the said sale, at \_\_\_\_\_ and at \_\_\_\_\_ and at \_\_\_\_\_, three of the most public places in the [\_\_\_\_\_ ward] of the [city] of \_\_\_\_\_, in which said [ward] the said place of sale is located, and the same notice to be published for six weeks successively previous to the day appointed for the said sale, in the \_\_\_\_\_, a newspaper printed in the county of \_\_\_\_\_, a copy of which notice, with the proof of such printing and publication thereof, is hereunto annexed.

And the said [executor] further reports, that on the said \_\_\_\_\_ day of \_\_\_\_\_, 18—, between the hours of nine o'clock in the morning and the setting of the sun of the same day, at the \_\_\_\_\_, in the [city] of \_\_\_\_\_, and within the county of \_\_\_\_\_, wherein the premises ordered to be sold are situated, he sold at public auction the whole of the real estate mentioned and described in the said decree, and that he did, on the said sale, sell the premises described in the said decree, as follows :

All that certain house and lot of land situate, lying and being, etc., to H. F., for the sum of \_\_\_\_\_ dollars, that being the highest sum bidden for the same.

And that on the said sale he did further sell the premises described in the said order, as follows [describe same], to J. A., for ——— dollars, that being the highest sum bid- den for the same.

And that on the said sale he did further sell, etc.

And the said [executor] doth further report, that the said sale was in all respects legally made and fairly conducted.

All of which is respectfully submitted.<sup>1</sup>

Dated ———, 18—.

A. B., *Executor, etc.*

No. 1490.

### Order Confirming Sale.

(Code Civ. Pro., § 2776.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

On reading and filing the report of sale of A. B. [executor of the will] of C. D., deceased, of the real property described in the decree made herein on the ——— day of ———, 18—, pursuant to the said decree and the order directing the execution of the same, which report bears date on the ——— day of ———, 18—, and due notice of this appli- cation, as prescribed by me, having been given to each party who has appeared in the above entitled proceeding, and on motion of ———, after hearing, etc. :

It is hereby ordered, that the said report and the said sale be and the same are hereby confirmed as to [describe parcels if the sale is confirmed only in part].

And it is further ordered, that the said [executor] be and he is hereby directed to execute the proper conveyance [or conveyances], upon compliance on the part of the purchaser [or purchasers] with the terms of said sale.

F. W., *Surrogate.*

<sup>1</sup> As to mode of sale and notice, see section 2772, Code Civ. Pro.; as to private sale, see same section; that distinct parcels must be separately sold, unless otherwise directed by the decree, or in the order to execute the same, or in an order subsequently made by the surrogate, see section 2773 (id.); as to who may and who may not purchase, see section 2774 (id.). And see *Stilwell v. Swarthout* (81 N. Y., 109).  
See, also, amendment to section 2775, id., by ch. 213 of Laws of 1885.

No. 1491.

**Deed of Executor or Administrator.**

(Code Civ. Pro., § 2776.)

This indenture made the \_\_\_\_\_ day of \_\_\_\_\_ in the year 18—, between A. B., executor of the will of C. D., late of \_\_\_\_\_, deceased, of the first part, and J. T., of \_\_\_\_\_, of the second part, witnesseth.

Whereas, F. W., Esq., surrogate of the county of \_\_\_\_\_, heretofore made a decree, dated \_\_\_\_\_, 18—, directing the premises hereinafter described, or so much thereof as was necessary in order to pay the debts and funeral expenses of the said decedent, as established by the said decree, to be sold for the payment of the said debts [*or* funeral expenses] by said A. B., executor as aforesaid, upon his filing a bond as prescribed by law; and,

Whereas, the said [executor] duly filed a bond as required by said order; and,

Whereas, an order was thereupon duly made by the said surrogate directing the execution of the said decree by the said [executor]; and,

Whereas, [the whole] of the premises described in said decree were accordingly sold by the said [executor] on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at public auction at the \_\_\_\_\_, in the [city] of \_\_\_\_\_, in the county of \_\_\_\_\_ and State of New York, that being the county where the said premises are situated, due notice of the time and place of said sale having been given according to law; and,

Whereas, the party of the first part did, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, file with said surrogate his report of said sale, in pursuance of the said order and of the statute in such case made and provided; and,

Whereas, the said surrogate, after examining the said proceedings did, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, make an order confirming the said report and the said sale, and directing the said party of the first part to execute a conveyance of the said real property to the party of the second part, to whom the said premises [*or* the parcel of said premises hereinafter described] were sold at the said sale, he being the highest bidder for the same, for the sum hereinafter mentioned.

Now, this indenture further witnesseth, that the said party of the first part, in pursuance of the said sale and of the said orders of the said surrogate, and, in pursuance of the statutes of this State in such case made and provided, and also for and in consideration of the sum of \_\_\_\_\_ dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained, sold, granted and conveyed, and by these presents doth bargain, sell, grant and convey, unto the said party of the second part, his heirs and assigns forever, all that certain, etc. [describe the premises conveyed]:

Together with the privileges and appurtenances thereunto belonging or in any way appertaining, and all the estate, right, title and interest which the said C. D., deceased, had at the time of his death, of, in and to the same free and discharged from all claims of dower of J. D., widow of the said C. D., deceased; subject, however, to all charges by judgment, mortgage or otherwise, upon the lands so sold, existing at the time of the death of the said C. D.:<sup>1</sup>

To have and to hold the above described and conveyed premises, with the appurtenances, and all the estate, right and interest which the said C. D., at the time of his death, had therein, unto the said party of the second part, his heirs and assigns forever as fully and amply as the said party of the first part might, could or ought to sell and convey the same, by virtue of the orders above recited and of the statutes of this State made and provided or otherwise.

In witness whereof, the said party of the first part, hath hereunto set his hand and seal the day and year first above written.<sup>2</sup>

[L. s.]

A. B., *Executor.*

Sealed and delivered in presence of \_\_\_\_\_.

[Acknowledgment as in form No. 340, or proof as in form No. 538.]

<sup>1</sup> See section 2778, Code Civ. Pro., and see amendment to that section by ch. 735 of Laws of 1894.

<sup>2</sup> See, as to sale of interest of decedent under contract for the purchase of real property, Code Civ. Pro., §§ 2779-

2783; as to what irregularities will not affect the purchaser's title, see Code Civ. Pro., § 2784; *Stilwell v. Swarthout* (81 N. Y., 109), *O'Connor v. Huggins* (113 id., 511), and chapter 525 of Laws of 1895.

No. 1492.

**Order for Publication of Notice of Distribution.**

(Code Civ. Pro., § 2787.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

A. B., the [executor of the will] of C. D., late of the city of \_\_\_\_\_, deceased, having paid into the surrogate's court of \_\_\_\_\_ county and to the county treasurer of said county the moneys arising from the sale [or mortgage, or lease] of the real estate of the said C. D., lately made by him under the decree of the said surrogate, and the order directing the execution thereof :

It is hereby ordered, that the balance of the proceeds of said sale, after making the necessary deductions therefrom, be distributed by the surrogate according to law, at the surrogate's office in the [city] of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_ next, and that notice of the time and place of making the said distribution, be published at least once in each of the six weeks immediately preceding the same, in the \_\_\_\_\_, a newspaper published in the said county of \_\_\_\_\_.

\_\_\_\_\_  
F. W., *Surrogate.*

No. 1493.

**Notice of Distribution of Proceeds of Disposition of Real Property.**

(Code Civ. Pro., § 2787.)

[Title of proceeding.]

Notice is hereby given, that the balance remaining of the proceeds of the sale [or lease, or mortgage], after making the necessary deductions therefrom, of the real estate of C. D., late of the [city] of \_\_\_\_\_, deceased, lately made under the decree and order directing the execution thereof, of the surrogate of the county of \_\_\_\_\_, by A. B., the executor of the will of the said C. D., will be distributed by the said surrogate according to law, at the surrogate's office in the

[city] of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon of that day.

Dated \_\_\_\_\_, 18—.

F. W., *Surrogate of* \_\_\_\_\_ *County.*

No. 1494.

### Supplementary Decree for Distribution of Proceeds of Sale.

(Code Civ. Pro., § 2791.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

Notice that distribution of the proceeds of the sale [*or lease, or mortgage*] of the real estate in this matter, would be made on the \_\_\_\_\_ day of \_\_\_\_\_, having been duly published, and the whole amount of the money paid into the surrogate's court of \_\_\_\_\_ county, and to the county treasurer of \_\_\_\_\_ county, on the said sale [*or mortgage, or lease*], being \_\_\_\_\_ dollars and [state appearances], and the surrogate having heard the proofs and allegations of the parties so appearing [and the matter having been adjourned, from time to time, to this day], and the surrogate having allowed from the said amount the sum of \_\_\_\_\_ dollars for the charges and expenses of the sale [*or mortgage, or lease*] of said premises and of the publication of the notice of distribution, and the other actual disbursements attending the distribution, leaving in the said surrogate's court, undistributed, the sum of \_\_\_\_\_ dollars; and J. D., the widow of the testator, being entitled to dower in the lands sold, and she having consented, according to law, to take a gross sum in lieu of said dower:<sup>1</sup>

It is hereby ordered, that distribution of the said sum be made as follows: that is to say, to the said widow, the sum of \_\_\_\_\_ dollars, being the gross sum to which she is entitled in lieu of her said dower, and that the residue of said sum after paying therefrom to the petitioner [*or his attorney,*

<sup>1</sup> For provisions as to dower, see 2795, Code Civ. Pro., and forms Nos. section 2793, subd. 3, as amended by 1495, 1496. See, also, Matter of Zahrt (94 N. Y., ch. 652 of Laws of 1886, sections 2794, 605).



M. F.], the sum of ——— dollars, hereby awarded to said petitioner as his costs of this proceeding,<sup>1</sup> be distributed among the creditors of the said testator, whose debts have been established, and recited by the decree directing said sale [excepting the following claims allowed by said decree, and which have been again controverted, upon due notice to the claimant, as directed by me, and rejected upon this hearing (name such claims, if any)],<sup>2</sup> the amounts to be paid to said creditors and the order of their payment being as follows, to wit: the said persons names are mentioned in the first column of the following list, and the amount due to each in the second column opposite each name, and the amount to which each of said creditors is entitled on such distribution, this day ordered, in the third column opposite each name, which list is as follows, that is to say:

| NAME.     | AMOUNT DUE. | AMOUNT ENTITLED. |
|-----------|-------------|------------------|
| W. T..... | \$1,281 73  | \$726 73         |
| W. A..... | 192 11      | 108 92           |
| Etc.....  | Etc.        | Etc.             |

[In case any surplus remains after payment of the claims in full, its payment may be provided for.]<sup>3</sup>

No. 1495.

**Notice to Widow as to Satisfaction of Her Dower.**

(Code Civ. Pro., § 2793, subd. 3.)

[Title of proceeding.]

Take notice, that A. B., the [executor of the will] of C. D.,

<sup>1</sup> As to costs, etc., see Code Civ. Pro., §§ 2556-2561, and § 2563, id.; and see Long v. Olmsted (3 Dem., 581).

<sup>2</sup> See section 2788 and former subd. 7, now subd. 8, of section 2793, Code Civ. Pro., as to this clause.

<sup>3</sup> See sections 2790, 2791, Code Civ. Pro., as to disposal of surplus. Also amendments to section 2791, by ch. 735 of Laws of 1894.

<sup>4</sup> As to order of distribution, see

section 2793, Code Civ. Pro., to meet the various cases arising under which section this form is to be adapted.

See as to delivering certified copies of the supplementary decree to the county treasurer, and his distribution, etc., pursuant thereto, id., § 2792.

As to surplus due to an infant, or to a party in remainder or reversion, see section 2796, id.

late of the [city] of ———, deceased, has paid into the surrogate's court of ——— county, and to the county treasurer of ——— county, the moneys arising from the sale lately made by him of the real estate of the said testator, pursuant to the decree of the surrogate of said county, authorizing said sale and to the order of said surrogate directing the execution of the said decree by said [executor], and that the said surrogate will satisfy your claim of dower upon the lands so sold, by the payment to you of such sum in gross, as shall be equal to the value of your right of dower in the said gross proceeds to be ascertained by said surrogate according to the principles applicable to life annuities; if you shall consent before or on the ——— day of ———, 18—, to accept such sum in lieu of your said dower, by an instrument under seal, duly acknowledged or proved and certified in like manner as a deed to be recorded in the said county; and that if such consent be not given within the time above mentioned, then the said surrogate will set apart one-third of the purchase money of the said real estate, to satisfy your claim of dower, and will cause the same to be invested according to law.

Dated ———, 18—.

Yours, etc.,

[Signature as in form No. 1493.]

To J. D., *the widow of C. D., deceased.*

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No. 1496.

**Widow's Release of Dower, and Consent to Accept a Gross Sum.**

(Code Civ. Pro., § 2793, subd. 3.)

Whereas, A. B., the [executor of the will of] C. D., late of the [city] of ———, deceased, my late husband, has recently sold the real estate whereof the said C. D., died siezed, under a decree of the surrogate of ——— county, authorizing him to sell the same for the payment of the debts [*or funeral expenses*] of the said deceased, and the order of said surrogate directing the execution of the said decree, and has paid the proceeds of such sale into the sur-

rogate's court of the county and to the county treasurer of said county for the purpose of distribution.

Now, these presents witness that I, J. D., of the [city] of \_\_\_\_\_, widow of the said C. D., deceased, do hereby consent to accept, in lieu of my dower in said real estate, a sum to be ascertained by the said surrogate equal to the value of my right of dower in the gross proceeds of such sale, according to the principles applicable to life annuities.

And these presents further witness, that I, the said J. D., widow as aforesaid, do hereby acknowledge that I have received from F. W., Esq., surrogate of the county of \_\_\_\_\_, the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, pursuant to the foregoing consent, in full discharge and satisfaction of all my right and claim of dower upon the lands so sold as aforesaid.

In testimony whereof, I have hereunto set my hand and seal, this \_\_\_\_\_ day of \_\_\_\_\_, 18—. <sup>1</sup>

J. D. [SEAL.]

Sealed and delivered in presence of \_\_\_\_\_.

[Acknowledgment as in form No. 340, or proof as in form No. 538.]

## TITLE VI.

### FORMS RELATING TO PROVISIONS RELATING TO A TESTAMENTARY TRUSTEE.

(Code Civ. Pro., Ch. 18, Tit. 6.)

- No. 1497. Petition by testamentary trustee for final settlement of his accounts.
- 1498. Petition by person interested in the estate for intermediate account by testamentary trustee.
- 1499. Petition to compel payment of money or delivery of personal property by testamentary trustee.
- 1500. Citation pursuant to petition for payment of money or delivery of personal property by testamentary trustee.
- 1501. Answer of testamentary trustee to petition to compel payment of money or delivery of personal property.
- 1502. Decree dismissing petition, etc., on filing of answer.
- 1503. Petition by persons interested in execution of trusts, etc., for judicial settlement of account of testamentary trustee.
- 1504. Petition of testamentary trustee for leave to resign his trust.
- 1505. Petition for security from testamentary trustee.
- 1506. Petition for removal of testamentary trustee.

<sup>1</sup> As to provisions in cases in which subdivision 3 of § 2793, Code Civ. Pro., widow is an infant, lunatic, or otherwise by ch. 652 of Laws of 1886. wise incompetent, see amendment to

## No. 1497.

**Petition by Testamentary Trustee for Final Settlement of His Accounts.**

(Code Civ. Pro., § 2802, as amended by chapter 518 of Laws of 1885, and section 2810, Code Civ. Pro.)

See form No. 1479, which may be adapted to this petition, and see notes to that form, and see *In the Matter of Hood* (20 Week. Dig., 316); and for proceedings under the petition, see Code of Civil Procedure, sections 2811, 2812, and sections therein referred to, and forms under these sections; as to commissions of testamentary trustee, see note 2 to form No. 1480.<sup>1</sup>

## No. 1498.

**Petition by Person Interested in the Estate for Intermediate Account by Testamentary Trustee.**

(Code Civ. Pro., § 2803.)

*To the Surrogate of* \_\_\_\_\_ *County:*

The petition of A. B., of \_\_\_\_\_, respectfully shows, that he is a person interested in the trust estate, etc., under the will of C. D., late of \_\_\_\_\_, deceased [state how interested].

That the will of said C. D. was duly admitted to probate by a decree of the surrogate of \_\_\_\_\_ county, made and entered on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and that E. F., of \_\_\_\_\_ [the executor named in said will was, by said decree, and by letters testamentary, duly issued to him thereupon, appointed executor thereof, and], is a testamentary trustee thereunder [as such executor] of the following trusts [state same].

That said C. D. has entered upon the discharge of said trusts [make further necessary statements, according to the facts, and conclude with prayer, as follows]:

Wherefore your petitioner prays, that an order may be made requiring the said E. F. to render an intermediate account of his proceedings as such testamentary trustee, pursuant to the provisions of title sixth of chapter eighteenth

<sup>1</sup> See *Van Sinderen v. Lawrence* (50 Hun, 272), *Matter of Rutherford* (5 Dem., 499).

of the Code of Civil Procedure, and for such other and further relief as may be necessary.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

A. B.

[Verification as in form No. 52.]

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No. 1499.

**Petition to Compel Payment of Money or Delivery of Personal Property by Testamentary Trustee.**

(Code Civ. Pro., § 2804.)

SURROGATE'S COURT—NEW YORK COUNTY.

IN THE MATTER OF THE ESTATE OF }  
 E. McC., DECEASED. }

*To the Surrogate of the County of New York :*

The petition of P. J. B. respectfully shows unto your honor, that on or about the sixteenth day of March 1859, E. McC., of the city of New York, widow, departed this life, after making and publishing her last will and testament, dated January 27, 1855 [with several codicils thereto], by which she appointed P. A. H. J. and D. A. W. her executors and trustees.

That said will and codicils were duly proved before the surrogate of the county of New York, on the fifth day of May, 1859, and letters testamentary thereon were duly issued to the executors named therein, both of whom entered upon the discharge of their trust, and continued to act until the death of said D. A. W., which occurred on the seventeenth day of November, 1878, since which time said P. A. J. has continued, and still continues, to act as sole trustee.

That in and by the seventh section of said will, the said E. McC. did give, devise and bequeath the remaining eighth part of her residuary estate, after deducting therefrom the sum of two thousand three hundred dollars, theretofore advanced to said P. J. B., from the principal of her estate, and twelve thousand dollars, the expense occasioned her by said P. J. B.'s late proceedings in the Supreme Court, unto

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<sup>1</sup> See in Matter of Estate of McCarter (94 N. Y., 558).

the said D. A. W. and P. A. J., executors, and the survivors of them, during the natural life of her grandson, P. J. B., upon trust, to manage and improve, invest and re-invest the same, from time to time, during his natural life, in such manner as they, or the survivor of them, shall deem most beneficial, and the interest and income thence arising, to apply to the use of said Peter during his natural life, and, upon his decease, leaving issue, to pay and divide the principal among his then surviving children, and the lawful issue, if any, who may then be dead, leaving issue *per stirpes* and not *per capita*, and in case of his decease, without leaving lawful issue, then to be divided between his next of kin according to law.

That said trust fund so directed to be invested amounts, as your petitioner is informed and believes, to the sum of sixteen thousand five hundred dollars.

That petitioner has demanded of said P. A. J., testamentary trustee as aforesaid, payment of the annual income arising from said trust fund, but said J., although conceding part of said annual income, to wit: the sum of three hundred and thirty-seven dollars and seventy-five cents to be in his possession, refuses to pay the same, or any part thereof, to petitioner, claiming that by a certain instrument of assignment by petitioner to his wife in her life-time, petitioner had divested himself of his beneficial interest in said trust-fund, whereas this petitioner claims and insists that, as a matter of law, his said interest was inalienable, and that whatever instruments of assignment in relation thereto were, or have been, made by him are void, convey no interest in said trust estate to the assignee therein named, and do not divest petitioner of his said beneficial estate and interest therein.

Petitioner further shows, that said P. A. J., has mis-managed the trust estate in his hands to your petitioner's loss, in that he wrongfully sold a one thousand-dollar gold-bearing bond to pay a mortgage of your petitioner, when said P. A. J. had other funds in his hands applicable thereto, drawing only two per cent interest.

And petitioner further shows, that more than one year has elapsed since the probate of the will aforesaid, and

there has been no judicial settlement of the account of the said trustee.

Wherefore your petitioner prays, that a judicial settlement of said account may be had according to law; that said P. A. J., trustee, may be cited to show cause why he should not render and settle his account, and also why he should not pay this petitioner the sum herein already mentioned of three hundred and thirty-seven dollars and seventy-five cents, conceded to be in his hands, and whatever other amount may be found on such accounting to be in his hands or under his control, being the annual income of such trust estate, and why he should not abide such further or other order as the court may see fit to grant in the premises.<sup>1</sup>

Dated ———, 18—.

P. J. B.

[Verification as in form No. 52.]

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No. 1500.

**Citation Pursuant to Petition for Payment of Money or Delivery of Personal Property by Testamentary Trustee.**

(Code Civ. Pro., § 2804.)

*The People of the State of New York, to E. F., testamentary trustee under the will of C. D., late of ———, deceased:*<sup>2</sup>

Whereas, A. B., has lately presented to the surrogate's court of ——— county his written petition, duly verified, dated ———, 18—, praying for a decree directing the payment to him of the sum of ——— dollars [or the delivery to him of certain personal property] by you as such testamentary trustee.

Now, therefore, you are hereby cited and required to be and appear before the surrogate of ——— county, at, etc., on, etc., at ——— o'clock in the ——— noon to show cause why such a decree should not be made.

In testimony, etc. [conclude as in general form No. 1345].

[L. s.]

[Signature as in form No. 1345.]

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<sup>1</sup> The above is substantially the form of the petition in the Matter of McCarter (94 N. Y., 558).

<sup>2</sup> See, also, as to other persons to be cited, if necessary, Code Civ. Pro., § 2806, and Matter of Odell (52 Hun, 88).

No. 1501.

**Answer of Testamentary Trustee to Petition to Compel Payment of Money or Delivery of Personal Property.**

(Code Civ. Pro., § 2805.)

Substantially as in answer, form No. 1468, making necessary changes, and see notes to that form; and see *Matter of Estate of McCarter* (94 N. Y., 558).

No. 1502.

**Decree Dismissing Petition, etc., on Filing of Answer.**

(Code Civ. Pro., § 2805.)

Substantially as in form No. 1469, adapting the provisions to the facts.

No. 1503.

**Petition by Person Interested in Execution of Trusts, etc., for Judicial Settlement of Account of Testamentary Trustees.**

(Code Civ. Pro., § 2808.)

Substantially as in form No. 1475, adapting the allegations to the facts.<sup>1</sup>

No. 1504.

**Petition of Testamentary Trustee for Leave to Resign His Trust, etc.**

(Code Civ. Pro., § 2814.)

This petition must set forth the facts upon which the application is founded, and must, in all other respects, conform to a petition presented for a judicial settlement of the account of a testamentary trustee as prescribed in title sixth of chapter nineteenth of the Code of Civil Procedure [§ 2814, *id.*]. See form No. 1497, and the forms, etc., referred to under that form for this petition and proceedings thereunder.<sup>2</sup>

<sup>1</sup> For proceedings upon return of citation, see forms Nos. 1476, 1478, 521), *Ellsworth v. Hinton* (21 State and §§ 2728, 2729, 2808, Code Civ. Pro. Rep., 730).

<sup>2</sup> See *Rogers v. Rogers* (4 Redf.,



No. 1505.

**Petition for Security from Testamentary Trustee.**

(Code Civ. Pro., § 2815.)

*To the Surrogate's Court of ——— County:*

The petition of A. B., of ———, respectfully shows that heretofore M. B., of ———, departed this life on or about the ——— day of ———, 18—, leaving a will [by which he appointed M. N. executor thereof, and by which will he gave and bequeathed to said executor (*or* to P. R.) in trust (state nature of trust)].

That said will was duly admitted to probate on the ——— day of ———, 18—, by the surrogate of ——— county, in which county said M. B. resided at the time of his death [and on the same day letters testamentary thereupon were duly issued by said surrogate to said M. N., and he duly qualified as such executor], and entered [*or* that said P. R. entered] upon the discharge of his duties as such [executor and] trustee.

That [as your petitioner is informed and believes] [here set forth facts respecting the trustee, the existence of which, if it was interposed as an objection to granting letters testamentary to a person named as executor in a will, would make it necessary for such person to give security in order to entitle himself to letters; see form No. 1410].

And your petitioner shows, that he is interested in the execution of the said trust [state in what manner, if it does not appear from the above recital of the trust], and your petitioner prays for a decree directing the said M. N. [*or* P. R.] to give security for the performance of his said trust, and that he may be cited to show cause why such a decree should not be made.<sup>1</sup>

Dated ———, 18—.

A. B.

[Verification as in form No. 52.]

<sup>1</sup> For form of decree upon objections, see form No. 1411, which may be adapted to the decree upon this petition.

See, also *Matter of Whitehead* (3 Dem., 227), *Kelsey v. Van Camp* (3 Dem., 530), *Morgan v. Morgan* (3 Dem., 612), and notes to form No. 1410.

For form of bond of trustee, see form No. 1413.

No. 1506.

**Petition for Removal of Testamentary Trustee.**

(Code Civ. Pro., § 2817.)

See form No. 1449, and notes thereto ; and see, also, *Savage v. Gould* (60 How., 234), *In re Clapp* (4 Redf., 200).

## TITLE VII.

## FORMS RELATING TO PROVISIONS RELATING TO A GUARDIAN.

## ARTICLE FIRST.

## FORMS RELATING TO THE APPOINTMENT, REMOVAL AND RESIGNATION OF A GENERAL GUARDIAN.

(Code Civ. Pro., Ch. 18, Tit. 7, Art. 1.)

- No. 1507. Petition by infant over fourteen for appointment of a general guardian.
1508. Affidavit as to circumstances of minor.
1509. Citation upon petition for appointment of general guardian.
1510. Decree appointing general guardian of infant.
1511. Petition by mother of infant under fourteen years of age for appointment of temporary guardian.
1512. Bond of general guardian of infant.
1513. Letters of guardianship.
1514. Petition for revocation of letters of guardianship.
1515. Citation to guardian upon petition for revocation of his letters.
1516. Decree revoking letters of guardianship.
1517. Order suspending guardian during pendency of proceeding for revocation of letters.
1518. Petition by general guardian for revocation of letters.
1519. Citation upon application of general guardian for revocation of letters.
1520. Order allowing petitioner to account for the purpose of being discharged.
1521. Decree revoking letters and discharging guardian.
1522. Petition for ancillary letters of guardianship.
1523. Decree granting ancillary letters of guardianship.

No. 1507.

**Petition by Infant over Fourteen for Appointment of a General Guardian.**

(Code Civ. Pro., §§ 2822, 2823.)

*To the Surrogate's Court of the County of \_\_\_\_\_ :*

The petition of A. B., an infant of the age of [fourteen]

years and upwards, respectfully shows, that your petitioner resides at \_\_\_\_\_, in the county of \_\_\_\_\_, and is the daughter of C. B., late of, etc., deceased, and was of the age of [fourteen] years on the \_\_\_\_\_ day \_\_\_\_\_, 18—, and that the mother of your petitioner is also dead [*or is living at \_\_\_\_\_, in the county of \_\_\_\_\_, in (this State)*].<sup>2</sup>

[\*] That as one of the devisees of her said father, now deceased, your petitioner is seized of and entitled to an estate in fee, in and to a certain house and lot situated in the fourth ward of the city of Albany, and known as lot No. 52, \_\_\_\_\_ street, the gross income of which is about \_\_\_\_\_ dollars annually; also to a certain farm or lot of land situate in the town of \_\_\_\_\_, in the county of \_\_\_\_\_, consisting of about one hundred acres, the gross annual income of which is about \_\_\_\_\_ dollars.

That she is also entitled to the following personal estate, viz.: a horse of the value of about \_\_\_\_\_ dollars, two cows of the value of about \_\_\_\_\_ dollars each, a promissory note given by J. T. to her said father previous to his death, for the sum of \_\_\_\_\_, and interest from the \_\_\_\_\_ day of \_\_\_\_\_, 18—, which note became due and payable on the \_\_\_\_\_ day of \_\_\_\_\_ last, and that no part thereof has been paid.

And your petitioner further shows, that she has not, to her knowledge or belief, any other property, real or personal, nor any right or interest in any other than that above specified.

That no general guardian of her person, or of her property, has been appointed, either by a court of competent jurisdiction of this State, or by the will admitted to probate or authenticated and recorded, as prescribed in section 2851 of the Code of Civil Procedure, of her said father, or by the deed of her said father. or of her said mother.<sup>3</sup>

[*Or state appointment of a general guardian of her person or property, or both, by either of the above methods,*

<sup>1</sup> See section 2822, Code Civ. Pro., as to surrogate's court, to which petition is to be presented.

<sup>2</sup> The petition must state whether or not the father and mother of the peti-

tioner are known to be living. (Code Civ. Pro., § 2823.)

<sup>3</sup> See subd. 1 of section 2822 of Code Civ. Pro.

<sup>4</sup> See subd. 2 of section 2822 of Code Civ. Pro., and section 2851, *id.*

and state as follows: that the general guardian so appointed has died (*or* has become incompetent by reason of, state same; *or* disqualified by reason of, state reason; *or* refuses to act; *or* has been removed, stating how; *or* that his term of office has expired).<sup>1</sup>]

That the following circumstances render the appointment of another person than the said \_\_\_\_\_, the mother of your said petitioner, expedient (state circumstances).<sup>2</sup>]

That the only relatives of said infant residing in the said county of \_\_\_\_\_ are [state same]. [†]

And your petitioner prays, that a decree may be made appointing the said \_\_\_\_\_, the mother of your petitioner [*or* P. M., of, etc., physician, who is the uncle of your petitioner], the general guardian of the person [and property] [*or* property] of your petitioner [and that the said \_\_\_\_\_ (naming mother, etc.), may be cited to show cause why such a decree should not be made].<sup>2</sup>

Dated \_\_\_\_\_, 18—.

A. B.

[Verification as in form No. 52.]

#### CONSENT OF GUARDIAN.

I hereby consent to be appointed the general guardian of the above petitioner, and I hereby offer, as my sureties, W. N. and R. S., both of, etc.

Dated \_\_\_\_\_, 18—.

P. M.

No. 1508.

#### Affidavit as to Circumstances of Minor.

(Code Civ. Pro., § 2829.)

COUNTY OF \_\_\_\_\_, ss.:

F. B., of the [city] of \_\_\_\_\_, being duly sworn, says, that he is acquainted with the property and estate of \_\_\_\_\_, of

<sup>1</sup> See Code Civ. Pro., § 2823.

11 Hun, 41), In re Valentine (22 Week. Dig., 175), as to this proceeding.

<sup>2</sup> See, generally, as to prayer and contents of petition, Code Civ. Pro., §§ 2822, 2823, 2824; also see Matter of Barre (5 Redf., 64), Ledwith v. Ledwith (1 Dem., 154), Matter of Reynolds

A corporation may receive letters of general guardianship of an infant's property. (Ledwith v. Ledwith, *supra*.) As to allegations in case of non-resi-

———, a minor upwards of [*or under*] fourteen years of age; and that the same consists of the real and personal estate mentioned in the annexed petition, and that the personal estate of said minor does not exceed the sum of ——— dollars; and that the annual rents and profits of the real estate of said minor does not exceed the sum of ——— dollars or thereabouts.

F. B.

[Jurat as in form No. 46.]

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No. 1509.

**Citation upon Petition for Appointment of General Guardian.**

(Code Civ. Pro., § 2824.)

*The People of the State of New York, to [name persons cited]:*<sup>1</sup>

Whereas, A. B., of ———, an infant of the age of fourteen years and upwards, has lately presented to the surrogate's court of ——— county her petition in writing and duly verified praying for the appointment of P. M., of ———, as the general guardian of her person [and property]:

Now, therefore, you are hereby cited and required to show cause before the surrogate of ——— county, at, etc., on, etc., why the prayer of the petition should not be granted.

In testimony, etc. [as in form No. 1345].

[L. s.]

[Signatures as in form No. 1345.]

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dent married woman see section 2822 of Code Civ. Pro., last sentence; and that the husband of a married woman must be cited, see section 2824, id.

It has been usual to annex an affidavit as in form No. 1508, to comply

with the provision of the R. S., corresponding with section 2829 of the Code of Civ. Pro.

<sup>1</sup> See sections 2823, 2824, Code Civ. Pro.

No. 1510.

**Decree Appointing General Guardian of Infant.**

(Code Civ. Pro., § 2825.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

A. B., of ———, an infant of fourteen years of age [and upwards], having presented to this court her written petition, duly verified, praying for the appointment of P. M., of ———, as the general guardian of her person [and property], together with the consent of the said P. M. in writing to become such guardian [and a citation having been thereupon duly issued to the proper persons, requiring them to show cause before the surrogate of said ——— county, on, etc., at, etc., why the prayer of said petition should not be granted, and the said citation having been returned with due proof of service thereof upon the said persons to whom the same was directed, and [state appearances], and the said matter having been duly adjourned, from time to time, to this day; and the said surrogate [having heard the proofs and allegations of the parties, and] having inquired into the circumstances, and being satisfied that the allegations of the said petition are true in fact, and that the interests of the said infant will be promoted by the appointment of a general guardian of her person [and of her property]:

It is hereby ordered and decreed, that the said P. M. be and he is hereby appointed the general guardian of the person [and property] of the said infant, upon his executing his bond to the said infant, with at least two sureties, in the penalty of ——— dollars, conditioned that the said guardian will, in all things, faithfully discharge the trust reposed in him, and obey all lawful directions of the surrogate of ——— county, touching the trust, and that he will, in all respects, render a just and true account of all money and other property received by him, and of the application thereof, and of his guardianship, whenever he is required so to do by a court of competent jurisdiction.<sup>1</sup>

F. W., *Surrogate.*

<sup>1</sup> See as to bond required of a guardian, Code Civ. Pro., § 2830, and form No. 1512; and see *Rieck v. Fish* (111 N. D., 1898), *Nichols v. McLean* (98 N. D., 1915).

No. 1511.

**Petition by Mother of Infant under Fourteen Years of Age  
for Appointment of Temporary Guardian.**

(Code Civ. Pro., § 2827.)

*To the Surrogate's Court of the County of ———:*

The petition of A. B., of ———, respectfully shows, that your petitioner is the mother of A. B., an infant, who resides at ———, in the county of ———, and became of the age of ——— years on the ——— day of ———, 18—.

That F. B., the father of said infant, died on or about the ——— day of ———, 18— [here insert from (\*) to (†), from form No. 1507, making necessary changes, and conclude as follows]: and your petitioner prays, that a decree may be made appointing a general guardian of the person (and property) of said infant, to serve until the said infant attains the age of fourteen years, and a successor to such guardian is appointed.'

Dated ———, 18—.

**C. D**

[Verification as in form No. 52.]

No. 1512.

**Bond of General Guardian of Infant.**

(Code Civ. Pro., § 2830.)

As in form No. 340 to [\*], and from thence as follows: That, whereas, by a decree of the surrogate's court of the county of ———, made on the ——— day of ———, 18—, the above bounden ——— was appointed the gen-

Y., 458), *Hurd v. Hannibal* and *St. Joseph R. R. Co.* (33 Hun, 109), and note 1 to form No. 340, as to bonds executed by trust companies as sureties, and as to bonds generally; also, ch. 401, Laws of 1885, amending ch. 486, Laws of 1881.

For oath of guardian, see form No. 1378, and section 2831, Code Civ. Pro.

' In case the father is living, the petition by the mother must pray that he

may be cited to show cause why the decree should not be made, and see notes to form No. 1507, and the sections of Code Civ. Pro. therein referred to.

The proceedings are the same as in the case of an infant over fourteen, except that the surrogate must nominate, as well as appoint, the temporary guardian. (Code Civ. Pro., § 2827.)

See, as to residence of infant, *Matter of Daniels* (71 Hun, 195.)

eral guardian of the person and property of the above named [insert name of infant], an infant under the age of twenty-one years, upon his executing his bond to the said infant, with two sufficient sureties, in the penalty and upon the condition therein mentioned :

Now, therefore, the condition of this obligation is such, that if the above bounden ——— shall, in all things, faithfully discharge the trust reposed in him as such guardian, and obey all lawful directions of the surrogate of ——— county, touching the said trust, and shall, in all respects, render a just and true account of all money and other property received by him, and of the application thereof, and of his said guardianship, whenever he is required so to do by a court of competent jurisdiction, then this obligation to be void, otherwise to be and remain in full force and virtue.<sup>1</sup>

[Signatures and seals as in form No. 340.]

Sealed and delivered in presence of ——— ———.

[Acknowledgment as in form No. 340, or proof as in form No. 538; affidavits and approval by surrogate as in form No. 340.]

No. 1513

### Letters of Guardianship.

(Code Civ. Pro., § 2830.)

*The People of the State of New York, to P. M., of ———, send greeting :*

Whereas, an application, in due form of law, has been made to our surrogate's court of the county of ———, to have said P. M. appointed the guardian of A. B., of the [city] of ———, in the county of ———, minor upwards of [or under] fourteen years of age, and,

Whereas, said P. M. has agreed and consented to become such guardian, and has duly executed and delivered a bond pursuant to law, for the faithful discharge of his duty as such guardian, and we being satisfied of the sufficiency of said bond, and that said P. M. is a good and reputable person, and is in every respect competent to have the custody

<sup>1</sup> See notes to form No. 1510, and see amendment to section 2830 of Code Civ. Pro., by ch. 559 of Laws of 1892. As to bond to be given by guardian of person, see Code Civ. Pro., § 2831.



of the person and estate of said minor, do by these presents allow, constitute and appoint you, the said P. M., the general guardian of the person [and property] of said minor during his minority [*or until (he) attains the age of fourteen years, and until a successor to such guardian shall be appointed*],<sup>1</sup> hereby requiring you, the said guardian, to safely keep the real and personal estate of said minor, which shall hereafter come to your custody and not suffer any waste, sale or destruction of the same, but to keep up and sustain [his] lands, tenements and hereditaments, by and with the rents, issues and profits thereof, or with such other moneys belonging to [him], as shall come to your possession, and to deliver the same to [him] when [he] becomes of full age, or to such other guardian as may be hereafter appointed, in as good order and condition as you receive the same, and also to render a just and true account of all moneys and property received by you, and the application thereof, and of your guardianship in all respects to any court having cognizance thereof, when thereunto required.

In testimony whereof, etc. [as in form No. 1412, to end thereof].

F. W., *Surrogate*.

[Annex copies of sections 2842 and 2843 of Code of Civil Procedure.<sup>2</sup>]

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No. 1514.

**Petition for Revocation of Letters of Guardianship.**

(Code Civ. Pro., § 2832.)

*To the Surrogate's Court of the County of \_\_\_\_\_.*

The petition of A. B., of \_\_\_\_\_, respectfully shows, that he is an infant of the age of \_\_\_\_\_ years and upwards, having become of the age of \_\_\_\_\_ years on the \_\_\_\_\_ day of \_\_\_\_\_, 18— [*or that he is a relative, to wit (state relationship), or a friend of C. D., an infant of the age of, etc., as above*)].

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, P. M., of

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<sup>1</sup> Insert this clause in brackets when the minor is under fourteen years of age. (Code Civ. Pro., § 2827.)

<sup>2</sup> See last sentence of section 2843, Code Civ. Pro.

———— was appointed the general guardian of the person [and property] of your petitioner [*or* of said infant] by the surrogate of ——— county, in which county your petitioner [*or* said infant] then resided and now resides, and that said P. M. duly qualified and entered upon the discharge of his duties as such guardian.

And your petitioner further shows, that the said guardian is disqualified by law [*or* is incompetent to fulfill his trust] by reason of [state reason] [*or* state facts bringing the case within any of the subdivisions of section 2832 of the Code of Civil Procedure].

Wherefore your petitioner prays for a decree revoking the said letters of guardianship issued to said P. M., and that the said guardian may be cited to show cause why such a decree should not be made.<sup>1</sup>

Dated ———, 18—.

A. B.

[Verification as in form No. 52.]

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No. 1515.

### Citation to Guardian upon Petition for Revocation of His Letters.

(Code Civ. Pro., § 2833.)

*To P. M., General Guardian of A. B., an Infant :*

Whereas, said A. B. [*or* C. D., the relative (*or* friend) of said A. B.], has presented a petition to the surrogate's court of ——— county, praying for a decree revoking the letters of guardianship of the person [and property] of said A. B., heretofore issued to you :

Now, therefore, you are hereby cited and required to be and appear before the surrogate of ——— county, at, etc., on, etc., to show cause why such a decree should not be made.

In testimony, etc. [conclude as in form No. 1345].

[L. s.]

[Signature as in form No. 1345.]

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<sup>1</sup> The words "in his behalf," at the beginning of section 2832 of Code Civ. Pro., refer to "the ward," and not to "any relative," the intention of the section being to enable any person to apply for a revocation of letters of guardianship, where no relative of the infant is willing to make the applica-

No. 1516.

**Decree Revoking Letters of Guardianship.**

(Code Civ. Pro., § 2833.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

A. B., of ———, an infant [or C. D., a relative, etc., of A. B., an infant], having presented to this court his written petition, duly verified and dated ———, 18—; praying for a decree revoking the letters of guardianship heretofore issued to P. M., by the surrogate of ——— county, of the person [and property] of said A. B., and the surrogate having inquired into the matter, and being satisfied that there is probable cause to believe that the allegations of the said petition are true, and having thereupon, pursuant to law, issued a citation to the said P. M. requiring him to appear before said surrogate, on, etc., at, etc., and show cause why such a decree should not be made, and said citation having been returned with due proof of service upon said P. M., and the said petitioner having appeared by G. P., his attorney, and said guardian having also appeared [by M. G., his attorney] on the return of the said citation [and the said proceeding having been adjourned, from time to time, to this day], and the surrogate having heard the proof and allegations of the respective parties, and the material allegations of the said petition having been established :

It is hereby ordered and decreed, and the said surrogate doth hereby order and decree, that the said letters of guardianship heretofore issued to said P. M. by the [said] surrogate be and they are hereby revoked.

[Add further provisions as to accounting by guardian, and as to costs, etc., as may be necessary.<sup>1</sup>]

F. W., *Surrogate.*

tion. (Bolling v. Coughlin, 5 Redf., 116.)

*Quære.* Whether a suppression of facts is equivalent to a "false suggestion of a material fact," under subd. 4 of that section. (Id.)

See, also, matter of Kerrigan 2 [Mc-

Carty] Civ. Pro. R., 334, Ledwith v. Union Trust Co. (2 Dem., 439), and notes to form No. 1449.

<sup>1</sup> See, as to costs, sections 2556-2562, Code Civ. Pro.

See for form of decree dismissing proceedings, form No. 1451.

No. 1517.

**Order Suspending Guardian During Pendency of Proceeding for Revocation of His Letters.**

(Code Civ. Pro., § 2834.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

A. B., having presented to this court his written petition, duly verified, dated ———, 18—, praying for a decree revoking the letters of guardianship heretofore issued to C. D., of the [person and] property of ———, and the surrogate having inquired into the matter and being satisfied that there is reasonable cause to believe that the allegations of the said petition are true, and having issued a citation to the said guardian requiring him to show cause, before said surrogate, at, etc., on, etc., why such a decree should not be made :

It is hereby ordered, that the said guardian be wholly [*or state in what respects*] suspended from the exercise of his powers and authority during the pendency of the above entitled proceeding.

\_\_\_\_\_ F. W., *Surrogate.*

No. 1518.

**Petition by General Guardian for Revocation of Letters.**

(Code Civ. Pro., § 2835.)

*To the Surrogate's Court of the County of ——— :*

The petition of A. B., of ———, respectfully shows, that heretofore, and on the ——— day of ———, 18—, a decree was made by the surrogate of ———, appointing your petitioner the general guardian of the person [and property] of C. D., of ———, an infant of the age of ——— years and upwards, and that letters of guardianship of said infant were thereupon, on the ——— day of ———, 18—, duly issued to your petitioner, who duly qualified and entered upon the discharge of his duties as such guardian.

That [here set forth facts upon which the application is founded].

Wherefore your petitioner prays, that his account, as such

guardian, may be judicially settled; that a decree may thereupon be made revoking his said letters, and discharging him accordingly, and that the said infant may be cited to show cause why such a decree should not be made.

Dated ———, 18—.

P. M.

[Verification as in form No. 52.]

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No. 1519.

**Citation upon Application of General Guardian for Revocation of Letters.**

(Code Civ. Pro., § 2835.)

*The People of the State of New York, to A. B., infant [and name other parties].*<sup>1</sup>

Whereas, P. M., the general guardian of A. B., an infant, has presented to the surrogate's court of ——— county his written petition, duly verified, dated ———, praying that his account may be judicially settled, and that a decree may thereupon be made revoking his letters and discharging him accordingly:

Now, therefore, you are hereby cited and required to appear before the surrogate of the county of ———, at, etc., on, etc., to show cause why such a decree should not be made.

In testimony, etc. [as in form No. 1345 to end thereof].

[L. s.]

[Signature as in form No. 1345.]

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No. 1520.

**Order Allowing Petitioner to Account for the Purpose of being Discharged.**

(Code Civ. Pro., § 2836.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

P. M., of ———, the general guardian of the person

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<sup>1</sup> The surrogate may also require notice of the application to be given to such other persons, besides the infant, and in such a manner as he deems proper. As to service of citation upon an infant under fourteen years of age, see Code Civ. Pro., § 2526.

[and property] of A. B., an infant, having presented to this court his written petition, duly verified, dated ———, 18—, praying that his account as such guardian might be judicially settled, and that a decree might thereupon be made revoking his letters and discharging him accordingly, and that said infant might be cited to show cause why such a decree should not be made, and the surrogate having entertained the said application and having issued a citation as prayed for in the said petition, returnable on, etc., at, etc., and said citation having been returned, with proof of due service thereof upon the said infant [and the other parties to whom the same was directed], and M. T. having been appointed the guardian *ad litem* of said infant and having duly appeared in said proceeding, and [state any further appearances], and the surrogate having determined that sufficient reasons exist for granting the prayer of said petition, and that the interests of said infant will not be prejudicial by the resignation of said guardian:

It is hereby, on motion of ———, counsel for said petitioner, after hearing, etc., ordered accordingly, and that the said petitioner be allowed to account for the purpose of being discharged.

\_\_\_\_\_ F. W., *Surrogate*.

No. 1521.

### **Decree Revoking Letters of Guardianship and Discharging Guardian.**

(Code Civ. Pro., § 2836.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

An order having been heretofore made in the above entitled matter, pursuant to law, on the ——— day of ———, 18—, by the surrogate of ——— county, that P. M., the general guardian of A. B., an infant, be allowed to account for the purpose of being discharged from his said guardianship, and the said P. M. having fully accounted as such general guardian, and having paid all money which was found to be due from him to such infant, and delivered all books, papers and other property of said infant in his hands,

into this court [*or* name other manner of payment and delivery], as directed by said surrogate:

It is hereby ordered and decreed, and the said surrogate doth order and decree, on motion of ———, counsel for the said petitioner, after hearing, etc., that the letters of general guardianship of the person [and property] of said A. B., heretofore issued on the ——— day of ———, 18—, to said P. M. by the surrogate of ——— county, be and the same are hereby revoked, and that said P. M. be discharged accordingly as such guardian.

[Insert any provisions as to costs of the proceeding, as to which, see Code of Civil Procedure, §§ 2556–2562.<sup>1</sup>]

No. 1522.

### Petition for Ancillary Letters of Guardianship.

(Code Civ. Pro., § 2838.)

*To the Surrogate's Court of the County of ———:*

The petition of A. B., of ———, respectfully shows, that heretofore and on the ——— day of ———, 18—, your petitioner was appointed by the ——— Court, a court of competent jurisdiction within the State [*or* Territory] of ———, in the United States, the general guardian of C. D., an infant, who resides at ———, in the said State [etc.], and that your petitioner has given security within the said State [etc.] in at least twice the value of the personal property, and of the rents and profits of the real property of the said infant, and that your petitioner has duly qualified as such guardian and has entered upon the discharge of his duties as such.

And your petitioner further shows, that the said infant is entitled to property within the State of New York, to wit: of, etc. [briefly describing property], [part of] which is situated in the said county of ———.

[*Or* state that the infant is entitled to maintain an action in a court of this State against ——— for (stating object of the action).]

<sup>1</sup> See as to judicial settlement of the accounts of the guardian after such discharge, and that his sureties remain liable until such judicial settlement, Code Civ. Pro., § 2837.

That no debts are due from the estate of said infant to residents of this State [*or if any creditors, state same*].

Wherefore your petitioner prays, that ancillary letters of guardianship may be issued to him accordingly, pursuant to article first of title seventh of chapter eighteenth of the Code of Civil Procedure of the State of New York.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

A. B.

[Verification as in form No. 52.]

[Annex exemplified copies of the records and other papers showing that the petitioner has been so appointed and has given the required security, authenticated as prescribed in article seventh of title one of chapter eighteenth of the Code of Civil Procedure ; see section 2695 (*id.*).]

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No. 1523.

### Decree Granting Ancillary Letters of Guardianship.

(Code Civ. Pro., § 2839.)

[At, etc., as in form No. 1394.]

[Title of proceeding.]

A. B., the general guardian of C. D., an infant residing without the State of New York, and within the State [*or Territory*] of \_\_\_\_\_, in the United States, having presented to this court his written petition, duly verified, dated \_\_\_\_\_, 18—, by which it appears that said C. D. is entitled to property situated within the county of \_\_\_\_\_, in this State [*or state otherwise according to the fact*], and that said A. B. has been duly appointed by the \_\_\_\_\_ court, a court of competent jurisdiction within the said State [*or Territory*] of \_\_\_\_\_, and has there given security in at least twice the value of the personal property and of the rents and profits of the real property of the said infant, and praying for ancillary letters of guardianship accordingly ; and the said petition being accompanied with exemplified copies of the records and other papers duly authenticated,

<sup>1</sup> See *Griffin v. Sarsfield* (2 Dem., 4), In *Matter of Fitch* (3 Redf., 457), as to this proceeding.

As to proceedings upon petition, see Code Civ. Pro., § 2839; as to effect of ancillary letters, see section 2840, *id.* ; 64 How., 515.

See, also, provisions of subd. 2 of § 2838, Code Civ. Pro., added to that section by ch. 263 of Laws of 1889, and amended by ch. 576 of Laws of 1892, relating to application by the general guardian of an infant residing without the State and within a foreign



showing that he has been so appointed and has given the security required by section 2838 of the Code of Civil Procedure, and the surrogate being satisfied upon the papers presented that the case is within said section 2838, and that it will be for the interest of said infant that ancillary letters of guardianship should be issued to the said petitioner :

Now, upon motion of F. G., counsel for said petitioner :

It is hereby ordered and decreed, that the exemplified copies of the letters of guardianship accompanying said petition be recorded, and that ancillary letters of guardianship of the said infant's property be and they are hereby granted to the said A. B. [upon payment of the debts due from said ward to residents of this State, and upon said A. B. producing to the surrogate proper vouchers for such payments].<sup>1</sup>

F. W., *Surrogate.*

## ARTICLE SECOND.

### FORMS RELATING TO THE SUPERVISION AND CONTROL OF A GENERAL GUARDIAN, AND SETTLEMENT OF HIS ACCOUNTS.

(Code Civ. Pro., Ch. 18, Tit. 7, Art. 2.)

- No. 1524. Annual inventory and account of guardian.
- 1525. Petition for judicial settlement of guardian's account.
- 1526. Citation to guardian for judicial settlement of his account.

### No. 1524.

#### Annual Inventory and Account of Guardian.

(Code Civ. Pro., § 2842.)

Same as form No. 1245.<sup>2</sup>

country, entitled to personal property within the State, or to maintain an action or special proceeding, in any court thereof, respecting such personal property, for ancillary letters of guardianship on the personal estate of such infant.

<sup>1</sup> The decree may be made without a citation, or the surrogate may cite such persons as he thinks proper, to show cause why the prayer of the petition should not be granted. But before the ancillary letters are issued, the surrogate must inquire whether any debts are due from the ward's estate to residents of the State, and if so he must require payment thereof.

(Code Civ. Pro., § 2839.) See, also, amendment to that section by chap. 576 of Laws of 1892, by which the words "admitting the exemplified copies of the foreign letters to be recorded and" contained in that section before such amendment were omitted.

See, also, notes to last form, No. 1522.

<sup>2</sup> The proceedings upon the account are substantially the same as in the case of a lunatic. See form No. 1246, and see notes to forms Nos. 1245 and 1246, and see *Matter of Camp* (91 Hun, 204), *Matter of Plumb* (135 N. Y., 661).

No. 1525.

**Petition for Judicial Settlement of Guardian's Account.**

(Code Civ. Pro., § 2847.)

*To the Surrogate's Court of the County of ——— :*

The petition of C. D., of ———, respectfully shows, that heretofore, and on the ——— day of ———, 18—, A. B., of ———, was appointed the general guardian of the [person and] property of your petitioner by the surrogate of ——— county.

And your petitioner further shows, that on the ——— day of ———, 18—, he attained his majority, and became of the age of twenty-one years.

And your petitioner prays, that a judicial settlement may be had of the account of said A. B. as such general guardian, and that he may be cited to attend the settlement thereof.<sup>1</sup>

Dated ———, 18—.

C. D.

[Verification as in form No. 52.]

No. 1526.

**Citation to Guardian for Judicial Settlement of His Account.**

(Code Civ. Pro., § 2850.)

*The People of the State of New York, to A. B., General Guardian of the Person and Property of C. D.:*

Whereas, C. D. has presented to the surrogate's court of the county of ——— his written petition, duly verified, praying for the judicial settlement of your account as such guardian:

Now, therefore, you are hereby cited and required to be and appear before the surrogate of ——— county, at, etc., on, etc., to attend the judicial settlement of said account.

In testimony, etc. [as in form No. 1345, to end thereof].<sup>2</sup>

[L. s.]

[Signature as in form No. 1345.]

<sup>1</sup> As to who, besides the ward, may subds. 2 and 3, and § 2849, cited petition, see Code Civ. Pro., § 2847, below; see, also, id., § 2848, as to peti-

## ARTICLE THIRD.

## FORMS RELATING TO GUARDIANS APPOINTED BY WILL OR DEED.

(Code Civ. Pro., Ch. 18, Tit. 7, Art. 3.)

No. 1527. Petition for security to be given by guardian appointed by deed or will.

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No. 1527.

**Petition for Decree Directing Security to be Given by  
Guardian Appointed by Deed or Will.**

(Code Civ. Pro., § 2853.)

See form No. 1410 for allegations of this petition.

tion for accounting by general guardian of the person; see, also, *Welch v. Gallagher* (2 Dem., 40), *Smith v. Lusk* (2 id., 595), and amendment to section 2847 by adding subdivision 4 thereto, providing that the application may be made by a surety in the official bond of a guardian whose letters have been revoked; or by the legal representatives of such surety. The citation under that subdivision must be directed to both the guardian and the ward. (Laws of 1892, chap. 62.)

A guardian may present to the surrogate's court a written petition duly verified, praying for a judicial settlement of his account and a discharge from his duties and liabilities, in any case where a petition for a judicial

settlement of his account may be presented by any other person as prescribed in either of the last two sections. The petition must pray that the person who might have so presented a petition, *and also the sureties in his official bond of such guardian or the legal representatives of such surety* may be cited to attend the settlement. (Code Civ. Pro., § 2849, as amended by chap. 304 of Laws of 1893, by inserting words in italics, such amendment taking effect September 1, 1893.)

<sup>2</sup> For proceedings upon the return of the citation, see section 2850, Code Civ. Pro., and forms Nos. 1476, 1481.

See, also, note 1 to last form No. 1526, as to direction of citation under subdivision 4 of section 2847, id.

## CHAPTER XIX.

FORMS RELATING TO COURTS OF JUSTICES OF THE PEACE,  
AND PROCEEDINGS THEREIN.

- TITLE I. Forms relating to jurisdiction and general powers.  
 TITLE II. Forms relating to commencement of action ; appearance of parties ; provisional remedies.  
 TITLE III. Forms relating to pleadings, including counterclaim, and proceedings upon answer of title.  
 TITLE IV. Forms relating to proceedings between the joinder of issue and the trial.  
 TITLE V. Forms relating to trial and its incidents.  
 TITLE VI. Forms relating to judgment and docketing the same.  
 TITLE VII. Forms relating to executions.  
 TITLE VIII. Forms relating to appeals.  
 TITLE IX. Forms relating to action or special proceeding relating to an animal straying upon the highway.  
 TITLE X. Forms relating to miscellaneous provisions.

## TITLE I.

## FORMS RELATING TO JURISDICTION AND GENERAL POWERS.

(Code Civ. Pro., Ch. 18, Tit. 1.)

- No. 1528. Warrant of arrest for criminal contempt.  
 1529. Record of conviction for criminal contempt.  
 1530. Warrant of commitment for criminal contempt.

## No. 1528.

**Warrant of Arrest for Criminal Contempt.**

(Code Civ. Pro., § 2872.)

\_\_\_\_\_ COUNTY,  
 Town [or City] of \_\_\_\_\_, } ss. :

*The People of the State of New York, to any Constable of the said County, greeting :*

We command you to arrest C. D., and bring him before A. F., Esq., one of the justices of the peace of the said county, at his [dwelling-house] in the said town, to show cause why he, the said C. D., should not be convicted of a criminal contempt, alleged to have been committed on the

\_\_\_\_\_ day of \_\_\_\_\_, 18—, before the said justice, while engaged as a justice of the peace in judicial proceedings.

Witness our said justice, at the town aforesaid, this \_\_\_\_\_ day of \_\_\_\_\_, 18—. <sup>1</sup>

A. F., *Justice.*

No. 1529.

### Record of Conviction for Criminal Contempt.

(Code Civ. Pro., § 2873.)

\_\_\_\_\_ COUNTY, ss.:

Whereas, on the \_\_\_\_\_ day of \_\_\_\_\_, in the year 18—, while the undersigned, one of the justices of the peace of the town of \_\_\_\_\_, in the said county, was engaged in the trial of [*or* in the rendering of judgment in] an action between J. J., plaintiff, and R. B., defendant, in said town, according to the statute in such case made and provided, C. D., of the [town] of \_\_\_\_\_, in [said] county, did contemptuously, insolently and in a disorderly manner, so behave and conduct himself towards the undersigned, as to interrupt the said proceedings, and to impair the respect due to the authority of the undersigned by declaring, in a loud voice, that the said defendant, R. B., could not have justice done him in a court held by the undersigned [*or* that the undersigned lied (*or* on being admonished to take off his hat, that he did not value what the undersigned could do; *or* that the undersigned was forsworn, *or* a fool, *or* that if the defendant could not have justice here, he could get it elsewhere, *or* the like)].

If the offense is within subdivision two of section 2870 of the Code of Civil Procedure, then, after word "county," above, say as follows: was guilty of making a great noise and disturbance, tending to, and which did, interrupt the said proceedings by loud and boisterous conversation with divers other persons in the presence and hearing of the undersigned, while so engaged as aforesaid, and, on being requested to desist therefrom, refused so to do.

If the contempt was under the third subdivison of that section, then, after the said word "county," say as follows:

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<sup>1</sup> See notes to next form No. 1529.

willfully resisted in the presence of the undersigned, then sitting as justice in said trial, the execution of a lawful mandate issued by the undersigned for the commitment of F. N., for a contempt of court, for refusing to be sworn as a witness [*or if any other mandate, describing it*]; and,

Whereas, the undersigned thereupon issued his warrant, directed generally, to any constable of the said county, requiring the said constable to bring the said offender before him; and,

Whereas, the said C. D. was brought before the undersigned, pursuant to the said warrant, and an opportunity was given him to be heard in his defense; and,

Whereas, the said C. D. did not show any cause or make any defense against the said charge:

Be it, therefore, remembered, that the said C. D. is adjudged to be guilty, and is convicted of the criminal contempt aforesaid, before the undersigned, and adjudged by the undersigned to pay a fine of [twenty-five] dollars [and be imprisoned in the common jail of said county for the term of (five) days, and until such fine be paid, or he be discharged from imprisonment according to law].<sup>1</sup>

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

\_\_\_\_\_  
A. F., *Justice.*

No. 1530.

### Warrant of Commitment for a Criminal Contempt.

(Code Civ. Pro., § 2874.)

\_\_\_\_\_ COUNTY, }  
*Town [or City] of \_\_\_\_\_,* } *ss.:*

*The People of the State of New York, to any Constable of the County of \_\_\_\_\_, and to the Sheriff of the County of \_\_\_\_\_:*

Whereas, C. D., on the \_\_\_\_\_ day of \_\_\_\_\_, 18— [here set forth the particular circumstances of the offense, as to which see record of conviction, next form]; and,

Whereas, the said justice thereupon issued his warrant,

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<sup>1</sup> See notes to form No. 1530. after the conviction. (Code Civ. Pro., § 2873.)  
This record must be filed in the county clerk's office, within ten days

directed, generally, to any constable of the said county, requiring the said constable to bring the said offender before him; and,

Whereas, the said C. D. was brought before the said justice, pursuant to said warrant, and an opportunity was given them to be heard in his defense; and,

Whereas, the said C. D. was thereupon adjudged to be guilty, and was convicted of the said criminal contempt by the said justice, and, also, adjudged to pay a fine of \_\_\_\_\_ dollars [and to be imprisoned in the county jail of said county for the term of \_\_\_\_\_ days, and until such fine be paid, or he be discharged from imprisonment according to law].<sup>1</sup>

Now, therefore, you, the said constable, are hereby commanded forthwith to convey and deliver the said C. D. into the custody of the said sheriff of \_\_\_\_\_ county; and you, the said sheriff, are hereby commanded to receive the said C. D. into your custody in the jail of said county, and him there closely confine, by virtue of this warrant, during the said term of \_\_\_\_\_ days [and until he pays said fine], or until he is duly discharged according to law.

Witness my hand at the town of \_\_\_\_\_, in the county of \_\_\_\_\_, on this \_\_\_\_\_ day of \_\_\_\_\_, 18—.<sup>2</sup>

A. F., *Justice of the Peace.*

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## TITLE II.

### ARTICLE FIRST.

#### FORMS RELATING TO COMMENCEMENT OF ACTION.

(Code Civ. Pro., Ch. 19, Tit. 2, Art. 1.)

- No. 1531. Summons issued by a justice of the peace.  
 1532. Return of service of justice's summons.  
 1533. Return by constable of failure to make service of summons.

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<sup>1</sup> See as to punishment for a criminal contempt by justice, Code Civ. Pro., § 2871; and see *People ex rel. Schlosser v. Porter* (25 Hun, 601), as to proceedings before justice, cited in note 1 to form No. 1, and see that note as to criminal contempts generally.

<sup>2</sup> As to what constitutes a criminal

contempt in a justices court, see Code Civ. Pro., § 2870. See also, *Rutherford v. Holmes* (66 N. Y., 368; 21 Week. Dig., 130).

See, also, as to general requisites of mandate of justice of the peace, Code Civ. Pro., §§ 22, 3135.

No. 1531.

**Summons Issued by a Justice of the Peace.**

(Code Civ. Pro., § 2877.)

TOWN [OR CITY] OF \_\_\_\_\_, }  
 \_\_\_\_\_ County, } ss.:

*The People of the State of New York, to any Constable of said County, greeting:*

We command you to summon R. R. to appear before R. C., a justice of the peace of said county, on the \_\_\_\_\_ day of \_\_\_\_\_, 18— [or instant], at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, at his office in the [town] of \_\_\_\_\_ [or immediately upon the arrest of the said R. R., within twelve days after this summons is issued],<sup>1</sup> to answer the complaint of F. C., plaintiff, in a civil action.

Dated \_\_\_\_\_, 18—.

R. C., *Justice of the Peace.*

No. 1532.

**Return of Service of Justice's Summons.**

(Code Civ. Pro., § 2885.)

\_\_\_\_\_ COUNTY, ss.:

I [F. P., a constable of the county of \_\_\_\_\_],<sup>2</sup> hereby certify, [\*] that I served the within summons on R. R., the defendant therein named, on the \_\_\_\_\_ day of \_\_\_\_\_,

<sup>1</sup>This clause in brackets is to be inserted instead of the time when the summons is accompanied with an order of arrest. In all other cases the time is to be not less than six nor more than twelve days after the day when it was issued. (Code Civ. Pro., § 2877.)

See, also, as to indorsement upon summons in certain cases, section 1897 of Code Civ. Pro., and form No. 891 and note to that form.

See, also, *Hitchman v. Baxter* (20 Week. Dig., 304; S. C., 34 Hun, 271), *United States v. Rose* (2 Civ. Pro. R. [McCarty], 264), *Kee v. McSweeney* (66 How Pr., 447).

See also, as to issuing verified complaint with summons, in actions arising

on contract for the recovery of money only, chapter 414, Laws of 1881 as amended by ch. 472 of Laws of 1889; and see section 3156, Code Civ. Pro., and *Hayes v. Maytham* (20 Week. Dig., 337), *Warring v. Koeler* (11 Misc., 451), as to written authority to person other than the officer to serve.

As to designation of defendant in summons when the plaintiff is ignorant of his name, see Code Civ. Pro., § 2884. See, also, generally as to summons issued by justices of the peace, *Hanaman v. Muckle* (20 Civ. Pro. R., 296), *Griffin v. Jackson* (36 State Rep., 110), *Lindsay v. Tansley* (44 id., 653).

<sup>2</sup>This clause in brackets may be, and usually is, omitted.



18—, at the [city] of ———, in the said county of ———, by delivering a copy thereof to [the said defendant].<sup>1</sup>

Dated ———, 18—.

\_\_\_\_\_ F. P., *Constable.*

No. 1533.

**Return by Constable of Failure to Make Service of Summons.**

(Code Civ. Pro., § 2885.)

As in form No. 1532 to [\*], and from thence as follows: That the within summons was not served upon the defendant, R. R., for the reason that, etc. [state reason why service was not made].

Dated ———, 18—.

\_\_\_\_\_ F. W., *Constable.*

ARTICLE SECOND.

FORMS RELATING TO APPEARANCE OF PARTIES.

(Code Civ. Pro., Ch. 19, Tit. 2, Art. 2.)

- No. 1534. Consent of person to act as guardian *ad litem* of infant plaintiff.
- 1535. Consent of person to be appointed guardian *ad litem* of infant defendant.
- 1536. Offer by defendant to allow judgment.
- 1537. Acceptance of defendant's offer by plaintiff.

\_\_\_\_\_ No. 1534.

**Consent of Person to Act as Guardian ad litem of Infant Plaintiff.**

(Code Civ. Pro., § 2887.)

\_\_\_\_\_ COUNTY, ss.:

I hereby consent to be the guardian *ad litem* of C. D., an infant, in an action against R. R.

Dated ———, 18—.

J. S.

The said J. S. is accordingly appointed on this \_\_\_\_\_

<sup>1</sup> See, also, provisions of sections forms Nos. 84-88 in connection with 2879-2882, as to service upon corporations generally, upon railroad corporations and upon express companies, and those sections; and as to validity of return under statutes before Code Civ. Pro., *Sperry v. Reynolds* (65 N. Y.,

day of \_\_\_\_\_, 18—, upon the nomination of the said C. D.  
[or of A. M. the general guardian of said C. D.].

R. C., *Justice of the Peace.*

No. 1535.

**Consent of Person to be Appointed Guardian ad litem for  
Infant Defendant.**

(Code Civ. Pro., § 2888.)

**JUSTICE'S COURT.**

RICHARD ROE

*agst.*

JAMES JACKSON.

Before RANSOM COOK, *Eq.*,  
*Justice of the Peace.*

\_\_\_\_\_ COUNTY, ss.:

I consent to be the guardian *ad litem* of James Jackson,  
an infant, the defendant in the above entitled action.

Dated \_\_\_\_\_, 18—.

DANIEL FERM.

The said Daniel Ferm is accordingly appointed guardian  
*ad litem* of the said defendant, upon the nomination of the  
defendant [or on the application of the plaintiff, the said  
defendant having failed to appear upon the return of the  
summons, or having neglected (or refused) to nominate any  
person for such guardian].

Dated \_\_\_\_\_, 18—.

RANSOM COOK,  
*Justice of the Peace.*

No. 1536.

**Offer by Defendant to Allow Judgment.**

(Code Civ. Pro., § 2892.)

[Title of cause.]

SIR—Take notice, that the defendant [C. D.] above named  
hereby offers, pursuant to statute, to allow judgment to be

179; rev'g S. C., 5 Lans., 407), Snyder served the certificate must, under the  
v. Schram (59 How. Pr., 404). In an act, ch. 414, of Laws of 1881, show that  
action where a verified complaint is the copies of papers delivered to the

defendant were left with him (McMullin v. Mackey, 6 N.Y. Supp., 885), see, also, Wheeler & Wilson Mfg. Co. v. McLaughlin (28 State Rep., 372), McGill v. Weill (10 N. Y. Supp., 246), Guyon v. Rooney (28 State Rep., 624), Brown v. Niagara Machine Co. (27 id., 70), Syracuse Moulding Co. v. Squires (39 id., 824; 61 Hun, 48), Boynton v. Electric Light Co. (5 Misc., 118), Fort v. Mulligan (49 State R., 307), Nichols v. Place (1 Misc., 497).

In cases under section 1897 of Code Civ. Pro., the return should show that the copy served was indorsed, as required by that section.

See, also, Pearce v. Nester (50 Hun, 546) as to effect of service by delivering original summons instead of copy; and see, also, as to appearance. Stevens v. Stevens (17 Week. Dig., 481), Rickey v. Christie (40 Hun, 278), Village of Suspension Bridge v. Bedford

(10 State Rep., 850), Peck v. Hayes (14 Civ. Pro. R., 110), Crown Point Iron Co. v. Fitzgerald (14 State Rep., 427), Shehan v. Johnston (20 Week. Dig., 157), McCarty v. Crowley (5 N. Y. Supp., 675), Thomas v. Keeler (52 Hun, 318), Hoyt v. See (16 Week. Dig., 90), Dunn v. O'Keefe (31 State Rep., 311), Rogers v. Edmonds (28 id., 749), Syracuse Moulding Co. v. Squires (21 Civ. Pro. R., 58; 61 Hun, 48, rev'g S. C., 13 N. Y. Supp., 547), Hannaman v. Muckle (20 id., 296), Todd v. Doremus (60 Hun, 385), Duel v. Sykes (59 id., 117), Griffin v. Jackson (36 State Rep., 110), Boynton v. Keeseville Electric Light, etc., Co. (5 Misc., 118), Thompson v. Sheridan (80 Hun, 33), Ramsay v. Robinson (86 id., 511), Handshaw v. Arthur (89 id., 179), Harley v. Fitzgerald (84 id., 305), Beardsley v. Pope (88 id., 560 rev'g S. C., 11 Misc., 117).



taken against him in the above entitled action for the sum of \_\_\_\_\_ dollars, with costs.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

\_\_\_\_\_  
C. D., *Defendant*.

No. 1537.

**Acceptance of Defendant's Offer by Plaintiff.**

(Code Civ. Pro., § 2892.)

[Title of cause.]

SIR—Take notice, that the plaintiff above named hereby accepts the offer of the defendant [C. D.] in the above entitled action, dated \_\_\_\_\_, 18—, to allow judgment to be taken against him in said action for the sum of \_\_\_\_\_ dollars, with costs.<sup>2</sup>

Dated \_\_\_\_\_, 18—.

\_\_\_\_\_  
A. B., *Plaintiff*.

**ARTICLE THIRD.**

**FORMS RELATING TO ORDER OF ARREST,**

(Code Civ. Pro., Ch. 19, Tit. 2, Art. 3.)

- 1538. Affidavit to obtain order of arrest.
- 1539. Order of arrest granted by justice of the peace.
- 1540. Undertaking upon application for order of arrest.
- 1541. Return of constable to order.
- 1542. Notice of application for discharge from arrest.
- 1543. Order discharging defendant from arrest.
- 1544. Affidavit to procure discharge by justice of the peace of privileged person from arrest.
- 1545. Order of justice of the peace discharging privileged person from arrest.

No. 1538.

**Affidavit to Obtain Order of Arrest.**

(Code Civ. Pro., §§ 2894-2896.)

[Title of cause as in form No. 1535.]

STATE OF NEW YORK, }  
\_\_\_\_\_ County, } ss.:

R. R., of \_\_\_\_\_, being duly sworn, says [that he is the

<sup>1</sup> See, also, form No. 310, and notes, 346), *Mock v. Saile* (52 Hun, 199), and see *Fowler v. Haynes* (91 N. Y., Sherman v. Shisler (6 Misc., 203).

<sup>2</sup> See, also, form No. 311.

plaintiff (*or* plaintiff's attorney) in the above entitled action].<sup>1</sup>

That the defendant in this action resides at \_\_\_\_\_, in the county of \_\_\_\_\_, and is not a resident of the county of \_\_\_\_\_ [*or* that the plaintiff in said action resides in the county of \_\_\_\_\_, and is not a resident of the county of \_\_\_\_\_; *or* that all the plaintiffs in said action are non-residents of the county of \_\_\_\_\_, and reside respectively as follows: the said \_\_\_\_\_, at \_\_\_\_\_, in the county of \_\_\_\_\_, etc.; *or* that the defendant is about to depart from the county of \_\_\_\_\_ with intent not to return thereto, as will appear from the following facts (state same)].

That this action is brought to recover a fine [*or* penalty] [*or* state other cause of action enumerated in section 2895], and that a sufficient cause of action exists therein, arising out of the following facts, viz. [state facts constituting the cause of action].

R. R.

[Jurat as in form No. 46.]

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No. 1539.

**Order of Arrest Granted by Justice of the Peace.**

(Code Civ. Pro., §§ 2896, 2897.)

[Title of cause as in form No. 1535.]

It having appeared to me by the affidavit of C. D. [the plaintiff (*or* plaintiff's attorney) in the above entitled action], that a sufficient cause of action exists against the defendant, E. F., in the above entitled action, which is brought to recover a fine [*or* penalty] [*or* state other object of the action], and that the defendant is not a resident of the county [*or* state other case under section 2894 of the Code of Civil Procedure], and that the case is within the provisions of sections 2894 and 2895 of the Code of Civil Procedure, and the plaintiff having given the written un-

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<sup>1</sup> The affidavit may be made by the plaintiff or by another person. (Code Civ. Pro., § 2896.) When made by any person other than the plaintiff or his attorney, omit the clause in brackets. See, also, *Wells v. Sisson* (14 Hun, 267).

dertaking, on his part, to the defendant, as required by section 2896 of the Code of Civil Procedure :

I, R. C., a justice of the peace of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, do hereby order and direct the constable who serves the within [*or* annexed] summons in the above entitled action, to arrest the said defendant, to bring him forthwith before me, and to notify the said plaintiff of the said arrest, if he can do so with reasonable diligence.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

R. C., *Justice of the Peace.*

No. 1540.

### Undertaking upon Application for Order of Arrest.

(Code Civ. Pro., § 2896.)

[Title of cause as in form No. 1535.]

Whereas, the above named plaintiff has applied [*or* is about to apply] for an order for the arrest of the defendant in the above entitled action, which is to be brought for the recovery of a fine [*or* penalty], etc., and the defendant in which is not a resident of the county of \_\_\_\_\_ [*or* state other fact under section 2894 of the Code of Civil Procedure].

Now, therefore, we, E. F., of \_\_\_\_\_ [and G. H., of \_\_\_\_\_],<sup>2</sup> do hereby [jointly and severally] undertake, pursuant to statute, to and with the said defendant, that if the defendant recovers judgment in this action, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the arrest, not exceeding the sum of \_\_\_\_\_ dollars.<sup>3</sup>

[Signatures as in form No. 340.]

In presence of \_\_\_\_\_.

[Acknowledgment as in form No. 340, or proof as in form No. 538, affidavits and approval as in form No. 340.]

<sup>1</sup> This order is to be indorsed upon or attached to the summons. (Code Civ. Pro., § 2897.) As to contents of the order, see the same section; as to form of summons in such case, see *id.*, § 2877, and form No. 1531.

As to joining of issue where an

order of arrest is granted and executed, see section 2934, Code Civ. Pro.

<sup>2</sup> One or more sureties. (Code Civ. Pro., § 2896.)

<sup>3</sup> At least one hundred dollars. (Code Civ. Pro., § 2896.)

No. 1541.

**Return of Constable to Order.**

(Code Civ. Pro., § 2899.)

I, M. C., the constable of the county of \_\_\_\_\_ by whom the summons in the within entitled action was served, do hereby certify and return, that at the time of serving the said summons I executed the within order of arrest, by arresting the defendant, and forthwith taking him before R. C., the justice who made the said order [*or* before M. T., a justice of the peace, the justice who made the said order being absent (*or* unable to try the action)], and that I have notified the plaintiff of the arrest [*or* that I have not been able, with due diligence, to notify the plaintiff of said arrest].<sup>1</sup>

Dated \_\_\_\_\_, 18—.

M. C., *Constable.*

No. 1542.

**Notice of Application for Discharge from Arrest.**

(Code Civ. Pro., § 2901.)

[Title of cause, as in form No. 1535.]

Take notice, that the defendant will apply to R. C., justice of the peace of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, at, etc., on, etc., for an order discharging him from arrest, under the order heretofore made in the above entitled action.

That said application will be founded upon the papers upon which the said order was granted [and upon the complaint in said action], with copies of which you are herewith served.<sup>2</sup>

Dated \_\_\_\_\_, 18—.

Yours, etc.,

C. D., *Defendant* [*or Attorney for Defendant*].To A. B., *Plaintiff* [*or to E. F., Attorney (or Agent) for the Plaintiff*].

<sup>1</sup> As to proceedings of constable subsequent to the arrest, see Code Civ. Pro., § 2900.

<sup>2</sup> See *Stern v. Moss* (6 Civ. Pro. R., 184), *McNeary v. Chase* (30 Hun, 491).



No. 1543.

**Order Discharging Defendant from Arrest.**

(Code Civ. Pro., § 2901.)

[Title of cause as in form No. 1535.]

An application having been made by the defendant before me, at, etc., on, etc., founded upon the papers upon which the order of arrest heretofore made by me herein was granted [and upon the complaint herein], for the discharge of the defendant from said arrest, and two days personal notice having been given to the plaintiff of said application, I do hereby order and direct, on motion of, etc., after hearing, etc., that the said defendant be and he is hereby discharged from said arrest.<sup>1</sup>

Dated at \_\_\_\_\_, on this \_\_\_\_\_ day of \_\_\_\_\_, 18—,  
*R. C., Justice of the Peace.*

No. 1544.

**Affidavit to Procure Discharge by Justice of the Peace of Privileged Person from Arrest.**

(Code Civ. Pro., § 2904.)

See form No. 184. \_\_\_\_\_

No. 1545.

**Order of Justice of the Peace Discharging Privileged Person from Arrest.**

(Code Civ. Pro., § 2904.)

See form No. 185. \_\_\_\_\_

**ARTICLE FOURTH.**

**FORMS RELATING TO ATTACHMENT OF PROPERTY.**

(Code Civ. Pro., Ch. 19, Tit. 2, Art. 4.)

- No. 1546. Affidavit for attachment on application to justice of the peace.
- 1547. Warrant of attachment issued by justice of the peace.
- 1548. Undertaking on granting warrant of attachment by justice of the peace.
- 1549. Inventory of attached property.

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<sup>1</sup> See the cases cited in note 2 to last form, No. 1542.

- No. 1550. Defendant's undertaking on attachment.  
 1551. Bond of third person on claim to property attached.  
 1552. Constable's return to warrant of attachment issued by justice of the peace.  
 1553. Motion to vacate or modify warrant or to increase the plaintiff's security.

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No. 1546.

**Affidavit for Attachment on Application to Justice of the Peace.**

(Code Civ. Pro., §§ 2905, 2906.)

As in form No. 236 to end of paragraph one, and from thence as follows: That said action is brought to recover damages for [the breach of an express (*or* implied) contract], [*or* state other cause of action under section 2905 of the Code of Civil Procedure], and that the plaintiff claims and is entitled to recover therein from the defendant the sum of \_\_\_\_\_ over and above all counterclaims known to him, upon a cause of action existing in his favor against the said defendant, arising out of the following facts [here state the facts constituting the cause of action, and where any of the material facts are stated upon information and belief, add affidavit of informant or account for its absence].

That the said defendant is not a resident of the State of New York, but that he resides at the \_\_\_\_\_ of \_\_\_\_\_, in the [State] of \_\_\_\_\_ [*or* state other requirement of subdivision two of section 2906 of the Code of Civil Procedure].

The plaintiff, therefore, hereby applies, etc. [conclude as in last paragraph of form No. 236].<sup>1</sup>

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No. 1547.

**Warrant of Attachment Issued by Justice of the Peace.**

(Code Civ. Pro., § 2907.)

[Title of cause as in form No. 1535.]

*The People of the State of New York, to any Constable of the County of \_\_\_\_\_ :*

The plaintiff having shown by affidavit, filed with me at

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<sup>1</sup> See, also, forms Nos. 236-240, and notes thereto; also *Solinger v. Patrick* (7 Daly, 403), *Riley v. Skidmore* (6 N. Y. Supp., 107), *Bump v. Daheny* (36 State Rep., 114), *Kingsford v. Butler* (71 Hun, 598).

the time of granting this warrant, to my satisfaction, that a sufficient cause of action exists against the defendant, in favor of the plaintiff in the above entitled action, to recover damages for breach of an express [*or implied*] contract [*or state other cause of action specified in section 2905 of Code Civil Procedure*] [and that the plaintiff is entitled to recover therein the sum of ——— dollars over and above all counterclaims known to him],<sup>1</sup> and that the defendant is not a resident of the State [*or state other requisite under subd. 2 of section 2906 of Code Civil Procedure*], and the plaintiff having given a written undertaking on his part to the defendant as required by me, with a surety [*or sureties*] approved by me, as provided by section 2908 of the Code of Civil Procedure.

I, R. C., a justice of the peace of the town of ———, in the county of ———, issuing the summons in said action, do at the time of issuing said summons require you to attach, on or before the ——— day of ———, 18—,<sup>2</sup> and safely to keep, as much of the said defendant's goods and chattels, within your county, as will satisfy the plaintiff's demand, which amounts, as stated in said affidavit, to the sum of ——— dollars, with the costs and expenses, and to make your return hereon to me at the time when the said summons is returnable.

Dated at the town of ———, in the county of ———, this ——— day of ———, 18—.<sup>3</sup>

R. C., *Justice of the Peace.*

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No. 1548.

### Undertaking on Granting of Warrant of Attachment by Justice of the Peace.

(Code Civ. Pro., § 2908.)

[Title of cause.]

Whereas, the above named plaintiff has applied [*or is about to apply*] to R. C., a justice of the peace of the town

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<sup>1</sup> Insert this clause in brackets if the action is upon a judgment, or to recover for breach of a contract. (Code Civ. Pro., § 2906, subd. 1.)

<sup>2</sup> At least six days before the return day of the summons. (Code Civ. Pro., § 2907.)

<sup>3</sup> The warrant must be granted by the

of ———, in the county of ———, for a warrant of attachment against the property of the defendant in the above entitled action, in a case, provided by law ; and,

Whereas, the said justice has required, before granting the said warrant, a written undertaking to the said defendant, on the part of the plaintiff, to the effect as required by section 2908 of the Code of Civil Procedure :

Now, therefore [we], E. F., of ——— [and G. H., of ———],<sup>1</sup> do hereby [jointly and severally] undertake, pursuant to the statute, to and with said defendant, that if the defendant recovers judgment, or the warrant of attachment is vacated, the plaintiff will pay all costs which may be awarded to the defendant, and all damages which he may sustain by reason of the attachment, not exceeding the sum of ——— dollars,<sup>2</sup> and that, if the plaintiff recovers judgment, he will pay to the defendant all money received by him from property taken by virtue of the warrant of attachment, or upon any bond given therefor, over and above the amount of the judgment and interest thereupon.

Dated ———, 18—.

[Signatures as in form No. 340.]

[Acknowledgment as in form No. 340, or proof as in form No. 538 ; affidavit and approval by justice as in form No. 340.]

No. 1549.

### **Inventory of Attached Property.**

(Code Civ. Pro., § 2909.)

#### CONSTABLE'S INVENTORY.

An inventory of the goods and chattels of the defendant levied upon and taken into my custody upon and by virtue of the foregoing warrant of attachment, this ——— day

justice who issues the summons at the time when the summons is issued, and it must be indorsed thereupon or annexed thereto. (Code Civ. Pro., § 2907.)

See, also, form No. 242, and notes thereto, and *Sullivan v. Presdee* (9 Daly, 552).

<sup>1</sup> One or more sureties. Code Civ. Pro., § 2908.)

<sup>2</sup> At least two hundred dollars. (Id.)

of \_\_\_\_\_, 18—, with the estimated value of each item or article, viz.:

| ITEM OR ARTICLE. | ESTIMATED VALUE. |        |
|------------------|------------------|--------|
|                  | Dollars.         | Cents. |
|                  |                  |        |

\_\_\_\_\_, Constable.

No. 1550.

**Defendant's Undertaking on Attachment.**

(Code Civ. Pro., § 2911.)

[Title of cause.]

The plaintiff having obtained herein a warrant of attachment under and by virtue of which the constable to whom the summons herein and said warrant of attachment were delivered, has levied upon and taken into his custody certain goods and chattels of the defendant, and the defendant desiring that the said constable should redeliver said property to him and to obtain such redelivery:

Now, therefore, [we] E. F., of \_\_\_\_\_ [and G. H., of \_\_\_\_\_],<sup>1</sup> do hereby [jointly and severally] undertake to and with the plaintiff in the sum of \_\_\_\_\_ dollars [that being at least twice the value of the property attached as stated in the inventory], that if judgment is rendered against the defendant and an execution is issued thereupon within six months after the giving of this undertaking the property attached shall be produced to satisfy the execution.

Dated the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

[Signatures as in form No. 340.]

In presence of \_\_\_\_\_.

[Acknowledgment as in form No. 340, or proof as in form No. 538, affidavits a. l. approval by constable or justice as in form No. 340.]

<sup>1</sup> One or more sureties. (Code Civ. Pro., § 2911.)

• No. 1551.

### Bond of Third Person on Claim to Property Attached.

(Code Civ. Pro., § 2912.)

As in form No. 340 to [\*], and from thence as follows: That, whereas, F. G., a constable of the county of \_\_\_\_\_, did, by virtue of a warrant of attachment issued by R. C., Esq., a justice of the peace of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, in an action between A. B., plaintiff, and C. D., defendant, against the property of the said defendant, seize certain property, to wit [describe the property]; and,

Whereas, the above bounden A. B. claims the said property attached, and the same has not been reclaimed by the defendant:

Now, therefore, the condition of this obligation is such, that if the above bounden A. B. shall, in an action on this bond, commenced within three months hereafter, establish that he was the general owner of the said property claimed, at the time of the seizure, or, if he fails so to do, shall pay to the plaintiff the value thereof, with interest, then this obligation to be void, otherwise to be and remain in full force and virtue.

[Signatures and seals as in form No. 340.]

In presence of \_\_\_\_\_.

[Acknowledgment as in form No. 340, or proof as in form No. 538; affidavits and approval by constable or justice as in form No. 340.]

\_\_\_\_\_  
No. 1552.

### Constable's Return to Warrant of Attachment Issued by Justice of the Peace.

(Code Civ. Pro., § 2915.)

[TOWN] OF \_\_\_\_\_,  
County of \_\_\_\_\_, } ss.:

I, M. N., a constable of the county of \_\_\_\_\_, to whom the within [*or annexed*] warrant of attachment was issued at the same time, with the annexed summons, hereby certify and return to the foregoing warrant of attachment that, by virtue thereof, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, I

levied upon and took into my custody, as such constable, the property of the defendant, specified in the annexed inventory, and immediately made an inventory thereof, which is hereto annexed.

That immediately after making the inventory, and at least six days before the return day of the foregoing [*or* annexed] summons, I did serve the said summons, together with the said warrant of attachment and inventory, upon the defendant, C. D., by delivering a copy of each to said defendant personally.

[*Or* by leaving a copy of each, duly certified by me, at the last place of residence of the said defendant, in the county of \_\_\_\_\_, with M. D.,<sup>1</sup> a person of suitable age and discretion, to wit: of the age of at least \_\_\_\_\_ years, I not having been able, with reasonable diligence, to find the said C. D. within the county of \_\_\_\_\_; *or* by posting a copy of each, duly certified by me, on the outer door at the last residence of the said defendant in the county of \_\_\_\_\_, and also by depositing another copy of each in the nearest post-office, to wit: the post-office at \_\_\_\_\_, inclosed in a sealed post-paid wrapper, directed to the said defendant at his residence, I not being able to find any person of suitable age and discretion at his place of residence to whom the same could be delivered; *or* by delivering a copy of each, duly certified by me, to M. D.,<sup>1</sup> the person in whose possession the attached property was found, at, etc., the said defendant having no place of residence in the county of \_\_\_\_\_].<sup>2</sup>

Dated \_\_\_\_\_, 18—.

\_\_\_\_\_  
M. N., *Constable.*

No. 1553.

### **Motion to Vacate or Modify Warrant or to Increase the Plaintiff's Security.**

(Code Civ. Pro., § 2916.)

See form No. 271, and notes thereto, and see section 2917

<sup>1</sup> The name of the person to whom the copy was delivered must be stated, if known; if not known, the return must describe him, so as to identify him, as nearly as may be. (Code Civ. Pro., § 2915.)

<sup>2</sup> See Code Civ. Pro., § 2910. As to proceedings where the sum-

of the Code of Civil Procedure, as to the effect of vacating warrant.

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ARTICLE FIFTH.

(Code Civ. Pro., Ch. 19, Tit. 2, Art. 5.)

FORMS RELATING TO REPLEVIN IN JUSTICES' COURTS.

- No. 1554. Affidavit to procure replevin in justice's court.  
 1555. Requisition to constable to replevy chattel.  
 1556. Undertaking to procure replevin.  
 1557. Constable's return to requisition for replevin of chattel.  
 1558. Notice of exception to sureties by defendant.  
 1559. Affidavits to require return of chattel replevied.  
 1560. Undertaking to obtain return of chattel replevied.  
 1561. Notice of justification of sureties and certificate of allowance.  
 1562. Affidavit by third person or his agent or attorney claiming title to chattel replevied.  
 1563. Notice by constable to plaintiff that he requires indemnity on claim by third person.  
 1564. Executions, etc., in replevin, under section 2931 of Code of Civil Procedure.

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No. 1554.

**Affidavit to Procure Replevin in Justice's Court.**

(Code Civ. Pro., § 2926.)

See forms Nos. 757 and 758, and notes to those forms.

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No. 1555.

**Requisition to Constable to Replevy Chattel.**

(Code Civ. Pro., § 2921.)

*To the Constable to whom the summons in the action entitled in the within [or annexed] affidavit is delivered:*

You are hereby required to replevy the property described in the within [or annexed] affidavit on or before the \_\_\_\_\_ day of \_\_\_\_\_, 18—.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

J. G., *Justice of the Peace.*

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mons was not personally served, see section 2918, Code Civ. Pro., and as to execution upon property attached, see same section.

<sup>1</sup> At least six days before the return day of the summons. (Code Civ. Pro.,

§ 2921.) See, also *Jaynes v. Jaynes* [No. 2], (8 Civ. Pro. R., 97), *Guyon v. Rooney* (17 Civ. Pro. Rep., 172), *Same v. Same* (28 State Rep., 624), *Bame v. Seykora* (77 Hun, 529).



No. 1556.

**Undertaking to Procure Replevin.**

(Code Civ. Pro., § 2920.)

[Title of cause.]

Whereas, an action is about to be commenced before J. G., a justice of the peace of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, by the above named plaintiff against the above named defendant to recover a chattel [*or* chattels] of the estimated value of \_\_\_\_\_ dollars, and said plaintiff desires to cause the said chattel [*or* chattels] to be replevied :

Now, therefore, in pursuance, etc. [conclude as in form No. 759].

Dated \_\_\_\_\_, 18—.

A. F.  
G. H.

In presence of \_\_\_\_\_.

[Acknowledgment or proof, affidavit and approval by justice as in form No. 759.]

No. 1557.

**Constable's Return to Requisition for Replevin of Chattel.**

(Code Civ. Pro., §§ 2922, 2923.)

I, M. N., a constable of the county of \_\_\_\_\_, do hereby certify and return, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, by virtue of the annexed affidavit, and the requisition indorsed thereupon, I replevied the following property described in said affidavit, to wit [describe same], which I found in the possession of the defendant [*or* of C. D., the defendant's agent] [here state the manner of service of the summons, affidavit and requisition as in form No. 1552, and the other proceedings thereupon].<sup>1</sup>

Dated \_\_\_\_\_, 18—.

A. B., *Constable..*

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<sup>1</sup> See, also, forms Nos. 769-772.

No. 1558.

**Notice of Exception to Sureties by Defendant.**

(Code Civ. Pro., § 2924.)

[Title of cause.]

SIR—Take notice, that the defendant excepts to plaintiff's sureties, in the undertaking served upon him on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in the above entitled action.

Dated \_\_\_\_\_, 18—.<sup>1</sup>M. N., *Defendant.*To [A. B., *Plaintiff*, or C. D., *Constable of the County of \_\_\_\_\_*].

No. 1559.

**Affidavits to Require Return of Chattel Replevied.**

(Code Civ. Pro., § 2925.)

See forms Nos. 761 and 762, and notes. Add same notice as in form No. 761, omitting the words "by you," and direct to the justice instead of to the sheriff.

No. 1560.

**Undertaking to Obtain Return of Chattel Replevied.**

(Code Civ. Pro., § 2925.)

As in form No. 763, making necessary changes, and omitting the words in that form "or if the action abates in consequence of the defendant's death."<sup>2</sup>

No. 1561.

**Notice of Justification of Sureties and Certificate of Allowance.**

(Code Civ. Pro., § 2926.)

[Title of cause.]

SIRS—Take notice, that the sureties named in the undertaking given in this action by the plaintiff, dated \_\_\_\_\_, 18—, will justify before J. G., Esq., a justice of the peace of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, at the

<sup>1</sup> See Goff v. Bliss (12 Civ. Pro. R., 99.)<sup>2</sup> See Clark v. Hooper (69 Hun, 445-)

office of said justice in said town, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon.

Dated \_\_\_\_\_, 18—.

C. D., *Constable.*

I find the sureties mentioned in the within [*or annexed*] undertaking to be sufficient, and hereby allow the same.

Dated \_\_\_\_\_, 18—.

J. G., *Justice of the Peace.*

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No. 1562.

**Affidavit by Third Person or His Agent or Attorney Claiming Title to Chattel Replevied.**

(Code Civ. Pro., § 2929.)

See forms Nos. 765 and 766, with exceptions and changes mentioned in section 2929; also, see notes to form No. 765.

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No. 1563.

**Notice by Constable to Plaintiff that He Requires Indemnity on Claim by Third Person.**

(Code Civ. Pro., § 2929.)

See form No. 764, with exceptions and changes mentioned in section 2929.

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No. 1564.

**Executions, etc., in Replevin, under Section 2931 of Code of Civil Procedure.**

(Code Civ. Pro., § 2931.)

See form No. 1598; also, forms Nos. 561, 562, 564, 775, 779-783, and changes mentioned in section 2931; and see *Delin v. Stohl* (2 Civ. Pro. R. [Browne], 222).

## TITLE III.

## FORMS RELATING TO PLEADINGS IN JUSTICES' COURTS, INCLUDING COUNTERCLAIMS AND PROCEEDINGS UPON ANSWER OF TITLE.

(Code Civ. Pro., Ch. 19, Tit. 3.)

- No. 1564a. Undertaking to remove action to Kings County court.  
 1565. Complaint in justice's court, general form.  
 1566. Answer in justice's court, general form.  
 1567. Answer of title in justice's court.  
 1568. Undertaking on interposing answer of title.

## No. 1564a.

**Undertaking to remove action to Kings County Court.**

(Code Civ. Pro., § 2934.)

[Title of action.]

Whereas, an issue of fact [or, of law] has been joined in the above entitled action, in which the judgment demanded by the plaintiff in his complaint [or, by the defendant in his answer] exceeds the sum of one hundred dollars; [or, the value of the chattels sought to be recovered as fixed by the plaintiff in his complaint (or by the defendant in his answer) exceeds the sum of one hundred dollars], and whereas the defendant has made application, pursuant to statute, to —, the justice before whom said action has been brought, for an order removing said action into the county court of the county of Kings;

Now, therefore, I [or we], E. F., of — [and G. H., of —],<sup>1</sup> do hereby [jointly and severally] undertake, pursuant to statute, in the sum of — dollars,<sup>2</sup> that the said defendant will pay to the said plaintiff, the amount of any judgment, including costs, that may be recovered

<sup>1</sup> One or more sureties. (Code Civ. Pro., § 2934.)

<sup>2</sup> A sum fixed by the justice, not exceeding twice the amount of the dam-

ages claimed, or twice the value of the chattel or of all the chattels claimed, as stated in the pleading or affidavits. (Same section.)



against him in the said county court, in the said action so removed.<sup>1</sup>

Dated ———, 1——.

E. F.

[G. H.]

In presence of ———.

[Acknowledgment, etc., as in form No. 1568.]

### No. 1565.

#### Complaint in Justices' Court, General Form.

(Code Civ. Pro., § 2936.)

See general form of complaint, form No. 120, and notes thereto.<sup>2</sup>

### No. 1566.

#### Answer in Justice's Courts, General Form.

(Code Civ. Pro., § 2938.)

See general forms of answer Nos. 140–143, and No. 145, and notes to those forms.<sup>3</sup>

### No. 1567.

#### Answer of Title in Justice's Court.

(Code Civ. Pro., § 2951.)

### JUSTICE'S COURT.

RICHARD ROE

*agst.*

JAMES JACKSON.

Before J. H., Esq., one of  
the Justices of the Peace,  
in and for the County of  
———.

The answer of the defendant above named to the plaintiff's complaint herein, respectfully shows, that the said

<sup>1</sup> See section 2934 of Code Civ. Pro., as amended by chapter 380 of Laws of 1893, and see *Clark v. Hooper* (69 Hun, 445).

<sup>2</sup> See, also, *Bradner v. Howard* (75 N. Y., 417; aff'g S. C., 14 Hun, 420), *Howe Sewing Machine Co. v. Haupt* (7 Daly, 108), *Frazier v. Gibson* (15 Hun, 37), *Doner v. Williams* (20 Week. Dig., 457, 458); also, ch. 414 of Laws of 1881, permitting the verification of pleadings in the justice's court, and ch. 472 of Laws of 1889, amending §§ 3 and 4, id.; *Hoffman v. Barton* (47 Hun, 409),

*McMullin v. Mackey* (6 N. Y. Supp., 885), *Culmane v. Schmidt* (85 Hun, 345), *Thomas v. Jones* (47 id., 81), *Lansing v. Stevens* (20 State Rep., 320), *Button v. Lusk* (32 id., 531), *Hartwell v. Young* (67 Hun, 472).

<sup>3</sup> See also, *Green v. Waite* (19 Week. Dig., 436; S. C., 33 Hun, 191), *Steinam v. Bell* (7 Misc., 318), *Rude v. Crandall* (11 Civ. Pro. R., 11), *Doty v. Campbell* (1 How. Pr. [N. S.], 101), *Adams v. Robeson* (19 W. Dig., 468), *Gerould v. Crank* (85 Hun, 500), *Harley v. Fitzgerald* (84 id., 305).

premises mentioned in the said complaint, and in which the said trespasses are therein supposed to have been committed, now is, and at the time when the said trespasses are by the said complaint supposed to have been committed, was the close, soil and freehold of him, the said defendant; wherefore the said defendant, in his own right, at the said time when, etc., broke and entered the said close in which, etc., and with his foot, in walking, trod down the grass there growing, etc. [enumerating the several acts alleged as trespasses which he means to justify], as he lawfully might, for the cause aforesaid, which is the same trespass whereof the said plaintiff hath, in his said complaint, complained.

Wherefore he prays judgment, and that the said plaintiff may be barred from having or maintaining his aforesaid action against him.<sup>1</sup>

JAMES JACKSON, *Defendant*  
[or W. F., *Attorney for Defendant*].

The above plea was delivered to me, at the time of joining issue in the above cause, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and is hereby countersigned by me.

J. H., *Justice of the Peace.*

No. 1568.

### Undertaking on Interposing Answer of Title.

(Code Civ. Pro., § 2952.)

[Title of cause.]

Whereas, an answer is about to be made by the defendant in the above entitled action, setting forth facts, showing that the title to real property will come in question therein:

Now, therefore, [we] E. F., of \_\_\_\_\_, [and G. H., of \_\_\_\_\_],<sup>2</sup> do hereby [jointly and severally] undertake, pursuant to statute, that if the plaintiff, within twenty days hereafter, pursuant to statute, deposits with the justice a

<sup>1</sup> See *Kelly v. N. Y. and Manhattan B. R. R. Co.* (19 Hun, 363), *Hawkins v. Peterson* (9 Week. Dig., 408), *Ryan v. Harrigan* (9 Hun, 520), *Masten v. Olcott* (60 How. Pr., 105; S. C., 24 Hun, 587), *Gates v. Canfield* (2 Civ. Pro. Rep. [Srowne], 254), *Matter of White* (12 Abb. N. C., 348), and Code Civ. Pro., § 2958; *Van Etten v. Van Etten* (69 Hun, 499), *Shufelt v. Sweet* (15 Week.

Dig., 1), *Firth v. Veeder* (34 State Rep., 678), *Harding v. Ellston* (19 Civ. Pro. R., 352), *Lane v. Young* (66 Hun, 563), *Van Etten v. Van Etten* (69 id., 499), *Hathaway v. Jenks* (67 Hun, 289), *People ex rel. Baldwin v. Goldfogle* (23 Civ. Pro. R., 417).

<sup>2</sup> One or more sureties. (Code Civ. Pro., § 2952.)

summons and complaint in a new action about to be brought in the [name proper court], as prescribed in section 2953 of the Code of Civil Procedure, the defendant will, within twenty days after the deposit, give a written admission of the service thereof [and that he will, at all times, render himself amenable to any mandate which may be issued to enforce a final judgment in the action so to be brought].<sup>1</sup>

Dated \_\_\_\_\_, 18—.

E. F.

[G. H.]

In presence of \_\_\_\_\_.

[Acknowledgment or proof, affidavits and approval by justice as in forms Nos. 340, 538.]

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## TITLE IV.

### ARTICLE FIRST.

#### FORMS RELATING TO ADJOURNMENTS.

(Code Civ. Pro., Ch. 19, Tit. 4, Art. 1.)

No. 1569. Undertaking upon adjournment.

1570. Undertaking to procure discharge of defendant from custody on adjournment.

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No. 1569.

#### Undertaking upon Adjournment.

(Code Civ. Pro., § 2962.)

[Title of cause.]

Whereas, the defendant above named, has made [*or is about to make*] application for an adjournment of the trial of the above entitled action, on the ground that he cannot safely proceed to trial for want of material testimony [*or of a material witness*]:

Now, therefore [we], F. G., of \_\_\_\_\_ [and G. H., of \_\_\_\_\_], do hereby [*jointly and severally*] undertake, pur-

---

<sup>1</sup> Insert this clause in brackets where the defendant was arrested in the action. (Code Civ. Pro., § 2952.)

<sup>2</sup> If the defendant fails to comply with the undertaking, the sureties are liable thereupon, to an amount not exceeding two hundred dollars. (Code

Civ. Pro., § 2952.) See, also, Kohlbrenner v. Elsheimer (19 Hun, 88), Matter of White (12 Abb. N. C., 348), as to undertaking.

As to pleadings in new action, see Code Civ. Pro., § 2957; Fox v. The Erie Preserving Co. (93 N. Y., 54), Gould v. Patterson (23 Abb. N. C., 335; 63 Hun, 575).



suant to law, that, if the plaintiff recovers judgment in the action, and if, before the expiration of ten days after the plaintiff becomes entitled to an execution upon the judgment, the defendant removes, secretes, assigns, or in any way disposes of any part of his property liable to levy and sale by virtue of an execution, except for the necessary support of himself and his family, and if an execution upon the judgment is returned wholly or partly unsatisfied, we will, upon demand, pay to the plaintiff the sum due upon the judgment.<sup>1</sup>

Dated ———, 18—.

[Signatures as in form No. 341.]

[Acknowledgment or proof as in forms Nos. 340, 538; affidavits and approval by justice as in form No. 340.]

No. 1570.

### Undertaking to Procure Discharge of Defendant from Custody on Adjournment.

(Code Civ. Pro., § 2963.)

[Title of cause.]

Whereas, the defendant has been arrested in the above entitled action, and has made [*or is about to make*] an application for an adjournment of the trial of said action on the ground that he cannot safely proceed to trial for want of some material testimony [*or a material witness*]:

Now, therefore [we], E. F., of ——— [and G. H., of ———],<sup>2</sup> do hereby [jointly and severally] undertake, pursuant to statute, that if the plaintiff recovers judgment in the action, and if an execution is issued thereupon against the person of the defendant, within ten days after the plaintiff is entitled to the same, and, if a return is made thereto, on or after the return day thereof, that the defendant cannot be found, we will pay to the plaintiff the amount due upon the judgment.<sup>3</sup>

Dated ———, 18—.

E. F.  
[G. H.]

[Acknowledgment, etc., as in last form.]

<sup>1</sup> See *Sheridan v. Farnham* (21 Week Dig., 470), *Hutchinson v. Grout* (24 id., 236; S. C., 40 Hun, 207), *Pennoyer v. Phillips* (10 State Rep., 733), *Redford v. Snow* (46 Hun, 370), *Bonney v. Paul* (39 State Rep., 596), *Young v.*

*Conklin* (3 Misc., 122), *Crisp v. Rice* (83 Hun, 465), *Freeborn v. Badgley* (15 Misc., 173), *Fish's Eddy Chemical Co. v. Stevens* (92 Hun, 179).

<sup>2</sup> One or more sureties. (Code Civ. Pro., § 2963.)

## ARTICLE SECOND.

FORMS RELATING TO COMPELLING THE ATTENDANCE OF A  
WITNESS.

(Code Civ. Pro., Ch 19, Tit. 4, Art. 2.)

- No. 1571. Subpœna issued by justice of the peace.  
 1572. Constable's return of service of subpœna.  
 1573. Affidavit to procure warrant of attachment for a witness.  
 1574. Warrant of attachment against a defaulting witness.  
 1575. Minute of conviction of witness.  
 1576. Execution upon minute of conviction (No. 1575).

No. 1571.

**Subpœna Issued by Justice of the Peace.**

(Code Civ. Pro., § 2969.)

———— COUNTY, ss. :

*The People of the State of New York, to J. S. and T. N.,  
greeting :*

You are commanded to appear, personally, before the subscriber, a justice of the peace of the said county, at, etc., on, etc., at ——— o'clock in the ——— noon, to give evidence in a civil action now pending, then and there to be tried, between J. R., plaintiff, and R. F., defendant, on the part of the plaintiff [state the characters in which the parties appear, as survivors, executors, etc.].

[And you, the said J. S., are further commanded to bring with you and then and there produce in evidence a certain agreement in writing (or promissory note, etc., according to the case), lately left in your hand by the said parties, and all deeds, evidences and writings which you have in your custody or power concerning the premises.<sup>1</sup>]

Hereof fail not at your peril.

<sup>2</sup> If the trial of an action in which the defendant has been arrested, is adjourned with the consent of both parties, or upon the application of the plaintiff, the defendant must be discharged from custody. (Code Civ. Pro., § 2964)

As to second adjournment and un-

dertaking thereupon and condition thereof, see Code Civ. Pro., §§ 2965, 2966; *Bush v. Weeks* (24 Hun, 545), *Livingston v. Morrissey* (6 Civ. Pro. R., 28.)

<sup>1</sup> Insert this *duces tecum* clause only when required.

Given under my hand at the town of \_\_\_\_\_, in said county, this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

J. G., *Justice of the Peace.*

\_\_\_\_\_  
No. 1572.

**Constable's Return of Service of Subpœna.**

(Code Civ. Pro., § 2970.)

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_, I served the within subpœna on J. S. [one of the persons], to whom it is directed, by reading the same [*or* stating the contents of the same] to him personally, and by paying [*or* tendering] to him the sum of \_\_\_\_\_ dollars, his lawful fees for attendance as a witness.

Dated \_\_\_\_\_, 18—.

\_\_\_\_\_  
J. M., *Constable.*

No. 1573.

**Affidavit to Procure Warrant of Attachment for a Witness.**

(Code Civ. Pro., § 2971.)

[Title of cause.]

STATE OF NEW YORK, }  
\_\_\_\_\_ County, } ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that he is the plaintiff, etc. [*or* attorney for the plaintiff, etc.], in the above entitled action; that the testimony of J. S. is material to the said plaintiff [*or* defendant] upon the trial of this action, and that the said J. S. neglected [*or* refused] to attend as a witness in the above entitled action in obedience to the annexed subpœna, and that defendant knows of no just cause for such neglect [*or* refusal].<sup>1</sup>

A. B.

[Jurat as in form No. 46.]

[Annex return or affidavit of service of subpœna; see last form.]

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<sup>1</sup> See *Rutherford v. Holmes* (66 N. Y., 368; aff'g S. C., 5 Hun, 317).

No. 1574.

**Warrant of Attachment against a Defaulting Witness.**

(Code Civ. Pro., § 2971.)

\_\_\_\_ COUNTY, ss. :

*The People of the State of New York, to any Constable of said County, greeting :*

We command you to attach J. S., and bring him before the subscriber, a justice of the peace in and for said county, at his [dwelling-house] in the town of \_\_\_\_\_, forthwith [or on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon] to testify those things which he knows, in a civil action now depending before the said justice, between J. R., plaintiff, and R. F., defendant, on the part of the plaintiff [or defendant], and also to answer all such matters as shall be objected to against him for that, as has appeared to my satisfaction, by affidavit [etc.], the said J. S. having been duly subpoenaed to attend at the trial of the said action, has refused [or neglected] to attend in conformity to such subpoena; and have you then and there this precept.

Given under the hand of the said justice, this \_\_\_\_\_ day of \_\_\_\_\_, 18—.<sup>1</sup>

J. G., *Justice.*

No. 1575.

**Minute of Conviction of Witness.**

(Code Civ. Pro., § 2976.)

\_\_\_\_ COUNTY, ss.:

Be it remembered, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, J. S., is convicted before me, having been brought before me, pursuant to a warrant of attachment issued against him pursuant to law, and fined the sum of \_\_\_\_\_ dollars, besides \_\_\_\_\_ dollars costs for non-attendance as a witness to give evidence before me [or before R. C., Esq., one of the justices of the peace of said county], at my [or his] dwelling-house, in the town of Saratoga Springs, on the

<sup>1</sup> As to punishment of witness, see Code Civ. Pro., § 2974.

\_\_\_\_\_ day of \_\_\_\_\_, 18—, in a cause then and there depending before me [*or* before the said justice], in which J. C. was plaintiff and R. G. defendant.<sup>1</sup>

J. G., *Justice.*

No. 1576.

**Execution upon Minute of Conviction.**

(Code Civ. Pro., § 2977.)

\_\_\_\_\_ COUNTY, ss.:

*The People of the State of New York, to any Constable of said County, greeting:*

Whereas, J. S. was, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, convicted and fined by the undersigned, a justice of the peace in and for the said county, the sum of \_\_\_\_\_ dollars, besides \_\_\_\_\_ dollars costs, for non-attendance as a witness, to give evidence before the said justice, at his dwelling-house in the town of \_\_\_\_\_, in said county, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in a certain cause then and there depending before the said justice, in which J. C. was plaintiff and R. G. defendant, a minute of which conviction, and of the cause thereof, has been duly made up and entered in the docket of the undersigned; and,

Whereas, the said J. S. has neglected to pay the said fine and costs [*or* a part of said fine and costs to wit: the sum of \_\_\_\_\_ dollars]:

You are hereby required to collect the said sum remaining unpaid, of the goods and chattels of the said J. S., within the county of \_\_\_\_\_, and, for want thereof, to take him and convey him to the jail of the said county, there to remain until he pays that sum, not exceeding thirty days, and that you return this execution within sixty days.

Witness my hand at the town of \_\_\_\_\_, in the county of \_\_\_\_\_, on this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

J. G., *Justice of the Peace.*

<sup>1</sup> The minute is deemed a judgment paid, by section 2875 of Code Civ Pro. against the delinquent, in favor of the officer to whom fines are directed to be (§ 2976, id.)

## ARTICLE THIRD.

FORMS RELATING TO COMMISSION TO TAKE TESTIMONY,  
ISSUED BY JUSTICE OF THE PEACE.

(Code Civ. Pro., Ch. 19, Tit. 4, Art. 3.)

- No. 1577. Affidavit to obtain commission to examine witness out of the county of the justice.
1578. Notice of application for a commission.
1579. Affidavit of service of notice, No. 1578.
1580. Commission to examine witness.
1581. Consent of parties to commission for examination of witness upon oral questions.

## No. 1577.

**Affidavit to Obtain Commission to Examine Witness Out  
of the County by the Justice.**

(Code Civ. Pro., § 2980.)

[Title of cause.]

\_\_\_\_\_ COUNTY, *ss.*:

A. B., of \_\_\_\_\_, being duly sworn, says, that he is the [plaintiff] in the above entitled action; that the defendant has neglected to appear upon the return of the summons in said action [*or* has failed to answer the complaint in said action, *or* that an issue of fact has been joined in said action].

That M. F., a witness who is not within the county of \_\_\_\_\_, or within an adjoining county,<sup>1</sup> is material in the prosecution [*or* defense] of the said action.

A. B.

[Jurat as in form No. 46.]

## No. 1578.

**Notice of Application for a Commission.**

(Code Civ. Pro., § 2982.)

[Title of cause.]

SIR—Take notice, that an application for a commission to be directed to T. N., Esq., of the [city] of \_\_\_\_\_, to ex-

<sup>1</sup> An adjoining county to the one mission in justice's court, *Collins v. Shaffer* (78 Hun, 512), *Dryer v. Sexsmith* (40 Hun, 242). where the action is pending. (Code Civ. Pro., § 2980.) See, also, as to com-

amine J. S., of the same place, a witness in the above entitled cause, upon interrogatories to be annexed to such commission, will be made to J. G., Esq., at [his dwelling-house], in the town of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon.

Dated \_\_\_\_\_, 18—. <sup>1</sup>

J. C., *Plaintiff*.

To R. F., *Defendant* [or C. R., *Attorney for R. F., Defendant*].

No. 1579.

**Affidavit of Service of Notice (No. 1578).**

(Code Civ. Pro., § 2982.)

\_\_\_\_\_ COUNTY, *ss.*:

J. D., of \_\_\_\_\_, being duly sworn, says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, <sup>1</sup> he served a notice, of which the annexed is a copy, upon R. F., the defendant therein named, by delivering the same to him [or to F. H., his attorney], personally.

J. D.

[Jurat as in form No. 46.]

No. 1580.

**Commission to Examine Witness.**

(Code Civ. Pro., §§ 2980, 2982, 2984, 2985.)

\_\_\_\_\_ COUNTY, *ss.*:

To T. N., of the [city] of \_\_\_\_\_:

Whereas, it appears to me, the undersigned, a justice of the peace of the town of \_\_\_\_\_, in the said county, by affidavit, that J. S., of the said [city], is a material witness in a civil action now pending before me, at the said town of \_\_\_\_\_, between J. C., plaintiff, and R. G., defendant:

Now, therefore, in pursuance of the statute, in such case made and provided, I have appointed, and hereby do ap-

<sup>1</sup> This notice need not be given unless issue has been joined. (Code Civ. Pro., § 2982.)

<sup>2</sup> Six days' notice. (Code Civ. Pro., § 2982.)

Pro., § 2982.)

point, you commissioner to examine the said witness, and authorize you at certain days and places, to be by you for that purpose appointed, to examine the said witness on the interrogatories hereto annexed [*or without written interrogatories, and upon oral questions to be put to the witness when he is produced*],<sup>1</sup> under oath, to be taken before you, and to cause such examination and deposition to be reduced to writing, and certified by you, and to return the same, by mail, addressed to me, at the [town] of ———, in the county of ———, and State of New York, according to the directions hereunto annexed.<sup>2</sup>

J. G., *Justice of the Peace.*

[Annex copy of section 901, and, it would seem, of section 902 of the Code of Civil Procedure, as in form No. 382, except that subdivision six of section 901 may be omitted. When the examination is to be taken upon oral questions, section 900 of the Code of Civil Procedure must be annexed. *Id.*, § 2981.]

#### DIRECTION FOR RETURN.

Let the within commission be returned through the post-office, directed to me at the ——— of ———, in the county of ———, and State of New York.

J. G., *Justice of the Peace.*

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No. 1581.

### Consent of Parties to Commission for Examination of Witness upon Oral Questions.

(Code Civ. Pro., § 2981.)

[Title of cause.]

We do hereby stipulate and consent, pursuant to section 2981 of the Code of Civil Procedure, that a commission to be granted in the above entitled action, as prescribed in article third of title fourth of chapter nineteenth of the said Code may issue to ———, of ———, in the State of

---

<sup>1</sup> See section 2981, Code Civ. Pro., as to this form of examination; and agreement, form No. 1581, and see form No. 387.

cross-interrogatories and notice of settlement, see forms Nos. 383, 384, 385, and see, generally, forms Nos. 375, etc., and notes thereto.

<sup>2</sup> For forms of interrogatories and



\_\_\_\_\_, to examine C. D., of \_\_\_\_\_, in said State, as a witness on the part of the \_\_\_\_\_, without written interrogatories, and that the deposition of said witness may be taken upon oral questions.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

A. B., *Plaintiff*  
 [or M. N., *Attorney for Plaintiff*].  
 C. D., *Defendant*  
 [or H. J., *Attorney for Defendant*].

## TITLE V.

### FORMS RELATING TO TRIAL AND ITS INCIDENTS.

(Code Civ. Pro., Ch. 19, Tit. 5.)

- No. 1582. Venire.  
 1583. Constable's return to venire.  
 1584. Oath of juror.  
 1585. Oath of witness.  
 1586. Warrant of commitment of witness refusing to be sworn, etc.  
 1587. Constable's oath to keep jury.  
 1588. Proceedings to impose upon and collect from jurors a fine for failure to attend or refusing to serve.

### No. 1582.

#### Venire.

(Code Civ. Pro., §§ 2991, 2992.)

TOWN [OR CITY] OF \_\_\_\_\_, }  
 \_\_\_\_\_ County, } ss. :

*The People of the State of New York, to any Constable of the said County of \_\_\_\_\_, greeting :*

You are hereby commanded to notify twelve men of the town [or city] of \_\_\_\_\_, qualified to serve, and not exempt from serving, as trial jurors in courts of record, not of kin to the plaintiff or defendant [or to notify twelve men of the county of \_\_\_\_\_, qualified to serve, and not exempt from serving as trial jurors in courts of record, and who are not interested in the matter at issue, to attend, etc.], and not interested in the action, to attend before the undersigned, a justice of the peace of said town [or city],

<sup>1</sup> See, also, form No. 393.

at his dwelling-house, etc., in said town [*or* city], on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, to form a jury for the trial of a civil action, now pending before me, said justice of the peace, between M. F., plaintiff, and G. H., defendant<sup>1</sup> [*or* between the town (*or* city) of \_\_\_\_\_, plaintiff, and the town (*or* city) of \_\_\_\_\_, defendant].

Dated \_\_\_\_\_, 18—.

J. G., *Justice of the Peace.*

No. 1583.

### Constable's Return to Venire.

(Code Civ. Pro., § 2993.)

I certify that, by virtue of the within precept, I have personally summoned as jurors the several persons named in the annexed list.

Dated \_\_\_\_\_, 18—.

J. G., *Constable.*

[Annex list of names and residences of jurors.]

No. 1584.

### Oath of Jurors.

(Code Civ. Pro., § 2998.)

You do solemnly swear [*or* affirm] that you will well and truly try the matter in difference between A. B., plaintiff, and C. D., defendant, and, unless discharged by me, a true verdict will give, according to the evidence.

No. 1585.

### Oath of Witness.

(Code Civ. Pro., § 3000.)

You do solemnly swear [*or* affirm], that the evidence which you shall give relating to the matter in difference between A. B., plaintiff, and C. D., defendant, shall be the truth, the whole truth and nothing but the truth.

<sup>1</sup> See *Becker v. Sitterly* (58 How. Laws of 1839, and *Prussia v. Guenther* (16 Abb. N. C., 230), *Horton v. § 2991, Code Civ. Pro., by ch. 505 of Hawkins* (20 Week. Dig., 17), *More-*

No. 1586.

**Warrant of Commitment of Witness Refusing to be Sworn,  
etc.**

(Code Civ. Pro., § 3001.)

TOWN [OR CITY] OF \_\_\_\_\_, }  
\_\_\_\_\_ County, } ss. :*The People of the State of New York, to any Constable of  
the County of \_\_\_\_\_, and to the Sheriff of the said  
County, greeting :*

Whereas, on the trial of a civil action before me, the said justice, this day, between A. B., plaintiff, and C. D., defendant, J. S., being called as a witness on the part of the said plaintiff [*or* defendant], and attending as such witness refused to be sworn or affirmed as such witness in the form prescribed by law [*or* to answer on his examination as such witness a pertinent and proper question asked of him by the plaintiff, to wit: whether he was acquainted with the hand writing of C. D., *or* neglected (*or* refused) to produce a book (*or* paper) which he had been duly subpoenaed to produce, as prescribed in section 2969 of the Code of Civil Procedure (*or* which he had been duly required to produce by an order, made as prescribed in section 867 of the Code of Civil Procedure), to wit (describe book, *or* paper)].<sup>1</sup>

And the said plaintiff, at whose instance the said J. S. attended as such witness, made oath before me, that the testimony of said witness [*or* that the said book (*or* paper)] was so far material that without it he could not safely proceed with the trial of said action, and it having been duly proven to me, by the oath of said plaintiff [*or* defendant] [*or* by the oath of J. S., *or* by the return of Y. C., one of the constables of said county], that the said J. S. was duly subpoenaed, etc.

Now, therefore, you, the said constable, are hereby commanded forthwith to convey the said J. S. into the custody of the said sheriff, and you, the said sheriff, are hereby required to receive the said J. S. into your custody in the jail of the said county, and him there safely keep and closely confine until he shall submit to be sworn or affirmed as such

head v. Brown (35 State Rep., 766),  
Cargain v. Everett (42 id., 618), Laws  
of 1892, ch. 567, amending § 2997,

Code Civ. Pro.; Belappi v. Hovey (90  
Hun, 135), Sherman v. Green (id., 462).

<sup>1</sup> See section 3002, Code Civ. Pro.

witness as aforesaid, or shall be otherwise discharged, according to law [*or* until he shall submit to answer the said question so put to him by the said (plaintiff) (*or* to produce the said book, *or* paper) or be otherwise discharged, according to law].

Given under my hand, this \_\_\_\_\_ day of \_\_\_\_\_, 18—.<sup>1</sup>  
*J. G., Justice of the Peace.*

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No. 1587.

**Constable's Oath to Keep Jury.**

(Code Civ. Pro., § 3006.)

You swear, in the presence of Almighty God, that you will, to the utmost of your ability, keep the persons sworn as jurors upon this trial together, in a private and convenient place, without any meat or drink, except such as shall be ordered by me; that you will not suffer any communication to be made to them, orally or otherwise; that you will not communicate with them yourself, orally or otherwise, unless by my order, or to ask them whether they have agreed upon their verdict, until they are discharged; and that you will not, before they render their verdict, communicate to any person the state of their deliberations, or the verdict they have agreed upon.<sup>2</sup>

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No. 1588.

**Proceedings to Impose Upon and Collect from Jurors a Fine for Failure to Attend or Refusing to Serve.**

(Code Civ. Pro., § 3009.)

See forms Nos. 1574-1576, to be adapted to this case.

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**TITLE VI.**

**FORMS RELATING TO JUDGMENT, AND DOCKETING THE SAME.**

(Code Civ. Pro., Ch. 19 Tit. 6.)

- No. 1589. Confession of judgment before justice of the peace.  
 1590. Judgment upon confession.  
 1591. Transcript of justice's judgment for recovery of money.  
 1592. Transcript of justice's judgment for recovery of chattel.

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<sup>1</sup> See *Rutherford v. Holmes* (66 N. 78), *Gibbons v. Van Alstyne* (29 State Y., 368; aff'g S. C., 5 Hun, 317).  
 Rep., 461), *Seeley v. Bisgrove* (83

<sup>2</sup> See *Valentine v. Kelley* (34 Hun, Hun, 293).

No. 1589.

**Confession of Judgment Before Justice of the Peace.**

(Code Civ. Pro., §§ 3010, 3011.)

|   |
|---|
| A. B., <i>Plaintiff</i> ,<br><i>agst.</i><br>C. D., <i>Defendant.</i> |
|---|

To R. C., Esq., *one of the Justices of the Peace of the County of* \_\_\_\_\_:

I, C. D., of \_\_\_\_\_, do hereby confess judgment on a demand arising upon contract [*or in tort*] in favor of A. B., for the sum of \_\_\_\_\_ dollars, besides costs, and authorize you to enter judgment against me accordingly.

Dated at \_\_\_\_\_, in said county, this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

C. D.

In presence of R. C., *Justice.*

Filed this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

R. C., *Justice.*

\_\_\_\_\_ COUNTY, *ss.:*

We, A. B., of \_\_\_\_\_, and C. D., of \_\_\_\_\_, the parties named in the foregoing [*or annexed*] confession of judgment, being duly sworn, severally say, that the said C. D. is honestly and justly indebted to the said A. B., in the sum of \_\_\_\_\_ dollars, over and above all just demands which the said C. D. has against the said A. B., and that the above [*or annexed*] confession is not made or taken with intent to defraud any creditor.<sup>1</sup>

A. B.

C. D.

[Jurat as in form No. 46.]

We, A. B. and C. D., the plaintiff and defendant above named, do hereby agree that the issuing of execution upon the judgment rendered upon the above confession be stayed for [name time].<sup>2</sup>

Dated \_\_\_\_\_, 18—.

A. B.

C. D.

---

<sup>1</sup> This affidavit is to be annexed, in sum exceeding fifty dollars. (Code case the judgment is confessed for a Civ. Pro., § 3011, subd. 3.) As to effect

No. 1590.

**Judgment upon Confession.**

(Code Civ. Pro., § 3015.)

|  |   |              |
|--|---|--------------|
| A. B., <i>Plaintiff</i> ,<br><i>agst.</i><br>C. D., <i>Defendant</i> . | } | _____ , 18—. |
|--|---|--------------|

Parties appear [*or defendant appears*] personally before me, and judgment entered against the said defendant on his confession, in writing, on a demand arising upon contract [*or in tort*] [*accompanied by the affidavit of the defendant and plaintiff, as required by the statute*]<sup>3</sup> for

|  |         |
|--|---------|
| Sum confessed .....                      | \$75 00 |
| Costs (specify items) <sup>4</sup> ..... | 62      |
|  | \$75 62 |

Agreement of parties filed, pursuant to statute, staying execution for [*state time*].

No. 1591.

**Transcript of Justice's Judgment for Recovery of Money.**

(Code Civ. Pro., §§ 3017, 3021.)

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 \_\_\_\_\_ COUNTY—JUSTICE'S COURT.

|   |   |              |
|---|---|--------------|
| J. H.<br><i>agst.</i><br>D. G. [AND C. M.]. | } | _____ , 18—. |
|---|---|--------------|

|  |         |
|--|---------|
| Judgment rendered for plaintiff for the sum of ..... | \$49 64 |
| Costs .....  | 1 18    |
|  | \$50 82 |

Costs of copy to be added.

[The defendant, C. M., was not summoned.<sup>5</sup>]

[“Defendant liable to execution against his person.”<sup>6</sup>]

of omission of affidavit, see *Bodine v. Walters* (20 Week. Dig., 132; S. C., 34 Hun, 6), and see section 3012, Code Civ. Pro. See also, *Crouse v. Johnson* (65 Hun, 337), *Adams v. Tator* (57 Hun, 302).

<sup>3</sup>See, as to stay of execution, section 3010, Code Civ. Pro..

<sup>4</sup>Insert this statement if the judgment is for over fifty dollars. (Code

Civ. Pro., § 3011, subd. 3.) See also, *Putnam v. Van Allen* (46 Hun, 492).

<sup>5</sup>See, section 3078, Code Civ. Pro.

<sup>6</sup>See section 3021, Code Civ. Pro., and as to justices' judgments generally, see *Tracy v. Frost* (32 State R., 907), *Rogers v. Edmonds* (23 id., 749), *Kusselewsky v. Fabricant* (8 Misc., 104), *Matter of Phelps* (6 id., 397), *Brown v. Hyman* (27 N. Y. Supp.,

———— COUNTY, ss.:

I certify that the above is a transcript from my docket of a judgment therein rendered by me; that I have compared the same with the original and that it is a true transcript therefrom and of the whole thereof.<sup>1</sup>

D. B., *Justice.*

No. 1592.

**Transcript of Justice's Judgment for Recovery of a Chattel.**

(Code Civ. Pro., § 3019.)

[Title of cause as in last form.]

Judgment rendered on the ——— day of ———, 18—, for [plaintiff] for a chattel, to wit: [describe same], which has been delivered to the [defendant] [or which was not replevied].

|  |         |
|--|---------|
| Value of chattel.....                        | \$60 00 |
| Damages .....                                | 15 00   |
| Costs (state items); <sup>2</sup> total..... | 5 00    |
|  | \$80 00 |

D. B., *Justice of the Peace.*

[Certificate as in last form, No. 1591.]

TITLE VII.

FORMS RELATING TO EXECUTIONS IN JUSTICE'S COURT.

(Code Civ. Pro., Ch. 19, Tit. 7.)

- No. 1593. Justice's execution, upon judgment for money.
- 1594. Renewal of execution.
- 1595. Constable's notice of sale under justice's execution.
- 1596. Indorsement of levy upon execution.
- 1597. Affidavit of debtor to obtain discharge from imprisonment under justice's execution.
- 1598. Execution upon justice's judgment in action for a chattel.
- 1599. Complaint in action against constable for not returning execution within five days after the return day.
- 1600. Execution upon justice's judgment docketed with county clerk.

436), Laws 1894, ch. 307, amd'g §§ 376, 382, 3017, Code Civ. Pro; Beardsley v. Pope (88 Hun, 560), Tousley v. Mowers (14 Misc., 125), Smith v. McMillan (90 Hun, 542), Rich v. Markham (92 Hun, 78).

<sup>1</sup> See section 3018, Code Civ. Pro.  
<sup>2</sup> When the judgment is docketed in the county clerk's office it becomes a judgment of the county court upon which an action may be brought at

No. 1593.

**Justice's Execution upon Judgment for Money.**

(Code Civ. Pro., §§ 3024, 3025, 3026.)

*The People of the State of New York, to any Constable of the County of ———, greeting :*

Whereas, on the ——— day of ———, 18—, a judgment was rendered by the undersigned, a justice of the peace of the town of ———, in the county of ———, in favor of A. M., plaintiff, and against C. D., defendant, for the sum of ——— dollars damages and ——— dollars costs; and,

Whereas, the sum of ——— dollars is actually due thereupon, at the date of this execution.

[And, whereas, said action was brought to recover a fine (or penalty) (or state other cause of action, so as to bring the case within section 2985 of the Code of Civil Procedure, adding when the case is specified in subdivision three of that section, as follows: in which an order of arrest was granted and was executed).<sup>2</sup>]

Now, therefore, you are hereby required to satisfy the said judgment, together with your fees, out of [\*] the personal property of the said judgment debtor within your county, not exempt from levy and sale by virtue of an execution, and to bring the money before me, the said justice, by the return day of this execution, to be rendered by me to the said A. M.

[And you are further required, if sufficient personal property cannot be found to satisfy the said judgment, to arrest the said judgment debtor, and to convey him to the jail of said county, there to remain until he pays the said judgment, or is discharged according to law.<sup>3</sup>]

And you are further required, to return this execution to me within sixty days after its date.'

Dated ———, 18—.

J. G., *Justice of the Peace.*

any time within twenty years. (Spencer v. Wait, 22 Week. Dig., 214.) See, also, amendment to § 3017, Code Civ. Pro., by chap. 307 of Laws of 1894, whereby the application for a transcript of a judgment must be made within six years after the rendering thereof, and see O'Reilly v. Block (23 N. Y. Supp., 670), Kingsford v. Butler (71 Hun, 598).

<sup>2</sup> It may be safer to state the items of costs in the transcript under the

words "stating the particulars thereof" in section 3019. The provision is a new one.

<sup>3</sup> Insert this clause in case of execution against the person. (Code Civ. Pro., § 3026). See, also, Winne v. Houghtaling (84 Hun, 166), Farrelly v. Hubbard (id., 391), Blakely v. Weaver (46 id., 174), Farrelly v. Hubbard (148 N. Y., 592, rev'g 84 Hun, 391).



No. 1594.

**Renewal of Execution.**

(Code Civ. Pro., § 3027.)

The within execution is renewed.<sup>1</sup>

\_\_\_\_\_, 18—.

J. G., *Justice.*

If a part has been collected :

The within execution is renewed for \_\_\_\_\_ dollars remaining due thereupon, with interest from this date.

\_\_\_\_\_, 18—.<sup>1</sup>

J. G., *Justice.*

No. 1595.

**Constable's Notice of Sale Under Justice's Execution.**

(Code Civ. Pro., § 3029.)

By virtue of an execution [*or* of sundry executions] I have seized and taken one mahogany bureau, etc. [name the articles particularly], the goods and chattels of Richard Roe, which I shall expose to sale at public vendue [*or* auction] to the highest bidder, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at \_\_\_\_\_ o'clock —. M., at the [Columbian hotel], in the [village] of \_\_\_\_\_.

Dated \_\_\_\_\_, 18—.<sup>2</sup>

\_\_\_\_\_  
G. C., *Constable.*

No. 1596.

**Indorsement of Levy upon Execution.**

(Code Civ. Pro., § 3029.)

On the \_\_\_\_\_ day of \_\_\_\_\_, 18—, I levied upon the

<sup>1</sup> See Jones v. Newman (21 Week. Dig., 328), Hampton v. Boylan (46 Hun, 151).

As to indorsement of execution in an action to recover a penalty or forfeiture, see last sentence of section 3026, Code Civ. Pro., and see form No. 891.

As to proceedings under execution against the person, see sections 3032-3036, Code Civ. Pro., Ryan v. Parr (40 State Rep., 946).

As to return of execution, see sections 3027, 3031, *id.*, and see Hampton v. Boylan (*supra*).

<sup>2</sup> Each indorsement renews the execution for sixty days from the date thereof. (Code Civ. Pro., § 3027.)

The execution may be issued or renewed by the justice after the expiration of his term of office. (*Id.*)

<sup>3</sup> Where a sheriff has levied upon property and taken it into his possession, a constable, holding a subsequent execution cannot make any levy upon it, or sell it subject to the sheriff's levy. (Seymour v. Newton, 17 Hun, 30.)

See, also, First Nat. Bank of Oswego v. Dun (29 Hun, 529), Jones Station-

following property by virtue of the within execution, to wit  
[describe articles].

\_\_\_\_\_ G. C., *Constable*.

No. 1597.

**Affidavit of Debtor to Obtain Discharge from Imprisonment under Justice's Execution.**

(Code Civ. Pro., § 3033.)

[Title of cause.]

\_\_\_\_\_ COUNTY, *ss.*:

A. B., of \_\_\_\_\_, being duly sworn, says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, he was committed to the county jail of \_\_\_\_\_ county by virtue of an execution issued by R. C., justice of the peace for the town of \_\_\_\_\_, in the county of \_\_\_\_\_, to M. N., constable of said county, upon a judgment rendered in the above entitled action, in favor of said plaintiff against this deponent, and has remained ever since in custody, by virtue of said execution, in the said jail, or within the liberties thereof, to wit: for thirty days [*or for sixty days*].

That he has a family [*or that he has no family*] within the State of New York, to wit: at the [city] of \_\_\_\_\_, in the county of \_\_\_\_\_, for which he provides.<sup>1</sup>

A. B.

[Jurat as in form No. 46.]

No. 1598.

**Execution upon Justice's Judgment in Action for a Chattel.**

(Code Civ. Pro., § 3038.)

TOWN [OR CITY] OF \_\_\_\_\_, }  
County of \_\_\_\_\_, } *ss.*:

*The People of the State of New York, to any Constable of the said County, greeting:*

Whereas, in an action before me, the undersigned justice

ery, etc., Co., v. Case (26 Kans., 209; S. C., 40 Am. R., 310), People v. Hall (31 Hun, 404).

As to posting the notice and time of sale, see section 3023, Code Civ. Pro.; and see further as to sale and levy,

of the peace of said town, in which A. B. was plaintiff, and C. D. was defendant, I did, on the —— day of ——, 18—, render judgment that the plaintiff recover of the defendant the possession of the following described chattels, viz. [describe the chattel or chattels particularly] [or the sum of —— dollars if possession thereof is not delivered to the plaintiff], and, also, that said plaintiff recover from said defendant the sum of —— dollars damages, and —— dollars costs; and,

Whereas, there is actually due thereon, at the date hereof, the sum of —— dollars, for said damages and costs [and the further sum of —— dollars and —— cents, if the said chattels are not delivered to the said plaintiff:]

Now, therefore, you are hereby commanded to deliver the possession of the said chattels, if found within your county, to the said plaintiff, and [in case the said chattels cannot be found within your county to satisfy the said sum of —— dollars, with interest thereon, and in either case] to also satisfy the said damages and costs, together with your fees hereon, out of, etc. [conclude as in form No. 1593, from (\*), omitting the clause in brackets].<sup>2</sup>

Dated ——, 18—.

J. G., *Justice of the Peace.*

No. 1599.

**Complaint in Action against Constable for not Returning Execution within Five Days after the Return Day.**

(Code Civ. Pro., § 3039.)

[Title of cause.]

The complaint of the above named plaintiff respectfully shows, that on or about the —— day of ——, 18—, at ——, the defendant being a constable of the town of

Code Civ. Pro., § 3030, and sections therein referred to.

As to exempt property see section 3028, Code Civ. Pro., and sections therein referred to.

As to indorsement upon execution in case of joint debtors, where summons is served upon one or more but

not upon all; see Code Civ. Pro., § 3020, and form No. 1027.

<sup>1</sup> See sections 3034-3037, Code Civ. Pro., as in proceedings upon affidavit, etc.

<sup>2</sup> See, also, forms Nos. 562, 564, and notes to those forms.

———, an execution was duly issued by R. C., a justice of that town, in favor of the plaintiff and against one R. D., directed to any constable of the county of ———, directing and requiring him to levy of the goods and chattels of said R. D., except such as were by law exempt from execution, to satisfy a judgment recovered by the plaintiff against said R. D., before such justice, on the ——— day of ———, 18—, for ——— dollars and ——— cents, and to bring the money within sixty days from the date thereof before such justice, to render to the plaintiff.

That such execution was, on the said ——— day of ———, 18—, delivered to the defendant to execute, and the defendant neglected to return the same within five days after the return day thereof, whereby he became indebted to the plaintiff in the amount of the said execution with interest from the ——— day of ———, 18—, when the judgment upon which it was issued was rendered, pursuant to the provisions of sections 3039 of the Code of Civil Procedure.

Wherefore the plaintiff demands judgment against the said defendant for the sum of ——— dollars, with costs of this action.<sup>1</sup>

M. G., *Plaintiff's Attorney.*

[Office address.]

[Verification as in forms Nos. 151, etc.]

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No. 1600.

### **Execution upon Justice's Judgment Docketed with County Clerk.**

(Code Civ. Pro., § 3043.)

See form No. 557, and notes thereto.<sup>2</sup>

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<sup>1</sup> See *Curry v. Farley* (8 Daly, 228),  
*Inman v. McNeil* (57 How. Pr., 151),  
*Jones v. Newman* (21 Week., 328).

<sup>2</sup> See note 2 to form No. 122.  
<sup>3</sup> See, also, *Jones v. Newman* (21  
Week. Dig, 328), *Townsend v. Tol-*  
*hurst* (57 Hun, 40).

## TITLE VIII.

## ARTICLE FIRST.

## FORMS RELATING TO APPEALS GENERALLY FROM JUSTICE'S JUDGMENT.

(Code Civ. Pro., Ch. 19, Tit. 8, Art. 1.)

- No. 1601. Notice of entry of judgment to limit time to appeal.  
 1602. Notice of appeal from judgment rendered by justice of the peace.  
 1603. Undertaking to stay execution upon judgment.  
 1604. Notice to respondent of delivery of undertaking.  
 1605. Justice's return upon appeal from his judgment.  
 1606. Judgment of reversal on appeal from justice's judgment, and award of restitution.

## No. 1601.

**Notice of Entry of Judgment to Limit Time to Appeal.**

(Code Civ. Pro., § 3046.)

[Title of cause.]

Take notice, that judgment was entered in the above entitled action, by R. C., Esq., justice of the peace for the town of \_\_\_\_\_, in the county of \_\_\_\_\_, in favor of the plaintiff and against the defendant, for \_\_\_\_\_ dollars damages and \_\_\_\_\_ dollars costs, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

Yours, etc.,

\_\_\_\_\_  
A. B., *Plaintiff*.

## No. 1602.

**Notice of Appeal from Judgment Rendered by a Justice of the Peace.**

(Code Civ. Pro., § 3046.)

[Title of cause.]

Take notice, that the [defendant] appeals to the [county court of \_\_\_\_\_ county] from the judgment rendered by R. C., Esq., justice of the peace of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, in the above entitled action, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in favor of the plaintiff and against the defendant, for the sum of \_\_\_\_\_ dollars and \_\_\_\_\_ cents, damages and costs [and that defendant de-

mands a new trial of said action in the said appellate court].<sup>1</sup>

Dated \_\_\_\_\_, 18—.

C. D., *Appellant*

[or E. F., *Attorney for Appellant*].

[Office address.<sup>2</sup>]

To R. C., Esq., *Justice of the Peace*.

No. 1603.

### Undertaking to Stay Execution upon Judgment.

(Code Civ. Pro., § 3050.)

[Title of cause.]

Whereas, a judgment was rendered by R. C., justice of the peace of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in favor of the above named plaintiff against the above named defendant for \_\_\_\_\_ dollars and \_\_\_\_\_ cents, damages and costs [or for the recovery of a chattel, to wit (describe chattel), with \_\_\_\_\_ damages and costs, and for the value of said chattel in case a delivery thereof cannot be had]; and,

Whereas, the said defendant intends to appeal from the said judgment to the [county court of \_\_\_\_\_ county]:

Now, therefore, we, E. F., of \_\_\_\_\_ [and G. H., of \_\_\_\_\_],<sup>3</sup> do hereby [jointly and severally] undertake, that if the said appeal is dismissed, or if judgment is rendered against the appellant in the said appellate court, and an execution issued thereon is returned wholly or partly unsatisfied, [\*] we will pay the amount of the said judgment, or the portion thereof remaining unsatisfied, not exceeding the sum of \_\_\_\_\_ dollars.<sup>4</sup>

[Or as above to (\*), and from thence as follows: We will

<sup>1</sup> See Code Civ. Pro., § 3068; Marsh v. Village of Lansingburgh (31 Hun, 514), Matteson v. Hall (64 How. Pr., 515), Thorn v. Roods (47 Hun, 433), Mann v. Dennis (20 State Rep., 195), Dudley v. Brinckerhoff (13 Civ. Pro. R. 62), Green v. Waite (33 id., 191), Royce v. Gibbons (50 Hun, 341), Denniston v. Trimmer (27 id., 393), Harvey v. Van Dyck (66 How. Pr., 396), Moore v. Trimmer (17 Civ. Pro. R., 99), Hinkley v. Troy, etc., Horse R. Co. (42 Hun, 281), Reynolds v. Swick (35 id., 278), Bates v. Gorman (8 Civ. Pro.

R., 180), Gilman v. Jenkins (40 Hun, 594), Amos v. Bradley (15 Week. Dig., 262), Kimball v. Rich (20 State Rep., 153), McCarthy v. Crowley (5 N. Y. Supp., 675), Clark v. Snyder (40 Hun, 330), Andrews v. Snyder (6 Civ. Pro. R., 333), Horr v. Seaton (18 Week. Dig., 510), Garling v. Ladd (27 Hun, 112), Albert Palmer Co. v. Dickinson (14 Week. Dig., 191), Benerlin v. Hodges (31 State Rep., 759), Chatfield v. Reynolds (18 Civ. Pro. R., 378), Longrill v. Downey (7 N. Y. Supp., 530), Strawbridge v. Vandenburg (32

State Rep., 493), *Brown v. Niagara Machine Co.* (27 id., 70), *O'Reilly v. Block* (23 N. Y. Supp., 670), *Richardson v. Levi* (69 Hun, 432), *Page v. Larrowe* (51 State Rep., 35), *Young v. Conklin* (3 Misc., 122), *Poen v. Scott* (4 id., 603), *Killmer v. Messling* (70 Hun, 582), *Merris v. Hunt* (71 id., 483), ch. 383, Laws of 1893, amd'g § 3063, Code Civ. Pro.; *Bartlett v. Mudgett* (75 Hun, 292), *Platz v. Burton & Corey Cider, etc., Co.* (7 Misc., 473), *Halsey v. Hart* (85 Hun, 46), *Reid v. Diefendorf* (87 id., 40), *Kenney v. Livery Stable Keepers' Ass'n* (89 id., 190), *Frink v. Stevens* (88 id., 283), *De Bevoise v. Ingalls* (id., 186), *Gould v. Patterson* (87 id., 533), *Pierano v. Merritt* (89 id., 207; aff'd 148 N. Y., 289), *Rhodes v. Carr* (88 Hun, 217), *Sherman v. Green* (90 Hun, 462), *Frost v. Frost* (15 Misc., 167), *Baum's Castorine Co. v. Thomas* (92 Hun, 1), *Utter v. Nelligan* (id., 185).

<sup>2</sup> See note 2 to form No. 122.

<sup>3</sup> One or more sureties. (Code Civ. Pro., § 3050.)

<sup>4</sup> At least one hundred dollars, and not less than twice the amount of the judgment. (Code Civ. Pro., § 3050.)

Where the only signature of the sureties was at the end of the jurat to the affidavit of justification, but their names were written in the body of the instrument as the persons who "undertake," and they acknowledged the execution thereof before a notary; *held*, that the signing and execution of the undertaking were sufficient. (*Weisbrod v. Marquardt*, 8 Abb. N. C., 243 [Brooklyn City Ct., Gen. Tm.].)

See, also, *Ross v. Markham* (5 Civ. Pro. R., 81), *Slattery v. Haskin* (42 Hun, 86), *Elson v. Murray* (27 Hun, 536).





pay the sum fixed by the said judgment as the value of the said chattel, to wit: the said sum of ——— dollars (together with the damages awarded for the taking, withholding or detention thereof).]

E. F.  
[G. H.]

[Acknowledgment, etc., as in form No. 1550.]

No. 1604.

**Notice to Respondent of Delivery of Undertaking.**

(Code Civ. Pro., § 3051.)

Please take notice, that an undertaking, of which the within is a copy, was delivered to [M. F., clerk of] J. G., justice of the peace [*or* filed with the clerk of the (name of appellate court)],<sup>1</sup> on the ——— day of ———, 18—.

Dated ———, 18—.

A. B., *Appellant*.

To C. D., *Respondent*.

No. 1605.

**Justice's Return upon Appeal from His Judgment.**

(Code Civ. Pro., § 3053.)

[Title of cause.]

*To the County Court of ——— County:*

In pursuance of the notice of appeal hereto annexed, and which was served upon me, on the ——— day of ———, 18—, on which day the annexed undertaking was also delivered to me, I, D. B., a justice of the peace of the town of ———, in said county, having been paid, at the time of such service, the costs in such action, included in the judgment, and my fee of two dollars for making this return, do hereby return [all of the testimony, proceedings and judgment in the action in the said notice mentioned],<sup>2</sup> as follows:

<sup>1</sup> See as to cases in which the filing trial insert here a description of the papers returned as prescribed in section 3053, Code Civ. Pro., and see Gardner v. Smith (2 Civ. Pro. R. [Browne], 420).  
Pro.

<sup>2</sup> In the case of a demand of a new See, also, generally, as to return,

[Here insert all the proceedings, including the evidence and judgment, unless the appellant has, in the notice of appeal, demanded a new trial, as to which case see section 3053, Code Civil Procedure.]

Dated \_\_\_\_\_, 18—.

J. G., *Justice of the Peace.*

[Annex notice of appeal and undertaking, if any has been delivered.]

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No. 1606.

**Judgment of Reversal on Appeal from Justice's Judgment,  
and Award of Restitution.**

(Code Civ. Pro., § 3058.)

See form No. 533, and note 1, page 410, to that form. See, also, *Cushing v. Vanderbilt* (7 Daly, 512); and as to setting off costs against the sum awarded, see section 3059; as to what disbursements may be allowed upon the appeal, see Code of Civil Procedure, § 3070; and further, as to costs upon appeal, see *Combs v. Combs* (1 Civ. Pro. R., 298); *Sherwood v. Travelers' Ins. Co. of Hartford* (3 Civ. Pro. R., 281), *Atkin v. Pitcher* (31 Hun, 352); *Horning v. Smith* (19 Civ. Pro. R., 142), and cases cited in note 2 to form No. 1610; Code of Civil Procedure, §§ 3066, 3070, 3073); as to judgment roll on determination of appeal, see *id.*, § 3061.

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ARTICLE SECOND.

FORMS RELATING TO APPEAL FROM JUSTICE'S JUDGMENT  
WHEN A NEW TRIAL IS NOT HAD IN THE APPELLATE  
COURT.

(Code Civ. Pro., Ch. 19, Tit. 8, Art. 2.)

No. 1607. Stipulation of defendant for reversal on appeal.

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No. 1607.

**Stipulation of Respondent for Reversal on Appeal.**

(Code Civ. Pro., § 3062.)

[Title of cause.]

It is hereby stipulated, that the judgment appealed from

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sections 3054-3056, Code Civ. Pro., and *Aylesworth v. St. John* (25 Hun, 156),  
*Barber v. Stettheimer* (13 Hun, 198), *Brooks v. St. John* (25 Hun, 540), *Flint*

in the above entitled action may be reversed, with five dollars costs and disbursements of the appeal.

Dated \_\_\_\_\_, 18—.

A. B., *Respondent*  
[or C. D., *Attorney for Respondent*].  
[Office address.<sup>1</sup>]

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ARTICLE THIRD.

FORMS RELATING TO APPEAL FROM JUSTICE'S JUDGMENT FOR  
A NEW TRIAL IN THE APPELLATE COURT.

(Code Civ. Pro., Ch. 19, Tit. 8, Art. 3.)

- No. 1608. Offer of judgment on appeal from money judgment.  
1609. Notice to respondent of acceptance of offer.  
1610. Offer of judgment after case is deemed at issue in appellate court.

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No. 1608.

**Offer of Judgment on Appeal from Money Judgment.**

(Code Civ. Pro., § 3070.)

\_\_\_\_\_ COUNTY COURT.

|   |
|---|
| A. B., <i>Respondent</i> ,<br><i>agst.</i><br>C. D., <i>Appellant</i> . |
|---|

Take notice, that the above named respondent [or appellant] hereby offers to allow judgment to be rendered in the above named appellate court, in the above entitled action, in favor of the said respondent and against the said appellant [or in favor of the said appellant and against the said respondent] for the sum of \_\_\_\_\_ dollars.

Dated \_\_\_\_\_, 18—.

A. B. [*Respondent*]  
[or J. F., *Attorney for (Respondent)*].  
[Office address.<sup>1</sup>]

To C. D. [*Appellant*] [or E. F., *Attorney for (Appellant)*].

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v. Gault (15 Hun, 213), Fritz v. Pultz (2 Civ. Pro. R., 142), Knight v. Wilson (55 Hun, 559), Valentine v. Kelley (54 id., 78) Larocque v. Harvey (57 id., 366), Gibbons v. Van Alstyne (29 State Rep., 461), Armstrong v. Sanford (60 Hun, 356), Young v. Conklin (3 Misc., 122), Thompson v. Sheridan (80 Hun,

33), Sherman v. Green, (90 id., 462), Rule 46 Gen. Rules of Prac.

The return must be made, after ten and within thirty days from the service of the notice of appeal, and the payment of the costs and fee. Code Civ. Pro., § 3053.)

<sup>1</sup> See note 2 to form No. 122.

No. 1609.

**Notice to Respondent, etc., of Acceptance of Offer.**

(Code Civ. Pro., § 3070.)

[Title as in last form.]

SIR—Take notice, that the appellant [*or* respondent] above named accepts the offer of the above named respondent [*or* appellant], dated ———, 18—, to allow judgment to be taken in the above named appellate court in the above entitled action in favor, etc. [as in last form].

Yours, etc.,

C. D., *Appellant*[*or* E. F., *Attorney for Appellant*].[Office address.<sup>2</sup>]To A. B., *Respondent* [*or* J. F., *Attorney for Respondent*].

No. 1610.

**Offer of Judgment after Case is Deemed at Issue in the Appellate Court.**

(Code Civ. Pro., § 3072.)

[Title of cause as in form No. 1608.]

SIR—Take notice, that the appellant [*or* the respondent] above named hereby offers to allow judgment to be taken against him, in the above entitled action, for the sum of ——— dollars [*or* for the recovery of the property described as follows, to wit [describe same], with costs [*or* without costs].<sup>1</sup>

Yours, etc.,

A. B. [*or* C. D.] *or* E. F., *Attorney for A. B. or C. D.*[Office address.<sup>2</sup>]

## TITLE IX.

**FORMS RELATING TO ACTION OR SPECIAL PROCEEDING, RELATING TO AN ANIMAL STRAYING UPON THE HIGHWAY.**

(Code Civ. Pro., Ch. 19, Tit. 10.)

No. 1611. Complaint in action for penalty for suffering animals to run at large upon highway.

<sup>1</sup> For notice of acceptance of offer, see form No. 1609.

<sup>2</sup> See note 2 to form No. 122, and see amendment to § 3070, Code Civ. Pro., by ch. 356 of Laws of 1895. See, also, *Vanderwerken v. Brown* (38

Hun, 234), *Kelly v. Bonesteel* (29 Hun, 546), *Earl v. Collins* (23 Week. Dig., 108), *Pruyn v. Lynch* (44 Hun, 587), *Sheehan v. Buller* (24 Week. Dig., 168), *Balcom v. Terwilliger* (42 Hun, 170), *Munson v. Curtis* (43 id., 214),

- No. 1612. Petition for final order directing sale of animals seized when running at large, etc., on street, highway, etc.  
 1613. Precept upon petition (form No. 1612).  
 1614. Final order directing sale of animals.  
 1615. Warrant for sale of animals seized.  
 1616. Notice of claim to surplus of the proceeds of sale of animals seized.  
 1617. Verdict of jury in favor of party answering.  
 1618. Final order upon verdict.  
 1619. Warrant upon final order (form No. 1618).  
 1620. Undertaking on appeal from final order.

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No. 1611.

**Complaint in Action for a Penalty for Suffering Animals to Run at Large.**

(Code Civ. Pro., § 3082.)

As in form No. 890, inserting therein as follows: That the plaintiff is a resident of the town of \_\_\_\_\_ [or is the overseer (or superintendent of the poor of the town of \_\_\_\_\_, etc.)], so as to bring the action within the provisions of section 3082 of the Code of Civil Procedure.<sup>1</sup>

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No. 1612.

**Petition for Final Order Directing Sale of Animals Seized when Running at Large, etc., in Highway, Street, etc.**

(Code Civ. Pro., § 3086.)

To J. G., Esq., *Justice of the Peace of the town of* \_\_\_\_\_, *in the County of* \_\_\_\_\_ :

The petition of A. B., of \_\_\_\_\_, respectfully shows: [That he is the overseer of highways of the road district (describing it) (or the street commissioner of the village of \_\_\_\_\_), in the said town of \_\_\_\_\_].<sup>2</sup>

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Hollenbeck v. Knapp (42 id., 207), Zoller v. Smith (45 id., 319), Adolph v. De Ceu (id., 130), Watson v. Benz (57 Hun, 398), Harding v. Ellston (13 N. Y. Supp., 199), Watson v. Benz (84 State Rep., 327), McKuskie v. Hendrickson (128 N. Y., 555), Vogel v. Schneter (73 Hun, 595), Sherman v. Shisler (6 Misc., 203), Pierano v. Merritt (148 N. Y., 289; aff'g S. C., 89 Hun, 207), Rhodes v. Carr (88 id., 217), Southard v. Becker (15 Misc., 436).

<sup>1</sup> The summons in an action brought under section 3082 of Code Civ. Pro., must conform to section 1897 of that statute, and the memorandum thereby

required must be indorsed upon, and not stated in, the body of the summons. (Schoonmaker v. Brooks, 24 Hun, 553.)

The term "run at large," implies permission or assent, or, at least, some fault or neglect on the part of the owner of the animals, and when they escape, after due precaution to secure them and the owner makes immediate efforts to recover them, they are not running at large within the meaning of title tenth of chapter nineteenth of Code Civ. Pro. (Coles v. Burnes, 21 Hun, 246.)

<sup>2</sup> The seizure may be made by, and

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, certain animals to wit [briefly describing them], were found by him running at large [or being herded (or pastured)] in a public street, to wit: \_\_\_\_\_ street [or highway, or park, or place, stating what highway, etc.], of the village [or town] of \_\_\_\_\_, in the county of \_\_\_\_\_ [bordering upon real property owned (or occupied) by your petitioner; or then trespassing upon real property owned (and occupied) (or occupied) by your petitioner, having entered thereupon from a public street (or highway, or park, or place) of the village (or town) of \_\_\_\_\_, in the county of \_\_\_\_\_],<sup>1</sup> and that said animals were thereupon immediately seized by your petitioner, and are now in his possession.

That the name of the owner of said animals is C. D., who resides in the town of \_\_\_\_\_, in the county of \_\_\_\_\_ [or that the name of the owner of the said animals is unknown to your petitioner, and cannot be ascertained by him with reasonable diligence].

[That the amount of damages sustained by your petitioner, by reason of the said trespass, is \_\_\_\_\_ dollars.<sup>2</sup>]

And your petitioner prays for a final order, directing the sale of the said animals so seized by him, and the application of the proceeds thereof, as prescribed in title tenth of chapter nineteenth of the Code of Civil Procedure.<sup>2</sup>

Dated \_\_\_\_\_, 18—.

A. B.

[Verification as in form No. 52.]

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No. 1613.

**Precept upon Petition (form No. 1612).**

(Code Civ. Pro., § 3087.)

*The People of the State of New York, to C. D. [or to all persons having any interest in the animals seized as hereinafter mentioned]:*

Whereas, A. B., of \_\_\_\_\_ [describing official capacity,

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the proceedings taken by, the officers named (Code Civ. Pro., § 3084), or, in certain cases, by a private person (id., § 3085).

<sup>1</sup> Insert these statements where the proceeding is taken by a private person. (Code Civ. Pro., § 3085.)

<sup>2</sup> See notes to form No. 1611.

if any, of petitioner], did, on the ———, 18—, present to me, a justice of the peace of the town of ———, in the county of ———, his written petition, verified by his oath, the substance of which petition is as follows [state the substance of petition, describing the animals seized], praying for a final order, etc. [reciting prayer of petition]: [\*]

Now, therefore, you are hereby required to show cause before me, at [my office] in the town of ———, in the county of ———, on the ——— day of ———, 18—, at ——— o'clock in the ——— noon, why the prayer of the said petition should not be granted.<sup>1</sup>

Dated ———, 18—.

J. G., *Justice of the Peace.*

To E. F., an *Electer of the Town of* ———, *in the County of* ———:

You are hereby authorized to serve the within precept in manner required by law.<sup>1</sup>

Dated ———, 18—.

J. G., *Justice of the Peace.*

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No. 1614.

### Final Order Directing Sale of Animals Seized.

(Code Civ. Pro., § 3091.)

#### JUSTICE'S COURT.

IN THE MATTER OF THE PETITION OF A. B. FOR SALE OF ANIMALS SEIZED BY HIM [AS, STATING OFFICIAL CAPACITY, IF ANY], AND APPLICATION OF THE PROCEEDS THEREOF, PURSUANT TO TITLE TENTH OF CHAPTER NINETEENTH OF THE CODE OF CIVIL PROCEDURE.

*Before J. G., a Justice of the Peace of the town of ———, in the county of ———.*

As in last form, No. 1613, to [\*], and from thence as follows: And, whereas, a precept was issued, under my hand,

<sup>1</sup> As to manner of service of precept 3088, Code Civ. Pro.; and see section and by whom to be made, see section 2910, id., therein referred to, and form

upon the presentation of the said petition, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, directed, etc. [state how directed], briefly reciting the substance of the said petition: describing the animals so seized, and requiring the said person [*or* persons] to whom the said precept was directed to show cause before me, at, etc., on, etc., why the prayer of the said petition should not be granted; and,

Whereas, at the time and place where the said precept was returnable as aforesaid, and at the expiration of the time specified in section 2893 of the Code of Civil Procedure, the petitioner having furnished due proof of the service of the said precept, as required by law; and,

Whereas, said C. D., the owner of said animals seized [*or* E. F., a person having an interest in said animals seized], appeared upon the return of said precept [by G. H., his attorney], and filed a written answer, subscribed by him [*or* by his said attorney], and verified by his oath [*or* by the oath of his said attorney], denying, absolutely or upon information and belief, one or more material allegations contained in the said petition, and [state further proceedings] [*or* no person having appeared and answered upon the return of said precept]; and,

Whereas, the decision of the said justice [*or* the verdict of said jury] was in favor of the said petitioner:

Now, therefore, I do hereby order, that the said animals seized be sold, and that the proceeds of the sale thereof be applied as prescribed in title tenth of chapter nineteenth of the Code of Civil Procedure.

Dated \_\_\_\_\_, 18—.

J. G., *Justice of the Peace.*

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No. 1615.

**Warrant for Sale of Animals Seized.**

(Code Civ. Pro., § 3091.)

*The People of the State of New York, to any Constable of the County of \_\_\_\_\_, greeting:*

Whereas, a final order was made, pursuant to law, on the

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No. 1552. As to proof of service, see section 3089, *id.*

For proceedings upon return of precept, see Code Civ. Pro., § 3090.



——— day of ———, 18—, by the undersigned, a justice of the peace of the town of ———, in the county of ———, in a special proceeding pending before him, upon the petition of A. B. [state official capacity, if any], made pursuant to title tenth of chapter nineteenth of the Code of Civil Procedure, whereby a sale was directed of the animals seized by said A. B. [as such, etc.], to wit [describe the animals], and the application of the proceeds of such sale as required by the provisions of the said title :

Now, therefore, you are hereby commanded, pursuant to law, to sell the said animals, so seized, at public auction, for the best price which you can obtain therefor, and to make return thereof to me, at, etc., on, etc.<sup>1</sup>

Dated ———, 18—.

J. G., *Justice of the Peace.*

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No. 1616.

**Notice of Claim to Surplus of the Proceeds of Sale of Animals Seized.**

(Code Civ. Pro., § 3093.)

[Title of proceeding as in form No. 1614.]

Notice is hereby given that the undersigned claims the surplus of the proceeds of the sale of the animals seized in the above entitled proceeding [or state part of surplus claimed].<sup>2</sup>

Dated ———, 18—.

C. D.

To J. G., Esq., *Justice of the Peace.*

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No. 1617.

**Verdict of Jury in Favor of Party Answering.**

(Code Civ. Pro., § 3096.)

The jury find in favor of C. D., and hereby fix the value of each animal seized, as follows [state separately each animal and its value] ; and the jury further find that the seizure

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<sup>1</sup> Not less than ten nor more than twenty days thereafter. (Code Civ. Pro., § 3091.)

The sale is to be made upon the like notice and in like manner as a sale of property by virtue of an execution

of said animals was malicious, and without probable cause, and assess the damages sustained by the said C. D., by means of the said seizure and detention, at ——— dollars.

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No. 1618.

**Final Order Upon Verdict.**

(Code Civ. Pro., § 3096.)

It is hereby ordered, pursuant to the verdict of the jury, that the return of the animals seized, to wit [describe them], or the value of the said animals, as fixed by said verdict, to wit: the sum of ———, if a return thereof cannot be had, together with the costs of said C. D., to wit: the sum of ——— dollars [and ——— dollars damages],<sup>2</sup> be and hereby is awarded to C. D. against the petitioner, A. B.

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No. 1619.

**Warrant upon Final Order (form No. 1618).**

(Code Civ. Pro., § 3096.)

*The People of the State of New York, to any Constable of the County of ———, greeting:*

Whereas, a final order was made by the undersigned, a justice of the peace of the town of ———, in the county of ———, on the ——— day of ———, 18—, in a special proceeding upon the petition of A. B., made to me, pursuant to title tenth of chapter nineteenth of the Code of Civil Procedure, awarding to C. D., the return of the animals described as follows, to wit [describing same], or the value of the said animals, to wit, the sum of ———, if a return could not be had, and the payment by said A. B. to said C. D. of the sum of ——— damages and ——— dollars costs; and,

Whereas, the sum of ——— dollars, with interest there-

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issued by a justice of the peace. (See form of notice, form No. 1595.) to surplus, Code Civ. Pro., §§ 3093-3095.

As to application by justice of the proceeds of sale, see Code Civ. Pro., § 3092.

<sup>2</sup> State damages at double the amount awarded by the verdict. (Code Civ. Pro., § 3096.)

<sup>2</sup> See for further proceedings relating

upon from the ——— day of ———, 18—, is actually due thereon at the date hereof, for said damages and costs, and the further sum of ——— dollars and ——— cents with interest, etc., is also actually due thereon, at the date hereof, if the possession of said chattel is not delivered to said plaintiff:

Now, therefore, you are hereby commanded to deliver the said animals to the said C. D., if found within your county, and to satisfy the said sum of ——— dollars and ——— cents, damages and costs, with interest as aforesaid, and the further sum of ——— dollars and ——— cents, with interest thereupon as aforesaid, if the said animals cannot be found within your county, together with your fees thereon, out of, etc. [conclude as in form No. 1593 from (\*)].

Dated ———, 18—.

J. G., *Justice of the Peace.*

—————  
No. 1620.

### Undertaking on Appeal from Final Order.

(Code Civ. Pro., § 3105.)

[Title of proceeding as in form No. 1614.]

Whereas, a final order was made by J. G., a justice of the peace of the town of ———, in the county of ———, in the above entitled proceeding, on the ——— day of ———, 18—, by which it was ordered, etc. [state substance of the order]; and,

Whereas, the said C. D. intends to appeal therefrom to the [county court of the county of ———]:

Now, therefore, etc. [conclude as in form No. 1603, adding as follows: And, also, that if the said final order appealed from is affirmed, or if the said appeal is dismissed, the appellant will pay all sums which the justice awards against him, upon the hearing, after the determination of the said appeal as prescribed in section 3106 of the Code of Civil Procedure, not exceeding the sum of ——— dollars.]

Dated ———, 18—.

E. F.  
[G. H.]

[Acknowledgment, etc., as in form No. 1548.]

## TITLE X .

## FORMS RELATING TO MISCELLANEOUS PROVISIONS.

(Code Civ. Pro., Ch. 19, Tit. 12..)

- No. 1621. Transfer of action when justice's term expires, etc.  
 1622. Affidavit when justice is a witness to obtain order for transfer of action, etc.  
 1623. Order upon foregoing affidavit.

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 No. 1621.
**Transfer of Action when Justice's Term Expires, etc.**

(Code Civ. Pro., § 3150.)

[Title of cause or proceeding.]

Whereas, I, J. G., a justice of the peace of the town [*or* city] of \_\_\_\_\_, in the county of \_\_\_\_\_, am about to remove from the said town [*or* city] before judgment is rendered in the above entitled action [*or* before a final order is made in the above entitled proceeding] pending before me :

[*Or* whereas, the term of office of the undersigned, J. G., justice, etc. (as above), is about to expire before judgment, etc. (as above).]

Now, therefore, I do hereby order and direct that the said action [*or* proceeding] be continued before M. P., Esq., a justice of the peace of the said town [*or* city] of \_\_\_\_\_.

Dated \_\_\_\_\_, 18—.

J. G., *Justice of the Peace.*


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 No. 1622.
**Affidavit when Justice's is a Witness to Obtain Order for Transfer of Action, etc.**

(Code Civ. Pro., § 3151.)

JUSTICE'S COURT, \_\_\_\_\_ COUNTY, ss.:

|   |
|---|
| JAMES JACKSON<br><i>agst.</i><br>RICHARD ROE. |
|---|

Richard Roe, of \_\_\_\_\_, being duly sworn, says, that he is the defendant in the above entitled action [*or* that he

is the attorney for the defendant in the above entitled action, and that the defendant has not been arrested therein].

That an issue of fact has not been joined in said action.

That J. G., Esq., the justice of the peace before whom the said action is pending, is a material witness for this deponent [*or for the defendant*] in the said cause, and that he cannot safely proceed to the trial thereof without the testimony of the said justice.

And this deponent further says, that he expects to prove, by the said justice, the following facts and circumstances, to wit: That before the commencement of the said action, the plaintiff sued the defendant before the said justice, for the same identical property for which he now claims the surplus money, and that judgment was passed on the same and entered in favor of the defendant and against the plaintiff for costs; and also that the plaintiff acknowledged, in the presence of the justice, that the defendant had tendered to him, said plaintiff, the overplus money before the commencement of the former suit, and that he had no claim for surplus moneys; and this defendant does not know of any other person by whom he can prove these facts, except by one J. S., who is now absent from the said county, and without the jurisdiction of this court, and is not expected to return in several months.

[*Or if the action be for trespass on land, state after the words "in the presence of the said justice," as follows: That he, the said plaintiff, gave this deponent liberty to enter upon the premises of the said plaintiff, described in the said plaintiff's complaint, but that he, this deponent, had acted unfairly, and he, the said plaintiff, meant to make him suffer for it (set forth the facts and circumstances particularly, according to the facts).*]

RICHARD ROE.

[*Jurat as in form No. 46.*]

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No. 1623.

**Order upon Foregoing Affidavit.**

(Code Civ. Pro., § 3151.)

[*Title of cause, etc.*]

Whereas, satisfactory proof, by affidavit, has been pre-

sented to me, before the joinder of issue in the above entitled action [*or* proceeding] by the above named defendant [*or* by G. H., attorney for the defendant in the above entitled action, in which the defendant has not been arrested], that I, the undersigned, a justice of the peace of the town [*or* city] of ———, in the county of ———, am a material witness for the said defendant, without whose testimony he cannot safely proceed to trial:

Now, therefore, I do, etc. [conclude as in form No. 1621].

sale of such real estate see section 2751 id., as amended by ch. 423 of Laws of 1887.

<sup>2</sup> See subd. 1 of section 2752, Code Civ. Pro., as amended by ch. 735 of Laws of 1894, as to persons holding judgment liens against decedent dock-

eted before his decease.

<sup>3</sup> See subd. 1 of section 2752, Code Civ. Pro., as to funeral expenses, and see section 2749 (id.), In re Erlacher (3 Redf., 8), In re Mount (id., 9 n.), In re Wood (id., 9 n.), In re Rodney (id., 15), Owens v. Bloomer (14 Hun,





## CHAPTER XX.

## FORMS RELATING TO COSTS, ETC.

(Code Civ. Pro., Ch. 21.)

TITLE I. Forms relating to awarding and enforcing payment of costs

TITLE II. Forms relating to fixing the amount of costs.

TITLE III. Forms relating to security for costs, etc

## TITLE I.

## ARTICLE FIRST.

FORMS RELATING TO MISCELLANEOUS PROVISIONS AS TO  
AWARDING AND ENFORCING PAYMENT OF COSTS.

(Code Civ. Pro., Ch. 21, Tit. 1, Art. 1.)

- No. 1624. Certificate entitling party to costs or increased costs.

## No. 1624.

## Certificate Entitling Party to Costs or Increased Costs.

(Code Civ. Pro., § 3248.)

[Title of cause.]

I, J. M., referee in [*or* judge (*or* justice) presiding at the trial of] the above entitled action, do hereby certify that the title to real property came in question upon the trial of said action [*or* state other fact whereby either party becomes entitled to costs or to the increased costs specified in section 3258 of Code of Civil Procedure].<sup>1</sup>

Dated ———, 18—.

J. M., *Referee, etc.*

<sup>1</sup> Where the plaintiff, in an action, against a municipal corporation, to recover money, has omitted to present the claim for payment to the chief fiscal officer of the corporation before the commencement of the action, as prescribed by section 3245 of Code Civ. Pro., as a prerequisite to the allowance of costs to him, no certificate of the judge presiding on the trial is required to defeat plaintiff's claim for costs. (*Baine v. City of Rochester*, 85 N. Y., 523; S. C., 1 Civ. Pro. R., 269.)

As the non-presentation of the claim is not a defense to the action, and is not a fact involved in the trial, the provisions of section 3248 of the Code of Civ. Pro. have no application to such a case. (*Id.*)

See, also, *Wood v. Excise Commissioners* (9 Misc., 507) that section 3248, above referred to, does not apply to a special proceeding, but only to actions, and see, also, *Cleveland v. Wilder* (78 Hun, 591), *Gensay v. Liddle* (82 *id.*, 85), *Shaver v. Eldred* (86 *id.*, 51).

TITLE II.

ARTICLE FIRST.

FORMS RELATING TO SUMS ALLOWED AS COSTS.

(Code Civ. Pro., Ch. 21, Tit. 2, Art. 1.)

- No. 1625. Bill of costs.
- 1626. Notice of motion for extra allowance of costs.
- 1627. Order for extra allowance.
- 1628. Affidavit to procure adjournment of trial.
- 1629. Order postponing trial.

No. 1625.

Bill of Costs.

(Code Civ. Pro., § 3251.)

[Title of cause.]

Costs.

|  |          |
|--|----------|
| Costs before notice of trial .....   | \$ _____ |
| Costs after notice and before trial .....  | _____    |
| Additional defendants served .....   | _____    |
| Trial fee, issue of fact .....   | _____    |
| Trial fee, issue of law .....  | _____    |
| Allowance by statute .....   | _____    |
| Allowance of court .....   | _____    |
| Costs of motion for .....  | _____    |
| Trial occupied more than two days .....  | _____    |
| Appointment of guardian for infant defendant .....   | _____    |
| Procuring order directing service of summons by publication or personally without the State <sup>1</sup> ..... | _____    |
| Procuring injunction order (or an order of arrest) .....   | _____    |
| Examination of party before trial .....  | _____    |
| Attending and taking deposition <i>de bene esse</i> .....  | _____    |
| Drawing interrogatories to annex to commission .....   | _____    |
| Making and serving case .....  | _____    |
| Making and serving amendments to case .....  | _____    |
| Making and serving case of more than fifty folios .....  | _____    |
| Term fees, for following terms, viz.:  |          |
| _____ .....  | _____    |
| _____ .....  | _____    |
| Costs of motion for new trial, Special Term .....  | _____    |
| Proceedings before and after granting new trial .....  | _____    |
| Application for judgment on special verdict, before argument .....   | _____    |
| Application for judgment on special verdict, for argument .....  | _____    |
| Appeal to <sup>2</sup> Appellate Division (or General Term), before argument ..                                | _____    |
| Appeal to Appellate Division (or General Term), for argument .....   | _____    |
| _____ Term fees, as follows:   |          |
| _____ .....  | _____    |
| Appeal to Court of Appeals, before argument .....  | _____    |
| Appeal to Court of Appeals, for argument .....   | _____    |

<sup>1</sup> See amendment to section 3251, Code Civ. Pro., by chap. 226 of Laws of 1896.

<sup>2</sup> See amendments to section 3251, Code Civ. Pro., by chap. 946 of Laws of 1895 taking effect January 1, 1896.

\_\_\_\_\_ Term fees, as follows:

|   |          |
|---|----------|
| _____   | _____    |
| Preparing case on appeal to Court of Appeals..... | \$ _____ |
| Damages in Court of Appeals for delay .....       | _____    |
| Interest on verdict.....                          | _____    |
| Disbursements as per next column.....             | \$ _____ |
| Total costs and disbursements.....                | \$ _____ |

DISBURSEMENTS.

|   |          |
|---|----------|
| Referee's fees .....  | \$ _____ |
| Commissioner's fees .....   | _____    |
| Clerk's trial fee, \$ _____; clerk's fee for entering judgment, \$ _____, | _____    |
| Paid for searches.....  | _____    |
| Paid affidavits and acknowledgments as follows:                           |          |
| _____   | _____    |
| _____   | _____    |
| Serving summons and complaint .....                                       | _____    |
| Paid referee settling case .....  | _____    |
| Certified copies orders as follows, viz:                                  |          |
| _____   | _____    |
| Clerk filing execution and entering satisfaction.....                     | _____    |
| Transcript and filing .....   | _____    |
| Copy judgment for roll. ....  | _____    |
| Postage incurred, \$ _____; to be incurred, \$ _____                      | _____    |
| Jurors' fees .....  | _____    |
| Stenographer's fees, copy .....   | _____    |
| Sheriff's fees on execution.....  | _____    |
| Sheriff's fees on attachment .....  | _____    |
| Sheriff's fees, _____ terms as above .....                                | _____    |
| Copy minutes.....   | _____    |
| For printing cases.....   | _____    |
| For printing points.....  | _____    |
| For remittitur .....  | _____    |
| Copies following papers:  |          |
| _____   | _____    |
| _____   | _____    |
| Witnesses' fees as per statement below.....                               | _____    |
|   | \$ _____ |

[Annex affidavit of disbursements, form No. 1631, and of attendance of witnesses, form No. 1632, to original.]

No. 1626.

Notice of Motion for Extra Allowance of Costs.

(Code Civ. Pro., §§ 3252, 3253.)

[Title of cause.]

SIR—Take notice, that [on the affidavit, and the certificate

of W. A., Esq., the referee, of which copies are herewith served, and] on all the proceedings in this action, the plaintiff] will move the court, at the next [Circuit and] Special Term thereof, to be held at, etc., on, etc., at the opening of the court on that day, for an order directing that an extra allowance be made to him in addition to the usual costs.

Dated \_\_\_\_\_, 18—.

J. C., *Plaintiff's Attorney.*

[Office address.<sup>1</sup>]

To A. P., Esq., *Defendant's Attorney.*

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No. 1627.

**Order for Extra Allowance.**

(Code Civ. Pro., § 3253.)

At a circuit court [*or* Special Term], held at the court house, in the \_\_\_\_\_ of \_\_\_\_\_, in the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

Present, Hon. J. P., *Justice.*

[Title of cause.]

The plaintiff in this action having recovered of the defendant the sum of \_\_\_\_\_ dollars, and it being a difficult and extraordinary case in which a defense has been interposed, and due notice of this motion having been given to \_\_\_\_\_, Esq., attorney for the [defendant], and on motion of F. C., Esq., counsel for the plaintiff, after hearing, etc., and on reading and filing [name motion papers]:

It is hereby ordered, that the plaintiff be and he hereby is allowed \_\_\_\_\_ per cent on the amount of such recovery, by way of additional costs.

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No. 1628.

**Affidavit to Procure Adjournment of Trial.**

(Code Civ. Pro., § 3255.)

[Title of cause.]

\_\_\_\_\_ COUNTY, ss.:

C. D., of \_\_\_\_\_, being duly sworn, says, that he is the defendant in this action.

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<sup>1</sup> See note 2 to form No. 122.

[That issue was joined herein on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and notice of trial was served by the (plaintiff) for the present (circuit), at, etc.] .

That the deponent has fully and fairly stated to \_\_\_\_\_, Esq., his counsel herein, who resides at \_\_\_\_\_, the case in this action, and the facts which he expects to prove by E. F., a witness for the deponent herein.

That deponent is advised by his said counsel, after such statement, and believes, that the said E. F. is a material witness for deponent, and that without his testimony deponent cannot safely proceed to the trial of this action [state what has been done to procure the attendance of the witness, and the cause of his absence].

That the said witness is not in attendance at this said circuit.

That deponent believes and expects that he will be able to procure the attendance of the said E. F. at the next circuit court, to be held in said county on the \_\_\_\_\_ day of \_\_\_\_\_ next.

C. D.

[Jurat as in form No. 46.]

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No. 1629.

### Order Postponing Trial.

(Code Civ. Pro., § 3255.)

[At, etc., as in form No. 80 (when made by the court)].

[Title of cause.]

On reading and filing the affidavit of C. D., dated \_\_\_\_\_, 18—, and upon the application of M. F., counsel for the [defendant]:

It is hereby ordered, after hearing, etc., that the trial of the above entitled action be adjourned to the next circuit court to be held, etc., on payment to the plaintiff's attorney of \_\_\_\_\_ dollars costs [this day].

Date [when made by judge].

[Signature of judge (when made by him).]

## ARTICLE SECOND.

## FORMS RELATING TO TAXATION OF COSTS.

(Code Civ. Pro., Ch. 21, Tit. 2, Art. 2.)

- No. 1630. Notice of taxation and retaxation of costs.  
 1631. Affidavit respecting disbursements.  
 1632. Affidavit of attendance and travel fees of witnesses.  
 1633. Same affidavit, another form.

No. 1630.

**Notice of Taxation and Retaxation of Costs.**

(Code Civ. Pro., § 3263.)

SIR—Take notice, that the costs and disbursements mentioned in the [foregoing] bill will be taxed [or retaxed] by the county clerk of \_\_\_\_\_ county, at his office in the [city] of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at o'clock in the \_\_\_\_\_ noon.

Dated \_\_\_\_\_, 18—.

Yours, etc.,

M. N., *Attorney for Plaintiff.*

[Office address.¹]

To F. G., *Attorney for Defendant.*

No. 1631.

**Affidavit Respecting Disbursements.**

(Code Civ. Pro., § 3267.)

[Title of cause.]

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that he is the attorney [or one of attorneys] for the plaintiff [or defendant] in the above entitled action; that the foregoing disbursements, other than charges for the attendance of witnesses and for travel fees of witnesses, have been necessarily made and incurred in said action, on the part of the plaintiff [or defendant], excepting prospective charges contained therein for, etc. [stating same], which will be necessarily incurred

¹ See note 2 to form No. 122.

in said action ; that the charges contained therein for copies of documents and papers are made for such copies actually and necessarily used, or necessarily obtained for use. [\*]

[That the witnesses named in said bill of costs were actually in attendance the number of days stated in said bill.]<sup>1</sup>

A. B.

[Jurat as in form No. 46.]

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No. 1632.

**Affidavit of Attendance and Travel Fees of Witnesses.**

(Code Civ. Pro., § 3267.)

Title of cause.]

\_\_\_\_\_ COUNTY, ss.:

A. B., of \_\_\_\_\_, being duly sworn, says, that he is the plaintiff [or the attorney for the plaintiff] in the above entitled action.

That said action was at issue, and necessarily upon the calendar for trial, at the several circuits held in and for the county of \_\_\_\_\_, at the court house in the town of \_\_\_\_\_, viz.: one commenced on the \_\_\_\_\_ day of \_\_\_\_\_, 18—; one commenced on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

[That the said action was referred to W. O., Esq., as referee, and was brought to trial before him, at his office in \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.]

That each of the persons named in schedule A, hereto annexed, which is made a part hereof, attended the several circuits [or Special Terms, or hearings] therein named, pursuant to a subpoena, or upon special request of this deponent, as a witness for the plaintiff, the number of days set opposite their respective names therein.

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<sup>1</sup>As to disbursements which the party to whom costs are awarded is entitled to include in his bill of costs, see section 3256, Code Civ. Pro., as amended by ch. 331 of Laws of 1895, *Salter v. Utica and B. R. R. Co.* (86 N. Y., 401), *Mark v. City of Buffalo* (87 id., 184), *Provost v. Farrell* (13 Hun, 303), *Vender v. Medgett* (27 id., 519), *Colton v. Simmons* (14 id., 75), *Corbett v. De Comeau* (45 N. Y., Super. Ct., 587), *Allen v. Mahon* (1 Abb. N. C., 468), *Flood v. Moore* (2 id., 91), *Consalus v. Brotherson* (54 How. Pr., 62), *Potter v. Carpenter* (56 id., 89), *Higgins v. Callahan* (2 Civ. Pro. R. [Browne] 302), *Douglass v. Atwell* (3 id., 80), *Hall v. United States Reflector Co.* (4 id., 148; 11 Abb. N. C., 217), *Town of Pierrepont v. Lovelass* (4 Hun, 681), *Equitable Life Ins. Society v. Hughes* (125 N. Y., 106), *Whitney v. Roe* (75





Hun, 508), *Kohn v. Manhattan R. Co.* (8 Misc., 421), *Shaver v. Eldred* (86 Hun, 51), *Matter of Bender* (id., 570), *Warren v. Chase* (8 Misc., 520), *Cheever v. Pittsburgh S., etc., R. Co.* (74 Hun, 539), *King v. Munzer* (31 Abb. N. C., 482), *Wolff v. Horn* (9 Misc., 100), *Gilbert v. Deshon* (40 State Rep., 799), *Matter of Metropolitan Elevated R. Co.* (46 id., 138), *Seasongood v. N. Y. Elevated R. Co.* (id., 832), *Matter of Byron* (61 Hun, 278), *Griggs v. Grinn* (29 Abb. N. C., 144), *Pyne v. Nat. Steamship Co.* (44 State Rep., 791), *Nestor v. Bischoff* (123 N. Y., 517), *Jones v. Newton* (33 State Rep., 823), *Wright v. Rensea* (39 id., 802), *Chevers v. Duncan* (37 id., 904), *Stevens v. N. Y. Elevated R. Co.* (18 Civ. Pro. R., 350), *Reichel v. N. Y. Central, etc., R. Co.* [No. 2], (29 State Rep., 841), *Equitable Life Assurance Soc. v. Olyphant* (57 Hun, 414), *Inderlied v. Whaley* (17 Civ. Pro. R., 377), *Clegg v. Aiken* (11 State Rep., 354, *aff'd* without op., 109 N. Y., 612), *O'Loughlin v. Hammond & Co.* [No. 2], (12 Civ. Pro. R., 171), *Barlow v. Barlow* (35 Hun, 50), *Byrnes v. Labagh* (12 id., 417), *Van Gelder v. Hallenbeck* (15 id., 333), *Bick v. Reese* (52 id., 125), *Simpson v. Rowan* (13 Civ. Pro. R., 206), *Lynch v. Butler* (43 Hun, 605), *Brown v. Mapleson* (2 City Ct., 404), *Deegan v. Karp* (13 Civ. Pro., 202), *Matter of Willett* (6 Dem., 435), *Wood v. Kroll* (43 Hun, 328), *Bowe v. Brown*, (4 State Rep., 456), *Clegg v. Aikens* (17 Abb. N. C., 88), *Varnum v. Wheeler* (9 Civ. Pro. R., 406), *Pfandler Barm Extracting Co. v. Pfandler* (39 Hun, 191), *Same v. Sargent* (43 id., 154), *Cutler v. Morris* (7 State Rep., 426), *Nugent v. Keenan* (53 Snpr. Ct., 530), *Sargent v. Warren* (41 Hun, 103), *Durant v. Abendroth* (48 Hun, 16), *Evans v. Ferguson* (10 Civ. Pro. R., 57), *Kley v. Healey* (18 State Rep., 174), *Kerwin Valentine* (13 Civ. Pro. R., 334), among other cases.

That the residences of said witnesses respectively, the distance therefrom, according to the usually traveled route, to the said court house [*or* place of hearing], and the number of miles they severally traveled as such witnesses, according to the usually traveled route, for the purpose of going to the place of trial and returning therefrom, at said circuit court [*or* hearings], respectively, are correctly stated and set forth in said schedule A, opposite their respective names.

That each and every of said persons named in said schedule A, was a necessary and material witness on the part of the plaintiff [*or* of the defendant] on the trial of this action.<sup>1</sup>

A. B.

[Jurat as in form No. 46.]

#### SCHEDULE A.

Circuit [*or* Special Term, *or* hearing] commenced on the \_\_\_\_\_ day of \_\_\_\_\_, 18— :

| NAMES OF WITNESSES. | RESIDENCES. | Miles from court house or hearing. | Miles traveled. | Number of days attended. |
|---------------------|-------------|------------------------------------|-----------------|--------------------------|
|                     |             |                                    |                 |                          |

[Proceed in same manner as to the subsequent Circuits, etc.]

No. 1633.

#### Affidavit of Attendance, etc., of Witnesses, Another Form.

(Code Civ. Pro., § 3267.)

As in form No. 1631 to [\*], and from thence as follows : Deponent further says, that G. H., J. K. and L. M. were severally necessarily subpoenaed, and attended as witnesses

<sup>1</sup> Where an affidavit was presented upon the taxation of costs showing that certain witnesses for whom fees were charged were not called at the trial; *held*, that the clerk should require proof of what was expected to be proved by such witnesses, and why

they were not called. (*Robitzek v. Hect*, 3 Civ. Pro. R. 156 [N. Y. Super. Ct., Sp. Tm.] )

See also, notes to forms Nos. 356 and 1631, and *Allen v. Mahon* (1 Abb. N. C., 468).

on the part of the plaintiff [*or* defendant] in this action, and that they were severally and necessarily in attendance \_\_\_\_\_ days each upon the trial of this action, and the said G. H. and J. K. each traveled \_\_\_\_\_ miles from the town of \_\_\_\_\_ to attend the trial of this action.

[That L. M. resides in the town of \_\_\_\_\_, in the State of \_\_\_\_\_, and traveled from that town to the place of trial to attend said trial as a witness for the plaintiff (*or* defendant), and that he was a necessary and material witness, and necessarily attended as such \_\_\_\_\_ days; that he came from his said residence to said place of trial (by the \_\_\_\_\_ railroad), which is the nearest usually traveled route between said places, and that on said route he entered this State at \_\_\_\_\_, and traveled \_\_\_\_\_ miles therefrom to said place of trial.]

A. B.

[Jurat as in form No. 46.]

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### TITLE III.

#### FORMS RELATING TO SECURITY FOR COSTS, ETC.

(Code Civ. Pro., Ch. 21, Tit. 3.)

- No. 1634. Affidavit to obtain security for costs.
- 1635. Order requiring security to be given.
- 1636. Undertaking pursuant to order (form No. 1635).
- 1637. Affidavit of merits to prevent inquest.
- 1638. Order directing service of notice of motion for cancellation of notice of pendency of action.
- 1639. Affidavit on motion to cancel notice of pendency of action, where action has abated, etc.
- 1640. Notice of motion for cancellation of notice of pendency of action.
- 1641. Order directing cancellation of notice of pendency of action.

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#### No. 1634.

#### Affidavit to Obtain Security for Costs.

(Code Civ. Pro., §§ 3268, 3269, 3271.)

[Title of cause.]

\_\_\_\_\_ COUNTY, ss.:

C. D., the defendant in this action, being duly sworn, says, that the plaintiff herein does not reside in this State, but resides at \_\_\_\_\_, in the State of \_\_\_\_\_, and so

resided at the commencement of this action [*or otherwise, according to the facts*].

C. D.

[*Jurat as in form No. 46.*]

No. 1635.

### Order Requiring Security to be Given.

(Code Civ. Pro., § 3272.)

[*At, etc., as in form No. 80 (when made by court).*]

[*Title of cause.*]

On reading and filing the affidavit of A. B., dated ———, 18—, by which it appears that the plaintiff herein does not reside in the State of New York, but resides at ———, in the State of ———, and so resided when this action was commenced [*or otherwise, according to facts*], with proof of due service of a copy of said affidavit and of notice of this motion upon M. F., attorney for the plaintiff, and on motion of A. B., attorney for the defendant, after hearing ———, of counsel for the plaintiff, and on reading [*name any opposing papers*]:<sup>1</sup>

It is hereby ordered, that the plaintiff be and he is hereby required, within ——— days, either to pay into court the sum of two hundred and fifty dollars, to be applied to payment of the costs of this action, if any, awarded against him, or, at his election, to file with the county clerk of ——— county [*or name other clerk of the court*], an undertaking, as required by law, executed to the defendant by one surety [*or name other number of sureties*], to the effect that he [*or they*] will pay upon demand, to the defendant, all costs which may be awarded to him in this action, not exceeding the sum of [*two hundred and fifty*]

<sup>1</sup> *It seems*, that no notice of the motion need be given, but that it is intended to leave the plaintiff to his motion to review or vacate the order. The practice was formerly to grant an order to show cause why such relief should not be given. See 3 Barb. Ch. Pr. (2d ed.), 492; and see note 1 to form No. 162, as to orders to show cause.

See also, *Healy v. Twenty-third St.*

*R. R. Co. (1 Civ. Pro. R., 15) Buckley v. Gutta Percha, etc., Manuf. Co. (3 Civ. Pro. R., 428), McCall v. Frith (4 id., 102), Hoffman v. Lowell (4 Civ. Pro., 103), Robertson v. Barnum (29 Hun, 657), Gage v. Peetsch (12 Misc., 548), Republic of Honduras v. Soto (112 N. Y., 310; rev'g S. C., 47 Hun, 194), Montgomery v. Odell (73 Hun, 424), Brewster v. Wooster (9 Misc., 690), Laws of 1891, ch. 170; amd'g*

- § 3268, Code Civ. Pro.; ch. 161 of Laws of 1891; amd'g § 3276, id., Ridgway v. Symons (14 Misc., 78), Swift v. Wheeler (48 Hun, 580), Churchman v. Merritt (50 id., 270), Trimble v. Kilgannon (12 Misc., 459), Rutherford v. Town of Madrid (77 Hun, 545, rev'g S. C., 5 Misc., 572), Schmidt v. Eiseman (6 id., 264), Mitchell v. Dick (8 Misc., 98), Sullivan v. Remington Sewing Machine Co. (27 Hun, 270), Sharp v. Whitmore (29 id., 193), Bennet v. Goble (43 id., 354), Tolman v. Syracuse, B. and N.Y. R. R. Co. (92 N. Y., 353), Bennett v. Townsend (63 Hun, 45), Holmes v. Evans (36 State Rep., 933), Gates v. McDonald (39 id., 128), Longstreet v. Sawyer (id., 693), Loesche v. Griffin (3 Dem., 358), Wolff v. Houston, 19 State Rep., 762), McDonald v. Peet (7 Civ. Pro. R., 200), Stevenson v. N. Y., Lake Erie, etc., R. Co. (14 id., 384), Abel v. Bradner (15 id., 241), Todd v. Marsily (7 State Rep., 872), Fessenden v. Blanchard (48 Hun, 350), Wassinger v. Fennell (13 Civ. Pro. R., 286), McDougall v. Gray (15 id., 237), Gifford v. Rising (48 Hun, 128), Fitzsimmons v. Curley (6 Civ. Pro. R., 156), Krom v. Kursheedt (51 Super. Ct., 119), Grant v. Crittenden (13 Civ. Pro. R., 123), McDonald v. Gray (15 id., 237), Wyckoff v. Devlin (2 How. Pr. [N. S.], 333), F. A. Kennedy Co. v. McCormack (15 Civ. Pro. R., 239), Nugent v. Keenan (53 Super. Ct., 530), Newhall v. Appleton (6 N. Y. Supp. 4), Reck v. Phenix Ins. Co. (5 id., 543; 18 Week. Dig., 505), Brackett v. Griswold (46 Hun, 442), Renwick v. N. Y. Central R. Co. (55 Super. Ct., 444), Donner v. Ogilvie (12 Civ. Pro. R., 399), Wood v. Blodgett (49 Hun, 64), Winchester v. Brown (51 id., 284), Lyon v. Park (111 N. Y., 350), Hinman v. Pierce (50 Hun, 209), Fraser v. Ward (13 Daly, 431), Badger v. Appleton (12 Civ. Pro., 93), Longrill v. Downey (27 State Rep., 51), Haines v. Judd (18 Civ. Pro. R., 324), Rothschild v. Wilson (24 Abb. N. C., 123), Fagan v. Strong (19 Civ. Pro. R., 88), Kokoma Straw Board Co. v. Sacho (17 id., 432), Sims v. Bonner (42 State Rep., 10), Knoch v. Funke (28 Abb. N. C., 240), Murphy v. Manhattan Brass Co. (44 State Rep., 834), McHugh v. Astrophe (1 Misc., 218), Barnes v. Seligman (51 State R., 376), Cornel v. Heinze (id., 461), Lafrentz v. Mass (26 N. Y. Supp., 739), Schwartz v. Scott (25 Civ. Pro. R., 53), Edward Thompson Co. v. Lobenthal (24 Civ. Pro., 247), Hand v. Shaw (13 Misc., 143), Hale v. Mason (86 Hun, 499), as to this proceeding.



dollars, and to serve a written notice of said payment, or of the filing of said undertaking, upon the defendant's attorney.

And it is further ordered, that all other proceedings on the part of the plaintiffs, except to review or vacate this order, be and they are hereby stayed, until the said payment or filing, and notice thereof, and also if an undertaking be given until the allowance of the same.

Dated \_\_\_\_\_, 18— [when made by judge].

[Signature, when made by judge.]

No. 1636.

**Undertaking Pursuant to Order (form No. 1635).**

(Code Civ. Pro., § 3273.)

[Title of cause.]

Whereas, an order was made by Hon. A. O., justice [or judge] of the \_\_\_\_\_ court [or by the \_\_\_\_\_ Court, at a \_\_\_\_\_ Term thereof, held at, etc., on, etc.], requiring the plaintiff to file with the county clerk of \_\_\_\_\_ county [or otherwise describe clerk], an undertaking for the payment to the defendant of the costs which might be awarded against him in the above entitled action, in the penalty and with the sureties hereinafter mentioned :

Now, therefore [we], E. F., of \_\_\_\_\_ [and G. H., of \_\_\_\_\_], do hereby, jointly and severally, undertake, to and with the above named defendant, that we will pay, on demand, to said defendant, all costs which may be awarded to him in the above entitled action, not exceeding the sum of [two hundred and fifty] dollars.<sup>1</sup>

Dated \_\_\_\_\_, 18—.

E. F.

[G. H.]

[Acknowledgment or proof, affidavit and approval as in forms Nos. 340 and 538.]

<sup>1</sup> See as to bond under former statute, Warner v. Ross (9 Abb. N. C., 335), Schenke v. Rowell (1Abb. N. C., 295); and see, also, Brewster v. Wooster (9 Misc., 690), Rothschild v. Wilson (24 Abb. N. C., 123), and see note 1 to form No. 1635, and cases there cited.

As to exception to sureties and their justification and allowance of the undertaking, see sections 3274, 3275, Code Civ. Pro.

As to giving additional security, and in what cases, see section 3276, id., as amended by ch. 161 of Laws of 1891; Republic of Honduras v. Soto (112 N. Y., 310), Bennett v. Townsend (63 Hun, 45), Brewster v. Wooster (*supra*) and note above referred to.

As to effect of failure to obey order to give security, see section 3277, id., and Hoffman v. Ridley (4 Civ. Pro. R., 41), and note above referred to.

No. 1637.

**Affidavit of Merits to Prevent Inquest.**

(Code Civ. Pro., § 980.)

[Title of cause.]

———— COUNTY, ss.:

R. J., the defendant [*or* the attorney for the defendant]<sup>1</sup> in the above entitled action, being duly sworn, says, that he has fully and fairly stated the case to A. B., his counsel in said action, who resides at ———, in the county of ———; and that he has a good and substantial defense on the merits in said action as he is advised by said counsel [after said statement]<sup>2</sup> and verily believes [*or* that from the statement of the case in the action made to him by the defendant, he verily believes that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint or some part thereof].<sup>3</sup>

[That the reason why this affidavit is not made by the defendant is that (state reason).<sup>1</sup>]

R. J.

[Jurat as in form No. 46.]

No. 1638.

**Order Directing Service of Notice of Motion for Cancellation of Notice of Pendency of Action.**

(Code Civ. Pro., § 1674.)

[At, etc., as in form No. 80.]

[Title of cause.]

On reading and filing the annexed affidavit and notice of

As to attorney's liability for costs, see section 3278, *id.*; also, *In re Levy* (14 Week. Dig., 360), *Krom v. Kunsheedt* (20 Week. Dig., 339), *Matter of Levy* (2 Civ. Pro. R. [Browne], 108), and note above referred to.

As to application of title 4 of chapter 21 of Code Civ. Pro., see section 3279, *id.*, and *Hasler v. Johnston* (59 How. Pr., 432), and said note.

<sup>1</sup> In the absence of the party, or other

sufficient excuse, an attorney may make the affidavit. (*Geib v. Icard*, 11 Johns., 82; *Philips v. Blagge*, 3 *id.*, 141.) But a sufficient excuse must be stated for its not being made by the defendant. (*Roosevelt v. Dale*, 2 Cow., 581, 583; *Johnson v. Lynch*, 15 How., 199.)

<sup>2</sup> See *Brown v. Seys* (2 How. Pr., 276), overruling *Lansing v. Mickels* (1 How. Pr., 248).

<sup>3</sup> Insert this last clause in brackets in case the affidavit is made by the at



motion, and on motion of A. W., of counsel for the defendant:

*Ordered*, That notice of said motion be given to [naming parties to be served]. \_\_\_\_\_

No. 1639.

**Affidavit on Motion to Cancel Notice of Pendency of Action, where Action has Abated, etc.**

(Code Civ. Pro., § 1674.)

[Title of cause.]

A. W., being duly sworn, says, that he is one of the attorneys for the defendant in the above entitled action.

That T. S., the plaintiff in said action, died after the commencement of said action, and during the pendency thereof, to wit: on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, an order was made and entered in said action, at a Special Term of the Supreme Court, held at, etc., which provided and directed that said action should abate, unless it was continued by the proper parties within six months after the granting of the last mentioned order.

That it appears by affidavits filed with the papers upon the motion, upon which said order was granted, that said motion was made upon due notice to the heirs at law and devisee of said plaintiff, to S. W., Esq., of \_\_\_\_\_, who appeared as the attorney for the plaintiff in said action, etc., as required by an order entered in said action on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, at a Special Term of this court, held at, etc.

That on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, upon the affidavit of this deponent, showing that said action had not been continued by the proper parties, or by any person on their behalf, although more than six months had elapsed since the granting of said order of \_\_\_\_\_, 18—, an order was made and entered upon the application of said defendant's attorneys, at a Special Term held by, etc., on, etc., in the

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torney. See, also, note 5 to form No. 412, and rule 24 of Gen. Rules of Prac. An inquest for want of an affidavit of merits cannot be taken where the answer is verified. (Code Civ. Pro., § 980.)

[city] of ———, that the said action be and the same was thereby abated. And deponent further says, that on the ——— day of ———, in the year 18—, a notice of pendency of said action was filed by the plaintiff, or his attorney therein, in the ——— county clerk's office, with the complaint therein, and recorded in said clerk's office.

That said notice was in form as prescribed by article ninth of title first of chapter fourteenth of the Code of Civil Procedure, and stated the names of the parties, the object of the action, and contained a brief description of the property in said county of ——— affected thereby, and that said notice has never been cancelled, but is still of record and on file in said clerk's office.

That said action was brought [for the recovery of the possession, by the plaintiff, of a certain house and lot of land, in the (city) of ———, described in the complaint in said action, and of which the defendant was, at the commencement of said action, and still is, in possession claiming to be the owner thereof, and for the recovery of damages for the withholding thereof].

That said actions were triable in the said county of ———, which county was designated in the complaint therein as the place of trial thereof.<sup>1</sup>

A. W.

[Jurat as in form No. 46.]

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No. 1640.

**Notice of Motion for Cancellation of Notice of Pendency of Action.**

(Code Civ. Pro., § 1674.)

[Title of cause.]

Take notice, that a motion will be made in the above entitled action, at [a Special Term of the Supreme Court, to be held at, etc., in the (city) of ———, on the ——— day of ———, 18—], at the opening of the court, or as soon thereafter as counsel can be heard, that the notice of pendency of the said action, mentioned and described in the annexed affidavit, be cancelled of record by the county clerk of ——— county, in the manner prescribed by law,

<sup>1</sup> See, also, amendments to § 1674, Code Civ. Pro., by ch. 504 of Laws of 1892.

and for such other or further order or relief as may be proper; that said motion will be made upon the said affidavit annexed hereto.

Dated \_\_\_\_\_, 18—.

A. W., *Attorney for Defendant.*

[Office address.¹]

To [name parties on whom notice is directed to be served by order, form No. 1638].

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No. 1641.

**Order Directing Cancellation of Notice of Pendency of Action.**

(Code Civ. Pro., § 1674.)

[At, etc., as in form No. 80.]

[Title of cause.]

On reading and filing the affidavit of A. W., the attorney for the defendant in the above entitled action, dated \_\_\_\_\_, 18—, together with the order of this court, made at a Special Term thereof, held, etc., directing the service of notice of this motion and of copies of said affidavit and of said order upon the parties therein mentioned, and on reading and filing proof of due personal service of said notice of motion and of copies of said affidavit and order as directed by said order, and on motion of A. W., counsel for the defendant, no one appearing to oppose [etc.]:

It is hereby ordered, that the notice of pendency of action filed and recorded in the \_\_\_\_\_ county clerk's office on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18—, in the above entitled action be cancelled of record by the county clerk of \_\_\_\_\_ county in the manner prescribed by law.

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¹ See note 2 to form No. 122.



# INDEX.

[The references are to the pages: those followed by a letter are considered and referred to as part of the original page. See, also, Table of Contents, at beginning of each volume.]

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